



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 10, 2004

Hon. David J. Maland, Clerk
United States District Court
Eastern District of Texas/Tyler Division
211 West Ferguson Room 106
Tyler, Texas 75702

Re: ***Udo Birnbaum v. Paul Banner, et al.***
Civil Action No. 6:04-CV-114

Dear Clerk:

Enclosed please find the original and one copy of the following documents to be filed among the papers in the above-referenced cause:

- 1) **Original Answer of Judge Paul Banner,**
- 2) **Defendant Paul Banner's Motion to Dismiss for Failure to State a Claim.**

Please indicate the date of filing on the enclosed copy of this letter and return in the enclosed postpaid envelope. By copy of this letter, I am forwarding a copy of these instruments to the Plaintiff.

Thank you for your attention to this matter.

Sincerely,

JOHN M. ORTON
Assistant Attorney General
Law Enforcement Defense Division
(512) 463-2080 / Fax (512) 495-9139

JMO/jmg
Enclosures

c: Udo Birnbaum
540 VZCR 2916
Eustace, Texas 75124
Via CM/RRR #7002 3150 0001 4727 2836

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION**

UDO BIRNBAUM,
Plaintiff,

v.

**PAUL BANNER, DAVID WESTFALL,
CHRISTINA WESTFALL, and
STEFANI (WESTFALL) PODVIN,**
Defendants.

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Civil Action No. 6:04 CV 114

ORIGINAL ANSWER OF JUDGE PAUL BANNER

TO THE HONORABLE JUDGE OF THE DISTRICT COURT:

Defendant Judge Paul Banner (“Judge Banner”), by and through the Office of the Attorney General for the State of Texas, and submits this his Original Answer. In support thereof, Judge Banner respectfully offers the following:

STATEMENT OF THE CASE

Plaintiff Udo Birnbaum (“Birnbaum”) brought this *pro se* action pursuant to 42 U.S.C. §1983 claiming a violations of his First, Fifth, and Fourteenth Amendment rights. Defendant Judge Banner is a senior state district court judge for the State of Texas.

Judge Banner sat by special assignment in the 294th District Court of Van Zandt County, Texas, in a case brought by the Law Office of G. David Westfall, P.C., (“the Westfall law office”) against Birnbaum for unpaid legal services.¹ The Westfall law office had previously represented Birnbaum in a civil lawsuit brought by him against 294th District Court Judge Tommy Wallace and

¹ *The Law Offices of G. David Westfall, P.C. v. Udo Birnbaum*, Cause No. 00-00619, 294th District Court, Van Zandt County, Texas.

other state judges for racketeering pursuant to 18 U.S.C. 1964©) (Racketeer Influenced and Corrupt Organizations Act (RICO)).² In the lawsuit for unpaid legal services, Birnbaum asserted the defense of fraud and counter-claimed under the Texas Deceptive Trade Practices Act (DTPA). Birnbaum also made civil RICO claims against individuals associated with the Westfall law office. These individuals included Defendants G. David Westfall, Christina Westfall, and Stefani (Westfall) Podvin (“the Westfalls”).

After a hearing, Judge Banner granted the Westfall law office’s motion for summary judgment concerning Birnbaum’s fraud, DTPA, and RICO allegations. After a second hearing, Judge Banner concluded, “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.” Exhibit B to Plaintiff’s Complaint for Declaratory Relief. Judge Banner then granted the Westfalls’ motions for sanctions and awarded damages in the total amount of \$62,885.

Birnbaum now claims the sanctions are illegal. He says the sanctions deprive him of his First Amendment right to free speech because filing a lawsuit is constitutionally protected conduct and the government may not retaliate against someone for engaging in constitutionally protected activities. He also claims the sanctions violate his Fifth Amendment rights because they are criminal penalties and he has not been afforded the constitutional (due process) protections for criminal proceedings. Birnbaum asks that this Court declare that the order on the motion for sanctions is contrary to law.

² *Udo Birnbaum v. Richard L. Ray, et al.*, Cause No. 3:99-CV-0696-R, U.S. District Court, Northern District, Dallas Division.

ANSWER AND AFFIRMATIVE DEFENSES

1. Defendant Judge Banner admits jurisdiction of this cause of action is founded on the existence of a question arising under the laws of the United States of America and more particularly 28 U.S.C. Section 1331 [federal question], 28 U.S.C. Section 2201 [declaratory judgment], and Rule 57 of the Federal Rules of Civil Procedure [declaratory judgment].
2. Defendant Judge Banner admits paragraphs 2, 3, 4, 5, 6, 7, 8, and 9 of Plaintiff's complaint.
3. Defendant Judge Banner denies paragraph 10 of Plaintiff's complaint.
4. Defendant Judge Banner admits paragraphs 11, 12, 13, 14, of Plaintiff's complaint.
5. Defendant Judge Banner denies paragraph 15, 16, 17, and 18 of Plaintiff's complaint.
6. Defendant Judge Banner admits paragraph 19 of Plaintiff's complaint.
7. Defendant Judge Banner denies paragraphs 20, 21, 22, 23, 24 of Plaintiff's complaint.
8. Defendant Judge Banner admits paragraph 25 of Plaintiff's complaint.
9. Defendant Judge Banner denies paragraphs 26, 27, of Plaintiff's complaint.
10. Defendant Judge Banner admits paragraph 28 of Plaintiff's complaint.
11. Defendant Judge Banner denies paragraph 29 of Plaintiff's complaint.
12. Defendant Judge Banner admits paragraph 30 of Plaintiff's complaint.
13. Defendant Judge Banner denies paragraph 31 of Plaintiff's complaint.
14. Defendant Judge Banner asserts that at all times relevant he acted in a judicial capacity as a district court judge for the State of Texas. He further asserts that judges are absolutely immune from liability for damages for judicial acts that are not performed in clear absence of all jurisdiction, however erroneous the act and however evil the motive.
15. Defendant Judge Banner asserts sovereign immunity to any claims for damages which may

- have been brought against him in his official capacity.
16. Defendant Judge Banner asserts Eleventh Amendment immunity to any claim for damages which may have been brought against him in his official capacity.
 17. Defendant Judge Banner asserts his entitlement to official immunity to any claims brought against him under the Constitution and laws of the State of Texas.
 18. Defendant Judge Banner asserts that the Plaintiff was not deprived of any right, privilege or immunity granted or secured by the Constitution and/or laws of the United States.
 19. Defendant Judge Banner asserts the Plaintiff has not stated a claim upon which relief can be granted under 18 U.S.C. 1962, 42 U.S.C. 1983 or under any other statute, constitutional theory, or legal authority.
 20. Defendant Judge Banner asserts a declaratory judgment would not serve any useful purpose in clarifying and settling the legal relations in issue; it would only confuse the legal relations that have already been resolved. A declaratory judgment would not terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding; it would create uncertainty, insecurity, and controversy. Interference with the orderly and comprehensive disposition of the state court litigation in this case should be avoided. The discretionary jurisdiction conferred by the Declaratory Judgment Act should not be exercised by this court in this case and the Plaintiff is not entitled to injunctive, declaratory, or any other relief demanded in his complaint.
 21. Defendant Judge Banner asserts that the Plaintiff is not entitled to damages, attorney's fees, or costs in any amount whatsoever.
 22. Defendant Judge Banner asserts that at all times relevant to the allegations against him he

acted in good faith and with a reasonable belief that his acts were in compliance with the laws and Constitution of the United States and they hereby claim their entitlement to a qualified, good faith immunity from suit.

23. Defendant Judge Banner asserts that this suit is frivolous and without merit and that as such he is entitled to recover from the Plaintiff the amount of any attorneys fees and costs incurred in defending this suit. Defendant Judge Banner therefore seeks recovery from the Plaintiff such attorneys fees and costs expended by him in being required to defend this suit.
24. Pursuant to Federal Rule of Civil Procedure 8(b), Defendant Judge Banner denies each and every allegation contained in the Plaintiff's Complaint except those expressly admitted herein.

III.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Defendant Judge Paul Banner urges this Court to deny the Plaintiff any and all relief demanded in his complaint and to grant such other and further relief as the Court deems just and proper.


Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

BARRY R. MCBEE
First Assistant Attorney General

EDWARD D. BURBACH
Deputy Attorney General for Litigation

DAVID A. TALBOT, JR.
Assistant Attorney General
Chief, Law Enforcement Defense Division



JOHN M. ORTON
Assistant Attorney General
Law Enforcement Defense Division
Attorney in Charge
State Bar No. 00792038


P. O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2080 / Fax No. (512) 495-9139
E-mail: john.orton@oag.state.tx.us

ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

I, JOHN M. ORTON, Assistant Attorney General of Texas, do hereby certify that a true and correct copy of the above and foregoing **Original Answer of Judge Paul Banner** has been served by placing same in the United States Mail on this the 10th day of May, 2004, addressed to:

Udo Birnbaum
540 VZCR 2916
Eustace, Texas 75124
Via CM/RRR #7002 3150 0001 4727 2836



JOHN M. ORTON
Assistant Attorney General

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION**

UDO BIRNBAUM,

Plaintiff,

v.

PAUL BANNER, DAVID WESTFALL,

CHRISTINA WESTFALL, and

STEFANI (WESTFALL) PODVIN,

Defendants.

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Civil Action No. 6:04 CV 114

**DEFENDANT PAUL BANNER'S
MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM**

TO THE HONORABLE JUDGE OF SAID COURT:

Judge Paul Banner ("Judge Banner"), by and through the Attorney General for the State of Texas, submits this motion to dismiss for failure to state a claim upon which relief may be granted pursuant to FED. R. CIV. P. 12(b)(6). In furtherance of his motion, Judge Banner respectfully offers the following:

I.

STATEMENT OF THE CASE

Plaintiff Udo Birnbaum ("Birnbaum") brought this *pro se* action pursuant to 42 U.S.C. §1983 claiming a violations of his First, Fifth, and Fourteenth Amendment rights. Defendant Judge Banner is a senior state district court judge for the State of Texas.

Judge Banner sat by special assignment in the 294th District Court of Van Zandt County, Texas, in a case brought by the Law Office of G. David Westfall, P.C., ("the Westfall law office")

against Birnbaum for unpaid legal services.¹ The Westfall law office had previously represented Birnbaum in a civil lawsuit brought by him against 294th District Court Judge Tommy Wallace and other state judges for racketeering pursuant to 18 U.S.C. 1964(c) (Racketeer Influenced and Corrupt Organizations Act (RICO)).² In the lawsuit for unpaid legal services, Birnbaum asserted the defense of fraud and counter-claimed under the Texas Deceptive Trade Practices Act (DTPA). Birnbaum also made civil RICO claims against individuals associated with the Westfall law office. These individuals included Defendants G. David Westfall, Christina Westfall, and Stefani (Westfall) Podvin (“the Westfalls”).

After a hearing, Judge Banner granted the Westfall law office’s motion for summary judgment concerning Birnbaum’s fraud, DTPA, and RICO allegations. After a second hearing, Judge Banner concluded, “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.” Exhibit B to Plaintiff’s Complaint for Declaratory Relief. Judge Banner then granted the Westfalls’ motions for sanctions and awarded damages in the total amount of \$62,885.

Birnbaum now claims the sanctions are illegal. He says the sanctions deprive him of his First Amendment right to free speech because filing a lawsuit is constitutionally protected conduct and the government may not retaliate against someone for engaging in constitutionally protected activities. He also claims the sanctions violate his Fifth Amendment rights because they are criminal penalties and he has not been afforded the constitutional (due process) protections for criminal

¹ *The Law Offices of G. David Westfall, P.C. v. Udo Birnbaum*, Cause No. 00-00619, 294th District Court, Van Zandt County, Texas.

² *Udo Birnbaum v. Richard L. Ray, et al.*, Cause No. 3:99-CV-0696-R, U.S. District Court, Northern District, Dallas Division.

proceedings. Birnbaum asks that this Court declare that the order on the motion for sanctions is contrary to law.

II.

ISSUE

Whether the discretionary jurisdiction conferred by the Declaratory Judgment Act should be exercised in this case.

III.

MOTION TO DISMISS

A. Standard of Review.

A motion to dismiss under FRCP 12(b)(6) for failure to state a claim upon which relief can be granted tests the formal sufficiency of the statement of claim for relief in the plaintiff's complaint. *Doe v. Hillsboro ISD*, 81 F.3d 1395, 1401 (5th Cir. 1996). It admits the facts alleged, but challenges the plaintiff's right to any relief based on those facts. *Crowe v. Henry*, 43 F.3d 198, 203 (5th Cir. 1995). A court should dismiss under FRCP 12(b)(6) only if it can determine with certainty that the plaintiff cannot prove any set of facts that would allow relief under the allegations in the complaint. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). Appellate courts review dismissals under FRCP 12(b)(6) *de novo*. *Abrams v. Baker Hughes, Inc.*, 292 F.3d 424, 430 (5th Cir. 2002). Decisions about the propriety of hearing declaratory judgment actions are reviewed for abuse of discretion. *Wilton v. Seven Falls Co.* 515 U.S. 277, 289-90 (1995).

B. Judicial Immunity.

Judges are absolutely immune from liability for damages for judicial acts "that are not performed in clear absence of all jurisdiction, however erroneous the act and however evil the

motive." *Johnson v. Kegans*, 870 F.2d 992, 995 (5th Cir.), *cert. denied*, 492 U.S. 921, 109 S.Ct. 3250, 106 L.Ed.2d 596 (1989). This absolute judicial immunity does not, however, bar equitable relief such as declaratory judgment against state court judges. *Pulliam v. Allen*, 466 U.S. 522, 541-42, 104 S.Ct. 1970, 1980-81, 80 L.Ed.2d 565 (1984); *Society of Separationists, Inc. v. Herman*, 939 F.2d 1207, 1219 (5th Cir.1991).

C. Sanctions.

Sanctions ensure the parties' compliance with the rules, punish those that violate the rules, and deter other litigants from violating the rules. *Chrysler Corp. v. Blackmon*, 841 S.W.2d 844, 849 (Tex. 1992). In Texas, courts may sanction lawyers and parties for frivolous pleadings, groundless pleadings, and groundless pleadings brought in bad faith or for harassment. TEX. CIV. PRAC. & REM. CODE §§ 10.001 - 10.006; TEX. CIV. PRAC. & REM. CODE §§ 9.011 - 9.014; and TEX. R. CIV. PRO., RULE 13. Due process demands are met when the sanctioned party is afforded notice of the hearing and an opportunity to be heard. *Merriman v. Security Ins. Co. of Hartford*, 100 F.3d 1187, 1191 (5th Cir. 1996).

Birnbaum has not claimed he was denied notice and an opportunity to be heard at his sanctions hearing. Exhibit B to Plaintiff's Complaint for Declaratory Relief shows Birnbaum participated in a judicial hearing on the sanctions. His due process rights were not denied.

D. Declaratory Judgment.

Since its inception, the Declaratory Judgment Act has been understood to confer discretion on federal courts in deciding whether to declare the rights of litigants. *Wilton v. Seven Falls Co.* 515 U.S. 277, 286 (1995). On its face, the statute provides that a court "may declare the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. § 2201(a). This discretion

is not unfettered. A court may not dismiss a request "on the basis of whim or personal disinclination." *Rowan Cos., Inc. v. Griffin*, 876 F.2d 26, 28-29 (5th Cir.1989) (quoting *Hollis v. Itawamba County Loans*, 657 F.2d 746, 750 (5th Cir.1981)).

The two principal criteria guiding the policy in favor of rendering declaratory judgments are (1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding. *Aetna Cas. & Sur. Co. v. Sunshine Corp.*, 74 F.3d 685, 687 (6th Cir. 1996); *State Farm Fire & Cas. Co. V. Mhoon*, 31 F.3d 979, 983 (10th. Cir. 1994). It follows that when neither of these results can be accomplished, the court should decline to render the declaration prayed.

A declaratory judgment is usually not available to resolve state law issues that are already pending before a state court. See *Brillhart v. Excess Ins. Co.*, 316 U.S. 491, 495 (1942); *Magnolia Mar. Transp. Co. V. LaPlace Towing Corp.*, 964 F.2d 1571, 1581 (5th Cir. 1992). As the Supreme Court admonished in *Brillhart*, "[g]ratuitous interference with the orderly and comprehensive disposition of a state court litigation should be avoided." 316 U.S. at 495, 62 S.Ct. at 1176. The federal court should consider whether the declaratory suit presents a question distinct from the issues raised in the state court proceeding, whether the parties to the two actions are identical, whether going forward with the declaratory action will serve a useful purpose in clarifying the legal obligations and relationships among the parties or will merely amount to duplicative and piecemeal litigation, and whether comparable relief is available to the plaintiff seeking a declaratory judgment in another forum or at another time. *Nationwide Ins. v. Zavalis*, 52 F.3d 689, 692 (7th Cir. 1995); *State Farm Fire & Casualty Co. v. Mhoon*, 31 F.3d 979, 983 (10th Cir.1994); *NUCOR Corp. v.*

Aceros y Maquilas de Occidente, S.A. de C.V., 28 F.3d 572, 577-78 (7th Cir.1994); *American States Ins. Co. v. Kearns*, 15 F.3d 142, 145 (9th Cir.1994); *American Casualty Co. of Reading, Pa. v. Continisio*, 819 F.Supp. 385, 393 (D.N.J.1993), *judgment aff'd*, 17 F.3d 62 (3d Cir.1994); *see also Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 126-28, 88 S.Ct. 733, 746-47, 19 L.Ed.2d 936 (1968); *Brillhart*, 316 U.S. at 495, 62 S.Ct. at 1176.

In the instant case, Birnbaum challenges the constitutionality of his court-imposed sanctions. He says the defendants deprived him of his First Amendment free speech rights because the government may not retaliate against someone for engaging in constitutionally protected activities. He also claims they violated his Fifth Amendment due process rights because he has not been afforded the constitutional protections for criminal proceedings.

The sanctions did not deprive Birnbaum of a First Amendment right. They were merely the consequence of him filing claims with no basis in law. The court imposed the sanctions on Birnbaum only after a notice and due process hearing. He could have appealed the sanctions in the state court system, but apparently chose not to do so. Instead, he filed this action for a declaratory judgment.

A declaratory judgment would not serve any useful purpose in clarifying and settling the legal relations in issue; it would only confuse the legal relations that have already been resolved. A declaratory judgment would not terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding; it would create uncertainty, insecurity, and controversy. Interference with the orderly and comprehensive disposition of the state court litigation in this case should be avoided. Birnbaum cannot prove any set of facts that would allow relief under the

allegations in his complaint. The discretionary jurisdiction conferred by the Declaratory Judgment Act should not be exercised by this court in this case.

IV.

PRAYER

ACCORDINGLY, Defendant Judge Paul Banner prays that this Court grant his Motion to Dismiss and dismisses all of Plaintiff Udo Birnbaum's claims against him. Judge Banner further prays that this Court award him any other relief this Court deems just and proper.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

BARRY R. MCBEE
First Assistant Attorney General

EDWARD D. BURBACH
Deputy Attorney General for Litigation

DAVID A. TALBOT, JR.
Assistant Attorney General
Chief, Law Enforcement Defense Division



JOHN M. ORTON
Assistant Attorney General
Law Enforcement Defense Division
Attorney in Charge
State Bar No. 00792038

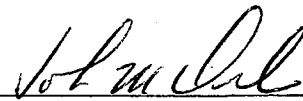
P. O. Box 12548, Capitol Station
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E-mail: john.orton@oag.state.tx.us

ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

I, JOHN M. ORTON, Assistant Attorney General of Texas, do hereby certify that a true and correct copy of the above and foregoing **Defendant Paul Banner's Motion to Dismiss for Failure to State a Claim** has been served by placing same in the United States Mail on this the 10th day of May, 2004, addressed to:

Udo Birnbaum
540 VZCR 2916
Eustace, Texas 75124
Via CM/RRR #7002 3150 0001 4727 2836



JOHN M. ORTON
Assistant Attorney General

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION**

UDO BIRNBAUM,
Plaintiff,

v.

***PAUL BANNER, DAVID WESTFALL,
CHRISTINA WESTFALL, and
STEFANI (WESTFALL) PODVIN,***
Defendants.

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Civil Action No. 6:04 CV 114

O R D E R

On this day Defendant Judge Paul Banner's Motion to Dismiss for Failure to State a Claim came before the Court for hearing. After having considered said motion and the pleadings of the parties filed herein, the Court is of the opinion that the following order should issue:

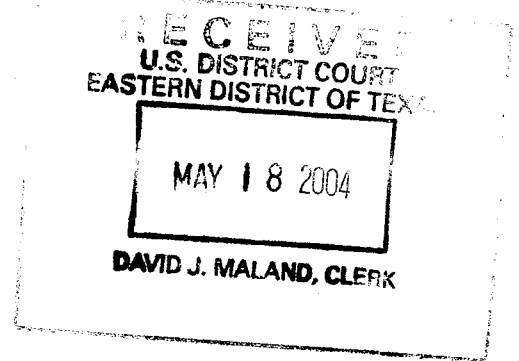
It is hereby ORDERED that the Motion to Dismiss for Failure to State a Claim be GRANTED and that all claims for relief asserted by Plaintiff in this action against this Defendant are hereby DISMISSED with prejudice.

SIGNED on this the ____ day of _____, 2004.

UNITED STATES DISTRICT JUDGE

May 18, 2004

Hon. David J. Maland, Clerk
United States District Court
Eastern District of Texas/Tyler Division
211 West Ferguson Room 106
Tyler, Texas 75702



Re: *Udo Birnbaum v. Paul Banner, et al.*
Civil Action No. 6:04-CV-114

Dear Clerk:

Enclosed please find the original and one copy of the following documents to be filed among the papers in the above-referenced cause:

- 1) *Plaintiff's Response to Defendant Paul Banner's Motion to Dismiss for Failure to State a Claim*
- 2) *Plaintiff's Motion for Summary Judgment*

By copy of this letter, I am forwarding a copy of these instruments to Paul Banner, together with *Plaintiff's Motion for Sanctions*, which I am NOT filing with the court at this time.

Thank you for your attention to this matter.

Sincerely,

UDO BIRNBAUM, pro se
540 VZCR 2916
Eustace, Texas 75124
(903) 479-3929 phone/fax

c: John M. Orton
Assistant Attorney General
Post Office Box 12548
Austin, Texas 78711-2548

In The United States District Court
For the Eastern District of Texas
Tyler Division

FILED-CLERK
04 MAY 18 PM 1:54
TEXAS-EASTERN
BY _____

Udo Birnbaum
Plaintiff

vs.

Paul Banner, David Westfall
Christina Westfall, and
Stefani (Westfall) Podvin
Defendants

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Civil Action No. 6:04CV 114

**PLAINTIFF'S RESPONSE TO DEFENDANT PAUL BANNER'S
MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM**

TO THE HONORABLE JUDGE OF SAID COURT:

Movant is bringing a FED. R. Civ. P. 12(b)(6) for "*failure to state a claim*", but instead of showing why this Court CANNOT grant relief, he starts arguing the facts and the law as to whether it SHOULD or SHOULD NOT:

1. Judge Banner states¹ the issue as being, "*Whether the discretionary jurisdiction conferred by the Declaratory Judgment Act should be exercised in this case*". "SHOULD" or "SHOULD NOT" is NOT the issue in a 12(b)(6) motion, but whether a court "CAN" or "CANNOT" issue relief.
2. Judge Banner does correctly state that a 12(b)(6) motion "*tests the formal sufficiency of the statement of claim for relief*", and that a 12(b)(6) "*admits the facts alleged*" (Birnbaum claimed that the \$62,885 sanction was unlawful²), but

¹ Motion, Section II, page 3: "ISSUE. Whether the discretionary jurisdiction conferred by the Declaratory Judgment Act should be exercised in this case".

² See Birnbaum's Complaint for details. The following just as highlights:
"It was, however, clearly established that filing a lawsuit was constitutionally protected Conduct" Milhouse U.S. SUPREME COURT

then, in this very 12(b)(6) motion turns right around (page 6 par. 3) and states "*The sanction did not deprive Birnbaum of a first amendment right*", without ever addressing Birnbaum's issue that the sanction is UNLAWFUL, because it is punitive, unconditional (not "coercive"), imposed for having engaged in constitutionally protected conduct, namely making a claim in a Texas court of law, and also that it is a criminal penalty imposed by purely civil process!

3. Judge Banner claims (page 6 par. 4) that "*A declaratory judgment would not serve any useful purpose in clarifying and settling the relations in issue*". Such is NOT the issue in a 12(b)(6), nor is it a fact in the case, or regarding the process:

The attached Exhibit "A" shows how even NOW, in the absence of ALL jurisdiction (the case was DEAD), TWO visiting judges, ONE hearing a motion to recuse the OTHER from the case, ONE³ judge from the bench, the OTHER⁴ from the witness box, managed to assess a \$125,770 FINE⁵ ("sanction") against Birnbaum on April 1, 2004!

4. Judge Banner in this 12(b)(6) motion keeps talking about how judges are immune from liability for damages (page 3), when Birnbaum is not even seeking damages, just declaratory relief from an UNLAWFUL "sanction".

"The distinction between civil and criminal contempt has been explained as follows: The purpose of civil contempt is remedial and coercive in nature. ... it is civil contempt when one may procure his release by compliance with the provisions of the order of the court. ... a civil contemnor "carries the keys to his release" in his own pocket." "criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of criminal proceedings, including the requirement that the offense be proved beyond a reasonable doubt." *Hicks v. Feiock* U.S. SUPREME COURT

³ Hon. Ron Chapman, Senior Texas judge, by assignment

⁴ Hon. Paul Banner, Senior Texas judge

⁵ This is on top of the \$62,885 "sanction" that is at issue in THIS complaint for declaratory relief.

5. And even now, opposing attorney, Frank C. Fleming, is again threatening Birnbaum with more sanctions, for seeking relief in this very federal court (Exhibit "B").
6. A declaratory judgment in this case would make it clear that punishment by civil "sanction" for having sought redress through the Texas courts, is in violation of the Constitution.
7. Furthermore, Birnbaum gives notice that he is in the process, per FRCP Rule 11, of urging Judge Banner to withdraw his 12(b)(6) motion in this cause.


PRAYER

Judge Banner in his motion DOES correctly state the law: *"A court should dismiss under FRCP 12(b)(6) only if it can determine with certainty that the plaintiff cannot prove any set of facts that would allow relief under the allegations in the complaint". (page 3, Sect. III, "Standard of Review")*

Accordingly, Plaintiff Birnbaum prays that this Court DENY Judge Banner's motion under 12(b)(6), and determine, based on the evidence, and upon hearing, or trial if necessary, that the \$62,885 "sanction" on him is indeed UNLAWFUL, and DECLARE it as such.

Plaintiff Birnbaum further prays that this court issue any other relief this Court deems just and proper.

Respectfully submitted,


UDO BIRNBAUM, *pro se*
540 VZCR 2916
Eustace, Texas 75124
(903) 479-3929

CERTIFICATE OF SERVICE

I, UDO BIRNBAUM, Plaintiff Pro Se, do hereby certify that a true and correct copy of this document has been served by CERTIFIED Mail on this the 18 day of May, 2004, addressed to John M. Orton, Assistant Attorney General, Post Office Box 12548, Austin, TX 78711-2548.

Udo Birnbaum
UDO BIRNBAUM

**Exhibit
B**

FRANK C. FLEMING
ATTORNEY AND COUNSELOR

6611 Millwood Ave. #305
Dallas, TX 75205-1301
lawyerof@earthlink.net

Voice: 214/373-1234
Fax: 214/373-3232
or Fax: 214/265-1979

April 23, 2004

Mr. Udo Birnbaum
540 VZ 2916
Eustace, TX 75124

VIA FAX No. :903/479-3929

Re: Cause No. : 6:04 cv114
Udo Birnbaum
v. Hon. Paul Banner, et al.

Dear Mr. Birnbaum:

This letter is to notify you that I will be representing Christina Westfall and Stefani (Westfall) Podvin in this matter. They are each currently out of town. Upon their return, they will be signing and returning the Waiver of Service of Summons.

I previously notified you that your continuation of this legal action against my clients will result in my clients seeking sanctions against you.

If you have any questions, you may contact me.

Very truly yours,

FRANK C. FLEMING

cc: Judge Paul Banner

Via Fax No. : 903/567-5652

In The United States District Court
For the Eastern District of Texas
Tyler Division

FILED CLERK
DISTRICT COURT
04 MAY 18 PM 1:55
TEXAS-EASTERN
BY _____

Udo Birnbaum
Plaintiff

vs.

Paul Banner, David Westfall
Christina Westfall, and
Stefani (Westfall) Podvin
Defendants

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Civil Action No. 6:04CV 114

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiff UDO BIRNBAUM moves for summary judgment under FRCP Rule 56 to show that the \$62,885 "sanction" at issue is indeed UNLAWFUL.

There is no genuine issue as to any material fact, and movant is entitled to judgment as a matter of law, to wit:

Paul Banner, in his Answer (Exhibit "A", page 3 thereto, No. 4, admitting to paragraphs 11, 12, 13, and 14), has ADMITTED to the following allegation in Birnbaum's Complaint for Declaratory Relief, shown below EXACTLY as in the complaint, including the footnotes, except compacted to single spaced for differentiation from the text of this motion, and the footnotes automatically renumbered by the text editor, and without the indicated Exhibits A and B:

- - - - -

14. Then, THREE months AFTER the trial, Judge Banner comes back ¹ again to weigh my civil RICO case (I of course had asked for weighing by JURY), and FINES me \$62,885 (Exhibit A) for having made such claim TWO years earlier (having long ago granted summary judgment on it), stating (Exhibit "B", page 7, line 5) that I may have been "**well-intentioned**", just that **he did not see a civil RICO case**:

*"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 [civil RICO] suits against the individuals²". (all completed acts, making the sanction purely punitive, not "coercive") Sanctions hearing July 30, 2000 (Exhibit "B", page 7, line 5)*

- - - - -

It is of course clearly established that filing a lawsuit³ is constitutionally protected conduct.

Also, as far as sanctions, a court is to examine the **acts or omissions of a party, not the legal merit of a party's pleadings**⁴, and even Judge Banner ADMITS as indicated above that I may have been "**well-intentioned**", but rather "**just that he did not see a civil RICO case**" ("legal merit").

¹ The first time he weighed it was when he granted summary judgment against my civil RICO claim (Exhibit D)

² My civil RICO suit had been against "the individuals", and "the individuals" ONLY, not against "Law Office".

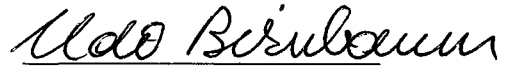
³ "It was, however, clearly established that filing a lawsuit was **constitutionally protected conduct**. See *Milhouse v. Carlson*, 652 F.2 d 371, 37 3-74 (3d C ir. 1981); see also *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) (access to courts is one aspect of the First Amendment right to petition the government for grievances). Moreover, it was also clearly established that the government cannot retaliate against someone for engaging in constitutionally protected activity in a way that would chill a reasonable person in the exercise of the constitutional right. See *Rutan v. Republican Party of Illinois.*", 497 U.S. 62, 73 , 76 n.8 (1990).

⁴ "Rule 13 requires the trial court to examine the acts or omissions of a party or counsel, not the legal merit of a party's pleading." *McCain*, 856 S.W.2d at 757. As quoted in *Rawles v. Builders Structural Services*, Texas 5th No. 05-96-00467-cv

PRAYER

WHEREFORE, said sanction having been made against Birnbaum for a pleading ("*his [civil RICO] suits against the individuals*") he made, and Birnbaum being "sanctioned" \$62,770 despite being "*well-intentioned*" in making such pleading, such "sanction" is indeed contrary to law, and as a matter of law, Birnbaum is entitled to prevail on his claim for declaratory relief, i.e. that the "sanction" is indeed UNLAWFUL.

Respectfully submitted,


UDO BIRNBAUM, *pro se*
540 VZCR 2916
Eustace, Texas 75124
(903) 479-3929

Att: "A", Answer, page 3

CERTIFICATE OF SERVICE

I, UDO BIRNBAUM, Plaintiff Pro Se, do hereby certify that a true and correct copy of this document has been served by CERTIFIED Mail on this the 18 day of May, 2004, addressed to John M. Orton, Assistant Attorney General, Post Office Box 12548, Austin, TX 78711-2548.


UDO BIRNBAUM

ANSWER AND AFFIRMATIVE DEFENSES

1. Defendant Judge Banner admits jurisdiction of this cause of action is founded on the existence of a question arising under the laws of the United States of America and more particularly 28 U.S.C. Section 1331 [federal question], 28 U.S.C. Section 2201 [declaratory judgment], and Rule 57 of the Federal Rules of Civil Procedure [declaratory judgment].
2. Defendant Judge Banner admits paragraphs 2, 3, 4, 5, 6, 7, 8, and 9 of Plaintiff's complaint.
3. Defendant Judge Banner denies paragraph 10 of Plaintiff's complaint.
4. Defendant Judge Banner admits paragraphs 11, 12, 13, 14, of Plaintiff's complaint.
5. Defendant Judge Banner denies paragraph 15, 16, 17, and 18 of Plaintiff's complaint.
6. Defendant Judge Banner admits paragraph 19 of Plaintiff's complaint.
7. Defendant Judge Banner denies paragraphs 20, 21, 22, 23, 24 of Plaintiff's complaint.
8. Defendant Judge Banner admits paragraph 25 of Plaintiff's complaint.
9. Defendant Judge Banner denies paragraphs 26, 27, of Plaintiff's complaint.
10. Defendant Judge Banner admits paragraph 28 of Plaintiff's complaint.
11. Defendant Judge Banner denies paragraph 29 of Plaintiff's complaint.
12. Defendant Judge Banner admits paragraph 30 of Plaintiff's complaint.
13. Defendant Judge Banner denies paragraph 31 of Plaintiff's complaint.
14. Defendant Judge Banner asserts that at all times relevant he acted in a judicial capacity as a district court judge for the State of Texas. He further asserts that judges are absolutely immune from liability for damages for judicial acts that are not performed in clear absence of all jurisdiction, however erroneous the act and however evil the motive.
15. Defendant Judge Banner asserts sovereign immunity to any claims for damages which may

In The United States District Court
For the Eastern District of Texas
Tyler Division

FILED-CLERK
DISTRICT COURT
04 MAY 18 PM 1:56
TEXAS-EASTERN
BY _____

Udo Birnbaum
Plaintiff

vs.

Paul Banner, David Westfall
Christina Westfall, and
Stefani (Westfall) Podvin
Defendants

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Civil Action No. 6:04CV 114

PLAINTIFF'S MOTION FOR SANCTIONS

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiff UDO BIRNBAUM hereby brings this motion for sanctions against DEFENDANT PAUL BANNER and his attorney, JOHN M. ORTON, for bringing a FRCP 12(b)(6) motion for "failure to state a claim" upon a complaint for DECLARATORY relief, where THE issue, the ONLY issue, is whether a certain \$62,775 "sanction" is LAWFUL, or UNLAWFUL.

Said motion is a violation of FRCP Rule 11(b)(1) and (2) by "needlessly increasing the cost of litigation" and "making claims, defenses, and non-warranted contentions", specifically:

In his Answer Judge Banner admits that this court has jurisdiction because this *"action is founded on a question arising under the laws of the United States of America and more particularly 28 U.S.C. Section 1331 [federal question], 28 U.S.C. Section 2201 [declaratory judgment], and Rule 57 of the Federal Rules of Civil Procedure [declaratory judgment]"*. (ANSWER page 3, Answer 1)

Yet by the VERY NATURE of a FRCP Rule 12(b)(6) motion for "failure to state a claim", Judge Banner is telling this court that he wants the claim dismissed, because the court cannot grant relief, under any set of circumstances, supposedly even if the \$62,885 "sanction" were indeed UNLAWFUL!

In his **Answer** Judge Banner asserts *"that at all times relevant to the allegations against him he acted in good faith and with a reasonable belief that his acts were in compliance with the laws and Constitution of the United States"*. (ANSWER page 4, Answer 22)

But \$62,885 punishment for having filed a pleading when one is sued is "objectively unreasonable" and in violation of "currently applicable constitutional standards". (filing a lawsuit is constitutionally protected conduct)

Also objectively unreasonable is Judge Banner's FRCP Rule 12(b)(6) motion to dismiss for "failure to state a claim on which relief can be granted", when the issue, the ONLY issue, is whether the "sanction" is LAWFUL, or UNLAWFUL.

PRAYER

With such said, Birnbaum moves for \$62,885 in exemplary sanctions against PAUL BANNER and his attorney JOHN ORTON for violations of Rule 11 as detailed above, lest they immediately withdraw their unwarranted 12(b)(6) motion.

Respectfully submitted,



UDO BIRNBAUM, *pro se*

540 VZCR 2916

Eustace, Texas 75124

(903) 479-3929

CERTIFICATE OF SERVICE

I, UDO BIRNBAUM, Plaintiff Pro Se, do hereby certify that a true and correct copy of this document has been served by CERTIFIED Mail on this the 18 day of May, 2004, addressed to John M. Orton, Assistant Attorney General, Post Office Box 12548, Austin, TX 78711-2548.

Udo Birnbaum
UDO BIRNBAUM

FRANK C. FLEMING

ATTORNEY AND COUNSELOR

6611 Hillcrest Ave., #305
Dallas, TX 75205-1301
lawyerfcf@aol.com

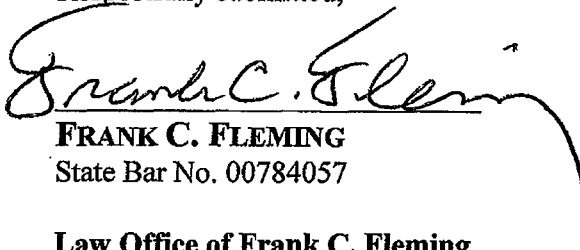
Voice: 214/373-1234
Fax: 214/373-3232
or Fax: 214/265-1979

May 25, 2004

To the Clerk of the Eastern District of Texas, Tyler Division:

Regarding my application to appear pro hac vice, I currently have a pending grievance proceeding in which I was unable to reach a satisfactory resolution with the local grievance committee and in which I have elected to appeal the grievance to District Court. A trial in that proceeding is scheduled to take place in either August or September 2004.

Respectfully submitted,



FRANK C. FLEMING
State Bar No. 00784057

Law Office of Frank C. Fleming
6611 Hillcrest Ave., #305
Dallas, Texas 75205-1301
fax: 214/373-3232 or 214/265-1979
phone: 214/ 373-1234

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION
APPLICATION TO APPEAR PRO HAC VICE

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MAY 27 2004
BY DAVID J. MALAN, D. CLERK
DEPUTY

1. This application is being made for the following: Case # 6:04 cv 114.

Style: *Birnbaum v. Banner, et al.*

2. Applicant is representing the following party/ies:

Christina Westfall

Stefani Podvin

3. Applicant was admitted to practice in Texas (state) on November 6, 1992 (date).

4. Applicant is in good standing and is otherwise eligible to practice law before this court.

5. Applicant is not currently suspended or disbarred in any other court.

6. Applicant has has not had an application for admission to practice before another court denied please circle appropriate language). If so, give complete information on a separate page.

7. Applicant has has not ever had the privilege to practice before another court suspended (please circle).

If so, give complete information on a separate page.

8. Applicant has has not been disciplined by a court or Bar Association or committee thereof that would reflect unfavorably upon applicant's conduct, competency or fitness as a member of the Bar (please circle). If so, give complete information on a separate page.

9. Describe in detail on a separate page any charges, arrests or convictions for criminal offense(s) filed against you. Omit minor traffic offenses.

10. There ^{is a} ~~are no~~ pending grievances or criminal matters pending against the applicant.

11. Applicant has been admitted to practice in the following courts:

United States District Court, Northern District of Texas

12. Applicant has read and will comply with the Local Rules of the Eastern District of Texas, including

Rule AT-3, the "Standards of Practice to be Observed by Attorneys."

13. Applicant has included the requisite \$25 fee (see Local Rule AT-1(d)).

14. Applicant understands that he/she is being admitted for the limited purpose of appearing in the case specified above only.

Application Oath:

I, Frank C. Fleming do solemnly swear (or affirm) that the above information is true; that I will discharge the duties of attorney and counselor of this court faithfully; that I will demean myself uprightly under the law and the highest ethics of our profession; and that I will support and defend the Constitution of the United States.

Date

5/25/04

Signature

Frank C. Fleming

Name (please print) Frank C. Fleming
State Bar Number 00784057
Firm Name: Law Office of Frank C. Fleming
Address/P.O. Box: 6611 Hillcrest Ave., #305
City/State/Zip: Dallas, TX 75205-1301
Telephone #: 214/373-1234
Fax #: 214/373-3232 or 214/265-1979
E-mail Address: lawyerfcf@aol.com

Applicant is authorized to enter an appearance as counsel for the party/parties listed above.

This application has been approved for the court this 27th day of May, 2004.

David J. Maland, Clerk

U.S. District Court, Eastern District of Texas

By

D. Wilson
Deputy Clerk



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 25, 2004

Hon. David J. Maland, Clerk
United States District Court
Eastern District of Texas/Tyler Division
211 West Ferguson Room 106
Tyler, Texas 75702

Re: ***Udo Birnbaum v. Paul Banner, et al.***
Civil Action No. 6:04-CV-114

Dear Clerk:

Enclosed please find the original and one copy of the following document to be filed among the papers in the above-referenced cause:

Defendant Paul Banner's Response to Plaintiff's Motion for Summary Judgment.

Please indicate the date of filing on the enclosed copy of this letter and return in the enclosed postpaid envelope. By copy of this letter, I am forwarding a copy of this instrument to the Plaintiff.

Thank you for your attention to this matter.

Sincerely,

JOHN M. ORTON
Assistant Attorney General
Law Enforcement Defense Division
(512) 463-2080 / Fax (512) 495-9139

JMO/jmg
Enclosures

c: Udo Birnbaum
540 VZCR 2916
Eustace, Texas 75124
Via CM/RRR #7003 1680 0001 3543 6562

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION**

UDO BIRNBAUM,
Plaintiff,

v.

**PAUL BANNER, DAVID WESTFALL,
CHRISTINA WESTFALL, and
STEFANI (WESTFALL) PODVIN,**
Defendants.

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Civil Action No. 6:04 CV 114

**DEFENDANT PAUL BANNER'S
RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

TO THE HONORABLE JUDGE OF SAID COURT:

Judge Paul Banner ("Judge Banner"), by and through the Attorney General for the State of Texas, submits this response to Plaintiff's motion for summary judgment.

I.

STATEMENT OF THE CASE

Plaintiff Udo Birnbaum ("Birnbaum") brought this *pro se* action pursuant to 42 U.S.C. §1983 claiming a violations of his First, Fifth, and Fourteenth Amendment rights. Defendant Judge Banner is a senior state district court judge for the State of Texas. He seeks a declaratory judgment.

Judge Banner sat by special assignment in the 294th District Court of Van Zandt County, Texas, in a case brought by the Law Office of G. David Westfall, P.C., ("the Westfall law office") against Birnbaum for unpaid legal services.¹ The Westfall law office had previously represented Birnbaum in a civil lawsuit brought by him against 294th District Court Judge Tommy Wallace and

¹ *The Law Offices of G. David Westfall, P.C. v. Udo Birnbaum*, Cause No. 00-00619, 294th District Court, Van Zandt County, Texas.

other state judges for racketeering pursuant to 18 U.S.C. 1964(c) (Racketeer Influenced and Corrupt Organizations Act (RICO)).² In the lawsuit for unpaid legal services, Birnbaum asserted the defense of fraud and counter-claimed under the Texas Deceptive Trade Practices Act (DTPA). Birnbaum also made civil RICO claims against individuals associated with the Westfall law office. These individuals included Defendants G. David Westfall, Christina Westfall, and Stefani (Westfall) Podvin (“the Westfalls”).

After a hearing, Judge Banner granted the Westfall law office’s motion for summary judgment concerning Birnbaum’s fraud, DTPA, and RICO allegations. After a second hearing, Judge Banner concluded, “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.” Exhibit B to Plaintiff’s Complaint for Declaratory Relief. Judge Banner then granted the Westfalls’ motions for sanctions and awarded damages in the total amount of \$62,885.

Birnbaum now claims the sanctions are illegal. He says the sanctions deprive him of his First Amendment right to free speech because filing a lawsuit is constitutionally protected conduct and the government may not retaliate against someone for engaging in constitutionally protected activities. He also claims the sanctions violate his Fifth Amendment rights because they are criminal penalties and he has not been afforded the constitutional (due process) protections for criminal proceedings. Birnbaum asks that this Court declare that the order on the motion for sanctions is contrary to law.

² *Udo Birnbaum v. Richard L. Ray, et al.*, Cause No. 3:99-CV-0696-R, U.S. District Court, Northern District, Dallas Division.

II.

ISSUE

Whether Plaintiff is entitled to summary judgement and declaratory judgment when he challenges state court imposed sanctions as unconstitutional.

III.

DISCUSSION

Under the *Rooker-Feldman* doctrine, the district court does not have jurisdiction over the instant case. Reduced to its essence, *Rooker-Feldman*³ doctrine "holds that inferior federal courts do not have the power to modify or reverse state court judgments." *Union Planters Bank Nat. Ass'n v. Salih*, --- F.3d ----, 2004 WL 911793 (5th Cir.(La.) Apr 29, 2004); *Reitnauer v. Texas Exotic Feline Found., Inc. (In re Reitnauer)*, 152 F.3d 341, 343 (5th Cir.1998). The Supreme Court has definitively established that "federal district courts, as courts of original jurisdiction, lack appellate jurisdiction to review, modify, or nullify final orders of state courts." *Liedtke v. State Bar of Texas*, 18 F.3d 315, 317 (5th Cir.1994) (citations omitted). "If a state trial court errs the judgment is not void, it is to be reviewed and corrected by the appropriate state appellate court. Thereafter, recourse at the federal level is limited solely to an application for a writ of certiorari to the United States Supreme Court." *Id*; see also *Carbonell v. Louisiana Dept. of Health & Human Resources*, 772 F.2d 185, 188-89 (5th Cir.1985).

In this case, Birnbaum filed the instant suit in federal court to nullify sanctions imposed by a state court that had become final and appealable. See Exhibit A to Plaintiff's Complaint for Declaratory Relief. Rather than seek relief from the Texas Appellate Courts (and if necessary from

³ *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983).

the Supreme Court of the United States by applying for a writ of certiorari), Birnbaum asked this federal district court to act as a *de facto* appellate court and reverse the state court's decision. This is precisely what the *Rooker-Feldman* doctrine does not tolerate.

Birnbaum is not entitled to summary judgment or a declaratory judgment because under the *Rooker-Feldman* doctrine, the district court does not have jurisdiction over the instant case. His motion, and this lawsuit, should be dismissed.

IV.

PRAYER

ACCORDINGLY, Defendant Judge Paul Banner prays that this Court denies the Plaintiff Udo Birnbaum's motion for summary judgment and dismisses all of Plaintiff's claims against him. Judge Banner further prays that this Court award him any other relief this Court deems just and proper.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

BARRY R. MCBEE
First Assistant Attorney General

EDWARD D. BURBACH
Deputy Attorney General for Litigation

DAVID A. TALBOT, JR.
Assistant Attorney General
Chief, Law Enforcement Defense Division



JOHN M. ORTON
Assistant Attorney General
Law Enforcement Defense Division
Attorney in Charge
State Bar No. 00792038

P. O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2080 / Fax No. (512) 495-9139
E-mail: john.orton@oag.state.tx.us

**ATTORNEYS FOR DEFENDANT
JUDGE PAUL BANNER**

CERTIFICATE OF SERVICE

I, JOHN M. ORTON, Assistant Attorney General of Texas, do hereby certify that a true and correct copy of the above and foregoing **Defendant Paul Banner's Response to Plaintiff's Motion for Summary Judgment** has been served by placing same in the United States Mail on this the 25th day of May, 2004, addressed to:

Udo Birnbaum
540 VZCR 2916
Eustace, Texas 75124
Via CM/RRR #7003 1680 0001 3543 6562



JOHN M. ORTON
Assistant Attorney General

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION**

UDO BIRNBAUM,
Plaintiff,

v.

***PAUL BANNER, DAVID WESTFALL,
CHRISTINA WESTFALL, and
STEFANI (WESTFALL) PODVIN,***
Defendants.

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Civil Action No. 6:04 CV 114

ORDER

On this day Plaintiff Udo Birnbaum's Motion for Summary Judgment came before the Court for hearing. After having considered said motion and the pleadings of the parties filed herein, the Court is of the opinion that the following order should issue:

It is hereby ORDERED that the Motion for Summary Judgment be DENIED, and that all claims for relief asserted by Plaintiff in this action against this Defendant be DISMISSED with prejudice.

SIGNED on this the ____ day of _____, 2004.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS

MAY 27 2004

BY DAVID J. MALAND, CLERK
DEPUTY

UDO BIRNBUAM,
Plaintiff

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v.

CIVIL ACTION NO. 6:04CV114

Hon. PAUL BANNER
G. DAVID WESTFALL
CHRISTINA WESTFALL
STEFANI (WESTFALL) PODVIN,
Defendants

**DEFENDANTS' CHRISTINA WESTFALL AND STEFANI PODVIN'S
MOTION TO DISMISS UNDER RULE 12 (b)**

COMES NOW, Defendants Christina Westfall and Stefani (Westfall) Podvin (the Defendant's) and file this their Motion to Dismiss under FRCP 12(b) for failure by Plaintiff to state a claim for which relief can be granted. In support thereof, the Defendants would show the Court:

I.

FACTS and ALLEGATIONS:

1. This lawsuit has been brought by Plaintiff, Birnbaum, ("Birnbaum") after his unsuccessful efforts to defend himself and bring counter-claims in a simple attorney/client

collection matter in a state court proceeding which has long since been concluded.

2. Initially, Birnbaum was sued by his former attorney (G. David Westfall) for collection of unpaid legal bills. Birnbaum filed a counter-claim against Mr. Westfall's law office, Mr. Westfall personally, the attorney's wife (Christina Westfall) and the attorney's daughter (Stefani Podvin) claiming that the attempt to collect the unpaid legal fees was an civil conspiracy of the law office and a violation of the RICO statute.

3. By summary judgment, all RICO claims were eventually dismissed in the state court action.

4. After a jury trial on the merits, the attorney was successful in receiving a jury verdict that legal fees were in fact due and owing to the attorney from Birnbaum.

5. Prior to entry of judgment on the jury award, the wife and daughter filed motions for sanctions against Birnbaum for having filed a frivolous RICO pleading against them which had required them to expend legal fees to defeat the pleading by summary judgment. The court granted the request for sanctions.

6. Birnbaum filed an appeal of the jury verdict and an appeal of the sanctions ruling. The Fifth District Court of Appeals denied the appeal and affirmed the two judgments.

7. Birnbaum filed a Petition for Review with the Texas Supreme Court. The request for review by the Texas Supreme Court was denied.

8. While on appeal, Birnbaum had filed a second motion to recuse the same trial judge. A previous attempt to recuse Judge Banner had been attempted by Birnbaum after the RICO claims were dismissed by Judge Banner by summary judgment ruling. The first attempt to remove Judge Banner was heard by a visiting judge and denied. A motion for sanctions for filing a frivolous pleading was filed and the judge took sanctions for that motion under advisement.

9. Prior to the hearing on the second attempt to recuse Judge Banner, the Defendants filed another motion for sanctions for filing another frivolous pleading. After another hearing by a visiting judge, the motion to recuse Judge Banner was again denied and sanctions were imposed for the frivolous filing of the motion to recuse Judge Banner.

10. Birnbaum now files this action in Federal Court in an attempt to obtain relief for what has happened to him in a state court proceeding.

11. Birnbaum files this lawsuit in the form of a request for declaratory relief asking the Federal Court to require Judge Banner to take certain actions.

12. Birnbaum's complaint names the Defendants as parties to this action yet Birnbaum failed to ask the Court to grant the Plaintiff any relief from the Defendants either in the complaint itself or in the prayer for relief.

II. **ARGUMENTS:**

LACK OF SUBJECT MATTER JURISDICTION:

This Motion should be granted under FRCP 12(b)(1) due the fact that the Court lacks subject matter jurisdiction. Plaintiff seeks in Federal Court that which the Plaintiff has already attempted to achieve in a state court civil proceeding. The Plaintiff made all the same legal arguments in state court and they failed at the trial level and at two separate levels of appeal. There are no "unique" federal issues raised by this complaint which should be reviewed and determined in a new federal proceeding. Simply because a litigant tried and failed in a state court action does not give rise to federal court subject matter jurisdiction to review and re-try the same matter again in a federal court.

In addition to lacking subject matter jurisdiction over the entire lawsuit, the Defendants assert that certainly the federal court lacks subject matter jurisdiction over these two Defendants due to the fact they are not the parties the Plaintiff is seeking the federal court to take action against.

FAILURE TO STATE A CLAIM:

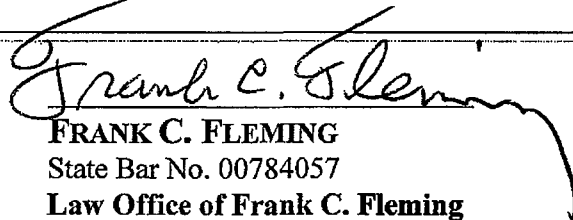
This Motion should be granted under FRCP 12(b)(6) due the fact that the Plaintiff has failed to state a claim on which relief can be granted.

The Defendants have not engaged in any behavior that has violated any civil right of the Plaintiff. The Defendants have only engaged in state court sanctioned behavior seeking monetary relief for the monetary losses caused by the Plaintiff's actions against the Defendants. Allowing the Plaintiff a second bite at the apple in a federal court simply because the Plaintiff did not "like" is outcome in state court is not a claim on which this court can grant relief.

In addition, the Plaintiff has particularly failed to state a claim against *these two Defendants* because on both the face of the Plaintiff's Original Complaint and the Plaintiff's prayer, there is no request for the court to take any action against these two Defendants.

WHEREFORE, PREMISES CONSIDERED, Movant prays that the Court dismiss the complaint filed by the Plaintiff against defendant, Christina Westfall and against defendant, Stefani Podvin, and for such other and further relief, both general and special, to which Defendants may be justly entitled, both at law and equity.

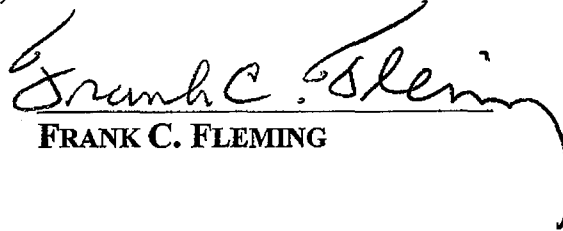
Respectfully submitted,



FRANK C. FLEMING
State Bar No. 00784057
Law Office of Frank C. Fleming
6611 Hillcrest Ave., #305
Dallas, Texas 75205-1301
fax: 214/373-3232 or 214/265-1979
phone: 214/ 373-1234
ATTORNEY FOR MOVANTS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above document has this day been delivered to Udo Birnbaum, Pro Se, by Certified Mail to 540 VZ CR 2916, Eustace, TX 75124, on this 35 th day of May, 2004.


FRANK C. FLEMING

In The United States District Court
For the Eastern District of Texas
Tyler Division

04 JUN -9 PM 3: 50
TEXAS-EASTERN
BY _____

Udo Birnbaum
Plaintiff

vs.

Paul Banner, David Westfall
Christina Westfall, and
Stefani (Westfall) Podvin
Defendants

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Civil Action No. 6:04CV 114

**PLAINTIFF UDO BIRNBAUM'S
REPLY TO DEFENDANT PAUL BANNER'S
RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
(and particularly addressing their claim of "*Rooker-Feldman*")**

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiff Udo Birnbaum ("Birnbaum") submits this reply to Judge Paul Banner's ("Judge Banner") response to Plaintiff's motion for summary judgment, including the prayer to dismiss under *Rooker-Feldman* in Judge Banner's response.

**I.
INTRODUCTION**

Plaintiff UDO BIRNBAUM ("Birnbaum") filed this suit seeking declaratory relief from deprivation of his rights. The latest ongoing is detailed in Exhibit 10.

BIRNBAUM contends a certain \$62,885 **sanction judgment ("Order on Motions for Sanctions"**, Exhibit 6) upon him is UNLAWFUL, because the order

is unconditional¹ (not "coercive") punishment for the completed act, TWO years before, of having made, in good faith, a "civil RICO" cross-claim (Birnbaum was the defendant).

As the state trial judge himself said at the close of the hearing on motion for sanctions:

"In assessing the [\$62,885] sanctions, the Court has taken into consideration that although 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 [civil RICO] suits against the individuals²". Sanctions hearing July 30, 2002, **Exhibit 5, line 5.**

Filing a lawsuit is of course constitutionally protected conduct:

"It was, however, clearly established that filing a lawsuit was constitutionally protected conduct. See *Milhouse v. Carlson*, 652 F.2 d 371, 373-74 (3d Cir. 1981); see also *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) (access to courts is one aspect of the First Amendment right to petition the government for grievances). Moreover, it was also clearly established that the government cannot retaliate against someone for engaging in constitutionally protected activity in a way that would chill a reasonable person in the exercise of the constitutional right. See *Rutan v. Republican Party of Illinois.*", 497 U.S. 62, 73, 76 n.8 (1990). **U.S. SUPREME COURT**

Plaintiff Birnbaum is asking this federal court to declare the **\$62,885 sanction** as indeed being contrary to law, and to grant such other relief so Birnbaum may have full access to the courts, free of fear of retaliation.

Defendant Paul Banner and the Attorney General, on the other hand, want this court to believe that it cannot declare the \$62,885 sanction as contrary to law, basically that under the *Rooker-Feldman* doctrine, this court cannot de-facto sit in

¹ It is unconditional, not "coercive", making the punishment criminal in nature, requiring full criminal process, including a finding of "beyond a reasonable doubt". Criminal sanctions cannot be imposed by civil process.

² My civil RICO claim (as cross and third-party plaintiff, same "enterprise", same "scheme") had been against "the individuals", and "the individuals" only, NOT against their Law Office "enterprise" they were using to sue me.

appeal on a "final decision" by a state court, i.e. it cannot even reach the issue as to whether the sanction is indeed unlawful. From their brief:

"Reduced to its essence, *Rooker-Feldman* doctrine "holds that inferior courts do not have the power to modify or reverse state court judgments".

"federal district courts, as courts of original jurisdiction, lack appellate jurisdiction to review, modify, or nullify final orders of state courts"

II. ISSUE

The *Rooker-Feldman* doctrine does NOT apply:

- The \$62,885 sanction is null and void on its face. The case was finished. (Exhibits 1 and 2). The judge had no jurisdiction left to make any more "final decisions."
- The \$62,885 sanction projects into the future to restrict the fundamental right of access to the courts by Birnbaum, and "others like him". (Exhibit. 7)
- There is an ongoing sanction (\$125,770), again with dangerous notions to restrict the fundamental right of access to the courts. (Exhibit 9)
- There is the threat of "further sanctions" upon "any further actions" (Exhibit 8)

III. DISCUSSION

**The \$62,885 sanction is null and void on its face.
The time for the trial judge to make ANY decisions had passed.
All this federal court has to do is view the FINAL JUDGMENT**

The Attorney General wants this court to believe that it cannot declare the \$62,885 sanction as contrary to law, because under the *Rooker-Feldman* doctrine, this court cannot de-facto sit in review of a "final decision" by a state court, i.e. it cannot even reach the issue as to whether the sanction is indeed unlawful.

The problem with this theory, however, is that the \$62,885 **Order on Motion for Sanctions** (Exhibit 6, "signed" Aug. 9, not "signed with the court" till Aug. 21, 2002) does not qualify as a "final decision", because it is NULL and VOID on its face, because the state court **finalized** its **FINAL JUDGMENT** on July 30, 2002. The state court was FINISHED at that time, and in fact was through on the date the FINAL JUDGMENT was rendered. (Exhibit 2, "**THIS JUDGMENT RENDERED ON APRIL 11, 2002, AND SIGNED THIS 30 day of JULY, 2002**").

This federal court does not have to review the issues in *Order on Motion for Sanctions* (Exhibit 6), but simply view the final decision of the state court, the FINAL JUDGMENT (Exhibit 2), and the final decision of the judge, as caught by the court reporter, of Birnbaum being "**well-intentioned**" (Exhibit 5).

There was NO state district court jurisdiction left on Aug. 9, 2002 to sign ANYTHING, much less a punitive sanction of \$62,885, on a motion for sanctions (Exhibit 3) brought as late as May 9, 2002, AFTER the rendering of FINAL JUDGMENT on April 11, 2002, and brought by persons that were not longer IN the case, but had been dismissed long before under summary judgment (Exhibit 4) on Sept. 7, 2001, and had NO counter-claims pending. They were OUT of the case!

The sanction is null and void on its face. The time for the trial judge to make more "final decisions" (like the sanction) had passed. All this federal court has to do is to look at the FINAL JUDGMENT, then the \$62,885 sanction, to see that the time for unconditional civil sanctions had passed, never mind that the sanction was punishment for having sought access to the court, i.e. protected activity.

The \$62,885 sanction projects into the future, with dangerous notions that restrict the fundamental right of access to the courts

The court process shows a pattern of violation of constitutional rights, with the threat thereof into the future, not only regarding Birnbaum, but for "*others like him*" (see below), regarding the right to make claims in a Texas district court, **free from fear of retaliation** by the government, for exercising the fundamental right of access to the courts.

The *Findings* (Exhibit 7) made against Birnbaum incorporate dangerous notions of law which constitute nothing less than de-facto legislating whole classes of persons and cases out of access to the courts, and particularly persons who exercise their right to appear without paying a lawyer literally thousands of dollars³, and/or bringing cases under 18 U.S.C. § 1964(c), "civil RICO".

Some of the dangerous enactment in the *Findings* (Exhibit 7):

The Defendant/Counter-Plaintiff's [Birnbaum's] claims concerning RICO civil conspiracy charges were not based upon the law ... (6)
(i.e. don't file civil RICO cases! "Civil RICO" of course IS the law!)

The court concludes as a matter of law that Defendant/Counter-Plaintiff's [Birnbaum's] claims concerning RICO civil conspiracy were brought for the purpose of harassment. (7)
(i.e. civil RICO cases will be deemed to be "harassment"!)

The award of punitive damages [\$62,885 "sanction"] is an appropriate amount to seek the relief sought which is to stop this Defendant/Counter-Plaintiff [Birnbaum], and others like him, from filing similar frivolous lawsuits. (14)
(i.e. "if any of you others out there, if you use civil RICO, THOU SHALT ALSO BE SANCTIONED!")

³ And at the risk of being sued additional THOUSANDS of dollars, by their OWN attorney, as in the underlying case, claiming \$38,121.10 "worth" of "legal fees" -- for suing the local district judge -- and under the anti-racketeering statute, "civil RICO" at that, AND IN THAT VERY JUDGE'S COURT!

The amount of punitive damage 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. (11)

(i.e. "similar future action", even "**well-intentioned**", will be punished!)

(civil sanctions are supposed to be **coercive**, NOT **punitive**. **Unconditional punitive** fines CANNOT be imposed by civil process!)

The Texas Attorney General has raised issues ranging from "failure to state a claim", to "*Rooker-Feldman*", i.e. that Birnbaum's complaint is upon "final" decisions of a Texas court, and that Birnbaum cannot raise in a lower federal court his claim of First Amendment and Due Process violation.

But as this court can see, these *Findings* do not concern just the past, but project into the future, not just for Birnbaum, but for "*others like him*", and "*similar frivolous lawsuits*", (i.e. DON'T DO CIVIL RICO!), and constitute outlawed "prior restraint".

There is an ongoing sanction, for \$125,770, again with dangerous notions that restrict the fundamental right of access to the courts

The attached Exhibit 10 details the ongoing violations of Birnbaum's civil rights and the threat thereof into the indefinite future, namely ANOTHER unconditional FINE ("sanction") for \$125,770! And in the same DEAD case! How can Birnbaum even appeal this in state court? (Use the old cause number again?)

And again there are dangerous novel notions in the proposed findings (Exhibit 9) regarding the \$125,770 sanction, again projecting into the future:

"A monetary sanction in the amount of \$124,770 as exemplary and/or punitive damages to serve as a deterrent to prevent Birnbaum from committing further similar acts again in the future."

*"The type and dollar amount of the sanctions award is appropriate in order to gain the relief which the Court seeks, which is to stop this litigant **and others similarly situated** from filing frivolous motions, frivolous lawsuits, frivolous defenses, frivolous counter-claims, and new lawsuits which attempt to re-litigate matters already litigated to a conclusion."*

*"Birnbaum's difficulties with judges and the repeated allegations of a lack of impartiality have had nothing at all to do with the conduct of the judges that Birnbaum has appeared before, but instead, is a **delusional belief** held only **inside the mind** of Birnbaum."*

Since when do lawyers and judges make a MEDICAL diagnosis, or assess a \$125,770 SANCTION for "*delusional belief*"?

**There is the threat of "*further sanctions*"
upon "*any further actions*"**

And then there is the ultimate (non-specific) threat, "*Please be aware that any further actions might result in further sanctions.*" (Exhibit 8)

PRAYER

ACCORDINGLY, Plaintiff UDO BIRNBAUM prays that this Court take jurisdiction of this case upon the ongoing violation of his rights, including the dark shadow of the \$62,885 sanction upon him and "*others like him*". (see above)

Birnbaum prays that this Court deny the request to dismiss under *Rooker-Feldman*, grant his motion for summary judgment, and declare that the \$62,885 ***Order on Motions for Sanctions*** is indeed contrary to law, and grant such other relief as this Court deems just and proper.

Respectfully submitted,

Udo Birnbaum

UDO BIRNBAUM, *pro se*

540 VZCR 2916

Eustace, Texas 75124

(903) 479-3929

CERTIFICATE OF SERVICE

I, UDO BIRNBAUM, Plaintiff Pro Se, do hereby certify that a true and correct copy of this document has been served by CERTIFIED Mail on this the 9 day of June, 2004, addressed to John M. Orton, Assistant Attorney General, Post Office Box 12548, Austin, TX 78711-2548, and by regular mail to Frank C. Fleming, 6611 Hillcrest Ave., #305, Dallas, TX 75205-1301.


UDO BIRNBAUM

CIVIL DOCKET

CASE NO. 00-00619

DAVIS, DALLAS FORT CO

NUMBER OF CASE	STYLE OF CASE	ATTORNEYS	KIND OF ACTION	DATE OF FILING		
				Month	Day	Year
00-00619	The Law Offices of G. David Westfall vs. Udo Bumburn	G. David Westfall Plaintiff. Defendant.	Dist	09	24	00
<p>FEE BOOK</p> <p>Vol. _____ Page _____</p>						
<p>DATE OF ORDERS</p> <p>Mo. Day Year</p>						
12/6/2009	Judge Barrs Appointed					
9 20 01	PT- PPR					
9 7 01	Def's M/S summary Judgment.					
10 1 01	all parties present. Evidence presented on D's Motion to secure. Both sides present & close. Arguments presented. D's Motion to secure is ^{is} insufficient at law and is untimely and if it is not, D's evidence fails to establish any grounds in its favor, and therefore, the Ct. denies the motion on its merits. Ct. takes issue of Sanctioning					
	Next Bumburns under arrest Judge Ron Chapman					
				<p>Minute Book</p> <p>Vol. _____ Page _____</p>		
				<p>PROCESS</p> <p>Jury Demanded by _____</p> <p>Jury Fee, \$ _____</p> <p>Paid by _____</p>		

Exhibit
 1
 See page 2

ORDERS OF COURT CONTINUED

Date of Orders
Month Day Year

4	8	02	9R All present, jury selected, sworn in standard; Open Status, Enid Recor	
4	10	02	9R all present, Enid conch	
4	11	02	9R all present, Enid conch Jury Verdict	
7	30	02	9R all present, Jdt signed	
3	17	03	Order for 5 th Court of Appeals - clerks record	156 228
4	1	04	9R Movant Binnstaun P. 10 37 and atty. Fleming representing FF are present. Hearing conducted on Binnstaun's Motion to Recuse filed 9/30/03. Testimony presented, Both sides recd. Arguments presented. Motion to recuse is in all things denied. Hearing held on FF's Motion for Sanctions filed this date. Testimony presented, Both sides recd. Arguments presented. Ct find, based on the arguments, testimony, and pleadings that grounds for sanctions do exist and the Ct shall exercise said sanctions for A's violation of Rule 13 of the TRCP and/or Sa. Civ. P. 10.01 et seq. TCR C in the amount of \$1,000- for actual damages and \$124,770- for exemplary damages against A Binnstaun who is ordered to pay said sums to FF. FF's atty is instructed to draft a proposed order, Judge Calabrese and submit a copy of same to A.	



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 Slott

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

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IN THE DISTRICT COURT

294th JUDICIAL DISTRICT

VAN ZANDT COUNTY, TEXAS

FINAL JUDGMENT

On April 8, 2002, this cause came on to be heard. Plaintiff, The Law Office of G. David Westfall, P.C. (the "Plaintiff"), appeared in person by representative and by attorney of record and announced ready for trial and the defendant, Udo Birnbaum, appeared in person, pro se, and announced ready for trial and the counter-defendant, G. David Westfall, appeared in person by representative and by attorney of record and announced ready for trial. All other parties to this lawsuit having been dismissed previously by summary judgment rulings of the Court. A jury having been previously demanded, a jury consisting of 12 qualified jurors was duly impaneled and the case proceeded to trial.

After three days of testimony and evidence in the jury portion of these proceedings, the Court submitted questions of fact in the case to the Jury. The questions submitted to the Jury and the Jury's responses were as follows:

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]

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.

No. 00-00619

FILED FOR RECORD *Candi Scott*

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

Plaintiff/Counter-Defendant

v.

UDO BIRNBAUM

Defendant/Counter-Plaintiff and
Third Party Plaintiff

v.

G. David Westfall, Christina Westfall, and
Stefani Podvin

Third Party Defendants

IN THE DISTRICT COURT AM 8:47

HELENE YOUNG
DIST. CLERK VAN ZANDT CO. TX.

BY _____ DEP.

294th JUDICIAL DISTRICT

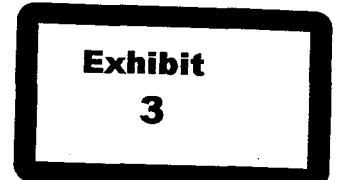
VAN ZANDT COUNTY, TEXAS

MOTION FOR SANCTIONS

COMES NOW, Third Party Defendants, G. David Westfall, Christian Westfall, and Stefani Podvin, ("Movants"), third party defendants in the above-styled and numbered cause and files this Motion For Sanctions based upon Defendant/Third Party Plaintiff's violation of Rule 13, T. R. C. P., and violation of §§10.001 et seq. of the Texas Civil Practice and Remedies Code, and would thereby show the Court as follows:

**I.
FACTS:**

1. This lawsuit was brought by Plaintiff to collect on overdue legal fees for legal services rendered to the Defendant at Defendant's request.
2. Instead of 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.

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.

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.

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.

II.

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

1. Filing a frivolous third party claim pleading without factual support or a valid legal basis in Defendant/Third Party Plaintiff's causes of action filed against either G. David Westfall, Christina Westfall, or Stefani Podvin. Movants contend that Defendant/Third Party Plaintiff filed these pleadings for the purpose of causing inconvenience and/or harassment for Stefani Podvin, Christina Westfall, G. David Westfall, P.C., and G. David Westfall, individually and not in support of any valid, legally factual, and legally supportable claims.

2. Filing discovery requests and taking depositions for the purpose of harassment and inconvenience and not to support any valid claims or causes of actions against the Movants.
3. Filing a frivolous motion to recuse the Hon. Paul Banner for the purpose of causing inconvenience and/or harassment for Movants.
4. Filing frivolous and untimely motions to appeal the granting of the Movants' Motions for Summary Judgment granted by the trial court.

WHEREFORE, PREMISES CONSIDERED, Movants pray that a hearing be set on this motion, and following a hearing, the Court assess appropriate sanctions against the Defendant/Third Party Plaintiff for the violations of Rule 13 of the Texas Rules of Civil Procedure and/or the violations of §10.001 et seq. of the Tex. Rules of Civil Procedure. Specifically, Movants request damages be assessed against the Defendant/Third Party Plaintiff and awarded to the Movants for the following:

- a. Reimbursement of all Movants' reasonable and necessary attorney's fees expended by Movants in defense of the allegations made by the Defendant/Third Party Plaintiff in this lawsuit to the extent such attorney's fees have not yet been awarded in any prior rulings of this Court.
- b. Reimbursement of all Movants' reasonable and necessary attorney's fees expended by Movants in pursuit of this Motion for Sanctions.
- c. Monetary damages to reimburse Movants for the inconvenience and harassment suffered by the Movants as a direct result of the improper actions taken by the Defendant/Third Party Plaintiff against the Movants in connection with this lawsuit.

- d. Punitive damages to be assessed against the Defendant/Third Party Plaintiff and awarded to the Movants in order to prevent the reoccurrence of such behavior again in the future by the Defendant/Third Party Plaintiff.
- e. Damages assessed against the Defendant/Third Party Plaintiff and awarded to the Court to reimburse the Court for its expenses and inconvenience suffered as a direct result of frivolous pleadings filed on behalf of the Defendant/Third Party Plaintiff.
- f. And for such other and further relief, both general and special, to which Movants may be justly entitled, both at law and equity.

Respectfully submitted,
LAW OFFICE OF FRANK C. FLEMING

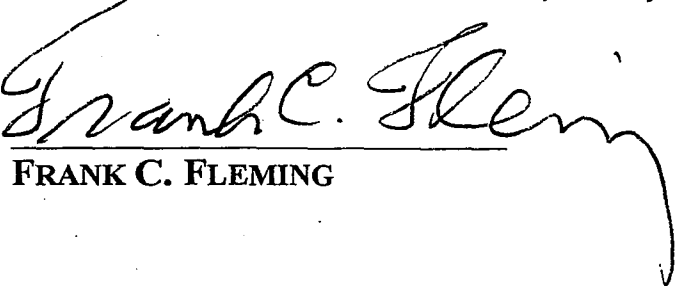


FRANK C. FLEMING
State Bar No. 00784057
PMB 305, 6611 Hillcrest Ave.
Dallas, Texas 75205-1301
(214) 373-1234
(fax) 373-3232

ATTORNEY FOR MOVANTS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above document has this day been delivered to Udo Birnbaum, by facsimile transmission to 903/479-3929, on this 9th day of May 2002.


FRANK C. FLEMING

FIAT

Please take note that this motion is set for hearing at ____ : ____ AM/PM on the

_____ day of _____, 2000.

District Judge Presiding

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

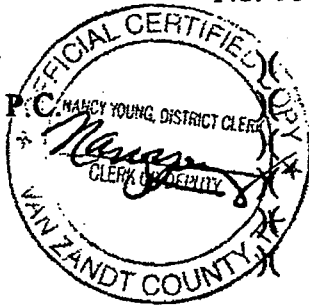
IN THE DISTRICT COURT

vs.

294th JUDICIAL DISTRICT

UDO BIRNBAUM

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

<p>Exhibit</p> <p>4</p>

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)

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

MR. FLEMING: Thank you, Your Honor.

No! Was not submitted to the jury!
Jury questions sounded in breach of contract.
(Not pleaded, Not proved)
Judge did not allow my "excused" issue
~~because I had filed with~~

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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

IN THE DISTRICT COURT

**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

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294th JUDICIAL DISTRICT

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.

**Order on Sanctions
PAGE 1 of 2**

156/834

**Exhibit
6**

westfall\udo\pleadings\order on sanctions

422

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.



JUDGE PRESIDING

156/835

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.

Findings of Fact and Conclusions of Law

PAGE 5 of 7

westfall\udo\judgment\

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

Complete & full access to the

~~Sections~~ ~~are for~~ ~~conduct~~ ~~outside~~ ~~of~~

Our jurisdictional provision faculty of
litigation after the parties have ~~been~~ avoided
themselves of the remedies ~~and~~ available under
our laws

^{Now}
You have the keys as whether there
are any further proceedings in this case in the
future. Please be aware that any further actions
might result in further revelations

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FRANK C. FLEMING
ATTORNEY AND COUNSELOR

6671 Hillcrest Ave. #305
Dallas, TX 75205-1301
law@fcf@aol.com

Voice: 214/373-1234
Fax: 214/373-3232
or Fax: 214/265-1979

April 1, 2004

The Hon. Ron Chapman
Justice, 5th District Court of Appeals (Ret.)
Sitting for the 294th District Court,
P.O. Box 191167
Dallas, TX 75219

VIA FAX No. : 903/778-²⁸¹⁹~~2222~~

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

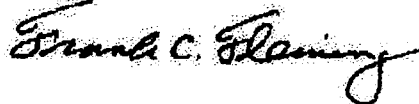
Dear Judge Chapman:

Attached is a proposed order regarding your recent ruling from the bench on the issue of sanctions in the above referenced matter. A copy of the proposed order is also being provided by fax to Mr. Birnbaum.

If you have any changes, additions, deletions, or corrections, please advise. I can either make those changes for you, or I could also email you the document so that you can download the document into your own word processor to allow you to make your own revisions. I await your further instructions.

Thank you for your consideration of this matter and please contact me if you have any questions.

Very truly yours,



FRANK C. FLEMING

cc: Udo Birnbaum

Via Fax w/attached proposed order
Fax No. : 903-479-3929

Exhibit

9

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

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IN THE DISTRICT COURT

294th JUDICIAL DISTRICT

VAN ZANDT COUNTY, TEXAS

ORDER ON MOTIONS FOR SANCTIONS

On April 1, 2004, came on to be heard, defendant, Udo Birnbaum's ("Birnbaum") Motion for Recusal of Judge Paul Banner. Prior to the hearing, the Court and Mr. Birnbaum were each served with notice of a Motion for Sanctions filed by G. David Westfall, P.C., Christina Westfall, and Stefani Podvin (referred to herein collectively as the "Sanctions Movants") and that Motion for Sanctions was also heard. The Sanctions Movants appeared by their attorney of record. Birnbaum, appeared in person, pro se. All parties announced ready for the hearing.

Based upon the pleadings of the parties, the evidence presented at the motion hearing, and the arguments of counsel and the arguments of the pro se defendant, the Court is of the opinion that Birnbaum's Motion to Recuse Judge Paul Banner should be in all things be denied.

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

**Order on Sanctions
PAGE 1 of 8**

It is therefore, **ORDERED, ADJUDGED, and DECREED** that the motion by the defendant, Udo Birnbaum, that Judge Paul Banner be recused from further matters effecting this cause of action is denied.

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

A. A monetary sanction in the amount of \$1,000.00 as actual damages, representing the reasonable value of the legal services rendered to the Sanctions Movants by their attorney for the defense of Birnbaum's Motion to Recuse and the prosecution of the Sanctions Movants' Motion for Sanctions.

B. A monetary sanction in the amount of \$124,770.00 as exemplary and/or punitive damages to serve as a deterrent to prevent Birnbaum from committing further similar acts again in the future.

IT IS FURTHER ORDERED THAT the judgment here rendered shall bear interest at the rate of five percent (5%) from the date of the signing of this order, until paid.

All other relief regarding any motions for relief on file in this cause of action not expressly granted in this order is hereby denied.

With regard to the award of sanctions, the Court makes the following findings and conclusions in support of the Court's award of sanctions and in support of the type and dollar amount of the sanctions imposed:

Findings of Fact

1. Birnbaum's claims regarding the attempt to have Judge Paul Banner recused were groundless, vacuous, manufactured, and totally unsupported by any credible evidence whatsoever.
2. Birnbaum's claims regarding the attempt to have Judge Paul Banner recused were without merit and brought for the purpose of harassment and/or delay.
3. The testimony of Birnbaum regarding the attempt to have Judge Paul Banner recused was biased, not credible, and totally uncorroborated by any other evidence.
4. The sole purpose of Birnbaum filing the motion regarding the attempt to have Judge Paul Banner recused was an attempt to harass, intimidate, and inconvenience the Sanctions Movants.
5. Birnbaum has a track record and history of filing lawsuits, motions, and writs of mandamus against judges that rule against him in litigation.
6. Birnbaum filed a pleading containing a completely false and outrageous allegation that Judge Paul Banner had conducted himself in a manner that showed bias and a lack of impartiality.
7. Birnbaum's difficulties with judges and the repeated allegations of a lack of impartiality have had nothing at all to do with the conduct of the judges that Birnbaum has appeared before, but instead, is a delusional belief held only inside the mind of Birnbaum.
8. Birnbaum will seemingly go to any length, even filing new lawsuits in State and Federal courts in an attempt to re-litigate issues which a court has already ruled upon and which all appropriate courts of appeal have affirmed.
9. Birnbaum's filing of this Motion to recuse Judge Banner was consistent with a proven pattern and practice of behavior engaged in by Birnbaum over many years and currently ongoing now in this court and in other federal courts.

10. Birnbaum has a track record and history of bickering and quarrelling with judges that have ruled against him in litigation.

11. Birnbaum has a track record and history of filing lawsuits without merit against judges, attorneys, and other individuals in an attempt to gain tactical advantage in other ongoing litigation.

12. Prior to this hearing, Birnbaum filed in March 2004, new legal action in Federal District Court against Judge Paul Banner, G. David Westfall, Christina Westfall, and Stefani Podvin. This new Federal lawsuit attempts to re-litigate the same issues Birnbaum unsuccessfully raised in this lawsuit.

13. Prior to this hearing, Birnbaum has initiated a lawsuit against the attorney for the Sanctions Movants, Frank C. Fleming. Birnbaum admitted in open court that he has never had any dealings with Frank C. Fleming other than in connection with Mr. Fleming's representation of the Plaintiff and the counter-defendants in this cause of action. Birnbaum admitted in open court that the legal basis of his lawsuit against Mr. Fleming, civil RICO, is the same basis Birnbaum was previously sanctioned in this lawsuit for attempting to bring against Christina Westfall and Stefani Podvin.

14. The behavior of Birnbaum himself in prosecuting the Motion to recuse Judge Banner has been vindictive, unwarranted, mean-spirited, frivolous, and totally without substantiation on any legally viable theory for the recusal of Judge Banner.

15. The Motion itself to Recuse Judge Banner without any ounce of evidence to support it, was frivolous, vindictive, and brought for the purpose of harassment.

16. The conduct of Birnbaum giving rise to the award of exemplary and/or punitive damages was engaged in by Birnbaum willfully and maliciously with the intent to harm the Sanctions Movants, Judge Paul Banner, and the attorney for the Sanctions Movants, Mr. Fleming.

17. Prior to the hearing on the Motion to Recuse, the Court admonished Birnbaum that if his Motion to Recuse Judge Banner was not withdrawn, that if it became appropriate, the Court would hear the Motion for Sanctions. In response to this admonition, Birnbaum unequivocally elected to move forward with a hearing on his Motion in an attempt to have Judge Banner recused.

18. The type and dollar amount of the sanctions award is directly related to the harm done. The Court has not been presented with any evidence to believe that the amount of the sanctions award is excessive in relation to the net worth of Birnbaum.

19. The type and dollar amount of the sanctions award is appropriate in order to gain the relief which the Court seeks, which is to stop this litigant and others similarly situated from filing frivolous motions, frivolous lawsuits, frivolous defenses, frivolous counter-claims, and new lawsuits which attempt to re-litigate matters already litigated to a conclusion.

20. The amount of the exemplary and/or punitive damage award is an amount narrowly tailored to the amount of harm caused by the offensive conduct to be punished.

21. The Sanctions Movants have suffered damages as a result of Birnbaum's frivolous counter-claims and Birnbaum's motion to recuse. These damages include expenses (in addition to taxable court costs), attorney's fees, harassment, inconvenience, intimidation, and threats.

Conclusions of Law

1. On the issue of the recusal of Judge Paul Banner, Birnbaum wholly failed to provide any credible evidence to substantiate any of his claims.

2. All of Birnbaum's claims were as a matter of law unproved and untenable on the evidence presented at the hearing.

3. The court concludes as a matter of law that Birnbaum's claim that Judge Paul Banner acted biased and with a lack of impartiality, was brought for the purpose of harassment. The Court makes

this conclusion based upon the fact that Birnbaum was not a credible witness, that other credible witnesses totally contradicted Birnbaum's version of the facts, and that evidence was presented establishing that Birnbaum has had a track record and history of harassment towards other opposing litigants, opposing counsels, and other judges before whom Birnbaum has appeared.

4. The Plaintiffs behavior in bringing and prosecuting this frivolous motion to recuse Judge Banner was a violation of one or more of the following: §§10.001, et seq., Tex. Civ. Prac. & Rem. Code, Rule 13, T.R.C.P., and/or the common law of Texas.

5. The Court has the power to award both actual and exemplary (and/or punitive) damages against Birnbaum for the filing and prosecution of a frivolous motion. This authority stems from one or more of the following: §§10.001, et seq., Tex. Civ. Prac. & Rem. Code, Rule 13, T.R.C.P., and/or the common law of Texas.

6. The behavior and attitude of Birnbaum in filing and prosecuting this Motion to Recuse claim against Judge Paul Banner calls out for the award of both actual and exemplary (and/or punitive) damages to be assessed against Birnbaum.

7. The appropriate award for actual damages as a result of the filing and prosecution of the frivolous Motion to Recuse, is an award of \$1,000.00 in attorney's fees. The Court makes this award under power granted to the Court by §§10.001, et seq., Tex. Civ. Prac. & Rem. Code, Rule 13, T.R.C.P., and/or the common law of Texas.

8. The appropriate exemplary and/or punitive sanction for the filing and full prosecution of the frivolous Motion to Recuse is an award of \$124,770.00 to be paid by Birnbaum to the Sanctions Movants.

9. The award of exemplary and/or punitive damages is directly related to the harm done.

10. The award of exemplary and/or punitive damages is not excessive.

Order on Sanctions

PAGE 6 of 8

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11. The award of exemplary and/or punitive damages is an appropriate amount to seek to gain the relief sought by the Court which is to stop Birnbaum and others like him from filing similar frivolous motions and other frivolous lawsuits.

12. The amount of the exemplary and/or punitive damage award is narrowly tailored to the harm done.

13. The amount of the exemplary and/or punitive damages is narrowly tailored to exactly coincide with the amount (in total) assessed against Birnbaum to date in this litigation. This amount was selected by the Court deliberately and on purpose to send a clear message to Birnbaum. The message this award of damages is intended to relay to Mr. Birnbaum is that this litigation is over, final, and ended. The message is that further attempts to re-open, re-visit, and re-litigate matters which have already been decided in court, reduced to judgment, and affirmed on appeal will not be tolerated; and that further attempts by this litigant to engage in such activity will not be conducted without the imposition of very serious and substantial monetary sanctions imposed upon Mr. Birnbaum.

14. Authority for an exemplary and/or punitive damage award is derived from §§10.001, et seq., Tex. 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.

THIS JUDGMENT RENDERED ON APRIL 1, 2004, AND SIGNED THIS

_____ day of _____, 2004.

JUDGE PRESIDING

In The United States District Court
For the Eastern District of Texas
Tyler Division

FILED - CLERK
U.S. DISTRICT COURT
JUL -6 PM 1:16
TEXAS-EASTERN
BY _____

Udo Birnbaum
Plaintiff

vs.

Paul Banner, David Westfall
Christina Westfall, and
Stefani (Westfall) Podvin
Defendants

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Civil Action No. 6:04CV 114

PLAINTIFF'S MOTION FOR A HEARING

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiff UDO BIRNBAUM moves for a HEARING on *Plaintiff's Motion For Summary Judgment* (filed May 18, 2004) and all other motions and matters before the court.

Respectfully submitted,

Udo Birnbaum
UDO BIRNBAUM, *pro se*
540 VZCR 2916
Eustace, Texas 75124
(903) 479-3929 phone/fax

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this document is being provided by Regular Mail to John M. Orton, Assistant Attorney General, Post Office Box 12548, Austin, TX 78711-2548, and Frank C. Fleming, 6611 Hillcrest Ave., #305, Dallas, Texas 75205-1301, on this the 6 day of July, 2004.

Udo Birnbaum
UDO BIRNBAUM

**U.S. District Court [LIVE]
Eastern District of TEXAS LIVE (Tyler)
CIVIL DOCKET FOR CASE #: 6:04-cv-00114-LED-HWM**

Birnbaum v. Banner et al
Assigned to: Judge Leonard Davis
Referred to: Magistrate Judge H. W. McKee
Cause: 42:1983 Civil Rights Act

Date Filed: 03/19/2004
Jury Demand: None
Nature of Suit: 440 Civil Rights: Other
Jurisdiction: Federal Question

Plaintiff

Udo H Birnbaum

represented by **Udo H Birnbaum**
540 VZCR 2916
Eustace, TX 75124
903-479-3929
PRO SE

V.

Defendant

**Paul Banner, Individually and is his
official capacity as judge of 294th
District Court of Van Zandt County,
TX**

represented by **John M Orton**
Attorney General's Office
PO Box 12548
Capitol Station
Austin, TX 78711
512/463-2080
Fax: 15124959139
Email: john.orton@oag.state.tx.us
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

G David Westfall

Christina Westfall

represented by **Frank C Fleming**
Law Office of Frank C Fleming
6611 Hillcrest Ave
Suite 305
Dallas, TX 75205-1301
214/373-1234
Fax: 214/373-3232
Email: lawyerfef@aol.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Stefani Westfall Podvin

represented by **Frank C Fleming**
(See above for address)

*LEAD ATTORNEY
ATTORNEY TO BE NOTICED*

Date Filed	#	Docket Text
03/19/2004	1	COMPLAINT for DECLARTORY RELIEF against Paul Banner, Stefani Westfall Podvin, Christina Westfall, G David Westfall (Filing fee \$ 150.) , filed by Udo H Birnbaum.(fnt,) (Entered: 03/22/2004)
03/19/2004	2	Filing fee: \$ 150, receipt number 626276 (fnt,) (Entered: 03/22/2004)
03/19/2004	3	Pro-Se packet and summons given to plaintiff on 3/19/04 by Intake Clerk (fnt,) (Entered: 04/28/2004)
05/13/2004	2	Original ANSWER to Complaint by Judge Paul Banner.(ehs,) (Entered: 05/13/2004)
05/13/2004	3	MOTION to Dismiss for failure to State a Claim by Paul Banner. (ehs,) Additional attachment(s) added on 5/13/2004 (ehs,). (Entered: 05/13/2004)
05/13/2004	4	ORDER On or before June 15, 2004, attorneys with cases pending before Judge Davis who have not already registered for electronic filing shall register their e-mail address with the clerk's office. After June 15, 2004, the Court will not mail or fax notices or orders to the parties. Also ordered, on or before June 15, 2004, attorneys with cases pending before Judge Davis should complete the live or on-line training course. After June 15, 2004, all documents in cases pending in Judge Davis' court shall be filed electronically. The clerk's office will not accept a paper filing in Judge Davis' cases after this deadline except for good cause shown. This order does not apply to pro se litigants. Signed by Judge Leonard Davis on 5/13/04. (ehs,) (Entered: 05/17/2004)
05/18/2004	5	RESPONSE to Motion re 3 MOTION to Dismiss filed by Udo H Birnbaum. (ehs,) (Entered: 05/19/2004)
05/18/2004	6	MOTION for Summary Judgment by Udo H Birnbaum. (ehs,) (Entered: 05/19/2004)
05/18/2004	7	MOTION for Sanctions by Udo H Birnbaum. (ehs,) (Entered: 05/19/2004)
05/18/2004	8	WAIVER OF SERVICE Returned Executed by Udo H Birnbaum. Stefani Westfall Podvin waiver sent on 4/26/2004, answer due 6/25/2004. (ehs,) (Entered: 05/19/2004)

05/18/2004	9	WAIVER OF SERVICE Returned Executed by Udo H Birnbaum. Christina Westfall waiver sent on 4/26/2004, answer due 6/25/2004. (ehs,) (Entered: 05/19/2004)
05/18/2004	10	WAIVER OF SERVICE Returned Executed by Udo H Birnbaum. Paul Banner waiver sent on 3/24/2004, answer due 5/23/2004. (ehs,) (Entered: 05/19/2004)
05/25/2004	11	APPLICATION to Appear Pro Hac Vice by Attorney Frank C Fleming for Stefani Westfall Podvin and Christina Westfall. (fnt,) (Entered: 05/27/2004)
05/25/2004	12	MOTION to Dismiss by Stefani Westfall Podvin, Christina Westfall. (fnt,) Additional attachment(s). Modified on 6/30/2004 (fnt,). (Entered: 05/27/2004)
05/27/2004	13	APPLICATION to Appear Pro Hac Vice by Attorney Frank C Fleming for Stefani Westfall Podvin and Christina Westfall. Approved by Clerk 5/27/2004 (rvw,) (Entered: 06/01/2004)
05/27/2004	14	MOTION to Dismiss by Stefani Westfall Podvin, Christina Westfall. (rvw,) (Entered: 06/01/2004)
05/27/2004	15	RESPONSE to Motion re 6 MOTION for Summary Judgment filed by Paul Banner. (Attachments: # 1)(rvw,) (Entered: 06/01/2004)
06/09/2004	16	REPLY to Response to Motion re 6 MOTION for Summary Judgment filed by Udo H Birnbaum. (fnt,) (Entered: 06/10/2004)
07/06/2004	17	MOTION for Hearing on Plaintiff's Motion for Summary Judgment by Udo H Birnbaum. (Attachments: # 1 Text of Proposed Order) (fnt,) (Entered: 07/07/2004)
08/17/2004	18	EXEMPTION ORDER to General Order 04-16 - RE courtesy paper copies of electronically-filed documents. It is Ordered that courtesy paper copies shall be filed when specifically requested by the undersigned. Signed by Judge Leonard Davis on 8/16/04. (ehs,) (Entered: 08/17/2004)

**In The United States District Court
For the Eastern District of Texas
Tyler Division**

Udo Birnbaum
Plaintiff

vs.

**Paul Banner, David Westfall
Christina Westfall, and
Stefani (Westfall) Podvin**
Defendants

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Civil Action No. 6:04CV 114

**PLAINTIFF'S RESPONSE TO DEFENDANTS' CHRISTINA WESTFALL
AND STEFANI PODVIN'S MOTION TO DISMISS UNDER RULE 12(b)**

COMES NOW, Plaintiff Udo Birnbaum ("Birnbaum") in response to the above-indicated motion to dismiss, and would show the Court:

1. As an initial matter, Birnbaum asks for judicial notice of Exhibit "A" hereto, *Commission for Lawyer Discipline v. Frank C. Fleming*, as it relates to mischaracterization of this case by said lawyer in their motion to dismiss, and specifically as follows:

2. Lawyer Fleming tells this Court that this lawsuit is about "*a simple attorney/client collection matter in a state court proceeding which has long since been concluded*". (Exhibit "B", page 1, "Facts and Allegations", par. 1)

Nothing could be further from the truth, as detailed in Birnbaum's *Complaint For Declaratory Relief* and specifically in *Response to Defendant Paul Banner's Motion To Dismiss (Docket #5)*, namely the ongoing nature of the additional \$125,770 FINE on April 1, 2004 (Exhibit "C"), even after the trial case is over, even after Birnbaum sought relief in this court. (That is, a \$125,770 FINE on top of the \$62,885 FINE at issue in THIS case!)

3. Lawyer Fleming states, *"By summary judgment, all RICO claims were eventually dismissed in the state court action."* (Exhibit "B", page 2, par. 3)

What Lawyer Fleming is NOT telling the Court, is that the summary judgment put his clients OUT of the case, and that under the "American Rule" each party pays for its own attorney fees unless specifically provided for by law, i.e. his clients are NOT entitled to \$62,885 in attorney fees (plus \$125,770) for having removed themselves from the case by summary judgment!

4. Lawyer Fleming tells this Court that *"Birnbaum's complaint names the Defendants as parties to this action yet Birnbaum failed to ask the Court to grant the Plaintiff any relief from the Defendants either in the complaint itself or in the prayer for relief."* (Exhibit "B", page 3, paragraph no. 12)

NOT TRUE. It is of course implicit in Birnbaum's request to have the \$62,885 fine awarded them to be declared UNLAWFUL, that "you can't collect on this, as it is UNLAWFUL". Birnbaum made them a party so any ruling by this Court would indeed be binding on them.

5. Lawyer Fleming tells this Court that *"Plaintiff seeks in Federal Court that which Plaintiff has already attempted to achieve in a state court civil proceeding"*. (Exhibit "B", page 3, "lack of subject matter jurisdiction", line no. 2 below that)

NOT TRUE. Birnbaum, in this Federal Court is raising constitutional issues, while in state court Birnbaum was trying to show that the defendants were in violation of RICO, i.e. that there was a "pattern of racketeering activity", and that Birnbaum's injury stemmed from their RICO violative conduct, i.e. "by reason" of the RICO violation.

6. Lawyer Fleming tells this Court that *"There are no 'unique' federal issues raised by this complaint which should be reviewed and determined in a new federal proceeding"*. (Exhibit "B", page 3, "lack of subject matter jurisdiction", line no. 5 below that)

NOT TRUE. The issues raised in this federal proceeding are constitutional issues of FREE SPEECH, DUE PROCESS, and rights under STATUTORY FEDERAL LAW, namely "civil RICO", NOT the issues in state court. (i.e. issues arising out of *"a simple attorney/client collection matter"*). Exhibit "B", page 1, "Facts and Allegations", par. 1.

7. Lawyer Fleming tells this Court that *"the federal court lacks subject matter jurisdiction over these two Defendants due to the fact that they are not the parties the Plaintiff is seeking the federal court to take action against."* Exhibit "B", page 3, last paragraph.

MISLEADING. Plaintiff is indeed not *"seeking the federal court to take action against [them]"*. What Plaintiff is seeking, is that as parties, the decision of this Court be binding on them, i.e. that they be officially informed that the piece of paper they are holding is unlawful and NULL and VOID.

WHEREFORE, PREMISES CONSIDERED, Plaintiff Birnbaum prays that this Court take judicial notice of the issues in Exhibit "A" hereto, *"Commission for Lawyer Discipline v. Frank C. Fleming"*, as they relate to the mischaracterization in these defendants' motion to dismiss as detailed above, deny their motion as well as all other motions to dismiss, and declare the \$62,885 sanction order at issue as being indeed contrary to law.

In the alternative, Birnbaum again seeks a hearing on all matters before the Court.

Respectfully submitted,

Udo Birnbaum

UDO BIRNBAUM, *pro se*

540 VZ CR 2916

Eustace, Texas 75124

(903) 479-3929 (phone and fax)

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this document, with attached exhibits "A", "B", and "C", has been served by Regular U.S. Mail on this the 3 day of September, 2004, addressed to:

Frank C. Fleming, 6611 Hillcrest Ave. #305, Dallas, Texas 75205-1301

John M. Orton, Assistant Attorney General, Post Office Box 12548, Austin, TX 78711-2548.

Udo Birnbaum

UDO BIRNBAUM

Att:

Exhibit "A", *Commission for Lawyer Discipline v. Frank C. Fleming* 14th District Court, Dallas

Exhibit "B", *Defendants' Christina Westfall and Stefani Podvin's Motion to Dismiss*

Exhibit "C", *Docket sheet* (state trial court) -- April 1, 2004

NO. 04-01332

FILED
04 FEB 12 PM 3:34

W. HAMILIN
DISTRICT CLERK
DALLAS CO. TEXAS
W. HAMILIN

COMMISSION FOR
LAWYER DISCIPLINE

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IN THE DISTRICT COURT OF

DALLAS COUNTY, TEXAS

A-14th JUDICIAL DISTRICT

V.

FRANK C. FLEMING

DISCIPLINARY PETITION AND REQUEST FOR DISCLOSURE

TO THE HONORABLE JUDGE OF SAID COURT:

Petitioner, the Commission for Lawyer Discipline, a committee of the State Bar of Texas (hereinafter called "Petitioner"), complains of Respondent, Frank C. Fleming, (hereinafter called "Respondent"), showing the Court:

I.

Discovery Control Plan

Pursuant to Rules 190.1 and 190.3, TEXAS RULES OF CIVIL PROCEDURE (TRCP), Petitioner intends discovery in this case to be conducted under the Level II Discovery Control Plan.

II.

Petitioner brings this disciplinary action pursuant to the State Bar Act, Tex. Gov't. Code Ann. §81.001, et seq. (Vernon 1988), the Texas Disciplinary Rules of Professional Conduct and the Texas Rules of Disciplinary Procedure. The complaint which forms the basis of the Disciplinary Petition was filed on or after May 1, 1992.

III.

Respondent is an attorney licensed to practice law in Texas and is a member of the State Bar of Texas. Respondent is a resident of and has his principal place of practice in Dallas County, Texas. Private Process Services will serve Respondent at his work address at 6611 Hillcrest, #305, Dallas.

Max



IV.

Elizabeth Chapman (hereinafter referred to as "Chapman") hired Respondent to finalize her pending divorce. Chapman paid Respondent \$3,800.00 of a \$5,000.00 retainer. Respondent later billed Chapman for additional fees that Chapman disputed. A money order for \$2,500.00 from Chapman's husband that was intended for Chapman's spousal support was delivered to Respondent's office. Without Chapman's permission, Respondent signed Chapman's name to the check and deposited it into his account. Chapman fired Respondent. When Chapman went to Respondent's office to copy her file, Respondent refused to return her file, and physically removed Chapman. Chapman called the police. A police report was filed in which the reporting officer stated that Respondent locked himself in his office and refused to open the door and speak with him. Respondent falsely stated to the Grievance Committee that he opened his door and spoke with the reporting officer.

V.

Such acts and/or omissions on the part of Respondent as are described in Paragraphs IV and hereinabove, which occurred on or after January 1, 1990, constitute conduct that violates Rules 1.14, 1.15, and 8.04(a)(3) of the Texas Disciplinary Rules of Professional Conduct.

VII.

The complaint which forms the basis of the Cause of Action hereinabove set forth was brought to the attention of the Office of the Chief Disciplinary Counsel of the State Bar of Texas by Elizabeth Chapman filing a complaint on or about March 4, 2003.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Petitioner prays for judgment that Respondent be disciplined as the facts shall warrant; and that Petitioner have such other relief to which entitled, including costs of Court and attorney's fees.

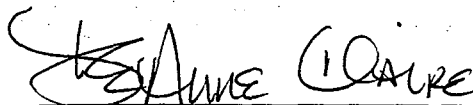
REQUEST FOR DISCLOSURE

Pursuant to Tex. R. Civ. P. 194, Respondent/you are requested to disclose, within 50 days of service of this request, the information or material described in Rule 194.2(a) - (k), Texas Rules of Civil Procedure.

Respectfully submitted,

Dawn Miller
Chief Disciplinary Counsel

DeAnne Claire
Assistant Disciplinary Counsel
State Bar of Texas
Litigation - Dallas
3710 Rawlins
Suite 800
Dallas, Texas 75219
(214) 559-4353
FAX (214) 559-4335



DeAnne Claire
State Bar Card No. 00789069

ATTORNEYS FOR PETITIONER

FRANK C. FLEMING

ATTORNEY AND COUNSELOR

6611 Hillcrest Ave., #305
Dallas, TX 75205-1301
lawyerfef@aol.com

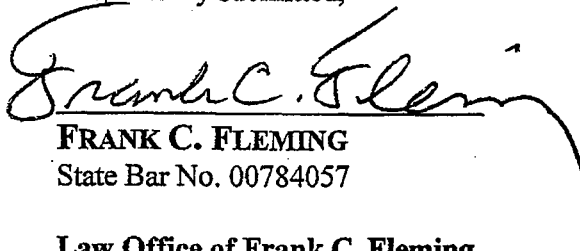
Voice: 214/373-1234
Fax: 214/373-3232
or Fax: 214/265-1979

May 25, 2004

To the Clerk of the Eastern District of Texas, Tyler Division:

Regarding my application to appear pro hac vice, I currently have a pending grievance proceeding in which I was unable to reach a satisfactory resolution with the local grievance committee and in which I have elected to appeal the grievance to District Court. A trial in that proceeding is scheduled to take place in either August or September 2004.

Respectfully submitted,



FRANK C. FLEMING
State Bar No. 00784057

Law Office of Frank C. Fleming
6611 Hillcrest Ave., #305
Dallas, Texas 75205-1301
fax: 214/373-3232 or 214/265-1979
phone: 214/ 373-1234

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

UDO BIRNBUAM,)
Plaintiff

v.

Hon. PAUL BANNER
G. DAVID WESTFALL
CHRISTINA WESTFALL
STEFANI (WESTFALL) PODVIN,
Defendants

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CIVIL ACTION NO. 6:04CV114

**DEFENDANTS' CHRISTINA WESTFALL AND STEFANI PODVIN'S
MOTION TO DISMISS UNDER RULE 12 (b)**

COMES NOW, Defendants Christina Westfall and Stefani (Westfall) Podvin (the Defendant's) and file this their Motion to Dismiss under FRCP 12(b) for failure by Plaintiff to state a claim for which relief can be granted. In support thereof, the Defendants would show the Court:

I.

FACTS and ALLEGATIONS:

1. This lawsuit has been brought by Plaintiff, Birnbaum, ("Birnbaum") after his unsuccessful efforts to defend himself and bring counter-claims in a simple attorney/client collection matter in a state court proceeding which has long since been concluded.
2. Initially, Birnbaum was sued by his former attorney (G. David Westfall) for collection of unpaid legal bills. Birnbaum filed a counter-claim against Mr. Westfall's law office, Mr. Westfall personally, the attorney's wife (Christina Westfall) and the attorney's daughter (Stefani Podvin) claiming that the attempt to collect the unpaid legal fees was an civil conspiracy of the law office and a violation of the RICO statute.

3. By summary judgment, all RICO claims were eventually dismissed in the state court action.
4. After a jury trial on the merits, the attorney was successful in receiving a jury verdict that legal fees were in fact due and owing to the attorney from Birnbaum.
5. Prior to entry of judgment on the jury award, the wife and daughter filed motions for sanctions against Birnbaum for having filed a frivolous RICO pleading against them which had required them to expend legal fees to defeat the pleading by summary judgment. The court granted the request for sanctions.
6. Birnbaum filed an appeal of the jury verdict and an appeal of the sanctions ruling. The Fifth District Court of Appeals denied the appeal and affirmed the two judgments.
7. Birnbaum filed a Petition for Review with the Texas Supreme Court. The request for review by the Texas Supreme Court was denied.
8. While on appeal, Birnbaum had filed a second motion to recuse the same trial judge. A previous attempt to recuse Judge Banner had been attempted by Birnbaum after the RICO claims were dismissed by Judge Banner by summary judgment ruling. The first attempt to remove Judge Banner was heard by a visiting judge and denied. A motion for sanctions for filing a frivolous pleading was filed and the judge took sanctions for that motion under advisement.
9. Prior to the hearing on the second attempt to recuse Judge Banner, the Defendants filed another motion for sanctions for filing another frivolous pleading. After another hearing by a visiting judge, the motion to recuse Judge Banner was again denied and sanctions were imposed for the frivolous filing of the motion to recuse Judge Banner.
10. Birnbaum now files this action in Federal Court in an attempt to obtain relief for what has happened to him in a state court proceeding.

11. Birnbaum files this lawsuit in the form of a request for declaratory relief asking the Federal Court to require Judge Banner to take certain actions.

12. Birnbaum's complaint names the Defendants as parties to this action yet Birnbaum failed to ask the Court to grant the Plaintiff any relief from the Defendants either in the complaint itself or in the prayer for relief.

II.
ARGUMENTS:

LACK OF SUBJECT MATTER JURISDICTION:

This Motion should be granted under FRCP 12(b)(1) due the fact that the Court lacks subject matter jurisdiction. Plaintiff seeks in Federal Court that which the Plaintiff has already attempted to achieve in a state court civil proceeding. The Plaintiff made all the same legal arguments in state court and they failed at the trial level and at two separate levels of appeal. There are no "unique" federal issues raised by this complaint which should be reviewed and determined in a new federal proceeding. Simply because a litigant tried and failed in a state court action does not give rise to federal court subject matter jurisdiction to review and re-try the same matter again in a federal court.

In addition to lacking subject matter jurisdiction over the entire lawsuit, the Defendants assert that certainly the federal court lacks subject matter jurisdiction over these two Defendants due to the fact they are not the parties the Plaintiff is seeking the federal court to take action against.

FAILURE TO STATE A CLAIM:

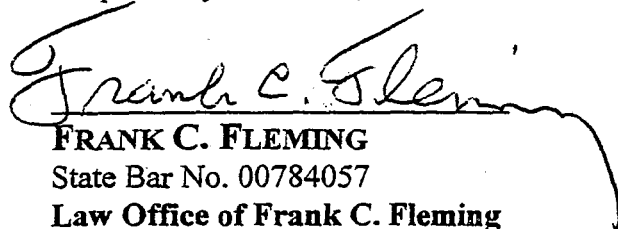
This Motion should be granted under FRCP 12(b)(6) due the fact that the Plaintiff has failed to state a claim on which relief can be granted.

The Defendants have not engaged in any behavior that has violated any civil right of the Plaintiff. The Defendants have only engaged in state court sanctioned behavior seeking monetary relief for the monetary losses caused by the Plaintiff's actions against the Defendants. Allowing the Plaintiff a second bite at the apple in a federal court simply because the Plaintiff did not "like" is outcome in state court is not a claim on which this court can grant relief.

In addition, the Plaintiff has particularly failed to state a claim against *these two Defendants* because on both the face of the Plaintiff's Original Complaint and the Plaintiff's prayer, there is no request for the court to take any action against these two Defendants.

WHEREFORE, PREMISES CONSIDERED, Movant prays that the Court dismiss the complaint filed by the Plaintiff against defendant, Christina Westfall and against defendant, Stefani Podvin, and for such other and further relief, both general and special, to which Defendants may be justly entitled, both at law and equity.

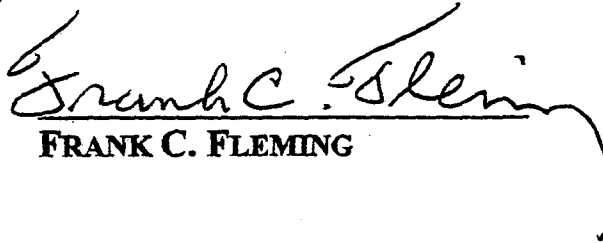
Respectfully submitted,



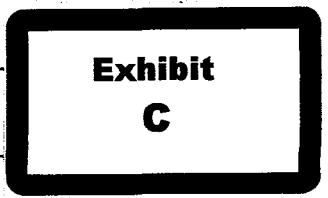
FRANK C. FLEMING
State Bar No. 00784057
Law Office of Frank C. Fleming
6611 Hillcrest Ave., #305
Dallas, Texas 75205-1301
fax: 214/373-3232 or 214/265-1979
phone: 214/ 373-1234
ATTORNEY FOR MOVANTS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above document has this day been delivered to Udo Birnbaum, Pro Se, by Certified Mail to 540 VZ CR 2916, Eustace, TX 75124, on this 25 th day of May, 2004.


FRANK C. FLEMING

Date of Orders			ORDERS OF COURT CONTINUED	Minute Book	
Month	Day	Year		Vol.	Page
4	8	02	4R All present, jury selected, sworn in standard; Open State, Enid Recor		
4	10	02	4R all present; bid work		
4	11	02	4R all present; Enid center Jury Verdict		
7	30	02	CR all present; J not signed		
3	17	03	Order for 5 th Court of Appeals - clerks record	156	228
4	1	04	<p>4R Movant Barntown P^{no} 38 and atty. Fleming representing II are present. Hearing conducted on Barntown's Motion to decrease filed 9/30/03. Testimony presented, Beth under oath. Arguments presented. Motion to remove is in all things denied. Hearing held on II's Motion for sanctions filed this date. Testimony presented, Beth under oath. Arguments presented. Ct find, based on the arguments, testimony, and pleadings that grounds for sanctions do exist and the Ct shall assess said sanctions for violation of Rule 13 of the RPC and/or Sa. Civ. P. 10.001 et seq. T.C.P.R.C. in the amount of \$1,000- for actual damages and \$124,770- for exemplary damages against A. Barntown who is ordered to pay said sums to the II's attorney at a cost of \$1,000. Judge Ralaband had submit a copy of same to A.</p>		



IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

UDO BIRNBAUM

PLAINTIFF,

vs.

PAUL BANNER, G. DAVID WESTFALL,
CHRISTINA WESTFALL, AND STEFANI
PODVIN

DEFENDANTS.

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CIVIL ACTION NO. 6:04CV114

**REPORT AND RECOMMENDATION OF
UNITED STATES MAGISTRATE JUDGE**

Came on for consideration plaintiff's motion for summary judgment against the defendant, Paul Banner (Doc.#6), and Mr. Banner's motion to dismiss (Doc.#3). After due consideration, this Court recommends that the plaintiff's motion for summary judgment be denied and that all of the claims against the defendant, Paul Banner, be dismissed.

Background

The plaintiff, Udo Birnbaum, was sued by his former attorney, G. David Westfall, for collection of unpaid legal bills. Mr. Birnbaum then filed a counterclaim against Mr. Westfall's law office, Mr. Westfall himself, Mr. Westfall's wife, Christina, and daughter, Stefani Podvin. In that suit, Mr. Birnbaum claimed that the Westfalls' attempts to collect the legal fee was a civil conspiracy and violation of the RICO statute, and asserted DTPA and civil fraud claims as well. In state court, these claims were dismissed by summary judgment, and in a jury trial, attorney Westfall received a

verdict awarding him the disputed legal fees. The state court judge was Judge Paul Banner of the 294th District Court of Van Zandt County. Judge Banner, now a defendant in the instant case, also awarded sanctions against Mr. Birnbaum upon motion by the defendants Christina Banner and Stefani Podvin. All appeals of the state court judgment were denied and the Texas Supreme Court denied the petition for review. Mr. Birnbaum has filed this most recent suit against the original parties as well as Judge Banner in an effort to obtain relief from the state court judgment, asserting such issues as his First Amendment right to sue and requesting declaratory relief from what he calls an “unlawful sanction.”

Analysis

This Court should dismiss all claims against the defendant, Judge Paul Banner, both because it lacks the subject matter jurisdiction to do so and because the plaintiff’s claims against Judge Banner do not state a claim upon which this court can fashion relief. First, this court lacks subject matter jurisdiction since the plaintiff is attempting to attain in federal court what he did not receive in state court. The plaintiff does not now present any new or “unique” federal issues. In reality, he is trying to recast his state law arguments in federal terms, using the First Amendment and Federal Declaratory Judgment Act to invoke this Court’s jurisdiction. His attempts are not persuasive. Mr. Birnbaum may be correct when he states that there is some First Amendment right to sue; however, this is not the reason he was sanctioned. Mr. Birnbaum was sanctioned because he abused the legal process and filed frivolous counterclaims in an attempt to avoid paying legal fees. The First Amendment will not be construed so broadly as to protect what a state court has determined to be sanctionable claims.

If a plaintiff seeks relief from a lower state court judgment, it is proper to follow the appeals

process in state court, not file suit in federal district court. After pursuing his claims and issues through the state courts, the only way to correct a state court judgment on a state law claim is by an application for a writ of certiorari to the United States Supreme Court. *Carbonell v. Louisiana Dept. of Health & Human Resources*, 772 F.2d 185, 188-89 (5th Cir. 1985). Therefore, for the reasons listed above, this Court lacks subject matter jurisdiction over the instant case.

Furthermore, the plaintiff's claims against Judge Banner should be dismissed because they fail to state a claim upon which this Court can grant relief. Dismissal under Federal Rule of Civil Procedure 12(b)(6) provides that a party may, by motion or as part of its answer to any pleading, assert as a defense that the pleading fails to state a claim upon which relief may be granted. Fed.R.Civ.P. 12(b)(6). A plaintiff's complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Xerox Corp. V. Genmoora Corp.*, 888 F.2d 345, 351 (5th Cir. 1989), citing *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

When considering a Rule 12(b)(6) dismissal, we construe the complaint liberally in favor of the plaintiff, taking all facts as true. See *Lowrey v. Texas A&M Univ. Sys.*, 117 F.3d 242, 247 (5th Cir. 1997). To conclude the plaintiff's cause of action is one upon which no relief can be granted, the Court must find that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Id.* This court will affirm an order granting a 12(b)(6) motion to dismiss if it appears that no relief could be granted under any set of facts that could be proven consistent with the allegations. *Holmes v. Texas A&M Univ. Sys.*, 145 F.3d 681, 683 (1998). Dismissal for failure to state a claim is not favored by the law. *Lowrey v. Texas A & M Univ. Sys.*, 117 F.3d 242, 247 (5th Cir. 1997).

As stated above, Paul Banner was the judge of the 294th District Court of Van Zandt County, Texas, who presided over the action brought by the Law Office of G. David Westfall to recover unpaid legal services against Mr. Udo Birnbaum, the plaintiff in the instant case. In the previous case, Judge Banner granted the Westfalls' motion for summary judgment on the attorneys' fees issue and awarded sanctions against Mr. Birnbaum. Judge Banner wrote that there "was nothing presented" in the suit to suggest that "he had any basis in law or fact to support" it. Judges are absolutely immune from liability for judicial acts, so long as they are not "performed in clear absence of all jurisdiction, however erroneous the act and however evil the motive." *Johnson v. Kegans*, 870 F.2d 992, 995 (5th Cir. 1989). Judicial immunity does not bar equitable relief, however. *Pulliam v. Allen*, 446 U.S. 522, 541-42 (1984). The plaintiff, Mr. Birnbaum, seeks at least in part such equitable relief in the form of a declaratory judgment. The declaratory judgment that the plaintiff seeks would declare the state court sanctions against him illegal.

The federal Declaratory Judgment Act confers discretionary jurisdiction on federal courts to clarify the rights of interested litigants. *Wilton v. Seven Falls Co.*, 515 U.S. 277, 286 (1995). There are two basic criteria that determine when and whether a court may render a declaratory judgment. The first occurs when the judgment would serve a "useful purpose in clarifying and settling" legal relations among parties. *Aetna Cas. & Sur. Co. v. Sunshine Corp.*, 74 F.3d 685, 687 (6th Cir. 1996). Second, a court may render a declaratory judgment if it will end and give relief from "uncertainty, insecurity, and controversy" surrounding the current dispute. *Aetna Cas. & Sur. Co.*, 74 F.3d at 687.

This Court will not declare that a state judge's decision to sanction the plaintiff or the sanctions themselves were illegal. The present situation implicates neither of the twin criteria necessary to confer discretionary jurisdiction under the Declaratory Judgment Act. Namely, the legal

relations among the parties appear settled, and there is no real controversy or uncertainty to contend with. The plaintiff is unhappy with the state court's sanctions and while some court may be able to settle matter to his satisfaction, this is not the Court. Therefore, this Court should dismiss the suit for failure to state a claim upon which this Court can grant relief.

Accordingly, it is

RECOMMENDED that the Court deny the plaintiff's motion for summary judgment and dismiss the claims against Paul Banner for lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted.

A party's failure to file objections to the findings, conclusions, and recommendations contained in this Report within ten days after service with a copy thereof shall bar that party from *de novo* review by the district judge of those findings, conclusions and recommendations and, except upon grounds of plain error, from appellate review of the unobjected-to proposed factual findings and legal conclusions accepted and adopted by the district court. *Douglass v. United Services Automobile Association*, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*).

SIGNED this 23 day of September, 2004.



HARRY W. McKEE
UNITED STATES MAGISTRATE JUDGE

In The United States District Court
For the Eastern District of Texas
Tyler Division

Udo Birnbaum
Plaintiff

vs.

Paul Banner, David Westfall
Christina Westfall, and
Stefani (Westfall) Podvin
Defendants

§
§
§
§
§
§
§

Civil Action No. 6:04CV 114

OBJECTIONS TO FINDINGS, CONCLUSIONS, AND
RECOMMENDATIONS¹ OF MAGISTRATE McKEE
(and request for *de novo* determination by Judge Davis)

HONORABLE JUDGE DAVIS:

Introduction and summary

Mr. Birnbaum brought this action under Civil Rights and the Declaratory Judgment Act. The magistrate finds:

"The present situation implicates neither of the twin criteria necessary to confer discretionary jurisdiction under the Declaratory Judgment Act. Namely, the legal relations among the parties appear settled, and there is no real controversy or uncertainty to contend with." Page 4, bottom.

"[T]here is no real controversy or uncertainty to contend with"? See Exhibit "A". [T]he legal relations ... appear settled"? As detailed below, neither "the parties" (Texas judge Paul Banner) nor your magistrate seem to fully comprehend the guarantees of Due Process and the First Amendment. This is America, NOT Afghanistan, Iraq, Libya or Namibia (See Exhibit "D"). Mr. Birnbaum cannot be punished based upon the "legal merits" of his claim in state court, only upon "conduct", and even then there are constitutional protections.

¹ Regarding Paul Banner's motion to dismiss

Whether this Court chooses to see this case as indeed showing a continuing violation of Mr. Birnbaum's civil rights, or posing a threat or "*uncertainty*" serious enough upon Mr. Birnbaum or others similarly situated, is of course up to this Court. But as detailed below, this Court DOES have discretionary jurisdiction.

Be it remembered that Mr. Birnbaum's problems with the courts arose ENTIRELY when he was sued because a family of BEAVERS had built themselves a home on his farm.

Details

Magistrate McKee somehow sees this case as, "*Mr. Birnbaum has filed this most recent suitto obtain relief from the state court judgment*". **page 2 line 5**

But THIS case is NOT about a state court judgment, but about relief from a \$62,885 unconditional (not "coercive") sanction², imposed of all things, for Mr. Birnbaum having been "*well-intentioned*", just that the evidence did not sufficiently "*suggest*" a claim to some state trial judge, even though Mr. Birnbaum had asked for determination by JURY:

"In assessing the [\$62,885] sanctions, the Court has taken into consideration that although 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 [civil RICO] suits against the individuals ...". Sanctions hearing July 30, 2002.

Magistrate McKee, under his erroneous assessment that a state judgment is indeed at issue in this action, continues, "*First, this court lacks subject matter*

² And ongoing further unconditional sanctions of \$125,770 on April 1, 2004. Exhibit "A". And threat of "further sanctions". Exhibit "B".

jurisdiction since the plaintiff is attempting to attain in federal court what he did not obtain in state court. The plaintiff does not now present any 'unique' federal issues". Page 2, "Analysis", line 3 . But this action under 18 U.S.C. § 1983 ("Civil Rights") is clearly upon entirely different and unique federal issues:

The issues in state court were upon 1) a claimed unpaid "open account" for "legal fees" against Birnbaum, 2) claims by Birnbaum of deceptive trade practices (Texas DTPA) and fraud against him, 3) Birnbaum's cross-claim of a "pattern of racketeering activity" under "civil RICO", and injury to Birnbaum "by reason of" (stemming therefrom), and upon, 4) what Mr. Birnbaum may or may not have done to incur the wrath of the court and a \$62,885 unconditional sanction.

The issues in this federal court are upon, 1) whether Mr. Birnbaum was denied DUE PROCESS in state court, 2) whether the unconditional \$62,885 sanction, imposed by purely civil state process, itself violated DUE PROCESS, 3) whether such sanction intrinsically violates the Constitution because it was imposed solely for Mr. Birnbaum having exercised his First Amendment right of access to the courts, 4) whether such oppression is still ONGOING³, 6) whether there are threats of more sanctions⁴ against Mr. Birnbaum, 7) whether such sanctions and threats thereof infringe upon the constitutional right of access to the courts by Mr. Birnbaum, and others similarly situated, and 8) whether the threat of such unlawful punishment extends into the indefinite future. **Exhibit "A"**

³ Additional \$125,770 unconditional sanction imposed on April 1, 2004. Exhibit "A"

⁴ "Please be aware that ... further sanctions." Exhibit "B"

Also, if someone, whose rights were violated under "color" of state law, would somehow lose his Right to seek relief under 18 U.S.C. 1983 ("Civil Rights"), simply because the instrument of the oppression was state judicial process, this would be the ultimate insult and offense against the Constitution and reason.

But first some essential case law in support of the above and the specific objections and responses to be detailed below:

Rule 13 requires the trial court to examine the acts or omissions of a party or counsel, not the legal merit of a party's pleadings. See *id.*; *McCain*, 856 S.W.2d at 757. As quoted in *Rawles v. Builders Structural Services*, Texas 5th No. 05-96-00467-cv.

It was, however, clearly established that filing a lawsuit was constitutionally protected conduct. See *Milhouse v. Carlson*, 652 F.2 d 371, 37 3-74 (3d Cir. 1981); see also *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) (access to courts is one aspect of the First Amendment right to petition the government for grievances). Moreover, it was also clearly established that the government cannot retaliate against someone for engaging in constitutionally protected activity in a way that would chill a reasonable person in the exercise of the constitutional right. See *Rutan v. Republican Party of Illinois.*, 497 U.S. 62, 73 , 76 n.8 (1990). **U.S. SUPREME COURT**

Whether a contempt is civil or criminal turns on the "character and purpose" of the sanction involved. Thus, a contempt sanction is considered civil if it "is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court. **U.S. Supreme Court** in *United Mine Workers v. Bagwell*, 512 U.S. 821 (1994)

The distinction between civil and criminal contempt has been explained as follows: The purpose of civil contempt is remedial and coercive in nature. A judgment of civil contempt exerts the judicial authority of the court to persuade the contemnor to obey some order of the court where such obedience will benefit an opposing litigant. Imprisonment is conditional upon obedience and therefore the civil contemnor carries the keys of (his) prison in (his) own pocket. In other words, it is civil contempt when one may procure his release by compliance with the provisions of the order of the court. Criminal contempt on the other hand is punitive in nature. The sentence is not conditioned upon some promise of future performance because the contemnor is being punished for some completed act which affronted the dignity and authority of the court. **The Texas Court of Criminal Appeals**, No. 73,986 (June 5, 2002)

"**These distinctions** lead to the fundamental proposition that **criminal penalties** may not be imposed on someone who has not been afforded the protections that the Constitution requires of criminal proceedings, including the requirement that the offense be proved **beyond a reasonable doubt.**" Pp. 631-635. *Hicks v. Feiock*, 485 U.S. 624 (1988) (emphasis added) U.S. SUPREME COURT

Birnbaum shows below, that despite a 12(b)(6) motion, the magistrate bases his recommendations NOT on plaintiff's version of the facts, but movant defendants' or his own, with no less than noteworthy results.

The following as examples:

NOT TRUE NO. 1: *"Mr. Birnbaum has filed this most recent suit against the original parties as well as Judge Banner in an effort to obtain relief from a state court judgment, asserting such issues as his First Amendment right to sue and requesting declaratory relief from what he calls an "unlawful sanction." Page 2 line 5.*

- Mr. Birnbaum is **NOT** seeking relief from a **state court judgment**, but from a SEPARATE \$62,885 unconditional (not coercive) sanction, which punishes him for something in the past, whereas unconditional punishment may ONLY be imposed by full criminal process, so says no less than the U.S. Supreme Court.
- Mr. Birnbaum made such clear, starting with the very FIRST sentence of his ***Complaint for Declaratory Relief***, emphasis as in original, except compacted:

START OF DIRECT QUOTE:

"Plaintiff pro se, **Udo Birnbaum** ("Birnbaum") hereby files this complaint for **Declaratory Relief** from an unlawful unconditional (not coercive) \$62,855 sanction (Exhibit "A"), imposed on him through purely civil process, to punish him for having made, as a defendant and nearly two years ago, a court pleading under the anti-racketeering statute, 18 U.S.C. § 1964(c), ("civil RICO").

"In assessing the [\$62,885] sanctions, the Court has taken into consideration that although 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 [civil RICO] suits against the individuals". Sanctions hearing July 30, 2002.

"All completed acts, making the sanction purely punitive, not "coercive". Due Process issue. Also First Amendment issue (access to the courts). Also, I had asked for trial by jury, NOT weighing of the evidence by the judge. Due Process issue. Detail below."

END OF DIRECT QUOTE from Birnbaum's *Complaint for Declaratory Relief*.

NOT TRUE NO. 2: *"Mr. Birnbaum claimed that the Westfalls' attempts to collect the legal fee was a civil conspiracy and violation of the RICO statute, and asserted DTPA and civil fraud claims as well." Page 1, "Background", line 4.*

- Mr. Birnbaum made NO such claim in THIS court, NOT in state court⁵, and besides, the state court issues are NOT even at issue in THIS case.
- The matter at issue in this action is the **\$62,885 Sanction**, and such further relief as to stop the likes of an additional **\$125,770 sanction (Exhibit "A")**, and threats of further sanctions (**Exhibit "B"**), on Birnbaum, and others similarly situated.

NOT TRUE NO. 3: *"First, this court lacks subject matter jurisdiction since the plaintiff is attempting to attain in federal court what he did not obtain in state court." Page 2, "Analysis", line 3.*

- *"What he did not obtain in state court", i.e. matters "in the cause of action" in state court, is NOT at issue in THIS action, but rather the violation of*

⁵ Without using the exact words, what Birnbaum actually alleged was that attorney **G. David Westfall**, bookkeeper **Christina Westfall**, and attorney daughter **Stefani (Westfall) Podvin ("The Westfalls")** were "associated with" their "**The Law Offices of G. David Westfall, P.C.**", qualifying as an "enterprise" under RICO, which "engaged in interstate commerce", and that through their "association" they were able to use their "enterprise" to perpetrate their scheme of bringing a fraudulent suit alleging an unpaid "open account" for "legal fees", and that their acts, because of use of the mail, constituted "predicate acts" of "racketeering activity" of depriving the state of Texas of "the intangible right of honest services" which attorney Westfall owed the state of Texas, that his conduct constituted a "pattern of racketeering activity" in violation of RICO, and that Birnbaum was "injured in his property or business" "by reason of the violation" of RICO, i.e. "flowing" or "stemming" from the "pattern of racketeering activity", and specifically from their "act of racketeering activity" of their fraudulent suit, and that their "conduct" was ongoing, and constituted a public threat "extending into the indefinite future".

Birnbaum's Civil Rights by an unlawful state sanction, and the threat of continuation of such conduct into the indefinite future. Exhibits "A", "B".

NOT TRUE NO. 4: *"The plaintiff does not now present any "unique" federal issues." Page 2, "Analysis", line 5.*

- Plaintiff presents the "unique" issue of being punished for filing a lawsuit, NOT upon conduct. Such was done under color of state law.

It was, however, 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). U.S. SUPREME COURT

- A court CANNOT punish for the merit of a claim, only upon CONDUCT:
Rule 13 requires the trial court to examine the acts or omissions of a party or counsel, not the legal merit of a party's pleadings. *See id.; McCain*, 856 S.W.2d at 757. As quoted in *Rawles v. Builders Structural Services*, Texas 5th No. 05-96-00467-cv.
- And even then the sanction has to be coercive, NOT unconditional for past conduct, so says no less than the U.S. Supreme Court.

NOT TRUE NO. 5: *"If a plaintiff seeks relief from a lower state court judgment, it is proper to follow the appeals process in state court, not file suit in federal district court." Page 2, last line.*

- Birnbaum is NOT seeking relief from "a lower state court judgment", but relief from an UNLAWFUL unconditional \$62,885 sanction, and such ongoing conduct. Exhibit "A", "B".

NOT TRUE NO. 6: *"After pursuing his claims and issues through the state courts, the only way to correct a state court judgment on a state law claim is by an application for a writ of certiorari to the United States Supreme Court. Page 3 line 1.*

- Birnbaum is NOT seeking relief from "state court judgment", but relief from an UNLAWFUL unconditional \$62,885 sanction, and such ongoing conduct. Exhibit "A", "B".

NOT TRUE NO. 7: *"In reality, he is trying to recast his state law arguments in federal terms, using the First Amendment and Federal Declaratory Judgment Act, in order to invoke this Court's jurisdiction."* Page 2, "Analysis", line 5.

- What is "state law arguments"? Does screaming in state court, for "Due Process", to no avail, count as "state law argument", to exclude jurisdiction in federal court under the Constitution and federal civil rights law? In America? See Exhibit "D", "*The crime of contempt of court*".
- What IS at issue is the distinction as to what was at issue "in the case" in state court, and what is "at issue" in this federal court, namely constitutional issues, which were NOT "at issue" in the state court "in the case", i.e. this federal action is on an entirely different "nucleus of operative facts".

NOT TRUE NO. 8: *"Mr. Birnbaum may be correct when the states that there is some First Amendment right to sue; however, this is not the reason he was sanctioned."* Page 2, "Analysis", line 7.

- "Not the reason he was sanctioned"? That is EXACTLY the reason Mr. Birnbaum was sanctioned:

" In assessing the [\$62,885] sanctionsMr. Birnbaum may be well-intentioned[but] there was nothing presentedthat suggest [to this judge] he had any basis in law or in fact..... that suggest he had any basis in law or in fact to support his [civil RICO] suits against the individuals"

- "Some First Amendment right to sue"? There is only "The First Amendment Right To Sue". There is also "The Right To Trial By Jury", instead of by "that suggest".
- Also, it certainly was NOT "*Mr. Birnbaum*", as Magistrate McKee suggests, who stated, "*that there is some First Amendment right to sue*".

NOT TRUE NO. 9: *"Mr. Birnbaum was sanctioned because he abused the legal process and filed frivolous counterclaims in an attempt to avoid paying legal fees."* Page 2, "Analysis", line 9

- Mr. Birnbaum was sanctioned, in violation of the law, because he made a "civil RICO" cross-claim:

" In assessing the [\$62,885] sanctionsMr. Birnbaum may be well-intentioned[but] ... there was nothing presentedthat suggest [to this judge] he had any basis in law or in fact..... that suggest he had any basis in law or in fact to support his [civil RICO] suits against the individuals"

Rule 13 requires the trial court to examine the acts or omissions of a party or counsel, not the legal merit of a party's pleadings. *See id.; McCain*, 856 S.W.2d at 757. As quoted in *Rawles v. Builders Structural Services*, Texas 5th No. 05-96-00467-cv.

"It was, however, 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) U.S. SUPREME COURT

NOT TRUE NO. 10: "The First Amendment will not be construed so broadly as to protect what a lower court has determined to be sanctionable claims." Page 2, "Analysis", end of first paragraph.

- WHERE does this absurd quote or notion come from? The First Amendment is **FIRST!**
- ALSO, as shown above, there is NO such thing as "sanctionable claims", ONLY "sanctionable conduct".

Rule 13 requires the trial court to examine the acts or omissions of a party or counsel, not the legal merit of a party's pleadings. *See id.; McCain*, 856 S.W.2d at 757. As quoted in *Rawles v. Builders Structural Services*, Texas 5th No. 05-96-00467-cv.

- And even the trial judge did NOT find Mr. Birnbaum's conduct as anything other than "**well-intentioned**".

Also these conclusions and recommendations previously made in this cause, together with the objections by Mr. Birnbaum thereto:

"At the outset, it is necessary to state that Mr. Birnbaum has no real federal complaint."

- "At the outset"? Magistrate McKee of course should not already have a conclusion "at the outset", neither as a "fact" nor as "the law".

"He [Birnbaum] merely claims that the state court had no right to impose sanctions on him, that he has a First Amendment right to file suit in Texas courts, and that it is a criminal penalty to sanction in a civil courts [sic]."

- "He merely claims"? Mr. Birnbaum's *Complaint for Declaratory Relief* certainly is not "merely", but rather it documents, in excruciating detail, with case law after case law, and exhibit after exhibit, just exactly how this sanction is UNLAWFUL, and violates DUE PROCESS, even the Texas Rules of Court.
- Also, Mr. Birnbaum made NO claim whatsoever, "*that it is a criminal penalty to sanction in a civil court*", but rather that it is unlawful to impose an unconditional (not coercive) sanction in civil process, that unconditional punishment for past conduct can only be by full due criminal process, including a finding of "beyond a reasonable doubt", by a jury. (See *Complaint* and above case law for details)
- Also, the state court was prohibited from punishing Mr. Birnbaum, by civil process, for the completed act, TWO years earlier, of having made cross-claims under "civil RICO", regardless of the merits of Mr. Birnbaum's claim, only to "coerce", which the court never had to, and never did.

"A declaratory judgment is typically not available for state law issues already being decided by a state court."

- "*Typically not available*"? This is not a "*typical*" case, nor is this case upon "*state law issues*".
- This Civil Rights Complaint for Declaratory Relief is upon constitutional and federal issues, for relief for Birnbaum, and others similarly situated, to be free from fear of unlawful state court punishment for filing a lawsuit⁶.

"The federal court should consider whether the declaratory action presents an issue distinct from those in the state court, whether the parties are the same or similar, whether the declaratory action would clarify obligations and relationships among the parties or merely result in duplicative and unnecessary litigation, and whether comparable relief is available in another forum." page 3 - bottom.

- The issue in this case is "*distinct from those in the state court*". (See above)
- The parties are not the same.
- A declaratory judgment would indeed "*clarify obligations*", i.e. that Birnbaum is entitled to due process and his rights under the Constitution, and that all Texas judges are obligated to provide "due process".
- "*Comparable relief*" has been shown to be unavailable in another forum, i.e. Texas courts.

"In this case, Mr. Birnbaum pursued many of these arguments in state court and his appeals were denied, while the new "federal" claims he brings are not new or different in nature, only in name." Page 4 line 4.

⁶ Birnbaum did not actually bring the state suit. Birnbaum just made cross-claims against three persons associated with a "The Law Offices of G. David Westfall, P.C." when he was sued in the name of their "law office".

- These claims ARE different, for instead of being issues "in the process" in the Texas court, are specific issues "in the case", i.e. under a specific cause of action, namely 18 U.S.C. § 1983 ("Civil Rights").
- The relationship is somewhat analogous to "intrinsic" and "extrinsic" fraud in state court, where the "extrinsic" fraud in state court would become THE "intrinsic" issue under 18 U.S.C. § 1983 ("Civil Rights").
- The "nucleus of operative facts" is entirely different in this federal action from what was at issue in the state court action, i.e. different parties, different cause of action, etc. etc, i.e. entirely different nuclei.

END of conclusions and recommendations previously made in this cause

NOT TRUE NO. 11: *In the previous case, Judge Banner granted the Westfall's motion for summary judgment on the attorney's fees issue and awarded sanctions against Mr. Birnbaum. Page 4 line 3.*

- *"summary judgment on the attorney's fees"?* NOT SO AT ALL. Judge Banner granted the Westfalls relief from Mr. Birnbaum's civil RICO claim against them, precluding Mr. Birnbaum from presenting the jury with a timely and viable alternative as to what the evidence really meant.
- *"and awarded sanctions"?* Not true. Judge Banner got the Westfalls OUT of the case, and then AFTER judgment, despite being OUT, they came back. Under the "American Rule", each party pays for its own attorney fees, unless specifically authorized by statute or agreement, and the law does NOT provide for "attorneys fees" for having been granted summary judgment.

NOT TRUE NO. 12: *Judge Banner wrote that there "was nothing presented" in the suit to suggest that "he had any basis in law or fact to support" it. Page 4 line 5.*

- *"Judge Banner wrote"?* NOT SO at all. Judge Banner got CAUGHT by the court reporter. ("... Mr. Birnbaum may be well-intentioned")

NOT TRUE NO. 13: *Judges are absolutely immune from liability for judicial acts as long as they are not "performed in clear absence of all jurisdiction, however erroneous the act and however evil the motive." Page 4 line 6.*

- Mr. Birnbaum is not trying to hold Judge Banner liable.
- Mr. Birnbaum is NOT complaining about motive, but that the act was unlawful, and therefore done in "absence of all jurisdiction".

NOT TRUE NO. 14: *The present situation implicates neither of the twin criteria necessary to confer discretionary jurisdiction under the Declaratory Judgment Act. Namely, the legal relations among the parties appear settled, and there is no real controversy or uncertainty to contend with. Page 4, bottom.*

- "the legal relations among the parties appear settled"? NOT SO. The state judges act as if they never heard of the Constitution.
- "no real controversy or uncertainty to contend with"? How about Due Process, and First Amendment Right of access to the courts? What about the ongoing nature of this matter (Exhibit "A", "B", "C")

CONCLUSION

The magistrate is seeing things that are clearly not there.

At issue in this cause is NOT a state court judgment at all, as Magistrate McKee is telling this Court, but an unlawful \$62,885 sanction, and additional \$125,770 sanctions, plus the threat of more unlawful sanctions, all arising from having made a claim in a Texas court.

The unlawful conduct is ongoing, and the threat extends into the indefinite future. Unlike what the magistrate presents, this court DOES have subject matter jurisdiction, because the issues in this Civil Rights cause are entirely different from what the issues were in the state court action.

When Birnbaum, whose rights were violated "under color of state law", loses his right to relief under 18 U.S.C. § 1983 ("Civil Rights"), simply because the

instrument of the oppression was state judicial process, **this IS the ultimate insult and offense against the Constitution and Rights under 18 U.S.C. § 1983!**

PRAYER

WHEREFORE, Plaintiff Birnbaum request a hearing and de novo determination upon the above issues, prays that this Court find jurisdiction, and issue such relief as this Court may deem proper so as to release Mr. Birnbaum from the conduct upon him.

What the magistrate has done is a continuation in a pattern of judicial rulings not according to law or facts.

Mr. Birnbaum asks for judicial notice that ALL his entanglements in the courts stemmed ENTIRELY from Mr. Birnbaum being sued, in a Texas court, because a family of BEAVERS had built themselves a home on his farm!

Before that, Mr. Birnbaum was living peaceably in Van Zandt County, taking care of his cows and ninety (90) year old invalid mother, and had only known the courthouse from getting automobile license tags. Yet today, after NINE years, the BEAVERS are still in court, with their THIRD judge.

Honorable Judge Davis, upon this FRCP Rule 12(b)(6) motion by Judge Paul Banner, put yourself into MY shoes: "When considering a Rule 12(b)(6) dismissal, we construe the complaint liberally in favor of the plaintiff, taking all facts as true. *See Lowrey v. Texas A&M Univ. Sys.*, 117 F.3d 242, 247 (5th Cir. 1997)". Magistrate's findings, **page 3, paragraph 3.**

Respectfully submitted,

UDO BIRNBAUM, pro se

UDO BIRNBAUM, *pro se*
540 VZCR 2916
Eustace, Texas 75124
(903) 479-3929

CERTIFICATE OF SERVICE

I, UDO BIRNBAUM, do hereby certify that a true and correct copy of this document has been served by Regular Mail on this the ____ day of October, 2004, addressed to John M. Orton, Assistant Attorney General, Post Office Box 12548, Austin, TX 78711-2548, and to Frank C. Fleming, 6611 Hillcrest Ave., #305, Dallas, TX 75205-1301.

UDO BIRNBAUM

VS. No.

Minute Book
Vol. Page

ORDERS OF COURT CONTINUED

Date of Orders Month Day Year	Minute Book Vol. Page
4 8 02	
4 10 02	
4 11 02	
7 30 02	
3 17 03	
4 1 04	156 228

9R All present, jury selected, sworn in, stacks, Open State, Enid Review

9R All present, Enid center

Jury Verdict

9R All present, J not signed

Order for 5th Court of Appeals - clerks record

~~9R~~ ~~All present~~ Movant Bivinsbaum P. 103³⁵ and et al. Filing supporting

They are present. Hearing conducted on Bivinsbaum's Motion to Revoke

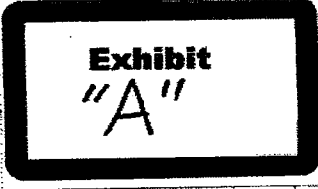
filed 9/30/03. Testimony presented. Both sides rest. Both sides rest.

Argument presented. Motion to Revoke is in all things denied.

Hearing held on 11th Motion for Sanctions filed this date.

Testimony presented. Both sides rest. Arguments presented.

Et Judd, based on the arguments, testimony, and pleadings that grounds for sanctions do exist and the Ct. ~~shall~~ ~~grant~~ ~~sanctions~~ ~~for~~ ~~violation~~ ~~of~~ ~~Rule~~ ~~13~~ ~~of~~ ~~the~~ ~~TRC~~ ~~and~~ ~~for~~ ~~Sanctions~~ ~~for~~ ~~10,001 et seq. T.C.P.R.C. in the amount~~ ~~of~~ ~~\$~~ ~~1,000-~~ ~~for~~ ~~actual~~ ~~damages~~ ~~and~~ ~~\$~~ ~~124,770-~~ ~~for~~ ~~exemplary~~ ~~damages~~ ~~against~~ ~~Bivinsbaum~~ ~~who~~ ~~is~~ ~~ordered~~ ~~to~~ ~~pay~~ ~~and~~ ~~submit~~ ~~to~~ ~~the~~ ~~Ct.~~ ~~in~~ ~~order~~ ~~to~~ ~~admit~~ ~~to~~ ~~apportioned~~ ~~costs~~ ~~of~~ ~~Judge~~ ~~Cal~~ ~~Labford~~ ~~and~~ ~~submit~~ ~~a~~ ~~copy~~ ~~of~~ ~~same~~ ~~to~~ ~~A.~~



Complete & full access to its
Sections are for conduct outside of

Our jurisdictional environment faculty of
litigation after the parties have ~~been~~ avoided
themselves of the remedies ~~to~~ available under
or laws

^{Now} You have the keys as whether there
are any further proceedings in this case in the
future. Please be aware that any further actions
might result in further revelations

62885
2
125770
124770

Exhibit
"B"

Courthouse Vignettes — "Tales from the Hive"

Just like "court TV" — except real and in writing and in OUR courthouse
From a fresh and personal perspective — go turn off judge Judy!



"A masterpiece of accomplishment" or "April fools"?

How, on a **DEAD** case, **TWO** visiting judges, **ONE** hearing a motion to remove the **OTHER** from the case, **ONE** judge from the bench, the **OTHER** from the witness box, managed to assess a \$125,770 **FINE** ("sanction") against a 67 year old non-lawyer on April 1, 2004.

For having filed (out of desperation) a **ONE** page "motion to recuse", **SIX** (6) MONTHS AGO!
"If there is insanity around, well, some of us gotta have it!"

APPEARANCES

- ONE:** Hon. Ron Chapman, Senior judge, assigned to hear a "motion to recuse"
- OTHER:** Hon Paul Banner, Senior judge, assigned to hear a suit over "open account"
- Non-lawyer:** Udo Birnbaum, was sued because beavers had built a dam on his farm
- Lawyer:** Frank C. Fleming, sued Birnbaum claiming \$38,121.10 "worth" of legal services in suing the ex-Van Zandt district judge and other state judges for racketeering.

1.

*All "arising from" a dam built by BEAVERS!
Watch YOUR fire ants — or YOU could be next*

It was April 1, 2004, "April Fools Day", and I was driving into town for yet another hearing in our district court.

The whole thing had started in 1995 when I was sued because BEAVERS had built a dam on my farm. Before that I was living peaceably on my farm in Van Zandt County, taking care of my cows and ninety (90) year old invalid mother, and had only known the courthouse from getting automobile license tags.

Even today, the beavers are still in court, after NINE years, with their THIRD judge, just assigned to the case.

2.

*"Legal fees" and "legal fees" for collecting on "legal fees"
"Smoke Old Mold — The ONLY cigarette that is ALL filter!"
But today's hearing was on a case where ... (continued page 2)*

More

*"Tales from the Hive"
All from public records*

"Disciplinary Trial"

The problems the State Bar has with lawyers and vice-versa ...

"Case of *res ipsa loquitur*"

In OUR courthouse. NO, it is NOT a disease, or is it?

"Bunk-bed Bunk"

A kid falls out of bed, and the lawyers ...

At www.OpenJustice.US

Contempt of Court

The purpose of the crime of contempt of court has been stated to be the protection of the dignity, repute and authority of judicial bodies and to ensure the fair and effective administration of justice.

The offence of Contempt of Court not only has the backing of the common law, but is buttressed in the Namibian Constitution itself.

In addressing the issues of freedom of speech and of the media, that this right is “expressly and specifically made subject to the law relating to contempt of court”



Case law found on the web. THANK GOD, WE LIVE IN AMERICA!

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS
NOV 16 2004
DAVID J. MALAND, CLERK
BY
DEPUTY _____

UDO BIRNBAUM

Plaintiff,

vs.

PAUL BANNER, G. DAVID WESTFALL,
CHRISTINA WESTFALL, AND STEFANI
PODVIN,

Defendants.

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CIVIL ACTION NO. 6:04cv114

ORDER

The above entitled and numbered civil action was referred to United States Magistrate Judge Harry W. McKee pursuant to 28 U.S.C. §636. The Report of the Magistrate Judge which contains his proposed findings of fact and recommendations for the disposition of such action, has been presented for consideration. The plaintiff has raised objections to the Report and Recommendation, however does not raise any arguments different from those asserted in his pleadings. This Court is of the opinion that the findings and conclusions of the Magistrate Judge are correct. Therefore, the Court hereby adopts the Report of the United States Magistrate Judge as the findings and conclusions of this Court.

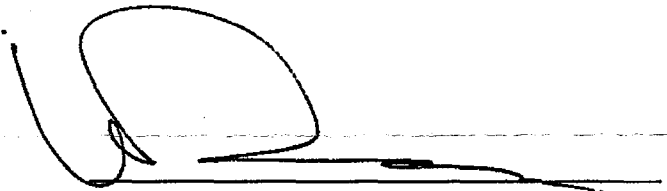
Accordingly, it is

ORDERED that the plaintiff's motion for summary judgment is DENIED

(Doc.#6).

ORDERED that the defendant's motion to dismiss is GRANTED (Doc. # 3).

SIGNED this 15 day of November, 2004.

A handwritten signature in black ink, appearing to read 'Leonard Davis', is written over a horizontal line. The signature is stylized with a large loop at the beginning.

LEONARD DAVIS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

UDO BIRNBAUM

Plaintiff,

vs.

PAUL BANNER, DAVID WESTFALL,
CHRISTINA WESTFALL, and STEFANI
PODVIN

Defendants.

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CIVIL ACTION NO. 6:04cv114

**REPORT AND RECOMMENDATION OF
UNITED STATES MAGISTRATE JUDGE**

The above entitled matter was referred to the undersigned Magistrate Judge pursuant to provisions of 28 U.S.C. § 636(b)(1)(A)-(C). On November 15, 2004, United States District Judge Leonard Davis signed an order adopting a Report recommending that the plaintiff's motion for summary judgment be denied, and dismissing plaintiff's suit against defendant Paul Banner (Doc. #3 and 6, respectively). The plaintiff objected to these recommendations and now presents this motion to reconsider (Doc.#26). However, this motion to reconsider reiterates the same concerns and same arguments raised in the plaintiff's objections noted above.

Accordingly, it is

RECOMMENDED that the above motion to reconsider is DENIED.

A party's failure to file objections to the findings, conclusions, and recommendations contained

in this Report within ten days after service with a copy thereof shall bar that party from *de novo* review by the district judge of those findings, conclusions and recommendations and, except upon grounds of plain error, from appellate review of the unobjected-to proposed factual findings and legal conclusions accepted and adopted by the district court. *Douglass v. United Services Automobile Association*, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*).

SIGNED this 30 day of **November, 2004**.



HARRY W. MCKEE
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS
JAN - 3 2005
DAVID J. MALAND, CLERK

UDO BIRNBAUM

Plaintiff,

vs.

PAUL BANNER, G. DAVID WESTFALL,
CHRISTINA WESTFALL, AND STEFANI
PODVIN,

Defendants.

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CIVIL ACTION NO. 6:04cy114

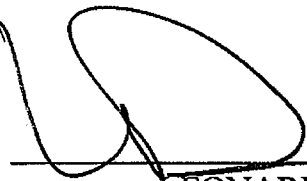
ORDER

The above entitled and numbered civil action was referred to United States Magistrate Judge Harry W. McKee pursuant to 28 U.S.C. §636. The Report of the Magistrate Judge which contains his proposed findings of fact and recommendations for the disposition of such action, has been presented for consideration. The plaintiff has not objected to this Report. This Court is of the opinion that the findings and conclusions of the Magistrate Judge are correct. Therefore, the Court hereby adopts the Report of the United States Magistrate Judge as the findings and conclusions of this Court.

Accordingly, it is

ORDERED that the plaintiff's motion to reconsider is DENIED (Docs. # 28).

SIGNED this 3 day of ^{Jan}~~December~~, 2004/5


LEONARD DAVIS
UNITED STATES DISTRICT JUDGE

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS

JAN 10 2005

DAVID J. MALAND, CLERK

BY
DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

UDO BIRNBAUM

v.

PAUL BANNER, ET AL.

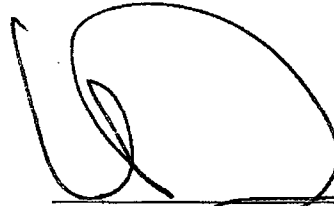
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CIVIL ACTION NO. 6:04cv114

FINAL JUDGMENT

The Court hereby ORDERS that this action be dismissed with prejudice. It is further ORDERED that all relief not previously granted is hereby denied.

SIGNED this 10 day of January, 2005.



LEONARD DAVIS
UNITED STATES DISTRICT JUDGE