

## Index

### Complaint

Short synopsis of this complaint

Details of this complaint

### Appendix

1. Sanction Judgment "Order on Motions for Sanctions" (1)
2. Transcript of Sanction Hearing (3)
3. Request for Findings of Fact and Conclusions of Law (5)  
Motion for Sanctions (10)  
Response to the Motion for Sanctions - LET THE U.S. JUSTICE DEPT. DECIDE (15)
4. Jury Questions - "Court's Charge" (21)
5. The Attorney Retainer Agreement - the supposed basis of the lawsuit on me (25)
6. Request for Endorsements by the Court of "Refusals" and "Modifications" (re jury questions) (28)
7. Motion to Reconsider the \$59,000 Judgment (30)
8. Motion to Reconsider the \$62,000 Sanction (33)
9. Motion for New Trial (36)
10. Notice of Past Due Findings of Fact and Conclusions of Law (48)

## COMPLAINT

### Short synopsis of this complaint<sup>1</sup>

See below for details

This is my complaint of official oppression upon me by a senior "visiting judge" sent from Dallas to our 294<sup>th</sup> District Court, namely a certain Paul Banner. Specifically I am complaining of dispossession and assessment by unlawful judgments, by Judge Banner retaliating against me for having made a civil RICO claim when I was sued.

I was engaged in protected speech<sup>2</sup>. I was speaking out in court, and under the anti-racketeering statute ("RICO"), and on an "issue of public importance" at that.

The judge took an adverse action against me (assessed a \$62,000 sanction) upon such protected speech (he himself said it was for having made my civil RICO claim), making his action retaliation<sup>3</sup> per se.

It is of course proper for a judge to adjudicate between the parties, but not for the judge to punish me for having made such civil RICO claim. And of course he cannot unconditionally punish me at all (only "coerce" me), for anything, without full criminal process, including a finding beyond a reasonable doubt. (See details below)

Retaliation of course has *mens rea* (a guilty mind, guilty knowledge and willfulness) built in. And because he is a public servant, that makes it official oppression.

Such conduct is not "objectively reasonable" under "currently applicable constitutional standards", or any standards. Not with TWO UNLAWFUL judgments. In the first one, the judge

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<sup>1</sup> This is a short overview of the presentation to follow. Else, it can serve as a conclusion at the end of the evidence presented.

<sup>2</sup> It was, however, clearly established that filing a lawsuit was constitutionally protected conduct. See *Milhouse v. Carlson*, 652 F.2d 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).

<sup>3</sup> A retaliation claim essentially entails three elements: (1) the plaintiff engaged in protected conduct; (2) an adverse action was taken against the plaintiff that would deter a person of ordinary firmness from continuing to engage in that conduct; and (3) there is a causal connection between elements one and two -- that is, the adverse action was motivated at least in part by the plaintiff's protected conduct. See, e.g., *Bloch v. Ribar*, 156 F.3d 673, 678 (6th Cir. 1998); *Lewis v. ACB Bus. Servs., Inc.*, 135 F.3d 389, 406 (6th Cir. 1998); *Penny v. United Parcel Serv.*, 128 F.3d 408, 417 (6th Cir. 1997); *Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133, 1138 (6th Cir. 1994). This formulation describes retaliation claims in general, but it will yield variations in different contexts.

decided, when I had asked for decision by jury. As for the second, it was patently unlawful retaliation. So of course is the first by denial of my right to due process. See below for details.

### Details of this complaint

First a few things about myself. Although I went to school and college in Houston, and worked for Texas Instruments in Dallas for many years as an electrical engineer, I have lived on my farm in south Van Zandt County now for the last 22 years. I am not a lawyer.

Official oppression is of course a public servant intentionally doing certain things, knowing it is against the law<sup>4</sup>. Specifically, I am talking about assessing two judgments that the judge sent here from Dallas knew were unlawful. That judge denied me of what in legal terms is called "right of due process". What I'm saying is that this judge deprived me of my property without following certain rules that he is required by law to follow. That judge knew that depriving me of my property was unlawful, AND HE DID IT ANYWAY.

The first question of course is, if this took place in a court, I should be in the appeals court, not before you. Well, I have appealed, and some judge, or clerk, may, or may not, undo what this judge has done to me. But that does not change that we have a judge here that will intentionally deny due court process, and assess judgments that he knows are unlawful. Besides, the appeals court does not have investigators, nor is it charged with enforcing the criminal statutes.

The official oppression statute is there, of course, to encourage all public servants not to do official oppression. Is a judge exempt from a criminal statute, because he is a judge? I don't think so.

Is he immune from a civil suit for what he does? Yes, pretty much, under the doctrine of judicial immunity. That is why I am here to detail this criminal complaint.

But before I get into my evidence, I need to give a real quick overview of what is called a civil racketeering, or civil RICO suit, because it is the central issue in this matter.

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<sup>4</sup> Texas Penal Code, Sec. 39.03. OFFICIAL OPPRESSION: (emphasis added)

(a) A public servant acting under color of his office or employment commits an offense if he:

- (1) intentionally subjects another to mistreatment or to arrest, detention, search, seizure, dispossession, **assessment**, or lien that he knows is unlawful;
- (2) intentionally denies or impedes another in the exercise or enjoyment of any **right**, privilege, power, or immunity, knowing his conduct is unlawful; or
- (3) intentionally subjects another to sexual harassment.

(b) For purposes of this section, a public servant acts under color of his office or employment if he acts or purports to act in an official capacity or takes advantage of such actual or purported capacity.

(c) In this section, "sexual harassment" means ... etc

You may be familiar with RICO, the federal Racketeer Influenced and Corrupt Organizations Act<sup>5</sup>. But it also allows for filing a civil suit<sup>6</sup> under that law, and it allows for triple damages, and the U.S. Supreme court says that civil RICO can be used in state courts<sup>7</sup>, and that the purpose of the treble damages was to, and these are pretty much the exact words they used, "turn victims into private attorneys general, diligently investigating, supplementing Government efforts by undertaking litigation in the public good"<sup>8</sup> I.e. go out, citizens, go fight corruption by filing civil RICO suits "in the public good" against gangster style conduct, by whosoever<sup>9</sup>, even if it does not involve what we normally think of as organized crime.

I made such civil RICO pleading in our 294<sup>th</sup> District Court and asked for determination by jury when I was sued by a crooked Dallas lawyer, a certain G. David Westfall, in the name of his law office professional corporation, suddenly claiming I owed him \$18,000 on an "open account" for legal fees<sup>10</sup>. There is of course no such animal as an open account for legal fees. An open account requires a sale and delivery, or rather, sales and deliveries. And the judge was required to appoint an auditor when I denied the alleged "account" under oath, which he never did.

Instead the whole house came down on me, as a pro se, that is a self representing party, for speaking out against a lawyer, on that holiest of holies, "legal fees", and with a civil racketeering claim at that.

Anyhow, the judge would not let the jury decide the "open account" claim against me, nor my civil RICO claim, and on top of that, punished with a \$62,000 sanction, to be unconditionally paid for having made my civil RICO claim. Although a court can hold one in contempt, a \$62,000 assessment is not

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<sup>5</sup> 18 U.S.C. § 1961 et seq. ("RICO")

<sup>6</sup> 18 U.S.C. § 1964(c) ("civil RICO"). "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee."

<sup>7</sup> State courts have concurrent jurisdiction to consider civil claims arising under RICO. *Tafflin v. Levitt*, 493 U.S.455 (1990)

<sup>8</sup> A Congressional objective [in enacting civil RICO] of encouraging civil litigation not merely to compensate victims but also to turn them into private attorneys general, supplementing Government efforts by undertaking litigation in the public good. *Rotella v. Wood*, 528 U.S. 549 92000)

<sup>9</sup> "Congress did not limit scope of this chapter to those persons involved in what traditionally has been thought of as "organized crime", but, rather, any "person" as term is broadly defined in this chapter, **whether associated with organized crime or not**, can commit violation, and **any person injured** in his business or property by such violation may then sue violator for damages in federal court." *Lode v. Leonardo*, D.C.Ill.1982, 557 F.Supp. 675.

<sup>10</sup> *The Law Offices of G. David Westfall, P.C. vs. Udo Birnbaum*, 294<sup>th</sup> District Court, No. 00-0619, Sept. 2000.

coercive, but punitive in nature, and therefore requiring full criminal due process, including a finding beyond a reasonable doubt, by a jury.

With this in mind, I will now present the evidence of official oppression by this judge, by intentionally assessing not one, but two judgments against me, knowing that they were unlawful, and denying me my rights to due process, knowing that his conduct was unlawful. By a man in his capacity as a judge, a seasoned senior judge, misusing the tools and power entrusted to him.

Remember the key phrases: Intentional, Unlawful assessment. Knowing it was unlawful. Denying a Right. Knowing his conduct was unlawful.

Also keep in mind that the evidence is in the totality of the exhibits. I will try to go over all of them very fast. Details are in the footnotes, and there is lots more backup. So here goes:

### **Exhibit 1. Sanction Judgment**

The law, as given in the Texas Rules of Civil procedure, says that any sanction Order shall state with specificity and particularity what was supposedly done wrong<sup>11</sup>, but this states nothing.

The law says that a judge cannot impose severe sanctions without having considered, and actually having imposed<sup>12</sup> lesser sanctions (to see if they will "coerce"). I was never warned about anything, never disobeyed anything. The judge never ordered or told me to do or not do anything!

The persons that moved for sanctions against me had been removed from the case seven (7) months ago by summary judgment<sup>13</sup>, and moved for such<sup>14</sup> after award of a 59,000 judgment<sup>15</sup>, all for "legal fees". They were out of the case!

And \$62,000 for "legal fees"? The "American Rule" says that each party is responsible for its own legal fees, except under very narrow limits, and certainly not for having been granted "summary

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<sup>11</sup> "Courts shall presume that pleadings, motions, and other papers are filed in good faith. No sanctions under this rule may be imposed except for good cause, the particulars of which must be stated in the sanctions order." Rule 13, Texas Rules of Civil Procedure

<sup>12</sup> A trial court must first consider and impose less stringent sanctions to determine whether lesser sanctions will promote compliance and discourage further abuse. *Jones v. Andrews*, 873 S.W.2d 102, 106 (Tex. App.--Dallas 1994, no writ). As quoted in *Rawles v. Builders Structural Services*, Texas 5<sup>th</sup> No. 05-96-00467-cv

<sup>13</sup> *Order Sustaining Motions for Summary Judgment*, pronounced July 30, 2001, formally signed Nov. 13, 2001

<sup>14</sup> *Motions for Sanctions*, May 9, 2002.

<sup>15</sup> *Final Judgment*, "rendered" (pronounced) Apr. 11, 2002

judgment" upon my civil RICO claim. This of course should have ended all matters regarding civil RICO and those persons!

Also note the date signed, Aug. 9, 2002, but the judge did not get it to the clerk until Aug. 21. I did not get notice of it till Aug. 22, and the Rules say I have only 20 days to request "Findings of fact and conclusions of law" as to how the judge came up with this stuff, or loose my right to such<sup>16</sup>. More on that later. But also keep in mind the following:

**Two factors** determine the extent of a trial court's discretion in ordering "just" sanctions: **(1) a direct relationship must exist between the offensive conduct and the sanction imposed and (2) the sanction imposed must not be excessive.** *Blackmon*, 841 S.W.2d at 849.

### **Exhibit 2. Transcript of Sanction Hearing**

So what WAS the supposed offensive conduct. What was it that made the judge to assess a \$62,000 punishment on me? The sanctions order gave no hint. The judge never said anything at any other time against me. But he got caught by the court reporter at the sanctions hearing:

*"In assessing the 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 ... .."*

So what was I sanctioned for? Look at what the judge himself said, namely **for having made a civil RICO claim**, with the judge having once previously weighed the evidence to grant summary judgment on my civil RICO claim, then again weighing it at this hearing, when I had asked for determination by jury.

The judge was no more entitled to weigh the evidence to find that there was no RICO violation, and sanction me, then he could find that there was a RICO violation, and throw the other side in jail.

Furthermore, this is a **criminal punishment** because it was for a completed act. Look at all the **had, was, had** in there. **He can't do this in a civil procedure**. Let me give you the law, and this judge knows this:

"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

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<sup>16</sup> Rule 296; "Any party may request the court to state in writing its findings of fact and conclusions of law. Such request shall be entitled "**Request for Findings of Fact and Conclusions of Law**" and shall be filed **within twenty days after judgment is signed** with the clerk of the court, who shall immediately call such request to the attention of the judge who tried the case."

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). Also the Supreme Court<sup>17</sup> in *United Mine Workers v. Bagwell*

Again note all the past tenses, had, was, had that the judge had in there. The case was over. He had issued final judgment. And now he sanctions me for something way in the past. This is a criminal punishment for a completed act, to set an example for no one ever to bring another **civil RICO** claim into Texas courts again!

Also sanctions require the trial court to examine the acts or omissions of a party or counsel, not the **legal merits** of the pleadings<sup>18</sup>. Also a trial court must consider and impose less stringent sanctions first, to see if they work, if the judge feels like he needs to impose sanction to "coerce" anything<sup>19</sup>. And "no basis in law or in fact"? Is not **civil RICO**<sup>20</sup> the law? And nobody<sup>21</sup> is immune from RICO.

This \$62,000 sanction is patently UNLAWFUL. It is also retaliatory. The judge stated exactly what he was punishing me for, namely for making a civil RICO claim, and the Supreme Court has said that access to the courts is a First Amendment Right. And particularly when I speak on what is called an

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<sup>17</sup> 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)

<sup>18</sup> **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 5<sup>th</sup> No. 05-96-00467-cv

<sup>19</sup> A trial court must first consider and impose less stringent sanctions to determine whether lesser sanctions will promote compliance and discourage further abuse. *Jones v. Andrews*, 873 S.W.2d 102, 106 (Tex. App.--Dallas 1994, no writ). As quoted in *Rawles v. Builders Structural Services*, Texas 5<sup>th</sup> No. 05-96-00467-cv

<sup>20</sup> "**Any person injured in his business or property** by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." 18 U.S.C. § 1964(c) "civil RICO"

<sup>21</sup> "Congress did not limit scope of this chapter to those persons involved in what traditionally has been thought of as "organized crime," but, rather, **any "person"** as term is broadly defined in this chapter, **whether associated with organized crime or not**, can commit violation, and **any person injured** in his business or property by such violation may then sue violator for damages in federal court." *Lode v. Leonardo*, D.C.Ill.1982, 557 F.Supp. 675

"issue of great public importance", that is whether what this lawyer was doing to me in hauling me into court was part of a "pattern of racketeering activity". Remember what the Supreme Court had said about "private attorneys general", and "litigation in the public good". Can you see why this judge came down on me, despite his knowing that "*Mr. Birnbaum may be well-intentioned*"?

### **Exhibit 3. Request for Findings of Fact and Conclusions of Law**

The Rules state: "The court shall file its findings of fact and conclusions of law within twenty days after a timely request is filed." Rule 297: Time to File Findings of Fact and Conclusions of Law:

Judge, what did you find so awful in what I was supposed to have done? Judge how did you do all this stuff? Judge, how did YOU decide whether they were really doing "racketeering", or whether my claim was "frivolous" as they claimed? And had I not paid for determination by jury? And if you thought it was frivolous, why did you ORDER depositions? NO RESPONSE.

### **Exhibit 4. Jury Question**

The judge assessed a \$59,000 judgment against me, but he did not allow the right questions. They sued me for an "open account" for legal fees, which I of course denied. Had I not denied it under oath, the lawyer would have gotten by with it. It is called a "mandatory counterclaim". A "sworn open account" is "deemed" true unless I swear to the contrary, and I did, with my civil RICO claim to boot.

As for jury questions, the law says that the questions to the jury have to be on what you were sued for, of course<sup>22</sup>. But this judge did not submit "open account" (amount owed) at all, but a question that presumed a contract!

**QUESTION NO. 1:** "What sum of money, if paid now in cash, would fairly and reasonably compensate The Law Offices of G. David Westfall, P.C., for its damages, if any, that resulted from the Defendant Udo Birnbaum's failure to comply with the agreement between the Plaintiff and the Defendant?"

And the judge did not allow my "excused" issue as to whether plaintiff had not lived up to his promises, and that all the lawyer's flapping in suing 294<sup>th</sup> District Judge Tommy Wallace, Judge James

<sup>22</sup> Rule 278. Submission of Questions, Definitions, and Instructions. "The court shall submit the questions, instructions, and definitions in the form provided by Rule 277 which are raised by the written pleadings and the evidence."  
"A party shall not be entitled to any submission of any question .... not raised by affirmative written pleading by that party."

Zimmermann, Judge Pat McDowell, Judge Richard Davis, even District Attorney Leslie Dixon, and others, had no worth because of immunity from civil suit. And there was of course no "open account" or contract at all, not with a non-refundable prepayment of \$20,000 to "*insure our availability in your matter*", and the lawyer reserving the "*right to terminate ... .. for non-payment of fees or costs*".

#### **Exhibit 5. The Attorney Retainer Agreement**

Look at it. \$20,000 non-refundable prepayment for "*insuring our availability*", and reserving the right "*to terminate for non-payment*". This is **neither open account**, **nor breach of contract**".

This judge decided on his own, with his question to the jury, instead of letting the jury decide if there even was an open account or a contract. This is "jury tampering", and "incurable jury argument", as they call it, done by the judge himself.

#### **Exhibit 6. Request for Endorsement by the Court of "Refusals" and "Modifications"**

I am asking the judge to mark on paper, and sign, showing that I had requested other jury questions, and that he had denied them. The Rules<sup>23</sup> say he shall do this. HE DID NOT.

#### **Exhibit 7. Motion to Reconsider the \$59,000 Judgment**

Self explanatory. At issue was the "state of the account". This judge was required to have appointed an auditor:

Rule 172. Audit. "When an investigation of **accounts** or examination of vouchers appears necessary for the purpose of justice between the parties to any suit, the court **shall** appoint an auditor or auditors to state the accounts between the parties and to make report thereof to the court as soon as possible."

#### **Exhibit 8. Motion to Reconsider the \$62,000 "Frivolous Lawsuit" Sanction Against Me**

Self explanatory, and especially my First Amendment pleading in there. Judge, this America!

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<sup>23</sup> Rule 276. Refusals and Modification: "When an instruction, question, or definition is requested and the provisions of the law have been complied with and the trial judge refuses the same, the judge **shall** endorse thereon "Refused," and **sign the same officially**."

"If after reconsideration, this Court still feels that what I did was so sanctionable, please advise me as to other views I am also not allowed to voice, whether to this Court, on Appeal, or elsewhere, lest I unknowingly risk being subjected to further sanctions."

I am also once again asking Judge Banner to refer this whole matter to the U.S. Justice Department.  
NO RESPONSE.

#### Exhibit 9. Motion for New Trial

This is a pretty good summary of the entire case, including my complaint of jury tampering by the judge himself in going in and out of the jury room. NO RESPONSE.

#### Exhibit 10. Notice of Past Due Findings of Fact and Conclusions of Law

Self explanatory. Judge, how did you make all these determinations, when I had asked that these determinations be made by jury? The judge is of course required to make findings of fact and conclusions of law<sup>24</sup>, **BUT HE CHOSE NOT TO**. The following directly out of the document:

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

How, upon a pleading of an unpaid open account, and absent a finding to you by an Auditor under RCP Rule 172 regarding such claimed unpaid open account, and absent a finding by a jury as to the state of the account, what *findings of fact*, and what *conclusions of law* did you make to award a judgment totaling \$59,280.66 against me upon such pleading, an issue I had asked to be resolved by jury?

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

The judge's problem is, of course, contained in these two issues. Namely, he got caught.

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<sup>24</sup> Rule 297: Time to File Findings of Fact and Conclusions of Law: "If the court fails to file a timely findings of fact and conclusions of law, the party making the request shall, within thirty days after filing the original request, file ... . Notice of Past Due Findings of Fact and Conclusions of Law which shall be immediately called to the attention of the court by the clerk."

### Summary

Judge Banner, a public servant, **intentionally** (not accidentally) **assessed** judgments that were **unlawful**. He **knew** the assessments were **unlawful**, because he is a seasoned, senior judge. His **knowledge** of the **unlawfulness** of his **assessed judgments** is indicated again and again by his doing NOTHING upon the issues presented above.

Judge Banner, a public servant, **intentionally** (not accidentally) **denied** me **due process**, and my Right to be free of **retaliation** for having made a civil RICO claim. His **knowledge** of the **unlawfulness** of his **conduct** is indicated again and again by his doing NOTHING upon the issues presented above.

Consider the following. Someone drives at 100 miles an hour through a school zone. Does he know that what he is doing is unlawful? Now suppose the driver were a lawyer, or a judge.

Also, that courts have held that if state officials in some way retaliate against an individual for seeking redress through the courts, they have violated that person's right of access to the courts.<sup>25</sup>

A judge, assessing not one, but two unlawful judgments. A judge, denying me my right to due process and to be free from retaliation.

They did not catch our assistant DA with drugs until he went splat all over the road. This judge sent here from Dallas did not get caught until he splatted all over me.

The evidence of official oppression is there<sup>26</sup>. A public servant, a senior judge, he knew it was unlawful, AND HE KEPT ON DOING IT ANYWAY.

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<sup>25</sup> In Crowder v. Sinyard, 884 F.2d 804, 813 (5th Cir. 1989), cert. denied, 110 S. Ct. 2617 (1990), the court recognized that "courts have held that if state officials in some way retaliate against an individual for seeking redress through the courts, they have violated that person's right of access to the courts."

<sup>26</sup> For completeness, and to show the depth of this whole matter, please consider my total experience with crooked lawyers and judges:

One of my neighbors, now deceased, on his land trapped beavers, blew up their dam, flushed it all down on me, got himself a shyster lawyer, who sued me for supposedly building a dam in violation of the Texas Water Code, and washing sand, driftwood, and debris on him, who is entirely upstream.

We have a trial, likewise with wrong jury question, have a verdict of ZERO damages, and the attorney wants \$10,000 "legal fees", and have hearing after hearing about what the verdict "meant"

Along comes a big Dallas lawyer, and unbeknownst to me, solicits and ultimately becomes my lawyer in a civil racketeering suit. I find out he is a fink, and fire him, waving goodbye to my \$20,000 non-refundable retainer.

Sincerely,

Udo Birnbaum

Udo Birnbaum  
540 VZCR 2916  
Eustace, Texas 75124  
(903) 479-3929 phone (receives fax also)  
(903) 245-5018 cellular

AFFIDAVIT

I, Udo Birnbaum, certify that all statements in this brief are made upon personal knowledge acquired under the described circumstances and upon diligent investigation of the facts and the law, and that my statements are true, correct, and complete to the best of my ability, and that the exhibits I have provided are true copies of the originals (with obvious handwritten mark-ups for this complaint).

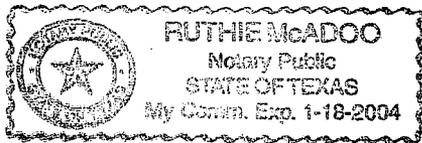
Udo Birnbaum  
Udo Birnbaum

STATE OF TEXAS

COUNTY OF VAN ZANDT

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

Given under my hand and seal of office this 9<sup>th</sup> day of September, 2003



Ruthie McAdoo  
Notary in and for The State of Texas

He winds up in involuntary bankruptcy, trying to show he has income, and is not broke, and makes up an \$18,000 'bill', backdates it 6 months, and files suit on me in the very same court that he was suing in the racketeering suit as a "pocket of corruption".

Along comes Judge Paul Banner, somehow assigned to this case, without an order of recusal or order of referral by 294<sup>th</sup> District Judge Tommy Wallace, but assigned anyway. Then does not show up till five (5) months later, and at his first hearing states that he has "never seen one [civil RICO case] that had any merit".

From there on things went downhill, as partially shown on this complaint, culminating in a \$62,000 Sanction for having made my civil RICO claim!

## Index

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Short synopsis of this complaint

Details of this complaint

### Appendix

1. Sanction Judgment "Order on Motions for Sanctions" (1)
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3. Request for Findings of Fact and Conclusions of Law (5)  
Motion for Sanctions (10)  
Response to the Motion for Sanctions - LET THE U.S. JUSTICE DEPT. DECIDE (15)
4. Jury Questions - "Court's Charge" (21)
5. The Attorney Retainer Agreement - the supposed basis of the lawsuit on me (25)
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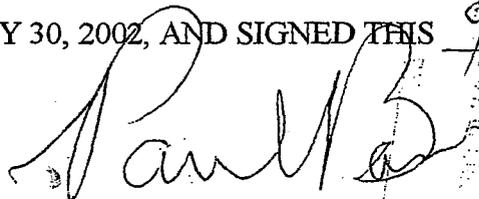
It is therefore, **ORDERED, ADJUDGED and DECREED** that the Counter-Defendants, Christina Westfall and Stefani Podvin are awarded damages as a sanction against and to be paid by defendant, Udo Birnbaum, to Christina Westfall and Stefani Podvin as follows:

- A. Christina Westfall and Stefani Podvin are awarded jointly and severally the amount of \$50,085.00 as reimbursement for their joint attorney's fees.
- B. Christina Westfall is awarded actual damages for her personal inconvenience in the amount of \$1,000.00, and she is further awarded punitive damages for the harassment caused to her in the amount of \$5,000.00.
- C. Stefani Podvin is awarded actual damages for her personal inconvenience in the amount of \$1,800.00, and she is further awarded punitive damages for the harassment caused to her in the amount of \$5,000.00.
- D. The Court denies the request for a finding of any sanctions to be awarded in favor of G. David Westfall, individually.
- E. The Court denies the request for a finding of any sanctions to be awarded in favor of Udo Birnbaum.

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

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

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

  
\_\_\_\_\_  
JUDGE PRESIDING

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!*

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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" time  
~~because I had filed with~~

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**The central Issue regarding this Judgment:**

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

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

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

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

**The Westfalls' "sanctionable facts" issue 1:**

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

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

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

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

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

**(The Westfalls' "sanctionable facts" issue 2)**

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

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

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

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

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

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

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

The Westfalls' "sanctionable facts" issue 3:

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

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

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

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

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

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

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

The Westfalls' "sanctionable facts" issue 4:

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

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

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

The Westfalls' "sanctionable facts" issue 5:

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

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

Further Westfalls' "sanctionable facts" issues:

(Movants starting page 2 paragraph II)

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

See Birnbaum *Response to Motion for Sanctions*.

Summary

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

**The central Issue regarding this Judgment:**

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

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

8

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

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

Respectfully submitted

*Udo Birnbaum*

UDO BIRNBAUM, *Pro Se*

540 VZ CR 2916

Eustace, TX 75124

(903) 479-3929

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

**CERTIFICATE OF SERVICE**

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

*fax net  
receiving*

*Udo Birnbaum*  
UDO BIRNBAUM

9



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.

12

- 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



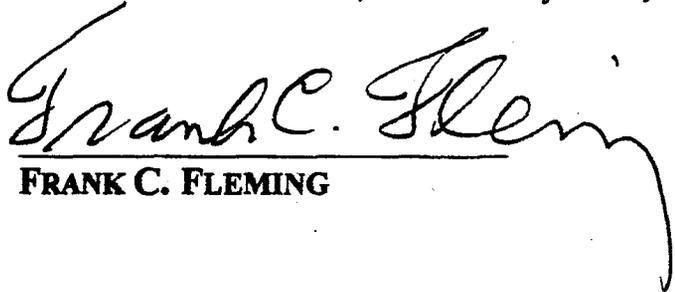
**FRANK C. FLEMING**  
State Bar No. 00784057  
PMB 305, 6611 Hillcrest Ave.  
Dallas, Texas 75205-1301  
(214) 373-1234  
(fax) 373-3232

**ATTORNEY FOR MOVANTS**

13

**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 9<sup>th</sup> 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

14



The Westfalls' "sanctionable facts" issue 2:

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

**FALSE:** Birnbaum raised the **normal defense** of denying the account **under oath** per Rule 185, RCP, and calling for **appointment of an auditor** per Rule 172. (see attachment)

Neither the "Law Office", G. David Westfall, Stefani Podvin, Christina Westfall, or Frank C. Fleming ever responded to any of Birnbaum's motions for appointment of such Auditor under Rule 172!

Birnbaum has a First Amendment Right to speak out on the corruption G. David Westfall, Christina Westfall, and Stefani Podvin are bringing upon him in this Court in the name of their "Law Office".

The Westfalls' "sanctionable facts" issue 3:

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

**FALSE AND CONCLUSORY:** Birnbaum used more precise statutory language. But the issue is clear: Only the **U. S. Justice Department** can determine whether the above were indeed running a racketeering enterprise in violation of 18 U.S.C. § 1961, *et seq.* out of the "law office" as Birnbaum complains. This Court has **no investigative capability**.

Birnbaum has a First Amendment Right to speak out against public corruption as he has seen it, **without fear of retaliation** masquerading as "sanctions".

*"Implicate the owner"* is ludicrous under the circumstances: "Plaintiff" is the alter ego of Westfall, his wife, and his daughter. Another issue for the **U. S. Justice Department**.

The Westfalls' "sanctionable facts" issue 4:

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

FALSE: Birnbaum was seeking the intervention of the Court from the beginning upon the issue of **fraud in bringing this suit**. Another issue for the **U. S. Justice Department**.

The Westfalls' "sanctionable facts" issue 5:

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

FALSE: Birnbaum was seeking the intervention of the addressees to bring this entire matter to the attention of the **U. S. Justice Department**.

**IN RESPONSE TO MOVANTS' "ACTIONS" (OF BIRNBAUM) ISSUES**

(Movants starting page 2 paragraph II)

Further Westfalls' "sanctionable facts" issues:

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

Issue II-1

*"Filing a frivolous third party claim pleading without factual support or a valid legal basis in Defendant/Third Party Plaintiffs 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."*

FALSE: Birnbaum has a First Amendment Right to speak out against public corruption as he has seen it, **without fear of retaliation** masquerading as "sanctions". Another issue for the U. S. Justice Department.

Issue II-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."*

FALSE: Birnbaum has a First Amendment Right to speak out against public corruption as he has seen it, **without fear of retaliation** masquerading as "sanctions". Another issue for the U. S. Justice Department.

Issue II-3

*"Filing a frivolous motion to recuse the Hon. Paul Banner for the purpose of causing inconvenience and/or harassment for Movants."*

FALSE: As pointed out at the trial by Hon. Paul Banner himself, Birnbaum has a procedural right to ask for recusal.

Birnbaum has a First Amendment Right to speak out against public corruption as he has seen it, **without fear of retaliation** masquerading as "sanctions". Another issue for the U. S. Justice Department.

Issue II-4

*"Filing frivolous and untimely motions to appeal the granting of the Movants' Motions for Summary Judgment granted by the trial court."*

Birnbaum has a First Amendment Right to speak out against public corruption as he has seen it, **without fear of retaliation** masquerading as "sanctions". Another issue for the U. S. Justice Department.

In response to [The Westfall] Movants "Wherefore, Premises Considered" paragraph, seeking 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*

18

- 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.*

Birnbaum has a First Amendment Right to speak out against public corruption as he has seen it, **without fear of retaliation** masquerading as "sanctions". Another issue for the **U. S. Justice Department**.

WHEREFORE, PREMISES CONSIDERED, Birnbaum prays that a hearing be set on the "fact" and "actions" issues raised in the *[Westfalls'] Motion for Sanctions*, so that he may more fully show that the interest of justice requires that this matter be turned over to the **U. S. Justice Department**. (See attached *Petition to U. S. Bankruptcy Judge* for details). The Westfalls are a menace to society.

Respectfully submitted

*Udo Birnbaum*

**UDO BIRNBAUM, Pro Se**

540 VZ CR 2916

Eustace, TX 75124

(903) 479-3929

att:

- *Motion for Appointment of Auditor Pursuant to Rule 172*
- *Petition to U. S. Bankruptcy Judge Harold C. Abramson Nov. 26, 2001 (incl. 68 page Appendix)*

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above document has this 10 day of May, 2002 been delivered as follows:

**REGULAR U.S. FIRST CLASS MAIL:**

- FRANK C. FLEMING, 6611 Hillcrest, PMB 305, Dallas, Texas 75205-1301
- THE HON. PAUL BANNER, c/o Sandy Hughes, First Administrative Judicial Region, 133 N. Industrial LB 50, Dallas, TX 75207 (no attachments)
- Judge Paul Banner, 24599 CR 3107, Gladewater, TX 75647 (no attachments)

**CERTIFIED MAIL, RESTRICTED DELIVERY**

**NO. 7000 0520 0022 8182 1532:**

- HON. HAROLD C. ABRAMSON, United States Bankruptcy Court, Northern District of Texas, 1100 Commerce Street, Rm. 12A24, Dallas, TX 75242-1496 (including attachments)

**HAND DELIVERY:**

- THE HON. PAUL BANNER, c/o Betty Davis, Court Administrator 294<sup>th</sup> District Court, 121 E. Dallas Street Room 301, 75103 (including attachments)
- DISTRICT CLERK, 294<sup>th</sup> District Court, Courthouse, Canton, TX 75103 (including attachments)

  
Udo Birnbaum

20



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

*Candi Scott*

No. 00-00619

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

§  
§  
§  
§  
§  
§

IN THE DISTRICT COURT

v.

294<sup>th</sup> JUDICIAL DISTRICT

UDO BIRNBAUM

VAN ZANDT COUNTY, TEXAS

COURT'S CHARGE

LADIES AND GENTLEMEN OF THE JURY:

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

1. Do not let bias, prejudice or sympathy play any part in your deliberations.

2. In arriving at your answers, consider only the evidence introduced here under oath and such exhibits, if any, as have been introduced for your consideration under the rulings of the court, that is, what you have seen and heard in this courtroom, together with the law as given you by the court. In your deliberations, you will not consider or discuss anything that is not represented by the evidence in this case.

3. Since every answer that is required by the charge is important, no juror should state or consider that any required answer is not important.

4. You must not decide who you think should win, and then try to answer the questions accordingly. Simply answer the questions, and do not discuss nor concern yourselves with the effect of your answers.

BY \_\_\_\_\_ DEP.  
DIST. CLERK VAN ZANDT CO. TX.  
02 APR 11 PM 5:57  
RECORDED

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

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

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

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

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

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

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**INSTRUCTION**

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

QUESTION NO. 1

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

INSTRUCTION:

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

ANSWER:

Answer in dollars and cents:

ANSWER: \$15,817.60

The question pre-supposes that there was a contract

Judge did not allow my question that if there had been an agreement, he had broken it long ago ("excused" issue)

LAW OFFICES OF  
G. DAVID WESTFALL, P.C.  
A Professional Corporation  
714 JACKSON STREET  
700 RENAISSANCE PLACE  
DALLAS, TEXAS 75202

Telephone: (214) 741-4741  
Fax: (214) 741-4746

May 5, 1999

Mr. Udo Birnbaum  
Route 1 Box 295  
Eustace, Texas 75124

"for insuring availability  
this is neither "open Account"  
or a contract

also see page 2

RE: Birnbaum v. Ray, et al.

for "non-payment"

Dear Mr. Birnbaum:

You have requested that I act as your attorney in the above referenced suit pending in the U.S. District Court for the Northern District of Texas. This letter sets forth the agreement concerning our representation of you. This agreement shall become effective upon our receipt of a counter-signed copy of this agreement and upon the payment of the retainer.

You agree to pay our firm a retainer fee of \$20,000.00, which is non-refundable. This retainer is paid to us for the purpose of insuring our availability in your matter. The retainer will be credited against the overall fee in your matter.

We have agreed to handle this matter on an hourly basis at the rate of \$200.00 per hour for attorney time and \$60.00 per hour for paralegal time. In addition, we have agreed that you will reimburse us for expenses incurred on your behalf, such as, but not limited to, filing fees, deposition expenses, photocopy expenses, travel expenses, and employment and testimony of expert witnesses, if necessary. I will not obligate you for any large expense without your prior approval. I would ask and you have agreed to pay expenses as they are incurred.

After the \$20,000.00 has been expended in time we will then operate on a hybrid type of agreement wherein we will lower our hourly rate to \$100.00 for

Exhibit  
"A"

25

DEPOSIT

153

attorney's time and \$30.00 an hour for paralegal time, but then charge as an additional fee a 20% contingency of the gross recovery in this case.

You will be billed monthly for the time expended and expenses incurred. Payment of invoices is expected within 10 days of receipt unless arrangements are made in advance. We reserve the right to terminate our attorney-client relationship for any of the following reasons:

← this was his only remedy

1. Your non-payment of fees or costs;
2. Your failure to cooperate and comply fully with all reasonable requests of the firm in reference to your case; or
3. Your engaging in conduct which renders it unreasonably difficult for the firm to carry out the purposes of its employment.

Fees and costs, in most cases, may be awarded by the Judge against either party. Sometimes, the court makes no order for fees or costs. Because fees and costs awards are totally unpredictable, the court's orders must be considered merely "on account" and the client is primarily liable for payment of the total fee. Amounts received pursuant to any court order will be credited to your account.

You have represented to me that the purpose of this litigation is compensation for damages sustained and that you are not pursuing this matter for harassment or revenge. In this regard, if settlement can be reached in this case whereby you will be reimbursed for all actual damages and I will be paid for my services, you agree to accept the settlement. Notwithstanding this agreement, however, I will not settle this cause of action without your prior approval and any settlement documents must bear your signature.

Inasmuch as I am a solo practitioner, we have agreed that I at my sole discretion may hire such other attorneys to assist in the prosecution of this matter as may be reasonably necessary.

26 16

I will keep you informed as to the progress of your case by sending you copies of documents coming into and going out of our office. Every effort will be made to expedite your case promptly and efficiently. I make no representations, promises or guarantees as to the outcome of the case other than to provide reasonable and necessary legal services to the best of my ability. I will state parenthetically, from what you have told me, you have a very good case. Various county officials and others involved in this matter should never have done what they apparently did. I will explain in detail the ramifications and affect of Section 1983 and Civil Rico when we next meet.

Please retain a copy of this letter so that each of us will have a memorandum of our understanding concerning fees and expenses.

Sincerely yours,

Accepted: Udo Birnbaum  
Udo Birnbaum

Date: 5-5-99

a "very good case" in a suing  
Texas district judges, and under  
the "racketeering" statute!  
(civil RICO)

(27) (17)

02 AUG 20 PM 12:59

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

IN THE DISTRICT COURT

294<sup>TH</sup> JUDICIAL DISTRICT

Vs.

BY \_\_\_\_\_ DEP

UDO BIRNBAUM

VAN ZANDT COUNTY, TEXAS

Vs.

G. DAVID WESTFALL  
STEFANI PODVIN  
CHRISTINA WESTFALL

**RULE 276 REQUEST FOR ENDORSEMENT BY THE  
COURT OF "REFUSALS" AND "MODIFICATIONS"**

**(of the "refusals" and "modifications" made by the Court to  
Birnbaum's requested jury instructions, questions, and  
definitions)**

TO THIS HONORABLE COURT:

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

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

28

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

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

#### Summary

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

Respectfully Submitted,

*Udo Birnbaum*

UDO BIRNBAUM

540 VZ 2916

Eustace, Texas 75124

(903) 479-3929

ref: **Above indicated documents as provided to the Court**

#### CERTIFICATE OF SERVICE

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

*Udo Birnbaum*

UDO BIRNBAUM

29



agreement; or in the absence of agreement, are usual, customary and reasonable prices for the things sold and delivered; and (3) that the amount alleged is unpaid. See *Maintain, Inc. v. Maxson-Mahoney-Turner, Inc.*, 698 S.W.2d 469, 471)

At issue was the state of the accounts. Plaintiff pleaded no other issue. And neither an auditor, a jury, or the Court ever made a finding of such state of the accounts.

### The jury issues are not relevant to plaintiff's pleadings

3. The only issues of Plaintiff submitted to the jury were in the nature of a breach of contract, which Plaintiff had not pleaded, and to which Birnbaum had objected. The issues actually submitted were as follows:

- *What sum of money, if paid now in cash, would fairly and reasonably compensate The Law Offices of G. David Westfall, P.C. for its damages, if any, that resulted from the Defendant, Udo Birnbaum's, failure to comply with the agreement between the Plaintiff and the Defendant?*
- *What is a reasonable fee for the necessary services of the Plaintiff's attorneys in this case, stated in dollars and cents?*

These issues are not relevant to Plaintiff's cause of action, i.e. the state of the accounts.

### "Even if"

4. Even if Plaintiff had pleaded in the nature of a breach of contract, which it did not, at issue would still be whether Birnbaum was excused by Plaintiff's prior breach of the "agreement", i.e. not billing monthly and not obligating to large expenses without Birnbaum's prior approval. Birnbaum submitted these issues to be determined by the jury, but such request was denied by the Court. Plaintiff certainly did not plead that he had complied with the agreement, and submitted no such issue to the jury. Hence the jury verdict, even if Plaintiff had pleaded "breach of contract", certainly would not support all the elements of a "breach of contract".

5. At issue was the state of the accounts. There certainly was no "sale", and even "delivery" is at issue. The legal "goods" (bringing a federal civil racketeering suit on judges!) were worthless. As this Court even lectured the jury, judges are immune from suit, and as this Court stated early on in this cause, it had never seen a civil racketeering suit that had any merit. (31)

Birnbaum submitted this issue of "no worth" for determination by the jury. But such request was also denied by the Court. The Court knew the "goods" plaintiff had "delivered" had no worth.

**Summary**

6. Staring at each other are two diametrically opposed verified pleadings as to the state of the accounts, with no report by an auditor, and no finding by the jury of the state of the accounts.

No judgment, under RCP Rule 301, "conforming to the pleadings and the verdict" is possible, because the verdict did not resolve the state of the accounts.

**PRAYER**

Birnbaum moves the Court to reconsider the judgment, and to declare a mistrial, because the jury made no finding of the state of the accounts, the very matter at issue.

Respectfully Submitted,

*Udo Birnbaum*

UDO BIRNBAUM

540 VZ 2916

Eustace, Texas 75124

(903) 479-3929

**CERTIFICATE OF SERVICE**

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

*Udo Birnbaum*

UDO BIRNBAUM

32



### The pleadings

2. **I did not bring this lawsuit.** Plaintiff, claiming "*systematic records*" and an unpaid account of \$18,121.10, brought suit falling under RCP Rule 185, "Suit on [sworn] Account", and no other cause of action. Birnbaum timely complied with the mandatory counterclaim, and denied the "account" under oath, claiming fraud, and moved for the mandatory appointment of an Auditor per RCP Rule 172. Such motion was, however, denied and no auditor's report of the "**state of the accounts between the parties**" was ever made to the Court or the jury.

At issue was the state of the accounts. Plaintiff pleaded no other cause of action.

### The proceedings

3. **I did not bring this lawsuit,** but denied, under oath, plaintiff's version of the state of the accounts. Had this Court appointed an auditor as was required under the circumstances, this Court would have seen that the Westfalls (G. David, Christina, and daughter Stefani Podvin) were lying in their pleadings, and that the Westfalls were indeed conducting a racketeering enterprise just as I was claiming, and that I was their latest victim.

Had this Court **timely denied** such Auditor, instead of considering for one year, the proceedings would not have expanded as they did, for I would have known that this Court would not accept a civil racketeering claim, and there would not have been this horrible waste of judicial resources, nor time for the Westfalls to run up such humongous "legal fees".

### The Westfalls' motions for sanctions

4. Noteworthy in the Westfalls' Motion for Sanction are the claims that I "*chose to make this lawsuit into [my] own public forum to make a mockery of all lawyers and the entire legal system*", and that I was "*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.*" Those were not the precise words I used under 18 U.S.C. § 1961 et seq. (civil RICO), but this is generally the issue of great public importance I raised in my defense regarding the conduct of the Westfalls. And of course all civil RICO defendants always claim the suit against them is "frivolous".

34

**My responses to the Motions for Sanctions**

5. In my responses I pleaded that "Only the U.S. Justice Department can determine whether the [Westfalls] were indeed running a racketeering enterprise ... as Birnbaum complains", and that "Birnbaum has a First Amendment right to speak out against public corruption as he sees it, without fear of retaliation masquerading as 'sanctions'."

This Court was no more entitled to weigh the evidence to make a finding that there was no RICO violation, and sanction me, than it was entitled to find that there was a RICO violation, and throw the Westfalls in jail. The Court has no investigative capability. Hence my call for the U.S. Justice Department.

**PRAYER**

I am being punishing for the sins of this entire proceeding. If, after reconsideration, this Court still feels that what I did was so sanctionable, please advise me as to other views I am also not allowed to voice, whether to this Court, on Appeal, or elsewhere, lest I unknowingly risk being subjected to further sanctions.

Respectfully Submitted,

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

att: **ORDER SUSTAINING MOTIONS FOR SUMMARY JUDGMENT**  
(Signed November 13, 2001)

**CERTIFICATE OF SERVICE**

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

*Udo Birnbaum* (35)  
UDO BIRNBAUM



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

No. 00-00619

FILED FOR RECEPTION  
02 AUG 28 PM 3:02

IN THE DISTRICT COURT  
NANCY YOUNG  
DIST. CLERK VAN ZANDT CO. TX  
294<sup>TH</sup> JUDICIAL DISTRICT  
BY \_\_\_\_\_ DEP  
VAN ZANDT COUNTY, TEXAS

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

Vs.

UDO BIRNBAUM

Vs.

G. DAVID WESTFALL  
STEFANI PODVIN  
CHRISTINA WESTFALL

**MOTION FOR NEW TRIAL**

TO THIS HONORABLE COURT:

COMES NOW Udo Birnbaum, moving for a new trial upon the following points:

1. For not appointing an auditor as required by RCP Rule 172
2. For not making Plaintiff abide by the rules of discovery
3. For granting summary judgment on my civil RICO claims and cross-claims
4. For allowing Plaintiff to submit "surprise" jury issues not supported by its pleadings
5. For not allowing submission to the jury of my "excused" issue
6. For not allowing submission to the jury of my "no worth" issue
7. For jury misconduct by the judge himself

**Point 1. For not appointing an auditor as required by RCP Rule 172**

Plaintiff, claiming "systematic records" and an unpaid account of \$18,121.10, brought suit falling under RCP Rule 185, "Suit on [sworn] Account", and no other cause of action. Birnbaum timely complied with the mandatory counterclaim, and denied the "account" under oath, claiming fraud, and moved for the mandatory appointment of an Auditor per RCP Rule 172. Such motion was, however, denied and no auditor's report of the "**state of the accounts between the parties**" was ever made to the Court or the jury.

Your Honor was required to appoint an auditor because of the clashing sworn affidavits by the two parties. Rule 172 is a wise rule, for it cuts through fraud in accounting, and saves precious judicial resources. And particularly so when there are complaints of "cooking the books", obstruction of discovery, and racketeering, as in this case. I had alleged that the Westfalls had

36

*447*

honed fraud and racketeering to a fine skill, and justice required that you appoint an auditor under the circumstances of this case, to testify before the jury, so that I could cut through their lying and obstruction of discovery.

In essence, what I am complaining of, is that not appointing an auditor as required by RCP Rule 172 deprived me of due process and a fair trial.

**Point 2. For not making Plaintiff abide by the rules of discovery**

The file is full of my complaints to you about all the Westfalls not complying with the rules of discovery. About me serving them with subpoena *duces tecum*, and them not bringing anything other than the clothes they were wearing. About them not answering questions even as to who owns the "law office", the records there, copies of computer records, etc. You never made them comply with discovery, and they were the ones that brought this suit!

In essence, what I am complaining of, is that not making the plaintiff abide by the rules of discovery deprived me of due process and a fair trial.

**Point 3. For granting summary judgment on my civil RICO claims and cross-claims**

Your Honor granting summary judgment on my civil RICO ("racketeering") claims and cross-claims kept me from showing the jury a viable alternative to the Westfalls' version of the facts. You never allowed me to tell the jury that what the Westfalls were doing was outlawed by RICO. How can the jury believe me, if you will not let me tell them about RICO, and let me show them all this other stuff I had about what the Westfalls were doing that was violating RICO. That all that stuff showed a "pattern of racketeering activity", and that this very suit they were bringing upon me was another "predicate act" in their "pattern of racketeering activity".

If you would have dismissed my civil RICO case for "failure to state a claim", i.e. that my claim was not pleaded correctly, that would be one thing. But finding that there was no evidence of a RICO violation, is another. My claim was that the stuff the Westfalls themselves were bringing was evidence of a "pattern of racketeering activity" of which I was the victim.

Your Honor, knowingly or unknowingly, violated the law in weighing the evidence, which no less than the Supreme Court of the United States says you cannot do. (Details in my responses to the various motions for summary judgment)

In essence, what I am complaining of, is that granting summary judgment on my civil RICO

claims deprived me of due process and a fair trial.

**Point 4. For Allowing Plaintiff to submit "surprise" jury issues not in its pleadings**

Plaintiff, claiming "*systematic records*" and an unpaid account of \$18,121.10, brought suit falling under RCP Rule 185, "Suit on [sworn] Account", and no other cause of action. Birnbaum timely complied with the mandatory counterclaim, and denied the "account" under oath, claiming fraud, and moved for the mandatory appointment of an Auditor per RCP Rule 172. Such motion was, however, denied and no auditor's report of the "**state of the accounts between the parties**" was ever made to the Court or the jury.

At issue was the state of the accounts. Plaintiff pleaded no other cause of action. And this issue, the state of the accounts, was not what you submitted to the jury. (See my Aug. 19, 2002 *Motion to Reconsider the \$59,280.66 Judgment* for details)

Your Honor allowed the Westfalls to pop me with surprise jury questions (which they did not submit until the third day of trial), just before submission to the jury. The issues you submitted to the jury were in the nature of a breach of contract, which Plaintiff had not pleaded, and to which questions I had objected (Exhibit C, Exhibit D):

- *What sum of money, if paid now in cash, would fairly and reasonably compensate The Law Offices of G. David Westfall, P.C. for its damages, if any, that resulted from the Defendant, Udo Birnbaum's, failure to comply with the agreement between the Plaintiff and the Defendant?*
- *What is a reasonable fee for the necessary services of the Plaintiff's attorneys in this case, stated in dollars and cents?*

These issues are not relevant to Plaintiff's cause of action, i.e. the state of the accounts.

In essence, what I am complaining of, is that allowing submission of these unpleaded jury issues deprived me of due process and a fair trial.

**Point 5. For not allowing submission to the jury of my "excused" issue**

This matter is more fully developed in *Defendant Birnbaum's Objections to Plaintiff's Requested Jury Instructions* (Exhibit C). My requested issue, directly from *Texas Pattern Jury Charges, Business, Consumer, Insurance, Employment*, was as follows:

**Was Udo Birnbaum's failure to comply excused?**

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

38

This issue is again shown in *Birnbaum's Objections to today's Plaintiff's Court charge*, handwritten, filed, and served, just after plaintiff submitted its surprise jury issues on the third day of trial, just before submission to the jury. (Exhibit D)

In essence, what I am complaining of, is that not allowing submission of this "excused" issue deprived me of due process and a fair trial.

**Point 6. For not allowing submission to the jury of my "no worth" issue**

My counterclaim was that the Westfalls were violating the Texas Deceptive Trade Practices Act (DTPA), i.e. that they were engaging in "false, misleading, or deceptive practices" that I relied on to my detriment. *Texas Pattern Jury Charges, Business, Consumer, Insurance, Employment* specifies jury instructions as follows:

*"False, misleading, or deceptive act" means any of the following:*

- a) Failing to disclose, etc; or*
- b) Representing that services had or would have a characteristic that they did not have.*

I claimed that the services did not have the *characteristic of worth*, and substituted that word into my requested instruction exactly as follows, even citing the authority for my jury issue exactly as follows (see the record for detail):

- a) Failing to disclose, etc; or*
  - b) Representing that services had or would have worth that they did not have.*
- PJC 102.2 Description of Goods or Services or Affiliation of Persons (DTPA § 1746(b)(5))*

At one point in the trial Fleming, the Westfalls' attorney, was lighting into me, something about me supposedly "harassing" either the Westfalls or you by having asked for your recusal, and the jury not even knowing what a "recusal" was. You correctly lectured that asking for recusal of judge was one of those rights every American has because judges are absolutely immune from suit for everything they do in their "judicial capacity", i.e. sitting as a judge. This however made me a new target of Fleming, namely that I was some sort of vicious monster suing honest friendly judges as they were seeing in you, who were absolutely immune from suit.

However if Westfall was charging me for "legal services" for suing judges who are absolutely immune, then even if he did a whole lot of "stuff", his "services" would still have the *characteristic of no worth*, and submitting this question to the jury would have certainly informed the jury that there was something wrong with all that "legal fee" stuff Westfall was doing. 39

I was entitled to submission of the "no worth" instruction, unless Your Honor had already

found that, as a matter of law, Westfall's services had *no worth*, because of what he was doing, namely suing judges, and under the racketeering statutes at that!

In essence, what I am complaining of, is that not allowing my "*no worth*" jury issue deprived of due process and a fair trial.

**Point 7. For jury misconduct by the judge himself**

Your Honor was over-reaching with the jury, such as giving them "grandfatherly" type advice, telling them about "great historical" matters, and mingling with them as described in the two attached affidavits. There is no doubt in my mind that you made the jury like you, and not see what I was trying to show about Westfall abusing the judicial system, and not see that this very suit they brought was a fraud.

Your Honor should have been at the bench as the jurors left and came back into the courtroom, instead of welcoming them into and out of the jury room by yourself as if you were their personal servant. Your Honor should have used a bailiff or some other designated officer. I have never seen nor heard of a judge mingling with jurors as you did at this trial. (Affidavit Exhibit A) And on numerous occasions you actually entered the jury room and did not come back out until 5 or 10 minutes later. (Affidavit Exhibit B)

And I clearly remember Your Honor's lengthy lecture to the jury about judges being, for all practical purposes, absolutely immune from suit. Remember, this issue came up in the context of the Westfalls trying to show that I had somehow "harassed" them, or Your Honor, by asking for your recusal. You did bring out that asking for recusal of the judge is a fundamental American right, because that is effectively the only recourse one has because judges are absolutely immune for what they do in a judicial capacity.

However this lecture not only elevated you and all other judges in the eyes of this jury, but also allowed the Westfalls to harp, to this jury, that I had to be some sort of viscous person that has to be "stopped" because he was suing honest "grandfatherly" judges such as they have just seen in you.

In essence, what I am complaining of, is that Your Honor Yourself, knowingly or unknowingly, turned this jury against me.

40

HTT

**PRAYER**

WHEREFORE, upon the points designated above, Birnbaum moves for a new trial.

Respectfully Submitted,

*Udo Birnbaum*

UDO BIRNBAUM

540 VZ 2916

Eustace, Texas 75124

(903) 479-3929

STATE OF TEXAS

COUNTY OF VAN ZANDT

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

Given under my hand and seal of office this 28 day of August 2002.

*Ruthie McAdoo*

Notary Public



**CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of this document has been served via Regular Mail and FAX on this the 28 day of August, 2002, on Frank C. Fleming, Law Office of Frank C. Fleming, 6611 Hillcrest, Suite 305, Dallas, Texas 75205-1301.

*Udo Birnbaum*

UDO BIRNBAUM

(41)

*TTCC*

## AFFIDAVIT OF UDO BIRNBAUM

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

From April 8, 2002 through April 11, 2002, I was present in the courtroom of the 294<sup>th</sup> District Court of Van Zandt County during the entirety of the Westfall/Birnbaum trial. I have also witnessed numerous other proceedings, including numerous other trials, in this courtroom over the last seven (7) years, with various judges presiding.

There are five (5) doors that provide entry/exit to this courtroom. Full size doors, each with a small glass window, are located at the back of the courtroom, and at the front, just to the left of the judge's bench. The side entry/exit is through a double swinging door, each panel of the door also having a small glass window. These three doors are available for everyone in the courtroom, although the front door is the one favored by lawyers, judges, and other court personnel. There is also a narrow door with no glass window right behind the judge's bench. I have reason to believe this narrow door remains locked at all times, and it certainly was not used anytime during this trial.

The fifth door, without a window, is right in front of the jury box, and next to the witness stand, which is immediately to the right of the judge. I have never, at any previous time, seen this [fifth] door used by anyone other than the jurors, the bailiff, or some clerk assisting the judge, except when prisoners, usually handcuffed, were being maneuvered before the bench.

**I have never seen a judge go into or come out of this door, at any time, for any reason, jury present or not, except at this trial.**

I knew that one could somehow go through this [fifth] door and come out next to the stairway going down from the second floor, for I had seen jurors, as they came up the stairs, go in there, only to come out this [fifth] door, upon cue of the bailiff or some other officer.

What is noteworthy about this trial is that there was **no bailiff, or other officer** leading the jury into and out of this [fifth] door. Except during jury voir dire, there was no court personnel at all during the entire trial, except for the court reporter, and the judge himself.

The judge presiding at this trial, known to me to be Judge Paul Banner, himself would lead the jury back into the jury box. I have never seen any other judge do this. It is clear to this observer, that this judge wanted the jury to like him. Judge Banner should have been seated at his place, "business" instead of "butter", as the jury entered the courtroom.

But what I did not fully recognize at the time was the matter of Judge Banner going into this [fifth] door on numerous occasions and not coming out again until **five or ten minutes later**,

42

Exhibit A

UEA

even on the day of deliberation. I was at that time under the mistaken belief that this door went to a hallway to some exit, with the jury room somehow off to the side, for I had never been in there.

But I have since found out that this door leads **directly into the jury room**, and that Judge Banner was **actually going into the jury room, with the jury in there**, for the jury came out just after him, and also because the jury had not been milling around in the halls. (Attached is a to scale sketch of the above described jury/courtroom area based on measurements I took.)

THERE IS NO DOUBT IN MY MIND THAT JUDGE PAUL BANNER WAS ENGAGED IN PRIVATE CONVERSATION WITH THE JURY IN THE JURY ROOM OF THE VAN ZANDT COURTHOUSE ON APRIL 10, 2002 AND APRIL 11, 2002 DURING THE WESTFALL/BIRNBAUM TRIAL.

There were other witnesses in the courtroom, the identity of whom I am not revealing at this time by providing their affidavit or their names, for fear of retaliation against them.

Further affiant sayeth not.

Udo Birnbaum  
UDO BIRNBAUM

STATE OF TEXAS

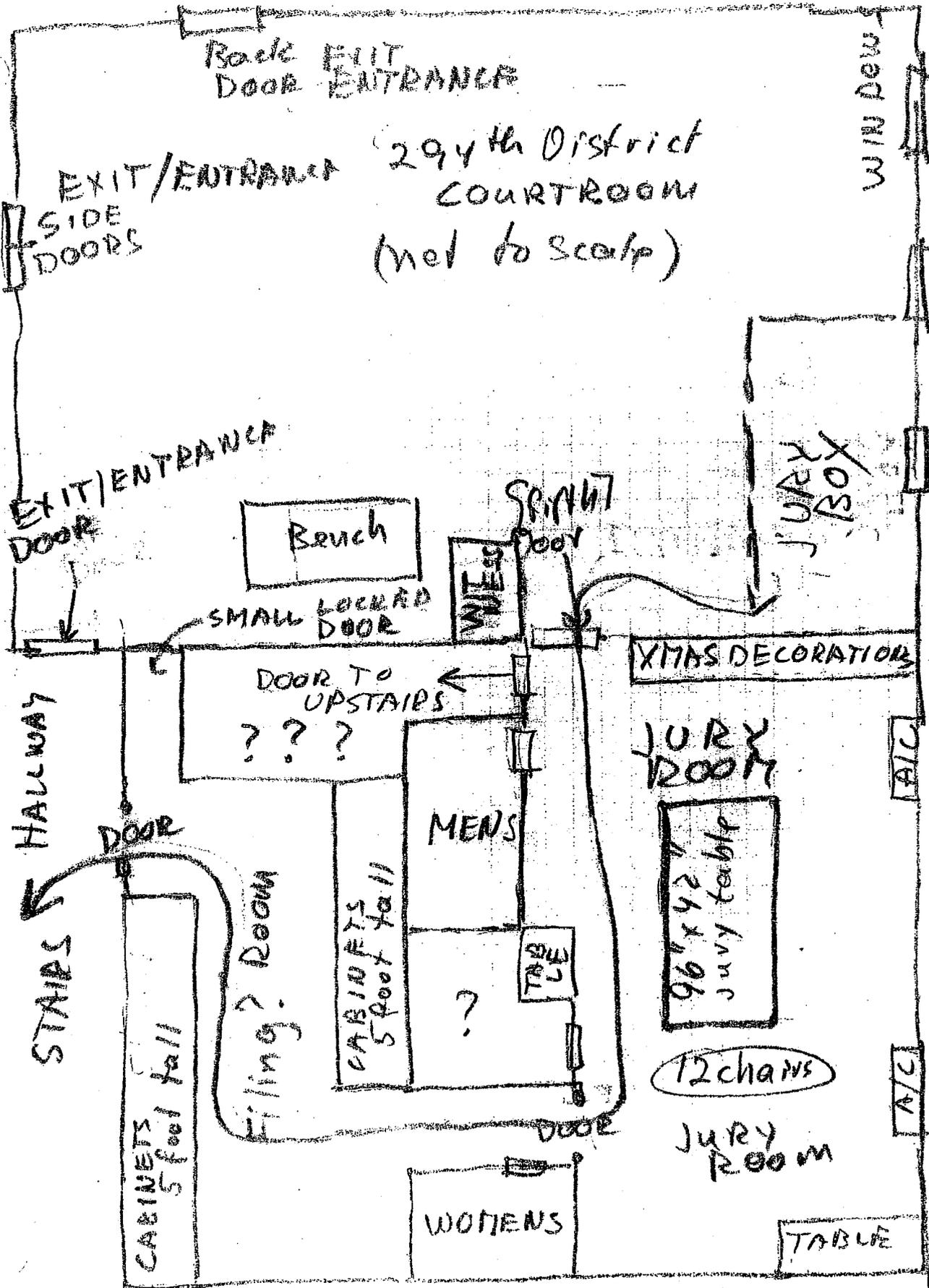
COUNTY OF VAN ZANDT

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

Given under my hand and seal of office this 28 day of August 2002.

Ruthie McAtee  
Notary Public





SCALE: 1/4" = 1 foot

44

AFFIDAVIT OF JERRY MICHAEL COLLINS

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

On APRIL 10, 2002 I WAS PRESENT ON THE 3<sup>RD</sup> FLOOR OF THE VAN ZANDT COUNTY COURTHOUSE AND WITNESSED A PRIVATE, WHISPERING CONVERSATION BETWEEN A FEMALE JUROR AND A WHITE HEADED MAN.

I KNEW THE NAME OF THE FEMALE TO BE KATHY SUE BOUGH AND THE WHITE HAired MAN TO BE JUDGE PAUL BANNER.

I AM CERTAIN OF THE NAME OF THE WHITE HAired MAN INgAGED IN THAT CONVERSATION BECAUSE THE SAME MAN PRESIDED OVER THE TRIAL OF BIRNBAUM/WESTFALL WHICH WAS IN SESSION ON THE DAY I WAS IN THE VAN ZANDT COUNTY COURTHOUSE AS A WITNESS.

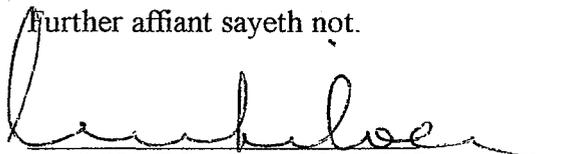
I AM CERTAIN OF THE NAME OF THE FEMALE JUROR BECAUSE SHE WAS ONE OF THE TWO FEMALE FUNERAL ATTENDANTS PRESENT AT THE FIVE HOUR EXHUMATION OF MY DAUGHTER AT THE EASTLAND CEMETERY IN EASTLAND, TEXAS IN APRIL 1999. (SEE ATTACHED PHOTOS)

AFTER THE EXHUMATION KATHY SUE BAUGH AND HER ASSISTANT TRANSPORTED MY DAUGHTER'S REMAINS FROM THE EASTLAND CEMETERY IN EASTLAND TEXAS TO THE SOUTHWEST INSTITUTE OF FORENSIC SCIENCES IN DALLAS. I FOLLOWED THE FUNERAL CAR FROM EASTLAND TO DALLAS.

A FEW DAYS LATER, AFTER THE AUTOPSY WAS COMPLETED, KATHY SUE BAUGH AND HER ASSISTANT TRANSPORTED MY DAUGHTER'S REMAINS FROM DALLAS TO THE MURRAY CEMETERY IN CARBON TEXAS WHERE I WAS WAITING FOR THE FINAL BURIAL, WHICH TOOK ANOTHER HOUR.

THERE IS NO DOUBT IN MY MIND THAT JUROR KATHY SUE BAUGH AND JUDGE BANNER WERE INgAGED IN A PRIVATE CONVERSATION IN THE HALL OF THE VAN ZANDT COUNTY COURTHOUSE ON APRIL 10, 2002 DURING THE WESTFALL/BIRNBAUM TRIAL.

Further affiant sayeth not.

  
JERRY MICHAEL COLLINS

45  
Exhibit  
B

45

STATE OF TEXAS

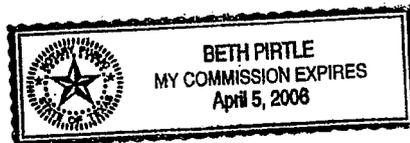
COUNTY OF GUADALUPE

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

Given under my hand and seal of office this 24 day of August 2002.

Beth Pirtle

Notary Public



46

45

KATHY SOEBAUGH  
4/99



KATHY SUE  
BAUGH - 4/99



KATHY SUE  
BAUGH - 4/99



47



Details in:

***Request for Findings of Facts and Conclusions of Law***

***Motion to Reconsider the \$59,280.66 Judgment***

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

***Motion for New Trial***

***Supplement to Motion for New Trial***

***First Amended Notice of Appeal.***

Respectfully submitted

*UDO BIRNBAUM*

UDO BIRNBAUM, *Pro Se*

540 VZ CR 2916

Eustace, TX 75124

(903) 479-3929

**CERTIFICATE OF SERVICE**

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

*UDO BIRNBAUM*

UDO BIRNBAUM

49