

CAUSE NO. _____

UDO BIRNBAUM

Plaintiff

v.

FRANK C. FLEMING

Defendant

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IN THE DISTRICT COURT

294th JUDICIAL DISTRICT

VAN ZANDT COUNTY, TEXAS

ORIGINAL PETITION

Comes now UDO BIRNBAUM ("Birnbaum", "I"), Plaintiff, complaining of FRANK C. FLEMING ("Fleming"), Defendant, and for cause of action would respectfully show the court the following:

Udo Birnbaum is an individual residing in Van Zandt County, Texas. He may be served with process at 540 VZ CR 2916, Eustace, Texas 75124.

Frank C. Fleming is an individual who may be found at 5646 Milton, Suite 520, Dallas, Texas 75206. His mailing address is PMB 305, 6611 Hillcrest Ave., Dallas, Texas 75205-1301.

Birnbaum brings this cause under 18 U.S.C. § 1964(c) ("civil RICO") complaining of injury stemming from a pattern of racketeering activity as outlawed by 18 U.S.C. §1961 *et seq.* ("RICO").

INTRODUCTION

1. Discovery is intended to be conducted under Level 3. (RCP Rule 190.4)
2. The Racketeer Influenced Corrupt Organizations act ("RICO", 18 U.S.C. § 1961 et seq.) goes far beyond what we normally think of as organized crime settings. What is outlawed is certain conduct, by any person, under any setting outlawed by RICO, i.e. under certain relationships between "person", "enterprise", "scheme", "predicate acts", "pattern of racketeering activity", etc. Furthermore RICO provides a **private cause of action** ("civil RICO") for injury "by reason of" the RICO violation.
3. Although the RICO statute comes with its own definitions of the above terms, judicial interpretations determine the law. A clear view of current law is, however, contained in "civil

RICO pattern jury instructions" such as those used in the U.S. Fifth Circuit, made an attachment to this pleading as Exhibit "A". It should be noted that RICO has no "elements" in the customary tort context, but only "issues of fact" as to the phrases in the law as interpreted by the courts.

4. This pleading pleads to each jury "issue of fact" in the Fifth Circuit civil RICO pattern jury instructions.

5. Each named act of "racketeering activity" is by reason of violation of 18 U.S.C. § 1341 or 1343, the mail fraud statutes, which are among the enumerated violations qualifying as acts of "racketeering activity" ("predicate acts") under RICO. Each violation is by not providing "honest service" which Defendant owed the court, the plaintiff, and the State of Texas, but rather engaging in a scheme of lies and deception to deprive of such required "honest service", and executing the scheme through use of the mails (See United States v. Brumley, 116 F.3d 728, 733 5th Cir. 1997 en banc). The applicable law (emphasis added):

"It shall be **unlawful** for **any** person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt". 18 U.S.C. § 1962(c).

"**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")

Note: State courts have concurrent jurisdiction to consider civil claims arising under RICO. Tafflin v. Levitt, 493 U.S. 455 (1990).

Sec. 1341. - Frauds and swindles: Whoever, having devised or intending to devise any scheme or artifice to defraud ... places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service ... or takes or receives therefrom ... shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both. 18 U.S.C. §1341 (mail fraud)

Definition: "For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services". 18 U.S.C. § 1346

6. Birnbaum, in asserting this claim, is in conformance with the Congressional intent of civil RICO as established by the Supreme Court of the United States in Rotella v. Wood et al. (2000), i.e. 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".

7. Having diligently investigated both the facts and the law, Birnbaum has found that the various matters he is complaining of are not isolated garden variety wrongs, but that the evidence shows he is indeed the victim of conduct proscribed by 18 U.S. C. § 1961 et seq. ("RICO")

THE RICO SCHEME

8. The Defendant's scheme was to use his attorney license to "participate in the conduct of the affairs" of the 294th District Court of Van Zandt County, Texas to prosecute a fraudulent "attorney fee" case that he knew to be fraudulent, and to do so by a scheme to deprive of the honest service that he owed as an officer of the court, and to create more "attorney fees" in the process. The scheme and "pattern of racketeering activity" can be clearly seen from the "predicate acts" of "racketeering activity" as shown below.

THE VIOLATION OF RICO

(from U.S. Fifth Circuit civil RICO pattern jury instructions, Exhibit "A")

9. The 294th District Court of Van Zandt County, Texas is an "enterprise".
(as defined in RICO)
10. The "enterprise" engaged in, or had some effect upon, interstate or foreign commerce.
(Mails letters, uses interstate capable communications equipment, uses equipment made in other states, etc)
11. The Defendant was employed by or associated with the enterprise.
(As an officer of the court)
12. The Defendant participated in the operation or management of the enterprise itself in such a way, directly or indirectly, as to have played some part in directing the affairs of the enterprise. (He is part of the court "process" as an attorney "officer of the court")
13. The Defendant in fact engaged in the pattern of racketeering activity as the plaintiff claims. (As shown by the acts of "racketeering activity" shown below)
14. The Defendant's association with or employment by the enterprise facilitated his commission of the racketeering acts. (He could not have committed the "predicate acts" of "racketeering activity" except as an attorney officer of the court)

15. The commission of these predicate acts had some direct or indirect effect on the alleged enterprise. (Made the court issue judgment, sanction, issue process, take up its time)

CAUSATION OF DAMAGES

16. Plaintiff's damage stemmed from both the predicate acts and the pattern of racketeering activity. Damage was by unlawful judgments and sanctions produced upon him and expenses incurred regarding the referenced case, all "by reason of" Defendant's RICO violation.

THE "PATTERN OF RACKETEERING ACTIVITY"

17. The acts of "racketeering activity" shown below constitute a "pattern of racketeering activity" within the meaning of 18 U.S.C. § 1961(5). The acts complained of are not isolated events, but relate to each other by virtue of a common participant, a common method of commission, and the common purpose and common result of defrauding of honest service by a pattern of deception and lying by an officer of the court).

THE PREDICATE ACTS OF 'RACKETEERING ACTIVITY

(depriving the Court, Birnbaum, etc. of "honest service"
and using the mail to execute the scheme)

predicate act 1

Fleming prosecuting a cause that he knew was fraudulent

18. Although Fleming did not initially represent The Law Offices of G. David Westfall, P.C. (*No. 00-619, The Law Offices of G. David Westfall, P.C. vs. Udo Birnbaum*) in filing that suit (filed as a suit on a claimed unpaid OPEN ACCOUNT), Fleming knew through his association with G. David Westfall ("Westfall", deceased) that the suit was fraudulent. In any case Fleming learned at the depositions of Westfall on July 3, 2001, and at the depositions of his clients (Westfall's wife and daughter) on July 20, 2001, that the matters in the Law Office pleadings were all fraud:

- That Westfall did not have "*systematic records*" and billing as he was pleading.
- That Westfall had no intention of abiding by his agreement to honestly and openly bill monthly.
- That it was not an "open account" at all, but a \$20,000 prepaid account for attorney's fees.
- That Westfall's remedy if the account was used up was limited to quitting working, as stated in the agreement.

- That Westfall had broken the agreement long ago.
- That Westfall had been fired long ago.

19. Furthermore Fleming learned from the transcript of Westfall's involuntary bankruptcy trial (provided to Fleming as summary judgment evidence) that Westfall, his wife, and his daughter ("The Westfalls") had all the money coming out of one giant Law Office slush fund account, and that Westfall had a pattern of fraud.

20. Knowing all this, Fleming nevertheless took the case, and continued the case to trial, and used the mail in the process. The Court, Birnbaum, and the State of Texas were deprived of "honest service" on the part of Frank C. Fleming as an officer of the court.

predicate act 2
Fleming's obstruction of discovery

21. The file is replete with Fleming's documents obstructing discovery: Incomplete answers, lies, excuses as to why I could not get something. Fleming's "clients" upon subpoena duces tecum for deposition would not bring anything with them except the clothes they were wearing. On request for production, Fleming's answer would be "permitted", but nothing would be produced. What Fleming was concealing was that his "clients" (Westfall's wife and daughter) were deeply involved in all of Westfall's doings, and that Fleming knew it, for he was working out of their law office, yet still maintaining an external PMB (personal mail box?) as an address.

22. Westfall had of course been acting in similar dishonest manner to obstruct discovery. So I kept submitting requests for production and complaining to the court. One of the things I asked for were the accounting records for the legal fees they were trying to get for prosecuting their "unpaid open account" suit against me. (Fourth request for production to the Law Office). I was trying to show that they were not maintaining accounting at all.

23. So what does Fleming do when he becomes "co-counsel" (more on that below) for the Law Office? Same thing. Not only that, but Fleming wants me sanctioned for trying to get production that Westfall had been obstructing. Then at trial Fleming suddenly springs a surprise document purporting such "accounting" as I had been trying to get from him all along! Fleming was defrauding me of timely evidence that the "Law Office" had no honest accounting.

24. The Court, Birnbaum, and the State of Texas were again deprived of "honest service" on the part of Frank C. Fleming as an officer of the court.

predicate act 3
Fleming's motions for summary judgment

25. But nothing had more direct impact than the matters surrounding Fleming's motion for summary judgment against my civil RICO claims. Fleming's motion was nothing less than another scheme to deprive (defraud) me, namely of my right to show my best cause and best evidence, i.e. that the Westfalls have a history of schemes to defraud, and that those schemes themselves actually violated RICO, giving me my civil RICO cause. How else can I show that I was injured "by reason of" their "pattern of racketeering activity", if I am not allowed to show their "pattern of racketeering activity", and to give the jury a "window" to recognize the racketeering right in front of them, particularly that Westfall's very "collection suit" stemmed from fraud Westfall perpetrated in involuntary bankruptcy proceedings against him. (Note: Fraud in bankruptcy qualifies as predicate acts under RICO)

26. Fleming's motion is so full of falsities and omissions that space in this pleading does not permit addressing them. Fleming's schemes are, however, fully shown in Birnbaum's responses to Fleming's summary judgment motions.

27. One lie by Fleming, however, stands out. Fleming, to get one of his clients, Stefani Podvin, out of the RICO claims against her, tells the court that she is an *"independent contractor to the law firm ... embroiled in alleged RICO violations"*, and *"There is no evidence that Podvin participated in the operation or management of the enterprise [The Law Office]"*, when in fact she was Westfall's daughter, and OWNER of the Law Office, as evidenced by her own testimony upon documents she had signed each of the last eight (8) years designating Westfall as "director" of The Law Office. And Fleming, as her attorney, heard it at the deposition! The same evidence (that she is the OWNER) is also in Westfall's testimony in the transcript of the bankruptcy proceedings, designated and provided to Fleming as summary judgment evidence.

28. Similar lies are in Fleming's summary judgment motion regarding his other client, Westfall's wife. Fleming tells the court that *"There is no evidence that Christina Westfall ever received any income from Birnbaum or the alleged racketeering enterprise"*, when the bankruptcy testimony of Westfall shows that neither he nor his wife Christina Westfall maintained private checking accounts, and that everything, including personal bills, came out of a single Law Office account.

29. And as shown in Birnbaum's summary judgment responses, SUMMARY JUDGMENT IS OF COURSE NOT EVEN AVAILABLE UNDER CIVIL RICO. Moreover, Fleming never even indicated as to which "element" I supposedly had no evidence, as Fleming was required to do by the Rules of procedure.

30. Fleming knew that Westfall's case was fraud, yet he participated with Westfall in his fraudulent case. The Court, Birnbaum, and the State of Texas were again deprived of “honest service” on the part of Frank C. Fleming as an officer of the court.

predicate act 4

Fleming's sudden appearance as counsel for the trial

31. Fleming and his clients (Westfall's wife and daughter) had been released by grant of summary judgment. Then suddenly the day before trial is to start, Fleming suddenly appears under cloud of "co-counsel", puts in a motion in limine for among other things, that I could not present any evidence or document of any person not actually at trial the next day (matter no. 2).

32. With "co-counsel" now on board, even the presence of Westfall (previously self-representing) was no longer a given, and even the evidence in the deposition of Westfall I had taken would no longer be "admissible". What a scheme! (I did, however, hurriedly drive to Dallas and serve Westfall with subpoena to be present at trial)

33. THERE IS NO DOCUMENT ON FILE OF FLEMING APPEARING IN BEHALF OF THE LAW OFFICE OR WESTFALL!

34. At the start of the second day of the actual trial, Fleming comes up to the bench, telling the judge *"I have had a falling out with my client [Westfall], and want to withdraw as counsel."* Everybody stares at each other, until I finally state *"I object"*. The judge looks at everybody and everybody stares at each other some more. Then Fleming states *"Just kidding, Mr. Birnbaum"*. Everybody stares at each other some more. The judge says *"I was not going to let him withdraw anyway."* Then everybody goes away as if nothing had happened.

35. Fleming knew that Westfall's case was fraud, yet he participated with Westfall in his fraudulent case. The Court, Birnbaum, and the State of Texas We were again deprived of “honest service” on the part of Frank C. Fleming as an officer of the court.

predicate act 5

Fleming keeps me from telling the jury of Westfall not providing discovery

36. My whole case had been about deception and fraud by Westfall. Just because Fleming got by with obstructing evidence does not make Fleming's obstruction of evidence right. I not only had the right to obtain the evidence, but certainly the right to tell the jury that the Westfalls were continuing the same pattern of conduct right in front of them! Evidence is in Fleming's Motion in Limine, specifically matter No. 1 and 22, and in my various motions to compel discovery of Westfall and Fleming.

37. The Court, Birnbaum, and the State of Texas were again defrauded of "honest service" on the part of Frank C. Fleming as an officer of the court.

predicate act 6

Fleming knowingly submitting wrong jury issues

38. The Law Office pleading was for a debt owed on a sworn account. Yet the jury issues submitted by Fleming was for breach of contract, which he had not pleaded. When Birnbaum wanted to put in the jury issue as to whether he was "excused" by reason that Plaintiff had previously breached the letter contract, Fleming came up with surprise jury issues, on the third day of trial, just before the case went to the jury, fully knowing (by my "excused" issue) that he had not pleaded nor proved all the elements of his case, namely that Westfall had lived up to the contract.

39. Neither Birnbaum, nor the Court, nor the jury, nor the State of Texas received "honest service" from Fleming as an officer of the court. Fleming deprived all of "honest service".

predicate act 7

Fleming lying and just making things up in closing argument

40. *"When you're analyzing what the truth is, just like those judges in that 12(b)(6) motion had to analyze what the truth is".* Upon a federal 12(b)(6) motion judges do not *"analyze what the truth is"*, and Fleming knows it. What they do is to take everything in the claim to be true, and it still did not "state a claim" because of judicial immunity. The suit had no worth!

41. *"It didn't turn out to be true, as far as what the federal magistrate and the federal judge thought."* Westfall's civil RICO suit (the one he was trying to get \$18,121.10 more "legal fees" on top of the \$20,000 up front prepayment) was dismissed on 12(b)(6) judicial immunity grounds, not because it was not true, as Fleming was telling the jury. Judges are immune from suit. Westfall's "legal services" had NO WORTH, AND FLEMING KNEW IT.

42. *"And Mr. Collins got his message. He changed He changed his lawsuit".* Fleming is saying I should have let Mr. Westfall "change" my lawsuit (by dropping judges) just like he "changed" Collins'. Well, Westfall did not drop all the judges, and got sanctioned \$2500 for being the *"cornucopia of evil that is plaguing the judicial system"* even after he "changed" it. Fleming is hiding from the jury that Westfall's two civil RICO suits (mine was one) HAD NO WORTH, and he knew it, and is hiding all of this from the jury.

43. *"But Mr. Birnbaum has alleged a lot of conspiracies all throughout his 15 years of living here in Van Zandt County. Not one of them has come true yet."* (Fleming's last statements before jury deliberations) Not true, and there was no testimony to this effect. Fleming just keeps making up more "facts".

44. Neither Birnbaum, nor the Court, nor the jury, nor the State of Texas received "honest service" from Fleming as an officer of the court. Fleming deprived all of "honest service".

predicate act 8

Fleming's motion for judgment on the verdict

45. Fleming's Motion (and attached Judgment, ultimately signed by the Court) is unlawful, for it does not conform to Rule 301 of the Rules of Civil Procedure. Fleming had pleaded an unpaid "open account", Birnbaum had pleaded fraud and racketeering, and the jury of course made no finding of the "state of the accounts", for they were not asked to make such finding. No judgment under Rule 301 *"conforming to the pleadings, the nature of the case proved and the verdict"* is possible under the circumstances, yet Fleming put one in anyway.

46. The Court, Birnbaum, and the State of Texas were again deprived of the "honest services" that Frank C. Fleming, as an officer of the court, owed everybody.

predicate act 9

Fleming's motion for sanctions [on Birnbaum]

This document continues the pattern of lies and deceptions:

47. *"This lawsuit was brought by Plaintiff to collect on overdue legal fees for legal services rendered to the Defendant at Defendant's request".* All of a sudden Fleming is away from the breach of contract, and back at "open account", which he had not proved, for he had not submitted that issue to the jury. Besides that, "open account" for "legal fees" is ludicrous with a \$20,000 prepayment, and Westfall's remedy, Westfall's only remedy, as stated in the agreement, was quitting working when the money ran out.

48. Fleming accuses me of not having made a "normal defense", when I had made the proper defense of denying the account under oath, and asking for appointment of an auditor under Rule 172 (which was denied nearly two years later). Fleming next accuses me of "*making a mockery of all lawyers and the entire legal system*". Then he accuses me of not having a valid "*legal basis*" and all kinds of other mumbo jumbo (civil RICO is a legal basis), and wants me punished "*to prevent the reoccurrence of such behavior again in the future*". Not only was the case finished, but such punishment for a completed act is criminal in nature, and I am entitled to due criminal process, requiring a finding beyond a reasonable doubt, not someone (Fleming) trying to slap a \$62,255 criminal sanction on me with the stroke of a pen without due process.

49. Besides that, Fleming and his parties moving for sanctions had been out of the case long ago by summary judgment. And Fleming even wanted me to have to pay the Court, a clearly criminal fine.

50. The Court, Birnbaum, and the State of Texas were again deprived of "honest service" on the part of Frank C. Fleming as an officer of the court.

predicate act 10
\$62,255 in legal fees in violation of the "American Rule"

51. Under the "American Rule", a party is not entitled to attorney's fees unless specifically authorized by agreement or statute. The Texas Civil Practice and Remedies Code Section 38.001 authorizes attorney fees for a number of categories, but not for having been granted summary judgment, and there certainly was no agreement, but Fleming asked for attorney fees anyway for Westfall's wife and daughter, and got them.

52. The Court, Birnbaum, and the State of Texas were again deprived of "honest service" on the part of Frank C. Fleming as an officer of the court.

CONCLUSION

53. The RICO violation and scheme can be clearly seen from the "predicate acts" of "racketeering activity" constituting the "pattern of racketeering activity" as shown above. The Defendant's scheme was to use his attorney license to "participate in the conduct of the affairs" of the 294th District Court of Van Zandt County, Texas to prosecute a fraudulent "attorney fee"

case that he knew to be fraudulent, to defraud of the honest service that he owed as an officer of the court, and to create more "attorney fees" in the process.

54. Damage was by unlawful judgments against me "by reason of" Fleming's RICO violation.

PRAYER FOR RELIEF

Wherefore, Udo Birnbaum respectfully requests that judgment be entered against Frank C. Fleming.

Defendant's conduct was knowing, intentional, with malice, demonstrated a complete lack of care, and was in conscious disregard for the rights of Birnbaum. Birnbaum is therefore entitled to an award of punitive damages. Birnbaum seeks judgment as follows:

- (a) For damages of not less than \$130,000
- (b) For the costs of suit, including reasonable attorney's fees, if any
- (c) Pre-judgment interest at the maximum rate allowed by law
- (d) Post-judgment interest at the maximum rate allowed by law
- (e) Punitive damages in an amount as the jury may award at its discretion
- (f) A permanent injunction prohibiting him from litigating in the 294th District Court of Van Zandt County.
- (g) Such other relief, legal and equitable, special or general, as the Court deems proper and just

BIRNBAUM HEREBY DEMANDS A TRIAL BY JURY

Respectfully submitted,

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