No. 05-02-01683-CV

§

In the Court of Appeals
Fifth District of Texas at Dallas

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

v.

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

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

CHRISTINA WESTFALL
Third Party Defendant, Sanction Movant - Appellee

STEFANI PODVIN
Third Party Defendant, Sanction Movant - Appellee

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

BRIEF FOR APPELLANT

(Civil Appendix is bound separately)

OTHER SEPARATE DOCUMENTS:
Trial Closing Argument (transcription)
"Frivolous Lawsuit" Sanction Hearing
(see Index page 4)

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

IDENTITY OF PARTIES AND COUNSEL

The Law Offices of G. David Westfall, P.C. Plaintiff, Counter-defendant	Frank C. Fleming[1] PMB 305, 6611 Hillcrest Ave. Dallas, Texas 75205-1301 (214) 373-1234 (214) 373-3232 (fax)
Udo Birnbaum Defendant, Counter-claimant, Third party plaintiff	Udo Birnbaum, *pro se* 540 VZ 2916 Eustace, Texas 75124 (903) 479-3929 (903) 479-3929 fax
G. David Westfall[2] Third party defendant	Frank C. Fleming
Stefani Podvin[3] Third party defendant	Frank C. Fleming
Christina Westfall[4] Third party defendant	Frank C. Fleming
Hon. Paul Banner[5] Trial Judge	

[1] Suit brought by attorney G. David Westfall in behalf of the "Law Office", claiming an unpaid open account debt of $18,121 for "legal services". Fleming became "co-counsel" shortly before trial, then apparently the only attorney, although Westfall was the only attorney ever "of record" for the "Law Office" or for "G. David Westfall"
[2] Originally representing self and the "Law Office"
[3] Attorney daughter of G. David Westfall
[4] Bookkeeper wife of G. David Westfall
[5] Visiting judge, by assignment. Listed as a participant because of Appeals Issue 5 (denied motion for recusal).

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[6] Subtitles for concept grouping only

OTHER SEPARATE DOCUMENTS

- CLOSING ARGUMENTS from the jury trial of April 11, 2002
  D. Keith Johnson, RDR, CRR (provided directly to this Appeals Court)

- EXCERPT FROM [SANCTION] HEARING held 7-30-02
  Barbara J. Roberson (provided directly to this Appeals Court)

- CLERK'S RECORD (Volume 1 and Volume 2)

INDEX OF AUTHORITIES

STATEMENT OF THE CASE

The nature of the Case

A pattern of flagrant abuse of the judicial system

> **Introductory Note:** This is really a very simple case once one recognizes the pattern of FRAUD from start to finish, intrinsic and extrinsic, turning into retaliation by official oppression and unlawful judgments against pro se Birnbaum for having made a civil racketeering ("civil RICO") defense against a fraudulent suit by lawyers.

PLAINTIFF The Law Offices of G. David Westfall, P.C. ("Law Office") claimed an UNPAID OPEN ACCOUNT[7] for "legal services" in the amount of $18,121.10 and pleaded no other cause of action[8].

DEFENDANT Udo Birnbaum ("Birnbaum") answered [9] by denying such alleged "open account" under oath, asserted defenses of FRAUD, counter-claimed under the Texas Deceptive Trade Practices Act (DTPA), and made cross and third party claims[10] under 18 U.S.C. § 1964(c) ("civil RICO") against three (3) persons associated with the "Law Office" (G. David Westfall, Christina Westfall, and Stefani [Westfall] Podvin, "The Westfalls"), and asked for trial by jury. Birnbaum also moved for APPOINTMENT OF AN AUDITOR per RCP Rule 172 to investigate and report on the alleged OPEN ACCOUNT [11] to show that there

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[7] *Plaintiff's Original Petition* 9-20-00 (Civil Appendix 18, Clerk's Record 16-17) and *First Amended Original Petition* 9-05-01 (Civil Appendix 20, Record 229-237), ONE YEAR LATER, no difference except for attached exhibit "A" and verification. **There is of course no such thing as an OPEN ACCOUNT for "legal services", not with a $20,000 non-refundable prepayment**.

[8] Plaintiff did not plead breach of contract, and certainly not all the elements of breach of contract, although the jury issues were made to sound in breach of contract. See Issue 1 and Issue 6 of this appeal.

[9] *Defendant's Amended Answer, Counterclaim, and Cross-Complaint* 7-06-01 (Record 92-99)

[10] *Udo Birnbaum's Amended Third Party civil RICO claim, against G. David Westfall, Christina Westfall, and Stefani Podvin* 7-11-01 (Clerk's Record 100-114)

[11] *Motion for Appointment of Auditor Pursuant to Rule 172 RCP to Make Finding of State of the Accounts between the parties*. 12-26-00 (Record 65-66). Also *Supplement to Motion for Appointment of Auditor etc* 1-8-01 (Record 67-68). RCP rule 172 says the trial judge SHALL appoint an auditor, but this trial judge would not do so. See Issue 2, this Appeal.

existed no open account at all, nor systematic records, etc. as claimed, but only a $20,000 prepaid non-refundable retainer paid to lawyer G. David Westfall.[12]

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

THE TRIAL COURT, **Hon. Paul Banner**, stated at his appearance on June 20, 2001, that he had ***"never seen one [civil RICO case] that had any merit"***[13].

At the July 30, 2002 sanctions hearing[14] (after the Apr. 8-11 trial), Judge Banner weighs the evidence (see quote next paragraph), and somehow "finds" that I had no basis in **law** or in fact to make a civil RICO claim, and unconditionally punishes me $62,255 for having made such civil RICO claim 14 months earlier on Apr. 30, 2001[15]. In pronouncing sanctions ($62,255.00[16]) on July 30, 2002, Judge Banner states:

"[A]lthough Mr. Birnbaum may be well-intentioned and may believe that he had some kind of real claim as far as RICO there was nothing presented to the court in any of the proceedings since I've been involved that suggest he had any basis in law or in fact to support his suits against the individuals, and I think -- can find that such sanctions as I've determined are appropriate." [17]

[12] Civil Appendix 15
[13] Judge Banner said this at his first hearing on June 20, 2001. I also believe it did not get into the official record. Anyhow the judge's gestures and demeanor would not be reflected in the record anyway.
[14] This was after the Apr. 8-11, 2002 trial at which Judge Banner would not let me show the jury my civil RICO claim and evidence. (Summary Judgment "RICO relief" on 9-7-01, Civil Appendix 4)
[15] *Udo Birnbaum's Third Party Plaintiff civil RICO Claim against G. David Westfall, Christina Westfall, and Stefani Podvin* 4-30-01, amended by *Udo Birnbaum's Amended Third Party Plaintiff civil RICO Claim against G. David Westfall, Christina Westfall, and Stefani Podvin* 7-11-01 (Record 100)
[16] Civil Appendix 11, Clerk's Record 432
[17] Transcription of ending of sanctions hearing of 7-30-02, Civil Appendix 13, also separately provided by court reporter Barbara J. Roberson to the Fifth Court of Appeals

DEFENDANT Birnbaum claims that Judge Banner hid the law and the facts [18] from the jury by not abiding by statutory law ("civil RICO"), the rules of procedure (summary judgment rules), and the mandates of the Supreme Court of the United States ("private attorneys general"), and that the **$62,255 sanction** [19] Judge Banner imposed was not coercive (civil) at all but punitive (criminal sanction), for it was for a completed act (**had**, **was**, **had**, above), and was imposed on him without due (full criminal) process including a finding beyond a reasonable doubt (by a jury)[20].

DEFENDANT Birnbaum claims that he is the victim of retaliation and official oppression[21] for having spoken out via his civil RICO claim on corruption and racketeering, and that Judge Banner should have been recused long ago for not abiding by the law of the land [22]. (Also Issue 5 of this Appeal).

Course of proceedings

The Law Office and each of the Westfalls moved to quash depositions and objected to numerous interrogatory and production requests[23], but never moved to dismiss any of Birnbaum's claims against them[24].

On June 20, 2001, nine (9) months since the suit upon Birnbaum started, visiting judge Paul Banner appeared as the first judge ever in the case, having been assigned on January 26, 2001 by Judge John Ovard of the First Administrative Judicial Region, without any motion for recusal, or order of recusal or referral from

[18] See issues in this appeal
[19] *Order on Motions for Sanctions* signed 8-9-02 - filed 8-21-02 (Civil Appendix 11, Clerk's Record 432-433)
[20] Issue 4 of this appeal
[21] To Criminal District Attorney, Re: Retaliation, official oppression, jury tampering, tampering with government records, and racketeering in the 294th District Court of Van Zandt County by Betty Davis, Tommy Wallace, and others. Sept. 18, 2002. (An attachment to *Notice Of Official Oppression And Unlawful Judgments Against Me* (Civil Appendix 95-96, Clerk's Record 497-498)
[22] *Motion for recusal of Hon. Paul Banner* 9-10-01 (Record 263-265). Supplement (not in this clerk's record) gives details. Issues almost identical to issues in this Appeal. Available at www.CourthouseAwarenessNews.com, as are most of the documents referred to in this brief.
[23] Misc motions starting 12-7-00. Summarized by *Udo Birnbaum's Motion under Rule 193.4 for Hearing and Ruling on Objections and Assertions of Privilege (with exhibits)* 4-20-01 (Civil Appendix 25)

294th District Judge Tommy Wallace. Hearings had been set for May 9, June 6, and then June 20, 2001, but June 20, 2001 was the first actual hearing in the case[25]. Judge Banner asked the parties if there were any pending motions to dismiss or for summary judgment. There were none, and Judge Banner issued a handwritten scheduling order[26] that ordered depositions of all parties, and set certain deadlines, but made no ruling and issued no order regarding Birnbaum's complaint of obstruction of discovery[27] and Birnbaum's motion for appointment of an auditor per RCP Rule 172 to investigate and report on the state of the claimed account. (Judge Banner NEVER ruled on Birnbaum's motion for appointment of an auditor, he just NEVER appointed one)

On August 17, 2001 all the Westfalls[28] moved for summary judgment[29]. Birnbaum filed separate responses[30] to the four (4) parties, i.e. 1) The Law Office, 2) G. David Westfall, 3) Stefani Podvin, and 4) Christina Westfall, such responses accompanied by the filing of an Appendix consisting of VOLUMES of additional exhibits[31]. Each of Birnbaum's responses designated specific evidence to each and

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[24] Various parties' answers, Clerk's record at 53, 55, 57, 59

[25] I had prepared a notebook of the pending motions, including the Rule 193.4 complaint of obstruction of discovery, the motion for an Auditor, etc (Civil Appendix 32), but all Judge Banner issued was a scheduling order (Civil Appendix 3)

[26] Handwritten scheduling order (Civil Appendix 3). Trial set for Nov. 12, 2001, which turned out to be a holiday.

[27] *Udo Birnbaum's Motion under Rule 193.4 for Hearing and Ruling on Objections and Assertions of Privilege (with exhibits)* 4-20-01 (Civil Appendix 25)

[28] Motion by the "Law Office" and David Westfall, also separate motion by wife Christina and Daughter Stefani Podvin.

[29] *Counter Defendant **Law Office** of G. David Westfall, P.C. and **G. David Westfall's** Motion for Summary Judgment* (Record 115-116)
*Third Party Defendant, **Stefani Podvin's** Motion for Summary Judgment* (Record 117-122)
Third Party Defendant, **Christina Westfall's** Motion for Summary Judgment (Record 123-128)

[30] *Udo Birnbaum's Response to Counter defendant **Law Office** of G. David Westfall, P.C. Motion for Summary Judgment* (Record 129-142)
*Udo Birnbaum's Response to **G. David Westfall's** Motion for Summary Judgment* (Record 143-164)
*Udo Birnbaum's Response to Third Party Defendant, **Stefani Podvin's** Motion for Summary Judgmen* (Record 165-188)
*Udo Birnbaum's Response to Third Party Defendant, **Christina Westfall's** Motion for Summary Judgment* (Record 189-212)

[31] *Appendix to Udo Birnbaum's Response to Motions for Summary Judgment* 8-31-01 (Record 213-228). Includes all deposition transcripts in this cause including exhibits thereto, transcript of Westfall bankruptcy proceedings showing

every "issue of fact" in his civil RICO claims (civil RICO has no "elements" of law in the tort sense. Birnbaum used the U.S. Fifth Circuit civil RICO Pattern Jury Instructions as a template, and designated evidence to each jury issue of fact.)[32].

At a hearing on September 7, 2001 Judge Banner granted[33] summary judgment against Birnbaum's civil RICO claims, but still did not rule on Birnbaum's long-standing motion to appoint an auditor[34] per RCP Rule 172 to investigate the state of the account. (Judge Banner NEVER ruled on Birnbaum's motion for an auditor)

On September 10, 2001 Birnbaum moved for recusal[35] of Judge Banner, such hearing being held before Judge Chapman on November 1, 2001, who denied such motion.[36] (See docket sheet)

On November 7, 2001 Birnbaum submitted a petition for writ of mandamus[37] to make Judge Banner appoint an auditor, and to let Birnbaum show his civil RICO defense and claims. Such petition was denied on November 9, 2001.

No notice of any kind regarding the long ago set trial[38] for Monday, Nov. 12, 2001 was received, and no request issued for the parties' jury issues and instructions[39]. Indeed the Courthouse was closed[40].

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that this "collection suit" fraud flowed from fraud in his bankruptcy proceedings, sanctions upon Westfall by numerous courts for abuse of the judicial system by filing "frivolous lawsuits", "bad faith", etc.

[32] In the summary judgment Appendix Birnbaum included a copy of the U.S. Fifth Circuit "Civil RICO Pattern Jury Instructions. In each of the responses to the four (4) summary judgment movants, Birnbaum designated specific evidence "of record" as to each jury "issue of fact". See summary judgment responses for details.

[33] *Order Sustaining Motions for Summary Judgment* - pronounced at the hearing on 9-7-01, signed 11-13-01 (Appendix 4)

[34] *Motion for Appointment of Auditor Pursuant To Rule 172 RCP To Make Finding of State of The Accounts Between The Parties* 12-26-01 (Civil Appendix 23, Clerk's Record 65)

[35] *Motion for Recusal of Hon. Paul Banner* 9-10-01 (Record 263-264), and *Position Supporting Recusal of Judge Banner*, issues much like in this appeal, i.e. for not abiding by the law, the rules, and the U.S. Supreme Court.

[36] See *Docket Sheet*, entry for 10-1-01 (Civil Appendix 1, Clerk's Record 1)

[37] Much the same issues as in this Appeal, i.e. not going by the rules and the law, including failure to appoint auditor, that granting summary judgment on civil RICO (i.e. not letting Birnbaum show evidence of the "pattern of racketeering activity") would result in an improper judgment that could not be remedied by appeal.

[38] Handwritten scheduling order by Judge Banner on 6-20-01 (Civil Appendix 3)

[39] Judge Banner (sitting by special assignment) at his first hearing on 6-20-01 had told us that we would not be going through 294th District Court Administrator Betty Davis, but did not at that time tell us why. At testimony at trial judge Banner acted surprised to find out that Betty Davis had been one of the defendants in the Dallas civil RICO

So on Tuesday, Nov. 13, 2001, I went to the courthouse and asked Betty Davis, then Court Administrator, if anything was to be heard that day for my case. Betty said that she was "out" of my case, but that nothing civil was scheduled for the day[41], so I started going home. It was then that I saw Judge Paul Banner coming up the stairs and I followed him into the courtroom.

It was then that David Westfall, previously *pro se*, suddenly and without any prior notice of any kind, was allowed representation by "co-counsel" attorney Frank C. Fleming, Judge Banner granting their motion in limine that I could not show the jury anything about anyone that would not be present as a witness at the trial, and setting trial for the **next day**, November 14, 2002.

With "co-counsel" now on board, even the presence of G. David Westfall at the trial was no longer a given, and I would not be able to present even my deposition evidence about him. So I immediately had subpoena issued for G. David Westfall, and had such served on him in Dallas that afternoon.

About noon on November 14, 2001, during jury selection, and with G. David Westfall present, Judge Banner called the "trial" off.

The trial court's disposition of the case

Trial started on April 8, with a verdict and judgment[42] pronounced on April 11. On May 9, 2002, SEVEN MONTHS after having been removed from the case (by

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suit (the start of the "legal fee" dispute of this case) . Why Judge Banner did not go through Betty Davis in this case is an interesting issue, raising the issue as to whether he had prior knowledge about the parties and nature of this case ***before*** his first hearing on 6-20-01.

[40] The long-ago set trial date of Monday, November 12 was a holiday. Also the 12th Court had just ruled that Friday Nov. 9, and the parties had not even received the ruling that the petition for mandamus had been denied.

[41] Betty Davis keeps the civil docket a secret in the 294th District Court. You cannot find out today, what is going on today, without going into the courtroom, and then you cannot hear, just see and guess. See *Birnbaum v. Ray, et al*, G. David Westfall's federal civil RICO suit on Betty Davis and others for detail. Northern District of Texas, Dallas Div. 3:99cv0696. Also David Westfall's other Dallas federal civil RICO suit against Betty Davis and others, *Collins v. Lawrence, et al*, 3:99cv0641.

[42] The judgment does not conform to the pleadings and the verdict. See Issue 1, this appeal. Also Issue 6.

SUMMARY JUDGMENT on Sept 7, 2001[43], and ONE MONTH after pronouncement of judgment), the Westfalls moved for sanctions[44]. On July 30, 2002 judgment of $59,280.66 was entered against me, and sanctions of $62,255.00 also pronounced. On August 21, 2002 Judge Banner "signed with the clerk" (entered by filing) $62,255.00 in "frivolous lawsuit" sanctions, which stated no particulars at all[45], and made no findings of bad faith. Judge Banner had never warned me regarding anything. I had never been disobedient to anything.

On Aug. 19, 2002 I filed *Notice of Appeal*[46], *Motion to Reconsider the $59,280.66 Judgment*[47], *Motion to Reconsider the $62,255.00 Sanctions*[48]. On Aug. 28, 2002 I filed *Motion for New Trial*[49] and on Sept. 3, *2002 Request for Findings of Fact and Conclusions of Law*[50] regarding the $62,255.00 sanctions, and on Oct. 1, 2002 *Notice of Past Due Finding of Facts and Conclusions of Law*[51].

On September 18, 2002 I filed a complaint[52] with the Van Zandt Criminal District Attorney regarding retaliation by official oppression for having spoken out against corruption in the trial court, the 294th District Court of Van Zandt County.[53] On Oct. 8, 2002 I filed *Notice of Official Oppression and Unlawful Judgments Against Me*[54] with the Clerk of the trial court.

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[43] *Order On Motions For Summary Judgment* (Civil Appendix 4)
[44] *Motion For Sanction* (Civil Appendix 52, Clerk's Record 380)
[45] NOTHING at all, only that he is of the opinion that the sanctions should be granted! *Order on Motions For Sanctions* (Civil Appendix 11, Clerk's Record 432)
[46] *Notice of Appeal* 8-19-02 (Record 436-437)
[47] *Motion To Reconsider the $59,280.66 Judgment* 8-19-02 (Civil Appendix 75, Clerk's Record 436-437)
[48] *Motion to Reconsider the $62,255.00 "Frivolous Lawsuit" Sanctions* 8-19-02 (Civil Appendix 78, Clerk's Record 441-443)
[49] *Motion for New Trial* 8-28-02 (Civil Appendix 81, Clerk's Record 444-458)
[50] *Request for Findings of Fact and Conclusions of Law* 9-3-02 (Record 461-487)
[51] Civil Appendix 93, Clerk's Record 492
[52] Civil Appendix 96, Clerk's Record 498
[53] To Criminal District Attorney, Re: Retaliation, official oppression, jury tampering, tampering with government records, and racketeering in the 294th District Court of Van Zandt County by Betty Davis, Tommy Wallace, and others. Sept. 18, 2002
[54] *Notice of Official Oppression and Unlawful Judgments Against Me* 10-08-02 (Civil Appendix 95, Clerk's Record 497-499)

ISSUES PRESENTED

1. WHETHER THE $59,280.66 JUDGMENT IS UNLAWFUL
It does not conform to the pleadings and the verdict

2. WHETHER DEFENDANT BIRNBAUM HAD A RIGHT TO A COURT-APPOINTED AUDITOR
Due process demanded appointment of an auditor per RCP Rule 172 to address the issue of fraud

3. WHETHER THE "RICO RELIEF" SUMMARY JUDGMENT IS ALSO UNLAWFUL
I have the Right to show my best defense, claim, and evidence. The Rules of Procedure and the law do not allow a judge to weigh the evidence to grant summary judgment on civil RICO claims.

4. WHETHER THE $62,255.00 "SANCTION" JUDGMENT IS ALSO UNLAWFUL
It is a criminal punishment without due process for having made a civil RICO claim

5. WHETHER THE TRIAL JUDGE SHOULD HAVE BEEN RECUSED FROM THE CASE
For not abiding by statutory law, the Rules of Procedure, and the mandates of the Supreme Court

6. WHETHER THERE WAS FRAUD, FRAUD, AND MORE FRAUD
FRAUD from start to finish, intrinsic and extrinsic, turning into retaliation by official oppression

7. WHETHER DUE PROCESS DEMANDS A NEW TRIAL
I am entitled to appointment of an auditor, enforcement of the rules of discovery, and my best defense, claim, and evidence under civil RICO.

STATEMENT OF FACTS

(A pattern of flagrant abuse of the judicial system!)

Westfall ("The Law Office") had no case! [55]

On May 5, 1999 G. David Westfall and Udo Birnbaum signed an attorney-client agreement[56]. Udo Birnbaum paid a $20,000 non-refundable retainer fee to be credited against the overall fee in the matter. G. David Westfall agreed **to bill monthly and not to obligate** Udo Birnbaum for any large expense without prior approval. **G. David Westfall** also asked Udo Birnbaum to pay expenses as they are incurred, and **reserved the right to terminate the attorney-client relationship for non-payment of fees or cost**.[57]

That was the only remedy G. David Westfall had for non-payment. Besides that, it was NOT AN OPEN ACCOUNT at all as claimed in the suit, but a $20,000 NON-REFUNDABLE PREPAID RETAINER AGREEMENT.

IT ALSO WAS NO CONTRACT. Careful reading shows that Birnbaum promised NOTHING, but only agreed as to the use of the $20,000 RETAINER, i.e. that it was for the purpose *"of insuring our availability in your matter"* [58], and that it was non-refundable, and that Westfall could terminate upon certain stated conditions.(See Appeals issue 6)[59] As a matter of law, Westfall had no case!

Westfall's "legal services" had NO WORTH because of judicial immunity

In the letter agreement David Westfall told Udo Birnbaum: ***"I will state parenthetically, from what you have told me, you have a very good case"***. Based

[55] Subtitles for concept grouping only

[56] *Letter agreement between Westfall and Birnbaum* 5-5-99 (Civil Appendix 15, also among the various documents and depositions in the Clerk's Record.

[57] Phrases directly out of the letter agreement (Civil Appendix 15)

[58] Phrase directly out of the letter agreement, first page, second paragraph (Civil Appendix 15)

on the information and evidence provided by Birnbaum, G. David Westfall filed amended civil RICO pleadings (No. 3-99-CV0696-R) in the Dallas Federal Court, (First Amended Complaint, June 28, 1999) accusing ten (10) defendants of engaging in

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

The defendants included three state judges, one ex state judge, a district attorney, two attorneys, the court coordinator and a court reporter. The suit (No. 3-99-CV0696-R) was dismissed on September 20, 1999 by judgment under Federal Rule 12(b)(6) ("failure to state a claim"), by reason of absolute and derived judicial immunity, i.e. **even if all things were as stated, it would still "fail to state a claim"**.

The suit had **no worth**.

About that time (May 3, 1999) G. David Westfall and a Jerry Michael Collins also signed a similar attorney-client agreement. G. David Westfall likewise agreed **to bill monthly**. G. David Westfall likewise told such Jerry Michael Collins: ***"I will state parenthetically, from what you have told me, you have a very good case"***.

The defendants included twenty or so defendants, including the same state district judge, Tommy Wallace, another state district judge, the same district attorney, a sheriff, an ex-sheriff, a constable, the same court-coordinator, various lawyers, etc., also centered on the same 294th District Court.

That suit (No. 3-99-CV0641) was dismissed on March 10, 2000, and G. David Westfall sanctioned for acting in "bad faith" in the suit, and ordered **to pay**

[59] Issue 6, "Fraud, fraud, and more fraud", this Appeal

the court a $2500 fine under the court's **inherent power**, and further to pay the Comptroller of the State of Texas **$189.97**, and **$54.30** in damages to the state district judge who had wanted Westfall *"hammered"* ***"with all the power it can legally muster, and thereby end this horribly dangerous and abusive precedent against the judiciary itself."*** As the federal judge said in the sanction order, ***"the filing of frivolous civil lawsuits against judicial officers deserves a special place in the cornucopia of evils plaguing our judicial system because such lawsuits are not only an affront to the dignity of the courts but also an assault upon the integrity of our judicial system"***. [60]

Westfall's "legal services" in said Collins suit likewise had **no worth**.

G. David Westfall in depositions stated that he never billed in the Collins case.[61] Then, however, in the same deposition he claims he did send a bill "at the same time as he billed me [Birnbaum]". Birnbaum claims Westfall never sent him anything until July 31, 2000, even though the "bill" at issue in this case claims to be of December 31, 1999 origin, and to show several attempts of collection. Birnbaum denies all this, claiming that the "bill" and the handwritten notations of "demand" is all fraud. The deposition testimony of Westfall[62] (**very revealing!**) shows that Westfall **never even intended to bill**, even though he promised in the letter agreement to do so **monthly**. Also that he did not even have an accounting system! (*"We just simply keep time records")*[63]

[60] One more of the documents designated as "of record" in Birnbaum's response to the various motions for summary judgment. See Issue 3, this appeal. Document in the summary judgment Appendix (Record 213), and specifically included as Exhibit 9-F. Also note all the other documents regarding Westfall conduct "of record. (Record 215)
[61] Also designated as "of record", see title page of the VOLUMES of evidence designated in the INDEX to the APPENDIX. (Record 213)
[62] Deposition of G. David Westfall 6-20-01 (Civil Appendix 68, starting line 19) Shows Westfall had no intention of abiding by the letter agreement (attorney retainer agreement) and did not even have an **accounting system** at his "Law Office", and surely no "systematic records" as he claimed in his suit, and certainly no OPEN ACCOUNT.
[63] Civil Appendix 75, page 24 line 4 of the deposition

Auditor under RCP Rule 172 was never appointed

The $18,121.10 sought by plaintiff in this cause was upon a claimed open account for "legal services" regarding the federal **civil RICO** suit above. Birnbaum was claiming that there was no "open" account at all, but a $20,000 PREPAID account, that the entries were fraud, that it was not a "bill" at all, that all "legal work" in the case had **no worth**, that the "Law Office" had no "systematic records" as claimed in the pleadings, that Westfall had failed to openly and honestly bill, and that the suit was a fraud, and moved the Court **for appointment of an auditor** under RCP rule 172 to make a finding of the state of the accounts. Such motion for an appointed auditor was totally ignored by the court despite numerous request for such auditor.

Obstruction of discovery

During the proceeding in this case (Westfall v. Birnbaum, etc) Birnbaum on numerous occasions complained to the Court about obstruction of discovery by "the Westfalls". These are the same "the Westfalls" in *Westfall v. King Ranch No. 05-92-00262-CV Fifth District of Texas at Dallas (1993)* ***("King Ranch alleges that for almost eighteen months the Westfalls engaged in a campaign of delay, deceit, and disobedience to prevent King Ranch from getting the requested discovery"***)[64]

Unlawful summary judgment

On Aug. 17, 2001 the Westfalls ("The Law Office", G. David Westfall, Christina Westfall, Stefani Podvin) entered motions for summary judgment[65], without even designating as to which element of Birnbaum's claims they were

[64] *Westfall v. King Ranch 05-92-00262-CV Fifth District of Texas at Dallas (1993)*

[65] (Record 115,117, 123). Summary judgment case law says they MUST designate as to which element they claim that there is not evidence. If they do not, the court MUST deny the motions. See Birnbaum's summary judgment responses, excruciatingly detailed in the case law presented

claiming there was no evidence[66]. Civil RICO of course only has three elements: 1) a violation of RICO, 2) direct injury from such violation, and 3) damage, all jury issues not subject to disposal by summary judgment[67]. Birnbaum did, however, designate evidence to each and every "issue of fact" in the U.S. Fifth Circuit civil RICO "pattern jury instructions[68]", and gave the law that summary judgment is not even available under civil RICO.[69]

The Court did, nevertheless, on Sept. 20, 2001, grant summary judgment to the three Westfalls (G. David Westfall, Christina Westfall, and Stefani Podvin), and signed the ***Order Sustaining Motions for Summary Judgment***[70] on Nov. 13, 2001.[71]

Fraud in submission of jury issues

Defendant Birnbaum on April 1, 2002 requested the following jury issue as part of his DTPA (Texas Deceptive Trade Practices Act) jury issues:

> *Did the Law Offices of G. David Westfall, P.C. engage in any false, misleading, or deceptive act or practice that Udo Birnbaum relied on to his detriment and that was a producing cause of damages to Udo Birnbaum?*[72]
>
> "False, misleading, or deceptive act" means any of the following:
>
> Failing to disclose information etc
>
> **Representing that services had or would have *worth* that they did not have**[73]
>
> (The Texas pattern jury instructions had used the phrase ***a characteristic***, I substituted ***worth***.)

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[66] See Birnbaum responses to motions for summary judgment (Record 129,143, 165, 189)
[67] See Birnbaum responses to motions for summary judgment
[68] Clerk's Record 480-487. Was part of VOLUME "Exhibit 9" of the summary judgment APPENDIX (Record 213), Exhibit "9-O" (Clerk's Record 215)
[69] See Birnbaum responses to motions for summary judgment (Record 129,143, 165, 189)
[70] *Order Sustaining Motions For Summary Judgment* (Civil Appendix 4)
[71] Then on May 9, 2002 these dismissed parties moved for sanctions. Among the issues in this appeal.
[72] *Udo Birnbaum's Texas Deceptive Trade Practices Act (DTPA) Counterclaim requested etc.* (Record 317, 321, bottom of page)
[73] This instruction came straight out of ***Texas Pattern Jury Charges, Business, Consumer, Insurance, Employment***. I substituted the word ***worth*** for the word "***a characteristic***". **The judge did not allow** it, and did not tell me till just before it went to the jury. (Record 317, 321 bottom of page)

THE TRIAL JUDGE DID NOT ALLOW THIS INSTRUCTION (i.e. this QUESTION) [74]

Plaintiff "Law Office" on April 3, 2002 requested the following jury issues[75] regarding their ["open account"] claim[76]:

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

Defendant Birnbaum on April 4, 2002 objected to these issues[77], demanding the following question between No. 1 and No. 2 above:

Was Udo Birnbaum's failure to comply excused?

"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" [78]

THE TRIAL JUDGE DENIED BIRNBAUM THIS ISSUE[79]

Plaintiff Law Office, on the last day of trial (April 11, 2002) handed [80] the following jury issue to Birnbaum:

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

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[74] See *Court's Charge,* (Civil Appendix 38, Clerk's Record 345), note missing instruction regarding "no worth"
[75] *Plaintiff's Requested Jury Questions* 4-5-02 (Record 341)
[76] These are of course BREACH OF CONTRACT questions, an ISSUE NOT PLEADED.
[77] *Defendant Birnbaum's Objections To Plaintiff's Requested Jury Questions* 4-4-02 (Appendix 35, Record 339).
[78] Straight from ***Texas Pattern Jury Charges, Business, Consumer, Insurance, Employment***
[79] See *Court's Charge* (Civil Appendix 38, Record 345) The trial judge would not allow the ***"no worth"*** question!
[80] Handed to Birnbaum on last day of trial, NOT IN FILE, but incorporated into *Court's* Charge anyway (Appendix 35, Record 345) Question 1 and Question 2.

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

Defendant Birnbaum thereupon objected to Plaintiff's issues with handwritten objections [81] as follows:

> *"Elimination of Pl's Initial question 1 with **current phraseology** does not allow for Defendant's Question as to whether he **is excused** by Plaintiff's prior failure to abide by a material issue in the same contract (**FAILURE TO BILL MONTHLY**, Not get HIS APPROVAL BEFORE LARGE EXPENSE)" Served today. 4-11-02 by hand to Fleming. Udo Birnbaum (Emphasis as in original)*

Just before the case went to the jury, the judge borrowed *Texas Pattern Jury Charges* from Defendant Birnbaum. The Court had previously requested "citations of source". Birnbaum had provided citations[82] straight out of *Texas Pattern Jury Charges*. Plaintiff had not provided any citations.

Over Birnbaum's objections to the judge, the Court incorporated Plaintiff's that day's version in the Court's Charge, and **denied** Birnbaum's ***"excused"*** issue, as well as his ***"no worth"*** issue. [83]

(Note the dropping of ***"if any"***, ***"fees and expenses"*** becoming ***"damages"***, ***"attorney-client agreement"*** becoming ***"agreement"***, ***"Law Offices of G. David Westfall, P.C.'s attorneys"*** becoming ***"Plaintiff's attorneys"***)

The trial

There was no bailiff or other officer at the trial, and on several occasions, even during jury deliberations, the judge went into the jury room and stayed there for extended periods. [84]

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[81] *Birnbaum's Objections To Today's Plaintiff's Court Charge 4-11-02* (Appendix 37, Record 344) HANDWRITTEN, hand served, and filed

[82] *Udo Birnbaum's …… Requested definitions, questions, etc* 4-1-02 (Record 317) Identifies pattern jury charge numbers ("PJC's")

[83] See *Court's Charge* (Appendix 35, Record 345)

Judgment for $59,255 was pronounced upon the verdict on April 11, 2002 and signed July 30, 2002. **This judgment is unlawful** for it does not "conform to the pleadings, the nature of the case proved and the verdict" under RCP Rule 301.

The jury made no finding of the "state of the accounts" as pleaded by Plaintiff Law Office.

The jury made no finding of all the elements of a breach of contract either. (Plaintiff did not prove they had abided by the agreement. (to bill monthly, not obligate to large expenses without approval). Plaintiff of course did not plead breach of contract at all. THE JURY ISSUES ARE IRRELEVANT.

Sanction Judgment

The Westfalls had on May 9, 2002 (one month after of judgment on Apr. 11, 2002, and eight (8) months after they were removed from the case by summary judgment [85]) moved for sanctions against Birnbaum [86]. The sanctions they requested were punitive in nature. (The sanctions requested were not coercive, but for the completed act of having made civil RICO claims against them in October, 2000, seventeen (17) months ago!).[87]

Sanction judgment for $62,885 was pronounced on July 30, 2002, "signed" on Aug. 9, 2002, and "signed with the clerk" on Aug. 21, 2002 [88]. Birnbaum received first notice of signing on Aug. 22, 2002.

This sanction judgment is also unlawful for it is criminal in nature, and was imposed without due process. The Court cannot punish for a completed act except

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[84] See *Motion For New Trial 8-19-02* (Appendix 81,Record 444), Point 7 of the document, and affidavit attachments thereto.
[85] *Order Sustaining Motions For Summary Judgment* pronounced on 9-7-01, signed 11-13-01 (Civil Appendix 4)
[86] *Motion For Sanctions* 5-9-02 (Appendix 52, Record 380)
[87] The requested sanction, as well as the imposed sanction, was punitive and criminal in nature, for it was for a completed act, not coercive. See the law as shown in Appeals Issue 4.
[88] *Order On Motions For Sanctions - signed 8-9-02 - filed 8-21-02* (Appendix 11, Record 432)

by FULL DUE CRIMINAL PROCESS. (The proceedings had been closed by final judgment rendered on April 11, 2002)

Post judgment motions in the trial court

On Aug. 19, 2002 Defendant Birnbaum filed ***Motion to Reconsider the $59,280.66 Judgment*** [89] and ***Motion to Reconsider the $62,885.00 "Frivolous Lawsuit" Sanction*** [90]. The Court did not reconsider.

On Aug. 20, 2002 Defendant Birnbaum filed ***Rule 276 Request for Endorsement by the Court of "Refusals" and "Modifications*** [91] (of the "refusals" and "modifications" made by the Court to Birnbaum's requested jury instructions, questions, and definitions). No response.

On Aug. 28, 2002 Defendant Birnbaum submitted ***Motion for New Trial*** [92] and on Aug. 29, 2002 ***Supplement to Motion for New Trial*** [93] upon many of the above matters. No response.

On September 3, 2002 Defendant Birnbaum submitted ***Request for Findings of Facts and Conclusions of Law*** [94] regarding just what findings of fact and conclusions of law the judge had made to resolve the issue of ***"frivolous lawsuit"*** vs. ***"bona fide racketeering"*** as Birnbaum had alleged, an issue Birnbaum had asked to be resolved by jury. No response.

[89] Appendix 75, Clerk's Record 438
[90] Appendix 78, Clerk's Record 441
[91] Clerk's Record 434
[92] Appendix 81, Clerk's Record 444
[93] Clerk's Record 459
[94] Clerk's Record 461

On Oct. 1, 2002 Birnbaum submitted ***Notice of Past Due Findings of Fact and Conclusions of Law*** [95]. IT GOES TO THE HEART OF THE ISSUE. No response.

Retrospect

The Sanction imposed is by far the largest sanction ever imposed in the 294th District Court. Appointment of an Auditor under RCP Rule 172 early in the proceedings would have gone a long way in saving precious resources in these proceedings. Furthermore this Appeals Court *in Westfall v. King Ranch* (same "The Westfalls") ruled that a court could not impose severe sanctions without having first tried and imposed lesser sanctions. The trial court never imposed any lesser sanction nor ever found "bad faith", and in fact found just the opposite. (see italicized quote in the Summary of the Argument, below)

[95] Appendix 93, Clerk's Record 492

SUMMARY OF THE ARGUMENT
A pattern of flagrant abuse of the judicial system

The nature of this case is most clearly seen through the prism of the $62,255.00 sanction imposed, three months after the entry of judgment, such "sanction" for filing, two years earlier, civil RICO claims, as a defendant! Without ever being disobedient to anything[96], without ever any warning by the judge, without any lesser sanctions ever imposed, without the judge ever making a finding of bad faith, and in fact finding just the opposite at the close of the sanction hearing [97]:

> *"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 to support his suits against the individuals, and I think -- can find that such sanctions as I've determined are appropriate in his Sanction Order!"*

Such sanctions are excessive and not just under this Fifth Circuits own ***Westfall Family Farms, Inc. v. King Ranch, Inc.***, 852 S.W.2d 587 (1993), the very same "The Westfalls" that brought this case against me, the very same "The Westfalls" that *"for almost eighteen months the Westfalls engaged in a campaign of delay, deceit, and disobedience to prevent King Ranch from getting the requested discovery"*. Same in this case. "The Westfalls" never brought anything to depositions other than the clothes they were wearing! [98] And Judge Paul Banner never did anything about it. Never appointed an auditor as due process demanded under Rule 172.

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[96] The judge never previously chastised or warned me, and issued no order I could have disobeyed. In fact he Ordered depositions!
[97] Transcript of close of 7-30-02 "frivolous lawsuit" sanction hearing (Civil Appendix 13, paragraph 2)
[98] (Civil Appendix 25) *Motion Under Rule 193.4 For Hearing And Ruling On Objections And Assertions Of Privilege.*

As for the judge's *"as far as RICO"*, no less than the Supreme Court of the United States encourages the filing of civil RICO claims, citing a

"congressional objective of encouraging civil litigation to supplement Government efforts to deter and penalize the respectively prohibited practices. The object of civil RICO is thus not merely to compensate victims but to turn them into prosecutors, "private attorneys general," dedicated to eliminating racketeering activity" Rotella v. Wood.

On the contrary, the judge granted The Westfalls summary judgment "RICO relief", denying me from presenting to the jury a timely and viable alternative to what The Westfalls claimed the evidence shows. Summary judgment is of course not available under civil RICO [99], but the judge granted it anyway.

This judge just does not like civil RICO, as indicated by his early comment at his appearance on June 20, 2001, that he *"had never seen one [civil RICO case] that had any merit"*. I should have asked for his recusal right there on the spot.

Anyhow, when the judge granted summary judgment "RICO relief" I moved for recusal of the judge because due process entitles me to a judge who will abide by statutory laws, the rules of procedure, and the mandates of the Supreme Court. Upon denial of my motion to recuse I asked for a writ of mandamus on these issues, but it was denied also.

The failure to appoint an auditor, together with me not being allowed to show my best evidence, coupled with wrong jury issues, resulted in an unlawful $59,000 judgment. I was not allowed to show the Westfalls' prior "pattern of racketeering activity"[100], to show that their "collection" suit was a fraud, and just another "predicate act" in their pattern, and that my damages flowed from that pattern.

[99] Details and case law in Birnbaum's four (4) responses to the four (4) motions for summary judgment, also Issue 3 of this appeal.
[100] These terms are defined in RICO

ARGUMENT

1. THE $59,280.66 JUDGMENT [101] IS UNLAWFUL

It does not conform to the pleadings and the verdict. The jury answers are irrelevant. (Details in ***Motion to Reconsider the $59,280.66 Judgment***)

There was no finding by the jury regarding Plaintiff's claim[102] of the state of the accounts, i.e. how much is **owed:**

> The elements of an action on account are: (1) that there was a **sale** and **delivery**, (2) that the amount alleged on the account is just, i.e., the prices charged are consistent with an 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 (Tex. App.--Corpus Christi 1985, writ ref'd n.r.e.). *Milligan v. R&S Mechanical, NO. 05-87-01341-CV, Court of Appeals, Fifth District of Texas, Aug. 11, 1998.*

There certainly was no finding[103] by the jury of a "sale" and "delivery", and Birnbaum certainly raised the jury issue that all of plaintiff's "legal goods" (of suing judges) had ***no worth*** [104], for judges in their judicial capacity are absolutely immune from suit!

And in light of plaintiff's requested jury issues in the nature of a breach of contract, Birnbaum even submitted the jury issue of being ***excused*** by reason of plaintiff's prior failure to live up to the agreement [105], i.e. to bill monthly, and not to obligate to large expenses without prior approval. Plaintiff certainly did not get a jury finding that it had abided by the contract by systematically and honestly billing monthly. The purpose of "systematic billing", of course, is to keep someone from suddenly coming up with a humongous $18,121.10 surprise **owed** "bill" as plaintiff did.

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[101] Appendix 5, Record 421
[102] Plaintiff's petitions (Appendix 18, Record 16), also (Appendix 20, Record 229)
[103] Court's Charge (Appendix 38, Record 345) Question 1
[104] (Record 321) bottom of page, instruction regarding WORTH, PJC 102.2 ***Texas Pattern Jury Charges***
[105] Record 339

At issue in this cause was the existence of the account, i.e. how much money was **owed** , not "damages" under some other theory:

> At trial, McIntire had "the burden of proving the account, including that the prices charged were fair and reasonable." In establishing the existence of the account, the burden is to prove more than something is **owed**, but rather precisely how much. *Team Central, Inc. v. Teamco, Inc., 271 N.W.2d 914, 920 (Iowa 1978)*

RCP Rule 301 states: "***The judgment of the court shall conform to the pleadings, the nature of the case proved and the verdict, etc.*** " Staring at each other are two diametrically opposed verified pleadings as to the state of the accounts, i.e. how much is **owed**, with **no** report by an auditor [106], and **no** finding by the jury of the **state of the accounts**.[107]

This $59,280.66 judgment is unlawful, for it does not conform to the pleadings and the verdict. The jury answers are irrelevant to Plaintiff's cause of action.

2. DEFENDANT BIRNBAUM HAD A RIGHT TO A COURT-APPOINTED AUDITOR

Due process demanded appointment of an auditor per RCP Rule 172 to address the issue of fraud

(Details in ***Motion for Appointment of Auditor Pursuant to Rule 172 RCP***) [108]

At issue was Plaintiff's claim of the **state of the accounts**. Due process demanded the appointment of an auditor, not only in light of the diametrically opposite verified pleadings staring at each other, but also in light of Birnbaum's

[106] (Appendix 23, Record 65), *Motion For Appointment of Auditor, etc.* NEVER APPOINTED.
[107] The question to the jury was *"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?"* But Plaintiff did not plead breach of contract, and certainly did not prove all the elements, including that it had previously not breached the agreement.
[108] *Motion for Appointment of Auditor Pursuant to Rule 172 RCP* 12-19-00 (Appendix 23, Record 65-66)

complaint of fraud, racketeering, deceptive trade practices, and obstruction of discovery [109]:

> "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**. The auditor shall verify his report by his affidavit stating that he has carefully examined the state of the account between the parties, and that his report contains a true statement thereof, so far as the same has come within his knowledge, etc." RCP Rule 172, (emphasis added)

Due process demanded appointment of an auditor per RCP Rule 172 to report on the state of the account, i.e. how much, if any, money was owed.

Timely appointment of such auditor would have gone far to avoid the horrible waste of energy, money, and judicial resources in not only the trial court, but in this appeals court as well. (Note: the motion for appointment was never denied or granted. The Court completely ignored it despite numerous requests to grant such auditor)

Due process demanded appointment of an auditor per RCP Rule 172 to address the issue of fraud, and particularly in light of the claim of fraud, racketeering, and obstruction of discovery.

3. THE "RICO Relief" SUMMARY JUDGMENT IS ALSO UNLAWFUL

I have the Right to show my best defense, claim, and evidence. The Rules of Procedure and the law do not allow a judge to weigh the evidence to grant summary judgment on civil RICO claims.

Granting the Westfalls "Rico relief", as the judge termed it [110], denied Birnbaum his Right to show his best claim and evidence. Birnbaum had a statutory right to show the jury G. David Westfall's prior "pattern of racketeering activity", to show that this very suit against me was just another "predicate act" that in that pattern.

[109] (Appendix 25)

Each of the Westfalls' motions failed to even designate which "element" supposedly lacked evidence! (details in the ***Motions, Responses, Replies*** [111]) This issue is fully developed in the four (4) separate responses in which I showed exactly what the law is, and exactly what evidence I designated to **each** of the "issues of fact" in my civil RICO cross and third party claim. Birnbaum also had a statutory right to show the Westfall's prior "pattern of racketeering activity", in order to show that this entire suit was just another "predicate act", and that Birnbaum's damage stemmed from Westfall's "pattern of racketeering activity."

Civil RICO of course does not have "elements" in a tort case sense [112], only "issues of fact". And as shown in my responses, **summary judgment is not available under civil RICO**. The pleading does of course have to allege the right relationship between the "enterprise", "person", "predicate acts", "pattern of racketeering activity", etc as established by precedent, i.e. case law.

I used the U.S. Fifth Circuit Court of Appeals (New Orleans) "pattern jury instructions" as a snapshot of current case law as it applies to a civil RICO claim. These "pattern jury instructions" are quite extensive (8 page) and very specific as to what issues of fact the jury has to find. I studied them extensively, investigated the facts thoroughly, and presented them as the Supreme Court of the United States said I should by becoming a **"private attorney general" "dedicated to eliminating corruption"**. I even deposed the defendants upon the "pattern jury

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[110] *Order Sustaining Motions For Summary Judgment* (Appendix 4) The civil RICO claim was not against the "Law Office", but against "The Westfalls" for using "The Law Office" as their "enterprise"

[111] Summary Judgment *Motions, Responses, Replies*, Clerk's Record 115, 117, 123, 129, 143, 165, 189, 213, 238, 242, 249, 256

[112] It is statutory law

instructions" and included the depositions in the designated summary judgment evidence, even included the "instructions". [113]

None of the Westfalls ever claimed that my pleading was insufficient under the Law. Even the trial judge did not find that I had not pleaded things right. What I found was that the Westfalls were ignorant of civil RICO law[114], and even the trial judge did not want to know. I should have been more concerned when the judge stated early on that he had never seen a civil RICO case that had any "merit". But when he granted summary judgment on civil RICO, I knew he was not going to give me justice by following the law, and I asked for his recusal. (More on that under separate issue)

Here are a few excerpts from my responses[115] to motions for summary judgment:

> "**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"*
>
> "There are **three essential elements** in a private action under this chapter: a violation of this chapter; direct injury to plaintiffs from such a violation; and damages sustained by plaintiffs." *Wilcox Development Co. v. First Interstate Bank of Oregon, N.A., D.C.Or.1983, 97 F.R.D. 440.*
>
> "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.

[113] *Appendix* Record 213, p215 Exh. 9-O bottom of page
[114] Even though David Westfall had presented himself as a civil RICO expert, and brought the federal civil RICO case against the scheme "around the 294th District Court".
[115] Record 129, 143, 165, 189.

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

As shown by case law in each of my four (4) responses [116], due process demanded denial of the summary judgment motions against the civil RICO claims. Allowing Plaintiff to go to a jury with summary judgment "RICO relief", as the Order termed it, precluded defendant Birnbaum from presenting the jury with a viable and timely alternative to Plaintiff's arguments as to what the evidence really showed. Birnbaum had a statutory right to show the jury Westfall's prior "pattern of racketeering activity", to show that this entire suit was just another "predicate act" in that pattern.

4. THE $62,255.00 "SANCTION" JUDGMENT [117] IS ALSO UNLAWFUL
The sanction is CRIMINAL in nature, for it is for a COMPLETED act (for making a civil RICO defense and claim TWO years ago)

First, this sanction is patently UNLAWFUL because it is not a civil sanction at all, but a CRIMINAL sanction, imposed on me without full due criminal process, including a finding beyond a reasonable doubt:

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

> The distinction between civil and criminal contempt has been explained as follows: The purpose of civil contempt is remedial and **coercive** in nature. A judgment of civil contempt exerts the judicial authority of the court to persuade the contemnor to obey

[116] Record 129, 143, 165, 189
[117] Appendix 11, Record 432

> 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)

So what had I done? There was never a warning. The sanction Order[118] does not even hint at wrongs (details below). RCP Rule 13 of course prohibits sanctions *"except for good cause, the particulars of which must be stated in the sanction order"*. The only clue comes from the transcript of the sanctions hearing[119] at which the trial judge certainly made no finding of "bad faith":

> *"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 to support his suits against the individuals, and I think -- can find that such sanctions as I've determined are appropriate."*

The answer is that I was sanctioned because I **"had"** made a civil RICO counterclaim in the case TWO years ago, a long ago **completed** act, that somehow now suddenly *"affronted"* the judge, making the sanction a CRIMINAL sanction, imposed on me without full criminal process. (Note: They file counterclaims all the time, but not civil RICO. I was the first.)

Without *"any basis in law or in fact"*? Then why did the trial judge not dismiss on the pleadings instead of granting summary judgment by weighing the evidence? (*"nothing … involved that suggests"*) And is not civil RICO the law? And he is again weighing the evidence at the sanction hearing! His belief that I may be *"well-intentioned"* and *"may believe that he had some kind of real claim"* surely

[118] Record 432. Appendix 11. *Order On Motions For Sanctions.*

did not weigh on him heavily as he assessed sanctions of $62,885.00 on the "frivolous v. racketeering" issue, an issue I had asked to be determined by jury.[120] And appointing an auditor under RCP Rule 172 surely would have determined early on whether Birnbaum or David Westfall was the one who was acting in "bad faith".

Rule 13, Rules of Civil Procedure, states:

> "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 sanction order.**"

So what particulars does the "Sanction Order" state? NOTHING!

> *"Based upon the pleadings of the parties, the evidence presented at trial and the evidence presented at the sanctions hearing and the arguments of counsel and by the pro se defendant,* ***the Court is of the opinion*** *that the Movants, Christina Westfall and Stefani Westfall are entitled to prevail on their claim for sanctions against the Defendant, Udo Birnbaum."* NOTHING MORE! [121] NOTHING!

My ***Motion to Reconsider*** [122] shows that the Westfalls had no standing on the date they moved for "frivolous lawsuit sanction", and had no standing in the trial court to get anything other than what they already got when they were granted summary judgment! (res judicata). That I did not bring this suit. That the court was required to appoint an auditor. That I am entitled to free speech on an issue of great public importance, i.e. the Westfalls' abuse of the judicial system. That civil RICO defendants always claim "frivolous".

That I had cried for the trial judge to call on the **U.S. Justice Department**. That the trial judge was no more entitled to weigh the evidence to make a finding that there was no RICO violation, and **sanction me**, than he was entitled to find that

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[119] Transcript of 7-30-02 "frivolous lawsuit" sanction hearing. (Appendix 13, "page 7" lines 5 through 12)
[120] My civil RICO claim. All civil RICO defendants of course always cry "frivolous".
[121] Record 432. Appendix 11. *Order On Motions For Sanctions*
[122] Appendix 78, Record 441

there was a RICO violation, and **throw the Westfalls in jail**. Hence my call for the **U.S. Justice Department**.

My ***Request for Findings*** [123] asked the court judge to please put down on paper, per RCP Rule 296, just exactly what he found that I did that was so wrong to incur a $62,885.00 sanction. I asked the judge to reduce to writing just how he arrived at his version of the "frivolous" vs. "bona-fide racketeering" issue. I asked him to rule specifically on the "sanctionable facts" in the Westfalls' motion for sanctions. I pleaded with the judge that this was the second suit in which I had been run over by lawyers and judges in this trial court, that I had become the victim of Official Oppression for having spoken out on corruption in this court. I pleaded with him that I did not bring this suit, and that I did not bring the other one either.

The record is replete with the trial judge letting the Westfalls run amuck. Again and again they obstructed discovery [124], moved for unwarranted sanctions against me, and the trial judge did nothing except let the clock tick and the Westfalls run up "legal fees". It is elementary that had the Court duly appointed an Auditor this whole case would not have expanded as it did.

How could the Court now suddenly find that the RICO issue, on which it had allowed and ordered discovery[125], now suddenly was so frivolous, when the Court, upon hearing, had ordered the discovery?

The sanction is CRIMINAL in nature, for it is for a COMPLETED act, namely for making a civil RICO defense and claim TWO years ago. It is patently UNLAWFUL because it was imposed on me without full due criminal process, including a finding beyond a reasonable doubt.

[123] Record 461
[124] Appendix 25, *Motion Under Rule 193.4 For Hearing And Ruling On Objections And Assertions Of Privilege*

5. THE TRIAL JUDGE SHOULD HAVE BEEN RECUSED FROM THE CASE

For failure to go by statutory law, the Rules of Procedure, and the mandates of the Supreme Court of the United States

This point is fully addressed in my ***Position Supporting Recusal of Judge Paul Banner*** [126].

It is a detailed pleading as to why Judge Banner should be gotten off this case, i.e. for having shown that he does not abide by statutory law, the rules of procedure, nor the mandates of the Supreme Court of the United States, and that I am entitled to a judge who will. My plea was simple and direct. And I asked the judge hearing the recusal motion to refer this entire case to the U.S. Justice Department, just as I had asked Judge Banner to do.

I wanted Judge Banner removed as judge for the following reasons:

- Violation of the Law by not timely appointing an auditor
- Violation of the Law by not following summary judgment procedure
- Violation of the Law by "weighing" the evidence
- Violation of the Law by blocking civil RICO claims
- Appearance of condoning racketeering activity in the court

The following is the Conclusion of my ***Position etc.*** as I argued at the recusal hearing. I still do not know any better way to plead this point. Emphasis as in the original:

> 1. This is not a garden variety suit. I did not bring this suit. I am the victim, for the second time, of massive fraud in this court, and I am not the only victim. There is a sign in the Clerk's Office that says it is a crime to file **a fraudulent document** in this Court. Westfall's whole suit is fraud, both intrinsic and extrinsic. Yet Judge Banner will not appoint an auditor under Rule 172 RCP as he is administratively and procedurally required to do in a suit claiming an open account countered by not only **my sworn complaint of fraud, but two (2) additional**

[125] Appendix 3, HANDWRITTEN BY THE JUDGE
[126] Voluminous. Not included in the Clerk's Record. Issues pretty much as in this Appeal.

affidavits by <u>other victims detailing the Westfall Bunch fraud in my case and theirs</u>!

2. This is not a matter of "judicial discretion" or "errors" on the part of a judge. Judge Banner has shown that he will not abide by the rules of procedure, statutory law, and the mandates of the Supreme Court of the United States.

3. Judge Banner has become knowledgeable, and gives the appearance of facilitating G. David Westfall's pattern of racketeering activity by condoning such conduct. It is time for the removal of Judge Banner from this cause, to be replaced by an unbiased judge who will **<u>abide by the law</u>** and duly appoint an auditor under the circumstances of this case.

4. It is time for this Court, under the circumstances of this case, to call on the Justice Department to bring an end to the Westfall Bunch's' racketeering and their hijacking of the judicial process in this Court.

Alternatively, if allowed to stay, ORDERED to abide by the Law.

So here we are, my arguing to this honorable Appeals Court, upon the same issues I argued at the recusal hearing, that I had not been given DUE PROCESS, i.e. that the trial judge was not ABIDING BY THE LAW.

6. <u>FRAUD, FRAUD, AND MORE FRAUD</u>
FRAUD from start to finish, intrinsic and extrinsic, turning into retaliation by official oppression

Plaintiff's Original Petition[127] claimed an OPEN ACCOUNT:

- *"The legal and/or personal services were provided <u>at the special instance</u> and requested of <u>Defendant in the regular course of business</u>".*
- *"In <u>consideration of such services</u>, on which <u>systematic records</u> were maintained, Defendant <u>promised and became bound and liable to pay</u> Plaintiff the prices charged for such services and expenses".*
- *"A true and accurate photostatic copy of the <u>accounts for services</u> rendered are attached hereto by reference"*

[127] *Plaintiff's Original P etition* 9-21-00 (Appendix 18, Record 16) *Plaintiff's First Amended Original Petition* 9-5-01 (Appendix 20, Record 229) <u>Identical</u>

- *"Has refused to pay the account in the total amount of $18,121.10. All just and lawful offsets, payments and credits have been allowed."*

The attorney RETAINER agreement [128] of May 5, 1999, however, shows that I was **not bound by ANYTHING AT ALL**, only that by my signature I **ACCEPTED** (NOTE THE "ACCEPTED" CAPTION BY MY SIGNATURE) the terms under which the ATTORNEY could use the $20,000 RETAINER:

- That I accepted that the RETAINER would be nonrefundable
- That I accepted the rate at which attorney could charge into the $20,000
- That I accepted that the lawyer could ask for reimbursement of current expenses (not attorney time or paralegal time)
- That I accepted that **if I did not pay the lawyer**, **the lawyer could quit**
- That I accepted that if I failed to cooperate, **the lawyer could quit**
- That I accepted that if I engaged in certain conduct, **the lawyer could quit**
- That I accepted that if the lawyer wanted to hire another attorney, that could be charged into the $20,000 RETAINER also.

* * * * * * * * * *

If I had not made the mandatory counterclaim[129] under RCP Rule 185 the lawyer would have gotten by with his fraud.

> **Rule 185. Suit on Account:** When any action or defense is founded upon an open account, or other claim for goods, wares and merchandise, including any claim for a liquidated money demand based upon written contract or founded on business dealings between the parties, or is for personal service rendered, or labor done or labor or materials furnished, on which a systematic record has been kept, and is supported by the affidavit of the party, his agent or attorney taken before some officer authorized to administer oaths, to the effect that such claim is, within the knowledge of the affiant, just and true, that it is due, and that all just and lawful offsets, payments and credits have been allowed, the same **shall be taken as prima facie evidence thereof**, unless the party resisting such claim shall file a written denial, under oath.
> A party resisting such a sworn claim shall comply with the rules of pleading as are required in any other kind of suit, provided, however, that **if he does not timely file a written denial, under oath, he shall not be permitted to deny the claim, or any item therein**, as the case may be.

[128] *Retainer Agreement* 5-5-99 (Appendix 15)
[129] Sworn denial is in *Defendant's Answer, Counterclaim, and Cross-Complaint* 10-3-00 (Record 18)

The sword has two sides, however, as RCP Rule 172 shows:

> **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. **The auditor shall** verify his report by his affidavit stating that he has carefully examined the state of the account between the parties, and that his report contains a true statement thereof, so far as the same has come within his knowledge. Exceptions to such report or of any item thereof must be filed within 30 days of the filing of such report. The court shall award reasonable compensation to such auditor to be taxed as costs of suit.

Under DUE PROCESS I had a RIGHT to such appointment, and **the judge had a DUTY to appoint such auditor**, particularly in light of my complaints of FRAUD, RACKETEERING, and OBSTRUCTION OF DISCOVERY. Add to this the fraud in the submission of the jury issues as shown above. A pleading of an unpaid OPEN ACCOUNT for "legal services"? There is no such animal! There was no SALE and DELIVERY![130] And submitting a jury question that PRE-SUPPOSES a BREACH OF CONTRACT? [131] (There was no contract, only a PREPAID RETAINER!) FRAUD, FRAUD, and MORE FRAUD, and the judge would not appoint an auditor!

7. DUE PROCESS DEMANDS A NEW TRIAL

I am entitled to appointment of an auditor, enforcement of the rules of discovery, and my best defense, claim, and evidence under civil RICO.

This appeals point is fully addressed in my ***Motion for New Trial*** [132], and ***Supplement to Motion for New Trial*** [133], and the exhibits and affidavits thereto.

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[130] See Issue 1, case law near beginning

[131] Court's Charge question 1: *"What sum of money, if paid now in cash, would fairly and reasonably compensate the Law Offices of G. David Westfall, P.C., for its damages, if any, that resulted from Defendant, Udo Birnbaum's failure to comply with the agreement between the Plaintiff and the Defendant?"* (Record 345, 348) Question pre-supposes a breach of contract!

[132] *Motion for New Trial* 8-28-02 (Appendix 81, Record 444)

[133] *Supplement To Motion For New Trial* 8-29-02 (Record 459)

The points raised in the above motion in the trial court were as follows (some of the trial court points are the same as the ones in this appeal):

Points in the ***Motion for New Trial***:

Point 1: For not appointing an auditor as required by RCP Rule 172.
Point 2: For not making Plaintiff abide by the rules of discovery.
Point 3: For granting summary judgment on my civil RICO claims and cross-claims.
Point 4: For allowing Plaintiff to submit "surprise" jury issues not in its pleadings.
Point 5: For not allowing submission to the jury of my "excused" issue
Point 6: For not allowing submission to the jury of my "no worth" issue
Point 7: For jury misconduct by the judge himself.
Point 8: For not allowing my evidence of DTPA "false, misleading, or deceptive act or practice".
Point 9: For absurdly excessive "legal fee" damages.
Point 10: For incurable jury argument.

The trial judge did not respond to this motion, nor my ***Motion to Reconsider the $59,280.66 Judgment*** [134], nor my ***Rule 276 Request for Endorsement by the Court of "Refusals" and "Modifications"*** [135] (re jury instructions, questions, and definitions), nor my ***Motion to Reconsider the $62,255.00 "frivolous lawsuit" Sanction*** [136], nor my ***Request for Findings of Facts and Conclusions of Law*** [137], nor my ***Notice of Past Due Findings of Fact and Conclusions of Law*** [138] regarding the trial judge sanctioning me $62,255.00 for having raised a civil RICO cross and third party claim.(i.e. the judge himself making a finding on the "frivolous" vs. "bona-fide racketeering" issue, an issue I had asked to be determined by jury.) Details are in the individual motions included in the Clerk's Record.

[134] *Motion to Reconsider the $59,280.66 Judgment* 8-19-02 (Appendix 75, Record 438)
[135] *Rule 276 Request for Endorsement by the Court of "Refusals" and "Modifications"* 8-19-02 (Record 434)
[136] *Motion to Reconsider the $62,255 "frivolous lawsuit" Sanction* 8-19-02 (Record 4410
[137] *Request for Findings of Facts and Conclusions of Law* 9-3-02 (Record 461)
[138] *Notice of Past Due Findings of Fact and Conclusions of Law* 10-1-02 (Appendix 93, Record 492)

I refer this Appeals Court to my ***Oral Pleading in Writing*** [139], and also my ***Closing Pleading in Writing*** [140], pleading that the entire proceedings are retaliation by official oppression for having spoken out on corruption in the trial court.

Due process demands a new trial. I am entitled to appointment of an auditor, enforcement of the rules of discovery, and my best defense, claim, and evidence under civil RICO.

CONCLUSION

A pattern of flagrant abuse of the judicial system

The failure of the trial judge to appoint an auditor under RCP Rule 172, together with me not being allowed to show my best evidence under civil RICO because of "RICO relief" summary judgment, together with wrong jury questions, resulted in an unlawful $59,280.66 judgment. I was not allowed to show the Westfalls' prior "pattern of racketeering activity", to show that their alleged "collection" suit was nothing but fraud stemming from more fraud in their involuntary bankruptcy proceedings, and just another "predicate act" in their "pattern of racketeering activity", and that my damages flowed from that pattern.

The whole proceedings could of course have been nipped in the bud if the trial judge had appointed an auditor as he was required to do with a suit claiming an unpaid open account, with two diametrically opposed affidavits as to the "state of the accounts". And if the judge truly believed there was *"no basis in law"*, he could have dismissed my civil RICO pleadings two years ago, instead of letting the case drag on with the Westfalls running up legal fees.

[139] *Oral Pleading in Writing* (Record 428) Pleaded at 7-30-02 "frivolous lawsuit" sanctions hearing
[140] *Closing Pleading in Writing* (Record 430) Pleaded at 7-30-02 "frivolous lawsuit" sanctions hearing

The following directly from my ***Notice Of Past Due Findings Of Fact And Conclusions Of Law***[141] pretty much sums up this issue (emphasis as in original):

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

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

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

* * * * * * * *

As shown above, not only the two judgments, but the entire process was lawless. If there is a problem that any judge has in complying with the objectives of civil RICO as interpreted by the Supreme Court of the United States ("private attorneys general")[142], he has the right to recuse himself. If there is a judge who is concerned about being the one opening up Pandora's box in Texas district courts with civil RICO, because the Texas Rules of Civil Procedure do not allow early dismissal by a rule such as federal rule 12(b)(6) for "failure to state a claim", let him recuse himself.

But a trial judge does not have the right to take it out on me for following the Supreme Court's urging that victims injured "by reason of a violation" of

[141] Appendix 93, Record 492
[142] *Rotella v. Wood et al.* 528 U.S. 549 (2000)

RICO file civil RICO claims. I am entitled to a new trial by a judge who will abide by the law and the rules of procedure.

PRAYER

So here we are, my asking this Appeals Court, on the same issue I pleaded in my motion to recuse the trial judge, i.e. that I was not being given DUE PROCESS.

I petition this Appeals Court to free me from the TWO unlawful judgments upon me, to reverse the unlawful "RICO relief" summary judgment, and to remand the case back to the trial court, with a recusal of Judge Paul Banner, and in the alternative, very strong guidance as to due process in a civil RICO environment.

> This is really a very simple case once one recognizes the pattern of FRAUD from start to finish, intrinsic and extrinsic, turning into retaliation by official oppression and unlawful judgments against pro se Birnbaum for having made a civil racketeering ("civil RICO") defense against a fraudulent suit by lawyers.
>
> Assessing a [criminal] punishment of $62,255 for having made a civil RICO defense is NOT "OBJECTIVELY REASONABLE", and especially so in light of a finding that ***"Mr. Birnbaum may be well-intentioned and may believe that he had some kind of real claim"***. Also see the judge's VERY LAST WORDS, below, and my replies thereto[143].

Sincerely,

_____

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

[143] The trial judge never made ***Findings of fact and conclusions of law***. I provide answers to maybe allow this Appeals Court to make an intelligent review of the trial judge's actions.

THE TRIAL JUDGE'S LAST WORDS IN THE CASE

(End of the 7-30-02 "frivolous lawsuit sanction" hearing. Brackets [] and emphasis added)[144]

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. **[1] 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. **[2] There was no dispute as to the contract or its terms**. What was in dispute is whether or not Mr. Westfall's P.C. **[3] 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 **[4] 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. END OF HEARING

[1] NO! Mr. Birnbaum was claiming **fraud**, **deceptive trade practices**, and **racketeering**, and asked for appointment of an **AUDITOR** and that you call on the **U.S. Justice Department**!

[2] NO! Mr. Birnbaum claimed that Plaintiff **had breached the agreement** long ago, and you did not allow submission of Mr. Birnbaum's ***"excused"*** (because of plaintiff's prior breach) and also Mr. Birnbaum's ***"no worth"*** issues!

[3] NO! The question you put to the jury was **not regarding *"residual"*** (state of the account), but **breach of contract**, which **Plaintiff did not plead**!

[4] YES, "**what was submitted to the jury is appropriate and subject to review**".

Documents in the cause on file with the clerk. If the trial judge had duly appointed an AUDITOR per RCP Rule 172, it would have cut through all the fraud of "open account" for "legal services" *(*Westfall: *"We just simply keep time records")*[145], and the suit against me not expanded as it did!

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[144] Civil Appendix 14, "page 8". Also provided by the court reporter, Barbara Roberson, re the 7-30-02 hearing

[145] Deposition of Westfall, Civil Appendix starting page 66, and specifically page 73 line 11 through page 74 line 8. Part of my summary judgment evidence. (Clerk's Record 213, Exhibit 9, 215 Exhibit 9A: "Account Work Sheet")

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 in the referenced Civil Appendix are true copies of the originals.

_____
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 _____ day of April, 2003

_____
Notary in and for The State of Texas

Certificate of Service

This is to certify that on this the _____ day of April, 2003 a copy of this document, together with the referenced Civil Appendix, was sent by Certified Mail to attorney Frank C. Fleming at PMB 305, 6611 Hillcrest Ave., Dallas Texas 75205-1301.

_____
Udo Birnbaum