

CAUSE NO. 00857

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2	UDO BIRNBAUM) IN THE DISTRICT COURT
3	v) VAN ZANDT COUNTY, TEXAS
4	PAUL BANNER AND)
5	RON CHAPMAN) 294 TH JUDICIAL DISTRICT
6		
7		

REPORTER'S RECORD

A P P E A R A N C E S:

MR. GREG ABBOTT, Attorney General in and for the State
of Texas, by:

MR. JASON CONTRERAS, Assistant Attorney General in and
for the State of Texas.

MR. UDO BIRNBAUM, Plaintiff

APPEARING PRO SE

On the 25th day of August, 2009, the following proceedings came
on to be heard in the above-entitled and numbered cause before the
HONORABLE JOHN L. McCRAW, JR., Judge Presiding, held in
Canton, Van Zandt County, Texas

PROCEEDINGS

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THE COURT: My name is John McCraw and I'm Senior Judge. I've been assigned to hear this case for the Honorable Judge Ovard. We'll call the case for Cause No. 06-00857; Birnbaum versus Judges Banner and Chapman.

What says the Movant on the motion Plea To The Jurisdiction?

MR. CONTRERAS: Good morning, Your Honor. Jason Contreras on behalf of Judges Banner and Chapman.

THE COURT: Thank you, sir. Sir, would you like to make an announcement?

MR. BIRNBAUM: Yes. My name is Udo Birnbaum. If they're going to be witnesses, I ask that they put on their robes.

THE COURT: Are there witnesses in the courtroom?

MR. CONTRERAS: Your Honor, my client Judge Banner. But I'm sure the Court is aware he is entitled to sit in on his hearing.

THE COURT: So noted. Are there any additional witnesses other than the parties?

MR. CONTRERAS: Not that I'm aware of, Your Honor. Oh, I guess Mr. Birnbaum's guest.

MR. BIRNBAUM: Yeah. That's my little old lady. I'm not related to her.

THE COURT: Is she a witness, sir?

MR. BIRNBAUM: No, sir.

MR. CONTRERAS: I wasn't sure.

1 THE COURT: Either side desire to make an opening
2 statement?

3 MR. CONTRERAS: Yes, Your Honor. This pleading
4 is filed on behalf of Judges Banner and Chapman by Mr. Birnbaum is
5 based on judicial immunity. I'm not sure how much in detail the Court
6 wants in background information.

7 As it's already been set forth in the section 1 of the pleading-

8 THE COURT: All right. The Court will indicate to the
9 parties I have reviewed the file and read all the pleadings and I've read
10 the briefs. I appreciate the briefing. I'll be glad to consider whatever
11 you want me to consider. I would indicate that I have read your pleadings.

12 MR. CONTRERAS: Thank you, Judge. Given that the
13 Court has reviewed the pleadings, I'm sure the Court is well aware of
14 the standard here for an affirmative defense for judicial immunity. The
15 factors have been met in this case for both Judges Banner and Chapman.

16 Just a few comments regarding the standards. All the activities
17 in which Mr. Birnbaum is complaining against the Judges occurred
18 within their judicial capacity. There's no dispute about that.

19 (Mr. Birnbaum raises hand)

20 THE COURT: Just a minute, sir. I'll allow him here
21 and I'll be glad to fully allow you to develop your position. And I will
22 allow you to break it down as to each and every individual issue.

23 So, you may proceed then on the-

24 MR. CONTRERAS: Thank you, Judge.

25 THE COURT: I'm assuming you're going forward on the

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jurisdiction at this time?

MR. CONTRERAS: That's correct, Your Honor. The bottom line here is that the State of Texas, as many other states – probably all the states, have this doctrine of judicial immunity based on policies for reasons of protecting judges from being harassed by frivolous lawsuits. For the simple reason that a party to a lawsuit may not like a judge's ruling or may not like a Court's order. But that is of no consequence. And that's why we want to protect our judges under Texas law from these types of lawsuits. If a party was able to bring a lawsuit against a judge every time a party didn't like the ruling or order, it would be a disservice to the public and it would be a disservice to the Texas court system. And it would clog the courts with further needless litigation and take time away from litigating cases that are more meritorious and should be litigated properly.

Under the standard, once again just to go back, Mr. Birnbaum cannot dispute that these types of orders and judgment that he's challenging are normal judicial activities. There's no question about that. That cannot be disputed.

THE COURT: Just a minute. Sir, would you like to dispute—

MR. BIRNBAUM: I dispute that, sir. Completely.

THE COURT: All right. On what grounds?

MR. BIRNBAUM: The facts don't bear any of the things that he's saying. I don't want to get into the whole thing but the facts don't bear out. There wasn't even a case then, Judge.

THE COURT: All right. I think he's presenting matters of law. Now, are you disputing the matter of law that judges have judicial

1 immunity for their rulings?

2 MR. BIRNBAUM: No, sir.

3 THE COURT: So that's not an issue?

4 MR. BIRNBAUM: That's not an issue at all.

5 THE COURT: You may proceed then.

6 MR. CONTRERAS: Thank you, Your Honor. And that's
7 clearly one of the elements of judicial immunity. And even based upon
8 Mr. Birnbaum's petition in which he has attached— He attached the Final
9 Judgment and he also attached, I believe it was an Order For Sanctions.
10 He has made no other reference to any other act, other than these in
11 which, once again, are normal judicial activities.

12 THE COURT: All right. Just a minute. Mr. Birnbaum,
13 do you dispute that?

14 MR. BIRNBAUM: Yes, sir.

15 THE COURT: What allegations have you made other than
16 these judge's rulings to cause you a problem?

17 MR. BIRNBAUM: Basically that they violated the law.
18 That they're retaliating for exercising a First Amendment right. That
19 they put a punitive sanction on my civil process, which violates the
20 Fourth and Fourteenth. And that the things that I'm complaining about
21 in this particular case were not judicial. They were administrative, if
22 anything.

23 THE COURT: All right, sir. Do you draw any distinction
24 between personal and subject matter jurisdiction?

25 MR. BIRNBAUM: Person, being me?

1 THE COURT: Person being the judge personally as
2 opposed to subject matter jurisdiction of the action that you complain
3 about.

4 MR. BIRNBAUM: I'm getting it personally.

5 THE COURT: I don't think you understand what I'm
6 talking about. But your claim is that these judges, by entering a
7 ruling violated you in some manner?

8 MR. BIRNBAUM: No.

9 THE COURT: All right. Would you please state what
10 your complaint is? I've read your pleadings and I can't determine what
11 your complaint is.

12 MR. BIRNBAUM: I have a real short introductory. Do
13 you want me to go into it?

14 THE COURT: No, sir. I want you to answer my question.
15 What's your complaint? Let's get to the bottom.

16 MR. BIRNBAUM: My complaint is, what these judges
17 did was unlawful.

18 THE COURT: Did you have a right to appeal what they
19 did?

20 MR. BIRNBAUM: No, sir.

21 THE COURT: You didn't have a right to appeal? How
22 did they block your right to appeal?

23 MR. BIRNBAUM: There was no case in the court.

24 THE COURT: You had no right to appeal their judgment?
25 Is that what you're telling me?

1 MR. BIRNBAUM: There was no case in the court. Final
2 Judgment was entered two years before they joined. I can't appeal on that
3 twice. All this thing that we're talking about happened two years after
4 Final Judgment and four years after Final Judgment. And we're still here
5 nine years after -- or seven years after this. There was no case in this.

6 THE COURT: Sir, I've reviewed your pleadings and it
7 indicates what you have filed as exhibits had a case number on it.
8 Are you indicating that you were not part of that case?

9 MR. BIRNBAUM: Sir, if you look at the Final Judgment
10 that was entered in July of 2002, signed by Judge Banner. After Final
11 Judgment--

12 THE COURT: Does that have a case number on it?

13 MR. BIRNBAUM: It's attached to my pleadings.

14 THE COURT: Yes, sir. And in reviewing your pleadings
15 it appears it has a case number.

16 MR. BIRNBAUM: 00619. Yes, sir.

17 THE COURT: So it was a part of that case then; isn't
18 that correct?

19 MR. BIRNBAUM: No, sir. No longer.

20 THE COURT: Why do you say it's no longer?

21 MR. BIRNBAUM: Because the Final Judgment had been
22 entered in 2002. And this sanction that Judge Chapman put on was in
23 2004. Signed in 2006. There lies the key, Your Honor. There was no
24 case in the court. There appears to be a case. Anybody looking at it bears
25 against me. It will deter anybody from doing what I'm doing. It offends

1 the First Amendment. That's the issue, Your Honor.

2 THE COURT: So you're saying the action did not occur in
3 the courtroom? Did not occur under a case number?

4 MR. BIRNBAUM: That's not a fair question, Your Honor.
5 The question is whether what these judges did was unlawful. Harlow (sic)
6 says that they're not -- A judge is entitled, while he's adjudicating and other
7 things, but not for violating a citizens laws, like the First Amendment. He
8 has no immunity.

9 THE COURT: All right. So you're not contesting the law on
10 judicial immunity.

11 MR. BIRNBAUM: I'm not contesting any law. I'm contesting
12 the application of the law of immunity to the facts of the case. And the facts
13 of the case, Your Honor, is there was no case in there and there was no law
14 to apply to. I don't doubt that these men are judges.

15 In fact, one of the judges didn't even swear that there's-- There's been
16 no evidence presented, any affidavits or even your motion regarding the facts
17 that I'm pleading.

18 MR. CONTRERAS: If I may, Your Honor. Mr. Birnbaum
19 did not plea the First Amendment claim in this lawsuit. If he had done
20 that, we would have moved it to Federal Court asap. There's no claim of
21 First Amendment. What he alleges, which he has alleged before in these
22 types of lawsuits, is the RICO claim. So he can't stand up here today and
23 say "You're violating my First Amendment Right to free speech or right to
24 exercise my opinion" by filing these frivolous lawsuits.

25 Additionally, Your Honor, Mr. Birnbaum, in the cases cited, he

1 did in fact appeal the Final Judgment, I believe. And the case came right
2 out of the Dallas Court of Appeals, Birnbaum v. The Law Offices of G.
3 David Westfall. And unless I'm mistaken, and unless he's got another
4 one of his lawsuits going on, he addressed all this stuff, or he could have
5 addressed it in his appeal. And this is a written opinion from the Dallas
6 Court of Appeals on all this stuff that he's standing up here complaining
7 about again today.

8 Now, what this lawsuit essentially is, Your Honor, is an impermissible
9 and improper collateral attack on judgment that happened years ago.
10 Additionally, Your Honor, this (inaudible) I'm hearing from Mr. Birnbaum
11 about the fact that Final Judgment was entered first and then there was a
12 Sanction Order, that has no – that does not serve as a bar to the application
13 of judicial immunity. And Mr. Birnbaum hasn't cited you one case in support
14 of that proposition that "Well, the Court didn't have jurisdiction to issue the
15 Order on sanctions and, therefore, Judge Chapman and Judge Banner are not
16 entitled to judicial immunity." That is just utter nonsense. And it has
17 absolutely no bearing and no consequence to the application of the
18 judicial immunity here.

19 And he's already conceded that, without question, that Judge
20 Banner and Judge Chapman were acting within their normal judicial
21 capacity. That these acts occurred, the rulings and orders, by the Honorable
22 judges took place in either the courtroom or their chambers. Whether the
23 controversy centered around the case pending before the judges, and whether
24 the act arose out of the business of the judges in their judicial capacity.

25 These are all elements of judicial immunity that clearly apply here,

1 Your Honor. And I'm not hearing anything from Mr. Birnbaum that
2 could remotely, even come close to possibly overcoming the application
3 of judicial immunity here. This is nothing, once again, but another
4 collateral attack. This entire lawsuit is harassing. These judges need to be
5 left alone. How many more years are we going to go through more lawsuits
6 by Mr. Birnbaum based on some frivolous RICO claim and these vague
7 generalized allegations of First Amendment violations?

8 THE COURT: You have the floor, sir.

9 MR. BIRNBAUM: Judge, he said if I would have filed a
10 civil rights suit, this is not a civil rights suit.

11 THE COURT: What kind of suit it it?

12 MR. BIRNBAUM: It's a civil RICO suit, Your Honor.

13 THE COURT: Civil RICO suit?

14 MR. BIRNBAUM: Have you ever heard of that before?

15 THE COURT: Yes, sir. Surely have. You're alleging
16 that someone committed a crime of racketeering against you. And you're
17 saying the Court was the means of this racketeering against you. Now, is
18 that what you have alleged?

19 MR. BIRNBAUM: No. I'm not saying the Court was the
20 means of the enterprise. That was misused.

21 THE COURT: On 19 you say "The 294th District Court
22 of Van Zandt County, Texas is an "enterprise" under RICO." Do you
23 really believe that this Court is part of a criminal action?

24 MR. BIRNBAUM: Judge, you don't understand RICO, I
25 believe.

1 THE COURT: Then why don't you educate me on RICO
2 then. How does the Court become a part of a criminal enterprise?

3 MR. BIRNBAUM: Yes, sir. Just a minute, Your Honor.
4 Well, first of all, we all agree that the civil RICO claim is a lawsuit
5 brought on violations of the law. Do we all agree on that?

6 THE COURT: I'm listening, sir.

7 MR. BIRNBAUM: Any objections to that? That a civil
8 RICO claim is (inaudible) by reason of violations of RICO.

9 MR. CONTRERAS: That's what you're alleging?

10 MR. BIRNBAUM: That's what RICO is. (18 USC
11 1964 (c) It's for violation of RICO. "A RICO case is a inherent
12 civil proceeding," I think the only one," where you can bring a civil suit
13 on the violation of a criminal statute." That makes a difference. So, it's-

14 THE COURT: You've indicated a court as a criminal
15 enterprise?

16 MR. BIRNBAUM: No, sir. I did not say it was a criminal
17 enterprise.

18 THE COURT: Didn't you plead that on page 4?

19 MR. BIRNBAUM: No. Well-

20 THE COURT: Paragraph 19 of your own pleadings?

21 MR. BIRNBAUM: Rephrase the question, Your Honor.

22 THE COURT: No, sir. I'm asking you, did you plead that?

23 MR. BIRNBAUM: Did I plead what?

24 THE COURT: That the 294th District Court of Van Zandt
25 County is an "enterprise," under RICO, which means it's a criminal

1 enterprise.

2 MR. BIRNBAUM: No, sir. That does not make it a
3 criminal enterprise. That's your words, Your Honor.

4 THE COURT: What is your position?

5 MR. BIRNBAUM: RICO is about the misuse of proper
6 important enterprises. And what could be more important than the 294th?

7 THE COURT: Do you have any case authority to indicate
8 that a court can be a criminal enterprise – an enterprise under RICO?

9 MR. BIRNBAUM: Judge, you keep saying a criminal
10 enterprise. It's not a criminal enterprise. Judge, let me give you the
11 instructions here that has the jury instructions. And that's what I learned
12 out of, and somebody is going to learn how to do the jury instructions.

13 (Approaching the bench)

14 BAILIFF: Sir, you must ask permission to approach the
15 bench.

16 MR. BIRNBAUM: May I approach?

17 THE COURT: Yes, sir.

18 MR. BIRNBAUM: Okay. Here are the 11th Circuit Jury
19 Instructions for civil RICO. It explains it in detail enough for a jury to
20 understand, and I'm not sure--

21 MR. CONTRERAS: Your Honor, I'll object to the
22 plaintiff trying to introduce the jury instructions from the 11th Circuit.
23 That has no bearing--

24 THE COURT: Well, the Court will allow some latitude.

25 MR. BIRNBAUM: Let me correct that. Here are the

1 additional ones from the 5th Circuit.

2 THE COURT: From the 5th Circuit.

3 MR. BIRNBAUM: They were difficult to understand, Your
4 Honor. But it's—

5 MR. CONTRERAS: Your Honor, I would like to object to
6 that, as well. They have not been provided to me before this hearing to
7 review. And, therefore, it's improper to introduce them for the first time
8 to the Court.

9 THE COURT: The Court will allow this by way of opening
10 statement since I asked the question.

11 MR. BIRNBAUM: Let me finish up on the criminal part
12 of the stuff here. What I said— May I approach the bench?

13 THE COURT: Yes, sir.

14 MR. BIRNBAUM: This was put forward to all the judges,
15 including Judge Banner. I think it mentions him.

16 COURT REPORTER: Mr. Birnbaum, I need you to face
17 this way when you talk.

18 THE COURT: She's got to make a record. She's got to be
19 able to hear you.

20 MR. BIRNBAUM: Your Honor, those complaints were made
21 and distributed to the parties before you were on the case.

22 THE COURT: What's the purpose of these?

23 MR. BIRNBAUM: A criminal complaint.

24 THE COURT: Filed with the U.S. Attorney's Office?

25 MR. BIRNBAUM: Yes, sir.

1 THE COURT: Is there a criminal action pending?

2 MR. BIRNBAUM: I don't know. They won't tell you.

3 That does not keep you from putting in a complaint. I just want you to
4 be aware that there is a criminal complaint since you raised the matter of
5 whether I alleged that this Court is a criminal enterprise. No. Furthest
6 thing from that, Your Honor.

7 THE COURT: What are you trying to do, intimidate me
8 with this?

9 MR. BIRNBAUM: No, sir. That was way before you.

10 THE COURT: I understand that. But why is it important?

11 MR. BIRNBAUM: Because you asked about the issue of
12 criminal. You said—

13 THE COURT: No, sir. I didn't ask you about that.

14 MR. BIRNBAUM: Huh?

15 THE COURT: I asked you, did you indicate this Court
16 was an enterprise under RICO?

17 MR. BIRNBAUM: Then you said— You added something
18 to that after that.

19 THE COURT: All right, sir.

20 MR. BIRNBAUM: I'm sorry. I forget where we were.

21 MR. CONTRERAS: If I may, Your Honor, just briefly
22 respond to one important part that Mr. Birnbaum has presented these
23 jury questions. I'm not sure exactly what they are. I haven't seen them.
24 I don't know what he's talking about here. But bottom line, we're not
25 a criminal court. There may be a criminal RICO statute out there that

1 applies against criminal defendants. But we're certainly not in criminal
2 court. We're sitting here in civil court. He's trying to bring in a civil
3 RICO claim, not a criminal RICO claim, if there is a distinction. I don't
4 know. But I do know that we're not sitting in criminal court so I don't
5 see how that has any bearing on these proceedings in this civil lawsuit.

6 THE COURT: All right, sir. Mr. Birnbaum, what's your
7 bottom line? What are you requesting?

8 MR. BIRNBAUM: Let me answer that.

9 THE COURT: What's the bottom line of all this?

10 MR. BIRNBAUM: It's a lawsuit that I filed. I complained
11 in the words of my petition of effectively these judges retaliating – a pattern
12 of retaliation for having exercising the First Amendment right.

13 THE COURT: What are you asking the Court to do?

14 MR. BIRNBAUM: Set it for trial.

15 THE COURT: What are you asking at the trial?

16 MR. BIRNBAUM: The injury that (inaudible) from this.

17 THE COURT: What was your injury?

18 MR. BIRNBAUM: These actions.

19 THE COURT: You are, in effect, asking the Court to
20 overrule a previous sanction? Is that what you're saying?

21 MR. BIRNBAUM: No, sir.

22 THE COURT: What are you asking the Court to do?

23 MR. BIRNBAUM: To compensate me for what they did.

24 THE COURT: And their action was to issue a Sanction Order
25 against you.

1 MR. BIRNBAUM: Well, it wasn't just the sanctions. It
2 was the events leading up to the sanctions and the events after the sanctions.
3 Including Judge Chapman signing the thing in 2006, finding me delusional
4 in the head.

5 THE COURT: Did you appeal that order?

6 MR. BIRNBAUM: I told you there was no case in there
7 to appeal. There was no case in there.

8 THE COURT: So the answer is, no you did not appeal?

9 MR. BIRNBAUM: I cannot appeal, Your Honor.

10 THE COURT: Who told you, you could not appeal?

11 MR. BIRNBAUM: There was no case in there.

12 THE COURT: Mr. Birnbaum, you're not answering my
13 question. Who told you, you could not appeal?

14 MR. BIRNBAUM: Your Honor, I tried.

15 THE COURT: So you did appeal; is that correct?

16 MR. BIRNBAUM: Yeah. But I have other remedies
17 for that.

18 THE COURT: So these orders were issued and appealed
19 by you?

20 MR. BIRNBAUM: One of the orders. Not the second one.

21 THE COURT: So you let the second one ripen as an operation
22 of law—

23 MR. BIRNBAUM: Your Honor, what do you think the
24 chances are of me coming into the Supreme Court six years later and
25 saying "Oops. They did some more and I need to get back in there."

1 Let's put some reality in this. What this has to do with is First Amendment
2 rights. The right to bring a lawsuit and not to be retaliated against.

3 THE COURT: Have you alleged that in your pleadings?

4 MR. BIRNBAUM: Yes, sir.

5 THE COURT: Where did you allege First Amendment?

6 MR. BIRNBAUM: Where did I allege what?

7 THE COURT: First Amendment rights. And I'm looking--

8 MR. BIRNBAUM: I've got First Amendment rights scattered
9 all through my pleadings.

10 THE COURT: Well, all I see is the RICO allegations.

11 MR. BIRNBAUM: No. Let me settle down and do this in
12 an orderly manner.

13 THE COURT: All right, sir.

14 MR. BIRNBAUM: All right. This is in page 2 of the
15 pleadings. "Defendants came together to use a dead case in the 294th
16 District Court of Van Zandt County. Final Judgment issued in 2002."
17 "Chapman knew that his pronouncement of sanctions against Birnbaum
18 was not proper."

19 MR. CONTRERAS: To save the Court a little bit of time,
20 Your Honor. He's struggling to find some language. The fact of the
21 matter is, there is no language in this petition referencing First
22 Amendment or that his First Amendment rights were violated. He's
23 being evasive. He's not answering the Honorable Judge's questions
24 because he can't come up with anything. He doesn't have anything to
25 overcome judicial immunity in this case.

1 Additionally, Your Honor, even if he had brought a First
2 Amendment claim later, it would clearly be barred by limitations
3 because it wasn't in this lawsuit. And any First Amendment
4 claim would have clearly been barred by limitations. I don't even
5 know why he's trying to talk about First Amendment at this point.

6 Additionally, Your Honor, the case law from the U.S. Supreme
7 Court v. (inaudible) specifically states that it makes no difference what
8 specific cause of action are brought. Mr. Birnbaum could have brought
9 a First Amendment claim, a RICO claim, a tort claim, a negligence claim,
10 whatever he wanted. Still doesn't matter because the case law holds it
11 makes no difference what cause of action you're bringing against a judge.
12 Judicial immunity dictates that a judge is immune from being sued at all.

13 That's where we're at. Mr. Birnbaum is done.

14 MR. BIRNBAUM: Your Honor, I agree with the law. A
15 judge is immune from all lawsuits of any kind while he is adjudicated.
16 He is clearly not immune while he is administrating or while he's breaking
17 the law.

18 THE COURT: How did you allege any administrative acts
19 in your pleadings?

20 MR. BIRNBAUM: Because they came together in a hearing
21 for recusal.

22 THE COURT: That hearing was in a courtroom?

23 MR. BIRNBAUM: There was no case. Just because you're
24 in— The Supreme Court is clear. I can get into law in just a minute. It is
25 the function that he is performing. The adjudication. He is absolutely

1 immune from adjudication. But he's not for ministerial magistrate
2 administrative things. That was strictly an administrative hearing
3 and he had no authority to do anything else other than decide the
4 recusal hearing.

5 THE COURT: What do you define as "administrative
6 hearing"?

7 MR. BIRNBAUM: When you're assigned to a recusal
8 hearing.

9 THE COURT: That's not a judicial hearing?

10 MR. BIRNBAUM: No. It's an administrative hearing.
11 He's not acting in his judicial capacity, Your Honor. No, sir, he isn't.

12 MR. CONTRERAS: Your Honor, Mr. Birnbaum is
13 incorrect. An order or a judgment, whatever you want to call it, is
14 a judicial act. It's a judicial act. It's not administrative. It's not ministerial.
15 And even if it was ministerial, the case law holds, Texas Supreme Court,
16 Turner v. Pruitt, it's on page 5 of my pleadings, held that "a judge is
17 immune whether the act was judicial or ministerial." Period. So that's
18 another road he's going down that makes no sense and has no application
19 here. It doesn't matter. It's of no consequence. It's neither here nor there.

20 MR. BIRNBAUM: I need to take the time— I've quoted one
21 from the Supreme Court, and he's got a copy of it. One from the Texas
22 Supreme Court. It essentially involved Judge Ovard— And I do believe it
23 involved Judge Banner indirectly somehow. But it had to do with— The
24 function was that the judge was doing an administrative recusal hearing.
25 And Texas Supreme Court, and I have it in one of my responses if we can

1 get back to some kind of order in this. That the Texas Supreme Court
2 ruled that all the judge was doing was the same thing that Judge Ovard
3 was entitled to do. It states point blank. Assigning a judge is administrative
4 and when you assign him to do that, all you assign him to do is what he was
5 doing. (sic) A recusal hearing is strictly administrative, Your Honor.

6 THE COURT: I'd like to see that case that indicates that--

7 (Talking at the same time)

8 MR. BIRNBAUM: Can we do this is an order?

9 THE COURT: All right, sir.

10 MR. BIRNBAUM: It is in the order of my last two responses
11 to you. It's at the very front.

12 THE COURT: So you can if he was acting in a judicial
13 capacity, you have no case. Is that what you're saying?

14 MR. BIRNBAUM: If he is in a adjudicative capacity -- if
15 he's acting in a judicial capacity he is absolutely immune from suit.

16 THE COURT: Okay.

17 MR. BIRNBAUM: Any other things, he can still claim
18 official immunity, qualified immunity, whatever you want to call it. But
19 not absolute immunity.

20 THE COURT: And you're saying a recusal hearing is not
21 a judicial proceeding. It's an administrative proceeding. Is that your
22 position?

23 MR. BIRNBAUM: I'm not saying it's not a judicial proceeding.
24 I'm saying it's administrative. It's not adjudicated. He is not adjudicated.

25 THE COURT: And you're saying judges have no immunity

1 in recusal proceedings?

2 MR. BIRNBAUM: Yes, I do. They have qualified immunity,
3 but not absolute.

4 MR. CONTRERAS: I'd like to see some authority for that,
5 Your Honor.

6 MR. BIRNBAUM: It's in all my documents. Give me a
7 chance to find them, Your Honor. It's in the last response.

8 THE COURT: I don't recall any reference to any case
9 law in any of your responses.

10 MR. BIRNBAUM: I have it in there, Judge. You couldn't
11 have caught it. I've been working on this longer than— It's in there.

12 THE COURT: If you'll point it out to me, I'll be glad to read
13 it.

14 MR. BIRNBAUM: All right. Let me look at the one that, uh—
15 It has a date on it of August 12.

16 THE COURT: All right, sir.

17 MR. BIRNBAUM: I think this is the one we probably ought
18 to be arguing because this was my response to the Plea of Jurisdiction.

19 THE COURT: All right, sir. You have the floor.

20 MR. BIRNBAUM: All right. If you will look in there—
21 Have you seen this? Have you looked at this, Your Honor?

22 THE COURT: Yes, sir. I read it last night.

23 MR. BIRNBAUM: All right. Well, first of all, everything
24 has to be based on facts. You apply the law to the facts. There's lots of
25 law out there. But what are the facts? And the facts are stated all over here.

1 It says, on page 1 at the bottom, it says "all other (inaudible) to Final
2 Judgment, all other relief not expressly granted in this order is hereby
3 denied." Boom. That's in 2002. Final Judgment should have been the
4 end of it.

5 Then we have the next one over here by Ron Chapman signed
6 in 2006. Do you see that at the bottom? Underlined 2006. On April
7 2004, came to be heard.

8 THE COURT: Yes, sir.

9 MR. BIRNBAUM: All right. Doesn't that strike you
10 kind of strange that four years later he signed something where he--
11 All right.

12 THE COURT: Your appeal had not been exhausted at
13 that time?

14 MR. BIRNBAUM: Huh?

15 THE COURT: Had your appeal been exhausted at that
16 time?

17 MR. BIRNBAUM: What appeal? There wasn't a case
18 in there.

19 THE COURT: Whatever appeal you filed, or the Supreme
20 Court--

21 MR. BIRNBAUM: This came after that. This came after
22 that.

23 THE COURT: I see you filed it in 2004. So apparently
24 didn't the Supreme Court act on it after 2004?

25 MR. BIRNBAUM: Yeah. About 2005. But it's obvious

1 the Supreme Court didn't get the old sanction. I can't believe it didn't
2 matter, Your Honor. Listen to this."These are punitive finds sought
3 by the Court." That's what it says."Sought by the Court"to stop me and
4 others. Judge, that's First Amendment retaliation right there.

5 THE COURT: Well, let me ask you this. Did you appeal
6 this order that you're complaining about?

7 MR. BIRNBAUM: There wasn't a case in there, Your
8 Honor.

9 THE COURT: So you didn't appeal?

10 MR. BIRNBAUM: Well, the strict answer is, no I didn't
11 appeal it.

12 THE COURT: All right. So it became final. Now, how--

13 MR. BIRNBAUM: So what? That doesn't affect whether
14 a crime is committed. I'm filing this under RICO--

15 THE COURT: A criminal action?

16 MR. BIRNBAUM: What?

17 THE COURT: You realize if it's a crime committed, you
18 need to take it to the District Attorney.

19 MR. BIRNBAUM: No, sir. I do not need to-- The Supreme
20 Court (inaudible)--

21 COURT REPORTER: Mr. Birnbaum, you need to slow down.

22 MR. BIRNBAUM: I'm sorry.

23 COURT REPORTER: You need to start that part over.

24 MR. BIRNBAUM: Okay. Let me start that over. I'm not--
25 What was the question, again?

1 THE COURT: Well, if you didn't appeal-- You have to
2 appeal a crime. And I was asking, did you file it with the District Attorney,
3 and you indicated you didn't. You're acting civilly to seek criminal regress.

4 MR. BIRNBAUM: Let me make a point on slowing down.
5 I intend to slow down. I'll try to. I had in the past complained to the District
6 Attorney on various things. It doesn't work. The Supreme Court in Rotella
7 v. Wood, tells people that the way to solve things is to turn victims into
8 private Attorney Generals filing civil RICO suits--

9 THE COURT: Who told you to do that?

10 MR. BIRNBAUM: Sandra Day O'Connor in the Supreme
11 Court. In Rotella v. Wood. It's in there somewhere. The purpose
12 for civil RICO states the it does not have any longer than a four year
13 statute of limitations. It's to encourage you quickly to file civil RICO
14 suits to assist the government, in deterring the (inaudible). That's exactly
15 what I'm doing.

16 THE COURT: So your suit is RICO--

17 MR. BIRNBAUM: To correct what I said, I believe there's
18 no mention of First Amendment in the petition. It's not because it's not
19 First Amendment. What my suit is on is injury by violation of RICO.
20 And the violation of RICO, it's got to have the enterprise. It's got to have
21 all sorts of things.

22 But essentially what it is, it is upon a scheme to deprive the State
23 of Texas of the honest services of these gentlemen. What I'm alleging
24 is a scheme to defraud the State of Texas--

25 (Talking over each other)

1 THE COURT: You filed your request with the U.S.
2 Attorney. Is that what you handed me?

3 MR. BIRNBAUM: Yeah.

4 THE COURT: All right. So you have sought regress with
5 the U.S. Attorney. Now, you're seeking some type of regress in this
6 civil action?

7 MR. BIRNBAUM: Yes, sir.

8 THE COURT: And the regress you're seeking is to
9 have previous Final Judgments set aside?

10 MR. BIRNBAUM: No, sir.

11 THE COURT: Then what are you seeking?

12 MR. BIRNBAUM: I'm seeking compensation for the
13 damage and injury that they did to me with those things. If they want
14 to set them aside, that could be negotiated.

15 THE COURT: All right. Anything else you want me to
16 hear?

17 MR. BIRNBAUM: I do want to get into making my--

18 THE COURT: You may proceed.

19 MR. BIRNBAUM: We can get into the individual laws.
20 At issue in this case are these sanctions, I call moot, imposed and the
21 circumstances leading up to them. The conduct of the judges. Conduct
22 of various parties. RICO is all about conduct.

23 THE COURT: You're referring to-- From my information
24 for what you say is Exhibit A and B? The two Sanction Orders? That's
25 what you're calling new sanctions, or--

1 MR. BIRNBAUM: I'm not referring to A and B. I'm
2 referring to one of the sanctions that was about \$62,000 and another
3 one is \$125,000. Only one is attached to the pleading.

4 THE COURT: Both of them are signed by the respective
5 judges that you have complained against.

6 MR. BIRNBAUM: Yes, sir.

7 THE COURT: All right. You may proceed.

8 MR. BIRNBAUM: So that's what's at issue. They're
9 claiming absolute judicial immunity. I'm claiming-- I'm filing it as a
10 civil RICO suit. A scheme to deprive the State of Texas on services
11 by, and among other things as has developed, retaliation, due process.
12 I've already mentioned *Rotella v. Wood*, that the Supreme Court
13 encourages people to become private Attorney Generals to stop that
14 kind of conduct.

15 Forrester and White was also a Supreme Court decision that I
16 have in here detailed more. And it essentially says the absolute immunity
17 depends on the function that the judge is performing, whether it was
18 adjudication at the time. It makes a clear distinction of distinguishing
19 that from administrative, ministerial, ceremonial and other things. So
20 as far as Forrester that has to do, that is only entitled to any government
21 official. Absolute when it's adjudicated. So we have the test of Forrester
22 whether the acts of (inaudible) constituted the adjudication. The other law
23 that's in there is *Harlow v. Fitzgerald* (sic) and another one (inaudible) v.
24 *Fitzgerald* that came out of Watergate with the President claiming absolute
25 immunity. And *Harlow* essentially says there are governmental officials--

1 They are immune unless they violate clearly established constitutional and
2 statutory rights. I'm claiming they violated clearly established constitutional
3 and statutory rights.

4 THE COURT: What right are you claiming?

5 MR. BIRNBAUM: All right. I'm going to answer your
6 question and then go back. The right I'm claiming that they violated was
7 one; punishment for exercising First Amendment rights of access to the
8 courts. Two; a punitive sanction, rather than coercive. These are punitive
9 sanctions. The judge said so. Punitive sanctions imposed by civil process.
10 You can't do that. That's a violation of due process. You cannot impose
11 a- When you do not have the keys to your own release- You cannot lock
12 me up until I testify- You cannot unconditionally punish me for past
13 conduct.

14 So I'm saying it's unlawful. It violated due process and unconditional-
15 The Supreme Court, and other things, have said "any fine as low as \$50.00,
16 you've got to have the keys to your own release." I have no keys to my own
17 release. Pay it. So it's unlawful. It's imposed by civil process.

18 And the second thing, all this thing we're talking about, these guys are
19 playing. When you look at the words very carefully, like this sanction hearing
20 was another jury trial. Heck no it wasn't a jury trial. They're trying to cover
21 up that this was a jury case and they heard this stuff and made this decision
22 all themselves

23 The key stuff is this, Your Honor. Judge Banner got caught by the
24 court reporter in assessing the sanctions. This is the underlying matter.

25 THE COURT: Mr. Birnbaum, if you want all these for the

1 record, you need to mark them and present them to the court reporter.
2 If you don't want them on the record, then you need to take them back.
3 And anything you want to be of record, you need to mark it.

4 MR. BIRNBAUM: I'm not concerned about the record.
5 I want you to listen and hear me.

6 THE COURT: I'm just indicating--

7 MR. BIRNBAUM: And to be honest, I'm not a meany.
8 What I believe is at the bottom of this stuff is what the court reporter
9 called it. "Judge Banner, in assessing his sanctions, the Court has taken
10 into consideration that although Mr. Birnbaum may be well intentioned
11 and may believe that he had some kind of real claim as far as RICO,
12 there was nothing presented to the Court in any proceeding that (inaudible)
13 that suggested he had any basis in law, or in fact, (inaudible)." He's
14 fined me \$62,000.00 for all the has and has beens. He can't do that. That
15 was just one of the predicated acts, Your Honor, that makes up the RICO
16 claim. That's a First Amendment retaliation for the predicate act, is the
17 violation of the civil rights. But it's not a civil rights case. It's a pattern
18 of civil rights abuse.

19 THE COURT: Anything you want to mark for the record?

20 MR. BIRNBAUM: I'll mark them in a minute.

21 THE COURT: All right, sir.

22 MR. CONTRERAS: May I respond, Your Honor?

23 THE COURT: Just a minute. Are you finished?

24 MR. BIRNBAUM: No, I'm not.

25 THE COURT: Proceed.

1 MR. BIRNBAUM: So the issue we have, as far as (inaudible),
2 what the function was, at the time he's claiming absolute immunity--
3 (inaudible) focus on the function. Not the act. He can get outside his
4 authority. He can do excess. There was one case where a judge was upset
5 about a lawyer and told the bailiff to get a piece of him. The bailiff beat
6 him up. And the final ruling was, well, you know, that shouldn't happen
7 but the function he was performing was adjudicating. He wasn't in the
8 function of beating up. Yeah, he beat him up, but the judge is immune
9 because he was in the function of adjudicating.

10 Forrester and White says--

11 THE COURT: Weren't these judges in the function of
12 adjudicating when they signed the Order?

13 MR. BIRNBAUM: No.

14 THE COURT: Is that what you're complaining of?

15 MR. BIRNBAUM: No.

16 THE COURT: Why weren't they?

17 MR. BIRNBAUM: They were punishing.

18 THE COURT: Well, isn't that a function if you violate a
19 sanction?

20 MR. BIRNBAUM: When you apply a punishment, that is
21 not adjudicating, Your Honor.

22 THE COURT: What is it?

23 MR. BIRNBAUM: Punishing. They're punishing. They
24 are not adjudicating anything.

25 THE COURT: All right. You may proceed.

1 MR. BIRNBAUM: So we have Forrester White who focuses
2 on function. Harlow focuses on the act. So we need to look at what we've
3 got over here, whether it violates either the Forrester or the Harlow.

4 I say in my pleadings and my responses, there was no adjudication.
5 There had been a final order issued in the course. The case was through.
6 And, if anything, it was (inaudible) to recusal. The defendant's, in both
7 their pieces of paper and in their affidavits, don't address the issue of
8 whether the sanction hearing, the sanctions itself, was indeed adjudicated.
9 They made no such statement. And even if they did, there's a controverting
10 statement by me, Your Honor. You have contradictory evidence. There's
11 no evidence for you to look at.

12 The motion— Let's come back to the Motion for Absolute Immunity.
13 The Motion for Absolute Immunity has to be done by sworn motions. It
14 wasn't sworn. It wasn't sworn.

15 THE COURT: Are you asking me to retry that case?

16 MR. BIRNBAUM: Which case?

17 THE COURT: The one where the sanctions were—

18 MR. BIRNBAUM: No. I'm saying his motion that he's
19 got before your court today is improper because it's not sworn.

20 THE COURT: Oh. The plea to the jurisdiction?

21 MR. BIRNBAUM: Yes, sir. That's what we're here for
22 today. It was not sworn and the affidavit says nothing about these matters.

23 THE COURT: The affidavits were sworn,

24 MR. BIRNBAUM: But the motions not, Your Honor.

25 MR. CONTRERAS: Additionally, Your Honor, there's no

1 authority which would require the judges or myself to have to swear to
2 the Plea of Jurisdiction. As the Court has noted, the affidavits are
3 sworn, signed and notarized. That is the evidence to be considered
4 in connection with the grounds for the plea, which is judicial immunity.

5 MR. BIRNBAUM: Objection, Your Honor. He said
6 a lot of things that are not in the affidavit. He puts all kinds of stuff
7 in there and he can't swear to it because he doesn't know it. That's
8 why we're here. Basically arguing about the bear in the woods or
9 something.

10 The second part of the thing is, it's absolutely clear under
11 the pleadings of the jurisdiction, this has to be done before. This
12 has to be done before any answer, or it's waived. Case law is clear
13 on that, Your Honor. It's untimely.

14 THE COURT: Isn't that to personal jurisdiction as
15 opposed to subject matter jurisdiction?

16 MR. BIRNBAUM: Any plea through the jurisdiction
17 has to be entered before or concurrent with an answer or it is waived.

18 THE COURT: You're citing a civil rule there.

19 MR. BIRNBAUM: Huh?

20 THE COURT: You're citing a civil rule as to personal
21 jurisdiction.

22 MR. BIRNBAUM: I'm citing civil rule 120--

23 THE COURT: That's personal jurisdiction as opposed
24 to subject matter jurisdiction.

25 MR. CONTRERAS: Additionally, Your Honor, subject

1 matter jurisdiction is a matter of law. It can never be waived and can
2 even be challenged on appeal. That is Texas law. Flat out. Black letter
3 law. Mr. Birnbaum is simply incorrect.

4 THE COURT: Do you understand what we're saying?

5 MR. BIRNBAUM: I'm arguing personal jurisdiction.

6 THE COURT: You're arguing personal jurisdiction.

7 They're arguing subject matter jurisdiction. And that can be brought
8 up at any time. So the timing of this is proper. And I'll make a finding
9 of that and clear that out of the hearing. Because if you're claiming
10 you're being sued in the wrong county, you've got to bring personal
11 jurisdiction. If you're challenging the subject matter jurisdiction, that
12 can be brought up at any time.

13 MR. BIRNBAUM: No.

14 THE COURT: Well, I'll rule—

15 (Talking over each other)

16 MR. BIRNBAUM: It has to do with them claiming
17 absolute judicial immunity. And I'm quoting the Supreme Court
18 that on Forrester White, they were not in adjudication. Therefore,
19 not entitled to it. Doesn't make any difference what Texas law is.
20 Supreme Court says if they're not in adjudication, Forrester White,
21 it's clearly established law, again. So look at the phrases that are
22 in the— I'm speaking of— They're in there someplace. The punishment
23 was, in one of them, one of them has "sought by the Court." The other
24 one has "which the Court seeks."

25 Judge, this is not adjudication. In fact, the Court never seeks

1 punishment. Have you ever sought punishment? Judge, you as a judge,
2 have you ever sought punishment? The State seeks punishment. The
3 Court doesn't seek punishment.

4 THE COURT: Anything else you want me to hear?

5 MR. BIRNBAUM: Okay. So it was not an adjudication
6 because it was in violation of Forrester White and it has to be coercive.
7 And it violates the law. Procedural rule 120 says "otherwise waived."
8 I'm essentially saying that what they have in their affidavits, in their
9 motion, is not complete. It's false, misleading and all kinds of other
10 stuff. It hasn't been sworn or accounted to it. And there's issues of
11 facts that need to be determined just what these judges were doing.
12 The documents speak for themselves.

13 I've also put in Motions for Summary Judgment. I've asked them--

14 MR. CONTRERAS: Your Honor, I'm going to object to
15 plaintiff raising his Motion for Summary Judgment. That has not been
16 properly set for hearing and, therefore, cannot be addressed today.

17 THE COURT: Right. It's not before the Court--

18 MR. BIRNBAUM: Yes, sir, it is. There's an objection
19 before the Court--

20 THE COURT: If you want a setting on something, all you've
21 got to do is get a fiat signed and the clerk has the ability to do that.

22 MR. BIRNBAUM: Don't we have a setting for the
23 objections?

24 MR. CONTRERAS: Which Mr. Birnbaum has never
25 done to date. Your Honor, I haven't seen any settings for a hearing

1 on his Motion for Summary Judgment.

2 THE COURT: Plea to the Jurisdiction. That's the only
3 thing before the Court.

4 MR. BIRNBAUM: Well, Judge, I'm asking you to set a
5 discovery on that.

6 MR. CONTRERAS: I'll object to that request, Your
7 Honor. Any matters for discovery also has not been set for hearing
8 today. Mr. Birnbaum hasn't set anything today. What he's doing is
9 coming up with all this other stuff to raise, which is improper before
10 this Court today, Your Honor, and I'm going to object to that.

11 THE COURT: I'll sustain your objection. Focus on
12 the Plea of Jurisdiction.

13 MR. BIRNBAUM: And I'll make a statement on that.
14 What I'm saying, the law he's saying is false. These are false statements.
15 This is a pattern that's been going on. It's going on in your court right here,
16 right now and needs to be put a stop to it. This issue is bigger than me.
17 The issue is on the First Amendment. Is what does, what these guys did
18 what does it do to a reasonable person to kill his access to the courts?

19 MR. CONTRERAS: Your Honor, I'm going to object
20 to this. This is re-argument. He's gone over this I don't know how
21 many times. First he tells the Court he has brought a First Amendment
22 claim. Then he says, well, I didn't really bring a First Amendment
23 claim. And now he's coming back and saying, well, yeah, under the
24 First Amendment. I mean, this is getting ridiculous. How many times
25 do I have to hear Mr. Birnbaum make these crazy, wild, vague assertions

1 and allegations which aren't supported by the pleadings? And I'm going
2 to object to that.

3 MR. BIRNBAUM: Judge, the issue is how crazy I can be.
4 The Constitution gives me a right to be crazy. The issue is what these judges
5 did. Whether they were—

6 THE COURT: All right. Now, Mr. Birnbaum, I've allowed
7 you to do a lot of things because you're pro se. But if you want to represent
8 yourself, I'm going to start holding you to the standard that I would hold an
9 attorney. Now, I've given some latitude.

10 MR. BIRNBAUM: Thank you.

11 THE COURT: Now, that's over.

12 MR. BIRNBAUM: Okay.

13 THE COURT: You've got to act as an attorney. Now, I want
14 to hear your final position on the Plea to the Jurisdiction and then I'm going to
15 enter a ruling.

16 MR. BIRNBAUM: All right. This is the big file that I have.
17 I'm not going to try to get into it. We've touched up on it before. My response
18 is—This is a document you looked at from August 12th. That judges are not
19 available for doing administrative functions like recusal hearings. Not for
20 unconditional findings sought by the Court. Not by doing it by civil process
21 and punishing by civil process. Not to keep me and others from filing. That's
22 a First Amendment right. Not four years after Final Judgment. That's the
23 absence of all jurisdictions.

24 Regarding their own words, I've gone through this final judgment,
25 "Came to be heard, the award of punitive damages" — I'm putting facts down.

1 – “which sought by the Court.” Which is to stop Birnbaum and others
2 from filing. The other sanction is “which the Court seeks and others
3 from filing.” Then I have a thing that was “in assessing sanctions, they
4 may be well intended, it’s just that I didn’t see any evidence.” Of course,
5 it was a jury trial.

6 The law is clearly established here. I have the law that I was looking
7 for, Forrester and White. “It is the nature of the function before adjudication,
8 rather than the identity (inaudible) the act performed by the judge that
9 determines whether absolute immunity attaches.” First Amendment,
10 Sandra Day O’Connor.

11 Second of all, was from the Texas Supreme Court says “However,
12 absent extraordinary circumstances, a presiding judge’s order appointing a
13 judge to hear a recusal motion is administrative.” There’s the law, Your
14 Honor. It simply transferred the power to decide the recusal to another judge.
15 This all grew, the second half of it, grew out of a recusal hearing. Incidentally,
16 two years after final judgment. It grew out of a recusal hearing. You can’t
17 do that.

18 The key words, “Sought by the Court. Which the Court seeks.” I
19 put in my little document that I called “Happy April Fool’s Day.” I wrote
20 that at the time. It gives lots of the details. The second half. But that’s not
21 all at issue. All that’s at issue is whether these guys were adjudicating. They
22 were not adjudicating. They are not entitled to absolute judicial immunity.
23 There’s no adjudication. It was a recusal hearing. A screwy one at that.
24 There was no case in there.

25 Judge Banner came in to testify as a witness at a hearing for

1 Chapman to see whether he needed to be removed from the case. He
2 signed the final judgment two years before that.

3 MR. CONTRERAS: Objection, Your Honor. There's no
4 evidence of that.

5 THE COURT: Sustain the objection.

6 MR. BIRNBAUM: Judge, it's in the documents (inaudible).
7 If you read them, there may be – they came up with an answer and made
8 counter-claims. And we've gone over Rule 120. This tells all the crazy
9 stuff that lies under this. I'm not going to go into that. There are three
10 judgments in the cases, Your Honor. Three judgments. I think two of
11 them bearing interest. Something screwy. They're not adjudicated.

12 Oh. I want to quote one of the things, Jason – Mr. Contreras,
13 that you quoted. I have one of your quotes. It says, "the absence of
14 plaintiff" – I'm quoting from your motion and my response, thereto.

15 MR. CONTRERAS: What page?

16 MR. BIRNBAUM: This is my response on page 7.
17 My response to your motion to Plea of Jurisdiction. Page 7. The
18 bottom line, number 2. I have it titled "How stupid do you think we
19 are?" "The actions complained" and this is quoting you "The actions
20 complained of are without question judicial acts of (inaudible). Although
21 plaintiff complains there was nothing to adjudicate, he requested adjudication
22 through his Motion to Recuse." Well, I'd say--

23 MR. CONTRERAS: Objection. I'm not sure what his point
24 is on that, Your Honor.

25 MR. BIRNBAUM: What? What?

1 MR. CONTRERAS: I object to that—

2 THE COURT: First of all, I don't allow argument between
3 counsel and—

4 MR. CONTRERAS: I'm sorry, Your Honor.

5 THE COURT: Direct your arguments to the Court.

6 MR. BIRNBAUM: The answer is, he's putting words in
7 my mouth that I requested adjudication with Motion to Recuse. That's
8 what I'm talking about the falsehood. I don't put in a Motion to Recuse
9 to request adjudication. A Motion to Recuse gets a judge off.

10 All right. My answers here. A recusal hearing is not adjudication.
11 Stop digging yourself a bigger hole, you know. Doing a recusal is not
12 adjudication. Motion to Recuse is not requesting adjudication. It's to
13 get the judge out. Judge Ron Chapman was signed on to do recusal.
14 Denied the recusal and then did not get off the bench to let Judge
15 Judge Banner, who was in the courtroom as a witness who came over
16 from there. But then let Judge Banner back on the bench two years after
17 Banner had tried to file a judgment would be just as crazy. (sic) Oh, what
18 tangled webs we weave.

19 Judge Ron Chapman had been assigned solely to do— He had no
20 jurisdiction at all to hear sanctions in the case. The case was dead. The
21 recusal hearing two years after final judgment, Your Honor? Crazy.
22 Okay. \$125,000 sanction four years after final judgment? Crazy.

23 Okay. Then we come back to punitive sanctions. The affidavit
24 of Judge Banner. I'll quote the quote from Judge Banner. "My rulings
25 and orders made in the underlying lawsuit were ones that I normally make

1 and perform in my capacity as a judge, including the Final Judgment.”
2 Makes no mention of the \$62,000 sanction that he gave after that. Makes
3 no mention of the finding that he made a year and a half after that. Makes
4 no mention of the finding which the Court seeks. Makes no mention of
5 the Final Judgment which said, “all other relief not expressly granted is
6 denied.” Makes no mention that it says, “This judgment rendered” on
7 the bottom of the order making it a second judgment.

8 I’ve got all kinds of listings in here, okay, which we’ve gone over.
9 The documents themselves says that this is something that the Court seeks
10 to punish Mr. Birnbaum. The Court cannot punish me, Your Honor. This
11 violates Harlow. They can put a contempt on me, but it has to be coercive.
12 \$125,000 sanction is not coercive, Your Honor. It violates Harlow. Violates
13 clearly established law.

14 MR. CONTRERAS: May I respond now, Your Honor?

15 THE COURT: I’m allowing him to present—

16 MR. BIRNBAUM: I’m almost through. Judge, you almost
17 have to read it. Forgive me for jumping over it like this. I try to construct
18 it to be clear then I catch myself running my mouth.

19 Judge Chapman even found that my difficulty with judges has
20 nothing to do with the conduct of the judges, is instead a delusional belief
21 found only inside the mind of Birnbaum. Judge, that’s a medical diagnosis
22 and if I was sick in the head you don’t punish me for it. Okay? It also says
23 that “The award of exemplary punitive damages is an appropriate amount to seek
24 to gain the relief sought by the Court, which is to stop Birnbaum and others,
25 similarly liking, from filing similar frivolous motions (inaudible)”. That was

1 a conclusion of law? Judge, come on.

2 Judge, Judge Chapman also doesn't mention that he was assigned
3 to the beaver dam case. The affidavits don't say anything. Opposing lawyer
4 says all kinds of stuff, which is hearsay at best. He doesn't swear to it and
5 he doesn't dispute the facts.

6 Judge, you've got nothing in front of you. The summary? It says,
7 coming back to this unconditional, "which the Court seeks" is unlawful.
8 And the other one "sought by the Court" exemplary punitive, plum unlawful
9 by civil process. And to keep a citizen from filing in a court of law, that
10 takes the cake. First of all, it violates the First Amendment right.

11 MR. CONTRERAS: Objection, Your Honor. This is all
12 rehashing things he's already talked about.

13 THE COURT: Mr. Birnbaum, your final words.

14 MR. BIRNBAUM: Thank you. Judge, I strongly urge you
15 what I've got in my pleadings, maybe not the exact words, to take judicial
16 notice of the First Amendment and due process violation by Judge Banner
17 and Judge Chapman regardless of how you rule whether I have a cause
18 over here.

19 MR. CONTRERAS: I'm going to object, Your Honor. That's
20 a totally absurd and inappropriate request.

21 MR. BIRNBAUM: Judge, I have a right--

22 THE COURT: The Court has written down-- The only
23 issue before the Court is Plea of Jurisdiction. That's the only thing I'm
24 here for.

25 MR. BIRNBAUM: Okay. I'm through. Thank you for

1 your indulgence in putting up with me.

2 THE COURT: Thank you. You may proceed.

3 MR.CONTRERAS: And I'll try to be much briefer –
4 more brief here. Your Honor, the bottom line is, based on the law and
5 based on the affidavits presented, of course which Mr. Birnbaum has
6 selectively quoted to, but reading the affidavits in their entirety, conclusively
7 show that these judges, the Honorable Judges Chapman and Banner, were
8 acting within their judicial capacity. They had (inaudible) jurisdiction over
9 their acts. Their orders and judgments in issue here occurred in the courtroom
10 here, or in their chambers, and were taken in their judicial capacity.

11 Now, Mr. Birnbaum has no evidence to controvert these affidavits.
12 He had– He could have done discovery over two years ago when he filed
13 this lawsuit. He filed this lawsuit back in November of '06. Two years
14 passed. Over two years and he finally gets around to serving them because
15 the case was going to get dwopd. He let the case sit there for two years. And
16 now he's trying to say he has some sort of evidence to create a fact issue, is
17 just ridiculous. He has presented no evidence other than generalized, vague,
18 unsupportable claims and allegations which would overcome judicial immunity,
19 which they don't.

20 He has no due process claim. I don't even know why he's talking about
21 due process. That wasn't alleged in the pleadings and that's not sufficient to
22 overcome judicial immunity.

23 And, Your Honor, based on legal authority and affidavits, it's clear
24 that judicial immunity does apply to bar any cause of action brought by Mr.
25 Birnbaum against these judges.

1 For those reasons, Your Honor, I would respectfully request that
2 this plea be granted in its entirety and be dismissed with prejudice. And
3 in that regard, Your Honor, may I approach with an order?

4 THE COURT: The Court, having heard the request is of
5 the opinion that the motion should be granted because the action is predicated
6 on two orders signed by these judges in their judicial capacity.

7 Now, I'll make a finding of fact that a recusal hearing is a judicial
8 proceeding. So the Court will grant the Motion for Plea of Jurisdiction
9 and sign the order as requested.

10 Now, Mr. Birnbaum, do you realize how much these hearings cost
11 the tax payers of the State of Texas and Van Zandt County? Do you
12 realize that I get paid for traveling down here and hearing this case from
13 the tax payers of your local county? And the tax payers of the State of
14 Texas pays this young man over here to come in from Austin to hear this
15 case? Do you realize that? The reason I'm going into this with you is,
16 if you come back in here with some of this stuff, you're looking at a
17 contempt proceeding by this Court because of your frivolous filings.

18 Now—

19 MR. BIRNBAUM: Would you—

20 THE COURT: Now, I've heard you and given you plenty
21 of time to be heard. Now, if you want to play lawyer, you've got to take
22 responsibilities of being a lawyer. And that means, no filing frivolous
23 pleadings. Do you understand what I'm telling you? It's not a game.
24 It is a very serious matter. I've listened to you and you're going to listen
25 to me.

1 MR. BIRNBAUM: Judge, I request you put that on paper
2 and sign it.

3 THE COURT: You request that I hold you in contempt and
4 put it on paper and sign it?

5 MR. BIRNBAUM: No. I request that the instructions that
6 you're giving me be in writing.

7 THE COURT: That's why we have a court reporter down
8 here. So I'm telling you, if you come back in here with frivolous pleadings,
9 you're looking at a potential punishment of up to six months confinement
10 and up to a \$500.00 fine. And I think I have the ability to hold you in contempt
11 at this particular time, but I'm not going to do it because you appear to be a
12 nice person. But you are misguided. You're wasting county tax payers money.
13 You're wasting the State of Texas's money. It needs to be spent on other things.

14 Now, do you understand what I'm telling you?

15 MR. BIRNBAUM: (No response)

16 THE COURT: Now, if you want me to come down on you, I'll
17 come down on you and give you something to appeal. And you can appeal it
18 from a jail cell. This is serious business. This isn't a game.

19 Now, you know a judge signing an order is a judicial action.

20 MR. BIRNBAUM: It can also be unlawful.

21 THE COURT: Then you had the right to appeal it and you
22 didn't appeal it, and you got a reversal. So put it to bed. If you get me back
23 down here, you're going to make me mad. And that's on the record. Because
24 there's no use in spending state money on this kind of frivolous action. Now,
25 do you understand me?

1 MR. BIRNBAUM: I hear you.

2 THE COURT: Okay. I'm sure you've got a life to live. I've
3 got a life to live. We don't need this kind of stuff. These judges made a
4 ruling. They didn't prevent you from appealing that ruling. They didn't
5 stand in your way.

6 MR. BIRNBAUM: They did. There was no case.

7 THE COURT: I've heard what you said. But legally there was
8 an enforceable order signed by a judge. You've got a right to appeal it. They
9 didn't stand in your way. You've got appellate courts. It's over.

10 Now, you try to resurrect it again, I've given you a warning that you're
11 going to be treated as any other attorney. If an attorney brought this kind of
12 stuff, they would get sanctioned by the bar association. And my job as judge
13 is to hear a case, and in a proper situation, hold people in contempt for frivolous
14 pleadings. And that's not just a monetary sanction. That's a jail sanction.
15 So if you continue to do this, you better bring your toothbrush to the next
16 hearing unless you've got some real good law. Do you understand what I'm
17 telling you?

18 MR. BIRNBAUM: I hear you.

19 THE COURT: All right. Good luck to you, sir. The Court
20 will sign orders upon presentation.

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(END OF PROCEEDINGS)

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COUNTY OF VAN ZANDT)
STATE OF TEXAS)

I, TRACY J. FONTAINE, Certified Shorthand Reporter in and for the County of Van Zandt, State of Texas, do hereby certify that the foregoing pages constitute a true and correct transcription of the proceedings held in open court, or in chambers, and were reported by me.

WITNESS MY HAND this the 19th day of October, 2009.



TRACY J. FONTAINE, CSR
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CERTIFICATION NO: 512
EXPIRATION DATE: 12/31/10