

No. _____

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

Udo Birnbaum
Plaintiff

vs.

VERIFIED COMPLAINT

Hon. Paul Banner

Individually and in his official capacity as judge assigned
to the Texas 294th District Court of Van Zandt County, Texas

G. David Westfall

Christina Westfall

Stefani (Westfall) Podvin
Defendants

COMPLAINT FOR DECLARATORY RELIEF

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

*"In assessing the [\$62,885] sanctions, the Court has taken into consideration that although Mr. Birnbaum may be well-intentioned and may believe that he had some kind of real claim as far as RICO there was nothing presented to the court in any of the proceedings since I've been involved that suggest he had any basis in law or in fact to support his [civil RICO] suits against the individuals¹". Sanctions hearing July 30, 2002, **Exhibit "B", line 5.***

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

¹ My civil RICO claim (as cross and third-party plaintiff, same "enterprise", same "scheme") had been against "the individuals", and "the individuals" only, NOT against their Law Office "enterprise" they were using to sue me.

JURISDICTIONAL BASIS

1. Plaintiff claims federal jurisdiction pursuant to Article III § 2 which extends the jurisdiction to cases arising under the U.S. Constitution.

2. Plaintiff brings this suit pursuant to Title 42 U.S. Code 1983 for violations of certain protections guaranteed to him by the First, Fifth, and Fourteenth Amendment of the federal Constitution, by all defendants in concert with **Hon. Paul Banner** under color of law in his capacity as a Texas district judge.

PARTIES

3. Plaintiff pro se **Udo Birnbaum** ("Birnbaum") is a natural person residing in Van Zandt County, with a mailing address of 540 VZCR 2916, Eustace, Texas 75124.

Birnbaum was the defendant in an underlying suit² claiming an unpaid OPEN ACCOUNT for "legal services", where a "The Law Offices of G. David Westfall, P.C." ("Law Office") was suing for an additional \$18,121.10 (in addition to having received a non-refundable prepayment of \$20,000, and the lawyer retainer plainly stating, "*We reserve the right to terminate for Your [Birnbaum] non-payment of fees or costs.*" (Clearly NOT an open account!))

Birnbaum can be reached at (903) 479-3929, phone and fax.

4. Defendant **Hon. Paul Banner** ("Judge Banner") is a Texas Senior judge, sitting by special assignment to the 294th District Court of Van Zandt County, Texas. He resides at 24599 CR 3107, Gladewater, Texas 75647. He conducts business through the 294th District Court, 121 E. Dallas Street, Canton, Texas

² The Law Offices of G. David Westfall, P.C. vs. Udo Birnbaum, Texas 294th District Court, No. 00-00619

75103. He may also be reached at First Administrative Judicial Region, 133 N. Industrial LB50, Dallas, Texas 75207.

Judge Banner was the trial judge in the underlying proceedings.

5. Defendant attorney **G. David Westfall, deceased** ("Westfall") through "Law Office" was claiming an unpaid OPEN ACCOUNT for legal fees of \$18,121.10 (on top of a non-refundable prepayment of \$20,000.00) supposedly due from Birnbaum for "legal services" in suing then 294th district judge, Tommy Wallace, Van Zandt district attorney Leslie Dixon, three more ex district judges, several attorneys, and assorted court personnel, in the Dallas federal court³ under the anti-racketeering statute ("civil RICO"), in response to a suit in the 294th district court against Birnbaum over a BEAVER dam⁴.

6. Defendant **G. David Westfall, deceased** ("David Westfall") was the ONLY attorney and ONLY officer ("director") and ONLY shareholder at the "Law Office".

He still speaks (as does the "Law Office") through attorney Frank C. Fleming, 6611 Hillcrest, PMB 305, Dallas, Texas 75205-1301. Phone (214) 373-1234. Fax (214) 373-3232 or (214) 265-1979.

7. Defendant **Christina Westfall** is the wife of G. David Westfall, and was the bookkeeper at the "Law Office". Judge Banner fined ("sanctioned") Birnbaum \$62,885, to be paid jointly to Christina Westfall and Stefani Podvin (below), stating that "*Mr. Birnbaum may be well-intentioned and may believe that he had*

³ *Udo Birnbaum v. Richard Ray, et al*, Northern District of Texas, Dallas Division, No. 3-99CV0696-R

⁴ *William B. Jones v. Udo Birnbaum*, Texas 294th District Court of Van Zandt County, No. 95-63

some kind of real claim as far as RICO", but that he did not see the evidence as showing Mr. Birnbaum's civil RICO claim. (Birnbaum had of course asked for determination by jury).

Christina Westfall is still represented in the underlying case by attorney Frank C. Fleming. (See above)

8. Defendant **Stefani [Westfall] Podvin** is the attorney daughter of G. David Westfall, and represents to the Texas Secretary of State that she is the ONLY shareholder of the Law Office PC, and documents show her as appointing G. David Westfall as "director" of the Law Office ten years in a row.

Stefani [Westfall] Podvin is still represented in the underlying case by attorney Frank C. Fleming. (See above)

STATEMENT OF CASE

9. **PLAINTIFF The Law Offices of G. David Westfall, P.C.** ("Law Office") filed suit⁵ against me in the 294th District Court of Van Zandt County, Texas, claiming an UNPAID OPEN ACCOUNT for "legal services" in the amount of \$18,121.10.

10. There of course never was an open account, not with a \$20,000 NON-REFUNDABLE prepayment "for the purpose of insuring our availability", and the lawyer reserving the "right to terminate" for "your [Birnbaum] non-payment of fees or costs".

⁵ *The Law Offices of G. David Westfall, P.C. v. Udo Birnbaum*, 294th District Court of Van Zandt County, Texas, cause no 00-00619

11. What had first brought me into the 294th District Court was when I was sued in 1995 over a BEAVER DAM⁶. The \$20,000 prepayment had been for suing then 294th district judge Tommy Wallace and other state judges in the Dallas Federal Court⁷ for racketeering (18 U.S.C. § 1964(c) "civil RICO") regarding their beaver dam scheme. Then long after I terminated him, Westfall brought this supposed "open account" case, claiming I owed him an additional \$18,121.00.

12. I asserted defenses of FRAUD, and counter-claimed under the Texas Deceptive Trade Practices Act (DTPA), and made cross and third party claims 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. I also moved for appointment of an auditor per RCP Rule 172 to investigate and report on the alleged OPEN ACCOUNT.

13. Judge Banner DENIED my motion for an auditor (Exhibit C, page 2), DENIED my evidence (Exhibit C), ruled summary judgment (Exhibit D) on my civil RICO claim, DENIED my DTPA jury question of **no-worth** (judges are immune from liability, the suit against the judges had no worth!), DENIED my jury question of **excused**, because the lawyer had not done what he had promised⁸.

14. Then, THREE months AFTER the trial, Judge Banner comes back⁹ again to weigh my civil RICO case (I of course had asked for weighing by JURY), and FINES me \$62,885 (Exhibit A) for having made such claim TWO years earlier

⁶ *William B. Jones v. Udo Birnbaum*, No. 95-63, 294th District Court of Van Zandt County, 1995. Case still active.

⁷ *Udo Birnbaum v. Richard L. Ray, et al*, No. 3:99-CV-0696-R, Dallas Federal Court, 1999.

⁸ I asked for the **excused** issue to the jury when the lawyer framed his jury issues as a breach of contract, which he of course had not even pleaded!)

⁹ The first time he weighed it was when he granted summary judgment against my civil RICO claim (Exhibit D)

(having long ago granted summary judgment on it), stating (Exhibit "B", page 7, line 5) that I may have been "**well-intentioned**", just that **he did not see a civil RICO case:**

*"Mr. Birnbaum may be **well-intentioned** and may believe that he **had** some kind of real claim as far as RICO there **was** nothing presented to the court in any of the proceedings since I've been involved that suggest he **had** any basis in law or in fact to support his [civil RICO] suits against the individuals¹⁰". (all completed acts, making the sanction purely punitive, not "coercive") Sanctions hearing July 30, 2000 (Exhibit "B", page 7, line 5)*

* * * * *

For those not real familiar "with civil RICO", some key law:

"It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." **18 U.S.C. § 1962(c)** (Part of 18 U.S.C. § 1961 et seq. "RICO")

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

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

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

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

¹⁰ My civil RICO suit had been against "the individuals", and "the individuals" ONLY, not against "Law Office".

"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.

"**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.

"[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)
U.S. SUPREME COURT

* * * * *

THE \$62,255.00 "SANCTION" JUDGMENT IS UNLAWFUL

The sanction is CRIMINAL in nature, for it is for a COMPLETED act (for making a civil RICO defense and claim TWO years earlier)

15. 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 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)

16. So what had I done? There was never a warning. The sanction Order (Exhibit "A") 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 hearing¹¹ 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

¹¹ Transcript of 7-30-02 "frivolous lawsuit" sanction hearing. (Exhibit B, "page 7" lines 5 through 12)

in law or in fact to support his suits against the individuals¹², and I think -- can find that such sanctions as I've determined are appropriate." Sanctions hearing, Exhibit "B", page 7, line 5.

17. 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.)

18. 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 Judge Banner is again weighing the evidence at the sanction hearing! His belief that I may be "*well-intentioned*" and "*may believe that he [Birnbaum] had some kind of real claim*" surely did not weigh on Judge Banner 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.¹³ 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".

19. 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.**"

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

¹² My civil RICO claim (as cross and third-party plaintiff, same "enterprise", same "scheme") had been against "the individuals", and "the individuals" only, NOT against their Law Office "enterprise" they were using to sue me.

¹³ My civil RICO claim. All civil RICO defendants of course always cry "frivolous".

*"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!¹⁴ NOTHING!

20. My ***Motion to Reconsider*** showed 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! That I did not bring this suit. That the court was required to appoint an auditor. That I am entitled to free speech (my claim in court) on an issue of great public importance, i.e. the Westfalls' abuse of the judicial system. That civil RICO defendants always claim "frivolous".

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

22. My ***Request for Findings*** asked Judge Banner 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.

¹⁴ *Order On Motions For Sanctions*, Exhibit A, page 1, near bottom of first page

23. The record is replete with the trial judge letting the Westfalls run amuck. Again and again they obstructed discovery, 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.

24. How could the Court now suddenly find that the RICO issue, on which it had allowed and ordered discovery (Appendix E, handwritten by judge Banner), now suddenly was so frivolous, when the Court, upon hearing, had ordered the discovery?

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

26. I never disobeyed any order, for there were none, and as judge Banner himself said, I was "well-intentioned", just that he did not see a civil RICO case, and punished me \$62,855 for having made a civil RICO claim!

27. 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.

COUNT I

Claim for Deprivation of First Amendment Right Of Speech and Confrontation without Fear of Oppression And Retaliation Under Color of Official Right

28. Plaintiff realleges paragraphs 1 through 27 as if fully stated herein.
29. The \$62,855 sanction imposed on Birnbaum is a deprivation of his First Amendment Right:

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

COUNT II

Claim for Deprivation of Fifth Amendment Right to Due Process

30. Plaintiff realleges paragraphs 1 through 27 as if fully stated herein.
31. The \$62,855 sanction imposed on Birnbaum is a deprivation of his Fifth Amendment Right to due process. Punishment, no matter how designated, of course requires full criminal process, including a finding of "beyond a reasonable doubt". It also does not matter how Judge Banner got there, this sanction is unlawful by civil process.

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

PRAYER

WHEREFORE, Plaintiff respectfully requests that this court:

- (a) declare that the \$62,855 Order on Motion for Sanctions is contrary to law;
- (b) direct that Judge Banner conform to such declaration within 30 days by rescinding the Order;
- (c) retain jurisdiction over this action in the event that Judge Banner fails to conform with such declaration;
- (d) issue other relief as this Court deems appropriate and just.

Respectfully submitted,

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

VERIFICATION

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 above, and being by me first duly sworn, declared that all the statements in the above complaint are true and correct to the best of his ability, and that the attached exhibits are true and correct copies of the originals (except for obvious mark-ups).

Udo Birnbaum

Given under my hand and seal of office this _____ day of March, 2004

Notary in and for The State of Texas

The **existence or nonexistence** of any **right**, duty, power, liability, privilege, disability, or immunity or of **any fact** upon which such legal relations depend, or of a status, may be declared.

SWAP JURISDICTION TO FRONT. Certain instruments, and specifically whether **unlawful under our Constitution.**

Attached Appendix

- A Order on Motion for Sanctions
- B Transcript of sanctions hearing - "well-intentioned"
- C Denial of my evidence
- D Summary Judgment
- E Ordering depositions