

No. 6:04cv114

FILED-CLERK
U.S. DISTRICT COURT
04 MAR 19 PM 3:02
TEXAS-EASTERN
BY _____

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, 373-74 (3d Cir. 1981); see also *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) (access to courts is one aspect of the First Amendment right to petition the government for grievances). Moreover, it was also clearly established that the government cannot retaliate against someone for engaging in constitutionally protected activity in a way that would chill a reasonable person in the exercise of the constitutional right. See *Rutan v. Republican Party of Illinois.*", 497 U.S. 62, 73 , 76 n.8 (1990). **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

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
Udo Birnbaum

Given under my hand and seal of office this 19 day of March, 2004



Ruthie McAdoo
Notary in and for The State of Texas



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

No. 00-00619

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

IN THE DISTRICT COURT

Plaintiff

v.

294th JUDICIAL DISTRICT

UDO BIRNBAUM

Defendant/Counter-Plaintiff

**G. David Westfall, Christina Westfall, and
Stefani Podvin,**

Counter-Defendants

VAN ZANDT COUNTY, TEXAS

ORDER ON MOTIONS FOR SANCTIONS

On July 30, 2002, came on to be heard, Motions for Sanctions filed by G. David Westfall, Christina Westfall, and Stefani Podvin, as well as to be heard Motions for Sanctions filed by Udo Birnbaum. The plaintiff, The Law Office of G. David Westfall, P.C. (the "Plaintiff"), appeared in person by representative and by attorney of record. The defendant, Udo Birnbaum, appeared in person, pro se. The counter-defendant, G. David Westfall, appeared by representative and by attorney of record. The counter-defendants, Christina Westfall and Stefani Podvin appeared in person and by attorney of record. All parties announced ready for a hearing on all the pending motions for sanctions currently on file in this matter at the time of the hearing.

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.



156/834

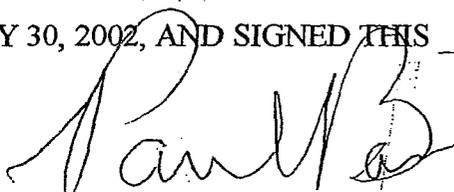
It is therefore, **ORDERED, ADJUDGED and DECREED** that the Counter-Defendants, Christina Westfall and Stefani Podvin are awarded damages as a sanction against and to be paid by defendant, Udo Birnbaum, to Christina Westfall and Stefani Podvin as follows:

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

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

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

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



JUDGE PRESIDING

156/835

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1 damages, \$5,000.00 in punitive and the joint and several
 2 \$50,085.00 in attorneys' fees. Mr. Birnbaum's sanctions as
 3 against Mr. Fleming or against the P.C. is denied and nothing
 4 is ordered.

5 In assessing the sanctions, the Court has
 6 taken into consideration that although Mr. Birnbaum may be
 7 well-intentioned and may believe that he had some kind of
 8 real claim as far as RICO there was nothing presented to the
 9 court in any of the proceedings since I've been involved that
 10 suggest he had any basis in law or in fact to support his
 11 suits against the individuals, and I think -- can find that
 12 such sanctions as I've determined are appropriate. And if
 13 you will provide me with an appropriate sanctions order, I
 14 will reflect it.

15 Now, as far as relief for sanctions on behalf
 16 of Mr. Westfall, individually, that is specifically denied.

17 Any relief sought by any party by way of
 18 sanctions which have not been specifically addressed either
 19 by the granting or the denial of same -- such is denied.

20 Okay. How soon can I expect an order because
 21 I gather this matter will go up to whatever appropriate
 22 appeals court for review?

23 MR. FLEMING: I will give Mr. Birnbaum the
 24 statutory three days. I'll submit it to him. And if I don't
 25 hear back from him, I'll submit it to you after.

*\$62,000 punishment for well-intentioned?
 unconditional - makes it criminal punishment!*

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THE COURT: Now, I am told that this Court should not engage in the discussion of why the Court did or didn't do something. The testimony, as I recall before the jury, absolutely was that Mr. Birnbaum entered into a contract, which the signature is referred to, agreed that he would owe some money that -- for attorneys' fees.

Mr. Westfall, on behalf of the P.C., testified to the same. There was no dispute as to the contract or its terms. What was in dispute is whether or not Mr. Westfall's P.C. would have been entitled to any residual amount. That's what was submitted to the jury. The jury resolved that issue and found a figure. And therefore, I think what was submitted to the jury is appropriate and subject to review. And that's it. This Court stands in recess.

MR. FLEMING: Thank you, Your Honor.

No! Was not submitted to the jury!

Jury questions sounded in Breach of Contract.

(Not pleaded, Not proved)

Judge did not allow my "excused" time ~~that HE had not lived~~ ^{that HE had not lived} ~~up~~ ^{up} to any agreement!

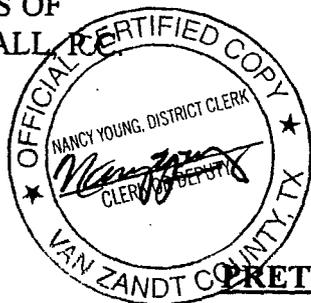
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THE LAW OFFICES OF
G. DAVID WESTFALL, P.C.

vs.

UDO BIRNBAUM



IN THE DISTRICT COURT

294th JUDICIAL DISTRICT

VAN ZANDT COUNTY, TEXAS

18 PM 2:50
DIST. CLERK NANCY YOUNG
VAN ZANDT CO. TX.
DEP.

PRETRIAL ORDER

On the 7th day of September 2001 came on to be heard the above-styled and numbered cause for various matters and motions pending for pretrial. All parties appeared either in person or by and through their attorney of record and announced ready to proceed.

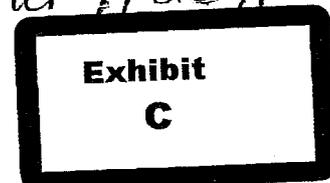
The court proceeded to first hear the objections of The Law Offices of G. David Westfall, P.C., G. David Westfall, Christina Westfall and Stefani Podvin's to the summary judgment evidence of Udo Birnbaum. The court was of the opinion that the objections were well founded and should be in all things sustained.

IT IS ACCORDINGLY ORDERED, ADJUDGED AND DECREED that:

- (1) objections 1-10 of the Law Offices of G. David Westfall, P.C. objections to summary judgment evidence of Udo Birnbaum be sustained;
- (2) objections 1-24 of G. David Westfall's objections to summary judgment evidence of Udo Birnbaum be in all things sustained;
- (3) objections 1-23 of Christina Westfall's objections to summary judgment evidence of Udo Birnbaum be in all things sustained; and
- (4) objections 1-23 of Stefani Podvin's objections to summary judgment evidence of Udo Birnbaum be in all things sustained.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that Udo Birnbaum's Motion to Compel Depositions be in all things denied.

See page 2 for Motion to appoint Auditor under PCA Rule 172 "Denied"

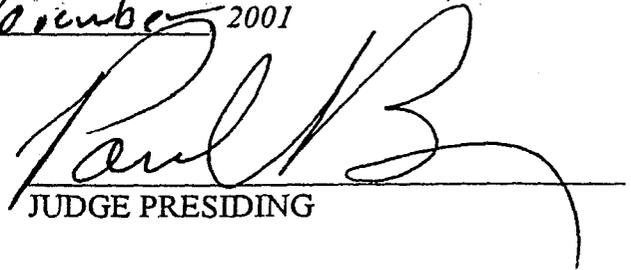


IT IS FURTHER ORDERED, ADJUDGED and DECREED that Udo Birnbaum's

Motion for Appointment of Auditor is in all things denied.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that G. David Westfall's
Objections to Defendant's First Set of Interrogatories Nos. 5, 6, and 7 be in all things sustained
and that the objection to Interrogatory No. 14 be in all things overruled.

SIGNED this the 13 day of November 2001


JUDGE PRESIDING

PAUL BANNER
SENIOR JUDGE
196TH DISTRICT COURT
SITTING BY ASSIGNMENT

No. 00-00619

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

vs.

UDO BIRNBAUM



IN THE DISTRICT COURT

294th JUDICIAL DISTRICT

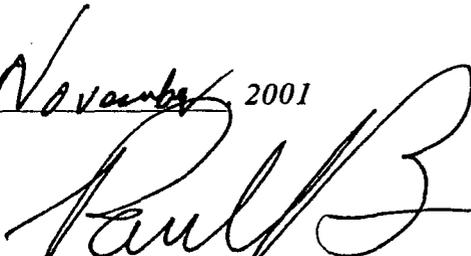
VAN ZANDT COUNTY, TEXAS

ORDER SUSTAINING MOTIONS FOR SUMMARY JUDGMENT

On the 7th day of September 2001 came on to be heard the Motions for Summary Judgment of The Law Offices of G. David Westfall, P.C, G. David Westfall, Christina Westfall and Stefani Podvin in the above-styled and numbered cause. The court having read the Motions together with the responses thereto, having ruled on the objections to the summary judgment evidence and having heard the argument of counsel and of the pro se parties is of the opinion that the Motions are well taken and should be in all things granted.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that the Motions for Summary Judgment of The Law Offices of G. David Westfall, P.C. be sustained as to RICO claims and that the Motion for Summary judgment of G. David Westfall be in all things sustained and that the Motions for Summary Judgment of Christina Westfall and Stefani Podvin be in all things sustained.

SIGNED this the 13 day of November 2001



JUDGE PRESIDING

PAUL BANNER
SENIOR JUDGE
196TH DISTRICT COURT
SITTING BY ASSIGNMENT

**Exhibit
D**

903-479-3929 FAX

Westfall

Westfall -
214 741-4746

7-6 Dep Det @ Westfall 9³⁰

Fleming
214 373-3232

7-13 Westfall @ PC "

7-20 Daughter @ 9³⁰ @ Fleming

7-27 wife @ 9³⁰ @ Flem

8-1 Med Req -

8-17 MST Fishing

9-5 - Pl Plead

9-7 MST Fishing

9-14 - Dy Ple

10-1 - Court

11-12 - P T Final

11-13 - Jury Selection

Exhibit
E

(3)

WAIVER OF SERVICE OF SUMMONS

TO: Udo Birnbaum (NAME OF PLAINTIFF'S ATTORNEY OR UNREPRESENTED PLAINTIFF)

I, PAUL BANNER, acknowledge receipt of your request (DEFENDANT NAME)

that I waive service of summons in the action of Udo Birnbaum v. Paul Banner et al (CAPTION OF ACTION)

which is case number 0104 cv 114 in the United States District Court (DOCKET NUMBER)

for the Eastern District of Texas, Tyler Division

I have also received a copy of the complaint in the action, two copies of this instrument, and a means by which I can return the signed waiver to you without cost to me.

I agree to save the cost of service of a summons and an additional copy of the complaint in this lawsuit by not requiring that I (or the entity on whose behalf I am acting) be served with judicial process in the manner provided by Rule 4.

I (or the entity on whose behalf I am acting) will retain all defenses or objections to the lawsuit or to the jurisdiction or venue of the court except for objections based on a defect in the summons or in the service of the summons.

I understand that a judgment may be entered against me (or the party on whose behalf I am acting) if an answer or motion under Rule 12 is not served upon you within 60 days after Mar. 24, 2004 (DATE REQUEST WAS SENT) or within 90 days after that date if the request was sent outside the United States.

MAY 10, 2004 (DATE)

[Signature] (SIGNATURE)

Printed/Typed Name: JOHN M. ORTON

As ATTORNEY of DEFENDANT BANNER (TITLE) (CORPORATE DEFENDANT)

Duty to Avoid Unnecessary Costs of Service of Summons

Rule 4 of the Federal Rules of Civil Procedure requires certain parties to cooperate in saving unnecessary costs of service of the summons and complaint. A defendant located in the United States who, after being notified of an action and asked by a plaintiff located in the United States to waive service of summons, fails to do so will be required to bear the cost of such service unless good cause be shown for its failure to sign and return the waiver.

It is not good cause for a failure to waive service that a party believes that the complaint is unfounded, or that the action has been brought in an improper place or in a court that lacks jurisdiction over the subject matter of the action or over its person or property. A party who waives service of the summons retains all defenses and objections (except any relating to the summons or to the service of the summons), and may later object to the jurisdiction of the court or to the place where the action has been brought.

A defendant who waives service must within the time specified on the waiver form serve on the plaintiff's attorney (or unrepresented plaintiff) a response to the complaint and must also file a signed copy of the response with the court. If the answer or motion is not served within this time, a default judgment may be taken against that defendant. By waiving service, a defendant is allowed more time to answer than if the summons had been actually served when the request for waiver of service was received.

WAIVER OF SERVICE OF SUMMONS

TO: Udo Birnbaum
(NAME OF PLAINTIFF'S ATTORNEY OR UNREPRESENTED PLAINTIFF)

I, Christina Westfall, acknowledge receipt of your request
(DEFENDANT NAME)

that I waive service of summons in the action of Birnbaum v. Baunev et al,
(CAPTION OF ACTION)
which is case number 0:04cv114 in the United States District Court
(DOCKET NUMBER)
for the Eastern District of Texas

I have also received a copy of the complaint in the action, two copies of this instrument, and a means by which I can return the signed waiver to you without cost to me.

I agree to save the cost of service of a summons and an additional copy of the complaint in this lawsuit by not requiring that I (or the entity on whose behalf I am acting) be served with judicial process in the manner provided by Rule 4.

I (or the entity on whose behalf I am acting) will retain all defenses or objections to the lawsuit or to the jurisdiction or venue of the court except for objections based on a defect in the summons or in the service of the summons.

I understand that a judgment may be entered against me (or the party on whose behalf I am acting) if an answer or motion under Rule 12 is not served upon you within 60 days after Mar. 26, 2004,
(DATE REQUEST WAS SENT)
or within 90 days after that date if the request was sent outside the United States.

4.26.04 Christina Westfall
(DATE) (SIGNATURE)

Printed/Typed Name: Christina Westfall

As _____ of _____
(TITLE) (CORPORATE DEFENDANT)

Duty to Avoid Unnecessary Costs of Service of Summons

Rule 4 of the Federal Rules of Civil Procedure requires certain parties to cooperate in saving unnecessary costs of service of the summons and complaint. A defendant located in the United States who, after being notified of an action and asked by a plaintiff located in the United States to waive service of summons, fails to do so will be required to bear the cost of such service unless good cause be shown for its failure to sign and return the waiver.

It is not good cause for a failure to waive service that a party believes that the complaint is unfounded, or that the action has been brought in an improper place or in a court that lacks jurisdiction over the subject matter of the action or over its person or property. A party who waives service of the summons retains all defenses and objections (except any relating to the summons or to the service of the summons), and may later object to the jurisdiction of the court or to the place where the action has been brought.

A defendant who waives service must within the time specified on the waiver form serve on the plaintiff's attorney (or unrepresented plaintiff) a response to the complaint and must also file a signed copy of the response with the court. If the answer or motion is not served within this time, a default judgment may be taken against that defendant. By waiving service, a defendant is allowed more time to answer than if the summons had been actually served when the request for waiver of service was received.

WAIVER OF SERVICE OF SUMMONS

TO: Uole Birnbbaum (NAME OF PLAINTIFF'S ATTORNEY OR UNREPRESENTED PLAINTIFF)

I, Stefani Podvin (DEFENDANT NAME), acknowledge receipt of your request

that I waive service of summons in the action of Birnbbaum v. Baumer et al (CAPTION OF ACTION)

which is case number 0:04cv114 (DOCKET NUMBER) in the United States District Court

for the Eastern District of Texas

I have also received a copy of the complaint in the action, two copies of this instrument, and a means by which I can return the signed waiver to you without cost to me.

I agree to save the cost of service of a summons and an additional copy of the complaint in this lawsuit by not requiring that I (or the entity on whose behalf I am acting) be served with judicial process in the manner provided by Rule 4.

I (or the entity on whose behalf I am acting) will retain all defenses or objections to the lawsuit or to the jurisdiction or venue of the court except for objections based on a defect in the summons or in the service of the summons.

I understand that a judgment may be entered against me (or the party on whose behalf I am acting) if an answer or motion under Rule 12 is not served upon you within 60 days after Mar. 26, 2004 (DATE REQUEST WAS SENT) or within 90 days after that date if the request was sent outside the United States.

4.26.04 (DATE) Stefani Podvin (SIGNATURE)

Printed/Typed Name: STEFANI PODVIN

As of (TITLE) (CORPORATE DEFENDANT)

Duty to Avoid Unnecessary Costs of Service of Summons

Rule 4 of the Federal Rules of Civil Procedure requires certain parties to cooperate in saving unnecessary costs of service of the summons and complaint. A defendant located in the United States who, after being notified of an action and asked by a plaintiff located in the United States to waive service of summons, fails to do so will be required to bear the cost of such service unless good cause be shown for its failure to sign and return the waiver.

It is not good cause for a failure to waive service that a party believes that the complaint is unfounded, or that the action has been brought in an improper place or in a court that lacks jurisdiction over the subject matter of the action or over its person or property. A party who waives service of the summons retains all defenses and objections (except any relating to the summons or to the service of the summons), and may later object to the jurisdiction of the court or to the place where the action has been brought.

A defendant who waives service must within the time specified on the waiver form serve on the plaintiff's attorney (or unrepresented plaintiff) a response to the complaint and must also file a signed copy of the response with the court. If the answer or motion is not served within this time, a default judgment may be taken against that defendant. By waiving service, a defendant is allowed more time to answer than if the summons had been actually served when the request for waiver of service was received.

CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

(a) PLAINTIFFS
 Birnbaum, Udo H.
 (b) County of Residence of First Listed Plaintiff Van Zandt, Tex
 (EXCEPT IN U.S. PLAINTIFF CASES)

DEFENDANTS
 Banner, Paul
 County of Residence of First Listed Defendant Upshur, Tex
 (IN U.S. PLAINTIFF CASES ONLY)
 NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

(c) Attorney's (Firm Name, Address, and Telephone Number)
 Udo Birnbaum, 540 UZCR 2916
 EUSTACE, TX 75124 (903) 479-3929

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

1 U.S. Government Plaintiff
 2 U.S. Government Defendant
 3 Federal Question (U.S. Government Not a Party)
 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

Citizen of This State	<input type="checkbox"/> 1	PTF	<input type="checkbox"/> 1	DEF	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	PTF	<input type="checkbox"/> 4	DEF	<input type="checkbox"/> 4
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5					
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6					

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	<input type="checkbox"/> 362 Personal Injury—Med. Malpractice <input type="checkbox"/> 365 Personal Injury—Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g))	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce/ICC Rates/etc. <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes <input type="checkbox"/> 890 Other Statutory Actions
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS	FEDERAL TAX SUITS		
<input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input checked="" type="checkbox"/> 444 Welfare <input type="checkbox"/> 440 Other Civil Rights	<input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition	<input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609		

V. ORIGIN (PLACE AN "X" IN ONE BOX ONLY)

1 Original Proceeding
 2 Removed from State Court
 3 Remanded from Appellate Court
 4 Reinstated or Reopened
 5 Transferred from another district (specify)
 6 Multidistrict Litigation
 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION (Cite the U.S. Civil Statute under which you are filing and write brief statement of cause. Do not cite jurisdictional statutes unless diversity.)
 42 U.S.C. 1983 for Violations of certain protections under Constitution

VII. REQUESTED IN COMPLAINT: CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 DEMAND \$ NONE CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY (See instructions): JUDGE DOCKET NUMBER

DATE 3-19-2004 SIGNATURE OF ATTORNEY OF RECORD Udo H. Birnbaum