

No. _____

IN THE
SUPREME COURT OF TEXAS
AUSTIN, TEXAS

UDO BIRNBAUM,
Petitioner

vs.

THE LAW OFFICES OF G. DAVID WESTFALL, P.C., ET AL.,
Respondents

On appeal from the 5th Court of Appeals, Dallas

PETITION FOR REVIEW

(Appendix bound separately)

Question presented:

Whether the precedent of a Texas court actually assessing a FINE of \$62,000 (or ANY fine), merely because the evidence did NOT prove a person's claim under 18 U.S.C. § 1964(c) "civil RICO", defeats the stated purpose of the [civil RICO] statute, and offends the Constitution

"[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),

"clearly established that filing a lawsuit was constitutionally protected conduct." *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 73, 76 n.8 (1990).

Udo Birnbaum, *Pro Se*
540 VZ 2916
Eustace, Texas 75124
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IDENTITY OF PARTIES AND COUNSEL

PETITIONER (Defendant, Counter-claimant, Third party plaintiff in Trial Court):

Udo Birnbaum, *Pro Se*
540 VZ 2916
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RESPONDENTS (Plaintiff, etc. in the trial court as indicated):
(Same attorney in the trial court and the appeals court)

The Law Offices of G. David Westfall, P.C. ¹ Plaintiff, Counter-defendant	Frank C. Fleming PMB 305, 6611 Hillcrest Ave. Dallas, Texas 75205-1301 (214) 373-1234 (214) 373-3232 (fax)
G. David Westfall ² Third party defendant	Frank C. Fleming
Stefani Podvin ³ Third party defendant	Frank C. Fleming
Christina Westfall ⁴ Third party defendant	Frank C. Fleming

¹ Suit initially brought by attorney G. David Westfall in behalf of the "Law Office", claiming an unpaid OPEN ACCOUNT for LEGAL FEES. There of course never was an open account, not with a \$20,000 NON-REFUNDABLE prepayment "for the purpose of insuring our [lawyer's] availability", and the lawyer reserving the "right to terminate" for "your [Birnbaum] non-payment of fees or costs".

² Told me I had "a very good case" in suing 294th District Judge Tommy Wallace, and others under civil RICO, for what they had done to me with their "BEAVER DAM" scheme on me.

³ Attorney daughter of G. David Westfall, and OWNER of the "Law Office" (at least on paper).

⁴ Wife of G. David Westfall and long time BOOKKEEPER at the "Law Office"

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STATEMENT OF THE CASE

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

(1) Nature of the case

PLAINTIFF The Law Offices of G. David Westfall, P.C. ("Law Office") claimed an UNPAID OPEN ACCOUNT⁵ for "legal services" in the amount of \$18,121.10 and pleaded no other cause of action⁶.

DEFENDANT Udo Birnbaum ("Birnbaum") answered⁷ by denying such alleged "open account" under oath, asserted defenses of FRAUD, counter-claimed under the Texas Deceptive Trade Practices Act (DTPA), and made cross and third party claims⁸ under 18 U.S.C. § 1964(c) ("civil RICO") against three (3) persons associated with the "Law Office" (G. David Westfall, Christina Westfall, and Stefani [Westfall] Podvin, "The Westfalls"), and asked for trial by jury. Birnbaum also moved for APPOINTMENT OF AN AUDITOR per RCP Rule 172 to investigate and report on the alleged OPEN ACCOUNT⁹ to show that there existed no open account at all, nor systematic records, etc. as claimed, but only a \$20,000 prepaid non-refundable retainer paid to lawyer G. David Westfall.¹⁰

⁵ *Plaintiff's Original Petition* 9-20-00 (Clerk's Record 16-17) and *First Amended Original Petition* 9-05-01 (Clerk's Record 229-237), ONE YEAR LATER, no difference except for attached exhibit "A" and verification. **There is of course no such thing as an OPEN ACCOUNT for "legal services", not with a \$20,000 non-refundable prepayment.**

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

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

⁸ *Udo Birnbaum's Amended Third Party civil RICO claim, against G. David Westfall, Christina Westfall, and Stefani Podvin* 7-11-01 (Clerk's Record 100-114)

⁹ *Motion for Appointment of Auditor Pursuant to Rule 172 RCP to Make Finding of State of the Accounts between the parties.* 12-26-00 (Record 65-66). Also *Supplement to Motion for Appointment of Auditor etc* 1-8-01 (Record 67-68). RCP rule 172 says the trial judge SHALL appoint an auditor, but this trial judge would not do so. See Issue 2, this Petition.

¹⁰ Exhibit A, at the end of this Petition

- (2) **Judge who signed the order and judgment:** Hon. Paul Banner
- (3) **Trial Court:** 294th District Court of Van Zandt County
- (4) **Disposition by trial court:**
- \$59,000 judgment against me to "Law Office"
 - Summary judgment against my civil RICO claim
 - \$62,000 SANCTION against me for having made my civil RICO claim
- (5) **Parties in the court of appeals:**
Udo Birnbaum - Appellant
The Law Offices of G. David Westfall, P.C. - Appellee
G. David Westfall - Appellee (Deceased)
Christina Westfall - Appellee
Stefani Podvin - Appellee
- (6) **District of the court of appeals:** Fifth Court of Appeals in Dallas, Texas
- (7) **Justices participating in the court of appeals:**
ORDER - signed by Justice Whittington (DENIED motion to make the trial judge make *Findings*)
OPINION - Justices **Whittington** (author), **Wright**, and **Bridges**
JUDGMENT - signed by Justice Mark Whittington
ORDER - signed by Justice Whittington (DENIED En Banc)
- (8) **Citation for the court of appeals' opinion:**
PUBLISHED, but citation unknown (but available at COA web site)
- (9) **Disposition by the court of appeals:**
OPINION - Oct. 23, 2003
JUDGMENT - Oct. 23, 2003
ORDER (Motion for Rehearing En Banc) - DENIED Dec. 10, 2003

STATEMENT OF JURISDICTION

Jurisdiction is per RCP Rule 53.1: "The Supreme Court may review a court of appeals' final judgment on a petition for review addressed to "The Supreme Court of Texas."

ISSUES PRESENTED ON APPEAL

The matters originating in the trial court and assigned as error in the court of appeals were as follows (presented here in the exact format as presented as issues to the Fifth Court of Appeals):

1. WHETHER THE \$59,280.66 JUDGMENT IS UNLAWFUL

It does not conform to the pleadings and the verdict

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

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

3. WHETHER THE "RICO RELIEF" SUMMARY JUDGMENT IS ALSO UNLAWFUL

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

4. WHETHER THE \$62,255.00 "SANCTION" JUDGMENT IS ALSO UNLAWFUL

It is a criminal punishment without due process for having made a civil RICO claim

5. WHETHER THE TRIAL JUDGE SHOULD HAVE BEEN RECUSED FROM THE CASE¹¹

For not abiding by statutory law, the Rules of Procedure, and the mandates of the Supreme Court

6. WHETHER THERE WAS FRAUD, FRAUD, AND MORE FRAUD

FRAUD from start to finish, intrinsic and extrinsic, turning into retaliation by official oppression

7. WHETHER DUE PROCESS DEMANDS A NEW TRIAL

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

¹¹ Not presented in this Petition because of page limitation.

ISSUES PRESENTED TO THE APPEALS COURT
IN MY MOTION FOR REHEARING EN BANC

(essentially the same as the Question in this Petition for Rehearing)

1. Whether the Panel's Opinion is devoid of Constitutional considerations
 - It is "clearly established that filing a lawsuit was constitutionally protected conduct " *Rutan*, 497 U.S. 62

2. Whether the Panel micro-procedurally upholds a patently unlawful \$62,000 punitive sanction for having made a civil RICO (civil racketeering) pleading
 - "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." *Hicks v. Feiock*, U.S. Supreme Court, 485 U.S. 624 (1988)

3. Whether the Panel micro-procedurally upholds a \$59,000 judgment that does not conform to the pleadings and the verdict.
 - It does not conform to the pleadings and the verdict (RCP Rule 301. Judgments)

ISSUES PRESENTED IN THIS PETITION FOR REHEARING

Question presented:

Whether the precedent of a Texas court actually assessing a FINE of \$62,000 (or ANY fine), merely because the evidence did NOT prove a person's claim under 18 U.S.C. § 1964(c) "civil RICO", defeats the stated purpose of the [civil RICO] statute, and offends the Constitution?

*"[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),*

"clearly established that filing a lawsuit was constitutionally protected conduct. "
Rutan v. Republican Party of Illinois.", 497 U.S. 62, 73 , 76 n.8 (1990).

STATEMENT OF THE FACTS

Suit (A.35) was brought against me in the 294th district court of Van Zandt County by attorney G. David Westfall ("Westfall") in behalf of a "**The Law Offices of G. David Westfall, P.C.**", claiming an unpaid OPEN ACCOUNT for LEGAL FEES . There of course never was an open account, not with a \$20,000 NON-REFUNDABLE prepayment "for the purpose of insuring our [lawyer's] availability", and the lawyer reserving the "right to terminate" for "your [Birnbaum] non-payment of fees or costs". (See attorney "retainer agreement", at end of this Petition)

What had first brought me into the 294th District Court was when I was sued in 1995 over a BEAVER DAM¹. The \$20,000 prepayment had been for suing then 294th district judge Tommy Wallace and other state judges in the Dallas Federal Court² 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.

I, **Udo Birnbaum**, 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 (CR.18, CR.77, CR.92, CR.100). Birnbaum also moved for appointment of an auditor per RCP Rule 172 to investigate and report on the alleged OPEN ACCOUNT. (CR.65, CR.67)

¹ *William B. Jones v. Udo Birnbaum*, No. 95-63, 294th District Court of Van Zandt County, 1995. Case still active.

² *Udo Birnbaum v. Richard L. Ray, et al.*, No. 3:99-CV-0696-R, Dallas Federal Court, 1999.

The trial judge DENIED (A.96) my motion for an auditor, ruled summary judgment (A.97) on my civil RICO claim, DENIED my DTPA jury question of **no-worth** (judges are immune from suit!), DENIED my jury question of **excused** (A.38, A.40) because the lawyer had not done what he had promised³.

Then, THREE months AFTER the trial, Judge Banner comes back again to weigh my civil RICO evidence (I of course had asked for weighing by JURY), and FINES me \$62,000 (A.18) for having made such claim TWO years earlier (having long ago granted summary judgment on it), stating (A.20) 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 individuals⁴". (all completed acts, making the sanction purely punitive, not "coercive") Sanctions hearing July 30, 2000 (A.20)*

Misstatements by the Court of Appeals

The *Opinion* INCORRECTLY stated virtually ALL procedural facts, and especially as they relate to my PRESERVING my points of error for appellate review. As examples of the erroneous nature of the *Opinion* (A.2), I present the following, taken directly out of my *Petition for Rehearing En Banc* (DENIED):

- *"Birnbaum appeals a jury verdict and judgment"?* I am not appealing on the answers by the jury⁵, but on a judgment that does not conform to the pleadings and the verdict (and due process).
- *"Birnbaum also appeals orders on motions for [] sanctions"?* This is not an "order" (to "coerce") at all, but unlawful punishment⁶ ("THIS JUDGMENT RENDERED", A.18) for having made a "civil RICO" pleading! (A.20)

³ 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!)

⁴ My civil RICO suit had been against "the individuals", and "the individuals" ONLY, not against "Law Office".

⁵ Except to the extent that the jury was not presented with the correct ("due process") jury questions

Background

- "There is no order on Birnbaum's motion to appoint an auditor in the clerk's record". ERRONEOUS. See **Pretrial Order** (A.96)
- "a jury made affirmative findings for breach of contract"? The jury did **NOT** find on all the elements of a breach of contract. (See **Court's Charge**, A.41, A.44) The jury was not asked 1) if there had really been a contract, 2) whether Law Office had abided by it, my "Excused" issue (A.38, A40), 3) whether I had failed to abide by it. The trial judge decided all this, and only asked the jury "What sum of money, etc"⁷. I of course had asked for trial by jury (on **all** the elements, of course). Plaintiff of course had pleaded (A.35) only unpaid "**open account**", NOT breach of contract.
- "Third Party defendants filed a motion for sanctions under Rule 13"? **\$62,000** sanctions for legal fees of the entire proceeding is of course **not permitted** under RCP Rule 13, only fees relating to abuse of discovery, of which there was **none** on my part. (only RCP Rule 215-2b sanctions available under Rule 13)⁸. Judge Banner even found that I was "well-intentioned" (A.20), only that he did not see the evidence as showing my civil RICO case. I of course had asked for determination by JURY.

Judgment

- "Because Birnbaum filed only a partial reporter's record we are unable to review these complaints [if the judgment conforms to the pleadings and the verdict]"? ERRONEOUS. All that is needed is the pleadings (A.35),

⁶ "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).

⁷ QUESTION 1: What sum of money, if paid now in cash, would fairly and reasonably compensate the Law Offices of G. David Westfall, P.C., for its damages, if any, that resulted from Defendant, Udo Birnbaum's failure to comply with the agreement between the Plaintiff and the Defendant?

⁸ The ONLY Rule 13 monetary sanction available is under RCP 215-2b(7): "In lieu of any of the forgoing orders or in addition thereto, the court shall require the **party failing to obey the order** or the attorney advising him, or both, to pay, at such **time as ordered** by the court, the reasonable expenses, including attorney fees, **caused by the failure**, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. Such an order shall be subject to review on appeal from the final judgment. **THERE WAS NO UNDERLYING ORDER!**

the verdict (A.41), and the judgment (A.11), and they were **all** in the Clerk's Record and the Civil Appendix! That is all that counts in a **jury trial!**

- "*court could not determine whether giving improper jury instructions was harmful error*"? **ERRONEOUS**. My appeals issue is **improper jury questions!** (A.38, A.40)
- "*nothing preserved for review on issue whether judgment conformed to pleadings, because complaint could not be raised for first time on appeal*"? **ERRONEOUS**. My Brief is full of evidence of my OBJECTING in the trial court, a detailed chronology of Law Office proposed jury issues and my objections, even copying them into my Appeal Brief, even providing a copy of my *Objections* (A.38) and again LAST MINUTE *handwritten OBJECTIONS* (A.40) and including them in the *Clerk's Record* and the *Civil Appendix!*
- "*complaint could not be raised for the first time on appeal*"? **ERRONEOUS**. Was raised in my *Rule 276 Request For Endorsement By The Court of "Refusals" and "Modifications"* (A.46). Raised in my *Motion to reconsider the \$59,000 judgment*. Raised in my *Request for Findings* (A.27). Raised in my *Notice of Overdue Findings* (A.32). NO RESPONSE. Again raised in my *Motion* (A.34) in the Appeals Court to make the trial judge produce Findings.

Appointment of Auditor

- "*While Birnbaum did file a motion to appoint an auditor with the trial court, he did not receive a ruling on the motion. Therefore, he did not preserve his complaint for appeal*"? **ERRONEOUS**. See *Pretrial Order* (A.96). I moved to appoint an Auditor. I put in a supplement thereto. I requested hearings thereon. At every hearing, I presented the trial judge with a three-ring notebook with all the un-addressed motions, with a summary list on the cover. I moved for recusal for not appointing auditor. I sought **mandamus** (A.100) to make trial judge appoint auditor (denied). But it was not till his PRETRIAL Order (A.96) that Judge Banner formally denied my motion⁹.
- Despite my claim of fraud, racketeering, obstruction of discovery, affidavits by numerous persons regarding the fraud, and my right to a court-appointed auditor under RCP Rule 172, this trial judge would not do so. If there ever

⁹ *Pretrial Order*, Nov. 13, 2002. "*motion for appointment of Auditor is in all things denied.*"

was a case that required an auditor, this case was it! Also see my *Summary Judgment Appendix* (A.72)

Summary Judgment

- "We review a no-evidence summary judgment ... [for] more than a scintilla"? I provided the trial judge with hours of depositions, and documents showing that Law Office did not even have an accounting system, VOLUMES and VOLUMES of court transcripts, court findings of "bad faith" on G. David Westfall, numerous person's affidavits regarding Westfall's fraud, etc.¹⁰ See my *Summary Judgment Appendix* (A.72)
- "Birnbaum filed affidavits of several unhappy clients of Law Office"? This evidence, looked at "in light most favorable", of course showed G. David Westfall's "pattern of racketeering activity", as did the transcript of G. David Westfall's involuntary bankruptcy proceeding, as did various courts' and the State Bar's finding of "bad faith".
- "Although Birnbaum also referred to deposition testimony this evidence was not submitted to the trial court"? ERRONEOUS. At summary judgment, Judge Banner ruled that each and every document I had did not show a civil RICO case, and denied each and every bit of my civil RICO evidence, and my civil RICO claim. See *Pretrial Order* (A.95) and *Order Sustaining Motions for Summary Judgment* (A.97).
- "He [Birnbaum] does not, however, offer summary judgment evidence regarding how mailing this fraudulent bill constitutes a pattern of racketeering activity, or furthers a recognizable scheme formed with specific intent to defraud"? How can there be fraud, without intent to defraud?
- I had asked for trial by jury on my civil RICO cause and evidence, in a trial court, of course, not before the appeals panel.

Sanctions Order

- "We agree with Birnbaum that the trial court's order awards sanctions without stating the basis for the award, and therefore does not meet the requirements of rule 13. THAT MAKES IT UNLAWFUL. PERIOD.
- "This error, however, may be waived". "Waived" means knowingly giving up a right. Why would I knowingly give up a right about an unlawful sanction against me. NONSENSE.

¹⁰ The trial judge ruled on all of it, and ruled it did not show a "civil RICO" case, and granted summary judgment. See *Pretrial Order* (A.96)

- And what about my point that it is UNLAWFUL, because it is unconditional punishment, for a completed act¹¹, (i.e. not "coercive"), imposed without full due criminal process? SILENCE!
- "*Birnbaum did not bring either of his complaints about the sanctions order to the attention of the trial judge*"? ERRONEOUS. See my ***Request for Findings*** (A.27), ***Notice of Past Due Findings*** (A.32), etc.
- "*he [Birnbaum] did not object to the specificity of the order or to the criminal nature of the sanctions*"? ERRONEOUS. See my ***Request for Findings*** (A.27), ***Notice of Past Due Findings*** (A.32), etc.
- "*Birnbaum's only complaint about the specificity of the order was made in an untimely request for findings of fact*"? ERRONEOUS. The trial judge put "Aug. 9" on his ***Order on Motions for Sanctions*** (A.18), but did not "sign with the clerk", or let anybody know that he had "signed" it, till Aug. 21, and I first got notice of it on Aug. 22, 2002. My ***Request for Findings*** (A.27) filed Sept. 3, 2002 WAS timely. See my ***Request*** (A.27) for details.
- "*Therefore, the trial judge did not have the opportunity to correct the erroneous order*"? What about my ***Notice of Past Due Findings*** (A.32), even my ***Motion to have the Trial Judge Produce Finding*** (A.34) before this very same panel? (Copy was provided to Judge Banner)

Fraud

- "*he [Birnbaum] contends he made no agreements with Law Office*" ? **I made no such statement in by Brief**. I stated that our attorney retainer agreement (attached at end of this Petition) was neither "open account" nor "contract", only a prepaid \$20,000 "*to insure our [Westfall] availability in your matter*", and that he [Westfall] "*reserved the right to terminate*" for NON-PAYMENT. That was his **ONLY remedy**. Besides he had long ago broken the agreement. FRAUD, FRAUD, FRAUD

¹¹ "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)

- *"The issue regarding any contractual relationship between Birnbaum and Law Office was resolved by jury"?* The jury was not asked the due process questions, i.e. whether there had been an agreement, whether it still existed, i.e. whether Westfall had abided by the agreement (not to incur large expenses without my approval, the "excused" issue). See *Court's Charge* (A.41) and my objections (A.38) and (A.40).
- *"Therefore, we presume the omitted portions of the record support the trial court's judgment"?* This was of course a jury trial, and I am not attacking the sufficiency of the evidence for the jury verdict. Only that the VERDICT does not support the trial court's JUDGMENT.

Due Process

- *"complains of the same rulings addressed in other parts of his brief"?* My Appeals Brief refers to my ***Motion for New Trial*** (CR.444, CR.459, excruciatingly detailed, with affidavits and exhibits), with seven (7) specific Points, among them:

Point 7, "**For jury misconduct by the judge himself**", for going into the jury room for long periods, even during deliberations. There was no bailiff or other court personnel.

Point 4, "**For allowing Plaintiff to submit 'surprise' jury issues not in its pleadings**"? (handed them to me, last day of trial, just before Argument. I of course objected, even in hand-writing, and immediately filed, but to no avail)

- *"The issue presents nothing for review"?* How about the trial judge allowing surprise jury issues not in the pleadings, and jury misconduct by the trial judge himself by mixing with the jury in the jury room, and the whopping \$62,000¹² "sanction judgment" for having made a civil RICO pleading¹³. And how about **TWO** (2) judgments, in the same cause¹⁴?

¹² A trial court must first consider and impose less stringent sanctions to determine whether lesser sanctions will promote compliance and discourage further abuse. *Jones v. Andrews*, 873 S.W.2d 102, 106 (Tex. App.--Dallas 1994, no writ). As quoted in *Rawles v. Builders Structural Services*, Texas 5th No. 05-96-00467-cv

¹³ **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**. See *id.*; *McCain*, 856 S.W.2d at 757. As quoted in *Rawles v. Builders Structural Services*, Texas 5th No. 05-96-00467-cv

¹⁴ RCP Rule 301. Judgments. "**THE JUDGMENT** of the court shall conform, etc." The "*Order on Motions for Sanctions*" states : THIS JUDGMENT RENDERED ON JULY 30, 2002, AND SIGNED THIS 9TH day of August, 2002. (Not actually "signed with the clerk" till August 21, 2002. I received NO KNOWLEDGE of it till August 22, 2002. My Request for *Findings and Conclusions* WAS TIMELY, as was my *Notice of Past Due Findings and Conclusions*.

SUMMARY OF THE ARGUMENT

As shown above, the Appeals Court is using a clearly ERRONEOUS version of the PROCEDURAL background of the entire case to find that I had somehow not "preserved" and/or "waived" my issues. But what they are saying has NO SUPPORT IN THE RECORD!

But even more than that, the important issues they did NOT address were those I put into my *Petition for Rehearing En Banc* (DENIED), namely:

- Whether the Panel's Opinion is devoid of Constitutional considerations
- Whether the Panel micro-procedurally upholds a patently unlawful \$62,000 punitive sanction for having made a civil RICO (civil racketeering) pleading
- Whether the Panel micro-procedurally upholds a \$59,000 judgment that does not conform to the pleadings and the verdict.

The evil nature of this whole case is most clearly seen through the prism of the \$62,255.00 sanction (A.18) imposed, three months after the entry of judgment (A.11), such "sanction" for filing, two years earlier, civil RICO claims, as a defendant! Without ever being disobedient to anything¹⁵, without ever any warning by the judge, without any lesser sanctions ever imposed, without the judge ever making a finding of bad faith, and in fact finding just the opposite at the close of the sanction hearing¹⁶:

"In assessing the sanctions, the Court has taken into consideration that although Mr. Birnbaum may be well-intentioned and may believe that he had some kind of real claim as far as RICO there was nothing presented to the court in any of the proceedings since I've been involved that suggest he had any basis in law or in fact to support his suits against the individuals, and I think -- can find that such sanctions as I've determined are appropriate in his Sanction Order!" Sanctions hearing (A.20)

¹⁵ The judge never previously chastised or warned me, and issued no order I could have disobeyed. In fact he Ordered depositions!

¹⁶ Transcript of close of 7-30-02 "frivolous lawsuit" sanction hearing (A.20, paragraph 2)

The Fifth Court of Appeals precedent of upholding the assessment of a FINE of \$62,000 (or ANY fine), merely because the evidence (I had asked for trial by JURY!) did NOT convince a judge of a person's claim under 18 U.S.C. § 1964(c) "civil RICO", defeats the stated purpose of the [civil RICO] statute:

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

The Fifth Court of Appeals also sets a dangerous precedent of punishment for speaking out in a Texas court of law. (RAP Rule 56.1(a)(4) "constitutional issue")

The Fifth Court of Appeals made an "error of law of such importance to the state's jurisprudence that it should be corrected". RAP Rule 56.1(a)(5)

ARGUMENT

1. THE \$59,280.66 JUDGMENT¹⁷ (A.11) IS UNLAWFUL

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

There was no finding by the jury regarding Plaintiff's claim¹⁸ of the state of the accounts, i.e. how much is **owed**:

The elements of an action on account are: (1) that there was a **sale** and **delivery**, (2) that the amount alleged on the account is just, i.e., the prices charged are consistent with an agreement, or in the absence of agreement, are usual, customary and reasonable prices for the things **sold** and **delivered**; and (3) that the amount alleged is unpaid. See *Maintain, Inc. v. Maxson-Mahoney-Turner, Inc.*, 698 S.W.2d 469, 471 (Tex. App.--Corpus Christi 1985, writ ref'd n.r.e.). *Milligan v. R&S Mechanical, NO. 05-87-01341-CV, Court of Appeals, Fifth District of Texas, Aug. 11, 1998.*

There certainly was no finding¹⁹ by the jury of a "sale" and "delivery", and Birnbaum certainly raised the jury issue that all of plaintiff's "legal goods" (of

¹⁷ Appendix 11, CR.421

¹⁸ Plaintiff's petitions (A.35) Also see CR.16, CR.229

¹⁹ Court's Charge (A.41, CR.345) Question 1, "What amount of money, etc." Not conditioned on ANYTHING!

suing judges) had *no worth*²⁰, for judges in their judicial capacity are absolutely immune from suit! (My DENIED DTPA jury issue)

And in light of plaintiff's requested jury issues in the nature of a breach of contract, Birnbaum even submitted the jury issue of being *excused* (A.38, A.40) by reason of plaintiff's prior failure to live up to the agreement, i.e. to bill monthly, and not to obligate to large expenses without prior approval (Attorney retainer agreement, end of this Petition). Plaintiff certainly did not get a jury finding (A.41) that it had abided by the contract by systematically and honestly billing monthly. The purpose of "systematic billing", of course, is to keep someone from suddenly coming up with a humongous \$18,121.10 surprise owed "bill" as plaintiff did.

At issue in this cause was the existence of the account, i.e. how much money was owed, not "damages" under some other theory. RCP Rule 301 states: "*The judgment of the court shall conform to the pleadings, the nature of the case proved and the verdict, etc.*" Staring at each other are two diametrically opposed verified pleadings as to the state of the accounts, i.e. how much is owed, with **no** report by an auditor, and **no** finding by the jury of the state of the accounts.²¹

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

Due process demanded an auditor per RCP Rule 172 to address the issue of fraud
(Details in *Motion for Appointment of Auditor Pursuant to Rule 172 RCP*)²²

At issue was Plaintiff's claim of the state of the accounts. Due process demanded²³ the appointment of an auditor, not only in light of the diametrically

²⁰ (Record 321) bottom of page, instruction regarding WORTH, PJC 102.2 *Texas Pattern Jury Charges*. "False, misleading, or deceptive" to include "representing that services would have worth that they did not have."

²¹ The question to the jury was "What sum of money, if paid now in cash, would fairly and reasonably compensate The Law Offices of G. David Westfall, P.C., for its damages, if any, that resulted from the Defendant, Udo Birnbaum's failure to comply with the agreement between the Plaintiff and the Defendant?" But Plaintiff did not plead breach of contract, and certainly did not prove all the elements, including that it had previously not breached the agreement.

opposite verified pleadings staring at each other, but also in light of Birnbaum's complaint of fraud, racketeering, deceptive trade practices, and obstruction of discovery.

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

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

Granting the Westfalls "Rico relief", as the judge termed it ²⁴, denied Birnbaum his Right to show his best claim and evidence.

"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"

Birnbaum had a statutory right to show the jury G. David Westfall's prior "pattern of racketeering activity", to show that this very suit against me was just another "predicate act" that in that pattern.

Civil RICO of course does not have "elements" in a tort case sense, only "issues of fact". And as shown in my responses²⁵, **summary judgment is not even available under civil RICO:**

"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

²² *Motion for Appointment of Auditor Pursuant to Rule 172 RCP 12-19-00 (CR.65, CR.67)*

²³ "When an investigation of accounts or examination of vouchers appears necessary for the purpose of justice between the parties to any suit, **the court shall appoint an auditor** or auditors to state the accounts between the parties and to make report thereof to the court **as soon as possible**. The auditor shall verify his report by his affidavit stating that he has carefully examined the state of the account between the parties, and that his report contains a true statement thereof, so far as the same has come within his knowledge, etc." RCP Rule 172, (emphasis added)

²⁴ *Order Sustaining Motions For Summary Judgment (A.97)* The civil RICO claim was not against the "Law Office", but against "The Westfalls" for using "The Law Office" as their "enterprise"

²⁵ Summary Judgment *Motions, Responses, Replies*, Clerk's Record 115, 117, 123, 129, 143, 165, 189, 213, 238, 242, 249, 256

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.*

4. THE \$62,255.00 "SANCTION" JUDGMENT²⁶ IS ALSO UNLAWFUL

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

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)

So what had I done? There was never a warning. The sanction Order 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 hearing²⁷ 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***

²⁶ *Order on Motions for Sanctions*, (A.18, CR.432)

²⁷ Transcript of 7-30-02 "frivolous lawsuit" sanction hearing. (A.20, "page 7" lines 5 through 12)

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

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

I had asked for trial by JURY, and 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**.

6. FRAUD, FRAUD, AND MORE FRAUD

Plaintiff's Original Petition²⁸ claimed an OPEN ACCOUNT. The attorney RETAINER agreement²⁹, however, gives the remedy, the ONLY remedy the lawyer had, "We reserve the right to terminate our attorney-client relationship for Your non-payment of fees or costs." It was NOT an open account at all!

There was no SALE and DELIVERY!³⁰ And submitting a jury question that PRE-SUPPOSES a BREACH OF CONTRACT?³¹ (There was no contract, only a PREPAID RETAINER!) FRAUD, FRAUD, and MORE FRAUD, and the judge would not appoint an auditor!

²⁸ Plaintiff's Original Petition 9-21-00 (CR.16) First Amended Original Petition 9-5-01 (A.35, CR.229) Identical

²⁹ Retainer Agreement 5-5-99, attached AT END of this Petition

³⁰ See Issue 1, case law near beginning

³¹ Court's Charge question 1: "What sum of money, if paid now in cash, would fairly and reasonably compensate the Law Offices of G. David Westfall, P.C., for its damages, if any, that resulted from Defendant, Udo Birnbaum's failure to comply with the agreement between the Plaintiff and the Defendant?" (Record 345, 348) Question pre-supposes a breach of contract!

7. DUE PROCESS DEMANDS A NEW TRIAL

This appeals point is fully addressed in my *Motion for New Trial*³², and *Supplement to Motion for New Trial*³³.

The trial judge did not respond to this motion, nor my *Motion to Reconsider the \$59,280.66 Judgment*³⁴, nor my *Rule 276 Request for Endorsement by the Court of "Refusals" and "Modifications"*³⁵ (re jury instructions, questions, and definitions), nor my *Motion to Reconsider the \$62,255.00 "frivolous lawsuit" Sanction*³⁶, nor my *Request for Findings of Facts and Conclusions of Law*³⁷, nor my *Notice of Past Due Findings of Fact and Conclusions of Law*³⁸ regarding the trial judge sanctioning me \$62,255.00 for having raised a civil RICO cross and third party claim.(i.e. the judge himself making a finding on the "frivolous" vs. "bona-fide racketeering" issue, an issue I had asked to be determined by jury.)

CONCLUSION

The following from my *Notice Of Past Due Findings Of Fact And Conclusions Of Law*³⁹:

The judge had a jury sitting there, BUT HE DID NOT USE IT!

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

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

³² *Motion for New Trial* 8-28-02 (CR.444)

³³ *Supplement To Motion For New Trial* 8-29-02 (CR.459)

³⁴ *Motion to Reconsider the \$59,280.66 Judgment* 8-19-02 (CR.438)

³⁵ *Rule 276 Request for Endorsement by the Court of "Refusals" and "Modifications"* 8-19-02 (Record 434)

³⁶ *Motion to Reconsider the \$62,255 "frivolous lawsuit" Sanction* 8-19-02 (CR.441)

³⁷ *Request for Findings of Facts and Conclusions of Law* 9-3-02 (CR.461)

³⁸ *Notice of Past Due Findings of Fact and Conclusions of Law* 10-1-02 (CR.492)

³⁹ Clerk's Record (CR.492)

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

PRAYER

The Appeals Court's *Opinion* is a micro-procedural analysis devoid of Constitutional considerations. Nowhere does the Panel address my key point that assessing a punitive sanction for having made a civil RICO pleading actually violates the LAW.⁴⁰

Upholding the assessment of a FINE of \$62,000 (or ANY fine), merely because the evidence did NOT prove a person's claim under 18 U.S.C. § 1964(c) "civil RICO", defeats the stated purpose of the [civil RICO] statute:

*"[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)*

It also sets a precedent of punishment for speaking out in a Texas court of law, and is an error of law of such importance to the state's jurisprudence that it should be corrected. RAP Rule 56.1(a)(5)

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⁴⁰ "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).

Certificate of Service

This is to certify that on this the _____ day of January, 2004 a copy of this document, together with the referenced Civil Appendix, was sent by regular mail to attorney Frank C. Fleming at PMB 305, 6611 Hillcrest Ave., Dallas Texas 75205-1301. I further certify that all the documents in the Appendix to this Petition are true copies of the originals.

Udo Birnbaum