

CLERK'S RECORD

Appendix - Vol, 1 - 262 pages
Appendix - Vol. 2 - 250 pages
Scroll down

Volume 2 of 2

Trial Court Cause No. 00-00619

In the 294th JUDICIAL DISTRICT Court
of VAN ZANDT County, Texas.
Honorable TOMMY WALLACE, Judge Presiding

THE LAW OFFICES OF G. DAVID WESTFALL, P.C., Plaintiff(s)

vs.

UDO BIRNBAUM, Defendant(s)

Appealed to the

FIFTH COURT OF APPEALS

Attorney for appellant(s):

Name Udo Birnbaum - Pro Se

Address 540 VZ CR 2916, Eustace Texas 75124

Telephone No. 903-479-3929

Fax No. _____

SBOT No. _____

Attorney for: _____, Appellant(s)

Delivered to the FIFTH COURT OF APPEALS

on the 25th day of March, 2003.

Signature of Clerk _____

Name of Clerk _____

Title _____

Appellate Court Cause No. _____

Filed in the _____

this _____ day of _____

_____, Clerk

By _____, Deputy

VOLUME 2 OF 2

Christina Westfall's Objections To The Summary Judgment Evidence Of Respondent, Udo Birnbaum - filed 9-7-01	256
Motion For Recusal Of Hon. Paul Banner - filed 9-10-01	263
Defendant's Supplemental Amended Answer, Counterclaim, and Cross-Complaint filed 9-14-01	265
Letter from Udo Birnbaum to Sandy Hughes - filed 9-20-01	267
Order Denying Motions For Summary Judgment – not signed	269
Letter from First Administrative Judicial Region – dated 8-15-01	271
Udo Birnbaum's Affirmative Defense of Fraud requested definitions, questions, and special instructions to be given to the jury - filed 4-1-02	276
Udo Birnbaum's Texas Deceptive Trade Practices Act (DTPA) Counterclaim Requested definitions, questions, and special instructions to be given to the Jury filed - 4-1-02	317
Defendant Birnbaum's Objections To Plaintiff's Requested Jury Questions - filed 4-4-02	339
Plaintiff's Requested Jury Questions - filed 4-5-02	341
Birnbaum's Objections To Today's Plaintiff's Court Charge - filed 4-11-02	344
Court's Charge - filed 4-11-02	345
Defendant Birnbaum's Motion For Entry Of Judgment - filed 4-16-02	359
Defendant Birnbaum's Amended Motion For Entry Of Judgment - filed 4-29-02.....	362
Motion For Sanctions - filed 5-9-02	380
Birnbaum's Response To [The Westfalls'] Motion For Sanctions: Let the U.S. Justice Department Determine The Facts - filed 5-10-02	385
Suggestion of Death (of Plaintiff The Law Office of G. D. Westfall, P.C. - filed 6-24-02.....	391
Motion For Sanctions On The Law Offices Of G. David Westfall, P.C. - filed 6-24-02	399

Motion For Sanctions On Frank C. Fleming - filed 6-24-02	410
Final Judgment - signed 7-30-02	421
Oral Pleading In Writing	428
Closing Pleading In Writing	430
Order On Motions For Sanctions - signed 8-9-02 - filed 8-21-02.....	432
Rule 276 Request For Endorsement By The Court of “Refusals” and “Modifications” filed 8-19-02	434
Notice of Appeal - filed 8-19-02	436
Motion To Reconsider The \$59,280.66 Judgment - filed 8-19-02.....	438
MotionToReconsiderThe\$62,885.00“FrivolousLawsuit”SanctionsAgainst Me - filed 8-19-02.....	441
Motion For New Trial - filed 8-28-02.....	444
Supplement To Motion For New Trial - filed 8-29-02	459
Request for Findings of Fact and Conclusions of Law – filed 9-3-02	461
First Amended Notice of Appeal Regarding The \$59,280.66 [First] “Final Judgment” - filed 9-3-02	488
Notice of Appeal Regarding the \$62,885.00 [Second] Judgment - filed 9-3-02.....	490
Notice of Past Due Findings of Facts and Conclusions of Law - filed 10-1-02.....	492
Notice of Official Oppression And Unlawful Judgments Against Me	497
Letter to D. Keith Johnson Court Reporter – request for transcript – dated 11-11-02.....	500
Appellant Udo Birnbaum’s Designation For The Clerk’s Record To The Fifth Circuit – filed 11-21-02	501
Bill of Costs	504
Clerk’s Certification	505



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

CAUSE NO. 00-00619

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

Plaintiff.

v.

UDO BIRNBAUM,

Defendant.

§
§
§
§
§
§
§
§

IN THE DISTRICT COURT -7 AM 9:45

MAILED & FILED
DIST. CLERK VAN ZANDT CO. TX

294th JUDICIAL DISTRICT BY _____ DEP.

VAN ZANDT COUNTY, TEXAS

**CHRISTINA WESTFALL's
OBJECTIONS TO THE SUMMARY JUDGMENT EVIDENCE
OF RESPONDENT, UDO BIRNBAUM**

COMES NOW, Christina Westfall, (hereinafter referred to as "Movant"), cross-defendant in the above-styled and numbered cause and file this her objection to the summary judgment evidence offered by Udo Birnbaum ("Respondent") in response to the Motion for Summary Judgment filed by Movant and would hereby show the Court as follows:

I.

1. Movant objects to the summary judgment evidence referred to by Respondent in his response in paragraph IV: Birnbaum's Designated Evidence, subparagraph 1, for the reason that the same is a pleading and as such does not constitute proper summary judgment evidence. Further, Movant objects because the same is not attached to the response, and also for the reason that the evidence is a mere conclusion on the part of the Respondent and constitutes unsubstantiated factual and legal conclusions.

2. Movant objects to the summary judgment evidence referred to by Respondent in his response in paragraph IV: Birnbaum's Designated Evidence, subparagraph 2, for the reason that

the same refers to a deposition which is not properly authenticated and is not attached to the response, further, it contains unsubstantiated factual and legal conclusions.

3. Movant objects to the summary judgment evidence referred to by Respondent in his response in paragraph IV: Birnbaum's Designated Evidence, subparagraph 3, for the reason that he refers to a deposition excerpt which is not attached to the response, not properly authenticated, and as such is not proper summary judgment evidence.

4. Movant objects to the summary judgment evidence referred to by Respondent in his response in paragraph IV: Birnbaum's Designated Evidence, subparagraph 4, for the reason that he refers to a deposition excerpt which is not attached to the response, not properly authenticated, and as such is not proper summary judgment evidence.

5. Movant objects to the summary judgment evidence referred to by Respondent in his response in paragraph V: Evidence in Plaintiff's Own Documents, subparagraph 1, for the reason that the allegation of evidence is overly broad and not specific, thus not allowing the Movant an adequate opportunity to respond or object. Also, none of the referred to evidence has been attached to the response, or properly authenticated.

6. Movant objects to the summary judgment evidence referred to by Respondent in his response in paragraph V: Evidence in Plaintiff's Own Documents, subparagraph 2 (a), (b), (c), (d), (e), (f), and (g), for the reason that the allegation of evidence has not been attached to the response, or properly authenticated, further it contains unsubstantiated factual and legal conclusions.

7. Movant objects to the summary judgment evidence referred to by Respondent in his response in paragraph V: Evidence in Plaintiff's Own Documents, subparagraph 3 (a), (b), (c),

(d), (e), (f), and (g), for the reasons that: the exhibits are not properly authenticated, are not attached to the response, and constitutes unsubstantiated factual and legal conclusions.

8. Movant objects to the summary judgment evidence referred to by Respondent in his response in paragraph VI: Evidence in Other Documents, subparagraph 1, (a), (b), (c), (d), (e), (f), (g), (h), and (i), for the reason that: the exhibits are not properly authenticated, are not attached to the response, and constitutes unsubstantiated factual and legal conclusions.

9. Movant objects to the summary judgment evidence referred to by Respondent in his response in paragraph VI: Evidence in Other Documents, subparagraph 2 for the reason that: the depositions referred to are not properly authenticated, are not attached to the response, and the statement is simply an unsubstantiated factual and legal conclusions.

10. Movant objects to the summary judgment evidence referred to by Respondent in his response in paragraph VII: Summary of Evidence to Third Party Plaintiff RICO "Elements," subparagraphs A, sub (1), (2), (3), (4), and (5) for the reason that: the allegations of evidence are nothing more than unsubstantiated factual and legal conclusions and do not constitute proper summary judgment evidence.

11. Movant objects to the summary judgment evidence referred to by Respondent in his response in paragraph VII: Summary of Evidence to Third Party Plaintiff RICO "Elements," subparagraphs B, sub (1), (2), (3), and (4), for the reason that: the allegations of evidence are nothing more than unsubstantiated factual and legal conclusions and do not constitute proper summary judgment evidence.

12. Movant objects to the summary judgment evidence referred to by Respondent in his response in paragraph VII: Summary of Evidence to Third Party Plaintiff RICO "Elements,"

subparagraphs C, sub (1), and (2) for the reason that: the allegations of evidence are nothing more than unsubstantiated factual and legal conclusions and do not constitute proper summary judgment evidence.

13. Movant objects to the summary judgment evidence referred to by Respondent in his response in paragraph VII: Summary of Evidence to Third Party Plaintiff RICO "Elements," subparagraphs D, E, F, and G for the reason that: the allegations of evidence are nothing more than unsubstantiated factual and legal conclusions and do not constitute proper summary judgment evidence.

14. Movant objects to the summary judgment evidence referred to by Respondent in his response in paragraph VII: Summary of Evidence to Third Party Plaintiff RICO "Elements," subparagraphs H, sub (1), (2), and (4), for the reason that: the allegations of evidence are nothing more than unsubstantiated factual and legal conclusions and do not constitute proper summary judgment evidence.

15. Movant objects to the summary judgment evidence referred to by Respondent in his response in paragraph VII: Summary of Evidence to Third Party Plaintiff RICO "Elements," subparagraphs H, sub (3) for the reason that: the allegations of evidence are nothing more than unsubstantiated factual and legal conclusions and do not constitute proper summary judgment evidence and additionally the deposition and exhibit referred to has not been properly authenticated or attached to the response and as such does not constitute proper summary judgment evidence.

16. Movant objects to the summary judgment evidence referred to by Respondent in his response in paragraph VII: Summary of Evidence to Third Party Plaintiff RICO "Elements,"

subparagraphs J, sub (1) and (2) for the reason that: the allegations of evidence are nothing more than unsubstantiated factual and legal conclusions and do not constitute proper summary judgment evidence and the evidence referred to has not been properly authenticated or attached to the response and as such does not constitute proper summary judgment evidence.

17. Movant objects to the summary judgment evidence referred to by Respondent in his response in paragraph VII: Summary of Evidence to Third Party Plaintiff RICO "Elements," subparagraphs K for the reason that: the allegations of evidence are nothing more than unsubstantiated factual and legal conclusions and do not constitute proper summary judgment evidence.

18. Movant objects to the summary judgment evidence referred to by Respondent in his response in paragraph VII: Summary of Evidence to Third Party Plaintiff RICO "Elements," subparagraphs L for the reason that: the allegations of evidence are nothing more than unsubstantiated factual and legal conclusions and do not constitute proper summary judgment evidence and the evidence referred to has not been properly authenticated or attached to the response and as such does not constitute proper summary judgment evidence.

19. Movant objects to the summary judgment evidence referred to by Respondent in his response in paragraph VII: Summary of Evidence to Third Party Plaintiff RICO "Elements," subparagraphs M and N for the reason that: the allegations of evidence are nothing more than unsubstantiated factual and legal conclusions and do not constitute proper summary judgment evidence.

20. Movant objects to the summary judgment evidence referred to by Respondent in his response in paragraph VIII: Summary of Evidence to Cross-Complaint RICO "Elements," in its

entirety for the reason that: the allegations of evidence are nothing more than unsubstantiated factual and legal conclusions and do not constitute proper summary judgment evidence and that the evidence referred to has not been properly authenticated or attached to the response and as such does not constitute proper summary judgment evidence..

21. Movant objects to the summary judgment evidence referred to by Respondent in his response in paragraph IX: RE: Christina Westfall's Representations to this Court subparagraphs 1, 2, 3, 4, 5, 6, 9, 10-16 for the reason that: the allegations of evidence are nothing more than unsubstantiated factual and legal conclusions and do not constitute proper summary judgment evidence.

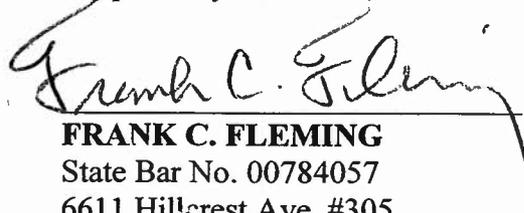
22. Movant objects to the summary judgment evidence referred to by Respondent in his response in paragraph IX: RE: Christina Westfall's Representations to this Court subparagraphs 7 and 8 for the reason that: the allegations of evidence are nothing more than unsubstantiated factual and legal conclusions and do not constitute proper summary judgment evidence and that the evidence referred to has not been properly authenticated or attached to the response and as such does not constitute proper summary judgment evidence.

23. Movant objects to the summary judgment evidence referred to by Respondent in his response in paragraph X: Summary in its entirety for the reason that: the allegations of evidence are nothing more than unsubstantiated factual and legal conclusions and do not constitute proper summary judgment evidence and that the evidence referred to has not been properly authenticated or attached to the response and as such does not constitute proper summary judgment evidence.

Prayer For Relief:

WHEREFORE, PREMISES CONSIDERED, Movant request that the above objections be in all things sustained, and for such other and further relief, both at law and in equity, to which this Movant may show herself justly entitled.

Respectfully submitted,



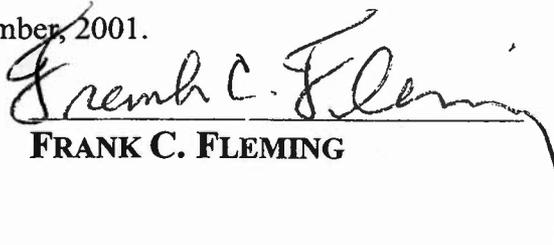
FRANK C. FLEMING
State Bar No. 00784057
6611 Hillcrest Ave. #305
Dallas, Texas 75205-1301
(214) 373-1234
(214) 373-3232 (fax)

ATTORNEY FOR MOVANT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above Objection to Summary Judgment Evidence has this day been served upon all parties by hand delivery.

SIGNED this 7th day of September, 2001.



FRANK C. FLEMING

VERIFICATION

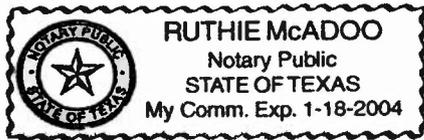
STATE OF TEXAS

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 the matters in his Motion for Recusal of Hon. Paul Banner are true and correct.

Udo Birnbaum
Udo Birnbaum

Given under my hand and seal of office this 10 day of September, 2001



Ruthie McAdoo
Notary in and for The State of Texas

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this document has been served via CMRR and FAX on this the 10 day of September, 2001 upon G. David Westfall, 5646 Milton, Suite 520, Dallas, Texas 75206 and Frank C. Fleming, Law Office of Frank C. Fleming, 6611 Hillcrest, Suite 305, Dallas, Texas 75205-1301.

Udo Birnbaum
UDO BIRNBAUM

VERIFICATION

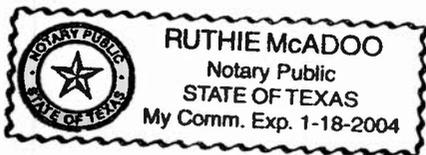
STATE OF TEXAS

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 the matters in his *Defendant's Supplemental Amended Answer, Counterclaim, and Cross-complaint* are true and correct.

Udo Birnbaum
Udo Birnbaum

Given under my hand and seal of office this 14 day of September, 2001



Ruthie McAdoo
Notary in and for The State of Texas

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this document has been served via Regular Mail on this the 14 day of September, 2001 upon G. David Westfall, 5646 Milton, Suite 520, Dallas, Texas 75206 and Frank C. Fleming, Law Office of Frank C. Fleming, 6611 Hillcrest, Suite 305, Dallas, Texas 75205-1301.

Udo Birnbaum
UDO BIRNBAUM

Udo Birnbaum
540 VZ 2916
EUSTACE, TEXAS 75124
(903) 479-3929



BY _____ DEP.
NANCY YOUNG
CLERK VAN ZANDT CO. TX.

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

SEP 20 PM 3:44

RECORDED

September 20, 2001

Sandy Hughes
First Administrative Judicial Region
133 N. Industrial LB50
Dallas, Texas 75207

**Regular Mail and
FAX to (214) 653-2957**

Copies: Hon. John Ovard
Clerk 294th District Court ✓
Frank C. Fleming
G. David Westfall

Re: Cause No. 00-619, 294th District Court
The Law Offices of G. David Westfall, P.C. vs. Udo Birnbaum

Dear Ms. Hughes:

Please note that this letter is not addressed to Hon. Paul Banner. Also please note that neither this letter, nor the attached document, is intended to indicate that I might consider it proper for Judge Banner, under the present status of this case, to act upon even such proposed order as I myself might now put into the record, or to communicate about this cause in any manner other than through an order of recusal or referral.

I do, however, have personal experience of fraud always trying to find an alternate path around even the strictest rules or through the most solid firewalls, at least in the court I have twice been forced to defend myself in under such circumstances. With this in mind I present the following:

David Westfall's attached "Order Sustaining Motions for Summary Judgment" does not reflect the proceedings and is even presenting new matters. David Westfall was informed seven (7) days earlier by certified mail and fax on that day of a pending motion of recusal.

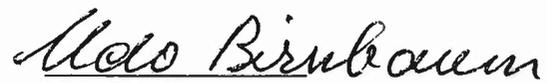
Westfall's proposed Order reads that "*Motions for Summary Judgment of The Law Offices of G. David Westfall, P.C. be sustained as to RICO claims*", when there **never even was a RICO claim against the "Law Office"**!

Westfall's proposed Order reads that *"the Motion for Summary judgment of G. David Westfall be in all things sustained"*, when that is **not what Judge Banner said at all**. David Westfall is still "in".

Also please note that there is no claim in Westfall's proposed Order that the Court even **heard the motions for summary judgment**, for it never did, and neither Westfall, nor the other parties, ever satisfied their **initial summary judgment burden** of **"showing the district court that there is an absence of evidence"**. Such being the case, the motion must be denied, regardless of my [nonmovant] response.

Please note, Ms. Hughes, that I am not trying to argue law with you, for I have no reason to believe you are a lawyer. But then neither am I. What I am trying to convey is the necessity to **timely set a hearing on my motion to recuse** under the present status of this case.

Sincerely,


Udo Birnbaum

Att:

Westfall letter 9/17/01 to Ms. Hughes
Westfall proposed "Order Sustaining"
Westfall proposed "Pretrial Order"
Birnbaum proposed "Order Denying"

cc: Frank C. Fleming
Law Office of Frank C. Fleming
6611 Hillcrest, Suite 305
Dallas, Texas 75205-1301

G. David Westfall
The Law Offices of G. David Westfall, P.C.
5646 Milton, Suite 520
Dallas, Texas 75206

Clerk of the Court
294th Judicial District
Van Zandt County
121 E. Dallas Street
Canton, Texas 75103

However, even when the non-movant bears the burden of proof at trial, "[s]imply filing a summary judgment motion does not immediately compel the party opposing the motion to come forward with evidence demonstrating material issues of fact as to every element of its case." Russ v. International Paper Co. 943 F.2d 589, 591 (5th Cir.1991),, See Celotex Corp. v. Catrett, 477 U.S. 317, 328, 106 S.Ct. 2548, 2555, 91. **It is not enough for the moving party to merely make a conclusory statement that the other party has no evidence to prove his case.** L.Ed.2d 265 (1986) (White J., concurring).

The motions for summary judgment **failed to point out an absence of proof on any factual issue.** In fact, the motions **failed to raise any factual issues at all**, other than in the most conclusory terms. And a mere conclusory statement that the other side has no evidence is not enough to satisfy the movant's burden. As a result, the **burden never shifted** to the plaintiff[s] to go beyond the pleadings to show specific facts creating a genuine issue for trial. See 5th Cir. Court of Appeals, No. 91-6299, Ashe v. Corley, June 4, 1993.

It was the movants' burden to show that "if the evidentiary material **of record were reduced** to admissible evidence in court, it would be insufficient to permit the nonmoving party to carry its burden." Celotex v. Catrett, 477 U.S. 317, 327.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that the Motions for Summary Judgment be in all things denied.

SIGNED this the _____ day of _____, 2001

JUDGE PRESIDING



First Administrative Judicial Region

JOHN OVARD

Presiding Judge

133 N. Industrial Blvd., LB 50

Dallas, Texas 75207

Telephone

(214) 653-2943

Fax (214) 653-2957

www.firstadmin.com

Administrative Assistant

SANDY HUGHES

Office Manager

GEORGE COWART

August 15, 2001

Mr. Udo Birnbaum
540 VZ 2916
Estate, TX 75124

Dear Mr. Birnbaum,

The statute does not authorize us to assign a judge under the present status of this case.

Sincerely,

A handwritten signature in cursive script that reads "Sandy Hughes".

Sandy Hughes

LAW OFFICES OF
G. DAVID WESTFALL, P.C.
A Professional Corporation
5646 Milton, Suite 520
DALLAS, TEXAS 75206

Telephone: (214) 741-4741
Fax: (214) 741-4746

September 17, 2001

Honorable Paul Banner
c/o Sandy Hughes
First Administrative Judicial Region
133 N. Industrial, LB 50
Dallas, Texas 75207

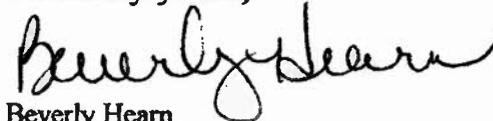
RE: No. 00-00619; 294th Judicial District
Law Offices of G. David Westfall, P.C. v. Udo Birnbaum

Dear Ms. Hughes:

Enclosed is an original and two (2) copies of a Pretrial Order and Order Sustaining Motions for Summary Judgment in connection with the above-referenced matter. Please have the Judge sign the Orders and return the extra copies fully conformed in the enclosed envelope.

Thank you for your assistance and if you have any questions please give our office a call.

Sincerely yours,



Beverly Hearn
Paralegal to G. David Westfall

:bh

Enclosures

cc: Udo Birnbaum
540 VZ 2916
Eustace, Texas 75124

Clerk of the Court (letter only)
294th Judicial District

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 _____ day of _____, 2001

JUDGE PRESIDING

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

vs.

UDO BIRNBAUM

) (IN THE DISTRICT COURT
) (
) (
) (294th JUDICIAL DISTRICT
) (
) (VAN ZANDT COUNTY, TEXAS

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.

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 _____ day of _____, 2001

JUDGE PRESIDING



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

FILED
DIST. CLERK VAN ZANDT CO. TX.
HANCY YOUNG
AM 8:41
DEP.

Udo Birnbaum's

Affirmative Defense of Fraud

requested

definitions, questions, and special instructions
to be given to the jury

Hon. Paul Banner
(Sitting by special assignment)

294th District Court, No 00-00619,
The Law Offices of G. David Westfall, P.C. vs. Udo Birnbaum
(Filed Sept. 20, 2000. Trial set for Apr. 8, 2002)

NOTE:

Definitions, questions, and special instructions taken directly from *Texas Pattern Jury Charges, Business, Consumer, Insurance, Employment*) Tags and labels left embedded for the sake of clarity as to source. More detailed source citations in *Texas Pattern Jury Charges* at the referenced PJC's.

Definitions for **fraud**, **lie** (n.), and **perjury** are from *Black's Law Dictionary, Special Deluxe Fifth Edition*.

DEFINITION

Fraud:

An intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right.

A false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury.

Any kind of artifice employed by one person to deceive another.

A generic term, embracing all multifarious means which human ingenuity can devise, and which are resorted to by one individual to get an advantage over another by false suggestions or by suppression of truth, and includes all surprise, trick, cunning, dissembling, and any unfair way by which another is cheated.

"Bad faith" and "fraud" are synonymous, and also synonyms of dishonesty, infidelity, faithlessness, perfidy, unfairness, etc.

It consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional.

It comprises all acts, omissions, and concealments involving a breach of a legal or equitable duty and resulting in damage to another. And includes anything calculated to deceive, whether it be a single act or combination of circumstances, whether the suppression of truth or the suggestion of what is false, whether it be direct falsehood or by innuendo, by speech or by silence, by word of mouth, or by look or gesture.

Fraud, as applied to contracts, is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other.

DEFINITION

Lie: n. An untruth deliberately told; the uttering or acting of that which is false for the purpose of deceiving; intentional misstatement. See Perjury.

Perjury: In criminal law, the willful assertion as to a matter of fact, opinion, belief, or knowledge, made by a witness in a judicial proceeding as part of his evidence, either upon oath or in any form allowed by law to be substituted for an oath, whether such evidence is given in open court, or in an affidavit, or otherwise, such assertion being material to the issue or point of inquiry and known to such witness to be false. Perjury is a crime committed when a lawful oath is administered, in some judicial proceeding, to a person who swears willfully, absolutely, and falsely, in a matter material to the issue or point in question.

A person is guilty of perjury if in any official proceeding he makes a false statement under oath or equivalent affirmation, or swears or affirms the truth of a statement previously made, when the statement is material and he does not believe it to be true.

Subornation of perjury is procuring another to commit perjury.

Black's Law Dictionary, Special Deluxe Fifth Edition

INSTRUCTION

A fact may be established by direct evidence or by circumstantial evidence or both. A fact is established by direct evidence when proved by documentary evidence or by witnesses who saw the act done or heard the words spoken. A fact is established by circumstantial evidence when it may be fairly and reasonably inferred from other facts proved.

PJC 100.8 Circumstantial Evidence

QUESTION

(Finding of fraud by intentional misrepresentation)

Did The Law Offices of G. David Westfall, P.C. commit a fraud against Udo Birnbaum by intentional misrepresentation?

PJC 105.1 Question on Common-Law Fraud -- Intentional Misrepresentation

Fraud by intentional misrepresentation occurs when—

PJC 105.2 Instruction on Common-Law Fraud -- Intentional Misrepresentation

- a. a party makes a material misrepresentation,
- b. the misrepresentation is made with knowledge of its falsity or made recklessly without any knowledge of the truth and as a positive assertion,
- c. the misrepresentation is made with the intention that it should be acted on by the other party, and
- d. the other party acts in reliance on the misrepresentation and thereby suffers injury.

“Misrepresentation” means:

A false statement of fact [or]

PJC 105.3A Factual Misrepresentation

A promise of future performance made with an intent not to perform as promised [or]

PJC 1056.3B Promise of Future Action

A statement of opinion based on a false statement of fact [or]

PJC 105.3C Opinion Mixed with Fact

A statement of opinion that the maker knows to be false [or]

PJC 105.3D False Statement of Opinion

An expression of opinion that is false, made by one claiming or implying to have special knowledge of the subject matter of the opinion.

PJC 105.3E Opinion Made with Special Knowledge

“Special knowledge” means knowledge or information superior to that possessed by the other party and to which the other party did not have equal access.

Answer: _____

QUESTION

(Finding of Fraud by Concealment or Failure to Disclose)

Did The Law Offices of G. David Westfall, P.C. commit a fraud against Udo Birnbaum by concealment or failure to disclose?

PJC 105.1 Question on Common-Law Fraud -- Concealment or Failure to Disclose

Fraud [by concealment or failure to disclose] occurs when—

- a. a party fails to disclose a material fact within the knowledge of that party,
- b. the party knows that the other party is ignorant of the fact and does not have an equal opportunity to discover the truth,
- c. the party intends to induce the other party to take some action by failing to disclose the fact, and
- d. the other party suffers injury as a result of acting without knowledge of the undisclosed fact.

“Misrepresentation” means:

A false statement of fact [or]
PJC 105.3A Factual Misrepresentation

A promise of future performance made with an intent not to perform as promised [or]
PJC 105.3B Promise of Future Action

A statement of opinion based on a false statement of fact [or]
PJC 105.3C Opinion Mixed with Fact

A statement of opinion that the maker knows to be false [or]
PJC 105.3D False Statement of Opinion

An expression of opinion that is false, made by one claiming or implying to have special knowledge of the subject matter of the opinion.
PJC 105.3E Opinion Made with Special Knowledge

“Special knowledge” means knowledge or information superior to that possessed by the other party and to which the other party did not have equal access.

Answer: _____

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

G. DAVID WESTFALL FAMILY *
LIMITED PARTNERSHIP, G. *
DAVID WESTFALL, CHRISTINA *
WESTFALL, JOHN WESTFALL, *
STEFANI PODVIN, JOHN D. *
PODVIN, Individually and *
As Members of the Listed *
Partnership, *

Plaintiffs, *

VS. *

CIVIL ACTION NO.
3-96CV3301-P

TOMMY PARKS, C. DENEAN *
AVERY, JOE F. GRUBBS, ELLIS *
COUNTY, TEXAS, RONALD *
SMITH, JAMES JONES, and *
NAVARRO COUNTY, TEXAS *

Defendants. *

ORAL DEPOSITION

OF

BEVERLY HEARN

Birnbaum's MSJ Response
EXHIBIT 9-M

ORIGINAL

1 A. He did.

2 Q. So Mr. Westfall's office was locked,
3 correct?

4 A. Yes.

5 Q. And so they never at any time looked in
6 Mr. Westfall's office, correct?

7 A. No.

8 Q. Is that correct?

9 A. Yes.

10 Q. And then they went to Mrs. Westfall's
11 office and it was also locked; is that correct?

12 A. At one point they did.

13 Q. And it remained locked, did it not?

14 A. Yes.

15 Q. They never looked inside there?

16 A. No, they did not.

17 Q. After they walked down the hall and had the
18 discussion about the maintenance man, what do they
19 do next?

20 A. Then they came down the hall, and they
21 asked me about Stefani's office and they asked me
22 whose office it was. And I said, his daughter, and
23 they questioned me, you know, his daughter? I said,
24 yes, and I told him that this is where she offices,
25 that that was her office.

Gerrit M. Pronske
State Bar No. 16351640
THOMPSON, COE, COUSINS & IRONS, L.L.P.
200 Crescent Court, 11th Floor
Dallas, Texas 75201-1853
Telephone: (214) 871-8288
Telecopy: (214) 871-8209

FILED
JUL 31 2000
Fm

ATTORNEY FOR G. DAVID WESTFALL

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE: §
§
G. DAVID WESTFALL, § CASE NO. 300-34287-HCA-7
§ Hearing: 7/31/00 at 9:15 a.m.
Alleged Debtor. §

ALLEGED DEBTOR'S ORIGINAL ANSWER TO INVOLUNTARY PETITION,
COUNTERCLAIM, AND MOTION TO REQUIRE POSTING OF BOND

TO THE HONORABLE HAROLD C. ABRAMSON, UNITED STATES BANKRUPTCY JUDGE:

COMES NOW, G. DAVID WESTFALL ("Alleged Debtor"), alleged debtor in the above-referenced involuntary bankruptcy case, and filed this his Original Answer to Involuntary Petition and Counterclaim (the "Involuntary Petition"), Counterclaim and Motion to Require Posting of Bond, and would respectfully show the Court the following:

JURISDICTIONAL DEFECT

1. The Involuntary Petition was executed by two Petitioning Creditors, Delcap Energy Corp. ("Delcap") and Preston Investment Group, Inc. ("Preston").
2. Delcap and Preston both purchased old Judgments against the Alleged Debtor.
3. The Judgment purchased by Delcap is extinguished and void

Birnbaum's MSJ Response
EXHIBIT 9-N

H 284

4. The Alleged Debtor has more than 12 creditors. A true and correct copy of the list of creditors of the Alleged Debtor as of the date of the filing of the Involuntary Petition is attached hereto as Exhibit "A" and incorporated by reference herein. Such list is filed herewith in accordance with Bankruptcy Rule 1003 (a). Alleged Debtor reserves the right to amend such list in the event that other creditors become known.

5. The Involuntary Petition is jurisdictionally defective, and should be dismissed because it was signed by fewer than three petitioning creditors, as required under section 303(b)(1) of the Bankruptcy Code.

ANSWER

6. The Involuntary Petition should further be dismissed because it does not contain a statement, required under Bankruptcy Rule 1003(a), that the claims of the transferee petitioning creditors were "not transferred for the purpose of commencing the case and setting forth the consideration for and terms of the transfer."

7. The Involuntary Petition should further be dismissed because the Alleged Debtor is generally paying his debts as they come due, as provided in section 303(h)(1) of the Bankruptcy Code, and because the Alleged Debtor has not been the subject to any receivership within 120 days of the filing of the Involuntary Petition, as provided in section 303(h)(2).

COUNTERCLAIM

8. Alleged Debtor, who is an attorney, has been damaged by the filing of this involuntary bankruptcy case.

9. This involuntary bankruptcy case was filed by shell companies that are insiders of the disgruntled defendant (Texakoma Oil & Gas) in numerous lawsuits that have been prosecuted by the

Alleged Debtor as an attorney on behalf of various clients. The petitioning creditors are both controlled by Dean Kennedy. Mr. Kennedy also controls Texakoma Oil & Gas, the defendant in numerous actions being prosecuted by the Alleged Debtor as an attorney. Mr. Kennedy signed the Involuntary Petition on behalf of both petitioning creditors. Mr. Kennedy's entities, the petitioning creditors, purchased old Judgments against the Alleged Debtor, including the extinguished and void Judgment purchased by Delcap. These Judgments were purchased to attempt to exert pressure on the Alleged Debtor to gain a tactical advantage in litigation which the Alleged Debtor was handling as an attorney against Texakoma Oil & Gas. The involuntary bankruptcy was likewise filed for such a purpose.

10. The purpose for which the Judgments were purchased, and the purpose for the filing of the involuntary bankruptcy, were improper.

11. The filing of the Involuntary Petition was in blatant bad faith.

12. On or about March 2, 2000, Delcap and Preston, through their attorney, sent a letter to the Alleged Debtor essentially stating that the Judgments could be settled if the Alleged Debtor stopped handling cases against Texakoma Oil & Gas, and that in the event that he did not stop, an involuntary bankruptcy would be filed. A true and correct copy of the March 2 letter is attached hereto as Exhibit "B", and incorporated by reference herein.

13. Following dismissal of this case, the Alleged Debtor requests this Court to retain jurisdiction to award

- a. under section 303(i)(1)(B), a reasonable attorneys' fee;
- b. under section 303(i)(2), damages proximately caused by the filing of the involuntary bankruptcy and punitive damages.

MOTION TO REQUIRE POSTING OF BOND

14. Alleged Debtor believes that the petitioning creditors are shell corporations that filed the above involuntary bankruptcy without the ability or intention to be able to respond to damages under section 303(i) of the Bankruptcy Code.

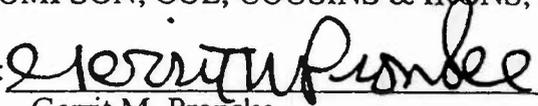
15. Section 303(e) of the Bankruptcy Code provides that for cause, the court may require the petitioners to file a bond to indemnify the debtor for such amounts as the court may later allow under section 303(i).

16. Alleged Debtor requests this Court to require a bond from the petitioning creditors and Dean Kennedy, their controller, in an amount of not less than \$300,000.00, pursuant to section 303(e) of the Bankruptcy Code.

WHEREFORE, PREMISES CONSIDERED, G. David Westfall requests this Court to dismiss the above-styled involuntary bankruptcy case, and to retain jurisdiction to award attorneys fees, actual and punitive damages under section 303(i) of the Bankruptcy Code, and to grant such other and further relief as is just.

Respectfully submitted,

THOMPSON, COE, COUSINS & IRONS, L.L.P.

By: 

Gerrit M. Pronske

State Bar No. 16351640

200 Crescent Court, 11th Floor

Dallas, Texas 75201-1853

Telephone: (214) 871-8288

Telecopy: (214) 871-8209

COUNSEL FOR G. DAVID WESTFALL

CERTIFICATE OF SERVICE

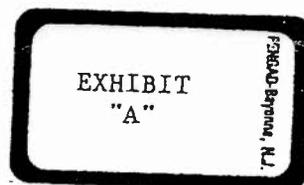
This is to certify that a true and correct copy of the above and foregoing pleading was forwarded via first class mail, postage prepaid on this the 20th day of July, 2000, to the following parties:

Office of the United States Trustee
11000 Commerce Street, Room 96C0
Dallas, Texas 75242

Frank L. Broyles
Goins, Underkofler, Crawford & Langdon
1601 Elm Street, Suite 3300
Dallas, Texas 75201


Gerrit M. Pronske

<u>CREDITOR</u>	<u>AMOUNT OWING</u>	<u>NATURE OF DEBT</u>
1. Minnesota Life P.O. Box 64593 St. Paul, MN 55164	\$1,103.65	Life Insurance Policy
2. Dallas Water Dallas Water Utilities Dallas City Hall, RM 1.1AN Dallas, TX 75277-0001	\$38.17	Utility Debt
3. AT&T 1565 Chenault Street Dallas, TX 75228	\$90.00	Utility Debt
4. SWBT P.O. Box 930170 Dallas, TX 75393	\$40.40	Utility Debt
5. Sample Pest Co. P.O. Box 3732 Dallas, TX 75208	\$92.00	Service Debt
6. Travelers Auto Ins. Travelers Property Casualty One Tower Square Hartford, CT 06183	\$29.68	Insurance Debt
7. TXU Electric P.O. Box 660409 Dallas, TX 75266	\$195.77	Utility Debt
8. JC Penney P.O. Box 27570 Albuquerque, NM 87125	\$182.28	Credit Card – Revolving Credit
9. Texaco P.O. Box 790001 Houston, TX 77279	\$4.86	Credit Card Revolving Credit



<u>CREDITOR</u>	<u>AMOUNT OWING</u>	<u>NATURE OF DEBT</u>
10. Travelers Auto Ins. Travelers Property Casualty One Tower Square Hartford, CT 06183	\$119.43	Insurance Debt
11. Citibank MC Driver's Edge MasterCard Box 6000 The Lakes, NV	\$2,716.92	Credit Card – Revolving Credit
12. Foley's P.O. Box 52026 Phoenix, AZ 85072	\$182.91	Credit Card – Revolving Debt
13. AT&T Telephone P.O. Box 630060 Dallas, TX 75263	\$58.31	Utility Debt
14. TXU Gas P.O. Box 650653 Dallas, TX 75265	\$12.22	Utility Debt
15. Neiman Marcus P.O. Box 6200.16 Dallas, TX 65262	\$276.49	Credit Card – Revolving Credit
16. Sears Payment Center 86 Annex Atlanta, GA 30386	\$813.67	Credit Card – Revolving Credit
17. Dallas News P.O. Box 222249 Dallas, TX 75222	\$27.10	Subscription

<u>CREDITOR</u>	<u>AMOUNT OWING</u>	<u>NATURE OF DEBT</u>
18. City/County of Dallas 1500 Marila Street Dallas, TX	\$5,000.00	Property Tax
19. IRS Austin, TX 73301	\$6,500.00	Income Tax 1040 and Federal Tax Deposit
20. Delcap Energy Corp. 5400 LBJ Freeway Suite 550 Dallas, TX 75240	\$38,978.22	Judgment purchase; Disputed
21. Preston Investment Group, Inc. 5400 LBJ Freeway Suite 550 Dallas, TX 75240	\$57,575.46	Judgment purchase; Disputed
22. Zisman Law Firm 714 Jackson, Suite 200 Dallas, TX 75202	\$400.00	Rent Debt
23. Star Parking 1200 Ross Ave. Suite 110 Dallas, TX 75202	\$55.00	Parking
24. Southwestern Bell P.O. Box 930170 Dallas, TX 75393	\$320.00	Utility Debt
25. Southwestern Bell Mobile P.O. Box 630069 Dallas, TX 75263	\$113.00	Cellular Service

8. RICO

8.1

RICO CLAIMS

The plaintiff has brought claims against each defendant for alleged violations of the Racketeer Influenced and Corrupt Organizations Act, commonly referred to as RICO. Specifically, the plaintiff claims that each defendant violated Section 1962 [(a) (b) (c) or (d)] of RICO.

The plaintiff must establish by a preponderance of the evidence every element of a RICO claim. You should consider each and every element of a RICO cause of action only in the precise way that I will define them in these instructions. You must avoid confusing any of the elements of a RICO claim with your prior conceptions of the meaning of the terms that are used to describe the elements of a RICO claim.

SECTION 1962(a)

I. The plaintiff has alleged that each defendant violated Section 1962(a) of the RICO Act. To establish that a defendant violated Section 1962(a), the plaintiff must prove by a preponderance of the evidence each of the following four elements:

1. That there was an "enterprise";
2. That the enterprise engaged in or had some effect "on interstate commerce";
3. That the defendant derived income, directly or indirectly, from a "pattern of racketeering activity"; and
4. That some part of that income was used in acquiring an interest in or operating the enterprise.

A "person" under the law includes but is not limited to any person or entity that is capable of holding a legal or beneficial interest in property. A corporation is a legal entity that, like a person, is capable of holding a legal or beneficial interest in property.

The term "enterprise" includes any individual, partnership, corporation, association, or other legal entity. An enterprise "affects interstate or foreign commerce" if the enterprise either engages in, or has an effect on commerce between the states or between the states and foreign countries.

A "racketeering activity" means an act in violation of [(the federal mail fraud statute) (the federal wire fraud statute) (securities fraud statutes).] You will be instructed on the law pertaining to this (these) statute(s) to guide you in determining whether the plaintiff proved by a preponderance of the evidence that a defendant committed one or more violations of these statutes. A "racketeering activity" may also be referred to as a "predicate offense".

A "pattern of racketeering activity" requires that the plaintiff prove that a defendant committed at least two acts of "racketeering activity" within ten years of each other [and that both of the acts occurred after October 15, 1970.] The proof of two or more predicate acts does not in and of itself establish a "pattern" under RICO. The two acts need not be of the same kind. For example, the acts may be one act of mail fraud and one act of wire fraud. However, you must find by a preponderance of the evidence that the two acts occurred within the time specified and that each was connected with the other by some common scheme, plan or motive so as to constitute a "pattern". A series of wholly separate, isolated or disconnected acts of racketeering activity does not constitute a pattern.

In other words, two or more otherwise unrelated acts of "racketeering activity" do not constitute a "pattern" of racketeering activity under RICO unless the acts all relate to a common scheme by the defendant to continually conduct the affairs of the alleged enterprise for illicit personal benefit, whether monetary or otherwise, for himself or for another, by committing the predicate offenses.

As I instructed you, "racketeering activity" means an act in violation of [the mail fraud and/or wire fraud and/or securities fraud statutes.] However you may not consider just any racketeering act allegedly committed by a defendant in violation of one of these statutes as bearing on the question of whether a defendant has committed two

or more predicate offenses as a pattern of racketeering activity. In making this determination, you are to consider only those specific racketeering acts alleged by the plaintiff against a particular defendant. Furthermore, you cannot find that the defendant has engaged in a "pattern of racketeering activity" unless you unanimously agree to which of the alleged predicate offenses, if any, make up the pattern. Thus, it would not be sufficient if some of you should find that a defendant committed a violation of two or more predicate offenses under one particular statute as a pattern and the rest of you should find that a defendant committed a violation of two or more predicate acts under another statute as a pattern. In other words, you may not find that the defendant has engaged in a pattern of racketeering activity unless you [1] find a "pattern" of predicate offenses and [2] find that the plaintiff has proved by a preponderance of the evidence that a defendant committed each of the two or more predicate offenses that you find are necessary to make up the pattern.

You should note that the pattern must be one in which the defendant has participated as a "principal." Thus in order to satisfy the second element, the plaintiff must prove the defendant was a "principal" by showing by a preponderance of the evidence:

1. That the defendant knowingly and willfully committed, or knowingly and willfully aided and abetted in the commission of two or more alleged predicate offenses that constitute the alleged pattern of racketeering activity, and
2. That the defendant knowingly and willfully received income derived, directly or indirectly, from that alleged pattern of racketeering activity.

The word "knowingly," as that term has been used in these instructions, means that the action was done voluntarily and intentionally and not because of mistake or accident.

The word "willfully," as that term has been used in these instructions, means that the action was committed voluntarily and purposely, with the specific intent to do something the law forbids. The action must be done with a bad purpose: either to disobey or disregard the law.

The plaintiff has alleged that each of the defendants has committed two or more predicate acts including violations of the mail fraud and wire fraud statutes. It is your function to decide whether the plaintiff has proved by a preponderance of the evidence as to each defendant whether that defendant violated either or both of those statutes on one or more occasions, if at all. To establish that mail fraud has been committed, the plaintiff must prove each of the following by a preponderance of the evidence as to each defendant so charged:

1. Some person or persons willfully and knowingly devised a scheme or artifice to defraud, or a scheme for obtaining money or property by means of false pretenses, representations or promises, and
2. Some person or persons used the United States Postal Service by mailing, or by causing to be mailed, some matter or thing for the purpose of executing the scheme to defraud.

To act with "intent to defraud" means to act knowingly and with the specific intent to deceive. The words "scheme" and "artifice" in the mail fraud statute include any plan or course of action intended to deceive others, and to obtain property by false or fraudulent pretenses, representations, or promises, from the persons so deceived.

A statement or representation is "false" or "fraudulent" within the meaning of the mail fraud statute if it relates to a material fact and is known to be untrue or is made with reckless indifference as to its truth or falsity, and is made or caused to be made with intent to defraud. A statement or representation may also be "false" or "fraudulent" if it constitutes a half truth, or effectively conceals a material fact, with intent to defraud. A material fact is a fact that would be important to a reasonable person in deciding whether to engage in a particular transaction.

Good faith constitutes a complete defense to mail fraud. Good faith means the actor had a genuine belief that the information which was sent or given was true.

The plaintiff must prove by a preponderance of the evidence that one or more of the defendants knowingly and willfully devised or intended to devise a scheme to defraud which was substantially the same as the one alleged by the plaintiff and that the use of the United States Mail was closely related to the scheme in that one or more of the defendants either mailed something or caused it to be mailed in an attempt to execute or carry out the scheme. One causes the mails to be used if he does an act with knowledge that the use of the mails will follow in the ordinary course of business, or if he can reasonably foresee such use.

To establish that wire fraud has been committed, the plaintiff must prove by a preponderance of the evidence that the defendant used the telephone (telegraph) for the purpose of executing the scheme to defraud.

To establish wire fraud, it must be found that when the defendant performed an act, he knew, or reasonably could foresee, that the telephone or telegraph would be used to further a scheme or artifice to defraud.

With respect to the fourth element of Section 1962(a) of the RICO Act—use of income to acquire an interest in, establish or operate an enterprise—you must decide whether a defendant, directly or indirectly, used any part of the income derived from a pattern of racketeering activity to acquire an interest in, to establish, or to operate the alleged enterprise. The plaintiff must prove by a preponderance of the evidence that a defendant, or any of them, invested income in a specific enterprise and that income was acquired through the scheme in which they illegally used the mails (telephone) with respect to that particular alleged enterprise.

The plaintiff claims that each of the following is an enterprise which affects interstate or foreign commerce, and that each defendant participated in each alleged enterprise through a separate and distinct pattern of racketeering activity: [Describe enterprise allegations here]

SECTION 1962(b)

II. The plaintiff also claims that the defendants have violated Section 1962(b) of RICO. To establish a violation of Section 1962(b), the plaintiff must prove by a preponderance of the evidence each one of the following four elements:

1. That an enterprise existed;
2. That the enterprise engaged in or had some effect upon interstate or foreign commerce;
3. That the defendant engaged in a pattern of racketeering activity; and
4. That through the pattern of racketeering activity the defendant acquired or maintained an interest in, or controlled the alleged enterprise.

[I have already instructed you about the first three elements of Section (b) in the previous discussion of Section (a). If you find that the alleged enterprise existed and engaged in or had some effect upon interstate or foreign commerce, and that the defendant engaged in a pattern of racketeering activity, then you must consider the fourth element.]

This fourth element that plaintiff must prove by a preponderance of the evidence is that the defendants, or any of them, through the pattern of racketeering activity, acquired or maintained an interest in, or control of one or more of the alleged enterprises. To find that the plaintiff established this fourth element, you must find by a preponderance of the evidence not only that the defendants, or any of them, had some interest in or control over one or more of the alleged enterprises, but also that this interest or control was associated with or connected to the pattern of racketeering activity.

SECTION 1962(c)

III. The plaintiff also has alleged that defendants have violated Section 1962(c) of RICO. To establish that the defendant has violated Section 1962(c), the plaintiff must prove each of the following five elements by a preponderance of the evidence:

1. That an "enterprise" existed; (footnote 31)
2. That the enterprise engaged in, or had some effect upon, interstate or foreign commerce;
3. That the defendant was employed by or associated with the alleged enterprise;
4. That the defendant knowingly and willfully conducted or participated, directly or indirectly, in the conduct of the affairs of the alleged enterprise; and
5. That the defendant did so knowingly and willfully through a pattern of racketeering activity.

"Employed by or associated with" means some minimal association with the alleged enterprise. The defendant must know something about the alleged enterprise's activities as they relate to the racketeering activity.

The fourth and fifth elements require that the plaintiff prove by a preponderance of the evidence that the defendant knowingly and willfully conducted or participated in the conducting of the affairs of the alleged enterprise through a pattern of racketeering activity. The plaintiff must prove by a preponderance of the evidence a sufficient connection between the enterprise, the defendant, and the alleged pattern of racketeering activity. In order to establish a sufficient connection between the enterprise, the defendant and the alleged pattern of racketeering activity, the plaintiff must prove by a preponderance of the evidence:

1. That the defendant participated in the operation or management of the enterprise itself in such a way, directly or indirectly, as to have played some part in directing the affairs of the enterprise. (footnote 32)
2. That the defendant in fact engaged in the pattern of racketeering activity as the plaintiff claims;
3. That the defendant's association with or employment by the enterprise facilitated his commission of the racketeering acts; and
4. That the commission of these predicate acts had some direct or indirect effect on the alleged enterprise.

A person does not violate the law by merely associating with or being employed by an otherwise lawful enterprise the affairs of which are being conducted by others through a pattern of racketeering activity in which he is not personally engaged.

SECTION 1962(d)

IV. Plaintiff also claims that the defendants violated Section 1962(d) of RICO because the defendants agreed or conspired to violate the RICO law.

A "conspiracy" in this sense is a combination or agreement of two or more persons to join together to accomplish an offense which would be in violation of Section 1962(a), (b), and/or (c) under the law that I have given you with respect to those sections.

To establish a violation of Section 1962(d), the plaintiff must prove by a preponderance of the evidence:

1. That two or more persons in some way or manner came to a mutual understanding to attempt to accomplish a common and unlawful plan, that is that while being employed by or associated with an enterprise, they engaged in activities which affected interstate or foreign commerce, or conducted the affairs of the alleged enterprise through a pattern of racketeering activity, in the manner charged; and
2. That the defendant knowingly and willfully became a member of a conspiracy by objectively indicating, through his words or actions, his agreement to conduct or participate, directly or indirectly, in the conduct of the affairs of an enterprise through a pattern of racketeering activity; and

3. That at least one of the conspirators committed at least one overt act during the existence of a conspiracy in an effort to accomplish some object or purpose of the conspiracy.

The definitions and instructions that I gave to you earlier as to "enterprise," "racketeering activity," "pattern of racketeering activity," "conduct through a pattern of racketeering activity" and "engaged in, or the activities of which affect, interstate or foreign commerce" apply here.

In regard to the first element of the claim of conspiracy, the evidence in the case need not show that the alleged members of the conspiracy entered into any express or formal agreement, or that they directly stated between themselves the details of the scheme and its object or purpose or the precise means by which the object or purpose was to be accomplished. Similarly, the evidence in the case need not establish that all of the means or methods alleged were in fact set forth in the indictment wherein fact agreed upon to carry out the alleged conspiracy, or that all of the means or methods which were agreed upon were actually used or put into operation. The plaintiff is not required to prove that all of the persons charged with being members of the conspiracy were such or that the alleged conspirators actually succeeded in accomplishing their unlawful objectives.

On the other hand, it is not enough if the evidence shows only that the alleged conspirators agreed to commit the acts of racketeering alleged by the plaintiff, without more, or that they agreed merely to participate in the affairs of the same alleged enterprise. Instead, the plaintiff must prove by a preponderance of the evidence that the alleged conspirators agreed to conduct or participate in the conduct of the affairs of the alleged enterprise and that they further agreed that their individual participations would be through two or more racketeering acts in furtherance of the affairs of the alleged enterprise. It does not matter that the alleged conspirators participated in the conduct of the affairs of the alleged enterprise through different, dissimilar or otherwise unrelated acts of racketeering activity, so long as the alleged racketeering acts would, if they were actually committed, create a "pattern of racketeering activity" as I defined that phrase to you.

As to the second element of the alleged conspiracy violation—knowing and willful membership in the conspiracy—the plaintiff must prove by a preponderance of the evidence:

1. That the defendant knew that the basic object of the alleged conspiracy was conducting the alleged enterprise through a pattern of racketeering activity;
2. That the defendant knowingly and willfully agreed to personally commit, or aid and abet the commission of at least two acts of racketeering as a "pattern of racketeering activity" as I have defined it; and
3. That the defendant knowingly and willfully agreed to conduct or participate in the conduct of the affairs of the alleged enterprise through this pattern of racketeering activity.

One may become a member of a conspiracy without full knowledge of all of the details of the unlawful scheme or without knowledge of the names and identities of all of the other alleged conspirators. If the plaintiff proves by a preponderance of the evidence that the particular defendant has knowingly and willfully joined the alleged conspiracy under the three standards I have just set forth, it does not matter that the defendant may not have participated in the earlier stages of the alleged conspiracy or scheme.

However, mere presence at the scene of some transaction or event, or mere similarity of conduct among various persons and the fact that they may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily prove the existence of a conspiracy. Also, a person who has no knowledge of a conspiracy, but who happens to act in a way which advances some object or purpose of a conspiracy, does not thereby become a conspirator.

The plaintiff need not prove that the defendant actually committed any of the acts that he may have agreed to commit in order to establish his membership in the conspiracy. You may consider only those racketeering acts alleged against the particular defendant by the plaintiff in determining whether that defendant has agreed to commit two acts of racketeering activity as a "pattern of racketeering activity." [These alleged racketeering acts are outlined as to each defendant on pages ___ of these instructions.]

To establish the third element, the plaintiff must prove by a preponderance of the evidence that at least one of the alleged conspirators committed at least one "overt act" during the existence of the alleged conspiracy. An "overt act" is a transaction or event, even one which may be entirely legal and innocent when considered alone, but which is knowingly committed by a conspirator in an effort to accomplish some object of the conspiracy. However, in accordance with my instructions during the trial, you may not consider any evidence of any alleged wrongful act, other than the alleged wrongful act which the plaintiff contends is a specific violation, as in any way bearing on the character of any defendant or as an indication that any defendant may have a propensity to commit any of the offenses charged.

In your consideration of this conspiracy claim, you should first determine whether the alleged conspiracy existed. If you conclude that a conspiracy did exist as alleged, you should next determine whether or not the defendant under consideration willfully became a member of that conspiracy.

In determining whether there was a conspiracy you may consider all the evidence in the case. If you find that there was a conspiracy then you may attribute the statements or acts of the _____, [insert names of co-conspirators] to the defendant. If you find that there was no conspiracy then you may not attribute the statements or acts of _____, [insert names of alleged co-conspirators] to the defendant.

If you find that no such conspiracy existed, then you must find for the defendants. However, if you are satisfied that such a conspiracy existed, you must determine who were the members of that conspiracy.

If you find that a particular defendant is a member of another conspiracy, but not the one charged by the plaintiff, then you must find for that defendant. In other words, you cannot find that a defendant violated Section 1962(d) unless you find that he was a member of the conspiracy charged, and not some other separate conspiracy.

CAUSATION

Finally, for the plaintiff to prevail under RICO, he must prove by a preponderance of the evidence that the defendant's RICO violations were the "proximate cause" of injury to the plaintiff's business or property. Therefore you must find that the plaintiff suffered an injury to his business or property and that the injury was caused by reason of the defendants' violation of RICO.

An injury or damage is proximately caused when the act played a substantial part in bringing about or actually causing injury or damage, and that the injury or damage was either a direct result or a reasonably probable consequence of the act.

A person is injured in his business when he suffers loss of money or profits or a reduction in the value or worth of his business.

A finding that the plaintiff was injured in his business or property because of the defendant's violation of RICO requires only that you find the plaintiff was harmed by the predicate acts.

However, to find that injury to the plaintiff's business or property was caused by reason of the defendants' violation of RICO, you must find that the injury to the plaintiff was caused by, and was a direct result of the defendants' violation of either Section 1962(a) or (b) or (c).

Therefore, you must find that the commission of the acts of racketeering, or the pattern of racketeering activity, or the conduct of the affairs of the enterprise through the pattern of racketeering activity directly resulted in the injury or played a substantial role in producing the injury.

In considering the issue of damages, if any, with respect to the RICO claims, you must assess the amount you find justified by a preponderance of the evidence as full, just and reasonable compensation for all of the damages to the plaintiff in his business or property. Damages may not be based on speculation because it is only actual damages (what the law calls compensatory damages) that you are to determine.

You should consider the amount of damages, if any, as to each defendant with respect to each RICO claim separately and independently from the amount of damages, if any, with respect to the other, non-RICO claims. For example, and by way of example only, if you determine that damages should be awarded to the plaintiff under his RICO claim, you should award full, just and reasonable compensation for damages under the RICO claim, without regard to the damages, if any, you might award under any other claim brought by the plaintiff.

The fact that I have given you instructions concerning the issue of the plaintiff's damages should not be interpreted in any way as an indication that I believe that the plaintiff should or should not prevail in this case. The interrogatories which you will answer contain several questions about damages under different laws and different theories of recovery. You should not draw any inference from the fact that a damage question has been asked. You must answer each Interrogatory separately and award damages, if appropriate, independently of damages which you may award under any other interrogatory.

SUGGESTED RICO JURY INTERROGATORIES

NOTE: These special interrogatories for RICO claims are provided as illustrations and guidelines to assist in preparation of special interrogatories for other claims.

SPECIAL ISSUE NO. 1

Do you find from a preponderance of the evidence that any defendant received any income derived, directly or indirectly, from a pattern of racketeering activity in which that defendant participated as a principal, and that the defendant used or invested, directly or indirectly, any part of that income, to acquire an interest in, establish, or operate an enterprise which is engaged in, or the activities of which affect, interstate commerce?
Answer as to each defendant and each enterprise.

SPECIAL ISSUE NO. 2

What sum of money, if any, do you find from a preponderance of the evidence would reasonably compensate the plaintiff for actual damages, if any, to his business or property proximately caused by the operation of an enterprise, if any you have so found, through a pattern of racketeering activity, if any you have so found?
Answer separately as to each defendant and enterprise.

SPECIAL ISSUE NO. 3

Do you find from a preponderance of the evidence that any defendant listed below, through a pattern of racketeering activity, acquired or maintained, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce?
Answer yes or no as to each defendant.

SPECIAL ISSUE NO. 4

What sum of money, if any, do you find from a preponderance of the evidence would reasonably compensate the plaintiff for actual damages, if any, to his business or property arising from any of the defendants' acquisition or maintenance of each enterprise?

Answer separately as to each defendant and enterprise.

SPECIAL ISSUE NO. 5

Do you find from a preponderance of the evidence that any defendant listed below was employed by or associated with an enterprise engaged in, or the activities of which affected, interstate or foreign commerce?
Answer as to each defendant and each enterprise.

SPECIAL ISSUE NO. 6

What sum of money, if any, do you find from a preponderance of the evidence would reasonably compensate the plaintiff for actual damages to his business or property arising from any defendant's employment by or association with each enterprise, if any you have so found?

Answer separately as to each defendant and each enterprise.

SPECIAL ISSUE NO. 7

Do you find from a preponderance of the evidence that any defendant entered into a conspiracy with any other person to accomplish any of the purposes described below?

Answer yes or no separately as to each category and defendant.

1. To receive income derived, directly or indirectly, from a pattern of racketeering activity in which at least one of the defendants participated as a principal, to use or invest, directly or indirectly any part of such income, or the proceeds of such income, in an acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in or the activities of which affects interstate or foreign commerce.
2. To acquire or maintain through a pattern of racketeering activity any interest in or control, directly or indirectly, of any enterprise which is engaged in, or the activities of which affects interstate or foreign commerce.
3. To conduct or participate, directly or indirectly, in the conduct of the affairs of an enterprise which is engaged in, or the activities of which affect, interstate commerce or foreign commerce through a pattern of racketeering activity, while employed by or associated with such enterprise.

END of "8.RICO"

31. ¹Under Section 1962(c), the RICO "person" and the RICO "enterprise" cannot be one and the same. However, under Sections 1962(a) and (b), "enterprise" and "person" may be the same and need not be separate and distinct. In *re Burzynski*, 989 F.2d 733 (5th Cir.1993); *Landry v. Air Line Pilots Association, et al.*, 901 F.2d 404 (5th Cir.1990). *See also*, *Liquid Air Corporation v. Rogers, et al.*, 834 F.2d 1297 (7th Cir.1987); *Petro-Tech, Inc. v. The Western Company of North America*, 824 F.2d 1349 (3d Cir.1987); *Haroco v. American National Bank and Trust Company of Chicago, et al.*, 747 F.2d 384 (7th Cir.1984); *Bowman v. Western Auto Supply Company, et al.*, 773 F.Supp. 174 (W.D.Mo.1991); *Harrison v. Dean Witter Reynolds, Inc., et al.*, 695 F.Supp. 959 (N.D.Ill.1988).

32. ²The United States Supreme Court adopted the "operation and management" test of the Eighth Circuit in defining the scope of the meaning of "to conduct or participate ... in the conduct of such enterprise's affairs through a pattern of racketeering activity." *Reves v. Ernst & Young*, 507 U.S. 170, 113 S.Ct. 1163, 122 L.Ed.2d 525 (1993).

I. RULE 11 SANCTIONS

By the present motion, Judge Gohmert seeks to sanction plaintiff Jerry Michael Collins and Collins' attorney, G. David Westfall, pursuant to Federal Rule of Civil Procedure 11. Rule 11(b) provides:

By presenting [a pleading] to the court ... an attorney or unrepresented party is certifying that to the best of that person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of a new law; (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

The central issues in determining whether to impose sanctions against Collins or Westfall¹ are whether they abused the legal process and, if so, what sanction would be appropriate. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396 (1990). The Court addresses each issue in turn.

A. Did Collins and/or Westfall Abuse the Legal Process?

Whether Plaintiff's lawsuit against Judge Gohmert constitutes sanctionable harassment under Rule 11 depends upon the objectively ascertainable circumstances rather than subjective intent. *Sheets v. Yamaha Motors Corp.*, 891 F.2d 533, 538 (5th Cir. 1990). If a reasonably clear

¹Although Collins' initial state-court lawsuit was brought pro se, he subsequently retained Westfall as counsel and continued to prosecute the case against Judge Gohmert in federal court. The Fifth Circuit has made it clear that Rule 11 applies both to pro se litigants as well as those represented by counsel. *Mendoza v. Lynaugh*, 989 F.2d 191, 195-96 (5th Cir. 1993).

legal justification can be shown for the filing of the lawsuit, no improper purpose may be found and sanctions are inappropriate. *Id.* However, sanctions are warranted if the lawsuit is found to have inadequate legal and factual support and an improper purpose. *See* Fed. R. Civ. P. 11(b). Furthermore, a litigant or attorney's subjective good faith is not enough to avoid sanctions if the initiation of the lawsuit against Judge Gohmert was objectively unreasonable. *United States v. Alexander*, 981 F.2d 250, 252 (5th Cir. 1993) ("Rule 11 demands that the actions of the attorney be objectively, not just subjectively, reasonable under the circumstances").

In this lawsuit, Collins maintained that his business was destroyed when "some El Paso lawyers conspired with two women from El Paso, who conspired with at least one east Texas lawyers [sic], who conspired with Van Zandt County law enforcement officers, the 294th district court coordinator, district judges, the county tax collector, and every lawyers [sic] Collins hired to represent him or attempted to hire to represent him."² (First Amended Compl. at 9-10). The only claim against Judge Gohmert arose from Judge Gohmert's granting a motion for summary judgment and disposing of Collins' state-court action against his former attorney. In other words, the Complaint made no specific allegation against Judge Gohmert except to say that he was involved in a far-reaching RICO conspiracy against Collins.

As discussed more fully in this Court's March 7, 2000 Order, Collins' conclusory claims against Judge Gohmert were legally untenable pursuant to the doctrine of absolute judicial immunity, and were therefore dismissed in their entirety. *See* 3/7/00 Order at 4-6. There was no reason to bring such claims, let alone continue to prosecute them over a period of years, save that

²The present action is at least the fourth suit filed by Collins stemming from the alleged conspiracy. *See* 3/7/00 Order at 2.

of harassment. The record in this case plainly demonstrates that Collins' RICO conspiracy claims against Judge Gohmert are utterly without arguable factual or legal basis and were filed maliciously and solely for the purpose of harassing, annoying and burdening Judge Gohmert.

As one court wrote, "the filing of frivolous civil lawsuits against judicial officers deserves a special place in the cornucopia of evils plaguing our judicial system because such lawsuits are not only an affront to the dignity of the courts but also an assault upon the integrity of our judicial system." *Hicks v. Bexar County, Texas*, 973 F. Supp. 653, 688 (W.D. Tex. 1997), *aff'd*, 137 F.2d 1352 (5th Cir. 1998), citing *Bogney v. Jones*, 904 F.2d 272, 274 (5th Cir. 1990) (upholding imposition of Rule 11 sanctions where plaintiff asserted civil claims against state district judge). So it is even more significant that the frivolous claims against Judge Gohmert continued to be asserted by Collins *after* G. David Westfall was retained. As reprehensible as Collins' conduct against Judge Gohmert is, he was acting pro se during many of the matters.³ But that an attorney such as Westfall could file a complaint against a state-court judge based upon the circumstances in this record leaves the Court nothing short of bewildered.

Thus, after concluding that Collins' claims against Judge Gohmert lacked legal and/or factual support and were brought for an improper purpose, the Court finds that both Collins and Westfall abused the legal process by instigating and then pursuing the lawsuit against Judge Gohmert. The Court concludes without reservation that the claims against Judge Gohmert warrant the imposition of sanctions under Rule 11.

³But again, just because it may be more understandable for an unrepresented party to pursue frivolous claims, Collins' pro se status should not, and will not, shield him from sanctions in this case. *Mendoza*, 989 F.2d at 195-96.

B. What Rule 11 Sanctions are Appropriate?

Having found a Rule 11 violation, the Court turns to the issue of appropriate sanctions. The Fifth Circuit instructs that the least severe sanction adequate to serve Rule 11's purposes should be imposed. See *Mendoza v. Lynaugh*, 989 F.2d 191, 196 (5th Cir. 1993); *Thomas v. Capital Security Svcs., Inc.*, 836 F.2d 866, 877 (5th Cir. 1988); see also Fed. R. Civ. P. 11(c)(2). Furthermore, the amount of Rule 11 sanctions must be limited to the expenses actually and directly caused by the filing of the pleading found to violate Rule 11. See *Jennings v. Joshua I.S.D.*, 948 F.2d 194, 199 (5th Cir. 1991), cert. denied, 504 U.S. 956 (1992).

Although Judge Gohmert has offered some evidence of the expenses incurred while defending against Collins' frivolous claims,⁴ the evidence is incomplete and, as yet, Collins has not been afforded the opportunity to challenge it. So, while the Court is eager to dispose of this matter, the parties have not yet presented sufficient evidence upon which to base an appropriate sanction.

Accordingly, the Court requests that within twenty (20) days from the date of entry of this Order, Judge Gohmert file and serve upon Plaintiff a properly authenticated affidavit or other proper summary judgment evidence establishing the amount of fees and costs actually incurred by Judge Gohmert and/or the State of Texas in defending against Collins' lawsuit.⁵ Then, within seven (7) days of being served with Judge Gohmert's submission, Collins and/or Westfall shall file and

⁴In his reply brief, filed May 16, 2000, Judge Gohmert states: "This Defendant has utilized a visiting judge on two different days to allow him an opportunity to deal with this suit at a cost to the State of Texas of \$327 per day. The rest of the significant burden required by this frivolous suit has been borne by the undersigned including one trip to Dallas personally to insure that filing requirements and rules were timely and appropriately met." Reply at ¶ 5.

⁵If Judge Gohmert requires additional time to assemble his evidence, he should notify this Court in writing

serve upon Judge Gohmert any written response which they wish to make to each such statement and any arguments establishing why such fees and costs should not be imposed upon them pursuant to Rule 11. Should Plaintiff fail to file a response within the proscribed time, the Court will award sanctions without Plaintiff's input.

II. SANCTIONS UNDER THE COURT'S INHERENT POWER

Separate and apart from Rule 11, a court may use its inherent power to sanction a party who acts in bad faith, vexatiously, wantonly or for oppressive reasons. *Chambers v. NASCO*, 501 U.S. 32, 45-46 (1991); *see also Kipps v. Caillier*, 197 F.3d 765, 770 (5th Cir. 1999) (court must make specific finding that party acted in bad faith in order to impose sanctions under its inherent power). The purpose of this power is to enable the Court to ensure its own proper functioning. *Chambers*, 501 U.S. at 43 ("It has long been understood that certain implied powers must necessarily result to our Courts of justice from the nature of their institutions... because they are necessary to the exercise of all others."); *Conner v. Travis County*, 209 F.3d 794, 799 (5th Cir. 2000). The invocation of this sanctioning power should be the exception rather than the rule. *Kipps*, 197 F.3d at 770.

This case, to which the Court has devoted more time and energy than it cares to remember, falls squarely within the "exceptional" category. As discussed in more detail above, the claims first initiated by Collins and later vigorously pursued by Westfall lacked any arguable legal and/or factual support, were brought to harass Judge Gohmert and other defendants, and generally constituted a flagrant abuse of the legal process. At the bottom of this now almost five-year long fiasco, Collins initiated and Westfall subsequently ratified (by filing a complaint in federal court that violated virtually

every precept of Rule 11) wholly groundless civil rights claims against two state court judges (including Judge Gohmert), the sheriff, constable, district attorney and tax assessor-collector of Van Zandt County, and several attorneys. In fact, upon losing a law suit, it is Collins' practice simply to file a new one, adding as parties most of the participants in the old suit (such as Judge Gohmert) who are then alleged, without supporting evidence, to be part of the RICO conspiracy against him. This practice is, needless to say, intolerable.

Given the utter lack of evidence tending to demonstrate that Judge Gohmert participated in a RICO conspiracy, the Court cannot avoid the conclusion that Collins and Westfall each acted in bad faith, vexatiously, wantonly *and* for oppressive reasons. *Kipps*, 197 F.3d at 770. Consequently, it is appropriate to impose sanctions pursuant to the Court's inherent power to preserve the Court's authority, to punish and to deter future misconduct. *See, e.g., Chambers*, 501 U.S. at 45-46; *Kipps*, 197 F.3d at 770.

Any sanctions levied under a court's inherent power must be the least severe sanctions adequate to achieve the end of preserving the court's authority and punishing the misconduct. *Scaife v. Associated Air Center, Inc.*, 100 F.3d 406, 411 (5th Cir. 1996). In light of the circumstances of this case, Collins and Westfall are hereby sanctioned in the amount of \$2,500 each; any greater sanction would be excessive while a lesser sanction would fail to serve the Court's purposes.

Therefore, within twenty (20) days from the date of entry of this Order, both Jerry Michael Collins and G. David Westfall are each directed to pay \$2,500 to the Clerk of the District Court of the Northern District of Texas. Furthermore, the parties are directed to submit

Rule 11 evidence and arguments in the manner set forth at pages 6-7 of this Order.

So Ordered.

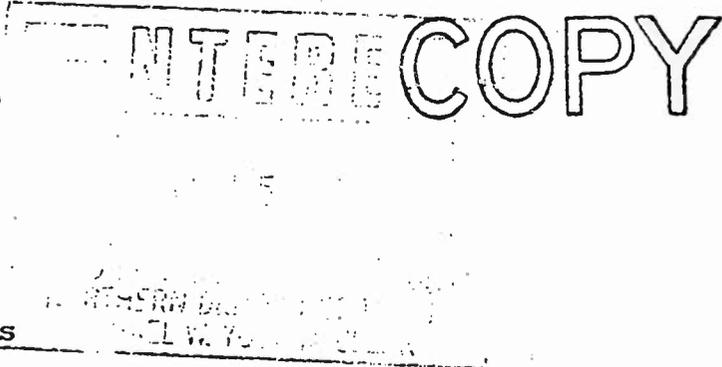
Signed this 26th day of July, 2000.



JORGE A. SOLIS
UNITED STATES DISTRICT JUDGE

Frank L. Broyles
Texas Bar 03230500
GOINS, UNDERKOFKLER, CRAWFORD
& LANGDON
1601 Elm Street, Suite 3300
Dallas, Texas 75201
(214) 969-5454
(214) 969-5902 (Fax)

Attorneys for Texakoma Parties



IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE: §
§
DAVID PAUL CHAPMAN, et.al. § CASE NO. 392-34230-HCA-13
§ Chapter 13
Debtor. §

FINDINGS OF FACT

On March 4, 1993 and March 5, 1993 the court heard the objection by Texakoma Oil & Gas Corporation and Texakoma Financial, Inc. to the Application to Employ Special Counsel. Pursuant to Bankruptcy Rule 7052 the Court makes the following findings of fact and conclusions of law:

1. Debtor David Chapman embarked on a campaign against the Texakoma Movants by helping to dig up parties to sue Texakoma and by working very closely with David Westfall to encourage more parties to sue Texakoma or their principals even though Debtor David Chapman has been at least culpable in some regard with respect to those parties when he worked at Texakoma.

2. David Chapman has been hustling business for David Westfall.

3. Tony Graham is a witness for Debtor in Debtor's state court employment lawsuit against Texakoma. David Westfall represents Chapman in that lawsuit. Without any request by Tony Graham, David Westfall faxed an employment contract to Tony Graham seeking to have Graham engage Westfall to represent Graham against Texakoma. Westfall's motive was pecuniary gain.

CONCLUSIONS OF LAW

1. This is a core proceeding under 11 U.S.C. 157 (b)(2).

2. The actions of David Westfall violated State Bar Rules 7.02 and 1.06.

3. The disqualification of David Westfall as counsel for any Texakoma investor is a state court matter.

4. If the state court refuses to disqualify Westfall from representing any Texakoma investor against Texakoma, then Westfall should be disqualified as special counsel for the Debtor.

SIGNED APR 13 1993, 1993.

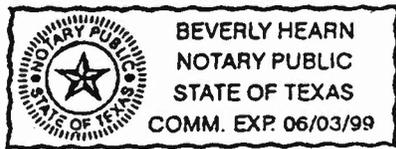
ORIGINAL SIGNED BY
/s/ HAROLD C. ABRAMSON

U. S. BANKRUPTCY JUDGE

WITNESS MY HAND this 20th day of March, 1998.

Christina Westfall
CHRISTINA WESTFALL

SUBSCRIBED AND SWORN TO before me, this the 20th day of March, 1998 to
certify which witness my hand and seal of office.



Beverly Hearn
Notary Public, State of Texas

vs.
Gwen David Westfall

§
§
§
§

IN AND FOR

NAVARRO COUNTY, TEXAS

JAMES F. DOOLEY
Clerk of Court
Navarro County, Texas
Suzanne Thomas
Suzanne Thomas

ORDER GRANTING COMMUNITY SUPERVISION

On this day, this cause being called for trial, came the State of Texas by and through its District Attorney for Navarro County, and came the Defendant in person/and being represented by counsel; and the Defendant, having been duly arraigned, pleaded NOT GUILTY to the information herein, had trial by the Court, and submitted the cause to the Court. Having heard all evidence submitted thereon, the Court adjudged the Defendant guilty as charged in the information of Cruelty to Animals. The Court, having heard evidence submitted thereon, assessed his/her punishment at a fine of \$ 2000.00 and 30 days confinement in the Navarro County Jail, together with all costs in this behalf incurred.

HOWEVER, IT APPEARING TO THE COURT that the Defendant has applied for community supervision and that the ends of justice and the best interest of the public, as well as the Defendant, will be served if the imposition of sentence in this case is suspended and the Defendant is placed on community supervision under the supervision of the Court.

IT IS THEREFORE ORDERED by the Court that the imposition of sentence in this cause be and the same is hereby suspended during the good behavior of the Defendant, and that the Defendant is hereby placed on community supervision in this cause for a period of one year from this date, on the following terms and conditions, to-wit:

DURING THE TERM OF COMMUNITY SUPERVISION DEFENDANT SHALL:

- (1) Commit no offense against the laws of the State of Texas or any other State, or of the United States and report any arrest to the Community Supervision Officer within 10 days;
- (2) Avoid injurious or vicious habits, totally avoiding the use of narcotics or other controlled substances and alcoholic beverages;
- (3) Avoid persons who have criminal records and those of disreputable or harmful character;
- (4) Avoid places of disreputable or harmful character, especially taverns and pool halls where gambling is permitted and alcoholic beverages are sold;
- (5) Report to the Navarro County Community Supervision Officer immediately and thereafter as he/she shall direct, but at least once each thirty days;
- (6) Permit the Community Supervision Officer or his assistants to visit you at your home or elsewhere;
- (7) Remain within the limits of Navarro County, Texas unless granted permission to leave the County by the Community Supervision Officer;
- (8) Keep the Community Supervision Officer advised of his residence address at all times and obtain his permission before changing places of residence;
- (9) Work faithfully at suitable employment;
- (10) Support his dependents;
- (11) Pay the costs of this cause in the amount of \$ 194.00 to the Navarro County Community Supervision Department to be paid in full within 10 months;
- (12) Pay to the Navarro County Community Supervision Department a supervision fee of \$25.00 each month during said term of Supervision, said sum to be used in the administration of Community Supervision as provided by law;
- (13) Make restitution in the amount of \$ 0 to _____ said restitution to be paid to the Navarro County Community Supervision Department;
- (14) Pay the Fine in the amount of \$ 2000.00 to the Navarro County Community Supervision Department to be paid in full within 10 months;
- (15) Submit to urine tests at the discretion of the Navarro County Community Supervision Department for alcohol, marijuana, and all other controlled substances and dangerous drugs as defined by the Texas Statutes;
- (16) Pay the sum of \$ 55.00 for the Navarro County Crime Stoppers;
- (17) Serve 0 days of your sentence in the Navarro County Jail; Credit for _____ days;
- (18) Attend a Drug Offenders Course approved by the Navarro County Community Supervision Department and this Court, and submit a certificate of completion to the Navarro County Community Supervision Department within 180 days of this order.
- (19) 45.00 - Out of County source fee through Adult Probation.

You are hereby advised that under the law of this State, the Court shall determine the terms and conditions of your supervision and may at any time during the period of your supervision alter or modify the conditions of your supervision. The Court also has the authority at any time during the period of supervision to revoke your supervision for violation of any conditions of your supervision set out above.

SIGNED AND ENTERED this the 20 day of February, 1997

Quay G. Law
PRESIDING JUDGE



Defendant's Right Thumb

Gwen David Westfall
DEFENDANT by Attorney Pat Robertson, Atty

Neal B. [Signature]
COMMUNITY SUPERVISION OFFICER

Birnbaum's MSJ Response
EXHIBIT 9-H

SPCA CASE NO. 17688
DISTRICT 3A

ELLIS COUNTY CASE NO. 96-02691
DATE 4/24/96

VIOLATION: C.T.A.

On Wednesday, 24 April 1996, Reporting Investigator Ron Smith, Badge #16, SPCA of Texas (R.I.), met with Investigator Tommy Parks of Ellis County S.O. at the Ellis County Detention Facility in Waxahachie, Texas.

Inv. Parks showed R.I. numerous color photos of decomposing cattle carcasses of various breeds. These bovine were in open country and what appeared to be a tin barn/shed. Inv. Parks informed R.I. that there were approximately 27 dead bovine located on the property, which is located in Ellis County, Texas on Bunkey Road. Inv. Parks stated that these cattle were owned by G. David Westfall W/M DOB NA who resides at 6623 Norway Road in Dallas County Texas. Mr. Westfall's cattle operation(s) are managed by a Mr. Gist who resides in Purdon, Texas.

R.I. and Inv. Parks then departed from the detention facility and arrived at the location on Bunkey Road at approximately 9:50 a.m. The property is approximately 400 acres with two gated entries on Bunkey Road. There are two single family dwellings located on this acreage; one two-story brick veneer structure and one single-wide mobile home. There is also a wood frame tin covered multi-room barn located in a grove of trees approximately 1,000 yards west of the brick structure. All structures were in various states of disrepair and obviously had not seen maintenance in quite some time. The barn, however, has had some recent activity which will be detailed further in this report. There are numerous "stock ponds" on this property as well as a substantial waterway at what could be considered the "back" of the property.

There was one "feeder" found to contain what appeared to be a "mineral supplement" of a reddish color in a powder form. This "feeder" was located approximately 500 yards south, south east from the "back structure." There were no "hay rings" located on any section of the property to indicate the usage of hay in "round bale" form although several "rings" were on the property and appeared to have not been used in quite some time. There were also no "hay frames" to indicated the usage of "square bales." No "twine" remnants or "baling wire" was found on or around the pastures as well.

There were approximately 105 head of cattle and two donkeys seen in the pastures. The cattle were of various breeds but predominately brahman. There were calves, cows and bulls in this herd. Approximately 25% of this herd were displaying signs of malnutrition. Most of the nursing cows displayed utters that were not expanded normally from milk production for nursing calves. Many of these bovine displayed pronounced hip bones, ribs and other skeletal structure which would not be prominent in a properly fed and healthy animal.

Inspection of various manure droppings throughout the property did not show remnants of any grains and poor or no hay.

00608

Birnbaum's MSJ Response
EXHIBIT 9-J

The pastures are "green" however, grass height is approximately one to two inches and show signs of overgrazing.

The two donkeys at this location are a "jenny" of unknown age and a "jack" approximately two to three years of age. The "jenny" appeared in fair condition and was not in any visible distress. The "jack" when viewed initially appeared dead but was alive. It had extreme difficulty in rising on all fours due to an apparent "founder" and the right fore hoof being grown out approximately eight inches, which created extreme difficulty in mobility for the animal. When the "jack" attempted to "graze" it was apparent that it was difficult at best since it could not bear weight on it's fore legs. This type of growth would take at least one year of neglect to arrive at this state. This animal is in immediate and deadly distress and requires proper attention without delay.

As R.I. and Inv. Parks inspected the property we located several dead bovine in various states of decomposition. In an area near the waterway at the north east area of the property. These bodies did not display any signs of trauma to cause death and apparently "dropped in their tracks," there were signs of "animal scavenging" but they were negligible. Along the banks and base bed of the waterway were various "bovine bones." At the northwest corner along the waterway is a washed out area containing several bovine skeletons of various size which had been covered with timber and burned. In between these two points in another washout area are at least three dead bovine in various states of decomposition.

As R.I. and Inv. Parks began inspection of the "barn" two dead bovine were discovered inside. One large cow in a state of decomposition of approximately 40%. The other bovine was primarily skeletal remains. There were apparent signs of a recent cleaning in this barn which Inv. Parks confirmed. In the hay loft of this structure there were approximately twelve (12) square bales of hay. There were no other types of bovine feed found in or around this structure.

All structures, natural ground, vehicles, fencing, and animals showed obvious signs of neglect with little or no attempt at maintaining a healthy, productive ranch. Numerous photos were taken of animals, grounds, and structures, and are attached with this report.

During the course of the day R.I. and Inv. Parks checked with feed (bulk) stores in Frost and Waxahachie, Texas, and the last known purchase of feed was in 1993.

In a telephone conversation between R.I. and Mr. Westfall at approximately 4:00 p.m., Mr. Westfall could not verify if and when or where feed or hay was purchased nor where it is stored, nor the amount spent and how often.

R.J. Smith, Investigator [Signature]
SPCA of Texas

006092

I, J. Dee Hiest, AM NOT UNDER ARREST N
 AM I BEING DETAINED FOR ANY CRIMINAL OFFENSES CONCERNING THE EVENTS
 AM ABOUT TO MAKE KNOWN TO Mr. Tommy Parker, WITHOU
 BEING ACCUSED OF OR QUESTIONED ABOUT ANY CRIMINAL ACTS REGARDING THE FAC
 I AM ABOUT TO STATE. I VOLUNTEER THE FOLLOWING INFORMATION OF MY ON
 FREE WILL FOR WHATEVER PURPOSE IT MAY SERVE. MY DATE OF BIRT
 IS 4-1-'61, I AM PRESENTLY LIVING AT DRAKE ST. (NO. 2TH)
 IN DURHAM, TEXAS. I AM PRESENTLY WORKIN
 FOR GWEN DAVID Westfall, WHOSE ADDRESS IS 6623 NORWAY DALLAS
 MY BUSINESS TELEPHONE NUMBER IS 1-214-6646, MY HOME TELEPHONE NUMBE:
 IS 1-903-673-2631

Mr. Investigator Tommy Parker is writing this statement for
me with my permission. My Name is J. Dee Hiest
and I work for atty. Gwen David Westfall who
has told me that I work for him. I started work
for Mr. Westfall in 1988. Mr. Westfall has approx.
320 head of cattle and 2 Donkeys. On several
occasions I have contacted Mr. Westfall or his wife
Chris that we needed feed for the cattle and then
I told Chris that if they did not get hay & feed that
they were going to lose the cattle because they
would not make it if they were not fed. They would keep
talking me OK, and they would not get back with
me. I would see Mr. Westfall when he came
to the ranch I would tell him again and he
would just look down and walk off, he would not
answer me. I have tried to buy feed at Boyce feed
in Holly Tx, Rowan farm store, The feed store in
Frost Tx and they will not give me any feed
under the name of Westfall Farms because he
owes all these people money and will not pay
them. Also Hunter feed in Abilene Tx. The reason that I
love out quit Mr. Westfall is that he always pays me

I HAVE READ EACH PAGE OF THIS STATEMENT WHICH CONSISTS OF 2 PAGES
 EACH WHICH BEARS MY SIGNATURE AND THE FACTS THEREIN ARE TRUE AND CORRECT.

J. Dee Hiest
 WITNESS SIGNATURE

Tommy Parker
 WITNESS SIGNATURE

Rinbaum's MSJ Response
 EXHIBIT 9-K

I, Tommy Parks, AM NOT UNDER ARREST N
AM I BEING DETAINED FOR ANY CRIMINAL OFFENSES CONCERNING THE EVENTS
AM ABOUT TO MAKE KNOWN TO Mr. Tommy Parks, WITHOU
BEING ACCUSED OF OR QUESTIONED ABOUT ANY CRIMINAL ACTS REGARDING THE FACT
I AM ABOUT TO STATE. I VOLUNTEER THE FOLLOWING INFORMATION OF MY OWN
FREE WILL FOR WHATEVER PURPOSE IT MAY SERVE. MY DATE OF BIRTH
IS 4-1-61, I AM PRESENTLY LIVING AT DRYKE ST. NO.
IN PURDON TX, TEXAS. I AM PRESENTLY WORKING
FOR GUEN David Westfield WHOSE ADDRESS IS 6623 NORWAY DR. HST,
MY BUSINESS TELEPHONE NUMBER IS 1-214-483, MY HOME TELEPHONE NUMBER
IS 1-903-673-2631

On on time every two weeks. I know that these cattle
are not fed right and I know that some were going
to get weak and die. Mr. Westfield has never contacted
on any of the dying cattle. He has not showed
me any remorse. Mr. Westfield told me after I saw
Tommy Parks called me and told me that he
was coming to talk to me, Mr. Westfield told me
to try and hide the dead cattle. I did not
do what he ask me to do with the cattle. After the
happened the cattle was more and some were buried
and I did not do this.

I HAVE READ EACH PAGE OF THIS STATEMENT WHICH CONSISTS OF 2 PAGES
EACH WHICH BEARS MY SIGNATURE AND THE FACTS THEREIN ARE TRUE AND CORRECT.

Tommy Parks
WITNESS

[Signature]
214

0

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

FILED

26 2000

NANCY DOHERTY, CLERK

BY Deputy

JERRY MICHAEL COLLINS,

Plaintiff,

v.

RICHARD LAWRENCE, et al.,

Defendants.

§
§
§
§
§
§
§
§
§

CIVIL ACTION NO.
3:99-CV-0641-P

ENTERED ON DOCKET
JUL 27 2000
U.S. DISTRICT CLERK'S OFFICE

ORDER

Now before the Court is Defendant Judge Louis B. Gohmert, Jr.'s Motion for Sanctions Under Rule 11(b), filed May 3, 1999 (the "Sanctions Motion"). Pursuant to this Court's March 7, 2000 Order disposing of virtually all of Plaintiff's claims in favor of the defendants, Plaintiff filed responsive papers to the Sanctions Motion on March 27, 2000. See 3/7/00 Order at 6, fn. 3. Judge Gohmert filed his reply on May 16, 2000.

For the following reasons, the Court GRANTS the Sanctions Motion but declines to make a specific award under Rule 11 until Judge Gohmert and Jerry Michael Collins and/or G. David Westfall submit proof and argument on the issues discussed herein. Furthermore, in addition to whatever sanctions are ultimately rendered under Rule 11, Collins and Westfall are hereby sanctioned \$2,500 each pursuant to the Court's inherent power.

ORDER — 1
99-0641



Birnbaum's MSJ Response
EXHIBIT 9-F

000000011



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.

02 APR 2002 AM 8:41

NANCY YOUNG
CLERK VAN ZANDT CO. TX
BY _____

Udo Birnbaum's

Texas Deceptive Trade Practices Act (DTPA) Counterclaim

requested

definitions, questions, and special instructions
to be given to the jury

Hon. Paul Banner
(Sitting by special assignment)

294th District Court, No 00-00619,
The Law Offices of G. David Westfall, P.C. vs. Udo Birnbaum
(Filed Sept. 20, 2000. Trial set for Apr. 8, 2002)

NOTE:

Definitions, questions, and special instructions taken directly from *Texas Pattern Jury Charges, Business, Consumer, Insurance, Employment* Tags and labels left embedded for the sake of clarity as to source. More detailed source citations in *Texas Pattern Jury Charges* at the referenced PJC's.

Definitions for **fraud, lie (n.), and perjury** are from *Black's Law Dictionary, Special Deluxe Fifth Edition*.

DEFINITION

Fraud:

An intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right.

A false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury.

Any kind of artifice employed by one person to deceive another.

A generic term, embracing all multifarious means which human ingenuity can devise, and which are resorted to by one individual to get an advantage over another by false suggestions or by suppression of truth, and includes all surprise, trick, cunning, dissembling, and any unfair way by which another is cheated.

"Bad faith" and "fraud" are synonymous, and also synonyms of dishonesty, infidelity, faithlessness, perfidy, unfairness, etc.

It consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional.

It comprises all acts, omissions, and concealments involving a breach of a legal or equitable duty and resulting in damage to another. And includes anything calculated to deceive, whether it be a single act or combination of circumstances, whether the suppression of truth or the suggestion of what is false, whether it be direct falsehood or by innuendo, by speech or by silence, by word of mouth, or by look or gesture.

Fraud, as applied to contracts, is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other.

DEFINITION

Lie: n. An untruth deliberately told; the uttering or acting of that which is false for the purpose of deceiving; intentional misstatement. See Perjury.

Perjury: In criminal law, the willful assertion as to a matter of fact, opinion, belief, or knowledge, made by a witness in a judicial proceeding as part of his evidence, either upon oath or in any form allowed by law to be substituted for an oath, whether such evidence is given in open court, or in an affidavit, or otherwise, such assertion being material to the issue or point of inquiry and known to such witness to be false. Perjury is a crime committed when a lawful oath is administered, in some judicial proceeding, to a person who swears willfully, absolutely, and falsely, in a matter material to the issue or point in question.

A person is guilty of perjury if in any official proceeding he makes a false statement under oath or equivalent affirmation, or swears or affirms the truth of a statement previously made, when the statement is material and he does not believe it to be true.

Subornation of perjury is procuring another to commit perjury.

Black's Law Dictionary, Special Deluxe Fifth Edition

INSTRUCTION

A fact may be established by direct evidence or by circumstantial evidence or both. A fact is established by direct evidence when proved by documentary evidence or by witnesses who saw the act done or heard the words spoken. A fact is established by circumstantial evidence when it may be fairly and reasonably inferred from other facts proved.

PJC 100.8 Circumstantial Evidence

QUESTION NO. 1
(Finding of DTPA Violation)

Did The Law Offices of G. David Westfall, P.C. engage in any false, misleading, or deceptive act or practice that Udo Birnbaum relied on to his detriment and that was a producing cause of damages to Udo Birnbaum?

PJC 102.1 Question and Instruction on False, Misleading, or Deceptive Act or Practice (DTPA § 17.46(b))

"Producing cause" means an efficient, exciting, or contributing cause that, in a natural sequence, produced the damages, if any. There may be more than one producing cause.

"False, misleading, or deceptive act" means any of the following:

Failing to disclose information about services that was known at the time of the transaction with the intention to induce Udo Birnbaum into a transaction he otherwise would not have entered into if the information had been disclosed; or
PJC 102.5 Failure to Disclose Information (DTPA § 17.46(b)(23)):

Representing that services had or would have *worth* that they did not have
PJC 102.2 Description of Goods or Services or Affiliation of Persons (DTPA § 17.46(b)(5))

Answer: _____

QUESTION NO. 2
(Finding of DTPA Violation)

Did The Law Offices of G. David Westfall, P.C. engage in any unconscionable action or course of action that was a producing cause of damages to Udo Birnbaum?

PJC 102.7 Question and Instruction on Unconscionable Action or Course of Action (DTPA §§ 1750(a)(3) and 17.45(5))

"Producing cause" means an efficient, exciting, or contributing cause that, in a natural sequence, produced the damages, if any. There may be more than one producing cause.

An unconscionable course of action is an act or practice that, to a consumer's detriment, takes advantage of the lack of knowledge, ability, experience, or capacity of the consumer to a grossly unfair degree.

Answer: _____

INSTRUCTION 3

If your answer to Question 1 or Question 2 is "Yes", then answer Question 3. Otherwise, do not answer Question 3.

QUESTION NO. 3
(Finding of "knowingly")

Did The Law Offices of G. David Westfall, P.C. engage in any such conduct knowingly?

PJC 102.21 Question and Instruction on Knowing or Intentional Conduct

"Knowingly" means actual awareness, at the time of the conduct, of the falsity, deception, or unfairness of the conduct in question or actual awareness of the conduct constituting a failure to comply with a warranty. Actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness.

In answering this question, consider only the conduct that you have found *was a producing cause of damages* to Udo Birnbaum.

Answer: _____

INSTRUCTION 4

If your answer to Question 1 or Question 2 is "Yes", then answer Question 4. Otherwise, do not answer Question 4.

QUESTION NO. 4
(Finding of "intentionally")

Did The Law Offices of G. David Westfall, P.C. engage in any such conduct intentionally?

PJC 102.21 Question and Instruction on Knowing or Intentional Conduct

"Intentionally" means actual awareness of the falsity, deception, or unfairness of the conduct in question or actual awareness of the conduct constituting a failure to comply with a warranty, coupled with the specific intent that the consumer act in detrimental reliance on the falsity or deception. Specific intent may be inferred from facts showing that the person acted with such flagrant disregard of prudent and fair business practices that the person should be treated as having acted intentionally.

In answering this question, consider only the conduct that you have found *was a producing cause of damages* to Udo Birnbaum.

Answer: _____

INSTRUCTION 5

If your answer to Question 1 or Question 2 is "Yes", then answer Question 5. Otherwise, do not answer the following question.

QUESTION 5
("Compensatory" damages)

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate Udo Birnbaum for his damages, if any, that resulted from such conduct?

PJC 110.8 Question and Instruction of Deceptive Trade Practice Damages

Consider the following elements of damages, if any, and none other.

Answer separately in dollars and cents, if any, for each of the following:

The difference, if any, in the value of the services as received and the price Udo Birnbaum paid for them. The difference, if any, shall be determined at the time and place the services were done.

Answer: _____

Expense costs to Udo Birnbaum, if any, produced by the conduct of The Law Offices of G. David Westfall, P.C.

Answer: _____

The reasonable value of Udo Birnbaum's lost time, if any, produced by the conduct of The Law Offices of G. David Westfall, P.C.

Answer: _____

Udo Birnbaum's loss of earning capacity sustained in the past.

Answer: _____

Udo Birnbaum's mental anguish sustained in the past.

Answer: _____

In answering questions about damages, answer each question separately. Do not increase or reduce the amount in one answer because of your answer to any other question about damages. Do not speculate about what any party's ultimate recovery may or may not be. Any recovery will be determined by the court when it applies the law to your answers at the time of judgment. Do not add any amount for interest on damages, if any.

INSTRUCTION 6

If your answer to Question 3 is "Yes", then answer Question 6. Otherwise, do not answer Question 6.

QUESTION 6
(Additional damages)

What sum of money, if any, in addition to actual damages, should be awarded to Udo Birnbaum against The Law Offices of G. David Westfall, P.C. because The Law Offices of G. David Westfall, P.C.'s conduct was committed knowingly?
PJC 110.11 Question on Additional Damages -- Deceptive Trade Practices

Answer in dollars and cents, if any.

Answer: _____

INSTRUCTION 7

If your answer to Question 4 is "Yes", then answer Question 7. Otherwise, do not answer Question 7.

QUESTION 7
(Additional damages)

What sum of money, if any, in addition to actual damages, should be awarded to Udo Birnbaum against The Law Offices of G. David Westfall, P.C. because The Law Offices of G. David Westfall, P.C.'s conduct was committed intentionally?

PJC 110.11 Question on Additional Damages – Deceptive Trade Practices

Answer in dollars and cents, if any.

Answer: _____

INSTRUCTION 8

If your answer to Question 1 or Question 2 is "Yes", then answer the following question. Otherwise, do not answer the following question.

QUESTION NO. 8
(Finding of harm from fraud)

Do you find by clear and convincing evidence that the harm to Udo Birnbaum resulted from fraud?

PJC 110.33 Predicate Question and Instruction on Award of Exemplary Damages (Post - September 1995 Cases)

“Clear and convincing evidence” means the measure or degree of proof that produces a firm belief or conviction of the truth of the allegations sought to be established.

Fraud occurs when—

PJC 105.4 Instruction on Common Law Fraud -- Concealment or Failure to Disclose

- a. a party fails to disclose a material fact within the knowledge of that party,
- b. the party knows that the other party is ignorant of the fact and does not have an equal opportunity to discover the truth,
- c. the party intends to induce the other party to take some action by failing to disclose the fact, and
- d. the other party suffers injury as a result of acting without knowledge of the undisclosed fact.

Answer “Yes” or “No.”

Answer: _____

INSTRUCTION 9

If your answer to Question 8 is "Yes", then answer the following question. Otherwise, do not answer the following question.

QUESTION 9
(Exemplary damages)

What sum of money, if any, if paid now in cash, should be assessed against The Law Offices of G. David Westfall, P.C. and awarded to Udo Birnbaum as exemplary damages, if any, for the conduct found in response to Question 8?

PJC 110.34 Question and Instruction on Exemplary Damages

“Exemplary damages” means an amount that you may in your discretion award as a penalty or by way of punishment.

Factors to consider in awarding exemplary damages, if any, are—

- a. The nature of the wrong.
- b. The character of the conduct involved.
- c. The degree of culpability of The Law Offices of G. David Westfall, P.C.
- d. The situation and sensibilities of the parties concerned.
- e. The extent to which such conduct offends a public sense of justice and propriety.
- f. The net worth of The Law Offices of G. David Westfall, P.C.

Answer in dollars and cents, if any.

Answer: _____

INSTRUCTION 10

If you have answered "Yes" to Question 1 or Question 2, then answer the following question. Otherwise, do not answer the following question.

QUESTION 10
(Attorney's fees)

What is a reasonable fee for the necessary services of Birnbaum's attorney in this case, stated in dollars and cents?

PJC 110.43 Question on Attorney's Fees

Answer with an amount for each of the following:

- a. For preparation and trial. Answer: _____
- b. For an appeal to the Court of Appeals. Answer: _____
- c. For an appeal to the Supreme Court of Texas. Answer: _____

INSTRUCTION 11

If your answer to Question 8 is "Yes", then answer the following question. Otherwise, do not answer the following question.

QUESTION 11

("Piercing the corporate veil")

Is G. David Westfall responsible for the conduct of The Law Offices G. David Westfall, P.C.?

PJC 108.1 Basic Question

G. David Westfall is "responsible" for the conduct of The Law Offices of G. David Westfall, P.C. ("The Law Office") if:

The Law Office was organized and operated as a mere tool or business conduit of G. David Westfall; there was such unity between The Law Office and G. David Westfall that the separateness of The Law Office had ceased and holding only The Law Office responsible would result in injustice; and G. David Westfall caused The Law Office to be used for the purpose of perpetuating and did perpetuate an actual fraud on Udo Birnbaum primarily for the direct personal benefit of G. David Westfall; or

In deciding whether there was such unity between The Law Office and G. David Westfall that the separateness of The Law Office had ceased, you are to consider the total dealings of The Law Office and G. David Westfall, including:

1. the degree to which The Law Office's property had been kept separate from that of G. David Westfall;
2. the amount of financial interest, ownership, and control G. David Westfall maintained over The Law Office; and
3. whether The Law Office had been used for personal purposes of G. David Westfall.

[or]

G. David Westfall used The Law Office for the purpose of perpetrating and did perpetrate an actual fraud on Udo Birnbaum primarily for the direct personal benefit of G. David Westfall.

PJC 108.1 Basic Question

Answer "Yes" or "No."

Answer: _____

INSTRUCTION 12

If your answer to Question 11 is "Yes", then answer the following question. Otherwise, do not answer the following question.

QUESTION 12
(Exemplary damages)

What sum of money, if any, if paid now in cash, should be assessed against *G. David Westfall* and awarded to Udo Birnbaum as exemplary damages, if any, for the conduct found in response to Question 8?

PJC 110.34 Exemplary damages

“Exemplary damages” means an amount that you may in your discretion award as a penalty or by way of punishment.

Factors to consider in awarding exemplary damages, if any, are—

- a. The nature of the wrong.
- b. The character of the conduct involved.
- c. The degree of culpability of *G. David Westfall*.
- d. The situation and sensibilities of the parties concerned.
- e. The extent to which such conduct offends a public sense of justice and propriety.
- f. The net worth of *G. David Westfall*.

Exemplary damages can be assessed against *G. David Westfall* as a principal because of an act by an agent if, but only if,

- a. the principal authorized the doing and the manner of the act

Answer in dollars and cents, if any.

Answer: _____

INSTRUCTION 13

If your answer to Question 8 is "Yes", then answer the following question. Otherwise, do not answer the following question.

QUESTION 13

("Piercing the corporate veil")

Is *Stefani Podvin* responsible for the conduct of The Law Offices G. David Westfall, P.C.?

PJC 108.1 Basic Question

Stefani Podvin is "responsible" for the conduct of The Law Offices of G. David Westfall, P.C. if:

The Law Office was organized and operated as a mere tool or business conduit of *Stefani Podvin*; there was such unity between The Law Offices of G. David Westfall, P.C. and *Stefani Podvin* that the separateness of The Law Offices of G. David Westfall, P.C. had ceased and holding only The Law Office responsible would result in injustice; and *Stefani Podvin* caused The Law Offices of G. David Westfall, P.C. to be used for the purpose of perpetuating and did perpetuate an actual fraud on Udo Birnbaum primarily for the direct personal benefit of *Stefani Podvin Westfall*; or

In deciding whether there was such unity between The Law Office and *Stefani Podvin* that the separateness of The Law Office had ceased, you are to consider the total dealings of The Law Office and *Stefani Podvin*, including:

1. the degree to which The Law Office's property had been kept separate from that of *Stefani Podvin*;
2. the amount of financial interest, ownership, and control *Stefani Podvin* maintained over The Law Office; and
3. whether The Law Office had been used for personal purposes of *Stefani Podvin*.

[or]

***Stefani Podvin* used The Law Offices of G. David Westfall, P.C. for the purpose of perpetrating and did perpetrate an actual fraud on Udo Birnbaum primarily for the direct personal benefit of *Stefani Podvin*.**

Answer "Yes" or "No."

Answer: _____

INSTRUCTION 14

If your answer to Question 13 is "Yes", then answer the following question. Otherwise, do not answer the following question.

QUESTION 14 (Exemplary damages)

What sum of money, if any, if paid now in cash, should be assessed against *Stefani Podvin* and awarded to Udo Birnbaum as exemplary damages, if any, for the conduct found in response to Question 8?

PJC 110.34 Exemplary damages

"Exemplary damages" means an amount that you may in your discretion award as a penalty or by way of punishment.

Factors to consider in awarding exemplary damages, if any, are—

- a. The nature of the wrong.
- b. The character of the conduct involved.
- c. The degree of culpability of *Stefani Podvin*.
- d. The situation and sensibilities of the parties concerned.
- e. The extent to which such conduct offends a public sense of justice and propriety.
- f. The net worth of *Stefani Podvin*.

Exemplary damages can be assessed against *Stefani Podvin* as a principal because of an act by an agent if, but only if,

- a. the principal authorized the doing and the manner of the act, or
- b. the agent was unfit and the principal was reckless in employing him, or
- c. the agent was employed in a managerial capacity and was acting in the scope of employment.

Answer in dollars and cents, if any.

Answer: _____

INSTRUCTION 15

If your answer to Question 8 is "Yes", then answer the following question. Otherwise, do not answer the following question.

QUESTION 15
("Piercing the corporate veil")

Is *Christina Westfall* responsible for the conduct of The Law Offices G. David Westfall, P.C.?

PJC 108.1 Basic Question

Christina Westfall is "responsible" for the conduct of The Law Offices of G. David Westfall, P.C. if:

The Law Office was organized and operated as a mere tool or business conduit of *Christina Westfall*; there was such unity between The Law Office and *Christina Westfall* that the separateness of The Law Office had ceased and holding only The Law Office responsible would result in injustice; and *Christina Westfall* caused The Law Office to be used for the purpose of perpetuating and did perpetuate an actual fraud on Udo Birnbaum primarily for the direct personal benefit of *Christina Westfall*; or

In deciding whether there was such unity between The Law Office and *Christina Westfall* that the separateness of The Law Office had ceased, you are to consider the total dealings of The Law Office and *Christina Westfall*, including:

1. the degree to which The Law Office's property had been kept separate from that of *Christina Westfall*;
2. the amount of financial interest, ownership, and control *Christina Westfall* maintained over The Law Office; and
3. whether The Law Office had been used for personal purposes of *Christina Westfall*.

Answer "Yes" or "No."

Answer: _____

INSTRUCTION 16

If your answer to Question 15 is "Yes", then answer the following question. Otherwise, do not answer the following question.

QUESTION 16
(Exemplary damages)

What sum of money, if any, if paid now in cash, should be assessed against *Christina Westfall* and awarded to Udo Birnbaum as exemplary damages, if any, for the conduct found in response to Question 8?

PJC 110.34 Exemplary damages

“Exemplary damages” means an amount that you may in your discretion award as a penalty or by way of punishment.

Factors to consider in awarding exemplary damages, if any, are—

- a. The nature of the wrong.
- b. The character of the conduct involved.
- c. The degree of culpability of *Christina Westfall*.
- d. The situation and sensibilities of the parties concerned.
- e. The extent to which such conduct offends a public sense of justice and propriety.
- f. The net worth of *Christina Westfall*.

Answer in dollars and cents, if any.

Answer: _____

INSTRUCTION 17

If your answer to Question 8 is "Yes", then answer the following question. Otherwise, do not answer the following question.

QUESTION 17
("Piercing the corporate veil")

Is *Frank C. Fleming* responsible for the conduct of The Law Offices G. David Westfall, P.C.?

PJC 108.1 Basic Question

Frank C. Fleming is "responsible" for the conduct of The Law Offices of G. David Westfall, P.C. if:

Frank C. Fleming used The Law Offices of G. David Westfall, P.C. for the purpose of perpetrating and did perpetrate an actual fraud on Udo Birnbaum primarily for the direct personal benefit of *Frank C. Fleming*.

Answer "Yes" or "No."

Answer: _____

INSTRUCTION 18

If your answer to Question 17 is "Yes", then answer the following question. Otherwise, do not answer the following question.

QUESTION 18
(Exemplary damages)

What sum of money, if any, if paid now in cash, should be assessed against *Frank C. Fleming* and awarded to Udo Birnbaum as exemplary damages, if any, for the conduct found in response to Question 8?

PJC 110.34 Exemplary damages

“Exemplary damages” means an amount that you may in your discretion award as a penalty or by way of punishment.

Factors to consider in awarding exemplary damages, if any, are—

- a. The nature of the wrong.
- b. The character of the conduct involved.
- c. The degree of culpability of *Frank C. Fleming*.
- d. The situation and sensibilities of the parties concerned.
- e. The extent to which such conduct offends a public sense of justice and propriety.
- f. The net worth of *Frank C. Fleming*.

Answer in dollars and cents, if any.

Answer: _____



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
DISTRICT CLERK

02 APR 2002 PM 3:26

H. G. YOUNG
DIST. CLERK
VAN ZANDT CO. TX.
BY _____ DEP.

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

**DEFENDANT BIRNBAUM'S OBJECTIONS TO
PLAINTIFF'S REQUESTED JURY QUESTIONS**
(Case Filed Sept. 20, 2000. Trial set for Apr. 8, 2002)

To this Honorable Court:

1. Defendant Udo Birnbaum provides the following question to be answered by the jury **immediately after Plaintiff's Question 1** ("failure to comply"). A finding of "Yes" of course precludes the jury from ever reaching Plaintiff's Question 2 ("damages") and Question 3 ("attorney fees"), and **excuses Udo Birnbaum from any and all off Plaintiff's claims.**

2. Defendant Birnbaum also objects to Plaintiff's Question 3 being submitted upon an Affirmative finding to **Question 1**. Plaintiff's Question 3 should be contingent to an answer of "Yes" to Plaintiff's **Question 2**.

3. Birnbaum's requested **Question** is as follows:

INSTRUCTION

If your answer to [Plaintiff's] Question 1 is "Yes", then answer the following question. Otherwise, do not answer the following question.

QUESTION

Was Udo Birnbaum's failure to comply excused?

a. Failure to comply by *Udo Birnbaum* is **excused** by *The Law Offices of G. David Westfall, P.C.*'s previous failure to comply with a material obligation of the same agreement.

b. Failure to comply by *Udo Birnbaum* is excused if all the following circumstances occurred:

1. *The Law Offices of G. David Westfall, P.C.*

a. by words or conduct made a false representation or concealed material facts,

b. with knowledge of the facts or with knowledge or information that would lead a reasonable person to discover the facts, and

c. with the intention that *Udo Birnbaum* would rely on the false representation or concealment in acting or deciding not to act; and

2. *Udo Birnbaum*

a. did not know and had no means of knowing the real facts and

b. relied to *his* detriment on the false representation or concealment of material facts

c. Failure to comply by *Udo Birnbaum* is excused if the agreement was made as the result of undue influence by *The Law Offices of G. David Westfall, P.C.*

"Undue influence" means that there was such dominion and control exercised over the mind of the person executing the agreement, under the facts and circumstances then existing, as to overcome his free will. In effect, the will of the party exerting undue influence was substituted for that of the party entering the agreement, preventing him from exercising his own discretion and causing him to do what he would not have done but for such dominion and control.

Answer "Yes" or "No"

ANSWER: _____

Note: Unable to send to Fleming's
214-373-3232 fax number.
Has not worked in months.
Having trouble sending to Westfall
only receives 1 page **CERTIFICATE OF SERVICE**

Respectfully submitted

Udo Birnbaum
UDO BIRNBAUM, Pro Se
540 VZ 2916
Eustace, Texas 75124
(903) 479-3929

This is to certify that a true and correct copy of this document has today been delivered to G. David Westfall and Frank C. Fleming, by facsimile transmission on this the 4th day of April, 2002.

Sent pages separately.
Talked to a "Bobby"
at Westfall's Law Office.

Udo Birnbaum
UDO BIRNBAUM



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.

v.

UDO BIRNBAUM

§
§
§
§
§
§

IN THE DISTRICT COURT 2:54

02 APR 6 PM
WASLEY YOUNG
DIST. CLERK VAN ZANDT CO. TX.

294th JUDICIAL DISTRICT

BY _____ DEP.
VAN ZANDT COUNTY, TEXAS

PLAINTIFF'S REQUESTED JURY QUESTIONS

QUESTION NO. 1:

Did the Defendant, Udo Birnbaum, fail to comply with the terms of the attorney-client agreement, between the Law Offices of G. David Westfall, P.C. and Udo Birnbaum?

Answer "Yes" or "No."

Answer: _____

If you have answered "Yes" to Question No. 1, then answer the following question. Otherwise, do not answer the following question and proceed to answer Question No. 3.

QUESTION NO. 2:

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

Answer in dollars and cents:

Answer: _____

If you have answered "yes" to Question No. 1, then answer the following question.
Otherwise, do not answer the following question.

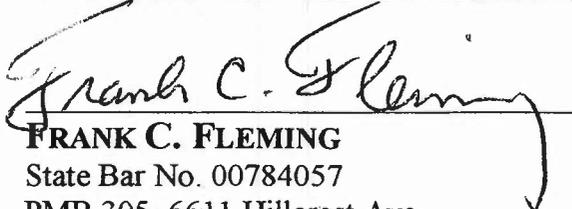
QUESTION NO. 3:

What is a reasonable fee for the necessary services of the Law Offices of G. David Westfall, P.C.'s attorneys in this case, stated in dollars and cents?

Answer in dollars and cents for each of the following:

- A. For preparation and trial in this matter: \$ _____
- B. For an appeal to the Court of Appeals, if necessary: \$ _____
- C. For making or responding to a petition for review to the Supreme Court of Texas \$ _____
- D. If petition for review is granted by the Supreme Court of Texas \$ _____

Respectfully submitted,
LAW OFFICE OF FRANK C. FLEMING



FRANK C. FLEMING
State Bar No. 00784057
PMB 305, 6611 Hillcrest Ave.
Dallas, Texas 75205-1301
(214) 373-1234
(fax) 373-3232

ATTORNEY FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above document has this day been delivered to Udo Birnbaum, by facsimile transmission to on this 3RD day of April, 2002.


FRANK C. FLEMING

No 00-619

Law Office

v.

Birnbaum



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.

Law Office
2844 Over Ct
Candi Scott

Van Zand

FILED FOR RECORD

APR 11 AM 9:18

MARCY YOUNG
CLERK VAN ZANDT CO. TX.

DEP.

Birnbaum's Objections to
Today's Plaintiff's
Court charge.

1. ~~Plaintiff's~~ Elimination of Pl's invited question 1 with current phraseology does not allow for Defendant's question as to whether he is excused by Plaintiff's prior failure to abide by a material issue in the same contract (FAILURE TO BILL MONTHLY), Not get HIS APPROVAL BEFORE LARGE EXPENSE)

Served today, 4-11-02
by hand to Fleming &
Cleo Birnbaum



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

v.

294th JUDICIAL DISTRICT

UDO BIRNBAUM

VAN ZANDT COUNTY, TEXAS

COURT'S CHARGE

LADIES AND GENTLEMEN OF THE JURY:

This case is submitted to you by asking questions about the facts, which you must decide from the evidence you have heard in this trial. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony, but in matters of law, you must be governed by the instructions in this charge. In discharging your responsibility on this jury, you will observe all the instructions which have previously been given you. I shall now give you additional instructions which you should carefully and strictly follow during your deliberations.

1. Do not let bias, prejudice or sympathy play any part in your deliberations.
2. In arriving at your answers, consider only the evidence introduced here under oath and such exhibits, if any, as have been introduced for your consideration under the rulings of the court, that is, what you have seen and heard in this courtroom, together with the law as given you by the court. In your deliberations, you will not consider or discuss anything that is not represented by the evidence in this case.
3. Since every answer that is required by the charge is important, no juror should state or consider that any required answer is not important.
4. You must not decide who you think should win, and then try to answer the questions accordingly. Simply answer the questions, and do not discuss nor concern yourselves with the effect of your answers.

BY _____
 DEP. _____
 DIST. CLERK VAN ZANDT CO. TX.
 APR 11 PM 5:57
 DISTRICT CLERK

5. You will not decide the answer to a question by lot or by drawing straws, or by any other method of chance. Do not return a quotient verdict. A quotient verdict means that the jurors agree to abide by the result to be reached by adding together each juror's figures and dividing by the number of jurors to get an average. Do not do any trading on your answers; that is, one juror should not agree to answer a certain question one way if others will agree to answer another question another way.

6. You may render your verdict upon the vote of ten or more members of the jury. The same ten or more of you must agree upon all of the answers made and to the entire verdict. You will not, therefore, enter into an agreement to be bound by a majority or any other vote of less than ten jurors. If the verdict and all of the answers therein are reached by unanimous agreement, the presiding juror shall sign the verdict for the entire jury. If any juror disagrees as to any answer made by the verdict, those jurors who agree to all findings shall each sign the verdict.

These instructions are given you because your conduct is subject to review the same as that of the witnesses, parties, attorneys and the judge. If it should be found that you have disregarded any of these instructions, it will be jury misconduct and it may require another trial by another jury; then all of our time will have been wasted.

The presiding juror or any other who observes a violation of the court's instructions shall immediately warn the one who is violating the same and caution the juror not to do so again.

When words are used in this charge in a sense that varies from the meaning commonly understood, you are given a proper legal definition, which you are bound to accept in place of any other meaning.

Answer "Yes" or "No" to all questions unless otherwise instructed. A "Yes" answer must be based on a preponderance of the evidence *unless otherwise instructed*. If you do not find that a preponderance of the evidence supports a "Yes" answer, then answer "No." The term "preponderance of the evidence" means the greater weight and degree of credible testimony or evidence introduced before you and admitted in this case. Whenever a question requires an answer other than "Yes" or "No," your answer must be based on a preponderance of the evidence *unless otherwise instructed*.

INSTRUCTION

A fact may be established by direct evidence or by circumstantial evidence or both. A fact is established by direct evidence when proved by documentary evidence or by witnesses who saw the act done or heard the words spoken. A fact is established by circumstantial evidence when it may be fairly and reasonably inferred from other facts proved.

QUESTION NO. 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 the Defendant, Udo Birnbaum's, failure to comply with the agreement between the Plaintiff and the Defendant?

INSTRUCTION:

You are instructed that after the attorney-client relationship is terminated, a client or an attorney can have post termination obligations to each other, such as, the client is still obligated financially for the lawyer's time in wrapping up the relationship and the lawyer is still obligated to perform tasks for the client to prevent harm to the client during the termination process.

ANSWER:

Answer in dollars and cents:

ANSWER: \$ 15,817.60

QUESTION NO. 2

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

Answer in dollars and cents for each of the following:

- | | |
|--|------------------------|
| A. For preparation and trial in this matter: | \$ <u>\$ 41,306.91</u> |
| B. For an appeal to the Court of Appeals, if necessary: | \$ <u>20,000.00</u> |
| C. For making or responding to a petition for review to the Supreme Court of Texas | \$ <u>5,000.00</u> |
| D. If petition for review is granted by the Supreme Court of Texas | \$ <u>10,000.00</u> |

QUESTION NO. 3
(Finding of DTPA Violation)

Did The Law Offices of G. David Westfall, P.C. engage in any false, misleading, or deceptive act or practice that Udo Birnbaum relied on to his detriment and that was a producing cause of damages to Udo Birnbaum?

"Producing cause" means an efficient, exciting, or contributing cause that, in a natural sequence, produced the damages, if any. There may be more than one producing cause.

"False, misleading, or deceptive act" means any of the following:

Failing to disclose information about services that was known at the time of the transaction with the intention to induce Udo Birnbaum into a transaction he otherwise would not have entered into if the information had been disclosed; or

Answer: NO

QUESTION NO. 4
(Finding of DTPA Violation)

Did The Law Offices of G. David Westfall, P.C. engage in any unconscionable action or course of action that was a producing cause of damages to Udo Birnbaum?

"Producing cause" means an efficient, exciting, or contributing cause that, in a natural sequence, produced the damages, if any. There may be more than one producing cause.

An unconscionable course of action is an act or practice that, to a consumer's detriment, takes advantage of the lack of knowledge, ability, experience, or capacity of the consumer to a grossly unfair degree.

Answer: No

If your answer to Question 3 or Question 4 is "Yes", then answer Question 5. Otherwise, do not answer Question 5.

QUESTION NO. 5
(Finding of "knowingly")

Did The Law Offices of G. David Westfall, P.C. engage in any such conduct knowingly?

"Knowingly" means actual awareness, at the time of the conduct, of the falsity, deception, or unfairness of the conduct in question or actual awareness of the conduct constituting a failure to comply with a warranty. Actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness.

In answering this question, consider only the conduct that you have found *was a producing cause of damages* to Udo Birnbaum.

Answer: _____

If your answer to Question 3 or Question 4 is "Yes", then answer Question 6. Otherwise, do not answer Question 6.

QUESTION NO. 6
(Finding of "intentionally")

Did The Law Offices of G. David Westfall, P.C. engage in any such conduct intentionally?

"Intentionally" means actual awareness of the falsity, deception, or unfairness of the conduct in question or actual awareness of the conduct constituting a failure to comply with a warranty, coupled with the specific intent that the consumer act in detrimental reliance on the falsity or deception. Specific intent may be inferred from facts showing that the person acted with such flagrant disregard of prudent and fair business practices that the person should be treated as having acted intentionally.

In answering this question, consider only the conduct that you have found *was a producing cause of damages* to Udo Birnbaum.

Answer: _____

If your answer to Question 3 or Question 4 is "Yes", then answer Question 7. Otherwise, do not answer the following question.

QUESTION NO. 7
("Compensatory" damages)

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate Udo Birnbaum for his damages, if any, that resulted from such conduct?

Consider the following elements of damages, if any, and none other.

Answer separately in dollars and cents, if any, for each of the following:

The difference, if any, in the value of the services as received and the price Udo Birnbaum paid for them. The difference, if any, shall be determined at the time and place the services were done.

Answer: _____

Expense costs to Udo Birnbaum, if any, produced by the conduct of The Law Offices of G. David Westfall, P.C.

Answer: _____

The reasonable value of Udo Birnbaum's lost time, if any, produced by the conduct of The Law Offices of G. David Westfall, P.C.

Answer: _____

In answering questions about damages, answer each question separately. Do not increase or reduce the amount in one answer because of your answer to any other question about damages. Do not speculate about what any party's ultimate recovery may or may not be. Any recovery will be determined by the court when it applies the law to your answers at the time of judgment. Do not add any amount for interest on damages, if any.

If your answer to Question 5 is "Yes", then answer Question 8. Otherwise, do not answer Question 8.

QUESTION NO. 8
(Additional damages)

What sum of money, if any, in addition to actual damages, should be awarded to Udo Birnbaum against The Law Offices of G. David Westfall, P.C. because The Law Offices of G. David Westfall, P.C.'s conduct was committed knowingly?

Answer in dollars and cents, if any.

Answer: _____

If your answer to Question 6 is "Yes", then answer Question 9. Otherwise, do not answer Question 9.

QUESTION NO. 9
(Additional damages)

What sum of money, if any, in addition to actual damages, should be awarded to Udo Birnbaum against The Law Offices of G. David Westfall, P.C. because The Law Offices of G. David Westfall, P.C.'s conduct was committed intentionally?

Answer in dollars and cents, if any.

Answer: _____

MEMBERS OF THE JURY:

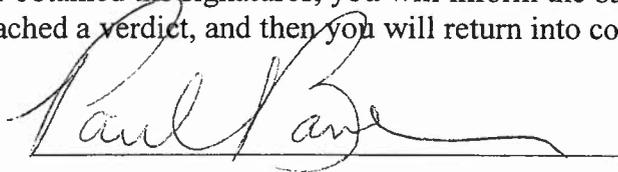
After you retire to the jury room, you will select your own presiding juror. The first thing the presiding juror will do is to have this complete charge read aloud and then you will deliberate upon your answers to the questions asked.

It is the duty of the presiding juror:

1. to preside during your deliberations,
2. to see that your deliberations are conducted in an orderly manner and in accordance with the instructions in this charge,
3. to write out and hand to the bailiff any communications concerning the case that you desire to have delivered to the judge,
4. to vote on the questions,
5. to write your answers to the questions in the spaces provided, and
6. to certify to your verdict in the space provided for the presiding juror's signature or to obtain the signatures of all the jurors who agree with the verdict if your verdict is less than unanimous.

You should not discuss the case with anyone, not even with other members of the jury, unless all of you are present and assembled in the jury room. Should anyone attempt to talk to you about the case before the verdict is returned, whether at the courthouse, at your home, or elsewhere, please inform the judge of this fact.

When you have answered all the questions you are required to answer under the instructions of the judge and your presiding juror has placed your answers in the spaces provided and signed the verdict as presiding juror or obtained the signatures, you will inform the bailiff at the door of the jury room that you have reached a verdict, and then you will return into court with your verdict.

A handwritten signature in cursive script, appearing to read "Paul Lane", written over a horizontal line.

JUDGE PRESIDING

Certificate

We, the jury, have answered the above and foregoing questions as herein indicated, and herewith return same into court as our verdict.

(To be signed by the presiding juror if unanimous.)

PRESIDING JUROR

(To be signed by those rendering the verdict if not unanimous.)

William Hart
Kathleen Taylor
Lynn Curtis
Ann M. Phillips
Brenda Mitchell
Joseph L. Patchett

Wanda Butler
~~Ernest P. H.~~
Lacey Thomas
Selita Joe Carter
Jammy Armstrong

WHEREFORE, Movant requests that the Court render judgment in accordance with the jury verdict and that:

- (1) Plaintiff have and recover zero damages from Defendant;
- (2) Plaintiff recover zero attorney's fees from Defendant.

Respectfully submitted



UDO BIRNBAUM, *Pro Se*

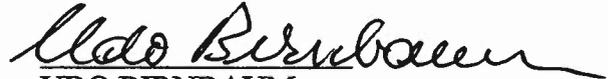
540 VZ 2916

Eustace, Texas 75124

(903) 479-3929

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this document has today been delivered to G. David Westfall and Frank C. Fleming, by regular mail on this the 16th day of April, 2002.



UDO BIRNBAUM

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

Vs.

UDO BIRNBAUM

)
)
)
)
)
)
)

IN THE DISTRICT COURT
294TH JUDICIAL DISTRICT
VAN ZANDT COUNTY, TEXAS

TAKE NOTHING JUDGMENT

On the 8TH day of April, 2002, came on to be heard the above-entitled and numbered cause and the Plaintiff appeared in person and by attorney of record and announced ready for trial, and Udo Birnbaum, appeared in person, Pro Se, and announced ready for trial and a jury having been previously demanded, a jury consisting of twelve good and lawful jurors was duly empanelled and the case proceeded to trial.

At the conclusion of the evidence, the Court submitted the case to the jury on special issues. The Charge of the Court, including the special issues, and the verdict of the jury, are incorporated herein for all purposes by reference. It appearing to the Court that the verdict of the jury was for the Defendant and against the Plaintiff, judgment should be rendered upon the verdict in favor of the Defendant and against the Plaintiff

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the court that Plaintiff take nothing by this suit, and the Defendant, Udo Birnbaum, be in all things discharged and go hence without delay. All costs of Court are taxed against Plaintiff, for which let execution issue.

All other relief not expressly granted herein is denied.

SIGNED this _____ day of April, 2002.

Judge Presiding

361



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.

Vs.

UDO BIRNBAUM

)
)
)
)
)
)
)

IN THE DISTRICT COURT
294TH JUDICIAL DISTRICT
VAN ZANDT COUNTY, TEXAS

RECORDED
29 PM 1:24
CLERK OF DISTRICT COURT
VAN ZANDT COUNTY TEXAS

DEFENDANT BIRNBAUM'S AMENDED MOTION FOR ENTRY OF JUDGMENT

Defendant UDO BIRNBAUM moves the Court to render judgment in favor of Defendant as a matter of law upon the verdict of the jury, and in support of this motion shows:

1. Plaintiff, The Law Offices of G. David Westfall, P.C. ("Plaintiff") and Defendant contracted by letter agreement on May 5, 1999 (Exhibit "A"). Defendant paid a \$20,000 up front non-refundable "retainer fee". In this suit, Plaintiff claims damages of \$18,121.10 plus legal fees for Defendant not paying a certain "billing statement".

2. In such letter contract, Plaintiff promised to **bill monthly** for time expended and expenses **incurred**. The evidence, including Plaintiff's own testimony, shows that Plaintiff **did not bill monthly as promised**, and that the first demand ever was for the \$18,121.10 that was the subject of this suit.

3. In such letter contract, Plaintiff promised to not obligate Defendant for **any large expense without Defendant's prior approval**. The evidence, including Plaintiff's own testimony, shows that Plaintiff did not do as promised, and that the \$18,121.10 additional sought on the \$38,121.10 "billing statement" was the first knowledge, ever, Defendant had that Plaintiff was running up such a gigantic "bill".

4. As a matter of law, Birnbaum is excused by Plaintiff's previous failure to comply with material obligations of the May 5, 1999 letter agreement Plaintiff signed with him by failure to **bill monthly and running up large expenses without prior approval**)

5. In such letter contract, Plaintiff also made the false representation that Defendant had "a very good case" (in suing sitting Texas District Judges under the racketeering statutes, when in fact these judges and officials enjoyed total immunity from suit), with knowledge of the falsity of such representation, and with the intention that Defendant rely on such false representation to part with \$20,000 up front money, and Defendant, at the time of the signing of the contract had no means of knowing the real facts, and relied to his detriment on Plaintiff's false representation.

6. In bringing this suit under Rule 185 ("Suit on Account"), the lawyers lied to the Court, when they averred under oath that "systematic records were maintained" at The Law Offices of G. David Westfall, P.C. The testimony and evidence clearly shows that such was not the case. Such lies are also evidenced in the July 20, 2000 deposition of G. David Westfall: "*Because I don't know that I've ever promised anyone that I would bill them monthly*". (Exhibit "B" page 18 line 25, etc)

WHEREFORE, Movant requests that the Court render judgment as a matter of law upon the verdict of the jury and that:

- (1) Plaintiff have and recover zero damages from Defendant;
- (2) Plaintiff recover zero attorney's fees from Defendant.

Respectfully submitted

Aldo Birnbaum
UDO BIRNBAUM, *Pro Se*
540 VZ 2916
Eustace, Texas 75124
(903) 479-3929

att: Exhibit "A" May 5, 1999 letter agreement (emphasis added)
Exhibit "B" July 20, 1999 Westfall deposition excerpts (emphasis added)
Exhibit "C" Defendant's Objections April 4, 2002 (to Plaintiff's req. jury instructions)
Excibit "D" Birnbaum's Objections April 11, 2002 (to that day's new Plaintiff's questions)
Take Nothing Judgment

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this document has today been delivered to G. David Westfall and Frank C. Fleming, by regular mail on this the 29th day of April, 2002.


UDO BIRNBAUM

LAW OFFICES OF
G. DAVID WESTFALL, P.C.
A Professional Corporation
714 JACKSON STREET
700 RENAISSANCE PLACE
DALLAS, TEXAS 75202

Telephone: (214) 741-4741
Fax: (214) 741-4746

May 5, 1999

Mr. Udo Birnbaum
Route 1 Box 295
Eustace, Texas 75124

RE: Birnbaum v. Ray, et al.

Dear Mr. Birnbaum:

You have requested that I act as your attorney in the above referenced suit pending in the U.S. District Court for the Northern District of Texas. This letter sets forth the agreement concerning our representation of you. This agreement shall become effective upon our receipt of a counter-signed copy of this agreement and upon the payment of the retainer.

You agree to pay our firm a retainer fee of \$20,000.00, which is non-refundable. This retainer is paid to us for the purpose of insuring our availability in your matter. The retainer will be credited against the overall fee in your matter.

We have agreed to handle this matter on an hourly basis at the rate of \$200.00 per hour for attorney time and \$60.00 per hour for paralegal time. In addition, we have agreed that you will reimburse us for expenses incurred on your behalf, such as, but not limited to, filing fees, deposition expenses, photocopy expenses, travel expenses, and employment and testimony of expert witnesses, if necessary. I will not obligate you for any large expense without your prior approval. I would ask and you have agreed to pay expenses as they are incurred.

After the \$20,000.00 has been expended in time we will then operate on a hybrid type of agreement wherein we will lower our hourly rate to \$100.00 for

Exhibit
"A"

DEPOSITION
EXHIBIT

2 715

attorney's time and \$30.00 an hour for paralegal time, but then charge as an additional fee a 20% contingency of the gross recovery in this case.

You will be billed monthly for the time expended and expenses incurred. Payment of invoices is expected within 10 days of receipt unless arrangements are made in advance. We reserve the right to terminate our attorney-client relationship for any of the following reasons:

1. Your non-payment of fees or costs;
2. Your failure to cooperate and comply fully with all reasonable requests of the firm in reference to your case; or
3. Your engaging in conduct which renders it unreasonably difficult for the firm to carry out the purposes of its employment.

Fees and costs, in most cases, may be awarded by the Judge against either party. Sometimes, the court makes no order for fees or costs. Because fees and costs awards are totally unpredictable, the court's orders must be considered merely "on account" and the client is primarily liable for payment of the total fee. Amounts received pursuant to any court order will be credited to your account.

You have represented to me that the purpose of this litigation is compensation for damages sustained and that you are not pursuing this matter for harassment or revenge. In this regard, if settlement can be reached in this case whereby you will be reimbursed for all actual damages and I will be paid for my services, you agree to accept the settlement. Notwithstanding this agreement, however, I will not settle this cause of action without your prior approval and any settlement documents must bear your signature.

Inasmuch as I am a solo practitioner, we have agreed that I at my sole discretion may hire such other attorneys to assist in the prosecution of this matter as may be reasonably necessary.

Mr. Birnbaum
May 5, 1999
Page three

I will keep you informed as to the progress of your case by sending you copies of documents coming into and going out of our office. Every effort will be made to expedite your case promptly and efficiently. I make no representations, promises or guarantees as to the outcome of the case other than to provide reasonable and necessary legal services to the best of my ability. I will state parenthetically, from what you have told me, you have a very good case. Various county officials and others involved in this matter should never have done what they apparently did. I will explain in detail the ramifications and affect of Section 1983 and Civil Rico when we next meet.

Please retain a copy of this letter so that each of us will have a memorandum of our understanding concerning fees and expenses.

Sincerely yours,



Accepted: Udo Birnbaum
Udo Birnbaum

Date: 5-5-99

CAUSE NO. 00-00619

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE LAW OFFICES OF)	IN THE DISTRICT COURT
G. DAVID WESTFALL, P.C.)	
)	
Plaintiff,)	
)	
v.)	294TH JUDICIAL DISTRICT
)	
UDO BIRNBAUM)	
)	
Defendant.)	VAN ZANDT COUNTY, TEXAS

* * * * *

VIDEOTAPED DEPOSITION OF DAVID WESTFALL

* * * * *

ANSWERS AND ORAL DEPOSITION OF DAVID WESTFALL,
 being produced as a witness at the instance of
 the Defendant, taken in the above-styled and numbered
 cause on the 3rd day of July, 2001, before April L.
 Struck, Certified Shorthand Reporter in and for the
 State of Texas, by machine shorthand, at the Van
 Zandt County Courthouse, in the City of Canton, County
 of Van Zandt, State of Texas, in accordance with the
 Texas Rules of Civil Procedure and the agreements
 hereinafter set forth.

Exhibit "B"

1 on the bottom of page 2, using the 1962-A pattern
2 jury instruction and the evidence I have designated,
3 can you give me a specific reason as to why I cannot
4 convince a jury to find affirmatively as to
5 participating as a principal?

6 MR. FLEMING: Objection.

7 MR. WESTFALL: Objection to the
8 form.

9 MR. FLEMING: Form.

10 Q (By Mr. Birnbaum) Using pattern jury
11 instructions, can you give me any reason as to why I
12 cannot convince a jury to find affirmatively as to
13 mail fraud by an affirmative finding?

14 MR. WESTFALL: Same objection.
15 Objection as to form.

16 Q (By Mr. Birnbaum) Do you see any flaws in
17 the 1962-A jury instructions?

18 A I haven't had an opportunity to view them.

19 Q I refer you to section 3. This is the May
20 5, 1999 contract between us.

21 Did you promise that you would bill me
22 monthly?

23 A I don't believe so.

24 Q Why don't you believe so, Mr. Westfall?

25 A Because I don't know that I've ever

1 promised anyone that I would bill them monthly.

2 Q Never promised anybody you would bill them
3 monthly?

4 A Not that I recall.

5 Q Would you look on page 2, first paragraph?

6 A Okay.

7 Q Let me ask you the question again,
8 Mr. Westfall.

9 A Okay.

10 Q Did you promise that you would bill me
11 monthly?

12 A It is contained in the agreement that you
13 will be billed monthly for the time expended and
14 expenses incurred.

15 MR. BIRNBAUM: Nonresponsive.

16 Q (By Mr. Birnbaum) Did you bill me monthly,
17 as you contracted?

18 A I don't believe so.

19 Q Did you bill me at all?

20 A Yes, sir.

21 Q When did you bill me? When did you start
22 billing?

23 A Can you give me the tab that's immediately
24 in front of --

25 Q Mr. Westfall, where would we have to look

1 to find out when you started billing?

2 A I guess we'd have to look at the contract.
3 Possibly May the 5th.

4 Q Mr. Westfall, what documents at a law
5 office would I have to look at to find out when you
6 started billing me monthly?

7 A You would look at the agreement would be
8 one thing, I would say.

9 Q Well, look at it. You got it in front of
10 you.

11 A May the 5th is the date of it. And that's
12 the day that it was prepared and the date that you
13 signed it.

14 Q Is that the date you should have started
15 billing or the day you did start billing?

16 A I guess -- the day I did or the day I
17 should? I guess it's the date that I should start
18 billing.

19 Q Monthly?

20 A I guess I'm not understanding that
21 question. Were you expecting a monthly bill on the
22 5th of May?

23 Q Mr. Westfall, look at line number --
24 paragraph 2, says, You will be billed monthly.
25 Did you promise to bill me monthly?

1 A The contract contains that language. I
2 don't know that I promised to bill you monthly.

3 Q Mr. Westfall, did you sign this contract?

4 A Yes.

5 Q Did you intend to bill me monthly?

6 A I guess that depends on the amount of time
7 that we expended. I mentioned to you at the
8 beginning of this that this was going to be time
9 consuming, particularly initially, and that's why --
10 that there would be a \$20,000 retainer.

11 Q Mr. Westfall, would you explain to me your
12 understanding of monthly?

13 A Monthly is pretty plain.

14 Q It is to me. I took that to mean that you
15 were going to bill me monthly. All right.

16 A Did you ever complain to me for not -- for
17 doing it any differently than was done?

18 MR. BIRNBAUM: Nonresponsive.

19 Q (By Mr. Birnbaum) What all sort of
20 information did you put in such bills?

21 A I beg your pardon?

22 Q Did you ever bill?

23 A Yes, sir. I billed you on December the
24 31st of 1999. I sent you a remainder on February the
25 1st of 2000. I sent you another on April the 3rd of

1 2000. I sent you another on June the 1st of 2000.

2 And I sent you another on 7/31/2000.

3 Q Who-all do you designate as having actually
4 prepared those bills as you claim you sent?

5 A I beg your pardon?

6 Q Who-all do you designate as having prepared
7 such bills as you sent?

8 A My secretary, Beverly Hearn.

9 Q What evidence do you have of actually
10 mailing such bills? Mr. Westfall, do you have any
11 evidence of having mailed me any bill before you
12 mailed this piece of paper? Do you have any
13 evidence?

14 A I can tell you that I know that the billing
15 went out to you at the end of 1999.

16 MR. BIRNBAUM: Nonresponsive.

17 Q (By Mr. Birnbaum) Mr. Westfall, do you
18 have any evidence of having billed me, ever having
19 mailed me anything?

20 A Yes.

21 Q What?

22 A My statement that we did it, Beverly Hearn's
23 statement that we did it. I think we even have a
24 green card finally that you signed.

25 Q According to your own documents, you had

1 already eaten up the entire \$20,000 retainer
2 agreement by July of 1999, in just two months; is
3 that correct?

4 A I haven't bothered to view it in that
5 fashion. I can certainly go through it if you'd like
6 me to do that.

7 Q Do you have any reason to doubt that that's
8 what you did?

9 A I do not doubt that we spent \$20,000 worth
10 of time on your case within two months. I have no --

11 Q Okay. So the answer is yes, according to
12 your own documents you had already eaten up or may
13 have already eaten up the \$20,000 agreement by July
14 1999; is that correct?

15 A I said that I do not have any reason to
16 doubt, based upon the amount of time that we were
17 spending on your matter, that we would have spent
18 \$20,000 worth of time within the first couple of
19 months.

20 Q So you're running in the red ever after,
21 after the first two months; is that correct?

22 A Running in the red, in other words, you now
23 owe me more money?

24 Q No. Your accounting system had a negative
25 balance. I'm not saying who owed who. Your

1 accounting system showed a negative balance when the
2 \$20,000 was eaten up; is that correct?

3 A I don't know that our accounting system is
4 as you've stated. We just simply keep time records.

5 Q What sort of flag does running into the red
6 raise in your bookkeeping system?

7 A We don't -- well, I don't understand that
8 question.

9 MR. BIRNBAUM: Okay.

10 Nonresponsive.

11 Q (By Mr. Birnbaum) You contracted in this
12 contract -- look toward the end of the page 3 of
13 that. You contracted to explain in detail the
14 ramifications -- look at the last sentence of that
15 paragraph. You contracted to explain in detail the
16 ramifications and effect of Section 1983 civil RICO.

17 Why would you need to explain to me Section
18 1983 civil RICO? You were signing on to what you
19 knew were two existing parallel civil RICO causes,
20 were you not?

21 A Yes.

22 Q And we had been talking civil RICO, had we
23 not?

24 A Yes.

25 Q Why would you want to explain -- let me

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

Vs.

UDO BIRNBAUM

) IN THE DISTRICT COURT
)
) 294TH JUDICIAL DISTRICT
)
) VAN ZANDT COUNTY, TEXAS
)
)

**DEFENDANT BIRNBAUM'S OBJECTIONS TO
PLAINTIFF'S REQUESTED JURY QUESTIONS**
(Case Filed Sept. 20, 2000. Trial set for Apr. 8, 2002)

To this Honorable Court:

1. Defendant Udo Birnbaum provides the following question to be answered by the jury **immediately after Plaintiff's Question 1** ("failure to comply"). A finding of "Yes" of course precludes the jury from ever reaching Plaintiff's Question 2 ("damages") and Question 3 ("attorney fees"), and excuses Udo Birnbaum from any and all off Plaintiff's claims.

2. Defendant Birnbaum also objects to Plaintiff's Question 3 being submitted upon an Affirmative finding to **Question 1**. Plaintiff's Question 3 should be contingent to an answer of "Yes" to Plaintiff's **Question 2**.

3. Birnbaum's requested **Question** is as follows:

INSTRUCTION

If your answer to [Plaintiff's] Question 1 is "Yes", then answer the following question. Otherwise, do not answer the following question.

QUESTION

Was Udo Birnbaum's failure to comply excused?

a. Failure to comply by *Udo Birnbaum* is excused by *The Law Offices of G. David Westfall, P.C.*'s previous failure to comply with a material obligation of the same agreement.

Exhibit
"C"

b. Failure to comply by *Udo Birnbaum* is excused if all the following circumstances occurred:

1. *The Law Offices of G. David Westfall, P.C.*

- a. by words or conduct made a false representation or concealed material facts,
- b. with knowledge of the facts or with knowledge or information that would lead a reasonable person to discover the facts, and
- c. with the intention that *Udo Birnbaum* would rely on the false representation or concealment in acting or deciding not to act; and

2. *Udo Birnbaum*

- a. did not know and had no means of knowing the real facts and
- b. relied to *his* detriment on the false representation or concealment of material facts

c. Failure to comply by *Udo Birnbaum* is excused if the agreement was made as the result of undue influence by *The Law Offices of G. David Westfall, P.C.*

"Undue influence" means that there was such dominion and control exercised over the mind of the person executing the agreement, under the facts and circumstances then existing, as to overcome his free will. In effect, the will of the party exerting undue influence was substituted for that of the party entering the agreement, preventing him from exercising his own discretion and causing him to do what he would not have done but for such dominion and control.

Answer "Yes" or "No"

ANSWER: _____

Respectfully submitted

Udo Birnbaum
UDO BIRNBAUM, *Pro Se*
540 VZ 2916
Eustace, Texas 75124
(903) 479-3929

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this document has today been delivered to G. David Westfall and Frank C. Fleming, by facsimile transmission on this the 4th day of April, 2002.

Udo Birnbaum
UDO BIRNBAUM

No 00-619

Law Office

v.

Birnbaum

~~Law Office of Westbed~~
284th Oval Ct

Van Zee

FILED FOR RECORD
02 APR 11 AM 9:18
JST. CLERK VAN ZANDT CO. TX.
BY _____ DEP.

Birnbaum's Objections to
Today's Plaintiff's
Court change.

1. ~~The New~~ Elimination of Pl's Interop
question 1 with current phraseology
does not allow for Defendant's
Question as to whether he is
excused by Plaintiff's prior
failure to abide by a material
issue in the same contract (FAILURE
TO BILL MONTHLY), Not get HIS
APPROVAL BEFORE LARGE EXPENSE)

Served today, 4-11-02
by hand to Fleming #

Exhibit
"D"

instead to make this lawsuit into his own public forum to make a mockery of all lawyers and the entire legal system.

3. Defendant/Third Party Plaintiff tried unsuccessfully to intimidate and harass the Plaintiff into dropping this lawsuit by attempting to implicate the owner of the Plaintiff, G. David Westfall, as well as his wife and daughter in a totally frivolous claim of running an organized crime syndicate in the form of a law office.

4. The Defendant/Third Party Plaintiff has attempted to use the forum of this lawsuit to launch a full scale attack on the integrity and character of G. David Westfall, Christina Westfall, and Stephanie Podvin.

5. If those attacks were not enough, the Defendant/Third Party Plaintiff broadened his attack in his pleadings and so called "Open Letters" to include casting aspersions at this Court, the visiting Judge, the Hon. Paul Banner, the Coordinator of the Court, the Court Reporter for the Court, and the Court of Appeals.

II.

Specifically, Movants file this request for sanctions against the Defendant/Third Party Plaintiff for the following actions of the Defendant/Third Party Plaintiff:

1. Filing a frivolous third party claim pleading without factual support or a valid legal basis in Defendant/Third Party Plaintiff's causes of action filed against either G. David Westfall, Christina Westfall, or Stefani Podvin. Movants contend that Defendant/Third Party Plaintiff filed these pleadings for the purpose of causing inconvenience and/or harassment for Stefani Podvin, Christina Westfall, G. David Westfall, P.C., and G. David Westfall, individually and not in support of any valid, legally factual, and legally supportable claims.

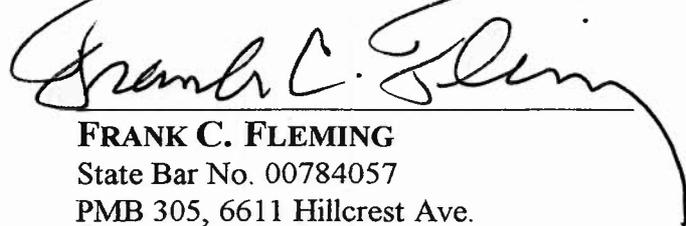
2. Filing discovery requests and taking depositions for the purpose of harassment and inconvenience and not to support any valid claims or causes of actions against the Movants.
3. Filing a frivolous motion to recuse the Hon. Paul Banner for the purpose of causing inconvenience and/or harassment for Movants.
4. Filing frivolous and untimely motions to appeal the granting of the Movants' Motions for Summary Judgment granted by the trial court.

WHEREFORE, PREMISES CONSIDERED, Movants pray that a hearing be set on this motion, and following a hearing, the Court assess appropriate sanctions against the Defendant/Third Party Plaintiff for the violations of Rule 13 of the Texas Rules of Civil Procedure and/or the violations of §10.001 et seq. of the Tex. Rules of Civil Procedure. Specifically, Movants request damages be assessed against the Defendant/Third Party Plaintiff and awarded to the Movants for the following:

- a. Reimbursement of all Movants' reasonable and necessary attorney's fees expended by Movants in defense of the allegations made by the Defendant/Third Party Plaintiff in this lawsuit to the extent such attorney's fees have not yet been awarded in any prior rulings of this Court.
- b. Reimbursement of all Movants' reasonable and necessary attorney's fees expended by Movants in pursuit of this Motion for Sanctions.
- c. Monetary damages to reimburse Movants for the inconvenience and harassment suffered by the Movants as a direct result of the improper actions taken by the Defendant/Third Party Plaintiff against the Movants in connection with this lawsuit.

- d. Punitive damages to be assessed against the Defendant/Third Party Plaintiff and awarded to the Movants in order to prevent the reoccurrence of such behavior again in the future by the Defendant/Third Party Plaintiff.
- e. Damages assessed against the Defendant/Third Party Plaintiff and awarded to the Court to reimburse the Court for its expenses and inconvenience suffered as a direct result of frivolous pleadings filed on behalf of the Defendant/Third Party Plaintiff.
- f. And for such other and further relief, both general and special, to which Movants may be justly entitled, both at law and equity.

Respectfully submitted,
LAW OFFICE OF FRANK C. FLEMING

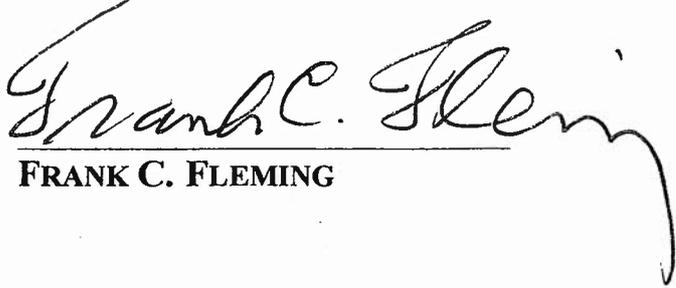


FRANK C. FLEMING
State Bar No. 00784057
PMB 305, 6611 Hillcrest Ave.
Dallas, Texas 75205-1301
(214) 373-1234
(fax) 373-3232

ATTORNEY FOR MOVANTS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above document has this day been delivered to Udo Birnbaum, by facsimile transmission to 903/479-3929, on this 9th day of May 2002.


FRANK C. FLEMING

FIAT

Please take note that this motion is set for hearing at ____ : ____ AM/PM on the ____ day of _____, 2000.

District Judge Presiding

The Westfalls' "sanctionable facts" issue 2:

"Instead of a mounting a normal defense to a rather simple lawsuit such as this and raising the normal objections to a suit on a sworn account, the Defendant/Third Party Plaintiff chose instead to make this lawsuit into his own public forum to make a mockery of all lawyers and the entire legal system".

FALSE: Birnbaum raised the **normal defense** of denying the account **under oath** per Rule 185, RCP, and calling for **appointment of an auditor** per Rule 172. (see attachment)

Neither the "Law Office", G. David Westfall, Stefani Podvin, Christina Westfall, or Frank C. Fleming ever responded to **any** of Birnbaum's motions for appointment of such Auditor under Rule 172!

Birnbaum has a First Amendment Right to speak out on the corruption G. David Westfall, Christina Westfall, and Stefani Podvin are bringing upon him in this Court in the name of their "Law Office".

The Westfalls' "sanctionable facts" issue 3:

"Defendant/Third Party Plaintiff tried unsuccessfully to intimidate and harass the Plaintiff into dropping this lawsuit by attempting to implicate the owner of the Plaintiff, G. David Westfall, as well as his wife and daughter in a totally frivolous claim of running an organized crime syndicate in the form of a law office".

FALSE AND CONCLUSORY: Birnbaum used more precise statutory language. But the issue is clear: Only the **U. S. Justice Department** can determine whether the above were indeed running a racketeering enterprise in violation of 18 U.S.C. § 1961, *et seq.* out of the "law office" as Birnbaum complains. This Court has **no investigative capability**.

Birnbaum has a First Amendment Right to speak out against public corruption as he has seen it, **without fear of retaliation** masquerading as "sanctions".

"Implicate the owner" is ludicrous under the circumstances: "Plaintiff" is the alter ego of Westfall, his wife, and his daughter. Another issue for the **U. S. Justice Department**.

The Westfalls' "sanctionable facts" issue 4:

"The Defendant/Third Party Plaintiff has attempted to use the forum of this lawsuit to launch a full scale attack on the integrity and character of G. David Westfall, Christina Westfall, and Stephanie Podvin".

FALSE: Birnbaum was seeking the intervention of the Court from the beginning upon the issue of **fraud in bringing this suit**. Another issue for the **U. S. Justice Department**.

The Westfalls' "sanctionable facts" issue 5:

"If those attacks were not enough, the Defendant/Third Party Plaintiff broadened his attack in his pleadings and so called "Open Letters" to include casting aspersions at this Court, the visiting Judge, the Hon. Paul Banner, the Coordinator of the Court, the Court Reporter for the Court, and the Court of Appeals".

FALSE: Birnbaum was seeking the intervention of the addressees to bring this entire matter to the attention of the **U. S. Justice Department**.

IN RESPONSE TO MOVANTS' "ACTIONS" (OF BIRNBAUM) ISSUES
(Movants starting page 2 paragraph II)

Further Westfalls' "sanctionable facts" issues:

"Specifically, Movants file this request for sanctions against the Defendant/Third Party Plaintiff for the following actions of the Defendant/Third Party Plaintiff:"

Issue II-1

"Filing a frivolous third party claim pleading without factual support or a valid legal basis in Defendant/Third Party Plaintiffs causes of action filed against either G. David Westfall, Christina Westfall, or Stefani Podvin. Movants contend that Defendant/Third Party Plaintiff filed these pleadings for the purpose of causing inconvenience and/or harassment for Stefani Podvin, Christina Westfall, G. David Westfall, P.C., and G. David Westfall, individually and not in support of any valid, legally factual, and legally supportable claims."

FALSE: Birnbaum has a First Amendment Right to speak out against public corruption as he has seen it, **without fear of retaliation** masquerading as "sanctions". Another issue for the U. S. **Justice Department.**

Issue II-2

"Filing discovery requests and taking depositions for the purpose of harassment and inconvenience and not to support any valid claims or causes of actions against the Movants."

FALSE: Birnbaum has a First Amendment Right to speak out against public corruption as he has seen it, **without fear of retaliation** masquerading as "sanctions". Another issue for the U. S. **Justice Department.**

Issue II-3

"Filing a frivolous motion to recuse the Hon. Paul Banner for the purpose of causing inconvenience and/or harassment for Movants."

FALSE: As pointed out at the trial by Hon. Paul Banner himself, Birnbaum has a procedural right to ask for recusal.

Birnbaum has a First Amendment Right to speak out against public corruption as he has seen it, **without fear of retaliation** masquerading as "sanctions". Another issue for the U. S. **Justice Department.**

Issue II-4

"Filing frivolous and untimely motions to appeal the granting of the Movants' Motions for Summary Judgment granted by the trial court."

Birnbaum has a First Amendment Right to speak out against public corruption as he has seen it, **without fear of retaliation** masquerading as "sanctions". Another issue for the U. S. **Justice Department.**

In response to [The Westfall'] Movants "Wherefore, Premises Considered" paragraph, seeking the following:

- a. *Reimbursement of all Movants' reasonable and necessary attorney's fees expended by Movants in defense of the allegations made by the Defendant/Third Party*

- Plaintiff in this lawsuit to the extent such attorney's fees have not yet been awarded in any prior rulings of this Court.*
- b. Reimbursement of all Movants' reasonable and necessary attorney's fees expended by Movants in pursuit of this Motion for Sanctions.*
 - c. Monetary damages to reimburse Movants for the inconvenience and harassment suffered by the Movants as a direct result of the improper actions taken by the Defendant/Third Party Plaintiff against the Movants in connection with this lawsuit.*
 - d. Punitive damages to be assessed against the Defendant/Third Party Plaintiff and awarded to the Movants in order to prevent the reoccurrence of such behavior again in the future by the Defendant/Third Party Plaintiff*
 - e. Damages assessed against the Defendant/Third Party Plaintiff and awarded to the Court to reimburse the Court for its expenses and inconvenience suffered as a direct result of frivolous pleadings filed on behalf of the Defendant/Third Party Plaintiff.*
 - f. And for such other and further relief, both general and special, to which Movants may be justly entitled, both at law and equity.*

Birnbaum has a First Amendment Right to speak out against public corruption as he has seen it, **without fear of retaliation** masquerading as "sanctions". Another issue for the U. S. Justice Department.

WHEREFORE, PREMISES CONSIDERED, Birnbaum prays that a hearing be set on the "fact" and "actions" issues raised in the *[Westfalls'] Motion for Sanctions*, so that he may more fully show that the interest of justice requires that this matter be turned over to the U. S. Justice Department. (See attached *Petition to U. S. Bankruptcy Judge* for details). The Westfalls are a menace to society.

Respectfully submitted

Udo Birnbaum

UDO BIRNBAUM, Pro Se

540 VZ CR 2916

Eustace, TX 75124

(903) 479-3929

att:

- *Motion for Appointment of Auditor Pursuant to Rule 172*
- *Petition to U. S. Bankruptcy Judge Harold C. Abramson Nov. 26, 2001 (incl. 68 page Appendix)*

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above document has this 10 day of May, 2002 been delivered as follows:

REGULAR U.S. FIRST CLASS MAIL:

- FRANK C. FLEMING, 6611 Hillcrest, PMB 305, Dallas, Texas 75205-1301
- THE HON. PAUL BANNER, c/o Sandy Hughes, First Administrative Judicial Region, 133 N. Industrial LB 50, Dallas, TX 75207 (no attachments)
- Judge Paul Banner, 24599 CR 3107, Gladewater, TX 75647 (no attachments)

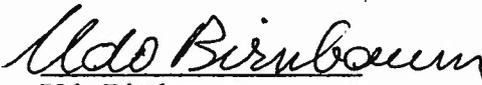
CERTIFIED MAIL, RESTRICTED DELIVERY

NO. 7000 0520 0022 8182 1532:

- HON. HAROLD C. ABRAMSON, United States Bankruptcy Court, Northern District of Texas, 1100 Commerce Street, Rm. 12A24, Dallas, TX 75242-1496 (including attachments)

HAND DELIVERY:

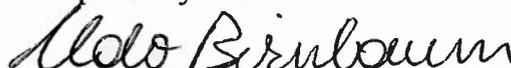
- THE HON. PAUL BANNER, c/o Betty Davis, Court Administrator 294th District Court, 121 E. Dallas Street Room 301, 75103 (including attachments)
- DISTRICT CLERK, 294th District Court, Courthouse, Canton, TX 75103 (including attachments)


Udo Birnbaum

I therefore suggest the Court examine:

- 1) Just exactly who, if anybody, is authorized to be **representing** the now deceased Plaintiff at this point in time?
- 2) Who is **responsible** for the past, present, and future conduct of "The Law Offices" and that of Frank C. Fleming under these extraordinary circumstances.

Respectfully submitted



UDO BIRNBAUM, *Pro Se*

540 VZ 2916

Eustace, Texas 75124

(903) 479-3929

att:	Exhibit 1	G. David Westfall Obituary
	Exhibit 2	Election by a Small Business Corporation (G. David Westfall is only owner)
	Exhibit 3	Confirmation by IRS
	Exhibit 4	Testimony by G. David Westfall (that Law Office is not a "person")
	Exhibit 5	Fleming Letter seeking yet another "telephone conference"

CERTIFICATE OF SERVICE

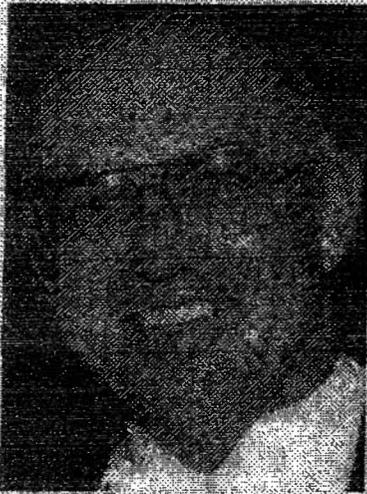
This is to certify that a true and correct copy of this document has today been delivered to Frank C. Fleming, by fax and regular mail on this the 24th day of June, 2002.



UDO BIRNBAUM

Memorials

of Thanks. Flowers. In Memoriam



WESTFALL

G. DAVID, 65, passed away suddenly Saturday, May 25, 2002. Born in Glen Cove, Texas in 1936, he practiced law in Dallas in general civil litigation. He graduated from Big Spring High School in 1954. A graduate of Texas A&M University, in 1958, he attended law school at Southern Methodist University Law School. He began the practice of law in 1963 with the firm of Bailey, Williams, Westfall, Lee & Fowler for 19 years, until establishing his solo practice in 1982. He was successful in the courtroom and was respected throughout the state for his legal exper-

tise. He was also a successful cattleman who was progressive in combining new technologies with the traditional methods, earning the respect of his peers worldwide in the cattle industry. David had a positive and vibrant personality with the true Aggie spirit. He had a big beautiful voice, a ready, contagious laugh and a sharp-witted sense of humor. He believed in working hard. Laying by his credo, he set the pace for all around him. David had an exceptionally fine, creative, even visionary mind. He was a person with diverse interests. He loved his law practice because he helped people by solving their problems; he loved the cattle business because of the creativity in improving them, the pleasure of working with them and the land, and its international venue. He was respected and admired by his peers. He was truly loved by his friends. David was devoted to his family. He was extremely proud of his children and the outstanding individuals they have come to be and the mates they chose. He was a dotting grandfather to his grandchildren who in turn adored him. David Westfall was a private man who safeguarded his family and enjoyed every moment spent with them.

He will be greatly missed by all of us who so dearly love him. He is survived by his wife Christina of Dallas; daughter Stefani Podvin and husband John of Dallas; son John Westfall, an anesthesiologist, and his wife Marguerite of Fredericksburg, Texas; grandchildren Jack, Caroline, James and Will. He is also survived by his mother Thelma Westfall of Abilene, Texas; sister and her husband Helen and Norman Langham of Garland, Texas; brother and his wife Bonnie and Beverly Westfall of Abilene; and sister Linda Miller of Abilene; and numerous nieces and nephews. His family will receive friends at Sparkman/Hillcrest Funeral Home, Wednesday May 29, 2002 from 5:00 P.M. to 7:00 P.M. Funeral services at 10:00 A.M., Thursday, May 30, 2002 at Sparkman/Hillcrest Funeral Home Chapel. In lieu of flowers, Memorials may be made in David Westfall's name to: Texas A and M Foundation, 401 George Bush Drive, College Station, TX 77840, 979-845-8161, Texas Scottish Rite Hospital for Children TSRHC Development Department 2222 Welborn Street Dallas, Texas 75219 Please direct questions to 214-559-7650 or 1-800-421-1121, ext. 6652.

SPARKMAN/HILLCREST
FUNERAL HOME
CEMETERY • MAUSOLEUM
7405 W. Northwest Highway
Dallas • (214) 363-5401

Exhibit 2 202

Election by a Small Business Corporation
 (Under section 1362 of the Internal Revenue Code)
 ▶ For Paperwork Reduction Act Notice, see page 1 of Instructions.
 ▶ See separate instructions.

OMB No. 1545-0146
 Expires 11-30-93

Notes: 1. This election, to be treated as an "S corporation," can be accepted only if all the tests in General Instruction B are met; all signatures in Parts I and III are originals (no photocopies); and the exact name and address of the corporation and other required form information are provided.
 2. Do not file Form 1120S until you are notified that your election is accepted. See General Instruction E.

Part I Election Information

Please Type or Print	Name of corporation (see instructions) G. David Westfall, A Professional Corporation	A Employer identification number (see instructions) 75-2376631
	Number, street, and room or suite no. (If a P.O. box, see instructions.) 714 Jackson #601	B Name and telephone number (including area code) of corporate officer or legal representative who may be called for information (214) 741-4741
	City or town, state, and ZIP code Dallas, Texas 75202	C Election is to be effective for tax year beginning (month, day, year) 1/1/93
D Is the corporation the outgrowth or continuation of any form of predecessor? . . . <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No If "Yes," state name of predecessor, type of organization, and period of its existence ▶		E Date of incorporation 2/13/91
F Check here <input type="checkbox"/> if the corporation has changed its name or address since applying for the employer identification number shown in item A above.		G State of incorporation TEXAS
H If this election takes effect for the first tax year the corporation exists, enter month, day, and year of the earliest of the following: (1) date the corporation first had shareholders, (2) date the corporation first had assets, or (3) date the corporation began doing business. ▶		
I Selected tax year: Annual return will be filed for tax year ending (month and day) ▶ 12/31/93 If the tax year ends on any date other than December 31, except for an automatic 52-53-week tax year ending with reference to the month of December, you must complete Part II on the back. If the date you enter is the ending date of an automatic 52-53-week tax year, write "52-53-week year" to the right of the date. See Temporary Regulations section 1.441-2T(e)(3).		

J Name of each shareholder, person having a community property interest in the corporation's stock, and each tenant in common, joint tenant, and tenant by the entirety. (A husband and wife (and their estates) are counted as one shareholder in determining the number of shareholders without regard to the manner in which the stock is owned.)	K Shareholders' Consent Statement. We, the undersigned shareholders, consent to the corporation's election to be treated as an "S corporation" under section 1362(a). (Shareholders sign and date below.)		L Stock owned		M Social security number or employer identification number (see instructions)	N Shareholder's tax year ends (month and day)
	Signature	Date	Number of shares	Dates acquired		
G. David Westfall	<i>G. David Westfall</i>	2-11-93	100%	2-13-91	466-48-6318	1
	<i>x Christina L. Westfall</i> Spouse					
	Note					

DEPOSITION EXHIBIT 50
Westfall
9/6/00 DLS

RECEIVED
FEB 23 1993
AUSTIN, TEXAS

Receipt & Control Branch
FEB 18 1993
 AISC
 Correspondence Group

*For this election to be valid, the consent of each shareholder, person having a community property interest in the corporation's stock, and each tenant in common, joint tenant, and tenant by the entirety must either appear above or be attached to this form. (See instructions for Column K if continuation sheet or a separate consent statement is needed.)

Under penalties of perjury, I declare that I have examined this election, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete.
 Signature of officer ▶ *G. David Westfall* Title ▶ *Pres* Date ▶ **2-11-93**
 See Parts II and III on back. **Exhibit** Form 2553 (Rev. 12-90)



Department of the Treasury
Internal Revenue Service
AUSTIN, TX 73301

Date of this return: APR. 26 1993
Taxpayer Identification Number: 75-2376631
Form: Tax Period:



G DAVID WESTFALL A PROFESSIONAL CORPORATION
714 JACKSON ST 601
DALLAS TX 75202-4595-146

For assistance you may call us at:
742-2440 LOCAL DALLAS
1-800-829-1040 OTHER

Or you may write to us at the address shown at the left. If you write, be sure to attach the bottom part of this notice.

NOTICE OF ACCEPTANCE AS AN S-CORPORATION

YOUR ELECTION TO BE TREATED AS AN S-CORPORATION WITH AN ACCOUNTING PERIOD OF DECEMBER IS ACCEPTED. THE ELECTION IS EFFECTIVE BEGINNING JAN. 1, 1993, SUBJECT TO VERIFICATION IF WE EXAMINE YOUR RETURN.

IF YOUR EFFECTIVE DATE IS NOT AS REQUESTED, IT WILL HAVE BEEN CHANGED FOR ONE OF TWO REASONS. EITHER YOUR ELECTION WAS MADE AFTER THE 15TH DAY OF THE THIRD MONTH OF THE TAX YEAR TO WHICH IT APPLIES, BUT BEFORE THE END OF THAT TAX YEAR, OR THE ELECTION WHEN SUBMITTED WAS INCOMPLETE, AND REQUESTED INFORMATION WAS RECEIVED AFTER THE FILING PERIOD. IN EITHER CASE, YOUR ELECTION IS INVALID FOR THE TAX YEAR REQUESTED AND HAS THEREFORE, BEEN TREATED AS THOUGH IT WERE MADE FOR THE NEXT TAX YEAR.

PLEASE KEEP THIS NOTICE IN YOUR PERMANENT RECORDS AS VERIFICATION OF YOUR ACCEPTANCE AS AN S-CORPORATION.

IF YOU HAVE ANY QUESTIONS ABOUT THIS NOTICE OR THE ACTIONS WE HAVE TAKEN, PLEASE WRITE TO US AT THE ADDRESS SHOWN ABOVE. IF YOU PREFER, YOU MAY CALL US AT THE IRS TELEPHONE NUMBER LISTED IN YOUR LOCAL DIRECTORY. AN EMPLOYEE THERE MAY BE ABLE TO HELP YOU, HOWEVER, THE OFFICE AT THE ADDRESS SHOWN ON THIS NOTICE IS MOST FAMILIAR WITH YOUR CASE.

IF YOU WRITE TO US, PLEASE PROVIDE YOUR TELEPHONE NUMBER AND THE MOST CONVENIENT TIME FOR US TO CALL SO WE CAN CONTACT YOU TO RESOLVE YOUR INQUIRY. PLEASE RETURN THE BOTTOM PART OF THIS NOTICE TO HELP US IDENTIFY YOUR CASE.

THANK YOU FOR YOUR COOPERATION.

To make sure that IRS employees give courteous responses and correct information to taxpayers, a second IRS employee sometimes listens to telephone calls.

Keep this part for your records

Overlay 5 Form 8489 (R)

Return this part to us with your check or inquiry

Your telephone number
() -

Best time to call

752376631 QH 00 0000



INTERNAL REVENUE SERVICE
AUSTIN, TX 73301

G DAVID WESTFALL A PROFESSIONAL CORPORATION
714 JACKSON ST 601
DALLAS TX 75202-4595-146

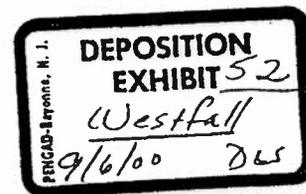


Exhibit 3

295

1 Q (By Mr. Birnbaum) Look at No. 11. This is
2 your March 20, 2000 letter telling me, quote, the
3 case is now ripe for appeal, unquote, and, quote, all
4 of the appropriate rules are now in effect relative
5 to your appeal, unquote. I fully addressed this
6 letter in my pleading. I had been in the appeals
7 court for nearly four months.

8 You have not responded to that matter in my
9 plead, have you, Mr. Westfall?

10 MR. FLEMING: Objection, form.

11 MR. WESTFALL: We join in that
12 objection.

13 Q (By Mr. Birnbaum) No. 12, you brought this
14 pleading on behalf of your law office, is that not
15 correct, Mr. Westfall?

16 A Yes.

17 Q Who is the owner of the law office?

18 A I guess I am the owner of the law office.

19 Q What do you mean you guess?

20 A Well, let me ask you this question, Udo.
21 How high is up?

22 MR. BIRNBAUM: Nonresponsive.

23 Q (By Mr. Birnbaum) The law office is
24 distinct from you, Mr. Westfall, isn't it?

25 A Yes. It's another entity.

Exhibit
4

1 Q Is it another person?

2 A It's another entity.

3 Q Is it a person?

4 A It's an entity.

5 Q What sort of a legal entity is it?

6 A It's a P.C.

7 Q You are not the owner of the law office; is
8 that correct?

9 A That's not correct.

10 Q You are the owner?

11 A I believe I'm the owner, yes, sir.

12 Q You believe you're the owner?

13 A Yes, sir.

14 Q Why do you believe that you are the owner?

15 A I've been operating as a professional
16 corporation for approximately ten years. I don't
17 know precise time, but we obtained the business. We
18 work on the business. We sign the pleadings. We do
19 everything that's done.

20 Q All the testimony regarding to the law
21 office given by you in the bankruptcy case is, of
22 course, truth; is that correct?

23 A Yes, sir.

24 Q Look at this pleading and look at your
25 signature block.

④

FRANK C. FLEMING
ATTORNEY AND COUNSELOR

6611 Hillcrest Ave., #305
Dallas, TX 75205-1901
lawyerff@aol.com

Voice: 214/373-1234
Fax: 214/373-3232
or Fax: 214/265-1979

June 17, 2002

The Hon. Paul Banner
Visiting Judge for the 294th District Court,
Van Zandt County
c/o Sandy Hughes
First Administrative Judicial Region
133 N. Industrial LB 50
Dallas, TX 75207

VIA FAX No. : 214/653-2957

also c/o
Betty Davis
Court Coordinator for the 294th District Court

VIA FAX No. : 903/567-5652

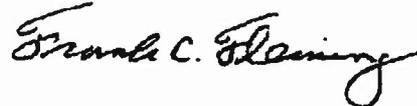
Re: Cause No. : 00-00619
294th District Court
Law Offices of G. David Westfall, P.C.
v. Udo Birnbaum

Dear Judge Banner:

I would like to schedule at your earliest convenience a hearing on the various pending motions which remain on file in this lawsuit. The motions are for entry of judgment as well as for frivolous lawsuit sanctions in the matters plead by Mr. Birnbaum against Mr. Westfall, and against his wife and daughter.

I suggest that we arrange a telephone conference with Mr. Birnbaum to select a mutually agreeable date for the next hearing. Please let me know your desire about proceeding on this matter.

Very truly yours,



FRANK C. FLEMING

cc: Udo Birnbaum Via Fax

Exhibit
5



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.

Randi Scott

No. 00-00619

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

IN THE DISTRICT COURT

Vs.

294TH JUDICIAL DISTRICT

UDO BIRNBAUM

VAN ZANDT COUNTY, TEXAS

Vs.

G. DAVID WESTFALL
STEFANI PODVIN
CHRISTINA WESTFALL

MOTION FOR SANCTIONS

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

FILED FOR RECORD
02 JUN 24 PM 1:53
DIST. CLERK VAN ZANDT CO. TX.

Defendant UDO BIRNBAUM moves the Court to sanction the Plaintiff for the following:

1. Plaintiff, The Law Offices of G. David Westfall, P.C. **knew** that it was **not entitled to bring this suit**, because it was **not a "person"** capable of holding a property interest. Such was evidenced by the testimony of its recently deceased **only professional, only officer, and only shareholder**, G. David Westfall, at depositions on July 3, 2001, i.e. that "Plaintiff" was not a "person", but a mere "entity". (Exhibit 1)

2. Plaintiff also **knew** it had **no cause** because of prior failure to abide by the terms of the letter agreement by failure to bill monthly, not to obligate for large expenses without prior approval. (Exhibit 2)

3. Such **knowledge** is also indicated by the extraordinary exchange at the bench on the second day of trial:

- Fleming:** *Judge, I had a falling out with my client. I want to withdraw from this case.* (Pause, with everybody looking at each other)
- Birnbaum:** *I object.* (Everybody looking at each other)
- Fleming:** *Just kidding, Mr. Birnbaum.* (Pause, with everybody looking at each other)
- Birnbaum:** *Judge, I did not think he was kidding.* (Everybody looking at each other)
- Judge:** *I was not going to let him withdraw anyway.* (Everybody looking at each other. End of subject)

4. The jury had no problem "adjusting" the \$18,121.10 "bill" to \$15,817.60. Plaintiff claims of "systematic and routine records" in calculating this "bill" was a fraud.

5. There was no early motion to dismiss or for summary judgment by Plaintiff, Westfall, his wife, or his daughter, followed by a humongous runup of "legal fees" to the tune of an additional **\$41,306.91!**

6. Plaintiff testified at trial that defendant Birnbaum did most of the work for Plaintiff in the underlying "bill" dispute

7. Plaintiff testified at trial that defendant Birnbaum did far more work in defending himself than did Plaintiff in prosecuting this fraudulent "collection suit".

WHEREFORE, PREMISES CONSIDERED, Movant prays that a hearing be set on this motion, and following a hearing, the Court assess appropriate sanctions against Plaintiff. Specifically Movant requests damages be assessed against Plaintiff and be awarded to movant in the following amounts:

1. \$18,121.10 for the initial bringing of the frivolous \$18,121.10 suit
2. \$41,306.91 for having to defend against harassment in these proceedings for time worth more than the \$41,306.91 expended by Plaintiff
3. Costs of transcription of depositions in this cause, amounting to \$2000.00
4. Investigative costs, including transcription of other court proceedings to serve as evidence in this cause, amounting to \$2000.00
5. Costs of preparing, copying, and mailing documents in this cause, amounting to \$3,000
6. Such other and further relief, both general and special, to which Movant may be justly entitled, both at law and equity.

Respectfully submitted



UDO BIRNBAUM, *Pro Se*

540 VZ 2916

Eustace, Texas 75124

(903) 479-3929

att: Exhibit 1 Testimony by G. David Westfall
(that Law Office is **not a "person"**)
Exhibit 2 Testimony by G. David Westfall
(that the Law Office much earlier **failed to abide** by the agreement)

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this document has today been delivered to Frank C. Fleming, by fax and regular mail on this the 24th day of June, 2002.


UDO BIRNBAUM

1111

1 Q (By Mr. Birnbaum) Look at No. 11. This is
2 your March 20, 2000 letter telling me, quote, the
3 case is now ripe for appeal, unquote, and, quote, all
4 of the appropriate rules are now in effect relative
5 to your appeal, unquote. I fully addressed this
6 letter in my pleading. I had been in the appeals
7 court for nearly four months.

8 You have not responded to that matter in my
9 plead, have you, Mr. Westfall?

10 MR. FLEMING: Objection, form.

11 MR. WESTFALL: We join in that
12 objection.

13 Q (By Mr. Birnbaum) No. 12, you brought this
14 pleading on behalf of your law office, is that not
15 correct, Mr. Westfall?

16 A Yes.

17 Q Who is the owner of the law office?

18 A I guess I am the owner of the law office.

19 Q What do you mean you guess?

20 A Well, let me ask you this question, Udo.

21 How high is up?

22 MR. BIRNBAUM: Nonresponsive.

23 Q (By Mr. Birnbaum) The law office is
24 distinct from you, Mr. Westfall, isn't it?

25 A Yes. It's another entity.

Exhibit
1

1 Q Is it another person?

2 A It's another entity.

3 Q Is it a person?

4 A It's an entity.

5 Q What sort of a legal entity is it?

6 A It's a P.C.

7 Q You are not the owner of the law office; is
8 that correct?

9 A That's not correct.

10 Q You are the owner?

11 A I believe I'm the owner, yes, sir.

12 Q You believe you're the owner?

13 A Yes, sir.

14 Q Why do you believe that you are the owner?

15 A I've been operating as a professional
16 corporation for approximately ten years. I don't
17 know precise time, but we obtained the business. We
18 work on the business. We sign the pleadings. We do
19 everything that's done.

20 Q All the testimony regarding to the law
21 office given by you in the bankruptcy case is, of
22 course, truth; is that correct?

23 A Yes, sir.

24 Q Look at this pleading and look at your
25 signature block.



1 on the bottom of page 2, using the 1962-A pattern
2 jury instruction and the evidence I have designated,
3 can you give me a specific reason as to why I cannot
4 convince a jury to find affirmatively as to
5 participating as a principal?

6 MR. FLEMING: Objection.

7 MR. WESTFALL: Objection to the
8 form.

9 MR. FLEMING: Form.

10 Q (By Mr. Birnbaum) Using pattern jury
11 instructions, can you give me any reason as to why I
12 cannot convince a jury to find affirmatively as to
13 mail fraud by an affirmative finding?

14 MR. WESTFALL: Same objection.
15 Objection as to form.

16 Q (By Mr. Birnbaum) Do you see any flaws in
17 the 1962-A jury instructions?

18 A I haven't had an opportunity to view them.

19 Q I refer you to section 3. This is the May
20 5, 1999 contract between us.

21 Did you promise that you would bill me
22 monthly?

23 A I don't believe so.

24 Q Why don't you believe so, Mr. Westfall?

25 A Because I don't know that I've ever

Exhibit
2

1 promised anyone that I would bill them monthly.

2 Q Never promised anybody you would bill them
3 monthly?

4 A Not that I recall.

5 Q Would you look on page 2, first paragraph?

6 A Okay.

7 Q Let me ask you the question again,

8 Mr. Westfall.

9 A Okay.

10 Q Did you promise that you would bill me
11 monthly?

12 A It is contained in the agreement that you
13 will be billed monthly for the time expended and
14 expenses incurred.

15 ; MR. BIRNBAUM: Nonresponsive.

16 Q (By Mr. Birnbaum) Did you bill me monthly,
17 as you contracted?

18 A I don't believe so.

19 Q Did you bill me at all?

20 A Yes, sir.

21 Q When did you bill me? When did you start
22 billing?

23 A Can you give me the tab that's immediately
24 in front of --

25 Q Mr. Westfall, where would we have to look

1 to find out when you started billing?

2 A I guess we'd have to look at the contract.
3 Possibly May the 5th.

4 Q Mr. Westfall, what documents at a law
5 office would I have to look at to find out when you
6 started billing me monthly?

7 A You would look at the agreement would be
8 one thing, I would say.

9 Q Well, look at it. You got it in front of
10 you.

11 A May the 5th is the date of it. And that's
12 the day that it was prepared and the date that you
13 signed it.

14 Q Is that the date you should have started
15 billing or the day you did start billing?

16 A I guess -- the day I did or the day I
17 should? I guess it's the date that I should start
18 billing.

19 Q Monthly?

20 A I guess I'm not understanding that
21 question. Were you expecting a monthly bill on the
22 5th of May?

23 Q Mr. Westfall, look at line number --
24 paragraph 2, says, You will be billed monthly.

25 Did you promise to bill me monthly?

1 A The contract contains that language. I
2 don't know that I promised to bill you monthly.

3 Q Mr. Westfall, did you sign this contract?

4 A Yes.

5 Q Did you intend to bill me monthly?

6 A I guess that depends on the amount of time
7 that we expended. I mentioned to you at the
8 beginning of this that this was going to be time
9 consuming, particularly initially, and that's why --
10 that there would be a \$20,000 retainer.

11 Q Mr. Westfall, would you explain to me your
12 understanding of monthly?

13 A Monthly is pretty plain.

14 Q It is to me. I took that to mean that you
15 were going to bill me monthly. All right.

16 A Did you ever complain to me for not -- for
17 doing it any differently than was done?

18 MR. BIRNBAUM: Nonresponsive.

19 Q (By Mr. Birnbaum) What all sort of
20 information did you put in such bills?

21 A I beg your pardon?

22 Q Did you ever bill?

23 A Yes, sir. I billed you on December the
24 31st of 1999. I sent you a remainder on February the
25 1st of 2000. I sent you another on April the 3rd of

1 2000. I sent you another on June the 1st of 2000.

2 And I sent you another on 7/31/2000.

3 Q Who-all do you designate as having actually
4 prepared those bills as you claim you sent?

5 A I beg your pardon?

6 Q Who-all do you designate as having prepared
7 such bills as you sent?

8 A My secretary, Beverly Hearn.

9 Q What evidence do you have of actually
10 mailing such bills? Mr. Westfall, do you have any
11 evidence of having mailed me any bill before you
12 mailed this piece of paper? Do you have any
13 evidence?

14 A I can tell you that I know that the billing
15 went out to you at the end of 1999.

16 MR. BIRNBAUM: Nonresponsive.

17 Q (By Mr. Birnbaum) Mr. Westfall, do you
18 have any evidence of having billed me, ever having
19 mailed me anything?

20 A Yes.

21 Q What?

22 A My statement that we did it, Beverly Hearn's
23 statement that we did it. I think we even have a
24 green card finally that you signed.

25 Q According to your own documents, you had

1 already eaten up the entire \$20,000 retainer
2 agreement by July of 1999, in just two months; is
3 that correct?

4 A I haven't bothered to view it in that
5 fashion. I can certainly go through it if you'd like
6 me to do that.

7 Q Do you have any reason to doubt that that's
8 what you did?

9 A I do not doubt that we spent \$20,000 worth
10 of time on your case within two months. I have no --

11 Q Okay. So the answer is yes, according to
12 your own documents you had already eaten up or may
13 have already eaten up the \$20,000 agreement by July
14 1999; is that correct?

15 A I said that I do not have any reason to
16 doubt, based upon the amount of time that we were
17 spending on your matter, that we would have spent
18 \$20,000 worth of time within the first couple of
19 months.

20 Q So you're running in the red ever after,
21 after the first two months; is that correct?

22 A Running in the red, in other words, you now
23 owe me more money?

24 Q No. Your accounting system had a negative
25 balance. I'm not saying who owed who. Your

1 accounting system showed a negative balance when the
2 \$20,000 was eaten up; is that correct?

3 A I don't know that our accounting system is
4 as you've stated. We just simply keep time records.

5 Q What sort of flag does running into the red
6 raise in your bookkeeping system?

7 A We don't -- well, I don't understand that
8 question.

9 MR. BIRNBAUM: Okay.
10 Nonresponsive.

11 Q (By Mr. Birnbaum) You contracted in this
12 contract -- look toward the end of the page 3 of
13 that. You contracted to explain in detail the
14 ramifications -- look at the last sentence of that
15 paragraph. You contracted to explain in detail the
16 ramifications and effect of Section 1983 civil RICO.

17 Why would you need to explain to me Section
18 1983 civil RICO? You were signing on to what you
19 knew were two existing parallel civil RICO causes,
20 were you not?

21 A Yes.

22 Q And we had been talking civil RICO, had we
23 not?

24 A Yes.

25 Q Why would you want to explain -- let me

4. The jury had no problem "adjusting" the \$18,121.10 "bill" to \$15,817.60. But Fleming was claiming "systematic and routine records" in pushing this "bill".

5. There was no early motion to dismiss or for summary judgment by Plaintiff, Westfall, his wife, or his daughter, followed by a humongous runup of "legal fees" to the tune of an additional \$41,306.91, and Fleming was a part of it.

6. Fleming **heard** Westfall testify at depositions and trial that defendant Birnbaum did most of the work for Plaintiff in the underlying "bill" dispute.

7. Fleming **heard** Westfall testify at trial that defendant Birnbaum did far more work in defending himself than did Plaintiff in prosecuting this fraudulent "collection suit".

WHEREFORE, PREMISES CONSIDERED, Movant prays that a hearing be set on this motion, and following a hearing, the Court assess appropriate sanctions against Frank C. Fleming.

Specifically Movant requests damages be assessed in the following amounts:

1. \$18,121.10 for the initial bringing of the frivolous \$18,121.10 suit
2. \$41,306.91 for having to defend against harassment in these proceedings for time worth more than the \$41,306.91 expended by Plaintiff
3. Costs of transcription of depositions in this cause, amounting to \$2000.00
4. Investigative costs, including transcription of other court proceedings to serve as evidence in this cause, amounting to \$2000.00
5. Costs of preparing, copying, and mailing documents in this cause, amounting to \$3,000
6. Such other and further relief, both general and special, to which Movant may be justly entitled, both at law and equity.

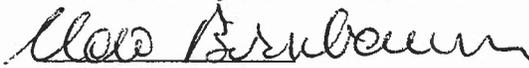
Respectfully submitted


UDO BIRNBAUM, Pro Se
540 VZ 2916
Eustace, Texas 75124
(903) 479-3929

att: Exhibit 1 Testimony by G. David Westfall
(that Law Office is **not** a "person")
Exhibit 2 Testimony by G. David Westfall
(that the Law Office much earlier **failed to abide** by the agreement)

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this document has today been delivered to Frank C. Fleming, by fax and regular mail on this the 24th day of June, 2002.


UDO BIRNBAUM

1 Q (By Mr. Birnbaum) Look at No. 11. This is
2 your March 20, 2000 letter telling me, quote, the
3 case is now ripe for appeal, unquote, and, quote, all
4 of the appropriate rules are now in effect relative
5 to your appeal, unquote. I fully addressed this
6 letter in my pleading. I had been in the appeals
7 court for nearly four months.

8 You have not responded to that matter in my
9 plead, have you, Mr. Westfall?

10 MR. FLEMING: Objection, form.

11 MR. WESTFALL: We join in that
12 objection.

13 Q (By Mr. Birnbaum) No. 12, you brought this
14 pleading on behalf of your law office, is that not
15 correct, Mr. Westfall?

16 A Yes.

17 Q Who is the owner of the law office?

18 A I guess I am the owner of the law office.

19 Q What do you mean you guess?

20 A Well, let me ask you this question, Udo.
21 How high is up?

22 MR. BIRNBAUM: Nonresponsive.

23 Q (By Mr. Birnbaum) The law office is
24 distinct from you, Mr. Westfall, isn't it?

25 A Yes. It's another entity.

Exhibit
1

1 Q Is it another person?

2 A It's another entity.

3 Q Is it a person?

4 A It's an entity.

5 Q What sort of a legal entity is it?

6 A It's a P.C.

7 Q You are not the owner of the law office; is
8 that correct?

9 A That's not correct.

10 Q You are the owner?

11 A I believe I'm the owner, yes, sir.

12 Q You believe you're the owner?

13 A Yes, sir.

14 Q Why do you believe that you are the owner?

15 A I've been operating as a professional
16 corporation for approximately ten years. I don't
17 know precise time, but we obtained the business. We
18 work on the business. We sign the pleadings. We do
19 everything that's done.

20 Q All the testimony regarding to the law
21 office given by you in the bankruptcy case is, of
22 course, truth; is that correct?

23 A Yes, sir.

24 Q Look at this pleading and look at your
25 signature block.

1

1 on the bottom of page 2, using the 1962-A pattern
2 jury instruction and the evidence I have designated,
3 can you give me a specific reason as to why I cannot
4 convince a jury to find affirmatively as to
5 participating as a principal?

6 MR. FLEMING: Objection.

7 MR. WESTFALL: Objection to the
8 form.

9 MR. FLEMING: Form.

10 Q (By Mr. Birnbaum) Using pattern jury
11 instructions, can you give me any reason as to why I
12 cannot convince a jury to find affirmatively as to
13 mail fraud by an affirmative finding?

14 MR. WESTFALL: Same objection.
15 Objection as to form.

16 Q (By Mr. Birnbaum) Do you see any flaws in
17 the 1962-A jury instructions?

18 A I haven't had an opportunity to view them.

19 Q I refer you to section 3. This is the May
20 5, 1999 contract between us.

21 Did you promise that you would bill me
22 monthly?

23 A I don't believe so.

24 Q Why don't you believe so, Mr. Westfall?

25 A Because I don't know that I've ever

Exhibit
2

1 promised anyone that I would bill them monthly.

2 Q Never promised anybody you would bill them
3 monthly?

4 A Not that I recall.

5 Q Would you look on page 2, first paragraph?

6 A Okay.

7 Q Let me ask you the question again,
8 Mr. Westfall.

9 A Okay.

10 Q Did you promise that you would bill me
11 monthly?

12 A It is contained in the agreement that you
13 will be billed monthly for the time expended and
14 expenses incurred.

15 MR. BIRNBAUM: Nonresponsive.

16 Q (By Mr. Birnbaum) Did you bill me monthly,
17 as you contracted?

18 A I don't believe so.

19 Q Did you bill me at all?

20 A Yes, sir.

21 Q When did you bill me? When did you start
22 billing?

23 A Can you give me the tab that's immediately
24 in front of --

25 Q Mr. Westfall, where would we have to look

1 to find out when you started billing?

2 A I guess we'd have to look at the contract.
3 Possibly May the 5th.

4 Q Mr. Westfall, what documents at a law
5 office would I have to look at to find out when you
6 started billing me monthly?

7 A You would look at the agreement would be
8 one thing, I would say.

9 Q Well, look at it. You got it in front of
10 you.

11 A May the 5th is the date of it. And that's
12 the day that it was prepared and the date that you
13 signed it.

14 Q Is that the date you should have started
15 billing or the day you did start billing?

16 A I guess -- the day I did or the day I
17 should? I guess it's the date that I should start
18 billing.

19 Q Monthly?

20 A I guess I'm not understanding that
21 question. Were you expecting a monthly bill on the
22 5th of May?

23 Q Mr. Westfall, look at line number --
24 paragraph 2, says, You will be billed monthly.

25 Did you promise to bill me monthly?

1 A The contract contains that language. I
2 don't know that I promised to bill you monthly.

3 Q Mr. Westfall, did you sign this contract?

4 A Yes.

5 Q Did you intend to bill me monthly?

6 A I guess that depends on the amount of time
7 that we expended. I mentioned to you at the
8 beginning of this that this was going to be time
9 consuming, particularly initially, and that's why --
10 that there would be a \$20,000 retainer.

11 Q Mr. Westfall, would you explain to me your
12 understanding of monthly?

13 A Monthly is pretty plain.

14 Q It is to me. I took that to mean that you
15 were going to bill me monthly. All right.

16 A Did you ever complain to me for not -- for
17 doing it any differently than was done?

18 MR. BIRNBAUM: Nonresponsive.

19 Q (By Mr. Birnbaum) What all sort of
20 information did you put in such bills?

21 A I beg your pardon?

22 Q Did you ever bill?

23 A Yes, sir. I billed you on December the
24 31st of 1999. I sent you a reminder on February the
25 1st of 2000. I sent you another on April the 3rd of

1 2000. I sent you another on June the 1st of 2000.

2 And I sent you another on 7/31/2000.

3 Q Who-all do you designate as having actually
4 prepared those bills as you claim you sent?

5 A I beg your pardon?

6 Q Who-all do you designate as having prepared
7 such bills as you sent?

8 A My secretary, Beverly Hearn.

9 Q What evidence do you have of actually
10 mailing such bills? Mr. Westfall, do you have any
11 evidence of having mailed me any bill before you
12 mailed this piece of paper? Do you have any
13 evidence?

14 A I can tell you that I know that the billing
15 went out to you at the end of 1999.

16 MR. BIRNBAUM: Nonresponsive.

17 Q (By Mr. Birnbaum) Mr. Westfall, do you
18 have any evidence of having billed me, ever having
19 mailed me anything?

20 A Yes.

21 Q What?

22 A My statement that we did it, Beverly Hearn's
23 statement that we did it. I think we even have a
24 green card finally that you signed.

25 Q According to your own documents, you had

1 already eaten up the entire \$20,000 retainer
2 agreement by July of 1999, in just two months; is
3 that correct?

4 A I haven't bothered to view it in that
5 fashion. I can certainly go through it if you'd like
6 me to do that.

7 Q Do you have any reason to doubt that that's
8 what you did?

9 A I do not doubt that we spent \$20,000 worth
10 of time on your case within two months. I have no --

11 Q Okay. So the answer is yes, according to
12 your own documents you had already eaten up or may
13 have already eaten up the \$20,000 agreement by July
14 1999; is that correct?

15 A I said that I do not have any reason to
16 doubt, based upon the amount of time that we were
17 spending on your matter, that we would have spent
18 \$20,000 worth of time within the first couple of
19 months.

20 Q So you're running in the red ever after,
21 after the first two months; is that correct?

22 A Running in the red, in other words, you now
23 owe me more money?

24 Q No. Your accounting system had a negative
25 balance. I'm not saying who owed who. Your

1 accounting system showed a negative balance when the
2 \$20,000 was eaten up; is that correct?

3 A I don't know that our accounting system is
4 as you've stated. We just simply keep time records.

5 Q What sort of flag does running into the red
6 raise in your bookkeeping system?

7 A We don't -- well, I don't understand that
8 question.

9 MR. BIRNBAUM: Okay.

10 Nonresponsive.

11 Q (By Mr. Birnbaum) You contracted in this
12 contract -- look toward the end of the page 3 of
13 that. You contracted to explain in detail the
14 ramifications -- look at the last sentence of that
15 paragraph. You contracted to explain in detail the
16 ramifications and effect of Section 1983 civil RICO.

17 Why would you need to explain to me Section
18 1983 civil RICO? You were signing on to what you
19 knew were two existing parallel civil RICO causes,
20 were you not?

21 A Yes.

22 Q And we had been talking civil RICO, had we
23 not?

24 A Yes.

25 Q Why would you want to explain -- let me

QUESTION NO. 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?

INSTRUCTION:

You are instructed that after the attorney-client relationship is terminated, a client or an attorney can have post termination obligations to each other, such as, the client is still obligated financially for the lawyer's time in wrapping up the relationship and the lawyer is still obligated to perform tasks for the client to prevent harm to the client during the termination process.

ANSWER:

Answer in dollars and cents:

ANSWER: \$15,817.60

QUESTION NO. 2

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

Answer in dollars and cents for each of the following:

- | | |
|--|-------------|
| A. For preparation and trial in this matter: | \$41,306.91 |
| B. For an appeal to the Court of Appeals, if necessary: | \$20,000.00 |
| C. For making or responding to a petition for review to the Supreme Court of Texas | \$5,000.00 |
| D. If petition for review is granted by the Supreme Court of Texas | \$10,000.00 |

QUESTION NO. 3
(Finding of DTPA Violation)

Did The Law Offices of G. David Westfall, P.C. engage in any false, misleading, or deceptive act or practice that Udo Birnbaum relied on to his detriment and that was a producing cause of damages to Udo Birnbaum?

“Producing cause” means an efficient, exciting, or contributing cause that, in a natural sequence, produced the damages, if any. There may be more than one producing cause.

“False, misleading, or deceptive act” means any of the following:

Failing to disclose information about services that was known at the time of the transaction with the intention to induce Udo Birnbaum into a transaction he otherwise would not have entered into if the information had been disclosed; or

Answer: NO

QUESTION NO. 4
(Finding of DTPA Violation)

Did The Law Offices of G. David Westfall, P.C. engage in any unconscionable action or course of action that was a producing cause of damages to Udo Birnbaum?

“Producing cause” means an efficient, exciting, or contributing cause that, in a natural sequence, produced the damages, if any. There may be more than one producing cause.

An unconscionable course of action is an act or practice that, to a consumer’s detriment, takes advantage of the lack of knowledge, ability, experience, or capacity of the consumer to a grossly unfair degree.

Answer: NO

156/230
EXHIBIT A

1172

If your answer to Question 3 or Question 4 is "Yes", then answer Question 5. Otherwise do not answer Question 5.

QUESTION NO. 5
(Finding of "knowingly")

Did The Law Offices of G. David Westfall, P.C. engage in any such conduct knowingly?

"Knowingly" means actual awareness, at the time of the conduct, of the falsity, deception, or unfairness of the conduct in question or actual awareness of the conduct constituting a failure to comply with a warranty. Actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness.

In answering this question, consider only the conduct that you have found *was a producing cause of damages* to Udo Birnbaum.

Answer: [Not answered by reason of submission]

If your answer to Question 3 or Question 4 is "Yes", then answer Question 6. Otherwise do not answer Question 6.

QUESTION NO. 6
(Finding of "intentionally")

Did The Law Offices of G. David Westfall, P.C. engage in any such conduct intentionally?

"Intentionally" means actual awareness of the falsity, deception, or unfairness of the conduct in question or actual awareness of the conduct constituting a failure to comply with a warranty, coupled with the specific intent that the consumer act in detrimental reliance on the falsity or deception. Specific intent may be inferred from facts showing that the person acted with such flagrant disregard of prudent and fair business practices that the person should be treated as having acted intentionally.

In answering this question, consider only the conduct that you have found *was a producing cause of damages* to Udo Birnbaum.

Answer: [Not answered by reason of submission]

If your answer to Question 3 or Question 4 is "Yes", then answer Question 7. Otherwise do not answer Question 7.

QUESTION NO. 7
(“Compensatory” damages)

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate Udo Birnbaum for his damages, if any, that resulted from such conduct?

Consider the following elements of damages, if any, and none other.

Answer separately in dollars and cents, if any, for each of the following:

The difference, if any, in the value of the services as received and the price Udo Birnbaum paid for them. The difference, if any, shall be determined at the time and place the services were done.

Answer: [Not answered by reason of submission]

Expense costs to Udo Birnbaum, if any, produced by the conduct of The Law Offices of G. David Westfall, P.C.

Answer: [Not answered by reason of submission]

The reasonable value of Udo Birnbaum’s lost time, if any, produced by the conduct of The Law Offices of G. David Westfall, P.C.

Answer: [Not answered by reason of submission]

In answering questions about damages, answer each question separately. Do not increase or reduce the amount in one answer because of your answer to any other question about damages. Do not speculate about what a party’s ultimate recovery may or may not be. Any recovery will be determined by the court when it applies the law to your answers at the time of judgment. Do not add any amount for interest on damages, if any.

If your answer to Question 5 "Yes", then answer Question 8. Otherwise do not answer Question 8.

QUESTION NO. 8
(“Compensatory” damages)

What sum of money, if any, in addition to actual damages, should be awarded to Udo Birnbaum against The Law Offices of G. David Westfall, P.C. because The Law Offices of G. David Westfall, P.C.’s conduct was committed knowingly?

Answer in dollars and cents, if any.

Answer: [Not answered by reason of submission]

If your answer to Question 6 "Yes", then answer Question 9. Otherwise do not answer Question 9.

QUESTION NO. 9
(Additional damages)

What sum of money, if any, in addition to actual damages, should be awarded to Udo Birnbaum against The Law Offices of G. David Westfall, P.C. because The Law Offices of G. David Westfall, P.C.’s conduct was committed intentionally?

Answer in dollars and cents, if any.

Answer: [Not answered by reason of submission]

The charge of the Court and the verdict of the jury are incorporated for all purposes by reference. Because it appears to the Court that the verdict of the jury was for the Plaintiff and against the Defendant, judgment should be rendered on the verdict in favor of the Plaintiff and against the Defendant.

It is therefore, **ORDERED, ADJUDGED and DECREED** that Plaintiff, G. David Westfall, P.C., be awarded damages as follows:

- A. Actual damages in the amount of \$15,817.60 plus pre-judgment interest up through the date of this Order which the Court finds to be \$2,156.15.
- B. Attorney's fees in the amount of \$41,306.91.
- C. An additional award of attorney's fees as follows:
1. \$20,000.00 in the event of an appeal to the Court of Appeals.
 2. \$5,000.00 in the event of an application for writ of error is filed with the Supreme Court of Texas.
 3. \$10,000.00 in the event of an application for writ of error is filed with the Supreme Court of Texas and the writ is granted.
- D. Taxable Court costs in the amount of \$926.80.

IT IS FURTHER ORDERED THAT the judgment here rendered shall bear interest at the rate of ten percent (10%) from April 11, 2002 until paid.

All costs of court expended or incurred in this cause are adjudged against Udo Birnbaum, Defendant/ Counter-Plaintiff. All writs and process for the enforcement and collection of this judgment or the costs of court may issue as necessary. All other relief not expressly granted in this order is hereby denied.

THIS JUDGMENT RENDERED ON APRIL 11, 2002, AND SIGNED THIS 30
day of July, 2002.


JUDGE PRESIDING

expenses.

Furthermore, the letter agreement gave the remedy available to the Law Office if I did not pay, namely that the lawyer had the right to withdraw and quit working ("*We reserve the right to terminate for ... 1) Your non-payment of fees or costs*"). That is the remedy, the only remedy. "*Expressio unius est exclusio alterius*". (expression of one thing is the exclusion of another)

On top of that, the Law Office had admitted that it was not a person, i.e. not capable of holding a property interest, but only an entity. It therefore has no more right to sue or be awarded judgment than a can of Coca Cola or a potted plant!

And a jury "adjusting" a sworn account down by five thousand dollars is absurd. Something stinks about the "systematic records maintained" claim.

Furthermore, the Law Office P.C. had only one participating attorney, who was the only officer, and the only shareholder, and he is now dead. Poof, Law Office is no more! And just whom, if anyone, opposing "counsel" is representing under these truly bizarre circumstances is beyond me!

With this said, I am ready to argue the motions. The provided binder has the motions and supporting documents.

UDO BIRNBAUM
540 VZ 2916
Eustace, Texas 75124
(903) 479-3929

It is now clear to me that the entire matters I have been subjected to in this Court is retaliation by official oppression for having spoken out on an issue of great public importance, namely rampant corruption and lawlessness in Judge Tommy C. Wallace's 294th District Court.

UDO BIRNBAUM
540 VZ 2916
Eustace, Texas 75124
(903) 479-3929

Official court documents indicating such perversion of the judicial process are available at Van Zandt E-Forum, www.vzinet.com/vzeforum.

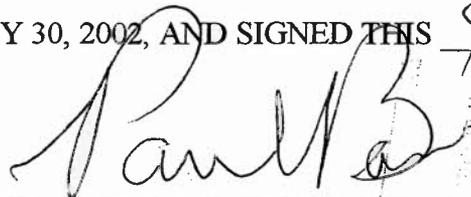
It is therefore, **ORDERED, ADJUDGED and DECREED** that the Counter-Defendants, Christina Westfall and Stefani Podvin are awarded damages as a sanction against and to be paid by defendant, Udo Birnbaum, to Christina Westfall and Stefani Podvin as follows:

- 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

The requested jury submissions of both of the parties, as well as the as the actual submissions in the Court's Charge, are contained in documents titled as follows:

- *Udo Birnbaum's Affirmative Defense of Fraud requested definitions, questions, and special instructions to be given to the jury. (Cert. of Service April 1, 2002)*
- *Udo Birnbaum's Texas Deceptive Trade Practices Act (DTPA) Counterclaim requested definitions, questions, and special instructions to be given to the jury. (COS April 1, 2002)*
- *Plaintiff's Requested Jury Instructions (3 questions, Cert. of Service April 3, 2002)*
- *Defendant Birnbaum's Objections to Plaintiff's Requested Jury Instructions [4/3/02] (contains submission of Birnbaum's "excused" issue) Cert. of Service April 4, 2002*
- *Plaintiff's submissions on the third day of the trial, the day of submission to the jury (2 question format (as was incorporated into the Court's Charge questions 1 and 2)*
- *Birnbaum's Objections to today's Plaintiff's Court charge. (handwritten, filemarked April 11, 2002, 9:18 AM)*
- *Court's Charge (April 11, 2002)*

Summary

COMES NOW Udo Birnbaum, requesting the Court to provide endorsement, per Rule 276, of such **refusals and modifications as the Court made** on his requested submissions to the jury. Udo Birnbaum makes such request so that the action of the trial judge on such matters may be reviewed without preparing a **formal bill of exceptions**.

Respectfully Submitted,

Udo Birnbaum

UDO BIRNBAUM

540 VZ 2916

Eustace, Texas 75124

(903) 479-3929

ref: Above indicated documents as provided to the Court

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this document has been served via Regular Mail and FAX on this the 19 day of August, 2002, on Frank C. Fleming, Law Office of Frank C. Fleming, 6611 Hillcrest, Suite 305, Dallas, Texas 75205-1301.

Udo Birnbaum

UDO BIRNBAUM

6. The \$59,280.66 Final Judgment against me as signed by this Court on July 30, 2002.
7. The pronounced, but as yet not signed, "frivolous lawsuit sanction" against me to pay the Westfalls a total of \$62,885.
8. Such other costs as the Court may hold against me

I reserve the right to amend this Notice of Appeal at such time as the Court has disposed of all of the issues between all of the parties.

Respectfully Submitted,

Udo Birnbaum

UDO BIRNBAUM, *Pro Se*

540 VZCR 2916

Eustace, Texas 75124

(903) 479-3929

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this document has been served via Regular Mail and FAX on this the 19 day of August, 2002, on Frank C. Fleming, Law Office of Frank C. Fleming, 6611 Hillcrest, Suite 305, Dallas, Texas 75205-1301.

Udo Birnbaum

UDO BIRNBAUM

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. Maxxon-Mahoney-Turner, Inc.*, 698 S.W.2d 469, 471)

At issue was the state of the accounts. Plaintiff pleaded no other issue. And neither an auditor, a jury, or the Court ever made a finding of such state of the accounts.

The jury issues are not relevant to plaintiff's pleadings

3. The only issues of Plaintiff submitted to the jury were in the nature of a breach of contract, which Plaintiff had not pleaded, and to which Birnbaum had objected. The issues actually submitted were as follows:

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

These issues are not relevant to Plaintiff's cause of action, i.e. the state of the accounts.

"Even if"

4. Even if Plaintiff had pleaded in the nature of a breach of contract, which it did not, at issue would still be whether Birnbaum was excused by Plaintiff's prior breach of the "agreement", i.e. not billing monthly and not obligating to large expenses without Birnbaum's prior approval. Birnbaum submitted these issues to be determined by the jury, but such request was denied by the Court. Plaintiff certainly did not plead that he had complied with the agreement, and submitted no such issue to the jury. Hence the jury verdict, even if Plaintiff had pleaded "breach of contract", certainly would not support all the elements of a "breach of contract".

5. At issue was the state of the accounts. There certainly was no "sale", and even "delivery" is at issue. The legal "goods" (bringing a federal civil racketeering suit on judges!) were worthless. As this Court even lectured the jury, judges are immune from suit, and as this Court stated early on in this cause, it had never seen a civil racketeering suit that had any merit.

Birnbaum submitted this issue of "no worth" for determination by the jury. But such request was also denied by the Court. The Court knew the "goods" plaintiff had "delivered" had no worth.

Summary

6. Staring at each other are two diametrically opposed verified pleadings as to the state of the accounts, with no report by an auditor, and no finding by the jury of the state of the accounts.

No judgment, under RCP Rule 301, "conforming to the pleadings and the verdict" is possible, because the verdict did not resolve the state of the accounts.

PRAAYER

Birnbaum moves the Court to reconsider the judgment, and to declare a mistrial, because the jury made no finding of the state of the accounts, the very matter at issue.

Respectfully Submitted,

Udo Birnbaum

UDO BIRNBAUM

540 VZ 2916

Eustace, Texas 75124

(903) 479-3929

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this document has been served via Regular Mail and FAX on this the 19 day of August, 2002, on Frank C. Fleming, Law Office of Frank C. Fleming, 6611 Hillcrest, Suite 305, Dallas, Texas 75205-1301.

Udo Birnbaum

UDO BIRNBAUM



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.

Vs.

UDO BIRNBAUM

Vs.

G. DAVID WESTFALL
STEFANI PODVIN
CHRISTINA WESTFALL

) IN THE DISTRICT COURT
)
) 294TH JUDICIAL DISTRICT
)
) VAN ZANDT COUNTY, TEXAS

FILED FOR RECORD
22 AUG 19 PM 4:01
DIST. CLERK VAN ZANDT CO. TX
DEP

MOTION TO RECONSIDER THE \$62,885.00 "FRIVOLOUS LAWSUIT" SANCTIONS AGAINST ME

The "Westfalls" have no standing. Also, I did not bring this lawsuit

TO THIS HONORABLE COURT:

COMES NOW Udo Birnbaum, showing as follows:

The Westfalls had no standing to move for sanctions!

1. "The Westfalls" (G. David Westfall, wife Christina Westfall, and daughter Stefani Podvin) moved for summary judgment on August 17 and 18, 2002. Such summary judgment was granted on November 13, 2001. (attached) **THAT PUT THEM OUT OF THE CASE.**

However on May 9, 2002, and a full month after trial in which they chose not to participate, they suddenly reappear, making wild claims against me seeking attorneys fees under color of "frivolous lawsuit" sanctions!

The Westfalls had no standing on the date they moved for "frivolous lawsuit sanctions", and even now have no standing in this Court to get anything other than what they already got when they were granted summary judgment! (Res judicata)

The pleadings

2. **I did not bring this lawsuit.** Plaintiff, claiming "*systematic records*" and an unpaid account of \$18,121.10, brought suit falling under RCP Rule 185, "Suit on [sworn] Account", and no other cause of action. Birnbaum timely complied with the mandatory counterclaim, and denied the "account" under oath, claiming fraud, and moved for the mandatory appointment of an Auditor per RCP Rule 172. Such motion was, however, denied and no auditor's report of the "**state of the accounts between the parties**" was ever made to the Court or the jury.

At issue was the state of the accounts. Plaintiff pleaded no other cause of action.

The proceedings

3. **I did not bring this lawsuit** but denied, under oath, plaintiff's version of the state of the accounts. Had this Court appointed an auditor as was required under the circumstances, this Court would have seen that the Westfalls (G. David, Christina, and daughter Stefani Podvin) were lying in their pleadings, and that the Westfalls were indeed conducting a racketeering enterprise just as I was claiming, and that I was their latest victim.

Had this Court **timely denied** such Auditor, instead of considering for one year, the proceedings would not have expanded as they did, for I would have known that this Court would not accept a civil racketeering claim, and there would not have been this horrible waste of judicial resources, nor time for the Westfalls to run up such humongous "legal fees".

The Westfalls' motions for sanctions

4. Noteworthy in the Westfalls' Motion for Sanction are the claims that I "*chose to make this lawsuit into [my] own public forum to make a mockery of all lawyers and the entire legal system*", and that I was "*attempting to implicate the owner of the Plaintiff, G. David Westfall, as well as his wife and daughter in a totally frivolous claim of running an organized crime syndicate in the form of a law office.*" Those were not the precise words I used under 18 U.S.C. § 1961 et seq. (civil RICO), but this is generally the issue of great public importance I raised in my defense regarding the conduct of the Westfalls. And of course all civil RICO defendants always claim the suit against them is "frivolous".

My responses to the Motions for Sanctions

5. In my responses I pleaded that "Only the U.S. Justice Department can determine whether the [Westfalls] were indeed running a racketeering enterprise ... as Birnbaum complains", and that "Birnbaum has a First Amendment right to speak out against public corruption as he sees it, without fear of retaliation masquerading as 'sanctions'."

This Court was no more entitled to weigh the evidence to make a finding that there was no RICO violation, and sanction me, than it was entitled to find that there was a RICO violation, and throw the Westfalls in jail. The Court has no investigative capability. Hence my call for the U.S. Justice Department.

PRAYER

I am being punishing for the sins of this entire proceeding. If, after reconsideration, this Court still feels that what I did was so sanctionable, please advise me as to other views I am also not allowed to voice, whether to this Court, on Appeal, or elsewhere, lest I unknowingly risk being subjected to further sanctions.

Respectfully Submitted,

Udo Birnbaum
UDO BIRNBAUM
540 VZ 2916
Eustace, Texas 75124
(903) 479-3929

att: **ORDER SUSTAINING MOTIONS FOR SUMMARY JUDGMENT**
(Signed November 13, 2001)

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this document has been served via Regular Mail and FAX on this the 19 day of August, 2002, on Frank C. Fleming, Law Office of Frank C. Fleming, 6611 Hillcrest, Suite 305, Dallas, Texas 75205-1301.

Udo Birnbaum
UDO BIRNBAUM

honed fraud and racketeering to a fine skill, and justice required that you appoint an auditor under the circumstances of this case, to testify before the jury, so that I could cut through their lying and obstruction of discovery.

In essence, what I am complaining of, is that not appointing an auditor as required by RCP Rule 172 deprived me of due process and a fair trial.

Point 2. For not making Plaintiff abide by the rules of discovery

The file is full of my complaints to you about all the Westfalls not complying with the rules of discovery. About me serving them with subpoena *duces tecum*, and them not bringing anything other than the clothes they were wearing. About them not answering questions even as to who owns the "law office", the records there, copies of computer records, etc. You never made them comply with discovery, and they were the ones that brought this suit!

In essence, what I am complaining of, is that not making the plaintiff abide by the rules of discovery deprived me of due process and a fair trial.

Point 3. For granting summary judgment on my civil RICO claims and cross-claims

Your Honor granting summary judgment on my civil RICO ("racketeering") claims and cross-claims kept me from showing the jury a viable alternative to the Westfalls' version of the facts. You never allowed me to tell the jury that what the Westfalls were doing was outlawed by RICO. How can the jury believe me, if you will not let me tell them about RICO, and let me show them all this other stuff I had about what the Westfalls were doing that was violating RICO. That all that stuff showed a "pattern of racketeering activity", and that this very suit they were bringing upon me was another "predicate act" in their "pattern of racketeering activity".

If you would have dismissed my civil RICO case for "failure to state a claim", i.e. that my claim was not pleaded correctly, that would be one thing. But finding that there was no evidence of a RICO violation, is another. My claim was that the stuff the Westfalls themselves were bringing was evidence of a "pattern of racketeering activity" of which I was the victim.

Your Honor, knowingly or unknowingly, violated the law in weighing the evidence, which no less than the Supreme Court of the United States says you cannot do. (Details in my responses to the various motions for summary judgment)

In essence, what I am complaining of, is that granting summary judgment on my civil RICO

claims deprived me of due process and a fair trial.

Point 4. For Allowing Plaintiff to submit "surprise" jury issues not in its pleadings

Plaintiff, claiming "*systematic records*" and an unpaid account of \$18,121.10, brought suit falling under RCP Rule 185, "Suit on [sworn] Account", and no other cause of action. Birnbaum timely complied with the mandatory counterclaim, and denied the "account" under oath, claiming fraud, and moved for the mandatory appointment of an Auditor per RCP Rule 172. Such motion was, however, denied and no auditor's report of the "**state of the accounts between the parties**" was ever made to the Court or the jury.

At issue was the state of the accounts. Plaintiff pleaded no other cause of action. And this issue, the state of the accounts, was not what you submitted to the jury. (See my Aug. 19, 2002 *Motion to Reconsider the \$59,280.66 Judgment* for details)

Your Honor allowed the Westfalls to pop me with surprise jury questions (which they did not submit until the third day of trial), just before submission to the jury. The issues you submitted to the jury were in the nature of a breach of contract, which Plaintiff had not pleaded, and to which questions I had objected (Exhibit C, Exhibit D):

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

These issues are not relevant to Plaintiff's cause of action, i.e. the state of the accounts.

In essence, what I am complaining of, is that allowing submission of these unpleaded jury issues deprived me of due process and a fair trial.

Point 5. For not allowing submission to the jury of my "excused" issue

This matter is more fully developed in *Defendant Birnbaum's Objections to Plaintiff's Requested Jury Instructions* (Exhibit C). My requested issue, directly from *Texas Pattern Jury Charges, Business, Consumer, Insurance, Employment*, was as follows:

Was Udo Birnbaum's failure to comply excused?

a) failure to comply by Udo Birnbaum is excused by the law Offices of G. David Westfall, P.C.'s previous failure to comply with a material obligation of the same agreement.

This issue is again shown in *Birnbaum's Objections to today's Plaintiff's Court charge*, handwritten, filed, and served, just after plaintiff submitted its surprise jury issues on the third day of trial, just before submission to the jury. (Exhibit D)

In essence, what I am complaining of, is that not allowing submission of this "excused" issue deprived me of due process and a fair trial.

Point 6. For not allowing submission to the jury of my "no worth" issue

My counterclaim was that the Westfalls were violating the Texas Deceptive Trade Practices Act (DTPA), i.e. that they were engaging in "false, misleading, or deceptive practices" that I relied on to my detriment. *Texas Pattern Jury Charges, Business, Consumer, Insurance, Employment* specifies jury instructions as follows:

"False, misleading, or deceptive act" means any of the following:

a) Failing to disclose, etc; or

*b) Representing that services had or would have a **characteristic** that they did not have.*

I claimed that the services did not have the *characteristic* of *worth*, and substituted that word into my requested instruction exactly as follows, even citing the authority for my jury issue exactly as follows (see the record for detail):

a) Failing to disclose, etc; or

*b) Representing that services had or would have **worth** that they did not have.*

PJC 102.2 Description of Goods or Services or Affiliation of Persons (DTPA § 1746(b)(5))

At one point in the trial Fleming, the Westfalls' attorney, was lighting into me, something about me supposedly "harassing" either the Westfalls or you by having asked for your recusal, and the jury not even knowing what a "recusal" was. You correctly lectured that asking for recusal of judge was one of those rights every American has because judges are absolutely immune from suit for everything they do in their "judicial capacity", i.e. sitting as a judge. This however made me a new target of Fleming, namely that I was some sort of vicious monster suing honest friendly judges as they were seeing in you, who were absolutely immune from suit.

However if Westfall was charging me for "legal services" for suing judges who are absolutely immune, then even if he did a whole lot of "stuff", his "services" would still have the *characteristic* of no worth, and submitting this question to the jury would have certainly informed the jury that there was something wrong with all that "legal fee" stuff Westfall was doing.

I was entitled to submission of the "**no worth**" instruction, unless Your Honor had already

found that, as a matter of law, Westfall's services had *no worth*, because of what he was doing, namely suing judges, and under the racketeering statutes at that!

In essence, what I am complaining of, is that not allowing my "*no worth*" jury issue deprived of due process and a fair trial.

Point 7. For jury misconduct by the judge himself

Your Honor was over-reaching with the jury, such as giving them "grandfatherly" type advice, telling them about "great historical" matters, and mingling with them as described in the two attached affidavits. There is no doubt in my mind that you made the jury like you, and not see what I was trying to show about Westfall abusing the judicial system, and not see that this very suit they brought was a fraud.

Your Honor should have been at the bench as the jurors left and came back into the courtroom, instead of welcoming them into and out of the jury room by yourself as if you were their personal servant. Your Honor should have used a bailiff or some other designated officer. I have never seen nor heard of a judge mingling with jurors as you did at this trial. (Affidavit Exhibit A) And on numerous occasions you actually entered the jury room and did not come back out until 5 or 10 minutes later. (Affidavit Exhibit B)

And I clearly remember Your Honor's lengthy lecture to the jury about judges being, for all practical purposes, absolutely immune from suit. Remember, this issue came up in the context of the Westfalls trying to show that I had somehow "harassed" them, or Your Honor, by asking for your recusal. You did bring out that asking for recusal of the judge is a fundamental American right, because that is effectively the only recourse one has because judges are absolutely immune for what they do in a judicial capacity.

However this lecture not only elevated you and all other judges in the eyes of this jury, but also allowed the Westfalls to harp, to this jury, that I had to be some sort of viscous person that has to be "stopped" because he was suing honest "grandfatherly" judges such as they have just seen in you.

In essence, what I am complaining of, is that Your Honor Yourself, knowingly or unknowingly, turned this jury against me.

PRAYER

WHEREFORE, upon the points designated above, Birnbaum moves for a new trial.

Respectfully Submitted,

Udo Birnbaum

UDO BIRNBAUM

540 VZ 2916

Eustace, Texas 75124

(903) 479-3929

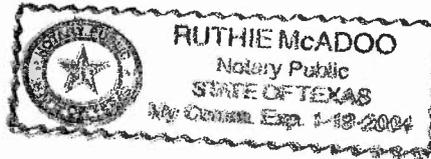
STATE OF TEXAS

COUNTY OF VAN ZANDT

Before me, a notary public, on this day personally appeared Udo Birnbaum, known to me to be the person whose name is subscribed to the foregoing document, and being by me duly sworn, declared that the statements therein contained are true and correct.

Given under my hand and seal of office this 28 day of August 2002.

Ruthie McAdoo
Notary Public



CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this document has been served via Regular Mail and FAX on this the 28 day of August, 2002, on Frank C. Fleming, Law Office of Frank C. Fleming, 6611 Hillcrest, Suite 305, Dallas, Texas 75205-1301.

Udo Birnbaum

UDO BIRNBAUM

AFFIDAVIT OF UDO BIRNBAUM

My name is Udo Birnbaum. I am over the age of 21 and have never been convicted of a felony or misdemeanor in this State or any other State, or in the United States, and am competent to make this affidavit. I have personal knowledge of the facts stated herein.

From April 8, 2002 through April 11, 2002, I was present in the courtroom of the 294th District Court of Van Zandt County during the entirety of the Westfall/Birnbaum trial. I have also witnessed numerous other proceedings, including numerous other trials, in this courtroom over the last seven (7) years, with various judges presiding.

There are five (5) doors that provide entry/exit to this courtroom. Full size doors, each with a small glass window, are located at the back of the courtroom, and at the front, just to the left of the judge's bench. The side entry/exit is through a double swinging door, each panel of the door also having a small glass window. These three doors are available for everyone in the courtroom, although the front door is the one favored by lawyers, judges, and other court personnel. There is also a narrow door with no glass window right behind the judge's bench. I have reason to believe this narrow door remains locked at all times, and it certainly was not used anytime during this trial.

The fifth door, without a window, is right in front of the jury box, and next to the witness stand, which is immediately to the right of the judge. I have never, at any previous time, seen this [fifth] door used by anyone other than the jurors, the bailiff, or some clerk assisting the judge, except when prisoners, usually handcuffed, were being maneuvered before the bench.

I have never seen a judge go into or come out of this door, at any time, for any reason, jury present or not, except at this trial.

I knew that one could somehow go through this [fifth] door and come out next to the stairway going down from the second floor, for I had seen jurors, as they came up the stairs, go in there, only to come out this [fifth] door, upon cue of the bailiff or some other officer.

What is noteworthy about this trial is that there was **no bailiff**, or **other officer** leading the jury into and out of this [fifth] door. Except during jury voir dire, there was no court personnel at all during the entire trial, except for the court reporter, and the judge himself.

The judge presiding at this trial, known to me to be Judge Paul Banner, himself would lead the jury back into the jury box. I have never seen any other judge do this. It is clear to this observer, that this judge wanted the jury to like him. Judge Banner should have been seated at his place, "business" instead of "butter", as the jury entered the courtroom.

But what I did not fully recognize at the time was the matter of Judge Banner going into this [fifth] door on numerous occasions and not coming out again until **five or ten minutes later**,

even on the day of deliberation. I was at that time under the mistaken belief that this door went to a hallway to some exit, with the jury room somehow off to the side, for I had never been in there.

But I have since found out that this door leads **directly into the jury room**, and that Judge Banner was **actually going into the jury room, with the jury in there**, for the jury came out just after him, and also because the jury had not been milling around in the halls. (Attached is a to scale sketch of the above described jury/courtroom area based on measurements I took.)

THERE IS NO DOUBT IN MY MIND THAT JUDGE PAUL BANNER WAS ENGAGED IN PRIVATE CONVERSATION WITH THE JURY IN THE JURY ROOM OF THE VAN ZANDT COURTHOUSE ON APRIL 10, 2002 AND APRIL 11, 2002 DURING THE WESTFALL/BIRNBAUM TRIAL.

There were other witnesses in the courtroom, the identity of whom I am not revealing at this time by providing their affidavit or their names, for fear of retaliation against them.

Further affiant sayeth not.

Udo Birnbaum
UDO BIRNBAUM

STATE OF TEXAS

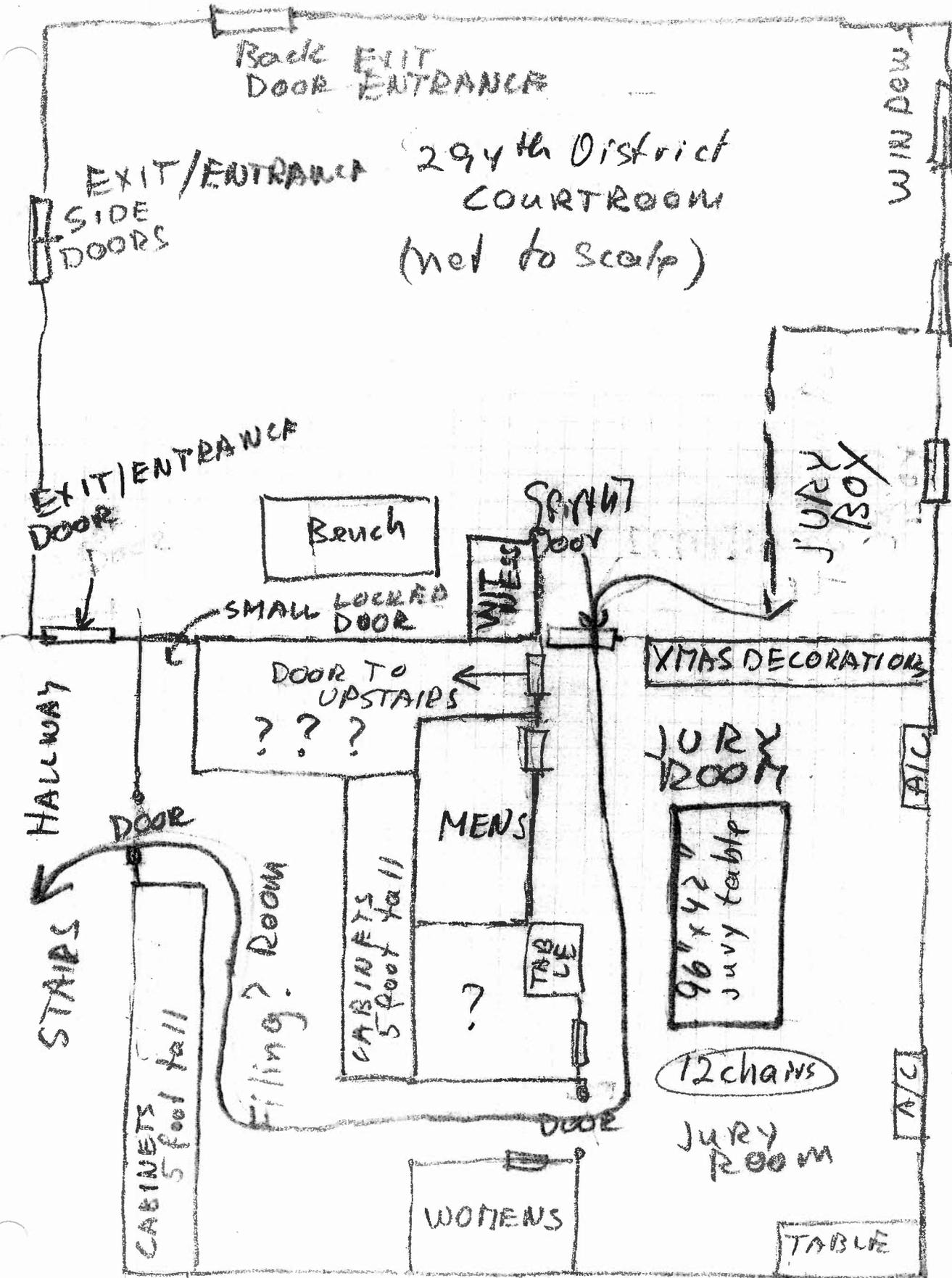
COUNTY OF VAN ZANDT

Before me, a notary public, on this day personally appeared Udo Birnbaum, known to me to be the person whose name is subscribed to the foregoing document, and being by me duly sworn, declared that the statements therein contained are true and correct.

Given under my hand and seal of office this 28 day of August 2002.

Ruthie McAdoo
Notary Public





SCALE: 1/4" = 1 foot

AFFIDAVIT OF JERRY MICHAEL COLLINS

My name is Jerry Michael Collins. I am over the age of 21 and have never been convicted of a felony or misdemeanor in this State or any other State, or in the United States and am competent to make this affidavit. I have personal knowledge of the facts stated herein.

On APRIL 10, 2002 I WAS PRESENT ON THE 3RD FLOOR OF THE VAN ZANDT COUNTY COURTHOUSE AND WITNESSED A PRIVATE, WHISPERING CONVERSATION BETWEEN A FEMALE JUROR AND A WHITE HEADED MAN.

I KNEW THE NAME OF THE FEMALE TO BE KATHY SUE BOUGH AND THE WHITE HAired MAN TO BE JUDGE PAUL BANNER.

I AM CERTAIN OF THE NAME OF THE WHITE HAired MAN INGAGED IN THAT CONVERSATION BECAUSE THE SAME MAN PRESIDED OVER THE TRIAL OF BIRNBAUM/WESTFALL WHICH WAS IN SESSION ON THE DAY I WAS IN THE VAN ZANDT COUNTY COURTHOUSE AS A WITNESS.

I AM CERTAIN OF THE NAME OF THE FEMALE JUROR BECAUSE SHE WAS ONE OF THE TWO FEMALE FUNERAL ATTENDANTS PRESENT AT THE FIVE HOUR EXHUMATION OF MY DAUGHTER AT THE EASTLAND CEMETERY IN EASTLAND, TEXAS IN APRIL 1999. (SEE ATTACHED PHOTOS)

AFTER THE EXHUMATION KATHY SUE BAUGH AND HER ASSISTANT TRANSPORTED MY DAUGHTER'S REMAINS FROM THE EASTLAND CEMETERY IN EASTLAND TEXAS TO THE SOUTHWEST INSTITUTE OF FORENSIC SCIENCES IN DALLAS. I FOLLOWED THE FUNERAL CAR FROM EASTLAND TO DALLAS.

A FEW DAYS LATER, AFTER THE AUTOPSY WAS COMPLETED, KATHY SUE BAUGH AND HER ASSISTANT TRANSPORTED MY DAUGHTER'S REMAINS FROM DALLAS TO THE MURRAY CEMETERY IN CARBON TEXAS WHERE I WAS WAITING FOR THE FINAL BURIAL, WHICH TOOK ANOTHER HOUR.

THERE IS NO DOUBT IN MY MIND THAT JUROR KATHY SUE BAUGH AND JUDGE BANNER WERE INGAGED IN A PRIVATE CONVERSATION IN THE HALL OF THE VAN ZANDT COUNTY COURTHOUSE ON APRIL 10, 2002 DURING THE WESTFALL/BIRNBAUM TRIAL.

Further affiant sayeth not.

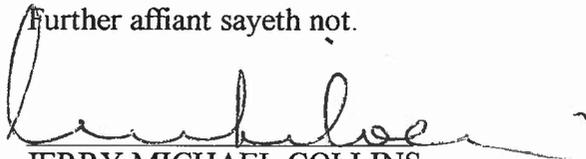

JERRY MICHAEL COLLINS

Exhibit
B

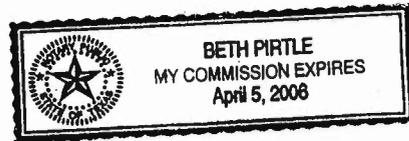
STATE OF TEXAS

COUNTY OF GUADALUPE

Before me, a notary public, on this day personally appeared Jerry Michael Collins, known to me to be the person whose name is subscribed to the foregoing document, and being by me duly sworn, declared that the statements therein contained are true and correct.

Given under my hand and seal of office this 24 day of August 2002.

Beth Pirtle
Notary Public



KATHY SUE BAUGH
4/99



KATHY SUE
BAUGH - 4/99



KATHY SUE
BAUGH - 4/99



214 373-3722

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

**DEFENDANT BIRNBAUM'S OBJECTIONS TO
PLAINTIFF'S REQUESTED JURY QUESTIONS**
(Case Filed Sept. 20, 2000. Trial set for Apr. 8, 2002)

To this Honorable Court:

1. Defendant Udo Birnbaum provides the following question to be answered by the jury **immediately after Plaintiff's Question 1** ("failure to comply"). A finding of "Yes" of course precludes the jury from ever reaching Plaintiff's Question 2 ("damages") and Question 3 ("attorney fees"), and excuses Udo Birnbaum from any and all off Plaintiff's claims.

2. Defendant Birnbaum also objects to Plaintiff's Question 3 being submitted upon an Affirmative finding to **Question 1**. Plaintiff's Question 3 should be contingent to an answer of "Yes" to Plaintiff's **Question 2**.

3. Birnbaum's requested **Question** is as follows:

INSTRUCTION

If your answer to [Plaintiff's] Question 1 is "Yes", then answer the following question. Otherwise, do not answer the following question.

QUESTION

Was Udo Birnbaum's failure to comply excused?

a. Failure to comply by *Udo Birnbaum* is excused by *The Law Offices of G. David Westfall, P.C.*'s previous failure to comply with a material obligation of the same agreement.

Exhibit
C

b. Failure to comply by *Udo Birnbaum* is excused if all the following circumstances occurred:

1. *The Law Offices of G. David Westfall, P.C.*

- a. by words or conduct made a false representation or concealed material facts,
- b. with knowledge of the facts or with knowledge or information that would lead a reasonable person to discover the facts, and
- c. with the intention that *Udo Birnbaum* would rely on the false representation or concealment in acting or deciding not to act; and

2. *Udo Birnbaum*

- a. did not know and had no means of knowing the real facts and
- b. relied to *his* detriment on the false representation or concealment of material facts

c. Failure to comply by *Udo Birnbaum* is excused if the agreement was made as the result of undue influence by *The Law Offices of G. David Westfall, P.C.*

"Undue influence" means that there was such dominion and control exercised over the mind of the person executing the agreement, under the facts and circumstances then existing, as to overcome his free will. In effect, the will of the party exerting undue influence was substituted for that of the party entering the agreement, preventing him from exercising his own discretion and causing him to do what he would not have done but for such dominion and control.

Answer "Yes" or "No"

ANSWER: _____

Respectfully submitted

Udo Birnbaum

UDO BIRNBAUM, *Pro Se*

540 VZ 2916

Eustace, Texas 75124

(903) 479-3929

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this document has today been delivered to G. David Westfall and Frank C. Fleming, by facsimile transmission on this the 4th day of April, 2002.

Udo Birnbaum
UDO BIRNBAUM

No 00-619

Law Office

v.

~~Law Office of West~~
284th O'Connell

Van Zee

Birnbaum

FILED FOR RECORD
02 APR 11 AM 9:18
BY
DEP.
JULIA YOUNG
CLERK VAN ZANT CO. TX.

Birnbaum's Objections to
Today's Plaintiff's
Court charge.

1. ~~The New~~ Elimination of Pl's Inquiry question 1 with current phraseology does not allow for Defendant's Question as to whether he is excused by Plaintiff's prior failure to abide by a material issue in the same contract (FAILURE TO BILL MONTHLY), Not get HIS APPROVAL BEFORE LARGE EXPENSE)

by hand to Served today, 4-11-02
Fleming

Exhibit D
1128

Point 9. For absurdly excessive "legal fee" damages

Attorney fees of \$41,306.91 for "collecting" on a supposed \$18,121.10 unpaid "bill", that the jury found really was not that at all ~~\$15,817.60~~ is absurd. A jury "adjusting" a sworn account is absurd. Who knows how they came up with \$15,817.60, but what it really means is that Plaintiff really did not have "systematic records" or honest open accounting.

This jury's number for "legal fee" damages is absurdly excessive. In essence, what I am complaining of, is that this jury was not adequately instructed in the Texas Deceptive Trade Practices Act. (Also see point 6 above, as to my "no worth" issue, which was the proper instruction as to what constitutes a violation of the DTPA.

Point 10. For incurable jury argument

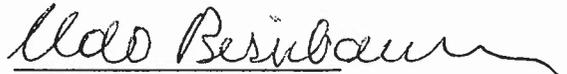
Plaintiff's attorney just made things up as he went along, and especially during closing argument, telling the jury that I had filed numerous suits against judges, when he knew that there had only been one suit against judges, and that was the one Westfall had been prosecuting, and that all of Westfall's "legal fee" stuff had no worth, as indicated in point 6 above.

In essence, what I am complaining of, is that incurable jury argument deprived me of a fair trial.

PRAYER

WHEREFORE, upon all these points, Birnbaum moves for a new trial.

Respectfully Submitted,



UDO BIRNBAUM

540 VZ 2916

Eustace, Texas 75124

(903) 479-3929

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this document has been served via Regular Mail and FAX on this the 29 day of August, 2002, on Frank C. Fleming, Law Office of Frank C. Fleming, 6611 Hillcrest, Suite 305, Dallas, Texas 75205-1301.



UDO BIRNBAUM

September 3, 2002

Nancy Young, District Clerk
294th District Court of Van Zandt County
121 E. Dallas St. Room 302
Canton, Texas

Re: *The Law Offices of G. David Westfall, P.C. vs. Udo Birnbaum*
Cause 00-619, 294th District Court

Dear District Clerk:

Provided under cover of this letter is my RCP Rule 296 *Request for Findings of Fact and Conclusions of Law* regarding the latest judgment in this case, which I am hereby filing within twenty days after such was signed with you.

Just so there is no confusion, I am not referring to the first judgment in this case, the one for \$59,280.66, since that was a jury trial, and the findings were of course made by the jury.

This request is in regard to the second judgment in this case, the "frivolous lawsuit" one for \$62,885.00. That proceeding was without a jury, with the findings by the judge, hence this *Request for Findings of Fact and Conclusions of Law*.

RULE 296. REQUEST FOR FINDINGS OF FACTS AND CONCLUSIONS OF LAW.
In any case tried in the district or county court without a jury, any party may request the court to state in writing its findings of fact and conclusions of law. Such request shall be entitled "Request for Findings of Fact and Conclusions of Law" and shall be filed within twenty days after judgment is signed with the clerk of the court, who shall immediately call such request to the attention of the judge who tried the case. The party making the request shall serve it on all other parties in accordance with Rule 21a.

So get this matter to Judge Banner and tell him he needs to do findings and conclusions.

Sincerely,

Udo Birnbaum

UDO BIRNBAUM, *Pro Se*

540 VZCR 2916

Eustace, TX 75124

(903) 479-3929 (phone and fax)

Copy: Frank C. Fleming

by Reg. Mail

Fax to (214) 265-1979
not receiving

4/21

FILED FOR RECORD
02 SEP - 3 PM 1:07

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

IN THE DISTRICT COURT

Plaintiff/Counter-Defendant

NANCY YOUNG
DIST. CLERK VAN ZANDT CO. TX

v.
UDO BIRNBAUM

BY _____ DEP
294th JUDICIAL DISTRICT

Defendant/Counter-Plaintiff and
Third Party Plaintiff

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

Third Party Defendants

VAN ZANDT COUNTY, TEXAS

REQUEST FOR FINDINGS OF FACTS AND CONCLUSIONS OF LAW

**REGARDING THE \$62,885 "FRIVOLOUS LAWSUIT SANCTION" JUDGMENT
"signed" on Aug. 9, 2002, but the judge did not give it to the Clerk
until Aug. 21, 9:59 am (see stamp on bottom of second page),
not mailed out to me till Aug. 22 (postmark date).**

COMES NOW Udo Birnbaum under RCP Rule 296, "*Requests for Findings of Facts and Conclusions of Law*", requesting that this Court reduce to writing its findings and conclusions as to exactly what the Court found that he did that was so wrong as to incur a **\$62,885.00 "frivolous lawsuit" sanction, when he did not even bring this suit!**

My request for this reduction to writing is not for the purpose of harassment of this Honorable Court or the Westfalls, but to facilitate an intelligent review at the Appeals Court level of the basis of this Honorable Court's decision and ruling.

I specifically request findings and conclusions regarding the divergent versions of the truth ("frivolous" vs. "racketeering") as alleged to this Court in the Westfalls' *Motion for Sanctions* and in my *Response* thereto, i.e. a finding and conclusion regarding:

The central Issue regarding this Judgment:

Regarding my civil RICO claim and cross-claim, and absent a finding of fact by a jury (that I had indeed not been damaged by reason of a RICO violation), what conclusions of law, if any, and what findings of fact, if any, this Court made to adjudicate the sanction issue of fact, i.e. whether there was a bona fide "*pattern of racketeering activity*" by the Westfalls, just as I was trying to show, or whether my claims were indeed "*frivolous*".

(plain English: How did Your Honor arrive at a finding on this central issue, an issue I had asked to be resolved by jury?)

For the convenience of the Court I am providing copies of the above referenced two documents with this request. Also, this request will try to stay with the flow of each fact issue in these two documents as much as possible. I am also attaching a copy of the *civil RICO pattern jury instructions* used in our U.S. Fifth Circuit.

I also request findings and conclusions regarding the underlying issues in dispute in the above referenced *Motion* and in my *Response*:

The Westfalls' "sanctionable facts" issue 1:

"This lawsuit was brought by Plaintiff to collect on overdue legal fees for legal services rendered to the Defendant at Defendant's request". (Movants starting page 1 paragraph I)

Fact issue: Were the legal services at issue (the \$18,121.10) actually rendered, or did they have no worth?

Fact issue: Were these \$18,121.10 legal services actually "at Defendant's request"?

Fact issue: Did Plaintiff (or sanction movants) obtain a jury finding upon these issues?

Fact issue: Had Plaintiff previously breached his agreement by not openly billing monthly?

(The Westfalls' "sanctionable facts" issue 2)

"Instead of a mounting a normal defense to a rather simple lawsuit such as this and raising the normal objections to a suit on a sworn account, the Defendant/Third Party Plaintiff chose instead to make this lawsuit into his own public forum to make a mockery of all lawyers and the entire legal system".

Law issue: Does denying the account under oath and calling for an appointment of an auditor under RCP Rule 172 qualify as a "normal defense" and "normal objection"?

Fact issue: Is that exactly what Birnbaum did, and if so, why is it "sanctionable"?

Fact issue: Was this really a "rather simple lawsuit" or part of a "pattern of racketeering activity" by the Westfalls?

Law issue: Does an allegation of a "pattern of racketeering activity" constitute a sanctionable pleading as a matter of law?

Law issue: Does a cross-defense of damage by a RICO "pattern of racketeering activity" constitute a sanctionable defense as a matter of law?

Law issue: Does a third party claim upon the same RICO "pattern of racketeering activity" constitute a sanctionable claim as a matter of law?

The Westfalls' "sanctionable facts" issue 3:

"Defendant/Third Party Plaintiff tried unsuccessfully to intimidate and harass the Plaintiff into dropping this lawsuit by attempting to implicate the owner of the Plaintiff, G. David Westfall, as well as his wife and daughter in a totally frivolous claim of running an organized crime syndicate in the form of a law office".

Fact Issue: Was G. David Westfall, as well as his wife and daughter, actually "running an organized crime syndicate in the form of a law office"?

Law Issue: Does a claim of "running an organized crime syndicate in the form of a law office" constitute a sanctionable act as a matter of law?

Fact Issue: Did Birnbaum actually make such "claim of running an organized crime syndicate in the form of a law office" as the Westfalls claim, or was he more specific and used the language of civil RICO?

Law Issue: Is it a sanctionable act as a matter of law to bring before the court a claim that one has been "injured in his business or property by reason of a violation of section 1962 of this chapter"? (18 U.S.C. § 1964(c), "civil RICO")

Fact Issue: Was Birnbaum trying "to intimidate and harass the Plaintiff into dropping this lawsuit", or were the Westfalls running a "pattern of racketeering activity" on him?

Law Issue: Is it a sanctionable act to try to "attempt to implicate the owner", if the owner is indeed implicated?

The Westfalls' "sanctionable facts" issue 4:

"The Defendant/Third Party Plaintiff has attempted to use the forum of this lawsuit to launch a full scale attack on the integrity and character of G. David Westfall, Christina Westfall, and Stephanie Podvin".

Law Issue: Does an "attack on the integrity and character" of the party who has brought suit constitute a sanctionable act as a matter of law?

Fact Issue: Was Birnbaum's attacking "integrity and character", or was his language more in the nature of "pattern of racketeering activity" under civil RICO?

The Westfalls' "sanctionable facts" issue 5:

"If those attacks were not enough, the Defendant/Third Party Plaintiff broadened his attack in his pleadings and so called "Open Letters" to include casting aspersions at this Court, the visiting Judge, the Hon. Paul Banner, the Coordinator of the Court, the Court Reporter for the Court, and the Court of Appeals".

Law Issue: Is it a sanctionable act to speak out, under the First Amendment, or in a court of law, on corruption as one has personally experienced it?

Further Westfalls' "sanctionable facts" issues:

(Movants starting page 2 paragraph II)

"Specifically, Movants file this request for sanctions against the Defendant/Third Party Plaintiff for the following actions of the Defendant/Third Party Plaintiff:"

See Birnbaum *Response to Motion for Sanctions*.

Summary

WHEREFORE, Udo Birnbaum requests the Court to **file findings of fact and conclusions of law** as to exactly what the Court found that he did that was so wrong as to incur a \$62,885.00 **"frivolous lawsuit" sanction, when he did not even bring this suit**, and specifically upon the central issue regarding this Judgment ("racketeering" vs. "frivolous") as alleged to this Court in the Westfalls' *Motion for Sanctions* and in my *Response* thereto, i.e. whether:

The central Issue regarding this Judgment:

Regarding my civil RICO claim and cross-claim, and **absent a finding of fact by a jury** (that I had indeed **not** been damaged by reason of a RICO violation), **what conclusions of law**, if any, and what **findings of fact**, if any, this Court made to **adjudicate the sanction issue of fact**, i.e. whether there was a bona fide **"pattern of racketeering activity" by the Westfalls**, just as I was trying to show, or whether my claims were indeed **"frivolous"**.

(plain English: How did Your Honor arrive at a finding on this central issue, an issue I had asked to be resolved by jury?)

This is the second suit in which I have been run over by lawyers and judges in this Court, and I have come to recognize the retaliation by Official Oppression that has come upon me for having spoken out on corruption in Tommy Wallace's 294th District Court, as I pleaded at the sanction hearing "trial" of July 30, 2002.

I did not bring this suit! I did not bring the other one either!

Respectfully submitted

Udo Birnbaum

UDO BIRNBAUM, *Pro Se*

540 VZ CR 2916

Eustace, TX 75124

(903) 479-3929

att: The "frivolous lawsuit" judgment
Motion for Sanctions (by the Westfalls)
Birnbaum Response to Motion for Sanctions
Civil RICO pattern jury instructions

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this document has been served via Regular Mail and ~~FAX~~ on this the 3 day of September, 2002, on Frank C. Fleming, Law Office of Frank C. Fleming, 6611 Hillcrest, Suite 305, Dallas, Texas 75205-1301.

*fax not
receiving*

Udo Birnbaum
UDO BIRNBAUM

COPY

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.

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.

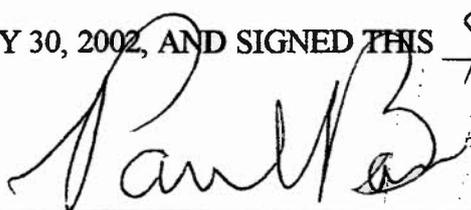
D. The Court denies the request for a finding of any sanctions to be awarded in favor of G. David Westfall, individually.

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

instead to make this lawsuit into his own public forum to make a mockery of all lawyers and the entire legal system.

3. Defendant/Third Party Plaintiff tried unsuccessfully to intimidate and harass the Plaintiff into dropping this lawsuit by attempting to implicate the owner of the Plaintiff, G. David Westfall, as well as his wife and daughter in a totally frivolous claim of running an organized crime syndicate in the form of a law office.

4. The Defendant/Third Party Plaintiff has attempted to use the forum of this lawsuit to launch a full scale attack on the integrity and character of G. David Westfall, Christina Westfall, and Stephanie Podvin.

5. If those attacks were not enough, the Defendant/Third Party Plaintiff broadened his attack in his pleadings and so called "Open Letters" to include casting aspersions at this Court, the visiting Judge, the Hon. Paul Banner, the Coordinator of the Court, the Court Reporter for the Court, and the Court of Appeals.

II.

Specifically, Movants file this request for sanctions against the Defendant/Third Party Plaintiff for the following actions of the Defendant/Third Party Plaintiff:

1. Filing a frivolous third party claim pleading without factual support or a valid legal basis in Defendant/Third Party Plaintiff's causes of action filed against either G. David Westfall, Christina Westfall, or Stefani Podvin. Movants contend that Defendant/Third Party Plaintiff filed these pleadings for the purpose of causing inconvenience and/or harassment for Stefani Podvin, Christina Westfall, G. David Westfall, P.C., and G. David Westfall, individually and not in support of any valid, legally factual, and legally supportable claims.

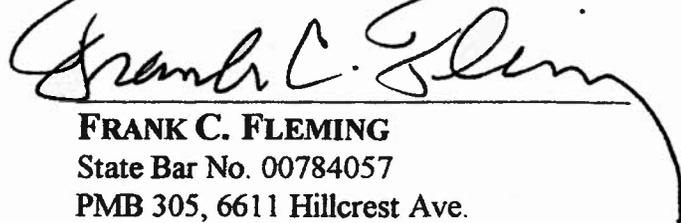
2. Filing discovery requests and taking depositions for the purpose of harassment and inconvenience and not to support any valid claims or causes of actions against the Movants.
3. Filing a frivolous motion to recuse the Hon. Paul Banner for the purpose of causing inconvenience and/or harassment for Movants.
4. Filing frivolous and untimely motions to appeal the granting of the Movants' Motions for Summary Judgment granted by the trial court.

WHEREFORE, PREMISES CONSIDERED, Movants pray that a hearing be set on this motion, and following a hearing, the Court assess appropriate sanctions against the Defendant/Third Party Plaintiff for the violations of Rule 13 of the Texas Rules of Civil Procedure and/or the violations of §10.001 et seq. of the Tex. Rules of Civil Procedure. Specifically, Movants request damages be assessed against the Defendant/Third Party Plaintiff and awarded to the Movants for the following:

- a. Reimbursement of all Movants' reasonable and necessary attorney's fees expended by Movants in defense of the allegations made by the Defendant/Third Party Plaintiff in this lawsuit to the extent such attorney's fees have not yet been awarded in any prior rulings of this Court.
- b. Reimbursement of all Movants' reasonable and necessary attorney's fees expended by Movants in pursuit of this Motion for Sanctions.
- c. Monetary damages to reimburse Movants for the inconvenience and harassment suffered by the Movants as a direct result of the improper actions taken by the Defendant/Third Party Plaintiff against the Movants in connection with this lawsuit.

- d. Punitive damages to be assessed against the Defendant/Third Party Plaintiff and awarded to the Movants in order to prevent the reoccurrence of such behavior again in the future by the Defendant/Third Party Plaintiff.
- e. Damages assessed against the Defendant/Third Party Plaintiff and awarded to the Court to reimburse the Court for its expenses and inconvenience suffered as a direct result of frivolous pleadings filed on behalf of the Defendant/Third Party Plaintiff.
- f. And for such other and further relief, both general and special, to which Movants may be justly entitled, both at law and equity.

Respectfully submitted,
LAW OFFICE OF FRANK C. FLEMING

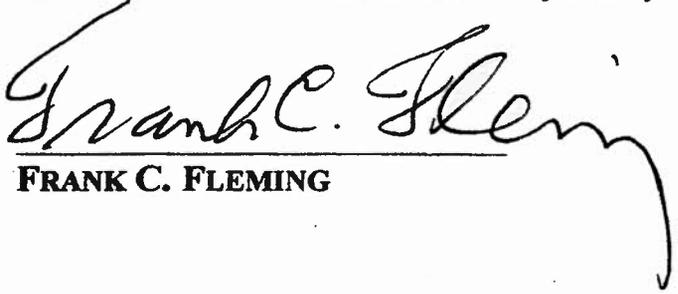


FRANK C. FLEMING
State Bar No. 00784057
PMB 305, 6611 Hillcrest Ave.
Dallas, Texas 75205-1301
(214) 373-1234
(fax) 373-3232

ATTORNEY FOR MOVANTS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above document has this day been delivered to Udo Birnbaum, by facsimile transmission to 903/479-3929, on this 9th day of May 2002.


FRANK C. FLEMING

FIAT

Please take note that this motion is set for hearing at _____ : _____ AM/PM on the _____ day of _____, 2000.

District Judge Presiding

The Westfalls' "sanctionable facts" issue 2:

"Instead of mounting a normal defense to a rather simple lawsuit such as this and raising the normal objections to a suit on a sworn account, the Defendant/Third Party Plaintiff chose instead to make this lawsuit into his own public forum to make a mockery of all lawyers and the entire legal system".

FALSE: Birnbaum raised the **normal defense** of denying the account **under oath** per Rule 185, RCP, and calling for **appointment of an auditor** per Rule 172. (see attachment)

Neither the "Law Office", G. David Westfall, Stefani Podvin, Christina Westfall, or Frank C. Fleming ever responded to any of Birnbaum's motions for appointment of such Auditor under Rule 172!

Birnbaum has a First Amendment Right to speak out on the corruption G. David Westfall, Christina Westfall, and Stefani Podvin are bringing upon him in this Court in the name of their "Law Office".

The Westfalls' "sanctionable facts" issue 3:

"Defendant/Third Party Plaintiff tried unsuccessfully to intimidate and harass the Plaintiff into dropping this lawsuit by attempting to implicate the owner of the Plaintiff, G. David Westfall, as well as his wife and daughter in a totally frivolous claim of running an organized crime syndicate in the form of a law office".

FALSE AND CONCLUSORY: Birnbaum used more precise statutory language. But the issue is clear: Only the **U. S. Justice Department** can determine whether the above were indeed running a racketeering enterprise in violation of 18 U.S.C. § 1961, *et seq.* out of the "law office" as Birnbaum complains. This Court has **no investigative capability**.

Birnbaum has a First Amendment Right to speak out against public corruption as he has seen it, **without fear of retaliation** masquerading as "sanctions".

"Implicate the owner" is ludicrous under the circumstances: "Plaintiff" is the alter ego of Westfall, his wife, and his daughter. Another issue for the **U. S. Justice Department**.

The Westfalls' "sanctionable facts" issue 4:

"The Defendant/Third Party Plaintiff has attempted to use the forum of this lawsuit to launch a full scale attack on the integrity and character of G. David Westfall, Christina Westfall, and Stephanie Podvin".

FALSE: Birnbaum was seeking the intervention of the Court from the beginning upon the issue of **fraud in bringing this suit**. Another issue for the **U. S. Justice Department**.

The Westfalls' "sanctionable facts" issue 5:

"If those attacks were not enough, the Defendant/Third Party Plaintiff broadened his attack in his pleadings and so called "Open Letters" to include casting aspersions at this Court, the visiting Judge, the Hon. Paul Banner, the Coordinator of the Court, the Court Reporter for the Court, and the Court of Appeals".

FALSE: Birnbaum was seeking the intervention of the addressees to bring this entire matter to the attention of the **U. S. Justice Department**.

IN RESPONSE TO MOVANTS' "ACTIONS" (OF BIRNBAUM) ISSUES
(Movants starting page 2 paragraph II)

Further Westfalls' "sanctionable facts" issues:

"Specifically, Movants file this request for sanctions against the Defendant/Third Party Plaintiff for the following actions of the Defendant/Third Party Plaintiff:"

Issue II-1

"Filing a frivolous third party claim pleading without factual support or a valid legal basis in Defendant/Third Party Plaintiffs causes of action filed against either G. David Westfall, Christina Westfall, or Stefani Podvin. Movants contend that Defendant/Third Party Plaintiff filed these pleadings for the purpose of causing inconvenience and/or harassment for Stefani Podvin, Christina Westfall, G. David Westfall, P.C., and G. David Westfall, individually and not in support of any valid, legally factual, and legally supportable claims."

FALSE: Birnbaum has a First Amendment Right to speak out against public corruption as he has seen it, **without fear of retaliation** masquerading as "sanctions". Another issue for the U. S. Justice Department.

Issue II-2

"Filing discovery requests and taking depositions for the purpose of harassment and inconvenience and not to support any valid claims or causes of actions against the Movants."

FALSE: Birnbaum has a First Amendment Right to speak out against public corruption as he has seen it, **without fear of retaliation** masquerading as "sanctions". Another issue for the U. S. Justice Department.

Issue II-3

"Filing a frivolous motion to recuse the Hon. Paul Banner for the purpose of causing inconvenience and/or harassment for Movants."

FALSE: As pointed out at the trial by Hon. Paul Banner himself, Birnbaum has a procedural right to ask for recusal.

Birnbaum has a First Amendment Right to speak out against public corruption as he has seen it, **without fear of retaliation** masquerading as "sanctions". Another issue for the U. S. Justice Department.

Issue II-4

"Filing frivolous and untimely motions to appeal the granting of the Movants' Motions for Summary Judgment granted by the trial court."

Birnbaum has a First Amendment Right to speak out against public corruption as he has seen it, **without fear of retaliation** masquerading as "sanctions". Another issue for the U. S. Justice Department.

In response to [The Westfall] Movants "Wherefore, Premises Considered" paragraph, seeking the following:

- a. *Reimbursement of all Movants' reasonable and necessary attorney's fees expended by Movants in defense of the allegations made by the Defendant/Third Party*

- Plaintiff in this lawsuit to the extent such attorney's fees have not yet been awarded in any prior rulings of this Court.*
- b. Reimbursement of all Movants' reasonable and necessary attorney's fees expended by Movants in pursuit of this Motion for Sanctions.*
 - c. Monetary damages to reimburse Movants for the inconvenience and harassment suffered by the Movants as a direct result of the improper actions taken by the Defendant/Third Party Plaintiff against the Movants in connection with this lawsuit.*
 - d. Punitive damages to be assessed against the Defendant/Third Party Plaintiff and awarded to the Movants in order to prevent the reoccurrence of such behavior again in the future by the Defendant/Third Party Plaintiff*
 - e. Damages assessed against the Defendant/Third Party Plaintiff and awarded to the Court to reimburse the Court for its expenses and inconvenience suffered as a direct result of frivolous pleadings filed on behalf of the Defendant/Third Party Plaintiff.*
 - f. And for such other and further relief, both general and special, to which Movants may be justly entitled, both at law and equity.*

Birnbaum has a First Amendment Right to speak out against public corruption as he has seen it, **without fear of retaliation** masquerading as "sanctions". Another issue for the U. S. Justice Department.

WHEREFORE, PREMISES CONSIDERED, Birnbaum prays that a hearing be set on the "fact" and "actions" issues raised in the *[Westfalls'] Motion for Sanctions*, so that he may more fully show that the interest of justice requires that this matter be turned over to the U. S. Justice Department. (See attached *Petition to U. S. Bankruptcy Judge* for details). The Westfalls are a menace to society.

Respectfully submitted

Udo Birnbaum

UDO BIRNBAUM, Pro Se

540 VZ CR 2916

Eustace, TX 75124

(903) 479-3929

att:

- *Motion for Appointment of Auditor Pursuant to Rule 172*
- *Petition to U. S. Bankruptcy Judge Harold C. Abramson
Nov. 26, 2001 (incl. 68 page Appendix)*

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above document has this 10 day of May, 2002 been delivered as follows:

REGULAR U.S. FIRST CLASS MAIL:

- FRANK C. FLEMING, 6611 Hillcrest, PMB 305, Dallas, Texas 75205-1301
- THE HON. PAUL BANNER, c/o Sandy Hughes, First Administrative Judicial Region, 133 N. Industrial LB 50, Dallas, TX 75207 (no attachments)
- Judge Paul Banner, 24599 CR 3107, Gladewater, TX 75647 (no attachments)

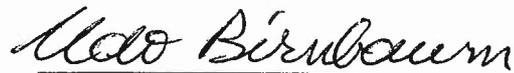
CERTIFIED MAIL, RESTRICTED DELIVERY

NO. 7000 0520 0022 8182 1532:

- HON. HAROLD C. ABRAMSON, United States Bankruptcy Court, Northern District of Texas, 1100 Commerce Street, Rm. 12A24, Dallas, TX 75242-1496 (including attachments)

HAND DELIVERY:

- THE HON. PAUL BANNER, c/o Betty Davis, Court Administrator 294th District Court, 121 E. Dallas Street Room 301, 75103 (including attachments)
- DISTRICT CLERK, 294th District Court, Courthouse, Canton, TX 75103 (including attachments)



Udo Birnbaum

8. RICO

Note: This is Section 8 from U.S. Fifth Circuit "Pattern Jury Instructions".
8.1 Numbered issues are "issues of fact" to be found by jury to make the
RICO CLAIMS ultimate finding of a violation of RICO by saying "YES".

The plaintiff has brought claims against each defendant for alleged violations of the Racketeer Influenced and Corrupt Organizations Act, commonly referred to as RICO. Specifically, the plaintiff claims that each defendant violated Section 1962 [(a) (b) (c) or (d)] of RICO.

The plaintiff must establish by a preponderance of the evidence every element of a RICO claim. You should consider each and every element of a RICO cause of action only in the precise way that I will define them in these instructions. You must avoid confusing any of the elements of a RICO claim with your prior conceptions of the meaning of the terms that are used to describe the elements of a RICO claim.

SECTION 1962(a)

I. The plaintiff has alleged that each defendant violated Section 1962(a) of the RICO Act. To establish that a defendant violated Section 1962(a), the plaintiff must prove by a preponderance of the evidence each of the following four elements:

1. That there was an "enterprise";
2. That the enterprise engaged in or had some effect "on interstate commerce";
3. That the defendant derived income, directly or indirectly, from a "pattern of racketeering activity"; and
4. That some part of that income was used in acquiring an interest in or operating the enterprise.

A "person" under the law includes but is not limited to any person or entity that is capable of holding a legal or beneficial interest in property. A corporation is a legal entity that, like a person, is capable of holding a legal or beneficial interest in property.

The term "enterprise" includes any individual, partnership, corporation, association, or other legal entity. An enterprise "affects interstate or foreign commerce" if the enterprise either engages in, or has an effect on commerce between the states or between the states and foreign countries.

A "racketeering activity" means an act in violation of [(the federal mail fraud statute) (the federal wire fraud statute) (securities fraud statutes).] You will be instructed on the law pertaining to this (these) statute(s) to guide you in determining whether the plaintiff proved by a preponderance of the evidence that a defendant committed one or more violations of these statutes. A "racketeering activity" may also be referred to as a "predicate offense".

A "pattern of racketeering activity" requires that the plaintiff prove that a defendant committed at least two acts of "racketeering activity" within ten years of each other [and that both of the acts occurred after October 15, 1970.] The proof of two or more predicate acts does not in and of itself establish a "pattern" under RICO. The two acts need not be of the same kind. For example, the acts may be one act of mail fraud and one act of wire fraud. However, you must find by a preponderance of the evidence that the two acts occurred within the time specified and that each was connected with the other by some common scheme, plan or motive so as to constitute a "pattern". A series of wholly separate, isolated or disconnected acts of racketeering activity does not constitute a pattern.

In other words, two or more otherwise unrelated acts of "racketeering activity" do not constitute a "pattern" of racketeering activity under RICO unless the acts all relate to a common scheme by the defendant to continually conduct the affairs of the alleged enterprise for illicit personal benefit, whether monetary or otherwise, for himself or for another, by committing the predicate offenses.

As I instructed you, "racketeering activity" means an act in violation of [the mail fraud and/or wire fraud and/or securities fraud statutes.] However you may not consider just any racketeering act allegedly committed by a defendant in violation of one of these statutes as bearing on the question of whether a defendant has committed two

or more predicate offenses **as a pattern of racketeering activity**. In making this determination, you are to consider only **those specific racketeering acts** alleged by the plaintiff against **a particular defendant**. Furthermore, you cannot find that the defendant has engaged in a "pattern of racketeering activity" unless you unanimously agree to which of the alleged predicate offenses, if any, make up the pattern. Thus, it would not be sufficient if some of you should find that a defendant committed a violation of two or more predicate offenses under one particular statute as a pattern and the rest of you should find that a defendant committed a violation of two or more predicate acts under another statute as a pattern. In other words, you may not find that the defendant has engaged in a **pattern of racketeering activity** unless you [1] find a **"pattern" of predicate offenses** and [2] find that the plaintiff has proved by a preponderance of the evidence that **a defendant** committed each of the **two or more predicate offenses** that you find are necessary to make up the pattern.

You should note that the pattern must be one in which **the defendant** has participated as a **"principal."** Thus in order to satisfy the second element, the plaintiff must **prove** the defendant was a "principal" by showing by a preponderance of the evidence:

1. That the defendant knowingly and willfully committed, or knowingly and willfully aided and abetted in the commission of two or more alleged predicate offenses that constitute the alleged pattern of racketeering activity, and

2. That the defendant knowingly and willfully received income derived, directly or indirectly, from that alleged pattern of racketeering activity.

The word "knowingly," as that term has been used in these instructions, means that the action was done voluntarily and intentionally and not because of mistake or accident.

The word "willfully," as that term has been used in these instructions, means that the action was committed voluntarily and purposely, with the specific intent to do something the law forbids. The action must be done with a bad purpose: either to disobey or disregard the law.

The plaintiff has alleged that each of the defendants has committed two or more predicate acts including violations of the mail fraud and wire fraud statutes. It is your function to decide whether the plaintiff has proved by a preponderance of the evidence as to each defendant whether that defendant violated either or both of those statutes on one or more occasions, if at all. To establish that mail fraud has been committed, the plaintiff must **prove** each of the following by a preponderance of the evidence as to each defendant so charged:

1. Some person or persons willfully and knowingly devised a scheme or artifice to defraud, or a scheme for obtaining money or property by means of false pretenses, representations or promises, and

2. Some person or persons used the United States Postal Service by mailing, or by causing to be mailed, some matter or thing for the purpose of executing the scheme to defraud.

To act with "intent to defraud" means to act knowingly and with the specific intent to deceive. The words "scheme" and "artifice" in the mail fraud statute include any plan or course of action intended to deceive others, and to obtain property by false or fraudulent pretenses, representations, or promises, from the persons so deceived.

A statement or representation is "false" or "fraudulent" within the meaning of the mail fraud statute if it relates to a material fact and is known to be untrue or is made with reckless indifference as to its truth or falsity, and is made or caused to be made with intent to defraud. A statement or representation may also be "false" or "fraudulent" if it constitutes a half truth, or effectively conceals a material fact, with intent to defraud. A material fact is a fact that would be important to a reasonable person in deciding whether to engage in a particular transaction.

Good faith constitutes a complete defense to mail fraud. Good faith means the actor had a genuine belief that the information which was sent or given was true.

The plaintiff must **prove** by a preponderance of the evidence that one or more of the defendants knowingly and willfully devised or intended to devise a scheme to defraud which was substantially the same as the one alleged by the plaintiff and that the use of the United States Mail was closely related to the scheme in that one or more of the defendants either mailed something or caused it to be mailed in an attempt to execute or carry out the scheme. One causes the mails to be used if he does an act with knowledge that the use of the mails will follow in the ordinary course of business, or if he can reasonably foresee such use.

To establish that wire fraud has been committed, the plaintiff must prove by a preponderance of the evidence that the defendant used the telephone (telegraph) for the purpose of executing the scheme to defraud.

To establish wire fraud, it must be found that when the defendant performed an act, he knew, or reasonably could foresee, that the telephone or telegraph would be used to further a scheme or artifice to defraud.

With respect to the fourth element of Section 1962(a) of the RICO Act—use of income to acquire an interest in, establish or operate an enterprise—you must decide whether a defendant, directly or indirectly, used any part of the income derived from a pattern of racketeering activity to acquire an interest in, to establish, or to operate the alleged enterprise. The plaintiff must **prove** by a preponderance of the evidence that a defendant, or any of them, invested income in a specific enterprise and that income was acquired through the scheme in which they illegally used the mails (telephone) with respect to that particular alleged enterprise.

The plaintiff claims that each of the following is an enterprise which affects interstate or foreign commerce, and that each defendant participated in each alleged enterprise through a separate and distinct pattern of racketeering activity:
[Describe enterprise allegations here]

SECTION 1962(b)

II. The plaintiff also claims that the defendants have violated Section 1962(b) of RICO. To establish a violation of Section 1962(b), the plaintiff must **prove** by a preponderance of the evidence each one of the following four elements:

1. That an enterprise existed;

2. That the enterprise engaged in or had some effect upon interstate or foreign commerce;

3. That the defendant engaged in a pattern of racketeering activity; and

4. That through the pattern of racketeering activity the defendant acquired or maintained an interest in, or controlled the alleged enterprise.

[I have already instructed you about the first three elements of Section (b) in the previous discussion of Section (a). If you find that the alleged enterprise existed and engaged in or had some effect upon interstate or foreign commerce, and that the defendant engaged in a pattern of racketeering activity, then you must consider the fourth element.]

This fourth element that plaintiff must **prove** by a preponderance of the evidence is that the defendants, or any of them, through the pattern of racketeering activity, acquired or maintained an interest in, or control of one or more of the alleged enterprises. To **find** that the plaintiff established this fourth element, you must find by a preponderance of the evidence not only that the defendants, or any of them, had some interest in or control over one or more of the alleged enterprises, but also that this interest or control was associated with or connected to the pattern of racketeering activity.

SECTION 1962(c)

III. The plaintiff also has alleged that defendants have violated Section 1962(c) of RICO. To establish that the defendant has violated Section 1962(c), the plaintiff must prove each of the following five elements by a preponderance of the evidence:

1. That an "enterprise" existed; (footnote 31)
2. That the enterprise engaged in, or had some effect upon, interstate or foreign commerce;
3. That the defendant was employed by or associated with the alleged enterprise;
4. That the defendant knowingly and willfully conducted or participated, directly or indirectly, in the conduct of the affairs of the alleged enterprise; and
5. That the defendant did so knowingly and willfully through a pattern of racketeering activity.

"Employed by or associated with" means some minimal association with the alleged enterprise. The defendant must know something about the alleged enterprise's activities as they relate to the racketeering activity.

The fourth and fifth elements require that the plaintiff prove by a preponderance of the evidence that the defendant knowingly and willfully conducted or participated in the conducting of the affairs of the alleged enterprise through a pattern of racketeering activity. The plaintiff must prove by a preponderance of the evidence a sufficient connection between the enterprise, the defendant, and the alleged pattern of racketeering activity. In order to establish a sufficient connection between the enterprise, the defendant and the alleged pattern of racketeering activity, the plaintiff must prove by a preponderance of the evidence:

1. That the defendant participated in the operation or management of the enterprise itself in such a way, directly or indirectly, as to have played some part in directing the affairs of the enterprise. (footnote 32)
2. That the defendant in fact engaged in the pattern of racketeering activity as the plaintiff claims;
3. That the defendant's association with or employment by the enterprise facilitated his commission of the racketeering acts; and
4. That the commission of these predicate acts had some direct or indirect effect on the alleged enterprise.

A person does not violate the law by merely associating with or being employed by an otherwise lawful enterprise the affairs of which are being conducted by others through a pattern of racketeering activity in which he is not personally engaged.

SECTION 1962(d)

IV. Plaintiff also claims that the defendants violated Section 1962(d) of RICO because the defendants agreed or conspired to violate the RICO law.

A "conspiracy" in this sense is a combination or agreement of two or more persons to join together to accomplish an offense which would be in violation of Section 1962(a), (b), and/or (c) under the law that I have given you with respect to those sections.

To establish a violation of Section 1962(d), the plaintiff must prove by a preponderance of the evidence:

1. That two or more persons in some way or manner came to a mutual understanding to attempt to accomplish a common and unlawful plan, that is that while being employed by or associated with an enterprise, they engaged in activities which affected interstate or foreign commerce, or conducted the affairs of the alleged enterprise through a pattern of racketeering activity, in the manner charged; and
2. That the defendant knowingly and willfully became a member of a conspiracy by objectively indicating, through his words or actions, his agreement to conduct or participate, directly or indirectly, in the conduct of the affairs of an enterprise through a pattern of racketeering activity; and

3. That at least one of the conspirators committed at least one overt act during the existence of a conspiracy in an effort to accomplish some object or purpose of the conspiracy.

The definitions and instructions that I gave to you earlier as to "enterprise," "racketeering activity," "pattern of racketeering activity," "conduct through a pattern of racketeering activity" and "engaged in, or the activities of which affect, interstate or foreign commerce" apply here.

In regard to the first element of the claim of conspiracy, the evidence in the case need not show that the alleged members of the conspiracy entered into any express or formal agreement, or that they directly stated between themselves the details of the scheme and its object or purpose or the precise means by which the object or purpose was to be accomplished. Similarly, the evidence in the case need not establish that all of the means or methods alleged were in fact set forth in the indictment wherein fact agreed upon to carry out the alleged conspiracy, or that all of the means or methods which were agreed upon were actually used or put into operation. The plaintiff is not required to prove that all of the persons charged with being members of the conspiracy were such or that the alleged conspirators actually succeeded in accomplishing their unlawful objectives.

On the other hand, it is not enough if the evidence shows only that the alleged conspirators agreed to commit the acts of racketeering alleged by the plaintiff, without more, or that they agreed merely to participate in the affairs of the same alleged enterprise. Instead, the plaintiff must prove by a preponderance of the evidence that the alleged conspirators agreed to conduct or participate in the conduct of the affairs of the alleged enterprise and that they further agreed that their individual participations would be through two or more racketeering acts in furtherance of the affairs of the alleged enterprise. It does not matter that the alleged conspirators participated in the conduct of the affairs of the alleged enterprise through different, dissimilar or otherwise unrelated acts of racketeering activity, so long as the alleged racketeering acts would, if they were actually committed, create a "pattern of racketeering activity" as I defined that phrase to you.

As to the second element of the alleged conspiracy violation—knowing and willful membership in the conspiracy—the plaintiff must prove by a preponderance of the evidence:

1. That the defendant knew that the basic object of the alleged conspiracy was conducting the alleged enterprise through a pattern of racketeering activity;
2. That the defendant knowingly and willfully agreed to personally commit, or aid and abet the commission of at least two acts of racketeering as a "pattern of racketeering activity" as I have defined it; and
3. That the defendant knowingly and willfully agreed to conduct or participate in the conduct of the affairs of the alleged enterprise through this pattern of racketeering activity.

One may become a member of a conspiracy without full knowledge of all of the details of the unlawful scheme or without knowledge of the names and identities of all of the other alleged conspirators. If the plaintiff proves by a preponderance of the evidence that the particular defendant has knowingly and willfully joined the alleged conspiracy under the three standards I have just set forth, it does not matter that the defendant may not have participated in the earlier stages of the alleged conspiracy or scheme.

However, mere presence at the scene of some transaction or event, or mere similarity of conduct among various persons and the fact that they may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily prove the existence of a conspiracy. Also, a person who has no knowledge of a conspiracy, but who happens to act in a way which advances some object or purpose of a conspiracy, does not thereby become a conspirator.

The plaintiff need not prove that the defendant actually committed any of the acts that he may have agreed to commit in order to establish his membership in the conspiracy. You may consider only those racketeering acts alleged against the particular defendant by the plaintiff in determining whether that defendant has agreed to commit two acts of racketeering activity as a "pattern of racketeering activity." [These alleged racketeering acts are outlined as to each defendant on pages ___ of these instructions.]

To establish the third element, the plaintiff must prove by a preponderance of the evidence that at least one of the alleged conspirators committed at least one "overt act" during the existence of the alleged conspiracy. An "overt act" is a transaction or event, even one which may be entirely legal and innocent when considered alone, but which is knowingly committed by a conspirator in an effort to accomplish some object of the conspiracy. However, in accordance with my instructions during the trial, you may not consider any evidence of any alleged wrongful act, other than the alleged wrongful act which the plaintiff contends is a specific violation, as in any way bearing on the character of any defendant or as an indication that any defendant may have a propensity to commit any of the offenses charged.

In your consideration of this conspiracy claim, you should first determine whether the alleged conspiracy existed. If you conclude that a conspiracy did exist as alleged, you should next determine whether or not the defendant under consideration willfully became a member of that conspiracy.

In determining whether there was a conspiracy you may consider all the evidence in the case. If you find that there was a conspiracy then you may attribute the statements or acts of the _____, [insert names of co-conspirators] to the defendant. If you find that there was no conspiracy then you may not attribute the statements or acts of _____, [insert names of alleged co-conspirators] to the defendant.

If you find that no such conspiracy existed, then you must find for the defendants. However, if you are satisfied that such a conspiracy existed, you must determine who were the members of that conspiracy.

If you find that a particular defendant is a member of another conspiracy, but not the one charged by the plaintiff, then you must find for that defendant. In other words, you cannot find that a defendant violated Section 1962(d) unless you find that he was a member of the conspiracy charged, and not some other separate conspiracy.

CAUSATION

Finally, for the plaintiff to prevail under RICO, he must prove by a preponderance of the evidence that the defendant's RICO violations were the "proximate cause" of injury to the plaintiff's business or property. Therefore you must find that the plaintiff suffered an injury to his business or property and that the injury was caused by reason of the defendants' violation of RICO.

An injury or damage is proximately caused when the act played a substantial part in bringing about or actually causing injury or damage, and that the injury or damage was either a direct result or a reasonably probable consequence of the act.

A person is injured in his business when he suffers loss of money or profits or a reduction in the value or worth of his business.

A finding that the plaintiff was injured in his business or property because of the defendant's violation of RICO requires only that you find the plaintiff was harmed by the predicate acts.

However, to find that injury to the plaintiff's business or property was caused by reason of the defendants' violation of RICO, you must find that the injury to the plaintiff was caused by, and was a direct result of the defendants' violation of either Section 1962(a) or (b) or (c).

Therefore, you must find that the commission of the acts of racketeering, or the pattern of racketeering activity, or the conduct of the affairs of the enterprise through the pattern of racketeering activity directly resulted in the injury or played a substantial role in producing the injury.

In considering the issue of damages, if any, with respect to the RICO claims, you must assess the amount you find justified by a preponderance of the evidence as full, just and reasonable compensation for all of the damages to the plaintiff in his business or property. Damages may not be based on speculation because it is only actual damages (what the law calls compensatory damages) that you are to determine.

You should consider the amount of damages, if any, as to each defendant with respect to each RICO claim separately and independently from the amount of damages, if any, with respect to the other, non-RICO claims. For example, and by way of example only, if you determine that damages should be awarded to the plaintiff under his RICO claim, you should award full, just and reasonable compensation for damages under the RICO claim, without regard to the damages, if any, you might award under any other claim brought by the plaintiff.

The fact that I have given you instructions concerning the issue of the plaintiff's damages should not be interpreted in any way as an indication that I believe that the plaintiff should or should not prevail in this case. The interrogatories which you will answer contain several questions about damages under different laws and different theories of recovery. You should not draw any inference from the fact that a damage question has been asked. You must answer each Interrogatory separately and award damages, if appropriate, independently of damages which you may award under any other interrogatory.

SUGGESTED RICO JURY INTERROGATORIES

NOTE: These special interrogatories for RICO claims are provided as illustrations and guidelines to assist in preparation of special interrogatories for other claims.

SPECIAL ISSUE NO. 1

Do you find from a preponderance of the evidence that any defendant received any income derived, directly or indirectly, from a pattern of racketeering activity in which that defendant participated as a principal, and that the defendant used or invested, directly or indirectly, any part of that income, to acquire an interest in, establish, or operate an enterprise which is engaged in, or the activities of which affect, interstate commerce?
Answer as to each defendant and each enterprise.

SPECIAL ISSUE NO. 2

What sum of money, if any, do you find from a preponderance of the evidence would reasonably compensate the plaintiff for actual damages, if any, to his business or property proximately caused by the operation of an enterprise, if any you have so found, through a pattern of racketeering activity, if any you have so found?
Answer separately as to each defendant and enterprise.

SPECIAL ISSUE NO. 3

Do you find from a preponderance of the evidence that any defendant listed below, through a pattern of racketeering activity, acquired or maintained, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce?
Answer yes or no as to each defendant.

SPECIAL ISSUE NO. 4

What sum of money, if any, do you find from a preponderance of the evidence would reasonably compensate the plaintiff for actual damages, if any, to his business or property arising from any of the defendants' acquisition or maintenance of each enterprise?

Answer separately as to each defendant and enterprise.

SPECIAL ISSUE NO. 5

Do you find from a preponderance of the evidence that any defendant listed below was employed by or associated with an enterprise engaged in, or the activities of which affected, interstate or foreign commerce?
Answer as to each defendant and each enterprise.

SPECIAL ISSUE NO. 6

What sum of money, if any, do you find from a preponderance of the evidence would reasonably compensate the plaintiff for actual damages to his business or property arising from any defendant's employment by or association with each enterprise, if any you have so found?

Answer separately as to each defendant and each enterprise.

SPECIAL ISSUE NO. 7

Do you find from a preponderance of the evidence that any defendant entered into a conspiracy with any other person to accomplish any of the purposes described below?

Answer yes or no separately as to each category and defendant.

1. To receive income derived, directly or indirectly, from a pattern of racketeering activity in which at least one of the defendants participated as a principal, to use or invest, directly or indirectly any part of such income, or the proceeds of such income, in an acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in or the activities of which affects interstate or foreign commerce.
2. To acquire or maintain through a pattern of racketeering activity any interest in or control, directly or indirectly, of any enterprise which is engaged in, or the activities of which affects interstate or foreign commerce.
3. To conduct or participate, directly or indirectly, in the conduct of the affairs of an enterprise which is engaged in, or the activities of which affect, interstate commerce or foreign commerce through a pattern of racketeering activity, while employed by or associated with such enterprise.

END of "8.RICO"

31. ¹Under Section 1962(c), the RICO "person" and the RICO "enterprise" **cannot be one and the same**. However, under Sections 1962(a) and (b), "enterprise" and "person" may be the same and **need not be separate and distinct**. *In re Burzynski*, 989 F.2d 733 (5th Cir.1993); *Landry v. Air Line Pilots Association, et al.*, 901 F.2d 404 (5th Cir.1990). *See also*, *Liquid Air Corporation v. Rogers, et al.*, 834 F.2d 1297 (7th Cir.1987); *Petro-Tech, Inc. v. The Western Company of North America*, 824 F.2d 1349 (3d Cir.1987); *Haroco v. American National Bank and Trust Company of Chicago, et al.*, 747 F.2d 384 (7th Cir.1984); *Bowman v. Western Auto Supply Company, et al.*, 773 F.Supp. 174 (W.D.Mo.1991); *Harrison v. Dean Witter Reynolds, Inc., et al.*, 695 F.Supp. 959 (N.D.Ill.1988).

32. ²The United States Supreme Court adopted the "operation and management" test of the Eighth Circuit in defining the scope of the meaning of "to conduct or participate ... in the conduct of such enterprise's affairs through a pattern of racketeering activity." *Reves v. Ernst & Young*, 507 U.S. 170, 113 S.Ct. 1163, 122 L.Ed.2d 525 (1993).



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.

Vs.

UDO BIRNBAUM

Vs.

G. DAVID WESTFALL
STEFANI PODVIN
CHRISTINA WESTFALL

) (IN THE DISTRICT COURT
) ()
) (294TH JUDICIAL DISTRICT
) ()
) (VAN ZANDT COUNTY, TEXAS
) ()
) ()
) ()
) ()
) ()
) ()
) ()

FILED FOR RECORD
02 SEP - 3 PM 12:59
DIST. CLERK VAN ZANDT CO. TEXAS

FIRST AMENDED NOTICE OF APPEAL
Regarding the \$59,280.66 [First] "FINAL JUDGMENT":
*"THIS JUDGMENT RENDERED ON APRIL 11, 2002, AND SIGNED THIS 30TH day of July, 2002.
Paul Banner, JUDGE PRESIDING"*

(Later \$62,885.00 [Second] JUDGMENT:
*"THIS JUDGMENT RENDERED ON JULY 30, 2002, AND SIGNED THIS 9TH day of August, 2002.
Paul Banner, JUDGE PRESIDING ")*

I, UDO BIRNBAUM, within 30 days of the Court "disposing of all the issues between all of the parties", at this time amend my August 28, 2002 *Notice of Appeal*, to include this additional matter:

- 7. That this \$59,280.66 [First] "FINAL JUDGMENT" of April 11, 2002 is null and void, because it has been superceded by a later \$62,885.00 [Second] JUDGMENT of July 30, 2002 (*"THIS JUDGMENT RENDERED ON JULY 30, 2002, AND SIGNED THIS 9TH day of August, 2002"*)
- 8. That the \$62,885.00 [Second] JUDGMENT" of July 30, 2002 is unlawful, null and void, because I was entitled to jury determination as to whether I was damaged by the Westfalls' "pattern of racketeering activity", or whether my claim against them was indeed "frivolous".

I also appeal upon the below and previously noticed matters:

1. The denial of my *Motion for Recusal of Hon. Paul Banner*
2. The granting of summary judgment upon my civil RICO cross-claim against G. David Westfall, Christina Westfall, and Stefani Podvin, as pleaded in *Defendant's Amended Answer, Counterclaim, and Cross-Complaint*.
3. The granting of summary judgment upon my civil RICO complaint as pleaded in *Udo Birnbaum's Amended Third Party Plaintiff civil RICO Claim Against G. David Westfall, Christina Westfall, and Stefani Podvin*.
4. The denial of my complaint that the entire conduct of the Westfalls be turned over to the U.S. Justice Department.
5. The \$59,280.66 Final Judgment against me as signed by this Court on July 30, 2002.
6. The "frivolous lawsuit sanction" against me to pay the Westfalls a total of \$62,885.
7. Such other costs as the Court may hold against me

I reserve the right to again amend this Notice of Appeal at such time as the Court may issue yet another judgment.

Respectfully Submitted,

Udo Birnbaum
UDO BIRNBAUM, *Pro Se*
540 VZCR 2916
Eustace, Texas 75124
(903) 479-3929

Not receiving

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this document has been served via Regular Mail and ~~FAX~~ on this the 3 day of September, 2002, on Frank C. Fleming, Law Office of Frank C. Fleming, 6611 Hillcrest, Suite 305, Dallas, Texas 75205-1301.

Udo Birnbaum
UDO BIRNBAUM



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 Slott

No. 00-00619

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

Vs.

UDO BIRNBAUM

Vs.

G. DAVID WESTFALL
STEFANI PODVIN
CHRISTINA WESTFALL

) (IN THE DISTRICT COURT
) ()
) (294TH JUDICIAL DISTRICT
) ()
) (VAN ZANDT COUNTY, TEXAS
) ()
) ()
) ()
) ()
) ()
) ()
) ()
) ()

FILED FOR RECORD
02 SEP - 3 PM 12:59
DIST. CLERK VAN ZANDT CO. TEXAS
BY _____

NOTICE OF APPEAL

Regarding the \$62,885.00 [Second] JUDGMENT

"THIS **JUDGMENT** RENDERED ON JULY 30, 2002, AND SIGNED THIS 9TH day of August, 2002". Paul Banner, JUDGE PRESIDING

(Earlier \$59,280.66 [First] "FINAL JUDGMENT":

"THIS **JUDGMENT** RENDERED ON APRIL 11, 2002, AND SIGNED THIS 30TH day of July, 2002". Paul Banner, JUDGE PRESIDING)

I, UDO BIRNBAUM, within 30 days of the indicated judgment, file this

Notice of Appeal upon the following matters:

1. This \$62,885.00 [Second] JUDGMENT" of July 30, 2002 is unlawful, null and void, because I was entitled to jury determination as to whether I was damaged by the Westfalls' "pattern of racketeering activity", i.e. that my claims against them were valid, and not "frivolous" as this Court found.
2. The denial of my *Motion for Recusal of Hon. Paul Banner*
3. The denial of my complaint that the entire conduct of the Westfalls be turned over to the U.S. Justice Department.
4. Such other costs as the Court may hold against me

I reserve the right to amend this Notice of Appeal at such time as the Court may issue yet another judgment.

Respectfully Submitted,

Udo Birnbaum

UDO BIRNBAUM, *Pro Se*
540 VZCR 2916
Eustace, Texas 75124
(903) 479-3929

not receiving

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this document has been served via Regular Mail and ~~FAX~~ on this the 3 day of September, 2002, on Frank C. Fleming, Law Office of Frank C. Fleming, 6611 Hillcrest, Suite 305, Dallas, Texas 75205-1301.

Udo Birnbaum
UDO BIRNBAUM

Details in:

Request for Findings of Facts and Conclusions of Law

Motion to Reconsider the \$59,280.66 Judgment

Motion to Reconsider the \$62,885.00 "Frivolous Lawsuit" Sanction Against Me

Motion for New Trial

Supplement to Motion for New Trial

First Amended Notice of Appeal.

Respectfully submitted

UDO Birnbaum

UDO BIRNBAUM, *Pro Se*

540 VZ CR 2916

Eustace, TX 75124

(903) 479-3929

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this document has been served via Regular Mail and FAX on this the 1 day of October, 2002, on Frank C. Fleming, Law Office of Frank C. Fleming, 6611 Hillcrest, Suite 305, Dallas, Texas 75205-1301.

UDO Birnbaum

UDO BIRNBAUM



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	§	IN THE DISTRICT COURT
G. DAVID WESTFALL, P.C.	§	
Plaintiff/Counter-Defendant	§	
v.	§	
UDO BIRNBAUM	§	294 th JUDICIAL DISTRICT
Defendant/Counter-Plaintiff and	§	
Third Party Plaintiff	§	
v.	§	
G. David Westfall, Christina Westfall,	§	
and Stefani Podvin	§	
Third Party Defendants	§	VAN ZANDT COUNTY, TEXAS

NOTICE OF OFFICIAL OPPRESSION AND UNLAWFUL JUDGMENTS AGAINST ME

TO WHOSOEVER: I hereby provide Notice of attached "Exhibit A" titled:

Re: Retaliation, official oppression, jury tampering, tampering with government records, and racketeering in the 294th District Court of Van Zandt County by Betty Davis, Tommy Wallace, and others.

SUCH COMPLAINT having been noted as received on September 19, 2002 by the District Attorney, Van Zandt County, Texas via Certified Mail Number 7002 0510 0001 5190 0586.

I HEREBY GIVE NOTICE, TO WHOSOEVER, THAT ANY AND ALL JUDGMENTS AGAINST ME IN THIS CASE WERE UNLAWFULLY OBTAINED BY OFFICIAL OPPRESSION.

Filed for the record,

Udo Birnbaum

UDO BIRNBAUM, Pro Se

540 VZ CR 2916

Eustace, TX 75124

(903) 479-3929

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this document has been served via Regular Mail and FAX on this the 9 day of October, 2002, on Frank C. Fleming, Law Office of Frank C. Fleming, 6611 Hillcrest, Suite 305, Dallas, Texas 75205-1301.

Udo Birnbaum
UDO BIRNBAUM

September 18 2002

Criminal District Attorney
Courthouse Annex
Canton, Texas 75103

CERTIFIED

Re: Retaliation, official oppression, jury tampering, tampering with government records, and racketeering in the 294th District Court of Van Zandt County by Betty Davis, Tommy Wallace, and others.

Dear Van Zandt Criminal District Attorney:

This whole matter upon me started with a "beaver dam" frivolous lawsuit against me in 1995. When I started complaining of the fabrication, the whole court process became a "must-win" conspiracy against me for speaking out against corruption in the 294th District Court.

In violation of the oaths of their office and duties of their positions, the above participated in a scheme to defraud me of honest judicial service. After seven (7) years the scheme is still ongoing upon me. It has cost me and the taxpayers and will continue to cost.

I hereby officially complain of having become the victim of the following:

1. **Retaliation and official oppression in the 294th District Court for having spoken out about corruption in that court**
2. **Jury tampering in the 294th District Court**
3. **Tampering with government records in the 294th District Court**
4. **A racketeering scheme in the 294th District Court to defraud of the right to honest judicial service (violation of 18 U.S.C. § 1961 *et seq.* ("RICO"))**

I ask for assistance in letting me show my evidence to the Grand Jury.

As a sampler of the ongoing lawlessness in the 294th District Court, I am providing the following documents with this complaint:

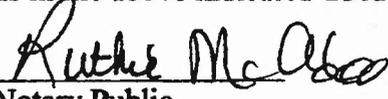
***Motion for New Trial and Supplement thereto (w/ exhibits)
Request for Findings and Conclusions***

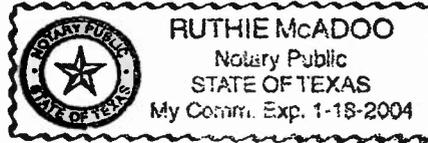
Despite an all week trial and a verdict in the "beaver dam" matter in 1998, the case is not resolved as of this day.


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

STATE OF TEXAS
COUNTY OF VAN ZANDT

Before me, a notary public, on this the 18th day of September, 2002 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 the matters in this Complaint to the Van Zandt District Attorney, as well as in the above indicated documents, are true and correct.


Notary Public



November 11, 2002

Court Reporting Services of Tyler
PO Box 120100
Tyler, TX 75712

also fax to 903-596-7809

Att: D. Keith Johnson
Official Court Reporter
294th Judicial District Court

Re: *The Law Offices of G. David Westfall, P.C. vs. Udo Birnbaum*
Cause 00-619, 294th District Court of Van Zandt County

Mr. Johnson:

Per your request enclosed is check for \$175.00 toward the transcript.

However I am not sure whether the request I gave you said "closing argument", or "argument". What I need is the entire argument (both parties) after the jury instructions. So please adjust the amount if necessary, and let me know.

Sincerely,

Udo Birnbaum

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

← also receives fax

att: Keith Johnson 11-5-02 quote

No. 00-00619

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

Vs.

UDO BIRNBAUM

Vs.

G. DAVID WESTFALL
STEFANI PODVIN
CHRISTINA WESTFALL

) (IN THE DISTRICT COURT
) (294TH JUDICIAL DISTRICT
) (VAN ZANDT COUNTY, TEXAS
) ()
) ()
) ()
) ()
) ()
) ()
) ()
) ()

FILED FOR RECORD
NOV 21 PM 3:17
CLERK OF DISTRICT COURT
VAN ZANDT COUNTY, TEXAS

**APPELLANT UDO BIRNBAUM'S DESIGNATION
FOR THE CLERK'S RECORD TO THE FIFTH CIRCUIT**

UDO BIRNBAUM hereby designate the following documents to be included in the Clerk's Record to the Texas Fifth Court of Appeals:

Docket Sheet

Computer printout of documents filed in this cause

Index of names or numbers of each folder in this case

(designating the general contents of each folder, such as "from date xxx to xxx", and particularly regarding the designated **Appendix** filed with my response to the motions for summary judgment)

Plaintiff's Original Petition	9-21-00
Defendant's Answer, Counterclaim, and Cross-Complaint (no exhibits)	10-30-00
Plaintiff G. David Westfall's Original Answer etc	10-30-00
Plaintiff The Law Offices of G. David Westfall, P.C.'s Original Answer etc	10-30-00
Christina Westfall's Original Answer to Defendant's Counterclaim	10-30-00
Stefani Podvin's Original Answer to Defendant's Counterclaim	12-01-00
Plaintiff's Motion for Sanctions	12-11-00
Defendant's Response to Plaintiff's Motion for Sanctions, etc	12-19-00
Motion for Appointment of Auditor Pursuant to Rule 172 RCP etc	12-26-00
Supplement to Motion for Appointment of Auditor, etc	01-08-01
Defendant's Amended Answer, Counterclaim, and Cross-Complaint	07-06-01

Udo Birnbaum's Amended Third Party Plaintiff civil RICO claim, etc	07-11-01
Counter Defendant Law Office etc MSJ (Motion Summary Judgment)	08-07-01
Third Party Defendant Stefani Podvin MSJ	08-17-01
Third Party defendant Christina Westfall MSJ	08-17-01
Udo Birnbaum's Response to ... Law Office MSJ	08-31-01
Udo Birnbaum's Response to G. David Westfall's MSJ	08-31-01
Udo Birnbaum's Response to ... Stefani Podvin's MSJ	08-31-01
Udo Birnbaum's Response to ... Christina Westfall's MSJ	08-31-01
Appendix to Udo Birnbaum's Response to MSJ (Index for Exhibits 1-18)	08-31-01
<u>Exhibit 9 ONLY</u> ("Regarding G. David Westfall Conduct", includes U. S. Fifth Circuit civil RICO pattern jury instructions	
The Law Office etc Objections to the Summary Judgment Evidence etc	09-07-01
G. David Westfall's Objections to the Summary Judgment Evidence etc	09-07-01
Stefani Podvin's Objections to the Summary Judgment Evidence, etc	09-07-01
Christina Westfall's Objections to the Summary Judgment Evidence, etc	09-07-01
Plaintiff's First Amended Original Petition	09-04-01
Defendant's Supplemental Amended Answer, Counterclaim, and Cross Motion for Recusal of Hon. Paul	09-14-01 09-10-01
Letter re "Motions for Summary Judgment of the Law Offices, etc" [Birnbaum proposed] Order Denying Motions for Summary Judgment	09-20-01 09-20-01
ORDER SUSTAINING MOTIONS FOR SUMMARY JUDGMENT	11-13-01
PRETRIAL ORDER	11-13-01
The Law Offices ... Objections ... and Motion for Sanctions	12-26-01
Defendant's Response to Plaintiff's [Second] Motion for Sanctions	01-04-02
Birnbaum's Affirmative Defense of Fraud requested jury issues	04-01-02
Birnbaum's Texas Deceptive Trade Practices Act requested jury issues	04-01-02
Plaintiff's Requested Jury Questions	04-03-02
Defendant Birnbaum's Objections to Plaintiff's Requested Jury Questions	04-04-02
Birnbaum's Objections to today's Plaintiff's Court Charge (handwritten & filed)	04-11-02
Court's Charge with Verdict	04-11-02
Defendant Birnbaum's Motion for Entry of Judgment (w take nothing judgm)	04-16-02
Defendant Birnbaum's Amended Motion for Entry of Judgment w/ attachments	04-29-02
[Dismissed parties'] Motion for Sanctions	05-09-02
Birnbaum's Response to [The Westfalls'] Motion for Sanctions...	
<u>"Let the U.S. Justice Department Determine the Facts"</u>	05-10-02
Suggestion of Death (of Plaintiff Law Office) w/ attachments	06-24-02

Motion for Sanctions on Law Office w/ attachments	06-24-02
Motion for Sanctions of Frank C. Fleming	06-24-02
FINAL JUDGMENT	07-30-02
Oral Pleading in Writing	07-30-02
Closing Pleading in Writing	07-30-02
ORDER ON MOTIONS FOR SANCTIONS (another JUDGMENT)	08-09-02
(not "signed with the clerk" till Aug. 21, 2002)	
Rule 276 Request for Endorsement of "refusals' and "modifications"	08-19-02
Notice of Appeal	08-19-02
Motion to reconsider the \$59,280.66 Judgment	08-19-02
Motion to Reconsider the \$62,885.00 "frivolous lawsuit" Sanction against me	08-19-02
Motion for New Trial	08-28-02
Supplement to Motion for New Trial	08-29-02
First Amended Notice of Appeal re the \$59,280.66 [First] "Final Judgment"	09-03-02
Notice of Appeal re the \$62,885.00 [Second] Judgment	09-03-02
RICO pattern jury instructions	
Notice of Past Due Findings of Fact and Conclusions of Law	10-01-02
Letter to Clerk regarding filing of criminal complaint with the District Attorney	10-08-02
(re Official Oppression and Unlawful Judgements)	09-18-02

Sincerely,

Udo Birnbaum

UDO BIRNBAUM, *Pro Se*

540 VZCR 2916

Eustace, TX 75124

(903) 479-3929 (phone and fax)

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this document has been served via Regular Mail on this the 25 day of October, 2002, on Frank C. Fleming, Law Office of Frank C. Fleming, 6611 Hillcrest, Suite 305, Dallas, Texas 75205-1301.

Udo Birnbaum
UDO BIRNBAUM

B I L L O F C O S T
DISTRICT COURT
VAN ZANDT COUNTY, TEXAS

CAUSE NO. 00-00619
294TH DISTRICT COURT

LAW OFFICE OF G.DAVID WESTFALL
VS
UDO BIRNBAUM

CLERK'S FEE	1117.00
JURY FEE	30.00
OPTION CLERK FEE	<u>11.60</u>
TOTAL COST OF CAUSE	1158.60
Paid By Deposit: Plaintiff	.00
Defendant	<u>121.00</u>
TOTAL DEPOSITION COST	.00
Paid By: Plaintiff	.00
Defendant	<u>.00</u>
Amount due from Plaintiff/Defendant	<u>1037.60</u>

⊕ Paid 3-25-03

THE STATE OF TEXAS)
County of Van Zandt)

I, Karen Wilson, District Clerk of the 294TH DISTRICT COURT in and for said County and State, hereby certify the foregoing to be a true and correct account of the costs in the within entitled and numbered cause to this date.

Witness my hand and seal of the said court affixed at the office in the City of Canton this 24th day of March 2003.

BY *Karen Wilson*, Deputy

ORIGINAL MAILED TO:

KAREN WILSON
District Clerk
121 East Dallas St. Room 302
Canton, Tx. 75103

COPY MAILED TO:

CLERK'S CERTIFICATION

THE STATE OF TEXAS)
COUNTY OF VAN ZANDT)

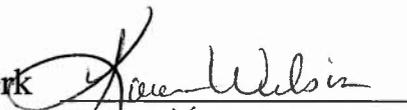
I, Karen Wilson, Clerk of the 294th Court of Van Zandt County, Texas do hereby certify that the documents contained in this record to which this certification is attached are all of the documents specified by Texas Rule of Appellate Procedure 34.5(a) and all other documents timely requested by a party to this proceeding under Texas Rule of Appellate Procedure 34.5(b)

GIVEN UNDER MY HAND AND SEAL at my office in Van Zandt County, Texas this 24th day of March, 2003.

Signature of clerk

Name of Clerk

Title


Karen Wilson
District Clerk