

REPORTER'S RECORD
VOLUME 1 OF 1 VOLUME

TRIAL COURT CAUSE NO. 07-00168

4	UDO BIRNBAUM,)	IN THE DISTRICT COURT
5	Plaintiff,)	
6	VS.)	VAN ZANDT COUNTY, TEXAS
7)	
8	RICHARD RAY, ET AL)	
9	Defendants.)	294TH JUDICIAL DISTRICT

MOTION FOR PROTECTION

AND

MOTION FOR DISCOVERY

COPY

20 On the 20th day of March, 2008, the following

21 proceedings came on to be heard in the above-entitled

22 and numbered cause before the Honorable

23 Andrew J. Kupper, Judge presiding, held in Canton,

24 County of Van Zandt, State of Texas;

25 Proceedings reported by machine shorthand.

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REPRESENTING THE DEFENDANTS

I N D E X
VOLUME 1
(MOTION FOR PROTECTION AND
MOTION FOR DISCOVERY)

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1 *** P R O C E E D I N G S ***

2 (March 20, 2008; 1:30 p.m.)

3 THE COURT: Thank you. Be seated. This is
4 Cause Number 07-00168, Udo Birnbaum versus Richard Ray
5 and others, and Richard Ray versus Udo Birnbaum.

6 We're here on a Motion for Protection that
7 Mr. Elliott has filed having to do with a deposition
8 notice to Mr. Elliott, or to Mr. Elliott and Ms.
9 Thatcher; both?

10 MR. ELLIOTT: Both, Judge.

11 THE COURT: And we're also here on
12 Mr. Birnbaum's Rule 190.4 Motion for Discovery control
13 plan, and I guess some other matters to take care of as
14 we move along.

15 Mr. Elliott, you may proceed on your
16 motion.

17 MR. ELLIOTT: Your Honor, I've been
18 practicing with Mr. Ray as a partner for about five or
19 six years and as an attorney associate since, like,
20 1999. This suit started in the mid '90s. And in all
21 honesty, it was something that just kind of lingered
22 along, and somehow, I always thought it was something we
23 could just kind of chuckle about, but now I've turned up
24 as a defendant in this. And at the same time, I think
25 Mr. Birnbaum believes he's properly served me. As of

1 today when I contacted the clerk's office there hadn't
2 been a proper return of service. No one's actually come
3 out and served me, and I don't think they've got it done
4 properly through the mail. And the same holds true for
5 Ms. Thatcher.

6 In addition to that, Judge, I haven't been
7 served with a subpoena for a deposition. No one's
8 actually come and served me with a subpoena. I haven't
9 received anything by certified mail that would have been
10 properly filed with the Court.

11 And then, third, Judge, even if
12 Mr. Birnbaum does come out and serve me with a subpoena,
13 any knowledge that I have in this case has been as a
14 defense attorney for Mr. Ray. And all the knowledge
15 that I have of Mr. Ray should be protected by the
16 attorney-client privilege, which is his privilege to
17 waive, not mine. So under those reasons, both
18 Ms. Thatcher and I have filed this Motion for
19 Protection.

20 My first inclination was since I hadn't
21 been properly served, if I just didn't show up, it
22 wasn't going to matter anyway; he wasn't going to be
23 able to file for sanctions because I hadn't been
24 properly served.

25 However, seeing as how I've been brought

1 into this suit simply by the -- simply for the reason
2 that I was representing Mr. Ray, and I assume Ms.
3 Thatcher, because her name's on the letterhead, and
4 maybe she signed the pleading if I was out -- now that
5 we're both in this, I figure it was best to be proactive
6 and bring this to your attention instead of sitting back
7 and waiting to see what Mr. Birnbaum does next. So with
8 that said, that's our Motion for Protection.

9 I don't necessarily know if the Court needs
10 to -- I would like to have an order granting my Motion
11 for Protection, but since I haven't been properly
12 served, I don't even know if the Court doesn't enter an
13 order that I still have to show up. But I just wanted
14 to bring this to the Court's attention.

15 THE COURT: Mr. Birnbaum?

16 MR. BIRNBAUM: First thing I'm going to
17 address is some of the things he mentioned. And you can
18 look at it here --

19 THE COURT: I can't hear you.

20 MR. BIRNBAUM: Okay. I'm sorry. First, I
21 want to address what Mr. Elliott just said. He said he
22 entered a Motion for Protection for himself and
23 Ms. Thatcher, and the Motion for Protection, I believe,
24 does not mention Ms. Thatcher at all. He said this
25 stuff started in the mid '90s. He didn't say what it

1 is. I think he described it properly; it's just
2 something they could chuckle about, and now he finds
3 himself being a defendant after 13 years or something
4 like that. The problem is they were chuckling about it.

5 He says he has not received a subpoena
6 for -- I presume that is for service, but if you look at
7 the Motion for Protection, it says right there on the
8 face: Motion for Protection, comes now defendant, Joel
9 C. Elliott. And it is signed on the bottom. It makes
10 no mention of Thatcher, like he just said -- makes no
11 mention, and he only signs it as Joel Elliott, attorney
12 for defendant.

13 Now, it's not real clear what defendant is.
14 Defendant has so far been Mr. Ray. But in this
15 particular case if he comes now -- come defendant, Joel
16 Elliott, he's appearing in this Court, before this
17 Court, appearing in this Cause Number to tell you he's
18 not in this Cause Number.

19 THE COURT: How did he get in,
20 Mr. Birnbaum?

21 MR. BIRNBAUM: I added him to the suit upon
22 his counterclaim.

23 THE COURT: How did you do that?

24 MR. BIRNBAUM: I amended the petition.

25 THE COURT: You amended the petition?

1 MR. BIRNBAUM: Yes, sir.

2 THE COURT: And what did you do after that?

3 MR. BIRNBAUM: Well, I notified Mr. Ray
4 that -- I notified Mr. Ray that there were other parties
5 in it, and this person has knowledge of it as Mr. Ray's.
6 So, yes, there is a formality of this. In general, when
7 you have a serving you go to the sheriff, someone that
8 runs around with a gun that people --

9 THE COURT: Are we talking about the second
10 amended original petition?

11 MR. BIRNBAUM: Yes, sir.

12 THE COURT: And you didn't sign it?

13 MR. BIRNBAUM: Of course, I signed it.

14 THE COURT: Well, the one that I'm looking
15 at is not signed.

16 MR. BIRNBAUM: Well, if it is -- that is
17 correct. I saved you a copy.

18 THE COURT: I'm talking about in the file.
19 I'm looking at it right here in the file.

20 MR. BIRNBAUM: Should be signed. If it's
21 not, it's a screw-up by me or by somebody.

22 THE COURT: Well, it's a non-pleading if
23 you don't sign it.

24 MR. BIRNBAUM: Well, in that particular
25 case, a person is allowed to -- upon notice that it is

1 not signed, he is allowed to correct --

2 THE COURT: That's true.

3 MR. BIRNBAUM: -- that mistake.

4 THE COURT: But until he has signed it,
5 it's not a plea, because it's required by the Rules of
6 Civil Procedure that all pleadings be signed.

7 MR. BIRNBAUM: Well, if I didn't, it's --

8 THE COURT: You want to look at it and see?
9 See if I'm lying to you?

10 MR. BIRNBAUM: I'm really surprised.

11 THE COURT: Unless there's something I'm
12 missing, here it is, unless there's another one in here.
13 I've just --

14 MR. BIRNBAUM: I'm really surprised at
15 that.

16 THE COURT: You think somebody did that to
17 you?

18 MR. BIRNBAUM: No, I did that myself.

19 THE COURT: Okay. Thank you.

20 MR. BIRNBAUM: Screw-up.

21 THE COURT: It happens. I've done it
22 myself.

23 MR. BIRNBAUM: I've got some copies -- you
24 know, I don't think the Court has any reason to believe
25 that I would intentionally not sign it.

1 THE COURT: I don't think -- absolutely.

2 MR. BIRNBAUM: This is the copies I've made
3 and all of the copies that I've screwed up.

4 THE COURT: Be sure and file a new one with
5 his signature on it.

6 MR. BIRNBAUM: Yes, sir. All right. I'll
7 move on with this.

8 THE COURT: Did you have Mr. Elliott and
9 Ms. Thatcher served?

10 MR. BIRNBAUM: I did not have them served
11 through the sheriff's office. I notified them that they
12 had been added because by my sending Mr. Ray and them
13 acting attorney, they have full knowledge of it. They
14 know what it means to be added to a lawsuit. They know
15 what duties they have. And the normal person out there
16 who only recognizes a sheriff with a gun, he has to be
17 told that they really ought to come down to the
18 courthouse and what they ought to do.

19 THE COURT: Mr. Birnbaum, at the same time
20 as I don't exempt you from the rules of being an
21 attorney, I don't exempt them from the rules of being an
22 individual person.

23 MR. BIRNBAUM: I understand.

24 THE COURT: So you got to serve him.

25 MR. BIRNBAUM: Okay.

1 THE COURT: You can do it by certified
2 mail.

3 MR. BIRNBAUM: Can I do it by certified
4 mail?

5 THE COURT: I'm telling you you can do it
6 by certified mail.

7 Isn't that right, Mr. Elliott?

8 MR. ELLIOTT: Your Honor, I think that may
9 be what he's tried to do most recently since he's
10 figured out what I've done. However, he can't --

11 THE COURT: You have to be served by an
12 officer, either a sheriff or a private server. I don't
13 practice law. I don't know what the rules on service
14 are. I just know that it's got to be served.

15 MR. ELLIOTT: He hasn't been able to
16 properly serve us even by certified mail. He's sent it
17 certified, but he hasn't followed the rules to get his
18 return of citation filed.

19 THE COURT: I can't advise you,
20 Mr. Birnbaum. I'm trying to not cross over into
21 anything here.

22 MR. BIRNBAUM: Yes, sir.

23 THE COURT: Let me go on. Forget that part
24 for a minute. You've asked for a discovery control
25 plan? Is that what you really want?

1 MR. BIRNBAUM: Let me -- just a minute.

2 THE COURT: Oh, I thought you were through.

3 MR. BIRNBAUM: I was not through with this.

4 If he's talking about me and Ms. Thatcher both simply by
5 representing -- just because their name is on the

6 letterhead -- her name is not just on the letterhead.

7 Her name is listed as an attorney, and several motions
8 in this case have been actually signed by --

9 THE COURT: Why, as their attorneys, are
10 they added as parties?

11 MR. BIRNBAUM: For aiding and abetting.

12 THE COURT: For aiding and abetting?

13 MR. BIRNBAUM: Mr. Ray.

14 THE COURT: Because they're his attorney?

15 MR. BIRNBAUM: No, not because they are his
16 attorney at all. Because they are telling untruths in
17 the Court.

18 THE COURT: Well, but these are just
19 allegations in a pleading, Mr. Birnbaum.

20 MR. BIRNBAUM: Well, those are my
21 allegations.

22 THE COURT: No. What I'm saying is,
23 they're allegations that attorneys make. It doesn't
24 mean that they're true.

25 MR. BIRNBAUM: Well, of course, they are.

1 Yes, Your Honor. If you look at the RICO statute, it
2 has aiding and abetting. But for aiding and abetting,
3 it has to be done through the enterprise that was the
4 RICO case in the first place, and that's the case over
5 here. I'm alleging that Mr. Ray did these things.

6 You can't do RICO violation if you have a
7 lemonade stand in the street. It has to be something
8 affect interstate or foreign commerce. This Court
9 affects -- I've said, this is the enterprise. That
10 doesn't mean it's bad. It simply says he's
11 participating in the conduct of it as an attorney. If
12 Mr. Ray has not been an attorney, I would not have been
13 able to file this suit.

14 And by the same reason, Mr. Ray and
15 Mr. Elliott and Ms. Thatcher would not have been able to
16 aid and abet except as officers of the Court. If they
17 simply just have a lemonade stand out there, I couldn't
18 get them for aiding and abetting Mr. Ray by getting a
19 glass of lemonade or putting air into his tires. The
20 case law on the RICO statute --

21 THE COURT: So anybody that represents
22 Mr. Ray is aiding and abetting?

23 MR. BIRNBAUM: No. No. When their
24 conscience arises that they violated their oath of
25 office and don't tell the truth.

1 THE COURT: But, Mr. Birnbaum, if they're
2 representing their client and their client tells them
3 something, aren't they duty-bound to believe their
4 client?

5 MR. BIRNBAUM: Not if they're a partner.

6 THE COURT: If they're a partner it's
7 different?

8 MR. BIRNBAUM: Then they have to make a
9 reasonable rule of inquiry, and this person has seen the
10 evidence and represented summary judgment that started
11 the beavers, and Mr. Ray turned it into a case of the --
12 remember, we had the Motion for Summary Judgment? You
13 saw the evidence; he saw the evidence, and then he comes
14 up --

15 THE COURT: Mr. Birnbaum, that's -- those
16 are allegations. Those are your claims of evidence.

17 MR. BIRNBAUM: Well, that's what a pleading
18 is. That's how --

19 THE COURT: You're exactly right. An
20 allegation, right? Doesn't mean it's true.

21 MR. BIRNBAUM: No, it doesn't mean it's
22 true at all, but it gives you cause of action.

23 THE COURT: Not necessarily. It does not
24 give you a cause of action. But you are pleading your
25 request for a cause of action.

1 MR. BIRNBAUM: Judge, how familiar are you
2 with the RICO statute, or have you read my pleading?

3 THE COURT: I've read everything you've
4 sent me.

5 MR. BIRNBAUM: You noticed that it was not
6 signed, so I imagine you did get to the end of it.

7 THE COURT: Yes, sir.

8 MR. BIRNBAUM: Thank you.

9 THE COURT: Just now. I just now saw it.
10 You did not send it to me. And anything that's been
11 transmitted to me I've signed. I don't come over here
12 to Canton every day to see if anything's in the
13 pleadings.

14 MR. BIRNBAUM: As part of the Motion for
15 Rule 194 setting the discovery control plan, I attached
16 and gave to Pam the motion and gave you a copy of the
17 motion.

18 THE COURT: I didn't get a copy of the
19 motion. I found out about it when Pam called me this
20 week. Actually, I called her when I got his motion.

21 MR. BIRNBAUM: Well, it's got the date on
22 here on March the 11th. So maybe she called you about
23 that.

24 THE COURT: She did not call me. I called
25 her. When I received --

1 MR. BIRNBAUM: Okay. I gave Pam and the
2 Court my motion for -- let me get it over here. Okay.
3 Have you received my motion at all?

4 THE COURT: I just looked at it just now.
5 No, I have not received it.

6 MR. BIRNBAUM: All right. It says: Now
7 claiming on March, I filed original petition. This
8 January 21, they filed the counterclaim, and then I
9 said, On March 11th, I filed second amended petition and
10 I have at the front -- it says: Plaintiff comes now
11 counter defendant, Udo Birnbaum, respectfully shows the
12 Court the following, attaching the named documents by
13 reference.

14 So I did not refile them in the Court, but
15 I provided you a copy through Pam of both of these
16 documents.

17 THE COURT: Okay. That's fine. I don't
18 disagree with you at all, Mr. Birnbaum. You asked me a
19 question, and I said, No, I did not personally receive
20 them in Kaufman, Texas. The first time I've seen your
21 second amended petition -- I think that's what you
22 called it.

23 MR. BIRNBAUM: Yes.

24 THE COURT: And this request for a
25 discovery control plan was today.

1 MR. BIRNBAUM: Okay. That, of course, is
2 their counterclaim.

3 THE COURT: But I knew it existed. I knew
4 that your request existed because Pam told me. And I
5 said, Well, set that today along with Mr. Elliott's
6 request for protection.

7 MR. BIRNBAUM: Well, I gave it to Pam also.

8 THE COURT: Do you know what a discovery
9 control plan is?

10 MR. BIRNBAUM: Yes, sir.

11 THE COURT: Okay. What is it?

12 MR. BIRNBAUM: Is that a -- on a motion the
13 party -- the judge shall, if other matters arise that
14 require the thing and it has something to do with --
15 well, I have the number; the new matters need to be
16 incorporated into it.

17 THE COURT: And what new matters do we
18 have?

19 MR. BIRNBAUM: We have a new pleading from
20 over there. We have a new pleading of libel, slander,
21 intense -- and emotional distress.

22 THE COURT: Okay. And so how would you
23 deal with that under a discovery control plan?

24 MR. BIRNBAUM: You're the one that sets the
25 discovery control plan.

1 THE COURT: No, no. How are you requesting
2 me to deal with the discovery control plan?

3 MR. BIRNBAUM: That you set the trial, the
4 pretrial, set a schedule for completing the discovery on
5 that matter.

6 THE COURT: That's all? That's all you
7 want?

8 MR. BIRNBAUM: Yes, and tell the -- and,
9 more or less, tell the parties to behave and assume
10 control over the things so we don't -- well.

11 THE COURT: Okay. The kind of control
12 plans I've seen are very detailed and very long, and
13 they usually anticipate a Level 3. Is this a Level 3?

14 MR. BIRNBAUM: Yes, sir.

15 THE COURT: Okay. I don't know.

16 MR. BIRNBAUM: No. What I'm saying is, it
17 was pleaded by them under Level 2. By being a Level 2
18 and from the new pleadings, I'm asking --

19 THE COURT: Your original petition says
20 Level 3.

21 MR. BIRNBAUM: But it says it's intended
22 under.

23 THE COURT: Say again?

24 MR. BIRNBAUM: The original petition says
25 it's under 2.

1 THE COURT: No.

2 MR. BIRNBAUM: Well, the original says it's
3 under 3, I believe.

4 THE COURT: Thank you.

5 MR. BIRNBAUM: I've corrected that and made
6 it under 2 on the first amended and didn't change
7 anything else on it.

8 THE COURT: So what did you put on the
9 second amended? Level 2?

10 MR. BIRNBAUM: It still has Level 2, but I
11 am putting -- I'm not putting it in the pleading; I'm
12 putting it into the motion, so I don't have to amend my
13 pleading again.

14 THE COURT: What are you putting into the
15 motion?

16 MR. BIRNBAUM: For it to be Level 3.

17 THE COURT: Okay.

18 MR. BIRNBAUM: Your Honor?

19 THE COURT: Yes.

20 MR. BIRNBAUM: May I continue?

21 I want to -- well, specifically, on this
22 thing that he said over there on the lawyer. He says,
23 Just because her name appeared on the letterhead.
24 Again, I repeat, it did not appear just on the
25 letterhead. She actually signed --

1 THE COURT: He conceded that to you that he
2 knew she probably signed something but he didn't know.

3 MR. BIRNBAUM: The issue in this particular
4 case is just assume the possibility of one lawyer
5 representing one and the other one representing that one
6 and both claiming privilege because they're
7 attorney-client. Can you imagine the mess that would
8 be?

9 When you're their partner -- when you're
10 their partner or their daughter and you live in that law
11 office, you ought to consider the possibility that you
12 might become a witness, particularly if he sues me for
13 damage to his business in another county suit. As of
14 the moment that he claims injury in terms of suffering
15 anxiety, stress, loss of confidence, loss of his
16 business, when you are his lawyer and his partner, you
17 ought to get yourself off that case in that case,
18 because you becoming a witness as to whether this man is
19 really suffering from stress, anxiety, loss of
20 confidence, and a couple more things.

21 So I'm saying all of the things about the
22 attorney doesn't hold. They were his partners long
23 before they chose to become his attorney to assume the
24 mantle of privilege. They're in it in their office.
25 This is not a normal lawyer-client relationship where

1 the lawyer doesn't know anything. In this particular
2 case, the lawyer came in there with full knowledge of
3 the facts.

4 This has been going on before. There had
5 been another suit before; he had seen it. This man has
6 seen the documents that -- how he took a beaver case
7 where the man sued me because he was mad because I
8 wouldn't sign a permission request for him to blow up a
9 beaver dam on my property. I had no obligation to let
10 him on my property to blow up a beaver dam.

11 THE COURT: Okay. Wait a minute. That
12 case has been tried, right?

13 MR. BIRNBAUM: Yes.

14 THE COURT: Okay. I don't want to hear any
15 more about beaver dams. It doesn't have anything to do
16 with this case.

17 MR. BIRNBAUM: Yes, sir, it does.

18 THE COURT: No, it doesn't. I say it
19 doesn't; it doesn't. Because you tried that case.

20 MR. BIRNBAUM: This is a completely
21 different nucleus of operative facts.

22 THE COURT: So my question now is, why is
23 there not a judgment in that case?

24 MR. BIRNBAUM: Because they've been
25 concealing what they did all along. That's my point.

1 THE COURT: Why isn't there a judgment,
2 Mr. Elliott?

3 MR. ELLIOTT: Your Honor, I believe that
4 Judge Chapman -- I don't have the file here. I believe
5 Judge Chapman did sign an order in 2007 at some point in
6 time, and that's kind of what precipitated him filing
7 this suit. I think there was an order that got rid
8 of that --

9 THE COURT: That has to do with the
10 sanctions and all that other stuff, that other thing.

11 MR. BIRNBAUM: No, sir, it does not.

12 THE COURT: Did he sign a judgment?

13 MR. BIRNBAUM: No.

14 THE COURT: What did he sign?

15 MR. BIRNBAUM: Well, I gave you a copy of
16 the thing what he did. Hold on. Now, we're coming to
17 the heart of this stuff. Hold on. I have this in my
18 second amended as an exhibit.

19 THE COURT: Okay.

20 MR. BIRNBAUM: Have you got the exhibits
21 with the unsigned version of that over there?

22 THE COURT: I'm looking for it, yes, sir.
23 No exhibits.

24 MR. BIRNBAUM: It's got Exhibits A through
25 E, I believe. Have you got those?

1 THE COURT: No, sir. You didn't file
2 those, either.

3 MR. BIRNBAUM: Of the documents that I gave
4 Pam to give to you so you would be informed, I included
5 those. And if they got -- here's the exhibits and
6 here's -- may I approach the bench?

7 THE COURT: Certainly. I thought you said
8 they were attached to the seconded amended petition.

9 MR. BIRNBAUM: They are.

10 THE COURT: They're not.

11 MR. ELLIOTT: They may not be the same,
12 Your Honor.

13 MR. BIRNBAUM: I beg your pardon? They are
14 not attached to this. They are in some other documents.
15 Give me a minute.

16 MR. ELLIOTT: Your Honor, was your question
17 to me, Why is there not a judgment signed in the
18 original 2004 case?

19 THE COURT: Yes.

20 MR. ELLIOTT: I believe that the issue that
21 was hanging that one up was the issue of attorney's
22 fees, and I'm not sure how many judges actually sat on
23 this, but I think Chapman was the most recent judge.
24 And I think there had been an agreement that the
25 attorney's fees that were awarded by the jury would be

1 waived, and I think there was a judgment that was signed
2 sometime last year, and I'm not for sure.

3 THE COURT: Couldn't find it. And Mr. Ray
4 stated recently in a letter to you that Judge Chapman
5 had ordered him to prepare a judgment on the injunction.
6 And apparently nobody's done so.

7 MR. ELLIOTT: And part of that, Judge, may
8 be our client has passed away, and I'm not sure exactly
9 what Mr. Ray's doing on that one.

10 THE COURT: Well, has Mr. Ray tried to
11 enforce that in any way?

12 MR. ELLIOTT: No. There has been no action
13 taken against Mr. Birnbaum by our office in an
14 initiation of a lawsuit. We have the counterpetition,
15 but we have not initiated any type of enforcement --

16 THE COURT: Counterpetition in this suit or
17 in another suit?

18 MR. ELLIOTT: In this suit. There haven't
19 been any other pleadings against Mr. Birnbaum since, I
20 believe, the mid '90s. And there were -- I don't think
21 he was involved in the Westfall suit, but he was
22 involved in the suit where --

23 THE COURT: Who is he?

24 MR. ELLIOTT: Mr. Ray. Mr. Ray was not a
25 party to the suit where Mr. Birnbaum and Mr. Westfall

1 were opposing parties, but after the first suit where
2 Mr. Ray was against Mr. Birnbaum. Then Mr. Birnbaum,
3 through Mr. Westfall, sued everybody. Mr. Ray was a
4 party to that suit. Then the next suit was
5 Mr. Birnbaum, I believe, against Mr. Westfall, and I
6 don't think Mr. Ray was a party to that.

7 Then in 2003 Mr. Birnbaum sued Mr. Ray
8 again. We filed no counterpetition. We just went
9 through the discovery; he ended up nonsuiting, I
10 believe, on his own. And then this suit is the most
11 recent suit, and we have filed a counterpetition in this
12 suit.

13 THE COURT: Okay. So there's four suits?

14 MR. ELLIOTT: There has been four different
15 original petitions.

16 THE COURT: The Westfall suit you were not
17 involved in, to your knowledge?

18 MR. ELLIOTT: Right. If you count the
19 Westfall suit, then there would be five suits.

20 THE COURT: Okay. So the original suit was
21 the one about the beaver dam?

22 MR. ELLIOTT: Yes, Your Honor.

23 THE COURT: And who was the plaintiff?
24 Who sued you, Mr. Birnbaum?

25 MR. ELLIOTT: Who was our client?

1 MR. BIRNBAUM: On which one?

2 MR. ELLIOTT: The original lawsuit. Who
3 was your neighboring landowner?

4 MR. BIRNBAUM: Well, that's still that case
5 I --

6 THE COURT: Okay. That's what I asked you.
7 What was the name of that?

8 MR. BIRNBAUM: William B. Jones, deceased a
9 couple years ago.

10 THE COURT: Okay. Mr. Jones sued you, and
11 what was the next lawsuit?

12 MR. BIRNBAUM: The next lawsuit was
13 Mr. Westfall of Dallas coming telling me I had a really
14 good case for suing everybody --

15 THE COURT: Okay. Just tell me what the
16 suit was. What was the title of the suit? Westfall
17 versus Birnbaum?

18 MR. BIRNBAUM: Birnbaum versus Ray is the
19 first one; naming Judge Tommy Wallace, Judge Zimmerman,
20 Pat McDowell, Eddie Davis, Leslie Dickson -- but that
21 was my attorney.

22 THE COURT: Okay. So you -- you were sued
23 by Mr. Jones, and then you sue Mr. Ray. Mr. Westfall
24 sued Mr. Ray for you?

25 MR. BIRNBAUM: Yes, sir.

1 THE COURT: And these other judges?

2 MR. BIRNBAUM: Yes, sir.

3 THE COURT: And then that was dismissed?

4 MR. BIRNBAUM: That was dismissed under
5 real strange --

6 THE COURT: No, no. I just want to know
7 what happened to it.

8 MR. BIRNBAUM: I don't know what happened
9 to it, Your Honor.

10 THE COURT: Okay. You don't know. All
11 right. Then the third suit was Mr. Ray --

12 MR. BIRNBAUM: I know what happened to it.

13 THE COURT: Okay. What happened?

14 MR. BIRNBAUM: A judgment was entered
15 allowing me to amend the petition. Now you figure that
16 one out.

17 THE COURT: No, I don't -- you're right. I
18 can't. Okay. The third one was Mr. Westfall suing you.

19 MR. BIRNBAUM: Yes, sir.

20 THE COURT: And then there was a fourth one
21 where you sued Mr. Ray.

22 MR. BIRNBAUM: One added. Mr. Westfall
23 sued me for the legal fees that he incurred in suing
24 Mr. Ray.

25 THE COURT: Okay. I understand that. I

1 assumed that's what it was. Okay. What was number four
2 suit? We're in number five right now, right?

3 MR. BIRNBAUM: I can't keep up with the
4 numbers, Your Honor. Several things happened --

5 THE COURT: Well, did you sue or did they
6 sue you?

7 MR. BIRNBAUM: No, they sued me. He sued
8 me for an unpaid open account.

9 THE COURT: No, no, no. After that; the
10 next suit.

11 MR. BIRNBAUM: Well, in that suit I made a
12 counterclaim for Mr. Ray.

13 THE COURT: Okay.

14 MR. BIRNBAUM: Then after that, I made a
15 claim against his law partner, Mr. Westfall's law
16 partner, I believe, Frank C. Flemings.

17 MR. ELLIOTT: I may have mentioned some of
18 those. The suits between him and Westfall's office, I
19 know that they were there because I know that part of
20 what he's suing us for are sanctions he received in that
21 lawsuit. I know that --

22 THE COURT: That's what Judge Chapman --
23 that was where the sanctions were in the Westfall suit,
24 right?

25 MR. BIRNBAUM: Well, there was a sanction

1 by Judge --

2 THE COURT: Chapman?

3 MR. BIRNBAUM: There was a judgment by
4 Judge Banner.

5 THE COURT: Was it Judge Banner?

6 MR. BIRNBAUM: Both of them. Both of them,
7 finding that it was a delusion in my mind to stop -- and
8 all these things. Let me continue just one more moment.
9 And there was some squabbling. The court reporter had
10 found the judge saying that it was well intentions, just
11 didn't say the RICO, and then some squabbling occurred,
12 and then I became the devil. After the case was in the
13 appeals court, they were working in the court over here.

14 And, anyhow, somewhere along the line then,
15 I countersued Frank Fleming, and I may have
16 countersued -- not countersued -- may have sued Mr. Ray.
17 I believe that's correct. And then the crowning knoll
18 of the whole thing was Judge Banner after putting a
19 \$62,000 fine on me -- not a judgment, a fine -- and
20 Mr. Chapman coming in to hear a recusal motion on a case
21 that was dead because they were mocking me around in the
22 back of the court --

23 THE COURT: A case that was what?

24 MR. BIRNBAUM: It was dead.

25 THE COURT: Dead? Why was it dead?

1 MR. BIRNBAUM: It was in the Supreme Court.
2 It wasn't over here at all.

3 THE COURT: Then why was there a recusal
4 motion?

5 MR. BIRNBAUM: Figure that one out.

6 THE COURT: You filed it, didn't you?

7 MR. BIRNBAUM: I was trying to stop it.
8 The judge was doing all kinds of things in the case over
9 here while it was over there, and that was the only way
10 I knew to stop it was with a recusal motion. And we had
11 a hearing, and it was decided to hear a recusal motion
12 on the dead case. And then he got mad at me --

13 THE COURT: Wait a minute. When you say a
14 dead case -- if it's on appeal, it's not dead.

15 MR. BIRNBAUM: Well, maybe I used the
16 improper word. It was not in here.

17 THE COURT: It had been appealed to the
18 Court in Texarkana?

19 MR. BIRNBAUM: No, it was in the 12th
20 Circuit of the Dallas one. I can't tell you which one.
21 It was one of the State Courts, and it was already in
22 the Texas Supreme Court.

23 MR. ELLIOTT: I think that one's Tyler.

24 THE COURT: Is it Tyler?

25 MR. ELLIOTT: I believe it was.

1 THE COURT: I'm not familiar with where the
2 appellate courts are out here. I just know Dallas and
3 West Texas.

4 MR. BIRNBAUM: Let me state, the point was
5 Judge Chapman was assigned to hear a recusal hearing and
6 nothing else, and he put a \$125,000 fine on me stating
7 that when it's through, it's supposed to be through,
8 nothing going on.

9 THE COURT: Did he sign a judgment on it?

10 MR. BIRNBAUM: Yes, sir.

11 THE COURT: What happened? Did you pay it?

12 MR. BIRNBAUM: That was the one you asked
13 me about last time, was I going to pay it, and I told
14 you, No.

15 THE COURT: Oh, well, I misunderstood you.
16 I thought I was asking about another one. I thought I
17 was asking about the attorney's fees. Okay. So you
18 didn't pay that sanction?

19 MR. BIRNBAUM: No, but let me put the
20 counter clinch on it. The answer is that after all this
21 stuff of getting the -- this judgment, 60 thousand plus
22 interest, whatever --

23 THE COURT: Which judgment?

24 MR. BIRNBAUM: In the Westfall case.

25 THE COURT: Mr. Westfall got a judgment?

1 MR. BIRNBAUM: Yes. Now, the law office
2 may have become a defunct -- defaulted under the
3 Secretary of State; I do not know. No, in fact, I know.
4 But it's still in the works. There was the -- about a
5 \$62,000 fine in the Westfall case against me. And then
6 there is a \$125,000 against me in the Westfall case
7 signed by Judge Chapman. That happened to be on
8 April the 1st on the dead case.

9 THE COURT: But the case was originally
10 tried by Judge Zimmerman; is that right?

11 MR. BIRNBAUM: Oh, no. That one's just
12 been sitting there.

13 THE COURT: So -- but it was tried by Judge
14 Zimmerman; is that right?

15 MR. BIRNBAUM: Yes, sir, uh-huh.

16 THE COURT: Where is Judge Zimmerman?

17 MR. BIRNBAUM: He recused himself finally.

18 THE COURT: Is he from Canton?

19 MR. ELLIOTT: No. He was a visiting judge
20 also. Judge Wallace originally started the case, I
21 believe; he was recused. I believe there was a motion
22 to recuse. Then, I think Judge Zimmerman came in and
23 heard the case. Then after it was appealed, Judge
24 Zimmerman ended up being recused. And then, I think --
25 after that I get confused. I know Banner, Chapman --

1 THE COURT: What did McDowell have to do
2 with it?

3 MR. ELLIOTT: I think that was in the
4 Westfall case. There's -- I don't know, Judge.

5 MR. BIRNBAUM: McDowell was the Westfall
6 case that was my lawyer, Westfall, suing a flock of
7 something. Let me continue the stuff with the
8 sanctions. The 62,000 sanction put on me by Judge
9 Banner, then the 125,000, where he just simply doubled
10 it on the dead case, by Judge Chapman in about 2004.

11 And upon that I said, Boy, they're after
12 me. I better get out of here and all kinds of other
13 stuff, and I dropped these other lawsuits. Well, guess
14 what? Judge Chapman, that had put the \$125,000 fine on
15 me, gets assigned to the beaver case. And I want him
16 off.

17 THE COURT: The original case?

18 MR. BIRNBAUM: Yes. Judge Chapman is right
19 now the official judge on the beaver case.

20 THE COURT: But he's the one that ordered
21 Mr. Ray to do a judgment. That's what you said in the
22 letter.

23 MR. BIRNBAUM: Yes, yes. That is correct.

24 THE COURT: You said, At our most recent
25 proceeding --

1 MR. BIRNBAUM: I was trying to find that
2 document, and I'll find it.

3 THE COURT: In 2004 Judge Chapman
4 instructed Mr. Ray to draw up a judgment -- the
5 injunction is what it says. Okay. After the -- let's
6 say after Judge Chapman had this sanction hearing at the
7 time of the recusal hearing, I guess it was, what has
8 Mr. Ray done since then?

9 MR. BIRNBAUM: He's filed a counterclaim on
10 me for libel.

11 THE COURT: Other than -- between the time
12 of that hearing and time you filed this suit, what has
13 he done?

14 MR. BIRNBAUM: He's been setting and piling
15 the beaver case, throwing all kinds of the cloud upon
16 title of my property and other stuff and leaving this
17 beaver case to fester over there for judges to grant an
18 injunction that I forever keep the creek clear of
19 beavers and other things. It wasn't real clear what it
20 is that he's supposed to do, but he ordered him to write
21 it up. The problem that they got when you put it down
22 on paper, it starts looking stupid. When he starts
23 writing down --

24 THE COURT: What you -- and I'm asking you.
25 Maybe I'm wrong, if that case went away --

1 MR. BIRNBAUM: Which case?

2 THE COURT: The beaver case that there's no
3 judgment in.

4 MR. BIRNBAUM: If it went away -- it hasn't
5 gone away.

6 THE COURT: Okay. I said, if it did.

7 MR. BIRNBAUM: Yes.

8 THE COURT: If it went away -- and Mr. Ray,
9 Mr. Elliott, and Ms. Thatcher and Mr. Westfall -- is he
10 dead?

11 MR. BIRNBAUM: Yes.

12 THE COURT: Okay. Any of these people,
13 they have nothing against you anymore --

14 MR. BIRNBAUM: Westfall, his wife and his
15 daughter have got these big sanctions.

16 THE COURT: But have they got a judgment?

17 MR. BIRNBAUM: It says on the bottom, this
18 judgment to be paid. Yes, they have a judgment.

19 THE COURT: Did they abstract? Do you
20 know?

21 MR. BIRNBAUM: They abstracted one. They
22 did not abstract the other one. As I understand it, one
23 of the judges came in here and tried to abstract an
24 order. I don't know what it was. You figure that one
25 out.

1 THE COURT: I doubt any judge did that,
2 Mr. Birnbaum. He might have granted a request, but I
3 doubt that he would, himself, abstracted.

4 MR. BIRNBAUM: Your Honor, if you look at
5 the thing that both Judge Banner signed and Judge --

6 THE COURT: Well, if they signed it, that's
7 not the same thing as them going down to the county
8 clerk's office and abstracted.

9 MR. BIRNBAUM: You were saying that they
10 wouldn't. Okay. I'm arguing that I've seen them sign
11 some things that one wouldn't expect a judge to sign.

12 THE COURT: Well, signing something is
13 different from going down to the county clerk's office
14 and abstracting a judgment. First of all, we're not
15 going to pay the money to have it done. We're too
16 cheap; okay? We don't have it in our expense account to
17 do it.

18 MR. BIRNBAUM: Your Honor, I'm not a
19 lawyer, but I know this thing has been rattling around.
20 Let me make one correction --

21 THE COURT: What I want to know is what you
22 want.

23 MR. BIRNBAUM: What's in my petition.

24 THE COURT: I know that. But what do you
25 really want? Do you really want this beaver dam thing

1 to go away?

2 MR. BIRNBAUM: I want it out of my hair
3 that it doesn't hang on top of it. But that's not the
4 problem. The problem is all the problems that it's
5 caused.

6 THE COURT: What's that?

7 MR. BIRNBAUM: All my entitlements with
8 Westfall, all my entitlements in the Court, all the
9 judges getting mad at me, all kinds of judges putting
10 sanctions on me all over the place. And this all
11 started out because I wouldn't sign a submission request
12 over beavers in 1994. Let me finish. Mr. Elliott said
13 this beaver case has been around since 2004.

14 THE COURT: He didn't say that.

15 MR. BIRNBAUM: Is that correct?

16 THE COURT: No, he didn't say that.

17 MR. BIRNBAUM: 1994.

18 THE COURT: He said over 10 years is what I
19 thought he said. And he and I -- neither one were here.
20 So we're not sure. You should tell us when it started.

21 MR. ELLIOTT: Well, he may have
22 misunderstood. There was the suit in 2003 that he
23 dismissed in 2004, which was the four out of five cases
24 that I know of. So that's maybe what he was talking
25 about.

1 THE COURT: All right. Now then. I still
2 don't understand why there's not a judgment.

3 MR. BIRNBAUM: Your Honor, that's what I'm
4 pleading in my petition. He's concealing what he did,
5 what he threw me into the Court, that everybody came out
6 against me because I'm not a lawyer or pro se. I've
7 quoted the things in there, Mr. Birnbaum would have had
8 a lawyer, he would have never gotten here. It's in the
9 petition.

10 THE COURT: Mr. Birnbaum, come up here. I
11 want you to take this and hand one to Mr. Elliott. Hand
12 one of those copies to him. Whenever I receive
13 something in the mail that has something to do with the
14 lawsuit, I always furnish it to both parties.

15 MR. BIRNBAUM: Your Honor, just for the
16 record, I have not seen this.

17 THE COURT: Absolutely; I'm sure you
18 haven't. It came surreptitiously in the mail.
19 Surreptitious is probably the wrong word. It was
20 surreptitious to me, because I thought somebody was
21 trying to sell me a book. And I almost threw it in the
22 trash and then I kept on reading and realized that it
23 had something to do with this lawsuit.

24 MR. BIRNBAUM: I do know the person, and he
25 is named in the disclosure, that he had a request for

1 disclosure. I do know him, but I'm not in control of
2 him any more than --

3 THE COURT: You're not in control of him.

4 MR. BIRNBAUM: I'm not in any more control
5 of him than the man in the back of the courtroom last
6 time.

7 THE COURT: Well, you understand that when
8 I get something like that, I'm duty-bound to share it
9 with everyone.

10 MR. BIRNBAUM: Thank you.

11 THE COURT: Okay. I'm also going to share
12 it with the presiding judge and make sure that he
13 understands that I received, if not a suggestion of
14 influence, maybe a veiled threat. But in any event, if
15 you talk to Mr. Collins, since you know him, you might
16 tell him that that's not proper for him to do that. The
17 Court would like to make its decisions based upon what
18 it hears in the court and reads in the pleadings and not
19 what somebody else writes in.

20 MR. BIRNBAUM: Your Honor, all the person
21 I've come to know him when these things have been
22 through the Court, he was in the court. Some other
23 things was thrown in the hat with Judge Zimmerman. We
24 got to know each other out of that. I don't control him
25 any more than I control the man that was at the last

1 hearing in the back of the room.

2 THE COURT: I don't doubt you,
3 Mr. Birnbaum, but I've made a request. I said, If you
4 speak to the man, please tell him don't do that. If you
5 don't speak to him, don't worry about it. Don't make a
6 special effort.

7 MR. BIRNBAUM: Do not make a special
8 effort?

9 THE COURT: No.

10 MR. BIRNBAUM: Okay. Thank you.

11 THE COURT: If he's not your friend -- you
12 said you just met him. I don't know. Apparently, he's
13 sided with you.

14 MR. BIRNBAUM: Yeah, he is my friend. He
15 has become my friend over the years, but I do not
16 control him.

17 THE COURT: I never have claimed that you
18 did. I don't know how he found out that I was in the
19 lawsuit. Don't know how he found out my address.

20 MR. BIRNBAUM: Incidentally, a lot of my
21 things are on the Internet, as you would know, as was in
22 the pleading over here, what he called Exhibit A.

23 THE COURT: Are any of the pleadings on the
24 Internet?

25 MR. BIRNBAUM: There is a copy of my Web

1 site in his libel and slander suit, Exhibit A.

2 THE COURT: Well, you understand,
3 Mr. Birnbaum, I'm 30 miles away. I don't run over here
4 and read everything that's filed. I spent a lot of time
5 the last time we were here until the middle of the
6 afternoon reading everything that y'all sent. So that's
7 my opportunity to read is when I come here. So if you
8 want me to read something, you should send it to me.

9 MR. BIRNBAUM: So anything that is filed
10 from now on needs to be sent to you also?

11 THE COURT: I would appreciate it.

12 MR. BIRNBAUM: Thank you. I didn't know if
13 that was proper.

14 THE COURT: Absolutely. I would appreciate
15 it. That's how -- Mr. Elliott sent me a copy of his
16 motion that he had filed for protection, and that's how
17 I knew to call Pam to request a hearing. If I had
18 gotten your Motion for Discovery control plan, I would
19 have done the same thing.

20 MR. BIRNBAUM: Your Honor, I'm talking
21 about all the subject we covered here, almost confused
22 myself, and I wouldn't be surprised if everybody else is
23 either at this moment.

24 I'm not real good on my feet. I've got the
25 documents; they're all in here, and I suggest, Your

1 Honor, either ask the parties to resubmit to you their
2 documents or have the clerk provide you a copy of the
3 file. You know, I sometimes feel like I'm just writing
4 things to the wall and --

5 THE COURT: Okay.

6 MR. BIRNBAUM: Suggestion?

7 THE COURT: First of all, the Motion for
8 Protection is granted. Ms. Thatcher hadn't filed one; I
9 don't know what her situation is, but Mr. Elliott's is
10 granted.

11 Mr. Elliott, if and when you become a party
12 to this suit, it's probably going to be advisable for
13 y'all to get your own attorneys outside your law firm.

14 The Motion for Discovery control plan is
15 granted, and I will prepare one. I'll have to come up
16 with some dates for trials, and since we've been in --
17 delayed here, it'll probably in the fall sometime.

18 MR. ELLIOTT: Your Honor, if we could,
19 we're actually on several dockets. Can we give you the
20 months that we're not set for trial?

21 THE COURT: Would you mail me those?

22 MR. ELLIOTT: We'll do that. And, Your
23 Honor --

24 THE COURT: Do you understand,
25 Mr. Birnbaum?

1 MR. BIRNBAUM: Yeah. What I understand
2 that the setting that you now have for pretrial is gone.

3 THE COURT: Is gone.

4 MR. BIRNBAUM: I suspected that. Let me
5 make one more correction. He received yesterday a sworn
6 subpoena from the Court asking for a deposition on this
7 thing properly served to him, and they signed that
8 yesterday or day before yesterday. So that has changed
9 in the sense that I corrected that, that he may not have
10 been served.

11 THE COURT: You need to get him in the suit
12 first; you need to get your pleading corrected to where
13 it's signed. If there's exhibits that need to be on
14 it -- I don't know whether they are or not -- you need
15 to include those.

16 MR. BIRNBAUM: Yes, sir.

17 THE COURT: You need to -- and that's it.
18 And -- but as I said, when they're in the suit as
19 defendants, I have suggested to them that they get their
20 own attorneys or represent themselves.

21 MR. ELLIOTT: Your Honor, if we actually
22 did -- I filed --

23 THE COURT: Let me stop you while I have a
24 train of thought. I don't know why Mr. Birnbaum got off
25 on this other thing.

1 What I said was, Mr. Birnbaum -- listen to
2 me. He is going to provide me with some dates that they
3 have conflicts for six months down the line. I expect
4 you to do the same. Do you have my address?

5 MR. BIRNBAUM: I have your address on the
6 letter.

7 THE COURT: I know you do because you sent
8 me something. Okay. So I expect you to do the same.

9 MR. BIRNBAUM: I will give you a verbal
10 that almost anytime is -- almost anytime is -- barring
11 emergencies I will comply.

12 THE COURT: All right. Go ahead,
13 Mr. Elliott, I'm sorry.

14 MR. ELLIOTT: When he served -- when he
15 mailed me a copy of the petition with my name on it, and
16 it had a notice -- some type of attempted notice of
17 deposition, I filed a Motion of Protection for me. Then
18 he brought by my office, or maybe he sent it certified
19 mail -- I'm not sure which how he got it -- another
20 notice of deposition that included Ms. Thatcher at that
21 time.

22 So we came back and filed Motions for
23 Protection for both of us. It wasn't the one that
24 actually made it to you. I think we filed those
25 probably yesterday or the day before, whenever they came

1 by the office to serve us with that.

2 THE COURT: It didn't make it to the
3 lawsuit.

4 MR. ELLIOTT: It may not have even made it
5 to the folder yet if it came in yesterday.

6 MR. BIRNBAUM: Your Honor, I make that
7 comment again on it. It says, We filed a Motion for
8 Protection for him and Ms. Thatcher. I did not receive
9 anything with Ms. Thatcher.

10 THE COURT: Okay.

11 MR. ELLIOTT: Well, it may not have gotten
12 there yet, because we just got served with -- or we just
13 received a copy of those so...

14 THE COURT: I'm sure you'll get it. But if
15 you don't, that's not proper either.

16 MR. BIRNBAUM: As I understand it; fix the
17 thing, fix the clerical errors, and do it correct, and
18 we will hear from you.

19 THE COURT: And get it served properly.
20 I'll go to work on some dates for a discovery control
21 plan. Okay?

22 MR. BIRNBAUM: Thank you, Your Honor.

23 MR. ELLIOTT: Your Honor, just before --

24 THE COURT: You'll send me an order.

25 MR. ELLIOTT: In addition to that, I

1 anticipate there being some more motions. I know we've
2 got the Motion for Summary Judgment and possibly some
3 Motions to Dismiss the other parties that we may request
4 settings on at sometime in the near future.

5 THE COURT: Well, like I said, I made
6 suggestions to you. So do what you want to do. Judge
7 Chapman is still in the original suit?

8 MR. BIRNBAUM: No, he's not in the suit.
9 Judge Chapman is the judge on the --

10 THE COURT: That's what I mean. I
11 misspoke. You're right. He is the judge in the
12 original suit that Judge Zimmerman tried that does not
13 have a judgment.

14 MR. BIRNBAUM: Yes. And Judge Chapman got
15 on me for filing frivolous motions to recuse, not
16 recognizing the reason he's sitting on there is because
17 Judge Zimmerman recused himself.

18 THE COURT: Well, what happened to those --
19 well, never mind.

20 MR. BIRNBAUM: Judge, I suggest you look at
21 the file and clarify things.

22 THE COURT: I have. And like you said, I'm
23 confused.

24 MR. BIRNBAUM: Thank you.

25 (End of Proceedings)

1 REPORTER'S CERTIFICATE

2 THE STATE OF TEXAS)

3 COUNTY OF VAN ZANDT)

4

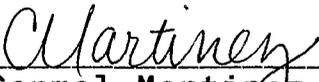
5 I, Carmel Martinez, Deputy Official Court Reporter
6 in and for the 294th District Court of Van Zandt County,
7 State of Texas, do hereby certify that the above and
8 foregoing contains a true and correct transcription of
9 all portions of evidence and other proceedings requested
10 in writing by counsel for the parties to be included in
11 this volume of the Reporter's Record, in the
12 above-styled and numbered cause, all of which occurred
13 in open court or in chambers and were reported by me.

14 I further certify that this Reporter's Record of
15 the proceedings truly and correctly reflects the
16 exhibits, if any, admitted by the respective parties.

17 I further certify that the total cost for the
18 preparation of this Reporter's Record is \$241.50 and was
19 paid by Mr. Udo Birnbaum, Plaintiff.

20 WITNESS MY OFFICIAL HAND this the 9th day of April,
21 2008.

22



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