

CAUSE NO. 06-00857

UDO BIRNBAUM
Plaintiff

v.

PAUL BANNER
Defendant

RON CHAPMAN
Defendant

§
§
§
§
§
§
§
§
§

IN THE DISTRICT COURT

294th JUDICIAL DISTRICT

VAN ZANDT COUNTY, TEXAS

FILED FOR RECORD
2006 NOV -2 PM 1:07

ORIGINAL PETITION

Comes now UDO BIRNBAUM ("Birnbaum"), Plaintiff, *Pro Se*, complaining of PAUL BANNER ("Banner") and RON CHAPMAN ("Chapman") and for cause of action would respectfully show the Court the following:

Udo Birnbaum is an individual residing in Van Zandt County, Texas. He may be served with process at 540 VZ CR 2916, Eustace, Texas 75124.

Paul Banner is a retired Texas judge who may be served with process at First Administrative Judicial Region, 133 N. Industrial Blvd., LB 50. Dallas, Texas 75207

Ron Chapman is a retired Texas judge who may be served with process at First Administrative Judicial Region, 133 N. Industrial Blvd., LB 50. Dallas, Texas 75207

1. Discovery is intended to be conducted under Level 3. (RCP Rule 190.4)

STATEMENT ON JUDICIAL IMMUNITY

2. Defendant **Chapman's** conduct complained of was NOT in a judicial capacity -- there was nothing to adjudicate -- and nothing to magistrate -- and Defendant's conduct was also objectively unreasonable.

3. Defendant **Banner's** conduct complained of was as a WITNESS -- and also objectively unreasonable.

STATEMENT OF THE CASE

4. Plaintiff complains under 18 U.S.C. § 1964(c) ("civil RICO") of injury to his property by reason of Defendant's violation of 18 U.S.C. §1961 *et seq.* ("RICO").

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

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

5. The scheme and pattern of racketeering activity complained of is open ended.
6. Injury amounting to \$125,770 was discovered shortly after Oct. 24, 2006.

THE SCHEME

7. Plaintiff Birnbaum complains of a scheme to punish and silence Birnbaum for having exercised his right of access to the courts, and to execute the scheme by a *"scheme to deprive of the intangible right of honest services"*.

8. Defendant's use of the U.S. Mail and interstate capable communications equipment to execute such scheme provides the *"predicate acts" of "racketeering activity"* constituting the outlawed *"pattern of racketeering activity"* as defined under RICO.

THE PATTERN OF RACKETEERING ACTIVITY

9. Ever after April 1, 2004 Defendants came together to use a DEAD case in the 294th District Court of Van Zandt County. FINAL JUDGMENT had issued way back on July 30, 2002. (Exhibit B)

10. **Chapman** knew that his April 1, 2004 pronouncement of \$125,770 sanctions against Birnbaum was not proper -- as indicated by his NOT then following through with an Order.
11. **Chapman** hiding this original wrong for over TWO years constitutes another wrong.
12. **Chapman** on October 24, 2006 actually issuing \$125,770 Order is the latest wrong.
13. **Banner** willingly participated against Birnbaum as a WITNESS, fully knowing that the case was DEAD, he himself having issued FINAL JUDGMENT way back on July 30, 2002.
14. **Banner**, having personally observed Chapman pronounce unlawful \$125,770 punishment on Birnbaum, did NOTHING to protect Birnbaum from the wrong Chapman was doing.
15. **Banner** for over TWO YEARS did NOTHING to report the wrong he had witnessed on April 1, 2004.

16. The acts of "*racketeering activity*" shown above constitute a "*pattern of racketeering activity*" within the meaning of 18 U.S.C. § 1961(5). The acts complained of are not isolated events, but relate to each other by virtue of a common participant, a common method of commission, and the common purpose and common result of defrauding of honest service these defendants owed to the state of Texas by their oaths of office and positions as public servants.
17. Defendants' use of the U.S. Mail and interstate capable communications equipment to execute such scheme provides the "*predicate acts*" of "*racketeering activity*" constituting the outlawed "*pattern of racketeering activity*" as defined under RICO.
18. Plaintiff's injury to his property was "*by reason of*" Defendant's violation of RICO.

THE VIOLATION OF RICO

18 U.S.C. § 1962(c)

"to conduct or participate, directly or indirectly, in the conduct of an enterprise's affairs through a pattern of racketeering activity"

19. The 294th District Court of Van Zandt County, Texas is an "enterprise" under RICO.
20. This "enterprise" has some effect upon interstate commerce
21. Defendants were associated with the enterprise.
22. Defendants played some part in directing the affairs of the enterprise
23. Defendants engaged in the pattern of racketeering activity as outlined above
24. Defendants' association with the enterprise facilitated the commission of the acts
24. The commission of these predicate acts did indeed have some effect on the "enterprise"

INJURY

"by reason of the RICO violation"

25. Injury of \$125,770 is as indicated and detailed in Exhibit "A", *Order on Motion for Sanctions* (signed Oct. 24, 2006).
26. The injury flowed from both the pattern of racketeering activity and from the acts of racketeering activity.

PRAYER FOR RELIEF

Wherefore, Plaintiff Birnbaum seeks judgment against Defendants jointly and severally. Defendants' conduct was knowing, intentional, with malice, demonstrated a complete lack of care, and was in conscious disregard for the rights of Birnbaum. Birnbaum is therefore entitled to an award of punitive damages. Birnbaum seeks judgment as follows:

- (a) \$377,310 as treble damages as proscribed by RICO
- (b) For the costs of suit, including reasonable attorney's fees, if any
- (c) Pre-judgment interest at the maximum rate allowed by law
- (d) Post-judgment interest at the maximum rate allowed by law
- (e) Punitive damages in an amount as the jury may award at its discretion
- (f) A permanent injunction prohibiting Defendants from sitting as "visiting judges" in the 294th District Court of Van Zandt County.
- (g) Such other relief, legal and equitable, special or general, as the Court deems proper and just

Defendants' conduct is a menace to society that extends into the indefinite future.

BIRNBAUM HEREBY DEMANDS A TRIAL BEFORE A JURY

Respectfully submitted,

Udo Birnbaum

Udo Birnbaum, *Pro Se*

540 VZ CR 2916

Eustace, Texas 75124

(903) 479-3929

Exh. "A", *Order on Motion for Sanctions – \$125,770 (Oct. 24, 2006)*
(On a FOUR year old DEAD case!)

Exh. "B", *Final Judgment – signed by Defendant Banner himself (July 30, 2002)*
(The DEAD case, page 1 and 7 only)

It is therefore, **ORDERED, ADJUDGED, and DECREED** that the motion by the defendant, Udo Birnbaum, that Judge Paul Banner be recused from further matters effecting this cause of action is denied.

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

- A. A monetary sanction in the amount of \$1,000.00 as actual damages, representing the reasonable value of the legal services rendered to the Sanctions Movants by their attorney for the defense of Birnbaum's Motion to Recuse and the prosecution of the Sanctions Movants' Motion for Sanctions.
- B. A monetary sanction in the amount of \$124,770.00 as exemplary and/or punitive damages to serve as a deterrent to prevent Birnbaum from committing further similar acts again in the future.

IT IS FURTHER ORDERED THAT the judgment here rendered shall bear interest at the rate of five percent (5%) from the date of the signing of this order, until paid.

All other relief regarding any motions for relief on file in this cause of action not expressly granted in this order is hereby denied.

With regard to the award of sanctions, the Court makes the following findings and conclusions in support of the Court's award of sanctions and in support of the type and dollar amount of the sanctions imposed:

Findings of Fact

1. Birnbaum's claims regarding the attempt to have Judge Paul Banner recused were groundless, vacuous, manufactured, and totally unsupported by any credible evidence whatsoever.
2. Birnbaum's claims regarding the attempt to have Judge Paul Banner recused were without merit and brought for the purpose of harassment and/or delay.
3. The testimony of Birnbaum regarding the attempt to have Judge Paul Banner recused was biased, not credible, and totally uncorroborated by any other evidence.
4. The sole purpose of Birnbaum filing the motion regarding the attempt to have Judge Paul Banner recused was an attempt to harass, intimidate, and inconvenience the Sanctions Movants.
5. Birnbaum has a track record and history of filing lawsuits, motions, and writs of mandamus against judges that rule against him in litigation.
6. Birnbaum filed a pleading containing a completely false and outrageous allegation that Judge Paul Banner had conducted himself in a manner that showed bias and a lack of impartiality.
7. Birnbaum's difficulties with judges and the repeated allegations of a lack of impartiality have had nothing at all to do with the conduct of the judges that Birnbaum has appeared before, but instead, is a delusional belief held only inside the mind of Birnbaum.
8. Birnbaum will seemingly go to any length, even filing new lawsuits in State and Federal courts in an attempt to re-litigate issues which a court has already ruled upon and which all appropriate courts of appeal have affirmed.
9. Birnbaum's filing of this Motion to recuse Judge Banner was consistent with a proven pattern and practice of behavior engaged in by Birnbaum over many years and currently ongoing now in this court and in other federal courts.

Order on Sanctions

PAGE 3 of 8

10. Birnbaum has a track record and history of bickering and quarreling with judges that have ruled against him in litigation.
11. Birnbaum has a track record and history of filing lawsuits without merit against judges, attorneys, and other individuals in an attempt to gain tactical advantage in other ongoing litigation.
12. Prior to this hearing, Birnbaum filed in March 2004, new legal action in Federal District Court against Judge Paul Banner, G. David Westfall, Christina Westfall, and Stefani Podvin. This new Federal lawsuit attempts to re-litigate the same issues Birnbaum unsuccessfully raised in this lawsuit.
13. Prior to this hearing, Birnbaum has initiated a lawsuit against the attorney for the Sanctions Movants, Frank C. Fleming. Birnbaum admitted in open court that he has never had any dealings with Frank C. Fleming other than in connection with Mr. Fleming's representation of the Plaintiff and the counter-defendants in this cause of action. Birnbaum admitted in open court that the legal basis of his lawsuit against Mr. Fleming, civil RICO, is the same basis Birnbaum was previously sanctioned in this lawsuit for attempting to bring against Christina Westfall and Stefani Podvin.
14. The behavior of Birnbaum himself in prosecuting the Motion to recuse Judge Banner has been vindictive, unwarranted, mean-spirited, frivolous, and totally without substantiation on any legally viable theory for the recusal of Judge Banner.
15. The Motion itself to Recuse Judge Banner without any ounce of evidence to support it, was frivolous, vindictive, and brought for the purpose of harassment.
16. The conduct of Birnbaum giving rise to the award of exemplary and/or punitive damages was engaged in by Birnbaum willfully and maliciously with the intent to harm the Sanctions Movants, Judge Paul Banner, and the attorney for the Sanctions Movants, Mr. Fleming.

17. Prior to the hearing on the Motion to Recuse, the Court admonished Birnbaum that if his Motion to Recuse Judge Banner was not withdrawn, that if it became appropriate, the Court would hear the Motion for Sanctions. In response to this admonition, Birnbaum unequivocally elected to move forward with a hearing on his Motion in an attempt to have Judge Banner recused.

18. The type and dollar amount of the sanctions award is directly related to the harm done. The Court has not been presented with any evidence to believe that the amount of the sanctions award is excessive in relation to the net worth of Birnbaum.

19. The type and dollar amount of the sanctions award is appropriate in order to gain the relief which the Court seeks, which is to stop this litigant and others similarly situated from filing frivolous motions, frivolous lawsuits, frivolous defenses, frivolous counter-claims, and new lawsuits which attempt to re-litigate matters already litigated to a conclusion.

20. The amount of the exemplary and/or punitive damage award is an amount narrowly tailored to the amount of harm caused by the offensive conduct to be punished.

21. The Sanctions Movants have suffered damages as a result of Birnbaum's frivolous counter-claims and Birnbaum's motion to recuse. These damages include expenses (in addition to taxable court costs), attorney's fees, harassment, inconvenience, intimidation, and threats.

Conclusions of Law

1. On the issue of the recusal of Judge Paul Banner, Birnbaum wholly failed to provide any credible evidence to substantiate any of his claims.

2. All of Birnbaum's claims were as a matter of law unproved and untenable on the evidence presented at the hearing.

3. The court concludes as a matter of law that Birnbaum's claim that Judge Paul Banner acted biased and with a lack of impartiality, was brought for the purpose of harassment. The Court makes

Order on Sanctions

this conclusion based upon the fact that Birnbaum was not a credible witness, that other credible witnesses totally contradicted Birnbaum's version of the facts, and that evidence was presented establishing that Birnbaum has had a track record and history of harassment towards other opposing litigants, opposing counsels, and other judges before whom Birnbaum has appeared.

4. The Plaintiffs behavior in bringing and prosecuting this frivolous motion to recuse Judge Banner was a violation of one or more of the following: §§10.001, et seq., Tex. Civ. Prac. & Rem. Code, Rule 13, T.R.C.P., and/or the common law of Texas.
5. The Court has the power to award both actual and exemplary (and/or punitive) damages against Birnbaum for the filing and prosecution of a frivolous motion. This authority stems from one or more of the following: §§10.001, et seq., Tex. Civ. Prac. & Rem. Code, Rule 13, T.R.C.P., and/or the common law of Texas.
6. The behavior and attitude of Birnbaum in filing and prosecuting this Motion to Recuse claim against Judge Paul Banner calls out for the award of both actual and exemplary (and/or punitive) damages to be assessed against Birnbaum.
7. The appropriate award for actual damages as a result of the filing and prosecution of the frivolous Motion to Recuse, is an award of \$1,000.00 in attorney's fees. The Court makes this award under power granted to the Court by §§10.001, et seq., Tex. Civ. Prac. & Rem. Code, Rule 13, T.R.C.P., and/or the common law of Texas.
8. The appropriate exemplary and/or punitive sanction for the filing and full prosecution of the frivolous Motion to Recuse is an award of \$124,770.00 to be paid by Birnbaum to the Sanctions Movants.
9. The award of exemplary and/or punitive damages is directly related to the harm done.
10. The award of exemplary and/or punitive damages is not excessive.

Order on Sanctions

PAGE 6 of 8

11. The award of exemplary and/or punitive damages is an appropriate amount to seek to gain the relief sought by the Court which is to stop Birnbaum and others like him from filing similar frivolous motions and other frivolous lawsuits.
12. The amount of the exemplary and/or punitive damage award is narrowly tailored to the harm done.
13. The amount of the exemplary and/or punitive damages is narrowly tailored to exactly coincide with the amount (in total) assessed against Birnbaum to date in this litigation. This amount was selected by the Court deliberately and on purpose to send a clear message to Birnbaum. The message this award of damages is intended to relay to Mr. Birnbaum is that this litigation is over, final, and ended. The message is that further attempts to re-open, re-visit, and re-litigate matters which have already been decided in court, reduced to judgment, and affirmed on appeal will not be tolerated; and that further attempts by this litigant to engage in such activity will not be conducted without the imposition of very serious and substantial monetary sanctions imposed upon Mr. Birnbaum.
14. Authority for an exemplary and/or punitive damage award is derived from §§10.001, et seq., Tex. Civ. Prac. & Rem. Code, Rule 13, T.R.C.P., and/or the common law of Texas.

Any finding of fact herein which is later determined to be a conclusion of law, is to be deemed a conclusion of law regardless of its designation in this document as a finding of fact. Any conclusion of law herein which is later determined to be a finding of fact, is to be deemed a finding of fact regardless of its designation in this document as a conclusion of law.

THIS JUDGMENT RENDERED ON APRIL 1, 2004, AND SIGNED THIS

24 day of Oct, 2006.


JUDGE PRESIDING

- 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