IN THE

TWELFTH COURT OF APPEALS

In re UDO BIRNBAUM

Relator

v.

THE HONORABLE PAUL BANNER, JUDGE

Respondent

THE LAW OFFICES OF G. DAVID WESTFALL, P.C.
G. DAVID WESTFALL
CHRISTINA WESTFALL
STEFANI PODVIN

Real parties in interest

PETITION FOR WRIT OF MANDAMUS
AND MOTION FOR TEMPORARY RELIEF

(underlying proceeding is in 294th District Court
of Van Zandt County, No. 00-619)

Udo Birnbaum, *Pro Se*
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IDENTITY OF PARTIES AND COUNSEL

The Honorable Paul Banner Senior Texas District Judge, Sitting by assignment	c/o Betty Davis, Court Admin. 294th Judicial District Court 121 East Dallas St., Room 301 Canton, Texas Phone (903) 567-4422 Fax (903) 567-5652
The Law Offices of G. David Westfall, P.C. Plaintiff / Counter defendant	G. David Westfall 5646 Milton, Suite 520 Dallas, Texas 75206 Phone (214) 741-4741 Fax (214) 741-4746
G. David Westfall Cross and third party defendant	G. David Westfall (as above)
Christina Westfall Cross and third party defendant	Frank C. Fleming 6611 Hillcrest, Suit 305 Dallas, Texas 75205-1301 Phone (214) 373-1234 Fax (214) 373-3232
Stefani Podvin Cross and third party defendant	Frank C. Fleming (as above)
Udo Birnbaum Defendant, cross and third party plaintiff	Udo Birnbaum, *Pro Se* 540 VZ 2916 Eustace, Texas 75124 (903) 479-3929 (phone and fax)

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STATEMENT OF THE CASE

1. Plaintiff **The Law Offices of G. David Westfall, P.C.** claims a sworn unpaid open account for legal services provided. (App#15)

2. Defendant, cross-claimant, and third party plaintiff **Udo Birnbaum** claims under 18 U.S.C. § 1964(c) ("civil RICO"), that Plaintiff's suit (No. 00-619 in the 294th District Court) and a "bill" (the alleged unpaid open account for services provided) to be acts of "racketeering activity" in a longtime "pattern of racketeering activity" violative of 18 U.S.C. § 1961 et seq. ("RICO") by a **G. David Westfall**, **Christina Westfall**, and a **Stefani Podvin**. Birnbaum makes cross-claim **defenses** and third party plaintiff **claims** for damages stemming from the same pattern of racketeering activity. (App#24, App#62)

3. **Hon. Paul Banner** is a Texas Senior Judge of the 196th District Court sitting by assignment to this cause (No.00-619) in the 294th District Court of Van Zandt County, Texas. (App#2)

4. Hon. Paul Banner on September 7, 2001 granted **summary judgment "RICO Relief"** to the third party defendants from Birnbaum's civil RICO claims (App#4). Hon. Paul Banner on this date also denied Defendant Birnbaum's motion to appoint an auditor under Rule 172 RCP to make a finding of the state of the accounts between the parties (App#4).

5. Birnbaum claims it was Hon. Paul Banner's duty under the law to appoint such auditor under the circumstances of this case. Birnbaum also claims that Hon. Paul Banner violated his duty under the rules of summary judgment procedure as mandated by the Supreme Court of the United States.

6. Birnbaum seeks relief from Judge Paul Banner's denial of his ***Motion for Appointment of Auditor etc*** under Rule 172 RCP (App#52). Birnbaum also seeks relief from Judge Banner's granting **summary judgment** "RICO Relief" to opposing

parties from Birnbaum's 18 U.S.C. § 1964(c) ("civil RICO") cross and third party plaintiff claims. (App#4-5).

STATEMENT OF JURISDICTION

1. Birnbaum is entitled to issuance of writ of mandamus because the failure by the trial court to correctly apply the Rules of Civil Procedure and statutory law (18 U.S.C. § 1964(c), "civil RICO") is clear abuse of discretion and violation of duty imposed by law that **cannot be remedied on appeal**.

2. Plaintiff claims it is bringing a collection suit. Birnbaum claims the very bringing of this suit is intrinsic and extrinsic fraud constituting predicate acts of "racketeering activity" as defined by 18 U.S.C. § 1961, and that the acts of "racketeering activity" upon him are part of a longtime "pattern of racketeering activity" outlawed by 18 U.S.C. § 1962. Birnbaum claims that his damages stem from the outlawed conduct, and that he has a right to make claims under 18 U.S.C. § 1964(c) ("civil RICO") upon such conduct.

3. This violation of duty produced an unlawful summary judgment upon Birnbaum's civil RICO **claims**, denying Birnbaum his right of showing his civil RICO **cause of action** to a jury **in the presence** of the "collection suit" **predicate act** as it would be **directly visible** to the jury. This lost right cannot be remedied by a tail-end appeal that "undoes" the summary judgment.

4. Appeal is one step further away from direct evidence of the RICO predicate act of bringing the fraudulent "collection suit", and the **"pattern of racketeering activity"** itself, as it would be observable to the jury if Birnbaum were allowed to show that the conduct of Plaintiff through its agents actually violates clearly established statutory law.

5. "Although mandamus relief will not issue merely because an appellate remedy may be more expensive and time-consuming than mandamus, it will issue when the failure to do so would vitiate and render illusory the subject matter of appeal." *Jack B. Anglin Co. Inc v. Tipps, 842 S.W.2d 266 (Tex. 1992) (emphasis added)*

6. **Allowing the Plaintiff to go to a jury with summary judgment "RICO Relief", as Judge Banner terms it (App#4), precludes defendant Birnbaum from presenting the jury with a viable and timely alternative to Plaintiff's arguments as to what the evidence really shows.**

ISSUES PRESENTED

ISSUE 1: Whether failure to appoint an auditor per Rule 172 RCP is a violation of duty imposed by law that cannot be remedied by appeal

ISSUE 2: Whether not following summary judgment rules is a violation of duty imposed by law that cannot be remedied by appeal

ISSUE 3: Whether the judge weighing the summary judgment evidence is a violation of duty imposed by law that cannot be remedied by appeal

ISSUE 4: Whether the judge granting "RICO Relief" is a violation of duty that precludes defendant Birnbaum from presenting the jury with a viable and timely alternative to Plaintiff's arguments as to what the evidence really means

ISSUE 5: Whether the judge not providing due process is a violation of duty imposed by law that cannot be remedied by appeal

STATEMENT OF FACTS

1. Plaintiff, **The Law Offices of G. David Westfall, P.C.** ("Law Office") filed suit against Udo Birnbaum on September 20, 2000. Plaintiff claims an unpaid open account of $18,121.10, that it maintains "systematic records" on its accounts,

and that it had sent four (4) prior demand notices of the $18,121.10 "bill" (App#15, App#18) in an attempt to collect.

2. **Birnbaum** claims Plaintiff did not make **any demand** or send **any statement** of any kind prior to July 31, 2000 (App#24, App#30), and that the "bill", as well as Plaintiff's suit, is a fraud, and that both are "predicate acts" in a longtime "pattern of racketeering activity" involving not only **G. David Westfall**, but also his bookkeeper and law office manager wife **Christina Westfall**, and his attorney daughter **Stefani Podvin** ("The Westfalls").

3. Birnbaum, in ***Defendant's Amended Answer, Counterclaim, and Cross-Complaint*** (App#24) holds G. DAVID WESTFALL, CHRISTINA WESTFALL, and STEFANI PODVIN liable to UDO BIRNBAUM for such amounts as they, by reason of their RICO violation, may be liable to UDO BIRNBAUM for their having made UDO BIRNBAUM liable to their agent Law Office "enterprise" (i.e. the $18, 121.10 Plaintiff is seeking)

4. Birnbaum, in ***Udo Birnbaum's Amended Third Party Plaintiff Civil RICO Claim against G. David Westfall, Christina Westfall, and Stefani Podvin*** (App#62) holds G. DAVID WESTFALL, CHRISTINA WESTFALL, and STEFANI PODVIN liable to UDO BIRNBAUM for such amounts as they, by reason of their RICO violation, damaged UDO BIRNBAUM through their agent Law Office "enterprise" (i.e. the $20,000 retainer fee paid, other costs, and loss of earnings). Same RICO "enterprise", same "pattern of racketeering activity", different liability.

5. Birnbaum in ***Affidavit of Udo Birnbaum*** (App#30) denied the "bill" under oath claiming that it was a fraud, that he had never seen this "bill" till it was sent to him on July 31, 2000, that the claimed four (4) collection notices were a fabrication, and that the "bill" was not of December 31, 1999 origin as portrayed by the "bill" (App#18), but of July 31, 2000 origin. Birnbaum also averred (App#30) that according to this "bill" the entire $20,000 retainer had already been eaten up five

(5) months before even the date portrayed by the "bill". Birnbaum claims that even going by the supposed "bill", the "account" was already in the red by about $4500 by July 17, 1999, and about $10,460 by September 17, 1999 (App#194-196, account work sheet), and that there is not even a claim by the Westfalls of any "bill" or "bills" being sent or demands being made for more money at such time.

6. On December 26, 2000, Birnbaum moved for appointment of an auditor under Rule 172 RCP to make a finding for the court as to the true status of accounts at the Law Office (App#52). The motion for the auditor was denied by Hon. Paul Banner on September 7, 2001 during summary judgment proceedings (App#4-5). Also denied at that September 7, 2001 hearing was Birnbaum's motion to compel deposition of the Law Office.

7. Evidence to the fraud by the Westfalls is also attested to by the Affidavit of Jerry Michael Collins (App#197-198), the affidavits of Kathy Young (App#32 and App#199), and the affidavit of Margie Phelps (App#202), all a part of the evidence presented by Birnbaum in his ***Appendix*** to his summary judgment response. Further summary judgment evidence is in the deposition testimony of G. David Westfall himself where he testified that he traded "legal fees" in return for work regarding several of his clients who had come to move out to and work at the Westfall's farm, with the trade of "work for legal fees" not being reflected in the accounts of both the law office nor the farm. (App#248 line 24 through App#250).

8. Evidence that Plaintiff the Law Office does not maintain "systematic records" as it is claiming to the court is shown by G. David Westfall's deposition testimony that he **never promised anybody** that they would be billed monthly. (App#241 line 15 through App#244). Yet he wrote such into the contract with Birnbaum (App#260) and the contract with Collins (App#262).

9. On August 17, 2001 opposing parties moved for summary judgment. (App#85, #87, #93). Birnbaum presented separate responses, (App#99, #113, #135, #159), showing that the motions by all of the parties were procedurally insufficient for failing to even designate as to which element they were claiming there was no evidence. Birnbaum nevertheless presented and designated his evidence as to every element and every issue of material fact of his claims and defenses and filed ***APPENDIX to Udo Birnbaum's Response to Motions for Summary Judgment*** (App#183, #191, #240, #255). (Details in motions, responses, and the APPENDIX)

10. Movants presented their replies (App#268, #272, #279, #286) at the September 7, 2001 hearing (App#1). They claimed that each and every bit of Birnbaum's summary judgment evidence was, among other things, not of the right form, too broad, or did not show what it was that Birnbaum said it showed. Judge Banner weighed and ruled on each designated bit of evidence individually (App#4-5). Judge Banner never forced them to meet their initial burden under *Celotex v. Cattrett (477 U.S. 317, 1986)* of showing *"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"*.

11. Judge Banner pronounced the granting of their summary judgment motions as to "RICO Relief" as indicated by his handwritten notes indicating such "RICO Relief". (App#4-5). The court reporter is still preparing the record of the hearing.

12. On September 10, 2001 Birnbaum entered a motion for recusal of Judge Banner (App#293). A hearing was held before Hon. Ron Chapman on October 1, 2001 at which Birnbaum orally presented his ***Position Supporting Recusal of Judge Paul Banner*** (App#296). A document containing the case law was given to Judge Chapman and Frank Fleming at the hearing.

13. Contrary to Judge Chapman's entry of "All parties present" on the docket (App#1) sheet, the Law Office and G. David Westfall were **not** present. Frank C. Fleming, attorney solely for the dismissed parties, was present.

Backdrop

14. Pertinent to the issues presented is the entire backdrop to these proceedings:

15. The "legal fees" of $38,121.10 (App#18-23) at issue in this cause relate to G. David Westfall suing, under **civil RICO**, not only 294th District Judge Tommy Wallace, but also his predecessor Hon. Richard Davis, the Van Zandt District Attorney Leslie Dixon, Senior Texas District Judge James B. Zimmermann, Hon. Pat McDowell, ex Presiding Judge of the First Administrative Judicial Region, and others including Betty Davis, Court Administrator of the 294th District Court.

16. At the same time G. David Westfall claims he was providing these alleged "services", he was also suing, for another client (App#197, #262), not only the same 294th District Judge Tommy Wallace, Van Zandt District Attorney Leslie Dixon, Senior District Judge James B. Zimmermann, but also the Van Zandt county judge, the sheriff, a constable, plus Tyler District **Judge Louis B. Gohmert**, among others. G. David Westfall testified in depositions that he spent "more time" (App#246 line 19 through #247) on the Collins civil RICO case (than the $38,121.10 above), yet never sent a bill, because he did not believe Collins "could afford it" (App#247 line 3). Westfall did however bill Collins $9,957.50 on July 31, 2000 in a Wal-Mart suit he was doing for Collins (App#265-267).

17. G. David Westfall was fined $2500 by Dallas Federal Judge Jorge Solis under the inherent power of the court for having flagrantly abused the judicial system in the Collins civil RICO matter (App#207-214).

18. At the same time the Westfalls were embroiled in a major Civil Rights suit against an Ellis County deputy, county attorney, Ellis County, an S.P.C.A. representative, a Navarro County deputy sheriff, Navarro County, and others stemming from Westfall's conviction under cruelty to animals (App#217-223)

19. At the same time G. David Westfall was also embroiled in involuntary bankruptcy proceedings in the Dallas Bankruptcy Court (App#224-231). The creditors were claiming that he was a "personal shell" (App#185) controlling large funds (App#187) but refusing to pay on judgments and other debts against him. The creditors were claiming he was personally broke. He was claiming he was not.

20. July 31, 2000, the date Birnbaum claims G. David Westfall **fabricated** the $18,121.10 "bill", (dated Dec. 31, 1999) is the exact date of the $9,957.50 (Wal-Mart) bill Westfall sent to Collins (App#265), a "bill" which Collins claims (App#197, Affidavit) is *"just as fraudulent as the one he sent to Udo Birnbaum"*. July 31, 2000 is also the exact date on which G. David Westfall was scheduled to and had his first hearing in the involuntary bankruptcy matter.

21. On September 20, 2000, G. David Westfall initiated his No. 00-619 suit against Birnbaum to collect upon the "bill" (App#12). September 20, 2000 is also the exact date on which G. David Westfall was scheduled to and did have his trial in the involuntary bankruptcy matter (App#184, bankruptcy transcript) . G. David Westfall testified on September 20, 2000 that the **only assets he had were his attorney fee interests in cases he had** (App#190 line 10-14).

22. Thereupon the bankruptcy record was sealed for 90 days. The parties did however settle by September. The full transcript of the September 20, 2000 proceedings (App#183, Summary judgment Appendix Exhibit 8) was designated by Birnbaum as summary judgment evidence to the alleged long time "pattern of racketeering" by the Westfalls that forms the basis of Birnbaum's civil RICO and other claims against all of the Westfalls.

ARGUMENT

CONTENTION AS TO ISSUE 1:

The failure to appoint an auditor per Rule 172 RCP is a violation of duty imposed by law that cannot be remedied by appeal

1. Rule 185 RCP ("Suit on Account") states:

> When any action or defense is founded upon an ***open account*** or other claim for goods, wares and merchandise, including any claim for liquidated money demand based upon ***written contract*** or founded on business dealings between the parties, or is for personal service rendered, or labor done or labor or materials furnished, on which ***systematic record has been kept***, and is supported by the affidavit of the party, his agent or attorney taken before some officer authorized to administer oaths, to the effect that such claim is, within the knowledge of the affiant, ***just and true***, ***that it is due***, and that all just and lawful offsets, payments and credits have been allowed, the same ***shall be taken as prima facie evidence thereof***, **unless** the party resisting such claim shall file a ***written denial***, ***under oath***. A party resisting such a sworn claim shall comply with the rules of pleading as are required in any other kind of suit, provided, however, that **if he does not timely file** ***a written denial***, **under oath**, he ***shall not be permitted to deny the claim***, or any item therein, as the case may be. No particularization or description of the nature of the component parts of the account or claim is necessary unless the trial court sustains special exception to the pleadings. (Rule 185 RCP, emphasis added)

2. **Plan 1** of the scheme of the "Law Office" is self-evident when viewed in light of the racketeering claims made against the individual persons in this cause: That Pro Se Birnbaum does not know about **Rule 185**, then use procedure to get by force of the Court that which is not properly theirs, i.e. **defraud** Birnbaum of an **additional $18, 121.10**.

3. It is to be noted that this is the same Court as G. David Westfall knows, as shown by his **<u>two</u> civil racketeering suits against Judge Wallace and others (*Collins v. Lawrence*, 3:99cv0641 and *Birnbaum v. Ray*, 3:99cv0696 in the Dallas federal court)**, is a pocket of **corruption**. Westfall enticed Birnbaum to bring such suit (3:99cv0696) (App#197, Affidavit of Collins) so that G. David Westfall would not only get **$20,000 up front money**, but be available to "save" Judge Wallace and others from the very suits he had instigated. (App#34-43, Affidavit of Udo Birnbaum). Judge Wallace, or some other judge in the 294th, could be expected to stick by procedure under Rule 185, and presto, G. David Westfall could get a judgment for $18,121.10 plus legal fees against Birnbaum. **What a scheme. What a fraud. What abuse of the judicial process.**

4. **Problem 1** arose when Birnbaum not only **denied under oath**, but brought claims under the Texas Deceptive Trade Practices Act (DTPA) against the "Law Office", and cross and third party claims under 18 U.S.C. § 1961 et seq. ("civil RICO") and **fraud** against G. David Westfall, his wife, and his daughter.

5. **Plan 2** of the scheme was to stall, then try to get Birnbaum **sanctioned** (App#56), quash depositions, not produce in discovery, and give incomplete answers. Same in depositions when they were finally **ordered** by Judge Banner (App#3). Then lure Birnbaum to take depositions in Van Zandt, not at the "Law Office" as ordered by Judge Banner (App#80, Motion to Compel), and not bring anything with them other than the clothes they were wearing, harass and delay so that Birnbaum could never get around to deposing the Law Office, then claim Birnbaum had deposed the Law Office (App#80, Motion to Compel). **What a scheme. What a fraud. What abuse of the judicial process.**

6. **Problem 2** arose when Birnbaum avails himself, under Rule 172 RCP, to seek an **investigation** into the **fraud.** Rule 172, RCP reads, in part:

> When an **investigation** of **accounts** or examination of vouchers appears necessary for the **purpose of justice** between the parties to any suit, the court **shall appoint an auditor** or auditors to state the accounts between the parties and to make report thereof to the court as soon as possible. The auditor **shall** verify his report by his affidavit stating that he has carefully **examined** the state of the account between the parties, and that his report contains a true statement thereof, so far as the same has come within his knowledge. Exceptions to such report or any item thereof must be filed within 30 days of the filing of such report. The court shall award reasonable compensation to such auditor to be taxed as costs of suit. (Rule 172 RCP, emphasis added)

7. The motion for an auditor was submitted on December 26, 2000. None of opposing parties responded to it. The court never got around to either appointing the auditor or denying the motion until September 7, 2001, when at the summary judgment hearing Judge Banner denied the motion, and at the same time granted "RICO Relief" to the Westfalls (App#4-5)

8. An **investigation** of the accounts was necessary **for the purpose of justice** under the above-described circumstances. Judge Banner violated the Law, as set out by the Supreme Court of Texas in Rule 172 of the Rules of Civil Procedure, in not **administerially** appointing such auditor.

9. Neither Judge Banner, nor anyone else, anywhere, has "discretion" to violate the law of due process as codified in the Rules of Civil Procedure.

10. This violation of duty denies Birnbaum his right under Rule 172 RCP of having an **auditor**, acting for the court, to **cut through all the fraud** in Plaintiff's $18,121.10 "collection suit", and establish that the very filing of the "collection suit", and the very filing of all the other documents in support of it, constitute **predicate acts** in a **pattern of racketeering activity** associated with a **scheme** and associated with an **enterprise**, constituting a **criminal violation of RICO**. This lost right of having the auditor cut through the fraud cannot be remedied by a tail-end appeal.

11. Appeal is one step further away from direct evidence of the RICO predicate act of bringing the fraudulent "collection suit", and the **"pattern of racketeering activity"** itself, as it would be observable to the jury if Birnbaum were allowed to show that the conduct of Plaintiff through its agents actually violates clearly established statutory law.

12. **Allowing the Plaintiff to go to a jury with summary judgment "RICO relief", as the trial judge terms it, precludes defendant Birnbaum from presenting the jury with a viable and timely alternative to Plaintiff's arguments as to what the evidence really shows.**

CONTENTION AS TO ISSUE 2:

Judge Banner not following summary judgment rules is a violation of duty imposed by law that cannot be remedied by appeal.

1. The **Movants** for summary judgment never satisfied their ***initial burden*** of designating which **element** of Birnbaum's civil RICO claim had no support in the **evidentiary material *of record***. (App#99, #113, #135, #159, Birnbaum MSJ responses).

2. It never was Birnbaum's duty to put his summary judgment **evidentiary material** into the "right form". It was the **movant's burden** to **show** that, if the **evidentiary material** were **reduced to admissible evidence**, it then would be insufficient. Inferences, as required in a RICO case, are of course the prerogative of the jury, not the judge.

3. Movants got the court to rule as to whether Birnbaum's designated evidentiary material was in the "right form" for summary judgment. Of course it was if it was **"of record"**, which it was. The proceedings give the perception of Judge Banner letting the movants get away with chipping at the evidence in Birnbaum's

response, when it was his duty to make them carry out their ***initial burden***, which of course is impossible under a RICO claim.

4. First the relevant **law** under the circumstances of this case, to be followed by how Judge Banner **violated this law**:

> We review de novo, a district court's grant of **summary judgment**, applying the same standard as the district court in the first instance. See Burge v. Parish of St. Tammany, 157 F.3d 452, 465 (5th Cir. 1999). Summary judgment is appropriate where the moving party establishes that " there is no genuine issue of material fact and that it is entitled to judgment as a matter of law." Fed R.Civ.P. 50(c). The moving party must 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, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986). **Once the moving party has carried its *summary judgment burden***, the opposing party must set forth specific facts showing a genuine issue for trial and may not rest upon the mere allegations or denials of its pleadings. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). Thus, this showing requires more than some metaphysical doubt as to the material facts. Matsushito Elec. Indus. Co v. Zenith Radio Corp., 475 U.S. 574, 584-86, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). *Beck v. Texas State Board of Dental Examiners*, U.S. Fifth Circuit No. 98-51111, March 3, 2000, emphasis added.

> We review de novo a district court's grant of **summary judgment**, applying the same standard as the district court. See Walker v. Thompson, 214 F.3d 615, 624 (5th Cir. 2000). **Summary judgment** is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). "If the moving party meets the ***initial burden*** of showing there is no genuine issue of material fact, the burden shifts to the nonmoving party to produce evidence or designate specific facts showing the existence of a genuine issue for trial." Allen v. Rapides Parish Sch. Bd., 204 F.3d 619, 621 (5th Cir. 2000) (internal quotations and citation omitted). Doubts are to be resolved in favor of the nonmoving party, and any reasonable inferences are to be drawn in favor of that party. See Burch v. City of Nacogdoches, 174 F.3d 615, 619 (5th Cir.

1999). *Evans v. City of Bishop*, U.S. Fifth Circuit No. 99-41444, December 11, 2000, emphasis added.

This court reviews a grant of summary judgment de novo, viewing the evidence in the light most favorable to the nonmovant. Smith v. Brenoettsy, 158 F.3d 908, 911 (5th Cir. 1998); see also Tolson v. Avondale Indus., Inc., 141 F.3d 604, 608 (5th Cir. 1998). " **Summary judgment** is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) (quoting Fed. R. Civ. P. 56(c)). The moving party bears the burden of showing the district court that there is an absence of evidence to support the nonmoving party's case. See id. At 325. "If the moving party fails to meet this ***initial burden***, **the motion must be denied**, regardless of the nonmovant's response. If the movant does, however, meet this burden, the nonmovant must go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial." Tubacex, Inc. v. M/V Risan, 45 F.3d 951, 954 (5th Cir. 1995). "A dispute over a material fact is genuine 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" Smith, 158 F.3d at 911 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). The ***substantive law*** **determines which facts are material**. See Anderson, 477 U.S. at 248. *Kee v. City of Rowlett Texas*, U.S. Fifth Circuit No. 99-10555, March 28, 2001, emphasis added.

We review a grant or denial of **summary judgment** de novo. See Webb v. Cardiothoracic Surgery Assocs., P.A., 139 F.3d 532, 536 (5th Cir. 1998). **Summary judgment** is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits filed in support of the motion, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c). The **summary judgment** evidence is reviewed in the light most favorable to the nonmovant. See Melton v. Teachers Ins. & Annuity Ass'n, 114 F.3d 557, 559 (5th Cir. 1997). **If the moving party** meets its ***initial burden*** of showing that there is no genuine issue, ***then the burden shifts*** to the nonmovant to set forth specific facts showing the existence of a genuine issue. See Fed. R. Civ. P. 56(e). *Rascal Survey U.S.A. v. M/V Count Fleet*, U.S. Fifth Circuit No. 98-31382, October 24, 2000, emphasis added.

We review the grant or denial of **summary judgment** de novo, applying the same standards as did the district court. See Webb v. Cardiothoracic Surgery Assocs., P.A., 139 F.3d 532, 536 (5th Cir. 1998).(1) **Summary judgment** is appropriate if the record "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The **moving party bears** the ***initial burden*** of demonstrating an absence of evidence supporting the nonmovant's case. See Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). Although we consider the evidence and all reasonable inferences to be drawn therefrom in the light most favorable to the nonmovant, the nonmoving party must come forward with specific facts indicating a genuine issue for trial. See Webb, 139 F.3d at 536. *Babcock v. Hartmarx Corporation*, U.S. Fifth Circuit No. 98-30766, July 26, 1999, emphasis added.

We review a grant of **summary judgment** de novo.(6) **Summary judgment** is proper under Federal Rule of Civil Procedure 56(c) "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the nonmoving party is entitled to judgment as a matter of law."(7) **If the movant meets** the ***initial burden*** of establishing that there is no genuine issue as to a material fact, the burden shifts to the nonmoving party to set forth specific facts showing that there is a genuine issue for trial. *Wooley v. City of Baton Rouge*, U.S. Fifth Circuit No. 98-30267, May 8, 2000, emphasis added.

"We review a grant of **summary judgment** de novo, applying the same criteria used by the district court in the first instance." Texas Manufactured Housing Ass'n v. City of Nederland, 101 F.3d 1095, 1099 (5th Cir. 1996); see Tolson v. Avondale Indus., Inc., 141 F.3d 604, 608 (5th Cir. 1998). **Summary judgment** is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); see Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986). The party moving for **summary judgment** bears the ***initial burden*** of showing an **absence of evidence** to support the nonmoving party's case, see id. At 322-27, but, once this burden has been met, the nonmoving party can resist the motion by making a positive showing that a genuine issue of material fact exists, see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). The nonmovant must go beyond the pleadings and **designate specific facts** showing that there is a genuine issue of material fact for trial. See Celotex, 477 U.S. at 324-25. Finally, we note that a grant of

summary judgment may be affirmed on any ground that was raised to the district court and upon which both parties had the opportunity to present evidence. See Conkling v. Turner, 18 F.3d 1285, 1296 n.9 (5th Cir. 1994). *Batiste v. Island Records Inc.*, U.S. Fifth Circuit No. 98-30046, June 21, 2000, emphasis added.

We review the entry of **summary judgment** de novo, see Morris v. Covan World Wide Moving, Inc., 144 F.3d 377, 380 (5th Cir. 1998), applying the same standards as the district court, see Lodge Hall Music, Inc. v. Waco Wrangler Club, Inc., 831 F.2d 77, 79 (5th Cir. 1987). After consulting applicable law in order to ascertain the material factual issues, we consider the evidence bearing on those issues, viewing the facts and the inferences to be drawn therefrom in the light most favorable to the non- movant. See King v. Chide, 974 F.2d 653, 656 (5th Cir. 1992). The party moving for **summary judgment** has the ***initial burden*** of "informing the district court of the basis for its motion, and **identifying those portions** of [the summary judgment record] which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). ***Once that burden is met***, the burden of production ***shifts*** to the non-movant to demonstrate that a genuine issue of fact does exist on the material elements of his claims. See id. At 323-24. *Colson v. Grohman*, U.S. Fifth Circuit No. 97-41388, April 26, 1999, emphasis added.

The party moving for **summary judgment** bears the ***initial burden*** of showing the absence of a genuine issue of material fact.(5) Once the burden of the moving party is discharged, the burden shifts to the nonmoving party to **show**, by **either referring to evidentiary material in the record** or by **submitting additional evidentiary documents**, that genuine issues of material fact remain to be resolved.(6) We will affirm the grant of **summary judgment** only if there exists no genuine issue of material fact and the movant was entitled to judgment as a matter of law. *Wise v. E.I Dupont De Nemours and Co.*, U.S. Fifth Circuit No. 94-60490, July 18, 1995, emphasis added.

We review the district court's grant of **summary judgment** de novo. Montgomery v. Brookshire, 34 F.3d 291, 294 (5th Cir.1994). **Summary judgment** is proper under Rule 56 of the Federal Rules of Civil Procedure when all the evidence viewed in the light most favorable to the non-movant shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). Rule 56 "mandates the entry of **summary judgment**, after adequate time for

discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); accord Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir.1994) (en banc). The movant bears the ***initial burden*** of demonstrating the absence of a genuine issue of material fact, but need not negate the elements of the nonmovant's case. Celotex, 477 U.S. at 323, 106 S.Ct. at 2553; accord Little, 37 F.3d at 1075. "If the moving party **fails to meet** this ***initial burden***, the **motion must be denied**, **regardless of the nonmovant's response.**" Little, 37 F.3d at 1075. "Once the moving party has supported its contention that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law, the burden is on the nonmoving party "to go beyond the pleadings and by her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate "specific facts" showing that there is a genuine issue for trial.' " Krim v. BancTexas Group, Inc., 989 F.2d 1435, 1445 (5th Cir.1993) (quoting Celotex, 477 U.S. at 324, 106 S.Ct. at 2553.) *Dempsey v. State of Texas*, U.S. Fifth Circuit No. 94-50599, Oct. 3, 1995, emphasis added.

The owners correctly state that under Texas law, the determination of whether a fiduciary relationship exists between the parties is a question of fact for the jury. Schiller v. Elick, 240 S.W.2d 997, 999 (Tex.1951). However, that the determination of whether a fiduciary relationship exists is a fact question did not abolish the owners' burden to come forward with specific facts demonstrating that there is a genuine issue of material fact for trial after Apache moved for **summary judgment** and offered evidence that no fiduciary relationship existed. Under Federal Rule of Civil Procedure 56(c), the party moving for **summary judgment** bears the ***initial burden*** of "informing the district court of the basis for its motion, and **identifying those portions of [the record]** which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). **Once this burden is met**, the burden shifts to the non-moving party to establish the existence of a genuine issue for trial. Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 585-87, 106 S.Ct. 1348, 1355-56, 89 L.Ed.2d 538 (1986); Leonard v. Dixie Well Serv. & Supply Inc., 828 F.2d 291, 294 (5th Cir.1987). The burden on the non-moving party is to " **do more** than simply show that there is **some metaphysical doubt** as to the material facts." *Matsushita*, 475 U.S. at 586, 106 S.Ct. at 1355-56.

The party moving for **summary judgment** must demonstrate the absence of fact issues by identifying portions of the pleadings, discovery, and affidavits which support its position. Celotex, 477 U.S. at 323, 106 S.Ct. at 2552-53. If the movant **fails to meet** this ***initial burden***, the non-moving party **has no burden to produce evidence**, even if the non-moving party bears the burden of proof at trial. *Russ v. International Paper Co.*, 943 F.2d 589, 592 (5th Cir.1991).

Apache has not met its ***initial burden*** under Celotex. Thus, whether Apache took upon itself the duty to continue to operate the Brothers well or to take reasonable action to prevent the loss of the Brothers Unit leases and, if so, whether Apache breached its duty by failing to act as a reasonably prudent operator under these circumstances are genuine fact issues. We therefore conclude that **summary judgment** was inappropriate.

Apache also failed to meet its ***initial burden*** under Celotex with respect to the owners' claim that Apache misrepresented to the owners that it continued to operate the Brothers well by sending the owners monthly billing statements from July through November 1990. *Norman v. Apache Corporation*, U.S. Fifth Circuit No. 93-7194, April 29, 1994, emphasis added.

Although this statement provides little insight into the district court's reasons for granting **summary judgment**, it does seem to indicate that the **district court felt** that the plaintiffs were under an ***initial burden*** to come forward with **summary judgment** evidence demonstrating a material issue of fact as to every element of their case. If so, the district court was incorrect.

Under Rule 56(c) of the Federal Rules of Civil Procedure, **summary judgment** is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 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). "[B]efore the non-moving party is required to produce evidence in opposition to the motion, the **moving party must first satisfy** its obligation of demonstrating that there are no factual issues warranting trial." Russ, 943 F.2d at 592; Commander v. BASF Wyandotte Corp., 978 F.2d 924, 927 n. 4 (5th

Cir.1992) ("Before the non-moving party is required to produce evidence in opposition to a motion for **summary judgment**, the **moving party** in a motion for **summary judgment** must **demonstrate that there are no factual issues warranting trial**."); see Clark v. Coats & Clark, Inc., 929 F.2d 604, 608-09 (11th Cir.1991) (vacating order granting **summary judgment** and remanding for determination of whether movant met its ***initial burden*** under Rule 56). From the Record, it is apparent that Montgomery County totally failed to satisfy the movant's burden as set out in Celotex and Russ. The County's motion for summary judgment **failed to point out an absence of proof on any factual issue**. In fact, the motion **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 a movant's burden**. The County's motion was more akin to a 12(b)(6) motion in that it raised legal issues and challenged only the sufficiency of the plaintiffs' complaint. As a result, the ***burden never shifted*** **to the plaintiffs** to go beyond the pleadings to show specific facts creating a genuine issue for trial.(5) It therefore would have been **error** for the district court to grant summary judgment for the County solely because the plaintiffs did not come forward with any **additional summary judgment evidence**. *Ashe v. Corley*, U.S. Fifth Circuit No. 91-6299, June 4, 1993, emphasis added.

5. The **Movants** for summary judgment never satisfied their ***initial burden*** of designating which **element** of Birnbaum's civil RICO claim had no support in the **evidentiary material *of record***.

6. Birnbaum clearly showed this again and again to Judge Banner in: ***Udo Birnbaum's Response to Counter Defendant Law Office of G. David Westfall, P.C. Motion for Summary Judgement, Udo Birnbaum's Response to G. David Westfall's Motion for Summary Judgment, Udo Birnbaum's Response to Third Party Defendant Stefanie (sic) Podvin's Motion for Summary Judgment,*** and ***Udo Birnbaum's Response to Third Party Defendant, Christina Westfall's Motion for Summary Judgment*** (App#99, #113, #135, #159) and in oral argument. (transcript not yet available)

7. As shown again and again to Judge Banner by Birnbaum's argument, RICO has no real "elements" in the usual sense, only "material issues of fact". The "elements", if any, of a civil RICO **cause of action** are as follows:

> "There are **three essential elements** in a **private action** under this chapter [civil RICO]: a violation of this chapter, direct injury to plaintiffs from such a violation; and damages sustained by plaintiffs." *Wilcox Development Co. v. First Interstate Bank of Oregon, N.A., D.C.Or.1983, 97 F.R.D., 440.*

8. These "elements" of the cause are all **issues of fact** for a jury and not subject to determination by the judge. Furthermore **summary judgment** is **not available** under RICO as a matter of **law**:

> "**Material issues of genuine fact** existed with respect to existence of an enterprise as defined by this chapter, association of defendant printing company with such enterprise, association of the alleged enterprise with organized criminal activity, the intent and knowledge of defendant concerning the underlying predicate acts and existence of injury caused by alleged violation of this chapter, **precluding summary judgment** in favor of defendant in action alleging the kickback scheme. *Estee Lauder, Inc. v. Harco Graphics, Inc., D.C.N.Y.1983, 558 F.Supp.83, emphasis added.*

9. The **Movants** for summary judgment never satisfied their ***initial burden*** of designating which **element** of Birnbaum's civil RICO claim had no support in the **evidentiary material *of record***.

10. It never was Birnbaum's duty to put his summary judgment **evidentiary material** into the "right form". It was the **movant's burden** to **show**, if the **evidentiary material** were **reduced to admissible evidence**, that it then would be insufficient. Inferences, as required in a RICO case, are of course the prerogative of the jury, not the judge.

11. The proceedings give the perception of Judge Banner violating the law by letting the movants get away with chipping at the evidence in Birnbaum's response, when it was Judge Banner's duty to make the movants carry out their ***initial***

burden, which of course is impossible under a RICO claim, and why summary judgment is not available under RICO **as a matter of law**.

12. Neither Judge Banner, nor anyone else, anywhere, has "discretion" to violate clearly established law.

13. This violation of duty produced an unlawful summary judgment upon Birnbaum's civil RICO **cross claims**, denying Birnbaum his right of showing his **best defense**, i.e. that plaintiff's $18,121.10 "collection suit" is really just another **predicate act** in a **pattern of racketeering activity** by the cross-defendants. This lost right to show the best defense cannot be remedied by a tail-end appeal.

14. This violation of duty also produced an unlawful summary judgment upon Birnbaum's civil RICO **claims**, denying Birnbaum his right of showing his civil RICO **cause of action** to a jury **in the presence** of the "collection suit" **predicate act** as it was **directly visible** to the jury. This lost right cannot be remedied by a tail-end appeal that "undoes" the summary judgment.

15. Appeal is one step further away from direct evidence of the RICO predicate act of bringing the fraudulent "collection suit", and the **"pattern of racketeering activity"** itself, as it would be observable to the jury if Birnbaum were allowed to show that the conduct of Plaintiff through its agents actually violates clearly established statutory law.

16. **Allowing the Plaintiff to go to a jury with summary judgment "RICO relief", as the trial judge terms it, precludes defendant Birnbaum from presenting the jury with a viable and timely alternative to Plaintiff's arguments as to what the evidence really shows.**

CONTENTION AS TO ISSUE 3:

Judge Banner weighing summary judgment evidence is a violation of duty imposed by law that cannot be remedied by appeal

1. As described to above, all that was required of Birnbaum was that he designate the **evidentiary material <u>of record</u>**, if indeed the movants had met their ***<u>initial burden</u>***, which they did not, of pointing to an element of Birnbaum's cause of action which they could show had no evidentiary support.

2. Instead the movants got Judge Banner to weigh (App#4-5, #8, Westfall proposed Order) the evidence **provided with** and **pointed at** by Birnbaum's summary judgment response. The movants' "objections" ranged among the following:

- *Because the same is not **attached** to the response*
- *Because none of the referred to evidence has been **attached** to the response*
- *That the **evidence** is a mere **conclusion***
- *Because it constitutes **unsubstantiated** factual and legal conclusions*
- *Refers to a deposition which is not properly authenticated and is not **attached** to the response*
- *That the allegation of evidence is **overly broad** and not specific*
- *The exhibits are not properly **authenticated***

3. The law does not allow Judge Banner to "weigh" the summary judgment evidence. Instead the judge, unlike the jury, is required to look at the evidence "in light most favorable" to the nonmovant. Judge Banner violated the law in even considering summary judgment when considering that the "issue of material fact", the only issue of fact at that point, was the question for a jury, **"did any of the cross and third party defendants violate RICO?"**

4. **Substantive law**, i.e. RICO, tells District Court trial judges which facts are material. Case law tells the District Court trial judge that he is to view the summary judgment evidence in the same manner as the jury, i.e. upon **largely or wholly circumstantial evidence** in the case of RICO:

"As to materiality, the **substantive law will identify** which facts are **material**. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant will not be counted." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242(1986)*

"Thus, in ruling on a motion for summary judgment, the judge **must view the evidence** presented **through the prism** of the **substantive evidentiary burden**. This conclusion is mandated by the nature of this determination. The question here is whether a jury could reasonably find either that the plaintiff proved his case by the quality and quantity of evidence required by the governing law or that he did not. Whether a jury could reasonably find for either party, however, cannot be defined except by the criteria governing what evidence would enable the jury to find for either the plaintiff or the defendant: It makes no sense to say that a jury could reasonably find for either party without some [477 U.S. 242, 255] benchmark as to what standards govern its deliberations and within what boundaries its ultimate decision must fall, and these standards and boundaries are in fact provided by the applicable evidentiary standards." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242(1986)*

"In prosecution under this chapter, jury is entitled to **infer existence** of enterprise **on basis of largely or wholly circumstantial evidence**." *U.S. v. Elliott, C.A.Ga 1978, 571 F.2d 880, rehearing denied 575 F.2d 300, certiorari denied 99 S.Ct. 349,439 U.S. 953, 59 L.Ed.2d 344.*

5. Summary judgment case law also tells District Court trial judges, that unlike the jury, he is not allowed to draw inferences[1] like a jury is allowed to. Case law also tells him that whether an issue needs to go to a jury turns on whether it presents a proper jury question[2]. **RICO violation is a jury question**. Case law also tells the judge that he, unlike the jury, is not entitled to draw inferences from any of the documentary evidence[3] in front of him either. Case law also tells him that summary judgment on affidavits is inappropriate[4] when state of mind is involved, **as it surely is in RICO.**

[1] "Credibility determinations, the weighing of the evidence, and the **drawing of legitimate inferences** from the facts **are jury function**, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed

verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Adickes, 398 U.S., at 158-159. Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242(1986)

[2] "Again, in *Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970)*, the Court emphasized that the availability of summary judgment turned on whether a **proper jury question** was **presented**. There, one of the issues was whether there was a conspiracy between private persons and law enforcement officers. The District Court granted summary judgment for the defendants, stating that there was no evidence from which reasonably minded jurors might draw an inference of conspiracy. We reversed, pointing out that the moving parties' submissions had not foreclosed the possibility of the existence of certain facts from which "it would be open to a jury … to infer from the circumstances" that there had been a meeting of the minds. *Id., at 158-159. Anderson v. Liberty Lobby, Inc., 477 U.S. 242(1986)*

[3] "Cases may be posed dealing with evidence that is essentially documentary, rather that testimonial; but the Court has held in a related context involving Federal Rule of Civil Procedure 52(a) that inferences from documentary evidence are as much the prerogative of the finder of fact as inferences as to the credibility of witnesses. *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985)." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 270 (1986)*, Justice Rehnquist, dissenting

[4] "And summary judgment on **affidavits** and the like is even more **inappropriate** when the central, and perhaps only, inquiry is the official's **state of mind**. See C. Wright, Law of Federal Courts 493 (3d ed. 1976) (It "is not feasible to resolve on motion for summary judgment cases involving state of mind"); *Subin v. Goldsmith*, 224 F.2d 753 (CA2 1955). *Butz v. Economou*, *438 U.S. 478, 527 (1978)*, Justice Rehnquist, etc. concurring in part and dissenting in part.

6. Judge Banner violated summary judgment law in weighing the evidence. He also violated substantive law (civil RICO) as judicially interpreted. Summary judgment is of course not available in civil RICO.

"**Material issues of genuine fact** existed with respect to existence of an enterprise as defined by this chapter, association of defendant printing company with such enterprise, association of the alleged enterprise with

> organized criminal activity, the intent and knowledge of defendant concerning the underlying predicate acts and existence of injury caused by alleged violation of this chapter, **precluding summary judgment** in favor of defendant in action alleging the kickback scheme. *Estee Lauder, Inc. v. Harco Graphics, Inc., D.C.N.Y.1983, 558 F.Supp.83, emphasis added.*

7. Neither Judge Banner, nor anyone else, anywhere, has "discretion" to disobey the law.

8. This violation of duty produced an unlawful summary judgment upon Birnbaum's civil RICO **cross claims**, denying Birnbaum his right of showing his **best defense**, i.e. that plaintiff's $18,121.10 "collection suit" is really just another **predicate act** in a **pattern of racketeering activity** by the cross-defendants. This lost right to show the best defense cannot be remedied by a tail-end appeal.

9. This violation of duty also produced an unlawful summary judgment upon Birnbaum's civil RICO **claims**, denying Birnbaum his right of showing his civil RICO **cause of action** to a jury **in the presence** of the "collection suit" **predicate act** as it was **directly visible** to the jury. This lost right cannot be remedied by a tail-end appeal that "undoes" the summary judgment.

10. Appeal is one step further away from direct evidence of the RICO predicate act of bringing the fraudulent "collection suit", and the **"pattern of racketeering activity"** itself, as it would be observable to the jury if Birnbaum were allowed to show that the conduct of Plaintiff through its agents actually violates clearly established statutory law.

11. **Allowing the Plaintiff to go to a jury with summary judgment "RICO relief", as the trial judge terms it, precludes defendant Birnbaum from presenting the jury with a viable and timely alternative to Plaintiff's arguments as to what the evidence really shows.**

CONTENTION AS TO ISSUE 4:

Judge Banner granting "RICO relief" is a violation of duty that precludes defendant Birnbaum from presenting the jury with a viable and timely alternative to Plaintiff's arguments as to what the evidence really shows

1. The conduct of Judge Banner, at both hearings before him, evinced a fundamental opposition to civil RICO. But civil RICO is the **law of the land**, and its purpose is clearly established by no other than the Supreme Court of the United States. Even if Judge Banner dislikes civil RICO, he is nevertheless bound by the **law**. If he does not follow the **law**, his rulings must be reversed. As for the law:

> It shall be **unlawful** for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of an unlawful debt." *18 U.S.C. § 1962(c).(emphasis added)*
>
> **Any person** injured in his business or property **by reason of a violation of section 1962** of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee. *18 U.S.C. § 1964(c), "civil RICO". (emphasis added)*
>
> "Purpose and history of this chapter and substance of its provisions demonstrate clear congressional intent that chapter be interpreted to apply to activities that **corrupt** public or governmental entities". *U.S. v. Angelili, C.A.N.Y.1981, 660 F.2d 23, certiorari denied 102 S.Ct. 1258, 1442, 455 U.S. 910, 945, 71 L.Ed.2d 449, 657, rehearing denied 102 S.CT. 1998, 1999, 2024, 456 U.S. 939, 951, 72 L.Wd.2d 460, 476. (emphasis added)*
>
> "Congress did not limit scope of this chapter to those persons involved in what traditionally has been thought of as "organized crime," but, rather, **any "person"** as the term is broadly defined in this chapter, whether associated with organized crime or not, **can commit violation**, and **any person injured in his business or property by such violation** may then sue violator for damages in federal court". *Lode v. Leonardo, D.C.Ill.1982, 557 F.Supp. 675. (emphasis added)*

(18 U.S.C. § 1962): "**Whoever** engages in prohibited patterns of racketeering activities comes within purview of this chapter, **including public officials**". *U.S. v. Mandel, D.C. Md. 1976, 415 F.Supp. 997, supplemented 415 F.Supp. 1025. (emphasis added)*

(18 U.S.C. § 1964): "A link to organized crime is not a requirement of a civil cause of action under this chapter". *Kimmel v. Peterson, D.C.Pa.1983, 565 F.Supp. 476*

In rejecting a significantly different focus under RICO, therefore, we are honoring an analogy that Congress itself accepted and relied upon, and one that promotes the objectives of **civil RICO** as readily as it furthers the objects of the Clayton Act. Both statutes share a common congressional objective of **encouraging civil litigation** to supplement Government efforts to deter and penalize the respectively prohibited practices. The object of civil RICO is thus not merely to compensate victims but to **turn them into prosecutors, "private attorneys general," dedicated to eliminating racketeering activity**. *Klehr*, at 187 (citing Malley-Duff, 483 U.S. at 151) (civil RICO specifically has a "further purpose [of] encouraging potential private plaintiffs diligently to investigate") The provision for treble damages is accordingly justified by the expected benefit of **suppressing racketeering activity**, an object pursued the sooner the better. It would, accordingly, be strange to provide an unusually long basic limitations period that could only have the effect of postponing whatever public benefit civil RICO might realize. *Rotella v. Wood, United States Supreme Court No. 98-896, certiorari to the united states court of appeals for the fifth circuit, February 23, 2000. (emphasis added)*

2. Given the utter abhorrence of **civil RICO** by most lawyers, it should be of interest as to why G. David Westfall brought **two (2) civil RICO causes**, and against judges and public officials at that.

3. It should also be of interest as to why G. David Westfall, in bringing these civil RICO causes, believed it was extortion when another attorney abused the judicial process to extract "legal fees", and why it is not a violation of RICO when he does so with this fraudulent suit.

4. In any case, I am entitled to have process that conforms to the **law of the land**. Neither Judge Banner, nor anyone else, anywhere, has "discretion" to disobey the law.

5. This violation of duty produced an unlawful summary judgment upon Birnbaum's civil RICO **cross claims**, denying Birnbaum his right of showing his **best defense**, i.e. that plaintiff's $18,121.10 "collection suit" is really just another **predicate act** in a **pattern of racketeering activity** by the cross-defendants. This lost right of being allowed to show the best defense cannot be remedied by a tail-end appeal.

6. This violation of duty also produced an unlawful summary judgment upon Birnbaum's civil RICO **claims**, denying Birnbaum his right of showing his civil RICO **cause of action** to a jury **in the presence** of the "collection suit" **predicate act** as it was **directly visible** to the jury. This lost right cannot be remedied by a tail-end appeal that "undoes" the summary judgment.

7. Appeal is one step further away from direct evidence of the RICO predicate act of bringing the fraudulent "collection suit", and the **"pattern of racketeering activity"** itself, as it would be observable to the jury if Birnbaum were allowed to show that the conduct of Plaintiff through its agents actually violates clearly established statutory law.

8. **Allowing the Plaintiff to go to a jury with summary judgment "RICO relief", as the trial judge terms it, precludes defendant Birnbaum from presenting the jury with a viable and timely alternative to Plaintiff's arguments as to what the evidence really shows.**

CONTENTION AS TO ISSUE 5:

Judge Banner not providing due process is a violation of duty imposed by law that cannot be remedied by appeal

1. Judge Banner, at the September 7, 2001 hearing, told those adverse to Birnbaum to write the order reflecting that proceeding. Judge Banner is empowering those I have charged with racketeering and fraud to "write", to their liking, a fraudulent "Order" in the name of the judge himself. This gives the appearance of willingness, on the part of this judge, to condone fraud, particularly when viewed in light of this judge not timely appointing an auditor in the first place. As for the "Order" presented by G. David Westfall for Judge Banner's signature (App#6):

2. G. David Westfall's attached ***"Order Sustaining Motions for Summary Judgment"*** (App#6) does not even reflect what Judge Banner stated.

3. G. David Westfall's proposed Order (App#6) 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"!** The RICO claims were solely against G. David Westfall, his wife, and his daughter.

4. G. David Westfall's proposed Order (App#6) 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". This Order gets Westfall completely "out"!

5. It should also be noted that there is no statement in Westfall's proposed Order that the Court actually **heard the motions for summary judgment**, for it never did, and neither Westfall, nor the other parties, ever satisfied their ***initial burden*** of **"showing the district court that there is an absence of evidence"**. Such being the case, the motion must be denied as a **matter of law**, regardless of my [nonmovant] response.

6. If Judge Banner had indeed signed such order, as I have every reason to believe G. David Westfall had reason to believe he would, I would of course have no recourse but to appeal that matter.

7. Judge Banner empowering those I have charged with racketeering and fraud to "write", to their liking, a fraudulent "Order" in the name of the judge himself, gives the appearance of willingness, on the part of this judge, to condone such fraud, particularly when viewed in light of this judge not timely appointing an auditor in the first place.

8. In any case, I am entitled to have the judge be made to abide by the **law of the land**. Neither Judge Banner, nor anyone else, anywhere, has "discretion" to disobey the law.

9. This violation of duty produced an unlawful summary judgment upon Birnbaum's civil RICO **cross claims**, denying Birnbaum his right of showing his **best defense**, i.e. that plaintiff's $18,121.10 "collection suit" is really just another **predicate act** in a **pattern of racketeering activity** by the cross-defendants. This lost right to show the best defense cannot be remedied by a tail-end appeal.

10. This violation of duty also produced an unlawful summary judgment upon Birnbaum's civil RICO **claims**, denying Birnbaum his right of showing his civil RICO **cause of action** to a jury **in the presence** of the "collection suit" **predicate act** as it was **directly visible** to the jury. This lost right cannot be remedied by a tail-end appeal that "undoes" the summary judgment.

11. Appeal is one step further away from direct evidence of the RICO predicate act of bringing the fraudulent "collection suit", and the **"pattern of racketeering activity"** itself, as it would be observable to the jury if Birnbaum were allowed to show that the conduct of Plaintiff through its agents actually violates clearly established statutory law.

12. **Allowing the Plaintiff to go to a jury with summary judgment "RICO relief", as the trial judge terms it, precludes defendant Birnbaum from presenting the jury with a viable and timely alternative to Plaintiff's arguments as to what the evidence really shows.**

CONCLUSION

1. This is not a garden variety suit. **I did not bring this suit**. I am the victim, for the second time, of massive fraud in this court, and I am not the only victim. There is a sign in the Clerk's Office that says it is a crime to file **a fraudulent document** in this Court. Westfall's whole suit is fraud, both intrinsic and extrinsic. Yet Judge Banner will not appoint an auditor under Rule 172 RCP as he is administratively and procedurally required to do in a suit claiming an open account countered by not only my sworn complaint of fraud, but two (2) additional affidavits by other victims detailing the Westfall Bunch fraud in my case and theirs.

2. The failure to appoint an auditor per Rule 172 RCP is a violation of duty imposed by law that cannot be remedied by appeal. So is not following summary judgment rules and especially the judge weighing the evidence under a civil RICO cross **defense**.

3. Civil RICO is **statutory law**, and its purpose is clearly established by no other than the Supreme Court of the United States, and I am entitled to timely avail myself of it:

> **Any person** injured in his business or property **by reason of a violation of section 1962** of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee. *18 U.S.C.* § *1964(c), "civil RICO". (emphasis added)*
>
> In rejecting a significantly different focus under RICO, therefore, we are honoring an analogy that Congress itself accepted and relied upon, and one that

> promotes the objectives of **civil RICO** as readily as it furthers the objects of the Clayton Act. Both statutes share a common congressional objective of **encouraging civil litigation** to supplement Government efforts to deter and penalize the respectively prohibited practices. The object of civil RICO is thus not merely to compensate victims but to **turn them into prosecutors, "private attorneys general," dedicated to eliminating racketeering activity**. *Klehr*, at 187 (citing Malley-Duff, 483 U.S. at 151) (civil RICO specifically has a "further purpose [of] encouraging potential private plaintiffs diligently to investigate") The provision for treble damages is accordingly justified by the expected benefit of **suppressing racketeering activity**, an object pursued the sooner the better. It would, accordingly, be strange to provide an unusually long basic limitations period that could only have the effect of postponing whatever public benefit civil RICO might realize. *Rotella v. Wood, United States Supreme Court No. 98-896, certiorari to the united states court of appeals for the fifth circuit, February 23, 2000. (emphasis added)*

4. The Westfalls are hiding behind the laws and privileges of agency to hide behind each other and their Law Office enterprise as evidenced by the cross examination of G. David Westfall (App#253 line 23 through App#254 line 7) :

> Frank C. Fleming (Podvin's attorney): *"To your knowledge, did Stefani Podvin ever do anything for Udo Birnbaum other than work she did on behalf of G. David Westfall, P.C.?"*
>
> G. David Westfall: *"No"*
>
> Mr. Fleming: *"No further questions."*

5. Ordinary causes of action cannot punch through conduct and schemes such as the Westfalls'. That is why Congress passed RICO, and provided a private cause of action, and why the Supreme Court is telling appeals and other judges that I am entitled to avail myself of it. **It is the law of the land**.

PRAYER

I petitions this honorable court to listen carefully to my pleas as to why writ of mandamus is required for the sake of due process and justice under the circumstances of this case. For the reasons presented above I petition for the following:

1. To stay the underlying proceedings while this petition is under consideration
2. To reverse the unlawful summary judgment ***"RICO Relief"*** denying my civil RICO defenses and claims
3. To refer the evidence of the Westfalls' conduct to the appropriate authorities
4. To order the cause to trial with my cross and third party RICO claims intact
5. Such other relief as this court may find just and proper

Respectfully submitted,

_____

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

VERIFICATION

I, Udo Birnbaum, affirm that the factual statements I have made in the above ***Petition for Writ of Mandamus and Motion for Temporary Relief*** are based on my personal knowledge as I have obtained through my observation and investigation.

_____

UDO BIRNBAUM

CERTIFICATION OF NOTICE OF MOTION FOR TEMPORARY RELIEF

I, Udo Birnbaum, certify that pursuant to Rule 52.10(a) RAP I have notified all parties by fax that a motion for temporary relief is being filed.

_____
UDO BIRNBAUM

STATE OF TEXAS

COUNTY OF HENDERSON

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 ***Petition for Writ of Mandamus and Motion for Temporary Relief***, and being by me first duly sworn, declared that the statements above are true and correct.

Given under my hand and seal of office this _____ day of November, 2001

_____
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 _____ on this the _____ day of November, 2001 upon G. David Westfall, 5646 Milton, Suite 520, Dallas, Texas 75206 and Frank C. Fleming, 6611 Hillcrest, Suite 305, Dallas, Texas 75205-1301.

_____
UDO BIRNBAUM