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REPORTER'S RECORD
VOLUME 1 OF I VOLUME

TRIAL COURT CAUSE NO. 07-00168

UDO BIRNBAUM,

IN THE DISTRICT COURT

Plaintiff,

VS

VAN ZANDT COUNTY, TEXAS

RICHARD RAY, ET AL

Defendants.

294TH JUDICIAL DISTRICT

MOTION FOR PROTECTION

AND

MOTION FOR DISCOVERY

ORIGINAL

On the 20th day of March, 2008, the following proceedings came on to be heard in the above-entitled and numbered cause before the Honorable Andrew J. Kupper, Judge presiding, held in Canton, County of Van Zandt, State of Texas; Proceedings reported by machine shorthand.

A P P E A R A N C E S

MR. UDO BIRNBAUM
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SE PLAINTIFF

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REPRESENTING THE DEFENDANTS

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

	Page	Vol.
MARCH 20, 2008		
Appearances.....	2	1
CaseCalled	4	1
Comments by Mr. Elliott	4	1
Commentsby Mr. Birnbaum	6	1
(Motion for Protection Granted	42	1
Motion for Discovery Granted	42	1
Adjournment.....	46	1
Court Reporter's Certificate	47	1

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

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

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

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

MR. ELLIOTT: Both, Judge.

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

Mr. Elliott, you may proceed on your
I motion

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

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

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

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

Ms. Thatcher and I have filed this Motion for Protection.

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

However, seeing as how I've been brought

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

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

THE COURT: Mr. Birnbaum?

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

THE COURT: I can't hear you.

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

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

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

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

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

MR. BIRNBAUM: I added him to the suit upon this counterclaim.

THE COURT: How did you do that?

MR. BIRNBAUM: I amended the petition.

THE COURT: You amended the petition?

MR. BIRNBAUM: Yes, sir.

THE COURT: what did you do after that?

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

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

MR. BIRNBAUM: Yes, sir.

THE COURT: And you didn't sign it?

MR. BIRNBAUM: Of course, I signed it.

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

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

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

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

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

MR. BIRNBAUM: well, in that particular (case, a person is allowed to -- upon notice that it is

not signed, he is allowed to correct --

THE COURT: That's true.

MR. BIRNBAUM: -- that mistake.

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

MR. BIRNBAUM: well, if I didn't, it's -THE

COURT: You want to look at it and see?

See if I'm lying to you?

MR. BIRNBAUM: I'm really surprised.

THE COURT: Unless there's something I'm missing, here it is, unless there's another one in here.

I've just --

MR. BIRNBAUM: I'm really surprised at

I that

THE COURT: You think somebody did that to

I you?

MR. BIRNBAUM: No, I did that myself.

THE COURT: Okay. Thank you.

MR. BIRNBAUM: Screw-up.

THE COURT: It happens. I've done it

I myself

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

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

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

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

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

THE COURT Did you have Mr. Elliott and IMs. Thatcher served?

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

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

MR. BIRNBAUM: I understand.

THE COURT: So you got to serve him.

MR. BIRNBAUM: Okay.

THE COURT: You can do it by certified

mail

MR. BIRNBAUM: Can I do it by certified

mail?

THE COURT: I'm telling you you can do it

by certified mail.

Isn't that right, Mr. Elliott?

MR. ELLIOTT: Your Honor, I think that may

be what he's tried to do most recently since he's figured out what I've done. However, he can't --

THE COURT: You have to be served by an

officer, either a sheriff or a private server. I don't practice law. I don't know what the rules on service are. I just know that it's got to be served.

MR. ELLIOTT: He hasn't been able to properly

serve us even by certified mail. He's sent it certified, but he hasn't followed the rules to get his return of citation filed.

THE COURT: I can't advise you,

Mr. Birnbaum. I'm trying to not cross over into anything here.

MR. BIRNBAUM: Yes, sir.

THE COURT: Let me go on. Forget that part

for a minute. You've asked for a discovery control plan? Is that what you really want?

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

THE COURT: Oh, I thought you were through.

MR. BIRNBAUM. I was not through with this.

If he's

representing

letterhead

--

Her name is

in this case

they added
as

attorney at
the Court.

about me and Ms. Thatcher both simply by -- just because their name is on the

her name is not just on the letterhead. listed as an attorney, and several motions

have been actually signed by --

THE COURT: why, as their attorneys, are parties?

MR. BIRNBAUM: For aiding and abetting.

THE COURT: For aiding and abetting?

MR. BIRNBAUM: Mr. Ray.

THE COURT: Because they're his attorney?

MR. BIRNBAUM: No, not because they are his

all. Because they are telling untruths in

THE COURT: well, but these are just

allegations in a pleading, Mr. Birnbaum.

MR. BIRNBAUM: well, those are my allegations.

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

MR. BIRNBAUM: well, of course, they are.

Yes, Your Honor. If you look at the RICO statute, it has aiding and abetting. But for aiding and abetting, it has to be done through the enterprise that was the RICO case in the first place, and that's the case over here.

I'm alleging that Mr. Ray did these things.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: I've read everything you've sent me

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

THE COURT: Yes, sir.

MR. BIRNBAUM: Thank you.

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

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

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

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

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

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

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

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

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

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

MR. BIRNBAUM: Yes.

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

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

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

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

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

MR. BIRNBAUM: Yes, sir.

THE COURT: Okay. What is it?

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

THE COURT: And what new matters do we have?

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

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

MR. BIRNBAUM: You're the one that sets the

discovery control plan.

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

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

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

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

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

MR. BIRNBAUM: Yes, sir.

THE COURT: Okay. I don't know.

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

THE COURT: Your original petition says I Level 3

MR. BIRNBAUM: But it says it's intended I under

THE COURT: Say again?

MR. BIRNBAUM: The original petition says fit'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

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

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

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

15 MR. BIRNBAUM: Yes.

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

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

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

22 MR. BIRNBAUM: This is a completely
23 different nucleus of operative facts.

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

25 MR. BIRNBAUM: Because they've been 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?

2
3
4 THE COURT: No, sir. You didn't file
5 those, either.

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

10 THE COURT: Certainly. I thought you said
11 they were attached to the seconded amended
12 petition. MR. BIRNBAUM: They are.

13 THE COURT: They're not.

14 MR. ELLIOTT: They may not be the same,
15 Your Honor.

16 MR. BIRNBAUM: I beg your pardon? They are
17 not attached to this. They are in some other documents.
18 Give me a minute.

19 MR. ELLIOTT: Your Honor, was your question
20 to me, why is there not a judgment signed in the
21 original 2004 case?

22 THE COURT: Yes.

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

2
3
4 by Judge --

5 THE COURT: Chapman?

6 MR. BIRNBAUM: There was a judgment by
7 Judge Banner.

8 THE COURT: Was it Judge Banner?

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

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

THE COURT: A case that was what?

MR. BIRNBAUM: It was dead.

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?

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

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

14 MR. BIRNBAUM: Oh, no. That one's just
15 been sitting there.

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

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

19 THE COURT: Where is Judge Zimmerman?

20 MR. BIRNBAUM: He recused himself finally.

21 THE COURT: Is he from Canton?

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

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THE COURT: what did McDowell have to do with it?

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

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

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

THE COURT: The original case?

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

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

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

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

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

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

12 MR. BIRNBAUM: He's filed a counterclaim on
13 time for libel.

14 THE COURT: Other than -- between the time
15 of that hearing and time you filed this suit, what has
16 he done?

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

THE COURT: what you -- and I'm asking you.
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.

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4 THE COURT: I doubt any judge did that,
5 He might have granted a request, but
6 doubt that he would, himself, abstracted.

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

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

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

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

21 MR. BIRNBAUM: Your Honor, I'm not a

22 Let me make one correction --

23 THE COURT: What I want to know is what you

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

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

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to go away?

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

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THE COURT: What's that?

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

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THE COURT: He didn't say that.

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MR. BIRNBAUM: Is that correct?

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

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MR. BIRNBAUM: 1994.

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

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

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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
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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
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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

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I don't run over here

afternoon reading everything that y'all sent. So that's my opportunity to read is when I come here. So if you want me to read something, you should send it to me.

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

THE COURT: I would appreciate it.

MR. BIRNBAUM: Thank you. I didn't know if

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

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

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

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

8 THE COURT: Okay.

9 MR. BIRNBAUM: Suggestion?

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

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

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

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

24 THE COURT: Would you mail me those?

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

THE COURT: Do you understand,
Mr. Birnbaum?

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4 MR. BIRNBAUM: Yeah. What I understand
5 that the setting that you now have for pretrial is
6 gone. THE COURT: Is gone.

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

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

18 MR. BIRNBAUM: Yes, sir.

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

23 MR. ELLIOTT: Your Honor, if we actually
24 did -- I filed --

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

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

8 THE COURT: well, like I said, I made
9 suggestions to you. So do what you want to do. Judge
10 Chapman is still in the original suit?

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

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

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

21 THE COURT: well, what happened to those --
22 well, never mind.

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

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

MR. BIRNBAUM: Thank you.

(End of Proceedings)

1 REPORTER'S CERTIFICATE

2 i)

3)T)

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 Carmel M ~ z , CSR

23 Texas CSR# 8128

Expiration Date: 12/31/08

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