

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:08-CV-601-BO

NORTH AMERICAN SAVINGS BANK,)
F.S.B.,)

Plaintiff,)

ORDER

MELVIN L. HENDERSON, LAVETTA)
B. HENDERSON, HENDERSON)
HOLDINGS COMPANY, LLC, LEROY)
ROBERTS, JR., JACQUELINE M.)
ROBERTS, PAUL A. VIETA, INGRAM)
WALTERS, and ERIN WALTERS,)

Defendants.)

INGRAM WALTERS and ERIN)
WALTERS,)

Third-Party Plaintiffs,)

v.)

TODD BROCKMANN, TARA)
SHERBERT, THE CAPITOL BUILDING,)
LLC, CAPITOL ENTERTAINMENT, LLC)
and COMMUNITY COMMERCIAL)
DEVELOPMENT, LLC,)

Third-Party Defendants.)

This matter is before the Court on Plaintiff's Motion for Summary Judgment against Defendants' Melvin L. Henderson, Lavetta B. Henderson, and Henderson Holdings Company, LLC; Third-Party Defendant Brockmann's Motion for Summary Judgment; and Third-Party

Defendant Sherbert's Motion for Summary Judgment. For the reasons below, Plaintiff's Motion is GRANTED; Third-Party Defendant Brockman's motion is GRANTED; and Third-Party Defendant Sherbert's motion is GRANTED.

BACKGROUND

On December 10, 2008, North American Savings Bank, F.S.B. ("NASB") filed this action against loan guarantors Melvin L. Henderson and Lavetta B. Henderson (collectively, the "Hendersons"), Henderson Holdings Company, LLC ("HHC"), Leroy and Jacqueline B. Roberts (collectively, the "Roberts"), Ingram and Erin Walters (collectively, the "Walters"), and Paul A. Vieta (collectively, the "Defendants" or "Guarantors") seeking compensatory damages and attorneys' fees arising out of Defendants' breach of separate guaranty agreements. The Walters asserted counter claims against NASB, cross-claims against the Hendersons, as well as Third-Party claims against Todd Brockmann, Tara Sherbert, The Capitol Building, LLC ("CB, LLC"), Capitol Entertainment, LLC, and Community Commercial Development, LLC. Plaintiff has since reached a settlement agreement with Defendants Vieta and Leroy and Jacqueline B. Roberts.

In 1995, Melvin Henderson, a retired physician, purchased commercial property known as the Capitol Building, located in downtown Fayetteville, North Carolina. In 2002 or 2003, Henderson decided to develop the Capitol Building as a family entertainment and amusement center, which later became known as "Docks at the Capitol." Henderson formed The Capitol Building, LLC to serve as the developer of the Capitol Building project, and he formed HHC to serve as the managing entity for the project. Dr. Henderson also serves as the manager of HHC.

Shortly thereafter, Henderson began the process to have the Capitol Building included on

the National Register of Historic Places (the "Register"). Designation of the Capitol Building on the Register made its rehabilitation eligible for federal tax credits. Following the designation by the National Park Service, Henderson began working with the Reznick Group, an accounting firm with whom Sherbert was then employed, and the Law Offices of Todd Brockmann, both of which were familiar with tax credit transactions. CB, LLC also partnered with Cityscape Capital Group, LLC ("Cityscape"), an entity that ultimately purchased the tax credits issued relating to the Capitol Building and allocated the equity proceeds to CB, LLC.

In February 2007, NASB and CB, LLC entered into a Construction Loan Agreement, whereby NASB committed to lend \$4,160,000.00 to CB, LLC for purposes of renovating, rehabilitating, constructing, and equipping the project. On that same date, CB, LLC executed and delivered a promissory note and deed of trust securing the note to NASB for the principal amount of \$4,160,000.00. Pursuant to the note, CB, LLC was required to make monthly payments to NASB. The note also obligated CB, LLC to pay \$1.3 million from the tax credit proceeds received by CB, LLC to NASB to reduce the principal amount of the loan.

In light of the amount of the loan and the nature of the project, NASB required Dr. Henderson to provide suitable guarantors for the loan, including an "angel guarantor," who would guarantee payment of the full loan amount. The "angel guarantors" were the Walters. NASB also required that CB, LLC obtain other guarantors, Roberts and Vieta, who became the limited guarantors on the loan.

On or about February 22, 2007, Dr. Henderson, his wife, Lavetta, and HHC executed Guaranty Agreements in order to induce NASB to make the loan to CB, LLC. Dr. Vieta executed a limited Guaranty Agreement on or about February 22, 2007. Dr. Vieta's liability under the Guaranty was limited to \$433,333.00 of the principal balance due under the note, plus all unpaid

and accrued interest and the costs of enforcement of the guaranty. On or about February 26, 2007, the Walters executed an unlimited guaranty in favor of NASB to induce NASB to make the loan to CB, LLC. On or about February 28, 2007, the Roberts executed a limited guaranty agreement, guaranteeing CB, LLC's re-payment of the loan to NASB. The Roberts' guaranty was limited to \$433,333.00 of the principal balance due under the note, plus all unpaid and accrued interest and the costs of enforcement of the guaranty.

In late 2007, Dr. Henderson contacted NASB to discuss a possible increase in the loan amount to cover CB LLC's construction cost overruns and the resulting capital shortfall. NASB and Dr. Henderson discussed a proposed loan modification, under which CB, LLC's debt would have been restructured and CB, LLC would have been required to pay only \$500,000 of the original \$1.3 million principal pay down from tax credit proceeds required by ¶16 of the Note.

A draft loan modification agreement was prepared and CB, LLC remitted a \$500,000 principal payment to NASB in anticipation that the proposed loan modification would be consummated. However, the modification required that the approval of all the guarantors. The Walters did not agree to the proposed modification, and thus it never took effect. CB, LLC received at least \$3 million in tax credits from the tax credit investor, Cityscape. However, CB, LLC failed to remit the remaining \$800,000 of the required \$1.3 million principal reduction to NASB. CB, LLC has also failed to make its monthly payments on the loan since early 2009.

Plaintiff alleges that as of January 4, 2010 the following amounts are owed to NASB under the terms of the Note: Principal - \$3,658,545.29; Past Due Note Interest (through 12/31/09) - \$223,187.07; Default Interest (through 12/31/09) - \$305,464.33; Late Charges - \$13,504.94; Escrow Shortage - \$52,917.30; Attorneys' Fees and Costs - \$79,834.61; for a total debt of \$4,333,453.54.

DISCUSSION

Summary judgment is proper only when, viewing the facts in the light most favorable to the non-moving party, there is no genuine issue of any material fact, and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Cox v. County of Prince William*, 249 F.3d 295, 299 (4th Cir. 2001). An issue is genuine if a reasonable jury, based on the evidence, could find in favor of the non-moving party. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986); *Cox*, 249 F.3d at 299.

The party moving for summary judgment always bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 322-23. Once a motion for summary judgment is properly made and supported, to survive a summary judgment motion, the plaintiff bears the burden of production of evidence that creates an issue of material fact on an element essential to his case and on which he will bear the burden of proof at trial. *See Id.*, at 322. A plaintiff "may not rest upon mere allegations or denials," but rather must demonstrate that a triable issue of material fact exists. *Shaw v. Stroud*, 13 F.3d 791, 798 (4th Cir. 1994).

Plaintiff's Motion for Summary Judgment against Defendants' Melvin L. Henderson,
Lavetta B. Henderson, Henderson Holdings Company, LLC,

Plaintiff brings this motion alleging that CB, LLC is in default of the loan for failing to make a mandatory principal reduction payment, as well as for not making timely monthly payments as required under the guaranty agreement. Therefore, payment is due from Defendants on the promissory note that was executed with as part of the loan agreement.

Defendants acknowledge that only a \$500,000 payment was made toward reducing the principal, and that they were required to use tax credits to make a \$1.3 million payment. Defendants also acknowledge that required monthly payments have ceased. However,

Defendants argue that the guaranty agreement did not specify when the principal payment was due, that there is really no deadline, apparently *ever*, thus, they are not in default. Defendants also argue that because there is a question as to what month the monthly payments ceased, this is enough to survive summary judgment.

The Hendersons argue that ¶16 of the promissory note executed by CB, LLC did not require it to make the \$1.3 million principal reduction payment at any particular time. This argument is flatly contradicted by the language in question. Paragraph 16 of the agreement provides that “[a]t least \$1,300,000.00 of the capital contributions required to be made by the investors for Tax Credits upon completion of the project and issuance of the Tax Credits shall be applied to reduce the principal balance of this Note.” Dkt. No. 91, Exh. D, ¶ 16. The language is unambiguous that the principal reduction must be made upon (1) receipt of at least \$1.3 million in tax credit; and (2) completion of the project. Defendants acknowledge that both these events occurred. Defendants acknowledge CB, LLC has in fact received approximately \$3 million in tax credits. The parties also agree the project was completed in March 2008. Todd Brockmann, CB, LLC’s transactional counsel also conceded to NASB’s transactional counsel in an email prior to the commencement of this action that the \$1.3 million principal reduction payment was due no later than August 1, 2008. *See* Dkt. No. 125, Exh. 19, p. 2, E-mail from T. Brockmann to J. Shadwick, April 17, 2008. *See, e.g., Hawkspere Shipping Co. v. Intamex, S.A.*, 330 F.3d 225, 238-39 (4th Cir. 2003). (finding that party was equitably estopped from making an argument due, in part, to previous representations of counsel). The failure to make payment after the triggering events occurred constitutes an event of default pursuant to the note and deed of trust.

The note is also in default because CB, LLC failed to make timely monthly payments as required. While there may be a question as to when these payments stopped, the parties do agree

that Defendants are in breach for not continuing to make these payments. When the payments stopped only goes to the calculation of damages and not to whether the moving party is entitled to a judgment on the default. *See Winstead v. U.S.*, 863 F. Supp. 264, 267 (M.D.N.C. 1994) (granting summary judgment as to liability while leaving open the issue of the extent of damages).

Defendants also argue that Plaintiff waived its right to assert a default on the basis of acceptance of some payments after CB, LLC was in default on the principal payment. Without deciding whether the guarantors even have standing to make this challenge, such waiver is expressly precluded by the language of the agreement. The Construction Loan Agreement provides in pertinent part, that NASB will not be deemed to have waived any of its rights by exercising any right under the Agreement:

No failure by Lender to exercise, or delay by Lender in exercising any right, power or privilege hereunder shall operate as a waiver thereof, nor shall any single or partial exercise of any right, power or privilege hereunder preclude any other or further exercise thereof, or the exercise of any other right, power, or privilege.

Dkt. No. 91, Exh. C, ¶ 12.4.

Therefore, Plaintiff's Motion for Summary Judgment is GRANTED as to entry of default on the guaranty agreement. Defendants' are liable for the remaining balance on the principal amount of the loan, NASB's costs of enforcement, and regular and default interest.

Third-Party Defendant Brockmann's Motion for Summary Judgment

Defendants Ingram and Erin Walters have filed a Third-Party Complaint against Todd Brockmann, alleging fraudulent misrepresentation; negligent misrepresentation; negligence; breach of duty of good faith and fair dealing; breach of fiduciary duty; and constructive fraud.

The claim of an attorney-client or fiduciary relationship, however, is not viable in the face of undisputed evidence that it was expressly disclaimed. While an attorney-client relationship

"may be implied from the conduct of the parties, and is not dependent on the payment of a fee, nor upon the execution of a formal contract," *The North Carolina State Bar v. Sheffield*, 326 S.E.2d 320, 325, *cert. denied*, 332 S.E.2d 482, *cert. denied*, 474 U.S. 981 (1985), this does not hold true where an attorney has explicitly disclaimed the existence of an attorney-client relationship. To the contrary, courts have noted the significant absence of such a disclaimer. *Id.* at 325-26. *See also Broyhill v. Aycock & Spence*, 402 S.E.2d 167, 171-72 (plaintiff gave an affidavit stating, "[a]t no time did [the lawyer] notify me that he did not represent my interests in the sales transaction, that he only represented Mr. Smith or Sea Isle Realty's interest."), *aff'd per curiam*, 410 S.E.2d 392 (1991).

It is uncontested that Brockmann was the Walters' attorney on a number of previous transactions. However, while previous representation may suggest continued representation, such relationship is not implied or assumed in the face of an express waiver as there was in this case. Brockmann has produced evidence that he explicitly disclaimed, in a writing signed by the Walters, an attorney-client relationship for this transaction. It is also uncontested that the Walters had the opportunity to review and execute the documents outside of Brockmann's presence. The documents disclaiming an attorney-client relationship and the agreement to serve as guarantors were clear and unambiguous. And while the Walters dispute the oral disclaimers Brockmann claims, the express written waiver is not contradicted. Whether the Walters chose to read the written disclaimer provided to them is immaterial since they signed the agreement. "[O]ne who signs a paper writing is under a duty to ascertain its contents, and in the absence of a showing that he was willfully misled or misinformed by the defendant as to these contents, or that they were kept from him in fraudulent opposition to this request, he is held to have signed with full knowledge and assent as to what is therein contained." *Williams v. Williams*, 187 S.E.2d 364, 366

(1942).

The Guaranty Fee Agreement not only explained that Brockmann was "LEGAL COUNSEL TO THE PROJECT" but also advised that "EACH PARTY HAS THE RIGHT AND OPPORTUNITY TO HIRE HIS OWN INDEPENDENT LEGAL COUNSEL TO REVIEW THIS AGREEMENT ON HIS BEHALF PRIOR TO THE SIGNATURE OF SUCH AGREEMENT."

Dkt. No. 87, Doc. 11, Exhibits Deposition Exhibits, Excerpted, p. 20, ¶ 12. This language appeared not only in the final, signed version of the Guaranty Fee Agreement, but also in the initial version, transmitted to Ingram Walters via email prior to the closing. Dkt. No. 120, Exh. 7, p.5 ¶ 12. Brockmann's email with the documents stated again, "I do not represent either of you in regard to this document, and I am drafting this in my capacity as the project attorney based upon my understanding of what the two of you have decided." Dkt. No. 87, Doc. 11, Exhibits Deposition Exhibits, Excerpted, p. 13. There is no material issue of fact in this case because whether a contractual attorney-client relationship was formed for this transaction, depends not on Walters' beliefs, but on the parties' mutually and objectively manifested intent, through words and conduct. *Howell v. Smith*, 128 S.E.2d 144, 146 (1962) (in formation of contract, "[i]t is not what either thinks, but what both agree.").

In this case, the written agreement was clear that Brockmann disclaimed any question that he was not the Walters' attorney. These facts preclude as a matter of law an attorney-client relationship between Brockmann and the Walters in connection with this transaction. Because all of the Walters' claims against Brockmann rest on a theory that Brockmann was their attorney and had a fiduciary duty, Brockmann's Motion for Summary Judgment is GRANTED.

Third-Party Defendant Sherbert's Motion for Summary Judgment

The Walters brought the same claims against Third-Party Defendant Sherbert as they did

against Defendant Brockmann. These claims include fraudulent misrepresentation; negligent misrepresentation; negligence; breach of duty of good faith and fair dealing; breach of fiduciary duty; and constructive fraud.

In order to establish a claim for fraud, the Walters must forecast evidence of the following elements: a) false representation or concealment of a material fact; b) reasonably calculated to deceive; c) made with the intent to deceive; and d) which does in fact deceive; e) resulting in damage to the party. *Harold v. Dowd*, 561 S.E.2d 914, 918 (2002). The circumstances giving rise to these claims must be pled with particularity. N.C. R. Civ. P. 9(b). This requirement is met by alleging the time, place and content of the fraudulent representation, the identity of the person making this misrepresentation, and what was obtained as a result of the fraudulent misrepresentation. *Brandeis v. Lightmotive Fatman, Inc.*, 443 S.E. 2d 887, 889 (1994).

Even taking the facts in the most favorable light to the Walters, they are unable to state the time, place, and content of Sherbert's alleged fraudulent misrepresentation. The Walters' focus on two allegations: first, they had worked on at least one other deal in the past with Sherbert; second, that she attended a dinner where this deal was discussed. The Walters make no credible allegation that Sherbert made a false representation, or concealed a material fact. It was Brockmann who allegedly told the Walters he was only a "backstop guarantor." The crux of the claim against Sherbert is her silence.

As to the first allegation, there is no evidence to suggest Sherbert was at the meeting on behalf of the Walters. Contrary to other business dealings with the Walters' or their company, there was no contract signed for her services in this case, nor do the Walters claim one had been discussed. In fact, Sherbert had been hired by Dr. Henderson. The Walters also brought Mr. Grisson, their Chief Financial Officer ("CFO") to the dinner meeting as their financial

representative. The Walters argument thus essentially consists of Sherbert's silence after Brockmann allegedly said the deal was a "slam dunk." However, vague statements like a company will be "profitable" or a "moneymaker" or the deal is a "slam dunk" is not sufficient to constitute a misrepresentation. *Ragsdale v. Kennedy*, 209 S.E.2d 494, 500 (1974). The Walters present no evidence that Sherbert ever made a knowingly false representation or that her statements about the \$1.3 million were anything but accurate. Both parties agree that the \$1.3 million tax credits were supposed to go toward paying down the principal. Sherbert did not, and could not have known at the time of the dinner that CB, LLC may breach the agreement. Accordingly, Sherbert's Motion for Summary Judgment as to the fraudulent misrepresentation claim is GRANTED.

The second claim against Sherbert was for negligent misrepresentation. Negligent misrepresentation "occurs when a party justifiably relies to his detriment on information prepared without reasonable care by one who owes the relying party a duty of care." *Harrold v. Dowd*, 561 S.E.2d 914, 919 (2002) (quoting *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 367 S.E.2d 609, 612 (1988)). Any justifiable reliance asserted by the plaintiff must be reasonable. If the plaintiff has an alternative source of information from which he could have gleaned the truth, in spite of the alleged fraud or misrepresentation, then his reliance is not reasonable. *Broussard v. Meineke Disc. Muffler Shops*, 155 F.3d 331, 341 (1998).

As this Court noted above, Sherbert was not representing the Walters, thus she did not owe them a heightened duty. This is also supported by Ingram Walters' deposition, where he admitted that he understood Sherbert to be the "accountant on the project", and not his personal representative. Dkt. No. 89, Ingram Walters Dep. Vol. 2, Exh. 7, p. 61. The Walters also cannot show that anything Sherbert said was a misrepresentation. As discussed, the agreement stated

that CB, LLC was to use \$1.3 million in tax credits to pay down the principal. The Walters' own CFO also testified in his deposition that the projections prepared by Sherbert were not certified, but were a draft; that they were only projections that could turn out to be incorrect; and there was nothing in the numbers that makes him believe that the numbers were padded, faked, or intended to deceive anyone. Dkt. No. 89, Grissom Dep., Exh. 9, p. 106-09, 234-35. Finally, the Walters had their own CFO review the deal and even if Sherbert was negligent in any representations she made, it would not be reasonable under these circumstances to take her word, an accountant they had only met on limited occasions, over the word of their trusted chief financial officer.

A reasonable jury could not conclude that Sherbert in any way negligently misrepresented the Walters. Accordingly, Sherbert's Motion for Summary Judgment on this claim is GRANTED.

The third claim against Sherbert is for negligence. This claim against Sherbert is essentially a claim for professional malpractice. *Sharp v. Teague*, 439 S.E.2d 792, 794 (1994). "One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information." *Simpson v. Specialty Retail Concepts*, 908 F.Supp. 323, 330 (1995) (quoting § 552 of the Restatement (Second) of Torts). Before an accountant can be held liable for damages, a duty of care exists only where one was first owed. In this case, there was no accountant-client relationship for this transaction. There was no contract or other evidence to suggest that Sherbert was at the meeting on behalf of the Walters. And there was no justifiable reliance. The evidence is all to the contrary. Sherbert was invited by Brockmann; the Walters brought their own CFO to discuss the numbers; and Sherbert's fee was being paid by Dr.

Henderson. In addition, there is no allegation that Shebert ever certified any financial information for the Walters or anyone else regarding the deal. Even the Walters' CFO stated that he did not believe Sherbert did anything that fell below the exercise of reasonable care and competence. Dkt. No. 89, Grissom Dep., Exh. 9, p. 173. Accordingly, Sherbert's Motion for Summary Judgment as to the negligence claim is GRANTED.

Next, the Walters bring a claim of breach of duty of good faith and fair dealing. In every contract there is an implied covenant of good faith and fair dealing that neither party will do anything that injures the rights of the other to receive the benefits of the agreement and that the parties have agreed to act in good faith in performing the contract. "Good faith" means that one is being factually honest in the performance of the contract, and for someone who holds himself or herself out as having a particular skill or expertise, upon this person is placed the added requirement to observe the reasonable standards of fair dealing in that person's trade or profession. *Governors Club, Inc. v. Governors Club, Ltd. P'ship*, 567 S.E. 2d 781, 789 (2002). While there was no contract between the Walters and Sherbert, that is not a complete bar to recovery. *Id.*

However, to survive summary judgment, the Walters must be able to show that first, they were misled by Sherbert. Second, they must present evidence that Sherbert was aware that they were being misled or deceived at the time the Walters signed the guarantee agreement, and that she failed to correct what she knew to be a falsehood. Without making this showing, plaintiff has failed to demonstrate that defendant did not act in good faith.

In this case, the numbers discussed by Sherbert were for all practical purposes, correct. She is not an attorney and could only speak as to what the tax credits would be, and not about the danger of CB, LLC's unforeseeable breach of the agreement. Second, there is no evidence she knew the project had been underfunded, so this information that later came to light cannot be the

basis of her alleged knowing deception of the Walters. Therefore, Sherbert's Motion for Summary Judgment is GRANTED.

The fifth claim against Sherbert is for breach of fiduciary duty. However, the Walters did not have a contract with Sherbert on this transaction. In fact, Sherbert's fiduciary duty, if she had one at all in this transaction, existed with Dr. Henderson, who had hired Sherbert to work out the tax benefits for this transaction. The fact that the Walters and Sherbert had worked on one previous transaction, and that the Walters' firm had hired her for another project that there is not evidence the Walters' were directly involved in, is not sufficient for a reasonable fact finder to determine that Sherbert had a fiduciary duty to the Walters. Accordingly, Sherbert's Motion for Summary Judgment is GRANTED.

Finally, the Walters' allege a claim for constructive fraud against Sherbert. In order to state a claim for constructive fraud, a plaintiff must first allege facts and circumstances that the defendant created a relation of trust and confidence that in this case led up to and surrounded the consummation of their agreement to serve as guarantor. Second, a plaintiff must show that the defendant took advantage of that trust in an effort to benefit him or herself. *Ridenhour v. IBM*, 512 S.E.2d 774, 777 (1999). A plaintiff must also show that they were injured as a result of the defendant taking advantage of that trust. In order to support the second element of their claim, the Walters must do more than allege that the benefit sought was a payment of fee paid by the project or based on hours incurred for the work she actually performed on the project. *Clay v. Monroe*, 658 S.E.2d 532, 536-37 (2008) (quoting *White v. Consolidated Planning, Inc.*, 603 S.E.2d 147, 156 (2004)(internal citations omitted), *disc. rev. denied*, 601 S.E.2d 717 (2005)). "In order to satisfy the second element of constructive fraud, a plaintiff must allege, 'the benefit sought was more than a continued relationship with the plaintiff or payment of a fee to a defendant for work it

actually performed.” *Id.*

As this Court noted above, the Walters have failed to establish any type of relationship of trust and confidence on this transaction with Sherbert. They have also failed to show what additional benefit Sherbert sought or received. Thus, their claim for constructive fraud must fail. Sherbert’s Motion for Summary Judgment is GRANTED.

CONCLUSION

For the reasons above, Plaintiff’s Motion for Summary Judgment against Defendants’ Melvin L. Henderson, Lavetta B. Henderson, and Henderson Holdings Company, LLC is GRANTED. Third-Party Defendant Brockmann’s Motion for Summary Judgment is GRANTED. Third-Party Defendant Sherbert’s Motion for Summary Judgment is GRANTED.

SO ORDERED.

This 22 day of August, 2010.



TERRENCE W. BOYLE
UNITED STATES DISTRICT JUDGE