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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

DENNLy R. BECKER, THE  
BECKER TRUST DATED  
MARCH 25, 1991,

NO. CIV. S-10-2799 LKK/KJN

Plaintiffs,

v.

O R D E R

WELLS FARGO BANK, N.A.,  
WACHOVIA MORTGAGE  
CORPORATION; DOES 1-20,

Defendants.

\_\_\_\_\_ /

Plaintiff, proceeding pro se, moves for a preliminary injunction enjoining the foreclosure sale of three residential properties. For the reasons discussed below, plaintiff's motion is granted.

**I. BACKGROUND**

**A. Procedural Background**

On September 15, 2010, Denny Becker ("Becker") and the

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1 Becker Trust Dated March 25, 1991 ("Becker Trust"),<sup>1</sup> proceeding  
2 pro se, filed a complaint against defendants Wells Fargo Bank,  
3 N.A. ("Wells Fargo"), Wachovia Mortgage Corporation  
4 ("Wachovia"), and twenty Doe defendants in state court. This  
5 complaint concerned plaintiff's loans on nine residential  
6 properties. On October 15, 2010, Wells Fargo and Wachovia  
7 removed this action to federal court. On October 27, 2010,  
8 defendants moved to dismiss plaintiff's complaint. On November  
9 4, 2010, plaintiff filed a motion for leave to file a first  
10 supplemental complaint pursuant to Fed. R. Civ. P. 15(d).  
11 Plaintiff attached his proposed supplemental complaint to the  
12 motion. On November 12, 2010, the Magistrate Judge denied  
13 plaintiff's motion on the ground that Fed. R. Civ. P. 15(d) is  
14 not the proper section of the rule from which plaintiff may  
15 amend his complaint. Rather, the Magistrate Judge instructed  
16 plaintiff to file and serve a first amended complaint on or  
17 before December 10, 2010 pursuant to Fed. R. Civ. P. 15(a). The  
18 Magistrate Judge also denied defendants' motion to dismiss  
19 without prejudice. On November 29, 2010, plaintiff filed his  
20 verified first amended complaint. This complaint appears to be  
21 virtually identical to the proposed supplemental complaint  
22 attached to plaintiff's November 4, 2010 motion.

23 On November 12, 2010, plaintiff filed a motion for a  
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25 <sup>1</sup> The court treats Becker and the Becker Trust as a singular  
26 plaintiff because, as discussed supra, Becker is the sole  
beneficiary of the Becker Trust.

1 preliminary injunction. Plaintiff seeks to enjoin foreclosure  
2 sales of three properties, which plaintiff represents are  
3 scheduled to occur on December 23, 2010.<sup>2</sup> The three properties  
4 are located at 865 Shelborne Drive, Tracy, CA ("Shelborne  
5 property"), 2416 Third Street, Lincoln, CA ("Third Street  
6 property"), and 1896 Larkflower Way, Lincoln, CA ("Larkflower  
7 property"). Pursuant to Local Rule 230(a), defendants'  
8 opposition to this motion was due on November 22, 2010.  
9 Defendants, however, failed to file their three page opposition  
10 until November 23, 2010. Defendants incorporated the arguments  
11 contained within their two page motion to dismiss, which was  
12 denied without prejudice, in their opposition. On November 29,  
13 2010, plaintiff timely filed a reply brief, noting, inter alia,  
14 that defendants' opposition was not timely filed.

15 **B. Factual Allegations and Evidence**

16 Plaintiff's First Amended Complaint ("FAC") is one hundred  
17 and thirteen pages long, and contains detailed factual  
18 allegations. Plaintiff also enumerates ten causes of action.  
19 Essentially, plaintiff alleges that he invested in nine  
20 residential properties. He obtained mortgages on all of these  
21 properties with Wachovia's predecessor. Currently, Wachovia owns  
22 the mortgages. Recently, Wells Fargo purchased Wachovia and  
23 continues to run Wachovia mortgage. After he lost his job,

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24  
25 <sup>2</sup> The Court declines to refer this motion alone to the  
26 Magistrate Judge due to the short time frame in which the Court  
must enter an order. All other pretrial motions remain referred to  
the Magistrate Judge.

1 Becker was not able to afford the mortgage payments on rental  
2 income and savings alone. Becker then alleges that he engaged in  
3 numerous communications with Wachovia agents to modify his loan  
4 payments. Subsequently, Wachovia and its owner, Wells Fargo,  
5 initiated foreclosure proceedings on at least three of  
6 plaintiff's properties. Becker further alleges that defendants  
7 failed to follow California law during this process. Of  
8 particular note, Becker alleges that Wachovia's agents  
9 repeatedly asked for the same documentation and provided him  
10 with inconsistent information. The Court discusses below the  
11 factual allegations and evidence presented with respect to the  
12 three properties at issue in this motion.

13 On October 1, 2009, Becker stopped making his mortgage  
14 payments on the Shelborne property. FAC ¶ 28. Later that month,  
15 Becker was contacted by an agent of Wachovia, who, he alleges,  
16 referred him to Wachovia's loan counseling department to discuss  
17 loan modification. Id. at ¶ 29. In early November 2009, Wachovia  
18 agent Carl Saris ("Saris") asked Becker whether he could afford  
19 his payments on this loan and the Third Street and Larkflower  
20 property loans if they were reduced by \$500. Id. at ¶ 31. Becker  
21 told Saris that he could make those reduced payments effective  
22 immediately. Id. Saris then represented that as soon as  
23 documentation he requested was received, Becker's loan  
24 modifications on all three loans would be modified to lower the  
25 monthly payments by \$500 each per month. Id. Becker submitted  
26 documentation as requested by the loan counseling agent. Id. at

1 ¶ 32. Later that month, however, Wachovia informed Becker that  
2 it would not modify his loans. Id. at ¶ 35.

3 In December 2009, Wachovia notified Becker that it intended  
4 to commence foreclosure on the Shelborne property. Id. at ¶ 39.  
5 Subsequently, Becker informed Wachovia to close his loan  
6 modification requests for all but the Shelborne property. In  
7 January 2010, Wachovia requested that Becker provide it with  
8 information concerning modification of the loan on the Shelborne  
9 property. Id. at 54. Becker, then engaged in numerous  
10 communications with Wachovia agents concerning the status of the  
11 loan modification request on the Shelborne property, provided  
12 documents to support the request. Id. at ¶¶ 57-86.

13 In April 2010, Becker decided to cease making payments on  
14 the Third Street and Larkflower properties. Id. at ¶ 87. He then  
15 requested loan modifications on all of his loans, including the  
16 six for which he was still making payments. Id. at ¶ 88. Later  
17 that month, Becker was informed that his request for the loan  
18 modification on the Shelborne property was denied because he was  
19 not an owner resident. Id. at ¶ 92. The next day, Becker  
20 received a Wachovia Forbearance Agreement, which stated "The  
21 purpose of this Agreement is to determine Borrower's capacity  
22 and willingness to make monthly mortgage payments. Upon  
23 completion of the payments referenced in this Agreement,  
24 Borrower will be required to (1) move forward with any necessary  
25 actions to result in payoff of the loan, (2) fully reinstate the  
26 loan and/or cure the default, or (3) you may choose to apply for

1 a permanent modification.” Id. at ¶ 93. The Agreement required  
2 Becker to make three monthly payments, starting in June 2010,  
3 that were \$360 more than the amount to which Saris had  
4 represented that his loan would be modified. Id. Becker then  
5 engaged in numerous communications with Wachovia agents in which  
6 he tried to determine whether it was necessary for him to enter  
7 the Forbearance Agreement and the status of his requests for  
8 loan modification. Id. at ¶¶ 94-101. He received some  
9 conflicting and otherwise confusing information. Id.  
10 Additionally, Wachovia agents failed to respond to some of his  
11 communications. Id. Ultimately, Becker altered his income from  
12 his retirement funds in order to meet the income he was informed  
13 was necessary for the modification. Id.

14 In May 2010, Becker received a letter from Wachovia  
15 indicating that his loan modification file had been closed due  
16 non-receipt of documentation and information. Id. at ¶ 102. The  
17 letter indicated that Wachovia intended to move forward with  
18 collection efforts. Id. In response to this letter, Becker  
19 signed the Forbearance Agreement. Id. at 103. Becker also  
20 included a letter to Wachovia in which he expressed his belief  
21 that Wachovia was engaging in unfair business practices because  
22 it denied his request for a loan modification even though he  
23 adjusted his income to the levels Wachovia’s agents indicated  
24 would be necessary to qualify for the modification. Id. The  
25 Forbearance Agreement was subsequently approved by Wachovia. Id.  
26 at 106. Around the same time, Becker was notified by Wachovia

1 that he was not entitled to any in-house loan modification  
2 programs on the Shelborne property because he was not an owner  
3 resident. Id. at 107. Becker was surprised by this letter  
4 because Wachovia had advised him to apply for loan modifications  
5 and because through all of his communications with Wachovia  
6 about loan modification he was never informed that he could not  
7 qualify, but rather that if he should provide proper  
8 documentation and adjust his income to qualify. Id.  
9 \_\_\_\_\_ Later that month, Becker received notices of intent to  
10 foreclose from Wachovia on the Third Street and Larkflower  
11 properties. Id. at 112. The notices included information on loan  
12 modification. Id. He subsequently received three more letters  
13 from Wachovia encouraging him to seek loan modification on those  
14 properties. Id. at 113-15. In June 2010, Becker sent Wachovia a  
15 request for loan modification on the Third Street and Larkflower  
16 properties along with documentary support of his current income.  
17 Id. at 116. Several weeks later, plaintiff was informed by  
18 Wachovia that the mortgages on the Third Street and Larkflower  
19 properties would not be modified. Id. 124-25. Wachovia indicated  
20 that they intended to commence foreclosure upon these properties  
21 as well. Id. at 125.

22       After several attempts to speak with Keith Cardenas  
23 ("Cardenas"), an employee with the Wachovia Office of the  
24 President, whom Becker was instructed to call about his requests  
25 for modifications of the loans on the Third Street and  
26 Larkflower properties, Cardenas returned Becker's calls. Id. at

1 ¶ 129. Cardenas indicated that he would be handling Becker's  
2 requests directly, and that he need not contact Wachovia Loss  
3 Mitigation or Loan Counseling. Id.

4 In July 2010, Becker received two letters from Wachovia  
5 concerning his loan on the Shelborne property. Id. at ¶ 142. He  
6 had made the three payments on the loan under the Forbearance  
7 Agreement. Id. at ¶¶ 109, 119, 132. While Becker made these  
8 payments early, according to the terms of the Forbearance  
9 Agreement, they were due on June 1, 2010, July 1, 2010, and  
10 August 1, 2010. Id. at ¶ 93. The final payment was sent on July  
11 15, 2010. Id. at ¶ 132. The first letter was dated July 14,  
12 2010, and thanked Becker for his participation in the temporary  
13 program and advised him that he could then apply for a permanent  
14 loan modification. Id. at 142. However, several days later,  
15 plaintiff received a Notice of Intent to Foreclose on the  
16 Shelborne property, which was dated July 22, 2010. Id. On July  
17 28, 2010, Wachovia agent Lindsay Vasquez ("Vasquez") called  
18 Becker concerning his loan modification request on the Shelborne  
19 property. Id. at ¶ 146. During this call, Vasquez told Becker  
20 that a monthly payment of \$1,800, a \$500 reduction in his  
21 monthly payment, was acceptable to Wachovia. Id. Despite this  
22 commitment by Wachovia's agent, in October 4, 2010, Wells Fargo  
23 filed a Notice of Default on the Larkflower property. Id. at ¶  
24 168. A Notice of Default was also recorded on the Third Street  
25 property. See id. at ¶ 174.

26 Defendants have not presented any evidence in opposition to

1 plaintiff's motion for a preliminary injunction. Even though  
2 plaintiff's amended complaint was not filed before their  
3 opposition was due, nearly all of the relevant facts testified  
4 to above were part of plaintiff's original complaint, which  
5 "Wells Fargo and Wachovia are treating . . . as the operative  
6 one" in their opposition. Opposition at 2. Further, nowhere in  
7 defendants filings do they challenge the authenticity or  
8 veracity of plaintiff's averments. Thus, for purposes of this  
9 motion, the court considers the only evidence before it:  
10 plaintiff's verified first amended complaint and his  
11 declarations.

12 **II. STANDARD OF REVIEW FOR FED. R. CIV. P. 65 MOTION FOR**  
13 **PRELIMINARY INJUNCTION**

14 A preliminary injunction is an "extraordinary remedy."  
15 Winter v. Natural Resources Defense Council, Inc., \_\_\_ U.S. \_\_\_,  
16 129 S. Ct. 365, 376 (2008) (internal citation omitted). When a  
17 court considers whether to grant a motion for a preliminary  
18 injunction, it balances "the competing claims of injury, . . .  
19 the effect on each party of the granting or withholding of the  
20 requested relief, . . . the public consequences in employing the  
21 extraordinary remedy of injunction," and plaintiff's likelihood  
22 of success. Id. at 374, 376-77 (quoting Amoco Prod. Co. v.  
23 Gambell, 480 U.S. 531, 542 (1987); Weinberger v. Romero-Barcelo,  
24 456 U.S. 305, 312 (1982)). In order to succeed on a motion for a  
25 preliminary injunction, the plaintiff must establish that "he is  
26 likely to succeed on the merits, that he is likely to suffer

1 irreparable harm in the absence of preliminary relief, that the  
2 balance of equities tips in his favor, and that an injunction is  
3 in the public interest." Winter, 129 S. Ct. at 374.

4 An even more stringent standard is applied where mandatory,  
5 as opposed to prohibitory, preliminary relief is sought. The  
6 Ninth Circuit has noted that although the same general  
7 principles inform the court's analysis, "where a party seeks  
8 mandatory preliminary relief that goes well beyond maintaining  
9 the status quo pendente lite, courts should be extremely  
10 cautious about issuing a preliminary injunction." Martin v.  
11 International Olympic Committee, 740 F.2d 670, 675 (9th Cir.  
12 1984). Thus, an award of mandatory preliminary relief is not to  
13 be granted unless both the facts and the law clearly favor the  
14 moving party and extreme or very serious damage will result. See  
15 Anderson v. United States, 612 F.2d 1112, 1115 (9th Cir. 1979).  
16 "[I]n doubtful cases" a mandatory injunction will not issue. Id.

### 17 **III. ANALYSIS**

#### 18 **A. Irreparable Harm**

19 Plaintiff, as a matter of law, is likely to face an  
20 irreparable harm in the foreclosure of his properties. See  
21 Chetal v. American Home Mortg., No. C 09-02727 CRB, 2009 WL  
22 2612312, at \*2 (N.D. Cal. Aug. 24, 2009) (citing Cottonwood  
23 Christian Ctr. v. Cypress Redevelopment Agency, 218 F. Supp. 2d  
24 1203, 1230 (C.D. Cal. 2002); Edejer v. DHI Mortg. Co., No. C 09-  
25 1203 PJH, 2009 WL 1684714, at \*5 (N.D. Cal. Jun. 12, 2009)). If  
26 an injunction does not issue plaintiff's properties will be

1 subject to a trustee sale later this month.

2 **B. Balance of Equities**

3 The balance of equities tips sharply in support of  
4 plaintiff. While plaintiff stands to permanently lose his  
5 properties if a preliminary injunction does not issue,  
6 defendants would only experience a relatively short delay in  
7 earning income from the sale of plaintiff's property.

8 **C. Public Interest**

9 The public interest favors preventing wrongful foreclosures  
10 given the adverse impact that foreclosures have on households  
11 and communities. Moreover, plaintiff has alleged a good faith  
12 effort to modify his loan, and payments made in reliance of a  
13 modification agreement. This element also favors plaintiff.

14 **D. Likelihood of Success on the Merits**

15 Plaintiff brings numerous claims against defendants. The  
16 Court finds a likelihood of success on two of these claims to  
17 support enjoining foreclosure of the three properties. The  
18 Court, thus, does not address the merits of plaintiff's  
19 remaining claims.

20 **1. Fraud**

21 The elements of a claim for intentional misrepresentation  
22 under California law are (1) misrepresentation (a false  
23 representation, concealment, or nondisclosure), (2) knowledge of  
24 falsity, (3) intent to defraud (to induce reliance), (4)  
25 justifiable reliance, and (5) resulting damage. Agosta v. Astor,  
26 120 Cal. App. 4th 596, 603 (2004). Here, plaintiff has testified

1 that several specific agents of Wachovia represented to him that  
2 he would qualify for loan modification. He identified the date  
3 of the communication, whether the communication was oral or  
4 written, and the parties to the communication. His testimony  
5 concerning notifications from some Wachovia agents that no loan  
6 modifications were available for non-owner resident loans  
7 suggest that the agents who made the representations about  
8 modification were aware, or should have been aware, of  
9 Wachovia's policy. He has also testified that he relied on these  
10 representations and suffered damages, including the upcoming  
11 foreclosure sale of his properties. Defendants have presented no  
12 argument in opposition to this claim. Thus, the Court finds, on  
13 the evidence before it, that plaintiff has demonstrated a  
14 likelihood of success on his fraud claim.

## 15                   **2. Breach of Contract**

16           The Court must liberally construe a pro se plaintiff's  
17 complaint "[b]ecause the pro se litigant is far more prone to  
18 making errors in pleading than the person who benefits from the  
19 representation of counsel." McGuckin v. Smith, 974 F.2d 1050,  
20 055 (9th Cir. 1991) (internal quotations omitted). Further, a  
21 plaintiff, whether represented by counsel or not, need not plead  
22 the statute or other provision upon which he bases his claims.  
23 Rather, all that is necessary is that he pleads facts sufficient  
24 to support such claims. See Bell Atlantic Corp. v. Twombly, 550  
25 U.S. 544, 555 (2007) (Complaint must "give the defendant fair  
26 notice of what the . . . claim is and the grounds upon which it

1 rests.”) (quoting Fed. R. Civ. P. 8(a)(2)).<sup>3</sup> While plaintiff  
2 does not specifically allege a breach of contract claim, he does  
3 allege facts that support such a claim. Specifically, he alleges  
4 that agents of Wachovia told Becker that they would modify his  
5 loans on the three properties at issue so long as he provided  
6 certain documents and information, Becker provided said  
7 information, and Wachovia nonetheless commenced foreclosure  
8 proceedings on the loans. Further, Becker signed a written  
9 contract, the Forebearance Agreement, that he complied with, and  
10 nonetheless during the time period covered by the Agreement,  
11 Wachovia commenced foreclosure proceedings on the Shelborne  
12 property.

13 A cause of action for breach of contract includes four  
14 elements: (1) that a contract exists between the parties, (2)  
15 that the plaintiff performed his contractual duties or was  
16 excused from nonperformance, that the defendant breached those  
17 contractual duties, and that plaintiff’s damages were a result  
18 of the breach. Reichert v. General Ins. Co., 68 Cal. 2d 822, 830  
19 (1968); First Commercial Mortgage Co. v. Reece, 89 Cal. App. 4th  
20 731, 745 (2001). Here, Becker has testified that defendants  
21 entered into several oral and one written contract. He has  
22 further testified that he performed his duties (i.e. submitting  
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24 <sup>3</sup> At oral argument on this motion, counsel for defendants  
25 represented that plaintiff's claims essentially amount to violation  
26 of alleged oral contract or contracts. Thus, defendants have fair  
notice that plaintiff is bringing a breach of contract claim even  
though the claim is not explicitly enumerated in his complaint.

1 documentation, adjusting his retirement income, and making  
2 certain payments) under these contracts. Defendant failed to  
3 modify his loans by reducing the monthly fees by \$500 each per  
4 month and failed to comply with the terms of the Forbearance  
5 Agreement by initiating foreclosure proceedings during the  
6 forbearance period. Plaintiff suffered damages, including harms  
7 to his retirement funds and pending foreclosure sales of his  
8 properties. These damages directly resulted from defendants'  
9 breach of their contractual duties. Thus, the Court finds that  
10 plaintiff has alleged a claim for breach of contract and, based  
11 on the evidence before it, has demonstrated a likelihood of  
12 success on that claim.<sup>4</sup>

### 13 **3. Whether a Trust Must be Represented by Counsel**

14 Two of the three properties at issue here are in the name  
15 of the Becker Trust Dated March 25, 1991. Becker is the trustee  
16 and the beneficiary of this trust. Defendants argue that a trust  
17 must be represented by counsel, but provide no case law or  
18 statutory support for this contention. "In all courts of the  
19 United States the parties may plead and conduct their own cases  
20 personally or by counsel as, by the rules of such courts,  
21 respectively, are permitted to manage and conduct causes

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22  
23 <sup>4</sup> At oral argument, counsel for defendants argued that the  
24 deeds of trust on plaintiff's properties require loan modifications  
25 to be in writing. Defendants, however never presented the deeds of  
26 trust to the Court and, thus, the Court cannot consider them in  
this motion. Further, even if the deeds of trust enumerate such a  
prohibition, the prohibition would only bear on plaintiff's claims  
for breach of oral contracts, not his claim for breach of the  
forbearance agreement and for fraud.

1 therein." 28 U.S.C. § 1654. In C.E. Pope Equity Trust v. U.S.,  
2 818 F.2d 696, 697 (9th Cir. 1987), the Circuit found that a  
3 trustee may not represent a trust pro se. However, the court  
4 specifically distinguished the position of a trustee to that of  
5 a beneficial owner of a trust. Id. Specifically, the court  
6 reasoned, "Because [the trustee] is not the actual beneficial  
7 owner of the claims being asserted by the [trust] (so far as one  
8 can tell from the record), he cannot be viewed as a 'party'  
9 conducting his 'own case personally' within the meaning of  
10 Section 1654." The Court of Appeals concluded that the right of  
11 self-representation is limited to where "one seeking to  
12 represent himself pro se is a person who by substantive law has  
13 the right sought to be enforced." Id. Courts in this district  
14 have interpreted C.E. Pope Equity Trust to stand for the  
15 principle that "the beneficial owner of the claim being asserted  
16 is the only person permitted to appear in propria persona . . .  
17 ." Alpha Land Company v. Little, 238 F.R.D. 497, 499 (E.D. Cal.  
18 2006). The Court concurs in this interpretation, and finds that  
19 because Becker is the sole beneficiary of the Becker Trust, he  
20 may represent the trust pro se.

21 **E. Bond**

22 Under Fed. R. Civ. P. 65(c), "The court may issue a  
23 preliminary injunction . . . only if the movant gives security  
24 in an amount that the court considers proper to pay the costs  
25 and damages sustained by any party found to have been wrongfully  
26 enjoined . . . ." Here, the costs and damages that would be

1 sustained by defendants are limited to a delay in holding the  
2 foreclosure sale on the properties. Defendants remain in  
3 possession of the notes and, if successful in this litigation,  
4 can reinstate foreclosure proceedings. While recognizing that  
5 defendants may have to pay some recording fees, ultimately their  
6 damages are limited to those of delay. Particularly in the  
7 current residential real estate market, these damages are  
8 relatively low. Thus, the Court finds that bond in the amount of  
9 \$500 is appropriate.

#### 10 **IV. CONCLUSION**

11 For the foregoing reasons, the Court ORDERS as follows:

- 12 (1) Plaintiff's motion for a preliminary injunction, ECF  
13 No. 14, is GRANTED.
- 14 (2) The foreclosure sales of the Shelborne property, the  
15 Third Street property, and the Larkflower property are  
16 ENJOINED.
- 17 (3) Plaintiff SHALL POST BOND in the amount of \$500 within  
18 fourteen (14) days of the issuance of this order.
- 19 (4) Counsel for defendants is hereby ORDERED TO SHOW CAUSE  
20 in writing why sanctions should not issue in  
21 accordance with Local Rule 110, including a fine of  
22 \$150, for his failure to timely file an opposition to  
23 plaintiff's motion. See also Fed. R. Civ. P. 41(b),  
24 Link v. Wabash R.R., 370 U.S. 626, 633 (1962). Counsel  
25 shall file a response to this order to show cause  
26 within fourteen (14) days of the issuance of this

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order.

IT IS SO ORDERED.

DATED: December 13, 2010.



LAWRENCE K. KARLTON  
SENIOR JUDGE  
UNITED STATES DISTRICT COURT