

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

May 20, 2019

Elisabeth A. Shumaker
Clerk of Court

FRANK R. MONTERO,

Plaintiff - Appellant,

v.

No. 18-5011
D.C. No. 4:17-CV-00622-TCK-JFJ
(N.D. Okla.)

TULSA AIRPORT
IMPROVEMENTS TRUST,

Defendant - Appellee.

ORDER AND JUDGMENT*

Before MATHESON, McKAY, and BACHARACH, Circuit Judges.

In this case, a pro se plaintiff sued in state court and then purported to transfer or remove the case to federal court. The federal district court dismissed the action based on the *Rooker-Feldman* doctrine. Though this doctrine doesn't apply, a plaintiff can't transfer or remove a case to federal

* Oral argument would not materially help us to decide this appeal. See Fed. R. App. P. 34(a)(2)(C); 10th Cir. R. 34.1(G). We have thus decided the appeal based on the briefs and record on appeal.

This order and judgment does not constitute binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. But the order and judgment may be cited for its persuasive value if otherwise appropriate. Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

- Appendix "A-4" -

court after suing in state court. We thus vacate the dismissal and remand with directions to remand the case to state district court.

1. Background

Mr. Frank Montero sued the Tulsa Airport Improvements Trust in Oklahoma state district court. The state district court entered judgment for the Trust and awarded attorney's fees to the Trust. Mr. Montero then unsuccessfully moved for post-judgment relief and appealed to the Oklahoma Supreme Court.

While the appeal was pending in the Oklahoma Supreme Court, Mr. Montero began this action in federal district court by moving to transfer venue. In the motion, Mr. Montero

- referred to the state case and
- purported to either transfer the state case to federal district court (under 28 U.S.C. § 1404(a)) or remove the state case to federal district court (under 28 U.S.C. § 1441).

The federal district court dismissed the action *sua sponte* under the *Rooker-Feldman* doctrine, which would preclude subject-matter jurisdiction.¹ The plaintiff appeals the dismissal.²

¹ The Trust also moved to strike Mr. Montero's filings and to dismiss the case for lack of subject-matter jurisdiction. The district court did not rule on these motions.

² Mr. Montero also filed a motion to alter the dismissal. The district court denied this motion, but Mr. Montero did not file a notice of appeal with respect to that ruling.

2. The District Court's Reliance on the *Rooker-Feldman* Doctrine

We engage in review de novo of the dismissal for lack of subject-matter jurisdiction. *Chapman v. Oklahoma*, 472 F.3d 747, 749 (10th Cir. 2006). Exercising de novo review, we conclude that the district court erred in dismissing the action under the *Rooker-Feldman* doctrine. “[F]ederal jurisdiction is not barred by the *Rooker-Feldman* doctrine if suit ‘was filed before the end of the state courts’ appeal process.’” *Id.* (quoting *Guttman v. Khalsa*, 446 F.3d 1027, 1029 (10th Cir. 2006)). Mr. Montero brought this suit before the state-court appeal was decided, so the *Rooker-Feldman* doctrine does not apply.

3. Invalidity of Mr. Montero's Transfer or Removal

But we conclude that the district court lacked jurisdiction because a plaintiff cannot

- transfer a case from state court to federal district court under 28 U.S.C. § 1404(a) or
- remove a case from state court to federal district court under 28 U.S.C. § 1441.³

³ Mr. Montero argues that the defendant was late in moving to dismiss. A motion to dismiss (or remand) for lack of subject-matter jurisdiction can be made at any time. *See Kontrick v. Ryan*, 540 U.S. 443, 455 (2004) (“A litigant generally may raise a court’s lack of subject-matter jurisdiction at any time in the same civil action, even initially at the highest appellate instance.”); *Wis. Dep’t of Corr. v. Schacht*, 524 U.S. 381, 392 (1998) (noting that a motion to remand for lack of subject-matter jurisdiction may be made “at any time”). But even if the Trust had been late in raising the issue, we would need to decide *sua sponte* whether jurisdiction existed in

Section 1404(a) authorizes a federal district court to transfer a case on its docket to another federal district court; this section does not allow a state court to transfer a case to federal court. *See 28 U.S.C. § 1404(a); see also Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509, 1515 (10th Cir. 1991) (“Congress enacted 28 U.S.C. § 1404(a) in 1948 ‘as a federal housekeeping measure, allowing easy change of venue within a unified federal system.’” (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 (1981))).

Section 1441 does permit removal of a case from state court to federal court. But a plaintiff like Mr. Montero cannot remove the case. *See Hamilton v. Aetna Life & Cas. Co.*, 5 F.3d 642, 643 (2d Cir. 1993) (per curiam) (“No section [of the U.S. Code] provides for removal by a plaintiff.”); *see also* 14C Charles Alan Wright, et al., *Federal Practice and Procedure* § 3730, at 607 (2018) (stating that “plaintiffs cannot remove” cases to federal court).

* * *

district court. *Cellport Sys., Inc. v. Peiker Acoustic GMBH & Co. KG*, 762 F.3d 1016, 1029 (10th Cir. 2014).

Mr. Montero could not transfer or remove his case from state court to federal court, so the federal court never obtained jurisdiction.⁴ The case should thus return to state court. So we vacate the dismissal and remand with directions for the federal district court to remand to the state district court.

Entered for the Court

Robert E. Bacharach
Circuit Judge

⁴ After Mr. Montero purported to transfer or remove the suit, he filed a federal petition that included federal claims. But Mr. Montero's right to transfer or remove the case is determined at the time of the purported transfer or removal. *See Pullman Co. v. Jenkins*, 305 U.S. 534, 537 (1939) (noting that the "right to remove" is "to be determined according to the plaintiffs' pleading at the time of the petition for removal"); *Pfeiffer v. Hartford Fire Ins. Co.*, 929 F.2d 1484, 1488 (10th Cir. 1991) ("[T]he propriety of removal is judged on the complaint as it stands at the time of the removal."). Accordingly, we do not address the issues that Mr. Montero raises in his federal petition.

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

June 13, 2019

Elisabeth A. Shumaker
Clerk of Court

FRANK R. MONTERO,

Plaintiff - Appellant,

v.

No. 18-5011

TULSA AIRPORT IMPROVEMENTS
TRUST,

Defendant - Appellee.

ORDER

Before MATHESON, McKAY, and BACHARACH, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court



ELISABETH A. SHUMAKER, Clerk

- Appendix "A-5" -

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

FRANK R. MONTERO,)
vs.)
Plaintiff,)
vs.) Case No. 17-CV-622-TCK-JFJ
TULSA AIRPORT IMPROVEMENTS)
TRUST,)
Defendant.)

OPINION AND ORDER

Before the Court is Plaintiff Frank Montero's *pro se* Complaint (styled as "Petition") (hereinafter "Complaint") (Doc. 4). For reasons discussed below, the Complaint is dismissed *sua sponte* because the *Rooker-Feldman* doctrine prevents this Court from exercising subject-matter jurisdiction over this case. *See Rooker v. Fid. Trust Co.*, 263 U.S. 413 (1923); *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

I. Background

On January 15, 2014, Plaintiff filed suit against Defendant in the District Court for Tulsa County ("State Court Action"), alleging breach of contract and various claims of property damage arising out of Plaintiff's lease of an airplane hangar from Defendant. (Complaint, *Montero v. Tulsa Airport Auth.*, CV-2014-72.)¹ Plaintiff alleged that Defendant stole his septic tank, gave it to his neighbor, and installed an illegal bootlegged septic tank on Plaintiff's leased airplane hangar. *Id.*

¹ The description of Plaintiff's claims in the State Court Action is based on (1) representations in Plaintiff's allegations set forth in his Complaint in this case, and (2) certain documents from the state court docket, of which the Court takes judicial notice. *See United States v. Ahidley*, 486 F.3d 1184, 1192 n.5 (10th Cir. 2007) ("[W]e may exercise our discretion to take judicial notice of publicly-filed records in our court and certain other courts concerning matters that bear directly upon the disposition of the case at hand."); *St. Louis Baptist Temple, Inc. v. FDIC*, 605 F.2d 1169, 1172 (10th Cir. 1979) ("[F]ederal courts, in appropriate circumstances, may take notice of proceedings in other courts, both within and without the federal judicial system . . ."). The State Court Action weighs on this Court's ability to exercise subject-matter jurisdiction here. Accordingly, this Court will take judicial notice of relevant documents from that proceeding.

Plaintiff also alleged that he should not be required to purchase a mandatory liability insurance policy pursuant to the parties' lease agreement ("Ground Lease Contract"), as the Ground Lease Contract was between Defendant and A.A. Inc., Plaintiff's corporation, rather than with Plaintiff personally, and also contained other technical defects. (Compl. at 2.) In the State Court Action, the judge judicially reformed the Ground Lease Contract to be between Defendant and Frank Montero personally. (*Id.* at 2, 6.) The state court also granted Defendant's motion to dismiss and entered final judgment on July 14, 2015. (Final Judg. of Dismissal with Prej., *Montero v. Tulsa Airport Auth.*, CV-2014-72.) Plaintiff filed the instant action on November 14, 2017.

II. Subject Matter Jurisdiction

Because federal courts are courts of limited jurisdiction, a plaintiff has the burden to allege sufficient jurisdictional facts to establish federal subject-matter jurisdiction. *See McNutt v. Gen. Motors Acceptance Corp. of Indiana, Inc.*, 298 U.S. 178, 182 (1936) ("It is incumbent upon the plaintiff to properly allege the jurisdictional facts, according to the nature of the case."); *Montoya v. Chao*, 296 F.3d 952, 955 (10th Cir. 2002). The Court addresses Plaintiff's Complaint *sua sponte* because "[f]ederal courts 'have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party.'" *Image Software, Inc. v. Reynolds & Reynolds Co.*, 459 F.3d 1044, 1048 (10th Cir. 2006) (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 501 (2006)); *see also* FED. R. CIV. P. 12(h)(3). A court may raise the question of subject-matter jurisdiction "at any stage in the litigation." *Id.*

This case raises the potential application of the *Rooker-Feldman* doctrine. The *Rooker-Feldman* doctrine establishes that, as a matter of subject-matter jurisdiction, only the United States Supreme Court has appellate authority to review a state-court judgment. *See Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005). Accordingly, this Court may not review a

state-court judgment. *Id.* The *Rooker-Feldman* doctrine, however, does not extend to parallel federal actions, or to independent claims, even if those claims raise overlapping legal issues. Such cases would be subject only to preclusion law. *See id.*, 544 U.S. at 292-93.

III. Analysis

Plaintiff is a *pro se* litigant participating in this proceeding *in forma pauperis*; accordingly, the Court construes his allegations liberally. *See Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). If the Court can reasonably read Plaintiff's Complaint to state a valid ground for jurisdiction, the Court should do so "despite the plaintiff's failure to cite proper legal authorities, his confusion of various legal theories, his poor syntax and sentence structure, or his unfamiliarity with pleading requirements." *Id.* However, it is not the proper function of this Court to assume the role of advocate for the *pro se* litigant. *See id.*

Although Plaintiff's allegations are not clearly stated, Plaintiff appears to seek reconsideration of the claims he raised in the State Court Action, as well as relief from enforcement of the judgment in that case. In the Complaint, Plaintiff lists his causes of action as follows: (1) declaratory judgment; (2) unlawful conversion of an out-of-state corporation; (3) wrongful conversion of Plaintiff's septic tank; (4) "sounds in tort causing property damage"; (5) "civil rights violations"; and (6) breach of contract. (Compl. at 7-9.) Despite the liberal construction that this Court affords to *pro se* pleadings, this Court cannot construe these listed claims as anything other than claims seeking review of and relief from the judgment in the State Court Action. Plaintiff's first cause of action requests immediate relief from the judgment in the State Court Action, while his remaining causes of action challenge the judgment in the State Court Action.

Throughout his Complaint, Plaintiff describes the same conduct which he first challenged in the State Court Action, and how that conduct has caused him harm. For example, Plaintiff

describes Defendant's alleged breach of contract and Defendant's attempt to enforce the Ground Lease Contract against him, rather than against A.A. Inc. (*Id.* at ¶¶ 4, 18.) Similarly, Plaintiff describes Defendant's alleged misconduct related to his septic tank, including that Defendant stole his septic tank, gave it to his neighbor, and installed an illegal, bootlegged septic tank on his property. (*Id.* at ¶ 18.) Plaintiff also describes the judgment in the State Court Action, such as the decision to judicially reform the Ground Lease Contract, as well as how that judgment has harmed him, in great detail. (*Id.* at ¶¶ 4-6.) Moreover, Plaintiff devoted his entire jurisdiction section and statement of facts to describing the harm he suffered as a result of the State Court Action and its underlying events. (*Id.* at ¶¶ 4-18.) Finally, Plaintiff has pleaded no facts that suggest this case falls outside the *Rooker-Feldman* doctrine. Specifically, he has not pleaded any allegations that this federal court action is a parallel action to the State Court Action, or pleaded any facts indicating that Plaintiff has any claims independent of the State Court Action.

Taken together, Plaintiff's Complaint demonstrates that he is seeking, essentially, a review of the judgment in the State Court Action, rather than the adjudication of separate claims. Accordingly, the Court lacks subject-matter jurisdiction in this proceeding, pursuant to the *Rooker-Feldman* doctrine. Plaintiff's Complaint (Doc. 4) is therefore **DISMISSED** Federal Rule of Civil Procedure 12(b)(1). A separate judgment of dismissal is entered herewith.

SO ORDERED this 10th day of January, 2018.



TERENCE C. KERN
United States District Judge

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

September 4, 2018

Elisabeth A. Shumaker
Clerk of Court

FRANK R. MONTERO,

Plaintiff - Appellant,

v.

TULSA AIRPORT IMPROVEMENTS
TRUST,

Defendant - Appellee.

No. 18-5011
(D.C. No. 4:17-CV-00622-TCK-JFJ)
(N.D. Okla.)

ORDER

This matter is before the court on the *Status Report* appellant Frank R. Montero filed with this court on August 30, 2018. Upon consideration, the court continues the abatement of this appeal until the district court rules on Mr. Montero's *Motion to Alter/Amend Petition*, which motion the district court may construe as a motion under Rule 59 of the Federal Rules of Civil Procedure. *See Fed. R. Civ. P. 59(e); Fed. R. App. P. 4(a)(4); Coll v. First Am. Title Ins. Co.*, 642 F.3d 876, 884 (10th Cir. 2011) ("When a party [files a motion to amend the complaint after the district court grants a motion to dismiss], this court treats such a motion as one made under either Fed. R. Civ. P. 59 or 60, depending upon when the motion is filed."); *Yost v. Stout*, 607 F.3d 1239, 1243 (10th Cir. 2010) ("Where [a] motion requests a substantive change in the district court's judgment or otherwise questions its substantive correctness, the motion is a Rule 59 motion, regardless of its label.").

- Appendix "A-2" -

On or before November 5, 2018, Mr. Montero shall file a written report advising this court only of the status in the district court of his *Motion to Alter/Amend Petition*.

If the district court rules on the *Motion to Alter/Amend Petition* before November 5, 2018, Mr. Montero shall promptly notify this court in writing. Once the district court has ruled on that motion: (1) the Clerk of the district court shall supplement the preliminary record as Tenth Circuit Rule 3.2(B) requires; and (2) this court will set a due date for Mr. Montero's opening brief and will send him a form on which to submit it. Mr. Montero should state any arguments he wishes to make regarding the merits of his appeal at that time and in that form.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk



by: Lisa A. Lee
Counsel to the Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FRANK R. MONTERO,)
vs.)
Plaintiff,)
vs.) Case No. 17-CV-622-TCK-JFJ
TULSA AIRPORT IMPROVEMENTS)
TRUST,)
Defendant.)

OPINION AND ORDER

Before the Court are Plaintiff Frank Montero (“Plaintiff”)’s Motion to Amend (Doc. 22), Motion to Strike Documents (Doc. 29), and Motion for Sanctions (Doc. 33). For the reasons discussed below, Plaintiff’s Motions are **DENIED**.

I. Background

Plaintiff filed the instant action *pro se* on November 14, 2017, apparently seeking reconsideration of claims he raised in a state court action and relief from enforcement of the judgment in that case. This Court found that it could not exercise jurisdiction over these claims due to the *Rooker-Feldman* bar on exercising appellate jurisdiction over a state-court judgment, and dismissed the instant action *sua sponte* on January 10, 2018. (Doc. 21). Plaintiff filed his Motion to Amend (Doc. 22) on January 16, 2018, and then filed his Notice of Appeal, filed on February 7, 2018 (Doc. 24). Plaintiff later filed a Motion to Strike (Doc. 29) on February 20, 2018 and a Motion for Sanctions (Doc. 33) on March 30, 2018. The Tenth Circuit has abated the appeal, and suspended briefing pending this Court’s ruling on Plaintiff’s Motion to Amend. (Doc. 30.)

II. Motion to Amend

The Tenth Circuit instructed this Court to construe Plaintiff’s Motion to Amend as a Motion under Rule 59(e). (Doc. 30). A Motion to Alter or Amend Judgment under Federal Rule

of Civil Procedure 59(e) (“Rule 59(e)”) is warranted when there is (1) an intervening change in the controlling law, (2) new evidence previously unavailable, or (3) the need to correct clear error or prevent manifest injustice. *See Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000) (internal citations and quotations omitted). A Motion to Alter or Amend Judgment is not appropriate, however, “to revisit issues already addressed or advance arguments that could have been raised in prior briefing.” *Id.*, *see June v. Union Carbide Corp.*, 577 F.3d 1234, 1247 (10th Cir. 2009); *Grayson v. DynaTen Corp.*, No. 10-cv-795-TCK-PJC, 2012 U.S. Dist. LEXIS 74885 at *3 (N.D. Okla. May 31, 2012). A motion pursuant to Rule 59(e) is designed “to permit relief in extraordinary circumstances and not to offer a second bite at the proverbial apple.” *See Hill v. Mem'l. Drive United Methodist Church*, 17-cv-227-CVE-JFJ, 2018 U.S. Dist. LEXIS 69232, *4 (N.D. Okla. Apr. 25, 2018); *Syntroleum Corp. v. Fletcher Int'l, Ltd.*, No. 08-cv-384-JHP-FHM, 2009 U.S. Dist. LEXIS 22312, *2 (N.D. Okla. Mar. 19, 2009).

In this case, Plaintiff contends that if he is permitted to “amend his petition” (sic) to add the F.A.A., the D.E.Q., the E.P.A. and the State of Oklahoma as Defendants, this Court will have subject-matter jurisdiction over the instant action. However, this argument is misplaced, as Plaintiff fails to demonstrate how his own failure to name all appropriate Defendants falls within the narrow circumstances that warrant granting a motion under Rule 59(e). Indeed, Plaintiff has alleged no intervening change in the controlling law, no new evidence that was previously unavailable, and no need to correct clear error or prevent manifest injustice, which would warrant granting a motion under Rule 59(e). Absent any appropriate explanation, Plaintiff’s attempt to name additional Defendants at this juncture would do nothing more than “offer [him] a second bite of the proverbial apple.” *See Hill*, 2018 U.S. Dist. LEXIS 69232, *4; *Syntroleum Corp.*, 2009 U.S. Dist. LEXIS 22312, *2. Accordingly, Plaintiff’s Motion to Amend (Doc. 22) is **DENIED**.

III. Motion to Strike Documents

Plaintiff has filed a Motion to Strike Defendant's Response to Plaintiff's Motion to Amend (Doc. 29). Though Plaintiff's motion is unclear, it appears that Plaintiff made his Motion to Strike under Federal Rule of Civil Procedure 12(f) ("Rule 12(f)"). Rule 12(f) allows a court to "strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." However, briefing in support of or opposition to a motion is not a pleading, and may not be stricken pursuant to Rule 12(f). *See Fed. R. Civ. P. 7(a)* (the only "pleadings" allowed are complaints, answers, and replies to answers); *McNeil v. Post*, No. 15-cv-478-JHP-PJC, 2016 U.S. Dist. LEXIS 69099, *20 (N.D. Okla. May 26, 2016) (denying to a motion to strike a party's motion to amend as motions are not pleadings); *Nadel & Gussman, LLC v. Reed Family Ranch LLC*, 998 F. Supp. 2d 1211, 1219 (N. D. Okla. May 15, 2014) (denying a motion to strike a motion for certification because a motion is not a pleading and may not be stricken pursuant to Rule 12(f)). Because Defendant's Response to Plaintiff's Motion to Amend is not a pleading, it may not be stricken pursuant to Rule 12(f). Plaintiff's Motion to Strike (Doc. 29) is **DENIED**.

IV. Motion for Sanctions

Plaintiff has filed a Motion for Sanctions against Defendants under Federal Rule of Civil Procedure 11(b) ("Rule 11(b)"), also based on Defendant's filing of a Response to Plaintiff's Motion to Amend (Doc. 23).

Under Rule 11(b), for every pleading, motion, or other paper presented to the court, an attorney must certify, to the best of his knowledge, information, and belief, formed after a reasonable inquiry, (1) that he isn't presenting the filing for any improper purpose, (2) that the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for changing the law, (3) that the factual contentions are warranted on the evidence or will likely have support after further investigation, and (4) that the denials of factual contentions have similar support. Fed. R. Civ. P. 11(b).

When, after notice and an opportunity to respond, a court determines that an attorney has violated Rule 11(b), it may impose sanctions under Rule 11(c).

King v. Fleming, 899 F.3d 1140, 1148 (10th Cir. 2018).

In this case, the Court has no basis for concluding that Defendant's counsel violated Rule 11(b). Plaintiff's argument is limited to the allegation that Defendant filed its response "in direct defiance to the acknowledged correction entered by the Court Clerk on the 17th day of February, 2018 [event to Motion to Amend]." (Doc. 33.) Plaintiff appears to challenge Defendant's Response being titled "Defendant's Response to Plaintiff's Motion to Alter Judgment" while the Motion is docketed as "Motion to Amend." However, Plaintiff has not alleged that Defendant filed the Response for any improper purpose or that Defendant's factual or legal contentions are unwarranted. Indeed, regardless of how the motion has been docketed, Defendant's Response addressed the substance of Plaintiff's Motion, which remained unchanged by the way in which it was docketed. Accordingly, this Court cannot, without more, find that Defendant has violated Rule 11(b). Plaintiff's Motion for Sanctions (Doc. 33) is **DENIED**.

V. Conclusion

For the reasons set forth above, Plaintiff's motions are all denied.

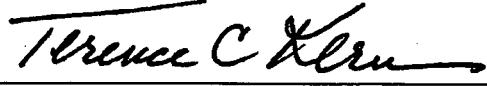
Plaintiff's Motion to Amend (Doc. 22) is **DENIED**.

Plaintiff's Motion to Strike Documents (Doc. 29) is **DENIED**.

Plaintiff's Motion for Sanctions (Doc. 33) is **DENIED**.

SO ORDERED.

DATED THIS 29th day of January, 2019.


TERENCE C. KERN
United States District Judge

**Additional material
from this filing is
available in the
Clerk's Office.**