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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

COMPANION PROPERTY AND CASUALTY)	3:12-cv-00595-HDM-VPC
GROUP,)	
Plaintiff,)	ORDER
vs.)	
CONSOLIDATED AGENCY PARTNERS, dba)	
MENICUCCI INSURANCE ASSOCIATES,)	
KAREN FAUST, RISK PLACEMENT)	
SERVICES, INC. dba RISK PLACEMENT)	
SERVICES, INSURANCE BROKERS, JOAN)	
VASCONES, GLORIA LAM, SKY HIGH)	
SPORTS, LLC, SKY HIGH SPORTS)	
ORANGE COUNTY OPERATIONS, LLC,)	
and ROLLAND WEDDELL, <i>et al.</i>)	
Defendants.)	

Plaintiff Companion Property and Casualty Group's ("plaintiff") first amended complaint (#46) filed on March 23, 2013, asserts fourteen causes of action against ten defendants based on their alleged involvement in procuring a workers' compensation policy from plaintiff for Sky High Sports, an entity

1 operating indoor trampoline centers. All defendants have appeared
2 and answered plaintiff's complaint. Sky High has asserted three
3 counterclaims against plaintiff.

4 Plaintiff has settled its claims against defendants Pinnacle
5 Underwriters, Highpoint Risk Services, and according to a
6 stipulation filed by the parties (#155) Risk Placement Services,
7 Joan Vascones, and Gloria Lam (collectively "RPS").¹ Plaintiff has
8 also reached a settlement with defendants Consolidated Agency
9 Partners, dba Menicucci Insurance Associates and Karen Faust
10 (collectively "CAP"), which is contingent on the court's
11 determination that the settlement was reached in good faith. CAP's
12 motion for good faith settlement determination remains pending.

13 Presently before the court are several motions for summary
14 judgment. The CAP defendants have filed a motion for summary
15 judgment on all of plaintiff's claims (#165). Plaintiff has
16 responded (#175), and CAP has replied (#181). Defendants Sky High
17 Sports, LLC, Sky High Sports Orange County Operations, LLC, and
18 Rolland Weddell (collectively "Sky High") have filed a motion for
19 summary judgment on all of plaintiff's claims as well as on their
20 counterclaims and one of their affirmative defenses (#168).
21 Plaintiff has responded (#174), and Sky High has replied (#180).
22 Finally, plaintiff has filed a motion for partial summary judgment
23 on its claim of negligent misrepresentation (#170). Defendants
24 have opposed (#177, #178) and plaintiff has replied (#182).²

25
26 ¹ The court has granted motions for good faith settlement filed by
Highpoint and Pinnacle. As of yet, RPS has not filed any such motion.

27 ²The parties have also filed several motions in limine. As the motions
28 for summary judgment can be decided without reference to the objected
evidence, those motions are not herein considered.

1 **Facts**

2 Sky High Sports operates recreational indoor trampoline
3 centers. (See Pl. Mot. Summ. J. Ex. 1 (Raymond Dep. 11-12); CAP
4 Opp'n Pl. Mot. Summ. J. Ex. C (Weddell Dep. 6-16); Sky High Mot.
5 Summ. J. Ex. S at 2)). Before 2010, Sky High's workers'
6 compensation coverage was issued under the "amusement" class code.³
7 (Pl. Mot. Summ. J. Ex. 2 (Lewis Dep. 19-20, 40-41, 43)). Sky High
8 owner and managing member Rolland Weddell ("Weddell") met with
9 insurance broker Karen Faust ("Faust") of Menicucci Insurance
10 Associates ("Menicucci") to discuss Sky High's insurance needs,
11 including workers' compensation.⁴ (*Id.* at 24; *id.* Ex. 5 (Weddell
12 Dep. 134-36); CAP Mot. Summ. J. Ex. M (Weddell Dep. 16); *id.* Ex. D
13 (Faust Dep. 31-32)). During their conversation, Faust and Weddell
14 discussed the nature of Sky High's business. Faust claims Weddell
15 said Sky High employees do not teach people how to do back flips or
16 tricks on the trampolines and do not perform such in the scope of
17 their duties.⁵ (CAP Mot. Summ. J. Ex. D (Faust Dep. at 41-42, 76-
18 77); Pl. Mot. Summ. J. Ex. 5 (Wedell Dep. 78)). Faust did not ask
19 whether employees jump up and down on the trampolines. (CAP Mot.
20 Summ. J. Ex. M (Weddell Dep. 77)). However, Weddell says he told

22 ³The agent handling Sky High's workers' compensation policy before 2010
23 had submitted Sky High's applications under the amusement class code after
24 consultation with the Workers' Compensation Insurance Rating Bureau of
California ("WCIRB"). (Pl. Mot. Summ. J. Ex. 2 (Lewis Dep. 16, 28-29)).

25 ⁴ Menicucci had already by that time placed personal and commercial
26 policies for Weddell, as well as some policies for Sky High. (Pl. Mot.
Summ. J. Ex. 4 (Faust Dep. 21-22); CAP Mot. Summ. J. Ex. M (Weddell Dep. 34,
117)).

27 ⁵ Weddell does not recall Faust asking whether employees do flips, but
28 he would have told her "definitely not." (CAP Mot. Summ. J. Ex. M (Weddell
Dep. 48)).

1 Faust that employees "travel on the trampolines and . . . in order
2 to travel they jump on the trampolines"; he also told her that
3 employees would "perch" on pads separating the trampolines until
4 they have to move. (Pl. Mot. Summ. J. Ex. 5 (Weddell Dep. 48, 76-
5 78)). Faust did not visit any Sky High centers or interview any
6 employees. (*Id.* at 32-33, 37, 40)). While she did visit the web
7 site, she did not recall seeing any AIRobics training depicted on
8 the site. (CAP Mot. Summ. J. Ex. D (Faust Dep. 37-40, 72, 124,
9 213-14)).

10 Faust believed that Sky High's classification should be sports
11 and fitness instead of amusement. (See Pl. Mot. Summ. J. Ex. 6;
12 *id.* Ex. 4 (Faust Dep. 37)). The premium with a fitness class code
13 was significantly less than the premium with an amusement class
14 code. (Pl. Mot. Summ. J. Ex. 5 (Weddell Dep. 135-36) (testifying
15 that the premium for amusement was 2.5 times more expensive than
16 that of sports and fitness). Weddell asked Faust to place Sky
17 High's workers' compensation coverage. (*Id.*)

18 Faust prepared an "Acord 125," an application for workers'
19 compensation insurance. (CAP Mot. Summ. J. Ex. D (Faust Dep. 99)).
20 In the "Nature of Business/Description of Operations" box, she
21 wrote: "Sports and fitness facility using trampolines. Employees
22 are used at the front desk for check, monitoring wrist bands for
23 time, food area, maintenance. They do not teach nor are they out
24 on the trampolines."⁶ (Pl. Mot. Summ. J. Ex. 3A). Under "Rating
25 Information," Faust included the fitness class code. (*Id.*)

26

27 ⁶ In stating that employees "do not teach nor are they out on the
28 trampolines," Faust says she intended to convey that "employees are not on
the trampoline teaching people how to do jumps or tricks." (CAP Mot. Summ.
J. Ex. D (Faust Dep. 84-86)).

1 Finally, she represented that Sky High did not have "any policy or
2 coverage declined, canceled, or non-renewed during the prior 3
3 years," and that no work was performed "underground or above 15
4 feet." (*Id.*)

5 Faust emailed Sky High's application to insurers and wholesale
6 brokers, including defendant RPS. (*See id.* Ex. 6). In her emails,
7 Faust noted that the policy had been written under the "amusement"
8 code but that she felt it had been misclassified and should be
9 "classified in Physical Fitness." (*Id.*) She stated that employees
10 are not on trampolines unless someone needs help, that they do not
11 provide any training or officiating, and that although Sky High
12 offers Airobics and dodge ball, employees stand on the "catwalk"
13 and call out moves and do not participate nor go out on the
14 trampolines.⁷ (*Id.*) She pointed to Sky High's web site for
15 "information on the business." (*Id.*)

16 Several insurers declined to quote. (Pl. Mot. Summ. J. Ex. 4
17 (Faust Dep. at 205-06)). One stated it would pass because Sky High
18 had trampolines and the losses showed "some claims where employees
19 jumped off the trampolines and injured themselves." (*Id.*; *id.* Ex
20 7).

21 RPS forwarded the application to defendant Pinnacle, which
22 forwarded the application to Dallas National. (CAP Mot. Summ. J.
23 Ex. P; *id.* Ex. A (Leatzow Dep. 52); *id.* Ex. N (Lam Dep. 21)).
24 Dallas National, acting as plaintiff's general agent, underwrote

25
26 ⁷ Weddell does not recall telling Faust that employees would lead
27 AIRobics classes by calling out moves from the separator pads. (*Id.* Ex. M
28 (Weddell Dep. 77)). However, he did tell her employees "don't participate."
(*Id.*) Faust appears to admit she assumed employees called out AIRobics moves
from "catwalks" based on her conversation with Weddell. (CAP Mot. Summ. J.
Ex. D (Faust Dep. 80-81)).

1 the policy, bound coverage and issued Sky High a workers'
2 compensation policy with effective dates of September 21, 2010, to
3 September 21, 2011. (CAP Mot. Summ. J. Ex. B (Hirsch Dep. 43-47);
4 Sky High Mot. Summ. J. Ex. C.; *id.* Ex. H).

5 Jerry Sam of Dallas National reviewed the application and made
6 the final decision to bind coverage. (CAP Mot. Summ. J. Ex. C (Sam
7 Dep. 17-18, 27)). Sam described his review as "almost like box
8 underwriting." (*Id.* at 52-53)). He compared the estimated losses
9 to the estimated premium to determine if the numbers fit "in the
10 box"; as the "loss run ratio" (estimated losses to estimated
11 premium) was under 40 percent, Sam issued the policy without
12 further investigation.⁸ (*Id.* at 31-32, 52-53, 83, 161-62, 164-
13 66)). Although Sky High's "loss runs" - a history of prior loss
14 claims - were available to Sam, he did not review them. (*See id.*
15 at 50, 159, 166); *id.* Ex. F). The loss runs available to Sam
16 contained some claims possibly involving trampolines. (*Id.* Ex. F).
17 Faust's email did not make it into Dallas National's file and
18 therefore was not considered by Sam. (*Id.* Ex. C (Sam Dep. at 174,
19 190)). While Sam assumed that employees would at least
20 occasionally be on the trampolines in the course of maintenance,
21 cleaning, or assisting customers, and that they would engage in
22 "low exposure jumping," he testified that had the application
23 stated employees were on the trampolines, he would have

24

25 ⁸ The estimated premium is based in part on the class code. Plaintiff
26 argues that the code is dictated by "state government" - and thus that
27 Faust's selection of the "fitness" rating was a material misrepresentation.
28 Defendants argue that insurers are not bound by the ratings of the WCIRB and
are responsible for selecting the appropriate code. Thus, they argue,
Faust's selection of the "fitness" code was merely a suggestion as to what
she believed the appropriate code should be.

1 investigated further, and had he known employees were jumping on
2 trampolines, he would not have issued the policy. (*Id.* at 93-94,
3 108-09, 121-30).

4 On July 6, 2011, Faust prepared and submitted a renewal
5 application. (See Pl. Mot. Summ. J. Ex. 3D). The renewal
6 application was in all material respects identical to the original
7 application.⁹ (See *id.*) Faust also submitted updated loss run
8 information. (See CAP Mot. Summ. J. Ex. T; *id.* Ex. U; *id.* Ex K;
9 *id.* Ex. C (Sam Dep. 64, 66, 82-83, 209-12, 215)). The updated loss
10 runs contained some injuries possibly related to the trampolines.
11 (Sky High Mot. Summ. J. Ex. K). Available in Dallas National's
12 file at the time of renewal was a document suggesting Sky High had
13 been classified under "amusement" in the past. (CAP Mot. Summ. J.
14 Ex. C (Sam Dep. 182-85); *id.* Ex. F; Sky High Mot. Summ. J. Ex. E).
15 Plaintiff renewed the policy and bound coverage from September 21,
16 2011, to September 21, 2012. (Sky High Mot. Summ. J. Ex. N).

17 On October 3, 2011, Sky High employee Jake Likich became
18 paralyzed when, while trying to perform a trick on the trampoline,
19 he landed on his head, upper back and neck area instead of on his
20 back. (Pl. Mot. Summ. J. Ex. 13; CAP Opp'n Ex. I (Reeve Dep. 27)).
21 Likich had been on duty at the time and was jumping with other Sky
22 High employees who were off the clock, including Sydney Reeve.
23 (CAP Mot. Summ. J. Ex. E (Reeve Dep. 28)). Although Likich had
24 been practicing AIRobics moves, Reeve testified that the trick he
25 had attempted was not part of being an AIRobics instructor. (CAP
26

27 ⁹ Sky High asserts that no one from Sky High ever signed the renewal
28 application. Sky High also argues that it was not a "renewal" application
but an entirely new application.

1 Mot. Summ. J. Ex. E (Reeve Dep. 26-28, 39-40)). Likich made a
2 claim under the workers' compensation policy issued by plaintiff.
3 Plaintiff has now settled Likich's workers' compensation proceeding
4 and has agreed to pay him a total \$8 million. (See Doc. #206).

5 Plaintiff asserts the applications submitted by Faust
6 materially misrepresented the nature of Sky High's business,
7 including the extent to which employees were on the trampolines.
8 Following the incident, plaintiff canceled Sky High's workers'
9 compensation coverage mid-term. (Pl. Opp'n to Sky High Mot. Summ.
10 J. Ex. 9). This lawsuit followed.

11 **Standard**

12 "The court shall grant summary judgment if the movant shows
13 that there is no genuine issue as to any material fact and the
14 movant is entitled to judgment as a matter of law." Fed. R. Civ.
15 P. 56(a). The burden of demonstrating the absence of a genuine
16 issue of material fact lies with the moving party, and for this
17 purpose, the material lodged by the moving party must be viewed in
18 the light most favorable to the nonmoving party. *Adickes v. S.H.*
19 *Kress & Co.*, 398 U.S. 144, 157 (1970); *Martinez v. City of Los*
20 *Angeles*, 141 F.3d 1373, 1378 (9th Cir. 1998). A material issue of
21 fact is one that affects the outcome of the litigation and requires
22 a trial to resolve the differing versions of the truth. *Lynn v.*
23 *Sheet Metal Workers Int'l Ass'n*, 804 F.2d 1472, 1483 (9th Cir.
24 1986); *S.E.C. v. Seaboard Corp.*, 677 F.2d 1301, 1306 (9th Cir.
25 1982).

26 Once the moving party presents evidence that would call for
27 judgment as a matter of law at trial if left uncontroverted, the
28 respondent must show by specific facts the existence of a genuine

1 issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,
2 250 (1986). “[T]here is no issue for trial unless there is
3 sufficient evidence favoring the nonmoving party for a jury to
4 return a verdict for that party. If the evidence is merely
5 colorable, or is not significantly probative, summary judgment may
6 be granted.” *Id.* at 249-50 (citations omitted). “A mere scintilla
7 of evidence will not do, for a jury is permitted to draw only those
8 inferences of which the evidence is reasonably susceptible; it may
9 not resort to speculation.” *British Airways Bd. v. Boeing Co.*, 585
10 F.2d 946, 952 (9th Cir. 1978); see also *Daubert v. Merrell Dow*
11 *Pharmaceuticals, Inc.*, 509 U.S. 579, 596 (1993) (“[I]n the event
12 the trial court concludes that the scintilla of evidence presented
13 supporting a position is insufficient to allow a reasonable juror
14 to conclude that the position more likely than not is true, the
15 court remains free . . . to grant summary judgment.”). Moreover,
16 “[i]f the factual context makes the non-moving party’s claim of a
17 disputed fact implausible, then that party must come forward with
18 more persuasive evidence than otherwise would be necessary to show
19 there is a genuine issue for trial.” *Blue Ridge Ins. Co. v.*
20 *Stanewich*, 142 F.3d 1145, 1149 (9th Cir. 1998) (citing *Cal.*
21 *Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc.*, 818
22 F.2d 1466, 1468 (9th Cir. 1987)). Conclusory allegations that are
23 unsupported by factual data cannot defeat a motion for summary
24 judgment. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).

25 If the nonmoving party fails to present an adequate opposition
26 to a summary judgment motion, the court need not search the entire
27 record for evidence that demonstrates the existence of a genuine
28 issue of fact. See *Carmen v. San Francisco Unified Sch. Dist.*, 237

1 F.3d 1026, 1029-31 (9th Cir. 2001) (holding that "the district
2 court may determine whether there is a genuine issue of fact, on
3 summary judgment, based on the papers submitted on the motion and
4 such other papers as may be on file and specifically referred to
5 and facts therein set forth in the motion papers"). The district
6 court need not "scour the record in search of a genuine issue of
7 triable fact," but rather must "rely on the nonmoving party to
8 identify with reasonable particularity the evidence that precludes
9 summary judgment." *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir.
10 1996) (quoting *Richards v. Combined Ins. Co.*, 55 F.3d 247, 251 (7th
11 Cir.1995)). "[The nonmoving party's] burden to respond is really
12 an opportunity to assist the court in understanding the facts. But
13 if the nonmoving party fails to discharge that burden—for example
14 by remaining silent—its opportunity is waived and its case
15 wagered." *Guarino v. Brookfield Twp. Trustees*, 980 F.2d 399, 405
16 (6th Cir. 1992).

17 Finally, if the parties file cross-motions for summary
18 judgment, the court must consider each party's motion separately
19 and determine whether that party is entitled to a judgment under
20 Rule 56. In making these determinations, the court must evaluate
21 the evidence offered in support of each cross-motion. *Fair Housing
22 Council of Riverside County, Inc. v. Riverside Two*, 249 F.3d 1132,
23 1136-37 (9th Cir. 2001).

24 **Analysis**

25 As an initial matter, plaintiff and CAP agree that Nevada law
26 applies to this case. (See CAP Mot. Summ. J. 16-18; Pl. Opp'n to
27 CAP Mot. 15).

28

1 I. Breach of Fiduciary Duty

2 Plaintiff's claim of breach of fiduciary duty is asserted
3 against CAP.

4 "A breach of fiduciary duty claim seeks damages for injuries
5 that result from the tortious conduct of one who owes a duty to
6 another by virtue of the fiduciary relationship." *Stalk v.*
7 *Mushkin*, 199 P.3d 838, 843 (Nev. 2009). A "fiduciary relation
8 exists between two persons when one of them is under a duty to act
9 for or to give advice for the benefit of another upon matters
10 within the scope of the relation." *Id.* To prevail on a breach of
11 fiduciary duty claim, the plaintiff must establish: "(1) the
12 existence of a fiduciary duty; (2) breach of that duty; and (3) the
13 breach proximately caused the damages." *Klein v. Freedom Strategic*
14 *Partners, LLC*, 595 F. Supp. 2d 1152, 1162 (D. Nev. 2009).

15 The complaint alleges CAP owed a fiduciary duty "by virtue of
16 [its] role as insurance agent[] and broker[]" and that it owed
17 plaintiff "a duty to adequately, competently, and faithfully place
18 insurance coverage with and through" plaintiff. CAP argues that it
19 did not owe any such duty to plaintiff.

20 The record reflects that in all material respects, CAP acted
21 on Sky High's behalf as Sky High's agent. See *Hiott v. Guar. Nat.*
22 *Ins. Co.*, 329 S.C. 522, 530, 496 S.E.2d 417, 422 (Ct. App. 1997)
23 ("Generally, an insurance broker is the agent of the insured, not
24 the insurer."). Plaintiff has presented no evidence that CAP acted
25 in any way on plaintiff's behalf, or that plaintiff had any
26 relationship with CAP, contractual or otherwise. (See CAP Mot.
27 Summ. J. Ex. B (Hirsch Dep. 26)). There is therefore no evidence
28 that CAP, acting as the agent for the insured, was under a duty to

1 act for or to give advice for the benefit of plaintiff, the
2 insurer. See *Kramer v. Lockwood Pension Servs., Inc.*, 653 F. Supp.
3 2d 354, 381 (S.D.N.Y. 2009) (finding as a matter of law that broker
4 could not be found to owe insurer a fiduciary duty because “[a]s a
5 broker, he is properly understood as the agent of the insured . . .
6 and not the insurer”). Further, as Nevada has not recognized a
7 duty owed by a broker toward an insured, it therefore follows that
8 a broker does not owe any duty toward an insurer with which the
9 broker has no relationship and on whose behalf the broker has not
10 acted. See *CBC Fin., Inc. v. Apex Ins. Managers, LLC*, 291 F. App’x
11 30, 32 (9th Cir. 2008) (unpublished disposition).

12 Plaintiff’s opposition completely fails to establish the
13 existence of a fiduciary relationship between plaintiff and CAP.
14 It does not even directly argue such a relationship exists. In
15 fact, not one of the cases cited in the section of plaintiff’s
16 opposition devoted to this claim involves a claim of breach of
17 fiduciary duty or a special relationship, and the one case that
18 mentions fiduciary duty does so to make clear that no such duty is
19 owed by a broker to an insurer where the broker is not the
20 insurer’s agent. See *Century Sur. Co. v. Crosby Ins., Inc.*, 124
21 Cal. App. 4th 116, 124, 21 Cal. Rptr. 3d 115, 121 (2004) (internal
22 punctuation omitted) (“Since a broker that is not the insurer’s
23 agent owes no fiduciary duty to the insurer, the broker is not
24 liable for an alleged failure to reveal known facts.”).¹⁰

25 Accordingly, CAP is therefore entitled to summary judgment on
26

27 ¹⁰ Although not argued by the plaintiff in its opposition, those cases
28 involving “dual agency” cited in earlier briefs are inapposite, as there is
no evidence that CAP acted on plaintiff’s behalf in any way.

1 the fiduciary duty claim.

2 II. Constructive Fraud

3 Plaintiff asserts a claim of constructive fraud against CAP.

4 "Constructive fraud is the breach of some legal or equitable duty
5 which, irrespective of moral guilt, the law declares fraudulent
6 because of its tendency to deceive others or to violate
7 confidence." *Long v. Towne*, 639 P.2d 528, 529-30 (Nev. 1982).

8 Constructive fraud requires a confidential or fiduciary
9 relationship, which "exists when one reposes a special confidence
10 in another so that the latter, in equity and good conscience, is
11 bound to act in good faith and with due regard to the interests of
12 the one reposing the confidence." *Id.*

13 As with the breach of fiduciary duty claim, CAP argues that no
14 special or confidential relationship exists between it and
15 plaintiff. Thus, as with the breach of fiduciary duty claim,
16 plaintiff has failed to show material issues of fact exist that
17 support a constructive fraud claim. Accordingly, CAP's motion for
18 summary judgment will be granted as to plaintiff's constructive
19 fraud claim.

20 III. Detrimental Reliance

21 Plaintiff concedes that summary judgment should be granted as
22 to this claim.

23 IV. Concert of Action

24 CAP moves for summary judgment on a claim of "concert of
25 action." However, such a claim is not included in plaintiff's
26 first amended complaint, and the amended complaint superseded
27 plaintiff's original complaint. *Valadez-Lopez v. Chertoff*, 656
28 F.3d 851, 857 (9th Cir. 2011). Accordingly, CAP's arguments in

1 this regard are moot.

2 V. Weddell in his Individual Capacity

3 Sky High's motion to dismiss Weddell in his individual
4 capacity is denied without prejudice.

5 VI. All Other Claims and Defenses

6 As to all remaining claims, counterclaims, and affirmative
7 defenses, the court finds that there are either triable issues of
8 material fact or that the moving party has failed to show it is
9 entitled to judgment as a matter of law. Summary judgment will
10 therefore be denied as to those claims.

11 **Conclusion**

12 In accordance with the foregoing, IT IS ORDERED:

13 1. Plaintiff's motion for partial summary judgment (#170) is

14 **DENIED;**

15 2. Faust's motion for summary judgment (#165) is **GRANTED** as to
16 plaintiff's claims of breach of fiduciary duty, constructive fraud,
17 and detrimental reliance and is **DENIED** in all other respects; and

18 3. Sky High's motion for summary judgment (#168) is **GRANTED** as
19 to plaintiff's claim of detrimental reliance and **DENIED** in all
20 other respects.

21 IT IS SO ORDERED.

22 DATED: This 24th day of June, 2014.

23 
24 UNITED STATES DISTRICT JUDGE