

**Case No. 80636**

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

In re: Newport Corporation Shareholder Litigation

Hubert C. Pincon; Locals 302 and 612 of the International Union of Operating  
Engineers-Employers Construction Industry Retirement Trust

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Elizabeth A. Brown  
Clerk of Supreme Court

*Appellants,*

v.

Robert J. Phillippy; Kenneth F. Potashner; Christopher Cox; Siddhartha C. Kadia;  
Oleg Khaykin; and Peter J. Simone

*Respondents,*

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**MOTION TO REDACT RESPONDENTS' ANSWERING BRIEF**

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Oleg Khaykin, and Peter J. Simone*

### **MOTION TO REDACT RESPONDENTS' ANSWERING BRIEF**

Pursuant to SRCR 3(4)(b) and (g), Respondents Robert J. Phillippy, Kenneth F. Potashner, Christopher Cox, Siddhartha C. Kadia, Oleg Khaykin, and Peter J. Simone ("Respondents"), by and through their undersigned counsel of record, hereby request leave to file a partially redacted version of their Answering Brief. This Motion is supported by the below memorandum of points and authorities and the exhibit attached hereto.

### **MEMORANDUM OF POINTS AND AUTHORITIES**

#### **I. INTRODUCTION**

On April 15, 2016, the district court entered an order approving the parties' stipulated protective order ("Protective Order"). Pursuant to the Protective Order, Defendants and/or third parties designated several documents as "Confidential" or "Highly Confidential." These documents contain sensitive business information of former defendant Newport Corporation and third parties related to the merger transaction at issue in this case. In order to protect this "Confidential" or "Highly

Confidential” information from public disclosure, the Respondents respectfully request leave to file a partially redacted version of the Answering Brief on the public record.

## **II. ANALYSIS**

This Court may redact court files to further a protective order entered into pursuant to NRCP 26(c) or to protect a trade secret.<sup>1</sup> SRCR 3(4)(b) and (g).

### **A. The parties are subject to a Protective Order**

On April 15, 2016, the district court entered an order approving the parties’ stipulated protective order (“Protective Order”). *See* Protective Order attached hereto as **Exhibit 1**. The Protective Order provides that:

Any Party or non-Party person or entity producing Discovery Materials ... may designate as ‘confidential’ those portions of Discovery Materials that contain or disclose confidential or proprietary information, ... trade secrets, nonpublic inside information, ... commercially sensitive information, ... or any other sensitive or proprietary information that has not been made public or otherwise disclosed to third parties.

*Id.* at ¶ 2. The Protective Order further provides that:

Any Producing Party may designate any Discovery Material as ‘Highly Confidential’ under the terms of this Order if such party in good faith reasonably believes that

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<sup>1</sup> A trade secret is information that “[d]erives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by the public or any other person who can obtain commercial or economic value from its disclosure or use.” NRS 600A.030(5).

disclosure of the Discovery Material ... is substantially likely to cause injury to the Producing Party.

*Id.* The Protective Order also provides that:

A Party may also designate deposition testimony and exhibits as confidential at the time of deposition, and may instruct the deposition officer to mark the deposition transcripts and exhibits as ‘confidential’ either at the time of the deposition or at any time prior to receiving the written deposition transcript.

*Id.* at ¶ 4.

**B. The Defendants and/or third parties designated several documents as “Confidential” or “Highly Confidential” under the Protective Order.**

Defendants and/or third parties designated several documents as “Confidential” or “Highly Confidential” under the Protective Order. These documents contain sensitive business information of former defendant Newport Corporation and third parties related to the merger transaction at issue in this case. This sensitive business information includes information pertaining to the identities of third parties with whom Newport discussed potential merger-of-equals or sale transactions, which is subject to nondisclosure agreements entered into between Newport and the third parties, and confidential business and financial information of Newport and other third parties. Additionally, Plaintiffs took depositions of each of the Defendants and several other fact witnesses throughout the course of

discovery in this case, and Defendants have designated the contents of each of these transcripts and certain exhibits thereto as “Confidential.”

**C. The proposed redactions protect the same confidential information that is contained in the documents that have been designated as “Confidential” or “Highly Confidential” under the Protective Order.**

The proposed redactions to the Answering Brief protect the same confidential information that is contained in the documents that have been designated as “Confidential” or “Highly Confidential” under the Protective Order. This includes sensitive and proprietary business information related to: (1) the merger transaction at issue in this case; and (2) the identities of third parties with whom Newport discussed potential merger-of-equals or sale transactions, which is subject to nondisclosure agreements entered into between Newport and the third parties; and (3) confidential business and financial information of Newport and other third parties.

Because the proposed redactions are necessary to protect this highly confidential information, Respondents respectfully request leave to file a redacted version of their Answering Brief on the public record.

DATED this 29<sup>th</sup> day of January, 2021.

*/s/ Maximilien D. Fetaz*

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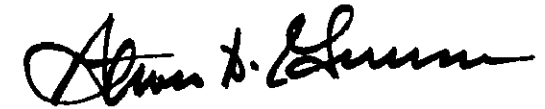
**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I electronically filed and served the foregoing **MOTION TO REDACT RESPONDENTS' ANSWERING BRIEF** with the Clerk of the Court of the Supreme Court of Nevada by using the Court's Electronic Filing System on January 29, 2021.

/s/ Wendy Cosby  
an employee of Brownstein Hyatt Farber Schreck,  
LLP

# **EXHIBIT 1**





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[Proposed] Lead Counsel for Plaintiffs

[Additional counsel appear on signature page.]

IN THE EIGHTH JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA

IN AND FOR THE COUNTY OF CLARK

DIXON CHUNG, Individually and on Behalf  
of All Others Similarly Situated,

Plaintiff,

vs.

NEWPORT CORP., et al.,

Defendants.

Case No. A-16-734039-B  
Dept No. XXVII

CLASS ACTION

STIPULATED CONFIDENTIALITY  
AGREEMENT AND PROTECTIVE ORDER  
REGARDING THE SEALING OF COURT  
RECORDS

HUBERT C. PINCON, Individually and on  
Behalf of All Others Similarly Situated,

Plaintiff,

vs.

NEWPORT CORPORATION, et al.,

Defendants.

Case No. A-16-733154-C  
Dept No. XXVII

CLASS ACTION

1 Through their counsel of record, defendants Newport Corporation, MKS Instruments, Inc.,  
2 PSI Equipment, Inc., Robert J. Phillippy, Kenneth F. Potashner, Christopher Cox, Siddhartha C.  
3 Kadia, Oleg Khaykin and Peter J. Simone (collectively, "defendants"), on the one hand, and plaintiff  
4 Hubert C. Pincon ("plaintiff"), on the other hand (collectively, the "Parties"), hereby stipulate,  
5 pursuant to N.R.C.P. 26(c) and 29 and EDCR 7.50, as follows:

6 1. This Stipulated Protective Order ("Order") shall govern all documents or things  
7 produced in discovery, deposition testimony, exhibits and transcripts, written discovery requests and  
8 responses, and any other information or material produced, given or exchanged in the action  
9 captioned above ("Discovery Materials"), including any other information contained therein or  
10 derived therefrom, and the designation and handling of Discovery Materials containing confidential,  
11 proprietary and/or private information produced in this action by any Party or non-Party.

12 2. Any Party or non-Party person or entity producing Discovery Materials (the  
13 "Producing Party") may designate as "confidential" those portions of Discovery Materials that  
14 contain or disclose confidential or proprietary information, information protected by the right to  
15 privacy, trade secrets, nonpublic inside information, private individual financial information,  
16 commercially sensitive information, personnel files or any other sensitive or proprietary information  
17 that has not been made public or otherwise disclosed to third parties ("Confidential Information").  
18 Any Producing Party may designate any Discovery Material as "Highly Confidential" under the  
19 terms of this Order if such party in good faith reasonably believes that disclosure of the Discovery  
20 Material other than as permitted pursuant to Paragraph 8 of this Order is substantially likely to cause  
21 injury to the Producing Party ("Highly Confidential Information"). By designating Discovery  
22 Materials as containing Confidential or Highly Confidential Information, the Producing Party is  
23 certifying to the Court that there is a good faith basis in law and in fact for the designation within the  
24 meaning of N.R.C.P. 26(g).

25 3. A Producing Party shall designate documents containing Confidential or Highly  
26 Confidential Information by marking a designated document, and all relevant pages of a designated  
27 document, with the word(s) "confidential" or "highly confidential" in a location that makes the  
28 designation readily apparent.

1           4.       A Party shall designate deposition testimony containing Confidential or Highly  
2 Information by, within thirty (30) days after receipt of the written deposition transcript, identifying  
3 the portions of the deposition testimony and exhibits to the deposition transcript which are  
4 confidential. Until that time, all deposition testimony, as well as the exhibits to the deposition  
5 transcript, shall be treated as confidential. A Party may also designate deposition testimony and  
6 exhibits as confidential at the time of deposition, and may instruct the deposition officer to mark  
7 deposition transcripts and exhibits as "confidential" either at the time of the deposition or at any time  
8 prior to receiving the written deposition transcript.

9           5.       A Producing Party shall designate electronic media containing Confidential or Highly  
10 Confidential Information, including but not limited to DVDs, CDs, flash drives, disks, hard-drives,  
11 video-recordings, etc., by, where practical, marking the media as "confidential" or "highly  
12 confidential."

13           6.       A Producing Party shall designate materials or things that have not been reduced to  
14 documentary or electronic form as containing Confidential or Highly Confidential Information by  
15 informing counsel for the Parties in writing that the material or thing contains Confidential or Highly  
16 Information.

17           7.       Any party seeking to file or disclose materials designated as Confidential or Highly  
18 Confidential Information with the Court in this action must file such or Confidential or Highly  
19 Information under seal pursuant to Rule 3 of the Nevada Rules for Sealing and Redacting Court  
20 Records.

21           8.       Confidential or Highly Information shall not be used by a non-Producing Party for  
22 any purpose other than the defense or prosecution of this action and shall not be used, directly or  
23 indirectly, by any non-Producing Party for any business, commercial or competitive purpose  
24 whatsoever. Confidential or Highly Information shall not be discussed with, or disclosed to, any  
25 person except as specifically authorized by this Order. Neither plaintiff, nor plaintiff's counsel, shall  
26 use any Confidential or Highly Information in connection with any future litigation against  
27 defendants or any parties related to defendants.

28           9.       Confidential Information shall be disclosed only to:

1 (a) the named Parties to this action and their officers, directors, and authorized  
2 agents deemed necessary by counsel for the prosecution or defense of this action;

3 (b) the attorney for the Parties, including both outside and in-house counsel, and  
4 their staff;

5 (c) the Court and its staff in this action and in any appeal;

6 (d) the jury, if any;

7 (e) any mediators, arbitrators, or judicial referees and their staff used in  
8 connection with this action;

9 (f) court reporters used in connection with this action and their employees;

10 (g) consultants, technical advisors, and expert witnesses (whether designated as  
11 trial witnesses or not) employed or retained by the Parties or their counsel; provided, however, that  
12 any such consultant, technical advisor, or expert witness is not currently an employee of, or advising  
13 or discussing employment with, or a consultant to, any Party to this litigation or any competitor or  
14 potential competitor of any Party;

15 (h) any anticipated witness in this action, except that such witness shall be shown  
16 Confidential Information only in preparation for or during his or her testimony and may not copy or  
17 retain such Confidential Information;

18 (i) any person indicated on the face of a document to be the author, addressee, or  
19 a recipient of the document;

20 (j) any other person or entity as to whom the Parties agree in writing; and

21 (k) any other person as to whom the Court orders.

22 10. Highly Confidential Information shall be disclosed only to:

23 (a) the attorney for the Parties, including both outside and in-house counsel, and  
24 their staff;

25 (b) the Court and its staff in this action and in any appeal;

26 (c) the jury, if any;

27 (d) any mediators, arbitrators, or judicial referees and their staff used in  
28 connection with this action;

- 1 (e) court reporters used in connection with this action and their employees;
- 2 (f) consultants, technical advisors, and expert witnesses (whether designated as
- 3 trial witnesses or not) employed or retained by the Parties or their counsel; provided, however, that
- 4 any such consultant, technical advisor, or expert witness is not currently an employee of, or advising
- 5 or discussing employment with, or a consultant to, any Party to this litigation or any competitor or
- 6 potential competitor of any Party;
- 7 (g) any anticipated witness in this action, except that such witness shall be shown
- 8 Highly Confidential Information only in preparation for or during his or her testimony and may not
- 9 copy or retain such Highly Confidential Information;
- 10 (h) any person indicated on the face of a document to be the author, addressee, or
- 11 a recipient of the document;
- 12 (i) any other person or entity as to whom the Parties agree in writing; and
- 13 (j) any other person as to whom the Court orders.

14 11. Prior to the disclosure of Confidential or Highly Confidential Information by a non-

15 Producing Party to any of the persons identified in Section 9 subsections (g) and (h) of this Order or

16 Section 10 subsections (f) and (g), the Party making the disclosure shall first secure from those

17 persons a signed statement in the form attached as Exhibit A to this Order by which the signatory

18 expressly states that he or she has read and understands this Order and agrees to be bound by its

19 terms and counsel shall be responsible for retaining the original, executed copy thereof.

20 12. To the extent that testimony is sought concerning Confidential or Highly Confidential

21 Information during any deposition or in any other pre-trial venue, any Party may exclude any person

22 from the deposition or other venue during such testimony if the Confidential or Highly Confidential

23 Information may not be disclosed to such person under the terms of this Order.

24 13. This Order shall be without prejudice to the right of the Parties or other persons to (i)

25 bring before the Court at any time the question of whether any particular item of Discovery Material

26 is properly designated as Confidential or Highly Confidential Information or (ii) present a motion to

27 the Court for a separate protective order as to any particular item of Discovery Material, including

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1 restrictions differing from those specified in this Order. This Order shall not be deemed to prejudice  
2 the Parties in any way in any future application for modification of this Order.

3       14. A Party or other person objecting to the designation of Confidential or Highly  
4 Confidential Information shall provide written notice of the objection to the designating Party,  
5 specifying the materials that are the subject of the objection. The Parties and any other objecting  
6 person(s) shall confer in good faith in an effort to resolve the objection. If such conference does not  
7 resolve the objection, within ten (10) days of such conference, the person objecting to the  
8 designation may apply to the Court, by motion, for a ruling that material designated by a Party as  
9 Confidential or Highly Confidential Information shall not be treated as Confidential. The Party that  
10 designated the material as Confidential or Highly Confidential Information shall be given notice of  
11 the motion and an opportunity to respond in accordance with the time frame set forth in the  
12 applicable rules of civil procedure. Pending determination by the Court, Discovery Material  
13 designated by a Party as Confidential or Highly Confidential Information shall be treated as  
14 confidential or highly confidential as provided in this Order. The Party who designated the  
15 Discovery Material as Confidential or Highly Confidential Information shall have the burden of  
16 showing that the Discovery Material was properly designated.

17       15. In the event of a disclosure of Confidential or Highly Confidential Information to a  
18 person not authorized to have had such disclosure made to him or her under the provisions of this  
19 Order, the Party responsible for having made such disclosure shall immediately procure the return of  
20 the Confidential or Highly Confidential Information, and inform counsel for the designating Party  
21 whose Confidential or Highly Confidential Information has thus been disclosed of all relevant  
22 information concerning the nature and circumstances of such disclosure. The responsible Party shall  
23 also take all reasonable measures promptly to ensure that no further or greater unauthorized  
24 disclosure of the Confidential Information occurs.

25       16. The inadvertent production of any Confidential or Highly Confidential Information,  
26 without the "Confidential Information" or "Highly Confidential Information" designation, shall be  
27 without prejudice to any claims that the information is confidential or highly confidential, and shall  
28 not constitute a waiver of its confidential or highly confidential nature. Upon demand of the

1 Producing Party, all copies of any inadvertently produced undesignated information shall be  
2 designated as "confidential" or "highly confidential" and shall be subject to the terms of this Order.  
3 Upon receiving such demand, the Parties shall thereafter mark and treat the Discovery Material so  
4 designated as Confidential or Highly Confidential Information, and such Discovery Material shall be  
5 fully subject to this Order from the date of such supplemental notice forward. The Party receiving  
6 such notice shall make a reasonable, good faith effort to ensure that any analyses, memoranda, notes,  
7 or other such materials generated based upon such newly designated information are immediately  
8 treated as containing Confidential or Highly Confidential Information. In addition, upon receiving  
9 such supplemental written notice, any receiving Party that disclosed the Discovery Material prior to  
10 its designation as Confidential or Highly Confidential shall exercise its best efforts (i) to ensure the  
11 return or destruction of such Discovery Material by any person not authorized to receive the  
12 Discovery material under the terms of this Order, (ii) to ensure that any documents or other materials  
13 derived from such Discovery Material are treated as if the Discovery Material had been designated  
14 as Confidential or Highly Confidential when originally produced, (iii) to ensure that such Discovery  
15 Material is not further disclosed by the recipient except in accordance with the terms of this Order,  
16 and (iv) to ensure that any such Discovery Material, and any information derived therefrom, is used  
17 solely for the purposes described in Paragraph 8 of this Order.

18       17. Disclosure (including production) of information that a Party or non-Party later  
19 claims should not have been disclosed because of a privilege, including (without limitation) the  
20 attorney-client privilege or attorney work product doctrine (collectively, "Privileged Information"),  
21 shall not constitute a waiver of, or estoppel as to, any claim of privilege as to which the Producing or  
22 receiving Party would be entitled in the action. The receiving Party agrees to return, sequester or  
23 destroy any Privileged Information disclosed or produced by a Producing Party upon request. If the  
24 receiving Party wishes to challenge the privileged nature of purportedly Privileged Information, the  
25 receiving Party must make its application to the Court pursuant to the procedures set forth in Section  
26 14 above within ten (10) days of the request by the Producing Party to return, sequester or destroy  
27 the purportedly Privileged Information. If the receiving Party reasonably believes that Privileged  
28 Information has been inadvertently disclosed or produced to it, it shall promptly notify the Producing

1 Party and sequester such information until instructions as to the disposition of such information are  
2 received. The failure of any Party or non-Party to provide notice or instructions under this Section  
3 shall not constitute a waiver or, or estoppel as to, any claim of privilege as to which the Producing  
4 Party would be entitled in this action.

5 18. Nothing herein shall be deemed to waive any applicable common law or statutory  
6 privilege or work product protection or any other objections any party may have regarding the  
7 production of information in this action.

8 19. If any person in possession of Confidential or Highly Confidential Information (the  
9 "Receiver") receives a subpoena or other compulsory process seeking the production or other  
10 disclosure of Confidential or Highly Confidential Information produced or designated as  
11 "Confidential" or "Highly Confidential" by a Producing Party other than the Receiver (collectively, a  
12 "Demand"), the Receiver shall give written notice (by hand, email, or facsimile transmission) to  
13 counsel for the Producing Party (or Producing Parties) within five business days of receipt of such  
14 Demand (or if a response to the Demand is due in less than five business days, at least 24 hours prior  
15 to the deadline for a response to the Demand), identifying the Confidential or Highly Confidential  
16 Information sought and enclosing a copy of the Demand, and must object to the production of the  
17 Confidential or Highly Confidential Information on the grounds of the existence of this Order. The  
18 burden of opposing the enforcement of the Demand will fall on the Producing Party. Nothing herein  
19 shall be construed as requiring the Receiver or anyone else covered by this Order to challenge or  
20 appeal any order requiring production of Confidential or Highly Confidential Information covered  
21 by this Order, or to subject itself to any penalties for noncompliance with any legal process or order,  
22 or to seek any relief from this Court or any other court. Compliance by the Receiver with any order  
23 directing production pursuant to a Demand of any Confidential or Highly Confidential Information  
24 will not constitute a violation of this Order.

25 20. A waiver by any Party of any provision of this Order for any purpose shall be strictly  
26 construed and shall not constitute, or be deemed to constitute, a waiver (a) of any other provision of  
27 this Order; (b) for any other purpose or (c) of any other right of such Party.



1           21.     Upon written request of the Producing Party and within thirty (30) days following the  
2 final disposition of all claims and defenses, by settlement or final judgment, including expiration of  
3 time to appeal, all Confidential or Highly Confidential Information must be destroyed or returned to  
4 the Producing Party, at the discretion of the Producing Party. The provisions of this Order shall  
5 continue to be binding after the conclusion of this action.

6           22.     Nothing in this Order shall prevent any Party from objecting to discovery that it  
7 believes is improper. The production of any Discovery Material under this Order shall not preclude  
8 any Party from objecting to the relevance, authenticity, use, or admissibility in evidence of any a  
9 document, testimony, or other evidence subject to this Order or preclude any Party from objecting to  
10 discovery that it believes to be otherwise improper.

11          23.     This Order has no effect upon, and shall not apply to, a Producing Party's use or  
12 disclosure of its own Discovery Material for any purpose.

13          24.     In the event additional Parties join or are joined to this litigation, they shall not have  
14 access to Confidential or Highly Confidential Information until the newly joined Party by its counsel  
15 has executed and filed with the Court its agreement to be bound by this Order.

16          25.     The Parties shall confer prior to trial to discuss the procedures for the use of  
17 Confidential or Highly Confidential Information at trial.

18          26.     Any litigation regarding this Order shall be conducted in the above-entitled Court.

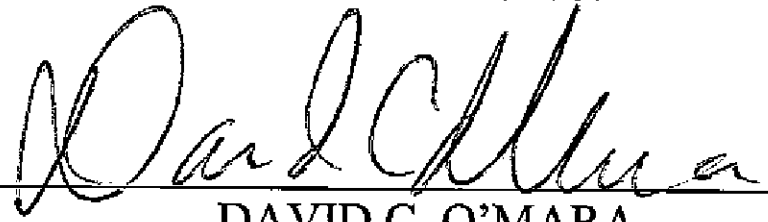
19          27.     This stipulation may be executed in any number of counterparts, each of which shall  
20 be deemed to be an original and all of which together shall be deemed to be one and the same  
21 document.

22          28.     The terms of this Order shall be binding on the Parties and their counsel. If the Court  
23 does not enter the Order approving this Stipulation, then the Stipulation shall remain in effect and be  
24 enforceable among the Parties and their counsel as a contract.

25                 SO STIPULATED.  
26  
27  
28

1 DATED: April , 2016

THE O'MARA LAW FIRM, P.C.

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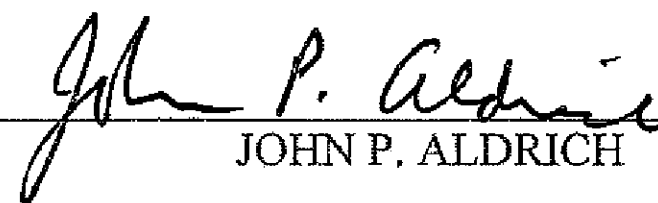
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20 Attorneys for Plaintiff Hubert C. Pincon

1 DATED: April 11<sup>th</sup>, 2016

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Attorneys For Plaintiff Dixon Chung

18 DATED: April \_\_, 2016

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and PSI Equipment, Inc.

29 DATED: April 11<sup>th</sup>, 2016

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1 DATED: April \_\_, 2016  
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21 \* \* \*

22 **ORDER**

23 IT IS SO ORDERED.

24 DATED: 4/14/16

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26 CLARK COUNTY DISTRICT COURT JUDGE