IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Champion Power Equipment Incorporated, Plaintiff, v. Firman Power Equipment Incorporated, Defendant.	No. CV-23-02371-PHX-DWL **ORDER**

The Court enters the following Case Management Order to govern the litigation in this case:

1. Initial Disclosures. The deadline for making the initial disclosures required by Federal Rule of Civil Procedure 26(a)(1) is **14 days** from the date of this Order.

2. Deadline for Joinder, Amending Pleadings, and Filing Supplemental Pleadings. The deadline for joining parties, amending pleadings, and filing supplemental pleadings is **July 12, 2024**.

3. Federal Rule of Evidence 502(d) Non-Waiver Order. The Court orders that a communication or information covered by the attorney-client privilege or work-product protection that is disclosed in connection with the litigation pending before the Court does not waive the privilege or protection in this or any other federal or state proceeding. This provision does not require any party agreement, and it avoids the need to litigate whether an inadvertent production was reasonable. By reducing the risk of waiver, this Order affords parties the opportunity to reduce the cost of discovery by reducing preproduction

privilege review.

4. Discovery Limitations. Discovery by interrogatory and requests for admission shall be governed by Rules 33 and 36 unless otherwise ordered by the Court. Therefore, there is a limit of twenty-five (25) interrogatories per party, including discrete subparts, and there is no limit on requests for admission. A single interrogatory may cover multiple Champion patents or multiple accused products. Discovery by requests for production shall be limited to eighty (80) requests for production per party. A single request for production may cover multiple Champion patents or multiple accused products. Each party shall be limited to a total of seventy (70) hours of fact depositions without any limits to the number of witnesses to be deposed and without change to the presumption of seven (7) hours per witness under Rule 30(d)(1). This limitation in deposition hours does not apply to expert depositions. The limitations set forth in this paragraph may be increased by mutual agreement of the parties, but such an increase will not result in an extension of the discovery deadlines set forth in this Order.

5. Patent-Specific Disclosures. Because this case includes a claim of patent infringement, the Court will require the parties to provide certain patent-specific disclosures and abide by certain patent-specific deadlines.

A. **Asserted Claims and Infringement Contentions**. By **June 21, 2024**, a party claiming patent infringement must serve on all parties a "Disclosure of Asserted Claims and Infringement Contentions." Separately for each opposing party, the "Disclosure of Asserted Claims and Infringement Contentions" must contain the following information:

1. Each claim of each patent in suit that is allegedly infringed by each opposing party;

2. Separately for each asserted claim, each accused apparatus, product, device, process, method, act, or other instrumentality ("Accused Instrumentality") of each opposing party of which the party is aware. This identification must be as specific as possible. Each product,

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device and apparatus must be identified by name or model number, if known. Each method or process must be identified by name, if known, or by any product, device, or apparatus which, when used, allegedly results in the practice of the claimed method or process.

3. A chart identifying specifically where each element of each asserted claim is found within each Accused Instrumentality, including for each element that such party contends is governed by 35 U.S.C. § 112(6), the identity of the structure(s), act(s), or material(s) in the Accused Instrumentality that performs the claimed function.

4. For each claim which is alleged to have been indirectly infringed, an identification of any direct infringement and a description of the acts of the alleged indirect infringer that contribute to or are inducing that direct infringement. Insofar as alleged direct infringement is based on joint acts of multiple parties, the role of each such party in the direct infringement must be described.

5. Whether each element of each asserted claim is claimed to be literally present and/or present under the doctrine of equivalents in the Accused Instrumentality.

6. For any patent that claims priority to an earlier application, the priority date to which each asserted claim allegedly is entitled.

7. If a party claiming patent infringement asserts or wishes to preserve the right to rely, for any purpose, on the assertion that its own apparatus, product, device, process, method, act, or other instrumentality practices the claimed invention, the party must identify, separately for each asserted claim, each such apparatus, product, device, process, method, act, or other instrumentality that incorporates or reflects that particular claim.

8. If a party claiming infringement alleges willful infringement, the basis

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for such allegation.

B. **Noninfringement, Unenforceability, And Invalidity Contentions**. By **August 30, 2024**, each party opposing a claim of patent infringement must serve on all parties its "Noninfringement, Unenforceability, And Invalidity Contentions," which must contain the following information:

1. Noninfringement Contentions shall contain a chart, responsive to the chart set forth in the "Disclosure of Asserted Claims and Infringement Contentions," that separately indicates, for each identified element in each asserted claim, to the extent then known by the party opposing infringement, whether such element is present literally or under the doctrine of equivalents in each Accused Instrumentality and, if not, each reason for such denial and the relevant distinctions. Conclusory denials are not permitted.

2. Invalidity Contentions must contain the following information to the extent then known to the party asserting invalidity:

   a. An identification, with particularity, of up to twenty five (25) items of prior art per asserted patent that allegedly invalidates each asserted claim. Each prior art patent shall be identified by its number, country of origin, and date of issue. Each prior art publication must be identified by its title, date of publication, and where feasible, author and publisher. Prior art in the form of sales, offers for sale, or uses shall be identified by specifying the item offered for sale or publicly used or known, the date the offer or use took place or the information became known, and the identity of the person or entity which made the use or which made and received the offer, or the person or entity which made the information known or to whom it was made known. For a patent governed by the pre-

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America Invents Act ("AIA") amendments to the patent statute, any prior art under 35 U.S.C. § 102(f) shall be identified by providing the name of the person(s) from whom and the circumstances under which the invention or any part of it was derived, and prior art under 35 U.S.C. § 102(g) (pre-AIA) shall be identified by providing the identities of the person(s) or entities involved in and the circumstances surrounding the making of the invention before the patent applicant(s).

b. For each item of prior art, a detailed statement of whether it allegedly anticipates or renders obvious each asserted claim. If a combination of items of prior art allegedly makes a claim obvious, the Invalidity Contentions must identify each such combination and the reasons to combine such items.

c. A chart identifying where specifically in each alleged item of prior art each element of each asserted claim is found, including for each element that such party contends is governed by 35 U.S.C. § 112(6)/112(f), a description of the claimed function of that element and the identity of the structure(s), act(s), or material(s) in each item of prior art that performs the claimed function.

d. A detailed statement of any grounds of invalidity based on indefiniteness under 35 U.S.C. § 112(2)/112(b), enablement or written description under 35 U.S.C. § 112(1)/112(a), or any other basis.

e. A detailed statement of any grounds for contentions that a claim is invalid as non-statutory/patent ineligible under 35 U.S.C. §101.

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3. Unenforceability contentions shall identify the acts allegedly supporting and all bases for the assertion of unenforceability.

C. **Amendment Of Contentions**. Amendment of the "Disclosure of Asserted Claims and Infringement Contentions" or the "Noninfringement, Unenforceability, And Invalidity Contentions" may be made only by order of the Court upon a timely showing of good cause. Non-exhaustive examples of circumstances that may, absent undue prejudice to the non-moving party, support a finding of good cause include: (i) a claim construction by the Court different from that proposed by the party seeking amendment; (ii) recent discovery of material, prior art despite earlier diligent search; and (iii) recent discovery of nonpublic information about the Accused Instrumentality which was not discovered, despite diligent efforts, before the service of the "Disclosure of Asserted Claims and Infringement Contentions." The duty to supplement discovery responses does not excuse the need to obtain leave of court to amend contentions.

D. **Exchange Of Proposed Terms For Construction**. By **December 11, 2024**, each party shall serve on each other party a list of claim terms which that party contends should be construed by the Court, and identify any claim term which that party contends should be governed by 35 U.S.C. § 112(6). The parties shall thereafter meet and confer for the purpose of limiting the terms in dispute by narrowing or resolving differences and facilitating the ultimate preparation of a Joint Claim Construction and Prehearing Statement. The parties shall also jointly identify the 10 terms likely to be most significant to resolving the parties' dispute, including those terms for which construction may be case or claim dispositive.

E. **Exchange of Preliminary Claim Constructions**. By **January 10, 2025**, the parties shall simultaneously exchange proposed constructions of each term identified by either party for claim construction. Each such Preliminary Claim Construction shall also, for each term which any party contends is governed by 35 U.S.C. § 112(6), identify the structure(s), act(s), or material(s) corresponding to that term's function. At the same time the parties exchange their respective Preliminary Claim Constructions, each party shall also

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identify all references from the specification or prosecution history that support its proposed construction and designate any supporting extrinsic evidence including, without limitation, dictionary definitions, citations to learned treatises and prior art, and testimony of percipient and expert witnesses. Extrinsic evidence shall be identified by production number or by producing a copy if not previously produced. With respect to any supporting witness, percipient or expert, the identifying party shall also provide a description of the substance of that witness' proposed testimony that includes a listing of any opinions to be rendered in connection with claim construction. The parties shall thereafter meet and confer for the purposes of narrowing the issues and finalizing preparation of a Joint Claim Construction and Prehearing Statement.

F. **Joint Claim Construction Statement**. By **February 28, 2025**, the parties shall complete and file a Joint Claim Construction Statement, which shall contain the following information:

1. The construction of those terms on which the parties agree.
2. Each party's proposed construction of each disputed term, together with an identification of all references from the specification or prosecution history that support that construction, and an identification of any extrinsic evidence known to the party on which it intends to rely either to support its proposed construction or to oppose any other party's proposed construction, including, but not limited to, as permitted by law, dictionary definitions, citations to learned treatises and prior art, and testimony of percipient and expert witnesses.
3. An identification of the terms whose construction will be most significant to the resolution of the case up to a maximum of 10. The parties shall also identify any term among the 10 whose construction will be case or claim dispositive. If the parties cannot agree on the 10 most significant terms, the parties shall identify the ones which they

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do agree are most significant and then they may evenly divide the remainder with each party identifying what it believes are the remaining most significant terms. However, the total terms identified by all parties as most significant cannot exceed 10. For example, in a case involving two parties, if the parties agree upon the identification of five terms as most significant, each may only identify two additional terms as most significant; if the parties agree upon eight such terms, each party may only identify only one additional term as most significant.

4. Anticipated length of time necessary for the Claim Construction Hearing.

5. Whether any party proposes to call one or more witnesses at the Claim Construction Hearing, and the identity of each such witness.

6. An identification of any factual findings requested from the Court related to claim construction.

G. **Claim Construction Expert Disclosures**. By **February 28, 2025**, any party that intends to rely on any witness who will give expert testimony to support that party's proposed constructions shall serve the other party or parties with a claim construction expert report for that witness. Such reports shall comply with the disclosure requirements of Fed. R. Civ. P. 26(A)(2)(B).

H. **Claim Construction Discovery**. By **March 31, 2025**, the parties shall complete all discovery relating to claim construction, including any depositions with respect to claim construction of any witnesses, including experts, identified in the Preliminary Claim Construction statement or Joint Claim Construction Statement

I. **Claim Construction Briefs**.

1. By **April 11, 2025**, the party claiming patent infringement shall serve and file an opening brief and any evidence supporting its claim construction.

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2. By **May 2, 2025**, each opposing party shall serve and file its responsive brief and supporting evidence.

3. By **May 16, 2025**, the party claiming patent infringement shall serve and file any reply brief and any evidence directly rebutting the supporting evidence contained in an opposing party's response.

J. **Claim Construction Hearing** Following submission of the reply brief specified in § 5.I.3 above, the Court may conduct a Claim Construction Hearing, to the extent the parties or the Court believe a hearing is necessary for construction of the claims at issue.

6. Fact Discovery. The deadline for completion of fact discovery, including discovery by subpoena and all disclosure required under Rule 26(a)(3), shall be **90 days** following the Court's issuance of the Claim Construction ruling. To ensure compliance with this deadline, the following rules shall apply:

A. Depositions: All depositions shall be scheduled to start at least five working days before the discovery deadline. A deposition started five days before the deadline may continue up until the deadline, as necessary.

B. Written Discovery: All interrogatories, requests for production of documents, and requests for admissions shall be served at least **45 days** before the fact discovery deadline.

C. Notwithstanding Local Rule of Civil Procedure 7.3, the parties may mutually agree in writing, without Court approval, to extend the time for providing discovery in response to requests under Rules 33, 34, and 36 of the Federal Rules of Civil Procedure. Such agreed-upon extensions, however, shall not alter or extend the deadlines set forth in this Order.

D. Notwithstanding any provisions of the Federal Rules of Civil Procedure, non-party witnesses shall **not** be permitted to attend (either physically, electronically, or otherwise) the deposition of any other witness in this case without an order of this Court to the contrary.

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7. Expert Disclosures, Expert Discovery, and Motions Challenging Expert Testimony.

A. The party with the burden of proof on an issue shall provide full and complete expert disclosures, as required by Rule 26(a)(2)(A)-(C) of the Federal Rules of Civil Procedure, no later than **45 days after the close of fact discovery**.

B. The responding party (not having the burden of proof on the issue) shall provide full and complete expert disclosures, as required by Rule 26(a)(2)(A)-(C) of the Federal Rules of Civil Procedure, no later than **45 days after the close of fact discovery**.

C. The party with the burden of proof on the issue shall make its rebuttal expert disclosures, if any, no later than **30 days after the deadlines in § 7.A and § 7.B above**. Rebuttal experts shall be limited to responding to opinions stated by the opposing party's experts.

D. No depositions of any expert witnesses shall occur before the aforementioned disclosures concerning expert witnesses are made.

E. Expert depositions shall be completed no later than **30 days after the deadline for rebuttal expert disclosures**. All expert depositions shall be scheduled to commence at least five working days before this deadline.

F. Disclosures under Rule 26(a)(2)(A) of the Federal Rules of Civil Procedure must include the identities of treating physicians and other witnesses who will provide testimony under Federal Rules of Evidence 702, 703, or 705, but who are not required to provide expert reports under Rule 26(a)(2)(B). Rule 26(a)(2)(C) disclosures are required for such witnesses on the dates set forth above. Rule 26(a)(2)(C) disclosures must identify not only the subjects on which the witness will testify, but must also provide a summary of the facts and opinions to which the expert will testify. The summary, although not as detailed as a Rule 26(a)(2)(B) report, must be sufficiently detailed to provide fair notice of what the expert will say at trial.[1]

[1] In *Goodman v. Staples The Office Superstore, LLC*, 644 F.3d 817 (9th Cir. 2011), the Ninth Circuit held that "a treating physician is only exempt from Rule 26(a)(2)(B)'s written report requirement to the extent that his opinions were formed during the course of treatment." *Id.* at 826. Thus, for opinions formed outside the course of treatment, Rule 26(a)(2)(B) written reports are required. *Id.* For opinions formed during the course of

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G. As stated in the Advisory Committee Notes to Rule 26 of the Federal Rules of Civil Procedure (1993 amendment), expert reports under Rule 26(a)(2)(B) must set forth "the testimony the witness is expected to present during direct examination, together with the reasons therefor." Full and complete disclosures of such testimony are required on the dates set forth above. Absent extraordinary circumstances, parties will not be permitted to supplement expert reports after these dates. The Court notes, however, that it usually permits parties to present opinions of their experts that were elicited by opposing counsel during depositions of the experts. Counsel should depose experts with this fact in mind.

H. Each side shall be limited to one retained or specifically employed expert witness per issue.

I. An untimely-disclosed expert will not be permitted to testify unless the party offering the witness demonstrates that (a) the necessity of the expert witness could not have been reasonably anticipated at the time of the disclosure deadline, (b) the opposing counsel or unrepresented parties were promptly notified upon discovery of the expert witness, and (c) the expert witness was promptly proffered for deposition. *See Wong v. Regents of Univ. of Cal.*, 410 F.3d 1052, 1060 (9th Cir. 2005).

J. Any motions challenging expert testimony must be filed no later than 28 days after the deadline for close of expert discovery.

8. Discovery Disputes.

A. The parties shall not file written discovery motions without leave of the Court. Except during a deposition, if a discovery dispute arises and cannot be resolved despite sincere efforts to resolve the matter through personal consultation (in person or by telephone), the parties shall jointly file (1) a brief written summary of the dispute, not to exceed three pages per side,[2] explaining the position taken by each party, and (2) a joint written certification that counsel or the parties have attempted to resolve the matter through

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treatment, Rule 26(a)(2)(C) disclosures will suffice.

[2] The discovery dispute summary shall adhere to the formatting requirements of LRCiv 7.1(b)(1). Discovery dispute filings that do not conform to the procedures outlined in this paragraph, including the page limitation, may be summarily stricken.

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personal consultation and sincere efforts as required by Local Rule of Civil Procedure 7.2(j) and have reached an impasse. If the opposing party has refused to personally consult, the party seeking relief shall describe the efforts made to obtain personal consultation. Upon review of the written submission, the Court may set a telephonic conference, order written briefing, or decide the dispute without conference or briefing. Any briefing ordered by the Court shall also comply with Local Rule of Civil Procedure 7.2(j).

B. If a discovery dispute arises in the course of a deposition and requires an immediate ruling of the Court, the parties shall jointly telephone the Court to request a telephone conference regarding the dispute.

C. Absent extraordinary circumstances, the Court will not entertain fact discovery disputes after the deadline for completion of fact discovery and will not entertain expert discovery disputes after the deadline for completion of expert discovery. Delay in presenting discovery disputes for resolution is not a basis for extending discovery deadlines.

9. Dispositive Motions.

A. Dispositive motions shall be filed no later than **60 days after the close of expert discovery**.

B. No party shall file more than one motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure without leave of the Court.

C. Local Rule of Civil Procedure 56.1 is suspended, except for subsection (d). The Court will decide summary judgment motions under Federal Rule of Civil Procedure 56 only. In other words, the parties may not file separate statements of facts or separate controverting statements of facts, and instead must include all facts in the motion, response, or reply itself. All evidence to support a motion or response that is not already part of the record must be attached to the briefs. The evidence may include only relevant excerpts rather than full documents. The only evidence that may be attached to a reply is evidence intended to rebut arguments raised for the first time in the non-movant's response. Because no separate controverting statement of facts will be permitted, the responding party must

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carefully address all material facts raised in the motion. Likewise, the reply must carefully address all material facts raised in the response. Any fact that is ignored may be deemed uncontested. Procedurally, immediately following the motion should be a numerical table of contents for the exhibits. The table of contents shall include only a title for each exhibit, not a description. Following the table of contents should be each exhibit (unless the document is already part of the record), numbered individually. Immediately following the response to the motion should be an alphabetical table of contents (again, the table of contents shall include only a title for each exhibit, not a description). Following the table of contents should be each exhibit (unless the document is already part of the record), labeled alphabetically. By way of example, citations to exhibits attached to the motion would be "(Ex. 1 at 7)" and citations to exhibits attached to the response would be "(Ex. D at 3)." Citations to documents that are already part of the record shall reference the docket number where the document can be found and include a pin cite to the relevant page—for example, "(Doc. 15 at 4)."

D. The parties shall not notice oral argument on any motion. Instead, a party desiring oral argument shall place the words "Oral Argument Requested" immediately below the title of the motion pursuant to Local Rule of Civil Procedure 7.2(f). The Court may decline the request and decide the motion without holding oral argument. If the request is granted, the Court will issue a minute entry informing the parties of the argument date and time.

10. Motions for Attorneys' Fees. All motions for an award of attorneys' fees shall be accompanied by an electronic Microsoft Excel spreadsheet, to be emailed to the Court and opposing counsel, containing an itemized statement of legal services with all information required by Local Rule 54.2(e)(1). This spreadsheet shall be organized with rows and columns and shall automatically total the amount of fees requested to enable the Court to efficiently review and recompute, if needed, the total amount of any award after disallowing any individual billing entries. This spreadsheet does not relieve the moving party of its burden under Local Rule 54.2(d) to attach all necessary supporting

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documentation to its motion. A party opposing a motion for attorneys' fees shall email to the Court and opposing counsel a copy of the moving party's spreadsheet, adding any objections to each contested billing entry (next to each row, in an additional column) to enable the Court to efficiently review the objections. This spreadsheet does not relieve the non-moving party of the requirements of Local Rule 54.2(f) concerning its responsive memorandum.

11. Tentative Rulings. Before holding oral argument, the Court sometimes issues a "tentative ruling"—a working draft of the order resolving the pending motion(s)—to allow the parties to focus their argument on the issues that seem salient to the Court and to maximize their ability to address any perceived errors in the Court's logic. If a tentative ruling issues, it is not an invitation to submit additional evidence or briefing. If the parties choose not to proceed with oral argument after reviewing the tentative ruling, the parties may stipulate to issuance of an order substantively identical to the tentative ruling.[3]

12. Good Faith Settlement Talks. All parties and their counsel shall meet in person and engage in good faith settlement talks no later than **October 25, 2024**. Upon completion of such settlement talks, and in no event later than five working days after the deadline set forth in the preceding sentence, the parties shall file with the Court a joint report on settlement talks executed by or on behalf of all counsel. The report shall inform the Court that good faith settlement talks have been held and shall report on the outcome of such talks. The parties shall indicate whether assistance from the Court is needed in seeking settlement of the case. The Court will set a settlement conference before a magistrate judge upon request of all parties. The parties are reminded that they are encouraged to discuss settlement at all times during the pendency of the litigation, but the Court will not extend the case management deadlines if and when the parties elect to pursue settlement efforts, including a settlement conference before a magistrate judge. The parties should plan their settlement efforts accordingly. The parties shall promptly notify the Court if settlement is

[3] The Court might make stylistic changes before finalizing the order. If the tentative ruling contains any factual error, the parties may note the error in the stipulation to allow for correction.

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reached.

13. The Deadlines Are Real. The Court intends to enforce the deadlines set forth in this Order, and the parties should plan their litigation activities accordingly.

14. Briefing Requirements.

A. All memoranda filed with the Court shall comply with Local Rule of Civil Procedure 7.1(b) requiring 13-point font in text and footnotes.

B. Citations in support of any assertion in the text shall be included in the text, not in footnotes.

C. To ensure timely case processing, a party moving for an extension of time, enlargement of page limitations, leave to amend, or leave to file a document under seal shall indicate in the motion whether the non-movant opposes the request and intends to file a written response. If such a motion does not so indicate, it may be denied for failure to comply with this Order.

15. Deadline for Notice of Readiness for Trial. The Plaintiff(s) shall notify the Court that the parties are ready to proceed to trial. The Plaintiff(s) shall file and serve this notice within seven days after the dispositive motion deadline if no dispositive motions are pending on that date. If dispositive motions are pending, Plaintiff(s) shall file and serve such notice within seven days after the resolution of the dispositive motions. The Court will then issue an order identifying a window of time when the Court is available for trial and instructing the parties to propose dates from within this window when all parties, counsel, and witnesses are available to begin trial. The Court will then issue an order setting a firm date for trial and the final pretrial conference that (a) sets deadlines for briefing motions in limine, (b) includes a form for the completion of the parties' joint proposed final pretrial order, and (c) otherwise instructs the parties concerning their duties in preparing for the final pretrial conference.

16. Dismissal for Failure to Meet Deadlines. The parties are warned that failure to meet any of the deadlines in this Order or in the Federal or Local Rules of Civil Procedure without substantial justification may result in sanctions, including dismissal of the action

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or entry of default.

17. Requirement for Paper Courtesy Copies. A paper courtesy copy of dispositive motions and any responses or replies thereto, as well as claim construction briefs and statements, shall be either postmarked and mailed to the judge or hand-delivered *to the judge's mail box* located in the courthouse by the next business day after the electronic filing. Please do not attempt to deliver documents to the Judge's chambers. A copy of the face page of the Notice of Electronic Filing shall be appended to the last page of the courtesy copy. Courtesy copies of documents too large for stapling must be bound with a metal prong fastener at the top center of the document or submitted in three-ring binders.

Dated this 24th day of April, 2024.

Dominic W. Lanza
United States District Judge

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