CITATION: Anson Advisors Inc. et al v. Doxtator et al, 2024 ONSC 437
COURT FILE NO.: CV-20-00653410-00CL
DATE: 20240119

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SUPERIOR COURT OF JUSTICE – ONTARIO

(COMMERCIAL LIST)

RE: Anson Advisors Inc., Anson Funds Management LP, Anson Investments Master Fund LP and Moez Kassam, Plaintiffs

AND:

James Stafford, Andrew Rudensky, Robert Lee Doxtator, Jacob Doxtator, and John Doe 1, John Doe 2, John Doe 3, John Doe 4, and other persons unknown Defendants

BEFORE: Cavanagh J.

COUNSEL: *Robert W. Staley, Douglas A. Fenton, and Dylan H. Yegendorf*, for the Plaintiffs (Responding Parties)

John Polyzogopoulos and Connor Allison, for the Defendant Andrew Rudensky (Moving Party)

Megan B. McPhee and Nicole J. Kelly, for Defendants James Stafford and Jacob Doxtator

HEARD: January 15, 2024

ENDORSEMENT

Introduction

[1] The Defendant, Andrew Rudensky, moves to set aside the default judgment obtained by the Plaintiffs against him and their noting of default of Mr. Rudensky.

[2] For the following reasons, I grant this motion.

Procedural Background

[3] Leave was granted to amend the Statement of Claim by Order dated May 3, 2022 by which Mr. Rudensky was to be added as a defendant. The Fresh As Amended Statement of Claim ("Amended Claim") was electronically filed on May 27, 2022.

[4] On October 4, 2023, Justice Osborne granted default judgment against Mr. Rudensky who had been noted in default on August 23, 2022. Mr. Rudensky was

held liable to the Plaintiffs in the amount of $450,000 for general damages for defamation.

[5] The default judgment provides that the finding of liability for general damages in this amount is without prejudice to the Plaintiffs' right to move against Mr. Rudensky for further relief, including further monetary relief. On this motion, the Plaintiffs agreed not to seek further relief against Mr. Rudensky at trial if default judgment is maintained.

[6] Mr. Rudensky appeared in person at the hearing of the Plaintiffs' motion for default judgment on January 25, 2023 and requested an adjournment of the motion. Mr. Rudensky did not file any materials. The Plaintiffs opposed the request for an adjournment and asked that their motion proceed on an unopposed basis with Mr. Rudensky being free to move to set aside the noting in default and any default judgment granted.

[7] At the hearing, Justice Osborne explained to Mr. Rudensky that the Plaintiffs proposed that the motion proceed that day as if it were unopposed and that Mr. Rudensky can move to set the judgment aside in the event that judgment is granted following the hearing of the motion. Justice Osborne asked for Mr. Rudensky's position. Mr. Rudensky responded that he would like to have time to retain counsel and present a defence. Counsel for the Plaintiffs reiterated their opposition to this request for an adjournment on grounds that included that Mr. Rudensky had been properly served with the Amended Claim in accordance with the *Rules of Civil Procedure* and that Mr. Rudensky's unsworn statement that he was not properly served should not be accepted. Counsel for the Plaintiffs submitted that for purposes of the motion for default judgment, proof of service of the Amended Claim had been shown and the motion should proceed, and Mr. Rudensky is free to move to set aside the default.

[8] At the hearing, Justice Osborne fully heard Mr. Rudensky's adjournment request and his explanations for why he had not been properly served. Justice Osborne accepted the submissions by Plaintiffs' counsel and declined to grant the requested adjournment. He urged Mr. Rudensky to retain legal counsel to assist him. Justice Osborne then heard the Plaintiffs' motion for default judgment on an unopposed basis.

[9] In his written reasons, Justice Osborne reviewed the procedural history of the action and the record before him which included proof of service of the Amended Claim on Mr. Rudensky and communications by Plaintiffs' counsel to Mr. Rudensky concerning the litigation at two email addresses that Mr. Rudensky had used. Justice Osborne held that these email addresses were valid and functioning and

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were used by Mr. Rudensky in correspondence with the Plaintiffs. He held that the Amended Claim was delivered to Mr. Rudensky through those email addresses.[1]

[10] Justice Osborne held that service of the Amended Claim was effected on Mr. Rudensky pursuant to rule 16.03(5) on July 22, 2022. Justice Osborne held that Mr. Rudensky had failed to deliver a Statement of Defence within the prescribed time or at all, or to respond, formally or informally, to the Amended Claim. Justice Osborne wrote in his endorsement that in all the circumstances and for reasons given, he declined Mr. Rudensky's request for an adjournment.

[11] Mr. Rudensky brings this motion for an order setting aside the default judgment and the noting in default.

Analysis

[12] I first address the applicable legal principles.

Legal Principles

[13] The *Rules of Civil Procedure* provide that an originating process shall be served personally under rule 16.02 or by an alternative personal service under rule 16.03. Rules 16.03(1) and 16.02(5) read:

> 16.03(1) Where these rules or an order of the court permit service by an alternative to personal service, service shall be made in accordance with this rule.
>
> 16.03(5) Where an attempt is made to effect personal service at a person's place of residence and for any reason personal service cannot be effected, the document may be served by,
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> (a) leaving a copy, in a sealed envelope addressed to the person, at the place of residence with anyone who appears to be an adult member of the same household; and
>
> (b) on the same day or the following day mailing another copy of the document to the person at the place of residence,

[1] There is no email in the record to Mr. Rudensky's email addresses sending the Amended Claim after May 27, 2022 (when the Amended Claim was filed) and before he was noted in default. There is an email sent on October 6, 2021 attaching a draft of the Amended Claim and requesting Mr. Rudensky's consent to the amendments which name him as a party. The Plaintiffs' motion materials for their motion for default judgment included the Amended Claim and were sent to the email accounts that had been used by Mr. Rudensky.

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> and service in this manner is effective on the fifth day after the document is made.

[14] Rule 18.01 of the *Rules* provides that a statement of defence shall be delivered within twenty days after service of the statement of claim, where the defendant is served in Ontario. The date of service is important because, upon service of the statement of claim, the clock begins to run for a defendant to deliver a statement of defence. If the statement of claim is not served, the twenty-day period for delivery of a statement of defence does not begin to run, even if the defendant knows of the action against him or her.

[15] Rule 19.01 provides that where a defendant fails to deliver a statement of defence within the prescribed time, the plaintiff may, on filing proof of service of the statement of claim, or of deemed service under subrule 16.01(2), require the registrar to note the defendant in default. A defendant who is noted in default is subject to serious consequences, as set out in rule 19.02.

[16] Rule 19.03(1) provides that the noting of default may be set aside by the court on such terms as are just.

[17] Rule 19.08(2) provides that a judgment against a defendant who has been noted in default that is obtained on a motion for judgment on the statement of claim under rule 19.05 or that is obtained after trial may be set aside or varied by a judge on such terms as are just. Rule 19.08 (3) provides that on setting aside a judgment under subrule (1) or (2) the court or judge may also set aside the noting of default under rule 19.03

[18] In *Royal Trust Corp of Canada v. Dunn*, 1991 CarswellOnt 468, Borins J., as he then was, set out the principles that apply on a motion to set aside a default judgment:

> It is well-established that there are two situations in which the court is able to set aside a default judgment. ... The first is when a defendant is able to establish that the judgment was irregularly obtained. If the defendant can establish the correct procedures have not been followed either in obtaining the judgment or in relation to some step taken by the plaintiff in the commencement of the proceedings, such as in failing to serve the statement of claim in a proper manner, then normally the defendant can have the judgment set aside as of right without the requirement of establishing a defence to the plaintiff's claim. The second is when the judgment has been regularly obtained and where the defendant asks the court to exercise its discretion to set aside the default judgment and to permit him or her to defend the claim.

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[19] The Plaintiffs submit that the principles stated in *Royal Trust* and other jurisprudence to the same effect are no longer good law and that the Court of Appeal has held that there is no longer a separate basis to set aside default judgments as of right based on service issues. The Plaintiffs submit that there is only one test on a motion to set aside a default judgment, that is, whether, in all the circumstances, it is in the interests of justice to set aside the default judgment based on consideration of five main factors. In support of this submission, the Plaintiffs cite decisions of the Court of Appeal for Ontario in *Mountain View Farms Ltd. v. McQueen*, 2014 ONCA 194 and *Intact Insurance Company v. Kisel*, 2015 ONCA 205 and the decision of the motion judge in *Marina Bay Sands Pte. Ltd. v. Jian Tu aka Tu Jian*, 2015 ONSC 5011.

[20] In *Mountain View*, the Court of Appeal heard an appeal from an order refusing to set aside a default judgment and, instead, varying the default judgment. The default judgment was not irregularly obtained. The Court of Appeal held, at para. 47, that the court's ultimate task on a motion to set aside a default judgment is to determine whether the interests of justice favour granting the order. The Court of Appeal, at paras. 48-49, identified five factors that should be considered, which are not to be treated as rigid rules, and held that the court must consider the particular circumstances of each case to decide whether it is just to relieve the defendant from the consequences of his or her default.

[21] In *Intact*, the defendant moved to set aside a noting in default and default judgment in two separate actions. The default judgment and noting in default were not irregularly obtained. The Court of Appeal, at paras. 13 and 14, explained the different approaches to be taken by a court when exercising its discretion to set aside a noting in default and on a motion to set aside a default judgment. With respect to the test on a motion to set aside a default judgment, the Court of Appeal cited *Mountain View*.

[22] In *Marina Sands*, the motion judge declined to set aside a default judgment where the defendant asserted that the statement of claim was not properly served and, therefore, the default judgment was irregularly obtained. The defendant submitted that his allegations of improper service entitle him to have the default judgment set aside as of right, citing jurisprudence including *Royal Trust*. The motion judge, at para. 30, wrote that, in his view, the "as of right" category for setting aside irregularly obtained default judgments is in reality no separate category at all but simply an instance where the interests of justice require a default judgment to be set aside. As authority for this conclusion, the motion judge cited *Mountain View* and *Intact*.

[23] Neither *Mountain View* nor *Intact* addresses whether prior jurisprudence, including *Royal Trust*, is still good authority for the proposition that a different test applies on a motion to set aside a default judgment or noting in default where the default judgment or the noting in default was irregularly obtained. This question was answered in subsequent decisions of the Court of Appeal.

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[24] In *Ken Jackson Construction Limited v. Macklin*, 2017 ONCA 324, the defendants appealed the dismissal of their motion to set aside the noting in default and default judgment obtained by the plaintiff. The Registrar signed judgment against the individual appellants for the amounts of invoices billed to the corporate appellant where the claims pleaded against the individual appellants were for breach of trust and conversion. The Court of Appeal, at para. 7, held that the default judgment was granted without jurisdiction and the individual appellants were entitled to have the default judgment set aside "as of right in the interests of justice". The Court of Appeal held that the Registrar had jurisdiction to sign default judgment against the corporate appellant for the amounts invoiced to it and, in respect of the motion to set aside the default judgment against the corporate appellant, where the default judgment was not irregularly obtained, applied the approach set out in *Intact*.

[25] The decision in *Macklin* shows that, contrary to the Plaintiffs' submission, there is not only one test on a motion to set aside a default judgment. Where the default judgment was irregularly obtained (in *Macklin* because the claim pleaded against the individual appellants did not entitle the respondent to default judgment) a different test applies than the test where the default judgment was not irregularly obtained.

[26] In *Redabe Holdings Inc. v. I.C.I. Construction Corporation*, 2017 ONCA 808, the appellant appealed the order of the motion judge dismissing his motion to set aside a default judgment. The motion judge had applied what the Court of Appeal described as "well-established criteria for determining whether the justice of the case required him to order that the default judgment be seat aside", citing *Intact*, at para. 4, and *Mountain View*, at paras. 48-50. On the appeal, the appellant argued that the motion judge had erred in applying these criteria because the default judgment had been irregularly obtained because the requisition was submitted without evidence and the facts alleged in the statement of claim did not permit the judgment to be granted.

[27] The Court of Appeal held that if the default judgment had been obtained in this way, the appellant's argument would have had merit. The Court of Appeal held, at para. 7, that "[i]f a default judgment is irregularly obtained, as a general rule, a defendant is entitled to an order, as of right, setting it aside, without the requirement of establishing a defence to the plaintiff's claim, and without the imposition of terms, other than possibly costs". The Court of Appeal cited the decision of Borins J. in *Royal Trust*, and another decision of Borins J. (as he also then was) in *Tomazio v. Rutale*, 1995 CanLII 7138, as authority for this proposition. However, unknown to the appellant until the hearing of the appeal, the default judgment was obtained on a motion, supported by affidavit evidence. It was not irregularly obtained. The Court of Appeal then considered the test from *Mountain View* and *Intact* and dismissed the appeal.

[28] The Court of Appeal in *Redabe* held that *Royal Trust* is still good authority for the proposition that if a default judgment is irregularly obtained, as a general rule, a

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defendant is entitled to have it set aside as of right, without the requirement of establishing a defence to the plaintiff's claim and without the imposition of terms, other than possibly costs. The decision in *Redabe* is consistent with the decision in *Macklin*.

[29] I conclude that *Royal Trust* and other jurisprudence standing for the same principles is still good authority setting out the approach to be taken on a motion to set aside a default judgment that was irregularly obtained, including for failure to properly serve the statement of claim.

Application of legal principles

[30] At the motion before Osborne J., the Plaintiffs provided proof of service of the Amended Claim on Mr. Rudensky through the Affidavit of Service of a process server, David Morrison. Mr. Morrison's Affidavit of Service reads that Mr. Morrison served Mr. Rudensky with a true copy of the Amended Claim by leaving a true copy in a sealed envelope addressed to Mr. Rudensky with Bruce Chapman, an adult male who appeared to be a member of the same household in which Andrew Rudensky resides at 4328 Club View Drive, Burlington Ontario and by sending a copy to Mr. Rudensky by prepaid regular letter mail on July 22, 2022 to the same address. Mr. Morrison states in his Affidavit of Service that he ascertained the person served was an adult member of the same household in which Mr. Rudensky is residing "by means of verbal admission". Mr. Morrison provides no evidence of what, specifically, Mr. Chapman said that was the "verbal admission".

[31] In support of this motion, Mr. Rudensky relies on his own affidavit and the affidavits of his mother-in-law, Karen Ann Cluhane, and her husband, Bruce Chapman.

[32] Mr. Rudensky deposes that he was never personally served with the Amended Claim and the address where the Amended Claim was, according to the Plaintiffs, served was not his place of residence. He deposes that he never received a copy of the Amended Claim or the Plaintiffs' motion record seeking default judgment against him until the day before the hearing of the default judgment motion.

[33] Mr. Rudensky deposes that in the spring of 2022, he sold his home in Oakville, bought a home in Naples, Florida, and moved there. Mr. Rudensky states that when completing the land transfer documents on the closing of the sale of his Oakville property, he listed his mother-in-law's address as his address for service. He explains that he was advised that land title documents require an address for service and he did not have any other address in Ontario. Mr. Rudensky deposes that he was not living at the Burlington property on July 22, 2022 when the Plaintiffs' process server attended there to serve the Amended Claim.

[34] Mr. Rudensky was cross-examined on his affidavit and his evidence in respect of whether the Burlington address was his residence was not directly challenged.

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[35] Mr. Chapman deposes that in May 1999, his wife, Karen, purchased the Burlington property and it is their home. He deposes that he has resided at this property since then with his wife. In December 2004, he was added on title to this property. Mr. Chapman deposes that at no point in time was their home Mr. Rudensky's place of residence. He deposed that Mr. Rudensky did not own, rent or reside at this property. In his affidavit, Mr. Chapman deposes that on or about July 22, 2022 an individual knocked on the door at the Burlington property and, when he answered, the individual advised that he had a package for Mr. Rudensky. Mr. Chapman states that the individual inquired into whether he, Mr. Chapman, lived at this address and he confirmed that he did. Mr. Chapman states that at no time did this person ask him if Mr. Rudensky lived there.

[36] When he was cross-examined, Mr. Chapman stated that he noted upon his review of the transcript "On reflection, he may have asked me if Andrew was here". He stated that he is not 100% sure whether the process server asked whether Mr. Rudensky was there or not. During the cross-examination, Mr. Chapman was not directly challenged on his evidence that Mr. Rudensky never lived at the Burlington property.

[37] Ms. Clahane deposes that she is Mr. Rudensky's mother-in-law. She deposes that are no point in time was her home, the Burlington property, Mr. Rudensky's place of residence. He did not own, rent or reside at this property. Her evidence in this respect was not disturbed on cross-examination.

[38] I am satisfied from the evidence of Mr. Rudensky, Mr. Chapman and Ms. Clahane that Mr. Rudensky has not resided at the Burlington property and, specifically, that Mr. Rudensky's place of residence was not the Burlington property where his mother-in-law resided on July 22, 2022 when Mr. Morrison attempted to effect service. I accept their evidence in this regard. This evidence was not before Justice Osborne when he granted default judgment. Justice Osborne was urged to accept proof of service based on Mr. Morrison's Affidavit of Service.

[39] In *Royal Trust*, Borins J. gave as an example of a default judgment irregularly obtained the situation where the defendant was not served with the statement of claim in a proper manner.

[40] In *Amexon Property Management Inc. v. Paramedical Rehabilitation Solutions Inc. et al*. 2011 ONSC 4783, Gilmore J., at paras. 21-22, confirmed the two ways in which a default judgment may be set aside and gave examples of irregularities which can lead to setting aside a default judgment:

> A default judgment may be set aside in two ways. As of right, where the judgment was irregularly obtained or, where the judgment has been obtained in a regular manner, the court may exercise its discretion to set aside the judgment.

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> Irregularities which can lead to setting aside a default judgment as of right may include failing to serve the Statement of Claim in the proper manner. Improper service includes service of a claim under Rule 16.03(5) by way of leaving the claim at a location which is not the defendant's residence. Residence for the purpose of a proper alternative to personal service means a person's permanent abode where they intend to remain. It is the plaintiff who must ascertain the place of residence of the person to be served.

[41] I conclude that by failing to leave the Amended Claim with a person at Mr. Rudensky's place of residence, the Plaintiffs failed to serve the Amended Claim in compliance with the *Rules of Civil Procedure*.[2] The fact that Mr. Rudensky designated the address of his mother-in-law as his "address for service" in the transfer document in relation to the sale of his home does not make his mother-in-law's home his "place of residence" within the meaning of this phrase in rule 16.03(5)(a) of the *Rules of Civil Procedure*.

[42] As a result, the time did not start to run under the *Rules of Civil Procedure* for Mr. Rudensky to deliver a Statement of Defence. When Mr. Rudensky was noted in default on August 23, 2022, he was not in default of rule 18.01(a) for failing to deliver a Statement of Defence within twenty days after service of the Amended Claim. The noting in default and the default judgment were irregularly obtained.

[43] The Plaintiffs rely on rule 16.08(a) of the *Rules of Civil Procedure* which reads:

> 16.08 Where a document has been served in a manner other than one authorized by these rules or an order, the court may make an order validating the service where the court is satisfied that,
>
> (a) the document came to the notice of the person to be served; or
>
> (b) the document was served in such a manner that it would have come to the notice of the person to be served, except for the person's own attempts to evade service.

[44] The Plaintiffs cite *McCann v. Yalda*, 2019 ONSC 5684 where the motion judge accepted that the plaintiffs did not serve the defendants in accordance with rule 16.01. The motion judge addressed the factual circumstances, where a lawyer representing the defendants received the affidavits of service and acknowledged that the defendants had been noted in default and he so advised one of the defendants. There were settlement discussions between counsel in which counsel for the plaintiffs agreed not to take steps relative to obtaining judgment arising from

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[2] It is not necessary for me to address Mr. Rudensky's argument that service was also ineffective because there was no prior attempt to effect personal service at Mr. Rudensky's place of residence.

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the noting in default while the discussions were ongoing. After unsuccessful settlement discussions, the legal counsel representing the defendants advised that was no longer acting.

[45] In *McCann*, the motion judge considered rule 16.08. The motion judge found that the statement of claim came to the attention of one defendant. With respect to the other defendant, the motion judge accepted that he was served or had notice of the claim. The motion judge held that the defendants were placed on notice of the statement of claim and the ensuing noting in default and, where such notice was nearly four months before default judgment was obtained, there is no legal prejudice. The motion judge concluded that, having determined that a court would exercise its discretion under rule 16.08 in favour of the plaintiffs in this case, the underlying foundation for this part of the motion to set aside the default judgment is unsubstantiated and there is no basis upon which to set aside default judgment on this ground.

[46] The Plaintiff also relies on *Royal Bank of Canada v. HCB Thickson Ltd. et al*., 2019 ONSC 7084. In *Thickson*, the defendants moved to set aside a default judgment. One individual defendant was properly served in his personal capacity but denied that the corporate defendant was served. The motion judge was satisfied that since the individual was the sole director and officer of the corporate defendant, "it is virtually inevitable that a trial judge would validate service on [the corporate defendant]". The other individual defendant affirmed his belief that he was not personally served, as the affidavit of service attested. The motion judge noted that his evidence had several weaknesses and concluded that it was "virtually inevitable" that service would be validated under rule 16.08(a) at trial.

[47] I accept that rule 16.08 may be applied in some circumstances to validate service of an originating process. The use of rule 16.08 to validate service is a matter of discretion. The facts in *McCann* differ from those on the motion before me. In *McCann*, the defendants' lawyer was informed that the defendants had been noted in default. This would have alerted them that, from the plaintiffs' perspective, the statement of claim had been properly served. After having been so advised, the defendants' lawyer requested and was given an indulgence from the plaintiffs that they would not seek default judgment while settlement discussions were ongoing. The lawyer did not ask that the noting in default be set aside, nor did the defendants. Even after the settlement discussions ended, the defendants did not move to set aside the noting in default. The facts in *Thickson* are also materially different than those on the motion before me.

[48] In *Amexon*, at para. 26, Gilmore J. addressed the plaintiff's submission that the defendant must have had notice of the action being commenced against her. Gilmore J. held that even if she did have such knowledge, that would not validate service of the claim on her in accordance with the *Rules of Civil Procedure*.

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[49] Mr. Rudensky was not served with the Amended Claim in compliance with the *Rules of Civil Procedure*, such that, without an order made before he was noted in default validating service in another manner, he was not in default for not delivering a statement of defence. I am not satisfied that the Amended Claim was sent to Mr. Rudensky's email accounts after it was filed and before he was noted in default. In these circumstances, I decline to exercise my discretion on this motion to validate service of the Amended Claim pursuant to rule 16.08 of the *Rules of Civil Procedure*.

[50] The Plaintiffs submit that Mr. Rudensky's motion should be dismissed because he failed to move promptly to set aside his noting in default, including during the period of time between the hearing of the default judgment motion and the release of the decision granting default judgment. I do not accept that Mr. Rudensky should have known that he was required to move to set aside his noting in default after the hearing of the motion and before a decision was released. At the hearing of the default judgment motion, Mr. Rudensky requested time to bring such a motion to allow him to defend the action and his request was denied. In such circumstances, where Mr. Rudensky was told that he could move after the hearing to set aside the noting in default and any default judgment granted, it was not unreasonable for Mr. Rudensky to wait for the decision on the default judgment motion before bringing his motion.

[51] The default judgment was irregularly obtained because the Amended Claim was not served in a manner required by the *Rules of Civil Procedure*. I conclude that the general rule as explained in *Royal Trust* and *Redabe* should be applied. The default judgment against Mr. Rudensky and the noting of him in default should be set aside.

Disposition

[52] I order that the default judgment against Mr. Rudensky and the noting of default of Mr. Rudensky are set aside.

[53] If the parties are unable to resolve costs, they may make written submission. Mr. Rudensky's submissions are due within 10 days (not longer than 4 pages, excluding costs outline). The Plaintiffs' submissions are due within 10 days thereafter (same page limit). Reply submissions, if any (2 pages), within 5 days thereafter.

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Cavanagh J.

Date: January 19, 2024

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