V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA	)	**CRIMINAL NUMBER FE-2024-69**
VERSUS	)	
HYRUM BAQUEDANO RODRIGUEZ	)	**INDICTMENT - ABDUCTION (COUNT I) and UNLAWFUL ENTRY (COUNT II)**

MEMORANDUM OPINION AND ORDER REJECTING PLEA AGREEMENT

The matter came before the Court on May 24, 2024, for the Court to determine whether to accept or reject the Plea Agreement entered in the above-entitled matter and, if it accepted the Plea Agreement, to impose sentence. For the following reasons, the Court rejected the Plea Agreement. Based on the Court's rejection of the Plea Agreement, the Defendant withdrew his pleas of guilty, and the matter was set for status on June 21, 2024, at 9 a.m., to be heard by another judge of this Court. As required, this Court can have no further involvement in the case. *See* Rule 3A:8(c) of the Rules of the Supreme Court of Virginia.

The purpose of this Opinion and Order is to explain the Court's reasons for rejecting the Plea Agreement. *See, generally, United States v. Robertson*, 45 F.3d 1423, 1438 (10th Cir. 1995), *United States v. Miller*, 722 F.2d 562, 566 (9th Cir. 1983), and *United States v. Moore*, 916 F.2d 1131, 1135-36 (6th Cir. 1990). Although the Court articulated its reasons for rejecting the Plea Agreement at the hearing on May 24, 2024, the Court "speaks through its orders," *McBride v. Commonwealth*, 24 Va. App. 30, 35 (1997). It is particularly important in a matter this grave that the Court's Order reflect not only the Court's decision to reject the Plea Agreement, but *why* the Court decided as it did.

A circuit court in the Commonwealth is vested with the explicit authority to accept or reject any plea in which the parties have agreed to a specific sentence or otherwise constrained the court's sentencing discretion, *see* Va. R. Sup. Ct. 3A:8(c)(2). However, the respect due a coordinate branch of government, coupled with the recognition that the prosecutor is generally in the best position to assess the merits of a case, counsels the Court to exercise its authority with restraint and caution, and to take such action only in those cases where the Court concludes that to do otherwise would constitute an abdication of the Court's independent responsibility to act in the public interest.

This is just such a case.

Statement of Facts

The "Statement of Facts" provided by the Office of the Commonwealth's Attorney to the Probation Office reads as follows:

> At approximately 4:13 a.m. on June 15, 2023, Officer Manrique Munoz of the Fairfax County Police Department responded to [victim's address] in Annandale, Virginia for a call regarding a burglary in progress. The caller, [victim's mother], advised that someone had broken into her apartment through her window and had attempted to take the victim, her four-year-old daughter, [victim's name].
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> Once on scene, Officer Manrique Munoz spoke with [victim's mother], who indicated that she and her daughter were sleeping in two difference beds within the same bedroom on the night of the incident. [Victim's mother] stated that she was awakened by [victim] yelling in the living room. [Victim's mother] indicated that she ran towards [victim] and noticed the blinds of the window rustling as if somebody had moved them. [Victim's mother] indicated that she did not see anyone inside or outside. [Victim's mother] advised that [victim] indicated that a big man had grabbed her but gave no other description of the subject. [Victim's mother] stated that [victim] also indicated that the man grabbed her buttocks and shoulder. [Victim's mother] later informed Detective Isa Martin – who was ultimately assigned as the lead investigator in this case – that [victim] had immediately indicated to her that the individual had 'grabbed her through the living room.' During a forensic interview conducted with [victim] the following day, [victim] also disclosed that the individual picked her up by her torso and removed her from her bed.
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> In speaking with Officer Manrique Munoz on scene, [victim's mother] also indicated that the window was closed before she went to sleep with her daughter and that the blinds were down. [Victim] had no marks or bruises on her skin from the incident. Upon checking the apartment, Officer Manrique Munoz noticed a shoe print on a cushion in front of the window used as the point of entry and exit. Officer Manrique Munoz likewise noted wet shoe prints leading directly to [victim's] bed. Additionally, Officer Manrique Munoz identified a handprint on the window that was slightly smudged. Detectives Leach and Fortner from the Crime Scene Unit of the Fairfax County Police Department later responded to the scene and were able to lift latent prints from outside of the window in question, as well as a footprint located on the cushion of a couch.
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> On June 16, 2023, Detective Martin was notified that the thumb print lifted from the exterior frame of the victim's window and the partial palm print lifted from the interior frames of the victim's window were preliminarily identified as a match for the defendant, Hyrum Baquedano-Rodriguez. Additional analysis later confirmed that the thumb and palm prints were, in fact, a match for the defendant. Detective Martin subsequently obtained a recent arrest photo of the defendant and asked [victim's mother] and her two adult sons – [names] – if they recognized the individual in the photo [Victim's mother] and [one son] stated that they did not recognize the defendant, but [second son] immediately said he did. [Second son] stated that the defendant loitered in front of his building and in a vacant storage area located in the basement of their building. [Second son] stated that he

had observed the defendant using drugs in the neighborhood, as well as in the hallways of his building, on several occasions. [Victim's mother and both sons] all indicated that they had not interacted with the defendant, nor were they aware of him ever having been inside their apartment. Following that conversation with [victim's mother and both sons], Detective Martin sought warrants for the defendant, who was later apprehended by Officer Jenkins.

The Charges

The Defendant was arrested on June 17, 2023, on two warrants. One warrant charged the Defendant with Statutory Burglary, pursuant to Va. Code §18.2-90, specifically that "on or about 06/15/2023 [the accused] did unlawfully and feloniously in violation of Section 18.2-90, Code of Virginia: enter in the nighttime the dwelling house or adjoining occupied outhouse of [ ], a four year old with the intent to commit murder, rape, robbery, or arson …." The other warrant charged the defendant with Abduction, with Intent to Defile, pursuant to Va. Code §18.2-48, specifically, that "on or about 06/15/2023 [the accused] did unlawfully and feloniously in violation of 18.2-48 Code of Virginia: abduct [ ], a 4 year old, with the intent to defile such person." The maximum period of active incarceration for the crime of Statutory Burglary is 20 years. The maximum period of active incarceration for the crime of Abduction, with Intent to Defile, is Life. Thus, the initial charges facing the Defendant carried a maximum period of potential active incarceration of Life + 20 years.

The initial Burglary charges were subsequently reduced upon motion of the Commonwealth in the General District Court. On November 20, 2023, the Burglary charge was initially amended from charging the Defendant with entering the victim's house with the intent to "commit murder, rape, robbery, or arson," pursuant to Va. Code §18.2-90, to entering the house with the intent to commit "a felony or any larceny therein," pursuant to Va. Code §18.2-89. On February 1, 2024, the charge was amended again, this time "by agreement of parties," from the felony of Burglary to the misdemeanor of Unlawful Entry, pursuant to Va. Code §18.2-121. The effect of the amendment was to reduce the maximum period of potential active incarceration from 20 years to 12 months.

The initial Abduction, with Intent to Defile, charges were also modified upon motion of the Commonwealth. On August 9, 2023, the Virginia Code section was changed from §18.2-48 to §18.2-47, and the words "with the intent to defile" were crossed out on the warrant. Significantly, the age of the abduction victim – a "4 year old" – remained in the warrant. The reason this is significant is that Va. Code §18.2-47 lists two potential punishments in Section C of the statute. Abduction "of a minor" remains a Class 2 felony, with a maximum potential imprisonment of Life. However, an abduction "for which no punishment is otherwise prescribed shall be punished as a Class 5 felony." A Class 5 felony carries a maximum period of potential active incarceration of ten years. Identifying the victim as a four-year-old in the warrant meant that the charge remained a potential Life offense.

That changed on February 20, 2024, the day of the Defendant's indictment. Although the Defendant was still charged with the felony of Abduction, the charging instrument no longer made any reference to the age of the victim, thus reducing the charge from a Class 2 felony (with a potential sentence of Life imprisonment) to a Class 5 felony (with a potential sentence of 10 years imprisonment). The Burglary charge, previously amended in the warrant to the misdemeanor of Unlawful Entry, remained as such in the indictment, and carried a potential incarceration sentence of 12 months in jail.

The Plea and Plea Agreement

On March 11, 2024, the Defendant entered guilty pleas to the felony of Abduction, in violation of Virginia Code §18.2-47, and the misdemeanor of Unlawful Entry, in violation of Virginia Code §18.2-121. The terms of the Plea Agreement read as follows:

> The defendant shall plead guilty to and be found guilty of abduction and unlawful entry. The Commonwealth and defendant agree that the total period of active incarceration which the defendant may receive on the aforesaid charges shall be capped at two (2) years. As part of this agreement, the defendant shall also agree to the entry of a lifetime protective order on behalf of the victim, [victim's initials], and her family or household members. The defendant shall also agree to have no contact with [victim] and her family or household members. There are no additional agreements as to sentence, and the parties remain free to argue all other conditions of the sentence, including but not limited to: (1) the length of any period of active incarceration which the defendant may receive, up to and including the cap of two (2) years; (2) the length of any suspended period of incarceration the defendant may receive; (3) the length of any probation the defendant may receive; (4) the length of any good behavior term the defendant may receive; and (5) any additional terms or conditions of probation and/or the suspended sentence.

Commonwealth's "Rationale for the Plea"

An Assistant Commonwealth's Attorney ("ACA") provided this Court, by email on May 22, 2024, an excerpt from its case memo entitled "Rationale for the Plea". It reads as follows:

> While the facts of this case are aggravating, there are multiple evidentiary challenges inherent in this case. The victim in this case, [name of victim], was only four years old at the time of the offense and described the defendant simply as a "big man." Neither her mother nor her brothers saw the defendant or the offense, and the case cannot rest on the ability of a four year old to be deemed competent to testify or her ability to identify the defendant. One of the victim's older brothers – [victim's brother] – misidentifies a person at the bus stop as the perpetrator, without having a description of the defendant from [victim] or her mother. DNA analysis – to include TrueAllele analysis – was conducted on the victim's nightgown, but the analysis was inconclusive. While the defendant thumb and palm print on the victim's window help to identify the defendant and clearly prove that the defendant was guilty of breaking into the victim's apartment, they are less helpful – in the absence of an ability by the victim to identify the defendant as the person who abducted her – in establishing the defendant as the person who committed the abduction, particularly given the results of the DNA analysis. For all of these reasons, the Commonwealth reached the instant agreement. It should be noted, however, that this Commonwealth was exceedingly clear that this resolution does not include any active investigations regarding the defendant (the defendant is a suspect in an active burglary investigation, which Detective Martin believed the detective on that case was waiting to charge until he had DNA / fingerprint results).

Victim Impact Statement

The Court received and reviewed a Victim Impact Statement provided by the mother of the victim. In her statement, the mother of the victim described the "life altering" impact of the Defendant's crimes, including the terror that her child experienced when she was abducted, and the traumatic impact that the defendant's crimes have had on this child since June of 2023. The child's mother also described the profound impact that the crimes have had on her, as well as on other family members.

The May 24, 2024 Hearing

At the hearing on May 24, 2024, the Office of the Commonwealth's Attorney argued for acceptance of the Plea Agreement:

> From this Commonwealth [Attorney]'s perspective, when I look at the rationale and I look at the case more broadly what this Commonwealth [Attorney] sees is a concern of what happens if we go to trial and we lose. And I think that my colleague looked at this case and in her professional experience evaluated it and considered the chances of losing to be higher than she was comfortable with.

The Court asked the ACA – who was not the attorney who negotiated the Plea Agreement – for *her* assessment of the case: "My judgment of this case is that it's triable. Frankly, if the Court were to reject the agreement, this Commonwealth stands ready, willing, and able to try it. However, I do see weaknesses inherent in this case."

Defense counsel also argued in favor of the Court accepting the Plea Agreement. Counsel made three arguments:

First, defense counsel asked the Court to consider the fact that there is "an extremely unlikely chance that [the defendant] will be able to remain in this country." Counsel suggested that this might give the Court "some assurances" or carry "some weight as far as the significance of the collateral consequences" to the defendant.

Second, defense counsel argued that the Court should also weigh the collateral consequence of the defendant being "a convicted felon," having to register as a sex offender, and having to be on very "strict" probation.

Third, defense counsel argued that, while the case might be a "triable" one, "I don't think the chances of success for the Commonwealth were very high."

Reasons for Rejecting the Plea Agreement

After giving the matter due consideration, reviewing case-related material[1], and hearing argument from counsel, the Court rejected the Plea Agreement. The Court based its decision on the following considerations:

First, the crimes of conviction are, as the Court stated during the hearing, a parent's "worst nightmare." The defendant broke into the victim's home in the middle of the night, entered the bedroom where mother and child were asleep, and tried to carry the child away. Fortunately, the defendant made it only as far as the living room, where the child's screaming apparently led the defendant to abandon his plan and flee.

Second, the Defendant comes before this Court with a deeply troubling record of unlawful conduct.[2] The Defendant has six prior misdemeanor convictions. Five of the six convictions began as felony charges, specifically two sex crimes involving minors and three burglaries. The prior convictions are as follows: (1) **Disorderly Conduct**, which was initially charged as "Indecent Liberties: Expose Genitals to Child" with Child Less than 15 Years of Age; (2) **Contributing to the Delinquency of a Minor**, which was also initially charged as "Indecent Liberties: Expose Genitals to Child" with Child less than 15 years of Age; (3) **Entering Property to Damage**, which was initially charged as Burglary; (4) A second **Entering Property to Damage**, which was also initially charged as Burglary; (5) A third **Entering Property to Damage**, which was also charged as Burglary; and (6) **Petit Larceny**.

Each of the crimes described above occurred in the last three years. The fact that these crimes occurred so recently is significant. It is evidence of the *present* danger posed by the Defendant. Nor have the sanctions imposed by the courts to date – including both jail time and probation – dissuaded the Defendant from committing further criminal acts. Indeed, the Defendant had not even completed his last term of probation when he committed the current offenses.

Third, the terms of the Plea Agreement precluded the Court from imposing any sentence of active incarceration greater than *two years*. That is less than one-fifth the amount of active incarceration the defendant would have faced had the Plea Agreement not imposed this limitation on the Court. True, the Court could have imposed additional periods of *suspended* incarceration – time that could be revoked in the event the Defendant committed new crimes while on probation – *but at what cost to new victims?* Beyond all other considerations, it is this restriction on the Court's sentencing authority that is the central reason for the Court's rejection of the Plea Agreement.

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[1] Among the documents the Court has reviewed and considered are the following: (1) Contents of the Court file, including original charging documents, the indictment, and various other material; (2) Presentence Investigation Report, including the applicable Sentencing Guidelines; (3) Plea Agreements; (4) Defense Sentencing Memorandum; (5) Victim Impact Statement; (6) Objection to Victim Impact Statement; (7) Redacted Victim Impact Statement; (8) Commonwealth's "Rationale for the Plea" email; and (9) Additional emails related to the calculation of the Sentencing Guidelines.

[2] The Defendant's prior record and probation status is drawn from the Presentence Investigation Report.

This Court recognizes that prosecutors, and the courts in which they practice, have distinct and defined roles in the criminal justice system. Prosecutors decide who to prosecute, what charges to initiate, the nature and content of the indictment to present to a grand jury, and what, if any, plea agreements should be considered, offered, or accepted. As to any plea negotiations which might be undertaken by the Commonwealth and defense counsel, the Court is not only uninvolved in that process but *prohibited* from participation. *See* Va. R. Sup. Ct. 3A:8(c)(1)(C). However, when the parties have entered into a plea agreement that restricts the Court's sentencing discretion, the Court does have the authority and the responsibility to determine whether to accept or reject the agreement.

The crimes before the Court do not lie at the periphery of concern. Kidnapping a four-year-old child – stealing her from her bed in the middle of the night – is at the dead center of concern. A criminal justice system that cannot protect a four-year-old child in such circumstances is a failure. When the court system has tried without success to bring a defendant into compliance with the law, and when that defendant has committed a crime of such gravity that it can only be described as posing an existential threat to a child's life, the only goal of sentencing likely to protect the community is a lengthy period of incarceration. This Plea Agreement fell woefully short of that goal.[3]

Nor did the Court view the other terms of the Plea Agreement – such as entry of a protective order, or the obligation of "no contact" with the victim, or any period of probation the Court might impose – as reducing the danger posed by the defendant. Such terms are only meaningful and effective if the defendant actually obeys the obligations they impose; unfortunately, this defendant has demonstrated that he cannot be trusted to obey the law or obey the orders of a court.

Defense counsel makes the argument that the Court, in deciding whether to accept the Plea Agreement, should take some "assurances" from counsel's prediction that the Defendant is likely to be excluded from this country upon his release. There are multiple problems with this argument. First, while exclusion from the United States would be a significant collateral consequence of the Defendant's plea, the Court cannot simply assume it will occur -- especially given defense counsel's representation that the

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[3] In the Defendant's Sentencing Memorandum, the Defendant emphasized that the Sentencing Guidelines for this case are "probation/no incarceration or up to 6 months incarceration" and that since the Defendant has already served approximately nine months in jail, "[a] sentence of time-served would be well above the sentencing guidelines in this case and is appropriate." *Defendant's Sentencing Memorandum*, at 6. Whatever merit this argument might have in connection with a sentencing determination, it has little persuasive force with regard to the determination whether to accept or reject a plea agreement. This is because the argument is circular: *The Plea Agreement makes sense because the cap exceeds the Sentencing Guidelines, but the reason the cap exceeds the Sentencing Guidelines is because of the Plea Agreement.* There are many factors that impact on the Sentencing Guidelines, but none is more significant than the offense of conviction. The charges in this case underwent fundamental change from the day of arrest to the day of plea. Some changes may have been due to the Commonwealth's assessment of the case independent of the potential for a plea, but it is reasonable to assume that the Commonwealth's decision to amend the Burglary felony to the Unlawful Entry misdemeanor was related to the Defendant's waiver of the Preliminary Hearing and signed statement of his intention to plead guilty, all of which occurred on February 1, 2024.

Defendant is in the United States pursuant to a lawful grant of political asylum. Second, exclusion from the United States is, in no respect, a panacea. It would essentially render meaningless the restrictions and requirements typically imposed on a probationer convicted of an offense that requires sex offender registration. This includes, and certainly is not limited to, sex offender registration itself, as well as sex offender treatment, GPS monitoring, substance abuse treatment if necessary, travel restrictions, and all the other requirements of probation supervision. Essentially, the Defendant will be physically free to do as he wishes, relieved of any constraints imposed upon him arising out of his convictions.

Against all of the foregoing, the Commonwealth makes one real argument: *They might lose if the case were to go to trial.* That is, of course, true. Litigation risk is always a concern in plea negotiations and plea agreements. But when the Commonwealth's principal rationale in support of a plea agreement is the risk of losing at trial, it is incumbent on the Court to give this rationale careful examination. The Court finds several of the Commonwealth's justifications to simply be inexplicable and certainly not persuasive.

First, the Commonwealth acknowledges that the presence of the defendant's thumb and palm print on the victim's window "clearly prove that the defendant was guilty of breaking into the victim's apartment." In other words, the Commonwealth acknowledges that there is essentially *no litigation risk* associated with the felony Burglary charge.

Second, the Commonwealth argues that "the case cannot rest on the ability of a four-year-old to be deemed competent to testify." It is certainly true that a court would need to make a determination of competency before the victim – who would presumably be at least five-years-old at the time of trial – would be permitted to testify.[4] But there is no reason to assume that the victim would be found

[4] The competency of a child witness is determined as of the date the child is offered as a witness, not the date of the events about which the child is called to testify. *See Cross v. Commonwealth*, 195 Va. 62, 64 (1953).

incompetent, and case law – in the Commonwealth of Virginia[5], in other states[6], in federal court[7], and in the United States Supreme Court[8] – certainly suggests otherwise.

Third, the Commonwealth argues that the victim will be unable to identify the Defendant as the person who abducted her, since she can only describe the individual as a "big man." But why would it even be necessary for the *victim* to identify the Defendant when he has already been conclusively identified through forensic evidence as the person who broke into the victim's apartment? The Commonwealth argues that the thumb print and palm print, while establishing that the Defendant broke into the apartment, are "less helpful" in "establishing the defendant as the person who committed the abduction." Is the Commonwealth really concerned that the jury might think there were two break-ins that evening, one to abduct, and one for some other purpose? Moreover, to prove motive, opportunity, intent and even identity, the Commonwealth might well be able to seek the admission of "other crimes" evidence associated with

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[5] Virginia courts have determined that "a child is competent to testify if he or she possesses the capacity to observe, recollect, communicate events, and intelligently frame answers to the questions asked of him or her with a consciousness of a duty to speak the truth." *Greenway v. Commonwealth*, 254 Va. 147, 153, 487 S.E.2d 224 (1997) (holding that allowing testimony of a twelve-year-old boy who did not have sufficient knowledge of the Defendant's vehicle was harmless error); *see also Bynum v. Commonwealth*, 2013 Va. App. LEXIS 170 (Va. App. 2013) (finding a ten-year old competent to testify); *see* Klevenz v. Commonwealth, 2013 Va. App. LEXIS 45 (Va. App. 2013) (finding a four-year-old competent to testify); *Tinsley v. Johnon*, 2010 U.S. Dist. LEXIS 76117 (W.D.V.A. 2010) (finding an eight-year-old competent to testify); *Guzman-Soto v. Dir., Dep't of Corr.*, 2010 U.S. Dist. LEXIS 18508 (E.D.V.A. 2010) (finding a ten-year-old competent to testify). In making a competency determination, Virginia courts "must consider the child's age, his [or her] intelligence or lack of intelligence, and his [or her] sense of moral and legal responsibility." *Greenway*, 254 Va. at 153 (quoting *Hepler v. Hepler*, 195 Va. 611, 619 (1954)).

[6] *See, e.g., Rivet v. State*, 556 So. 2d 521 (Fla. 5th DCA 1990) (4 1/2 -year-old alleged victim competent to testify in sexual battery prosecution; holding that "[T]he established law of this state is that if an infant witness has sufficient intelligence to receive a just impression of the facts about which he or she is to testify and has sufficient capacity to relate them correctly, and appreciates the need to tell the truth, the infant should be permitted to testify."); *Leon v. State*, 498 So. 2d 680 (Fla. 3d DCA 1986) (5-year-old alleged victim competent to testify in sexual battery prosecution); *Bradburn v. Peacock*, 135 Cal. App. 2d 161, 164 (1955) ("[B]ut in view of the many cases in this state which have upheld the trial judge's discretion in allowing 5-year-old children to testify we must hold that in arbitrarily refusing to permit this 5-year-old to testify without a voir dire examination the trial judge abused his discretion."); *People* v. *Trippell*, 7 Cal. 2d 612 (1936); *People* v. *Allen*, 131 Cal. App. 2d 72 (1955); *People* v. *Root*, 112 Cal. App. 2d 122 (1952); *People* v. *Norred*, 110 Cal. App. 2d 492 (1952); *People* v. *Goff*, 100 Cal. App. 2d 166 (1950); *People* v. *Terry*, 99 Cal. App. 2d 579 (1950); and *People* v. *Manuel*, 94 Cal. App. 2d 20 (1949).

[7] *See United States v. Allen J.*, 127 F.3d 1292, 1296 (10th Cir. 1997) ("Over one hundred years ago, the Supreme Court held it was proper for a five-year-old to give critical testimony in a capital case...Since that time, the trend in the law has been to grant trial courts even greater leeway in deciding if a witness is competent to testify.")

[8] See *Wheeler v. United States*, 159 U.S. 523, 524-525 (1895).

five of the Defendant's prior convictions, specifically those that began as Burglary or Indecent Liberties charges. *See* Virginia Rules of Evidence 2:404(b).

There are litigation risks in nearly all cases, and the Court does not doubt their presence in the instant case as well. But the Court was not persuaded that any of the litigation risks in this case were so momentous or overwhelming that it warranted acceptance of a plea agreement that was this profoundly inadequate in light of the crimes the Defendant committed and the danger he poses, and likely will continue to pose.

It is for these reasons that the Court rejected the Plea Agreement. The matter is set for status before another judge of this court at **9:00 a.m., on June 21, 2024.**

SO ORDERED, this 30 day of May, 2024.

JUDGE RANDY I. BELLOWS