

**IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION**

FARE TECHNOLOGIES, LLC,	)	
	)	
Plaintiff,	)	
	)	C.A. No. 6:22-cv-00317-ADA
v.	)	
	)	
UBER TECHNOLOGIES, INC. d/b/a UBER,	)	
	)	
Defendant.	)	
_____	)	

UBER’S CLAIM CONSTRUCTION REPLY BRIEF

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I. INTRODUCTION

Plaintiff Fare Technologies, LLC (“Fare”) asserts that all five terms identified for construction by Defendant Uber Technologies, Inc. (“Uber”) should be given their “plain and ordinary meaning” and do not need construction. Fare’s brief, however, is devoid of any meaningful explanation for its position other than generic claim construction propositions. For each of the five terms, Fare fails to address any of Uber’s intrinsic or extrinsic evidence establishing the meaning of those terms to a person of ordinary skill in the art (“POSITA”) in 1998, including the expert declaration of Dr. Mundy, who has over 50 years of experience in the taxi and transportation industry. Accordingly, the uncontested record establishes that Uber’s proposed constructions are the plain and ordinary meaning of the terms at issue and should be adopted by the Court.

This is not a case where “no construction” is appropriate. The five identified terms require constructions because the parties dispute each term’s scope. Under *O2 Micro Int’l Ltd. v. Beyond Innovation Tech. Co.*, 521 F.3d 1351, 1360 (Fed. Cir. 2008) and *Eon Corp. IP Holdings LLC v. Silver Spring Networks, Inc.*, 815 F.3d 1314, 1319 (Fed. Cir. 2016), a district court must “resolve a dispute about claim scope that has been raised by the parties” and, in those cases, it is legal error to leave the question of claim scope unanswered by “determining only that ... terms should be given their plain and ordinary meaning.”

Here, disputes about claim scope exist for all identified terms. Can any vehicle qualify as a “taxi”? Can a “trip meter” use GPS technology, or does it have to rely on input collected from the vehicle? Are the “starting point” and “destination point” for a ride limited to geographical location where a ride actually began or ended, or can they be estimates? And, what actually qualifies as “waiting time encountered in traffic”? All of these questions, and a few more, require answers before this case can be charged to a jury. Fare, of course, resists constructions of

these terms because it recognizes that under reasonable constructions, Uber does not infringe the '727 Patent, which is directed to an improvement on taxi technology that is inapplicable to modern rideshare technology.

II. THE COURT MUST DETERMINE CLAIM SCOPE

“When the parties raise an actual dispute regarding the proper scope of these claims, the court, not the jury, must resolve that dispute.” *O2 Micro*, 521 F.3d at 1360. “This duty resides with the court because, of course, ‘the ultimate question of construction [is] a legal question.’” *Eon Corp.*, 815 F.3d at 1318 (alteration in original) (quoting *Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 574 U.S. 318 (2015)). “In order to fulfill this obligation, the court must see to it that disputes concerning the scope of the patent claims are fully resolved.” *Every Penny Counts, Inc. v. Am. Express Co.*, 563 F.3d 1378, 1383 (Fed. Cir. 2009). “It is not appropriate to leave to the jury the task of resolving claim construction disputes.” *Cobalt Boats, LLC v. Brunswick Corp.*, 773 F. App’x 611, 614 (Fed. Cir. 2019).

“A determination that a claim term ‘needs no construction’ or has the ‘plain and ordinary meaning’ may be inadequate when a term has more than one ‘ordinary’ meaning or when reliance on a term’s ‘ordinary’ meaning does not resolve the parties’ dispute.” *O2 Micro*, 521 F.3d at 1361. Where the parties dispute the scope of the “plain and ordinary meaning” of a term and the district court declines to provide a definition, it is legal error. *Cobalt Boats*, 773 F. App’x at 614 (finding the district court erred by failing to construe the term “capable of being rotated 180°” and only giving the term its “plain and ordinary meaning.”)

III. LEVEL OF ORDINARY SKILL IN THE ART

Fare defines a POSITA as someone having “at least a Master of Science (“MS”) Degree in Mechanical or Electrical Engineering, or equivalent work experience in the **field of impact transducers for measuring vibration.**” (Dkt. 34 (“Response”) at 3-4 (emphasis added).) Yet,

the '727 Patent is directed to an improved “taxi trip meter system.” (See, e.g., Dkt. 31-2 at Title.) This error appears to be the result of Fare’s counsel reusing a prior claim construction brief in an unrelated case and not changing the section on the level of ordinary skill in the art.¹ (Ex. A - *Gold IP LLC v. Augury, Inc.*, 1:21-cv-04788 (S.D.N.Y. Aug. 22, 2022, Dkt. 44).) As a result, the Court should give no weight to Fare’s POSITA definition and adopt Uber’s definition as provided by Uber’s expert, Dr. Mundy: “on or before August 18, 1998, a POSITA relating to the technology of the '727 Patent would have working industry knowledge of the taxicab and the transportation industry.” (Dkt. 31-4 at ¶ 16.)

IV. ARGUMENT

A. “Taxi”

Claim(s)	Plaintiff’s Proposed Construction	Defendant’s Proposed Construction
Claim 1	“plain and ordinary meaning, needing no construction”	“an automobile licensed for hire as a taxi or taxicab and fitted with a meter”

The parties agree that “taxi” should be given its plain and ordinary meaning to a person of ordinary skill in the art in 1998. (Dkt. 31 (“Opening Br.”) at 7; Response at 4.) The parties disagree, however, on whether a construction is necessary and, if so, what the definition should be.

A construction of “taxi” is required here because there is a disagreement over the scope of this term. *O2 Micro*, 521 F.3d at 1360; *Eon Corp.*, 815 F.3d at 1319. Here, the dispute over scope is whether “taxi,” as understood by a POSITA in 1998, encompasses any passenger

¹ There are a number of commonalities between Fare’s responsive claim construction brief and its counsel’s brief in *Gold IP*, which suggests an apparent copy and paste effort with minimal consideration of the claim construction issues at issue in *this* case.

vehicle such as a limo or rideshare (Fare’s position), or whether it is limited to a specific type of commercial passenger vehicle – the one that we all know as a taxi (Uber’s position).

Fare takes the position that no construction is necessary because “[i]t belies logic that ... the phrase taxi needs construction.” (Response at 4.) Fare’s position is akin to arguing that the term “pencil” does not require construction because everyone knows its meaning, while at the same time arguing that a pen infringes that limitation. In such cases, even if the term is commonly used, it is incumbent on the Court to delineate the boundaries of the limitation (*e.g.*, the use of graphite or lead, and not ink, to be a pencil).

Fare also argues that the common definition of “taxi” is simply “a car with a driver who you pay to take you somewhere” based on a 2022 online dictionary definition. (*Id.*) Uber’s definition for “taxi,” namely “an automobile licensed for hire as a taxi or taxicab and fitted with a meter,” is the superior construction for several reasons.

First, Uber’s construction “is the meaning that the term would have to a person of ordinary skill in the art in question ***at the time of the invention***,” which in this case is 1998 (not 2022). *See Phillips v. AWH Corp.*, 415 F.3d 1303, 1313 (Fed. Cir. 2005) (emphasis added). Uber’s construction is supported by the 1997 version of The Oxford Desk Dictionary and Thesaurus (Dkt. 31-8) and the declaration of Dr. Mundy, who explained that “a taxi is a special type of vehicle,” one that is licensed by licensing authorities, and that uses a taximeter to determine the fare. (Dkt. 31-4 at ¶¶ 26-28.) Dr. Mundy also stated that the 1997 Oxford definition “is accurate for the 1998 timeframe.” (*Id.* at ¶ 30.) Additionally, “[b]oth the license and meter requirements are necessary to the definition of taxi” for this timeframe. (*Id.* at ¶ 33.) Fare does not rebut this evidence and provides no evidence relevant to the meaning of “taxi” in 1998.

Second, Uber’s construction is supported by the Patent Office’s finding the plain and ordinary meaning of “taxi” for a patent application filed on June 10, 1997, about a year before the ’727 Patent application was filed. (Dkt. 31-9 at 3, 8.) There, the PTAB construed the term “taxi” consistent with Uber’s proposed construction.

Third, Fare’s reliance on its online dictionary definition violates this Court’s requirements. Fare did not disclose this dictionary definition as part of its extrinsic evidence identification as required under the OGP and the case schedule. (OGP Version 4.2 at 13; Dkt. 27 at 2; Dkt. 28 at 1.)

Thus, for all the reasons described above and in Uber’s opening brief, the Court should adopt the plain and ordinary meaning of the term “taxi” to a POSITA in 1998: “an automobile licensed for hire as a taxi or taxicab and fitted with a meter.”

B. “Trip Meter”

Claim(s)	Plaintiff’s Proposed Construction	Defendant’s Proposed Construction
Claim 1	“plain and ordinary meaning, needing no construction”	“a device in the taxi that determines distance traveled using input collected from the taxi”

Here again, Fare asserts that a term is entitled to its “plain and ordinary meaning” and needs no construction. Fare’s brief, however, fails to provide a definition for the plain and ordinary meaning of “trip meter” in 1998. As Uber established, a “trip meter” was a term of art in 1998. (Opening Br. at 7-8.) Consistent with Uber’s definition, a “trip meter” resides in a taxi vehicle and collects input directly from the vehicle. Fare’s infringement contentions, on the other hand, generally assert that a “trip meter” can be any device that measures trip distance regardless of where the device is located and regardless of what input is used to measure

distance. That dispute as to scope is one the Court must resolve. *O2 Micro*, 521 F.3d at 1360; *Eon Corp.*, 815 F.3d at 1319.

Fare's brief never challenges that Uber's proposed construction is the plain and ordinary meaning of "trip meter." (Response at 4-6.) Further, Fare never addresses the opinion of Uber's expert, Dr. Mundy, who explains that a POSITA in 1998 understood that a trip meter "is the part of a taximeter that calculates the distance traveled during a taxi ride" ... "using input collected from the taxi." (Dkt. 31-4 at ¶¶ 39, 46.) Instead, Fare makes several incorrect arguments (Response at 5-6) against Uber's construction, none of which are persuasive.

First, Fare argues that Uber's construction of "trip meter" reads out an embodiment of the invention found in unasserted claims 19, 27, and 39, which Fare alleges "claim a computer connected to a trip meter that is remote from the taxi." (*Id.* at 5.) This statement is false to the extent it suggests that the trip meter can be remote from the taxi. To the contrary, all disclosed embodiments require the trip meter to be mounted in the taxi. (Opening Br. at 7-8.) Further, the claims cited by Fare never recite a trip meter that is remote from the taxi. Those claims only recite a "remote computer" or "a computer [in] a remote location":

- Claim 19: "...a *remote computer* in network communication with a taxi trip meter."
- Claims 27 and 39: "...a *computer* determines the fare *from a remote location* and communicates the fare over a network connection."

(Response at 5 (emphasis added).) Thus, there is nothing in these claims, or any other portion of the '727 Patent, that disclose a remote trip meter.

Second, to the extent that Fare is arguing that the '727 Patent, including claims 19, 27, and 39, discloses a "trip meter" outside of a taxi because the trip meter is connected to a remote computer, it only serves to demonstrate that such unasserted claims are invalid under 35 U.S.C. § 112 for failing to provide sufficient written description support because there is no disclosure

anywhere in the '727 Patent of a remote computer or a network connection.² *Biogen Int'l GmbH v. Mylan Pharms., Inc.*, 18 F.4th 1333, 1341-42 (Fed. Cir. 2021) (“[T]he § 112 written-description requirement is satisfied only if the inventor conveys with reasonable clarity [that] he or she was in possession of the invention, and demonstrates that by disclosure in the specification of the patent.” (internal alterations and quotation marks omitted)). Here, the only reference to a “network connection” or a “remote” computer in the '727 Patent is in the claims added during reissue, which is insufficient. *PowerOasis, Inc. v. T-Mobile USA, Inc.*, 522 F.3d 1299, 1308 (Fed. Cir. 2008) (affirming that claims directed to a user interface on a mobile device to operate a vending machine failed to satisfy the § 112 written-description requirement where the original patent only disclosed a user interface on the vending machine itself).

Third, Fare argues that “the claimed invention contemplates the use of GPS for determining distance.” (Response at 6.) But as shown in Fare’s excerpt: “[t]he trip meter may be eliminated and the trip distance may be determined with GPS and map data.” (*Id.*) Thus, the '727 Patent discloses two separate and distinct ways of determining actual trip distance: either with a trip meter or with GPS and map data. Based on this disclosure, a trip meter is not needed when using GPS and map data. (Dkt. 31-2 at 4:37-39.) As a result, the use of GPS systems is irrelevant to the plain and ordinary meaning of trip meter.

Fourth, Fare argues Uber’s “construction impermissibly changes the patentee’s choice of words” and “the term ‘in the taxi’ is not in the patent claims.” (Response at 5.) Similarly, Fare argues that “[t]he term trip meter is neither ambiguous or explicitly defined and therefore should be construed according to it [sic] plain and ordinary meaning.” (*Id.* at 6.) These arguments miss

² Further, even if the claims were valid, mere recitation of the trip meter being “connected” to the remote computer does not disclose the trip meter being remote since the trip meter can still be installed in the taxi and connected to the remote computer via a wireless network connection.

the point. Where a term has a specific industry meaning, as trip meter does here, construction is required to clarify the meaning of the term, even if the term is not ambiguous or explicitly defined in the patent. *NobelBiz, Inc. v. Global Connect, L.L.C.*, 701 F. App'x 994, 997 (Fed. Cir. 2017) (holding that the district court must provide a construction, even where “the term is not ambiguous and will easily be understood by a jury,” if the parties dispute the scope of the term) (citing *O2 Micro*, 521 F.3d at 1361).

Thus, for at least all the reasons described above, the Court should adopt the plain and ordinary meaning of the term “trip meter” to a POSITA in 1998: “a device in the taxi that determines distance traveled using input collected from the taxi.”

C. “Starting Point” and “Destination Point”

Term	Claim(s)	Plaintiff's Proposed Construction	Defendant's Proposed Construction
Starting Point	Claims 1, 7, 12	“plain and ordinary meaning, needing no further construction”	“geographical location where the ride began”
Destination Point	Claims 1, 7, 12	“plain and ordinary meaning, needing no further construction”	“geographical location where the ride ended”

Fare attempts to justify that no construction is necessary for these terms in a single paragraph. As with the other claims terms, however, the parties dispute the scope of these terms and a construction is required. *O2 Micro*, 521 F.3d at 1360; *Eon Corp.*, 815 F.3d at 1319. The dispute, as set forth in Uber's opening brief, is whether the starting point and destination point are the geographical locations where the ride began and ended (*e.g.*, where a taxi driver “pulled the flag”) or whether they can be points specified in advance (*e.g.*, a limo ride from the airport to the office).

In its abbreviated argument, Fare still finds room to contradict itself, arguing that Uber's proposed construction should be rejected because it “attempts to incorporate limitations from the

specification” and it applies “limitation to the terms that are not found in the specification.”

(Response at 7.) Fare also argues that “the plain and ordinary meaning must apply.” (*Id.*) As to the last point, Uber agrees.

These terms are entitled to their plain and ordinary meaning to a POSITA in view of the ’727 Patent’s specification and file history. Here, the un rebutted evidence confirms that Uber’s proposed construction is that plain and ordinary meaning. As set forth in Uber’s opening brief, the plain language of the asserted claims and the disclosures in the specification, along with Dr. Mundy’s testimony, all indicate that a POSITA reviewing the ’727 Patent would understand “starting point” and “destination point” to have their plain and ordinary meaning in the taxi industry – namely, “geographical location where the ride [started/ended].” (Opening Br. at 9-12.)

Accordingly, Uber requests that the Court adopt its proposed construction for the plain and ordinary meaning of these terms.

D. “Waiting Time Encountered in Traffic”

Claim(s)	Plaintiff’s Proposed Construction	Defendant’s Proposed Construction
Claim 12	“plain and ordinary meaning, needing no further construction”	Indefinite. Alternatively, if the Court determines that the term can be construed: “amount of time spent stopped or below a predefined speed threshold”

Fare’s brief fails to address that this term is indefinite under 35 U.S.C. § 112. (Response at 7-8.) As Uber explained, this term is susceptible to, at least, three reasonable constructions, all of which are consistent with the claim language and the specification. (Opening Br. at 13-16.) And all three constructions have different claim scopes. (*Id.*) Accordingly, the Court can and should find this term indefinite.

In the event that the Court finds this term not indefinite, the only reasonable construction for this term is the one proposed by Uber: “amount of time spent stopped or below a predefined speed threshold.” This construction comports with the disclosures in the specification and is the one that a POSITA understood for “waiting time” in 1998. (*Id.* at 16-18.)

Fare argues that no construction is necessary because “Defendant does not show the terms are ambiguous or defined in the specification and thus a plain and ordinary meaning needing no further construction should attach.” (Response at 8.) Uber, however, demonstrated that the term is insolubly ambiguous (Opening Br. at 13-16)—a point that Fare does not acknowledge, let alone address. Fare’s bald assertions to the contrary should be rejected.

Moreover, the cases cited by Fare are inapposite. In each of those cases, the parties argued about whether the intrinsic record requires a narrowing construction or other limitations in the construction. Here, by comparison, the parties agree that the terms should be given their plain and ordinary meaning, but dispute what constitutes that plain and ordinary meaning.

V. CONCLUSION

For the reasons set forth herein and in Uber’s opening brief, the Court should adopt Uber’s proposed constructions for each of the five identified terms.

Dated: November 10, 2022

By: /s/ Melissa R. Smith

Melissa R. Smith
Texas State Bar No. 24001351
GILLIAM & SMITH, LLP
303 South Washington Avenue
Marshall, Texas 75670
Telephone: 903.934.8450
Facsimile: 903.934.9257
Email: melissa@gilliamsmithlaw.com

Benjamin J. Bradford (*pro hac vice*)
Lisa M. Schoedel (*pro hac vice*)

Yusuf Esat (*pro hac vice*)
JENNER & BLOCK LLP
353 North Clark Street
Chicago, IL 60654
Telephone: 312-840-7224
Facsimile: 312-840-7324
BBradford@jenner.com
LSchoedel@jenner.com
YEsat@jenner.com

Attorneys for Defendant Uber Technologies, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on November 10, 2022, the foregoing was served upon counsel of record via electronic mail:

/s/ Melissa R. Smith
Melissa R. Smith

**IN THE UNITED STATES DISTRICT COURT
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WACO DIVISION**

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	)	
Plaintiff,	)	
	)	C.A. No. 6:22-cv-00317-ADA
v.	)	
	)	
UBER TECHNOLOGIES, INC. d/b/a UBER,	)	
	)	
Defendant.	)	
_____	)	

DECLARATION OF LISA M. SCHOEDEL

I, Lisa M. Schoedel, declare the following:

1. I am an attorney at Jenner & Block, LLP, and am one of the attorneys representing Defendant Uber Technologies, Inc. d/b/a Uber (“Uber”) in this case.
2. Exhibit A to this declaration is a true and correct copy of Docket No. 44 in *Gold IP LLC v. Augury, Inc.*, 1:21-cv-04788 (S.D.N.Y. Aug. 22, 2022).

I hereby declare under penalty of perjury that all statements made herein of my own knowledge are true and correct and that all statements made on information and belief are believed to be true and correct.

Executed: November 10, 2022 in Geneva, Illinois.

/s/ Lisa M. Schoedel
Lisa M. Schoedel

Exhibit A

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

**GOLD IP LLC,
Plaintiff,**

v.

**AUGURY, INC.,
Defendant.**

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)
)

Civil Action No. 1:21-cv-04788

JURY TRIAL DEMANDED

**PLAINTIFF GOLD IP LLC'S
OPENING CLAIM CONSTRUCTION BRIEF**

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I. CLAIM-CONSTRUCTION LAW

A. Resolving a Claim-Construction Dispute

The parties' claim-construction dispute will typically be reflected by the proposed constructions. Thus, a court's rejection of a defendant's proposed construction and adoption of a "plain and ordinary meaning" construction will typically resolve the parties' claim-construction dispute without need for further construction of the term.¹

B. Other Legal Principles

a. Heavy Bias to Plain and Ordinary Meaning

The purpose of claim construction is "to clarify and when necessary to explain what the patentee covered by the claims, for use in the determination of infringement."²

"Claim construction focuses primarily on the language of the claims."³ Per this "primacy of the claims,"⁴ "[T]he claim construction inquiry, [], begins and ends in all cases with the

¹ See *PerdiemCo, LLC v. IndusTrack LLC*, No. 2:15-cv-727-JRG-RSP, 2016 U.S. Dist. LEXIS 87927, at *64 (E.D. Tex. July 7, 2016) (Payne, Mag.) (stating, "The Court therefore expressly rejects Defendants' indefiniteness arguments. No further construction is necessary. [Citations and paragraph break omitted]. Defendants have cited *Maytag Corp. v. Electrolux Home Prods., Inc.*, 411 F. Supp. 2d 1008 (N.D. Iowa 2008), as authority for the proposition that construction is required because 'asserting that [the ordinary meaning of a term] should apply, without further construction, merely begs the question of what that meaning is.' [Citations omitted]. *Maytag* is not binding authority and, moreover, here the Court has resolved the parties dispute by rejecting Defendants' indefiniteness argument and Defendants' argument that the breadth of the 'code' terms necessarily gives rise to a lack of reasonable certainty as to claim scope. [Paragraph break omitted]. The Court accordingly hereby construes **"user identification codes"** and **"authorized user identification code"** to have their **plain meaning**. [Court's original bolding].); *Optis Wireless Tech., LLC v. Huawei Techs. Co.*, No. 2:17-cv-123-JRG-RSP, 2018 U.S. Dist. LEXIS 7711, at **84, 115 (E.D. Tex. Jan. 18, 2018) (Payne, Mag.) (distinguishing *O2 Micro Int'l Ltd. v. Beyond Innovation Tech. Co.*, 521 F.3d 1351, 1362 (Fed. Cir. 2008)); *Optis Cellular Tech., LLC v. Kyocera Corp.*, Nos. 2:16-cv-0059-JRG-RSP, 2017 U.S. Dist. LEXIS 18191, at **87, 88, 92 (E.D. Tex. Feb. 8, 2017) (Payne, Mag.) (distinguishing *O2 Micro*); *Nokia Solutions & Network US LLC v. Huawei Techs. Co. Ltd.*, No. 2:16-cv-0756-JRG-RSP, 2017 U.S. Dist. LEXIS 79837, at *70 (E.D. Tex. May 24, 2017) (Payne, Mag.) (distinguishing *O2 Micro*); *Mobile Telecommc'n Techs., LLC v. Google Inc.*, No. 2:16-CV-2-JRG-RSP, 2016 U.S. Dist. LEXIS 174667, at **51, 52 (E.D. Tex. Dec. 18, 2016) (Payne, Mag.).

² *Mobile Telecommc'ns, LLC v. T-Mobile USA, Inc.*, 78 F. Supp. 3d 634, 656 (E.D. Tex. 2015) (Payne, Mag.) (quoting *U.S. Surgical Corp. v. Ethicon, Inc.*, 103 F.3d 1554, 1568 (Fed. Cir. 1997)); *Freeny v. Murphy USA Inc.*, No. 2:13-CV-791-RSP, 2015 U.S. Dist. LEXIS 6377, at *90 (E.D. Tex. Jan. 21, 2015) (Payne, Mag.) (quoting the same case).

³ *Mobile Telecommc'ns, LLC v. T-Mobile USA, Inc.*, 78 F. Supp. 3d at 664 (quoting *Aria Diagnostics, Inc. v. Sequenom, Inc.*, 726 F.3d 1296, 1300 (Fed. Cir. 2013)).

⁴ *Id.*

actual words of the claim.”⁵

In the absence of ambiguity, construing claim terms with different language than that of the claim (i.e., providing a construction other than “plain and ordinary meaning”) runs the risk of “redraft[ing],”⁶ “redefin[ing],”⁷ or otherwise “chang[ing]”⁸ a claim term’s meaning. The danger of “redraft[ing]”⁹ or “redefin[ing]”¹⁰ a claim term’s meaning is particularly heightened when a proposed construction uses words found nowhere in the patent specification.¹¹

Unless the patent applicant clearly redefined (in the application or prosecution history) a term, an easily understandable, unambiguous term should simply be construed as “plain and ordinary meaning.”¹² A proposed construction narrowing a term from its plain and ordinary meaning should be rejected if the intrinsic evidence does not require the narrowing restriction.¹³

⁵ *Mobile Telecommc 'ns, LLC*, 78 F. Supp. 3d at 664 (quoting *Renishaw PLC v. Marposs Societa' per Azioni*, 158 F.3d 1243, 1248 (Fed. Cir. 1998)).

⁶ See *Arthrex, Inc. v. Smith & Nephew, Inc.*, No. 2:15-cv-1047-RSP, 2016 U.S. Dist. LEXIS 105750, at **93, 173 (E.D. Tex. Aug. 10, 2016) (Payne, Mag.).

⁷ See *Core Wireless Licensing S.a.r.l. v. LG Elecs. Inc.*, No. 2:14-cv-0911-JRG-RSP, 2015 U.S. Dist. LEXIS 150041, at **60, 61, 65, 66 (E.D. Tex. Nov. 5, 2015) (Payne, Mag.).

⁸ See *Freney*, 2015 U.S. Dist. LEXIS 6377, at **52, 61, 68, 90 (Payne, Mag.).

⁹ See *Arthrex*, 2016 U.S. Dist. LEXIS 105750, at **93, 173 (Payne, Mag.).

¹⁰ See *Core Wireless Licensing S.a.r.l.*, 2015 U.S. Dist. LEXIS 150041, at **60, 61, 65, 66 (Payne, Mag.).

¹¹ See *Arthrex*, 2016 U.S. Dist. LEXIS 105750, at *173 (Payne, Mag.) (stating, “[G]rooves’ does not appear in the specification. The Court is not persuaded that it should redraft the claims to replace a term that is in the specification with a term that is not in the specification, particularly when doing so would not provide any additional clarity.”); *Freney*, 2015 U.S. Dist. LEXIS 6377, at *73 (Payne, Mag.) (stating, “The specification never uses the term ‘group’ or ‘encoded,’ and the Court rejects Defendant’s inclusion of these terms as not being necessary or warranted.”).

¹² See *Arthrex*, 2016 U.S. Dist. LEXIS 105750, at **106, 108, 127 173, 174 (Payne, Mag.); *Traxxas, L.P. v. Hobbico, Inc.*, No. 2:16-CV-00768-JRG-RSP, 2017 U.S. Dist. LEXIS 162858, at *41 (E.D. Tex. Sept. 29, 2017) (Payne, Mag.).

¹³ *Arthrex*, 2016 U.S. Dist. LEXIS 105750, at *127 (Payne, Mag.) (stating, “There is nothing in the claim language that *requires* [emphasis added] the width to be the largest width.”); *Optis Cellular*, 2017 U.S. Dist. LEXIS 18191, at *27 (stating, “Defendants have pointed to no clear language in the intrinsic record of lexicography, disavowal, or disclaimer *mandating* [emphasis added] that ‘mapping’ be limited to ‘placing.’”); *Mobile Telecommc 'ns, LLC v. T-Mobile USA, Inc.*, 78 F. Supp. 3d at 661 (stating, “. . . Defendants have failed to identify anything in the claims or the specification that *necessarily limit* [emphasis added] s the disputed term to . . .”); see also *PerdiemCo.*, 2016 U.S. Dist. LEXIS 87927, at *90 (stating, “Plaintiff has not demonstrated that the existence of multiple ‘levels’ *necessarily requires* [emphasis added] a hierarchical organization.”); *Cellular Commc 'ns Equipment LLC v. AT&T, Inc.*, No. 2:15-CV-576-RWS-RSP, 2016 U.S. Dist. LEXIS 174666, at **62, 63 (E.D. Tex. Dec. 19, 2016) (Payne, Mag.) (stating, “[T]he specification does not *limit* [emphasis added] the claim scope to ‘resource blocks’ (RBs), which are only one disclosed example.”); *Core Wireless Licensing S.a.r.l.*, 2015 U.S. Dist.

A defendant proposing a different construction because of purported ambiguity bears the burden of proving the ambiguity.¹⁴

b. Requirements under 35 U.S.C. §112(f).

The use of the term “means” triggers a rebuttable presumption that § 112, ¶ 6 [now § 112(f)] applies.¹⁵ The standard is whether the words of the claim are understood by persons of ordinary skill in the art to have a sufficiently definite meaning as the name for structure. [citation omitted] When a claim term lacks the word “means,” the presumption can be overcome and § 112, para. 6 will apply if the challenger demonstrates that the claim term fails to “recite sufficiently definite structure” or else recites “function without reciting sufficient structure for performing that function.” [citation omitted]¹⁶

If persons of ordinary skill in the art reading the specification understand the term to have a sufficiently definite meaning as the name for the structure that performs the function, even when the term covers a broad class of structures or identifies the structures by their function (e.g., “filters,” “brakes,” “clamp,” “screwdriver,” and “locks”) 35 USC 112(f) will not apply.¹⁷ Many devices take their names from the functions they perform. The term is not required to denote a specific structure or a precise physical structure to avoid the application of 35 USC 112(f).¹⁸ The

LEXIS 150041, at *90 (Payne, Mag.) (stating, “There is no *requirement* [emphasis added] in the claim that . . .”).

¹⁴ *Optis Cellular*, 2017 U.S. Dist. LEXIS 18191, at **91, 92 (stating, “Defendants have not demonstrated any lack of clarity of the actual claim language in light of the specification.”); *Freeny*, 2015 U.S. Dist. LEXIS 6377, at **52, 60, 68, 90 (Payne, Mag.) (stating, “Absent clear evidence to the contrary, the Court is hesitant to change the plain meaning of a term.”); *see also Applera Corp. v. MJ Research, Inc.*, 297 F. Supp. 2d 453, 455, 456 (D. Conn. 2004); *Chamberlain Grp., Inc. v. Techtronic Indus. Co.*, No. 16 C 6097, 2017 U.S. Dist. LEXIS 53509, at *55 (N.D. Ill. Apr. 7, 2017).

¹⁵ *TecSec, Inc. v. IBM*, 731 F.3d 1336, 1348-9 (Fed. Cir. 2013) *citing TriMed, Inc. v. Stryker Corp.*, 514 F.3d 1256, 1259 (Fed. Cir. 2008).

¹⁶ *Williamson v. Citrix Online, LLC*, 792 F.3d 1339, 1349 (Fed. Cir. 2015).

¹⁷ *Apex Inc. v. Raritan Computer, Inc.*, 325 F.3d 1364, 1372-73, 66 USPQ2d 1444, 1451-52 (Fed. Cir. 2003)

¹⁸ *Greenberg v. Ethicon Endo-Surgery, Inc.*, 91 F.3d 1580, 1583, 39 USPQ2d 1783, 1786 (Fed. Cir. 1996) (“*See Watts*, 232 F.3d at 880, 56 USPQ2d at 1838; *Inventio AG v. Thyssenkrupp Elevator Americas Corp.*, 649 F.3d 1350, 99 USPQ2d 1112 (Fed. Cir. 2011) (holding that the claim terms “modernizing device” and “computing unit” when read in light of the specification connoted sufficient, definite structure to one of skill in the art to preclude

following are examples of structural terms that have been found **not** to invoke 35 USC 112(f): “circuit,” “detent mechanism,” “digital detector,” “reciprocating member,” “connector assembly,” “perforation,” “sealingly connected joints,” and “eyeglass hanger member.” Likewise, the Federal Circuit found the recitation of “aesthetic correction circuitry” sufficient to avoid a means plus function analysis or treatment because the term “circuit,” combined with a description of the function of the circuit, connoted sufficient structure to one of ordinary skill in the art.¹⁹ The party alleging that the specification fails to disclose sufficient corresponding structure must make that showing by clear and convincing evidence.²⁰

c. Level of Ordinary Skill in the Art

A person of ordinary skill in the art (“POSITA”) at the time of the filing of the Asserted Patents or Patents-in-Suit would have at least a Master of Science (“MS”) Degree in Mechanical or Electrical Engineering, or equivalent work experience in the field of impact transducers for measuring vibration.

II. TERMS FOR WHICH DEFENDANT PROPOSES A CONSTRUCTION

C. “DATA ENCODED AS IMPULSES”

Claim Term	Gold’s Construction	Defendant’s Construction
“data encoded as impulses”	“plain and ordinary meaning, needing no construction”	“a representation of information that has been converted from another format into impulses”

Defendant does not appear to allege that the terms are ambiguous or that they would not be understood by one of ordinary skill in the art. However, Defendant’s construction

application of 35 [USC112(f)].

¹⁹ *Mass. Inst. of Tech. v. Abacus Software*, 462 F.3d 1344, 1359-1360 (Fed. Cir. 2006).

²⁰ *Id.*, citing *Budde v. Harley-Davidson, Inc.*, 250 F.3d 1369, 1380-81 (Fed. Cir. 2001).

impermissibly changes the patentee’s choice of words without providing an explicit basis for changing patentee’s words. As the term “representation of information” is not in the patent claims, it should not be in the construction.²¹ Thus, Gold’s construction of plain and ordinary meaning is more appropriate.

Defendant’s proposal is further shown incorrect by looking at a dictionary definition of “data:”

Definition of *data*

- 1 : factual information (such as measurements or statistics) used as a basis for reasoning, discussion, or calculation
// the data is plentiful and easily available
 — H. A. Gleason, Jr.
// comprehensive data on economic growth have been published
 — N. H. Jacoby
- 2 : information in digital form that can be transmitted or processed
- 3 : information output by a sensing device or organ that includes both useful and irrelevant or redundant information and must be processed to be meaningful

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Defendant’s added word of “representation” finds no support in the dictionary definition of data.

D. “FLOATING MASS TRANSDUCER ASSEMBLY”

Claim Term	Gold’s Construction	Defendants’ Construction
“floating mass transducer assembly”	“plain and ordinary meaning, needing no construction”	“transducer assembly that is suspended such that the assembly can vibrate independently””

²¹ See *Arthrex*, 2016 U.S. Dist. LEXIS 105750, at *173.

²² See <https://www.merriam-webster.com/dictionary/data>.

Because there is no evidence that the patent applicant clearly redefined (in the application or prosecution history) “floating mass transducer assembly,” and easily understandable, unambiguous term, it should simply be construed as “plain and ordinary meaning.”²³ A proposed construction narrowing a term from its plain and ordinary meaning should be rejected if the intrinsic evidence does not require the narrowing restriction.²⁴ A defendant proposing a different construction because of purported ambiguity bears the burden of proving the ambiguity.²⁵ Rejection of Defendants’ proposed construction and adoption of a “plain and ordinary meaning” construction resolves the claim-construction dispute without need for further construction of the term.²⁶ The word suspended is not in the claims or specification. Thus, defendant’s proposed construction would add ambiguity to the term by using a word found not in the patent or specification. If any further clarity is needed, the term, “floating mass transducer assembly” would be understood by one of ordinary skill in the art to be an assembly of a transducer that makes use of a mass that floats in a sense that it is not firmly attached to a substrate and can thus vibrate in response to an impact.

²³ See *Arthrex*, 2016 U.S. Dist. LEXIS 105750, at **106, 108, 127 173, 174 (Payne, Mag.); *Traxxas*, 2017 U.S. Dist. LEXIS 162858, at *41 (Payne, Mag.).

²⁴ *Arthrex*, 2016 U.S. Dist. LEXIS 105750, at *127 (Payne, Mag.) (stating, “There is nothing in the claim language that *requires* [emphasis added] the width to be the largest width.”); *Optis Cellular*, 2017 U.S. Dist. LEXIS 18191, at *27 (stating, “Defendants have pointed to no clear language in the intrinsic record of lexicography, disavowal, or disclaimer *mandating* [emphasis added] that ‘mapping’ be limited to ‘placing.’”); *Mobile Telecommc’ns, LLC v. T-Mobile USA, Inc.*, 78 F. Supp. 3d at 661 (stating, “. . . Defendants have failed to identify anything in the claims or the specification that *necessarily limit* [emphasis added] s the disputed term to . . .”); see also *PerdiemCo*, 2016 U.S. Dist. LEXIS 87927, at *90 (stating, “Plaintiff has not demonstrated that the existence of multiple ‘levels’ *necessarily requires* [emphasis added] a hierarchical organization.”); *Cellular Commc’ns Equipment*, 2016 U.S. Dist. LEXIS 174666, at **62, 63 (stating, “[T]he specification does not *limit* [emphasis added] the claim scope to ‘resource blocks’ (RBs), which are only one disclosed example.”); *Core Wireless Licensing S.a.r.l.*, 2015 U.S. Dist. LEXIS 150041, at *90 (stating, “There is no *requirement* [emphasis added] in the claim that . . .”).

²⁵ *Optis Cellular*, 2017 U.S. Dist. LEXIS 18191, at **91, 92 (stating, “Defendants have not demonstrated any lack of clarity of the actual claim language in light of the specification.”); *Freeny*, 2015 U.S. Dist. LEXIS 6377, at **52, 60, 68, 90 (Payne, Mag.) (stating, “Absent clear evidence to the contrary, the Court is hesitant to change the plain meaning of a term.”); see also *Applera*, 297 F. Supp. 2d at 455, 456; *Chamberlain*, 2017 U.S. Dist. LEXIS 53509, at *55.

²⁶ See *PerdiemCo.*, 2016 U.S. Dist. LEXIS 87927, at *64.

E. “PICK-UP PORTION”

Claim Term	Gold’s Construction	Defendants’ Construction
“pick-up portion”	“plain and ordinary meaning, needing no construction”	This term should be construed according to 35 U.S.C 112(6). Function: picking up [vibrations] Structure: thin rectangular plate 42/142 or annular element 78/178

This term is an easily understandable, unambiguous term²⁷ that, thus, should simply be construed as “plain and ordinary meaning.”²⁸ Defendant’s proposed construction that the term should be governed by 35 USC Section 112(6) fails to present clear and convincing evidence that the specification fails to disclose sufficient corresponding structure.²⁹ A term is not required to denote a specific structure or a precise physical structure to avoid the application of 35 USC 112(f).³⁰ The following are examples of structural terms that have been found **not** to invoke 35 USC 112(f): “circuit,” “detent mechanism,” “digital detector,” “reciprocating member,” “connector assembly,” “perforation,” “sealingly connected joints,” and “eyeglass hanger member.” Likewise, the Federal Circuit found the recitation of “aesthetic correction circuitry” sufficient to avoid a means plus function analysis or treatment because the term “circuit,” combined with a description of the function of the circuit, connoted sufficient structure to one of ordinary skill in the art.³¹ Here, the term, “pick-up portion” would be understood by one of

²⁷ See *Mallinckrodt, Inc. v. Masimo Corp.*, 254 F. Supp. 2d 1140, 1152 (C.D. Cal. 2003) (holding “processor” required no construction).

²⁸ See *Arthrex*, 2016 U.S. Dist. LEXIS 105750, at **106, 108, 127 173, 174; *Traxxas*, 2017 U.S. Dist. LEXIS 162858, at *41.

²⁹ *Id.*, citing *Budde v. Harley-Davidson, Inc.*, 250 F.3d 1369, 1380-81 (Fed. Cir. 2001).

³⁰ *Greenberg v. Ethicon Endo-Surgery, Inc.*, 91 F.3d 1580, 1583, 39 USPQ2d 1783, 1786 (Fed. Cir. 1996) (“See *Watts*, 232 F.3d at 880, 56 USPQ2d at 1838; *Inventio AG v. Thyssenkrupp Elevator Americas Corp.*, 649 F.3d 1350, 99 USPQ2d 1112 (Fed. Cir. 2011) (holding that the claim terms “modernizing device” and “computing unit” when read in light of the specification connoted sufficient, definite structure to one of skill in the art to preclude application of 35 [USC] 112(f)).

³¹ *Mass. Inst. of Tech. v. Abacus Software*, 462 F.3d 1344, 1359-1360 (Fed. Cir. 2006).

ordinary skill in the art to be the structure for “picking up” the vibrations.³² The function of the structure is adequately disclosed in the specification for one of ordinary skill in the art.

F. “BIASED”

Claim Term	Gold’s Construction	Defendants’ Construction
“biased”	“plain and ordinary meaning, needing no construction”	“urged by a force as with a spring”

Defendant does not appear to allege that the terms are ambiguous or that they would not be understood by one of ordinary skill in the art. However, Defendant’s construction impermissibly changes the patentee’s choice of words without providing an explicit basis for changing patentee’s words. As the term “urged by a force as with a spring” is not in the patent claims, it should not be in the construction.³³ Thus, Gold’s construction of plain and ordinary meaning is more appropriate. Defendant’s addition of a spring is improper as the term “biased” has a well understood meaning of being placed or forced against and does not require a spring. In fact, the incorporation of a spring into any construction commits a cardinal sin in patent law by incorporating limitations from the specification. One of ordinary skill in the art would understand that there are a multitude of ways to bias objects.

G. “NORMAL TO”

Claim Term	Gold’s Construction	Defendants’ Construction
“normal to”	“plain and ordinary meaning, needing no	“perpendicular to

³² Doc. No. 31-1 at Column 1, lines 51-55 (“1:51-55”).

³³ See *Arthrex*, 2016 U.S. Dist. LEXIS 105750, at *173.

	construction”	
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Because there is no evidence that the patent applicant clearly redefined (in the application or prosecution history) “normal to,” an easily understandable, unambiguous term, it should simply be construed as “plain and ordinary meaning.”³⁴ A proposed construction narrowing a term from its plain and ordinary meaning should be rejected if the intrinsic evidence does not require the narrowing restriction.³⁵ A defendant proposing a different construction because of purported ambiguity bears the burden of proving the ambiguity.³⁶

H. “VIBRATIONS TRANSMISSIVE MEMBER”

Claim Term	Gold’s Construction	Defendants’ Construction
“vibrations transmissive member”	“plain and ordinary meaning, needing no construction”	This term should be construed according to 35 U.S.C. 112(6). Function: transmitting vibrations Structure: plate 151/161

This term is an easily understandable, unambiguous term³⁷ that, thus, should simply be construed as “plain and ordinary meaning.”³⁸ Defendant’s proposed construction that the term

³⁴ See *Arthrex*, 2016 U.S. Dist. LEXIS 105750, at **106, 108, 127 173, 174 (Payne, Mag.); *Traxxas*, 2017 U.S. Dist. LEXIS 162858, at *41 (Payne, Mag.).

³⁵ *Arthrex*, 2016 U.S. Dist. LEXIS 105750, at *127 (stating, “There is nothing in the claim language that *requires* [emphasis added] the width to be the largest width.”); *Optis Cellular*, 2017 U.S. Dist. LEXIS 18191, at *27 (stating, “Defendants have pointed to no clear language in the intrinsic record of lexicography, disavowal, or disclaimer *mandating* [emphasis added] that ‘mapping’ be limited to ‘placing.’”); *Mobile Telecomm’ns, LLC v. T-Mobile USA, Inc.*, 78 F. Supp. 3d at 661 (stating, “. . . Defendants have failed to identify anything in the claims or the specification that *necessarily limit* [emphasis added] s the disputed term to . . .”); see also *PerdiemCo*, 2016 U.S. Dist. LEXIS 87927, at *90 (stating, “Plaintiff has not demonstrated that the existence of multiple ‘levels’ *necessarily requires* [emphasis added] a hierarchical organization.”); *Cellular Commc’ns Equipment*, 2016 U.S. Dist. LEXIS 174666, at **62, 63 (stating, “[T]he specification does not *limit* [emphasis added] the claim scope to ‘resource blocks’ (RBs), which are only one disclosed example.”); *Core Wireless Licensing S.a.r.l.*, 2015 U.S. Dist. LEXIS 150041, at *90 (stating, “There is no *requirement* [emphasis added] in the claim that . . .”).

³⁶ *Optis Cellular*, 2017 U.S. Dist. LEXIS 18191, at **91, 92 (stating, “Defendants have not demonstrated any lack of clarity of the actual claim language in light of the specification.”); *Freeny*, 2015 U.S. Dist. LEXIS 6377, at **52, 60, 68, 90 (Payne, Mag.) (stating, “Absent clear evidence to the contrary, the Court is hesitant to change the plain meaning of a term.”); see also *Applera*, 297 F. Supp. 2d at 455, 456; *Chamberlain*, 2017 U.S. Dist. LEXIS 53509, at *55.

³⁷ See *Mallinckrodt, Inc. v. Masimo Corp.*, 254 F. Supp. 2d 1140, 1152 (C.D. Cal. 2003) (holding “processor” required no construction).

³⁸ See *Arthrex*, 2016 U.S. Dist. LEXIS 105750, at **106, 108, 127 173, 174; *Traxxas*, 2017 U.S. Dist. LEXIS

should be governed by 35 USC Section 112(6) fails to present clear and convincing evidence that the specification fails to disclose sufficient corresponding structure.³⁹ A term is not required to denote a specific structure or a precise physical structure to avoid the application of 35 USC 112(f).⁴⁰

Here, the specification would allow one of ordinary skill in the art to understand the identity of the function and structure:

the receiving unit connected to impact transmissive through the impact transmissive body, and further in that the vibration sensitive transducer constitutes part of a floating mass transducer assembly which has a pick-up portion biased towards surface of a rigid body, the rigid by being either the impact transmissive body or being a vibrations transmissive member within the device which is in a vibration receiving association with the impact transmissive body. The floating 41

And

162858, at *41.

³⁹ *Id.*, citing *Budde v. Harley-Davidson, Inc.*, 250 F.3d 1369, 1380-81 (Fed. Cir. 2001).

⁴⁰ *Greenberg v. Ethicon Endo-Surgery, Inc.*, 91 F.3d 1580, 1583, 39 USPQ2d 1783, 1786 (Fed. Cir. 1996) ("See *Watts*, 232 F.3d at 880, 56 USPQ2d at 1838; *Inventio AG v. Thyssenkrupp Elevator Americas Corp.*, 649 F.3d 1350, 99 USPQ2d 1112 (Fed. Cir. 2011) (holding that the claim terms "modernizing device" and "computing unit" when read in light of the specification connoted sufficient, definite structure to one of skill in the art to preclude application of 35 [USC112(f)]).

⁴¹ Doc. No. 31-1 at 1:58-65.

15 Reference is now being made to FIG. 5 showing an
embodiment which is a modification of the embodiment
shown in FIG. 3. Accordingly, like components were given
the same reference numerals shifted by 100. The difference
20 resides in the addition of a vibrations transmissive member
in the form of plate 161 attached to the bottom surface 168
of housing 166. Thus, the impact transmissive portion 178
bears against plate 161. Thus, vibrations reaching device
160 will impact pick-up portion 178 through plate 161.

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As such, the term is not a means plus function claim term and should be construed according to the plain and ordinary meaning, needing no construction.

I. “PRIMARY SURFACE”

Claim Term	Gold’s Construction	Defendants’ Construction
“primary surface”	“plain and ordinary meaning, needing no construction”	Indefinite

There is no evidence of the patent applicant defining a special meaning (i.e., meaning other than its plain and ordinary meaning) to this term by clear disavowal or lexicography. Further, this is a simple, straightforward term. Thus, this term should be construed as “plain and ordinary meaning, needing no construction.” Here, “primary surface” is mentioned several times in the specification and in an embodiment is identified as reference numerals 22 and 68.⁴³ There simply is nothing indefinite in the term.

IV. CONCLUSION

Plaintiff Gold’s claim constructions should be adopted because the constructions follow proper claim-construction principles.

⁴² Doc. No. 31-1 at 4:15-23.

⁴³ Doc. No. 31-1 at 3:11-18 (ref no. 22) and 3:51-56 (ref no. 68).

Respectfully submitted,

/s/ David J. Hoffman

David J. Hoffman
254 W 15th St., Apt. 2C
New York, New York 10011
(917) 701-3117 (telephone)
djhoffman@djhoffmanlaw.com

Ramey LLP

William P. Ramey, III (Pro Hac Vice anticipated)
Texas State Bar No. 24027643
5020 Montrose Blvd., Suite 800
Houston, Texas 77006
(713) 426-3923 (telephone)
(832) 900-4941 (fax)
wramey@rameyfirm.com

Attorneys for Gold IP

CERTIFICATE OF SERVICE

Pursuant to the Federal Rules of Civil Procedure and Local Rule CV-5, I hereby certify that all counsel of record who have appeared in this case are being served today, August 22, 2022, with a copy of the foregoing via the Court's CM/ECF system.

/s/ David J. Hoffman

David J. Hoffman