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

THETA IP, LLC, Plaintiff, v. APPLE INC., Defendant.	Civil Action No.: 6:23-cv-00314-ADA **JURY TRIAL DEMANDED**

THETA IP, LLC'S SUR-REPLY CLAIM CONSTRUCTION BRIEF

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I. THIS COURT PROPERLY CONSTRUED THE CLAIMS BEFORE

Apple's Reply fails to provide any reason to depart from the Court's prior treatment of those terms that it considered in the prior case, or to improperly limit those terms Apple has raised for the first time here. Apple's proposed additions to the claims—such as its request to artificially limit "signal path" to "path for analog signal"—are based only on expert testimony or attorney argument. And that expert testimony is founded only on unsupported say so. Apple fails to show any basis for an alleged disclaimer that both the Eastern District of Texas and this Court declined to find before—and gives no reason for this Court to change the construction of the "dynamically …" terms that it gave in the *Theta v. Samsung* litigation. For all of the reasons discussed below, and in Theta's Response brief, Apple's proposed claim constructions should be denied.

II. SIGNAL PATH IS NOT LIMITED TO ONLY ANALOG COMPONENTS

As Apple's Reply brief and expert deposition make even clearer, Apple is trying to limit the Asserted Claims based only on a conclusory expert argument that the embodiments disclose only analog. *See, e.g.*, Reply at 2 (alleging that "the only written description" refers to analog). This is completely improper, even if it were the case that every embodiment only discussed analog. *See, e.g.*, *Liebel-Flarsheim Co. v. Medrad, Inc.*, 358 F.3d 898, 913 (Fed. Cir. 2004) ("it is improper to read limitations from a preferred embodiment described in the specification—even if it is the only embodiment—into the claims absent a clear indication in the intrinsic record that the patentee intended the claims to be so limited"); *Phillips v. AWH Corp.*, 415 F.3d 1303, 1320 (Fed. Cir. 2005) (en banc) ("one of the cardinal sins of patent law—reading a limitation from the written description into the claims"). It is also factually wrong. Apple's arguments contradict the specification—which does discuss analog-to-digital conversion and digital signal processing in the signal path. At bottom, Apple's arguments are based only on the unsupported and non-credible statements of Apple's expert.

The patents mention certain components that would ordinarily be analog, but only explicitly discuss "analog" RF signals in the context of an "analog-to-digital converter" in the signal path.[1] *See, e.g.*, Ex. A ('330 Patent) at 4:32-47 (emphases added):

> … signal is filtered by low pass filters 108 and 110, which in turn drive baseband amplifiers 114 and 116. The outputs of baseband amplifiers 114 and 116 are typically converted to ***digital signals*** by ***analog-to-digital converters at the front end of a digital signal processing block***.

Challenged to account for this reference to digital signals, Apple's expert has taken the incredible position that the "signal path" somehow stops before the signal reaches the "digital ***signal*** processing" block. Reply at 4; Dkt. 53-2 at ¶23 ("comes after the 'signal path'"). Apple and Dr. Tentzeris do not answer the obvious question of how the analog-to-digital converter could convert the signal, or how the digital signal processing block could process the signal, without first receiving the signal. *See, e.g.*, Ex. L (Tentzeris Tr.) at 30:7-32:22.[2] The Court should not credit logically inconsistent, conclusory testimony such as this on claim construction. *See, e.g.*, *Phillips*, 415 F.3d at 1318 ("an expert's conclusory, unsupported assertions as to a term's definition are not helpful to a court"). Dr. Tentzeris' opinions are supported only by his own say so. *See, e.g.*, Ex. L (Tentzeris Tr.) at 27:3-28:17 ("So that's why I said I believe only analog signals"), 34:10-35:13 ("Because I'll say that would be obvious from [looking at] the schematic that's analog."). And his explanations of them are not coherent or credible. *Id.* at 26:3-28:17, 30:7-32:22. They consistently discuss (improperly) limiting claim scope based on what Dr. Tentzeris finds in the specification.

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[1] The patents also say that certain "control lines" can be digital "logic signals," "analog signals," or "other signal or bias lines." *See, e.g.*, Ex. A ('330 Patent) at 8:39-41. But this example of agnosticism about signal type is only indirectly related to the RF signal path under discussion.

[2] Due to the timing of Dr. Tentzeris' availability for deposition, Theta did not receive a final transcript of his deposition prior to the filing deadline of this brief. Citations here are to the Rough Transcript, attached as Ex. L, which contains obvious transcription errors. Theta will provide the final transcript in a supplemental filing.

See, e.g., *id.* ("I cannot [find] anything in Figure 1, making me believe that a [digital] part is g[o]ing to be critical."), 31:23-25 ("My answer about the patent has to do in the context of what I see in the figures of the patent.").

The Court should reject Apple's transparent attempt to read artificially limiting language into simple claim terms. The "signal path" is the path of the signal. Apple admits there are multiple components in the signal path. Reply at 2. And of course, a person of skill would understand that some of the named signal path components would ordinarily be analog components. But some of them, for example a filter, could also be digital. *See, e.g.*, Response at 3-4; Ex. L (Tentzeris Tr.) at 17:23-18:2. Analog signals can be converted to digital for various filtering, processing, and/or measuring operations on the signal. *See, e.g.*, Ex. A ('330 Patent) at 4:32-47; Ex. L (Tentzeris Tr.) at 32:24-33:7, 37:1-3. They could be converted from digital back to analog if the application called for that. Other, unclaimed components—which may be part of the signal path of these open-ended "comprising" claims—could be digital. Response at 3-4; Ex. L (Tentzeris Tr.) at 22:21-23:20. Apple fails to provide any legitimate basis to add a limitation requiring that every such claimed—and unclaimed—component in the path of the signal be "analog."

The well-known existence and application of analog-to-digital, and digital-to-analog, converters—as discussed in the patents and admitted to be within the understanding of a person of skill in the art (see Ex. L at 35:15-36:25)—means that the received RF signal can be both analog or digital at different points in the signal path. Theta's statements about impedance being an analog AC concept (see Reply at 3) or about DC bias currents not being in the signal path because they do not carry analog AC signal (see Reply at 4) may indeed refer to an analog ***portion*** of the signal path, but they are in no way admissions or proof that the ***entirety*** of such path must be analog. The patents themselves teach that the entire signal path is not analog. *See, e.g.*, Ex. A ('330 Patent) at

4:32-47 (signal at output of baseband amplifier is "converted to digital signals by analog-to-digital converters at the front end of a digital signal processing block").

The open-ended, "comprising" claim language here is not limited—expressly or otherwise—to only analog signal paths or components. The Court should decline Apple's invitation to improperly read in an analog-only limitation. The patent specification does not support this limitation, with its recitation of digital conversion and digital processing of the ***signal*** in the signal path. And Apple's expert opinion that the signal path inexplicably stops before that point is unsupported and indefensible. A person of ordinary skill would understand that the signal path is the path of the signal, and that no analog (or digital) limitation on that path is disclosed or claimed.

III. A POSITA WOULD UNDERSTAND IMPEDANCE IN THIS CONTEXT AS RELATING TO ALTERNATING CURRENT SIGNALS

In Reply, Apple agrees that impedance "necessarily refers to opposition to alternating current" in most Asserted Claims. Reply at 5. If Apple holds to that admitted position in the future—such as in summary judgment briefs or any IPR Petitions it chooses to file—then Theta's concern about claim scope disputes relative to this term is much reduced.[3]

Apple has not completely agreed, however, making an argument about an unclaimed "impedance component" that supposedly relates to one asserted claim. Reply at 5-6 (referring to claim 4 of the '825 Patent). But Apple's arguments here are not coherent and are supported only

[3] As noted in Theta's Response, Defendants in the co-pending case of *Theta v. Lenovo et al.* raised a dispute over the meaning of impedance vis-à-vis alternating current signals. *See, e.g.*, Response at 6. This dispute has now produced competing expert testimony over a claim scope issue in those PTO proceedings—motivating Theta to at least raise this term here. *See, e.g.*, Response at 6. It would be manifestly unfair for Apple to argue as it does here, then later attempt to read "changing an impedance" on changing a resistor carrying only a DC bias current, if found in a prior art reference. As noted, Apple has already made this argument in contentions. *Id.*

on selective citations to dictionaries. *Id.*

Theta already demonstrated that the dictionary Apple's expert relied on—to suggest there was a definition of impedance that did not refer to alternating current—did in fact incorporate a definition for electrical impedance as "[t]he total opposition that a circuit presents to an ***alternating current*** … ." Response at 10-11 (emphasis added). Dr. Tentzeris was not given this definition by Apple, and his being shown it for the first time at his deposition prompted what can only be described as non-responsive rambling. Ex. L (Tentzeris Tr.) at 43:3-48:1. In Reply, Apple inexplicably accuses Theta of attempting to "evade the evidence" by pointing out Apple's own omission of the definition. Reply at 6.[4] Apple then cites the third sub-definition from its own dictionary Exhibit 7, ignoring that the first sub-definition a few lines above says that impedance is "[t]he total opposition (i.e., resistance and reactance) a circuit offers to the flow of alternating current at a given frequency." *Id.* at 6 n.2, Ex. 7. The dictionaries rebut Apple's arguments citing them.

Apple's briefs and expert testimony fail to provide any reason to treat the language of asserted '825 Patent claim 4—which does not include the term "impedance component"—any differently. Impedance, understood as the total opposition to the flow of alternating current, is also understood to potentially include sub-components contributing to that total. Apple's expert tries to distinguish "impedance components" from electrical characteristics (*see* Opening Br., Ex. 1 at ¶30), but then apparently means "component" to refer to "resistance and reactance" (*id.* at ¶31, Reply at 6), which would be "electrical characteristics" under his and Apple's own apparent logic.

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[4] The definitions in the McGraw-Hill Dictionary of Scientific and Technical Terms are not "differing," they are directly linked. *Id.* The definition for "impedance" starts: "**impedance** [ELEC] *See* electrical impedance" and the omitted definition for "electrical impedance" starts: "**electrical impedance** Also known as impedance. [ELEC]". Response at 11.

Reply at 6. Theta's good faith effort to get clarification on this point from Dr. Tentzeris at deposition did not result in any—because he said both that "impedance component" meant characteristics (*e.g.*, reactance), and that "impedance component" meant devices (*e.g.*, capacitor). Ex. L (Tentzeris Tr.) at 39:11-41:14:

> ***What I meant, whenever I refer to a impedance component*** I -- under the context of the patent, that -- that could be ***resistance***. That could be [***reactance***]. So that could be a combination of these components.
>
> . . .
>
> So ***whenever I refer to impedance component***, I've -- or general impedance, ***that means*** the combination of ***a resistor*** and ***a capacitor*** in this case.

Apple's briefs and expert testimony might provide an object lesson in why the Federal Circuit puts dictionaries, and expert testimony, at the bottom of the claim construction evidence hierarchy. The intrinsic evidence—here, Professor's Tsividis' use of impedance (and resistance) in the teachings of the Asserted Patents, as understood by a person of skill in the art—is the proper beginning, and when clear and unambiguous is also the end, of the claim construction inquiry. *Phillips*, 415 F.3d at 1313-14. In deposition, Apple's expert ultimately agreed that the inquiry should center on what Professor Tsividis taught a person of ordinary skill in the art that impedance means in the context of the claims. Ex. L (Tentzeris Tr.) at 50:18-25, 54:1-9. But neither he nor Apple engage with those actual teachings or the use of the term in the patents.

Apple has not rebutted Theta's careful explanation of how Professor Tsividis used the term "impedance," and thus what a person of skill would understand it means in the context of the patents. *See* Response at 7-9. In Reply, Apple complains only of an alleged lack of express limitation. Reply at 7. But express limitation is not required when the plain and ordinary meaning of a term is understood and agreed from context of the patent's teachings.

As candidly explained in Response, Theta understands the Court's stated preference for not weighing in with constructions of ordinary terms of art—at least prior to the full crystallization

of disputes over scope that require resolution. Response at 5-7. Indeed, Theta recognizes that it asks the Court not to enter constructions for other terms that Apple raised here and now seeks to improperly limit. Theta believes that there is (at least) a latent dispute over the scope of impedance in the context of these claims and patents. Should the Court agree that there is a dispute, and decide to construe the term "impedance" in the context of the Asserted Patent claims, specification, and prosecution history, then it should find that the plain and ordinary meaning in that context to a person of skill is "opposition to the flow of alternating current."

IV. "SWITCHING" AND "DRIVE CURRENT" DO NOT REQUIRE CONSTRUCTION

In its Reply brief, Apple abandoned arguing for its original, "state"-based proposals for definition these plain meaning terms. Instead, Apple would now like both terms to be limited to "the current that carries a signal through a load." Reply at 7-8. That would be improper—because Apple has shown no need for any additional definition by the Court—and because it would risk improperly limiting the claim terms based on description of an embodiment in the specification.

From the beginning of conferral efforts regarding the two claim terms here, Theta has maintained the consistent position that they do not need to be construed. Theta pointed out examples in the specification that are consistent with (and informative of) plain meaning to a person of ordinary skill in the art. *See* Response at 12 (citing Ex. A ('330 Patent) at 7:44-59, Fig. 6). But Theta never suggested or intended that these explanations be adopted as official constructions. It is not clear that "current that carries a signal through a load" would be easier to apply and understand than "drive current." Courts should not add their weight of authority in such situations, or they risk interfering in the resolution of jury questions. *See, e.g.*, *Am. Piledriving Equip., Inc. v. Geoquip, Inc.*, 637 F.3d 1324, 1331 (Fed. Cir. 2011) ("It is well settled that the role of a district court in construing claims is not to redefine claim recitations or to read limitations into

the claims to obviate factual questions of infringement and validity but rather to give meaning to the limitations actually contained in the claims ... .")

As Theta showed, the Asserted Patents and the prosecution history of the '330 Patent provide all of the explanation needed to understand what a drive current and a switching current refer to in the context of the claims. Response at 12-14. These terms require no construction and Apple's shifting suggestions for their redefinition and limitation should be rejected.

V. THIS COURT PROPERLY CONSTRUED THE DYNAMICALLY […] TERMS BEFORE

This Court has already considered, and declined to adopt, a Defendant's assertion that there was a disclaimer of all signal strength threshold use in claims asserted here. Response at 14-16 (discussing *Theta v. Samsung* clam construction). Apple fails to provide new argument, or any other justification, for the Court to change course and depart from its own prior construction of these terms in the claims of this patent family. *Id.*

In Reply, Apple largely ignores Theta's Response and re-asserts, without support or a reasonable basis to believe, that an argument made during prosecution of an unasserted patent should be taken to refer to (and disclaim) every use of every signal strength threshold in every claim in this patent family. Reply at 9. But that lone "uses no threshold" statement cannot be divorced from its context, and its context makes clear that it was never a generalizable disclaimer—as the Eastern District of Texas agreed, even with respect to the '728 Patent claims from which the argument arose. Response at 14-15 (noting that the EDTX court did not find disclaimer), 15 (noting that this Court did not find disclaimer).

Each claim is axiomatically its own invention—there is no such thing as "the invention generally" applying to all of the claims in Professor Tsividis' patent family. Reply at 9. And Apple fails to provide any reason to convert the context-specific use of the word "threshold" in a

proposed claim amendment into a generalized limitation excluding all thresholds regardless of meaning and context. The Court should decline to limit the claims now, just as it declined before.

The cited statements during prosecution of the unasserted '728 patent were made to distinguish the specific Clark reference from the specific claims as amended there. Opening Br., Ex. 11 at 9. Clark used a single numeric threshold for signal quality—a static number above which "High current mode" was used and below which "Low current mode" was activated. *Id.* In contrast, the "independent claims in the case as now amended" for the '728 Patent instead used a "ratio," acting on determination of "strength of the desired signal" relative to "strength of the interferer signal." *Id.* at 3, 9. The distinction was between comparison to a static value—"a merely on/off implementation that is based on a predetermined threshold," *id.* at 11—and comparison to another varying signal component. *Id.* at 3 ("determination that the strength of the desired signal is lower than the strength of the interferer signal"); *see also id.* 9 ("a relation between the desired signal and the interference, as specifically set forth in all independent claims now in the case").

The argument during prosecution of the '728 Patent was only about what was being employed in the claims then at issue, as then amended—not about the concept of a threshold writ large. The phrase "uses no threshold" read in that context refers to the specific implementation of Clark distinguished from, and the specific claims at issue there—and it could more helpfully have been written "uses no such threshold" or "uses no static threshold." *See also id.* at 10 ("predetermined threshold"). But the law doesn't require perfect communication, it requires "clear and unmistakable" disclaimer in view of the surrounding context. *Ecolab, Inc. v. FMC Corp.*, 569 F.3d 1335, 1343 (Fed. Cir. 2009) ("[W]hen [the inventor's] statements are considered in the context of the prosecution history as a whole, they simply are not clear and unmistakable enough to invoke the doctrine of prosecution history disclaimer."); *Golight, Inc. v. Wal-Mart Stores, Inc.*,

355 F.3d 1327, 1332 (Fed. Cir. 2004) ("amenable to multiple reasonable interpretations and it therefore does not constitute a clear and unmistakable surrender").

The statements Apple cites here cannot reasonably be read in context to refer to a global disclaimer of anything and everything that might be deemed a threshold. Indeed, the term being construed here is "dynamically," and Apple has failed to show anything that would exclude use of a dynamic threshold, for example. Apple is relying only on statements made in discussion of "static" or "predetermined" thresholds—statements which anyway aren't shown to warrant treatment as a disclaimer even for the patent and claims for which they were made. In its Reply, Apple conflates two distinctions, separated by "and," in a ploy to relate "dynamically" to a supposed prohibition on thresholds. Reply at 10. A far less strained interpretation of the statements would be that, if anything, they compared "dynamically changing" to an implementation with static or "predetermined thresholds." *Id.* But whatever distinctions were being made, they were in, and are confined to, the context of the '728 Patent prosecution.

Certain asserted claims here do not have the same elements as those used to distinguish over Clark during prosecution of the '728 Patent. For example, asserted claims of the '330 Patent do not require measurement of a second (*e.g.*, interferer) signal strength. *See, e.g.*, Ex. A ('330 Patent) at 14:15-28 (claim 23). It would be improper, unreasonable, and unfair to apply an alleged disclaimer from another patent prosecution to these claims, based on a distinction made there that is not even shown to apply to the presently asserted claims.[5]

As shown in Response, the Court already declined Samsung's prior invitation to limit

[5] This is claim construction, not validity analysis, and of course there are many other reasons that the Asserted Claims here are valid over Clark. But differences in the claims to which a purported disclaimer is sought to be applied, as compared to those for which it was allegedly made, can and do eliminate any basis that might exist for limiting the different claims.

claims asserted here—including based on attorney argument in a 2017 reply brief from "*Theta I*," which were also raised by Samsung last time. *See, e.g.*, Response at 15. Apple offers no authority justifying a different treatment of such statements now. Apple's only case cited in Reply is about public reliance on statements ***to the Patent Office*** during prosecution, not former counsel arguments in a *Markman* brief. *See* Reply at 10; *Data Engine Techs. LLC v. Google LLC*, 10 F.4th 1375, 1383 (Fed. Cir. 2021). After this Court construed claims of the '825 and '202 Patents in *Theta v. Samsung*, Theta litigated that case to within hours of jury selection, and then subsequently filed this case. The public could not reasonably rely on attorney argument in a reply brief in *Theta I*—about a different patent with different claims—and ignore and fail to account for everything contrary that has happened publicly in litigation of the Asserted Patents since that time.

The other statements that Apple relies on in Reply are self-evidently not about excluding all varieties of threshold from claims—assuming again that one reads them in context rather than in the misleading excerpts in Apple's brief. *Compare* Reply at 10 ("… Clark on the other hand uses threshold settings …") *with* Opening Br. Ex. 14 at 12-13 (emphasis added):

> This is completely different from what is specified in claim 14 where the aim is the optimization of the power drain from the battery based on the relationship between the interferer and the desired frequency input in the radio frequency section of the transducer. The adjustment that is done in claim 14 is a dynamic change, that is based on continuous monitoring of the interferer signal levels to optimize the changes in gain and impedance of the devices and circuits in the path of the RF signal. Clark on the other hand ***uses threshold settings as described in his specification and claims*** to switch between high gain levels and a low gain states to conserve power. The examiner equates col. 2 line 34 to col. 4 line 66 to claim 14. The applicant respectfully disagrees. Clark indicates an intermediate frequency (IF) section where the frequency is an intermediate frequency formed by mixing the local oscillator frequency with the input frequency. See, e.g., Clark, FIG. 1. This is not part of claim 14. Claim 14 is mainly directed at optimizing the power drain of the input radio frequency section of the radio based on the interferer signal has increased or decreased.

This discussion mentions that Clark uses thresholds in a specific way, but the point of the

discussion it is not about thresholds and their alternatives—nor could it reasonably be read as broad, patent-family covering disclaimer of anything. *See* Response at 16.

Finally, Apple fails to show that statements during prosecution of the '202 Patent warrant any finding of disclaimer, or more to the point here, justify any construction attached to the term "dynamically." Reply at 11; see also Opening Br. Ex. 15 at 18-19 (emphasis added):

> The presently pending claims do not rely on a comparison of the desired and undesired (interferer) signals to thresholds; instead, the method requires dynamically adjusting impedance or bias ***based on the relative comparison of the desired signal strength to the interferer signal strength***.

This discussion is self-evidently about the difference between comparing desired and interferer signals to thresholds, and comparing desired and interferer signals to each other. No intervention by the Court is required here, because the discussed distinction and limitation was and is already captured in the "comparing" elements of the asserted claims of the '202 Patent—the very, and only, patent referenced in the cited statements. *See, e.g.*, Ex. C ('202 Patent) at 14:7-14 (claim 7) ("comparing the strength of the desired signal relative to the strength of the interferer signal" and "based on the comparison … dynamically adjusting …").

Again, Apple presents no justification for applying a negative "without reliance on thresholds" construction to any Asserted Patent—much less across all five asserted here. The "dynamically [varying]" terms should be construed in *Theta v. Apple* the same way the Court construed them in *Theta v. Samsung*. No. 6:20-cv-00160-ADA, Dkt. 57 at 2-3 (W.D. Tex.) ("Plain-and-ordinary-meaning, wherein the plain-and-ordinary meaning is "adjusting during operation based—at least in part—on information gained during operation."").

VI. BEST- AND WORST-CASE DO NOT REQUIRE CONSTRUCTION

In Reply, Apple criticizes Theta for supposedly refusing to take a position on a dispute Apple supposes might exist. Reply at 12-13. Theta's position is that these claim terms do not

require, and therefore should not receive, construction by the Court. Response at 16-18; *U.S. Surgical Corp. v. Ethicon, Inc.*, 103 F.3d 1554, 1568 (Fed. Cir. 1997) (claim construction is "not an obligatory exercise in redundancy"); *DuraSystems Barriers Inc. v. Van-Packer Co.*, No. 1:19-cv-01388-SLD-JEH, 2021 WL 4037826, *27-28 (C.D. Ill. Sept. 3, 2021) (discussing cases and declining to construe "joined directly"). The Court understands this principle well and has previously applied it to these precise terms—as seen when the Court declined to adopt constructions for these terms pre-trial in *Theta v. Samsung*. Response at 17.

Again, Apple's proposed constructions for "worst-case" and "best-case" are unnecessary, and so should not be adopted—even if they are not obviously incorrect.

VII. CONCLUSION

For the foregoing reasons, the Court should decline to adopt Apple's improperly limiting proposed constructions.

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Respectfully submitted,

/s/ Corey Johanningmeier

Denise M. De Mory (*Pro Hac Vice*)
California State Bar No. 168076
Corey Johanningmeier (*Admitted*)
California State Bar No. 251297
BUNSOW DE MORY LLP
701 El Camino Real
Redwood City, CA 94063
Telephone: (650) 351-7241
Facsimile: (415) 426-4744
ddemory@bdiplaw.com
cjohanningmeier@bdiplaw.com

B. Russell Horton
State Bar No. 10014450
GEORGE BROTHERS KINCAID & HORTON, LLP
114 West 7th Street, Ste. 1100
Austin, Texas 78701
(512) 495-1400 Telephone

(512) 499-0094 Facsimile
rhorton@gbkh.com

Attorneys for Plaintiff, Theta IP, LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was served by electronic filing using the Court's CM/ECF system on all counsel of record on January 16, 2024.

/s/ Corey Johanningmeier
Corey Johanningmeier