

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

KARIM KOUBRITI,

Plaintiff,

Case No: 07-13678

v

Hon. MARIANNE O. BATTANI

MICHAEL THOMAS,

Defendant.

---

BEN M. GONEK (P43716)  
Giarmarco, Mullins & Horton, P.C.  
Attorney for Plaintiff  
101 W. Big Beaver Rd  
10<sup>th</sup> Floor  
Troy, Michigan 48084  
(248) 457-7141  
bgonek@gmhlaw.com

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RICHARD L. SWICK  
Attorney for Michael Thomas  
1225 Eye Street, NW, Suite 1290  
Washington, D.C. 20005  
(202) 842-0300

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**PLAINTIFF'S RESPONSE TO DEFENDANTS MICHAEL THOMAS' MOTION TO  
DISMISS OR, ALTERNATIVELY, FOR SUMMARY JUDGMENT**

NOW COMES, Plaintiff, KARIM KOUBRITI, by and through his attorneys,  
GIARMARCO, MULLINS, & HORTON, P.C., and in Response to Defendant Michael Thomas'  
Motion to Dismiss or, Alternatively, for Summary Judgment, for the reasons set forth in the  
accompanying Brief in Support of Plaintiff's Response to Defendant Michael Thomas' Motion to  
Dismiss or, Alternatively, for Summary Judgment, respectfully request that this Honorable Court  
deny Defendant's Motion.

Respectfully Submitted,

/s/ Ben M. Gonek  
BEN M. GONEK (P43716)  
Giarmarco, Mullins, & Horton, P.C.  
Attorney for Plaintiff  
101 W. Big Beaver Road  
10<sup>th</sup> Floor  
Troy, Michigan 48084  
(248) 457-7141  
bgonek@gmhlaw.com

Dated: March 24, 2011

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101 W. Big Beaver Rd  
10<sup>th</sup> Floor  
Troy, Michigan 48084  
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RICHARD L. SWICK  
Attorney for Michael Thomas  
1225 Eye Street, NW, Suite 1290  
Washington, D.C. 20005  
(202) 842-0300

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**BRIEF IN SUPPORT OF PLAINTIFF'S RESPONSE TO DEFENDANT MICHAEL  
THOMAS' MOTION TO DISMISS OR, ALTERNATIVELY,  
FOR SUMMARY JUDGMENT**

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## QUESTIONS PRESENTED

- I. MUST DEFENDANT'S MOTION TO DISMISS FAIL WHERE PLAINTIFF HAS PLED MATTERS THAT, IF TRUE, WOULD ENTITLE HIM TO RELIEF UNDER THE LAW?

Plaintiff answers: Yes

Defendant answers: No

- II. MAY PLAINTIFF LITIGATE THE ISSUE OF DEFENDANT MICHAEL THOMAS' QUALIFIED IMMUNITY WHERE PRIOR HEARINGS DO NOT MEET THE REQUIREMENTS FOR THE APPLICATION OF THE DOCTRINE OF COLLATERAL ESTOPPEL?

Plaintiff answers: Yes

Defendant answers: No

- III. WHERE PLAINTIFF HAS ESTABLISHED THE EXISTENCE OF A GENUINE ISSUE OF MATERIAL FACT, AND WHERE DEFENDANT THOMAS IS NOT ENTITLED TO QUALIFIED IMMUNITY, MUST DEFENDANT'S MOTION FOR SUMMARY JUDGMENT FAIL?

Plaintiff answers: Yes

Defendant answers: No

**MOST CONTROLLING/APPROPRIATE LEGAL AUTHORITY**

**Cases**

*Ahlers v. Schebil*  
188 F.3d 365, 371-72 (6<sup>th</sup> Cir. 1999).....9

*Anderson v. Liberty Lobby, Inc.*,  
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## I. BRIEF STATEMENT OF FACTUAL AND PROCEDURAL HISTORY

Because the court is intimately aware of the history and background of this case, a detailed and specific factual history will be omitted.<sup>1</sup> In brief, this suit stems from the unlawful actions of Defendant Michael Thomas, in his capacity as a federal agent, during the investigation and prosecution of Plaintiff Karim Koubriti. Specifically, Mr. Koubriti was targeted by the Defendant and other members of the Detroit Joint Terrorism Task Force for his possible involvement in terrorist activities. Eventually, several Indictments were filed against Mr. Koubriti and, on June, 3, 2003, Mr. Koubriti was found guilty of conspiracy to provide material support to terrorists and conspiracy to engage in fraud.

Subsequent to his criminal trial, Mr. Koubriti filed several post-trial motions alleging pervasive prosecutorial misconduct which included the solicitation of perjury, the offer of fabricated evidence, and the deliberate failure to turn over exculpatory evidence. After an evidentiary hearing on the matter and a governmental review of the file, all charges relating to terrorism were dismissed and Mr. Koubriti was granted a new trial on the remaining charges against him.

In 2007, Mr. Koubriti sued Richard Convertino, the assistant United States Attorney handling the case, and Michael Thomas, a special agent working on the case against Mr. Koubriti. In his suit, Mr. Koubriti alleged that the Defendants violated his Fifth Amendment rights by fabricating evidence, failing to turn over exculpatory evidence, and procuring perjured testimony.

On May 9, 2008, Defendant Convertino filed a Motion to Dismiss which was eventually granted upon appeal to the Sixth Circuit Court of Appeals. *See, Koubriti v. Convertino*, 593 F.3d

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<sup>1</sup> For a more detailed account of the facts in the instant case, please see the parties' Briefs on Appeal, attached as Exhibits 1 and 2, as well as Plaintiff's Complaint, attached as Exhibit 3.

459 (6<sup>th</sup> Cir. 2010), attached as Exhibit 4. In their ruling, the Sixth Circuit Court of Appeals found that, as a prosecutorial official, Defendant Convertino was entitled to absolute immunity for his actions. It should be noted that the analysis was limited to the allegations against Defendant Convertino and all analysis was conducted based on the standards associated with the protections and immunity afforded to a prosecutorial official.

In the instant Motion, Defendant Michael Thomas' Motion to Dismiss or, Alternatively, for Summary Judgment, Defendant Thomas seeks to have this court apply the exact same analysis and result to the allegations and claims to which he is currently facing. In this case, Defendant's Motion to Dismiss must fail because Plaintiff has stated a valid and actionable claim. Moreover, Defendant's alternative Motion for Summary Judgment must also fail because Plaintiff has presented sufficient facts which, when viewed in a light most favorable to him, show that there are genuine issues of material fact. Finally, by knowingly engaging in such egregious and clearly unlawful actions designed to prevent Plaintiff from establishing any viable defense, the Defendant acted unreasonably and intentionally, thus forfeiting the availability of qualified immunity. As such, Defendant's Motion to Dismiss or, Alternatively, for Summary Judgment must fail in its entirety.

## II. ARGUMENT

### **A. DEFENDANT'S MOTION TO DISMISS MUST FAIL WHERE PLAINTIFF HAS PLED MATTERS THAT, IF TRUE, WOULD ENTITLE HIM TO RELIEF UNDER THE LAW.**

The Defendant's first argument is that this case should be dismissed under Federal Rule of Procedure 12(b)(6). Fed. R. Civ. P. 12(b)(6) allows a defendant to test whether, as a matter of

law, the plaintiff is entitled to legal relief even if everything alleged in the complaint is true. *Doe v. Detroit Bd. Of Educ.*, 319 F. Supp. 2d 871, 873 (E.D. Mich 2004). The Court will not dismiss a cause of action "for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957). When applying the standards under this Rule 12(b)(6), the Court must presume all well-pleaded factual allegations in the complaint to be true and draw all reasonable inferences from those allegations in favor of the non-moving party. *Doe*, 319 F. Supp. 2d. at 873, citing *Mayer v. Mylod*, 988 F.2d 635, 638 (6th Cir. 1993).

In his brief, Defendant relies on the new standards set forth within the Sixth Circuit following several recent Supreme Court cases. Under the new standards, the claims set forth in a plaintiff's complaint must move beyond mere labels and conclusions and a formulaic recitation of the elements, and must articulate factual allegations that will raise a right to relief on more than a speculative level. *Association of Cleveland Fire Fighters v. City of Cleveland, Ohio*, 502 F.3d 545, 584 (6<sup>th</sup> Cir. 2007). The court does however specifically note that their ruling does not require a complaint to contain detailed factual allegations. *Id.*

In this Court's previous ruling against Defendant Convertino on the same 12(b)(6) argument, this Court correctly reasoned that, since there is clear precedent to allow a *Bivens* type action based on a violation of the due process clause of the Fifth Amendment, that regardless of the likelihood of success of the plaintiff, that dismissal under 12(b)(6) is inappropriate. In the Sixth Circuit's later ruling on appeal, this part of the Court's ruling was not disturbed and the sole focus of the appellate ruling was on the issues of prosecutorial immunity.

Thus, as this Court has correctly reasoned at least one other time in the instant case, the well-pleaded allegations set forth in Plaintiff's complaint alleging the fabrication of evidence, the

intentional withholding of exculpatory evidence, and the rampant perjury is exactly the type of claim that is viable under *Bivens*. See, e.g., *Zahrey v. Coffey*, 221 F.3d 342 (2<sup>nd</sup> Cir. 2000). As such, Defendant Michael Thomas' Motion to Dismiss under FRCP 12(b)(6) must be denied in its entirety.

**B. PLAINTIFF MAY LITIGATE THE ISSUE OF DEFENDANT MICHAEL THOMAS' QUALIFIED IMMUNITY WHERE PRIOR HEARINGS DO NOT MEET THE REQUIREMENTS FOR THE APPLICATION OF THE DOCTRINE OF COLLATERAL ESTOPPEL.**

Defendant Thomas further argues that Plaintiff's allegations against him should be barred by the doctrine of collateral estoppel. The crux of Defendant's argument is that the issue was previously litigated in the Sixth Circuit Court of Appeals briefing during Defendant Convertino's appeal of this Court's denial of prosecutorial or absolute immunity. For the doctrine of collateral estoppel to be applicable, the following requirements must occur at some previous hearing: 1) that the issues in the subsequent litigation are identical to the issues in the resolved litigation; 2) that the current issue was actually litigated and decided in the previous hearing; 3) that the resolution of the issue was necessary and essential to a judgment on the merits of the prior litigation; 4) that there is party identity; and 5) that the party against whom the doctrine is being asserted had a full and fair opportunity to litigate the issue. *Hammer v. I.N.S.*, 195 F.3d 836, 840 (6<sup>th</sup> Cir. 1999); *Darrah v. City of Oak Park*, 255 F.3d 301, 311 (6<sup>th</sup> Cir. 2001).

Even though the Sixth Circuit Court of Appeals briefly addressed the issue of qualified immunity, the doctrine of collateral estoppel is not triggered by that Court's analysis.

Significantly, issues raised on appeal in the previous hearing are quite distinct from the issues

raised in Defendant's instant motion. The issues on appeal were limited to absolute immunity for Defendant Convertino and whether the Plaintiff stated a valid claim for relief. (Exhibit 1; Exhibit 2). In fact, neither party even briefed the issue of whether Defendant Convertino was entitled to the protections of qualified immunity for his actions. (Exhibit 1; Exhibit 2). Furthermore, the analysis of the issues were limited in scope to the actions of Defendant Convertino with extremely limited or no discussion as to the actions of and allegations against Defendant Thomas. (Exhibit 4).

When the requirements for collateral estoppel are examined, it becomes clear that the doctrine does not apply in this case. The issues are different (prosecutorial immunity v. qualified immunity), the parties are different (Convertino, a prosecutor v. Thomas, a federal agent), and it is undisputable that Plaintiff has never had the opportunity to argue the issue of whether Defendant Thomas' actions are entitled to the protections of qualified immunity. Thus, Defendant's argument with respect to the application of the doctrine of collateral estoppel and Plaintiff's claims against Defendant Thomas must fail.

**C. BECAUSE PLAINTIFF HAS ESTABLISHED THE EXISTENCE OF A GENUINE ISSUE OF MATERIAL FACT AND BECAUSE DEFENDANT THOMAS IS NOT ENTITLED TO QUALIFIED IMMUNITY, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT MUST FAIL.**

**1. Standard of Review**

Defendant moved for summary judgment pursuant to Federal Rule of Civil Procedure 56(c), requesting dismissal of this matter for no genuine issue of material fact. Fed. R. Civ. P.

56(c). Summary judgment is only appropriate when all the evidence, taken in a light most favorable to the non-moving party, shows that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c); *Matsushite Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587; 106 S. Ct. 1348; 89 L. Ed. 2d 583 (1986).

Summary judgment is properly precluded where disputes exist over facts which might affect the outcome of the suit under governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248; 106 S. Ct. 2505; 91 L. Ed. 2d 202 (1986). In other words, a dispute is genuine, and thus summary judgment is appropriate, if a reasonable jury could return a verdict in favor of the party opposing summary judgment. *Id.*

An initial burden rests on the moving party to show the absence of a genuine issue of material fact as to an essential element of the non-moving party's case. *Bass v. Robinson*, 167 F.3d 1041, 1044 (6<sup>th</sup> Cir. 1999). If the moving party successfully satisfies its burden, the party opposing the motion must show that there is a genuine issue of material fact for trial. *Id.* at 1044; *Frank v. D'Ambrosi*, 4 F.3d 1378, 1384 (6<sup>th</sup> Cir. 1993). The relevant inquiry is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. *Id.* at 251-52.

In deciding a motion for summary judgment, the Court must view all evidence in a light most favorable to the non-moving party and draw all inferences in the non-moving party's favor. *United States v. Diebold, Inc.*, 369 U.S. 654, 655; 82 S. Ct. 993; 8 L. Ed. 2d 176 (1962). In cases where qualified immunity is at issue, this presumption means that the Court should adopt the Plaintiff's version of facts as true. *Scott v. Harris*, 550 U.S. 372, 378; 127 S. Ct. 1769; 167 L. Ed. 2d. 686 (2007).

## 2. Qualified Immunity

Under the doctrine of qualified immunity, “[g]overnment officials, including police officers, are immune from civil liability unless, in the course of performing their discretionary functions, they violate the plaintiff’s clearly established constitutional rights.” *Jones v. Byrnes*, 585 F.3d 971, 974 (6<sup>th</sup> Cir. 2009). A right is clearly established if the “contours of the right are sufficiently clear that a reasonable official would understand that what he is doing violates the law.” *Saucier v. Katz*, 533 U.S. 194, 202; 121 S. Ct. 2151; 150 L. Ed. 2d 272 (2001) (internal citations omitted). Traditionally, the qualified immunity analysis followed a two-step analysis with the courts first having to determine whether a constitutional right was violated, and if, and only if, it was, then the court would consider whether the right was clearly established. *Saucier*, 533 U.S. at 201.

However, the Supreme Court in *Pearson v. Callahan*, \_\_\_ U.S. \_\_\_, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009), recently abandoned the requirement that courts address all qualified immunity questions sequentially. *Id.* at 813. The Court held that “while the sequence set forth [in *Katz*] is often appropriate, it should no longer be regarded as mandatory. The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.” *Id.* at 818. Thus, courts are free to consider the qualified immunity inquiries in whatever order is appropriate in light of the case-specific issues that are before the court. *Moldowan v. City of Warren*, 570 F.3d 698, 720 (6<sup>th</sup> Cir. 2009).

Frequently, the Sixth Circuit will employ a third step requiring the court to determine whether the plaintiff has offered sufficient evidence to indicate that what the defendant did was



objectively unreasonable in light of the clearly established constitutional right. *Feathers v. Aey*, 319 F.3d 843, 847-848 (6<sup>th</sup> Cir. 2003). As recently noted by the Court, the Sixth Circuit has consistently held that where “the reasonableness of an officer’s actions hinge on disputed issues of fact, the jury becomes the final arbiter of ... immunity, since the legal question of immunity is completely dependent upon which view of the facts is accepted by the jury. *Mitchell v. County of Washtenaw*, 2009 WL 909581, \*4 (E.D. Mich. 2009), quoting, *Leonard v. Robinson*, 477 F.3d 347, 354-55 (6<sup>th</sup> Cir. 2007). When the legal question of qualified immunity hinges upon which version of the facts are accepted, then the jury, not the judge, must determine liability, and thus summary judgment should not be granted. *Id.*

In essence, the singular question before the court becomes, did the defendant violate a Constitutional right which was clearly established at that time? If the answer is in the affirmative, then the defendant is not entitled to qualified immunity. Therefore, in order for Mr. Koubriti to prevail on his claim, he must show that Defendant Thomas violated one of his constitutional rights and that the right that was violated was clearly established at the time of the violation. *Jones*, 585 F.3d at 975.

In support of Defendant’s argument for the protections of qualified immunity, he attempts to apply the same logic and analysis that the Sixth Circuit Court of Appeals employed when considering Defendant’s Convertino’s arguments regarding his actions and their protection by prosecutorial immunity. However, as a federal agent, Defendant Thomas is in a significantly different position than former Assistant United States Attorney Convertino. Defendant Thomas is held to a different standard in both his actions during the investigation and prosecution of the case as well as a different standard and different analysis than Defendant Convertino in evaluating his claim of qualified immunity.

It is unquestioned that an arresting officer may not turn a blind eye toward potentially exculpatory evidence known to them in an effort to pin a crime on someone. *Ahlers v. Schebil*, 188 F.3d 365, 371-72 (6<sup>th</sup> Cir. 1999). Likewise, arresting officers cannot ignore exculpatory facts in reaching a probable cause determination. *Gardenhire v. Schubert*, 205 F.3d 303, 318 (6<sup>th</sup> Cir. 2000). Furthermore, it has been well established, since at least 1991, that an individual cannot be arrested without probable cause, and that the probable cause to arrest, detain, and prosecute an individual must involve an examination of all of the facts and circumstances within an officer's knowledge. *Deitrich v. Burrows*, 167 F.3d 1007, 1012 (6<sup>th</sup> Cir. 1999); *Carroll v. United States*, 267 U.S. 132, 162, 69 L. Ed. 543, 45 S. Ct. 280, Treas. Dec. Int. Rev. 3686 (1925). Thus, while the Sixth Circuit Court of Appeals held that Defendant Convertino was entitled to qualified immunity because it was not clearly established in law that his actions during the investigation and subsequent prosecution were unconstitutional, Defendant Thomas is again held to a different standard which requires independent analysis and is not entitled to the same protections as Defendant Convertino.

In this case, the amount and breadth of evidence that Defendant Thomas had in his possession that was potentially exculpatory is quite staggering. This evidence alone should have required Plaintiff's immediate release and a dismissal of the Indictment. Yet, not only did Defendant Thomas ignore this evidence but, in order to secure a conviction, he purposely withheld this evidence from Mr. Koubriti.

In his Complaint, Plaintiff alleges that Defendant Thomas willfully and intentionally withheld exculpatory evidence or fabricated evidence in the following manner: 1) By failing to take photographs of the Queen Alia Hospital; 2) By failing to turn over photographs he received of the Queen Alia Hospital to either Defendant Convertino and/or to the defense lawyers for

Plaintiff in the criminal trial; 3) Failing to disclose e-mails to either Defendant Convertino and/or to Plaintiff's defense lawyers in the criminal case. The e-mails undermined his testimony or the testimony of Defendant Smith concerning the sketches of the Queen Alia Hospital; 4) Failing to disclose to Defendant Convertino and/or to the defense attorney representing Plaintiff in the criminal case that Nassa Ahmad told him his mentally unstable brother might have been doodling in the day planner in question; 5) Failing to disclose to Defendant Convertino and/or the defense lawyers representing the Plaintiff in the criminal case that Air Force OSI SA Goodnight stated that the alleged sketch of the Incirlik Air Base was not accurate; 6) Failing to disclose the names of witnesses who could testify that the sketches did not represent the Incirlik Air Base; 7) Failing to disclose a 9/11/2007 e-mail where Defendant Thomas admitted that there was difficulty transcribing the audio portions of the videotape due to among other things, the Tuniusei or Algeria dialect speech; 8) Failing to record by way of 302, the contents of the ten interviews with Yousif Hnimssa; and 9) Failing to disclose to Defendant Convertino and/or the defense lawyers for Plaintiff Koubriti that Yousif Hnimssa made many different statements. (See Exhibit 3).

All of the above actions, each deplorable in its own right, only represents the actions that were known to the Plaintiff at the time of the filing of his Complaint. One can only guess at the amount and type of evidence that Defendant Thomas was either able to destroy before he was investigated or that the investigation and review failed to discover. There is no question that a constitutional violation occurred and that any reasonable officer or agent would be aware that the actions alleged would create that constitutional violation. The only questions that remain are whether there was probable cause to continue Plaintiff's imprisonment and prosecution and whether the investigation was conducted in an objectively reasonable manner. Because a

reasonable jury could answer those questions in Mr. Koubriti's favor, this matter should be submitted to a jury. As such, summary judgment must fail.

### III. CONCLUSION

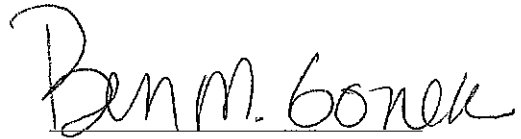
Defendant's Motion to Dismiss must be denied where there exists a viable claim that would entitle Plaintiff to some type of relief. As this court has articulated before, with respect to the claims and allegations against Defendant Thomas, there exists a valid cause of action for the Plaintiff, and as such, Defendant's Motion to Dismiss must be denied. Likewise, Defendant's Motion for Summary Judgment must fail where there exists a genuine issue of material fact that requires submission to a jury. Should the court accept Plaintiff's version of the facts as correct and view all evidence in a light most favorable to Plaintiff, then it becomes clear that his rights were clearly established and knowingly and intentionally violated by Defendant Thomas in his capacity as a federal agent. Since any jury could rule in favor of the Plaintiff, then there is a genuine issue as to material fact, and thus should be submitted to a jury.

For the arguments in Defendant's Motion to hold any water, this Court must find that Defendant Thomas and Defendant Convertino are in the same boat; only then do the arguments have any merit. However, once it is taken into account that the two Defendants have different positions, different standards for immunity, and different responsibilities and duties under the law, then there is no doubt that the analysis conducted by the Sixth Circuit Court of Appeals with respect to Defendant Convertino has little or no bearing on the analysis that must be conducted with respect to Defendant Thomas.

#### IV. RELIEF REQUESTED

**WHEREFORE**, for the reasons articulated herein, Plaintiff Karim Koubriti respectfully requests that this Honorable Court deny Defendant Michael Thomas' Motion to Dismiss or, Alternatively, for Summary Judgment in its entirety.

Respectfully Submitted,



BEN M. GONEK (P43716)  
Giarmarco, Mullins, & Horton, P.C.  
Attorney for Plaintiff  
101 West Big Beaver  
10<sup>th</sup> Floor  
Troy, Michigan 48084  
(248) 457-7141  
bgonek@gmhlaw.com

Dated: March 24, 2011

#### CERTIFICATE OF SERVICE

DELLA A. SUGARS hereby states that on the 24th day of March 2011, she caused the foregoing Plaintiff's Response to Defendants Michael Thomas' Motion to Dismiss or, Alternatively, For Summary Judgment to be filed electronically with the United States District Court and that copies of said response were forwarded to all counsel through the ecf system.

s/ Della A. Sugars  
DELLA A. SUGARS