UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 1:25-cv-25773-KMW

MICHEL HERNANDEZ-HERNANDEZ,

Plaintiff,

vs.

ELISA M. SUKKAR, *et al.*,

Defendants.
_____/

RESPONSE AND MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO ENFORCE JUDGMENT

Defendants respond to Plaintiff's motion to enforce judgment [DE 13], and state:

A. Introduction

There is no dispute that a hearing was provided to Plaintiff on January 22, 2026 "consistent with § 1226(a)" as ordered by this Court, that Plaintiff was present, that Plaintiff was represented by counsel at this hearing, that Plaintiff was able to argue for a bond, and that after an individualized hearing lasting fifteen minutes, Plaintiff's request for bond was denied because, according to the Immigration Judge, Plaintiff's record reflected a crime involving moral turpitude (CIMT) making him ineligible to be released on bond as a matter of law. DE 13-1. A copy of the transcript to the individualized bond hearing was filed today with this Court. DE 14.

Initially, the Immigration Judge (IJ) found that he had jurisdiction to hear the matter based on this Court's order [DE 11] requiring an individualized bond hearing. *Id.* At the conclusion of the hearing, the Immigration Judge found that based on Plaintiff's criminal record and his convictions [DE 8-7, 8-8, 8-9, 8-10], Plaintiff was "clearly subject to mandatory detention" pursuant to Section 236(c) of the Immigration and Nationality Act, 8 U.S.C. § 1226(c); essentially,

leaving the IJ no discretion but to deny the Plaintiff's request for a bond. DE 14; DE 13-1. Specifically, the Immigration Judge found Plaintiff's conviction under Florida Statute § 316.1935(3)(a) [DE 8-9] was a crime involving moral turpitude. DE 14. Although Plaintiff's counsel claimed at the hearing that the government had "waived" the argument of mandatory detention because it did not address it with this Court, the Immigration Judge was clear that was not something for him to decide given that this Court did not address waiver in its order or make any reference to mandatory detention under §1226(c), but that "as far as I am concerned he is subject to mandatory detention, it is clear as day to me". *Id.* Despite this hearing, Plaintiff claims the hearing did not occur as ordered and seeks this Court act in appellate *de novo* review of the immigration judge's decision to find Plaintiff was subject to mandatory detention because of his criminal record. DE 13.

B. Hearing was Provided Pursuant to § 1226(a), and IJ correctly denied Plaintiff's Bond as he Fell within the Enumerated Categories in § 1226(c) Exempting him from Release on Bond.

On January 20, 2026, this Court ordered that "Respondents shall afford Petitioner an individualized bond hearing consistent with 8 U.S.C. § 1226(a)". DE 11 at 12. § 1226(a) provides:

> (a) **Arrest, detention, and release**
>
> On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. *Except as provided in subsection (c)* and pending such decision, the Attorney General--
>
> (1) may continue to detain the arrested alien; and
>
> (2) may release the alien on--
>
> (A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or
>
> (B) conditional parole; but
>
> (3) may not provide the alien with work authorization ...

(emphasis added). Consequently, an immigration judge may not release an arrested alien on bond under § 1226(a) if the alien falls within[1] one of the categories of offenses listed in § 1226(c) (c)(1)(A)-(E). As such, "§ 1226(c) [] carves out a statutory category of aliens who may not be released under § 1226(a)." *Jennings v. Rodriguez*, 583 U.S. 281, 289 (2018) ("Under § 1226(c), the 'Attorney General shall take into custody any alien' who falls into one of several enumerated categories involving criminal offenses and terrorist activities" citing § 1226(c)(1), and "may release aliens in those categories 'only if the Attorney General decides ... that release of the alien from custody is necessary' for witness-protection purposes and 'the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding.'" citing § 1226(c)(2)). Thus, it is beyond dispute that, when conducting an individualized hearing under § 1226(a), an immigration judge may not release subject to bond aliens who, like Plaintiff, fall within a mandatory detention category listed in § 1226(c) absent a witness-protection purpose.

Given the Immigration Judge's finding that at least one of Plaintiff's convictions 'clearly' fell within the enumerated categories in §1226(c), the Immigration Judge correctly denied Plaintiff's request for bond. Consequently, Respondents complied with this Court's order by providing Plaintiff with a bond hearing under § 1226(a), which necessarily requires a determination of whether any the offenses enumerated in § 1226(c) prevent issuance of a bond. Moreover, the Immigration Judge correctly followed this Court's Order and provided a hearing in accordance with § 1226(a), which, unfortunately for Plaintiff, by its language required the Immigration Judge to determine whether any offense enumerated in § 1226(c) exempted a bond.

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[1] Depending on the offense, it varies whether a charge, arrest, conviction or admission may be sufficient to trigger mandatory detention. § 1226(c)(1)(A)-(E). For some, a conviction is necessary, for others a charge may be enough. *Id.*

Notably, in his Petition, Plaintiff acknowledges that a § 1226(a) bond hearing necessarily involves an analysis of § 1226(c) and requests this Court grant him a bond hearing were such an analysis would be made:

> The plaintiff's immigration custody is not lawfully authorized under 8 U. S. C. § 1225(b)(2)(A). Rather, his immigration custody is governed by § 1226, and **he is entitled by agency rules and regulations to a bond hearing governed by agency precedent, including *Matter of Joseph*, 22 I. & N. Dec. 799 (BIA 1999)**.

(emphasis added). DE 1 ¶ 4. *Matter of Joseph*, as explained in the Motion, involves the preliminary analysis required under § 1226(a) before a bond can be issued wherein an immigration judge must determine whether any of the offenses listed in § 1226(c) are present exempting issuance of a bond. In other words, Plaintiff and his counsel were aware from the beginning that their request for a hearing under § 1226(a) would result in a *Matter of Joseph* analysis (or *Joseph* hearing as called in the Motion) if this Court granted their Petition, and in fact stated that he was "entitled" to such a hearing. Moreover, contrary to the argument made in the Motion, *Matter of Joseph*, makes clear that an Immigration Judge makes the assessment of whether mandatory detention applies "during a bond hearing" given under § 1226(a), and not as Petitioner claims in his Motion that the *Joseph* hearing is a hearing that occurs at an earlier time separate and apart from the bond hearing [DE 13 at pg 5-6]. 22 I. & N. Dec. 799, 807 (BIA 1999) ("in assessing whether an alien is "properly included" in a mandatory detention category **during a bond hearing** taking place early in the removal process, the Immigration Judge must necessarily look forward to what is likely to be shown during the hearing on the underlying removal case") (emphasis added). Consequently, Plaintiff's position, in addition to being legally unsupportable, is also disingenuous because Plaintiff explicitly requested in his Petition that he given a bond hearing in compliance with *Matter of Joseph*, and he was.

C. Issue of Whether Plaintiff is Subject to Mandatory Detention was Not Waived, was not Decided by this Court, was not Raised in Petition or the Return, nor was it Tried By Consent.

Initially, Plaintiff requested this Court review an immigration judge's decision, relying on *Matter of Hurtado*, that he was not entitled to a hearing because his detention was pursuant to § 1225(b)(2)(A), and not §1226 as claimed by Plaintiff. DE 1 at ¶¶3-4. This was the issue framed for this Court to decide, and which supposedly entitled him to habeas relief. The issue of whether a disqualifying criminal offense(s) to a bond under §1226(a), as enumerated in § 1226(c) (c)(1)(A)-(E), applied was not properly raised with the Court in the initial pleadings by either side. This issue was absent from the initial Petition [DE 1], not addressed in Respondent's Return [DE 10], nor covered in this Court's Order granting in part the Petition [DE 11]. In fact, this issue was not directly raised in Plaintiff's Traverse, or reply, as he claimed to the Immigration Judge at the hearing. DE 9. Instead, the Traverse argues Plaintiff's past criminal record is irrelevant, then argues that his convictions do not constitute moral turpitude, and finally admits[2] that the Return does raise the issue of Plaintiff's criminal record affecting detention:

> As for the government's attempt to disparage the petitioner due to his past criminal record (D.E. 8, at 2–3), that is all ultimately irrelevant…
> [Discussion of the various offenses and argues they are not crimes involving moral turpitude]
> Regardless, the government has not suggested that the petitioner's criminal history is an impediment to his having a bond hearing under 8 U. S. C. § 1226(a), and has thus forfeited any such claim.

Id. at 8. Thus, at best, the issue of mandatory detention was first raised in reply, and even then, Plaintiff did not mention § 1226(c) directly.

[2] This admission is crucial as it confirms that the issue of mandatory detention was not tried by consent or implicitly waived by Respondents.

Nevertheless, this Court did not "decide" or even touch upon the issue of mandatory detention under § 1226(c). Instead, the issue to be resolved by this Court as framed by the Petition and Return, as explained in its order, was whether "§ 1225 or § 1226 governs Plaintiff's detention." DE 10 at 6.[3] Despite the issue of mandatory detention not appearing in the Petition, the Return or this Court's order, Plaintiff argues that this issue was implicitly decided in silence by this Court resulting in the government being estopped from ever raising it again.

Specifically, the Motion argues that the "the Court's ruling that the petitioner shall be given 'an individualized bond hearing consistent with 8 U.S.C. § 1226(a)' gives rise to issue preclusion (collateral estoppel) against any other argument that the petitioner is ineligible to request bond on the merits under § 1226(a). *CSX Transp., Inc. v. Bhd. of Maint. of Way Emps.*, 327 F. 3d 1309, 1317 (CA11 2003) (citations omitted)." DE 14 at 5. Plaintiff cites no authority to support this sweeping change to the doctrine of collateral estoppel; one which would expand the doctrine to issues not pled or actually decided. Hence, Plaintiff seeks an expansion, without authority or support, of the doctrine to any future dispute between the parties regardless of what actually was decided, what was pled, or what the court had jurisdiction to decide. Essentially, Plaintiff argues that issue preclusion can occur by omission and without consent in a situation in which the issue sought to be precluded was never pled with the court in the first instance or even decided.

Ironically, Plaintiff's cited authority belies this position. *CSX Transp., Inc. v. Bhd. of Maint. of Way Emps.*, 327 F.3d 1309, 1317 (11th Cir. 2003) lists the following "prerequisites to the application of collateral estoppel":

> (1) the issue at stake must be identical to the one involved in the prior litigation;

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[3] The Petition also raised an issue of whether Petitioner was a member of the *Maldonado Bautista* Class entitling Petitioner to an individualized hearing, which this Court declined to address as it found § 1226 entitles Petitioner to a hearing; thereby, mooting this argument. DE 11 fn 6.

> (2) the issue must have been actually litigated in the prior suit;
>
> (3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in that action; and
>
> (4) the party against whom the earlier decision is asserted must have had a full and fair opportunity to litigate the issue in the earlier proceeding.

Id. citing *I.A. Durbin, Inc. v. Jefferson Nat'l Bank,* 793 F.2d 1541, 1549 (11th Cir.1986).[4] Not a single element of collateral estoppel is present here. First, mandatory detention under § 1226(c) was not raised in the Petition, the Return or by the Court; and arguably not raised in the Traverse either as the Traverse only argued that Plaintiff's crimes did not involve moral turpitude without addressing § 1226(c)[5]. DE 9 at 7-8. Thus, at best, the issue of mandatory detention first appeared indirectly in reply. However, "[a]rguments not properly presented in a party's initial brief or raised for the first time in the reply brief are deemed waived." *In re Egidi*, 571 F.3d 1156, 1163 (11th Cir. 2009); *Patterson v. City of Melbourne*, 669 F. Supp. 3d 1204, 1221 (M.D. Fla. 2023) (treating arguments raised in reply as waived and citing *Egidi*); *ripKurrent LLC v. Richard Ballard IRA LLC*, 530 F. Supp. 3d 1281, 1297 (S.D. Fla. 2021) (argument raised for first time on reply is deemed waived). Thus, the issue was waived by Plaintiff, and this Court may not address the merits of the mandatory detention argument at this stage. Regardless, whether one of the enumerated offenses listed in § 1226(c) was applicable was not an issue identical to those decided by this Court as it was never decided.

Second, the issue of mandatory detention under § 1226(c) was never actually litigated. The issue was not raised in either operative pleading (Petition or Return), the Court did not decide the

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[4] Notably, Petitioner argued waiver, not collateral estoppel, to the immigration judge. DE 14. His shifting position was likely because his waiver argument was just as frivolous given that issues raised for the first time on reply are in fact waived. *See supra.* Thus, it was Petitioner who waived any claim that mandatory detention did not apply by waiting until reply to raise the issue.

[5] Petitioner's argument was partially correct in reply in the sense that his criminal history was irrelevant as to whether § 1225 or § 1226 apply, which was the issue this Court decided.

issue, and Respondents never consented to the issue being tried explicitly or impliedly[6]. *See Kipu Sys., LLC v. ZenCharts, LLC*, No. 17-CV-24733, 2020 WL 9460639, at *9 (S.D. Fla. Nov. 24, 2020) (holding that issue of misappropriation was not pled and could not be basis of judgment where it was neither pled nor tried by consent) citing *Cioffe v. Morris*, 676 F. 2d 539, 541 (11th Cir. 1982) (holding that judgment may not be based on issues not presented in the pleadings and tried without the express or implied consent of the parties). Third, the issue was neither necessary nor critical to the Court's ruling. In fact, the Court did not reference the issue at all. Moreover, as noted above, the issue of mandatory detention must be resolved by the IJ in connection with a bond determination under § 1226(a) because § 1226(c) operates as an exception to a bond issuance under § 1226(a). Thus, this Court's order required the Immigration Judge to make a determination of whether § 1226(c) applied when it ordered a hearing in compliance with "§ 1226(a)", because § 1226 (a) explicitly provides "Except as provided in subsection (c)". Consequently, by ordering a hearing be provided "consistent with § 1226(a)", this Court mandated that the immigration judge to make a *Joseph* determination as one had not previously been made by an IJ or this Court. Furthermore, as noted below, the issue of mandatory detention is outside of this Court's jurisdiction. Thus, it cannot be necessary or critical to the Court's ruling.

Last, Respondents did not have an opportunity to fairly and fully address these arguments, as they were not raised in the Petition and Respondents are limited to a Return to respond to the Petition. In its order setting briefing deadlines, the Court gave Plaintiff leave to file a Reply but did not give Respondents leave to file a sur-reply. DE 5. Nevertheless, Respondents are not required to seek leave to file a sur-reply, as Plaintiff argues was necessary, to address arguments

[6] Had Respondents sought to file a sur-reply to address the argument in reply, as Petitioner argues, Petitioner would surely argue that the issue was tried by consent.

raised in reply, because those arguments were waived as a matter of law. *See In re Egidi*, 571 F.3d at 1163.

Moreover, other courts within this circuit have denied leave to file a sur-reply to address new arguments raised in reply because it is more efficient for the court not to consider them at all as they are waived as a matter of law. As explained by one sister court, allowing sur-reply to address new arguments raised in reply would expose the court to an "endless volley of briefs". *Brown v. Life Univ., Inc.*, No. 1:23-CV-02487-MLB-LTW, 2023 WL 11915712, at *1 (N.D. Ga. Dec. 1, 2023), *report and recommendation adopted*, No. 1:23-CV-2487-MLB, 2024 WL 4005095 (N.D. Ga. Jan. 30, 2024) citing *Garrison v. Ne. Georgia Med. Ctr., Inc.*, 66 F. Supp. 2d 1336, 1340 (N.D. Ga. 1999). Consequently, there is no need for Respondent to file a sur-reply to address an argument that was first raised in reply, because such argument was waived. Accordingly, none of the elements of collateral estoppel are present, and Plaintiff's motion, which is based on the application of this doctrine, must be denied.

D. Mandatory Detention under § 1226(c) is not subject to Judicial Review via Habeas under both § 1226(e) and § 1252(b)(9).

Section 236(c) of the Immigration and Nationality Act, 8 U.S.C. § 1226(c), provides the Attorney General "shall take into custody any alien who—is deportable by reason of having committed any offense" involving moral turpitude or an aggravated felony, as defined in 8 U.S.C. § 1227(a)(2)(A)(ii) and (iii). The Attorney General may detain the alien or release the alien on bond or conditional parole. § 1226(a). However:

> The Attorney General's discretionary judgment regarding the application of [§ 1226] shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.

28 U.S.C. § 1226(e). In other words, "§ 1226(e) precludes an alien from 'challeng[ing] a 'discretionary judgment' by the Attorney General or a 'decision' that the Attorney General has made regarding his detention or release.'" *Jennings*, 583 U.S. at 295 (quoting *Demore v. Kim*, 538 U.S. 510, 516 (2003)).

Section 1226(c) states the Attorney General "shall take into custody any alien" who falls into one of the enumerated categories involving criminal offenses and terrorist activities. 8 U.S.C. § 1226(c)(1). Section 1226(c) specifies the Attorney General "may release" one of those aliens "only if the Attorney General decides" both doing so is necessary for witness-protection purposes and the alien will not pose a danger or flight risk. 8 U.S.C. § 1226(c)(2). As explained by the Supreme Court:

> [B]y allowing aliens to be released 'only if' the Attorney General decides that certain conditions are met, § 1226(c) reinforces the conclusion that aliens detained under its authority are not entitled to be released under any circumstances other than those expressly recognized by the statute. And together with § 1226(a), § 1226(c) makes clear that detention of aliens within its scope must continue 'pending a decision on whether the alien is to be removed from the United States.'

Jennings, 583 U.S. at 283 (quoting § 1226(a)). Thus, pursuant to §1226(e), this Court is without subject matter jurisdiction to review an immigration judge's application of § 1226(a) and its decision that a particular detainee is subject to mandatory detention under § 1226(c) for having committed a CIMT. *Lindsay v. Garland*, No. 5:23-CV-74, 2024 WL 2967271, at *1 (S.D. Ga. Apr. 30, 2024), *report and recommendation adopted*, No. 5:23-CV-74, 2024 WL 2959309 (S.D. Ga. June 12, 2024) (holding that the court lacked jurisdiction pursuant to 28 U.S.C. § 1226(e) to review IJ's decision of whether crime was CIMT necessitating mandatory detention under § 1226(c)); *Aguayo v. Martinez*, No. 1:20-cv-00825-DDD-KMT, 2020 WL 2395638, at *5 (D. Colo. May 12, 2020) (holding that §§ 1226(e) and 1252(b)(9) each stripped the district court of

jurisdiction to determine if the petitioner's conviction was a CIMT subjecting him to mandatory detention).

In addition to judicial review of the CIMT determination being barred by § 1226(e), it is also barred pursuant to 8 U.S.C. § 1252(b)(9). *Aguayo*, 2020 WL 2395638, at *5 (holding that § 1252(b)(9) also strips the district court of jurisdiction to determine if the petitioner's conviction was a CIMT subjecting him to mandatory detention because the issue of mandatory detention is intertwined with the issue of deportability, which a district court may not rule upon). Specifically, § 1252(b)(9) bars "judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter," except for review of a "final order," which hasn't been issued in this case. *See Gicharu v. Carr*, 983 F.3d 13, 16 (1st Cir. 2020) (holding that § 1252(b)(9) "strips federal courts of jurisdiction to decide legal and factual questions arising from an alien's removal in any other context, including on a petition for a writ of habeas corpus."); *I.N.S. v. St. Cyr*, 533 U.S. 289, 313 (2001) (§ 1252(b)(9) is referred to a "zipper clause," with a purpose to "consolidate 'judicial review' of immigration proceedings into one action in the court of appeals.").

Where, as here, the determination by an immigration judge that an alien is subject to mandatory detention under §1226(c) is intertwined with a detainee's deportability[7], § 1252(b)(9) bars a district court's jurisdiction to hear such a claim in a habeas proceeding. *Alphonse v. Moniz*, Case No. 21-11844-FDS, 2022 WL 279638 (D. Mass January 31, 2022) (holding same); *Flores-Powell v. Chadbourne*, 677 F. Supp. 2d 455, 464 (D. Mass. 2010) (holding that 8 U.S.C. §

[7] The commission of a crime involving moral turpitude is both a basis for mandatory detention [§ 1226(c)(1)(A)] and deportability [§ 1182(a)(2)]. Thus, the immigration judge's decision finding mandatory detention here is necessarily intertwined with any finding of deportability.

1252(b)(9) strips a district court of jurisdiction to make a determination of whether the offense constituted a CIMT "because the decisive factor is the [i]mmigration [c]ourt's determination of deportability, which district court's may not review."); *O.D. v. Warden, Stewart Det. Ctr.*, No. 4:20-CV-222-CDL-MSH, 2021 WL 5413968, at *4 (M.D. Ga. Jan. 14, 2021), *report and recommendation adopted*, No. 4:20-CV-222 (CDL), 2021 WL 5413966 (M.D. Ga. Apr. 1, 2021) (holding that pursuant to 8 U.S.C. § 1252(b)(9), the district court "cannot review the immigration court's determination that Plaintiff is subject to mandatory detention").

E. Failure to Exhaust Administrative Remedies

As it relates to his Motion, Plaintiff has not fully availed himself of the administrative remedies available to him. By regulation, the BIA has authority to review IJ custody determinations including his denial of bond. *See* 8 C.F.R. §§ 1003.1(b)(7), 1003.19(f), 1003.38, 1236.1(d)(3). Here, Plaintiff has refused to avail himself of the administrative and appellate review process available to him before proceeding to this Court in hopes of shopping for a more favorable forum and undermining the review process set forth in statute. *See Adams v. U.S. ex rel. McCann*, 317 U.S. 269, 274 (1942) (holding that "the writ of habeas corpus should not do service for an appeal" and that this "rule must be strictly observed if orderly appellate procedure is to be maintained. Mere convenience cannot justify use of the writ as a substitute for an appeal."). Unlike the Petition, which argued that DHS policy made an appeal futile, there is no argument in the Motion as concerning why an appeal would be futile. Accordingly, the Motion should be denied for failure to exhaust administrative remedies, so that Plaintiff may proceed with an appeal to the BIA should he chose.

F. Conclusion

Given that this Court's Order was complied with and an individualized bond hearing in compliance with § 1226(a) was provided, the Motion must be denied. Moreover, there is no basis to find that this Court's Order, which was silent on the issue, estopped the government from arguing mandatory detention with the Immigration Judge in the first instance, as that issue was never before this Court, nor was it decided by this Court at any point. As to Plaintiff's misguided attempt to "amend" his petition by seeking a de novo review of the Immigration Judge's finding that he was subject to mandatory detention, this Court lacks jurisdiction to hear such a challenge and no authority is provided that would engender such jurisdiction. Moreover, under the existing statutory scheme such a challenge must be first presented to the BIA via appeal and then to the Eleventh Circuit if applicable, not through motion in habeas proceeding after the pleadings are closed where the Court has already granted the requested relief and the issue was waived because it was not pled. As stated in the Motion, at this stage, given that the relief requested was granted, this Court's jurisdiction reaches only determining whether its Order was complied with; not whether an Immigration Judge applies the correct law going forward to issues outside those raised in the Petition. As noted, habeas writs are not a substitute for appeal and convenience cannot justify Plaintiff seeking de novo review from this Court of a finding that was not raised in his Petition, that this Court lacks jurisdiction to hear and that, if erroneous, should be addressed in appeal to the BIA. As to whether the subject offenses constituted crimes involving moral turpitude mandating detention, that issue is not before the Court as it was never pled, and even if it was pled, this Court would lack jurisdiction to hear them. Moreover, to be clear, Defendants do not consent to any attempt to raise this new issue with the Court. Accordingly, Defendants request that this Court deny the motion and close the case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 18, 2026, I electronically filed the foregoing with the Clerk of Court using CM/ECF.

Respectfully submitted,

JASON A. REDING QUIÑONES
UNITED STATES ATTORNEY

By: */s/ Francisco Armada*
Assistant United States Attorney