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**UNITED STATES DISTRICT COURT**
**DISTRICT OF STETSON**
**WESTVIEW DIVISION**

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UNITED STATES OF AMERICA,

CASE NO.: 1:21-cr-36

Plaintiff,

v.
WANDA MAXIMOFF,
Defendant.

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PLAINTIFF'S MEMORANDUM OPPOSING
DEFENDANT'S MOTION TO DISMISS

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/s/117
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Attorneys for the Plaintiff

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## INTRODUCTION

Plaintiff, the United States of America, files this Memorandum of Law in Opposition to Defendant's Motion to Dismiss. This Memorandum arises out of two issues: (1) whether the Government's return of the September 21, 2021, indictment satisfied the statutory requirements of 18 U.S.C. §§ 3288, 3298; and (2) whether, in the alternative, the United States is entitled to equitable tolling of a criminal statute of limitations.

Pertaining to the first issue, the Government properly complied with the straightforward statutory requirements of §§ 3288, 3298 and its interpretation of § 3298 reflects its plain-language meaning. As for the second issue, the Government is entitled to equitable tolling as an available remedy during extraordinary circumstances, like the COVID-19 pandemic. Further, the United States satisfies the two-part test required to establish equitable tolling.

WHEREFORE, for these reasons, the United States of America respectfully requests this honorable Court to deny Defendant's Motion to Dismiss.

## STATEMENT OF FACTS

### A. Background

This action arises out of the United States of America's (hereinafter "the United States" "the Government") investigation into Defendant Wanda Maximoff's (hereinafter "Defendant") for procuring fraudulent Orders of Supervision ("OSUPs") for unregistered aliens from 2007-2010) in violation of 8 USC § 1324(a)(1)(A)(iv), (v). (Indictment at 1-

3). Defendant is a naturalized United States citizen and national of the former Socialist Federal Republic of Yugoslavia living in Westview, Stetson. (Indictment at 2). The Government's investigation into this matter commenced in May of 2018 by Special Agent Jimmy Woo ("Agent Woo") of the Department of Homeland Security ("DHS"). Affidavit of Agent Woo ("Woo Aff.") at 2.

**B. Description of an OSUP**

United States Immigrations and Custom Enforcement ("ICE") is responsible for, *inter alia*, issuing OSUPs (also called DHS Form I-220B). Indictment at 2. Under certain conditions, an OSUP authorizes the alien's release under certain conditions but grants the alien substantial benefits including permission to obtain a Stetson Driver's License and Employment Authorization Card. *Id*. at 2.

**C. Agent Woo is Delayed As He Begins Investigating Defendant's Ex-Employer, Agatha Harkness**

On May 3, 2018, the Westview Sheriff's Office called Agent Woo to report that it had a Guatemalan citizen, S.P., in its custody who had no authorization to reside in the U.S and an expired Stetson Driver's License that was issued to her in June of 2008. *Id*. at 5. The next day, Woo interviewed S.P. who relayed that her husband H.P. purchased forged immigration papers for $10,000 from a person named "Scarlet." *Id*. at 6. Woo called H.P. but he. refused to answer questions without consulting his attorney and the investigation halted for two months, until H.P. called Woo on August 10, 2018. *Id*. at 8-9.

H.P. relayed the following to Agent Woo on that call. *Id.* at 9-13. First, H.P.'s attorney was Defendant's ex-employer, Agatha Harkness. *Id*. at 9. Harkness was also

H.P.'s attorney in 2008 when he and S.P. sought lawful temporary residence. *Id*. at 9. It was Harkness who introduced both S.P. and H.P. to, Defendant, her law clerk at that time, whom Harkness called "great with paperwork." *Id*. at 10. In total, Defendant and S.P. spent 50 hours working together to finalize the couple's lawful temporary residence applications. *Id*. at 10.

Then, after the paperwork was complete, as he and S.P. left Harkness's office, they found a handwritten note with a phone number and instructions to call "Scarlet" to obtain immigration documents "like an OSUP". *Id*. at 11. H.P. called "Scarlet" that night; a man answered and requested $10,000 in cash to be placed in their mailbox the next day in exchange for "what they needed." *Id*. at 12. H.P. did not report to Agent Woo that he told "Scarlet" their names, addresses, or any other identifying information. *Id.* at 12. But, next morning, H.P. found fraudulent OSUPs in the mailbox. *Id*. at 12. Finally, H.P. told Woo that others - all clients of Harkness - paid "Scarlet" for the same fraudulent services. *Id*. at 13.

Agent Woo then promptly opened an investigation into Defendant's employer. *Id*. at 14. He contacted her law office but learned she retired in 2015; he called DHS to visit her home in Boston, Massachusetts but it was abandoned; he searched her flight records but found nothing to indicate she left the country. *Id*. at 14-16. On August 15, 2018, however, he was forced to table his investigation to work undercover for the task force until February 14, 2019. *Id*. at 17.

**D. Agent Woo Begins Investigating Defendant**

When Agent Woo returned, he re-opened the investigation and began knocking on the doors of other residents in the neighborhood H.P. and S.P. Id. at 18. Many refused to answer his questions, but one resident, R.B., complied on February 19, 2019. *Id.* at 18-19. R.B. was also a client of Harkness and admitted to paying "Scarlet" $10,000 for a forged OSUP. *Id.* at 19. R.B. also gave Woo the note left to him with Scarlet's phone number. *Id*. at 20. Woo called the number, but it was disconnected; he later learned through subpoenaed phone records that the number once functioned as the "emergency contact" number for the staff of The Law Office of Agatha Harkness. *Id.* at 21-23. At this point, Agent Woo opened an investigation into Defendant as "Scarlet." *Id.* at 24.

**E. Agent Woo Digs Deeper into Defendant**

On March 18, 2019, Agent Woo subpoenaed Defendant's phone, financial and flight records. *Id.* at 25. He then researched court records and learned that Defendant appeared as either counsel of record or a certified legal intern on 40 cases during her employment with Harkness. *Id.* at 28. Woo then attempted to interview those clients, 24 of which he successfully interviewed, and 8 of which he determined to have conspired with Defendant. *Id.* at 29. At least one of these interviews occurred as late as October 28, 2019. *Id.* at 30. During this process, he identified the earliest payment made to Defendant occurred on May 31, 2007; the latest occurred on July 24, 2010. *Id.* at 29.

**F. The COVID-19 Pandemic Delays Prosecution**

On March 23, 2020, the Court suspended the federal grand jury in Administrative Order 20-019 in response to the COVID-19 Pandemic. *Id.* at 60-62. The grand jury would

remain suspended for over a year, until March 29, 2021, when Administrative Order 21-008 reinstated it. IA Transcript at 62-65. The state of limitations for prosecuting Defendant expired on July 24, 2020. *Id.* at 51-52. On July 22, 2020, the United States instituted an Information charging Defendant two days prior to that occurring. Order of Dismissal, July 23, 2020. The same day, it filed a Motion to Dismiss without Prejudice pursuant to Federal Rule of Procedure 48. *Id.* On July 23, 2020, the Motion to Dismiss was granted. *Id.* On September 21, 2021, the United States returned an indictment from the grand jury against Defendant on the present charges. *Id.*

## ARGUMENT

### I. THE UNITED STATE'S RETURN OF THE SEPTEMBER 21, 2021 INDICTMENT SATISFIED THE STATUTORY REQUIREMENTS OF 18 U.S.C. §§ 3288, 3298

The issue before this Court is whether the Government's return of the September 21, 2021 Indictment satisfied the statutory requirements of 18 U.S.C. §§ 3288, 3298. The United States maintains it met the respective requirements of §§ 3288, 3298 and thus the Indictment was timely. However, Defendant asserts that because she did not waive her right to an indictment under Federal Rule of Criminal Procedure 7, the Government's July 22, 2020, information is void and, thus, its September 21, 2021 indictment is untimely. Detailed *infra*, the Government is correct for three reasons. First, the Government properly complied with the straightforward statutory requirements of §§ 3288, 3298. Second, its interpretation of § 3298 reflects its plain-language meaning. Finally, Defendant's lack of notice is immaterial under these circumstances. It is for these reasons that this Court should deny Defendant's Motion to Dismiss.

### A. The September 21, 2021 Indictment Was Timely Returned In View Of The Straightforward Statutory Requirements Of 18 U.S.C. §§ 3288, 3298

The United States interprets the relevant statutory framework to first mandate that it meet the requirements of the statute of limitations in § 3298. According to § 3298, this means that to prosecute Defendant, either "the indictment is found or the information is instituted not later than 10 years after the commission of the offense." 18 U.S.C. § 3298. From this point, the Government concedes that while "the filing of the information was sufficient for statute of limitations purposes, the government could not have held [Defendant] to answer for a felony solely on the basis of the information." *U.S. v. Burdix-Dana*, 149 F.3d 741, 743 (7th Cir. 1998). Rather, to proceed with its prosecution, the Government had two options: "[obtain] a waiver of [Defendant's] right to indictment or [] return an indictment." *Id.* at 743.

Here, however, because "no regular grand jury [was] in session in the appropriate jurisdiction when the … information [was] dismissed" by the Government, "[t]his dismissal brought 18 U.S.C. § 3288 into play." 18 U.S.C. § 3288; *Id.* Accordingly, 18 U.S.C. § 3288, states, in relevant parts:

> Whenever an indictment or information charging a felony is dismissed for any reason after the period prescribed by the applicable statute of limitations has expired, a new indictment may be returned in the appropriate jurisdiction …. if no regular grand jury is in session in the appropriate jurisdiction when the indictment or information is dismissed, within six calendar months of the date when the next regular grand jury is convened, which new indictment shall not be barred by any statute of limitations.

In sum, § 3288 grants the Government six months after the grand jury reconvenes to secure an indictment where (1) an information charging a felony is dismissed; (2) so long as no grand jury was in session at the time of the dismissal.[1]

In this case the United States filed a Motion to Dismiss which was granted on July 23, 2020, triggering § 3288. IA Transcript at 56-59. At this time, it is also undisputed that the Government obtained the Dismissal when no regular grand jury was in session in the District of Stetson Westview Division. *Id.* at 55-65. Accordingly, when the Court lifted Order 20-019 on March 29, 2021 in Administrative Order 21-008, reinstituting the grand jury, the Government timely returned its Indictment against Defendant on September 21, 2021. IA Transcript, 62-65; Indictment at 3. In doing so, it satisfied the very purpose of § 3288, which "allows the government to file an indictment after the limitations period has run where… the reason for dismissing the information is other than a failure [satisfy] the applicable statute of limitation." *Burdix-Dana*, 149 F.3d at 743 (7th Cir. 1998). Therefore, "[the] new indictment shall not be barred by any statute of limitations" and Defendant's motion to Dismiss should be denied. 18 U.S.C. § 3288.

### B. The Government's Interpretation Of § 3298 Reflects Its Plain-Language Meaning

Defendant contests that the Government's failed to comply with § 3298, however, and raises a somewhat related, but separate issue: "[whether] 7(b) prohibits the *filing* of an information in the absence of a waiver of indictment … so as to impact the [statute of

[1] That the July 22, 2020 Information was dismissed prior to the statute of limitations expiring is immaterial because 18 U.S.C. § 3289 is materially identical to § 3288 except it applies to "Indictments and information dismissed *before* period of limitations."

limitations in § 3298]?" *United States v. Rosecan*, No. 20-CR-80052, 2021 WL 1026070, at *2 (S.D. Fla. Mar. 17, 2021). Put simpler, she argues that because she did not waive her right to an Indictment prior to the statute of limitations expiring, she is entitled to dismissal of this case. The Government maintains that under § 3298, it satisfied the statute of limitations because under the facts and statutory scheme at issue, "the filing of the information is sufficient to institute it." *Burdix-Dana,*149 F.3d at. at 742-43.

This is because, according to the "'the majority of federal district courts … an information is 'instituted' when it is 'filed with the clerk of the court' and does not require the defendant to have waived prosecution by indictment." *United States v. Rosecan*, No. 20-CR-80052, 2021 WL 1026070 *4 (citing *United States v. Holmes*, No. 18-cr-00258, 2020 WL 6047232, at *8 (N.D. Cal. Oct. 13, 2020); *United States v. Briscoe*, 2020 WL 5076053 at *2; *United States v. Marifat*, No. 2:17-0189 WBS, 2018 WL 1806690, at *1-2 (E.D. Cal. Apr. 17, 2018); *United States v. Stewart*, 425 F. Supp. 2d 727, 729 (E.D. Va. 2006); *United States v. Hsin-Yung*, 97 F. Supp. 2d 24, 28 (D.D.C. 2000); *United States v. Watson*, 941 F. Supp. 601, 603 (N.D. W. Va. 1996)) (internal quotations omitted). This interpretation is correct first "because it is grounded in the plain language of [the statute]." *Rosecan*, 2021 WL 1026070 at *3. Indeed, "the plain language of [§ 3298] only requires that the 'information' be 'instituted' to satisfy the statute of limitations." *Id.*

In fact, until 2006, § 3298 and 18 U.S.C. § 3282, the statute at play in both *Burdix-Dana*, and *Rosecan*, were one in the same. *United States v. Bello*, No. 1:10-CR-397-WSD, 2011 WL 855375, at *1 (N.D. Ga. Mar. 9, 2011) (explaining that in 2006, "Section

3298 expanded the then existing five (5) year limitations period under 18 U.S.C. § 3282 for non-capital felony offenses"); *See*, *Burdix-Dana*, 149 F.3d at 742-43; *Rosecan*, 2021 WL 1026070 at *1-2. Thus, it is no surprise that the language of § 3298 is materially similar to that of 18 U.S.C. § 3282, which states:

> (a) Except as otherwise expressly provided by law, *no person shall be prosecuted,* tried, or punished for any offense, not capital, unless the indictment is found *or the information is instituted within five years* next after such offense shall have been committed.

18 U.S.C. § 3282(a) (emphasis added). As for § 3298, it only differs in that its statute of limitations is satisfied when an "information is instituted *not less than 10 years* after the commission of the offense." 18 U.S.C. § 3298 (emphasis added). Consequently, "institute" in § 3298 has already been interpreted according to its plain-language meaning.

This plain-language interpretation is further supported by the distinction between "prosecuted" and "instituted" as it pertains to a Rule 7(b) waiver. *Rosecan*, 2021 WL 1026070 at *3 (Explaining that "the terms 'prosecuted' and 'instituted' are not equivalent, and an information is 'instituted' when it is properly filed, regardless of the defendant's waiver"); *see also, Burdix-Dan*a, 149 F.3d at 742 (noting that "the absence of a valid waiver of prosecution by indictment bars the acceptance of a guilty plea or a trial on the relevant charges" but declining to accept that "the absence of this waiver makes the filing of an information a nullity"); *United States v. Briscoe*, No. CR RDB-20-0139, 2020 WL 5076053, at *2 (D. Md. Aug. 26, 2020) (pointing out that that a waiver would be required for future "prosecutorial actions—such as a trial or a plea agreement"). In

other words, Rule 7(b) merely "concerns itself with the requirements that the government must satisfy before it proceeds with a prosecution." *Burdix-Dana*, 149 F.3d at 742-43. More specifically, this means that "Rule 7(b) does not prohibit the *filing* of an information in the absence of waiver of indictment by the defendant," it merely "proscribes *prosecution* without waiver." *United States v. Cooper*, 956 F.2d 960, 962 (10th Cir. 1992).

Here, Defendant's argument thus crucially neglects that an "information could [] be [] filed within the period of limitations, thus providing a valid basis for the prosecution." *Id*. at 962. This explains why "[t]here is nothing in the statutory language of section [3298] that suggests a 'prosecution,' rather than the information, must be instituted before the expiration of the [statutory] period…." *Rosecan*, 2021 WL 1026070, at *4. Rather, the statute's unambiguous language just requires that "[an] information is instituted not later than 10 years after the commission of the offense." 18 U.S.C. § 3298. And, "where the language of the statute is unambiguous, the inquiry ends." *Rosecan,* 2021 WL 1026070 at *3 (citing *United States v. St. Amour*, 886 F.3d 1009, 1013 (11th Cir. 2018)).

Accordingly, the only question is "whether filing an information with the district court is sufficient to 'institute' the information as that language is used in the statute of limitations…." *Burdix-Dana*, 149 F.3d at 742. And, for the reasons above, the answer to that question is, unequivocally, yes. Therefore, under this correct interpretation, of § 3298, the Government properly "instituted" the present suit on July 22, 2020, prior to the

statute of limitations going into effect and Defendant's Motion to Dismiss should be denied.

### C. Defendant's Lack of Notice Is Immaterial Under These Circumstances

Defendant's final contention seeks dismissal as a matter of policy insofar as the Government's interpretation "appears to suggest that the government can 'willy-nilly' file an Information at the end of the limitations period as a means of extending it." *United States v. Sharma*, No. 4:14-CR-61, 2016 WL 2926365, at *2 (S.D. Tex. May 19, 2016). The effect of which, she argues would further mean that "it is possible that a person could fail to assert her rights not for lack of diligence, but for lack of notice" and the Government could still secure a late indictment. *Burdix-Dana*, 149 F.3d at 743 n.3. Here, however, based on the foregoing correct interpretation of "institute" in § 3298 and the Government's total compliance with §§ 3288, 3298, that concern simply isn't present before this Court.

This is because the Government met every statutory requirement necessary to prosecute defendant. And, given the statute of limitations, it only had two years to complete an investigation of events that occurred seven or more years prior and to begin prosecuting Defendant. The Government acted diligently throughout each step. Moreover, "an offense of a felony nature can only proceed to prosecution by an indictment, unless the indictment is waived by the defendant." Sharma, 2016 WL 2926365, at *4. However, COVID-19 precluded the Government from even being able to pursue one; instead, it was forced to trigger § 3288.

Simply put, Defendant's fears "regarding the Government's potential misuse of a waiverless information as a placeholder to indefinitely toll the statute of limitations" do not apply to the Government's actions in prosecuting its case against her. *Rosecan*, 2021 WL 1026070, at *4. Rather, "the plain text of section [3298] does not compel the result Defendant seeks—and addressing such policy implications is a task for Congress, not the courts." *Id.*; *Burdix-Dana*, 149 F.3d at 743 (explaining that "since the statutory language does not compel the result [Defendant] seeks, this argument is better presented to Congress than this court"). Accordingly, Defendant's Motion to Dismiss should be denied.

## II. IN THE ALTERNATIVE, THIS COURT SHOULD DENY DEFENDANT'S MOTION TO DISMISS BECAUSE THE PLAINTIFF IS ENTITLED TO EQUITABLE TOLLING OF A CRIMINAL STATUTE OF LIMITATIONS

If this Court is inclined to disagree that the Government's return of the September 21, 2021 Indictment satisfied the statutory requirements of 18 U.S.C. §§ 3288, 3298, then in the alternative, the United States is entitled to equitable tolling of the statute of limitations due to the District's suspension of the grand jury during the COVID-19 pandemic. This Court should deny Defendant's Motion to Dismiss for two reasons. First, equitable tolling is an available remedy during extraordinary circumstances, like the COVID-19 pandemic. Second, the United States satisfies the two-part test required to establish equitable tolling.

### A. The Equitable Tolling Remedy Is Available During Extraordinary Circumstances, Like The COVID-19 Pandemic

The Third Circuit recognized that criminal statutes of limitations are subject to tolling, suspension, and waiver. *United States v. Midgley*, 142 F.3d 174, 178 (3d Cir.1998); *United States v. Levine*, 658 F.2d 113, 119–121 (3d Cir.1981). Traditionally, the equitable tolling of a statute of limitations occurs where a complaint succeeds a filing deadline through either the complainant's benign mistake or an adversary's misconduct. *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990). Equitable tolling is available to a party when there is a causal link between the extraordinary circumstance and the inability to timely file the petition. *Sossa v. Diaz*, 729 F.3d 1225, 1229 (9th Cir. 2013) ("[E]quitable tolling is available only when extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time and the extraordinary circumstances were the cause of the prisoner's untimeliness."). A literal impossibility to file, however, is not required. *Grant v. Swarthout*, 862 F.3d 914, 918 (9th Cir. 2017).

In the present case, the United States asserts that on July 22, 2020, two days before the expiration of the statute of limitations, they filed a sealed Information against the Defendant, signed by Judge Bradley. On March 23, 2021, Administrative Order No. 20-019 suspended grand jury proceedings because of COVID-19. On March 29, 2021, the Court lifted the suspension, and the United States sought an indictment by the grand jury within six months to comply with 18 U.S.C. §3288. The unprecedented pandemic caused the Court to halt all proceedings, including the grand jury, and created extraordinary

circumstances that forced the United States to wait to seek an indictment until after the suspension was lifted.

In *Holland*, the Supreme Court recognized that flexibility is inherent in equity in order to meet new situations that demand equitable intervention. *Holland v. Florida*, 560 U.S. 631, 649 (2010). Further, as the Court stated, this accords all the relief necessary to correct particular injustices. *Holland*, 560 U.S. at 650. The petitioner "bears the burden of showing that this extraordinary exclusion should apply to him." *Miranda v. Castro*, 292 F.3d 1063, 1065 (9th Cir. 2002); accord *Milam v. Harrington*, 953 F.3d 1128, 1132 (9th Cir. 2020). Here, the United States has satisfied that burden by establishing that the extraordinary circumstances brought about by the suspension of grand jury proceedings because of COVID-19 rendered them unable to seek a grand jury indictment by the statutory deadline of July 24, 2020.

### B. The United States Satisfies The Two-Part Test Required To Establish Equitable Tolling

Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way. *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005) (citing *Irwin*, 498 U.S. at 96). Courts determine whether a petitioner has exercised reasonable diligence using a subjective test that "must be considered in light of the particular circumstances of the case." *Ross v. Varano*, 712 F.3d 784, 799 (3d Cir. 2013). Further, a determination of whether there are grounds for equitable tolling is a highly fact-dependent question. *Whalem/Hunt v. Early*, 233 F.3d 1146, 1148 (9th Cir.

2000). Courts have concluded that the COVID-19 pandemic "could—in certain circumstances—conceivably warrant equitable tolling"... *United States v. Haro*, No. 8:18CR66, 2020 WL 5653520, at *4 (D. Neb. Sept. 23, 2020). These "certain circumstances" involve defendants who had been pursuing their rights diligently and would have timely filed if not for external obstacles caused by COVID-19. The District of Nevada, for example, granted a defendant's COVID-19-based request for equitable tolling because the pandemic had, among other things, halted ongoing investigations and prevented counsel from obtaining necessary court records. *See Dunn v. Baca*, No. 319CV00702MMDWGC, 2020 WL 2525772, at *2 (D. Nev. May 18, 2020).

Here, "in light of the particular circumstances" of this case, there is basis for equitable tolling. The criminal investigation, led by Agent Woo, tracked Defendant's criminal activity from May 31, 2007 until July 24, 2010. Indictment at 2. The United States did not become aware of Defendant's criminal activity until May 2018, after a routine traffic stop led Agent Woo to the first of multiple aliens whom the Defendant sold false and fraudulent OSUPs to. Woo Aff. at 2. Agent Woo, with the support of the United States Department of Homeland Security ("DHS"), diligently gathered evidence and conducted interviews. *Id.* at 5-8. DHS continued to conduct the investigation until the case was ready to be presented to a grand jury for an indictment. However, due to the unprecedented COVID-19 pandemic, the Court suspended the grand jury, and the United States could not file their indictment until the suspension was lifted by Administrative Order No. 21-008 on March 29, 2021.

That indictment was entered on September 21, 2021, within the six months requirement of 18 U.S.C §3288. IA at 62-65. Thus, the United States established that it was pursuing its rights to prosecute Defendant diligently and that the COVID-19 pandemic was an "extraordinary circumstance" that prevented it from timely filing. For these reasons, these extraordinary circumstances dictate that the Government is entitled to the equitable tolling of the statute of limitations in §3298, and Defendant's Motion to Dismiss should be denied.

## CONCLUSION

WHEREFORE, for the foregoing reasons, the United States of America respectfully requests that this honorable Court deny Defendant's Motion to Dismiss.

Respectfully submitted,

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Attorneys for the Plaintiff