SAMPLE

Motion to Reconsider with the BIA

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[If applicable: DETAINED]

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the Matter of:	)	
	)	
____,	)	A Number:_________________
	)	
Respondent.	)	
	)	
In Removal Proceedings.	)	
	)	
____	)	

MOTION TO RECONSIDER IN LIGHT OF
MATTER OF ABDELGHANY

I. <u>INTRODUCTION</u>

Pursuant to § 240(c)(6) of the Immigration and Nationality Act (INA), Respondent, ______, hereby seeks reconsideration of this case in light of the Board of Immigration Appeal's (BIA or Board) recent precedent decision in *Matter of Abdelghany,* 26 I&N Dec. 254 (BIA 2014). In *Matter of Abdelghany*, the Board brought its interpretation of former § 212(c) in line

with the Supreme Court's decisions in *Judulang v. Holder*, 132 S. Ct. 476 (2011), *Vartelas v. Holder*, 132 S. Ct. 1479, 1491 (2012), and *INS v. St. Cyr*, 533 U.S. 289, 326 (2001). Specifically, the Board corrected its prior decisions in *Matter of Blake*, 23 I&N Dec. 722 (BIA 2005) and *Matter of Brieva*, 23 I&N Dec. 766 (BIA 2005), which made § 212(c) relief unavailable to any lawful permanent resident (LPR) who was deportable on a ground that lacked a "comparable ground" of inadmissibility. *Matter of Abdelghany*, 26 I&N Dec. at 265. The Board eliminated the "comparable grounds" rule in recognition that the Supreme Court's decision in *Judulang, supra*, had rendered it invalid. The Board also eliminated the distinction between convictions based on guilty pleas and convictions entered after trial for the purposes of § 212(c) eligibility, and thereby abrogated the regulatory prohibition in 8 C.F.R. § 1212.3(h) against granting § 212(c) relief to LPRs convicted after trial. *Matter of Abdelghany*, 26 I&N Dec. at 268-69.

In the instant case, DHS charged Respondent, an LPR with [inadmissibility OR deportability] under INA § ___. The Immigration Judge (IJ) found Respondent ineligible for § 212(c) relief due to [insert whichever applicable: the lack of a comparable ground of inadmissibility AND/OR the fact that the conviction resulted from a trial]. The Board affirmed the IJ's decision on _______________. The Board's precedent decision in *Matter of Abdelghany* has nullified this basis of the Board's decision. Therefore, the Board should reconsider its decision and allow Respondent to proceed with an application for § 212(c) relief.

II. STATEMENT OF FACTS AND STATEMENT OF THE CASE

Respondent became a lawful permanent resident on _____________. The Department of Homeland Security (DHS) charged Respondent with [deportability OR inadmissibility] under INA §_____ for having been _________. *See* Notice to Appear.

On _______, the Immigration Judge (IJ) pretermitted Respondent's application for relief from removal under former § 212(c) of the INA [because the charged ground of deportability is not comparable to a ground of inadmissibility AND/OR because the conviction resulted from a trial]. *See* IJ Decision. This Board affirmed the IJ's decision on ______. *See* BIA Decision.

Pursuant to 8 C.F.R. § 1003.2(e), Respondent declares that:

(1) The validity of the removal order [has been or is OR has not been and is not] the subject of a judicial proceeding. [If applicable] The location of the judicial proceeding is: _________________________. The proceeding took place on: ________________________. The outcome is as follows ____.

(2) Respondent [is OR is not] currently the subject of a criminal proceeding under the Act. The current status of this proceeding is: ____.

(3) Respondent [is OR is not] currently the subject of any pending criminal proceeding under the Act.

III. <u>STANDARD FOR RECONSIDERATION</u>

A motion to reconsider shall specify the errors of law or fact in the previous order and shall be supported by pertinent authority. INA § 240(c)(6)(C); 8 C.F.R. § 1003.3(b)(1). In general, a respondent may file one motion to reconsider within 30 days of the date of a final removal order. INA § 240(c)(6)(A)&(B), 8 C.F.R. § 1003.2(b)(2).

[If motion is filed within 30 days of BIA's decision] The Board issued its decision in Respondent's case on ______. This motion is timely filed within 30 days of the date of that decision].

[If more than 30 have elapsed since the date of the Board's decision] The Board issued its decision in Respondent's case on ______. The Board should treat the instant motion as a timely filed statutory motion to reconsider because Respondent merits equitable tolling of the time [if applicable: and numeric] limitations. *See* § IV.C., *infra*; *see also* 8 C.F.R. § 1003.1(d)(1)(ii) ("a panel or Board member to whom a case is assigned may take any action consistent with their authorities under the Act and the regulations as is appropriate and necessary for the disposition of the case.").

[Consider adding the next paragraph if more than 30 days have elapsed since the BIA's decision and DHS has not removed the person. If more than 30 days have elapsed and DHS has removed the person, *see* section III.C of the accompanying advisory]. In the alternative, Respondent seeks *sua sponte* reconsideration pursuant to 8 C.F.R. § 1003.2(a) based on a fundamental change in the agency's position, which brings the agency's interpretation in line with the Supreme Court's precedent decisions in *Judulang*, *supra*, *St. Cyr*, *supra*, and *Vartelas supra*. The Board has held that an "exceptional situations" standard applies when adjudicating a *sua sponte* motion. *See Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997). A significant development in the agency's recognition of the governing law warrants sua sponte action by the Board. *See*, *e.g.*, *Matter of Muniz*, 23 I&N Dec. 207, 207-08 (BIA 2002); *Matter of X-G-W-*, 22 I&N Dec. 71, 73 (BIA 1998); *Matter of G-C-L-*, 23 I&N Dec. 359 (BIA 2002); *see also* 8 C.F.R. § 1003.1(d)(1)(ii) ("a panel or Board member to whom a case is assigned may take any action

consistent with their authorities under the Act and the regulations as is appropriate and necessary for the disposition of the case.”).

IV. ARGUMENT

A. AS A MATTER OF LAW, THE BOARD ERRED IN DENYING RESPONDENT THE OPPORTUNITY TO APPLY FOR § 212(c) RELIEF.

In *Matter of Abdelghany*, the Board adopted a uniform nationwide rule for § 212(c) relief eligibility consistent with the Supreme Court’s decisions in *Judulang v. Holder*, 132 S. Ct. 476 (2011), *Vartelas v. Holder*, 132 S. Ct. 1479, 1491 (2012), and *INS v. St. Cyr*, 533 U.S. 289, 326 (2001). The petitioner in *Matter of Abdelghany* was a lawful permanent resident whom DHS charged with deportability for having an aggravated felony conviction under INA § 101(a)(43)(E)(i) & (U), based on a 1995 arson conviction. *Matter of Abdelghany*, 26 I&N Dec. at 256. The Immigration Judge ordered his removal, holding that Abdelghany could not apply for § 212(c) relief because there is no inadmissibility ground in INA § 212 comparable to the charged aggravated felony deportability ground. *Id*. The Board reversed.

Because the Supreme Court’s decision in *Judulang* compelled it to do so, the Board overruled both *Matter of Blake* and *Matter of Brieva* and 8 C.F.R. § 1212.3(f)(5) as well as prior cases finding LPRs ineligible for § 212(c) relief if their conviction(s) did not trigger

inadmissibility.[1] Specifically, the Board reasoned that consistent with *Judulang*, this test "places inadmissible and deportable lawful permanent residents on a truly level playing field while disregarding mechanical distinctions that arise from the statutory structure and that bear no relation either to deportable aliens' fitness to remain in this country or to the overall purposes of the immigration laws." *Matter of Abdelghany*, 26 I&N Dec. at 265.

In addition, the Board found that the Supreme Court's decisions in *St. Cyr* and *Vartelas* further compelled it to eliminate the distinction between convictions based on guilty pleas and convictions entered after trial for purposes of § 212(c) eligibility, and thereby abrogated the regulatory prohibition in 8 C.F.R. § 1212.3(h) against granting § 212(c) relief to immigrants convicted after trial. In doing so, the Board pointed to both the Supreme Court's decisions in *INS v. St. Cyr*, 533 U.S. at 325, prohibiting retroactive application of AEDPA[2] and IIRIRA's[3] amendments to § 212(c), and *Vartelas v. Holder*, 132 S.Ct. at 1491, clarifying that the presumption against retroactive application of statutes does not require a showing of reliance. *Matter of Abdelghany*, 26 I&N Dec. at 259, 266-69.

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[1] *See*, *e.g.*, *Matter of Granados*, 16 I&N Dec. 726, 728 (BIA 1979) (finding LPR with a firearm possession offense ineligible for § 212(c) because the offense did not come within the grounds of excludability as a crime involving moral turpitude), *aff'd*, 624 F.2d 191 (9th Cir. 1980); *Matter of Hernandez-Casillas*, 20 I&N Dec. 262, 280-93 (BIA 1990; AG 1991) (overruling the BIA's decision in *Hernandez-Casillas*, which broadened the availability of § 212(c) to cover all grounds of deportability except those related to subversives and war criminals, and resuming the government's policy of excluding from § 212(c) relief those LPRs whose offenses did not trigger excludability).

[2] Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, § 440(d), 110 Stat. 1214, 1277 (effective Apr. 24, 1996).

[3] Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Div. C of Pub. L. No. 104-208, § 304(b), 110 Stat. 3009-546, 3009-597 (effective Apr. 1, 1997).

[Insert if applicable] Like the petitioner in *Matter of Abdelghany*, Respondent was charged with and found removable based on a ground of deportability (_____________) for which there is no comparable ground of inadmissibility and the BIA found Respondent ineligible for § 212(c) on this basis. *See* BIA Decision at p. __.

[Insert if applicable]Respondent was found ineligible for § 212(c) because [her/his] conviction resulted from a trial and the Board found Respondent ineligible for § 212(c) on this basis. *See* BIA Decision at p. __.] Thus, the Board erroneously found Respondent ineligible for § 212(c) relief in violation of INA § 212(c) (1995).

For the foregoing reason(s), the Board should reconsider the decision in this case.

B. RESPONDENT IS ELIGIBLE FOR RELIEF UNDER FORMER § 212(c)

[Because the requirements depend on the date of plea agreement or conviction insert whichever is applicable]

[For plea agreements or convictions before November 29, 1990]

An LPR who has accrued 7 consecutive years of lawful unrelinquished domicile in the United States and who is removable or deportable based on a plea agreement or conviction that occurred before November 29, 1990 is eligible to apply for discretionary relief under former INA § 212(c), unless excludable on grounds relating to national security or to former persecutors in Nazi Europe. *See Matter of Abdelghany*, 26 I&N Dec. at 272; INA § 212(c) (1990); 8 C.F.R. § 1212.3(f)(4)(ii).

[For plea agreements or convictions on or after November 29, 1990 but before April 24, 1996]

An LPR who has accrued 7 consecutive years of lawful unrelinquished domicile in the United States and who is removable or deportable based on a plea agreement or conviction that occurred on or after November 29, 1990 but before April 24, 1996 is eligible to apply for discretionary relief under former INA §212(c), unless convicted of one or more aggravated felonies for which the immigrant had served a term of imprisonment of at least 5 years; or inadmissible on grounds relating to national security, former persecutors in Nazi Europe, or international abductors. *See Matter of Abdelghany*, 26 I&N Dec. at 272; INA § 212(c) (1995); 8 C.F.R. § 1212.3(f)(4)(i).

[For plea agreements or convictions on or after April 24, 1996 but before April 1, 1997]

An LPR who has accrued 7 consecutive years of lawful unrelinquished domicile in the United States and who is removable or deportable based on a plea agreement or conviction that occurred on or after April 24, 1996 but before April 1, 1997 is eligible to apply for discretionary relief under former § 212(c), unless deportable by reason of having committed any aggravated felony (regardless of time served), a controlled substance offense, certain firearm offenses, or two or more crimes involving moral turpitude committed within five years of entry for which the sentence of imprisonment was one year or longer; or inadmissible on grounds relating to national security, former persecutors in Nazi Europe, or international abductors. *See Matter of Abdelghany*, 26 I&N Dec. at 272; AEDPA, § 440(d), Pub. L. No. 104-132, 110 Stat. 1214; 8 C.F.R. § 1212.3(h)(2).

[Insert paragraph explaining why Respondent meets the applicable criteria]

C. THE BOARD SHOULD TREAT THE INSTANT MOTION AS A TIMELY FILED STATUTORY MOTION BECAUSE RESPONDENT MERITS EQUITABLE TOLLING OF THE TIME AND NUMERICAL

LIMITATIONS.

1. Standard for Equitable Tolling

A motion to reconsider must be filed within 30 days of entry of a final administrative order of removal, INA § 240(c)(6)(B), 8 C.F.R. § 1003.2(b)(2), or as soon as practicable after finding out about the decision. The Board of Immigration Appeals issued its decision in *Matter of Abdelghany* on February 28, 2014. Respondent is filing this motion as soon as practicable after finding out about the Board's ruling. [If available] *See* Declaration of Respondent (addressing circumstances leading to the instant motion).

The Supreme Court concisely and repeatedly has articulated the standard for determining whether an individual is "entitled to equitable tolling." *See*, *e.g*., *Holland v. Florida*, 560 U.S. 631, 632 (2010). Specifically, an individual must show "'(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Id.* (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). *See also Credit Suisse Securities (USA) LLC v. Simmonds*, 132 S. Ct. 1414, 1419 (2012); *Lawrence v. Florida*, 549 U.S. 327, 336 (2007). The Supreme Court also requires that those seeking equitable tolling pursue their claims with "reasonable diligence," but petitioners need not demonstrate "maximum feasible diligence." *Holland*, 560 U.S. at 653 (internal quotations omitted).

The Supreme Court's equitable tolling test accords with the test of all nine circuits that already have recognized that motion deadlines are subject to equitable tolling. *Iavorski v. INS*, 232 F.3d 124, 134 (2d Cir. 2000) (Sotomayor, J.) ("[e]quitable tolling requires a party to pass with reasonable diligence though the period it seeks to have tolled") (internal citations omitted). *Borges v. Gonzales*, 402 F.3d 398, 407 (3d Cir. 2005) (explaining that petitioner must "exercise

reasonable diligence in investigating and bringing the claim") (internal quotation omitted); *Kuusk v. Holder*, 732 F.3d 302, 305 (4th Cir. 2013) (explaining that equitable tolling is proper when (1) wrongful conduct by the opposing party prevented petitioner from timely asserting her claim or (2) extraordinary circumstances beyond petitioner's control made it impossible to file the claims on time); *Mezo v. Holder*, 615 F.3d 616, 620 (6th Cir. 2010) (defining equitable tolling as the doctrine that the statute of limitations will not bar a claim if, despite diligent efforts, litigant did not discover the injury until after the limitations period had expired") (internal quotation omitted); *Pervaiz v. Gonzales*, 405 F.3d 488, 489 (7th Cir. 2005) ("…[T]he test for equitable tolling, both generally and in the immigration context, is not the length of the delay in filing the complaint or other pleading; it is whether the claimant could reasonably have been expected to have filed earlier") (citations omitted); *Ortega-Marroquin v. Holder*, 640 F.3d 814, 819-20 (8th Cir. 2011) (recognizing that equitable tolling of the motion deadline allows it to be treated as though it had been timely filed pursuant to the statute); *Socop-Gonzalez v. INS*, 272 F. 3d 1176, 1184-85 (9th Cir. 2001) (holding that "all one need show is that by the exercise of reasonable diligence the proponent of tolling could not have discovered essential information bearing on the claim") (internal quotation omitted); *Riley v. INS*, 310 F.3d 1253, 1258 (10th Cir. 2002) (holding that BIA must consider noncitizens due diligence in evaluating whether equitable tolling of motion to reopen deadline is warranted); *Avila-Santoyo v. AG*, 713 F.3d 1357 (11th Cir. 2013) (en banc) (explaining that equitable tolling requires litigant to show (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way). *Cf. Toora v. Holder*, 603 F.3d 282, 284 (5th Cir. 2010) (reviewing BIA decision in which BIA concluded "no equitable tolling excused the late [filed motion to reopen] because [petitioner]

failed to exercise due diligence…"); *Bolieiro v. Holder*, 731 F.3d 32, 2013 U.S. 39 n.7 (1st Cir. 2013) ("Notably, every circuit that has addressed the issue thus far has held that equitable tolling applies to . . . limits to filing motions to reopen.").

2. Respondent Is Diligently Pursuing [Her/His] Rights.

Respondent has exhibited the requisite "due diligence" because [she/he] is filing the instant motion to reopen within ___ days of discovering that [she/he] is eligible for relief under § 212(c) (1995). As set forth in Respondent's accompanying declaration, Respondent attempted to challenge the agency's decision pretermitting her/his § 212(c) application by appealing the decision to the BIA, [if applicable] and later via Petition for Review to the U.S. Court of Appeals for the _____ Circuit. [If Respondent did not seek BIA or circuit review, explain the reason why, i.e., perhaps the IJ said it was futile, perhaps prior counsel said it was futile, perhaps Respondent lacked financial resources and/or knowledge about the right to appeal (support all claims with citations to the transcript, declarations, etc. if possible)]. Respondent first learned that the agency's § 212(c) eligibility criteria had changed on ___________ when _____________. *See* Respondent's Declaration.

3. **Extraordinary Circumstances Prevented Timely Filing this Motion.**

There is rebuttable presumption that equitable tolling is read into every federal statute of limitations. *Holland v. Florida*, 560 U.S. 631, 631 (2010) (quoting *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89, 95-96 (1990)). This means that a deadline may be extended where the litigant acted diligently in pursuing his or her rights, but an extraordinary circumstance stood in the way. *See Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). Separately, but relatedly, the INA

requires that a motion to reconsider "shall specify the errors or law or fact in the previous order and shall be supported by pertinent authority." INA § 240(c)(6)(B); 8 C.F.R. § 1003.23(b)(3).

[If Ineffective Assistance of Counsel Prevented Timely Filing, insert the following;]

A motion to reopen or reconsider based on ineffective assistance of counsel must contain: (1) an affidavit detailing the agreement with former counsel and what prior counsel represented to the respondent; (2) an indication that prior counsel has been informed of the allegations of ineffective assistance of counsel and allowed an opportunity to respond; and (3) an indication of whether the respondent filed a complaint with the appropriate disciplinary authority regarding counsel's conduct, or, if a complaint was not filed, an explanation for not filing one. *Matter of Lozada*, 19 I&N Dec. 637, 639 (BIA 1988); 8 C.F.R. § 1208.4(a)(5)(iii). In addition, the motion must demonstrate that prior counsel's conduct prejudiced the respondent. *Matter of Lozada*, 19 I&N Dec. at 638. Respondent has met these requirements.

[Insert text explaining why Respondent met each of these requirements]

[If Agency Malfeasance Prevented Timely Filing, insert the following:]

The Executive Office for Immigration Review (EOIR)'s malfeasance, including the IJ's, the Board's, and the former Attorney General's incorrect positions and misguided interpretations regarding § 212(c) eligibility prevented Respondent from timely filing this motion. [If applicable: The IJ's malfeasance began when the IJ did not inform Respondent that he could apply for § 212(c) relief. *See* 8 C.F.R. § 1240.11(a)(2) ("The immigration judge shall inform the alien of his or her apparent eligibility to apply for any of the benefits enumerated in this chapter

and shall afford the alien an opportunity to make application during the hearing, in accordance with the provisions of § 1240.8(d)"). In addition, prior to ordering Respondent removed, the IJ made several statements to mislead Respondent into believing that he was not eligible for § 212(c) relief. [Include citation to the transcript to support this statement].

[If pro se before the IJ:] Significantly, the IJ's malfeasance effectively made it impossible for Respondent, an "unsophisticated claimant," to know about this relief. *Cf. Auburn Reg'l Med. Ctr.*, 133 S. Ct. at 830 (Sotomayor, J., concurring) (". . . with respect to remedial statutes designed to protect the rights of unsophisticated claimants, . . . agencies (and reviewing courts) may best honor congressional intent by presuming that statutory deadlines for administrative appeals are subject to equitable tolling, just as courts presume comparable judicial deadlines under such statutes may be tolled.").

The IJ's conduct, however, is symptomatic of a larger agency malfeasance in the Board's misinterpretation of eligibility for § 212(c) relief. The Supreme Court has corrected the agency's approach to § 212(c) eligibility in at least three cases. First, the Supreme Court overturned the agency's position in *Matter of Soriano*, 21 I&N Dec. 516, 533-40 (BIA 1996; A.G. 1997), in which the former Attorney General determined that the agency must apply AEDPA § 440(d) retroactively to foreclose applications for § 212(c) relief that were pending on AEDPA's effective date. *See INS v. St. Cyr*, 533 U.S. at 326 (holding that in view of the presumption against statutory retroactivity, "§ 212(c) relief remains available for aliens . . . whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for § 212(c) relief at the time of their plea under the law then in effect.").

Next, the Supreme Court in *Judulang* unanimously rejected as "arbitrary and capricious," the Board's ruling in *Matter of Blake*, 23 I&N Dec. at 729 and *Matter of Brieva*, 23 I&N Dec. at 773, that LPRs charged with deportability do not have a right to seek § 212(c) relief unless the charged ground of deportation is "substantially equivalent" to a ground of inadmissibility. 132 S. Ct. at 485. The Court explained that "by hinging a deportable alien's eligibility for discretionary relief on the chance correspondence between statutory categories—a matter irrelevant to the alien's fitness to reside in this country—the BIA has failed to exercise its discretion in a reasoned manner." *Id*. at 484. The Court's reasoning also undermined the Board's position barring § 212(c) relief to LPRs whose convictions did not trigger inadmissibility, such as firearm convictions. *See, e.g., Matter of Granados*, 16 I&N Dec. 726, 728 (BIA 1979), *aff'd*, 624 F.2d 191 (9th Cir. 1980); *Matter of Hernandez-Casillas*, 20 I&N Dec. 262 (BIA 1990; AG 1991).

Finally, the Supreme Court's decision in *Vartelas* effectively invalidated EOIR regulation at 8 C.F.R. § 1212.3(h), which prohibits § 212(c) relief to LPRs convicted after trial on the theory that such individuals cannot demonstrate detrimental reliance on the potential availability of § 212(c) relief. In *Vartelas*, the Supreme Court held that reliance on prior law is not required to find that a new law has impermissible retroactive effect. 132 S. Ct. at 1491 ("the presumption against retroactive application of statutes does not require a showing of detrimental reliance"). In doing so, the Court rejected the Second Circuit's contrary conclusion, explaining that it has never required a party to show specific reliance on prior law to invoke the presumption against retroactivity. *Id.* at 1490. Rather, the Court reiterated that the key issue is whether the "new provision attaches new legal consequences to events completed before its enactment." *Id.* at 1491 (internal citations omitted).

The Supreme Court's admonishment of the agency's errors, as reflected in its decisions in *St. Cyr*, *Judulang,* and *Vartelas*, constitutes specific "errors of law" within the meaning of INA § 240(c)(6)(B), which the Board must consider when determining whether to toll the statutory deadline. That is, Respondent argues that the agency's "misfeasance" merits equitable tolling. *Sebelius v. Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 830 (2013) (Sotomayer, J., concurring) ("In particular, efforts by an agency to enforce tight filing deadlines in cases where there are credible allegations that filing delay was due to the agency's own misfeasance may not survive deferential review.").

V. CONCLUSION

The Board of Immigration Appeal's precedent decision in *Matter of Abdelghany* nullifies the Board's prior decision denying Respondent the opportunity to apply for § 212(c) relief. Respondent respectfully requests the Board reconsider its decision and remand the case to the immigration court for a § 212(c) hearing in Respondent's case.

Dated: ____________ Respectfully submitted,

____

[Attach proof of service on opposing counsel]