Case No. 3:21-cv-2268-S

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

THE DUGABOY INVESTMENT TRUST AND THE GET GOOD TRUST,

Appellants,

v.

HIGHLAND CAPITAL MANAGEMENT, L.P.,

Appellee.

On Appeal from the United States Bankruptcy Court
Northern District of Texas, Dallas Division
The Honorable Stacey G. C. Jernigan, United States Bankruptcy Court

In re: Highland Capital Management, L.P.
Case No. 19-34054

ANSWERING BRIEF OF APPELLEE HIGHLAND CAPITAL MANAGEMENT, L.P.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

OTHER AUTHORITIES

RULES

CORPORATE DISCLOSURE STATEMENT

Appellee Highland Capital Management, L.P. is a limited partnership, the general partner previously was Strand Advisors, Inc., a privately held corporation, and is now HCMLP GP LLC, a privately held limited liability company. No publicly held corporation owns 10% or more of the interests in either entity.

Appellee Highland Capital Management, L.P. ("Highland" or the "Debtor"), the debtor and reorganized debtor in the above-referenced chapter 11 bankruptcy case, hereby submits its *Answering Brief* to the brief filed on November 15, 2021 (the "Appellants' Brief"), with respect to *Appellants' Motion to Compel Compliance with Rule 2015.3* (the "Motion to Compel")[1] filed by The Dugaboy Investment Trust ("Dugaboy") and the Get Good Trust ("Get Good" and, together with Dugaboy, the "Appellants") in respect of their appeal from the *Order Denying Motion to Compel Compliance with Bankruptcy Rule 2015.3* (the "2015.3 Order"), entered by the United States Bankruptcy Court for the Northern District of Texas (the "Bankruptcy Court") on September 7, 2021.[2]

I. STATEMENT OF ISSUES AND STANDARD OF REVIEW

The issue on appeal is whether the Bankruptcy Court properly exercised its discretion in denying the Motion to Compel. This appeal presents a question of fact. The Bankruptcy Court's findings of fact made pursuant to Bankruptcy Rule 2015.3(d) with respect to whether cause existed to modify the reporting requirements of Bankruptcy Rule 2015.3(a) is subject to an abuse-of-discretion review.[3]

[1] ROA.vol. 2.000421.

[2] Unless otherwise noted, capitalized terms used herein have the meanings ascribed herein or in the Appellants' Brief as applicable.

[3] The Fifth Circuit has explained that "a wide latitude of discretion is necessarily vested in the trial judge" who makes good-cause findings, because such determinations depend "to a large extent upon the facts of each case." *S. Ry. Co. v. Lanham*, 403 F.2d 119, 126 (5th Cir. 1968) (applying former Fed. R. Civ. P. 34). The Fifth Circuit thus "typically review[s] determinations of whether a justification exists to excuse a deadline for abuse of discretion." *United States v. Williams*, 774 F. App'x 871 (5th Cir. May 24, 2019)

II. SUMMARY OF THE RESPONSE

Neither of the Appellants have standing to appeal the 2015.3 Order under controlling Fifth Circuit law because they do not have any claims against the Debtor and they are not directly and adversely affected pecuniarily by the 2015.3 Order.[4] Even if the Appellants did have standing to appeal, the Bankruptcy Court properly determined that sufficient cause existed under Bankruptcy Rule 2015.3(d) to modify the reporting requirements under that rule because: (1) as a result of confirmation of the Debtor's plan of reorganization and imminent plan effective date, which occurred on August 11, 2021, reporting requirements are no longer required under Bankruptcy Rule 2015.3(a); (2) the lack of necessary Debtor personnel to draft reports for approximately 150 non-debtor entities, and; (3) the official committee of unsecured creditors ("Committee") appointed in the Debtor's chapter 11 case—which represented over 99% of the amount of unsecured claims that voted

(abuse-of-discretion review of finding, under Fed. R. Civ. P. 12(b)(3), of good cause for an untimely motion to suppress); *see also, e.g.*, *Thrasher v. City of Amarillo*, 709 F.3d 509, 511 (5th Cir. 2013) (abuse-of-discretion review of finding, under Fed. R. Civ. P. 4(m), of good cause to extend deadline to serve complaint); *United States v. Plascencia*, 537 F.3d 385, 388-89 (5th Cir. 2006) (abuse-of-discretion review of finding, under Fed. R. App. P. 4, of good cause or excusable neglect to extend deadline to notice appeal); *United States v. Gilmore*, 613 F. App'x 436 (5th Cir. Aug. 24, 2015) (unpublished) (abuse-of-discretion review of finding, under Fed. R. Crim P. 12.2(a), of good cause to file an untimely insanity-defense notice); *Fujita v. United States*, 416 F. App'x 400 (5th Cir. Mar. 2, 2011) (abuse-of-discretion review of finding, under Fed. R. Civ. P. 26(c), of good cause to stay discovery).

[4] Appellee is filing a separate motion to dismiss the appeal on the basis of Appellants' lack of standing, and on constitutional and equitable mootness ground pursuant to the *Appellee's Motion to Dismiss Appeal as Moot* filed contemporaneously with this Answering Brief. Those arguments are separately addressed in that motion and not repeated herein

overwhelmingly to accept the Debtor's plan—was already being provided with confidential information about the Debtor's operations and assets that was more fulsome than the information otherwise required under Bankruptcy Rule 2015.3(a).

III. STATEMENT OF FACTS

Appellee submits that Appellants' recitation of the central facts relevant to the issue submitted for review are both incomplete and misleading and therefore submits the following additional background facts.

A. Background of Appellants

Each of the Appellants are family "trusts" controlled by James Dondero, one of the Debtor's founders, and were created to manage the assets of Dondero and his family.[5] The Bankruptcy Court found Appellants, along with the rest of the entities controlled by Dondero, "to be all marching pursuant to the orders of Mr. Dondero."[6] Dondero owns no equity in the Debtor directly, but he owns the Debtor's former general partner, Strand Advisors Inc., which in turn owns 0.25% of the total prepetition equity of the Debtor. Dugaboy owned a 0.1866% limited-partnership interest in the Debtor.[7] The Bankruptcy Court previously found that it "is not clear

[5] *Order (I) Confirming the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified) and (II) Granting Related Relief*, entered on February 22, 2021, Bankruptcy Court Docket No. 1943, designated in *Amended Designation of Record*, ROA.vol 1 at 5(a) (the "Confirmation Order").

[6] Confirmation Order ¶ 19.

[7] Confirmation Order ¶ 18.

what economic interest the Get Good Trust has, but it seems to be related to Mr. Dondero."[8]

Each of the Appellants filed multiple claims in the Debtor's chapter 11 case, all of which were disputed and, in certain cases, formally objected to by the Debtor.[9] However, all of the claims collectively filed by both Appellants have now been withdrawn, with prejudice, pursuant to stipulated orders entered by the Bankruptcy Court.[10] Therefore, neither of the Appellants assert any claims against the Debtor.

B. The Chapter 11 Case and Appointment of the Independent Board

The Debtor filed a voluntary chapter 11 petition on October 19, 2019, in the United States Bankruptcy Court for the District of Delaware.[11] The Committee appointed in the Debtor's case and the U.S. Trustee quickly expressed serious concerns about Highland's ability to act as a fiduciary to its estate due to "concerns over and distrust of Mr. Dondero, his numerous conflicts of interest and his history of alleged mismanagement (and possibly even worse)."[12] The Committee threatened to seek the appointment of a chapter 11 trustee. To avoid such a drastic step, the

[8] Confirmation Order ¶ 18.

[9] Bankruptcy Docket Nos. 906 and 2796.

[10] *See* Bankruptcy Docket Nos. 2965, 2966, 3009 and 3010.

[11] The case was subsequently transferred to the Northern District of Texas upon motion of the Committee.

[12] Confirmation Order ¶ 11.

Committee, Highland, and Dondero agreed to a settlement (the "Governance Settlement"), which was approved by the Bankruptcy Court on January 9, 2020.[13]

The Governance Settlement resulted in the appointment of three independent directors at Strand to manage Highland and its reorganization: James P. Seery, Jr., John S. Dubel, and retired Bankruptcy Judge Russell Nelms (together, the "Independent Directors").[14] The Bankruptcy Court specifically found that "this [Governance Settlement] and the appointment of the independent directors changed the entire trajectory of the case and saved Highland from the appointment of a trustee."[15]

C. The Negotiation and Confirmation of the Debtor's Plan and Dondero's Commencement of Litigation

Following the approval of the Governance Settlement and appointment of the Independent Directors, the Debtor initially sought to propose a plan that would both pay creditors and allow Dondero to regain control of the Debtor and its assets.[16] But none of Dondero's proposals during those negotiations was acceptable to the Committee or the Independent Directors. Dondero responded to this rejection by launching a barrage of litigation directed against the Debtor and Mr. Seery,

[13] Confirmation Order ¶ 13.

[14] Confirmation Order ¶¶ 12-13.

[15] Confirmation Order ¶ 13.

[16] Confirmation Order ¶ 17.

individually. As the Bankruptcy Court found, Dondero told Seery that if he did not get what he wanted, he would "'burn down the place.'"[17]

True to his word, Dondero became an implacable opponent of the Independent Directors' efforts to confirm a plan and settle the substantial prepetition litigation then-pending against the Debtor. As noted by the Bankruptcy Court, Dondero and related entities then embarked on a campaign of destruction including:[18]

- objecting to virtually every settlement between Highland and its major creditors;
- commencing substantial, costly, and time-consuming litigation against the Debtor;
- interfering with Highland's business operations; and
- harassing Highland's employees and Mr. Seery.

The Bankruptcy Court referred to these roadblocks and maneuvers as the "Dondero Post-Petition Litigation" and found they were intended to harass Highland.[19] Several of these actions were found frivolous, and Dondero and his related entities have twice been found in contempt of court.[20]

[17] Confirmation Order ¶ 78.

[18] Confirmation Order ¶¶ 77-78.

[19] Confirmation Order ¶¶ 77-78.

[20] *Highland Capital Mgmt. v. Dondero (In re Highland Capital Mgmt.)*, 2021 Bankr. LEXIS 1533 (Bankr. N.D. Tex. June 7, 2021).

D. Appellants First Raise the Issue of Bankruptcy Rule 2015.3 and the Bankruptcy Court's Adjudication of the Motion to Compel

It is undisputed that the Debtor did not file any Bankruptcy Rule 2015.3(a) reports and did not file a motion to vary the requirements of that rule.[21] Even after the appointment of the Independent Board in January 2020, neither Appellant (nor any other party) raised the issue of the non-filing of the reports required under Bankruptcy Rule 2015.3(a). The first time that Appellants raised the issue of the non-filing of the 2015.3(a) reports was at the two-day evidentiary hearing conducted by the Bankruptcy Court on February 4 and 5, 2021 to confirm the Plan.[22] The Bankruptcy Court summarily rejected Appellants' argument for the non-filing of Bankruptcy Rule 2015.3 reports as a basis to defeat Plan confirmation and characterized that argument as "borderline frivolous."[23] The Plan was accepted by

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[21] Bankruptcy Rule 2015.3(a) requires that "the debtor in possession shall file periodic financial reports of the value, operations, and profitability of each entity that is not a publicly traded corporation or a debtor in a case under title 11, and in which the estate holds a substantial or controlling interest. The reports shall be prepared as prescribed by the Official Form, and shall be based upon the most recent information reasonably available to the trustee or debtor in possession." FED. R. BANKR. P. 2015.3(a) (2021).

[22] The *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified)* (the "Plan").

[23] *See* Transcript of Proceedings Before Hon. Stacey G.C. Jernigan, United States Bankruptcy Judge, March 19, 2021, Regarding Motion to Stay Pending Appeals, at 69-70:

> There were, of course, three primary legal issues raised as errors by this Court in the confirmation order. The first two arguments were not pressed too much in legal argument today although they were stressed in the briefing. One, the absolute priority rule violation argument; and then, two, the Bankruptcy Rule 2015.3/Bankruptcy Code Section 1129(a)(2) violation argument. The Court considered these arguments to wholly lack merit, and are borderline frivolous, frankly. They do not raise a serious legal question.

ROA.vol 6.0001231-32.

99.8% of the amount of general unsecured claims.[24] The Bankruptcy Court confirmed the Debtor's Plan over the objections of Dondero, Appellants, and their related entities and entered the Confirmation Order on February 22, 2021.[25]

Approximately three months after the Plan confirmation hearing, Appellants filed the Motion to Compel on April 29, 2021. The Debtor filed its opposition to the Motion to Compel, and the Court conducted a hearing on that motion on June 10, 2021.[26]

At the hearing, the Court commented on what it was concerned was Appellants' real motivation in filing the Motion to Compel when it did:

> Mr. Draper, you've urged me to focus on the literal working of the rule. It's "shall" language. You've talked about essentially the integrity of the system as being the reason for the rule. You've told me not to accept the Debtor's "bad guy" defense, you know, as an excuse. This is just Dondero, you know, wanting the information and therefore I should discount motivations here.
>
> But let me tell you something that is nagging very, very much at me, and I'll hear whatever response you want to give to this. I just had an all-day hearing a couple days ago, and this involved Charitable DAF entities and a contempt motion the Debtor filed because those entities went into the U.S. District Court upstairs in April and filed a lawsuit that was all about Mr. Seery's alleged mismanagement with regard to HarbourVest.

[24] Confirmation Order, ¶ 3.

[25] Confirmation Order ¶¶ k and A.

[26] ROA.vol 1.000012.

> So what I'm really worried about is the idea that your client wants this information to cobble together a new adversary alleging mismanagement. How can I not be worried about that?[27]

At the hearing on the Motion to Compel, the Bankruptcy Court determined that cause existed to vary the reporting requirements as permitted under Bankruptcy Rule 2015.3(d). [28]

> This motion was filed post-confirmation. So I acknowledge that the Rule 2015.3(b) has the requirement of filing of reports as to these nondebtor controlled entities until the effective date of a plan. We're so—we're presumably so very close to the effective date <u>that I think I should exercise my discretion under Subsection (d) of this rule to, after notice and a hearing, vary the reporting requirements for cause</u>. I think there's cause and the cause is I think we're oh so close to the effective date. That's number one. Number two, we're down to 12 staff members. And I've heard that 150 entities may be implicated, and I don't think that is a necessary and reasonable use of staff members at this extremely late juncture of the case.
>
> And my third reason for cause under Subsection (d) of this rule is that we have had an active, a very active Creditors' Committee in this case with sophisticated members and sophisticated professionals who negotiated getting more information, I think more useful information than this rule contemplated with the various form blanks.[29]

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[27] June 10 Transcript, ROA.vol 5.001116-17. The Charitable DAF entities are affiliates of Dondero and were previously found in contempt of court as noted above.

[28] Rule 2015.3(d) provides:

> **Modification of Reporting Requirement.** The court may, after notice and a hearing, vary the reporting requirement established by subdivision (a) of this rule for cause, including that the trustee or debtor in possession is not able, after a good faith effort, to comply with those reporting requirements, or that the information required by subdivision (a) is publicly available.

FED. R. BANKR. P. 2015.3(d) (2021).

[29] Transcript of Proceeding Before Hon. Stacy G.C. Jernigan, U.S. Bankruptcy Judge, June 10, 2021, Regarding Motion for Leave to Amend Answer ("<u>June 10 Transcript</u>")(emphasis added), ROA.vol 5.00121.

In addition to the Bankruptcy Court's factual findings pursuant to Bankruptcy Rule 2015.3(d), the Bankruptcy Court continued the Motion to Compel to September 2021 for further consideration in the event that the Plan Effective Date had not occurred by then and noted "if we don't have an effective date by early September, well context matters, maybe that causes me to view this in a whole different light."[30]

The effective date of the Plan occurred on August 11, 2021 (the "Plan Effective Date"), approximately two months after the hearing on the Motion to Compel and upon which date the Debtor was no longer a debtor-in-possession and became the "Reorganized Debtor." Following the Plan Effective Date on September 7, 2021, the Bankruptcy Court entered the 2015.3 Order. Appellants filed their notice of appeal of that order on September 14, 2021.[31]

IV. ARGUMENT

A. Even if the Appellants Hypothetically Had Standing to Prosecute the Appeal, the Bankruptcy Court Correctly Denied the Motion to Compel as a Result of Its Modification of the Debtor's Reporting Requirements under Bankruptcy Rule 2015.3(d) and the Occurrence of the Plan Effective Date

Although the Debtor did not file the reports required under Bankruptcy Rule 2015.3(a) or file a motion under Bankruptcy Rule 2015.3(d) to vary those reporting requirements, the Bankruptcy Court addressed its authority to vary such

[30] ROA.vol 5.001122.

[31] ROA.vol 1.000001 and ROA.vol 1.00006 (amended notice of appeal)

requirements under Bankruptcy Rule 2015.3(d) in adjudicating the Motion to Compel.[32] In adjudicating the Motion, the Bankruptcy Court exercised its discretion under Bankruptcy Rule 2015.3(d) to vary the reporting requirements with respect to prior 2015.3(a) reports, and then continued the Motion to Compel to early September 2021. It did so based on the imminent effectiveness of the Plan, after which date no future reports would be required to be filed under the provisions of Bankruptcy Rule 2015.3(b) and at which point in time the Debtor would become a reorganized debtor no longer subject to continued reporting requirements under Bankruptcy Rule 2015.3.[33] And if the Plan Effective Date did not occur by the continued hearing date on the Motion to Compel, the Bankruptcy Court indicated that it may reconsider the Appellants' request.[34]

1. Bankruptcy Rule 2015.3(d) Authorizes the Bankruptcy Court to Vary the Reporting Requirements of Bankruptcy Rule 2015.3(a)

The gravamen of Appellants' appeal is that the Bankruptcy Court "decided without legal precedent" that the Debtor did not have to retroactively file reports otherwise due under Bankruptcy Rule 2015.3, and "there is no support for this

[32] *See* ROA.vol 5.001102; vol 4.000863.

[33] "The first report required by this rule shall be filed no later than seven days before the first date set for the meeting of creditors under § 341 of the Code. Subsequent reports shall be filed no less frequently than every six months thereafter, until the effective date of a plan, or the case is dismissed or converted." FED. R. BANKR. P. 2015.3 (b) (emphasis added).

[34] ROA.vol 5.01122.

anywhere in the Bankruptcy Code, Bankruptcy Rules, or elsewhere."[35] Appellants are wrong on both counts. The text of Bankruptcy Rule 2015.3(d) makes crystal clear that the Bankruptcy Court had the authority "to vary the reporting requirement established by subdivision (a) of this rule for cause."

Appellants focus entirely on the mandatory "shall file periodic reports" language set forth in Bankruptcy Rule 2015.3(a), but they ignore Rule 2015.3(d), which specifically gives the bankruptcy court the authority to vary the reporting requirements Bankruptcy Rule 2015.3(a). Therefore, the suggestion that the Bankruptcy Court did not have the legal authority to vary the reporting requirements of Bankruptcy Rule 2015.3(a) is flat out wrong and expressly contradicted by the text of Bankruptcy Rule 2015.3(d).

Appellants do not cite a single case showing they are entitled to the reports provided under Bankruptcy Rule 2015.3(a) or that the Bankruptcy Court did not have the authority to waive the filing of all reports under that rule for cause shown, all as set forth on the record of the hearing on the Motion to Compel.[36] To the

[35] Appellants' Brief at 5.

[36] The only case cited in Appellants' Brief in support of its legal argument is a bankruptcy decision from the Central District of California that has nothing to do with Bankruptcy Rule 2015.3. *In re Summit Financial,* 2021 Bankr. LEXIS 3077 (Bankr. C.D. Cal. Nov. 5, 2021), addressed a debtor's statements on its schedule of statements of financial affairs and the propriety of the debtor's purported disclaimers on those documents and without court approval of the same. Aside from its lack of relevance and applicability to this issue, the Debtor is not "disclaiming" any information required to be included in any 2015.3 reports; it has already obtained an order from the Bankruptcy Court and (unlike the *Summit* debtor) pursuant Bankruptcy Rule 2015.3(d) to vary the requirements of Bankruptcy Rule 2015.3(a) for cause shown.

contrary, Appellants are not even creditors of the Debtor. The express purpose behind the public law establishing Rule 2015.3 was to ensure that the debtor's assets are used for the payment of allowed claims:

> (b) **PURPOSE** – the purpose of the rules and reports under [subsection 2015.3(a)] shall be to assist parties in interest taking steps to ensure that the debtor's interest in any interest referred to in subsection (a)(2) *is used for the payment allowed claims against the debtor.*[37]

Even if the Appellants were creditors of the Debtor, the confirmed and now-effective Plan is the instrument that dictates the terms of payment of the creditors' claims. The Plan has been effective and implemented for several months. There is nothing left to "assist parties" in ensuring that the Debtor's interests are "used for the payment of allowed claims[,]" because the treatment of claims is now fixed by the Plan. The Plan, which was overwhelmingly accepted by the Debtor's actual creditors, already provides the means for its implementation and the sources of payment of creditor claims. Providing reports post-effective date would therefore no longer serve any purpose for creditors to determine the value of their claims, which is why those reporting requirements cease as of the plan effective date pursuant to Bankruptcy Rule 2015.3(b).

[37] Bankruptcy Abuse Prevention & Consumer Protection Act, Pub L. No. 109-8 § 409(b) (2005) (emphasis added).

2. The Bankruptcy Court Made Express Findings of Fact under Bankruptcy Rule 2015.3(d) to Vary the Reporting Requirements of Bankruptcy Rule 2015.3(a)

In addition to being wrong on the law, Appellants also ignore the factual findings made by the Bankruptcy Court at the hearing on the Motion to Compel. Appellants argue that "the Bankruptcy Court ruled in favor of the Debtor on the argument that the Appellants waited too long to object despite the lack of a deadline in the Bankruptcy Rules for a party-in-interest to raise the issue of compliance and the whole issue became moot after the Effective Date of the Plan."[38] This simply ignores the specific factual findings by the Bankruptcy Court. The Bankruptcy Court did not rule that Appellants "waited too long." Rather, it concluded that the imminent occurrence of the Plan Effective Date (after which the Reorganized Debtor would no longer be required to file reports pursuant to Bankruptcy Rule 2015.3(b)) was one of several reasons justifying the modification of those reporting requirements pursuant to the authority provided by Bankruptcy Rule 2015.3(d). The Bankruptcy Court repeatedly questioned the utility of any information otherwise required under Bankruptcy Rule 2015.3.[39]

[38] Appellants' Brief at 4.

[39] "On that point, can I just ask, what is the utility? I mean, let's say we're one . . . month away from the effective date. Let's say we're three months away from the effective date. What is the utility at this point? There is a confirmed plan. Now, granted it's on appeal . . . . What would you with this information at this point? We have a confirmed plan. ROA.vol 5.001081.

In addition to the imminent occurrence of the Plan Effective Date, the Bankruptcy Court also found additional reasons to vary the reporting requirements permitted under Bankruptcy Rule 2015.3(d) with respect to the pre-plan effective date reports that the Debtor had not filed, including that the Debtor no longer had the staff to complete the reporting requirements, and the Committee, which represented over 99.8% of the creditors who voted to accept the Plan, was very active in the Debtor's case and was comprised of sophisticated members and professionals who negotiated getting more fulsome information than what would otherwise be required under Bankruptcy Rule 2015.3(a).[40]

The Motion to Compel therefore has nothing to do with determining the value of Appellants' claims against the Debtor because they have none. Nor does it have anything to do with ascertaining the historical value of assets from the Petition Date to the Plan Effective Date, because the Plan is now the vehicle that will monetize those assets for the benefit of creditors. Rather, the Motion to Compel is a further continuation of Appellants' and Dondero's litigation crusade to thwart the payment of the claims held by the Debtor's actual creditors as well as to compel the disclosure of confidential and proprietary information about assets that are already being administered under the Plan.

[40] ROA.vol 5.001110 and 001121.

V. CONCLUSION

Even if the Appellants had standing to appeal the 2015.3 Order (which they do not), the Bankruptcy Court had the legal authority to vary the reporting requirements of Bankruptcy Rule 2015.3(a) and did vary those requirements for the cause shown, pursuant to Bankruptcy Rule 2015.3(d), as fully set forth on the record of the hearing on the Motion to Compel.

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Dated: December 15, 2021

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By: */s/ Zachery Z. Annable*
Zachery Z. Annable

CERTIFICATE OF SERVICE

I hereby certify that, on December 15, 2021, a true and correct copy of the foregoing document was served electronically upon all parties registered to receive electronic notice in this case via the Court's CM/ECF system.

/s/ Zachery Z. Annable
Zachery Z. Annable