Case No. 24-10287

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

In re Highland Capital Management, L.P.,
Reorganized Debtor

James Dondero; Highland Capital Management Fund Advisors, L.P.;
The Dugaboy Investment Trust; NexPoint Real Estate Partners, L.L.C.;
Get Good Trust,

Plaintiffs - Appellants

v.

Stacey G. Jernigan; Highland Capital Management, L.P.,

Defendants - Appellees

Appeal from the United States District Court,
Northern District of Texas, Dallas Division
Case No. 3:23-cv-00726-S
Hon. Karen Gren Scholer, District Judge

APPELLEE'S RESPONSE TO PETITION FOR REHEARING EN BANC

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that:

(a) There are no other debtors associated with this bankruptcy case other than Highland Capital Management, L.P., and there are no publicly-held corporations that own 10% or more of Highland Capital Management, L.P., which is not a corporation or a parent corporation;

(b) On information and belief (and not as represented on the Certificate of Interested Persons contained in their opening brief, which is incomplete and does not comply with 5th Cir. R. 28.2.1), Appellants are all private, non-governmental parties whose owners are also private, non-governmental parties and no publicly-held corporation owns 10% or more of the equity interests in any of these entities;

(c) The following listed persons and entities, as described in the fourth sentence of 5th Cir. R. 28.2.1, have an interest in the outcome of this case:

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(ii) The Highland Claimant Trust, the beneficiaries of which comprise the creditors of Highland Capital Management, L.P., indirectly interested party

Counsel: Pachulski Stang Ziehl & Jones LLP
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(iii) James Dondero; The Dugaboy Investment Trust; NexPoint Real Estate Partners, L.L.C.; Get Good Trust; Highland Capital Management Fund Advisors, L.P., Appellants

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(iv) The Honorable Stacey G. Jernigan, U.S. Bankruptcy Court, Northern District of Texas, Dallas Division, Appellee

/s/ Zachery Z. Annable
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APPELLANTS MISCHARACTERIZE THE PROCEEDINGS AND THE STANDARDS OF REVIEW AND IMPROPERLY TAKE A CONTRADICTORY POSITION IN THEIR EN BANC PETITION[1]

Appellants' *Petition for Rehearing En Banc* [Doc. 96] (the "**En Banc Petition**") inaccurately describes the proceedings below, confuses the standards of review, and takes a new, contradictory, and improper position. Those errors are fatal.

The Bankruptcy Court's order denying Appellants' recusal motion was indisputably an interlocutory order. Consequently, rather than filing an appeal, Appellants filed a petition for a writ of mandamus in the District Court. Mandamus petitions are subject to a unique three-part test; the appellate standards of "de novo review" and "clearly erroneous" simply do not apply to mandamus petitions. When appealing the District Court's denial of their mandamus petition, Appellants approvingly cited long-standing Supreme Court precedent and explicitly reminded this Court that it "reviews the denial of mandamus for an abuse of discretion."[2] Appellee agreed and so did the Panel.[3]

Now, after losing, Appellants attempt to create a dispute where none existed by taking a contrary position in their En Banc Petition. Appellants build a strawman by citing 28 U.S.C § 455 and mistakenly contend that this Court "uph[eld] the district court's order affirming the bankruptcy judge's refusal to recuse."[4] The District

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[1] Capitalized but undefined terms used in this response have the meanings given to them in the *Brief of Appellants* [Doc. 34] (the "**Opening Brief**") that initiated the appeal in this Court of the District Court's denial of Appellants' petition for a writ of mandamus.

[2] Opening Brief at 29 (citing *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 380 (2004)).

[3] *See Appellee's Brief* [Doc. 45] ("**Appellee Brief**") at 1 ("Appellee agrees that the first part of Appellants' statement (Did the District Court abuse its discretion in denying the Dondero Parties mandamus relief?") accurately identifies the sole issue on appeal and the applicable legal standard.").

[4] En Banc Petition at 3. Appellants' apparent confusion continued by claiming that "in denying mandamus relief, [the panel] employed the highly deferential abuse-of-discretion standard of review" at odds with the federal recusal statute. *Id.* at 15. But this Court did not "deny mandamus

Court did not "affirm" the bankruptcy judge's refusal to recuse because it did not hear an appeal from a final order. Rather, the District Court denied a petition for writ of mandamus and this Court affirmed, employing the "clearly erroneous" standard of review mandated by the Supreme Court.

Appellants' confusion notwithstanding, there is nothing "extraordinary" about following Supreme Court precedent; the Seventh Circuit has never issued an "authoritative decision" concerning the standard of review on mandamus denials; and, following extensive consideration of the underlying record by the District Court and the Panel, recusal was and remains unwarranted.

ARGUMENT

APPELLANTS SHOULD BE ESTOPPED FROM CONTRADICTING THEMSELVES

In their Opening Brief, Appellants correctly stated that "[t]his Court reviews the denial of mandamus for an abuse of discretion." *Cheney v. U.S. Dist. Ct.,* 542 U.S. 367, 380 (2004)."[5] In their En Banc Petition, however, Appellants take the opposite view, arguing that this Court should apply a de novo review of the Bankruptcy Court's interlocutory recusal order. A petition for rehearing en banc is not a "do-over"—a chance for Appellants to try again because the first time didn't work[6]—nor

relief" (the District Court did that); instead, it affirmed the District Court's denial of mandamus by applying the very abuse-of-discretion standard for appellate review of a mandamus denial that Appellants embraced. Appellants mistakenly urge this Court to adopt a new de novo standard for the *first-level appellate review of a recusal denial,* something that never happened in this case. The Bankruptcy Court's recusal denial was never appealed to the District Court or this Court because it was an interlocutory order, not a final order. This Court's panel (the "**Panel**") correctly applied the standard of review of a *mandamus petition* and correctly found that the District Court applied that standard correctly.

[5] Opening Brief at 41.

[6] *Johnson v. Lumpkin*, 76 F.4th 1037, 1039 (5th Cir. 2023) ("Petitions for rehearing *en banc* are an 'extraordinary procedure' that should be used only to bring the court's attention to an issue of 'exceptional public important' or one that 'directly conflicts' with on-point Supreme Court or prior Fifth Circuit precedent'") (citing this Court's Internal Operating Procedures:

is it an opportunity for them to abandon their prior unqualified position in favor of its opposite.

Appellants should be judicially estopped from flipping their position. Judicial estoppel "prevents a party from assuming inconsistent positions in litigation."[7] "Judicial estoppel … 'prevents internal inconsistency, precludes litigants from "playing fast and loose" with the courts, and prohibits parties from deliberately changing positions based upon the exigencies of the moment.'"[8]

There are three requirements for judicial estoppel: "(1) the party is judicially estopped only if its position is **clearly inconsistent** with the previous one; (2) the court must have **accepted** the previous position; and (3) the non-disclosure must **not have been inadvertent**."[9] All three requirements are easily met here.

> A PETITION FOR REHEARING EN BANC IS AN EXTRAORDINARY PROCEDURE THAT IS INTENDED TO BRING TO THE ATTENTION OF THE ENTIRE COURT AN ERROR OF EXCEPTIONAL PUBLIC IMPORTANCE OR AN OPINION THAT DIRECTLY CONFLICTS WITH PRIOR SUPREME COURT, FIFTH CIRCUIT OR STATE LAW PRECEDENT. … PETITIONS FOR REHEARING EN BANC ARE THE MOST ABUSED PREROGATIVE OF APPELLATE ADVOCATES IN THE FIFTH CIRCUIT. FEWER THAN 1% OF THE CASES DECIDED BY THE COURT ON THE MERITS ARE REHEARD EN BANC; AND FREQUENTLY THOSE REHEARINGS GRANTED RESULT FROM A REQUEST FOR EN BANC RECONSIDERATION BY A JUDGE OF THE COURT RATHER THAN A PETITION BY THE PARTIES.

Rules and Internal Operating Procedures of the United States Court of Appeals for the Fifth Circuit, at 36 (all-CAPS in original)).

[7] *Superior Crewboats, Inc. v. Primary P & I Underwriters (In re Superior Crewboats, Inc.),* 374 F.3d 330, 334 (5th Cir. 2004) (quoting *Brandon v. Interfirst Corp*. 858 F.2d 266, 268 (5th Cir. 1988), and *Browning Mfg. v. Mims (In re Coastal Plains, Inc.),* 179 F.3d 197, 205 (5th Cir. 1999)). "Generally, judicial estoppel is invoked where 'intentional self-contradiction is being used as a means of obtaining unfair advantage in a forum provided for suitors seeking justice." *Superior Crewboats,* 374 F.3d at 334–35.

[8] *Occidental Petro Corp. v. Wells Fargo Bank, N.A.,* 117 F.4th 628, 638 (5th Cir. 2024), quoting *Ergo Sci., Inc. v. Martin,* 73 F.3d 595, 598 (5th Cir. 1996).

[9] *Id*. at 335 (emphasis added). *See also Reed v. City of Arlington,* 650 F.3d 571, 574 (5th Cir. 2011) (same), cited together with *Superior Crewboats* and *Coastal Plains* in *Cox v. Richards,* 761 F. App'x 244 (5th Cir. 2019).

First, Appellants' current position concerning the standard of review in the En Banc Petition is clearly inconsistent with the position Appellants took in their Opening Brief.[10]

Second, this Court explicitly accepted Appellants' prior (and undisputed) position concerning the standard of review: "We review the denial of mandamus for abuse of discretion. *United States v. White*, 67 F. App'x 253, at *1 (5th Cir. 2003) (per curiam) (citing *United States v. Denson*, 603 F.2d 1142, 1146 (5th Cir. 1979) (en banc)); *see also Cheney*, 542 U.S. at 380."[11]

Third, Appellants were obligated to set forth the standard of review in their Opening Brief,[12] so their position could not have been inadvertent. The Panel Opinion did not resolve a dispute over the standard of review because none was presented—Appellants, Appellee, and the Court's Panel all agreed that the standard for reviewing the District Court's denial of Appellants' mandamus petition is the abuse-of-discretion standard established in *Cheney*. Appellants should be estopped from creating a new dispute by arguing for a different standard of review.

APPELLANTS ARGUE A CASE THAT DOESN'T EXIST

Even if Appellants were not estopped from taking inconsistent positions, they are wrong on the merits (after, ironically, getting it right the first time). This Court reviewed the District Court's denial of a mandamus petition, *not* the Bankruptcy Court's denial of a motion to recuse under 28 U.S.C. § 455. *This is not and has never*

[10] *Compare* Opening Brief at 41 ("This Court reviews the denial of mandamus for an abuse of discretion.") *with* En Banc Petition at 7 *et seq.* (arguing that this Court should apply a de novo review of the Bankruptcy Court's interlocutory recusal order).

[11] Panel Opinion, Doc. 79-1 at 6.

[12] *See* FED. R. APP. P. 28(a)(8)(B).

been an appeal of the merits of the Bankruptcy Court's recusal order.[13] The Bankruptcy Court's order was interlocutory, and Appellants did not seek nor obtain leave from the District Court to appeal it.

Appellants acknowledged this fact:

> The Dondero Parties sought review of the [Bankruptcy Court's recusal] order by Petition for Writ of Mandamus to the United States District Court for the Northern District of Texas .... Appellate review is an inadequate remedy because "[i]t comes after the trial and if prejudice exists it has worked its evil ...."[14]

Appellee acknowledged this fact:

> Regarding the first prong of the standard for issuing a writ of mandamus, ... Even had the District Court explicitly ruled that, because the Bankruptcy Court's recusal order was interlocutory and not subject to direct appeal, the [mandamus] Petition was procedurally proper, the District Court would still have denied the [mandamus] Petition because Appellants did not satisfy either of the other two prongs of the standard .... the District Court proceeded to rule on the merits of the [mandamus] Petition, implicitly acknowledging that "an ordinary appeal will not suffice."[15]

This Court acknowledged this fact:

> As to the first requirement for mandamus relief, the Dondero Parties must show that they have no 'other adequate means to attain the relief.' ... that any error by Chief Judge Jernigan is 'irremediable on ordinary appeal.' The Dondero Parties' [mandamus] petition easily meets this condition. ... Claims of judicial bias cannot wait for the ordinary appeals process to run its course. Mandamus is thus the appropriate means for relief here.[16]

Everyone agreed that Appellants sought *appellate review of the District Court's denial of mandamus relief,* ***not*** *appellate review of the District Court's own appellate*

[13] Given the exhaustive review undertaken by the Panel, however, this debate is more academic than substantive. *See* below at 11 - 13.

[14] Opening Brief at 12, 59.

[15] Appellee's Brief at 16–17, n.53.

[16] Panel Opinion at 6–7.

review. The District Court did not hear an appeal; thus, the appellate standard it would have used is academic and irrelevant.[17]

Appellants mistakenly contend that "[t]he panel applied a deferential, abuse-of-discretion standard in upholding the district court's order affirming the bankruptcy judge's refusal to recuse."[18] But the District Court did not "affirm" the bankruptcy judge's refusal to recuse. It *denied a petition for writ of mandamus*. The entire En Banc Petition is born of Appellants' refusal to acknowledge this clear, legal, and factual distinction, despite having done so in their Opening Brief.

Appellants also wrongly accuse this Court's Panel of "incorrectly deferr[ing] to the judgment of" Judge Jernigan. This Court's panel extended no such deference to the bankruptcy judge. Instead, as *Cheney* requires, it properly deferred to the District Court that denied the mandamus petition.

The En Banc Petition should be denied because it is based on a fundamental mischaracterization of how this case progressed through the courts and the applicable standard of review at each stage. Because the District Court ruled on a mandamus petition, not an appeal, the "appellate standard" is irrelevant.

[17] This is why the District Court "did not discuss the standard of review that should apply to Chief Judge Jernigan's refusal to recuse." *See* En Banc Petition at 3.

[18] *Id*. Appellants repeat this error when framing the issue that supposedly merits en banc consideration, asking "[w]hether a judge's ruling on a motion to recuse pursuant to 28 U.S.C. § 455 should be reviewed de novo or for abuse of discretion." *Id*. at 1. By "reviewed," Appellants apparently (and mistakenly) refer to appellate review of a final order, not the consideration of a petition for a writ of mandamus.

EN BANC REHEARING IS UNWARRANTED

En banc review is permitted only where the panel decision (a) conflicts with Fifth Circuit precedent, (b) conflicts with Supreme Court precedent, (c) conflicts with an "authoritative decision of another United States court of appeals," or (d) involves a question of "exceptional importance."[19] The En Banc Petition does not meet this rigorous test.

Appellants purport to present an issue of "exceptional importance" because this Court's standard of review of final recusal decisions supposedly conflicts with that of a single other court, the Seventh Circuit. But the Seventh Circuit's rulings on the issue have been inconsistent; that Court has never issued an "authoritative decision" concerning the applicable standard of review.

Appellants cite two cases—*Sherwin-Williams*[20] and *Hook*[21]—where the Seventh Circuit applied the three-prong test from *Cheney* to a mandamus petition concerning recusal, but applied a de novo review on the issue of whether the appellant had an indisputable right to the relief sought (ultimately, mandamus was denied in each case). But contrary authority exists within the Seventh Circuit itself. Appellants

[19] FED. R. APP. P. 40(b)(2)(A)-(D). *See also Rules and Internal Operating Procedures of the United States Court of Appeals for the Fifth Circuit* ("**IOP**") at 36. This Court does not refer to conflicts with other circuits as a basis for en banc rehearing.

[20] *In re Sherwin-Williams Co.*, 607 F.3d 474 (7th Cir. 2010).

[21] *Hook v. McDade*, 89 F.3d 350 (7th Cir. 1996). Strangely, Appellants also cite *Taylor v. O'Grady*, 888 F.2d 1189, 1201 (7th Cir. 1989), for the same proposition, although *Taylor* was not a case about reviewing a denial of mandamus relief. They also cite a Tenth Circuit opinion, *Sac & Fox Nation of Oklahoma v. Cuomo*, 193 F.3d 1162, 1168 (10th Cir. 1999), which states clearly that recusal denials are reviewed for an abuse of discretion, except when the trial judge fails to "create a record or document her decision not to recuse ...." As the Panel was aware, Judge Jernigan's ruling denying Appellants' third recusal motion was 36 pages, including 23 pages of minutely detailed analysis of Appellants' allegations of bias. Appellee Brief at 24.

overlook *Tezak v. United States,* 256 F.3d 702 (7th Cir. 2001), where the Seventh Circuit applied an abuse-of-discretion standard.[22]

Tezak was decided after *Hook* and was not overruled by *Sherwin-Williams* or any other case.[23] Given the inconsistent decisions from the Seventh Circuit, Appellants have failed to meet their burden of proving that the En Banc Petition presents an issue of "exceptional importance" because the Panel's decision does not conflict with an "authoritative decision of another United States court of appeals," as required.

Finally, Appellants admit that this Court's *Chevron* decision noted that "[a]lthough section 455 speaks in mandatory language, in actual application we have recognized that the decision to recuse is committed to the sound discretion of the district court and typically is reviewed for an abuse thereof."[24] This Court explicitly pointed out the "mandatory language" Appellants rely so heavily on and still reaffirmed the "abuse of discretion" standard. In the years since *Sherwin-Williams* and *Hook,* this Circuit has never wavered from its decades-long adherence to the abuse of discretion standard articulated in *Cheney*. This Court grants en banc rehearing in the rare instance when a panel opinion conflicts with Fifth Circuit precedent.[25] The Panel Opinion here did not.

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[22] *Id*. at 716 ("A [trial] court judge's decision not to recuse himself is reviewed under an abuse of discretion standard. *United States v. Franklin*, 197 F.3d 266, 269 (7th Cir. 1999)." *See also United States v. TePoel*, 317 F. App'x 549, 552 (7th Cir. 2009) (ruling that district court did not "abuse[ ] its discretion in denying [defendant's] recusal motion").

[23] Moreover, the court in *Hook* explicitly admitted that the Seventh Circuit is out of step with both this Circuit and the Second Circuit, both of which "review disqualification motions for an abuse of discretion." 89 F.3d at 354 n.3

[24] *In re Chevron*, 121 F.3d 163, 165 (5th Cir. 1997) (denied mandamus).

[25] *Johnson v. Lumpkin*, 76 F.4th at 1039 ("Petitions for rehearing *en banc* are an 'extraordinary procedure' that should be used only to bring the court's attention to an issue ... that 'directly

An inconsistent handful of cases[26] from a single Court of Appeals that contradict every other Circuit is not what the en banc rule speaks of.

En banc review is unwarranted.

THIS COURT FOUND APPELLANTS' "EVIDENCE" OF BIAS UNPERSUASIVE

Regardless of any manufactured dispute concerning an inapplicable standard of review, further consideration would not change the result because the Panel has already carefully considered the evidence concerning Judge Jernigan's alleged bias. The Panel found, among other things, that:[27]

- None of the instances of alleged bias "suffice to show that Chief Judge Jernigan's impartiality might be reasonably questioned or that she had a personal bias against the Dondero Parties requiring recusal under § 455";
- Judge Jernigan's comments in the *Acis* case "about Dondero's role and reliability were judicial, rather than personal, in nature and relevant to her determination that the settlement was proper";
- "Chief Judge Jernigan's comments about potentially holding Dondero in contempt of court did nothing but emphasize the law";
- Judge Jernigan's "brief comments" about an article "would not lead a reasonable person to question her impartiality toward Dondero and certainly do not show bias so clear and indisputable as to warrant mandamus";
- In general, "comments disapproving of or hostile to a party aren't sufficient to support a partiality challenge, especially not when they are based on information learned in the judicial process";
- "[T]here is ample evidence in the record to support" Judge Jernigan's "various comments characterizing Dondero as 'transparently vexatious' and litigious";
- The Dondero Parties failed to show that Judge Jernigan based any of her "rulings on any extrajudicial information or pursued them for any

conflicts' with on-point Supreme Court or prior Fifth Circuit precedent.'"). This Court's IOP do not refer to conflicts with other circuits as a basis for en banc rehearing.

[26] Plus one unreported decision, *Dunkley v. Illinois Department of Human Services*, 2024 WL 1155448 (7th Cir. Mar. 18, 2024)–hardly the "authoritative" type of decision Rule 40 refers to.

[27] Panel Opinion at 8 – 14.

> personal, rather than judicial reasons . . . [she] is entitled to make credibility judgments based on the evidence before her, and it is not our duty to second guess those judgments"; and
>
> - Although the texts of the novels were not in the record, the Panel still found that "the three parallels cited by the Dondero Parties [were] insufficient to show that they are clearly and indisputably entitled to mandamus relief in the form of a recusal order. As the District Court emphasized, the novels are fiction."

In light of the Panel's extensive review, further consideration would serve no purpose. What would this entire Court do that the Panel has not already done?

Appellants also fail to explain how the rulings of an allegedly biased judge could be upheld time and again over a five-year period. Thus far, Appellants and their affiliates have filed 15 appeals in this Court; all but two were fully affirmed.[28] None of this is surprising. Regardless of the result, Judge Jernigan's exhaustive opinions typically cite extensive documentary and testimonial evidence. None has ever caused a judge in the Fifth Circuit or the District Court to question her partiality.[29]

Appellants' contention that Judge Jernigan harbors "negative views of the industry in which Mr. Dondero and his companies operate"[30] is nothing but empty rhetoric. Appellants cannot identify another litigant who complained that Judge

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[28] This Court reversed isolated aspects of two decisions on legal grounds but otherwise affirmed in all other respects.

[29] Notably, Judge Jernigan recently ruled in Dondero's favor in an important opinion in the Acis case. *See* Letter to Court dated October 22, 2024 (Doc. 75). On October 15, 2024, Chief Judge Jernigan recommended that the District Court grant Dondero's motion to dismiss with prejudice certain claims asserted against him. She not only ruled in Dondero's favor but did so by raising *sua sponte* a defense that apparently shields him from substantial personal liability. *See* Case No. 18-30264-sgj-11, Adv. Pro. No. 20-03060-sgj, Doc. 188 (the "**Report**"). The District Court adopted the Report and dismissed the claims against Dondero with prejudice. *Acis Mgmt., L.P. v. Dondero*, 3:24-cv-02036-N, Doc. 4.

[30] En Banc Petition at 3.

Jernigan ever displayed bias during her nearly 20 years on the bench of a specialized court where financial matters are paramount.[31]

In the end, Appellants are left to contend that a fictitious villain in a novel was modelled after Dondero. Any fair reading of the books shows this to be far-fetched.[32] As the District Court and the Panel found, Appellants' strained interpretation of the novels is insufficient to warrant mandamus.

CONCLUSION

The En Banc Petition must fail because it grossly misstates the case before this Court and doesn't satisfy the standard under Fed. R. App. P. 40 and this Court's own Internal Operating Procedures. An en banc rehearing of this appeal would simply be a waste of time. The En Banc Petition should be denied.

[31] "Financial industry" entities regularly appearing in bankruptcy courts include banks, private equity funds, hedge funds, secured lenders, asset managers, shareholders, and insurers. Of course, Acis and Appellee participate in the financial industry yet Judge Jernigan frequently rules in their favor because—as the appellate record shows—she should.

[32] *See* Appellee Brief at 20 n.61.

December 24, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify:

1. This document complies with the word limit of Federal Rule of Appellate Procedure 40(d)(3) because, including footnotes and excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), this document contains 3,549 words.

2. This response complies with the requirements of Fed. R. App. P. 32 and 40(d)(2). This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this document has been prepared in a proportionally spaced serif (Georgia Pro Condensed) typeface at 14-point type (12-point for footnotes).

/s/ Zachery Z. Annable
Zachery Z. Annable

CERTIFICATE OF SERVICE

I certify that, on December 24, 2024, the foregoing document was served electronically on all parties registered to receive electronic notice in this case via the Court's CM/ECF system.

/s/ Zachery Z. Annable
Zachery Z. Annable