Case No. 23-10911

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

In the Matter of: Highland Capital Management, L.P.,

Debtor,

Highland Capital Management, L.P.,

Appellee,

v.

NexPoint Asset Management, L.P., formerly known as Highland Capital Management Fund Advisors, L.P.; NexPoint Advisors, L.P.; NexPoint Real Estate Partners, L.L.C., formerly known as HCRE Partners L.L.C.; Highland Capital Management Services, Incorporated; James Dondero,

Appellants.

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In the Matter of: Highland Capital Management, L.P.,

Debtor,

James D. Dondero,

Appellant,

v.

Highland Capital Management, L.P.,

Appellee.

Appeal from the United States District Court for the
Northern District of Texas, the Honorable Brantley Starr
Civ. Act. No. 3:21-cv-00881-X

Consolidated with Case No. 23-10921

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

In the Matter of: Highland Capital Management, L.P.,

Debtor,

Highland Capital Management, L.P.,

Appellee,

v.

NexPoint Asset Management, L.P., formerly known as Highland Capital Management Fund Advisors, L.P.,

Appellant.

Appeal from the United States District Court for the Northern District of Texas, the Honorable Brantley Starr
Civ. Act. No. 3:21-cv-00881-X

# APPELLANTS' MOTION TO STAY THE APPELLATE MANDATE PENDING PETITION FOR WRIT OF CERTIORARI

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## CERTIFICATE OF INTERESTED PERSONS

Pursuant to 5TH CIR. RULES 28.2.1 and 35.2.1 Appellants certify that the following listed persons and entities have an interest in the outcome of this case. These representations are made so the judges of this Court may evaluate possible disqualifications or recusal:

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Highland Capital Management Services, Incorporated; and

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## I. INTRODUCTION

Pursuant to Federal Rule of Appellate Procedure 41(d) and Fifth Circuit Rule 8.9, Appellants bring this motion for a stay of issuance of the mandate so that Appellants may prepare and file a petition for a writ of certiorari to the United States Supreme Court. The forthcoming certiorari petition by Appellants would present substantial and meritorious questions arising from the panel's decision, including: (1) whether the Fifth Circuit created a new rule by requiring additional corroborating evidence to support a self-serving affidavit and (2) whether the panel's opinion fundamentally altered—contrary to Supreme Court precedent—the summary judgment standard by making credibility determinations and resolving inferences in the movants favor.[1]

Good cause exists for a stay because Appellants would be irreparably harmed absent a stay and the balance of equities strongly favors the granting of a stay for the following reasons: (1) there is a risk that the Highland bankruptcy estate will dissipate the funds in a way that recovering them will not be possible should a stay not be granted; (2) Highland's most recent financial disclosure reflect that the estate is in a strong financial position and will not be harmed if it is required to wait an additional ninety-days;[2] and (3) Highland's interest is protected with a supersedeas

[1] Fed. R. App. P. 41(d)(2)(A).

[2] Post-Confirmation Report for Highland Capital Management, LP for the Quarter Ending September 30, 2024 (Filed by Debtor Highland Capital Management, L.P.) (Bankr. Dkt. No 4171);

bond pursuant to a bond agreement[3] that the Appellants will continue to comply with, if necessary.[4]

## II. STATEMENT OF PROCEEDINGS AND DISPOSITION

This case is based on Highland's attempt to enforce $72 million in promissory notes issued by Appellants that were to be forgiven as compensation to James Dondero, then an executive of Highland and Appellants, if certain events accretive to Highland occurred. This motion will use the same party-naming conventions as the panel.

This case involves 18 promissory notes ("Notes"). Appellants raised fact-laden defenses to enforcement. In late 2014/early 2015, Dondero—on behalf of HCMFA and on behalf of Highland as Trustee of The Dugaboy Investment Trust—entered into an agreement that Highland would forgive the 2014 HCMFA Note upon the fulfilment of certain conditions subsequent ("2014 Agreement").[5] In late 2016/early 2017, subsequent Dugaboy Trustee Nancy entered into an identical agreement with Dondero (acting for HCMFA) regarding the 2016 Note.[6]

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Post-Confirmation Report for Highland Capital Management, LP for the Quarter Ending September 30, 2024 (Filed by Other Professional Highland Claimant Trust) (Bankr. Dkt. No. 4172), both of which the Court can take judicial notice of.

[3] Case 3:21-CV-00881-x, Dkt. No. 149.

[4] 5TH CIR. RULE 41(d)(1).

[5] **ROA.74885** ¶13.

[6] **ROA.74886** ¶15.

In late 2017/early 2018 (when Highland set bonuses for the prior period and compensation for the upcoming period), Nancy—again on behalf of Highland—entered an agreement with Dondero, acting on behalf of various Appellants, that Highland would forgive 2017 Notes upon the same conditions subsequent. Nancy and Dondero entered into identical and similarly timed agreements in subsequent years for the remaining loans.

The Agreements benefitted Highland. In exchange for each, Dondero forewent an increase in cash compensation in each relevant compensation period,[7] and made his compensation conditional upon success.[8]

The bankruptcy court issued reports ("Reports") recommending that the district court grant summary judgment, which it did. Appellants timely appealed.

The panel affirmed, rejecting opposing factual declarations and testimony by the Donderos regarding agreements to forgive the notes as "not the type of significant probative evidence required to defeat summary judgment" because "[t]hey differ[ed] with respect to such vital information as who entered into the alleged agreements and when." Op.8-9.

The panel also found that "even if the alleged oral [forgiveness] agreements did exist, they would likely be unenforceable for lack of consideration." Op.13. The

[7] **ROA.74885** ¶13.

[8] **ROA.70944** 182:2-18**, 74885** ¶13.

Appellants filed a petition for rehearing en banc and the petition was denied on October 16, 2024.

## III. A STAY OF THE MANDATE SHOULD BE GRANTED

### A. Standard for Granting Stay of the Mandate

A stay of an appellate mandate pending a petition for writ of certiorari is proper when "the petition would present a substantial question and there is good cause for a stay."[9] In determining whether the petition would present a substantial question, the Fifth Circuit must conclude that two conditions are met. First, it must decide that "there is a reasonable probability that 4 members of the Supreme Court would consider the underlying issues sufficiently meritorious for the grant of certiorari." Second, the Fifth Circuit must find that "there is a substantial possibility of reversal of its decision."[10] There is good cause for a stay if there is a likelihood that irreparable harm will result if its decision is not stayed.[11]

### B. Appellants' Petition for Writ of Certiorari Will Present Substantial and Meritorious Questions

Supreme Court Rule 10 provides some of the relevant considerations informing when certiorari will be granted. Two considerations indicate that the Supreme Court will grant certiorari in the instant case. First, Supreme Court Rule

[9] Fed. R. App. P. 41(d)(2).

[10] 5TH CIR. RULE 8.9; *see also*, *Barnes v. E-Systems, Inc. Group Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 13, 1302 (1991) (applying same standard to stay of mandate by Supreme Court).

[11] 5TH CIR. RULE 8.9; *see also*, *Al-Marbu v. Mukasey*, 525 F.3d 497, 498-99 (7th Cir. 2008).

10(a) provides for Supreme Court review when "a United States court of appeals has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power."[12] Second, Supreme Court Rule 10(c) provides for Supreme Court review when "a United States court of appeals has decided an important question of federal law in a way that conflicts with relevant decisions of this Court."[13] Here, the panel created new standards and rules for defeating summary judgment that conflict with prior Fifth Circuit and Supreme Court precedent. Moreover, the panel's decision to rebalance the scales of summary judgment analysis fundamentally reshapes the procedure in such a way that it risks permanently altering litigation in the Fifth Circuit and making it different than that in any other circuit.

*1. The Panel Opinion's Rewriting of the Self-Serving Affidavit Rule Contravenes Supreme Court's Precedent regarding Summary Judgment and Federal Rules of Evidence*

Consistent with Supreme Court precedent, the Fifth Circuit has consistently held that a non-conclusory affidavit—even if self-serving and uncorroborated—is insufficient to create a genuine issue of material fact.[14] For reasons unknown, the District Court and the panel departed from this consistent rule.

[12] S. CT. RULE 10(a).

[13] S. CT. RULE 10(c).

[14] *See e.g, Guzman v. Allstate Assurance Co.*, 18 F.4th 157, 160-61 (5th Cir. 2021) (citing, inter alia, *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 253-55 (1986) for the proposition that "the

The panel made improper findings that resulted from weighing credibility and reviewing the evidence in the light most favorable to the movant, Highland. Those credibility determinations led the Court to conclude that the Dondero Declarations—key pieces of evidence offered by Appellants in opposing summary judgment—were inconsistent, and hence did not create a genuine issue precluding summary judgment on all 18 Notes, even ones unrelated to the purported inconsistencies. But despite accepting that the purported inconsistencies were insufficient to suggest the declarations were shams, rather than merely the product of the usual minor vagaries of time and numerous moving parts, the panel nonetheless treated them as if they were false and, though admissible, still unsuitable for jury reliance. So long as the self-serving affidavits are admissible, the Federal Rules of Evidence require that they be considered when weighing a motion for summary judgment.[15] That approach to merely imperfect, but non-sham, declarations created a new standard for avoiding jury evaluation of the evidence, contrary to well-established summary judgment standards. The Supreme Court in *Norfolk Monument Co.*, held that a self-serving

sole question is whether a reasonable jury drawing all inferences in favor of the nonmoving party could arrive at a verdit in that party's favor").

[15] Fed. R. Civ. P. 56(c)(4) ("An affidavit . . . must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.").

disclaimer was sufficient to raise a question for the jury to resolve, even if it did not "conclusively rebut the petitioner's contention. . . ."[16]

Contrary to Fed. R. Civ. P. 56(c)(4), *Anderson*, and *Norfolk Monument*, the panel determined that an admissible affidavit based upon personal knowledge and to which Dondero was competent to testify, was somehow insufficient to create a genuine dispute of material fact. To compound its error, the panel veered further from the established rules of evidence by requiring the Appellants to produce additional corroborating evidence. The Fifth Circuit has never held that a self-serving affidavit needed to be supported by additional corroborating evidence at the summary judgment stage; rather, it consistently has held that "an affidavit based on personal knowledge and containing factual assertions suffices to create a fact issue, even if the affidavit is arguably self-serving."[17]

Moreover, the panel circumvented the rule in *United States v. Stein,* 881 F.3d 853, 859 (11th Cir. 2018), that "the self-serving and/or uncorroborated nature of an affidavit cannot prevent it from creating an issue of material fact" and instead created a new rule that self-serving testimony "coupled with … lack of detail and internal inconsistencies … are insufficient to 'lead a rational jury to find for [Appellants],'

[16] *Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700, 703 (1969).

[17] *C.R. Pittman Const. Co., Inc. v. Nat'l Fire Ins. Co. of Hartford*, 453 Fed. Appx. 439, 443 (5th Cir. 2011).

as required to successfully oppose summary judgment." Op.8. The panel imposed a heightened proof standard requiring written corroboration of facts supported by testimonial evidence. Despite acknowledging the holding in *Lester v. Wells Fargo Bank, N.A.*,[18] that even a single self-serving affidavit can establish a genuine issue of material fact, the panel refused to find such a genuine issue absent documentary corroboration, opining that "if the agreements existed, it should be easy to prove through other means: For example, someone would have written them down or told auditors about them…." Op.11

This Court requires courts to view evidence in the light most favorable to the non-movant and *draw all reasonable inferences in favor of the non-movant*.[19] Courts "may not 'evaluate the credibility of the witnesses, weigh the evidence, or resolve factual disputes'"[20] and must "disregard all evidence favorable to the movant that the jury would not be required to believe."[21] The burden is on the "moving party [], to show that there is '*not the slightest doubt* as to the facts and that only the legal conclusion remains to be resolved.'"[22] The Fifth Circuit's new standard not only

[18] 805 F. App'x 288, 292–93 (5th Cir. 2020).

[19] *Lettuce Entertain You Enter., Inc. v. Hotel Magdalena Joint Venture, L.L.C.,* 2024 WL 3274787, at *3-5 (5th Cir. July 2, 2024); *Samuel v. Holmes,* 138 F.3d 173, 176 (5th Cir. 1998).

[20] *Guzman,* 18 F.4th at 160.

[21] *Al-Saud v. Youtoo Media, L.P.*, No. 3:15-CV-3074-C, 2017 WL 3841197, at *2 (N.D. Tex. Mar. 15, 2017) (citing *Haverda v. Hays County*, 723 F.3d 586, 591 (5th Cir. 2013)).

[22] *Clark v. W. Chem. Products, Inc.*, 557 F.2d 1155 1157 (5th Cir. 1977) (quotation omitted and emphasis added).

ignores the Supreme Court's guidance in *Norfolk Monument*, but also presents a substantial question because it sets up a conflict with at least its sister circuits.[23]

Additionally, for all of the same reasons, there is a substantial likelihood that the Supreme Court will reverse the panel's decision. First, *Norfolk Monument* contains an important guideline for evaluating summary judgment and is still continuously cited, over the decades. Second, a major shift in the rules for evaluating whether summary judgment can be granted would cause a significant change in litigation across the country, throwing the judicial process into disarray.[24] Third, there is simply no ban on self-serving affidavits in the Federal Rules of Evidence. Therefore, the Supreme Court will likely reverse on the merits.

*2. The Panel's Opinion Fundamentally Alters the Role of Summary Judgment and Contravenes Supreme Court Precedent*

As discussed above, the panel skipped several steps in the litigation process by weighing credibility and resolving factual disputes at the summary judgment stage. The panel erroneously viewed the evidence in the light most favorable to the movant. Despite the panel's repeated citations to *Anderson v. Liberty Lobby, Inc*.,[25] it nonetheless abandoned *Anderson*'s teaching that "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts

[23] *C.R. Pittman Const. Co.*, 453 Fed. Appx. at 443 (collecting cases from sister circuits).

[24] *Id.*

[25] 477 U.S. 242 (1986).

are jury functions, not those of a judge, [and that] [t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor."[26]

It is clear that the panel abandoned the rule in *Anderson* because the Donderos swore to the existence of the Agreements, and Highland acted consistently with the agreements' existence for years by not calling the demand notes. Even if corroborating evidence could be required for self-serving affidavits, the Appellants' evidence met that high bar. Consequently, the only path to finding that there is no issue of material fact is by impermissibly weighing the credibility of Appellants' evidence and improperly drawing negative inferences from minor inconsistencies regarding which a jury could easily draw contrary inferences more favorable to Appellants.[27]

Moreover, the alleged inconsistencies the panel found in Dondero's affidavits further highlight the panel's improper analysis. The panel incorrectly found that Dondero's testimony "contrasts with an earlier interrogatory in which Dondero claimed that the only thing of value that Dondero received in exchange for these notes was the funds—not the potential for compensation via forgiveness," concluding that this "evidence [was] inconsistent as to the date and intent of the

[26] *Id.* at 255.

[27] *Guzman,* 18 F.4th at 161 ("How much weight to credit self-interested evidence is a question of credibility, which judges may not evaluate at the summary judgment stage.").

agreements." Op.9. But Dondero's testimony is perfectly consistent with the fact that the Agreements were struck after the Notes, not contemporaneously, and in exchange for foregoing other potential compensation and as a performance incentive.[28] The panel's contrary inference of inconsistency reflects the altered standard it used to evaluate testimonial evidence and draw an otherwise impermissible inference in a movant's favor.

That rule again substitutes the court's judgment regarding the existence, weight, and reasons for supposed inconsistencies, and inferences to be drawn therefrom, for the jury's constitutionally delegated role. For example, the panel rejected as insufficient to create an issue regarding the forgiveness agreements the "declarations and depositions by the Donderos" (Op.8) because they supposedly "differ[ed] with respect to such vital information as who entered into the alleged agreements and when." Op.9. To so hold, the panel accepted the mischaracterizations of the bankruptcy court,[29] flipped the rule for drawing all favorable inferences on its head, and thus created an unprecedented approach to summary judgment. Because the proffered testimony established the who, why,

[28] *See* nn.7-8 *supra*.

[29] Whether the bankruptcy judge should be recused is pending before the Court (Case No. 24-10287).

when, and what of the agreements,[30] it did not "lack detail"; rather, the Court misapprehended its role and improperly determined it insufficient.

The panel also found that the HCMFA "mistake" notes were enforceable (Op.13-18), despite acknowledging evidence that a junior staff member created the notes, added Mr. Waterhouse's signature (a fact hidden by Highland in discovery), and could not recall getting his permission (Op.14), disregarding detailed Dondero testimony that he had authorized a transfer by Highland to HCMFA as compensation for a mistake, not a loan.[31]

This, and the numerous other examples of the panel ignoring favorable evidence or drawing inferences against the non-movants confirm that the decision went beyond erroneous misapplication and reflects a wholly different standard for when disfavored testimonial evidence is sufficient to preclude summary judgment.[32]

By drawing inferences in favor of the movant and making credibility determinations at the summary judgment stage, the panel is effective denying litigants the opportunity to fully develop their arguments and protect their rights. It

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[30] **ROA.74885** ¶13, **ROA.74592** ¶24; **ROA.74951** ¶7, **ROA.74659** ¶6; **ROA.71199** 162:22-163:8; **ROA.70943** 176:20-177:5; **ROA.74885-74886** ¶¶13-15; **ROA.74659-74662**.

[31] **ROA.43803** ¶8.

[32] For example, compare Op.20n.10 (questioning existence of shared services agreement that required Highland to make payments) with **ROA.74594-96** ¶¶32-39 and **ROA.40274** 107:1-108:10 (Dondero and Highland testimony confirming shared services agreements and duties). Likewise, the panel rejected Dondero testimony that prepayments were intended to be applied to interest (Op20), even though it acknowledged independent evidence of such related to one of the Appellants. Op.10n.8.

effectively gives improper fact-finding power to an Article I judge in a case required to be tried to a jury in district court.[33] That is a dangerous precedent stripping juries of the power to draw inferences more favorable to non-movants and accreting improper and excessive power to federal court judges. The panel's remaking of the summary judgment standard is in direct contravention of its purpose. "[T]he purpose of Rule 56 is to enable a party who believes there is no genuine dispute as to a specific fact essential to the other side's case to demand at least one sworn averment of that fact before the lengthy process of litigation continues."[34] But once that sworn averment is provided, summary judgment is defeated and the litigation proceeds through trial.[35]

The Supreme Court is likely to grant certiorari and to reverse the panel. As discussed above, the panel's holding ignores a number of Supreme Court precedents. Additionally, the panel's rule conflicts with every other circuit. Simply put, a rule shift of this magnitude will have lasting ramifications to all litigants in the Fifth Circuit. It would upend parties' settled expectations regarding the sufficiency of the evidence because now, any minor or trivial inconsistency in the nonmovant's case can become a fatal flaw. These ramifications are not hyperbole; the panel relied on

[33] Order Adopting Report and Recommendation Regarding Withdrawal of the Reference, Civil Action No. 3:21-cv-0881-x, Dkt. No. 228.

[34] *Lujan v. Nat'l Wildlife Fed.*, 497 U.S. 871, 888-89 (1990).

[35] *Id*. at 889.

four illusory or trivial contradictions in approximately 46 pages of declarations and 849 pages of depositions to justify valuing all of Appellants evidence at near zero.[36] This case is ripe for the Supreme Court to reaffirm the role of the judiciary during a motion for summary judgment.

### C. There Is Good Cause to Stay the Mandate Because the Appellants Will Suffer Irreparable Harm

Good cause exists for a stay because Appellants would be irreparably harmed absent a stay and the balance of equities strongly favors the granting of a stay for the following reasons: (1) there is a risk that the Highland bankruptcy estate will dissipate the funds in a way that recovering them will not be possible; (2) Highland's most recent financial disclosure reflect that the estate is in a strong financial position and will not be harmed if it is required to wait an additional ninety-days; and (3) Highland's interest is protected with a supersedeas bond (actually, posted cash with interest top-ups when needed) pursuant to a bond agreement with which Appellants will continue to comply.

First, absent a stay, Appellants would be irreparably harmed because they would almost certainly not be able to recover the bond money if it is turned over to Highland. Highland is not an ongoing business; it is a reorganized debtor operating pursuant to bankruptcy court's Order Confirming the Fifth Amended Plan of

[36] The testimony is in: **ROA.74580-74601,74656-74663, 74880-74890, 74949-74952, 48145-48206, 48246-48315, 48379-48461, 74121-74158 and 74185-74265**.

Reorganization of Highland Capital, L.P. (as Modified) and (ii) Granting Related Relief [B.D.I. 1943] (ROA.000687-000776) (the "Confirmation Order"), which confirmed the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified). Highland has continued to manipulate the estate by spending unnecessary amounts of money. As such, if Highland continues to spend money at its current pace, it will be impossible for Appellants to have the monies returned to them in the event that the Judgment is overturned because Highland has no additional assets that could be returned to Appellants if Highland spends all of the money.

Second, Highland's most recent financial disclosures reflect that it will not be harmed as a result of the requested stay.[37] Specifically, Highland filed post-confirmation reports demonstrating that there is more than enough money in the estate to satisfy its obligations and to otherwise pay its remaining creditors in full.[38] With more than $100 million in assets remaining to monetize, and almost $550 million in assets already monetized, there is certainly enough money to pay the remaining amount of allowed creditor claims.[39] Highland has no immediate need for

[37] Post-Confirmation Report for Highland Capital Management, LP for the Quarter Ending September 30, 2024 (Filed by Debtor Highland Capital Management, L.P.) (Bankr. Dkt. No 4171); Post-Confirmation Report for Highland Capital Management, LP for the Quarter Ending September 30, 2024 (Filed by Other Professional Highland Claimant Trust) (Bankr. Dkt. No. 4172).

[38] *Id*.

[39] *Id.*

the money contained in the court registry and as such it will not be a harmed by the relatively short stay requested by Appellants.

Third, Highland's interest will be protected by the supersedeas bond that is currently in place in the court registry at the District Court. On August 3, 2023, the District Court entered an Order Granting Joint Agreed Emergency Motion for Order Approving Stipulation for the Bonding of Judgments and Stays of Executions Pending Appeals.[40] Pursuant to that order, Appellants deposited funds into the court registry in an amount sufficient to cover the Judgment plus interest.[41] To the extent necessary, Appellants are ready and willing to continue to deposit additional funds in the court registry to compensate for any interest that would potentially be lost by Highland as a result of the requested stay. As such, Highland will not suffer any harm if the requested stay is implemented. As such, the balance of harms favor granting a stay in this case.

## IV. CONCLUSION

Appellants respectfully request that the Court grant the Motion to Stay the Appellate Mandate Pending the Petition for Writ of Certiorari.

Respectfully submitted this 23rd day of October, 2024.

[40] Case 3:21-CV-00881-x, Dkt. No. 149.

[41] *Id.*

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## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) as amended by order dated, October 16, 2023, in that this brief contains 3,712 words, excluding parts of the brief exempted by Fed R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word, typeface Times New Roman, 14-point type (12-point for footnotes).

By: */s/ Deborah Deitsch-Perez*
Deborah Deitsch-Perez

## CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2024, this Motion was electronically filed using the appellate CM/ECF system. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished via CM/ECF.

By: */s/ Deborah Deitsch-Perez*
Deborah Deitsch-Perez