Nos. 22-2003, 22-2004, 22-2005, 22-2006, 22-2007, 22-2008, 22-2009, 22-2010, 22-2011 (Consolidated)

United States Court of Appeals for the Third Circuit

IN RE LTL MANAGEMENT, LLC,

Debtor.

OFFICIAL COMMITTEE OF TALC CLAIMANTS, *et al*.,

Petitioner-Appellants,

v.

LTL MANAGEMENT, LLC,

Debtor-Appellee.

Direct Appeal from the United States Bankruptcy Court for the District of New Jersey in Ch. 11 No. 21-30589 and Adv. Pro. No. 21-03032

MEMORANDUM OF LAW OF AMICI CURIAE BY CERTAIN COMPLEX LITIGATION LAW PROFESSORS IN SUPPORT OF MOTION OF THE OFFICIAL COMMITTEE OF TALC CLAIMANTS TO DISMISS DEBTOR'S CHAPTER 11 CASE

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INTEREST OF THE AMICI CURIAE[1]

1. The Amici Professors in Complex Litigation and Mass Torts (the "Complex Litigation Law Professors")[2] teach and write in the fields of complex litigation, mass torts, and the law of complex civil procedure. Amici have a professional interest in ensuring that the Court is adequately informed about the decades of experience that the federal and state courts have marshaled in managing complex mass torts. This experience is relevant to Johnson & Johnson's/LTL's Chapter 11 Filing and the arguments advanced to justify these bankruptcy proceedings.

SUMMARY OF ARGUMENT

2. Mass torts cases have long created some of the biggest regulatory challenges in the United States, especially for the judiciary, which has long been

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[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. The institutional affiliations of the Amici are listed for identification only.

[2] The Complex Litigation Professors are J. Maria Glover, Professor of Law, Georgetown University Law Center; Andrew Bradt, Professor of Law and Faculty Director, Civil Justice Research Initiative, Berkeley Law; Brooke Coleman, Associate Dean of Research & Faculty Development and Professor of Law, Seattle University School of Law; Robin Effron, Professor of Law and Co-Director, Dennis J. Block Center for the Study of International Business Law, Brooklyn Law School; D Theodore Rave, Professor of Law, The University of Texas School of Law; Alan M. Trammell, Associate Professor of Law, Washington & Lee University School of Law; and Adam Zimmerman, Professor of Law and Gerald Rosen Fellow, Loyola Law School (Los Angeles, CA).

tasked with resolving them.[3] The key challenges of "mass torts"—numerosity, geographic dispersion, temporal dispersion (deriving from the passing of the latency periods between exposure and impairment), causal dispersion—challenge any procedural system. Federal and state courts, however, have decades of experience handling even the most complex mass torts and have developed and refined a number of tools and techniques that enable them to successfully achieve global resolution of mass tort cases—routinely, and often with little fanfare. For example, the Multi-District Litigation ("MDL") device, *see* 28 U.S.C. § 1407, has resolved even the most complex, difficult, and headline-grabbing mass tort cases. Despite claims that Johnson & Johnson's[4] "Texas-Two-Step" is the only feasible or fair way to resolve mass tort claims, the "Texas-Two-Step" approach is not a necessary or suitable alternative because it raises serious constitutional due process concerns.

ARGUMENT

I. The Flexibility and Adaptiveness of the MDL Device Enables it to Achieve the Resolution of Thousands of Mass Tort Cases Every Year

[3] *See, e.g.*, J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137 (2012); SEAN P. FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* (2010); RICHARD A. NAGAREDA, *MASS TORTS IN A WORLD OF SETTLEMENT* (Univ. of Chicago Press 2007).

[4] Throughout this brief, for convenience, we refer to Johnson & Johnson, JJCI, and LTL as "Johnson & Johnson." Johnson & Johnson has been referred to as such throughout the past seven years of talc-related litigation.

3. The MDL device is widely viewed by judges and practitioners alike as a "remarkably effective" vehicle for achieving resolution of mass tort claims.[5] Even Defendants often prefer the organized, coordinated, and unitary processes of federal MDL, which is less risky than class certification but comes with similar promise for global peace.[6] Put simply: MDL works.

4. Year after year, in fact, the MDL device achieves global resolution of thousands of mass tort cases. The types of cases that have been resolved in MDL span the breadth of the mass tort and products liability landscape and involve some of the country's largest controversies, from the (relatively) simple (e.g., *In re Volkswagen Clean Diesel Marketing, "Sales Practices," and Products Liab. Litig.*, No. 15-md-2672 (N.D. Cal. 2016)) to some of the most complex and difficult public health and regulatory challenges of the twenty-first century (e.g., *In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico on April 20, 2010, No. 10-md-02179 (E.D. La. May 3, 2012); *In re NFL Players' Concussion Injury Litig.*, No. 12-md-2323 (E.D. Pa. Feb. 13, 2015)).

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[5] *See, e.g.*, Andrew Bradt, *Something Less and Something More: MDL's Roots as a Class Action Alternative*, 165 U. PA. L. REV. 1711, 1719 (2017).

[6] *See, e.g.*, J. Maria Glover, *Mass Litigation Governance in the Post Class-Action Era: The Problems and Promise of Non-Removable State Actions in Multi-District Litigation*, 5 J. TORT L. 3, 43 (2014) (arguing that defendants so much prefer the consolidation of federal MDL that they frequently seek to put an end to parallel state litigation).

5. One key reason that the MDL device has flourished as a mechanism for resolving mass tort is the flexible structure of the MDL process; more specifically, that it harnesses the efficiencies of consolidation of cases into a unitary package before a single judge through temporary coordination while *also* preserving the individual character of the cases destined for remand. *See* 28 U.S.C. § 1407.

6. MDL judges and practitioners have developed and refined a wide array of adaptive tools and techniques for structuring mass tort litigation and achieving global resolution of the consolidated cases. MDL judges have also built vast networks of federal judges, state judges, and extra-judicial officers to aid with the resolution of cases.[7]

7. The MDL has also achieved "global peace" in mass torts so complex and challenging that they elide resolution by way of any single "global deal." For these mass torts, the flexibility and adaptiveness of MDL has meant that experienced MDL judges have been able to achieve global resolution of cases either by way of multiple settlements, or through the use of a combination of procedural mechanisms, or both. *See, e.g.*, *In re Silicone Gel Breast Implants Prod. Liab. Lit.*, MDL No. 926; *In re Diet Drugs Prod. Liab. Lit.*, MDL No. 1203; *In re Welding Fume Prods. Liab. Litig.*, MDL No. 1535; *In re Ephedra Prod. Liab. Lit.*, MDL No. 1598.

[7] *See, e.g.*, *MANUAL FOR COMPLEX LITIGATION* § 22.87 (4th ed. 2004); Alexandra D. Lahav, *Recovering the Social Value of Jurisdictional Redundancy*, 82 TUL. L. REV. 2369, 2387 (2008).

8. As these examples illustrate, MDL successfully and routinely resolves thousands upon thousands of mass tort cases. Of course, not every example will share each and every feature of the Johnson & Johnson talc cases. And to be sure, none of this is to say that MDL is a perfect device for resolving mass claims. Yet, as a large body of legal scholarship and decades of federal and state court experience with mass tort demonstrate, resolution of cases in large and complex mass torts is frequently aided by the wide-ranging toolbox of flexible, adaptive, and well-developed procedural mechanisms found in MDL.

II. The "Texas Two-Step" Tactic Raises Concerns Under the Supreme Court's Longstanding Mass Tort Due Process Jurisprudence

9. Johnson & Johnson's Texas-Two-Step and the Texas-Two-Step Claims Trust that it seeks impose upon all talc claimants on a mandatory basis raise serious concerns under the Supreme Court's due process jurisprudence.

10. In *Amchem v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard*, 527 U.S. 815 (1999), the Supreme Court rejected the proposed arrangements for global resolution of thousands of present and future asbestos-related personal-injury claims, by way of class settlements because neither satisfied fundamental due process requirements. *See Amchem*, 521 U.S. at 591; *Ortiz*, 527 U.S. at 815.

11. Since *Amchem* and *Ortiz*, this Court has recognized that "[m]any of the [due process] issues [in a bankruptcy proceeding to resolve mass-tort claims] are

similar to those that arise in class actions for personal injuries." *In re Congoleum Corp.*, 426 F.3d 675, 693-94 (2005). Moreover, this Court has long made clear that "minimal due process requirements extend to bankruptcy proceedings." *In re Combustion Engineering, Inc.*, 391 F.3d 190, 245 n.64 (3d Cir. 2004); *Jones v. Chemetron Corp.*, 212 F.3d 199, 209 (3d Cir. 2000).

12. In particular, the Supreme Court has made clear that heightened scrutiny is needed when the court is presented with arrangements that purport to bring about global resolution of mass claims by way of binding absent plaintiffs. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 848-49 (1999) ("When a district court, as here, certifies for class settlement only, the moment of certification requires 'heightene[d] attention,' to the justifications for binding the class members.") (internal citation omitted). This Court has likewise emphasized the need for heightened judicial scrutiny when the court is presented with a pre-packaged arrangement for mass claim resolution: "[P]articularly [in] settlement-only suits, the district court has a 'duty to protect the members of the class . . . .'" *In re Congoleum Corp.*, 426 F.3d 675, 693-94 (quoting *In re Comm'y Bank of Northern Virginia*, 418 F.3d 277 (3d Cir. 2005)); *see also In re Pet Food Prods. Liability Litig.*, 629 F.3d 333, 350 (3d Cir. 2010) ("We ask district courts to apply an even more rigorous, heightened standard in cases where settlement negotiations precede class

certification, and approval and certification are sought simultaneously.") (internal quotations omitted)).

13. The need for "rigorous" scrutiny is particularly warranted when, as is the case here, the arrangement offered for achieving global resolution of claims is *mandatory*, and when the justification offered for such mandatory treatment is the existence of a so-called "limited fund." *Ortiz*, 527 U.S. at 815.

14. The Supreme Court reversed in *Ortiz*, finding that the Texas Claims Trust did not meet the requirements of a "limited fund," and therefore the proffered justification for requiring claimants to proceed against the Texas Claims Trust—necessity—was lacking. *Ortiz*, 527 U.S. at 815. To impose such a requirement on claimants *in the absence of such necessity*, in the absence of a "true limited fund," the Court declared, "implicate[d] the due process principle . . . in Anglo-American jurisprudence . . . that everyone should have his own day in court." *Id.* at 846 (internal quotations and citations omitted). Accordingly, the Court found whether there was a true "limited fund" must be determined by way of an independent evidentiary process and independent valuation. *Id.* at 853.

15. The characteristics and features of Johnson & Johnson's Texas-Two-Step Claims Trust for resolving talc claims bear striking resemblance to those of the Texas Claims Trust for resolving asbestos claims the Court struck down in *Ortiz*. Accordingly, the mandatory aggregation of talc-related damages claims by way of

the Texas-Two-Step Trust would likewise seem to implicate the bedrock principle of due process "that everyone should have his own day in court."

16. To be sure, the precise mechanism by which the requirement would be imposed on claimants differs (for the Texas Claims Trust in *Ortiz*, the requested certification of a mandatory "limited fund" class action under Rule 23(b)(1)(B); for the Texas-Two-Step Claims Trust, the requested approval of a Chapter 11 plan of reorganization to establish the Trust as the sole "limited fund" for talc claims and to enjoin any other talc-related claims, *see, e.g.*, Declaration of John K. Kim in Support of First Day Pleadings at ¶ 59). However, the Supreme Court in *Ortiz* was concerned principally with features and characteristics of the Texas Claims Trust at the center of the GSA itself, which was held out as a "limited fund" but whose characteristics deviated substantially from the "characteristics [that] are . . . necessary, and not merely sufficient, to satisfy the limited fund rationale for a mandatory class action," regardless of the differences in circumstances "from which [those limited funds] arose." *Ortiz*, 527 U.S. at 853 (referencing a series of cases, discussed in the opinion, that "form[] the pedigree of the limited fund class action," which span nearly two centuries and involve a variety of mandatory arrangements for resolving claims against an insolvent defendant, but nonetheless share "common characteristics" that satisfy the limited fund rationale).

17. First, the stated purpose behind the Texas Trust in *Ortiz* and that behind the Texas-Two-Step Claims Trust is nearly identical. The stated purpose of the former was to achieve "global" and "total peace" of virtually all present and future personal-injury asbestos claims against Fibreboard. *Ortiz*, 527 U.S. at 824. The stated purpose of the Texas-Two-Step Claims Trust—in the words of Johnson & Johnson itself—is to "globally resolve talc-related claims."[8]

18. Second, the means for achieving "global resolution" of asbestos-related personal-injury claims in *Ortiz*—the Texas Claims Trust—and the means for achieving "global resolution" of talc-related personal-injury claims proposed by Johnson & Johnson—the Texas-Two-Step Claims Trust—are similar in two critical respects. One, both are mandatory, and two, the proffered justifications for the *mandatory* Texas Claims Trust in *Ortiz* on the one hand, and the *mandatory* Texas-Two-Step Claims Trust on the other, are essentially identical—namely, that a "limited fund" necessitates a mandatory arrangement for claim resolution.

19. And as with the so-called "limited fund" in *Ortiz*—which the Court found lacked the "defining characteristics" of a limited fund and therefore implicated

[8] *See, e.g.*, David Warfield, *Johnson & Johnson: The Texas Two-Step and Talc-Related Liabilities*, CREDIT REPORT (Nov. 3, 2021) https://www.thompsoncoburn.com/insights/blogs/credit-report/post/2021-11-03/johnson-johnson-the-texas-two-step-and-talc-related-liabilities; *see also, e.g.*, Declaration of John K. Kim in Support of First Day Pleadings (ECF No. 5) (stating that the goal of the Texas-Two-Step Claims Trust is "to resolve and pay current and future talc-related claims").

due process concerns—the "limited fund" encompassed in the Texas-Two-Step Claim Trust here similarly appears to lack these "defining characteristics."

20. "The first and most distinctive characteristic [of limited funds] is that … the fund available for satisfying [claims] set definitely at their *maximums*, demonstrate the inadequacy of the fund to pay all the claims." *Id.* at 838 (emphasis added). The Supreme Court found that the $1.535 billion Texas Claims Fund in *Ortiz* lacked this "first and most distinctive characteristic," and therefore was not a "true limited fund," either as to Fibreboard or as to the insurers contributing to the Trust. The $10 million contribution by Fibreboard did not come close to a true representation of the limit of Fibreboard's assets (which were at least $235 million in sale value). And the $1.525 billion contribution by Fibreboard's insurers was likewise not a true representation of the limit of the insurance asset. *Id*. (finding that the $2 billion contribution by the insurers to the TSA did not represent the limit of the insurance asset).

21. As with the Texas Claims Trust in *Ortiz*, there is considerable reason to doubt that the Texas-Two-Step Claims Fund constitutes a true representation of the defendants' assets, "set at their maximums." *Id.* at 838. Johnson & Johnson, an "obviously solvent" company with a market capitalization of over $450 billion dollars, has a better credit rating than the United States of America, *see* Brief of Amici Curiae by Certain Bankruptcy Law Professors at ¶ 2, and is the named

defendant in the more than 9,000 talc-related personal injury cases that comprise *In re Johnson & Johnson Talcum Prods. Marketing, Sales Practices and Prods. Liab. Litig.*, MDL No. 2738, Case No. 3:16-md-02738. Moreover, juries have found defendant Johnson & Johnson *directly* liable for talc claims. *See, e.g.*, Initial Statement of Official Committee of Talc Claimants Respecting Chapter 11, No. 21-30589-MBK, Doc. #495 ¶¶ 22–24; *Memorandum of Law of Certain Mesothelioma Claimants as Creditors Opposition to Debtor's Motion for an Order (I) Declaring that the Automatic Stay Applies to Certain Actions Against Non-Debtors or (II) Preliminarily Enjoining Such Actions and (III) Granting a Temporary Restraining Order Pending a Final Hearing*, No. 21-03032 (Bankr. W.D.N.C.), Doc. #44 ¶¶ 13–22 (discussing evidence at TRO hearing in North Carolina demonstrating Johnson & Johnson's direct liability for talc claims).

22. The second characteristic of a limited fund is that "the whole of the inadequate fund was to be devoted to the overwhelming claims," and "[i]t [goes] without saying that the defendant . . . with the inadequate assets had no opportunity to benefit himself . . . by holding back on the amount . . . ." *Ortiz*, 527 U.S. at 839. At the very least, the Court in *Ortiz* stressed that "parties must present not only their agreement [for resolving claims], but evidence on which the district court may ascertain the limit and the insufficiency of the fund, with support in findings of fact following a proceeding in which the evidence is subject to challenge." *Id.* at 849.

This requirement is essential to ensure that this is the "best possible arrangement" for the class claimants. *Id.* at 852. In rejecting the proposed mandatory arrangement for resolving asbestos claims in *Ortiz*, the Supreme Court noted that no such evidentiary showing had been made, and moreover, found that the justification for a mandatory resolution of the claims was lacking precisely because Fibreboard and the insurers had "h[eld] back on the amount." *Id*. at 839.

23. It is difficult to see how the same is not true with the Texas Two-Step Claims Trust, which was created precisely for the purpose of "holding back on the amount" by way of excluding Johnson & Johnson, or its assets, from the bankruptcy proceedings under the trust.

24. Indeed, it is almost impossible to see how the Texas-Two-Step Claims Trust possibly satisfies this second criteria for a "limited fund." At least in *Ortiz*, it was arguably a close call: Defendant Fibreboard was in dire financial straits. It was struggling to pay plaintiffs even 40% of their settlement figures. And yet, the Court still struck down the deal. It simply strains credulity to think that defendant Johnson & Johnson has "inadequate assets" to cover talc claims.

25. At bottom, the "limited fund" justifications for both the mandatory Texas Claims Trust arrangement proposed in *Ortiz* and the mandatory Texas-Two-Step Claims Trust arrangement proposed by Johnson & Johnson here are the product

of the same flawed "bootstrapping" that the Court rejected in *Ortiz* and *Amchem*. *See Amchem v. Windsor*, 521 U.S. at 591; *Ortiz*, 527 U.S. at 815.

26. The core holding in *Amchem* was that the *creation* of a proposed global deal (in the form of a class-wide settlement) cannot *itself* supply either the relevant Rule 23 requirements *or* the required due process protections for the plaintiffs. In other words, the settlement cannot be its own justification, as a matter of due process or otherwise. *Amchem*, 521 U.S. at 622.

27. The core holding in *Ortiz* was that the *creation* of a mandatory claims trust cannot supply the necessity—the "limited fund" —for its own existence; "the equity of the limitation," the Court emphasized, "is its necessity," not the other way around. *Ortiz*, 527 U.S. at 839, 846 (emphasizing that this necessity requirement for a "limited fund" was grounded in the "deep rooted" principle of due process that "everyone should have his own day in court") (internal citations and quotations omitted). In other words, the "limited fund" cannot be its own justification, as a matter of due process or otherwise.

28. The central logic behind the core holdings in *Amchem* and *Ortiz* would seem to apply here. When seeking to achieve global resolution of claims (as Johnson & Johnson aims to do), the arrangement for doing so cannot justify itself. The justification must exist separate and apart from the arrangement (here, the Texas-

Two-Step Trust; in *Ortiz*, the Texas Claims Trust; in *Amchem*, the global settlement), it cannot *result from it*.

29. One additional point bears mention. As this Court has recognized, in resolving mass tort claims—whether "under bankruptcy or otherwise"—the Due Process Clause requires that claimants be "adequately represented throughout the process." *In re Combustion Engineering*, 391 F.3d at 245 (citing *Amchem*, 521 U.S. at 625-28; *Ortiz*, 527 U.S. at 856); *see also Phillips Petroleum v. Shutts*, 472 U.S. 797, 813 (1985) (adequate representation required by due process); *Hansberry v. Lee*, 311 U.S. 32, 42–43 (1940) (same). Indeed, section 524(g) of the Bankruptcy Code, 11 U.S.C. § 524(g), was premised upon claimant participation in and approval of a plan for resolving asbestos claims. *See generally In re Combustion Engineering*.

30. A particular concern with pre-arranged deals for resolving mass claims is that they present the opportunity for collusion between plaintiffs' and defense counsel, wherein plaintiffs' attorneys can undercut absent claimants in order to "obtain defendants' acquiescence" and collect hefty fees for themselves. *See, e.g.*, Jay Tidmarsh, *Auctioning Class Settlements*, 56 Wm. & Mary L. Rev. 227 (2014) (discussing the "reverse auction" problem in mass litigation); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum. L. Rev. 1343, 1370-73 (1995) (same). As this Court has recognized in the class-action context, "settlement classes can, depending on how they are used, evade the processes

intended to protect the rights of absentees." *In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 788 (3d Cir. 1995).

31. J&J's Texas Two-Step Process takes these concerns about inadequate representation of claimants one substantial step further. At no point during J&J's Texas Two-Step Process were the talc claimants—present *or* future—afforded representation, adequate or otherwise. At no time during the creation of the so-called debtor, LTL Management; nor during the formation of the Funding Agreement between J&J and LTL Management designed to govern the payment of all talc claims, present and future; nor at the time of filing of the bankruptcy petition 48 hours after the formation of LTL Management—were talc claimants represented by anyone—other than their litigation adversary. It is talismanic that one cannot be represented at the bargaining table by their adversary.

32. This lack of adequate representation during the entire Texas Two-Step process now has put all talc claimants, present and future, in a significant "position of weakness." *In re General Motors Corp. Pick-up Truck Fuel Tanks Prods. Liab. Litig.* at 788. Johnson & Johnson not only removed claimants and their representatives from the bargaining table, Johnson & Johnson unilaterally "bargained" away claimants' ability to extract settlement value by way of pursuing further litigation and trial. And claimants have *no recourse* in the way of an opt out against a deal that was made *for* them, *by* the defendant they allege caused their

injuries in the first place. Claimants have been put in in this "position of weakness" not by their own attorneys (who were not there), but by the defendant. Amici here are concerned that bankruptcy maneuvers like these would set a precedent under which defendants could obtain a free pass from fundamental constitutional principles of due process.

CONCLUSION

33. This Court should (i) reverse the order denying the motions to dismiss and dismiss the case, or alternatively, (ii) reverse the order granting the preliminary injunction and vacate the stay and injunctive relief granted therein.

Date: July 7, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Thomas A. Pitta hereby certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because this brief contains 3807 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). I further certify that this brief 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 brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman type style. The text of the electronic version of this document is identical to the text of the hard copies that will be provided.

Date: July 7, 2022

/s/ Thomas A. Pitta
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CERTIFICATE OF SERVICE

I, Thomas A. Pitta, counsel for amicus curiae and a member of the Bar of this Court, certify that on July 7, 2022, I electronically filed the foregoing document with the Clerk of Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. I also certify that the foregoing document is being served on this day on all counsel of record via transmission of the Notice of Electronic Filing generated by CM/ECF. All participants in this case are registered CM/ECF users.

Date: July 7, 2022

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CERTIFICATE OF BAR MEMBERSHIP

Pursuant to Local Rule 28.3(d) and Local Rule 46.1(e), I hereby certify that I, Thomas A. Pitta, am admitted to the Bar of the United States Court of Appeals for the Third Circuit.

Date: July 7, 2022

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