IN THE
SUPREME COURT OF MISSOURI

No. SC98222

STATE ex rel. JANSSEN PHARMACEUTICALS, INC., JOHNSON & JOHNSON, and JANSSEN RESEARCH & DEVELOPMENT, LLC,

Relators,

v.

THE HONORABLE MICHAEL NOBLE,

Respondent.

Writ of Prohibition

REPLY BRIEF OF RELATORS

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INTRODUCTION

Respondent's brief represents a transparent attempt by Plaintiffs to avoid the clear mandates of Missouri law set forth in the venue statutes, rules, and this Court's recent, straightforward decisions—in order to try cases in the City of St. Louis that have no connection to that venue and do not belong there.

Faced with clear statutory authority and legal precedent on the venue and joinder issues that are the subject of this writ, they ask this Court to undertake several convoluted maneuvers to change the law to reach their desired result. First, they ask this Court to read an "inherent" hearing requirement into the venue statute that appears nowhere in its text. Second, they ask this Court to overrule or re-write the clear, well-reasoned *HeplerBroom* decision it issued just last year. Next, they ask this Court to declare Section 508.010.10 unconstitutional as written—an argument so hollow that they have never previously raised it in the many months and many rounds of briefing on this issue. Finally, they ask this Court to void Rule 51.01 and overrule *J&J*, another recent holding which confirms that permissive joinder cannot create venue. This Court should decline Plaintiffs' baseless invitation to revisit and re-write the law.

The trial court's refusal to transfer the claims of the non-City

Plaintiffs when Defendants' motion was not denied within the statutory ninety-day period, and its finding that joinder created venue, directly contravened Missouri's venue statutes, venue rules, and recent holdings of this Court. Respondent's brief makes clear that Plaintiffs, and some trial courts, will continue to flout the law if left unchecked. The preliminary writ should be made permanent.

ARGUMENT

I. Section 508.010.10 Requires Transfer.

A. Section 508.010.10 Does Not Contain a Hearing Requirement as a Condition Precedent to Its Application.

Through what can only be described as a hopeful, yet completely imaginative, reading of Section 508.010.10, Plaintiffs claim the statute does not apply unless a hearing is held on the venue motion within ninety days. But the purportedly "inherent" hearing requirement invented by Plaintiffs appears nowhere in the text of the statute and is not supported by its plain language.

As this Court has recognized, the words of section 508.010.10 "are clear." *State ex rel. HeplerBroom, LLC v. Moriarty*, 566 S.W.3d 240, 244 (Mo. banc 2019). Those words do not limit the statute's application only to situations where a court hears oral argument on a venue motion. Indeed, Section 508.010.10 does not even mention a hearing, much less require one as a condition precedent to its application.

Plaintiffs admit this (as they must), acknowledging that Section 508.010.10 "***is silent*** on a hearing taking place..." (Resp. Br. at 11) (emphasis added). In other words, the statute contains no hearing requirement. Nonetheless, they urge this Court to "construe[] the statute to anticipate the trial court actually hearing the motion." (*Id.*) This it cannot do. It is well-established that "[i]n construing a statute, courts ***cannot add statutory language where it does not exist***," but rather "must construe the plain language enacted by the Missouri legislature." *Li Lin v. Ellis*, 594 S.W.3d 238, 244 (Mo. banc 2020) (emphasis added; internal quotation marks and citation omitted); *Macon Cty. Emergency Servs. Bd. v. Macon Cty. Comm'n*, 485 S.W.3d 353, 355 (Mo. banc 2016) ("This Court will not add words to a statute under the auspice of statutory construction."); *Frye v.* Levy, 440 S.W.3d 405, 424 (Mo. banc 2014) ("This Court will not interpret a statute as a party wishes it were written."). The plain language of Section 508.010.10 is both clear and explicit: if a motion based on improper venue is not denied within ninety days of filing, it is deemed granted unless the parties waive the statutory time period in writing.

The statute's language is unambiguous and requires no "interpretation." *See Kehlenbrink v. Dir. of Revenue*, 577 S.W.3d 798, 800 (Mo. banc 2019) ("The rules of statutory construction do not apply if the

statute is unambiguous."); *Orla Holman Cemetery, Inc. v. Robert W. Plaster Trust*, 304 S.W.3d 112, 117 (Mo. banc 2010) ("Courts may not create an ambiguity where the words of an ordinance are plain."). But even if Plaintiffs' nonsensical "interpretation" were considered, it should be rejected. Plaintiffs' invention of a hearing requirement is based on the misguided—and incorrect—notion that a trial court is "deprive[d]…from making an informed ruling on the merits of a motion" if a hearing does not occur. (Resp. Br. at 11; *see also id.* at 19 (arguing that court does not have an "opportunity" to rule on a motion unless there is hearing)). This argument fails for several reasons.

First, there is no "inherent" requirement of a hearing on every motion before a court can rule. State and federal courts alike routinely decide motions on the pleadings without oral argument. The trial court here was "informed" of the "merits of [the] motion" through the arguments set forth in Defendants' motion and Plaintiffs' response, both of which were filed on the public docket. Indeed, reading an "inherent" hearing requirement into every statute that is "silent" on the issue would result in a drastic upheaval and rewriting of Missouri law and court procedures.[1]

[1] Plaintiffs' claim (at p. 11) that Section 508.010.10 would "violate" Local Rule 33.7.2 is both factually and legally incorrect. First, that local rule does not, as Plaintiffs claim, dictate that the trial court ***cannot*** rule on a

Second, Section 508.010.10 gives the trial court ample opportunity to rule on the motion. Once the motion is filed, the court has a full ninety days to rule. Plaintiffs cannot credibly claim that the statute "deprive[s]" the trial court of an adequate time frame or opportunity to rule.

Third, if Plaintiffs were concerned that the trial court might not rule within ninety days unless prompted to do so, at any time they could have (1) requested a ruling from the court; (2) requested that Defendants waive the ninety-day time period for a ruling; or (3) set the motion for hearing.[2] Plaintiffs here did none of those things, and they cannot now be heard to complain about the consequences of that choice.

Finally, Plaintiffs' belabored attempt to invoke the current global

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motion absent oral argument. Rather, that local rule simply sets forth procedures for the location for motion practice. *See* City of St. Louis Circuit Court L.R. 33.7 (titled "Pre-Trial Motions, Where Heard) and 33.7.2 ("All other pre-trial motions shall be heard in the division in which the case is pending…"). In fact, the circuit court's local rules make clear that oral argument on motions is not required. *See* City of St. Louis Circuit Court L.R. 33.3 ("Oral Arguments—When Desired and How Requested"). Second, a state statute cannot, as a matter of law, "violate" a local rule.

[2] Indeed, Plaintiffs' counsel in other cases routinely seek waiver of the 90-day time period or set Defendants' motion for hearing. This is logical, because once a defendant moves to dismiss or transfer a case based on venue, the burden is on the *plaintiff* to show that venue is proper. *See State ex rel. Mylan Bertek Pharms., Inc. v. Vincent*, 561 S.W.3d 68, 73 (Mo. App. 2018) (citing *Igoe v. Dept. of Labor & Indus. Relations of State of Missouri*, 152 S.W.3d 284, 288 (Mo. banc 2004)).

pandemic to support their argument here hardly merits a response. The COVID-19 crisis is an unprecedented, ***emergency*** situation which has no temporal or other connection to this case. The Court should not change existing venue law based on Plaintiffs' hypothetical scenarios that are not at issue in this case. *See State v. Jeffrey*, 400 S.W.3d 303, 308 (Mo. banc 2013). As this Court has explained, a party "may not challenge [a] statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court. It would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive litigation. By focusing on the case at hand, this Court avoids ruling on—and thereby forming constitutional rules on—hypothetical cases." *Id.* (internal quotations and citations omitted). Additionally, this argument continues Plaintiffs' pattern of turning a blind eye to the fact that the statute contains a procedure for waiving the ninety-day time period.

* * *

Section 508.010.10 contains no exceptions, no conditions that must be met before it applies. It is a straightforward rule that applies to every action, including this one, and it requires transfer here.

B. This Court's *HeplerBroom* Opinion Governs and Requires Transfer.

Only last year, this Court decided the precise issues raised in this writ in *HeplerBroom*. Plaintiffs strain to avoid that decision, claiming that its holding applies only where a trial court hears oral argument on the defendant's motion to transfer within ninety days. This Court announced no such limitation in *HeplerBroom*, nor is there any basis for it to do so. As described above, such a limitation would improperly insert a hearing requirement that appears nowhere in the statute's text.

HeplerBroom did not turn on the fact that the trial court there entertained oral argument on the venue motion within ninety days of its filing. Rather, this Court's holding was based on the plain, clear language of Section 508.010.10, without regard to a hearing:

> When a statute's words are clear, this Court must apply its plain meaning. *State ex rel. Valentine v. Orr*, 366 S.W.3d 534, 540 (Mo. banc 2012). Relator's motion was filed October 6, 2017. Pursuant to section 508.010.10, the deadline for the circuit court to rule upon Relator's motion was January 4, 2018. The circuit court did not rule until May 10, 2018. Hence, the plain language of section 508.010.10 requires this Court to hold the circuit court's failure to rule upon Relators' motion to transfer within the ninety-day period resulted in Relators' motion being deemed granted. Hence, the circuit court lacked authority to do anything other than transfer the cause to St. Charles County. *See State ex rel. Schwarz Pharma, Inc. v. Dowd*, 432 S.W.3d 764, 769 (Mo. banc 2014).

HeplerBroom, 566 S.W.3d at 244. That same reasoning applies equally here, and the same result should follow. Here, Defendants' motion was filed on June 19, 2015. (A82-141.) Pursuant to section 508.010.10, the deadline for the circuit court to rule upon Relator's motion was September 17, 2015. The circuit court did not rule until February 11, 2016. (A298-313.) Hence, as in *HeplerBroom*, "the plain language of section 508.010.10 requires this Court to hold the circuit court's failure to rule upon Relators' motion to transfer within the ninety-day period resulted in Relators' motion being deemed granted...[and] the circuit court lacked authority to do anything other than transfer the cause . . . ." *HeplerBroom*, 566 S.W.3d at 244.[3]

C. Plaintiffs' New Constitutional Challenge Fails.

Faced with unavoidable statutory language and authority from this Court that requires transfer, Plaintiffs have conjured up another ploy to try to avoid the statute. They now claim—for the first time—that Section 508.010.10 is unconstitutional as written, and that the only way to cure the alleged constitutional defect is for this Court to re-write the statute by adding a hearing requirement. In the numerous pleadings filed by

[3] If Defendants' Motion to Reconsider is considered, the same result would follow. Defendants filed that motion on April 9, 2019 (A358-65), and the motion was called, ***heard***, and submitted less than ninety days later on May 13, 2019. (A390.) Respondent issued his order denying that motion on July 31, 2019—113 days after its filing. (A415-18.)

Plaintiffs and Respondent on this issue—including Respondent's Order, writ briefing in the Court of Appeals, and Respondent's Return in this Court—at no point did they raise the specter that Section 508.010.10 is unconstitutional as written. This untimely new argument should be rejected for what it is: a last-ditch attempt to avoid application of Missouri law.

Plaintiffs' new constitutional argument fails for several reasons. *First*, the argument is waived because it was raised for the first time in Respondent's brief, and not in the numerous prior pleadings filed by Plaintiffs and Respondent on this issue. "Constitutional violations are waived if not raised at the earliest possible opportunity." *State ex rel. York v. Daugherty*, 969 S.W.2d 223, 224 (Mo. banc 1998). *See also State ex rel. Hyde v. Buder*, 315 Mo. 791, 795-96, 287 S.W. 307, 308-09 (1926) (Respondents waived constitutional argument asserted for the first time in their Respondent's brief in original proceeding before the Missouri Supreme Court where they failed to raise the argument in their suggestions in opposition to relator's application for certiorari); *State ex rel. Laszewski v. R.L. Persons Const., Inc.*, 136 S.W.3d 863, 871 (Mo. App. 2004) (due process argument waived where not raised "in the trial court at the earliest opportunity consistent with good pleading and orderly procedure"). Here, Respondent and Plaintiffs had numerous

opportunities to raise a constitutional challenge—including in opposition to the motion to transfer or motion to reconsider, in Respondent's Order, in Respondent's suggestions in opposition to the writ petition before the Court of Appeals, and in Respondent's Return in this Court. Because the constitutional challenge was not raised "at the earliest possible opportunity," it should not be considered. *York*, 969 S.W.2d at 224.

Second, even if Respondent did believe that Section 508.010.10 was unconstitutional as written (which has no basis since he made no such indication in his Order, his opposition in the Court of Appeals, or his Writ Return here), such belief would not justify his refusal to enforce it as written. *See State ex rel. Dir. of Revenue v. Scott*, 919 S.W.2d 296, 301 (Mo. App. 1996) ("In the absence of a judgment that [a statute] is unconstitutional, the respondent was without authority to enter an order in conflict with the statute. The court's authority to issue its order is emphatically restricted by [the statute], and its language could not be more explicit."); *Cf. Estate of Mickels*, 542 S.W.3d 311, 315 (Mo. banc 2018) ("It is this Court's duty to enforce the laws as written . . . .")

Third, Plaintiffs fall far short of meeting their burden of establishing that Section 508.010.10 is unconstitutional as written. *See Jackson Cnty. Sports Complex Authority v. State*, 226 S.W.3d 156, 160 (Mo. banc 2007) (statutes "have a strong presumption of constitutionality. . . . The

burden of proof rests on the statute's challenger."). They simply assert that unless a hearing requirement is added to the statute, it violates separation of powers principles because it "divest[s] the trial court of all discretionary authority." (Resp. Br. at 12; *see also id.* at 11 (arguing that statute is unconstitutional "if construed to void all discretion of the trial court beyond 90 days under any circumstance."). This argument is both legally and factually incorrect, and it is no surprise that Plaintiffs fail to cite any relevant authority for to support it.[4]

In fact, this Court has recognized that, unlike jurisdiction, venue is ***not*** based on constitutional principles and "goes to process rather than substantive rights." *State ex rel. Kansas City Southern Ry. Co. v. Nixon*, 282 S.W.3d 363, 365 (Mo. banc 2009) ("A court's authority, or jurisdiction, to hear a case is based upon constitutional principles.

[4] The doctrine of "constitutional avoidance" does not apply here, as Respondent's own cases demonstrate. *See Harris v. U.S.*, 536 U.S. 545, 555 (2002) (The constitutional avoidance doctrine "has no role to play here. It applies only when there are serious concerns about the statute's constitutionality . . . ."); *Doe v. St. Louis Community College*, 526 S.W.3d 329, 345, 350 (Mo. App. 2017) (doctrine applies only if two interpretations are equally plausible and one violates the Constitution while the other does not). As described above, Section 508.010.10 does not raise serious constitutional concerns merely because it does not require an oral hearing on a venue motion, and Plaintiffs' "interpretation" of the statute is not equally plausible. *See also Kearney v. Dept. of Labor and Indus. Relations*, -- S.W.3d --, 2020 WL 1527084, at *3 (Mo. banc March 31, 2020) (where statute is unambiguous, court "cannot resort to other means of interpretation," including the doctrine of constitutional avoidance).

Venue, in contrast, is determined by the applicable rule or statute" and "involves a procedural rather than a jurisdictional question")(citations omitted)); *see also State ex rel. Heartland Title Svcs., Inc. v. Harrell*, 500 S.W.3d 239, 241 (Mo. banc 2016). In other words, venue is a ***procedural*** mechanism "to provide a convenient, logical and orderly forum for the resolution of disputes" that falls squarely within the province of the legislature. *State ex rel. Elson v. Koehr*, 856 S.W.2d 57, 59 (Mo banc 1993); *see also State ex rel. Rothermich v. Gallagher,* 816 S.W.2d 194, 196 (Mo. banc 1991) ("Venue in Missouri is determined solely by statute."). Thus, the legislature's statute is not an "unconstitutional directive to the trial Court," as Plaintiffs claim (Resp. Br. at 11), and the trial court's duty to transfer a case where mandated by the venue statutes or rules is "ministerial." *State ex rel. Kansas Cty. Southern Ry. Co. v. David*, 105 S.W.3d 517, 518 n.1 (Mo. App. 2003); *see also State ex rel. Vee-Jay Contracting Co. v. Neill*, 89 S.W.3d 470, 472 (Mo. banc 2002) (noting that Rule 51.045 mandates that a trial court *must* transfer an action if an opposing party does not reply to a proper motion to transfer, and has no discretion to do otherwise). This, too, disposes of Plaintiffs' constitutional challenge.

Additionally, Section 508.010.10 does not "divest[] the trial court of all discretionary authority" or "usurp the broad discretion of the trial

court to administer its docket." (Resp. Br. at 11-12.) As explained above, the statute provides an orderly procedure whereby the trial court has ninety days to exercise its discretion by ruling on the motion; or, it can exercise its discretion by choosing to not issue a ruling, which will result in transfer. Providing three full months for a trial court to rule on a venue motion simply does not deprive the court of an "opportunity to rule." (Resp. Br. at 13).

Venue is a procedural mechanism determined solely by statute. Plaintiffs' anemic and belated constitutional challenge to Section 508.010.10 should be rejected.

II. In the Alternative, Transfer Is Required Pursuant to Rule 51.01 and *J&J*.

Section 508.010.10 is dispositive, but it is not the only basis for making the preliminary writ permanent. The trial court also wrongly held that permissive joinder of the non-City Plaintiffs' claims with the claims of a single City Plaintiff created venue over all claims—in direct contravention of Rule 51.01 and this Court's holding in *J&J*. Respondent's brief asks the Court to ignore Rule 51.01 and either rewrite *J&J* or overturn it entirely. A trial court is not free to ignore laws with which it disagrees, which is what the trial court did here. Rule 51.01 and *J&J* unequivocally require transfer here.

A. Rule 51.01 and *J&J* Confirm that Permissive Joinder Cannot Create Venue.

Rule 51.01 is both clear and explicit: "These Rules shall not be construed to extend or limit the jurisdiction of the courts of Missouri, or the venue of civil actions therein." Mo. Sup. Ct. R. 51.01. Permissive joinder is one of those rules—Rule 52.05(a). Therefore, permissive joinder shall not be construed to extend the venue of civil actions. Yet that is exactly what the trial court did in this case when it held that permissive joinder created venue over the non-City Plaintiffs where it does not exist otherwise. Plaintiffs have no answer for Rule 51.01, so they simply ignore it; Respondent's brief does not even mention it.

In *J&J*, this Court affirmed that Rule 51.01 means what it says: "joinder of [a plaintiff]'s claims with the other claims alleged in the petition cannot extend venue to a county where [that plaintiff]'s claims could not otherwise be brought and pursued." *State ex rel. Johnson & Johnson v. Burlison*, 567 S.W.3d 168, 175 (Mo. banc 2019) (A427); *see also id.* at 183 ("[t]oday . . . the Court holds that no plaintiff or claim can be joined with any other plaintiff or claim unless venue can be established independently for each claim." (Wilson, J., dissenting)). Here, Respondent admits that "venue would not have existed in the City of St. Louis as to the claims of Plaintiff Ryan Shelton and Plaintiff Jacob

Simms . . . absent joinder with the Plaintiff from the City of St. Louis." Return at 2. That undisputed admission requires transfer.

Just as they did with *HeplerBroom*, Plaintiffs struggle to find a way out of this Court's holding in *J&J*, repeating their argument that *J&J*'s holding was limited only to plaintiffs whose claims had been designated for a separate trial. (Resp. Br. at 20.). Defendants addressed that argument at length in their opening brief. (*See* Opening Br. at 25-27). Plaintiffs offer no response aside from claiming that this Court's denials of writ petitions in other cases, ***before J&J*** was decided, should be read as "presumably sanctioning and supporting the distinction underlying Respondent's Order here." (Resp. Br. at 20.) But it is well-established that denial of a preliminary writ is ***not*** an adjudication on the merits and "does not necessarily reflect any view by the court on the merits." *Raskas Foods, Inc. v. Sw. Whey, Inc.*, 978 S.W.2d 49, 49 n.4 (Mo. App. 1998); *see also Buemi v. Kerckhoff*, 359 S.W.3d 16, 25 n.10 (Mo banc 2011). At the very least, denials of writ petitions that pre-dated *J&J* could not possibly be viewed as this Court "sanctioning" Respondent's flawed interpretation of that Opinion.

This Court did not hold in *J&J* that plaintiffs and trial courts are free to ignore Rule 51.01 so long as their claims are not designated for a separate trial. Rule 51.01 applies and mandates transfer here, in light of

the undisputed fact—as admitted by Respondent—that venue would not have existed over the claims of Plaintiffs Shelton and Simms absent joinder with the Plaintiff from the City of St. Louis.

B. Post-Order Changes to Missouri's Venue Statutes Were Not In Effect at the Relevant Time and Cannot Be a Basis for Respondent's Order.

Because the relevant statutes and precedent require transfer, Plaintiffs ask this Court to ignore those and instead interpret and apply venue statutes that were not in effect at the time of the trial court's order on Defendants' venue motion and were not in effect at the time of Respondent's Order on Defendants' motion to reconsider.

The trial court denied Defendants' venue motion in February 2016, and Respondent entered his Order denying Defendants' motion to reconsider on July 31, 2019. On August 28, 2019, certain amendments to some subsections of Section 508.010 went into effect, and certain new venue statutes also went into effect. Section 508.013, RSMo (2019) was one such new statute. Respondent's Order does not reference, and was not based on, forthcoming changes or additions to Missouri's venue statutes that were not in effect on July 31, 2019. Nor could it have been, as "all acts purporting to have been done under" a statute before its effective date "are void." *Levinson v. City of Kansas City*, 43 S.W.3d 312, 317 (Mo. App. 2001) (quoting 82 C.J.S. Statutes § 388 (1999)).

Section 508.013 was not the law of Missouri before August 28, 2019. Nonetheless, Plaintiffs claim this new statute can somehow serve as a basis for the trial court's July 2019 Order because it contains certain retroactivity provisions. Plaintiffs assert that Section 508.013 applies because it had been passed by the legislature at the time of Respondent's Order, and claim that the fact that it "did not go into effect until four weeks after the Order was handed down is irrelevant." (Resp. Br. at 19). But that fact is not only relevant, but dispositive. While a statute may, in some limited circumstances, apply retroactively ***once it is in effect***, a statute "***has no force what[so]ever***" prior to its effective date. *See Levinson*, 43 S.W.3d at 317 (citation omitted; emphasis added). This Court has thus recognized that, with the exception of emergency legislation, "the actual dates when the governor approves a bill or when the General Assembly passes a bill are not legally significant." *Berdella v. Pender*, 821 S.W.2d 846, 849 (Mo. banc 1991). "Therefore, while '[a] statute may have a potential existence' before its effective date, '***no rights may be acquired under it*** and no one is bound to regulate his or her conduct according to its terms, and ***all acts purporting to have been done under it prior to that time are void***.'" *Levinson*, 43 S.W.3d at 316 (quoting 82 C.J.S. Statutes § 388) (emphasis added.)

Respondent's Order of July 31, 2019 constituted an abuse of discretion under the venue laws in effect at that time, and he was required to transfer the non-City Plaintiffs' claims. Had he done so as required, those Plaintiffs' cases would not have been venued in the City of St. Louis at the time Section 508.013 became effective. Plaintiffs cannot now rely on that statute as a *post hoc* basis for Respondent's Order.

Finally, there is no dispute that Section 508.010.10 remains unchanged even to this day. In its most recent amendments to the venue statutes, the legislature chose to leave that provision without a hearing requirement as a condition precedent to its application.

CONCLUSION

This Court has repeatedly put trial courts on notice that Missouri's venue and joinder law must be followed. Many courts have heeded that notice, but some continue to ignore or evade the clear law as set forth in the venue rules, venue statutes, and this Court's *HeplerBroom* and *J&J* Opinions. The trial court here abused its discretion in refusing to follow that law and transfer the claims of the non-City of St. Louis Plaintiffs. This Court should make the preliminary writ permanent.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies, pursuant to Missouri Supreme Court Rule 84.06(c), that this brief complies with Rule 55.03 and the length limitations contained in Rule 84.06(b) in that there are 4,911 words in the brief (excluding the cover, signature block, certificate of service, and certificate of compliance) according to the word count of the Microsoft Word word-processing system used to prepare the brief.

/s/ Bettina J. Strauss

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 28, 2020, the foregoing was filed electronically with the Clerk of the Court to be served by operation of the court's electronic filing system on all counsel of record.

/s/ Bettina J. Strauss