

APPENDIX

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**APPENDIX A — ORDER DENYING REVIEW
IN THE SUPREME COURT OF CALIFORNIA,
COURT OF APPEAL, FIRST APPELLATE
DISTRICT, FILED APRIL 28, 2021**

Court of Appeal, First Appellate District,
Division Two - No. A159824

S267332

IN THE SUPREME COURT OF CALIFORNIA

En Banc

ROCHELLE WESTMORELAND, as an individual and
on behalf of all others similarly situated,

Petitioner,

v.

SUPERIOR COURT OF CITY AND COUNTY OF
SAN FRANCISCO,

Respondent;

KINDERCARE EDUCATION, LLC,

Real Party in Interest.

The petition for review is denied.

CANTIL-SAKAUYE
Chief Justice

**APPENDIX B — OPINION OF THE COURT OF
APPEAL OF THE STATE OF CALIFORNIA, FIRST
APPELLATE DISTRICT, DIVISION TWO, FILED
JANUARY 29, 2021**

IN THE COURT OF APPEAL OF THE STATE OF
CALIFORNIA, FIRST APPELLATE DISTRICT
DIVISION TWO

(San Francisco County Super. Ct. No. CGC-19-573125)

ROCHELLE WESTMORELAND, AS AN
INDIVIDUAL AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,

Petitioner,

v.

THE SUPERIOR COURT OF
SAN FRANCISCO COUNTY,

Respondent;

KINDERCARE EDUCATION, LLC,

Real Party in Interest.

BY THE COURT:

The court has conducted a detailed review of the record and the parties' briefing regarding this petition, which concerns respondent superior court's January 13, 2020 order granting Real Party in Interest's motion to compel

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arbitration and request for stay. Our review indicates the superior court erred by granting the motion and stay of Petitioner's PAGA claim. Although the superior court correctly concluded the PAGA waiver is unenforceable, it erred by severing the unenforceable PAGA waiver from the remainder of the Waiver of Class and Collective Claims and the remainder of the arbitration agreement. The acknowledged ambiguity in the Savings Clause & Conformity clause should be resolved against Real Party in Interest, the party that drafted the arbitration agreement. (*Securitas Security Services USA, Inc. v. Superior Court* (2015) 234 Cal.App.4th 1109, 1126, citing *Mastrobuono v. Shearson Lehman Hutton, Inc.* (1995) 514 U.S. 52, 62.) So construed, the unenforceable PAGA waiver is not severable from the rest of the agreement and, therefore, renders the entire agreement unenforceable. (*Securitas Security Services USA, Inc., supra*, at pp. 1123-1127.)

Therefore, let an alternative writ of mandate issue commanding respondent San Francisco County Superior Court, in the above-captioned case, to set aside and vacate its January 13, 2020 "Order Granting Defendant's Motion to Compel Arbitration and Request for Stay" and enter a new order denying the motion in its entirety. In the alternative, respondent superior court may appear and show cause before Division Two of this court why a peremptory writ of mandate should not be granted.

If respondent superior court complies with this court's directive on or before February 19, 2021, the court will discharge the alternative writ and dismiss the petition

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as moot. The superior court is advised that it must give the parties notice and an opportunity to be heard before issuing a new order in response to the alternative writ. (See *Brown, Winfield & Canzoneri, Inc. v. Superior Court* (2010) 47 Cal.4th 1233, 1250, fn. 10 [“if a trial court is considering changing an interim order in response to an alternative writ, it must give the respective parties notice and an opportunity to be heard.”].)

Petitioner shall inform this court by letter of respondent court’s decision as soon as possible. Should respondent court choose not to follow the above procedure, but instead to appear and show cause before this court why a peremptory writ of mandate should not issue, this matter will be heard before Division Two when ordered on calendar.

The alternative writ is to be issued, served and filed on or before January 29, 2021, and shall be deemed served upon mailing by the clerk of this court of a certified copy of the alternative writ and this order to respondent superior court. A written return shall be served and filed on or before March 5, 2021, and a reply to the return shall be served and filed on or before March 12, 2021. (Cal. Rules of Court, rule 8.487(b).) If, however, respondent superior court complies with the alternative writ, and proof thereof is filed herein on or before March 2, 2021, then no return or reply need be filed, the alternative writ will be discharged and the petition will be dismissed as moot.

Date 01/29/2021

Kline, P.J.

**APPENDIX C — OPINION OF THE SUPERIOR
COURT OF CALIFORNIA, COUNTY OF SAN
FRANCISCO, FILED JANUARY 13, 2020**

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO
DEPARTMENT 613

ROCHELLE WESTMORELAND, individually, and on
behalf of all others similarly situated,

Plaintiff,

v.

KINDERCARE EDUCATION LLC.,
and DOES 1 through 50, inclusive,

Defendants.

Case No. CGC-19-573125

**ORDER GRANTING DEFENDANT'S
MOTION TO COMPEL ARBITRATION
AND REQUEST FOR STAY**

INTRODUCTION

This matter came on regularly for hearing on January 8, 2020 in Department 606, the Honorable Andrew Y.S. Cheng, presiding. Larry Lee appeared for plaintiff Rochelle Westmoreland and the Class. Rishi Puri appeared for defendant Kindercare Education LLC.

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Having reviewed and considered the arguments, pleadings, and written submissions of all parties, the Court grants Defendant's (1) motion to compel arbitration of all of Plaintiffs individual claims (with the exception of her PAGA claim) and (2) request for stay of Plaintiffs PAGA claim.

BACKGROUND

On January 24, 2019, Plaintiff Rochelle Westmoreland ("Plaintiff"), individually and on behalf of all others similarly situated, filed this putative class action against Defendant Kindercare Education LLC ("Defendant") asserting violations of Labor Code sections 201-203, 212-213. On February 26, 2019, Plaintiff filed a first amended complaint ["FAC"] adding claims pursuant to Labor Code § 2698 *et seq.*, "Private Attorneys General Act" ("PAGA"). (See FAC ¶¶ 36-41.)

As part of its business, Defendant recruits and hires employees using a program called "Taleo" to manage and track employee hiring data. (See FAC ¶ 4; see also Declaration of Karin Campbell-Moore in Support of Defendant Kindercare Education LLC's Motion to Compel Arbitration and Stay ["Campbell-Moore Decl."] ¶ 2.) On April 25, 2016, Defendant sent Plaintiff an electronic offer letter for the position of Center Director. (See Campbell-Moore Decl. ¶ 7; see also Motion, 3.) After Plaintiffs acceptance of Defendant's offer letter, Defendant sent Plaintiff an e-mail through Taleo with a link to complete the "onboarding" process. (See *ibid.*) Taleo presented Plaintiff with a series of tasks to complete, including to

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review and execute the “Mutual Arbitration Agreement Regarding Wages and Hours” [“Arbitration Agreement”]. (See Campbell-Moore Decl. ¶ 8; see also Motion, 3.) Plaintiff was able to review the agreement at her leisure and was able to print the arbitration agreement prior to execution. (See Campbell-Moore Decl. ¶ 9; see also Motion, 3.) On April 25, 2019, Plaintiff executed the Arbitration Agreement. (See *ibid.*)

The pertinent provisions of the Arbitration Agreement are as follows:

- “‘Covered Claims’ under this agreement do not include claims alleging discrimination, harassment, or retaliation. Also excluded from this agreement are any claims for employee benefits under KU’s plans governed by the Employee Retirement Income Security Act (“ERISA”), *as well as any claims that cannot be required to be arbitrated as a matter of law . . .* KU and I understand and agree that arbitration is the only litigation forum for resolving covered claims and that we are both waiving the right to a trial before a judge or jury in federal or state court in favor of arbitration . . .” (Campbell-Moore Decl., Ex. A [“Arb. Agreement”] [emphasis supplied], 1.)
- “Waiver of Class and Collective Claims. KU and I also agree that covered claims will be arbitrated only on an individual

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basis and that both KU and I waive the right to participate in or receive money or any other relief, *to the maximum extent permitted by law*, from any class, collective, or *representative proceeding.*” (*Id.* at 2 [emphasis supplied].)

- “Savings Clause & Conformity Clause. If any provision of this agreement is determined to be unenforceable or in conflict with a mandatory provision of applicable law, it shall be construed to incorporate any mandatory provision, and/or the unenforceable or conflicting provision shall be automatically severed and the remainder of the agreement shall not be affected. *Provided, however, that if the Waiver of Class and Collective Claims is found to be unenforceable, then this agreement is invalid* and any claim brought on a class, collective, or representative action basis must be filed in a court of competent jurisdiction, and such court shall be the exclusive forum for such claims.” (See *id.* at 4 [emphasis supplied].)

LEGAL STANDARD

The arbitration agreement at issue expressly states that it is governed by the Federal Arbitration Act (“FAA”). “The FAA reflects a ‘liberal federal policy favoring arbitration,’ and the ‘fundamental principle that arbitration is a matter of contract.’ Its main purpose ‘is to

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ensur[e] that private arbitration agreements are enforced according to their terms’ and it ‘preempts any state law rule that stand[s] as an obstacle to the accomplishment of the FAA’s objectives.’” (*Da Loc Nguyen v. Applied Medical Resources Corp.* (2016) 4 Cal.App.5th 232, 245.) Any doubts regarding the arbitrability of a dispute shall be resolved in favor of arbitration. (*Coast Plaza Doctors Hosp. v. Blue Cross of Cal.* (1999) 83 Cal.App.4th 677, 686; see also *Lamps Plus, Inc. v. Varela* (2019) 139 S. Ct. 1407, 1418 [“the FAA provides the default rule for resolving certain ambiguities in arbitration agreements. For example, we have repeatedly held that ambiguities about the scope of an arbitration agreements must be resolved in favor of arbitration”].)

DISCUSSION AND ANALYSIS**I. The Federal Arbitration Act Governs**

The arbitration agreement itself states that it is governed by the Federal Arbitration Act (“FAA”). (See Arb. Agreement, 4 [“Controlling Law”].) Further, Plaintiff does not dispute that the FAA governs. (Compare Motion, 4-5 with Plaintiff’s Opposition to Defendant’s Motion to Compel Arbitration [“Opp.”], 4:19-21.)

II. The Waiver of Class and Collective Claims Includes an Unenforceable PAGA Waiver**a. Background Law**

A representative action brought under PAGA “authorizes an employee to bring an action for civil

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penalties on behalf of the state against his or her employer for Labor Code violations committed against the employee and fellow employees, with most of the proceeds of that litigation going to the state.” (*Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 360.) “[T]he Legislature’s purpose in enacting the PAGA was to augment the limited enforcement capability of the Labor and Workforce Development Agency by empowering employees to enforce the Labor Code as representatives of the Agency.” (*Id.* at 383.) “[A]n employee’s right to bring a PAGA action is unwaivable.” (*Id.* at 383.) First, “[b]ecause such an agreement has its ‘object, . . . indirectly, to exempt [the employer] from responsibility for [its] own . . . violation of law,’ it is against public policy and may not be enforced.” (*Id.* [quoting Cal. Civ. Code § 1668].) Second, “[s]uch an agreement also violates Civil Code section 3513’s injunction that ‘a law established for a public reason cannot be contravened by a private agreement.’” (*Id.* quoting Cal. Civ. Code § 3513.) “[T]he rule against PAGA waivers does not frustrate the FAA’s objectives because [] the FAA aims to ensure an efficient forum for the resolution of *private* disputes, whereas a PAGA action is a dispute between an employer and the state Labor and Workforce Development Agency.” (*Id.* at 384 [emphasis in original].)

b. Analysis

Plaintiff argues because the Arbitration Agreement covers claims for “penalties, or any other claimed violation of wage-and-hour practice or procedures under local, state, or federal statutory or common law” and precludes such. claims from being brought on a representative

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action basis, the Arbitration Agreement illegally compels arbitration of PAGA claims, rendering the entire agreement unenforceable. (See Opp., 8; see also Arb. Agreement, 1 [“Covered Claims”], 2 [“Waiver of Class and Collective Claims”].)

As Plaintiff highlights, “*Iskanian* and its progeny preclude any waiver of an employee’s right to bring a PAGA action.” (Opp., 6; see also *Iskanian, supra*, 59 Cal.4th at 383-384.) A PAGA action is a *representative* action brought by an aggrieved employee on behalf of the state. (See *Iskanian, supra*, 59 Cal.4th at 360; see also Arb. Agreement, 2 [Waiver of Class and Collective Claims including “representative proceedings”].) Thus, inasmuch as the Waiver of Class and Collective Claims contained in the Arbitration Agreement seeks to eliminate or abridge Plaintiffs right to litigate PAGA claims in a representative capacity, the Court finds the waiver to be invalid.” (See *id* at 1123.)

III. The Unenforceable PAGA Waiver Does Not Invalidate the Entire Agreement

a. Background Law

“A policy provision will be considered ambiguous when it capable of two or more constructions, both of which are reasonable . . . [D]isagreement concerning the meaning of a phrase, or the fact that a word or phrase isolated from its context is susceptible of more than one meaning [does not make it ambiguous].” (*Powerine Oil Co., Inc. v. Sup. Ct.* (2005) 37 Cal.4th 377, 390 [quotations and citations omitted].) “[L]anguage in a contract must be

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construed in *the context of the instrument as a whole*, and the circumstances of that case, and cannot be found to be ambiguous in the abstract.” (*Bank of the West v. Sup. Ct.* (1992) 2 Cal.4th 1254, 1265 [italics, quotations, and citation omitted] [emphasis supplied].)

b. Analysis**1. The Savings Clause & Conformity Clause**

Because the PAGA waiver is unenforceable as a matter of law, the Savings Clause & Conformity Clause applies. (See Arb. Agreement, 4.) The Savings Clause & Conformity Clause provides:

“If any provision of this agreement is determined to be unenforceable or in conflict with a mandatory provision of applicable law, it shall be construed to incorporate any mandatory provision, and/or the unenforceable or conflicting provision shall be automatically severed and the remainder of the agreement shall not be affected. *Provided, however, that if the Waiver of Class and Collective Claims is found to be unenforceable, then this agreement is invalid* and any claim brought on a class, collective, or representative action basis must be filed in a court of competent jurisdiction, and such court shall be the exclusive forum for such claims.”

(Arb. Agreement, 4 [emphasis supplied].) Defendant contends that the capitalization of the exact name of the

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clause (i.e. “Waiver of Class and Collective Claims”) in the Savings Clause & Conformity Clause demonstrates that the second sentence is triggered only when the *entirety* of the Waiver of Class and Collective Claims is unenforceable. Plaintiff asserts (1) the first sentence of the Savings Clause & Conformity Clause discusses severability of any provision of the agreement, and (2) the second sentence operates as a “poison pill”, which “mandates that if any part of [the] Waiver of Class and Collective Claims provision is unenforceable, then Defendant itself wants the entire Arbitration Agreement voided, as opposed to just a portion of the agreement.”

To support her argument, Plaintiff contends that the Savings Clause & Conformity Clause is analogous to the nonseverability clause in *Securitas Security Services USA, Inc. v. Sup. Ct.* (2015) 234 Cal.App.4th 1109,1125. (See Opp. at 9.) In *Securitas*, Paragraph No.4 of the dispute resolution agreement provided:

“[T]here will be no right or authority for any dispute to be brought, heard or arbitrated as a class, collective or representative action (‘Class Action Waiver’). *Notwithstanding any other clause in this agreement, the preceding sentence shall not be severable from this Agreement* in any case in which the dispute to be arbitrated is brought as a class, collective or representative action.”

(*Id.* at 1114 [emphasis supplied].) The *Securitas* Court concluded that Paragraph No.4 “unambiguously reflect[ed] the parties’ intent that where a disput is subject to

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the arbitration agreement [] and is ‘brought as a class, collective or representative claim’ [], the provision waiving such claims, even if later determined to be illegal or unenforceable, cannot be severed from the remainder of the agreement . . . [n]otwithstanding any other clause in the agreement.” (See *id.* at 1126.) Because the unenforceable PAGA waiver was not severable, the Court held that the dispute resolution agreement at issue was unenforceable in its entirety. (See *id.* at 1127.)

The following language in *Securitas*, Paragraph No.4 was significant: “[n]otwithstanding any other clause in this agreement, the preceding sentence shall not be severable from this agreement[.]” (*Id.* at 1125.), Dissimilar to Paragraph No. 4 in *Securitas*, the Savings Clause & Conformity Clause does not explicitly nullify the application of other clauses in the Arbitration Agreement to the Waiver of Class and Collective Claims. (See Arbitration Agreement, 4.) Instead, the Savings Clause & Conformity Clause provides that if the Waiver of Class and Collective Claims is unenforceable, then the entire agreement is invalid, without specifying whether the *entire* waiver or *any portion* of the waiver must be deemed unenforceable to render the Arbitration Agreement invalid.

In isolation, because the Savings Clause & Conformity Clause does not unambiguously address the applicability of the Arbitration Agreement’s other clauses to the Waiver of Class and Collective Claims, it is unclear how the “poison pill” applies where, as here, the Court determines that the Waiver of Class and Collective Claims contains

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an unenforceable PAGA waiver.

2. The Arbitration Agreement in its Entirety

Despite the Savings Clause & Conformity Clause's apparent ambiguity when examined in isolation, the Court must consider the Arbitration Agreement as a whole. (See *Bank of the West, supra*, Cal.4th at 1265.) When considered in its entirety, the Arbitration Agreement shows that the parties intended to limit the agreement (including the Waiver of Class and Collective Claims) to the bounds of the law. (See Reply, 7.)

First, the plain language of the Waiver of Class and Collective Claims expresses an intent that the waiver only be enforced “*to the maximum extent permitted by law[.]*” (Arb. Agreement, 2 [emphasis supplied].) Second, the Waiver of Class and Collective Claims specifies that “covered claims will be arbitrated.” (*Id.*) In pertinent part, the definition of “Covered claims” excludes “any claims that *cannot be required to be arbitrated as a matter of law.*” (*Id.* at 1 [emphasis supplied].) Third, the first sentence of the Savings Clause & Conformity Clause provides that “if any provision of this agreement is determined to be unenforceable or in conflict with a mandatory provision of applicable law, it shall be construed to incorporate any mandatory provision, and/or the unenforceable or conflicting provision shall be automatically severed and the remainder of the agreement shall not be affected.” (See Arb. Agreement, 4.) The Court agrees with Defendant that collectively through the terms of these clauses, the Arbitration Agreement invites the Court to sever any unenforceable provisions of the Waiver of Class and

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Collective Claims which go beyond what is permitted by law. (See Reply, 7-8.) Thus, it logically follows that the second sentence of the Savings Clause & Conformity Clause operates to invalidate the Waiver of Class and Collective Claims only where the entirety of the waiver is unenforceable.

In sum, the Arbitration Agreement as a whole manifests the parties' intended illegal portions of the Waiver of Class and Collective Claims to be severable. To the extent any ambiguity exists, it must be resolved in favor of arbitration. (*Lamps Plus, Inc. v. Varela, supra*, 139 S.Ct. at 1418.)

IV. The Unenforceable PAGA Waiver is Severable and Plaintiff's Remaining Claims Fall Within the Scope of the Arbitration Agreement

a. Background Law

"[W]hether a contract is entire or separable *depends upon its language and subject matter*, and this question is one of construction to be determined by the court *according to the intention of the parties*. If the contract is divisible, the first part may stand, although, the latter is illegal . . . [A] contract is not divisible where there is a showing that it was the intention of the parties to treat [their] agreement as an entire contract, and where it appears that their engagements would not have been entered into except upon the clear understanding that the full object of the contract should be performed." (*Securitas, supra*, 234 Cal.App.4th at 1126 [emphasis in original] [quotations and citations omitted].) "Courts are to

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look to the various purposes of the contract. If the central purpose of the contract is tainted with illegality, then the contract as a whole cannot be enforced. If the illegality is collateral to the main purpose of the contract, and the illegal provision can be extirpated from the contract by means of severance or restriction, then such severance and restriction are appropriate.” (*Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1075.)

b. Analysis

For the reasons discussed *supra*, in Part III.b., the language, subject matter, and the intentions of the parties clearly demonstrate that the Arbitration Agreement is divisible. (See *Securitas, supra*, 234 Cal.App.4th at 1126.) The illegal PAGA waiver is collateral to the overarching purpose of enforcing the terms of the Arbitration Agreement in conformity with “mandatory provision[s] of applicable law[.]” (Arb. Agreement, 4.) As such, the PAGA waiver is severable and the remainder of the Arbitration Agreement remains enforceable.

The parties do not dispute that Plaintiffs first cause of action alleging violations of Labor Code sections 201-203 falls within the scope of the Arbitration Agreement. (Compare Motion, 6-7 with Opp., 4 [“This Motion requires only a review of a single case because the Arbitration Agreement contains a ‘poison pill’ provision.”].) Further, the claims for alleged violations of section 201-203 fall within the scope of the Arbitration Agreement. (Compare Arb. Agreement, 1 [“Covered Claims” include “statutory or common law legal claims alleging the underpayment, overpayment, or mistimed payments of

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wages, expenses . . . timing or amount of pay at separation, deduction or fee disputes, . . . claims to fines or penalties, or any other claimed violations of wage-and-hour practices or procedures under local, state or federal statutory or common law.”] with FA ¶¶ 31-35 [alleging Defendant violated the Labor Code by “failing and refusing to pay all wages due and earned to discharged employees at the time of their termination, or within 72 hours.”].)

Thus, Plaintiffs first cause of action brought pursuant to Labor Code sections 201-203 is subject to the terms of the Arbitration Agreement.

V. A Stay Is Warranted Pending Arbitration

The Court stays the action pending the outcome of arbitration pursuant to Code of Civil Procedure § 1281.4 unless Plaintiff elects to pursue PAGA only claims in this Court.

CONCLUSION

The Court grants Defendant’s (1) motion to compel arbitration of all of Plaintiff’s individual claims (with the exception of her PAGA claim) and (2) request for stay of Plaintiff’s PAGA claim.

IT IS SO ORDERED.

Dated: January 13, 2020

/s/
ANDREW Y.S. CHENG

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Judge of the Superior Court

**SUPERIOR COURT OF CALIFORNIA
County of San Francisco**

ROCHELLE WESTMORELAND, individually and on
behalf of all others similarly situated,

Plaintiff,

vs.

KINDERCARE EDUCATION LLC., and DOES 1
through 50, inclusive,

Defendants.

Case No.: CGC-19-573125

**CERTIFICATE OF ELECTRONIC SERVICE
(CCP 1010.6 & CRC 2.251)**

I, Clark Banayad, a Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On January 13, 2020, I electronically served **ORDER GRANTING DEFENDANT'S MOTION TO COMPEL ARBITRATION AND REQUEST FOR STAY** via File & ServeXpress on the recipients designated on the Transaction Receipt located on the File & ServeXpress website.

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Dated: January 13, 2020

T. MICHAEL YUEN, Clerk

By: /s/
Clark Banayad, Deputy
Clerk