No. 20-

IN THE

Supreme Court of the United States

KINDERCARE EDUCATION, LLC,

Petitioner,

v.

THE SUPERIOR COURT FOR THE STATE OF CALIFORNIA FOR THE COUNTY OF SAN FRANCISCO, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Notwithstanding the express holding of this Court in *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1417 (2019) ("*Lamps Plus*") that the Federal Arbitration Act ("FAA") preempts the state common law doctrine of *contra proferentem* with regard to interpreting whether an arbitration agreement provides for arbitration of claims, can California courts avoid consideration of *Lamps Plus* and instead adhere to a contrary state appellate precedent, *Securitas Security Services USA, Inc. v. Superior Court*, 234 Cal. App. 4th 1109 (2015)?

LIST OF PARTIES

KinderCare Education, LLC is the petitioner to this Court but was real party in interest in the California appellate court.

Rochelle Westmoreland, petitioner in the California appellate court, is a respondent in this Court.

The Superior Court of the City and County of San Francisco, respondent in the California appellate court, is a respondent in this Court.

CORPORATE DISCLOSURE STATEMENT

KinderCare Education, LLC is a privately held limited liability company.

Rochelle Westmoreland is an individual.

RELATED CASES

Rochelle Westmoreland v. Superior Court, No. S267332, California Supreme Court. Petition for review denied on April 28, 2021.

Rochelle Westmoreland v. Superior Court, No. A159824, California Court of Appeal. Dismissed on March 5, 2021 following granting of alternative writ.

Rochelle Westmoreland v. KinderCare Education, LLC, CGC-19-573125, San Francisco County Superior Court. Action is pending.

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KinderCare Education, LLC ("KinderCare") respectfully petitions for a writ of certiorari to review the order of the California court of appeal.

OPINIONS BELOW

The order of the California court of appeal being challenged (Appendix B, pp. 2a-4a) and the order of the California Supreme Court denying KinderCare's petition for discretionary review (Appendix A, p. 1a) are both unreported.

JURISDICTION

The California court of appeal issued its unpublished order for an alternative writ on January 29, 2021 (which the trial court complied with on March 4, 2021). The California Supreme Court issued its order denying KinderCare's petition for discretionary review on April 28, 2021. This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTORY PROVISION INVOLVED

Title 9 United States Code, Section 2

Validity, irrevocability, and enforcement of agreements to arbitrate.

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole

> or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT OF THE CASE

California courts have frequently evinced hostility to arbitration. Over the past three decades, this Court has repeatedly reversed decisions from California courts that have been hostile to arbitration and have refused to follow this Court's direction concerning the interpretation and pre-emptive scope of the Federal Arbitration Act ("FAA").

This case provides another example, where the California courts have decided simply to disregard without explanation the controlling Supreme Court decision in *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1417 (2019) ("*Lamps Plus*"). The Court in *Lamps Plus* held that, when a court is deciding whether an arbitration agreement is enforceable, the FAA's doctrines for interpreting arbitration agreements displace contrary state law doctrines—including the particular doctrine of *contra proferentem*. That state law doctrine is at direct odds with the FAA doctrine that where an arbitration agreement reasonably can be construed as permitting arbitration, ambiguities should be construed in favor of arbitration irrespective of which party drafted the agreement.

Here, after the trial court correctly recognized that the arbitration agreement allowed for arbitration of claims (except for claims under the Private Attorneys General

Act ("PAGA") that were not at issue in the motion to compel arbitration), the court of appeal nonetheless issued a writ of mandate holding that none of the claims in the case were subject to arbitration. It drew this conclusion based on its construction of the portions of the arbitration agreement addressing the impact of the presence of PAGA claims on arbitration of other claims. Specifically, the court of appeal held that the agreement should be interpreted as banning arbitration of any claims if the complaint at issue contained a PAGA claim.

Despite this ultimate conclusion, the court of appeal conceded that the arbitration agreement could be read in two reasonable ways, one which would have supported the trial court's order compelling arbitration and the other which would have led to a denial of the motion to compel arbitration. Relying on a pre-*Lamps Plus* appellate decision, *Securitas Security Services USA, Inc. v. Sup. Court*, 234 Cal. App. 4th 1109 (2015) ("*Securitas*"), which in turn purported to rely upon a 30-year-old Supreme Court case, *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), the court of appeal held that because the employer drafted the arbitration agreement, the state law doctrine of *contra proferentem* required any ambiguity to be construed against it. Although KinderCare brought the *Lamps Plus* opinion to the court of appeal's attention and explained how *Lamps Plus* required the opposite result, the court of appeal did not even acknowledge the existence of *Lamps Plus* in its ruling, and it further summarily denied a petition for rehearing that expressly called out that it had not taken *Lamps Plus* into account even though it was controlling and on point. As such, the court of appeal did not even attempt to distinguish a controlling authority from this Court on FAA interpretation.

Supreme Court review is necessary to address the conflict between the *Securitas* decision and the *Lamps Plus* decision on the use of the *contra proferentem* doctrine to determine whether claims are arbitrable under ambiguous arbitration agreements governed by the FAA. Because this is a simple matter of federal supremacy on a federal issue (the preemptive effect of the FAA), the Court can summarily address this issue, as it did in *Sonic-Calabasas A., Inc. v. Moreno*, 132 S. Ct. 496 (2011), by vacating the state court order and instead ordering that the state court reconsider the issue in light of *Lamps Plus*.

I. The *Westmoreland* Lawsuit

On January 24, 2019, individually and on behalf of other purportedly similarly situated employees, Rochelle Westmoreland ("Plaintiff") filed a putative class action complaint against KinderCare in the superior court of the State of California, County of San Francisco, case no. CGC-19-573125 (the "Complaint"). (Petitioner's Appendix of Exhibits in Support of Petition for Peremptory Writ of Mandate ("Writ Appendix") at 1.) On February 26, 2019, Plaintiff filed a first amended complaint ("FAC") adding PAGA claims pursuant to Labor Code Section 2698 et. seq. (Writ Appendix at 10-20).

The FAC asserts class claims for relief arising out of the Plaintiff's alleged receipt of an electronic pay card at the time of her termination. Accordingly, Plaintiff asserts class claims for violation of California Labor Code Sections 201-203, 211, and 212. Plaintiff seeks to represent a putative class of "[a]ll former employees who were employed by Defendants in the State of California at any time from January 24, 2016, through the present,

whose employment was separated for any reason . . . and during their employment was paid their wages via a non-paycard method but upon their separation of employment received their final wages in the form of a paycard" (the "Putative Class"). (Writ Appendix at 4 and 13).

Plaintiff also filed PAGA representative claims based on alleged violations of California Labor Code Sections 201-203, 212, and 213 arising from the allegedly unlawful practice of issuing electronic paycards as final payment of wages. (Writ Appendix at 18).

II. Plaintiff's Arbitration Agreement with KinderCare

Plaintiff signed an arbitration agreement when she became a KinderCare employee. The following are pertinent parts of that agreement. (Writ Appendix at 55-58).

First, the arbitration agreement expressly states that it is governed by the FAA (and nobody has disputed that point). (Writ Appendix at 58).

Second, the agreement defines the scope of "covered claims." (Writ Appendix at 55). With some specific exceptions, covered claims include all employment related claims and, more specifically, wage and hour claims, such as those that KinderCare sought to compel to arbitration.

Third, the agreement provides that "covered claims" do *not* include "claims *that cannot be required to be arbitrated as a matter of law*." (Writ Appendix at 55, emphasis added.) Nobody in this action disputes that, under governing California Supreme Court authority,

PAGA claims are a type of claim that an employer cannot require employees to submit to arbitration through a pre-dispute arbitration agreement (which is why KinderCare did not seek to compel the PAGA claims to arbitration).

Fourth, the agreement provides that the arbitration will be only on an individual basis and that the employee waives "to the maximum extent permitted by law" the right to participate in "any class, collective, or representative proceeding." (Writ Appendix at 56).

Fifth, the agreement contains a "Savings Clause and Conformity Clause," which addresses what occurs when specific provisions of the agreement are deemed unenforceable:

> 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 remain 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 basis must be filed in a court of competent jurisdiction, and such court shall be the exclusive forum for such claims.

(Writ Appendix at 58, emphasis added).

III. The Trial Court Granted a Motion to Compel Arbitration of Non-PAGA Claims

KinderCare subsequently moved to compel arbitration of Plaintiff's non-PAGA claims on an individual basis. KinderCare did not move to compel arbitration of the PAGA claims, as KinderCare understood that PAGA claims are not arbitrable. The trial court ultimately compelled arbitration of Plaintiff's non-PAGA claims on an individual basis as KinderCare had requested. (App. C).

IV. The Court of Appeal Reversed and the California Supreme Court Denied Review

Plaintiff filed a petition for writ of mandate on March 23, 2020 on the basis that the trial court's decision allegedly ran counter to a state appellate precedent, *Securitas Security Services USA, Inc. v. Sup. Court*, 234 Cal. App. 4th 1109 (2015). After considering preliminary opposition, the court of appeal issued an alternative writ of mandate on January 29, 2021 directing the trial court to vacate its order compelling arbitration and instead order that no part of the action was arbitrable. (App. A).

The court of appeal examined the above-listed provisions of the arbitration agreement and expressly recognized an "acknowledged ambiguity" in the scope of the arbitration clause arising from the "Savings Clause and Conformity Clause" at page 4 of the agreement. Although the court of appeal's decision was rather terse, it appears the court of appeal recognized that one possible construction of the arbitration agreement was to require that class claims that are otherwise subject to arbitration must be sent to individual arbitration, while PAGA claims,

which as a matter of law are not subject to pre-dispute arbitration agreements, must proceed in court. Under this interpretation, the arbitration agreement would have been invalidated only *to the extent* it called for arbitration of claims not subject to arbitration as a matter of law, and an employee's mere assertion of a PAGA claim within a lawsuit of otherwise arbitrable claims was insufficient to invalidate the arbitration agreement as a whole.

An alternative interpretation favored by Plaintiff, however, was to construe the entire arbitration agreement as becoming inoperative in the face of a PAGA representative claim regardless of any other aspect of the lawsuit. In other words, if PAGA claims were deemed to be within the scope of the Agreement despite the language that the agreement did not apply to claims that are not arbitrable as a matter of law, and if the Savings Clause and Conformity Clause invalidated *the entire* arbitration agreement to the extent a court ruled that a PAGA representative claim could not lawfully be compelled to arbitration on an individual basis, then it would follow that the motion to compel arbitration should have been denied in total.[1]

From the bare premise of two reasonable constructions of the agreement's terms concerning the scope of arbitrable claims, the court of appeal held that interpretation of the agreement favored by Plaintiff *must* control based on the common law doctrine of *contra proferentem*. The court of appeal held that this result flowed necessarily from the *Securitas* precedent:

1. For purposes of this Petition, KinderCare does not dispute that there are two possible constructions of the arbitration agreement, both of which could be deemed reasonable.

> The acknowledged ambiguity in the Savings Clause and Conformity Clause should be resolved against [KinderCare], 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).

(App. A at 1-2).

The writ decision made no reference to the 2019 Supreme Court decision in *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1417 (2019), notwithstanding that: (1) KinderCare brought the case to the court of appeal's attention in its preliminary opposition to the writ petition; (2) *Lamps Plus* expressly rejects the use of *contra proferentem* in deciding the issue whether a dispute is subject to arbitration on the ground that the state law doctrine is preempted by contrary FAA interpretative doctrine; and (3) *Lamps Plus* is both more recent than *Securitas* and, as Supreme Court authority, it overrules any contrary state law decision on the topic of FAA preemption.

On March 4, 2021. the trial court stated its intent to comply with the alternative writ, which led to the writ being discharged. (Order Complying With Court of Appeal's Alternative Writ of Mandate).

On February 8, 2021, KinderCare filed a petition for rehearing that was summarily denied on February 17, 2021. KinderCare then petitioned for review in the California Supreme Court, which summarily denied review on April 28, 2021. (App. B). Thus, KinderCare has exhausted all avenues of state court review.

REASONS FOR GRANTING THE PETITION

I. State Courts Should Not Be Allowed to Ignore *Lamps Plus*'s Holding Rejecting the Use of *Contra Proferentem* in Interpreting an Arbitration Agreement and Arbitrability of a Dispute

The common law doctrine of "*contra proferentem*"—i.e., that ambiguous contracts are to be construed against the drafter—is an established doctrine within California state contract law. *See Lamps Plus*, 139 S. Ct. at 1417. In *Lamps Plus*, the employee signed an arbitration agreement that contained no express reference to class arbitration, but it stated that "all claims" arising out of employment would be subject to arbitration. The Ninth Circuit had relied on the *contra proferentem* doctrine to construe the arbitration agreement against an employer's proffered construction and in favor of the employee's proposed construction. The Ninth Circuit adopted an interpretation that the agreement allowed for class arbitration as part of the "all claims" clause (as the employee argued) in favor of the employer's argument that the agreement allowed only for individual arbitration because it was silent on class procedures. *Id.* at 1413. Nobody disputed, however, that the action was subject to arbitration.

The United States Supreme Court reversed the Ninth Circuit and expressly held that the state law *contra proferentem* rule was preempted by the FAA and was replaced by the FAA doctrines governing construction of arbitration agreements. The specific FAA doctrine that the Ninth Circuit's interpretation had offended was that arbitration was a product of consent, and it was improper to assume in the absence of express statement that an employer would consent to *class* arbitration, which the Court held to be fundamentally different from the type of arbitration contemplated by the FAA. *Id.* at 1415-16. The Court also recognized another fundamental FAA doctrine "that ambiguities about the scope of an arbitration agreement must be resolved in favor of arbitration." *Id.* at 1418 (*citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 105 S. Ct. 3346 (1985)). The Court did not limit its holding simply to the issue of whether an agreement should be interpreted to allow for class or individual arbitration, but couched its decision as one where FAA-specific interpretative doctrines preempt contrary state law doctrines. *Id.*

The *Securitas* decision to which the court of appeal cited is a pre-*Lamps Plus* state appellate decision that must give way to *Lamps Plus* on the federal issue of FAA preemption. See *Sonic-Calabasas A., Inc. v. Moreno*, 57 Cal. 4th 1109, 1124 (2013) (recognizing U.S. Supreme Court's ability to overrule even California Supreme Court on issues of FAA preemption). Although *Securitas* cites to a decade old Supreme Court decision (*Mastrobuono*), nothing in *Mastrobuono* addressed how to construe a provision in an arbitration agreement that was ambiguous *as to whether claims were arbitrable.*

Instead, the dispute in *Mastrobuono* was over a collateral issue of whether the arbitration agreement gave the arbitrator authority to impose punitive damages despite New York state law doctrines depriving arbitrators of the right to award them. After finding that the New York law was preempted, the Court resolved the issue of the arbitrator's power to award punitive damages using standard contract interpretation principles. *See* 514 U.S. 55-63. Key to the discussion was the fact that whether or not the arbitrator had the power to impose punitive damages did not conflict with any FAA doctrines, so the use of ordinary contract principles was entirely consistent with the FAA. Indeed the Court in *Mastrobuono* reiterated the applicability of the general *FAA doctrine* that "ambiguities as to the scope of the arbitration clause itself [are] resolved in favor of arbitration." *Id.* at 62.

Applying the same reasoning here requires that, to the extent there are ambiguities as to whether the non-PAGA claims are subject to arbitration, those ambiguities must be construed in favor of arbitration if they reasonably could be so construed, regardless of who drafted the arbitration agreement. The FAA doctrine thus displaces the generalized common law *contra proferentem* doctrine. This understanding of *Lamps Plus* is squarely inconsistent, however, with the court of appeal's reasoning in issuing the writ of mandamus because the court of appeal construed the ambiguity *against* finding claims to be arbitrable despite acknowledging that it would be plausible to interpret the agreement as requiring arbitration of the non-PAGA claims.

II. The Court Should Grant Review to Resolve the Dispute Between State Appellate and United States Supreme Court Decisions on an Important and Recurring Issue

The primary reason for this Court to grant review is to settle a dispute among decisions where the underlying issue is recurrent. The California courts of appeal seem to generate new published decisions on the arbitrability of disputes every few weeks, and the topic of arbitrability in class and collective actions has generated multiple California Supreme Court decisions and half a dozen United States Supreme Court decisions just since 2010. As such, courts of appeal plainly are in need of ongoing guidance as to how to interpret arbitration agreements that are potentially ambiguous as to whether they require arbitration of the claims asserted.

Here, there can be no doubt that there is an inconsistency between the reasoning employed by the court of appeal in *Securitas* and the holding of the United States Supreme Court in *Lamps Plus*. Because this dispute involves an issue of FAA preemption, the United States Supreme Court should have the final word and should be followed in all cases. *See Sonic-Calabasas*, 57 Cal. 4th at 1124 (recognizing United States Supreme Court's supremacy over state law on the issue of FAA preemption). As such, if this Court agrees that *Securitas* and *Lamps Plus* are at odds on the issue of the use of *contra proferentem* to address arbitrability of disputes, it must resolve this dispute, clarify this important area of law, and provide guidance to state courts on the FAA preemption issue.

Furthermore, the California courts take the position that using *contra proferentem* is required by the Supreme Court's *Mastrobuono* decision, when that plainly is not the case when the doctrine is inconsistent with the FAA. As such, the Court can also clarify its own precedents and explain how *Lamps Plus* is readily harmonized with *Mastrobuono*, but neither case allows state law to contravene FAA interpretative doctrines.

In the absence of this Court's intervention, California appellate courts will continue to rely on *Securitas*/*Mastrobuono* as a mechanism to invalidate properly enforceable arbitration agreements in violation of the strong federal policy in favor of arbitration.

The court of appeal's error is manifest from reviewing the record below and is a candidate for summary reversal without need of a hearing. Accordingly, KinderCare respectfully requests that this Court grant review to summarily remand the case back to the California Courts with instructions to reconsider in light of *Lamps Plus*.

CONCLUSION

For all these reasons, KinderCare respectfully urges the Court to grant this petition for writ of certiorari.

Respectfully submitted

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APPENDIX

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

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

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.

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 ofPlaintiffs 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

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.)
>
> - <u>"Waiver of Class and Collective Claims</u>. KU and I also agree that covered claims will be arbitrated only on an individual

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

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 ofthe 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

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

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

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

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

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

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

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

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 ofthe 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

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

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.

Dated: January 13, 2020

T. MICHAEL YUEN, Clerk

By: /s/
Clark Banayad, Deputy Clerk