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No. 97429-2

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STEVEN BURNETT,

Respondent,

vs.

PAGLIACCI PIZZA, INC.,

Appellant.

NO.: 78356-4-I

BRIEF OF APPELLANT

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I. INTRODUCTION

Appellant Pagliacci Pizza, Inc. (“Employer”) is a pizzeria chain that employs hundreds of employees at dozens of locations in the greater Seattle area. Appellee Steven Burnett (“Employee”) was formerly employed by Employer as a pizza delivery driver. After Employee ceased working for Employer, he filed a putative class action lawsuit in the Superior Court of Washington alleging ‘wage and hour’ claims under various municipal ordinances and state laws and regulations. CP 1-20. In essence, Employee alleges that Employer failed to provide required compensation, rest breaks and meal breaks to Employee and to other pizza delivery drivers formerly or currently employed by Employer. *Id.*

Employer moved to compel arbitration of Employee’s claims based on the Mandatory Arbitration Policy contained in Employer’s employee handbook, called the Little Book of Answers (the “Handbook”). CP 71. The Superior Court denied Employer’s motion, finding: “The Court finds there is no agreement to arbitrate.” CP 227. Employer moved for reconsideration (CP 228-320), which was denied. CP 321-22.

The Superior Court erred in denying the Motion to Compel Arbitration. The Mandatory Arbitration Policy contained in the Handbook created a binding agreement to arbitrate under the Washington State Supreme Court’s holding in *Gaglidari v. Denny’s Rests.*, 117 Wn.2d 426,

815 P.2d 1362 (1991) and similar Washington State appellate decisions. The Supreme Court has held that all three elements of a binding contract (offer, acceptance and consideration) are present when an employer reasonably notifies an employee of rules and policies contained in an employee handbook, and the employee begins or continues employment with notice of the handbook. *Gaglidari*, 117 Wn.2d at 432-34, 815 P.2d at 1366-67.

The undisputed evidence shows that Employee received a copy of the Handbook when he first came to work for Employer, and Employee began and continued his employment after being notified of the Handbook. The Handbook contains a Mandatory Arbitration Policy for disputes arising out of the employment relationship. A binding agreement to arbitrate was formed under the Supreme Court's ruling in *Gaglidari*. In addition, and although not required by *Gaglidari*, the Handbook was incorporated by reference into a written Employee Relationship Agreement signed by Employee. Thus, Employee expressly agreed to the Mandatory Arbitration Policy contained in the Handbook.

Given the undisputed evidence and the legal standard set forth in *Gaglidari* and similar appellate cases, the Superior Court erred as a matter of law in denying Employer's Motion to Compel Arbitration. This Court

should reverse and remand with instructions to stay the Superior Court action in favor of mandatory arbitration.

II. ASSIGNMENT OF ERROR

The Superior Court erred as a matter of law in denying Employer's Motion to Compel Arbitration. CP 226-27.

A. Issues

1. Did Employee agree to arbitrate disputes arising from his employment where he began and continued his employment with actual notice of the Handbook containing the Mandatory Arbitration Policy? (Answer: Yes.)

2. Did the Superior Court commit reversible error when it found "there is no agreement to arbitrate" and denied Employer's Motion to Compel Arbitration and Motion for Reconsideration? (Answer: Yes.)

3. Should this Court reverse the Superior Court's Order denying Employer's Motion to Compel Arbitration, and remand with instructions to stay the Superior Court lawsuit pending arbitration? (Answer: Yes.)

III. STATEMENT OF THE CASE

A. Employee Began and Continued His Employment After Receiving Actual Notice of the Handbook Containing the Mandatory Arbitration Policy

Employer is a pizzeria chain that employs hundreds of employees at dozens of locations in the greater Seattle area. CP 21. In October of 2015, Employee began working for Employer as a pizza delivery driver. CP 58. Employee has declared under penalty of perjury that during his initial orientation he “was given a copy of the Little Book of Answers and told to read it at home.” CP 142 at ¶ 8. It is undisputed that Employer began—and continued—his employment after receiving actual notice of the Handbook. CP 3 at ¶ 3.1 (“Plaintiff worked as a delivery driver for Pagliacci from approximately October 2015 to July 2017.”)

The Handbook states on page 1:

OBLIGATION

By working here, you agree to comply with the contents of this book and with the written plans and policies that are referenced in it.

CP 62.

One of the policies that Employer agreed to comply with is the Mandatory Arbitration Policy set forth in the Handbook:

MANDATORY ARBITRATION POLICY

The company has a mandatory arbitration policy with which you must comply for the binding resolution

of disputes without lawsuits. If you believe you have been a victim of illegal harassment or discrimination or that you have not been paid for all hours worked or at less than the rate of pay required by law or that the termination of your employment was wrongful, you submit the dispute to resolution in accordance with the F.A.I.R. Policy and if those procedures are not successful in resolving the dispute, **you then submit the dispute to binding arbitration before a neutral arbitrator pursuant to the Washington Arbitration Act.**

CP 71 (emphasis added).

These facts alone created a binding agreement to arbitrate employment-related disputes. As shown below, there are good policy reasons why Washington State and many other states recognize this procedure for using employee manuals or handbooks to create binding agreements between an employer and its employees.

B. The Handbook Was Incorporated by Reference into the Employee Relationship Agreement Signed by Employee

In addition, and although not required under Washington State law, Employee signed an “Employee Relationship Agreement” in which he agreed to “learn and comply with the rules and policies outlined in” the Handbook. CP 58. The first paragraph of the Employee Relationship Agreement states:

MY COMMITMENT

At Pagliacci Pizza respect, dignity and fairness are intended to be a two-way street. The following agreements and their written policies help make that happen and in consideration

of my employment by Pagliacci Pizza, **I agree to comply with them.**

CP 58 (emphasis added). The Employee Relationship Agreement further states:

RULES AND POLICIES

On your own initiative **you will learn and comply with the rules and policies in our Little Book of Answers**

CP 58 (emphasis added). Directly above the signature lines, the Employee Relationship Agreement states:

EMPLOYMENT

Pagliacci Pizza, Inc. agrees to employ you and you agree to work for it. For good and valuable consideration, the receipt of which is hereby acknowledged, **you agree to all the foregoing.** This agreement is effective from and after the date of your first shift.

CP 58 (emphasis added).

Thus, the Handbook states that it creates a binding “OBLIGATION” to comply with the contents of the Handbook (CP 62), and the Employee Relationship Agreement states that “by working here” Employee “agree[s] to comply” with the rules and policies contained in the Handbook. CP 58. The express, written agreement signed by the Employee goes beyond the requirements of Washington law for creating a binding agreement using an employee handbook.

C. Employee Admits that the Handbook Is Incorporated by Reference into the Employee Relationship Agreement

It was not necessary under Washington law for the Employee Relationship Agreement to incorporate by reference the terms of the Handbook. Nonetheless, the parties agree that the Employee Relationship Agreement did, in fact, incorporate the Handbook by reference. During the hearing on the Motion to Compel Arbitration, counsel for Employee made the following judicial admissions in open court:

THE COURT: Are you conceding that this arbitration clause is part of your client's employment agreement?

MS. CHANDLER: I believe that the -- **it is incorporated by reference into the agreement.**

THE COURT: Why do you think that?

MS. CHANDLER: **I think the case law discussing incorporation by reference suggests that when there is a clear reference to a document that is available to the person signing the contract, incorporation by reference is valid.** I did consider that issue quite extensively, but I can see that the court is aware of the way in which this contract was presented.

THE COURT: I ask you that because the argument in your briefing is that the employment relationship agreement failed to incorporate the Little Book of Answers, and, indeed, I do not see any of language incorporating it, so I'm wondering what you're looking at.

MS. CHANDLER: I think it's procedurally unconscionable in the manner in which it presents – or incorporates the Little Book of Answers. **I think the language that is probably sufficient for incorporation by reference is found under “rules and policies” in the employee relationship agreement. It says, “On your own**

initiative, you will learn and comply with the rules and policies outlined in our Little Book of Answers, including those that relate to positive attitude, public safety, company funds, tips, and the FAIR policy. So I think the key language there, related to whether or not that provision gives Mr. Burnett or other prospective employees notice that they are purportedly waiving arbitration when they sign this contract, or a fair opportunity to consider the arbitration provision that is found in the separate document, the Little Book of Answers – –

RP 4-5.

IV. ARGUMENT

A. There is a Strong Presumption in Favor of Arbitrability.

Where there is evidence of an agreement to arbitrate, “Washington courts apply a strong presumption in favor of arbitration.” *Heights at Issaquah Ridge Owners Ass’n v. Burton Landscape Grp., Inc.*, 148 Wn. App. 400, 405, 200 P.3d 254 (2009). “Washington courts apply a strong presumption in favor of arbitrability, and doubts should be resolved in favor of coverage. If the dispute can fairly be said to invoke a claim covered by the agreement, any inquiry by the courts must end.” *Marcus & Millichap Real Estate Inv. Servs. of Seattle, Inc. v. Yates, Wood & MacDonald, Inc.*, 192 Wn. App. 465, 474-475, 369 P.3d 503, 507 (2016) (citations and internal punctuation omitted). “Courts must indulge every presumption in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense

to arbitrability. *Verbeek Props., LLC v. GreenCo Env't'l., Inc.*, 159 Wn. App. 82, 86-87, 246 P.3d 205, 207 (2010) (citing *Heights*, 148 Wn. App. at 407).

“Under Washington law, an express agreement to arbitrate is not required. As a matter of contract, a party may consent to arbitration without signing an arbitration clause, just as a party may consent to the formation of a contract without signing a written document. *Marcus & Millichap*, 192 Wn. App. at 474, 369 P.3d at 507 (citations and internal punctuation omitted). The party opposing arbitration has the burden of proving that the arbitration agreement is unenforceable. *Woodall v. Avalon Care Ctr.-Federal Way, LLC*, 155 Wn. App. 919, 924, 231 P.3d 1252, 1254 (2010) (citations omitted).

B. The Objective Manifestations of the Parties Show that Employee Agreed to Comply with the Rules and Policies Set Forth in the Handbook.

The issue presented by the underlying Motion to Compel Arbitration was a question of fact, not an issue of law. *Swanson v. Liquid Air Corp.*, 118 Wn.2d 512, 522-23, 826 P.2d 664, 669-70 (1992). The Washington State Supreme Court held in *Swanson*:

We note that some courts have concluded that whether a handbook constitutes a contract is a matter of law for the court. However, “[t]he more modern view—and the view in keeping with the modern analysis of other types of contracts—is that **the question whether employee**

handbook provisions are part of the contract is a question of fact. That is, the analysis is the same as that generally used to **looking at the objective manifestations of the parties' intent** find that they had intended this obligation to be part of the contract?"

Id., quoting 1 L. Larson, Unjust Dismissal § 8.02, at 8-5 (1988) (emphasis added).

Although the underlying motion presented a question of fact, the facts relevant to the motion were undisputed. The undisputed "objective manifestations of the parties' intent" are: (1) Employee was given a copy of the Handbook during his orientation as a new employee, and was told to read it at home (CP 142 at ¶ 8); (2) the Employee Relationship Agreement states that Employee was required to "learn and comply with the rules and policies outlined in our Little Book of Answers" (CP 58); (3) the Handbook states on page 1: "OBLIGATION -- By working here, you agree to comply with the contents of this book and with the written plans and policies that are referenced in it" (CP 62); and (4) Employee began and continued his employment after being notified that he was required to comply with the Handbook (CP 142 at ¶ 8; CP 3 at ¶ 3.1).

C. A Binding Arbitration Agreement Was Formed When Employee Received Notice of the Handbook and Continued His Employment with Employer.

In 1984, the Washington State Supreme Court held that an employee policy manual can create binding legal obligations. *Thompson, supra*, 102

Wn.2d at 229, 685 P.2d at 1087 (“absent specific contractual agreement to the contrary, we conclude that the employer’s act in issuing an employee policy manual can lead to obligations that govern the employment relationship”). The Supreme Court revisited the issue seven years later in *Gaglidari*. The Court held that an employee handbook created a binding agreement where an employee (like Employee in this case) received a copy of the handbook on her first day of work, and (like Employee in this case) signed a form agreeing to abide by the rules. *Gaglidari*, 117 Wn.2d at 433-34, 815 P.2d at 1366-67. The Court held:

In *Thompson*, we held an employment relationship terminable at will can be modified by statements contained in policy manuals or handbooks. *Thompson*, 102 Wn.2d at 228. The concepts of offer, acceptance and consideration are requisite to a contract analysis of employee handbooks. *Thompson*, 102 Wn.2d at 228. ... [In this case, the] handbook formed a contract between defendant and plaintiff. Defendant extended plaintiff an offer by giving her the manual and explaining its provisions. Plaintiff accepted the offer by signing the acknowledgment form agreeing to abide by its provisions. The consideration is found in plaintiff actually working for defendant. *See Pine River State Bank v. Mettelle*, 333 N.W.2d 622 (Minn. 1983) (**the handbook language constitutes the offer; the offer is communicated by the dissemination of the handbook to the employee; the employee's retention of employment constitutes acceptance; and by continuing to stay on the job, although free to leave, the employee supplies the necessary consideration**).

Gaglidari, 117 Wn.2d at 433-34, 815 P.2d at 1366-67 (citation omitted);
see Parker v. Skagit/Island Head Start, No. 35481-7-I, 1996 Wn. App.

LEXIS 463, *9 (Sept. 30, 1996) (“Parker implies that her situation is like that of the plaintiff in *Gaglidari*, in which an employment contract was created when the employer gave Ronda Gaglidari an employee handbook, Gaglidari signed an acknowledgment form, then worked for the defendant.”)

The issue in *Gaglidari* was whether a Denny’s Restaurants employee was bound by the provisions of two Denny’s Restaurants employee handbooks. The Supreme Court described the issue it was deciding as follows: “Whether the employee handbooks, distributed to plaintiff, for which she signed an acknowledgment agreeing to abide by their rules and policies and which contained termination procedures, created a contract between defendant and plaintiff.” *Gaglidari*, 117 Wn.2d at 432, 815 P.2d at 1365. The Supreme Court held that the employee, Ms. Gaglidari, was legally bound by those rules and policies. *Id.* at 435, 815 P.2d at 1367.

The relevant facts in *Gaglidari* are not distinguishable from the facts of this case. Starting in 1980, plaintiff Rhonda Gaglidari was employed as a bartender at a Denny’s restaurant. On her first day of work, Ms. Gaglidari received a copy of the Denny’s Restaurants employee handbook. Like Employee here, Ms. Gaglidari acknowledged receiving the handbook. *Id.* at 428, 815 P.2d at 1364.

In 1986, Denny's Restaurants gave Ms. Gaglidari an "alcoholic beverage handbook" which she also acknowledged receiving. *Id.* at 429, 815 P.2d at 1364. "This handbook contained [a] provision that that fighting on company premises was grounds for immediate dismissal." *Id.* Ms. Gaglidari continued working for Denny's Restaurants. In 1987, while off duty, Ms. Gaglidari entered the Denny's restaurant and became involved in a fight with a customer. Three days later, Ms. Gaglidari was fired for fighting on company premises. She sued Denny's Restaurants for "breach of [her] employment contract and the tort of outrage." *Id.* at 430, 815 P.2d at 1365. The issue decided by the Supreme Court was whether the two handbooks provided to Ms. Gaglidari created a binding contract. The Court held: "We hold that the 1979 employee handbook did give rise to a contract and that its terms were modified by the alcoholic beverage handbook plaintiff received in 1986." *Id.* at 431, 815 P.2d at 1365.

The Supreme Court held that an employee handbook creates a binding contract where the employee receives reasonable notice of the handbook and continues her employment. *Gaglidari*, 117 Wn.2d at 435, 815 P.2d at 1367. "Plaintiff's receipt of the handbook satisfied the requisites of contract formation." *Id.* "The consideration was plaintiff's continuation of her employment." *Id.* The Supreme Court further held that "[a]n employer may unilaterally amend or revoke policies and procedures established in an

employee handbook” as long as the employee “receive[s] reasonable notice of the change.” *Id.* at 434, 815 P.2d at 1367. As shown in *Gaglidari*, it is not relevant whether an employee reads the employee handbook. The employee needs only to receive reasonable notice of the handbook, and thereafter begin or continue working for the employer.

The legal standard described in *Gaglidari* was applied by this Court in *Cascade Auto Glass, Inc. v. Progressive Cas. Ins. Co.*, 135 Wn. App. 760, 145 P.3d 1253 (2006). The Court held:

The same rule applies in at-will employment agreements, where an employer may unilaterally change policies and procedures set forth in an employee handbook so long as the employee receives reasonable notice of the change. In such cases, **a new contract is formed when the employer communicates the new terms (offer), the employee works after receiving notice (acceptance), and the employee continues in employment although free to terminate (consideration).**

Cascade Auto Glass, 135 Wn. App. at 768-69, 145 P.3d at 1257 (emphasis added), citing *Govier v. N. Sound Bank*, 91 Wn. App. 493, 498, 957 P.2d 811 (1998) and *Gaglidari*, 117 Wn.2d at 433-34. See *Browning v. 24 Hour Fitness, Inc.*, No. 05-5732, 2006 U.S. Dist. LEXIS 3386, *3-5, 2006 WL 151933 (W.D. Wash. Jan. 19, 2006) (“In Washington, as in many jurisdictions, an Employee Handbook can create a contract between the parties.”); *Sampson v. Jeld-Wen Inc.*, No. 15-03025, 2015 U.S. Dist. LEXIS 181232, *7-9 (E.D. Wash. Dec. 18, 2015) (“Sufficiently strong language in

an employee handbook can constitute offer, and the continuing work of employees after the introduction of the handbook can constitute acceptance.”)

In the instant case, Employee declares under oath that he received a copy of the Handbook during his new employee orientation, and was told to read it. CP 142 at ¶ 8. “Actual notice is reasonable notice.” *Govier*, 91 Wn. App. at 502, 957 P.2d at 817, *citing Gaglidari*, 117 Wn.2d at 435 (other citations omitted). Employee began—and continued—to work for Employer after receiving actual notice of the Handbook.

Virtually all Washington State companies that employ a significant number of employees use employee handbooks to govern the terms of the employment relationship. There are legitimate policy reasons why this procedure has been blessed by the courts. As explained by this Court: “[I]n the modern economic climate, the operating policies of a business enterprise must be adaptable and responsive to change. **An employer that could not change its policies without renegotiating with each employee could find itself obligated in a variety of different ways to any number of different employees.** The resulting confusion and uncertainty would not be conducive to harmonious labor-management relations.” *Govier*, 91 Wn. App. at 500-01, 957 P.2d at 816 (emphasis added) (citations and internal punctuation omitted).

D. Bilateral Contract Analysis Does Not Apply to Employee Handbooks.

It is significant to note that Employee's employment was terminable "at will" by either party. CP 58 ("AT WILL EMPLOYMENT – Your employment at Pagliacci Pizza is and will remain 'at will' meaning that you or your employer may terminate your employment at any time and in any manner without prior notice or warning and without cause.") Employee could have terminated his employment at any time if he did not accept the terms of employment that were offered to him through the Handbook. An employee's ability to terminate his employment is one of the reasons why Washington courts have blessed "unilateral" contacts arising from employee handbooks. "[A] new contract is formed when the employer communicates the new terms (offer), the employee works after receiving notice (acceptance), and the employee continues in employment although free to terminate (consideration)." *Cascade Auto Glass*, 135 Wn. App. at 768-69, 145 P.3d at 1257, citing *Govier, supra* (parentheses in original).

This Court has explained that "bilateral contract analysis," *i.e.*, the "exchange of reciprocal promises" does not apply to employee handbooks. *Govier*, 91 Wn. App. at 399, 957 P.2d at 815. The facts of *Govier* are as follows. In 1991, plaintiff Deborah Govier was hired by North Sound Bank to work as a loan originator. On her first day of work, Ms. Govier was given

a “personnel handbook” that described the terms of her employment. The handbook stated that after a 90-day probationary period, Ms. Govier would be considered a “permanent employee” and would not be terminated “except for cause.” *Id.* at 495-496, 957 P.2d at 813-814.

In 1993, the Bank unilaterally modified its terms of employment for loan originators. The Bank presented each loan originator with a written agreement to sign reflecting the new terms. The new agreement was for a one-year period and eliminated sick leave and holiday and vacation pay. *Id.* at 496-497, 957 P.2d at 814. Ms. Govier refused to sign the agreement, and sued the Bank “for breach of the employment contract embodied in the Bank’s personnel handbook.” *Id.* at 497, 957 P.2d at 814. The trial court dismissed the action on summary judgment, and this Court affirmed. *Id.* at 494, 957 P.2d at 813.

Ms. Govier argued that “the Bank could not substantially modify the terms of her employment without obtaining her assent or providing separate consideration.” *Id.* at 498, 957 P.2d at 814. This Court rejected that argument, holding that “an employer may modify the terms of employment without the employee’s assent where the employer established those terms by a ‘unilateral’ contract.” *Id.* at 494, 957 P.2d at 813.

In this case, Employee expressly agreed in writing to comply with the terms of the Handbook. But *Govier* shows that such terms can be

imposed unilaterally where the employment is “at will” and the employee can terminate his employment if he disagrees with the terms offered by the employer. The exception would be if the terms were unconscionable, as Employee argued below, but the Superior Court rejected that argument (CP 227), and there is no cross-appeal.

E. The Obligations of the Handbook Are Incorporated by Reference into the Employee Relationship Agreement

As shown by the cases cited above, an employee does not need to sign an agreement or any other document to form a binding agreement to comply with the terms of an employee handbook. The agreement is formed when the employee receives reasonable notice of the handbook and then begins or continues working for the employer.

But even assuming a signed document were required, there is no specific language needed to incorporate the terms of a separate writing into an agreement. For example, the words “incorporated by reference” were not used in the following cases, but the courts nevertheless found that the terms of various documents were incorporated into an agreement: *Santos v. Sinclair*, 76 Wn. App. 320, 325, 884 P.2d 941, 943-44 (1994) (finding that a policy of title insurance covered an easement described in a separate document mentioned in the property description); *Brown v. Poston*, 44 Wn.2d 717, 719, 269 P.2d 967, 968 (1954) (where a subcontractor

contracted to perform plastering work “as per plans and specifications,” both of those documents were incorporated by reference into the contract); *Washington Trust Bank v. Circle K Corp.*, 15 Wn. App. 89, 93, 546 P.2d 1249, 1252 (where a memorandum to lease referred to an earlier contract between the parties, the earlier contract was incorporated by reference), *review denied*, 87 Wn.2d 1006 (1976); *Turner v. Wexler*, 14 Wn. App. 143, 148, 538 P.2d 877, 880 (where a real estate contract referred to an earlier contract between parties, the terms of the earlier contract were incorporated by reference), *review denied*, 86 Wn.2d 1004 (1975).

In the instant case, the Employee Relationship Agreement specifically referenced the Handbook, and specifically informed Employee that he was required to “learn and comply with the rules and policies” set forth in the Handbook. CP 58. Although not required by *Gaglidari* and its progeny, these words are sufficient to incorporate the Handbook by reference.

F. Employee Has Judicially Admitted that the Handbook is Incorporated by Reference into the Employee Relationship Agreement

In response to questions from the Superior Court, Employee’s counsel stated three times in open court that the Handbook is incorporated by reference into the Employee Relationship Agreement. RP 4-5. Those

statements are judicial admissions. RCW 2.44.010; CR 2A; *see* K. Tegland,

5B Wash. Prac., Evidence § 801.54 (6th Ed. 2016). Judicial admissions:

have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact. Such admissions are proof possessing the highest possible probative value. Indeed, facts judicially admitted are facts established not only beyond the need of evidence to prove them, but beyond the power of evidence to controvert them.

Mukilteo Ret. Apartments, LLC v. Mukilteo Investors LP, 176 Wn. App.

244, 256 n.8, 310 P.3d 814, 820 n.8 (2013) (citations and internal

punctuation omitted).

V. CONCLUSION

For the foregoing reasons, Employer respectfully requests that the Court reverse the Order Denying Defendant’s Motion to Compel Arbitration (CP 226-27), and remand with instructions to stay the Superior Court action in favor of arbitration.

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Respectfully submitted this 26th day of July, 2018.

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A handwritten signature in black ink, appearing to read "Michael W. Droke", written over a horizontal line.

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CERTIFICATE OF SERVICE

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DATED this 26th day of July, 2018.



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