IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

TOM HENSIEK, ET.AL,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	Case No. 3:20-CV-377-DWD
	)	
BOARD OF DIRECTORS OF CASINO QUEEN HOLDING COMPANY, INC, ET. AL,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

DUGAN, District Judge:

Before the Court is the Motion to Compel Arbitration (Doc. 45) filed by Defendants Rand, Koman and Bidwill, joined by Defendants (Doc. 47) Board of Directors of CQ Holding Company, Inc., Administrative Committee of the Casino Queen Employee Stock Ownership Plan, Jeff Watson, and Robert Barrows (collectively referred to as the "Motion to Compel").

The parties have provided Court with briefs and arguments in support of their respective positions.

Plaintiff's Complaint

According to the Complaint, Plaintiffs are former employees of the Casino Queen ("CQ") and participants in the Casino Queen ESOP that was created in 2012 for the sole purpose of purchasing 100% of the outstanding common stock of CQ because the shareholders were unable to sell that asset elsewhere. (Doc. 1, ¶ 7-8) To effectuate the sale

of stock, the Board of Directors (Bidwell, Rand, Koman, Watson and Barrows) selected two of their own (Watson and Barrows) to be Co-Trustees of the ESOP and vested them with the authority to purchase from the selling shareholders (Bidwell, Rand, and Koman) all of the outstanding stock for the sum of $170 million. The Co-Trustees were instructed to take directions from a newly created Administrative Committee which consisted of Board members and officers of CQ. The Board retained the power to dismiss the Co-Trustees, an assertion that the Plaintiffs contend is the functional equivalent of the power and control over their decision making as Co-Trustees. (Doc. 1, ¶ 9). The Plaintiffs believe that because of this retention of control, the members of the Board attained a fiduciary status toward the Plaintiffs. (Doc. 1, ¶ 11).

The Plaintiffs go on to allege that two transactions, the terms of which were largely concealed from the participant group, served to benefit the selling shareholders who orchestrated and directed the transactions while acting in their fiduciary capacity. In the first, Plaintiffs assert that the price paid for the shares was inflated because previously CQ was unable to find a buyer due to local competition and low-income projections. (Doc. 1, ¶ 13-14). The purchase of the shares resulted in the incurrence of a debt of $170 million for the ESOP that is guaranteed by CQ. This transaction the Plaintiffs claim was imprudent and not in the best interests of the ESOP. The second transaction pointed to is the sale of "virtually all of" CQ's real property to pay off in an accelerated fashion debt owed to the Selling Shareholders. The real property sold at a price of $140 million. (Doc. 1, ¶¶ 17 and 92). This property was sold to Gaming and Leisure Properties ("GLPI") which refinanced all of the ESOP's debt owed to the Selling Shareholders. (Doc. 1, ¶ 113-

114). CQ then agreed to enter into a "triple net lease agreement" to lease the same property back from GLPI for $210 million over 15 years. (Doc. 1, ¶ 116-118).

The Plaintiffs contend that these transactions were conducted in violation of the Defendants' fiduciary duties to the participants of the ESOP and that the Plaintiffs were unaware of the events for several years until 2019 when the shares of stock were reported to have suffered a significant loss in value. Plaintiffs allege generally that the Defendants undertook acts to hide their breaches by concealing and misrepresenting their violations of the Employment Retirement Income Security Act ("ERISA") 29 U.S.C. §§ 1104, 1105 & 1106 et. seq. (See generally, Doc. 1, ¶ 160-169) Plaintiffs filed their six-count complaint seeking class certification and to recover damages. The Defendants responded with their Motion to Compel Arbitration.

Defendants' Motion to Compel Arbitration

Defendants' Motion to Compel asserts generally that the Casino Queen ESOP Plan Document ("Plan") was effectively amended on December 2, 2018 (Doc. 45-1 ¶ 6) ("Amendment") (Doc. 45-4) when the Board of CQ adopted an amendment proposed by CQ ESOP on January 1, 2017. The Amendment of concern here is entirely dedicated to changes to procedures regarding claims, mandatory arbitration, waiver of class actions and the establishment of limitations on the time period during which claims may be filed. In pertinent part, Section 11.03(a) of the Plan provides:

> (a) **Mandatory and Binding Arbitration Procedure**. By seeking and accepting benefits under the Plan, and in consideration of such benefits, (i) any Employee becoming eligible to participate in the Plan, (ii) any Employee, Participant, Beneficiary or other person receiving or seeking

> to receive any contributions or forfeiture allocations to his or her Plan account, and/or (iii) any Employee, Participant, Beneficiary, or other person receiving or seeking to receive any other benefit under this Plan hereby agrees to be bound, and is hereby bound, to follow and comply with the provisions of this Mandatory and Binding Arbitration Procedure ("Arbitration Procedure") to resolve all Covered Claims. (Section 11.03 CQ ESOP)

Section 11.01(c) of the Plan defines "covered claims" as follows:

> (c) **Covered Claims**. The term "Covered Claims" means, collectively, any claim by a Claimant made against any person which arises out of, relates to, or concerns this Plan, the Trust, or the Trust Fund, including, without limitation, any claim for benefits under the Plan, Trust or Trust Fund, including without limitation, any claim for benefits under the Plan, Trust or Trust Fund; any claim asserting a breach of or failure to follow, the Plan or Trust; and any claim asserting a breach of, or failure to follow, any provision of ERISA or the code, including without limitation, claims of breach of fiduciary duty related to the management of the Trust, claims related to prohibited transactions under ERISA § 406 or 407, ERISA § 510 claims, and claims for failure to timely provide notices or information required by ERISA or the Code.

Section 11.03(a)(ii) of the Plan also contains a "Class Action Waiver" and provides that "ALL COVERED CLAIMS MUST BE BROUGHT SOLELY IN THE CLAIMANT'S INDIVIDUAL CAPACITY AND NOT IN A REPRESENTATIVE CAPACITY OR ON A CLASS, COLLECTIVE, OR GROUP BASIS." (emphasis supplied)

In apparent anticipation of Plaintiffs' argument that these amendments were adopted *after* the alleged wrong doings occurred, and should not, therefore, apply to the claims pleaded, the Defendants point to Article X, Section 10.01 of the Plan which provides: "The Board may amend this Plan, either prospectively or retroactively, at any

time and from time to time in any manner the Board deems expedient or proper." Because the Amendment was implemented in a manner consistent with the authority provided for in Section 10.01, Defendants assert that the terms of the Amendment are enforceable. Defendants then argue that the Amendment, in concert with the Federal Arbitration Act, (FAA) 9 U.S.C. §§1-6, should compel the Plaintiffs to submit their claims through the arbitration procedures described in the Amendment.

Defendants go on to claim that the Plaintiffs' breach of fiduciary duties claims clearly "arise out of, relate to or concern" the CQ ESOP and, consequently, "fall squarely within the scope of the arbitration provisions". (Doc. 47, P. 2). Defendants then argue that, since the amendment contains a class action waiver, the Plaintiffs must bring their arbitration claims on an individual basis. (Doc. 45, P. 2). But it might appear, at least initially, that the question of arbitrability of statutory ERISA claims will dictate whether the Defendants' Motion to Compel is successful.

Arbitrability of Statutory ERISA Claims

In one of the few areas of agreement, both sides recognize that the Seventh Circuit has not directly addressed the issue of whether statutory ERISA claims are arbitrable. The Defendants point to a number of cases from other Circuits that have reached the issue and determined that, indeed, statutory ERISA claims are subject to arbitration under the FAA when the parties have executed a valid arbitration agreement encompassing the claims at issue. (Doc. 46. P. 7). First among the cases cited is *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1112 n.1 (3d Cir. 1993). In that case, the Court took the

opportunity to revisit its decision of just eight years prior where it determined that statutory ERISA claims are not subject to arbitration. The Court observed that in the intervening eight years, Supreme Court decisions had "substantially revised the rationale" it had once relied on. The Court went on to hold that ERISA claims are indeed subject to arbitration under the FAA. *Ibid* at 1112 and n.1. The Defendants here also point to several other cases in other Circuits which have concluded likewise and which provide some direction here.

In *Dorman v. Charles Schwab Corp.*, 934 F.3d 1107, 1109 (9th Cir. 2019) the Court found a nearly 35-year-old precedent for the proposition that ERISA claims are *not* arbitrable to no longer be good law. In *Arnulfo P. Sulit, Inc. v. Dean Witter Reynolds, Inc.*, 847 F.2d 475, 478–79 (8th Cir. 1988) the Court was unpersuaded by the argument that Congress intended that ERISA claims not be arbitrated, and found "no hint in the legislative history of a 'contrary congressional command.'"[1] The Court in *Bird v. Shearson Lehman/Am. Exp., Inc.*, 926 F.2d 116, 122 (2d Cir. 1991), while overruling the District Court in its refusal to enforce an arbitration agreement, held that Congress did not intend to preclude a waiver of a judicial forum for statutory ERISA claims and that the FAA requires courts to enforce agreements to arbitrate such claims. And, in *Kramer v. Smith*

[1] *Cf.* 29 U.S.C. § 1001(b) It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

Barney, 80 F.3d 1080, 1084 (5th Cir. 1996) the Court determined that "Congress did not intend to exempt statutory ERISA claims from the dictates of the [FAA]."

These cases reflect an evolution of thought toward allowing contracted-for alternatives to dispute resolution. The Supreme Court not that recently put to rest "the old judicial hostility toward arbitration." *Bird*, at 121, and determined that "[the] Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . ." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25, (1983). "[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Ibid* at 24. One underlying reason for the shift in thought is the recognition that arbitration is not necessarily inadequate to protect substantive rights of the parties to the agreement to arbitrate. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) ("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration."). Still another reason is found in this observation: "The preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation, at least absent a countervailing policy manifested in another federal statute." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985).

Notwithstanding this clear trend, this Court will stop short of making the declaration that the statutory ERISA claims raised in Plaintiffs' Complaint are arbitrable because resolution of the Motion to Compel lies not with making that declaration, but instead resolution lies with determining whether the agreement to arbitrate reflected in the Amendment is enforceable under basic principles of contract law. It is enough to assume, for the purposes of the Motion to Compel, that the Seventh Circuit will at the appropriate time determine that statutory ERISA claims are arbitrable. Not surprisingly, the Plaintiffs do not directly argue against the applicability of the FAA to statutory ERISA claims. Rather, they argue that there is no valid agreement for arbitration and, even if there was an agreement reached, it is unenforceable as drafted.

The Amendment and Whether it Constitutes a Valid Agreement

The FAA operates to require arbitration only if there is a valid contract that contains a provision whereby the parties agree to submit certain issues to arbitration instead of the courts. Section 2 of the FAA provides in pertinent part:

> A written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 2 is the "primary substantive provision of the Act", *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, (1983), and "reflects the fundamental principal that arbitration is a matter of contract". *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 67 (2010). "The FAA thereby places arbitration agreements on equal footing with

other contracts and requires courts to enforce them according to their terms." *Ibid.* "Although ERISA plans are a special kind of contract and courts are attentive to the statutory goal of protecting beneficiaries, an ERISA plan is nonetheless a contract." *In re Mathias*, 867 F.3d 727, 731 (7th Cir. 2017). The Seventh Circuit has stated that "[w]e will compel arbitration under the Federal Arbitration Act if three elements are present: (1) an enforceable written agreement to arbitrate, (2) a dispute within the scope of the arbitration agreement, and (3) a refusal to arbitrate." *A.D. v. Credit One Bank, N.A.*, 885 F.3d 1054, 1060 (7th Cir. 2018) (internal quotes omitted).

The Plaintiffs argue that the Amendment does not constitute an agreement because the Plaintiffs did not sign, give their consent to, nor receive consideration for the Amendment. (Doc. 56, P. 4). Indeed, "because arbitration agreements are contracts, a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *A.D.*, 885 F.3d at 1060. The Defendants respond to the Plaintiff by arguing first that the Plan granted the authority for amendments to be made to the plan "in any manner the Board deems expedient or proper" and, therefore, new or additional consideration is not necessary to make the Amendment enforceable. Second, the Defendants argue that CQ adopted Amendment One to the 2017 Restatement to the Plan while the Plaintiffs were employees and/or participants in the ESOP (Doc. 46, P. 9) and it provides: "[b]y seeking or accepting benefits under the Plan, and in consideration of such benefits . . . Participant . . . agrees to be bound, and is hereby bound, to follow and comply with the provisions of this Mandatory and Binding Arbitration Procedure ("Arbitration Procedure") to resolve all Covered Claims." Third, the Defendants assert

that Illinois contract law provides that a nonsignatory is estopped from avoiding arbitration if that party knowingly seeks the benefits of the contract containing the arbitration clause.

Under Illinois Law, "[a] modification of an existing contract, like a newly formed contract, requires consideration to be valid and enforceable." *Doyle v. Holy Cross Hosp.*, 708 N.E.2d 1140, 1145 (1999); *Chicago College of Osteopathic Medicine v. George A. Fuller Co.*, 776 F.2d 198, 208 (7th Cir.1985) (applying Illinois law). "Consideration consists of some detriment to the offeror, some benefit to the offeree, or some bargained-for exchange between them." *Doyle*, 708 N.E.2d at 1145. These basic tenets are readily found in general contract law including law governing contracts that arise out of employee-employer relationships. Particularly illuminating in this regard is the matter of *Doyle*, supra. In that case, the Illinois Supreme Court affirmed that an employee handbook may operate to create under Illinois Law a binding contract between an employer and an at-will employee. *See Duldulao v. Saint Mary of Nazareth Hospital Center*, 505 N.E.2d 314 (1987). But more to the point the Court stated:

> In the present case, we are unable to conclude that consideration exists that would justify our enforcement of the modification against existing employees. Because the defendant was seeking to reduce the rights enjoyed by the plaintiffs under the employee handbook, it was the defendant, and not the plaintiffs, who would properly be required to provide consideration for the modification. But in adding the disclaimer to the handbook, the defendant provided nothing of value to the plaintiffs and did not itself incur any disadvantage. In fact, the opposite occurred: the plaintiffs suffered a detriment—the loss of rights previously granted to them by the handbook—while the defendant gained a corresponding benefit.

Doyle, 708 N.E.2d at 1145.

The Seventh Circuit has also addressed the necessity of consideration to support a modification of an agreement in the context of an employer-employee relationship. In *Robinson v. Ada S. McKinley Cmty. Servs., Inc.,* 19 F.3d 359, 360 (7th Cir. 1994), Ada S. McKinley Community Services, Inc. ("McKinley") hired Claudine Robinson ("Robinson") as director of foster care services on April 30, 1979. At the time she was hired, Robinson received a letter dated March 29, 1979, from the Director of Children's Services confirming her appointment. The letter stated, "Please be advised that tenure is achieved after the successful completion of 6 (six) months of service with our agency." At the same time, Robinson also received a copy of McKinley's 1978 Personnel Policies Manual. The 1978 Manual provided: "[p]ermanent employment status is attained upon successful completion of the tenure probation period with the Agency." Years later, McKinley published a new manual. The 1986 Personnel Policies Manual contained a disclaimer stating, in part: "[Employer] reserves the right to modify or change any of the provisions of this manual at any time without notice to employees. " *Robinson*, 19 F.3d at 360. In October 1989, McKinley terminated Robinson. Robinson filed a complaint alleging the termination of her constituted a breach of their employment agreement created by the March 29, 1979 letter. The Court, after referring to McKinley's argument that Robinson's continued work provided the necessary consideration and that the only way she could have preserved her original contract rights is to have quit, as "ridiculous", ruled:

> "There is nothing unlawful about offering a benefit to a promisee in exchange for a modification of the contract; the problematic modifications

> are those not supported by consideration." *American Hosp. Supply v. Hospital Products Ltd.*, 780 F.2d 589, 599 (7th Cir. 1986). If a valid modification of the employment contract between Robinson and McKinley occurred, then Robinson gave up her legal right to tenure, permanent employment status, and the protections of the 1978 Manual. To find consideration to support this purported modification, there must be some benefit to Robinson, detriment to McKinley, or Robinson's continued work under the 1986 Manual must have been a bargained for exchange. There was no consideration here. McKinley does not claim that Robinson received any benefit for giving up her protections, and McKinley did not suffer any detriment. Moreover, there was no bargained for exchange to support Robinson's relinquishment of the protections she was entitled to under the 1978 Manual. Therefore, we find that Robinson's continued work does not constitute consideration for the purported modification.

Id. at 364.

Here, the Plan's language is clear in that it grants to the Board a means to implement amendments and to do so entirely in its discretion. And, further, Section 10.01 of the original CQ ESOP Plan document permits discretionary amendments both prospectively and retroactively. But, while the Board enjoyed that discretion, the use of it does not obviate the necessity of consideration to make the Amendment binding on the Plaintiffs. The cases cited above teach that consideration is a prerequisite to the validity of a proposed agreement or modification of an existing agreement. Consideration exists only if there is a grant of an advantage or the bargained for acceptance of a disadvantage. Here, the Defendants by implementing the Amendment took advantages for themselves while imposing corresponding disadvantages on the Plaintiffs by stripping from them certain rights they otherwise enjoyed under the Plan. Plaintiffs in their argument touch on this anomaly by pointing out that the Amendment provides for only "Covered

Claims" which by its own definition does not include a corresponding right of the Plaintiffs to demand arbitration of claims leveled against them by the Board or Plan. In contrast, the Defendants direct the Court to no specific consideration — and this Court can find none — in either the form of benefit conferred on the Plaintiffs or detriment suffered by the Defendants by the implementation of the Amendment. If ERISA-based plans, such as the ESOP here, are to be enforced on common principles of contract law, then an amendment thereto implemented by the Board unilaterally and solely for its benefit is, at best, without necessary consideration, or at worst, illusory, and, in either case, unenforceable.

Turning to the Defendants' third argument in support of the enforceability of the Amendment, "[t]he general rule is that non-signatories are not bound to arbitration agreements. We will enforce an arbitration agreement against a non-signatory if the party seeking to compel arbitration can show that an exception to this general rule applies." *A.D.*, 885 F.3d at 1060 (internal citation omitted). Defendants posit that such an exception exists where "[a] nonsignatory party is estopped from avoiding arbitration if it knowingly seeks the benefits of the contract containing the arbitration clause." *Zurich Am. Ins. Co. v. Watts Indus., Inc.*, 417 F.3d 682, 688 (7th Cir. 2005). True enough, "[b]ut caselaw consistently requires a *direct* benefit under the contract containing an arbitration clause before a reluctant party can be forced into arbitration." *Ibid* (emphasis supplied) (citing *Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 778 (2d Cir. 1995) (holding that although the unwilling party received a benefit, the benefit did not derive directly from the agreement containing the arbitration clause and thus arbitration could not be

compelled). Defendants fail to allude to anything in the record that suggests that there was a direct benefit derived by the Plaintiffs from the Amendment. Rather, the Defendants offer up only vague notions to the effect that since Plaintiffs continued their employment with CQ and participation in the plan, they are effectively estopped from contesting the enforceability of the mandatory arbitration provisions. (Doc. 46, P. 13). [2] But neither employment nor the continued right to participate in the Plan is a *direct* benefit to the Plaintiffs that they did not already enjoy at the moment before and after the Amendment was approved. The Plan is devoid of anything that would suggest that it may terminate the employment of a CQ employee unless he or she acknowledges the efficacy of the Amendment. The Defendants nevertheless ask this Court to consider cases they say support their argument. However, those cases provide no guidance for the resolution of the issues presented here.

The first case cited by the Defendants in support of their estoppel theory is *Int'l Ins. Agency Servs., LLC v. Revios Reinsurance U.S., Inc.,* No. 04 C 1190, 2007 WL 951943, (N.D. Ill. Mar. 27, 2007). There, the Plaintiff filed suit alleging breach of contract, but the Defendant moved to compel arbitration claiming that the contracts in question contained mandatory arbitration provisions. In determining that the Plaintiff, a non-signatory, had both recognized the existence of the contracts and made its claim based upon those contracts, the Court found the Plaintiff to be estopped from disavowing the arbitration

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[2]Defendants' argument seemingly is one not so much for true estoppel—where equity forbids a party's change of position to the detriment of the other party—as it is one for something akin to one form of a Suzerain-Vassal agreement—where the dominant party uses its past considerations toward the subordinate party to justify a requirement that the latter adhere to the revised will of the former.

provisions. The arbitration provision there was not derived from a unilateral amendment but existed in the original. Equity would be offended to allow the Plaintiff to sue on an existing contract and then claim he is not bound by the terms of that very contract. This principle is better articulated in *Hughes Masonry Co. v. Greater Clark Cty. Sch. Bldg. Corp.*, 659 F.2d 836, 839 (7th Cir. 1981): "In short, (plaintiff) cannot have it both ways. (It) cannot rely on the contract when it works to its advantage, and repudiate it when it works to (its) disadvantage." (citing *Tepper Realty Co. v. Mosaic Tile Co.*, 259 F. Supp. 688, 692 (S.D.N.Y. 1966)). But here, Plaintiffs do not seek to repudiate the Plan; rather they contest the enforceability of the Amendment. There is nothing "manifestly inequitable" in refusing to enforce the Amendment under the circumstances presented here. *See Hughes*, 659 F.2d at 838-839.

Defendants also cite to *In re Oil Spill by Amoco Cadiz Off Coast of France Mar. 16, 1978*, 659 F.2d 789 (7th Cir. 1981) in support of its argument that the Plaintiffs are estopped from contesting the enforceability of the Amendments. There, the Plaintiff, a self-alleged agent of a Co-Plaintiff who had entered into an agreement for salvage that contained an arbitration clause, attempted to disavow itself of the relationship in order to avoid arbitration. The Court determined that "[h]aving alleged an agency relationship as a basis for its standing in the suit, it cannot slough off that relationship at will." *Ibid* at 796. Plaintiffs here do not attempt to disavow themselves of their relationship to CQ or the Plan. Rather, as participants, they sue under the Plan for the rights and benefits it grants them.

Accordingly, the Court finds that the Amendment contained in Section 11.03 lacks necessary consideration and, therefore, is not a valid and enforceable contract provision for the purposes of the Federal Arbitration Act. Furthermore, the Plaintiffs are not equitably estopped from contesting the enforceability of the Amendment.

Disposition

The Motion to Compel Arbitration (Doc. 45) filed by Defendants Rand, Koman and Bidwill, joined by Defendants (Doc. 47) Board of Directors of CQ Holding Company, Inc., Administrative Committee of the Casino Queen Employee Stock Ownership Plan, Jeff Watson, and Robert Barrows is hereby **DENIED**.

SO ORDERED.

Dated: January 25, 2021

DAVID W. DUGAN
United States District Judge