SC96985

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI ex rel. JESSE NEWBERRY

Relator,

v.

HONORABLE STEVE JACKSON
CIRCUIT JUDGE
CIRCUIT COURT OF LACLEDE COUNTY, MISSOURI

Respondent.

Missouri Court of Appeals,
Southern District No. SD35345

Circuit Court of Laclede County
Cause No. 17LA-CC00061

BRIEF OF RELATOR IN SUPPORT OF WRIT OF PROHIBITION

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JURISDICTIONAL STATEMENT

Mo. Const. Art. V, § 4.1 provides this Court with the authority to issue original remedial writs. Upon application of Relator Jesse Newberry, this Court issued a Preliminary Writ of Prohibition on May 1, 2018. Newberry seeks a Permanent Order of Prohibition to prevent the Honorable Steve Jackson from enforcing his Order of January 16, 2018, in Cause No. 17LA-CC00061, which grants the Defendants' Motion to Compel Arbitration and Stay Proceedings.

Relator Jesse Newberry first sought relief from the Order in the Missouri Court of Appeals, Southern District, No. SD35345. The Court of Appeals denied the request.

At this Court's direction, Newberry submits this brief and requests that this Court make its Preliminary Writ absolute.

STATEMENT OF FACTS

Newberry had been an at-will employee for Dolgencorp, LLC, since 2001. [Rel. Appx. A004, ¶ 11] In approximately August 2014, Dolgencorp programmed an electronic document to appear whenever Newberry logged on to his work computer. [Rel. Appx. A146] The document was titled "Dollar General Arbitration Agreement." [Rel. Appx. A016-018, ¶¶ 4-6; A019-021] Newberry was able to bypass the document, but each day the document would appear again. [Rel. Appx. A146] The document stated its terms could take effect automatically after 30 days unless Newberry agreed to the terms immediately or submitted a separate document called an "Arbitration Opt Out Form." [Rel. Appx. A021]

Newberry called his supervisor for advice and the supervisor said that if Newberry did not agree to the terms, it would be grounds for discharge. [Rel. Appx. A146-147, A151-152] Newberry feared losing his at-will employment and, therefore, marked an X at the bottom of the electronic document to indicate immediate agreement to the terms. [Rel. Appx. A146-147, A151-152]

Neither Dolgencorp nor any of Newberry's supervisors signed the purported arbitration contract. [Rel. Appx. A019-021]

Newberry continued his at-will employment for nearly two years. [Rel. Appx. A004, ¶ 11] Newberry contends he experienced age and disability discrimination at work after returning from two medical leaves of absence and that after voicing his opposition to the discrimination that he experienced retaliation and further discrimination, which culminated in his discharge on June 24, 2016. [Rel. Appx. A004-007, ¶¶ 11-26]

Following Newberry's discharge, he timely filed a Charge of Discrimination with the Missouri Commission on Human Rights. [Rel. Appx. A003, ¶ 6] He then timely filed a lawsuit on July 24, 2017, against Defendant Dolgencorp and the supervisors who oversaw the discrimination/retaliation, Randy Johnson and Tod Boyster. [Rel. Appx. A001-008]

On September 5, 2017, the Defendants filed a Motion to Compel Arbitration and Stay Proceedings. [Rel. Appx. A009-077] The Defendants attached to their motion the document from 2014 titled "Dollar General Employee Arbitration Agreement." [Rel. Appx. A019-021] The Defendants contended in their motion that the "Arbitration Agreement" had a delegation clause that referenced the Employment Arbitration Rules of the AAA and that, therefore, the arbitrator and not the court determines whether the arbitration agreement is valid. [Rel. Appx. A010, ¶¶ 4-5] The Defendants also declared that Arbitration Agreement was formed by offer, acceptance, and consideration. [Rel. Appx. A010, ¶ 6]

The delegation clause did not contain any recital of consideration. [Rel. Appx. A013, A20]

On September 13, 2017, Newberry filed his suggestions in opposition to the Motion and contended that he received no consideration when he placed the "X" on the electronic form. [Rel. Appx. A078-080]

There was a hearing on January 16, 2018, before Judge Steve Jackson, the Respondent herein. Respondent determined that the testimony of Relator Jesse Newberry was credible, but concluded that because of the decision in *Pinkerton*, "the trial Court does not have jurisdiction (or authority) over the issue." [Rel. Appx. A111]

Respondent also made the following alternative legal findings:

> "In the event the Court retains jurisdiction over the issue (possibly because the Courts above find *Pinkerton* not to be precedent for non-commercial cases), the Court holds the arbitration agreement was a valid agreement, executed by the parties under today's means of execution of contracts, with valid consideration of mutuality of enforcement of the agreement coupled with continued at-will employment, and the agreement is itself not unconscionable on its face. Therefore, jurisdiction will only be an issue if the arbitrator finds the agreement not to be a binding agreement of the parties."
>
> "The Court finds the testimony of the witness credible. The witness (Plaintiff and party to the agreement) stands in the place of every disgruntled contract litigant that listened to and took oral advice from the opposite party instead of counsel, every litigant that did not read the plain language of the contract (here, the opt out provision), and, every litigant that did not exercise

their right to seek legal counsel before signing the contract. All of these issues have been litigated over and over since the beginning of contract law; and, none are dispositive of the issues of this case." [Rel. Appx. A111]

No legal findings were made as to whether the delegation clause itself was a valid contract supported by consideration. [Rel. Appx. A111]

Newberry sought a Writ on the basis of his contention that no consideration existed. [Rel. Appx. A112-129] Newberry petitioned for a writ of mandamus or prohibition in the Court of Appeals, Southern District, and that petition was denied on February 20, 2018. [[Rel. Appx. A112-129, A168] Newberry petitioned this Court for a writ of mandamus or prohibition, and a preliminary writ of prohibition was issued on May 1, 2018. [Rel. Appx. A169-199, A200]

POINT RELIED ON

I. Relator Newberry is entitled to a permanent Writ of Prohibition prohibiting Respondent, the Honorable Steve Jackson, from enforcing his Order sustaining Defendants' Motion to Compel Arbitration and Stay Proceedings because any agreement to arbitrate, including a severed delegation clause, must be supported by consideration; and Defendants failed to meet their burden of showing that consideration supported either the severed delegation clause or the larger arbitration agreement.

- *Jimenez v. Cintas Corp.*, 475 S.W.3d 679 (Mo. App. E.D. 2015)
- *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63 (2010)
- 9 U.S.C. § 2
- *Ellis v. JF Enterprises, LLC*, 482 S.W.3d 417 (Mo. 2016)

ARGUMENT

I. Relator Newberry is entitled to a permanent Writ of Prohibition prohibiting Respondent, the Honorable Steve Jackson, from enforcing his Order sustaining Defendants' Motion to Compel Arbitration and Stay Proceedings because any agreement to arbitrate, including a severed delegation clause, must be supported by consideration; and Defendants failed to meet their burden of showing that consideration supported either the severed delegation clause or the larger arbitration agreement.

A. Introduction

A writ of prohibition is an appropriate mechanism for a *de novo* review of whether a motion to compel arbitration was improperly sustained. *State ex rel. Pinkerton v. Fahnestock*, 531 S.W.3d 36, 42 (Mo. 2017); *Ellis v. JF Enterprises, LLC*, 482 S.W.3d 417, 419 (Mo. 2016).

Contract law is the foundation of any agreement to arbitrate. The Federal Arbitration Act "reflects the fundamental principle that arbitration is a matter of contract" and "thereby places arbitration agreements on equal footing with other contracts." *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 67 (2010).

An arbitration contract provision delegating authority to an arbitrator to determine the enforceability of a purported arbitration contract does not come into existence unless there is consideration for the contract. *See Jimenez v. Cintas Corp.*, 475 S.W.3d 679, 683-684 (Mo. App. E.D. 2015).

Under Missouri contract law, a party seeking to compel arbitration has the burden to prove consideration supports the agreement to arbitrate. *Arizon Structures Worldwide, LLC v. Glob. Blue Techs.-Cameron, LLC*, 481 S.W.3d 542, 547 (Mo. App. E.D. 2015) ("The party seeking to compel arbitration has the burden of proving the existence of a valid and enforceable arbitration agreement."); *Whitworth v. McBride & Son Homes, Inc.*, 344 S.W.3d 730, 737 (Mo. App. W.D. 2011). A recital of consideration creates a rebuttable presumption that consideration supports a contract. *Earl v. St. Louis Univ.*, 875 S.W.2d 234, 237–38 (Mo. App. E.D. 1994).

Newberry seeks a *de novo* review concerning Respondent's decision to enforce an arbitration delegation clause without requiring the Defendants to provide proof or presumption of consideration.

B. None of the appellate opinions about delegation clauses speak to consideration supporting the delegation clause

Delegation clauses have been given legal effect by the U.S. Supreme Court and Missouri appellate courts, but these opinions have not addressed what happens if the party who seeks to enforce a delegation clause fails to provide proof or a presumption of consideration for the delegation clause.

Delegation clauses are additional, antecedent contracts that allow an arbitrator to decide issues about the validity and enforceability of a larger arbitration contract in which the delegation clause is written. *See, e.g.*, *State ex rel. Pinkerton v. Fahnestock*, 531 S.W.3d 36, 41 (Mo. 2017) (delegation clause relating to existence, scope, and validity); *Dotson v. Dillard's, Inc.*, 472 S.W.3d 599, 601 (Mo. App. W.D. 2015) (delegation clause

relating to formation, applicability, meaning, enforcement), *Baker v. Bristol Care, Inc.*, 450 S.W.3d 770, 773–74 (Mo. 2014) (delegation clause relating to applicability and enforceability).

The appellate cases have, so far, focused on the fact that delegation clauses (1) are severable from the main contract and only subject to challenges specifically against the delegation clauses and (2) may enjoy a presumption of arbitrability so long as they are "clear and unmistakable." **Neither of these concepts have affected the requirement of consideration for a delegation clause to come into effect as a contract.** Meanwhile, (3) other opinions have addressed contract "conclusion," which is closely related to the burden of proof regarding consideration.

1. Severability concept

The case law regarding severability states that a party seeking to challenge the delegation clause must direct the challenges such as unconscionability, fraud in the inducement, and illegality specifically against the delegation clause. *Rent-A-Ctr.*, 561 U.S. at 71-73 (unconscionability); *Pinkerton*, 531 S.W.3d at 51-52 (unconscionability); see also *Ellis*, 482 S.W.3d 417, 419-420 (Mo. 2016) (fraud). The challenges described by these cases are the types of challenges that must be brought by the party that opposes enforcement of a contract. For example, unconscionability is "an affirmative defense as to which the party asserting the defense bears the burden of proof and persuasion." *Lopez v. H & R Block, Inc.*, 491 S.W.3d 221, 226 (Mo. App. W.D. 2016), fn. 4, *reh'g and/or transfer denied* (May 3, 2016), *transfer denied* (June 28, 2016), *cert. denied sub nom. H&R Block, Inc. v. Lopez*, 137 S. Ct. 829 (2017). The contract defenses such as

unconscionability, fraud, and illegality fall into a different category than consideration, which has a different burden of proof.

Two Missouri Court of Appeals cases address the effect of delegation clauses when there are questions about whether the larger arbitration contract is supported by consideration. *Dotson*, 472 S.W.3d 599, 604 (Mo. App. W.D. 2015), *Latenser v. Tarmac Int'l, Inc.*, 2018 WL 1384497, at *2 (Mo. App. W.D. Mar. 20, 2018); *see also* Memorandum and Order, *Sandra Doty v. Dolgencorp, Inc., et al.*, Case No. 4:15 CV 1931 RWS (U.S. Dist. Ct. E.D. Mo., May 2, 2016). The distinction here is important: Even though a delegation clause and the larger employment agreement share the same subject matter and possibly the same consideration, the Courts have severed the smaller delegation clauses. See *infra.* There have been no cases addressing a delegation clause unsupported by consideration.

2. "Clear and unmistakable" concept

The case law regarding the "clear and unmistakable" test states that if a delegation clause meets this test, it enjoys an "interpretive rule" under the FAA. *Rent-A-Ctr.*, 561 U.S. at 60, fn. 1. If a delegation clause is "clear and unmistakable" – which happens, for example, when the clause clearly references American Arbitration Association rules – that clause will enjoy the FAA's general presumption of arbitrability. *See Pinkerton*, 531 S.W.3d at 43, 48. The interpretive rule (*i.e.*, the presumption of arbitrability) has been used in analysis of whether the delegation clause was unconscionable, fraudulently induced, illegal, etc.

Rent-A-Ctr. specifically noted that the interpretive rule is not a stand-in for the requirement under 9 U.S.C. § 2 that a written agreement to arbitrate be valid or legally binding. *Rent-A-Ctr.*, 561 U.S. at 69, fn. 1.

3. Conclusion concept

Meanwhile, other courts have denied motions to compel arbitration because of defects in offer or acceptance – *i.e.*, elements that the party seeking to enforce the contract has the burden to prove. These decisions have framed offer and acceptance in terms of whether the contract was "concluded."

"Issues as to whether a contract has been 'concluded' include whether: a contract was signed by the obligor, a signor lacked authority to sign a contract to commit a principal, or a signor lacked the mental capacity to sign a contract." *Theroff v. Dollar Tree Stores, Inc.*, 2018 WL 1914851, at *2 (Mo. App. W.D. Apr. 24, 2018), *reh'g and/or transfer denied* (May 29, 2018). In *Theroff*, a legally blind employee said she did not see a Dollar Tree arbitration agreement and that an assistant manager helping her with employment paperwork had accepted the agreement without her authorization. Because the parties had not concluded or formed an arbitration agreement, the trial court was left "unable to order arbitration to proceed," *Id*. at *4 (citing *Pinkerton*, 531 S.W.3d at 49).

Likewise, the U.S. District Court in the Western District of Missouri recently refused to give legal effect to a delegation clause that was part of no purported contract but instead inside an employee handbook. Order, *Jennifer Shockley v. Primelending, a Plainscapital Company*, 4:17-cv-00763-DW (U.S. Dist. Co. W.D. Mo., January 12, 2018). The Order stated:

> Nevertheless, Defendant argues that the Court should compel arbitration because the delegation clause in the Handbook grants exclusive authority to the arbitrator to decide questions of arbitrability, including those related to contract formation. If Defendant's argument was correct, a party who never agreed to arbitrate claims could be compelled to proceed to arbitration in order to prove that she never agreed to arbitrate claims in the first place. Enforcing a contract where no contract in fact exists or ever existed seems illogical. The Eighth Circuit agrees.

Id.; see also Murray v. ManorCare-W. Deptford of Paulsboro NJ, LLC, 2018 WL 2436583, at *5 (N.J. Super. Ct. App. Div. May 31, 2018) (contract formation issues as to a housekeeper who spoke Tagalog, and did not understand English well, were not arbitrable despite the existence of a delegation clause).

Even though defects in offer and acceptance are contract conclusion issues, offer and acceptance are elements that – like consideration – a party seeking to compel arbitration has the burden to prove.

In this case, Respondent relied on *Pinkerton* even though it – and many other binding cases about arbitration delegation clauses – did not address the requirement for a delegation clause to be supported by consideration. [Rel. Appx. A111]

All that was actually decided in *Pinkerton* is that where the existence of an underlying arbitration contract is not in issue, and where the challenge is only to the conscionability of an arbitration contract admitted to have been created, then a clause in the arbitration contract declaring the applicability of the American Arbitration Association Employment

Arbitration Rules will be sufficient to permit a trial court to order arbitration. In *Pinkerton* the Supreme Court of Missouri specifically noted that the issue before the Court was whether or not it is permissible to delegate to an arbitrator resolution of the issue of conscionability, and that the existence of a contract requiring arbitration was not in issue. It stated: "Nevertheless, Mr. Pinkerton does not challenge whether the arbitration agreement was formed or concluded. Instead, Mr. Pinkerton challenges the conscionability of such arbitration agreement." *Pinkerton*, 531 S.W.3d at 49.

C. A purported delegation clause does not come into existence as a contract, under the FAA, unless it is supported by consideration

The Federal Arbitration Act does not give legal effect to a "delegation provision" unless it is supported by consideration. If that were the law, then Missouri courts would be required to order arbitration when any document purporting to require arbitration declares applicability of the AAA Rules, even when there is a complete absence of consideration for creation of a contract to delegate authority to an arbitrator!

For example, under this reasoning a document worded only as follows would require a Missouri Circuit Court to order that arbitration occur so that an arbitrator can decide whether or not arbitration should occur:

Employer's Arbitration Agreement

> The employer has a policy of having all claims brought by employees decided in arbitration pursuant to the American Arbitration Association Employment Arbitration Rules and is hereby adopting this policy as to all

> at-will employees. If you accept this agreement, push the button on the screen to place an "x" on the screen, signifying your acceptance of this agreement.
>
> "x" [electronic acceptance by employee]

As *Rent-A-Ctr.* and its progeny explain, the applicable and operative section is 9 U.S.C. § 2: "A written provision in any … contract ... 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's use of "contract" must be read as "putative" contract per *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 448 (2006); *Ellis v. JF Enterprises, LLC*, 482 S.W.3d 417, 422 (Mo. 2016).

In Missouri the burden of showing legally sufficient consideration rests on the party relying on the contract. *Earl*, 875 S.W.2d at 236. If an agreement contains a recitation of its consideration, a rebuttable presumption is created that the agreement was supported by consideration. *Id.*; *Tinch v. State Farm Ins. Co.*, 16 S.W.3d 747, 751 (Mo. App. E.D. 2000).

In *Tinch*, the Court of Appeals analyzed whether a one-paragraph "Driver Exclusion Endorsement" was invalid due to lack of consideration. The court reasoned that the endorsement had its own recitation of consideration, and that created a presumption of consideration that supported enforcement of the contract, and that presumption was not rebutted. *Id.* at 751.

In this case, the Respondent concluded that he had no authority to decide whether or not there was an enforceable arbitration contract where there was a delegation clause which delegated that authority to an arbitrator. Respondent held that Newberry was bound by the language of the purported arbitration contract, and that he should have obtained legal advice before submitting his electronic acceptance of the "Dollar General Employee Arbitration Agreement."

The issues presented in the case at bar are profound. The critical public policy issue presented is whether Missouri Circuit Courts are required to order arbitration in the absence of consideration for a contract delegating authority to an arbitrator to determine whether or not a purported arbitration contract was created.

Dicta in *Pinkerton* may have persuaded Respondent, Honorable Steve Jackson, to compel arbitration in this case. However, the actual holding in *Pinkerton* does not require Missouri trial courts to order delegation to an arbitrator where there is no consideration for a contractual provision to delegate, and it is doubtful such an outcome was intended by the Supreme Court of Missouri when *Pinkerton* was decided.

Unlike *Pinkerton*, in the case at bar the issue is whether a delegation clause must be supported by consideration before it is given a legal effect. Newberry suggests that the law and public policy of Missouri requires consideration for a purported contract to delegate authority to an arbitrator to proceed with arbitration.

D. A party seeking to enforce an arbitration delegation clause has the burden to prove that consideration supported the arbitration delegation clause

An agreement to arbitrate does not come into existence as a contract if it is not supported by consideration. *Jimenez v. Cintas Corp.*, 475 S.W.3d 679, 683-684 (Mo. App. E.D. 2015). As mentioned *supra*, delegation clauses are additional, antecedent agreements to arbitrate. *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 70 (2010).

The burden of showing legally sufficient consideration rests on the party relying on the contract. *Earl v. St. Louis Univ.*, 875 S.W.2d 234, 236 (Mo. App. E.D. 1994); *Ennis v. McLaggan*, 608 S.W.2d 557, 561 (Mo. App. S.D. 1980). In *Ennis*, the Court of Appeals discussed the difference between "failure of consideration," an affirmative defense that is listed within Rule 55.08 and that implies once-existing and sufficient consideration has become worthless or has ceased to exist, and "lack of consideration," which is the failure of a party's burden to show consideration in support of a contract. *Ennis*, 608 S.W.2d at 561. As a result of this difference, the parties who oppose enforcement of a contract "are not ... barred from claiming lack of consideration because [they] did not plead or offer proof on it." *Ennis*, 608 S.W.2d at 562.

A recitation of consideration creates a rebuttable presumption that an agreement was supported by consideration. *Earl*, 875 S.W.2d at 236; *Tinch v. State Farm Ins. Co.*, 16 S.W.3d 747, 751 (Mo. App. E.D. 2000). In *Tinch*, the recitation of consideration in a one-paragraph "Driver Exclusion Endorsement" created a rebuttable presumption of consideration that was not rebutted. *Id.* at 751.

As described *supra, Rent-A-Ctr., Pinkerton,* and other binding cases have not addressed the situation where a party seeking to enforce a delegation clause has not met the burden of proof for showing consideration supported the delegation clause.

Also, any presumption of consideration for the larger arbitration agreement should not apply to the severed delegation clause. The severability concept is resolved. *Rent-A-Ctr.*, 561 U.S. at 70-71; *Pinkerton*, 531 S.W.3d at 50-51. In *Ellis v. JF Enterprises, LLC*, 482 S.W.3d 417 (Mo. 2016), this Court used the severability concept of § 2 to reject a car buyer's arguments that an arbitration clause should be construed with the car sales agreement in which it is printed. This Court stated: "Under Missouri law, [the car buyer] may be right. But the FAA, not Missouri law, governs what courts may consider in determining whether an agreement to arbitrate is enforceable. Under the FAA, such agreements are 'severable.'" *Ellis*, 482 S.W.3d at 419.

Therefore, because a severed delegation clause is an agreement to arbitrate, it will not come into existence unless the party supporting it can prove it is supported by consideration.

In this case, the Defendants did not present evidence relating to the consideration that supported the delegation clause. [Rel. Appx. A009-077, A143-165] The delegation clause does not contain a recitation of consideration. It says: "All arbitrations covered by this Agreement will be conducted in accordance with the terms set forth in this Agreement and the Employment Arbitration Rules of AAA..." [Rel. Appx. A020] Even if the incorporated AAA rules had some mention of consideration within its 50+ pages, that only creates a rebuttable presumption of consideration. As the previous section explains,

the judge is required to analyze if consideration existed before determining that the delegation clause has any legal effect.

E. Because the severed delegation clause is not legally effective, Respondent (and not the arbitrator) should have determined that no consideration supported the arbitration agreement

An agreement to arbitrate does not come into existence as a contract if it is not supported by consideration. *Jimenez*, 475 S.W.3d at 683-684. The burden of showing legally sufficient consideration rests on the party relying on the contract. *Earl*, 875 S.W.2d at 236; *Ennis v. McLaggan*, 608 S.W.2d at 561.

Any promise of continued at-will employment in an arbitration agreement is insufficient consideration to support an agreement to arbitrate. *Jimenez*, 475 S.W.3d at 684-685. Additionally, a purported mutual obligation to arbitrate is insufficient consideration if "the practical effect of an arbitration agreement binds only one of the parties to arbitration …" *Jimenez*, 475 S.W.3d at 688.

The Dollar General Arbitration Agreement was found unsupported by consideration recently in Jackson County Circuit Court. *See* Judgment Denying Motion to Compel Arbitration, *N. White v. Dolgencorp, LLC, et al.*, Case No. 1716-CV20557 (Jackson County, Mo., December 12, 2017). The Judgment addressed the same arbitration agreement that Newberry had: "In the case before the Court, Dollar General admits that Ms. White worked for Dollar General for approximately one year before she allegedly electronically signed the Arbitration Agreement. Ms. White continued her

employment on an at-will basis. Therefore, no valid consideration existed for contract formation." *Id.*

Defendant Dolgencorp has only been able to get its 2014 or 2015-era Arbitration Agreements past court scrutiny with arguments about a "delegation clause." *See* Order, *Ambur Pankins v. Dolgencorp, LLC, et al.*, Case No. 17SL-CC03259 (St. Louis County Circuit Court, Mo., January 2, 2018); Order, *Angela Cochran v. Dolgencorp, LLC, et al.*, Case No. 16CA-CC00069 (Cass County Circuit Court, Mo., May 9, 2017); Memorandum and Order, *Sandra Doty v. Dolgencorp, Inc., et al.*, Case No. 4:15 CV 1931 RWS (U.S. Dist. Ct. E.D. Mo., May 2, 2016).

Here, Newberry's supervisor warned Newberry that failure to accept the "Dollar General Arbitration Agreement" was grounds for discharge. [Rel. Appx. A146-147, A151-152] That is insufficient consideration for a delegation clause or for a larger arbitration agreement. *See Jimenez*, 475 S.W.3d at 685.

Also, the "Dollar General Arbitration Agreement" contains no language even purporting to require Defendants to arbitrate employment related legal disputes with Plaintiff. The document was not signed by anyone on behalf of Defendant Dolgencorp. Defendant Dolgencorp provided no mechanism to arbitrate against Newberry and there was a resulting absence of mutuality. In the section of the "Dollar General Arbitration Agreement" titled "How to Begin the Arbitration Process Under this Agreement," the only mechanism "agreed upon" to begin arbitration is the employee filing for arbitration. "You" only refers to the "employee" throughout the document. The document states:

- "When you first become aware that you have a Covered Claim, you must filed a written notice of your intent to arbitrate …"
- "You have two options for filing your Demand with the AAA."
- "At the time you file your Demand, you will be required to pay AAA's filing fee for employees, which is currently $200." [Rel. Appx. A019-021]

This cannot be mutual and therefore cannot be consideration because the only mechanism for filing arbitration is for the employee to seek arbitration – there is no mechanism for the employer to file arbitration against the employee. All of the specific covered claims listed are those filed by an employee against an employer such as wage and hour violations, discrimination, harassment and retaliation, defamation or violation of confidentiality obligations, wrongful termination, and tort claims.

CONCLUSION

Neither the "Dollar General Arbitration Agreement" nor the delegation clause of the agreement were supported by consideration; and a permanent Writ of Prohibition should, therefore, issue, prohibiting Respondent from enforcing the Order sustaining the Motion to Compel Arbitration and Stay Proceedings, and remanding this action for disposition in the Circuit Court of Laclede County, Missouri.

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CERTIFICATE OF COMPLIANCE

The signature of this filing certifies the foregoing Brief complies with the limitations contained in Rule 84.06(b). This brief contains approximately 5,060 words.

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CERTIFICATE OF SERVICE

The undersigned certifies that true and accurate copies of this Brief was served on this 27th day of June, 2018, by first class U. S. mail, and that in addition a disc containing the Brief and the Appendix in PDF format were served by first class U.S. mail to the following:

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