IN THE SUPREME COURT OF MISSOURI

Case No. SC96986

STATE OF MISSOURI *ex rel.* BECKY LOWRANCE,

Relator,

v.

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

Respondent.

Circuit Court of Laclede County, Missouri, Case No. 17LA-CC00108

Missouri Court of Appeals for the Southern District, Case No. SD35346

DEFENDANTS' BRIEF IN OPPOSITION TO WRIT OF PROHIBITION

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Defendants Dolgencorp, LLC d/b/a Dollar General, Randy Johnson, and Tod Boyster (collectively "Defendants"), on behalf of themselves and Respondent the Honorable Steve Jackson ("Respondent"), respectfully submit this Brief in Opposition to Relator Becky Lowrance's ("Lowrance" or "Relator") Petition for Writ of Mandamus or Prohibition (the "Petition for Writ").

STATEMENT OF FACTS

1. Lowrance previously worked for Dollar General as a Store Manager from roughly November 2012 to October 2016. [Petition, Rel. Appx. A004 at ¶ 11][1]

2. In August 2014, Dollar General presented employees with an arbitration program to resolve disputes arising out of its employees' employment with the company. Employees had the opportunity to agree to arbitration by signing the Dollar General Employee Arbitration Agreement or to "opt out" of the program. [Agreement, Rel. Appx. A027-A029]

3. On August 14, 2014, Lowrance electronically signed the Dollar General Employee Arbitration Agreement (the "Agreement") by logging into Dollar General's online employee web portal using a unique user ID and password (which she created), reviewing the document, and selecting the option stating she "agree[d] to the terms of the Agreement." [Affidavit, Rel. Appx. A024-A026 at ¶¶ 4-6; Agreement, Rel. Appx. A027-A029]

4. Lowrance then affixed her electronic signature to the Agreement under the following statement:

[1] References to Relator's Appendix will be stated as "Rel. Appx. ___."

> I agree that by clicking "Submit" below, in conjunction with my personal password that I used to gain access to the system, will constitute my electronic signature (e-signature) and will identify this transaction as mine. … I understand that a record or signature may not be denied legal effect or enforceability solely because it is in electronic form.

[Affidavit, Rel. Appx. A026 at ¶6; Agreement, Rel. Appx. A029]

5. At no point after August 14, 2014 did Lowrance exercise her opportunity to "opt out" of the Agreement. [Affidavit, Rel. Appx. A026 at ¶6]

6. The Agreement requires Lowrance to arbitrate "any legal claims or disputes that [she] may have against Dollar General, its parent and subsidiary corporations, employees, officers and directors arising out of [her] employment with Dollar General or termination of employment with Dollar General ("Covered Claim" or "Covered Claims") … in the manner described in [the] Agreement." [Rel. Appx. A027]

7. The Agreement likewise requires Dollar General to arbitrate any "covered claims" it "may have against [Lowrance] related to [her] employment … in the manner described in [the] Agreement." [Rel. Appx. A027]

8. The Agreement provides that "covered claims" include those arising out of or related to Lowrance's termination of employment with Dollar General, including discrimination claims under state law:

> The procedures in this Agreement will be the exclusive means of resolving Covered Claims relating to or arising out of your employment or termination of employment with Dollar General, whether brought by you or Dollar General. This includes, but is not limited to, claims alleging … state and federal laws prohibiting discrimination, harassment, and retaliation ….

[Rel. Appx. A027]

9. The Agreement includes numerous provisions demonstrating that both Lowrance and Dollar General are bound to arbitration:

> This Dollar General Employee Arbitration Agreement … constitutes a **mutually binding agreement between you and Dollar General**, subject to opt out rights described at the end of this Agreement.…
>
> You also understand that **any Covered Claims that Dollar General may have against you related to your employment will be addressed in the manner described in this Agreement**.…
>
> **By agreeing to participate in binding arbitration, you and Dollar General acknowledge and agree** to the following ….
>
> **The procedures in this Agreement will be the exclusive means of resolving Covered Claims** relating to or arising out of your employment or termination of employment with Dollar General, **whether brought by you or Dollar General**.…
>
> You expressly waive your right to file a lawsuit in court against Dollar General asserting any Covered Claims. You also waive your right to a jury trial. **Dollar General waives its right to file a lawsuit for any Covered Claims it may have against you**, and Dollar General waives its right to a jury trial. …
>
> **You and Dollar General both** have the right to be represented by a lawyer at all stages of this process.…
>
> Opt out: You have the opportunity to opt out of this Agreement, meaning that you will not be bound by its terms. **If you opt out, Dollar General will not be bound by the terms of this Agreement either**. …
>
> I agree to the terms of the Agreement. I understand and acknowledge that by checking this box, **both Dollar General and I will be bound** by the terms of this Agreement.
>
> I would like to take up to 30 days to review and consider this Agreement. I understand that if I do not expressly opt out within 30 days using the process described above, I will be bound by the terms of this Agreement and that **Dollar General will also be bound by the terms of this Agreement**.

[Rel. Appx. A027-A029 (bold emphasis added)]

10. The Agreement also incorporates the American Arbitration Association's ("AAA") Employment Arbitration Rules:

> 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 … except as superseded by the terms of this Agreement.

[Rel. Appx. A028]

11. In turn, the AAA's Employment Arbitration Rule 6.a provides the following relative to the arbitrator's jurisdiction:

> The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement.

[Rel. Appx. A046]

12. The Agreement also contains an "opt out" provision:

> Opt out: You have the opportunity to opt out of this Agreement, meaning that you will not be bound by its terms. If you opt out, Dollar General will not be bound by the terms of this Agreement either. To opt out, you must expressly notify Dollar General of your intention to opt out by filling out and submitting electronically the "Arbitration Opt Out Form" linked on DGme within 30 days of the day you access the Agreement on DGme. If you do not expressly opt out of this Agreement by providing notice to Dollar General as described above, you will be bound by the terms of this Agreement if you continue to work for Dollar General 30 days after accessing the Agreement on DGme. Dollar General will not retaliate against you if you choose to opt out of this Agreement.

[Rel. Appx. A029] DGme is Dollar General's online employee web portal.

13. Lowrance's employment with Dollar General was terminated on October 7, 2016. [Petition, Rel. Appx. A004 at ¶ 11]

14. Despite being party to the Agreement, in November 2017, Lowrance filed a lawsuit in the Circuit Court of Laclede County, Missouri, against corporate defendant

Dolgencorp, LLC d/b/a Dollar General and individual defendants Randy Johnson and Tod Boyster (supervisors for Dollar General), alleging sex, age, and disability discrimination under the Missouri Human Rights Act relative to the termination of her employment. [Petition, Rel. Appx. A001-A007]

15. In December 2017, Defendants filed a Motion to Compel Arbitration and Stay Proceedings based on Lowrance's agreement to the Dollar General Employee Arbitration Agreement. [Rel. Appx. A008-A085]

16. Following briefing and oral argument by the parties, on January 16, 2018, Respondent Judge Jackson issued an Order sustaining Defendants' motion and compelling the parties to arbitration, pursuant to the delegation clause, to determine whether the parties entered into a valid agreement to arbitrate. [Order, Rel. Appx. A104]

17. On January 25, 2018, Relator filed a Petition for Writ of Mandamus or Prohibition with the Missouri Court of Appeals for the Southern District, seeking to avoid the arbitration compelled by Respondent's order. [Petition, Rel. Appx. A105-A122]

18. Following briefing by the parties, on February 20, 2018, the Missouri Court of Appeals for the Southern District denied Relator's requested writ without an opinion. [Order, Rel. Appx. A161]

ARGUMENT

I. Response to Relator's Sole Point Relied On: Relator Is Not Entitled to a Writ Prohibiting Respondent Judge Jackson from Enforcing the Order Compelling Arbitration and Staying Proceedings Because Relator's Challenges to the Arbitration Agreement and its Delegation Provision are Unavailing.

Relator seeks a permanent writ of prohibition from this Court requiring Respondent Judge Jackson to rescind his order compelling arbitration and staying proceedings. However, Respondent Judge Jackson's order was proper because (i) the parties' Agreement contains a clear and unmistakable intent to delegate threshold arbitrability issues to an arbitrator (including whether there was sufficient consideration to create a valid contract as Relator argues here) and (ii) even if there were no delegation provision, the parties entered into a valid and binding arbitration agreement that covers Relator's claims. Every challenge that Relator lodges against the Agreement and its delegation provision fails for the reasons outlined below. Relator's requested writ should be denied.

A. Respondent Properly Compelled Arbitration Because the Agreement Contains a Clear and Unmistakable Delegation Provision Granting An Arbitrator Sole Authority to Determine the Validity of the Agreement.

As both the U.S. Supreme Court and this Court have held, under the Federal Arbitration Act ("FAA"), courts must enforce delegation provisions like the one included in the Agreement here – *i.e.*, contractual language giving an arbitrator exclusive authority to determine threshold issues such as the validity or enforceability of an arbitration agreement – and cannot consider and rule on these issues themselves. *Rent-A-Center West,*

Inc. v. Jackson, 561 U.S. 63, 71-72 (2010) ; *State ex rel. Pinkerton v. Fahnestock*, 531 S.W.3d 26, 53 (Mo. banc 2017). There is no dispute that the FAA applies to the Agreement here, given the Agreement explicitly states it "is governed by the Federal Arbitration Act" and there can be no dispute it relates to interstate commerce. *See* Agreement [Rel. Appx. 020]; 9 U.S.C. § 2 (FAA governs arbitration contracts involving interstate commerce). The FAA evinces a national policy favoring the arbitration of disputes and requires courts to enforce arbitration agreements in the same manner that they enforce all other types of contracts. *Ellis v. JF Enters., LLC*, 482 S.W.3d 417, 420 (Mo. banc 2016); *Pinkerton*, 531 S.W.3d at 50; *Rent-A-Center*, 561 U.S. at 67. The only role for the court is to determine whether the parties clearly and unmistakably delegated threshold issues to the arbitrator. *Pinkerton*, 531 S.W.3d at 53; *Rent-A-Center*, 561 U.S. at 70.

Whether a valid arbitration agreement exists here is for an arbitrator to decide because the parties clearly and unmistakably delegated authority to determine such issue to an arbitrator, as evidenced by the plain terms of the Agreement and the parties' explicit incorporation of the Employment Arbitration Rules of the American Arbitration Association (the "AAA Employment Arbitration Rules"). Specifically, the Agreement states:

> **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**, except as superseded by the terms of this Agreement.

See Agreement [Rel. Appx. A028] (emphasis added). Rule 6.a of the AAA Employment

Arbitration Rules then provides:

> The **arbitrator shall have the power to rule on** his or her own jurisdiction, including **any objections with respect to the existence**, scope, **or validity of the arbitration agreement.**

See AAA Employment Rule 6.a [Rel. Appx. A046] (emphasis added).

While the Agreement supersedes AAA Employment Arbitration Rule 6.a with respect to "claims concerning the scope or enforceability" of the Agreement, it *does not* supersede Rule 6.a's grant of power to the arbitrator to determine the threshold issue of "validity" (*i.e.*, whether the parties have a valid agreement to arbitrate). *See* Agreement [Rel. Appx. A028] (indicating what is not a "covered claim"). That is because "validity" and "enforceability" are related but distinct concepts. Where a party challenges the "validity" of a contract, that party is asserting there was some flaw in the formation of the contract – *e.g.*, no offer or acceptance, no meeting of the minds, or no consideration. *Doty v. Dolgencorp*, 2016 WL 1732768, at *3 (E.D. Mo. May 2, 2016). But where a party challenges the "enforceability" of a contract, that party is asserting that while a valid contract was formed, the agreement is otherwise unenforceable – *e.g.*, for reasons of fraud or unconscionability. *See id.* at *3; *Baker v. Bristol Care, Inc.*, 450 S.W.3d 770, 774 (Mo. banc 2014) ("A dispute 'relating to the applicability or enforceability' of the agreement presupposes the formation of a contract …. [Whereas an] "argument that there was no consideration to create a valid agreement raises a contract formation issue rather than an applicability or enforceability issue."). Accordingly, the Agreement delegates issues of validity – which includes Relator's arguments that the Agreement lacks consideration – to

an arbitrator. *See Doty*, 2016 WL 1732768, at *1 (examining the agreement at issue and finding the plaintiff's arguments that the agreement lacked consideration and mutuality of obligations were challenges to "validity" not "enforceability" for arbitrator to decide).

In *State ex rel. Pinkerton v. Fahnestock*, this Court plainly held that where parties incorporate the AAA Rules into their arbitration agreement – as the parties did here – there is a "clear and unmistakable" delegation of authority to the arbitrator. 531 S.W.3d at 48 ("By clearly referencing the AAA commercial arbitration rules, the parties expressed their intent to arbitrate any dispute under [the AAA] rules, including the AAA's 'jurisdiction' rule providing that the arbitrator shall have the power to rule on … objections with respect to the existence … or validity of the arbitration agreement. Accordingly, the delegation provision clearly and unmistakably evidences the parties' intent to delegate threshold issues of arbitrability to the arbitrator"). That means issues of contract formation must be decided by the arbitrator, not by the court. *Id.* ("Pinkerton agreed the AAA commercial arbitration rules, which include a delegation provision, would govern arbitration disputes.... [B]oth issues of formation and enforceability of arbitration clauses can be delegated to an arbitrator."); *see also Latenser v. Tarmac Int'l Inc.*, 2018 WL 1384497, at *3 (Mo. Ct. App. W.D. Mar. 20, 2018) (incorporation of AAA rules into arbitration agreement delegated authority to adjudicate threshold issues to arbitrator). Accordingly, Respondent properly compelled the parties to arbitration to determine the threshold issue of whether the Agreement is valid, and this Court should reach the same result.

B. Respondent Properly Compelled Arbitration Because Relator Did Not Challenge the Delegation Provision Specifically.

As the United States Supreme Court and this Court have explained, where an arbitration agreement contains a clear and unmistakable delegation provision granting an arbitrator authority to determine threshold arbitrability issues, whether or not the arbitration agreement is enforceable will be up to the arbitrator **unless** the party challenging the arbitration agreement levies a specific challenge against the delegation provision. *Ellis*, 482 S.W.3d at 423-24; *Pinkerton*, 531 S.W.3d at 50; *Rent-A-Center*, 561 U.S. at 67.

In *Rent-A-Center West, Inc. v. Jackson*, the U.S. Supreme Court enforced a delegation provision in an employment-context arbitration agreement. 561 U.S. at 70-72. The plaintiff brought an employment discrimination claim against his former employer, who moved to compel arbitration under an agreement that the plaintiff had signed as a condition of his employment. *Id.* at 65-66. The plaintiff opposed the motion and argued the *entire* agreement was unconscionable. *Id.* But the agreement had a delegation provision stating the arbitrator would have exclusive authority to resolve disputes over whether the agreement was enforceable. *Id.* at 68. The Court found this delegation provision was valid because "parties can agree to arbitrate 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Id.* at 68 (citations omitted). Further, "[a]n agreement to arbitrate a gateway issue is simply an additional, antecedent agreement [that] the party seeking arbitration asks the … court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other." *Id.* at 70. The Court then

clarified that when a plaintiff challenges the enforceability of the contract in its entirety, without specifically challenging the delegation provision, arbitration is appropriate. *Id.* at 72-73. Specifically, "unless [the plaintiff] challenged the delegation provision specifically, [the Court] must treat it as valid under [FAA] § 2, and must enforce it under [FAA] §§ 3 and 4, leaving any challenge to the validity of the [a]greement as a whole to the arbitrator." *Id.* at 72. In short, because the plaintiff challenged the arbitration agreement as a whole as unconscionable, and did not levy any specific challenge to the delegation provision, the delegation provision was enforceable and threshold issues went to the arbitrator. *Id.*

In *Pinkerton*, this Court expressly acknowledged the *Rent-A-Center* holding and explained that a delegation provision "is an additional, severable agreement to arbitrate threshold issues," which "**is valid and enforceable unless a *specific* challenge is levied against the delegation provision**." 531 S.W.3d at 50 (emphasis added). In *Pinkerton*, the defendant sought to enforce the valid delegation provision discussed above (*i.e.* the incorporation of the AAA commercial arbitration rules), which this Court said was "valid and enforceable under the FAA" *unless* the plaintiff specifically challenged it. *Id.* at 51. The plaintiff claimed he had raised challenges to the delegation provision that were separate from his other challenges to the arbitration agreement as a whole, including that there was no meeting of the minds, the print was too small so as to be unreadable, and the clause was facially unconscionable. *Id.* But because all of these challenges were, in reality, challenges to the arbitration agreement "as a whole," and none were challenges directed at the delegation provision "specifically," this Court found it was obligated to treat the delegation provision as valid and to enforce it. *Id.* at 52-53. This Court did enforce the

delegation provision, finding it was appropriate for the circuit court to have ordered the parties to arbitrate threshold issues of arbitrability. *Id.* at 53.

The same result is obligated here. At the circuit court level, Relator's only challenge to the delegation provision was as follows: "[Relator] specifically challenges Defendants' purported 'delegation provision' because it is unconscionable and because it is not incorporated into the purported 'arbitration agreement.' … [T]here was no clear and unmistakable evidence of the parties' manifestation of intent." *See* Plaintiff's Opposition [Rel. Appx. A087]. But a blanket accusation of unconscionability, without any evidence or argument in support, is unavailing.[2] *Id.* Indeed, *Pinkerton* ruled out such a challenge. There, the plaintiff argued it "was unconscionable to delegate formation issues to an arbitrator"; this Court held such an argument was "without merit." 531 S.W.3d at 40. Relator otherwise has not carried that argument into the instant briefing before this Court, and the argument should be considered abandoned. Second, Relator's accusation that the delegation provision was not incorporated into the parties' Agreement and was not "clear and unmistakable" directly contradicts *Pinkerton* for the reasons stated above. *See supra* Argument I.A. *Pinkerton* held that incorporation of the AAA rules, as the parties did here, is a valid delegation of arbitrability to the arbitrator. *Id.*

Now during writ proceedings at the appellate level, Relator purports to challenge

[2] To the extent Relator couched the unconscionability of the delegation provision into her other unconscionability arguments directed at the Agreement as a whole, that is insufficient as set forth herein, because the delegation provision must be challenged specifically.

the delegation provision "specifically" by arguing it lacks consideration. But the reality is that Relator asserts **the very same challenge to the Agreement as a whole**. This is fatal to her arguments here. Relator appears to suggest that lack of consideration is not the same as a contract defense (*e.g.*, unconscionability, fraud, illegality) that must be specifically levied against the delegation provision as opposed to the contract as a whole, and thus the delegation clause can be severed and analyzed independently, but she does not (and cannot) cite any authority in support of such suggestion.

In short, Relator has failed to lodge any (valid) specific challenge to the Agreement's delegation provision; thus, this Court is obligated to treat the delegation provision as valid, enforce it, and compel the parties to arbitration on threshold arbitrability issues (including whether there was sufficient consideration to create a valid contract as Relator argues here).[3] *See Pinkerton*, 531 S.W.3d at 53; *Dotson v. Dillard's, Inc.*, 472 S.W.3d 599, 608 (Mo. Ct. App. W.D. 2015), as modified (Sept. 1, 2015) (circuit court properly treated delegation provision as valid and enforced it where plaintiff did not challenge the validity of the delegation provision itself); *Ellis*, 482 S.W.3d at 423-24 ("Ellis' argument that section 301.210 renders the arbitration agreement without consideration is not a 'discrete challenge' to the arbitration agreement because it requires

[3] Even if Relator's "lack of consideration" argument were a specific challenge to the delegation provision (it is not), it still fails for the reasons described below in Argument I.C, in that the delegation clause was offered to Relator, accepted by Relator, and is supported by consideration via mutual obligation to arbitrate threshold arbitrability issues.

the court to determine whether the sales contract is void in order to determine whether to enforce the arbitration agreement."); *Latenser*, 2018 WL 1384497, at *2 (enforcing delegation provision where employee's argument as to lack of consideration (among others) were challenges to agreement as a whole).

C. Even Ignoring the Agreement's Valid Delegation Provision, Respondent Properly Compelled Arbitration Because the Agreement is Indeed Supported by Consideration.

Even ignoring the delegation provision and assuming Respondent Judge Jackson had authority to rule on the validity of the Agreement, Respondent correctly found in the alternative that the Agreement is supported by consideration to create a valid contract under Missouri law. To determine arbitrability, two threshold issues must be decided: "(1) whether a valid agreement to arbitrate exists between the parties, and (2) whether the specific dispute falls within the substantive scope of that agreement." *Kagan v. Master Mome Prods. Ltd.*, 193 S.W.3d 401, 405 (Mo. Ct. App. E.D. 2006). Under Missouri law, the essential elements of a valid contract are offer, acceptance, and bargained-for consideration. *Johnson v. McDonnell Douglas Corp.*, 745 S.W.2d 661, 662 (Mo. banc 1988). Importantly, Relator does not dispute that the Agreement was offered to her, that she accepted the Agreement by signing it, or that her MHRA employment discrimination claims fall squarely within the scope of the Agreement. Relator disputes *only* whether there is adequate consideration for the delegation provision or the Agreement as a whole. But each of Relator's arguments relative to lack of consideration is unavailing.

1. Contrary to Relator's Assertion, Missouri Appellate Courts Have Addressed Alleged Lack of Consideration Relative to Delegation Provisions.

Relator first argues that there are no Missouri appellate decisions addressing the lack of consideration supporting a delegation clause. This is incorrect.

In *Dotson v. Dillard's*, the plaintiff was a former Dillard's employee who signed an arbitration agreement with a delegation provision sending arbitrability disputes – including disputes over "the way [the agreement] was formed" – to the arbitrator. *Id.* The plaintiff argued the agreement was unenforceable for "a variety of reasons due to formation," including that it lacked consideration. *Id.* at 604. Because the delegation provision "expressly provide[d] authority for the arbitrator to decide claims regarding contract formation," and the plaintiff's argument that "there was no consideration to create a valid agreement raise[d] a contract formation issue," the appellate court held that the delegation provision should be enforced, the arbitrability question was for the arbitrator, and the underlying court erred in determining arbitrability. *Id.* at 607.

In *Latenser v. Tarmac International*, the plaintiff was a former employee who signed an employment agreement containing a delegation provision by incorporation of the AAA Commercial Arbitration Rules. 2018 WL 1384497, at *1. The plaintiff argued that the delegation provision, specifically, lacked consideration. *Id.* at *2. Because the court was "compelled to enforce the delegation provision" unless the plaintiff specifically challenged the delegation provision, and the plaintiff's arguments concerning "lack of consideration" was a challenge to the agreement as a whole, the appellate court found the

delegation provision should be enforced and the underlying court lacked authority to determine threshold arbitrability issues. *Id.* at *3.

Relator is in the same shoes here as the plaintiffs in *Dotson* and *Latenser*. He claims both the Agreement and the delegation provision lack consideration, a challenge that should be delegated to the arbitrator to determine. Relator's argument that "no appellate court" has addressed lack of consideration for a delegation provision is incorrect and plainly ignores precedent providing that challenges to the formation of an arbitration agreement (including alleged lack of consideration as argued here) **can be delegated**, and further, where such challenges are made to the arbitration agreement as a whole (and not to the delegation clause specifically as argued here), the court must treat the delegation provision as valid and enforce it.

Relator also attempts to escape the mandatory result of *Pinkerton* by misstating its holding. Specifically, Relator claims *Pinkerton* did not address the requirement that a delegation clause be supported by consideration, but rather sanctioned enforcement of a delegation provision *only* in the narrow circumstance where the existence of an arbitration agreement is not disputed and the only challenge to the agreement is unconscionability. This patently misstates *Pinkerton*. The plaintiff in *Pinkerton* actually argued he was attacking "formation" and that such issues could not be delegated. But this Court found that while the plaintiff's argument was targeted at conscionability, not formation, it did not matter; either or both issues would be delegated to the arbitrator. *Id.* (Plaintiff's "characterization of the issue of unconscionability as a formation issue rather than enforceability has no impact on the resolution of this case … because **both issues of**

formation and enforceability of arbitration clauses can be delegated to an arbitrator.") (emphasis added). As such, this argument is an unsuccessful attempt to distinguish *Dotson* and *Pinkerton*, and insufficient to preclude enforcement of the delegation provision.

2. Contrary to Relator's Assertion, A Party Seeking to Enforce a Delegation Provision Does Not Have to Demonstrate Separate Consideration for the Delegation Provision.

Relator next argues that because the delegation provision is severable from the remainder of the Agreement, it does not come into effect unless it is separately supported by consideration (*i.e.*, not the same consideration as for the Agreement as a whole). Again, Relator cites no legal authority supporting such an argument. He is evidently attempting to again avoid binding precedent outlined above in Argument I.B. But *Pinkerton*, *Dotson*, and *Ellis* are clear: because Relator's challenge to the delegation provision (*i.e.*, lack of consideration) is the very same as her challenge to the Agreement as a whole (*i.e.*, lack of consideration), this Court must treat the delegation provision as valid and enforce it, and allow an arbitrator to determine the threshold issue of whether there is a valid contract supported by consideration.

Relatedly, Relator argues that a party seeking to enforce a delegation provision has the burden to prove consideration for the delegation provision, and Defendants have not met this burden. But sufficient consideration does exist here because there is mutuality of obligation supporting both the Agreement as a whole and the delegation provision. The parties are mutually bound to arbitrate gateway issues of arbitrability under the delegation provision, just as they are mutually bound to arbitrate disputes arising out of or related to

Relator's employment. *See below* Argument I.C.3. Accordingly, these arguments are also insufficient to preclude enforcement of the delegation provision.

3. Contrary to Relator's Assertion, Sufficient Consideration Exists for the Agreement as a Whole (and the Delegation Provision) through Mutuality of Obligation.

Relator next argues that without a valid delegation provision, Respondent Judge Jackson was required to evaluate whether the Agreement as a whole was supported by consideration and to conclude that it was not.[4] This argument is unavailing because mutuality of obligation clearly existed between Relator and Dollar General. Both mutually agreed to submit employment-related claims to arbitration. Relator's claim that "there is no language even purporting to require Defendants to arbitrate employment related legal disputes" is a blatant misrepresentation of the Agreement. Indeed, numerous provisions of the Agreement evince an unambiguous intent that **Dollar General be bound *to the same***

[4] Relator contends there is no consideration through ongoing at-will employment, which Defendants concede. Indeed, Defendants allege consideration exists through mutuality of obligation, not through continued at-will employment. *See* Brief [Rel. Appx. A020]. While Respondent Judge Jackson mentioned at-will employment as one basis for finding consideration for the Agreement, he also found consideration existed through mutuality of obligation. *See* Order [Rel. Appx. A104]. Relator's citation to *White v. Dolgencorp*, Case No. 1716-CV20557 (Cir. Ct. Jackson Cnty. Dec. 12, 2017), is unavailing because it addressed only lack of consideration based on at-will employment, not mutual obligations.

***extent* as Relator**: the Agreement makes clear it is "mutually binding;" it states "[t]he procedures in th[e] Agreement will be the exclusive means of resolving Covered Claims relating to or arising out of your employment or termination of employment with Dollar General, *whether brought by you or Dollar General*;" it expressly states "Dollar General waives its right to file a lawsuit for any Covered Claims it may have against you, and Dollar General waives its right to a jury trial"; and it states "I understand and acknowledge that by checking this box, *both Dollar General and I will be bound* by the terms of this Agreement." *See* Agreement [Rel. Appx. A027-A029]. The mutuality of these provisions is exactly the type of consideration recognized by Missouri courts as establishing enforceability. *See State ex rel. Hewitt v. Kerr*, 461 S.W.3d 798, 808-809 (Mo. banc 2015) (employment arbitration agreement supported by adequate consideration where both employee and employer were bound to arbitration); *Thomas v. Dillard's*, 2010 WL 2522742, *3 (E.D. Mo. June 16, 2010) (agreement of both parties to arbitrate employment-related claims was sufficient mutual obligation for enforceability); *McIntosh v. Tenet Health Sys. Hosps., Inc./Lutheran Med. Ctr.*, 48 S.W.3d 85, 89 (Mo. Ct. App. E.D. 2001) (enforcing arbitration agreement where employee signed mutual arbitration clause agreeing, along with company, to submit claims to arbitration).[5]

[5] Moreover, further consideration is evidenced by Dollar General's agreement to pay for the "AAA administrative costs and fees, the arbitrator's costs and fees, and any employee filing fees that exceed $200." *See* Agreement [Rel. Appx. A028]. Dollar General has therefore relieved Relator of any financial burden by promising to pay the entire difference

The parties' mutual obligation to arbitrate also demonstrates why this case is distinguishable from *Jimenez v. Cintas*, 475 S.W.3d 679 (Mo. Ct. App. 2015), on which Relator relies heavily. In *Jimenez*, the court found the arbitration agreement at issue lacked consideration because the employer and employee did not make mutual promises to arbitrate because the practical effect was that the arbitration agreement was binding on only one party (the employee). *Id.* at 686-89. Unlike the employer in *Jimenez*, Dollar General is bound here to the very same extent as Relator. Relator argues there is no mutuality because the Agreement outlines how Relator initiates an arbitration claim with the AAA but does not outline how Dollar General initiates an arbitration claim. This ignores not only that Dollar General knows how to initiate a claim but also the Agreement's incorporation of the AAA Employment Arbitration Rules, which outline procedures for pursuing arbitration before the AAA. Relatedly, that Dollar General agrees to cover the costs of arbitration and the majority fees surely cannot render the Agreement not mutual. Lastly, Relator's argument that the Agreement is not mutual because it defines "covered claims" only to include those asserted by an employee is a blatant misstatement. The Agreement specifically lists "claims for defamation or violation of confidentiality obligations[,] tort claims, and claims alleging violation of any other state or federal laws" as types of covered claims. *See* Agreement [Rel. Appx. A028]. These categories – clearly

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between the arbitration filing fee and the cost of a court filing fee, as well as all the fees and costs of the arbitrator and arbitration forum. This additional benefit to Relator is further evidence that the Agreement is supported by adequate consideration.

identified as examples and not an exhaustive list – would indeed encompass all potential civil employment-related claims that Dollar General might have against an employee (*e.g.*, breach of contract, defamation, breach of fiduciary duties, conversion, property damage, etc.). The obligation to arbitrate (including threshold issues under the delegation provision) and the types of covered claims to be arbitrated are the same for both parties. *Jiminez* is therefore inapposite and has no bearing here.

In a further attempt to avoid a finding of consideration, Relator also argues there is no mutuality of obligation because Defendants did not sign the agreement. Such an argument is not supported by case law; indeed, Relator cites no legal authority in support. That Defendant Dollar General did not physically sign the Agreement does not nullify otherwise existing consideration given its mutual agreement to also submit covered claims to arbitration. *See Baier v. Darden Rests.*, 420 S.W.3d 733, 738 (Mo. Ct. App. 2014) ("A party's signature on a contract remains the 'common, though not exclusive, method of demonstrating agreement'" and "a signature is not the only way to establish acceptance of … a bilateral contract."); *Hewitt*, 461 S.W.3d at 808-09 (holding that the employment arbitration agreement was supported by adequate consideration where both the employer and the employee were bound). The Agreement contains specific and definite terms under which Dollar General unambiguously offered to resolve disputes between the parties through arbitration. Again, Dollar General demonstrated a clear intent to be bound by the Agreement in the following language: "[t]he procedures in this Agreement will be the exclusive means of resolving Covered Claims relating to or arising out of your employment or termination of employment with Dollar General, *whether brought by you or Dollar*

General" and "*both Dollar General and I will be bound* by the terms of this Agreement." *See* Agreement [Rel. Appx. A029].

Further, that Defendants Johnson and Boyster did not sign the Agreement does not preclude them from enforcing it. As this Court held in *Hewitt v. Kerr*, the entirety of a discrimination claim should be referred to arbitration if the petition makes no distinction between signatory and non-signatory defendants. 461 S.W.3d at 815 (explaining "Hewitt cannot treat these defendants severally for arbitration purposes but jointly for all other purposes. His claim against the defendants is a single one that should be referred in its entirety to arbitration."). This Court specifically allowed non-signatories to an arbitration agreement to enforce the agreement against the plaintiff where he alleged both the employer-signatory and the non-signatory individual defendants collectively discriminated against her under the MHRA. *Id.* Similarly, here, Relator claims Dollar General, Johnson, and Boyster collectively discriminated against her and the claims as brought against each defendant here are indistinguishable. *See* Petition [Rel. Appx. 001 at ¶¶11-31].[6] As such, individual Defendants Johnson and Boyster can enforce the Agreement against Relator even though they did not physically sign it.

[6] Defendants Johnson and Boyster can also enforce the Agreement against Relator as third-party beneficiaries. *See Peters v. Employers Mut. Cas. Co.*, 853 S.W.2d 300, 301 (Mo. 1993) ("third-party beneficiary can sue to enforce the contract if the contract terms 'clearly express' an intent to benefit either that party or an identifiable class of which the party is a member").

Accordingly, given the mutuality of obligation between Relator and Dollar General, and that all Defendants are entitled to enforce the Agreement against Relator, it was proper for Respondent to compel arbitration under the alternate holding that even without a delegation provision the Agreement is a valid contract supported by consideration. Again, Relator's requested writ should be denied.

CONCLUSION

By incorporating the AAA's Employment Arbitration Rules, the parties clearly and unmistakably agreed to delegate threshold issues of the validity of the Agreement to an arbitrator. Even ignoring that delegation provision, the Agreement is otherwise valid because it is supported by sufficient consideration (and otherwise meets the elements of a valid contract and its scope encompasses Relator's dispute). Accordingly, Respondent the Honorable Steve Jackson properly compelled the parties to arbitration. Based on the reasons stated herein and in Defendants' Suggestions in Opposition, Defendants Dolgencorp, LLC d/b/a Dollar General, Randy Johnson, and Tod Boyster, on behalf of themselves and Respondent the Honorable Steve Jackson, therefore respectfully ask the Court to quash its preliminary writ in prohibition, deny Relator's request for a permanent writ of prohibition, and uphold Respondent the Honorable Steve Jackson's order compelling arbitration and staying proceedings.

Respectfully submitted,

/s/ René L. Duckworth

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CERTIFICATE OF COMPLIANCE

Pursuant to Mo. Sup. Ct. R. 84.06(c), I certify that this Brief is typed in Times New Roman, 13 point type, Microsoft Word. This Brief contains 6,410 words, which is in compliance with the limitations of Rule 84.06(b).

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I hereby certify that a copy of the above pleading was served on July 24, 2018, via the Court's ECF filing system upon:

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