IN THE MISSOURI SUPREME COURT

Case No. SC97235

NINA THEROFF,
Plaintiff/Respondent,

v.

DOLLAR TREE STORES, INC. AND JANIE HARPER,
Defendants/Appellants.

Appeal from the Circuit Court of Cole County, Missouri
Honorable Patricia Joyce, Circuit Judge
Case No. 16AC-CC00412

and

Missouri Court of Appeals for the Western District
Case No. WD80812

APPELLANTS' SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This is an appeal from the trial court's order denying a motion to compel arbitration on May 26, 2017. (Legal File [hereinafter "LF"] 487) The trial court's order is immediately appealable under the Missouri Uniform Arbitration Act, Mo. Rev. Stat. § 435.440. *See Riley v. Lucas Lofts Investors, LLC*, 412 S.W.3d 285, 289 n.3 (Mo.App. E.D. 2013). The Federal Arbitration Act ("FAA") also provides that an appeal may be taken from an order denying a motion to compel arbitration. 9 U.S.C. § 16(a)(1)(A)-(B). Defendants-Appellants timely filed their Notice of Appeal on June 5, 2017. (LF 488-91)

The Court of Appeals affirmed the trial court. *See* April 24, 2018 Court of Appeals opinion. Defendants-Appellants timely filed their Application to Transfer with this Court. *See* June 15, 2018 Application to Transfer.

Jurisdiction is proper in this Court under Article V, Section 10 of the Missouri Constitution because this case was transferred from the Court of Appeals by Order of this Court. *See* June 25, 2019 Mo. Sup. Ct. Mandate sustaining Defendants-Appellants' application to transfer.

STATEMENT OF FACTS

1. The Parties and the Underlying Claim

Plaintiff-Respondent Nina Theroff ("Theroff") was hired by Defendant-Appellant Dollar Tree Stores, Inc. ("Dollar Tree") in October 2015 to work as a seasonal sales associate at Dollar Tree's Jefferson City, Missouri store, which was supervised by Store Manager Janie Harper ("Harper") (Dollar Tree and Harper collectively "Defendants"). (LF 7 [¶6], 22, 36 [¶3], 49 [¶5]) Theroff's employment with Dollar Tree ended after roughly one month when she stopped communicating with store management about returning to work and failed to otherwise show up for work.[1] (LF 22, 36 [¶3]; Hearing Exhibit [hereinafter "EX"] B [¶3])

Theroff filed a Petition in the Circuit Court of Cole County, Missouri, asserting one claim of discrimination under the Missouri Human Rights Act against Appellants relative to the end of her employment. (LF 6-17)

2. The Onboarding Paperwork and Mutual Agreement

At issue here is Theroff's completion of new hire paperwork at the outset of her employment that included her receipt, review, and signature of a copy of Dollar Tree's Mutual Agreement to Arbitrate Claims (the "Mutual Agreement"). (LF 31-35, 36-38 [¶13], 62-63 [¶4]; Hearing Transcript [hereinafter "TR"] 67:12-18, 75:3-20, 79:9-80:20, 81:6-82:1; EX A, EX D; Appendix to Defendants-Appellants' Brief [hereinafter page

[1] The parties dispute the manner in which Theroff's employment ended, but the termination reason is not at issue on appeal.

numbers with "A"] A2-A6, A19-A20) On October 23, 2015, Theroff electronically signed the Mutual Agreement and agreed to be bound by its terms – including having all claims and controversies arising out of or relating to her employment with Dollar Tree resolved through arbitration rather than in court. (LF 31-35, 36-39; TR 55:15-85:6; EX A, EX B; A2-A6, A10-A13) The Mutual Agreement states:

> "This is a Mutual Agreement to Arbitrate Claims ("Agreement") between Dollar Tree and its associate ("Associate"). Dollar Tree and Associate are each a Party to the Agreement, and together they are the Parties to the Agreement and mutually bound by the Agreement.… The Parties understand and agree that by entering into this Agreement they mutually agree to waive their right to a trial in court by a judge or jury ..., and, in exchange, the Parties anticipate gaining the benefits of arbitration as a final and binding dispute-resolution procedure.… The Parties agree to the resolution by arbitration of all claims or controversies ("claims"), past, present or future, that can be raised under applicable federal, state, or local law, arising out of or related to Associate's employment (or its termination), that Dollar Tree may have against Associate or that the Associate may have against any of the following (1) Dollar Tree, (2) its officers, directors, employees, or agents …."

(LF 31; EX A p.1; A2). The Mutual Agreement further provides that all employment-related disputes must be resolved through binding arbitration: "Claims subject to arbitration include, but are not limited to, claims for … discrimination (including, but not

limited to, … physical or mental disability or handicap[)] ….” (LF 31; EX A p.1; A2)

During the hiring and onboarding process, Theroff electronically reviewed, completed by hand, and signed several documents (both electronically and by hand), including the arbitration agreement (“Mutual Agreement”) at issue here, which states that all claims and controversies arising out of or relating to her employment with Dollar Tree must be resolved through arbitration. (LF 31-35, 36-39; TR 55:15-85:6; EX A-B, I-L; A2-A6, A10-A13). The Mutual Agreement also has a delegation provision requiring arbitration to be held in accordance with the JAMS Employment Arbitration Rules & Procedures (“JAMS Rules”). (LF 32; EX A p.2; A3) JAMS Rule 11(b) requires that arbitrability disputes be decided by an arbitrator: “Jurisdictional and arbitrability disputes, ***including disputes over the formation, existence, validity, interpretation or scope of the agreement*** under which Arbitration is sought, and who are proper Parties to the Arbitration, ***shall be submitted to and ruled on by the Arbitrator.***” (LF 61) (emphasis added).

3. Theroff’s Admissions and Story Regarding Her Completion of the Paperwork

These simple facts are not in dispute and are dispositive:

- Dollar Tree offered, and Theroff opened and viewed, the Mutual Agreement and Arbitration FAQs documents on her home computer on

October 21, 2015;[2]

- Dollar Tree again offered and Theroff opened, viewed, and electronically signed the Mutual Agreement document when she came into the store on October 23, 2015;[3]
- Theroff filed a lawsuit alleging claims that fall within the scope of the Mutual Agreement;[4] and
- the Mutual Agreement contains a clear delegation clause directing all issues regarding formation, validity, and enforceability to the arbitrator.[5]

Up to this point in the litigation, Theroff has selectively represented her testimony relative to completing onboarding paperwork on her home computer on October 21, 2015. Specifically, she ignores the following admissions:

- On October 21, 2015, Dollar Tree emailed her personal email account with

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[2] *See* LF 36-39 at ¶13, LF 106-108 at ¶¶4-8, LF 269, LF 285-286; TR 28:2-8, 29:3-31:15, 37:6-10; EX B, I-O, Q; A14-A16. Theroff does not deny these actions; she merely states she does not remember. This, of course, is not sufficient to dispute these actions.

[3] *See* LF 31-35 at p.5, LF 36-39 at ¶13, LF 62-63, LF 106-108, LF 328; TR 37:6-38:22, 42:12-43:16, 44:23-45:5, 51:19-52:7; EX A, B, I-O, Q; A2-A6, A10-A13. Again, no denial by Theroff; she merely states she does not remember. This is still not sufficient to dispute these actions.

[4] *See* LF 6-15 and LF 31.

[5] *See* LF 32-33 and LF 61.

a link to onboarding documents to be completed on her home computer.

- In October 2015, Theroff had a 32-inch monitor on her home computer with "Zoomtext" equipment that magnified the screen.
- Theroff received Dollar Tree's link to onboarding documents.
- On October 21, 2015, Theroff used the link to access and complete some of the onboarding documents on her home computer with the assistive device; in fact, she testified: "I was so excited. It was a great night."
- Theroff does not remember all of the documents she accessed.

(TR 28:2-8, 30:10-31:15, 37:6-10)

Theroff also selectively represents her testimony relative to completing onboarding paperwork at the store on October 23, 2015. Specifically, she omits the following admissions:

- Theroff never told anyone she was uncomfortable signing or completing paperwork on the computer.
- Swift did not prevent Theroff from using and Theroff did not try to use her magnifier.
- Theroff knew she was signing employment related documents but did not "register the depth of the documents."
- Theroff also completed documents relative to taxes and direct deposit of paychecks, but does not remember signing or agreeing to direct deposit.
- Theroff could not estimate how many documents she completed or how

many times Swift directed her to "click here" or "put your name here."

- Theroff trusted Swift to tell her the accuracy of what she was signing, and did not expect Swift was misleading her or saying Theroff had agreed to something she had not agreed to.
- Theroff never asked for printed versions or copies of the electronic documents, before or after they were completed.

(TR 37:6-38:22, 42:12-43:16, 44:23-45:5, 51:19-52:7)

4. The Lawsuit and Procedural History

Despite being a party to the Mutual Agreement, in October 2016, Theroff filed her lawsuit. (LF 6-17) In December 2016, Dollar Tree and Harper[6] filed a Motion to Compel Arbitration and Stay Proceedings ("the Motion"). (LF 18-39) In January 2017, Plaintiff opposed Defendants' Motion, arguing that the Mutual Agreement was not enforceable as a valid contract because Theroff did not read or understand what she signed. (LF 40-50) The parties fully briefed the Motion and the trial court held evidentiary hearings on February 9, 2017 and April 3, 2017. (LF 18-82)

The trial court held two evidentiary hearings, the parties submitted post-hearing briefing, and Appellants submitted additional evidence – unrebutted by Theroff –

[6] Defendant Harper, as a Dollar Tree employee, also executed her own Mutual Agreement to Arbitrate Claims such that all claims by or against her and relating to her employment would also be resolved through arbitration. (LF 72-78; TR 104:18-106:20; EX. F; A23-A29)

regarding her electronic review and signing of the Agreement at her home and at the store. (LF 18-82, 83-486) Theroff testified at the motion to compel arbitration hearing: "I was so excited. It was a great night." (TR 31:1-2)

The parties also submitted post-hearing briefing in further support of their respective positions. (LF 83-486) Appellants demonstrated "existence, offer and acceptance" of the Agreement and provided the computer data logs documenting the date and time for all values and entries entered by Plaintiff as part of the "CareerLaunch website" onboarding process. These logs support Theroff's testimony that she completed part of the onboarding process on her home computer and part of the onboarding process at the store. In fact, these logs show that Plaintiff initially opened and reviewed the Agreement and Arbitration FAQs at home, where she previously testified that she had proper magnification to read documents on a computer. (LF 106-108 at ¶¶7-9, 269; EX. Q at p.160, with a date/time stamp of "20151021191748890365 5" *i.e.*, October 21, 2015). She also answered the "rate the ease of this process" question with "very easy." (LF 107 at ¶8, 295-286; EX. Q at pp. 176-177, with a date/time stamp of "20151021191913990547 5" *i.e.*, October 21, 2015). Finally, she electronically signed the Agreement at the store two days later. (LF 107 at ¶9, 328; EX. Q at p. 219, with date/time stamps of "20151023060450507639 2" and "20151023060852115680 1" *i.e.*, October 23, 2015).

The trial court denied the Motion in a one-sentence order without explanation or rationale. (LF 487; A1) Appellants timely appealed, arguing the trial court erred in considering Theroff's challenges to the Agreement because the parties agreed an

arbitrator would decide any such threshold challenges through a clear and unmistakable delegation provision covering all threshold issues, including formation and existence. (LF 488-91) Nevertheless, on April 24, 2018, the Court of Appeals affirmed the trial court's denial by creating a previously-unrecognized exception to delegation provision. Its rationale was that even though the arbitrator had exclusive jurisdiction to decide issues of formation, the Court could decide whether the Mutual Agreement was "concluded," because Theroff said she did not remember signing it. Opinion at 4, 6.

The Court of Appeals ignored Appellants' evidence from the CareerLaunch computer logs demonstrating Theroff reviewed the Agreement and Arbitration FAQs at home on October 21, 2015, and electronically signed the Agreement (along with the other important onboarding documents) at the store on October 23, 2015. (LF 106-108, 269, 285-286, 328) Then, it said Theroff presented evidence to the trial court that she "did not sign the Agreement or, alternatively, did not authorize an agent to do so on her behalf." Opinion at 6. However, Theroff never testified that she did not sign the agreement or did not authorize someone else to sign it. Rather, she simply said she did not remember and did not know whether she signed it.

5. The CareerLaunch Onboarding Platform and Process

As outlined in declarations from Dollar Tree employee Vince Votta, Dollar Tree maintains a comprehensive onboarding process for new associates. (EX B, P) Dollar Tree sends the applicant/associate an email with a link to a secure website, CareerLaunch, where the associate must create a unique password to use any time they access the website. (LF 36-37) CareerLaunch was designed to streamline and provide

consistency to the hiring process. (LF 106-107) Associates use CareerLaunch to review and acknowledge certain documents before beginning working, including a Federal I-9 immigration form, tax withholding forms, bank information for direct deposit of wages, and Dollar Tree's Mutual Agreement at issue. *Id.* To review it, an associate must (i) review a screen summarizing the purpose of the Mutual Agreement, (ii) click a link to review "Frequently Asked Questions" about arbitration, and (iii) click a link to review the Mutual Agreement, which opens as a PDF. *Id.* The associate cannot advance ***until*** she affirmatively clicks a statement affirming she has received and read the Mutual Agreement. *Id.* Then to sign the agreement, the associate must enter her unique password and click a button to place her digital signature on the Mutual Agreement. *Id.*

While Theroff's selective presentation of the record attempts to insinuate she was never given or allowed to read the Mutual Agreement on October 23, 2015 (***at the store***), this completely ignores her admissions relative to receiving onboarding documents at home on her home computer two days earlier, through the method described above:

- on October 21, 2015, Dollar Tree sent an email to her personal email address that contained a link to onboarding documents to be completed on her home computer (or any other computer with internet access);
- she received Dollar Tree's link to onboarding documents;
- she used the link to access and complete some of the paperwork from her home computer the evening of October 21, 2015; and
- she does not remember all of the documents she accessed.

(LF 36-39, 106-108; EX. B, M; TR 29:3-31:15, 37:6-10) Regardless how she attempts to spin the record now, Theroff admits she opened Dollar Tree's onboarding documents (and completed some) at home on her home computer. That she cannot remember now what all of those documents were does not demonstrate she never received the Mutual Agreement. (TR 31:3-15) Indeed, data logs of Dollar Tree's CareerLaunch website show Theroff both opened and reviewed the Mutual Agreement and Arbitration FAQs at home using her home computer on October 21, 2015 – and even answered the "rate the ease of this process" question as "very easy." (LF 106-108; EX Q; A14-A16) The data logs also show two days later on October 25, 2015, Theroff electronically signed and dated the Mutual Agreement and more, including federal and state tax withholding forms, bank information for direct deposit, the associate handbook acknowledgement, and federal I-9 immigration form.[7] *Id.* Theroff admits these additional documents were completed at the store, although she could not remember the documents she completed and signed.

When describing her completion of her new hire paperwork on her computer at home, Theroff testified at the motion to compel arbitration hearing: "I was so excited. It was a great night." (TR 31:1-2) Now, to avoid the implications of the arbitration clause, Theroff simply wants to ignore all of the paperwork, agreements, and signatures she executed – both at home and at the store. However, contrary to the Panel's factual findings, Theroff did not deny signing the Agreement, nor did she dispute authorizing an

[7] *See also* EX. I, J, and K showing electronic signatures ***and handwriting*** made by Theroff on October 23, 2015.

agent to do so on her behalf. Instead, ***Theroff's own testimony*** demonstrates the following:

- Theroff used an internet link sent to her by Dollar Tree to review the onboarding documents on her home computer with her own assistive device/magnifier.
- Theroff does not remember all of the documents she accessed or read.
- Theroff electronically signed the onboarding documents in the store, and she never said she was unable to sign, or uncomfortable signing, them on the computer.
- Theroff was not prevented from using (and did not try to use) her magnifier.
- Theroff knew she was signing employment related documents but did not "register the depth of the documents."
- Theroff admitted completing tax, immigration, and direct deposit documents.
- Theroff trusted her supervisor to tell her what she was signing and did not feel she was being misled.

(TR 28:2-8, 30:10-31:15, 37:6-39:7, 42:12-43:16, 44:23-45:5, 51:19-52:7) As such, the Panel improperly manipulated and twisted Theroff's own testimony to avoid applying the Agreement's delegation clause.

POINTS RELIED ON

POINT ONE. THE TRIAL COURT ERRED IN CONSIDERING AND RULING ON PLAINTIFF'S CHALLENGES TO THE MUTUAL AGREEMENT BECAUSE THE PARTIES AGREED AN ARBITRATOR WOULD DECIDE ANY SUCH CHALLENGES, IN THAT THE MUTUAL AGREEMENT CONTAINS A CLEAR DELEGATION PROVISION DIRECTING AN ARBITRATOR TO DETERMINE ANY THRESHOLD ISSUES OF VALIDITY OR ENFORCEABILITY OF THE MUTUAL AGREEMENT.

Soars v. Easter Seals Midwest, 563 S.W.3d 111 (Mo. banc 2018)

State ex rel. Pinkerton v. Fahnestock, 531 S.W.3d 36 (Mo. banc 2017)

Chochorowski v. Home Depot U.S.A., 404 S.W.3d 220 (Mo. banc 2013)

Rent-A-Center West, Inc. v. Jackson, 561 U.S. 63 (2010)

Mo. Rev. Stat. § 432.230

9 U.S.C. § 1 *et seq*.

15 U.S.C. § 7001(a)

POINT TWO. EVEN ASSUMING THE TRIAL COURT COULD DISREGARD THE DELEGATION PROVISION, THE TRIAL COURT NONETHELESS ERRED IN DENYING DEFENDANTS' MOTION TO ENFORCE THE MUTUAL AGREEMENT BECAUSE IT IS A VALID CONTRACT UNDER MISSOURI LAW, IN THAT THERE EXISTED THE REQUISITE OFFER, ACCEPTANCE,

AND CONSIDERATION, AND THE MUTUAL AGREEMENT COVERS THEROFF'S CLAIMS.

Soars v. Easter Seals Midwest, 563 S.W.3d 111 (Mo. banc 2018)

State ex rel. Hewitt v. Kerr, 461 S.W.3d 798 (Mo. banc 2015)

State ex rel. Vincent v. Schneider, 194 S.W.3d 853 (Mo. banc 2006)

AT&T Mobility LLC v. Concepcion, 131 S.Ct. 1740 (2011)

Mo. Rev. Stat. § 432.230

9 U.S.C. § 1 *et seq*.

15 U.S.C. § 7001(a)

ARGUMENT

I. STANDARD OF REVIEW

This court reviews the denial of a motion to compel arbitration *de novo*, and gives no deference to the trial court's legal conclusions. *Soars v. Easter Seals Midwest*, 563 S.W.3d 111, 113 (2018); *Triarch Indus., Inc. v. Crabtree*, 158 S.W.3d 772, 774 (Mo. banc 2005); *Dunn Indus. Group, Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 428 (Mo. banc 2003). Accordingly, this court is "not bound by and need not defer to the trial court's legal conclusions." *Amond v. Ron York & Sons Towing*, 302 S.W.3d 708, 711 (Mo.App. E.D. 2009).

Additionally, pursuant to the this Court's analysis in *Brewer v. Missouri Title Loans*, the Federal Arbitration Act "requires enforcement of an agreement to arbitrate unless a party successfully asserts a defense concerning the *formation* of the agreement." 364 S.W.3d 486, 491 (Mo. banc 2012) (emphasis in original) (quoting *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1755 (2011)).

The party trying to establish the signing – electronically or otherwise – of a contract must only demonstrate the signing by a preponderance of the evidence. *Baker v. Baker,* 251 S.W.2d 31, 36 (Mo. 1952); *State ex rel. J.E. Jones Const. Co. v. Sanders,* 875 S.W.2d 154, 157 (Mo.App. 1994). This same standard is used in the arbitration agreement context. *See, e.g., Ashbey v. Archstone Prop. Mgmt., Inc.,* 785 F.3d 1320, 1323 (9th Cir. 2015); *Starace v. Lexington Law Firm,* 2019 WL 2642555 at *2 (E.D. Cal. 2019); *Stover-Davis v. Aetna Life Ins. Co.*, Case No. 1:15-CV-1938-BAM, 2016 WL 2756848 at *4 (E.D. Cal. 2016).

This Court should, therefore, analyze the record to determine if, under the factual record presented, there is a preponderance of evidence demonstrating that Theroff signed the contract. If so, then this Court should reverse the trial court's decision and direct it to order delegation of all issues to an arbitrator – including any formation and enforceability issues raised by Theroff.

II. POINT ONE. THE TRIAL COURT ERRED IN CONSIDERING AND RULING ON PLAINTIFF'S CHALLENGES TO THE MUTUAL AGREEMENT BECAUSE THE PARTIES AGREED AN ARBITRATOR WOULD DECIDE ANY SUCH CHALLENGES, IN THAT THE MUTUAL AGREEMENT CONTAINS A CLEAR DELEGATION PROVISION DIRECTING AN ARBITRATOR TO DETERMINE ANY THRESHOLD ISSUES OF VALIDITY OR ENFORCEABILITY OF THE MUTUAL AGREEMENT.

As an initial matter, once Dollar Tree demonstrated by a preponderance of the evidence that Theroff signed the contract, the trial court had no choice but to delegate all of Theroff's other challenges to the arbitrator. Here, as in *Soars v. Easter Seals Midwest*, 563 S.W.3d 111, 114 (Mo. banc 2018), the Mutual Agreement's "delegation clause was clear in evincing a manifest intention to delegate threshold questions of arbitrability to a neutral arbitrator." The trial court lacked authority to determine the validity of the Mutual Agreement, including formation issues. *Id.* at 115 n. 3. As both the U.S. Supreme Court and this Court have held, under the Federal Arbitration Act, courts must enforce delegation provisions like the one included in the Mutual Agreement – *i.e.*, contractual

language that gives an arbitrator exclusive authority to determine any threshold issues, including the validity or enforceability of the arbitration agreement – and cannot consider and rule on these issues themselves. The trial court's ignoring of the Mutual Agreement's delegation provision is alone a basis for reversing its decision.

A. The Mutual Agreement is Governed by the Federal Arbitration Act

The Federal Arbitration Act (the "FAA") governs arbitration contracts involving interstate commerce. 9 U.S.C. § 2. Arbitration is a matter of contract under the FAA. *Soars*, 563 S.W.3d at 114. There can be no dispute the Mutual Agreement relates to interstate commerce and is subject to the FAA, and, in the document, Theroff agreed that "Dollar Tree is engaged in transactions involving interstate commerce and that [her] employment is related to such interstate transactions." (LF 33; EX A p.3; A4) Further, the explicit language of the parties' Mutual Agreement states that the Federal Arbitration Act "govern[s] the interpretation and enforcement of the [Mutual] Agreement and [governs] all proceedings relating to [the Mutual] Agreement." (LF 31; EX A p.1; A2) Theroff does not dispute the FAA governs this issue. (LF 23, 31; Respondent's Brief at 26-29)

Importantly, the FAA evinces a national policy favoring the arbitration of disputes by compelling courts to enforce agreements to arbitrate, stay court proceedings, and compel arbitration. It makes private agreements to submit disputes to arbitration valid and enforceable and requires courts – both state and federal – to enforce arbitration agreements ***in the same manner*** that they enforce all other types of contracts. *See* 9 U.S.C. § 1 *et seq*.; *Volt Info. Scis., Inc. v. Bd. of Trustees*, 489 U.S. 468, 474 (1989);

Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 111 (2001); *McIntosh v. Tenet Health Sys. Hosps., Inc./Lutheran Med. Ctr.*, 48 S.W.3d 85, 88-89 (Mo.App. E.D. 2001); *Bunge Corp. v. Perryville Feed & Produce, Inc.*, 685 S.W.2d 837, 839 (Mo. banc 1985) (Missouri state courts have jurisdiction in matters involving the FAA).

In short, a key purpose of the FAA is to "place[] arbitration agreements on an equal footing with other contracts." *Rent-A-Center West, Inc. v. Jackson*, 561 U.S. 63, 67 (2010).

B. The Preponderance of the Evidence Demonstrates Theroff Signed and Accepted the Mutual Agreement

The record evidence directly leads to the conclusion that Theroff signed the Mutual Agreement. True, Theroff testified that she did not *remember* signing, reading or understanding any arbitration agreement. The preponderance of the evidence submitted by both parties, nonetheless, cannot support any finding other than Theroff electronically reviewed and signed the agreement at home on October 21, 2015, and at the store on October 23, 2015. Like the parties in *Soars, supra,* and *State ex rel. Pinkerton v. Fahnestock,* 531 S.W.3d 36 (Mo. banc 2017), who unsuccessfully attempted to circumvent the delegation provisions in their contracts, Theroff's similar attempt to circumvent the Mutual Agreement must fail.

Theroff affirmatively accessed Dollar Tree's CareerLaunch internet link to complete some onboarding paperwork (and to review the Mutual Agreement) *at her home* on October 21, 2015, Theroff then completed the remainder of the paperwork at the store two days later in the presence of Assistant Store Manager Swift. (LF 36-39, 62-63,

106-108; TR 37:11-38:1; EX B, D, Q; A10-A16, A19-A22) Specifically, on October 23, 2015, Theroff again was required to review the terms of the Mutual Agreement and electronically signed her name to the document. (LF 38 [¶13], 62-63 [¶4], 107 [¶9]; TR 37:11-38:1; EX B [¶9], D [¶4], Q; A12 [¶13], A15 [¶9], A19-A22) Theroff's actions demonstrate her clear "acceptance" of Dollar Tree's offer and the terms of the Mutual Agreement.

Importantly, Theroff's electronic signature is just as valid as a handwritten signature. The Mutual Agreement explicitly provides that an electronic signature by the employee would have the same force and effect as a manual signature. (LF 34; EX A p.4; A5) Regardless, both federal and state law provide full legal recognition and enforcement of electronic signatures. *See* Mo. Rev. Stat. § 432.230 ("A contract shall not be denied legal effect or enforceability solely because an electronic record was used in its formation."); Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001(a) (contract cannot be denied legal effect, validity, or enforceability solely because an electronic signature was used in its formation).

Consequently, courts routinely hold that an electronic signature, even merely "checking a box", is sufficient to bind an individual to a contractual agreement. *See, e.g.*, *Mead v. Moloney Secs. Co.*, 274 S.W.3d 537, 542-43 (Mo.App. E.D. 2008) (electronic signature was sufficient to form a binding and enforceable arbitration agreement) (citing 15 U.S.C. § 7001(a)(2)); *ADP, LLC v. Lynch*, 678 Fed. App'x 77, 80 (3d Cir. 2017) (employees bound to non-competition agreements where they checked a box that they read the document, ***even where they did not recall reading it***); *Meyer v. Uber Techs.*, 868

F.3d 66, 79-80 (2d Cir. 2017) (consumer who registered for Uber through smartphone application "unambiguously manifested assent" to an arbitration agreement in the Terms of Service by clicking a "Register" button).

Despite the validity of her electronic signature, Theroff attempts to evade the Mutual Agreement by claiming she did not read or understand the Mutual Agreement. (LF 49-50; TR 44:23-45:5; A17-A18) But such claim is not supported by the record. Again, the evidence shows Theroff opened and reviewed both the Mutual Agreement and "Arbitration FAQs" at home and at her convenience. (LF 106-108; EX Q; A14-A16) Moreover, when presented with the Mutual Agreement (and other hiring paperwork) a second time at the store, Theroff admits she understood she was signing documents related to her employment. (TR 44:23-45:5) Theroff testified that she did not remember what specific documents she reviewed and signed; she claims she "was just signing what I was told to" and it "just didn't register [with me] the depth of the documents that I may have been signing." (TR 44:23-45:5)

Regardless of Theroff's explanation as to why she did not remember reading the Mutual Agreement or realize its significance, this Court has recently confirmed the longstanding rule: "A signer's failure to read or understand a contract is not, without fraud or the signer's lack of capacity to contract, a defense to the contract." *Chochorowski v. Home Depot U.S.A.*, 404 S.W.3d 220, 228 (Mo. banc 2013) (citing *Robinson v. Title Lenders, Inc.*, 364 S.W.3d 505, 509 n. 4 (Mo. banc 2012)). "[A] party is deemed to have knowledge of the contents of any contract he signs." *Binkley v. Palmer*, 10 S.W.3d 166, 171 (Mo.App. 1999). It is well-settled in Missouri that "absent a showing

of fraud, a party who is capable of reading and understanding a contract is charged with the knowledge of that which he or she signs." *Id.* (citing *Gibson v. Adams*, 946 S.W.2d 796, 803 (Mo.App. E.D. 1997)); *see also Sanger v. Yellow Cab Co., Inc.*, 486 S.W.2d 477, 481 (Mo. banc 1972) ("The rule is that the one who signs a paper, without reading it, if he is able to read and understand, is guilty of such negligence in failing to inform himself of its nature that he cannot be relieved from the obligation contained in the paper thus signed, unless there was something more than mere reliance upon the statements of another as to its contents[.]") (internal quotations omitted); *Repair Masters Constr., Inc. v. Gary*, 277 S.W.3d 854, 858 (Mo.App. 2009) ("The failure to read a document prior to signing it is not a defense, and does not make a contract voidable, absent fraud."); *Resch v. Citimortgage, Inc.*, Case No. 1511-CC00344 (St. Charles Cnty. Cir. Ct. Aug. 12, 2015) (finding plaintiff's "allegation that she doesn't remember [signing the arbitration agreement] is not a sufficient basis to allow her to avoid her contractual obligation" and granting employer's motion to compel employment arbitration agreement).

Notably, Dollar Tree's Mutual Agreement has been upheld and enforced by numerous other courts – even when the employees involved claimed not to remember reading or signing their agreements. *See Herbert v. Dollar Tree Inc.*, Case No. 16-cv-14043 (E.D. Mich. June 8, 2017) (granting motion to compel arbitration even where plaintiff claimed he never read, signed, or assented to arbitration in any way); *Gonder v. Dollar Tree Stores, Inc.*, 144 F. Supp. 3d 522 (S.D.N.Y. 2015) (granting motion to compel arbitration even where plaintiff did not recall electronically signing the Mutual Agreement because "[a] mere assertion that one does not recall signing a document does

not, by itself, create an issue of fact as to whether a signature on a document is valid—especially in the absence of any evidence the document was fabricated"); *DeLeon v. Dollar Tree Stores, Inc.*, Case No. 3:16-cv-00767-CSH (E.D. Conn. Jan. 30, 2017) (granting motion to dismiss and compel arbitration finding that Dollar Tree's and employee's mutual promises to arbitrate were sufficient consideration); *Taylor v. Dollar Tree, et al.*, Case No. 3:16-cv-00002-TLS-JEM (N.D. Ind. Nov. 3, 2016) (same).

Theroff has presented absolutely no evidence of fraud or that she was mentally incapable of reading and understanding the contractual language. Accordingly, even if she chose not to carefully read and understand the terms of the Mutual Agreement before signing it, she was capable of reading and understanding the Mutual Agreement and is charged with knowledge of its contents. She therefore accepted Dollar Tree's offer.

In many cases with similar evidence presented, courts have found the employer met its burden of proving the employee electronically signed the document in question. For example, the U.S. District Court for the Eastern District of Missouri issued a decision in *Ranson v. Securitas Security Services USA, Inc. et al.*, Case No. 1:18-cv-105-SNLJ, 2018 WL 4593707 (E.D. Mo. Sept. 25, 2018). The court held:

> . . . there is no genuine issue of material fact as to "the ***making*** of the arbitration agreement." . . . Indeed, plaintiff does not refute that he signed the parties' arbitration agreement – he states only that he does not remember signing it, and does not recall or understand what it says. . . . This is insufficient, under Missouri law, to invalidate a contract. *Pinkerton v. Fahnestock*, 531 S.W.3d 36, 48 (Mo. 2017). . . . Moreover, [the

> employer] has stated by way of affidavit – unrefuted by plaintiff – that it requires, as a condition of employment, "all employees to agree to mutual arbitration of all disputes regarding the employment relationship." . . . In addition, there are no allegations of fraud, duress, or coercion that might otherwise attack the formation of the parties' arbitration agreement. Simply put, this Court finds plaintiff has not raised a genuine dispute of fact that would merit a trial on the issue of contract formation under 9 U.S.C. § 4.

Id. at *4 (emphasis in original). Almost identical facts and arguments present themselves in this matter.

In another nearly identical case, *Wallace v. Communications Unlimited, Inc.*, Case No. 4:18-cv-00503-JAR, 2019 WL 1001701 (E.D. Mo. 2019), an employer-defendant moved to compel arbitration of an employment-context arbitration agreement, but the plaintiff-employee opposed, arguing in part that the agreement had not been formed. *Id.* at *7. Specifically, the employee claimed there was no "acceptance" to create a valid contract because he never signed the agreement and his signature was forged. *Id.* The court held that the agreement's delegation clause covered issues of contract formation (including "acceptance") and that the employee did not directly challenge the agreement's severable delegation provision (but merely challenged the "contract as a

whole").[8] *Id.* at *8-9. Therefore, under the U.S. Supreme Court's guidance in *Rent-A-Center*, "the delegation provision preclude[d] the Court from considering the[] contract-formation argument [and] the Court [was] therefore bound to compel arbitration." *Id.* at *12 (citing *Rent-A-Center West, Inc. v. Jackson*, 561 U.S. 63 (2010)).

In *Smith v. Rent-A-Center, Inc.*, an employer presented affidavits showing "a comprehensive picture of the electronic application and onboarding processes", including the signing of the arbitration agreement. 2019 WL 3004160, at *5 (E.D. Cal. 2019). The applicant would create a private password, review separate screens in succession, and "the application cannot be submitted until all screens have been reviewed. One of the screens includes the arbitration agreement and a signature box that requires an entry to proceed." *Id.* The court also noted that the applicant needed to provide "highly personal information" including "address, education, and work history." *Id.* *5-6. Ultimately, the Court held that this satisfied the employer's burden of proving the employee signed the arbitration agreement. *Id.* at *6. Even the use of a simple "checkbox" to show acknowledgment and agreement has been found sufficient. *Id.* at *5 (citing *Tanis v. Southwest Airlines, Co., et al.*, 2019 WL 1111240 (S.D. Cal. 2019)). Dollar Tree has presented virtually identical evidence in this case, and the outcome should be the same.

[8] Certainly if an allegation of a forged signature still must go to the arbitrator for a determination, then Theroff's "I don't remember" and "I didn't realize" objections must also be delegated to an arbitrator.

In *GC Services Limited Partnership v. Little*, the evidence demonstrated the employee electronically checked the box to sign the agreement with an electronic signature. 2019 WL 2647690 at *3 (S.D. Tex. 2019). The employer showed that the only way to record an electronic signature is for the applicant to log into the system with a private password that the employer does not know. *Id*. The court held "although "we cannot know with 100% certainty that" it was (the employee) who checked the box to provide her electronic signature, the law and record evidence amply support the conclusion that (employer) has met its burden." *Id.* at 4.

Likewise, in *Moise v. Family Dollar Stores of New York, Inc.*, the employer submitted evidence showing the date and time when the employee acknowledged the arbitration agreement online. 2017 WL 2378193 (S.D.N.Y. 2017). Much like Theroff in this case, the employee in *Moise* denied ever entering into the agreement or receiving or reviewing it, and he argued the employer "could have provided even more information" to prove it. However, the court held the employer met its burden by explaining its process and submitting the documents from its system. *Id.*

If this Court applies the correct burden of establishing a signature, then Dollar Tree has met and exceeded the threshold. The court in *Stover-Davis v. Aetna Life Ins. Co.*, Case No. 1:15-CV-1938-BAM, 2016 WL 2756848 (E.D. Cal. 2016), articulated the application of the "preponderance of the evidence" standard well:

> Finally, while the Court has taken Plaintiff's assertions into account including that she "was unaware that the Employee Handbook" contained an Arbitration Agreement and that she does "not recall seeing or being

> provided with any form allowing [her] to elect to opt [out] of arbitration," under California law, Plaintiff cannot avoid the terms of the contract by asserting that she failed to read it before signing. Further, a preponderance of the evidence supports the conclusion that Plaintiff electronically signed the acknowledgement of the Arbitration Agreement. Regardless of whether Plaintiff recalls agreeing to the Arbitration Agreement in the Employee Handbook, the Court finds that Defendant has met its burden of establishing, by a preponderance of evidence, that a valid agreement to arbitrate exists between the parties.

Id. at *4-5 (internal citations omitted). In *Stover-Davis*, the court held the employer proved the employee electronically signed an arbitration agreement, even though the employee did not recall doing so, because the employer explained how the employee would have signed the agreement after accessing a website, creating a password, and completing other onboarding tasks throughout the process. *Id.*

Further, the U.S. District Court for the Western District of Missouri held that an e-signature was valid when "no reasonable factfinder could find that plaintiff had not e-signed himself, or given his daughter the required information such that he would be verified as an acceptable cosigner." *Lewis v. Navient Solutions, Inc.*, 2015 WL 10936762 at *4 (W.D. Mo. 2015). The *Lewis* decision notes that Mo. Rev. Stat. § 432.230, is Missouri's adoption of the Uniform Electronic Transactions Act ("UETA") and also cites *Holmes v. Air Liquide USA LLC,* 2012 WL 267194 at *3 (S.D. Tex. 2012), for the proposition that the burden of proving attribution under the UETA is lower and "the

inability to be 100% certain is not unique to electronic signatures" when the plaintiff could not recall electronically assenting to a contract term. In *Holmes*, the court found the employer had met its burden of proving the employee's signature because – as Dollar Tree has done here – the employer presented the steps the employee had to take to submit the signature. *Id.*

Indeed, there is a plethora of decisions holding employers meet their burden of proving an employee's electronic signature by presenting the exact type of evidence Dollar Tree has presented here. *Espejo v. S. California Permanente Med. Grp.*, 246 Cal. App. 4th 1047, 1062, 201 Cal. Rptr. 3d 318, 329 (Cal. App. 2016) (finding a plaintiff electronically signed an arbitration agreement where the defendant presented evidence explaining the security measures and steps the plaintiff had to go through in order to electronically sign); *Gonder v. Dollar Tree Stores, Inc.*, 144 F. Supp. 3d 522, 528 (S.D.N.Y. 2015) (finding employee electronically signed an arbitration agreement, using the same CareerLaunch program, where the employer explained when the employee accessed the program to create a unique password for signing the documents a few days before signing, and then identified when the document was signed); *Employee Resources Group, LLC v. Collins*, 2019 WL 2338500 (W. Va. June 3, 2019) (reversing a lower court's finding that an electronic signature was not valid because the employer met its burden of presenting the electronically signed document, and explaining the process of how it was signed by the employee that started with an email sent to the employee to get the process started); *Schrock v. Nomac Drilling, LLC*, 2016 WL 1181484 (W.D. Pa. Mar. 28, 2016) (holding electronic signature was valid where the employee also had to enter

the last four digits of his social security number); *Jackson v. Univ. of Phoenix, Inc.*, 2014 WL 672852 (E.D.N.C. Feb. 20, 2014) (rejecting employee's unsupported and speculative assertion that his electronic signature was fraudulent where the employer implemented security measures including employee-created passwords); *Cortez v. Ross Dress for Less, Inc.*, 2014 WL 1401869 (C.D. Cal. 2014) (holding, based on a preponderance of the evidence, that an electronic signature enforceable despite plaintiff's statement that she does not recall signing the document and instead only recalled being required to fill out an online survey because the evidence supported the conclusion that Plaintiffs did electronically sign the Dispute Resolution Agreement with the company using reasonable security procedures including a procedure by which first-time users may create a unique password to access the system); *Starace v. Lexington Law Firm,* 2019 WL 2642555 at *5-6 (E.D. Cal. 2019) (finding acceptance when plaintiff was provided the arbitration agreement via text message, and he assented to the terms of the Agreement by replying "Agree" to the text message).

Against the weight of this entire body of case law, Theroff has not presented (and cannot) any facts or argument overcoming Dollar Tree's proof of her signature by a preponderance of the evidence. "[W]e cannot know with 100% certainty" that a person is responsible for his or her electronic signature. *Holmes v. Air Liquide USA LLC*, 2012 WL 267194, at *3 (S.D. Tex. Jan. 30, 2012), *aff'd sub nom.*, 498 F. App'x 405 (5th Cir. 2012). "[T]he inability to be 100% certain is not unique to electronic signatures" because any party can argue the signature was forged. *Id.* However, the right evidence can show it is "highly unlikely" that someone else would have made the signature. *Id.*

The Court of Appeals Panel below ("the Panel") created a new loophole to circumvent *Pinkerton* (and, now, *Soars*). It refused to enforce the delegation clause based on an entirely new theory, *i.e.*, the parties did not "conclude" an agreement to arbitrate. In sum, the Panel attempted to distinguish between contract "conclusion" and contract "formation," but *Pinkerton* treats those terms as synonyms.

In *Pinkerton*, this Court – citing U.S. Supreme Court precedent[9] – explained that "a court must be satisfied that the parties have ***'concluded' or formed*** an arbitration agreement before the court may order arbitration to proceed according to the terms of the agreement" and that "[q]uestions concerning whether an arbitration agreement was ever concluded are, therefore, '***generally*** nonarbitral question[s].'" 531 S.W.3d at 49 (emphasis added). However, "both issues of formation and enforceability of arbitration clauses ***can be delegated*** to an arbitrator." *Id.* (emphasis added). *Pinkerton* did not distinguish between contract "conclusion" and contract "formation;" rather, they are treated as one and the same. Notably, this Court then instructed that all such issues be delegated to an arbitrator when there is a valid delegation clause.[10] Further, ***none*** of the

[9] The Panel and the parties all agreed that the Federal Arbitration Act, 9 U.S.C. § 1 *et seq*. ("FAA") applies to this case. Opinion at p.1, n.2.

[10] Interestingly, the plaintiff in *Pinkerton* actually argued he was attacking "formation" and such issues could not be delegated. But the Court found plaintiff's argument was targeted at conscionability, not formation; and the court held that, regardless, either or both issues would be delegated to the arbitrator. *Id.* (Plaintiff's "characterization of the

cases cited by the Panel distinguish between contract "conclusion" and contract "formation."[11] While *Granite Rock* and *Buckeye* used the term "concluded," a logical reading of those cases suggests the word "concluded" was merely used as a synonym to "formation" – not an entirely separate category or theory. *See* 561 U.S. at 299-303 n.9; 546 U.S. at 440 n.1. Courts even deem allegations of "forgery" to be formation disputes. *See, e.g.*, *Carter v. Affiliated Computer Servs., Inc.*, 2010 WL 5572078 (W.D. Ark. Dec. 15, 2010), *adopted by* 2011 WL 96494 (W.D. Ark. Jan. 11, 2011).

The Panel also misinterpreted *Pinkerton* as having identified "certain relevant factual disputes that are ***not*** formation issues," namely (i) whether a contract was signed by the obligor or (ii) whether the obligor had authorized an agent to sign her name. Opinion at 5 n.3 (citing *Buckeye*, 546 U.S. at 444 n.1) (emphasis in original). But ***nowhere*** did *Pinkerton* carve out such factual scenarios. Rather, *Pinkerton* clearly categorizes and treats those factual disputes as formation issues. Indeed, the U.S.

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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.").

[11] The Panel borrowed the following citations from *Pinkerton*: *Granite Rock v. Int'l Broth. of Teamsters*, 561 U.S. 287, 297 (2010); *Buckeye v. Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006); *Chastain v. Robinson-Humphrey Co.*, 957 F.2d 851 (11th Cir. 1992); *Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99 (3d Cir. 2000); *Sphere Drake Ins. Ltd. v. All American Ins. Co.*, 256 F.3d 587 (7th Cir. 2001).

Supreme Court in *Granite Rock* specifically referred to the very same factual scenarios as "formation disputes." 561 U.S. at 303 n.9 (citing *Buckeye*, 546 U.S. 444 n.1). Thus, the facts here – even if analogized to the identified "factual disputes" of whether Theroff signed the Agreement or authorized someone else to sign for her – evidence a "formation dispute" subject to delegation. Opinion at 5 n.3; *see infra* Section III.B (arguing this is not the situation here because Theroff does not deny signing the Agreement).

Further, none of the cases cited by the Panel involved a delegation clause, let alone a delegation clause that – like the one in the Mutual Agreement here – sends gateway issues of formation or existence to an arbitrator. *Pinkerton* distinguished prior cases that ***did not involve a delegation provision*** from the situation it was addressing because those cases were not pertinent or helpful. 531 S.W.3d at 50. Accordingly, to the extent the Panel relied on cases not dealing with delegation in order to ignore the delegation clause here, the Panel further misapplied *Pinkerton*. Indeed, *Pinkerton* cited *Granite Rock* and *Buckeye* for the proposition that formation issues (*i.e.*, whether a contract was "concluded") are generally nonarbitral questions, ***but then explained*** that is not the case where the parties have delegated such issues to the arbitrator. *Id.* at 49-50.

True, there must be a preponderance of evidence showing that a contract to arbitrate exists. The clear weight of the evidence demonstrates that such a contract and delegation clause exists here. None of the linguistic gymnastics by Theroff or by the Panel should have resulted in avoidance of the delegation clause.

C. The Mutual Agreement Contains an Enforceable Delegation Provision That Should Be Followed Pursuant to United States Supreme Court and Missouri Supreme Court Authority

In *Rent-A-Center West, Inc. v. Jackson*, the U.S. Supreme Court enforced a delegation provision in an employment-context arbitration agreement. *Id.* at 70-72. There, the plaintiff brought an employment discrimination claim against his former employer, who moved to compel arbitration pursuant to 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 provision stating ***the arbitrator*** would have exclusive authority to resolve disputes over whether the agreement was enforceable, ***including whether any or all of the agreement was void***. *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 68-69 (citations omitted). This is because "[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.

This Court has expressly acknowledged this *Rent-A-Center* holding. *See Soars,* 563 S.W. 3d at 114 ("Here, the Agreement's delegation clause was clear in evincing a manifest intention to delegate threshold questions of arbitrability to a neutral arbitrator, and is identical to the provision at issue in Rent-A-Center."); *State ex rel. Pinkerton,* 531 S.W.3d at 50 (acknowledging the U.S. Supreme Court's decision in *Rent-A-Center* that "a delegation provision is an additional, severable agreement to arbitrate threshold issues that is valid and enforceable unless a specific challenge is levied against the delegation

provision") (attached as A30-A48); *Baker v. Bristol Care, Inc.*, 450 S.W.3d 770, 774 (Mo. banc 2014).

Importantly, the U.S. Supreme Court clarified that such delegation provisions are severable – in other words, a delegation provision can be valid irrespective of the validity of the larger agreement in which it appears. 561 U.S. 63, at 70. That means that when a plaintiff challenges the enforceability of the contract in its entirety, without specifically challenging the delegation provision, arbitration is appropriate. *Id.; Pinkerton*, 2017 WL 4930289, at *10-11. Indeed, in *Rent-A-Center*, arbitration was appropriate where the plaintiff challenged the unconscionability of the arbitration agreement (but made no specific challenge to the delegation provision). 561 U.S. at 66. This is true even where "the underlying contract is itself an arbitration agreement" (as here and as in *Rent-A-Center*) versus, for example, a commercial contract that also contains an arbitration provision. *Id.* at 71-72 ("Application of the severability rule does not depend on the substance of the remainder of the contract.").

The parties' incorporation of the JAMS Rules into the Mutual Agreement here unequivocally demonstrates an intent to arbitrate the threshold issue of arbitrability. In *Pinkerton*, this Court made clear that incorporating the AAA Rules into an arbitration agreement – *i.e.*, as the parties did here with the JAMS Rules – meant that issues of contract formation ***must be decided by the arbitrator, not the court***. *Pinkerton*, 2017 WL 4930289, at *8-9 ("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.")

(emphasis added); *see also Fallo v. High-Tech Inst.*, 559 F.3d 874, 877-78 (8th Cir. 2009) (holding that an arbitration agreement's incorporation of AAA rules requiring arbitrator to decide the threshold issue of arbitrability was a clear and unmistakable intent to arbitrate the question of arbitrability). The factual allegations of *Pinkerton* are remarkably on point here. In *Pinkerton*, the plaintiff argued that the arbitration agreement at issue was invalid as a whole because there was no "meeting of the minds" as to arbitration because "its terms [were] incomprehensible" – specifically that the print was "too small as to be virtually unreadable." 2017 WL 4930289, at *11. This Court ruled that because such challenge was to the agreement as a whole, not to the delegation provision specifically, the delegation provision was valid and enforceable, and therefore the circuit court did not err in ordering the parties to arbitrate the threshold issue of arbitrability. *Id.* at *12.

Theroff's attacks to the agreement as a whole do not challenge the delegation clause specifically. Even if she attempts to assert otherwise to this Court, she did not specifically challenge the delegation clause before the circuit court. Rather, she challenged the Mutual Agreement as a whole, merely arguing she did not "accept" or sign the agreement. (LF 89) Theroff's broad challenge to the Mutual Agreement is similar to the plaintiff's argument in *Ellis v. JF Enterprises, LLC*. 482 S.W.3d 417, 423 (Mo. 2016). There, the plaintiff challenged a sales contract (and the arbitration clause therein) as violating the Missouri Merchandising Practices Act and argued that if the overarching contract failed, the arbitration clause therein also failed. *Id.* at 419. Nonetheless, the Missouri Supreme Court ordered arbitration be compelled and litigation

stayed because the plaintiff raised the very same challenge to the arbitration clause that she raised against the overarching contract and "such end-runs around section 2 of the FAA have been directly—and repeatedly—rejected by the Supreme Court … and this Court is bound to follow those decisions." *Id.* at 419, 424.

Similarly here, Theroff claims that – if she does not remember signing the overarching Mutual Agreement – then she never accepted the delegation clause. As Theroff concedes, after Defendants asserted the validity of the delegation clause and incorporation of the JAMS Rules, she continued to challenge her acceptance of the Mutual Agreement ***as a whole***. She did not identify any specific challenge to the delegation provision; rather, she continually repeated the argument that if no overarching contract was formed, then no delegation provision therein was formed. These challenges are not specific to the delegation clause. *See id.* at 424 ("Ellis' argument that section 301.210 renders the arbitration agreement without consideration is not a 'discrete challenge' to the arbitration agreement because it requires the court to determine whether the sales contract is void in order to determine whether to enforce the arbitration agreement."); *Rent-A-Center*, 561 U.S. at 71 (even where "claimed basis of invalidity for the contract as a whole applies equally to the agreement to arbitrate within the contract, … the basis of challenge [must] be directed specifically at the agreement to arbitrate before the court will intervene"). Accordingly, Theroff failed to specifically challenge the delegation provision itself, and the threshold issue of arbitrability must be sent to the arbitrator.

Nevertheless, even if *arguendo* Theroff's challenges were directed specifically to

the delegation clause, the mutuality of obligation in the severable delegation clause provides the necessary consideration (in addition to the consideration provided by Dollar Tree Stores, Inc.'s offer of initial employment). As this Court made clear in *Soars*, the circuit court must direct this dispute (including any challenges to the arbitration agreement) to an arbitrator for resolution. Importantly, Theroff conceded in her Suggestions in Opposition to Transfer filed with this Court that the Court's eventual *Soars* decision would clarify the issues involved in this appeal.

Theroff's arguments here that the arbitration agreement as a whole was unreadable (due to her vision impairment) are equally unavailing because she did not challenge the delegation provision specifically (not to mention the fact that she opened and reviewed the document at home where she had all of the tools necessary to read it). The delegation provision in the Mutual Agreement is very similar to those provisions enforced by *Rent-A-Center, Soars* and *Pinkerton*. The Mutual Agreement states under the heading "Arbitration Procedures" that arbitration must be held in accordance with the JAMS Employment Arbitration Rules & Procedures ("the JAMS Rules"). (LF 32; EX A p.2; A3) The Mutual Agreement then provides internet address links to two websites where the JAMS Rules can be accessed, including the JAMS website and the Dollar Tree arbitration website. (LF 32; EX A p.2; A3) According to Rule 11(b) of the JAMS Rules, arbitrability disputes – including a dispute as to whether the agreement is valid in the first place or a dispute over the formation of the agreement – are to be decided by an arbitrator:

> Jurisdictional and arbitrability disputes, ***including disputes over the***

> ***formation, existence, validity, interpretation or scope of the agreement*** under which Arbitration is sought, and who are proper Parties to the Arbitration, ***shall be submitted to and ruled on by the Arbitrator.*** Unless the relevant law requires otherwise, the Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter.

See JAMS Employment Arbitration Rules & Procedures, https://www.jamsadr.com/rules-employment-arbitration/#eleven (emphasis added).

Here, Theroff challenged the validity of the Mutual Agreement ***as a whole*** and did not attack any specific provision. (LF 40-48, 83-90) Accordingly, any preliminary question as to validity of the Mutual Agreement must be determined by an arbitrator, not a circuit judge. *See id.; Dotson v. Dillard's, Inc.*, 472 S.W.3d 599, 608 (Mo.App. W.D. 2015), as modified (Sept. 1, 2015) ("[B]ecause the delegation provision clearly and unmistakably provides for the arbitrator to determine arbitrability, absent a challenge to the validity of the provision, itself, it is enforceable. And, in the absence of a specific challenge to the validity of the delegation provision, 9 U.S.C. § 2, as well as the U.S. Supreme Court's decision in *Rent–A–Center*, required the circuit court to treat the delegation provision as valid.").

Accordingly, as in *Soars* and *Pinkerton*, the parties should be ordered to proceed to arbitration on the threshold issue of whether the Mutual Agreement, as a whole, is valid. Because the trial court summarily denied Defendants' arguments relative to delegation provision and proceeded with determining the validity of the Mutual Agreement, its decision should be reversed.

III. POINT TWO. EVEN ASSUMING THE TRIAL COURT COULD DISREGARD THE DELEGATION PROVISION, THE TRIAL COURT NONETHELESS ERRED IN DENYING DEFENDANTS' MOTION TO ENFORCE THE MUTUAL AGREEMENT BECAUSE IT IS A VALID CONTRACT UNDER MISSOURI LAW, IN THAT THERE EXISTED THE REQUISITE OFFER, ACCEPTANCE, AND CONSIDERATION, AND THE MUTUAL AGREEMENT COVERS THEROFF'S CLAIMS.

When Dollar Tree first appealed to the Court of Appeals and then applied for transfer to this Court, the *Soars* decision had not yet been issued. In light of that case, however, this Court should rather easily resolve this appeal on Dollar Tree's Point I and need not reach this Point II (although guidance to the arbitrator on these formation and enforceability issues could prove helpful for the arbitrator on any threshold arbitrability issues raised by Theroff once this matter has been delegated).

Nonetheless, even ignoring the delegation provision and assuming the trial court had authority to rule on the validity of the Mutual Agreement (though it did not), the trial court erred in denying Defendants' Motion because the Mutual Agreement is a valid and enforceable contract under Missouri law. In deciding whether to stay a lawsuit pending arbitration, 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 Home Prods. Ltd.*, 193 S.W.3d 401, 405 (Mo.App. E.D. 2006) (citation omitted). The "party resisting arbitration bears

the burden of proving that the claims at issue are unsuitable for arbitration." *Id.* (quotations and citation omitted). Theroff cannot meet her burden because a valid agreement exists and Theroff's claim falls squarely within the scope of that agreement. Accordingly, the trial court's decision should be reversed.

A. The Mutual Agreement is Enforceable Because It Contains the Requisite Offer, Acceptance, and Consideration

State law contract principles govern the threshold issue of whether a valid arbitration contract exists. *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 856 (Mo. banc 2006). Importantly, the deference to state law on questions of contract formation is not unlimited, as a key purpose of Congress enacting the FAA was to overcome deeply-entrenched judicial hostility toward arbitration contracts. *See AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1745 (2011). Thus, the FAA defers only to principles of state law that apply generally to all contracts. *See* 9 U.S.C. § 2 (providing that all arbitration promises "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract"). In other words, state law principles that purport to apply special rules for the formation of contracts containing promises to arbitrate are preempted by, and must be disregarded under, the FAA. *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) (any "state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with" section 2 of the FAA); *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 281 (1995) (states may not decide a contract is fair enough to enforce all of its basic terms but not fair enough to enforce its arbitration clause).

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). Each of these essential elements exists here.

While the circuit court's one sentence order denying Defendants' Motion to Compel Arbitration fails to provide any rationale for the ruling, its feelings on the issue are evident from its statements on the record. At the outset of the hearing on Defendants' motion, when defense counsel began explaining the parties were before the court to address an arbitration agreement in the context of a Missouri Human Rights Act case, the following exchange occurred:

> MR. PAUL: … Clearly it covers all claims that arise from the employment relationship during the hiring process, during the employment relationship, or with regard to termination in the employment relationship. All of the parties are covered.
>
> THE COURT: So there's no rights under the Human Rights Act anymore then?
>
> MR. PAUL: I'm sorry?
>
> THE COURT: There's no rights under the Human Rights Act if it has to be arbitrated?
>
> (TR 6:3-12)

This exchange suggests the circuit court harbored the very hostility towards arbitration agreements that the FAA sought to counteract. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (FAA's purposes were "to reverse

the longstanding judicial hostility to arbitration agreements" and "place arbitration agreements upon the same footing at other contracts"); *State ex rel. Reg'l Convention & Sports Complex Authority v. Burton*, 533 S.W.3d 223, 226 (Mo. 2017) (FAA evinces a liberal policy favoring arbitration agreements, thus "any doubts as to arbitrability are to be resolved in favor of arbitration") (citing *Dunn Indus. Grp., Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 427 (Mo. banc 2003)).

1. Dollar Tree Made an "Offer" to Theroff

There can be no dispute that a clearly communicated "offer" was made to Theroff. To be valid, an offer must be sufficiently definite in its terms and must be communicated to the offeree. *Property Assessment Review, Inc. v. Greater Mo. Builders, Inc.*, 260 S.W.3d 841, 846 (Mo.App. E.D. 2008). Where the terms of a mandatory arbitration program are clear and unambiguous, the trial court should look to the language of the contract alone to determine the parties' intent. *Dunn Indus. Group, Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 428-29 (Mo. banc 2003) (enforcing mandatory arbitration where agreement language was "clear" and "unambiguous").

On or about October 21, 2015, Theroff submitted a hand-written application to work as a seasonal sales associate at Dollar Tree's Jefferson City Store. (LF 8 [¶14], 49 [¶5]; TR 28:16-20; A17 [¶5], A19 [¶3]) Following an in-person interview and job offer from the Assistant Store Manager Kayla Swift that day, on October 21, 2015, Dollar Tree sent Theroff an email to her personal email address that contained a link to onboarding documents to be completed on her home computer (or any other computer with internet access). (LF 36-39; EX B, EX M; TR 29:3-30:23; A10-A16) One of the documents

contained in the paperwork was the Mutual Agreement. (LF 36-39, 106-108; EX B; A10-A16) Indeed, Theroff admits she received Dollar Tree's CareerLaunch internet link to onboarding documents and used the link to complete some of the paperwork from her home computer the evening of October 21, 2015. (TR 30:12-31:15, 37:6-10) The record evidence further shows (contrary to Theroff's claims at the evidentiary hearing) that Theroff even ***opened and reviewed the Mutual Agreement and Arbitration FAQs at home using her home computer***. (LF 106-108; EX Q; A14-A16) In short, Theroff was presented with and given an opportunity to review a copy of the Mutual Agreement, through which Dollar Tree offered to have covered workplace disputes resolved through arbitration, in accordance with the specific terms of the agreement. (LF 31-35; EX A; A2-A6) Additionally, Dollar Tree offered Theroff employment in exchange for her acceptance of the terms in the Mutual Agreement; in fact, this "offer of employment to [Theroff was] ***conditioned on*** and made in consideration of this [Mutual] Agreement." (LF 34; EX A p.4; A5) (emphasis added) These offers were definite in form and clearly and unambiguously communicated to Theroff.

2. Theroff Accepted the Mutual Agreement with an Electronic Signature

As described more fully above in Point I and Section II.B., Theroff affirmatively accessed Dollar Tree's CareerLaunch internet link to complete some onboarding paperwork (and to review the Mutual Agreement) ***at her home*** on October 21, 2015, Theroff then completed the remainder of the paperwork at the store two days later in the presence of Assistant Store Manager Swift. (LF 36-39, 62-63, 106-108; EX B, D, Q; TR 37:11-38:1; A10-A16, A19-A22) Specifically, on October 23, 2015, Theroff again was

required to review the terms of the Mutual Agreement and electronically signed her name to the document. (LF 38 [¶13], 62-63 [¶4], 107 [¶9]; EX B [¶9], D [¶4], Q; TR 37:11-38:1; A12 [¶13], A15 [¶9], A19-A22) Theroff's actions demonstrate her clear "acceptance" of Dollar Tree's offer and the terms of the Mutual Agreement.

For all of the reasons discussed above in Section II.B., and pursuant to the legal authority laid out therein, there should be no doubt that the preponderance of the evidence demonstrates Theroff signed the Mutual Agreement and accepted its terms – even if she does not remember reviewing or signing the document. *See* the extensive list of cases cited, quoted and discussed in Section II.B., *supra.*

Accordingly, Dollar Tree has sufficiently proven the second contractual element of "acceptance."

3. The Mutual Agreement is Supported by Adequate Consideration

Adequate consideration to support contractual promises exists where the parties exchange mutually binding promises. *See, e.g., Morrow v. Hallmark Cards, Inc.*, 273 S.W.3d 15, 25 (Mo.App. W.D. 2008) (consideration satisfied by mutual promises to do or refrain from doing something); *Frye v. Speedway Chevrolet Cadillac*, 321 S.W.3d 429, 438 (Mo.App. W.D. 2010) (contract that contains mutual promises imposing some legal duty or liability on each promisor is supported by sufficient consideration to form a valid, enforceable contract). Consideration also exists where one party agrees to transfer or give up something of value to the other party. *Morrow*, 273 S.W.3d at 25.

Consideration is satisfied here because Theroff, Dollar Tree, and Harper mutually agreed to waive their right to the courts by submitting all employment-related claims to

final and binding arbitration. (LF 31-35, 72-78; EX. A, F; A2-A6, A23-A29) The Mutual Agreement states: "The Parties agree to the resolution by arbitration of all claims … arising out of or related to Associate's employment … that Dollar Tree may have against Associate or that the Associate may have against … Dollar Tree [or its] employees." (LF 31; EX A p.1; A2) As such, the agreement unambiguously applies to Theroff ***and*** Dollar Tree (and its other employees, like Harper), making arbitration the required and exclusive forum for resolving employment-related disputes, regardless of which party asserts a claim against the other. (LF 31; EX A p.1; A2) Similarly, language throughout the Mutual Agreement consistently imposes mutual and identical obligations on both Theroff and Dollar Tree, and both signed the document. (LF 31-35; EX A; A2-A6)

The mutuality of these provisions is exactly the type of consideration recognized by Missouri courts to establish enforceability. *See Soars, 563 S.W.3d at 116-117* (explaining that a "contract consisting of mutual promises to undertake some legal duty or liability between parties is a bilateral contract" and that a "mutual promise to arbitrate any threshold questions of arbitrability which may arise. . . . is bilateral in nature and consideration is present"); *State ex rel. Hewitt v. Kerr*, 461 S.W.3d 798, 808-9 (Mo. banc 2015) (employment arbitration agreement was supported by adequate consideration where both employee and organization were bound to arbitration); *Thomas v. Dillard's*, 2010 WL 2522742, *3 (E.D. Mo. June 16, 2010) (applying Missouri law and compelling arbitration where the agreement of both parties to arbitrate employment-related claims is sufficient mutual obligation for enforceability); *McIntosh*, 48 S.W. 3d at 89 (enforcing arbitration agreement where employee signed mutual arbitration clause ***agreeing, along***

with company, to submit claims to arbitration).

Moreover, further consideration is evidenced by Dollar Tree's agreement to bear all of the extra arbitration costs in exchange for Theroff's agreement to give up her right to trial in court for mandatory, binding arbitration. In the Mutual Agreement, Dollar Tree has relieved Theroff of any financial burden by promising to pay the entire difference 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. (LF 33; EX A p.3; A4) Such additional benefit to Theroff is further evidence that the Mutual Agreement is supported by adequate consideration.

Finally, an initial offer of employment – even "at-will" employment – in exchange for a promise to arbitrate claims arising from such employment should provide the necessary consideration for an enforceable contract. As this Court explained in *Soars*:

> . . . The difference in consideration analysis between an offer of continued at-will employment and an offer of initial at-will employment is paramount. When continued at-will employment is offered in exchange for a signed arbitration agreement, at the time of the offer the employee already enjoys the rights and expectations that come with the employer-employee relationship. However, before the employee was hired, an employer-employee relationship did not exist. At the point of hiring, the employer confers the benefit of employment upon the employee, and it is axiomatic that with the benefit of employment comes a bundle of legal rights and expectations to which the employee was not entitled prior to the handshake.

. . .

563 S.W.3d at 115 n. 3.[12]

In sum, the Mutual Agreement meets all elements for an enforceable contract under Missouri law and Theroff is bound by its terms.

B. The Mutual Agreement is Enforceable Because Theroff's Claim Falls Squarely within Its Provisions

Theroff's claim clearly constitutes an employment-related dispute and falls squarely within the scope of the Mutual Agreement that covers "all claims or controversies …, past, present or future, that can be raised under applicable federal, state, or local law, arising out of or related to Associate's employment (or its termination), … includ[ing] … discrimination." (LF 31; EX A p.1; A2) The U.S. Supreme Court has held that arbitration should be ordered "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *AT&T*

[12] Of course, in that same footnote 3, this Court made clear that any decision regarding sufficient consideration or validity of the contract must be delegated to the arbitrator when delegation is appropriate: ". . . the question of an arbitration agreement's validity as a whole is not for this Court to decide when the delegation provision is valid and enforceable. There would be no purpose behind a delegation provision if the opposite were true. This Court has held formation issues may be delegated to arbitration if a valid delegation provision exists." The same result, *i.e.*, delegation to an arbitrator for all issues – including any threshold formation or enforceability issues – should be ordered in this case. *See, supra*, Dollar Tree's Point One, Section II.

Techs., Inc. v. Comms. Workers of Am., 475 U.S. 643, 650 (1986) (citation omitted). The Mutual Agreement clearly encompasses Theroff's claim. No other interpretation is possible. *See Hewitt*, 461 S.W.3d at 814 (agreement to arbitrate "any dispute which may arise" between employee and employer encompassed plaintiff's MHRA discrimination claim).

Because Theroff's claim falls squarely within the scope of a valid arbitration agreement, the trial court's decision declining to compel arbitration should be reversed.

C. Theroff Cannot Avoid the Mutual Agreement by Naming Individual Defendant Janie Harper

As a final matter, Theroff does not avoid application of the Mutual Agreement to the extent her claim is also against Janie Harper as an individual defendant. Harper is clearly contemplated by the Mutual Agreement, which unequivocally provides for the arbitration of any employment-related dispute arising between Theroff and ***Dollar Tree's "officers, directors, employees, or agents in any capacity."*** (LF 31; EX A p.1; A2) Theroff agreed to arbitrate all employment-related claims she may have against this class of individuals; Harper, as a supervisory employee of Dollar Tree, belongs to such class. Theroff seeks to hold Harper liable as an agent or employee acting in the interests of Dollar Tree. (LF 7 [¶5 (alleging Harper was employed by Dollar Tree as a store manager), ¶8 (alleging Dollar Tree acted through certain managers, officers, employees, servants, and/or agents, including Harper)]).

Despite that Harper is not a ***signatory*** to Theroff's Mutual Agreement, she can still

enforce the agreement against Theroff. As this Court held in *Hewitt v. Kerr*,[13] 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."). In *Hewitt*, the court found that non-signatories to an arbitration agreement could enforce the agreement against a plaintiff where the plaintiff alleged both the employer-signatory and the non-signatory defendants collectively discriminated against him under the MHRA. *Id.* Similarly, here, Theroff claims that Dollar Tree and Harper collectively discriminated against her on the basis of her disability, and the allegations as brought against each defendant here are indistinguishable. (LF 7 [¶¶5, 8]).

Moreover, Harper signed her own Mutual Agreement likewise agreeing to be bound to Dollar Tree's arbitration program (and to arbitrate any claims she may have against Dollar Tree or its employees, which would include Theroff). (LF 72-78; EX F; A23-A29) Theroff's agreement with Dollar Tree – especially when considering Harper's parallel agreement – fully encapsulates Theroff's joint claims against both Dollar Tree

[13] In *Soars, supra*, this Court reversed and directed the trial court to stay the case and order the parties (including the claimant and both the employer entity and the individual defendant, Charity Twine) to arbitration to determine threshold issues of arbitrability. The same result should occur in this case.

and Harper brought in the Petition.

Finally, as a party contemplated by the terms of the Mutual Agreement, Harper is also a ***third-party beneficiary*** to the Mutual Agreement who can enforce the agreement against Theroff. *See Peters v. Employers Mut. Cas. Co.*, 853 S.W.2d 300, 301 (Mo. banc 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"); *see also Taylor v. Dollar Tree et al.*, Case No. 3:16-cv-00002-TLS (N.D. Ind. Nov. 3, 2016) (examining Dollar Tree's Mutual Agreement and finding non-signatory individual defendant could enforce the agreement against the plaintiff as a third-party beneficiary).

Accordingly, Theroff's claim against Harper also falls squarely within the scope of the valid arbitration agreement, and the trial court's decision declining to compel arbitration with regard to the joint claims against both Dollar Tree ***and Harper*** should be reversed.

CONCLUSION

For the forgoing reasons, Dollar Tree and Harper respectfully ask this Court to reverse the decision of the trial court and remand this case with instructions to compel Plaintiff's claims to arbitration and to stay the underlying litigation in the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above pleading was served this 6th day of August 2019, via the Court's ECF filing system upon: Timothy W. Van Ronzelen (MO #44382) and Shelly A. Kintzel (MO #55075), COOK, VETTER, DOERHOFF & LANDWEHR, P.C., 231 Madison, Jefferson City, Missouri 65101, Telephone: 573-635-7977, Facsimile: 573-635-7414, Emails tvanronzelen@cvdl.net and skintzel@cvdl.net.

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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 13,757 words (as generated by Microsoft Word), which is in compliance with the 31,000 word count allowed by Rule 84.06(b).

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