IN THE MISSOURI SUPREME COURT

No. SC97235

NINA THEROFF

Plaintiff/Respondent,

v.

DOLLAR TREE STORES, INC., et al.,

Defendants/Appellants

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

and

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

RESPONDENT'S SUBSTITUTE BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Missouri Supreme Court Rules

Other

STATEMENT OF FACTS

Respondent provides her own statement of facts pursuant to Rule 84.04(f). Respondent also objects to Appellants' statement of facts to the extent that it contains multiple factual assertions followed by a string of citations to the record, rather than a citation to the record for each factual statement as required by Rule 84.04(c).[1]

On October 21, 2015, Nina Theroff ("Theroff") went to the Dollar Tree store in Jefferson City, Missouri, with her husband. (Tr. 28:16-22). She was looking for a job, and brought an application she had completed at home. (Tr. 28:16-25, 48:1-11).

Theroff was declared legally blind in October 2013 due to one or a combination of two conditions: retinitis pigmentosa and episcleritis. (Tr. 26:23-27:5; L.F. 49). She has a certified guide dog named Tetra. (Tr. 26:16-22). Theroff described her disability at the time she applied at Dollar Tree as:

> I see things through tunnels. It's like holding straws up to your eyes. You essentially can't see up or below. With the depth perception, I can't see stairs. Where people see stairs, I see a hallway, and then I tumble down them.

(Tr. 27:9-19). At that time, she also "couldn't see close up things that are small," including a normal computer screen, without the aid of an assistive device. (Tr. 27:20-

[1] Although there are multiple instances, an example of this improper citation format can be found on pages 12-13, 13-14, 17-18, and 19 of Appellants' Brief. Appellants list several purported factual statements in a bullet point list, and then provide a string cite of multiple references to the record.

28:12). She needed an assistive device to fill out the Dollar Tree job application at home. (Tr. 28:23-29:2).

When Theroff went to Dollar Tree to turn in her application, she spoke with Kayla Swift, the manager on duty. (Tr. 29:3-7, 56:14-57:19, 58:6-9). Swift reviewed Theroff's application, which stated that she had left her last job because of her disability. (Tr. 29:8-15, 58:10-19, 88:4-89:1; Ex. G). Theroff and Swift discussed the nature of Theroff's disability and that Theroff used various assistive devices.[2] (Tr. 29:8-30:9; L.F. 49). Swift assured Theroff that Dollar Tree "does not discriminate" and described other employees with disabilities, including a man with a wooden leg, to Theroff.[3] (Tr. 29:17-30:1). Theroff said her only concern with being able to do the job was whether she would be able to see the cash register display. (Tr. 30:2-9). Theroff and Swift looked at register 3 and determined that it was big enough that Theroff could see it. (Tr. 30:2-9).

Swift hired Theroff on the spot. (Tr. 30:10-12, 60:12-15). Swift told Theroff that she would receive an email with hiring paperwork and that she could finish the paperwork with Swift in the office later.[4] (Tr. 30:12-17). Swift testified that the entire process (including approximately 75 different screens, plus review of the arbitration

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[2] Swift denied that she and Theroff discussed Theroff's disability. (Tr. 57:22-58:5, 88:1-3). However, she admitted that the disability is disclosed on the application, and that she doesn't actually remember what happened that day. (Tr. 87:16-18, 88:4-89:1, 90:13-16). The trial court apparently resolved this factual dispute in favor of Theroff.

[3] Harper confirmed that Dollar Tree had had an employee who was "missing part of his leg." (Tr. 111:22-112:12). This supports Theroff's version of events that she learned about this through discussion with Swift.

[4] Some of the paperwork could be completed anywhere with a computer, and some had to be completed with the manager in the office. (Tr. 75:25-76:21). The final steps could only be completed by the manager. (Tr. 75:25-76:21).

agreement and Employee Handbook) would take 30 to 45 minutes from start to finish.[5] (Tr. 82:2-11, 89:2-12). Theroff received the email and completed some "quick and simple" paperwork at home with the aid of her assistive devices. (Tr. 30:25-31:15, 52:15-23).

Theroff returned to Dollar Tree on the morning of October 23. (Tr. 31:16-19; L.F. 49). Swift was there again. (Tr. 31:20-21). Swift took Theroff into the office and said she needed to complete more computer paperwork. (Tr. 31:23-24). Theroff "kind of froze a little bit" because all she had with her was her "handheld little magnifier[.]"[6] (Tr. 31:23-32:2, 42:18-23).

> [Theroff] told Kayla [Swift] it would take quite some time for me to manipulate the computer using the handheld. And she said, 'Oh, that's fine.' She said, 'I can help you. It's confusing anyway.' And she says, 'I'll just tell you when you

[5] This process includes reading the Associate Handbook, reading the arbitration agreement and its FAQs, and completing forms including entry of bank account and tax information. (Tr. 89:2-19; Ex. N). The arbitration agreement itself is five pages. (L.F. 31-35). Swift agreed that Dollar Tree's attorney had examined her for approximately 30 minutes just to describe the process – without reading the handbook, arbitration agreement, or looking at each of the 75 screens. (Tr. 89:2-19).

[6] Swift denied that Theroff indicated any problem with reading the screen or completing the paperwork, and that Theroff only "said she had bad eyesight a little bit, but she said she could read the screen perfectly fine." (Tr. 83:2-16). However, Swift later testified that she didn't remember Theroff actually saying *that*, but rather that she did not remember Theroff saying she could *not* see the screen. (Tr. 86:24-87:18). Swift admitted that she cannot remember what Theroff said on October 23, 2015. (Tr. 87:16-18, 90:13-16). To the extent any factual dispute remains after this later testimony, the trial court apparently resolved it in favor of Theroff.

> need to hit enter or whatever necessary you need to hit enter.[']

(Tr. 32:2-7).[7] Theroff sat to the right of the keyboard and Swift sat to the left of the keyboard.[8] (Tr. 33:1-4). It took less than 30 minutes to complete the paperwork. (Tr. 33:5-9). Swift did not read or describe the documents to Theroff, but rather,

> [i]t was – When we were going through it, she would say, 'I need your address here. I need your phone number here, your name here. This is a standard document. Just hit enter. It's just normal employment things.'

(Tr. 33:10-18; *see also* L.F. 50). When asked whether information was typed in by Theroff or Swift, Theroff testified:

> It depended on the length of the answer probably, because she said – when I had to type my name, she knew it, so it was just quicker to do it. But if it was something more lengthy like a phone number or an account number or something of that

[7] Swift agreed that she had sat in the office with Theroff, but denied that Theroff had asked for help or that Swift had entered any information in or helped Theroff. (E.g., Tr. 69:9-71:4, 72:17-21, 84:21-85:2). However, Swift later testified that she doesn't remember what Theroff said on October 23, 2015, that her testimony was based on her standard procedure rather than her memory of that day, and that she did complete at least part of the paperwork. (Tr. 87:16-18, 90:13-16, 89:25-90:7). To the extent that any factual dispute remained after this later testimony, the trial court apparently resolved it in favor of Theroff.

[8] Swift testified that Theroff sat in front of the computer until the final steps, when they switched. (Tr. 76:22-77:17). However, she later testified that her testimony was based on her normal procedure and not based on her memory of that specific day. (Tr. 90:13-16). To the extent that any factual dispute remained after this later testimony, the trial court apparently resolved it in favor of Theroff.

> such [sic] – Because one of my previous jobs was data entry, so I'm much quicker on a computer. It was just she kept control until she thought it would be quicker for me to take over.

(Tr. 43:18-44:3). Theroff did not know the nature of the forms; for example, she did not know that she was completing federal or state tax forms:

> What I was giving her was information to put into them [the documents]. But she never stated specifically which documents I was filling out. As she put it, they were all just standard forms.

(Tr. 48:25-49:9).[9]

Theroff followed Swift's instructions. (Tr. 33:19-21). She does not know how many documents she "signed" this way or how many times Swift said "put your name here" or "click here." (Tr. 43:8-17). She was "vaguely" aware that these were actual employment documents but didn't understand "the depth of the documents" and "was just signing what I was told to[.]" (Tr. 44:23-45:5). She trusted Swift to accurately describe the nature of the forms being completed. (Tr. 51:19-52:7).

[9] Swift denied having made a similar statement. (Tr. 84:25-85:2). However, she later testified that she doesn't remember what Theroff said on October 23, 2015, that her testimony was based on her standard procedure rather than her memory of that day, and that she did complete at least part of Theroff's paperwork. (Tr. 87:16-18, 90:13-16, 89:25-90:7). To the extent that any factual dispute remained after this later testimony, the trial court apparently resolved it in favor of Theroff.

Theroff's arbitration agreement was "signed" electronically on October 23, 2015 – the day she completed papers in the office with Swift. (Tr. 79:15-80:2; L.F. 31-35, 38). According to Appellants' witnesses, the arbitration agreement had "two click boxes." (Tr. 75:3-8). The applicant has to "open up and review" both the frequently asked questions and the actual arbitration agreement before proceeding. (Tr. 75:13-17; L.F. 37). The later documents needed to complete the hiring process cannot be done until this document is passed. (Tr. 75:21-24).

When Theroff left Dollar Tree on October 23, she had not heard anything about arbitration and did not know she had "signed" an arbitration provision. (Tr. 35:16-19). Swift did not read the arbitration clause to Theroff, did not "read [Theroff] anything" about an arbitration clause, did not tell Theroff that she was giving up any rights, did not tell Theroff that she was waiving a jury trial, did not tell Theroff she was agreeing to terms and conditions, did not describe the procedure, and did not mention JAMS. (Tr. 34:6-8, 34:22-35:11, 52:8-12, 92:10-23, 94:15-24; L.F. 50). Swift agreed that she did not "help Miss Theroff or click any boxes or read anything to her during this screen[.]"[10] (Tr. 75:18-20, 80:3-10). Theroff was not provided with a copy of the arbitration agreement. (Tr. 35:24-36:1, 52:13-14; L.F. 50). Theroff did not even know what "arbitration" was. (Tr. 34:19-21). The first time she "ever heard anything about an arbitration agreement" was when her attorney told her that Dollar Tree had raised it in response to her lawsuit. (Tr. 36:2-5; L.F. 50). At the time of the evidentiary hearing in

[10] To the extent this creates a factual dispute between Theroff's testimony that Swift helped her enter information, generally, and Swift's testimony that she did not, the trial court apparently resolved this factual dispute in favor of Theroff. (L.F. 487).

this case, Theroff did not know what "JAMS employment arbitration rules and procedures" was. (Tr. 35:12-15).

Ms. Harper, the store manager, was not involved in Theroff's "onboarding," but agreed that if an employee had said she was unable to read or see the screen, she would have read the documents to the employee. (Tr. 107:11-20, 109:2-8, 109:12-17).

The documents that are provided in the "onboarding" process do not include the "then-current" JAMS rules which are referenced in the arbitration agreement. (L.F. 32). Rather, an employee has to go to a different website or email Dollar Tree to get a copy of the rules. (L.F. 32). The delegation clause which Appellants now seek to enforce was found within the JAMS rules. (L.F. 61).

Shortly after Theroff was hired, Swift stopped coming to work and her employment with Dollar Tree ended. (Tr. 93:8-94:6). Theroff alleges that she was later constructively discharged when the store manager (Appellant Harper) refused to let Theroff work if she needed to bring her guide dog with her. (L.F. 9-12).

Procedural History

Following her termination, Theroff filed a charge of discrimination with the Missouri Commission on Human Rights and, after obtaining a right to sue letter, filed a lawsuit in Cole County circuit court against Dollar Tree and Harper, alleging employment discrimination based on disability in violation of the Missouri Human Rights Act. (L.F. 6-17).

Appellants filed a motion to compel arbitration, and also requested attorneys' fees. (L.F. 18-39). Appellants' motion did not mention the delegation clause. (*Id.*). The

motion attached the arbitration agreement as an exhibit, but did not attach the delegation clause, and therefore did not put the language of the delegation clause into issue. (*Id.*). Rather than relying on the delegation clause, Appellants sought to compel arbitration "because the parties entered into a mutually binding and enforceable arbitration agreement that requires them to arbitrate – not litigate – disputes arising out of Theroff's employment with Dollar Tree." (L.F. 18). Neither the motion to compel nor its suggestions in support mention a delegation provision. (L.F. 18-39). In fact, Appellants argued in their suggestions in support that arbitration should be compelled because the elements of a Missouri contract (offer, acceptance, and consideration) were met as to the arbitration agreement. (L.F. 25).

Appellants supported their original motion to compel arbitration by attaching an affidavit from Vincent Votta, Dollar Tree's Manager of Recruiting Operations. (L.F. 36-39). In this affidavit, Mr. Votta claims he is "readily familiar with the onboarding process for new store associates (employees)." (L.F. 36, ¶ 2). In this affidavit, Votta claimed that: (1) Theroff accessed the Career Launch website on October 23 [the day she was in the office with Swift]; (2) Theroff digitally signed the arbitration agreement on October 23; and (3) Theroff digitally signed other documents on October 23. (L.F. 38, ¶ 13).

Theroff opposed the motion to compel arguing, *inter alia*, that an arbitration contract was never formed. (L.F. 40-50). She agreed with Appellants as to the three elements of contract formation (offer, acceptance, and consideration) but disputed that those elements were met, and thus that an arbitration agreement was formed. (*Id.*). She

also argued that, even if formed, the agreement would be unconscionable if applied to her given the facts and that the agreement did not apply to any dispute that she has with Defendant Harper. (L.F. 45-47).

Theroff supported her suggestions in opposition with an affidavit where she admitted viewing some information from the Dollar Tree link on October 21, but stated that she "did not use the link to access any agreements or documents." (L.F. 49, ¶ 6).

Appellants filed reply suggestions in support of their motion to compel on February 7, 2017. (L.F. 51-58). In this reply, Appellants raised the delegation clause for the first time, arguing that the delegation clause applied "because Theroff argues that the Mutual Agreement is invalid in its entirety – without attacking the validity of any specific provision therein[.]" (L.F. 51). This reply was the first time that the existence of the delegation clause was mentioned, the clause was relied on, or the language of the clause was provided to the circuit court. (L.F. 51-61).

On February 9, the trial court held an evidentiary hearing on the motion to compel in accordance with §435.355, RSMo. At this hearing, Theroff challenged the delegation clause by arguing that she could not have read or agreed to the delegation clause on October 23 because she was not physically capable of seeing the computer screen (and thus she had neither been offered nor accepted the delegation clause). (Tr. 23:1-17, 24:7-13). Theroff testified at that hearing, presenting the evidence detailed above, and Swift and Harper testified at a second evidentiary hearing. (Tr. 55:16-98:3, 98:19-114:12). The parties then filed post-hearing briefs. (L.F. 83-98). Theroff again challenged the delegation clause in her post-hearing brief, arguing that she was not offered "the actual

terms of arbitration, including the delegation clause" and that there was "no meeting of the minds" on the delegation clause. (L.F. 89).

After the two evidentiary hearings and the post-hearing briefing, Appellants attempted to submit a second affidavit from Votta, attached to a "supplemental post hearing brief in support of motion to compel arbitration and stay proceedings." (L.F. 103-108). In this "supplemental declaration," Votta asserted – for the first time – that Theroff had actually opened the arbitration agreement at home on October 21.[11] (L.F. 107, ¶ 8).

Theroff objected to both the content of the "supplemental declaration" and its submission after the court had closed the evidentiary hearing and taken the matter under advisement, and moved to strike the supplemental motion and affidavit. (Supp. L.F. 493-98). Specifically, Theroff argued that the new "evidence" was untimely, that Theroff was prejudiced by this untimeliness because it denied her the opportunity to subpoena and cross-examine the witness, that the record was closed, that there was no foundation in the record to show Votta's personal knowledge, that the affidavit contained inadmissible hearsay, and that the new "evidence" did not show that Theroff had reviewed the arbitration agreement on October 21. (Supp. L.F. 494-97).

In Votta's first declaration, he states that he is "familiar with the onboarding process . . ." (L.F. 36, ¶ 2). But in his second declaration, he states only that the affidavit

[11] Appellants' factual assertion that this declaration was "unrebutted by Theroff" (Appellants' Brief at 14) is inaccurate, in that Theroff objected to this evidence and did not have a chance to rebut it because it was not presented until the evidentiary hearing had closed. Theroff renews those objections here and specifically objects to any citations in Respondents' brief which are to the second Votta declaration.

is "based on [his] personal knowledge or on the records maintained by Dollar Tree in the ordinary course of business." (L.F. 106, ¶ 2). The second affidavit, which is attached to 377 pages of records, does not state that Votta is the custodian of the records, that he has knowledge of how the records are generated, that he has been trained on reading the records, that his job duties include maintaining, interpreting or reviewing the records, or that he has knowledge or experience in interpreting the records. (L.F. 106-108).

The trial court denied the motion to compel arbitration without stating any reasoning, and without explicitly ruling on the motion to strike the second Votta declaration. (L.F. 487).

Dollar Tree and Harper appeal that determination. (L.F. 488-90).

STANDARD OF REVIEW

Whether a motion to compel should have been granted is a question of law that is reviewed *de novo*. *Soars v. Easter Seals Midwest,* 563 S.W.3d 111, 113 (Mo. banc 2018); *Baker v. Bristol Care, Inc.*, 450 S.W.3d 770, 774 (Mo. banc 2014). The interpretation of a contract, whether a valid, enforceable delegation agreement clause exists within an arbitration agreement, is an issue of law reviewed *de novo. State ex rel. Newberry v. Jackson*, 575 S.W.3d 471, 473 (Mo. banc 2019).

Issues relating to whether or not an arbitration agreement exists are factual. *Baier v. Darden Rests.*, 420 S.W.3d 733, 736 (Mo. App. 2014); *Fogelsong v. Joe Machens Automotive Group, Inc.*, 564 S.W.3d 393, 396 (Mo. App. 2018). When the circuit court has conducted an evidentiary hearing to determine whether an arbitration agreement exists, appellate court review is under the *Murphy v. Carron* standard. *Katz v. Anheuser-Busch, Inc.*, 347 S.W.3d 533, 544 (Mo. App. 2011). Under that standard, "[t]he trial court's determination as to the existence of an agreement will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law." *Id.*; *Esser v. Anheuser-Busch, LLC*, 567 S.W.3d 644, 648 (Mo. App. 2018). If the trial court does not make factual findings, then all facts "shall be considered as having been found in accordance with the result reached." Rule 73.01; *Baier*, 420 S.W.3d at 737. Thus, where the parties present conflicting evidence about the existence of a valid arbitration agreement, and the trial court denies the motion to compel arbitration, it is determined that the trial court "necessarily

disagreed" with the assertion that there was an enforceable arbitration agreement. *Greene v. Alliance Auto., Inc.*, 435 S.W.3d 646, 649 (Mo. App. 2014).

This Court reviews the decision of the trial court, and can affirm the trial court's ruling on any theory supported by the record. *Baier*, 420 S.W.3d at 737. This Court is not bound by the legal reasoning used by the trial court, but rather considers whether the trial court's result was correct, regardless of the "route taken to reach it." *Jackson v. Higher Education Loan Authority of Mo.*, 497 S.W.3d 283, 288 (Mo. App. 2016).

ARGUMENT

I. *The circuit court did not err in denying the motion to compel because Appellants have not met their initial burden to show that a signed arbitration agreement exists, in that they have not shown by a preponderance of the evidence that it was Theroff who "clicked" to "sign" the agreement or that if Theroff clicked, she knew she was "signing" something.* (Responds to Appellants' Point I)[12]

Arbitration is a matter of contract, and a party will not be compelled to arbitrate unless it has agreed to do so. *State ex rel. Pinkerton v. Fahnestock,* 531 S.W.3d 36, 49 (Mo. banc 2017); *Granite Rock Co. v. Int'l Brotherhood of Teamsters*, 561 U.S. 287, 299-300 (2010). "[B]ecause arbitration is a matter of consent, not coercion, 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." *State ex rel. Pinkerton*, 531 S.W.3d at 49 (internal quotation and citation omitted). Arbitration agreements are treated the same as all other contracts and are interpreted under generally applicable principles of contract law. *Jackson*, 497 S.W.3d at 288; *Jimenez v. Cintas Corp.*, 475 S.W.3d 679, 683 (Mo. App. 2015).

[12] Appellant's arguments on this issue should be stricken to the extent that they violate Rule 84.04(e) by containing arguments that are not within the Point Relied on. Because of this violation, Appellants have waived their argument that they proved the existence of an agreement by a preponderance of the evidence. *See Thummel v. King*, 570 S.W.2d 679, 686-87 (Mo. 1978) (dismissing for failure to comply with rule); *Nichols v. Div. of Employment Security*, 399 S.W.3d 901, 904 (Mo. App. 2013) (Courts "do not review arguments and issues raised in the argument under a point that are not fairly encompassed by that point").

When determining whether to grant a motion to compel, the court must "decide whether a valid and enforceable arbitration agreement exists." *Esser*, 567 S.W.3d at 649. As the party seeking to compel arbitration, Appellants bear the burden of showing that an arbitration agreement exists under state law. *Jackson*, 497 S.W.3d at 287; *Jimenez*, 475 S.W.3d at 683; *Baier*, 420 S.W.3d at 737. Appellants argue that all they have to do to meet this burden is to show, by a preponderance of the evidence, that an arbitration agreement was signed by Theroff. (Appellants' Brief at 23). Even assuming that this is the proper starting point, Appellants fall well short of this standard. Unlike the vast majority of arbitration cases, there is a valid factual dispute here as to whether Theroff "signed" the agreement. Perhaps that is why Appellants consistently misrepresent Theroff's position as being that she does not remember signing the agreement.[13] This misrepresentation is contrary to Theroff's testimony, which was that she "did not use the link [sent to her at home] to access any agreements or documents" and that she was not physically capable of reading the documents on the screen on the day that the arbitration agreement was "signed." (Tr. 27:9-28:12, 31:23-32:7, 42:18-23; L.F. 49, ¶ 6).

[13] Appellants make these allegations throughout both the statement of facts and the argument portion of their brief, but generally do not support them with specific factual citations to the record, in violation of Rule 84.04(e). Examples of unsupported assertions in Appellants' Statement of Facts can be found on page 16 ("she simply said she did not remember and did not know whether she signed it.") and page 18 ("although she could not remember the documents she completed and signed."). Examples of unsupported assertions in Appellants' Argument can be found on page 25 ("Theroff testified that she did not *remember* signing, reading or understanding any arbitration agreement.") and on page 42 ("she does not remember signing the overarching Mutual Agreement"). These unsupported factual allegations should be stricken or disregarded.

Theroff does not dispute that Dollar Tree possesses a document which purports to be an arbitration agreement incorporating the JAMS rules, which themselves include a delegation provision. Nor does she dispute that *someone* electronically signed the agreement on October 23, 2015, by clicking on a computer screen. She does dispute that Appellants have shown, even by a preponderance of the evidence, that it was Theroff – and not Swift – who performed the "click" that resulted in the signature. Further, even if Theroff was the one who "clicked," there is no evidence that she knew this was a click to "sign" a document rather than a click to move to the next screen or to input some other type of information. Although the trial court did not make specific factual findings, there was ample evidence from which the court reasonably could have found that Theroff did not sign the agreement. Viewed in the light most favorable to the judgment as required by Rule 73.01, this evidence includes:

- Theroff's testimony that both she and Swift entered information, and that Swift "kept control until she thought it would be quicker for me to take over" (Tr. 43:18-44:3);
- Theroff's testimony that Swift would sometimes say "click here" or "hit enter here" and Theroff would do so (Tr. 33:10-18, 43:8-17; L.F. 50 ¶ 8);
- Theroff's testimony that she was physically unable to see or read the documents on the computer screen due to her disability (Tr. 27:9-28:12, 31:23-32:7, 42:18-23);
- Swift's admissions that she does not remember specifically what happened that day (Tr. 89:25-90:16); and

- Theroff's and Swift's testimony that Swift did not tell Theroff anything about what any of the documents on the screen were. (Tr. 34:6-8, 34:22-35:11, 48:25-49:9, 52:8-12, 75:18-20, 80:3-10, 92:10-23, 94:15-24; L.F. 50 ¶ 9; L.F. 79-80, ¶¶ 4-5).

There is no dispute that the agreement was electronically signed on October 23, the day Theroff was in the office with Swift. (Appellants' Brief at 12). Based on this evidence, it was reasonable for the trial court to conclude that Theroff did not "sign" the agreement because: (1) it could have been Swift who made the operative click, and (2) even if it was Theroff who clicked, she was misled into believing that she was completing routine, "normal employment things" and not that she was "signing" an arbitration or delegation agreement.

Appellants point out that Missouri has adopted the Uniform Electronic Transactions Act (UETA). (Appellants' Brief at 33). However, the UETA merely says that a signature "shall not be denied legal effect or enforceability **solely because** it is in electronic form." *WCT & D, LLC v. City of Kansas City*, 476 S.W.3d 336, 341 (Mo. App. 2015) (quoting §432.230.1, RSMo) (emphasis added). Neither the UETA, nor anything cited by Appellants, says that an electronic signature must be automatically accepted as valid regardless of the evidence of how it was obtained. Sections 432.200–432.295, RSMo. Theroff is not arguing that electronic signatures in general are invalid, or that the signature here is not valid merely because it is electronic. But an electronic signature cannot be presumed to be valid where there is evidence that more than one person was entering information or clicking, and where there is evidence that the "signer"

did not know whether a particular click constituted a signature or not. While an electronic signature may *generally* be as valid as a written signature, this case is different than most because Theroff did not know what was on the screen. This critical fact distinguishes the cases Appellants cite for their argument that even a blind or illiterate person is responsible for the content of a document she signs.[14] In all of those cases, the plaintiff knew he or she was signing something. Even by Appellants' description of those cases, they involve people who were "capable" of reading but chose not to do so. (Appellants' Brief at 27-29). Theroff is capable of reading with assistive devices, but she was not physically capable of reading the documents that were on the screen on the day the arbitration agreement was undisputedly signed. (Tr. 27:9-28:12, 31:23-32:7, 42:18-23). And, the fact that she did not demand that she be allowed to use her assistive devices does not bar her claim either, because she was misled into believing that the documents were unimportant, routine matters. (Tr. 33:10-18, 48:25-49:9). Surely Appellants would not argue that a blind person is responsible for the contents of a document which she signs without evidence that she even knew she was signing something? If that is the law, then why even require a signature at all?

[14] *See, e.g., Chochorowski v. Home Depot U.S.A.*, 404 S.W.3d 220 (Mo. banc 2013) (no dispute that the plaintiff knew she was signing an agreement); *Binkley v. Palmer*, 10 S.W.3d 166 (Mo. App. 1999) (plaintiffs knew they were signing agreement but didn't read all the disclaimers); *Sanger v. Yellow Cab Co., Inc.*, 486 S.W.2d 477 (Mo. banc 1972) (plaintiff knew he was signing something and was capable of reading it but didn't bother to read it); *Repair Masters Constr., Inc. v. Gary*, 277 S.W.3d 854 (Mo. App. 2009) (the fact that plaintiff did not read well does not excuse singing an agreement she knew she was signing, but can be considered in determining procedural unconscionability).

Appellants argue that a signed agreement exists here because courts have upheld Dollar Tree's arbitration agreement and signature process in numerous other employment discrimination lawsuits. (Appellants' Brief at 28-29). But none of the cases cited by Appellants have similar facts – they are either cases where a factual dispute as to formation was resolved in favor of the employer (*Herbert v. Dollar Tree, Inc.*, 2017 WL 2472889 (E.D. Mich. June 8, 2017)), or where the plaintiff provides only a "bald assertion" to dispute the validity of the signed agreement (*Gonder v. Dollar Tree Stores, Inc.*, 144 F.Supp. 3d 522 (S.D.N.Y. 2015)), or where the plaintiff does not dispute signing the agreement but argues that it lacked consideration (*Deleon v. Dollar Tree Stores, Inc.*, 2017 WL 396535 (D. Conn. Jan. 30, 2017)), or where there was no dispute that the plaintiff was aware of the arbitration agreement and chose not to opt out (*Taylor v. Dollar Tree*, No. 3:16-CV-2-TLS (N.D. Ind. Feb. 7, 2017)). None of these cases involve a claim that the employee could not read the agreement, that Dollar Tree knew she could not read the agreement, and that Dollar Tree led the employee to believe that the document was nothing important. Even more than that, Theroff provided a viable explanation, certainly more than a "bald assertion," of how the agreement still could have been signed despite her being completely unaware of it.

Moreover, Dollar Tree's standard agreement has not universally resulted in successful motions to compel arbitration. Appellants' brief omits a recent such case, *Andre v. Dollar Tree Stores, Inc.*, 2018 WL 3323825 (D. Del. July 6, 2018). In *Andre*, Dollar Tree presented electronic records similar to those presented in this case and argued that the plaintiff, an existing employee, had accessed the arbitration agreement using her

unique password and pin number, and had not opted out of the agreement. *Id*. at *3. The plaintiff alleged that she had never reviewed the agreement and that in the past the manager had accessed employees' passwords and completed paperwork for them because it was more efficient to keep the employees working on the floor. *Id*. The court found that the employee's allegation of "specific facts" which "call[ed] into question" whether she had seen or signed the agreement were enough to overcome the employer's evidence of "signature." *Id*. at *5-*7. Similarly, here, Theroff has alleged specific facts which overcome Appellants' evidence of a signed agreement.

The Missouri cases Appellants cite for the argument that they "proved" the existence of an agreement are easily distinguishable. *Ranson v. Securitas Security Services USA, Inc., et al,* a federal case applying Missouri law, is one of the cases Appellants rely on strongly. 2018 WL 4593707 (E.D. Mo. Sept. 25, 2018). Rather than being "virtually identical" as Appellants claim, *Ranson* is distinguishable because the plaintiff in *Ranson* "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." *Id*. at *4. In contrast, Theroff's testimony is not that she does not remember, but that she never saw or signed the arbitration agreement. (Tr. 27:9-28:12, 31:23-32:7, 42:18-23; L.F. 49, ¶ 6).

The second Missouri case, which Appellants characterize as "nearly identical," is *Wallace v. Communications Unlimited, Inc.*, 2019 WL 1001701 (E.D. Mo. Mar. 1, 2019). The *Wallace* case actually says very little about how the agreements were presented to the employees, but the plaintiff "concede[d] that Wallace was aware of the Agreement

. . . and understood that accepting its terms was a prerequisite to employment[.]" *Id*. at *5. Those facts make it distinguishable here.

The third Missouri case Appellants cite, *Lewis v. Navient Solutions, Inc.*, 2015 WL 10936762 (W.D. Mo. Jan. 22, 2015), merely stands for the propositions that a signature should not be denied merely because it is electronic and that the plaintiff must have something more than his own assertions to show that the signature is false. *Id*. at *4. *Lewis* is distinguishable as a case where "no reasonable factfinder" could find that he did not sign the agreement. *Id*. In contrast, Theroff presented actual evidence that reasonably explained how the agreement was "signed" without her knowledge, and that evidence was bolstered by Swift's admission that she did enter some information and that she did not specifically remember which things she entered for Theroff that day. (Tr. 87:16-18, 90:13-16; L.F. 62-63).

The remaining cases Appellants cite are factually distinguishable, as well as applying the contract law of other states. While these cases generally involve a similar electronic system where some sort of unique password was used to access and affix an electronic signature, they do not involve similar facts, because the plaintiffs in those cases either knew that they were signing documents or provided no actual evidence to support their claims that they had not signed.[15] Only one of these cases involves a

[15] *See, e.g., Smith v. Rent-A-Center, Inc.*, 2019 WL 3004160 (E.D. Cal. July 10, 2019) (plaintiff knew he was electronically signing agreement); *Moise v. Family Dollar Stores of New York, Inc.*, 2017 WL 2378193 (S.D.N.Y June 1, 2017) (employee did not dispute that there was a signed agreement, but argued that he did not remember signing it, he wasn't given a choice whether to sign it, and he didn't understand it); *Stover-Davis v. Aetna Life Ins. Co.*, 2016 WL 2756848 (E.D. Cal. May 12, 2016) (employee did not offer

credible allegation that the plaintiff did not actually sign the agreement. *GC Services Limited Partnership v. Little*, 2019 WL 2647690 (S.D. Tex. June 27, 2019). In that case, the plaintiff alleged that she had refused to sign the arbitration agreement and that therefore the employer must have done it. *Id*. at *4. The employer's evidence was that it would have been "impossible" to backdate the signature and that no one else knew Plaintiff's password. *Id*. at *3. Under these facts, the court, applying Texas law, found that the employer had met its burden to show a signed agreement even though it had not proved "with 100% certainty that it was [the employee] who checked the box to provide her electronic signature[.]" *Id*. at *4. In contrast to the plaintiff in *Little*, Theroff has

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any evidence to dispute that she had electronically signed with her unique i.d. and password); *Holmes v. Air Liquide USA LLC*, 2012 WL 267194 at *3 (S.D. Tex. Jan. 30, 2012) (plaintiff said she did not recall signing the agreement, and defendant is not required to prove "with 100% certainty" that she signed); *Carter v. Affiliated Computer Servs., Inc.*, 2010 WL 5572078 (W.D. Ark. Dec. 15, 2010) (plaintiffs did not remember signing and allege, without any supporting evidence, that their signatures "could be forgeries"); *Mead v. Moloney Secs. Co., Inc.*, 274 S.W.3d 537 (Mo. App. 2008) (employee admitted to having signed the document); *ADP, LLC v.* Lynch, 678 F.Appx. 77 (3rd Cir. 2017) (Plaintiffs agreed they had checked a box to accept stock awards in exchange for non-compete); *Meyer v. Uber Techs, Inc.*, 868 F.3d 66 (2nd Cir. 2017) (applying California law to issue of "clickwrap" agreement where lead plaintiff did not recall seeing terms and conditions); *Espejo v. S. California Permanente Med. Grp.*, 246 Cal. App. 4th 1047 (Ca. App. 2016) (applying California evidence rules to determine that employer's evidence of signature was admissible); *Employee Resource Grp., LLC v. Collins*, 2019 WL 2338500 (W. Va. June 3, 2019) (employee presented no evidence to support her claim that she hadn't seen the document); *Schrock v. Nomac Drilling, LLC*, 2016 WL 1181484 (W.D. Pa. Mar. 28, 2016) (Plaintiff provided only "naked assertions" that he had not signed); *Jackson v. Univ. of Phoenix, Inc.*, 2014 WL 672852 (E.D.N.C. Feb. 20, 2014) (employee's speculation, without evidence, that his signature was fraudulent does not overcome signed documents); *Cortez v. Ross Dress for Less, Inc.*, 2014 WL 1401869 (C.D. Cal. Apr. 10, 2014) (employees made only a vague argument that they didn't remember signing and someone else "could have" signed); *Starace v. Lexington Law Firm*, 2019 WL 2642555 (E.D. Cal. June 27, 2019) (employee responded "agree" to a text message containing contract).

provided significant evidence to support her assertion that she did not agree to electronically sign anything on October 23. Theroff's showing is much more than that provided by the plaintiff in *Little*, who offered no explanation for how the employer could have signed the agreement for her. Theroff is not arguing that "100% certainty" is required; she is arguing that Appellants cannot even show a probability that she signed the agreement.

Appellants have failed to show the existence of a signed arbitration agreement and, for that reason, this Court does not need to reach the issues of whether the delegation provision is valid or was agreed to, or whether arbitration itself was agreed to.

II. *The trial court did not err in denying the motion to compel because there is not a valid delegation provision that was agreed to, in that (a) the delegation clause was not offered to Theroff, and (b) the delegation clause was not accepted by Theroff.* **(Responds to Appellants' Points I and II).**

Even if this Court finds that a signed agreement exists, the motion to compel should be denied because there is not an enforceable delegation provision. As noted above, arbitration is solely a matter of contract. *State ex rel. Pinkerton,* 531 S.W.3d at 49. "When parties contract to arbitrate future disputes, they may choose to incorporate a delegation provision, which is an agreement to arbitrate threshold issues concerning the arbitration agreement." *Shockley v. PrimeLending*, 929 F.3d 1012, 1018 (8th Cir. 2019) (internal quotation marks omitted). A delegation "provision places gateway questions of arbitrability into the hands of an arbitrator." *Id.* (internal quotation marks omitted). The delegation provision Appellants seek to enforce here, which is found in the incorporated JAMS rules, states that

> 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.

(L.F. 61).

Importantly, the language of the delegation provision itself applies only to disputes about "the agreement under which Arbitration is sought," and *not* to disputes about the

formation of the delegation agreement itself. In other words, the language of the contractual provision which Appellants now seek to enforce (which this Court reviews *de novo*) says that issues of formation of the *arbitration* agreement may be delegated. It does not say that issues of formation of the *delegation* agreement may be delegated. This in itself answers the question of whether the trial court can consider whether the delegation agreement was validly formed.

A delegation clause is considered a separate, antecedent agreement. *State ex rel. Pinkerton*, 531 S.W.3d at 51 (quoting *Rent-A-Center, W, Inc. v. Jackson*, 561 U.S. 63, 70 (2010)); *Soars*, 563 S.W.3d at 114. As with any other valid contractual provision, a delegation clause must be agreed to by the parties. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) ("Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, so the question who has the primary power to decide arbitrability turns upon what the parties agreed about *that* matter."); *Henry Schein, Inc. v. Archer and White Sales, Inc.*, 139 S.Ct. 524, 527 (2019) ("the question of who decides arbitrability is itself a question of contract."). Like any other valid contract in Missouri, the formation of an agreement to delegate requires offer, acceptance, and consideration. *Shockley*, 929 F.3d at 1018; *Esser*, 567 S.W.3d at 651. Further, the existence of an agreement to delegate issues of arbitrability is not presumed, but must be shown by "clear and unmistakable evidence." *Soars*, 563 S.W.3d at 114; *State ex rel. Pinkerton*, 531 S.W.3d at 43; *St. Louis Regional Convention v. Nat'l Football League*, __ S.W.3d __, 2019 WL 1606160 at *5 (Mo. App. Apr. 16, 2019). In

Pinkerton, this Court held that incorporation of a system of rules which contain a delegation provision into a contract satisfies this standard. 531 S.W.3d at 44-45.

Appellants' argument that they only have to "demonstrate[] by a preponderance of the evidence that Theroff signed the agreement" is incorrect. The presence of a signature is not enough to create an enforceable contract in Missouri; an agreement to delegate requires that the contractual elements of offer, acceptance, and consideration be met. *See Shockley*, 929 F.3d at 1019 (delegation clause is invalid because it does not contain the essential elements of a contract); *Esser*, 567 S.W.3d at 651 (declining to compel arbitration where employer did not establish that delegation clause "fulfilled any of the three essential elements of a contract").

Because it is considered a severable provision, a delegation clause must be directly challenged. *State ex rel. Pinkerton*, 531 S.W.3d at 50-51; *Soars*, 563 S.W.3d at 114. If it is not specifically challenged, then it will be enforced, meaning that any disputes about arbitrability are decided by the arbitrator. *Soars*, 563 S.W.3d at 114. If the delegation clause is directly challenged, then the burden is on the party seeking to compel arbitration to show by clear and unmistakable evidence that the parties agreed to the delegation clause. *Esser*, 567 S.W.3d at 651. As detailed below, Theroff challenged the delegation clause by arguing that she did not agree to either the arbitration agreement or to the delegation clause contained within it. Specifically, she argues that she was not offered the delegation clause, she did not accept the delegation clause, she did not sign the delegation clause, and there was no meeting of the minds as to the delegation clause.

(a) The delegation agreement was not offered to Theroff.

The first reason that there was no agreement to delegate is that there was no offer communicated to Theroff. "An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." Restatement (2d) of Contracts, §24 (1981).

An offer requires, at a minimum, that the offeree be aware that an offer was made. *Jackson*, 497 S.W.3d at 288; *Shockley*, 929 F.3d at 1017. "[A]n offer must be definite and has been made when the offer leads the offeree to reasonably believe that an offer has been made." *Walker v. Rogers*, 182 S.W.3d 761, 767 (Mo. App. 2006) (quoting *Volker Court, LLC v. Santa Fe Apartments, LLC*, 130 S.W.3d 607, 611 (Mo. App. 2004)). The offeror's objective intent must be clear. *See Jackson*, 497 S.W.3d at 289 (no offer where the employer's "linguistic smokescreen" prevented the employee from knowing that she was being asked to agree to an arbitration policy).

Appellants cannot meet this test. Theroff could not see the documents on the screen, and therefore could not have seen the incorporation of the JAMS rules within the arbitration agreement (which she also could not see). (Tr. 31:23-32:7, 42:18-23). Swift knew this, but instead of giving Theroff time to review the documents with her assistive device, reading the documents to Theroff,[16] explaining the documents to Theroff, or even just stating the title of the documents, Swift represented to Theroff that the documents were routine, unimportant "normal employment things[.]" (Tr. 33:10-18, 48:25-49:9;

[16] Appellant Harper agreed that the agreement should have been read to Theroff. (Tr. 107:11-20, 109:2-8, 109:12-17).

L.F. 49-50). Swift did not tell Theroff that one of the documents was an arbitration agreement or what that meant. (Tr. 34:6-8, 34:22-35:11, 52:8-12, 92:10-23, 94:15-24; L.F. 50). Because she was not aware of what was on the screen, Theroff was not aware that an offer to delegate issues of arbitrability to the arbitrator was made.

Appellants allude to "evidence" that Theroff opened and reviewed the Agreement at her home prior to signing it at the store. The sole support for this assertion is the supplemental affidavit of Vincent Votta, which was attached to more than 700 pages of computer records and submitted after the two evidentiary hearings and post-hearing briefing. (L.F. 103-108). Theroff disputes that this evidence is admissible, and she objected to it on the bases that it was untimely, it was inadmissible hearsay, it denied her the opportunity for cross-examination, the record was closed, and there was no foundation to show the affiant's personal knowledge. (Supp. L.F. 494-97).

Votta's second affidavit is inadmissible and should not be considered by this Court. He states that he is the "Manager of Recruiting Operations" at Dollar Tree and that the computer "data logs" he used to support his conclusion that Theroff opened the Agreement at home are "records maintained by Dollar Tree in the ordinary course of business." (L.F. 106-108). To be admissible under the business records hearsay exception, Appellants were required to present testimony from a "qualified witness" who could lay the required foundation for the record by testifying to its identity and mode of preparation. Section 490.680, RSMo; *CACH, LLC v. Askew*, 358 S.W. 3d 58, 64 (Mo. banc 2012). To be a "qualified witness," the witness must have "sufficient knowledge of the business operation and methods of keeping records of the business[.]" *Id.* Votta's

supplemental affidavit does not meet these requirements for several reasons, including: (1) it does not describe how the data logs offered by Appellants were prepared; (2) it does not state how his position as "Manager of Recruiting Operations" gives him sufficient knowledge of Dollar Tree's methods of keeping such records; and (3) it does not identify how the information in the hundreds of pages of records supports his conclusions. Further, Appellants' late disclosure of his statement after two evidentiary hearings prevented Theroff from cross-examining him about the source or basis of the records or his conclusions about them.[17]

Even if this Court were to consider Votta's second affidavit (and find it more credible than Theroff's conflicting testimony that she did not access any agreements at home (L.F. 49, ¶ 6), this would not constitute an offer because Theroff presented evidence that she did not know *at the time that she was being asked to "sign"* that she was "signing" that agreement. (Tr. 34:6-8, 34:22-35:11, 52:8-12, 92:10-23, 94:15-24; L.F. 49-50). The most that the second Votta affidavit could establish is that Theroff had knowledge that an arbitration agreement existed somewhere. This type of general awareness does not create a contract because it does not show mutual assent to the same thing at the same time. *See Kunzie v. Jack-In-The-Box, Inc.*, 330 S.W.3d 476, 484 (Mo. App. 2010) (the fact that employee had general knowledge of the existence of an

[17] Although §490.692, RSMo, permits a party to lay the necessary foundation for a business record through an affidavit served at least seven days prior to the "trial of the cause," Votta's supplemental affidavit fails to meet these requirements: it does not identify or describe the record's mode of preparation or his own knowledge of Dollar Tree's business operations and methods of keeping records, and it was not served on Theroff before either of the evidentiary hearings, but was instead filed after the parties submitted post-hearing briefs and the case had been submitted.

arbitration program is not "acceptance"); *Katz*, 347 S.W.3d at 545-46 (this type of general knowledge does not constitute the "positive and unambiguous unequivocal acceptance" required under Missouri law); *Hobbs v. Tamko Building Prods., Inc.*, 479 S.W.3d 147 (Mo. App. 2015) (no acceptance where the manufacturer merely wrapped its arbitration agreement language around shingle packaging). It is, at most, an offer which – without acceptance – is not a contract. *See Baier*, 420 S.W.3d at 738-39 (employee's "acknowledgment" showed she had knowledge that the process existed, but was not "acceptance" because there could not have been a meeting of the minds where the employer did not also sign); *Shockley*, 929 F.3d at 1019 ("mere review of the subject materials did not constitute an acceptance on [the employee's] part").

Theroff did not even know that a delegation clause was being "offered" at all. This, in and of itself, was sufficient for the trial court to deny the motion to compel. *See, e.g. Jackson*, 497 S.W.3d 283 (denying motion to compel because no offer and acceptance); *Whitworth v. McBride & Son Homes, Inc.*, 344 S.W.3d 730, 739 (Mo. App. 2011) (denying motion to compel because no offer and acceptance); *Hobbs*, 479 S.W.3d at 150-51 (denying motion to compel because no offer and acceptance).

(b) There was no agreement to delegate because, even if there was an "offer," it was not accepted, in that there was neither mutual assent nor unequivocal acceptance.

Appellants also fail to meet the second requirement of a contract: acceptance. Of course, if there is no offer, then there is nothing to accept either. *See Esser*, 567 S.W.3d at 651 (employee "could not have accepted an offer that he did not know about"). If this

Court finds there was no offer, then no further analysis is needed as to the existence of a valid contract. *See Shockley*, 929 F.3d at 1019 (lack of any one essential element of a contract is dispositive).

Even if Appellants are found to have made a valid offer, they still cannot show acceptance of the delegation clause. Acceptance requires "mutual assent," which requires that "the minds of the contracting parties [] meet upon and assent to the same thing in the same sense at the same time." *Kunzie*, 330 S.W.3d at 483 (internal quotation marks omitted); *Katz*, 347 S.W.3d at 544-45. "A meeting of the minds occurs where there is a definite offer and an *unequivocal acceptance*." *Abdiana Properties, Inc. v. Bengtson*, 575 S.W.3d 754, 760 (Mo. App. 2019) (internal quotation marks and brackets omitted). Whether there was a meeting of the minds is a finding of fact for the trial court. *Jackson*, 497 S.W.3d at 289.

Acceptance must be "positive and unambiguous" and cannot be presumed from silence. *Kunzie*, 330 S.W.3d at 484; *Shockley*, 929 F.3d at 1017. Acceptance also cannot be based on misrepresentation:

> If a misrepresentation as to the character or essential terms of a proposed contract induces conduct that appears to be a manifestation of assent by one who neither knows nor has reasonable opportunity to know of the character or essential terms of the proposed contract, his conduct is not effective as a manifestation of assent.

Restatement (2d) of Contracts §163 (1981).

There is no mutual assent, and no acceptance, under the facts of this case, considered in the light most favorable to the trial court's judgment as required by Rule 73.01. Theroff could not see the screen containing the agreement, with its incorporation of rules including the delegation clause. (Tr. 31:23-32:7, 42:18-23; L.F. 49-50). Swift knew that Theroff had a disability, and that she could not see the screen without an assistive device. (Tr. 31:23-32:7, 42:18-23; L.F. 49). Swift did not tell Theroff what was on the screen, or the nature of the documents. (Tr. 34:6-8, 34:22-35:11, 52:8-12, 92:10-23, 94:15-24; L.F. 50). Swift did not explain anything about an arbitration agreement or even identify a particular document as being an arbitration agreement – much less a delegation clause. (Tr. 34:6-8, 34:22-35:11, 52:8-12, 92:10-23, 94:15-24; L.F. 50). Swift told Theroff to "put your name here," "click here," or "just hit enter." (Tr. 33:10-18, 43:8-17). Swift represented the documents as routine, "normal employment things." (Tr. 33:10-18, 48:25-49:9; L.F. 49-50). Even if Theroff was the one who clicked on the arbitration agreement (which has not been established), it was not "acceptance": because Swift did not tell Theroff that the document she was "clicking" on was the arbitration agreement, there could not have been an "assent to the same thing in the same sense at the same time." *Kunzie*, 330 S.W.3d at 483. The fact that it took less than 30 minutes to complete the paperwork (which included 75 screens, inputting bank account information, and review of the Employee Handbook), confirms that there was not time to discuss or read the arbitration agreement – much less to review the referred-to JAMS rules which contained the delegation clause. (Tr. 82:2-11, 89:2-19).

This was exacerbated by the fact that Swift misled Theroff into believing that the documents weren't important. Theroff trusted Swift and followed her instructions (Tr. 33:19-21, 51:19-52:7), and Swift told Theroff that the documents were "standard" and "normal employment things." (Tr. 33:10-18, 48:25-49:9). The fact that Theroff did not object (as Appellants point out) is a reflection of that misrepresentation: Theroff was led to believe that the documents were not important, thus she had no reason to insist on slowing down the process (and likely angering her new employer) by asking to use her assistive devices.

Greene, 435 S.W.3d 646, is instructive. In that case, a consumer was given an arbitration agreement along with other documents during the closing of a loan. The closing was videotaped. *Id*. at 651. Fifteen minutes in, the plaintiff was handed the arbitration agreement and asked if she had any questions about it. Then the loan officer said,

> Ok. Here it is in legal terms. If you can't sleep one night I suggest this for reading. It will help you get there. Just need your initials there. I don't think I've ever got through the whole thing without passing out.

Id. at 651. The presentation, discussion, and signing of the arbitration agreement took 13 seconds. *Id*. In finding that the circuit court could have reasonably found that there was

no acceptance, the Western District criticized the "matter of fact, cursory closing process where the closing agent trivialized the arbitration clause[.]" *Id*. at 651.[18]

Another case with similar facts is *American Heritage Life Ins. Co. v. Lang*, 321 F.3d 533 (5th Cir. 2003). In *Lang*, the defendant was aware that the plaintiff was illiterate, but stated that the arbitration agreement was "dealing with the loan or the insurance." *Id*. at 536. The defendant never mentioned arbitration. *Id*. The court noted that the plaintiff was challenging "the making of the agreements to arbitrate rather than the arbitration agreements themselves," and that "ordinary contract principles" show that an agreement was not formed because there was no meeting of the minds where one party was unaware of what the document said. *Id*. at 537-539. Similarly, here, Theroff challenges the making of the delegation agreement itself, and not whether the language of that agreement (if agreed to) would be effective.

[18] Appellants may argue that *Greene* is distinguishable because the court went on to find that the consumer nevertheless "accepted" the contract when she signed it (although ultimately finding that the contract was unenforceable). *Id.* at 652. However, that fact does not make *Greene* inapplicable here. In *Greene*, the consumer was told that the document was an arbitration agreement, is seen on video signing the agreement, and did not dispute that she signed it. Yet despite her knowledge that she was signing an "arbitration agreement," the court criticized the defendant's minimization of the significance of the agreement. In addition to those same concerns, there are other facts which make Theroff's case even more compelling: unlike the plaintiff in *Greene*, Theroff did not know there was an arbitration or delegation agreement at all and certainly did not know that an arbitration agreement, with its incorporated delegation clause, was the applicable document on the screen. Moreover, as discussed below, it is not even clear that *Theroff* signed the agreement. Obviously, *someone* clicked on a box that indicated signature, but there is no evidence that this was Theroff and not Swift. These facts make *Greene* distinguishable on the issue of signature manifesting "acceptance."

Greene and *Lang*, and many other cases, have found that there is no acceptance where a disability or other condition prevents the party from being informed of the contents of the agreement. *See, e.g., Basulto v. Hialeah Auto.*, 141 So.3d 1145 (Fla. 2014) (no arbitration agreement existed where plaintiffs did not speak English, the agreement was written in English, and the defendant's employees did not explain the agreement to the plaintiffs); *Gaines v. Jordan*, 393 P.2d 629 (Wa. 1964) (one party couldn't read agreement because of eye condition and other party misled the first party into thinking the terms they had orally agreed to were contained in written agreement); *Min Fu v. Hunan of Morris Food Inc.*, 2013 WL 5970167 (D.N.J. Nov. 6, 2013) (employer misrepresented the contents of a FLSA waiver by telling employee with minimal English skills that it was "routine paperwork").

Even if they could establish that Theroff had some knowledge that there was an arbitration agreement out there, Appellants still fail to acknowledge Missouri cases which show that this does not constitute acceptance. *See, e.g., Katz*, 347 S.W.3d at 545 ("We are aware of no legal authority holding that an employee's general knowledge or awareness of the existence of a contract constitutes the 'positive and unambiguous' 'unequivocal acceptance' required under Missouri law"); *Baier*, 420 S.W.3d 733, 738-39 (employee's "acknowledgment" showed she had knowledge that the process existed, but was not "acceptance" because there could not have been a meeting of the minds where the employer did not also sign); *Kunzie*, 330 S.W.3d at 484 (employee's general knowledge of the existence of an arbitration program did not constitute "acceptance"). Similarly, evidence that the offeree may have known about the offer is not enough to establish

acceptance. *See, e.g.*, *Esser*, 567 S.W.3d at 651 (employer did not establish offer was made where it is "inconclusive whether" the employee "received or viewed" the arbitration agreement or delegation provision). Silence is not acceptance, because acceptance must be "positive and ambiguous." *Esser*, 567 S.W.3d at 652; *Katz*, 347 S.W.3d at 544-45; *Abdiana Properties,* 575 S.W.3d at 760.

And, even if the disputed Votta affidavit was accepted, Appellants admit that this in itself does not conclude the agreement because "Theroff again was required to review the terms of the Mutual Agreement [on October 23, in the office] and electronically signed her name to the document." (Appellants' Brief at 49-50). But, as demonstrated above, Theroff did not "review the terms" and sign on October 23 because no one told her about the terms and she could not see them herself.

Even if Appellants could show that the delegation clause was offered (which they cannot), they would not be able to show that it was accepted because there clearly was neither a "meeting of the minds" nor "unequivocal acceptance." Since there was no agreement to the delegation clause, the trial court did not err in refusing to enforce that clause and determining the existence of an arbitration agreement.

III. *Theroff specifically challenged the delegation clause by arguing that she did not agree to either the delegation clause or the arbitration agreement and such challenge is sufficient to specifically challenge the existence or formation of an agreement to delegate, particularly where Appellants did not raise the issue in their initial motion to compel.* (Responds to Appellants' Point I(c)).[19]

Because it is considered a separate, severable agreement, a delegation clause must be directly challenged. *State ex rel. Pinkerton*, 531 S.W.3d at 50-51; *Soars*, 563 S.W.3d at 114. "A direct challenge is one that specifically addresses the delegation provision." *Latenser v. Tarmac Int'l, Inc.*, 549 S.W.3d 461, 464 (Mo. App. 2018). A direct challenge is one which is based "on an additional ground or basis beyond the fact it is contained in an arbitration contract that the party also contends is invalid." *State ex rel. Newberry*, 575 S.W.3d at 476. If there is a meritorious direct challenge to the delegation clause, then that challenge must be considered before enforcing the clause. *Id*. at 475; *Caldwell v. UniFirst Corp.*, __ S.W.3d __, 2019 WL 1445220 at *4 (Mo. App. Apr. 2, 2019).

Appellants argue that Theroff did not specifically challenge the delegation clause, and that therefore the clause should be enforced, and arbitration compelled, regardless of whether Theroff actually agreed to delegate or not. (Appellants' Brief at 41-44). Appellants' argument has two components: (1) that Theroff did not challenge the

[19] Appellants' arguments on this issue should be stricken to the extent that they violate Rule 84.04(e) by containing arguments that are not within the Point Relied on. Because of this violation, Appellants have waived their argument that Theroff did not challenge the delegation clause. *See Thummel*, 570 S.W.2d at 686-87 (dismissing for failure to comply with rule); *Nichols*, 399 S.W.3d at 904 (Courts "do not review arguments and issues raised in the argument under a point that are not fairly encompassed by that point").

delegation provision at the trial court; and (2) that whatever challenges Theroff did or does now make are "challenges to the agreement as a whole" because they are based on the same facts as her challenge to the formation of the arbitration agreement. *Id*. Both of these arguments are without merit.

Theroff challenged the delegation provision once it was raised by Appellants. It is important to note that Appellants' motion to compel did not seek to enforce the delegation clause, but rather sought to enforce the arbitration agreement as a whole. (L.F. 18-39). The delegation clause is never mentioned in the motion to compel and is not attached to the motion.[20] (*Id.*). It should not be surprising, then, that Theroff did not specifically challenge the delegation clause in her response to the motion to compel. Rather, she responded to the argument that was made by Appellants' motion – that there was an enforceable agreement to arbitrate. *See Nitro Distributing, Inc. v. Dunn*, 194 S.W.3d 339, 351 (Mo. banc 2006) (a motion to compel arbitration is "designed to compel specific performance of a term in a contract."). It is Appellants, not Theroff, who are shifting their argument to now try to enforce a provision they did not originally rely on. Appellants' failure to raise the delegation clause in their motion to compel distinguishes

[20] In fact, Appellants waived their right to rely on the delegation clause by not seeking to enforce it in their motion to compel. *See* Rule 55.26 (requiring that the grounds for a motion be stated with particularity); *Payne v. Markeson*, 414 S.W.3d 530, 538 (Mo. App. 2013) (requiring the trial court to rule on the relief actually requested in a motion). Appellants' failure to cite the delegation provision in their motion to compel was prejudicial to Theroff because it denied her the ability to challenge the delegation clause in her written response to the motion to compel. This provides further reason to prevent Appellants from relying on the delegation clause here. *See Katz*, 347 S.W.3d at 539-40 (delegation clause not considered by the appellate court because it was not raised in the circuit court).

this case from others where courts have found that the plaintiff failed to specifically challenge the delegation clause. *See, e.g., State ex rel. Pinkerton*, 531 S.W.3d at 42; *Caldwell*, 2019 WL 1445220 at *2.

Appellants first raised the delegation clause in their reply suggestions in support of their motion to compel, which were filed two days before the evidentiary hearing. (L.F. 51-58). Since the delegation clause is within the incorporated JAMS rules, which were not attached to the motion to compel, this was also the first time that the language of the delegation clause itself was put before the trial court. (L.F. 51-61). Ironically, Appellants' reply argued that the delegation clause should apply *because* "Theroff argues that the Mutual Agreement is invalid in its entirety – without attacking the validity of any specific provision therein[.]" (L.F. 51). In other words, Appellants argued that the delegation clause applied because Theroff had not specifically challenged *a provision that they had not yet raised, relied on, or put into evidence*. Once the delegation clause was finally raised by Appellants in their reply suggestions, Theroff challenged it specifically. At oral argument on the motion to compel, Theroff's counsel argued that neither the arbitration agreement nor the delegation clause was offered or accepted:

> [Theroff's counsel]: Now, Dollar Tree would like to go to great lengths to avoid the Court, to avoid you, Judge, from having to rule on whether a blind person could agree to the terms and conditions in a 12-page mouse print document that she could not read. And they think they've got one. They go, 'Oh, I know. Judge you don't even need to decide this

> because this is actually for someone else to decide under a so-called delegation clause.'
>
> Dollar Tree knows there's no delegation clause contained in this document. . . . They say, 'Oh, no. It's buried in here.'
>
> THE COURT: Oh, the JAMS?
>
> [Theroff's counsel]: It's all there. Yeah. So she couldn't read the first document. But they say, 'Oh, no. It's there,' which is crazy. She could not read the first document, **and she couldn't read that document.**

(Tr. 23:1-17) (Emphasis added). This argument, that Theroff "could not read that document," was a direct challenge to Appellants' assertion that Theroff had been offered or accepted the delegation provision.

Theroff's counsel also argued at the evidentiary hearing that "that's why we're here, to have the Court decide whether my client who is blind and never saw the arbitration agreement, could not read, could not physically read the arbitration agreement, somehow agreed to its terms and then, according to Dollar Tree, agreed to a sentence contained within these 11 pages that incorporated other terms." (Tr. 24:7-13). This was another direct challenge to her agreement to the delegation provision.

Theroff also raised this issue in her post-hearing briefing, arguing that she was not offered "the actual terms of arbitration, including the delegation clause" and that there was "no meeting of the minds" on the delegation clause. (L.F. 89). Contrary to Appellants' assertions, Theroff *did* directly challenge the delegation clause once it was

raised – both as to whether she "agreed" to it as part of or separate from the broader agreement, and as to its effectiveness even if it was agreed to. Theroff has consistently maintained that she *never* agreed to either the arbitration agreement or the delegation clause incorporated into that agreement. Thus, the first part of Appellants' argument fails.

The second part of Appellants' argument is that because Theroff's challenge to the delegation clause is based on the same facts and reasoning as her challenge to the agreement as a whole (that the required offer and acceptance are missing), it is not a "specific" challenge. (*See, e.g.,* Appellants' Brief at 41). This argument fails to recognize the difference between issues of contract formation[21] and issues of contract enforceability. As Judge Wilson has explained:

> Every promise is not a contract, of course, and it is consideration (among other issues of contract formation) that turns a promise into a contract. Moreover, courts may refuse to enforce all or part of a contract even though the elements of contract formation are present. For example, a party may ask that a promise not be enforced because it is unconscionable or because it was induced by fraud. Such defenses are not questions of contract formation, however,

[21] As the Western District recognized below, "formation" and "conclusion" are often used interchangeably but may not always mean the same thing. *See, e.g., State ex rel. Pinkerton*, 531 S.W.3d at 49 n.9; *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 441 n.1 (2006). In order to avoid confusing resulting from the use of these two terms, this brief will use "formation" to apply to all issues relating to the existence of an agreement, including offer, acceptance, consideration, and signature.

> and do not even arise until the question of formation is decided in favor of the party claiming the existence of the contract.

Baker, 450 S.W.3d at 778, n.1 (Wilson, J, dissenting). This distinction, and the recognition that enforceability challenges presuppose a validly formed contract, is nothing new. *See, Hobbs*, 479 S.W.3d at 149 (claims about the scope of the agreement and whether it was unconscionable are claims which assume that an agreement existed in the first place); *Jimenez*, 475 S.W.3d at 683, n.1 ("enforceability presupposes the existence of a validly formed contract"). This distinction applies to delegation clause challenges just as it does to other contracts. *See State ex rel. Pinkerton,* 531 S.W.3d at 49 (noting that unconscionability is an issue of contract enforceability rather than contract formation); *State ex rel. Newberry*, 575 S.W.3d at 475 (contract defenses presuppose the formation of a contract); *Granite Rock*, 561 U.S. at 299 (recognizing distinction between issues of enforceability, which generally can be delegated by agreement and issues of formation, which generally cannot); *Buckeye*, 546 U.S. 440, 444 n.1 (distinction between validity and "conclusion").

The distinction between an issue of formation and an issue of enforceability is critical when considering how to specifically challenge a delegation clause. Because the delegation clause is typically part of a larger arbitration contract and not a stand-alone document, if the larger contract was never offered or accepted or signed, then neither was the delegation clause. Although the delegation clause is *treated* as an "antecedent" agreement, in reality it is *presented* to the plaintiff as a clause within the larger arbitration

agreement (or, as in this case, incorporated by reference into the larger agreement). While this might not matter for defenses such as unconscionability, or even for consideration[22], it does matter for offer and acceptance. The only way that Theroff could have known about the delegation provision is because it is incorporated by the arbitration agreement; thus, if she was never offered the arbitration agreement, she could not have been offered the delegation agreement. Similarly, if she was offered the delegation agreement, it was at the same time and in the same manner that she was offered the arbitration agreement. The same goes for acceptance: if it happened, it was in the same time and manner for both. Therefore, although the delegation clause is considered a separate, severable agreement, the formation of that agreement is dependent on the same facts as the formation of the arbitration agreement. It would be virtually impossible for a plaintiff to assert that she did not agree to the delegation clause without relying on facts that show that she did not agree to arbitrate.

Two recent cases applying Missouri law have recognized that a plaintiff can specifically challenge the delegation clause on the same basis as she challenged the formation of the agreement as a whole. *Esser*, 567 S.W.3d 644; *Shockley*, 929 F.3d 1012.

[22] Most cases challenging consideration in the delegation clause context have challenged the consideration of the agreement as a whole, even though the delegation provision can have its own consideration in the form of mutuality of obligation. *See Caldwell*, 2019 WL 1445220 at *4 (bilateral agreement to follow the AAA rules provided consideration for the delegation clause). That makes consideration fundamentally different from offer and acceptance in this context, even though consideration is also a "formation" issue. While a delegation clause can have its own separate consideration, it typically is not separately offered, accepted, or signed.

Both of these case were decided or denied transfer after *Pinkerton* and *Soars*,[23] which Appellants rely on for their argument that Theroff did not specifically challenge the delegation agreement. (Appellants' Brief at 41-44).

Esser, which considers a meritorious challenge to the *formation* of an agreement, is directly on point. 567 S.W. 3d 644. In *Esser*, the employee argued that he had not agreed to either the arbitration agreement or the delegation clause. The plaintiff's allegation that "the [arbitration agreement] nor the [arbitration agreement]'s delegation provision contain the necessary elements of a valid contract under Missouri law" was a "resoundingly clear" challenge to the delegation provision. *Id*. at 650. It was not a problem that the same theory or evidence was used to challenge both the formation of the arbitration agreement and the formation of the delegation clause:

> While Respondent argued the same theories for why both the [arbitration agreement] and the delegation provision were not valid and enforceable (that Respondent had accepted neither and both lacked consideration), this does not mean that Respondent failed to sufficiently challenge the delegation provision with specificity.

[23] *Pinkerton* was decided in October 2017 (after the trial court's decision in this case and shortly before briefing in the Western District in this case), well before either *Esser* (October 2018) or *Shockley* (July 2019).
Soars was issued on December 18, 2018 (while this case's request for transfer was pending). *Esser* was decided by the Court of Appeals earlier than *Soars*, but this Court's denial of transfer in *Esser* occurred after *Soars*, on March 5, 2019. Presumably, therefore, *Esser's* analysis was found not to be conflicting with *Soars* or *Pinkerton*.

Id. at 650. All that was required for a successful formation challenge was to specifically name the delegation provision and to "assert[] deficiencies of the delegation provision that made it invalid and unenforceable[.]" *Id.*

The employer in *Esser* made the same argument that Appellants make here: that because the arbitration agreement and the delegation clause are challenged on the same basis, this is not a direct challenge to the delegation clause. The *Esser* court correctly characterized this argument as "both meritless and illogical." *Id.* As the court noted, there would be no other way to challenge the formation of the delegation clause:

> Logically, as [employer] attempted to present both the [arbitration agreement] and the delegation provision to [employee] in the same manner and in the same document, [employee] would obviously assert the same validity and enforceability challenges to both the [arbitration agreement] and to the delegation provision in regards to whether either fulfills the essential elements of a contract.

Id.

The Eighth Circuit recently adopted *Esser's* reasoning in determining that the type of challenge which Theroff made here is a valid challenge to the formation of a delegation agreement under Missouri law. *Shockley*, 929 F.3d at 1012. In *Shockley*, both the district court and the Eighth Circuit found that the parties "never entered into a contract relating to either [the arbitration or delegation] provision." *Id*. at 1016. In denying the motion to compel, the district court noted that an employee "should not be

'compelled to proceed to arbitration in order to prove that she never agreed to arbitrate claims in the first place.'" *Id*. at 1017, quoting 2018 WL 7506169 at *3. Following *Esser's* reasoning, the Eighth Circuit agreed that the plaintiff had adequately challenged the delegation clause:

> both the delegation and arbitration provisions were separately challenged as invalid under Missouri contract law. Shockley challenged the contraction formation of the delegation provision by name; the law requires no more.

Id. at 1018. *Esser* and *Shockley* directly consider challenges to a delegation clause based on formation under Missouri law, and both find that formation of the delegation and arbitration agreements can be challenged for the same reasons, so long as the delegation provision is separately identified. Theroff met that standard: she argued both at hearing and in her post-hearing brief that she had not been offered, accepted, signed, or agreed to the delegation provision *or* the arbitration provision, and she mentioned the delegation clause by name. (Tr. 23:1-17, 24:7-13; L.F. 89).

The cases on which Appellants rely are distinguishable; none of them consider a direct, meritorious challenge to the formation of the delegation clause. *Ellis v. JF Enterprises, LLC*, which does not involve a delegation clause, holds that an arbitration clause within a larger agreement must be specifically challenged. 482 S.W.3d 417, 423 (Mo. banc 2016). In *Ellis*, consumers sought to invalidate an arbitration agreement on the basis that the underlying sale agreement was void under the Missouri Merchandising Practice Act. *Id*. at 418. This Court stressed that the FAA "prohibits state courts from

refusing to enforce an arbitration agreement on the ground that the underlying contract was void under state law." *Id*. *Ellis* is distinguishable because the challenge there was to enforceability (not formation) and was based on an issue that had nothing at all to do with the arbitration agreement. *Id*. at 419. In *Ellis*, the arbitration agreement, standing alone, was valid, and it was only because another contract allegedly violated the MMPA that the arbitration agreement could be challenged at all. In contrast, here, Theroff is not arguing that the delegation provision is invalid because it is incorporated into the larger agreement, but rather that the delegation provision standing alone is not valid because it was never agreed to. *See State ex rel. Newberry*, 575 S.W.3d at 476 (specific challenge must be based "on an additional ground or basis beyond the fact it is contained in an arbitration contract").

Pinkerton followed *Ellis'* general principle as to severability, holding that a delegation clause must be separately challenged. 531 S.W.3d at 51 (also citing *Rent-A-Center*, 561 U.S. at 70). But the plaintiff in *Pinkerton*, unlike Theroff, did not challenge the formation of the delegation agreement (or even of the arbitration agreement), but rather argued that the delegation clause was unconscionable. *Id*. at 52. Formation was not even an issue in *Pinkerton*. *Id*. at 49. *Pinkerton* relies heavily on *Rent-A-Center*, which also involved an enforceability challenge (unconscionability). 561 U.S. at 65. Similarly, in *Dotson v. Dillard's, Inc.*, the plaintiff never challenged the delegation clause in the trial court, even though it was raised below, but rather argued that the agreement as a whole was unenforceable. 472 S.W.3d 599, 602-03 (Mo. App. 205).

In *Soars*, the plaintiff claimed to challenge the delegation agreement on three bases which were "expressly identical to his arguments against the Agreement as a whole": lack of consideration, unconscionability, and lack of mutuality. 563 S.W.3d at 115, n.4. The lack of mutuality and unconscionability challenges (which go to enforceability, not formation) were not directed at the delegation provision, but rather were "attempt[s] to circumvent" the requirement to challenge the delegation clause specifically because they were not applicable to that provision. *Id*. at 116. In other words, they were challenges to the agreement as a whole. *Id*.

The third challenge in *Soars* was that there was a lack of consideration, which is a formation issue. *Id*. This challenge was based on the same argument for the delegation clause as to the agreement as a whole – that both lacked consideration because continuing at-will employment was not sufficient consideration. *Id*. Without specifically deciding whether this constituted a specific challenge to the delegation clause, this Court found that the challenge was meritless because the delegation provision, "severed from the rest of the Agreement and considered by itself, is a bilateral contract supported by consideration" in that it involved mutual promises. *Id*. Unlike the agreement in *Soars,* the delegation clause here, when standing alone, does not have the requisite offer and acceptance to form a contract. Nothing about *Soars* precludes Theroff's argument that she can challenge formation of the agreement to delegate by using the same arguments she is using to challenge formation of the agreement to arbitrate.

As the above analysis demonstrates, the formation of a delegation clause can be specifically challenged if it is identified by name, even if formation of the arbitration

agreement is also challenged on the same basis and using the same evidence. This case fits squarely within those parameters, and therefore Theroff's challenge to the delegation clause should be considered by the court. *See State ex rel. Newberry*, 575 S.W.3d at 475 (meritorious direct challenge to delegation clause must be considered before applying the clause).

IV. *The trial court did not err in denying the motion to compel because it properly found that an arbitration agreement was not formed, in that the delegation clause was not effective because it was not agreed to and the underlying agreement also lacked the offer and acceptance needed to form an agreement.* **(Responds to Appellants' Points I and II).**

If a delegation provision does not have the required elements of a contract, then it is ineffective and the court should ignore the provision and determine whether an agreement to arbitrate was formed. *See Shockley*, 929 F.3d at 1018 ("if the delegation provision is not a valid contract because it lacks any of the three requisite elements, we may further review the challenged arbitration agreement's validity); *St. Louis Regional Convention*, 2019 WL 1606160 at *1 (affirming motion to compel after finding delegation clause was ineffective and there was no applicable arbitration agreement). Because an agreement to delegate was never formed, as demonstrated above, consideration of Theroff's challenges to the formation of the arbitration agreement are properly considered in this case.

No contract was formed as to the arbitration agreement as a whole for the same reasons as no contract was formed as to the delegation agreement, and therefore the circuit court properly denied the motion to compel. *See Shockley*, 929 F.3d at 1020 (after finding no formation of delegation agreement, finding that the arbitration agreement fails for the same reasons). Rather than restating all of those points, which are briefed in full above, the remainder of this brief will respond only to Appellants' arguments which have not already been addressed.

Appellants' argument that the trial court "harbored hostility" against arbitration because the judge questioned the applicability of arbitration in the initial evidentiary hearing (Appellants' Brief at 47) is without merit. However, it is of the same tenor as their complaints about the Western District's decision. *See* Appellants' Brief at 19 (accusing the Western District of "improperly manipulate[ing] and twist[ing] Theroff's own testimony to avoid applying the Agreement's delegation clause."). These allegations are improper, as lower courts are presumed to know and properly apply the law. *Greene*, 435 S.W.3d at 649, n.2.

The remainder of Appellants' Point II is devoted to overcoming arguments that Theroff never made or that were not a basis of the circuit court's decision. Pages 50-54 address consideration and scope of the arbitration agreement. Theroff has never disputed that the agreement contained sufficient consideration or that, if valid, it would cover the discrimination claim in this case. Pages 54-57 concern an issue (whether naming Harper as an individual defendant would allow Theroff to avoid the agreement) which does not appear to have been any basis for the trial court's decision.[24] Therefore, Theroff does not respond to these arguments.

[24] This issue is also not raised in Appellants' Point Relied On, in violation of Rule 84.04(e). Because of this violation, Appellants have waived their argument that on this issue. *See Thummel*, 570 S.W.2d at 686-87 (dismissing for failure to comply with rule); *Nichols*, 399 S.W.3d at 904 (Courts "do not review arguments and issues raised in the argument under a point that are not fairly encompassed by that point").

CONCLUSION

The trial court's denial of the motion to compel arbitration should be affirmed. Appellants did not show the existence of a signed agreement by a preponderance of the evidence. The delegation provision is invalid because Theroff did not agree to that provision, in that it was never offered to her or accepted by her. Theroff specifically challenged the delegation provision by arguing that she had not agreed to it. Because the delegation provision does not apply, the court properly considered whether there was an agreement to the arbitration agreement and found that there was not, for the same reasons that there was no agreement to the incorporated delegation provision.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Supreme Court Rule 84.06(b) and Rule 55.03, the undersigned hereby certifies the following:

1. This brief includes the information required by Rule 55.03.

2. This brief complies with the limitations contained in Rule 84.06(b) and contains 15,364 words.

3. Microsoft Word 2010 was used to prepare Respondent's Brief.

/s/ Shelly A. Kintzel
SIGNATURE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed electronically with the Clerk of the Court on this 5th day of September, 2019, to be served by operation of the Court's electronic filing system on all counsel of record.

/s/ Shelly A. Kintzel
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