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 REPLY BRIEF

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REPLY TO PLAINTIFF'S STATEMENT OF FACTS

Theroff persists with her "I don't remember signing an arbitration agreement," "I didn't know the hiring documents included an arbitration agreement," and "Kayla Swift was so nice that she tricked me" theories. On the other hand, Dollar Tree[1] provides substantial evidence (in the form of documents and sworn testimony, including Theroff's own admissions) that Theroff signed and accepted the arbitration agreement. The record before this Court can lead to no result other than all of the threshold challenges Theroff has leveled against the arbitration agreement should be sent to an arbitrator along with her underlying Missouri Human Rights Act claim.

Theroff was hired to work as a store cashier and operate the cash register to check out customers. She claims she could perform those duties just fine. (TR 30:2-9; Respondent's Substitute Brief at 10) Yet, her entire defense in this case is that she could not read or access the hiring paperwork during Dollar Tree's onboarding process. However, her arguments cannot overcome the numerous key facts she either admits or fails to dispute:

- Dollar Tree offered, and Theroff opened and viewed, the Mutual Agreement and Arbitration FAQs documents on her home computer on October 21, 2015. (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

[1] "Dollar Tree" herein collectively refers to Defendants/Appellants Dollar Tree and Janie Harper.

states she does not remember. Of course, as outlined in Dollar Tree's opening brief and in this reply brief, this is not sufficient to dispute these actions.

- Dollar Tree again offered and Theroff electronically signed (or, at the very least, authorized Swift to sign for her) the Mutual Agreement document when she came into the store on October 23, 2015. (LF 31-35 at p.5, 36-39 at ¶13, 62-63, 106-108, 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 did not notice the Mutual Agreement and the Arbitration FAQs, which the CareerLaunch program required her to view. This is still not sufficient to dispute these actions.
- Theroff filed a lawsuit alleging claims that fall within the scope of the Mutual Agreement. (LF 6-15, 31) Theroff concedes this point.
- The Mutual Agreement contains a clear delegation clause directing all issues regarding formation, validity, and enforceability to the arbitrator. (LF 32-33, 61)

Although Theroff tries to downplay what documents and information she reviewed and completed at home, she cannot escape these admissions in her testimony relating to the completion of onboarding paperwork ***on her home computer*** on October 21, 2015. Specifically, she ignores the following admissions:

- Theroff had a 32-inch monitor on her home computer with "Zoomtext" equipment that magnified the screen. (TR 28:2-8)
- On October 21, 2015, Dollar Tree emailed Theroff's personal email account with a link to the CareerLaunch onboarding documents to be completed on her home computer. (TR 30:10-31:15, 37:16-10; EX M at p. 2-3; LF 36-39, 106-109)

- On the same day, Theroff received and opened the email, and she used the link to access and complete some of the onboarding documents on her home computer with the Zoomtext assistive device; in fact, she testified: "I was so excited. It was a great night." (TR 28:2-8, 30:10-31:15, 37:6-10; LF 106-109)
- Theroff admits completing "some quick and simple paperwork at home with the aid of her assistive devices." (Respondent's Substitute Brief at 11)
- She also admits she viewed "some information from the Dollar Tree link on October 21 [at home]," but stated (somewhat contradictorily) that she "did not use the link to access any agreements or documents." (Respondent's Substitute Brief at 17; LF 49 at ¶6)
- Theroff does not remember all of the documents she accessed. (TR 30:18-31:15)
- Two of the documents Theroff accessed were the Mutual Agreement and the Dollar Tree Arbitration Program: Frequently Asked Questions. (LF 31-25, 106-109; EX N at 37)

Theroff also selectively represents her testimony relating to the completion of the onboarding paperwork ***at the store*** on October 23, 2015, but still fails to dispute or admits several key facts:

- Even though she "froze a little bit because all she had was her handheld little magnifier" (Respondent's Substitute Brief at 11; TR 31:23-32:2, 42:18-23), Theroff never told Swift (or anyone) she was uncomfortable signing or completing paperwork on the computer. (TR 37:6-23)

- Swift did not prevent Theroff from using – and Theroff did not try to use – her magnifier. (TR 42:12-43:16)
- In fact, Theroff described Swift as being "very sweet" and "I took her up on it to just be accommodating and quick as we can to do the paperwork. I often use people's help." (TR 42:14-17)
- The Electronic Signature page/step in the process stated: "Welcome to the electronic signature step. At this step you will sign all of your paperwork. Please acknowledge your agreement to use electronic signature technology by clicking the agreement below." (EX N at 69)
- The electronic signature acknowledgement read as follows: "I, _____ [applicant name], agree to sign these electronic PDF documents using 'click' signature technology. I understand that a record of each document and my signing of it will be stored in electronic code. I intend both the signature I inscribe with the 'click' signature technology and the electronic record of it to be my legal signature to the document. I confirm that the document is 'written' or 'in writing' and that any accurate record of the document is an original of the document." (EX N at 69)
- Then, the applicant enters their user name, pin code (which is the last 4 digits of their social security number) and their password that they created when initially logging into CareerLaunch with the link sent to them by email. (EX N at 69)
- The list of documents the applicant needs to sign is then displayed, the applicant clicks the "Click to Sign" button to place their electronic signature on the

document, and then a check mark appears next to the form that has been electronically signed. (EX N at 69, 78)

- Theroff admits she was "vaguely aware" that she was signing "actual employment documents" but did not "understand the depth of the documents." (Respondent's Substitute Brief at 13; TR 44:23-45:5)
    - Nevertheless, she "trusted Swift, whom she thought was being 'sweet' and helpful." (LF 87)
- Theroff also completed documents relating to income tax withholding and direct deposit of paychecks, but does not remember signing or agreeing to direct deposit. (TR 37:6-38:22; EX I-K)
- Theroff could not estimate how many documents she completed or how many times Swift directed her to "click here" or "put your name here." (TR 43:8-17)
- Theroff trusted Swift enough to "follow her directions" (Respondent's Substitute Brief at 13; TR 51:19-52:7), and did not expect Swift was misleading Theroff or saying Theroff had agreed to something Theroff had not actually agreed or authorized Swift to do. (TR 51:19-52:7)
- Theroff did some of the typing herself (instead of Swift) "because one of my previous jobs was data entry, so I'm much quicker on a computer." (Respondent's Substitute Brief at 13; TR 43:18-44:3)
- Theroff complains that she had not "heard anything about arbitration and did not know she had signed an arbitration provision," that Swift did not "read [to

Theroff] anything about the arbitration clause," that Swift did not tell her 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.[2] (Respondent's Substitute Brief at 14; TR 34:6-8, 34:22-35:11, 35:16-19, 52:8-12, 92:10-23, 94:15-24; LF 50)

- However, neither did Theroff ask for printed versions or copies of the electronic documents, before or after they were completed. (TR 37:6-38:22)

Theroff also makes unreasonable inferences from Swift's testimony in an apparent effort to paint the October 23 meeting as a fraudulent event wherein Theroff was "misled" into signing the arbitration agreement.[3] That version is simply not supported by the record absent unreasonable inferences:

- Swift testified that she ***did not click*** boxes or read anything from the arbitration screens to Theroff. (TR 60:9-11, 75:3-20) But there is no evidence that Swift did any clicking without Theroff's authorization or over her objection.

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[2] In her substitute brief, Theroff complains that "there are multiple instances" where Dollar Tree provides 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)." (Respondent's Substitute Brief at 9 and n. 1) Hypocritically, Theroff grouped her citations to the transcript in her substitute brief in several places, including this example on page 14 of her brief. This does not violate Rule 84.04(c), but Dollar Tree, nevertheless, breaks up its grouped citations in this substitute reply brief.

[3] As explained below, Theroff's argument seems to focus on ***how*** the Mutual Agreement was presented to her (*i.e.*, a contract defense, not formation), rather than disputing it was signed and accepted by her.

- Swift denies knowing that Theroff had any difficulty reading the screen or completing the on-line hiring document process. (TR 83:2-16, 86:24-87:18)
- Swift's version coincides with Theroff's story too, *i.e.*, Theroff admits she did not attempt to use her magnifier, Swift did not prevent Theroff from using it, and Theroff did not tell Swift she was uncomfortable signing or completing paperwork on the computer. (TR 37:20-23, 42:12-43:7)

ARGUMENT

No fewer than six times in Respondent's Substitute Brief she states: "The trial court apparently resolved this factual dispute in favor of Theroff." (*See* Respondent's Substitute Brief at 10 n.2, 11 n.6, 12 n.7-8, 13 n.9, 14 n.10) However, the trial court's one-sentence order denying Dollar Tree's Motion to Compel Arbitration makes nothing "apparent" and resolves no factual dispute. (LF 487) Actually, in light of the delegation clause, the trial court should not have resolved any factual disputes anyway (beyond confirming that Dollar Tree sufficiently demonstrated the presentation and making of a contract).

Furthermore, the trial court's feelings on the issue are evident from its statements on the record. At the outset of the hearing on Dollar Tree's 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 reveals the trial court harbored the very hostility towards arbitration agreements that the FAA prohibits.[4] *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 as 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)).

As a final initial matter (and as indicated in Dollar Tree's opening substitute brief), it is important to note that Dollar Tree has obtained universal success with regard to its well-structured arbitration agreement procedures. Theroff cites *Andre v. Dollar Tree*

[4] Although Theroff's substitute brief carefully avoids references to the FAA (other than in the context of her attempt to distinguish this Court's decision in *Ellis v. JF Enterprises, LLC, infra*), at no point has she disputed the FAA's governance of this issue.

Stores, Inc., 2018 WL 3323825 (D. Del. July 6, 2018) ("*Andre I*") as an exception to this line of successes regarding enforcement of the Mutual Agreement. Theroff argues that the court in *Andre I* "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.'" (Respondent's Substitute Brief at 28)

However, Theroff failed to disclose that *Andre I* simply denied Dollar Tree's initial motion to compel arbitration "without prejudice" and ordered the parties to proceed with limited discovery to "further flush out the facts regarding [the] key issue" of how Dollar Tree's arbitration website was set up. *Andre I, supra,* at *8. Then, after Dollar Tree re-filed its motion to compel arbitration (upon completion of the limited discovery), the district court in *Andre II* granted the motion and ordered the parties to arbitrate the claims pursuant to the arbitration agreement. *See Andre v. Dollar Tree Stores, Inc.*, 2019 WL 2617253 (D. Del. June 26, 2019) ("*Andre II")*.

I. 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.

A. Dollar Tree Offered Theroff Initial Employment in Exchange for the Mutual Agreement to Arbitrate and Its Delegation Clause

This Court's inquiry begins and ends with the Mutual Agreement's delegation provision. Assuming that *Katz v. Anheuser-Busch, Inc.,* 347 S.W.3d 533, 544 (Mo.App.

2011) sets the standard for this Court's review, the trial court's refusal to enforce the delegation clause and/or the arbitration agreement as a whole is "against the weight of the evidence."

As laid out fully in Dollar Tree's opening substitute brief, this Court should reverse the trial court and compel arbitration because the preponderance of the evidence demonstrates Dollar Tree offered and Theroff signed the Mutual Agreement. Theroff agrees that the "preponderance of the evidence" standard applies. (Respondent's Substitute Brief at 22-24, 34, 60)

A valid offer must be definite in its terms and communicated to the offeree. *Property Assessment Review, Inc. v. Greater Mo. Builders, Inc.*, 260 S.W.3d 841, 846 (Mo. Ct. App. E.D. 2008). Dollar Tree has shown the Mutual Agreement was "offered" to Theroff during the hiring process as a condition of her being hired. Theroff has not overcome the evidence showing Dollar Tree communicated the Mutual Agreement and its delegation provision to her, nor has she attacked the specific language of the Mutual Agreement or disputed that its terms requiring arbitration of employment disputes were clear, unambiguous, and definite. *See id.*; *Dunn*, 112 S.W.3d at 428-29 (enforcing mandatory arbitration where agreement language was "clear" and "unambiguous").

Theroff cannot equate the Mutual Agreement to the arbitration agreement found unenforceable in *Jackson v. Higher Education Loan Authority of Missouri*. 497 S.W.3d 283 (Mo. Ct. App. E.D. 2016). In *Jackson*, the Court of Appeals found the employer's dispute resolution policy was not a contract because the employer had not "offered" an agreement to the employee for acceptance. *Id.* This was based on the document's plain

language that (i) referred to itself as a policy (not a contract); (b) indicated employees were "deemed to have agreed" by virtue of accepting employment; and (c) stated it applied to employees ***even if they did not sign it***. *Id.* at 288-90. In contrast, the Mutual Agreement here specifically states it is a binding agreement and was methodically presented to employees for consideration and acceptance by electronic signature.[5] (LR 31-35) *See Jackson*, 497 S.W.3d at 289 ("offer is the act of presenting something for acceptance").

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 she accesses 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 employment, 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

[5] *Mead v. Moloney Secs. Co.*, 274 S.W.3d 537, 542-43 (Mo. Ct. App. E.D. 2008) (electronic signatures are sufficient to form a binding and enforceable arbitration agreement).

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 relating to receiving onboarding documents at home on her home computer two days earlier:

- 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) (LF 36-39, 106-108; EX B, M; TR 29:3-31:15, 37:6-10);
- she received Dollar Tree's link to onboarding documents (LF 36-39, 106-108; EX B, M; TR 29:3-31:15, 37:6-10);
- she used the link to access and complete some of the paperwork from her home computer the evening of October 21, 2015 (LF 106-108; EX B, M; TR 29:3-31:15, 37:6-10); and
- she does not remember all of the documents she accessed. (TR 29:3-31:15)

Regardless of 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; A14-A16; EX Q) The data logs also show two days later on October 23, 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.[6] (*Id.*) Theroff admits these additional documents were completed at the store, although she could not remember the documents she completed and signed. Theroff simply wants the Court to ignore all of the paperwork, agreements, and signatures she executed – both at home and at the store.

Moreover, her attempts to exclude the Votta Declaration and supporting computer logs in Exhibit Q are unavailing. (LF 106-108; A14-A16; EX Q) Contrary to Theroff's assertion, the Votta Declaration demonstrates he is a Manager of Recruiting Operations for Dollar Tree, his declaration was based on his personal knowledge or on records maintained by Dollar Tree in the ordinary course of business, and Dollar Tree had computer logs of its onboarding processes – specifically, logs showing the date, time, and values of the entries for each screen that Theroff completed as part of the onboarding process. *Id.*; Ex Q. This is sufficient to establish admissibility. *See* Mo. Rev. Stat. § 490.680, Uniform Business Records Act (business records admissible where custodian or qualified witness testifies as to identity of records, mode of preparation, and prepared

[6] *See also* Exhibits I, J, and K showing electronic signatures by Theroff on October 23, 2015.

at/near time of event); *Mo. Valley Walnut Co. v. Snider*, 569 S.W.2d 324 (Mo. Ct. App. 1978) (computer read outs admissible as business records).

Further, the trial court never granted Theroff's request to have the Votta Declaration or Exhibit Q stricken from the record, and she has not demonstrated here that they can (or should) be excluded. Dollar Tree supplemented this information more than a month ***before*** the trial court issued its order denying the motion to compel. The evidentiary record did not necessarily "close" after the hearing; rather, the trial court retained authority to accept additional evidence on the matter of arbitration (and even to revisit the issue and change its decision later). *See Nicholson v. Surry Vacation Resorts, Inc.*, 463 S.W.3d 358 (Mo. Ct. App. S.D. 2015) (trial court's denial of motion to compel arbitration was interlocutory and court retained jurisdiction to reconsider issue in a renewed motion). Theroff could easily have requested that discovery be accomplished on these issues (as was done between *Andre I* and *Andre II*, *supra*), but she chose not to pursue it. In any event, the Votta Declaration and Exhibit Q are admissible, and clearly show the Mutual Agreement and delegation provision were presented to Theroff.

B. Theroff Signed and Accepted the Mutual Agreement to Arbitrate and Its Delegation Clause by a Preponderance of the Evidence

No one disputes that a Mutual Agreement with Theroff's electronic signature exists. Theroff expressly concedes this fact: "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." (Respondent's Substitute Brief at 24)

Theroff, however, attempts to avoid the contract by asking this Court to conclude: "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." (Respondent's Substitute Brief at 25) (emphasis added)

Theroff alleges several times in her brief that Swift "misled" her, *i.e.*, fraudulently induced into signing the Mutual Agreement. (Respondent's Substitute Brief at 25-26, 41) ("Swift misled Theroff into believing the documents weren't important"). If that is the case, Theroff is making a contract defense (such as fraud in the inducement, misrepresentation, mistake, undue influence, duress, or unconscionability), which under any of those theories (as Theroff concedes on pages 49-51 of her substitute brief) delegation would also be required. *See, e.g.*, *Pinkerton, supra,* at 49-50.

Nonetheless, the preponderance of the evidence shows Theroff opened and reviewed the documents – including the Mutual Agreement and Arbitration FAQs – at home on October 21, and then she electronically signed several documents, including the Mutual Agreement on October 23. However, even if Theroff told or authorized Swift to electronically sign for her, that would demonstrate Theroff's assent to the terms of the Mutual Agreement. "Whether there exists mutual assent sufficient to form a contract is dependent upon the ***objective*** intentions of the parties," which are determined "by

reviewing the parties' actions and words." *Miller v. Securitas Security Services USA Inc.,* ___ S.W.3d ___, 2019 WL 4017786 at *5 (Mo.App. 2019), quoting *Jackson*, 497 S.W.3d 283, 289 (Mo.App. 2016). "[S]ignatures remain a common, though not exclusive, method of demonstrating agreement." *Miller, supra*, at *5, quoting *Morrow v. Hallmark Cards, Inc.*, 273 S.W.3d 15, 22-23 (Mo.App. 2008).

In her attempts to avoid this dispositive evidence, Theroff selectively quotes the record to claim any such signature was obtained through misrepresentation, mistake, or fraud. For example, Theroff claims Swift "admitted" she did not help Theroff read anything on the screens (to insinuate Swift blindly led Theroff through the screens); but Swift's statement followed her testimony that Theroff had completed the screens, not Swift. (TR 60:9-11, 75:6-24) And while Theroff claims Swift knew Theroff could not see the screen without an assistive device, she simply cites her own testimony that she told Swift it would take a long time to complete paperwork with a handheld magnifier. (TR 31:23-32:7)

Theroff admits that any such arguments and defenses would be delegated to the arbitrator. But, any objective reading of the record simply does not support that Swift "misled" Theroff or "trivialized" the documentation; any such conclusion can only be reached through unreasonable inferences. No legal requirement forces Swift to have read or explained the document to Theroff. Because Theroff does not deny the Mutual Agreement bears her electronic signature, and she is charged with knowing the contents of the Mutual Agreement despite not reading it, she is therefore bound to it and its delegation clause. *Robinson v. Title Lenders, Inc.*, 364 S.W.3d 505, 509 n.4 (Mo. banc

2012) (failure to read a contract is alone not a defense); *Sanger v. Yellow Cab Co., Inc.*, 486 S.W.2d 477, 481 (Mo. banc 1972) (signing a paper without reading it does not relieve one of the obligation contained in the paper signed); *Repair Masters Constr., Inc. v. Gary*, 277 S.W.3d 854, 858 (Mo. Ct. App. 2009) (failure to read contract before signing does not make it voidable).

Just this month, the Honorable Catherine D. Perry emphasized how clear the result should be here:

> [T]he fact that Frazier did not handwrite his signature is immaterial. . . . The Consent Form reiterates that, by signing, Frazier " . . . [agreed] that [his] electronic signature is the equivalent of a handwritten (or wet) signature, with all the same legal and binding effect." [record citation omitted] Nor do I find persuasive [employee] Frazier's assertion that his failure to recall signing the agreement somehow invalidates his acceptance of the delegation provision. Frazier maintains he does not specifically recall signing the agreement nor being given a copy, but again, he admits that he generally recalls "reviewing some information on a computer at the Papa John's store." [record citation omitted] "The law is clear that a signer's failure to read or understand a contract is not, standing alone, a defense to the contract." [citing *Robinson* and *Sanger*] Further, the Consent Form provided instructions on how to electronically access [Papa John's] materials, as well as instructions on how to request paper copies from [Papa John's] Human Resources Department. [record citation omitted]

Frazier v. Papa John's USA, Inc. et al., 2019 WL 4451155 *4 (E.D.Mo. September 17, 2019).

Like Papa John's system, Dollar Tree's CareerLaunch program notifies new applicants that their electronic signature will serve as their original and legal signature and the applicant acknowledges and consents to this process. Theroff did just that. Accordingly, the Mutual Agreement and the delegation provision meet all elements for an enforceable contract – including offer and acceptance – and Theroff is bound by them. The trial court's decision declining to compel arbitration should be reversed.

As a final point (of logic), Dollar Tree has demonstrated there is an ***actual*** agreement at issue and it contains Theroff's signature – as such, Dollar Tree has met the threshold required for demonstrating an actual arbitration agreement/document exists between the parties. There is clearly an existing document at the center of the parties' dispute, which Theroff cannot and does not deny – other than to say she does not know what or how many documents she signed and does not remember signing an arbitration agreement. Allowing Theroff to take this position and completely avoid the requirements of the agreement and its valid delegation clause would eviscerate hornbook contract law principles, as well as clear federal and state law favoring and encouraging arbitration.

Dollar Tree is not attempting to create an arbitration agreement where none existed. *See, e.g.*, *M&I Bank v. Sader & Garvin, LLC*, 318 S.W.3d 772, 777-78 (2010) (no arbitration agreement where bank delayed in relying on bank rules with arbitration terms that were not signed by other party and came into existence after incident at issue, and bank claimed other party "judicially admitted" an arbitration agreement existed).

Rather, Dollar Tree has a longstanding onboarding process for employees and presents a standalone Mutual Agreement for review and electronic signature. Whether Theroff claims her signature was unintentional, unknowing, coerced, obtained through fraud, or whatever other theory, the parties plainly agree a document exists and contains a delegation clause.

Because there was an offer, acceptance and consideration,[7] the parties plainly delegated threshold issues to the arbitrator through a Missouri Supreme Court-approved delegation clause. Theroff's challenge to the formation of the Mutual Agreement and the delegation provision involves a threshold issue. This Court should compel arbitration without addressing the specifics of Theroff's formation challenges. This result is mandated by recent decisions from this Court, the Missouri Supreme Court, and the U.S. Supreme Court, which reiterate that when a party seeks to compel arbitration under a delegation provision, a court must enforce that provision if it clearly and unmistakably provides authority for an arbitrator to determine arbitrability of the issues, unless the opposing party directly challenges the enforceability of the delegation provision itself.

C. The Mutual Agreement Includes a Clear and Unmistakable Delegation Clause

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) In turn, the JAMS Rules instruct

[7] Theroff confirms that she "has never disputed that the agreement contained sufficient consideration" (Respondent's Substitute Brief at 59), so Dollar Tree need not further demonstrate that element.

that arbitrability disputes – including a dispute over the formation of the agreement – "shall" be decided by an arbitrator. *See* JAMS Employment Arbitration Rule 11(b) (arbitrability disputes, ***including disputes over the formation, existence,*** validity, interpretation or scope of the agreement … ***shall be*** submitted to and ruled on by the Arbitrator.") (emphasis added).

As *Pinkerton* instructs, the parties' incorporation of the JAMS Rules into the Mutual Agreement unequivocally demonstrated an intent to arbitrate threshold arbitrability issues, including contract formation and existence. Thus, Theroff's dispute that the Mutual Agreement is not a valid contract because it lacks the requisite offer and acceptance – a clear dispute of contract formation – must be decided by the arbitrator. While Theroff argues Dollar Tree is taking this out of order, it is Theroff who puts the cart before the horse by arguing the court must decide the issue of contract formation before it can delegate that issue to the arbitrator. That is not the state of the law and ignores the clear, undisputed facts that the Mutual Agreement exists, was offered to Theroff, and was electronically signed by her. Because the trial court ignored the delegation provision, its decision should be reversed. *See id.; Dotson v. Dillard's, Inc.*, 472 S.W.3d 599, 608 (Mo. Ct. App. 2015), *as modified* (Sept. 1, 2015).

Theroff attempts to distinguish *Pinkerton, Soars,* and *Rent-A-Center* (561 U.S. 63 (2010)) on the grounds that they involved arguments of enforceability or validity (*i.e.*, contract defenses such as unconscionability or fraud in inducement) as opposed to formation (*i.e.*, whether the elements of a valid contract existed). This argument is unavailing. The well-established principle that failure to specifically challenge a

delegation provision results in arbitration is not limited to cases where the plaintiff opposes arbitration based on a defense to an otherwise validly formed contract; it also applies when a plaintiff challenges formation. The Missouri Supreme Court stated as much in *Pinkerton:* "[B]oth issues of formation and enforceability of arbitration clauses can be delegated to an arbitrator." 531 S.W.3d at 49 (noting plaintiff "[did] not cite any case law prohibiting issues of formation from being delegated"). Specifically, parties can delegate "threshold issues of arbitrability" to an arbitrator, and "[d]isputes over the formation of the parties' arbitration agreement … have been considered threshold issues of arbitrability." *Id.* Theroff has not cited a single case precluding the delegation of contract formation issues.

Regardless, even if *Pinkerton, Soars,* and *Rent-a-Center* did not concern delegation of formation issues, Theroff has not overcome *Dotson v. Dillard's*, which is ***directly on point*** and ***explicitly required*** delegation of a contract formation dispute to the arbitrator – specifically, whether the contractual element of consideration existed. 472 S.W.3d at 607; *see also Stubblefield v. Best Cars KC, Inc.*, 506 S.W.3d 377, 380 (Mo. Ct. App. W.D. 2016) (noting *Dotson* found the delegation provision at issue gave arbitrator authority to decide contract formation issues, including claim that agreement lacked consideration).

In *Dotson*, the plaintiff was a former Dillard's employee who signed an arbitration agreement with a delegation provision sending arbitrability disputes – including disputes over "the way [the agreement] was formed" – to the arbitrator, not the court. *Id.* The plaintiff argued the agreement was unenforceable for "a variety of reasons due to

formation," including that it lacked consideration, an essential element of a contract. *Id.* at 604. Because the delegation provision "expressly provide[d] authority for the arbitrator to decide claims regarding contract formation," and the plaintiff's argument that "there was no consideration to create a valid agreement raise[d] a contract formation issue," the Court of Appeals held the delegation provision should be enforced, the arbitrability question was for the arbitrator, and the underlying court erred in determining arbitrability. *Id.* at 607.

Theroff is in the same shoes here: she claims the Mutual Agreement was not formed due to lack of essential contract elements, but the agreement contains a delegation clause sending threshold questions of arbitrability – including formation – to the arbitrator. Theroff''s assertions that *Dotson* involved a contract "defense," and that Dollar Tree has not cited a case delegating lack of consideration to an arbitrator, are patently wrong. Dollar Tree has now cited several such binding cases. The trial court here erred in failing to delegate arbitrability – just like the underlying trial court in *Dotson* – and its decision should likewise be reversed.

D. Theroff's Attacks on the Delegation Clause Utterly Fail

Let's be clear. Dollar Tree moved to compel arbitration on December 9, 2016. (LF 18-19) Theroff then opposed Dollar Tree's motion on January 6, 2017, arguing that she did not know about any arbitration agreement (by relying on a self-serving affidavit that Theroff later contradicted while testifying under oath). (LF 40-50) In turn, on February 7, 2017, Dollar Tree properly replied that an offer, acceptance and exchange of consideration occurred here – and, by the way, the arbitration agreement also contained a

clear and unmistakable delegation clause directing all of Theroff's threshold arguments and theories to an arbitrator for consideration. (LF 51-58) All of this was prior to the first and second evidentiary hearings (on February 9 and April 4, 2017, respectively) (LF 4-5 and 81) and before the parties submitted their post-hearing briefs in April 2017 (LF 83-105) Accordingly, Theroff had ample opportunities to attack the delegation clause and, in fact, attempted to do so.

Theroff cites no authority for the proposition that reliance on a delegation clause must be raised and anticipated in initial motion papers, rather than in a reply brief filed with the trial court prior to two evidentiary hearings on this matter. Moreover, how or why would Dollar Tree anticipate, speculate or address Theroff's defenses to the arbitration agreement with its opening motion papers – even before Theroff raised any such arguments? At the time Dollar Tree filed its motion to compel arbitration, it had no idea what Theroff would say or do in response. Theroff's affidavit (confusing and, as we now know, incorrect as it is) was the first time Dollar Tree heard Theroff's story.

With regard to Theroff's argument that she did sufficiently and specifically attack the delegation clause in the trial court, she did not. Theroff references the delegation clause in only two places in her post-hearing brief filed with the trial court:

- "Theroff and Swift did not discuss any of the terms and conditions of the arbitration, such as a delegation clause or what the JAMS arbitration rules were." (LF 86 at ¶16)
- "The delegation clause itself is provided in the JAMS rules, which are not even provided to new employees prior to signing the agreement. Rather, employees are

told that the JAMS rules will control arbitration, and that they can see those rules on a separate website or email Dollar Tree to get a copy of the Rules." (LF 89)

Pinkerton and *Soars* summarily dispose of these attacks. Accordingly, Theroff is only able to challenge the Mutual Agreement as a whole, merely arguing she did not "accept" or sign the agreement (including the delegation clause). (LF 89)

Dollar Tree does not dispute that Theroff can technically launch the same attack on the delegation clause that she makes against the contract as a whole. Two recent cases do stand for this proposition. *See Esser v. Anheuser-Busch, LLC,* 567 S.W.3d 644 (Mo.App. 2018) and *Shockley v. Primelending,* 929 F.3d 1012 (8th Cir. 2019). However, those cases involved meritorious challenges that are distinguishable from this case. In *Esser*, there was "no evidence that [the employee] positively and unambiguously accepted either [the dispute resolution program or its delegation provision]," which was distributed through mailings to current employees. 567 S.W.3d at 651. More importantly, the employee's silence and continued employment (as opposed to an offer of new employment like that given to Theroff) could not demonstrate an intention to be bound by the dispute resolution program. And, unlike Anheuser Busch's "program" at issue in *Esser* (*supra* at 651-652), Dollar Tree uses a stand-alone contract and Theroff was offered employment contingent upon her acceptance of the mutual agreement to arbitrate all employment-related disputes.

Shockley involved an ***employee handbook policy*** by which the employer attempted to bind current employees to arbitration merely based on their review of the policy and continued at-will employment ***and*** in which the employer reserved the right to

unilaterally modify the terms. 929 F.3d at 1017. Again, Theroff's situation is drastically different; she was offered initial employment on the condition that she accept the terms of the mutual arbitration agreement (including the delegation clause). In fact, from that perspective, both *Esser* and *Shockley* actually help Dollar Tree because Theroff accessed, reviewed and electronically signed the arbitration agreement – and then began working after knowing her offer of employment was contingent on her acceptance of the arbitration agreement (including the delegation clause).

Despite how Theroff attempts to characterize her arguments now, as demonstrated below, she did not challenge the delegation provision specifically. Her mantra has been consistent: there was no contract in the first place because she does not remember signing it. In sum, she challenged the validity of the Mutual Agreement as a whole, and did not attack any specific provision. (LF 40-48, 83-90)

There is no credible or non-speculative dispute that the Mutual Agreement exists (along with its delegation provision), that Theroff received and reviewed it, and that she electronically signed it (or at the very least authorized and directed Swift to sign it for her). The only question, then, is whether the parties' Mutual Agreement contained a valid delegation provision, and according to *Pinkerton*, it did. In *Pinkerton*, the Court held 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*, 531 S.W.3d at 48 ("Pinkerton agreed the AAA … rules, which include a delegation provision, would govern arbitration disputes. … By clearly referencing the AAA … rules, the parties expressed their intent to arbitrate any

dispute under these rules, ***including*** the AAA's 'jurisdiction' rule providing that the '[a]rbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.'"); *see also Fallo v. High-Tech Inst.*, 559 F.3d 874, 877-78 (8th Cir. 2009).

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.

Accordingly, Theroff failed to specifically challenge the delegation provision itself beyond the losing "I did not sign or accept it" argument that she directs at the entire agreement, and any and all threshold issues of arbitrability must be sent to the arbitrator.

II. POINT TWO. Even assuming the Trial Court could disregard the delegation provision (it could not), 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.

Even assuming the trial court had authority to rule on the validity and enforceability of the Mutual Agreement (which, given the delegation provision, it did not), it also erred because the Mutual Agreement is a valid and enforceable contract for the same reasons the delegation provision is valid and enforceable. As explained in Section III of Dollar Tree's opening substitute brief: Theroff does not dispute there is valid consideration for the Mutual Agreement; her claims fall squarely within the scope of the contract; and the agreement also covers Theroff's allegations against Defendant Harper.

Again, Theroff's claim that Swift misled her (under the guise of being sweet and helpful) would be a contract defense. However, Theroff disclaims any such argument or defense in her substitute brief. In the end, then, Theroff disputes only whether the contractual elements of offer and acceptance were satisfied. As the briefing thoroughly covers, those attacks against the Mutual Agreement fail for the same reasons they fail against the delegation clause.

Accordingly, this Court should find that offer, acceptance, and consideration exist (and no contract defense has been lodged) and that the Mutual Agreement is valid and enforceable.

CONCLUSION

For the forgoing reasons, Defendants/Appellants Dollar Tree and Janie Harper respectfully ask this Court to reverse the decision of the Circuit Court and remand this case with instructions to compel Theroff's claims to arbitration and stay this litigation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above pleading was served on September 23, 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 **7,689** words, which is in compliance with the **7,750** words allowed by Rule 84.06(b), and this Brief is otherwise in compliance with Rules 84.04 and 84.06.

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