APPENDIX

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APPENDIX A

IN THE SUPREME COURT OF CALIFORNIA

No. S272483

TRICIA GALARSA,

Plaintiff and Respondent,

v.

DOLGEN CALIFORNIA, LLC,

Defendant and Appellant.

En Banc
Filed: Feb. 9, 2022

ORDER

The petition for review is denied.

APPENDIX B

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIFTH APPELLATE DISTRICT

F082404
(Super. Ct. No. BCV-19-102504)

TRICIA GALARSA,

Plaintiff and Respondent,

v.

DOLGEN CALIFORNIA, LLC,

Defendant and Appellant.

Filed: November 19, 2021

OPINION

THE COURT*

APPEAL from an order of the Superior Court of Kern County. Thomas S. Clark, Judge.

McGuire Woods, Mathew C. Kane, Amy E. Beverlin, Sabrina A. Beldner and Travis Gunn for Defendant and Appellant.

* Before Franson, Acting P. J., Peña, J. and Snauffer, J.

Robins Kaplan, Glenn A. Danas; The Bainer Law Firm, and Matthew R. Bainer for Plaintiff and Respondent.

-ooOoo-

Plaintiff Tricia Galarsa sued her former employer to recover civil penalties under the Private Attorneys General Act of 2004 (PAGA; Lab. Code, § 2698 et seq.)[1] for various Labor Code violations. The employer filed a motion to compel arbitration pursuant to an agreement signed by plaintiff when she began her employment. The superior court denied the motion, concluding plaintiff could not be compelled to arbitrate any portion of her PAGA representative claim.

We again conclude that (1) a former employee who is authorized to pursue PAGA representative claims cannot be compelled to arbitrate those claims pursuant to a predispute arbitration agreement and (2) this rule of state law is not preempted by federal law. (*Herrera v. Doctors Medical Center of Modesto, Inc.* (2021) 67 Cal.App.5th 538, 549–550 (*Herrera*).) Also, employer has not demonstrated the superior court was compelled as a matter of law to find that (1) the state assumed the obligation to arbitrate, (2) the state is bound by principles of agency to the arbitration agreement made before plaintiff became the state's authorized agent, or (3) plaintiff, as the state's agent, is equitably estopped from denying the arbitrability of the PAGA claim.

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[1] Unlabeled statutory references are to the Labor Code.

We therefore affirm the order denying the petition to compel arbitration.

FACTS

In March 2016, plaintiff applied for employment with Dolgen California, LLC (Dollar General).[2] As part of the application and hiring process, plaintiff accessed Dollar General's Express Hiring system, which allows persons to receive, review, and acknowledge documents related to their hiring and employment. It is undisputed that on March 30, 2016, plaintiff electronically signed Dollar General's arbitration agreement.

The arbitration agreement stated Dollar General "has a process for resolving employment related legal disputes with employees that involves binding arbitration." It also stated:

> "You agree that, with the exception of certain excluded claims described below, any legal claims or disputes that you may have against Dollar General … arising out of your employment with Dollar General or termination of employment with Dollar General ("Covered Claim" or "Covered Claims") will be addressed in the manner described in this Agreement. You also understand that any Covered Claims that Dollar General may have against you related

[2] This entity is a Tennessee limited liability company and a wholly owned subsidiary of Dollar General Corporation, a publicly traded company. Dollar General operates over 200 retail stores in California.

to your employment will be addressed in the manner described in this Agreement.

"**Class and Collective Action Waiver: You and Dollar General may not assert any class action, collective action, or representative action claims in any arbitration pursuant to the Agreement or in any other forum. You and Dollar General may bring individual claims or multi-plaintiff claims joining together not more than three plaintiffs, provided that the claims are not asserted as a class, collective or representative action. Non-representative, multi-plaintiff arbitrations (up to the three-plaintiff limit) may only be filed if each of the plaintiff's claims: (1) arises out of the same transaction, occurrence, or series of transactions or occurrences; (2) arises out of the same work location; and (3) presents a common question of law or fact. A challenge to a multi-plaintiff action can be initiated by any party by filing a motion to dismiss or sever one or more parties. The arbitrator shall rule upon the motion to dismiss or sever based upon the standards set forth in this Paragraph. NOTE: This waiver does not apply to claims under the National Labor Relations Act.**"

The arbitration agreement also stated its procedures "will be the exclusive means of resolving Covered Claims relating to or arising out of your employment or termination of employment with

Dollar General." The covered claims included alleged violations of wage and hour laws and alleged violations of any other state or federal laws. Plaintiff marked the box on the arbitration agreement stating she agreed to its terms and understood that by checking the box, both Dollar General and she would be bound by the agreement's terms. The agreement also contained an opt-out provision. Plaintiff did not opt out.

In April 2016, plaintiff began working for Dollar General as an hourly-paid assistant manager. Her employment ended in January 2017.

In October 2017, plaintiff's attorney mailed a written notice to the Labor and Workforce Development Agency and defendant pursuant to section 2699.3. Over 65 days passed without the agency responding to plaintiff's notice.

PROCEEDINGS

In February 2018, plaintiff filed a complaint seeking civil penalties under PAGA for violations of the Labor Code. In May 2018, plaintiff filed a first amended complaint for civil penalties under PAGA based on alleged violations of Labor Code sections 201, 202, 203, 204, 226, subdivision (a), 226.7, 510, 512, 1174, subdivision (d), 1194, 1197, 1197.1, and 1198. In June 2019, the parties stipulated to the transfer of the action from Contra Costa County Superior Court to Kern County Superior Court.

In July 2020, Dollar General filed a motion to compel arbitration and stay the proceeding pending completion of arbitration. The motion was supported by two declarations. Dollar General argued that

plaintiff must individually arbitrate the alleged wage and hour violations that involved her, whether cast as a PAGA claim or otherwise.

In September 2020, the superior court held a hearing, announced a tentative ruling to deny the motion, and heard argument from counsel for Dollar General. Counsel argued that allowing plaintiff to pursue a PAGA only action enabled her to void her agreement to arbitrate all employment related disputes. The court stated that, in its view, the statutory scheme allowed an employee to avoid arbitration.

After the hearing, the superior court filed a minute order denying the motion to compel arbitration. The order concluded (1) an employee's right to bring a PAGA representative claim could not be waived, (2) the rule against waivers was not preempted by federal law, and (3) a PAGA claim could not be split into arbitrable individual claims and nonarbitrable representative claims. Dollar General appealed.

DISCUSSION

I. WAIVER OF REPRESENTATIVE CLAIMS WAS INVALID

Dollar General contends plaintiff waived her right to bring representative claims when she signed the arbitration agreement, and that waiver is enforceable under the Federal Arbitration Act (FAA; 9 U.S.C. § 1 et seq.). We disagree.

The California Supreme Court has adopted the rule that "an arbitration agreement requiring an employee as a condition of employment to give up the

right to bring representative PAGA actions in any forum is contrary to public policy." (*Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 360 (*Iskanian*).) If this rule is good law, the waiver contained in Dollar General's arbitration agreement is not enforceable.

Iskanian's anti-waiver rule remains good law because it is not preempted by federal law. Our Supreme Court stated "that the FAA's goal of promoting arbitration as a means of private dispute resolution does not preclude our Legislature from deputizing employees to prosecute Labor Code violations on the state's behalf. Therefore, the FAA does not preempt a state law that prohibits waiver of PAGA representative actions in an employment contract." (*Iskanian*, *supra*, 59 Cal.4th at p. 360.) The court explained that "a PAGA claim lies outside the FAA's coverage because it is not a dispute between an employer and an employee arising out of their contractual relationship. It is a dispute between an employer and the *state*, which alleges directly or through its agents—either the [Labor and Workforce Development] Agency or aggrieved employees—that the employer has violated the Labor Code." (*Id.* at pp. 386–387.)

Dollar General argues *Iskanian*'s approach to federal preemption is no longer correct because more recent opinions of the United States Supreme Court are controlling. Dollar General contends this court can properly conclude that *Epic Systems Corp. v. Lewis* (2018) ___ U.S. ___ [138 S.Ct. 1612, 200 L.Ed.2d 889] (*Epic Systems*) and *Lamps Plus, Inc. v. Varela* (2019) ___ U.S. ___ [139 S.Ct. 1407, 203 L.Ed.2d 636] (*Lamps Plus*) impliedly abrogate the *Iskanian* rule banning

contractual waivers of PAGA representative claims. Dollar General acknowledges that several decisions by the Court of Appeal have concluded that *Iskanian* remains good law and argues "those court are incorrect and this Court is not bound to follow them or *Iskanian* at this juncture."

After Dollar General filed is opening brief, this court issued an opinion following those Court of Appeal decisions and concluding "our Supreme Court's analysis of preemption under the FAA remains good law." (*Herrera*, *supra*, 67 Cal.App.5th at p. 550.) We cited *Provost v. YourMechanic, Inc.* (2020) 55 Cal.App.5th 982 (*Provost*) as authority for the conclusion that *Epic Systems* did not implicitly overrule *Iskanian*. (See *Provost*, at p. 998; *Winns v. Postmates, Inc.* (2021) 66 Cal.App.5th 803, 813, 814 ["several other cases that have reached the same conclusion that *Epic Systems* did not overrule *Iskanian*"; the contention that "*Lamps Plus* overruled *Iskanian* is equally unavailing"]; see also, *Williams v. RGIS, LLC* (2021) 70 Cal.App.5th 445, 451–454 [*Correia* and subsequent Court of Appeal decisions].)

Disagreeing with these decisions, Dollar General argues the United States Supreme Court created "a new, additional line of FAA preemption analysis that courts must employ—one that no California court has yet considered—which asks whether any 'devices or formulas' frustrate the FAA's objectives of enforcing private arbitration agreements." Dollar General asserts plaintiff is patently abusing the PAGA device to avoid her arbitration agreement and is utilizing the

Iskanian rule to frustrate the FAA's objectives.[3] As explained below, we reject this argument and conclude that pursuing a PAGA representative action instead of arbitrating individual causes of action is not a device or formula for frustrating the FAA. Therefore, plaintiff's pursuit of a PAGA action in a judicial forum is not preempted by federal law.

First, Dollar General's contention that *Epic Systems* and *Lamps Plus* contain a new line of preemption analysis misreads the decisions of the United States Supreme Court. In 2011, over three years before *Iskanian* was decided, the United States Supreme Court stated that "the judicial hostility towards arbitration that prompted the FAA had manifested itself in 'a great variety' of 'devices and formulas' declaring arbitration against public policy." (*AT & T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 342 (*Concepcion*).) In *Epic Systems*, the court stated: "Just as judicial antagonism toward arbitration before the [FAA's] enactment 'manifested itself in a great variety of *devices and formulas* declaring arbitration against public policy,' *Concepcion* teaches that we must be alert to new *devices and formulas* that would achieve much the same result today. [Citation.] And a rule seeking to declare individualized arbitration proceedings off limits is, the Court held, just such a device." (*Epic Systems*, *supra*, 138 S.Ct. at p. 1623, italics added.) Therefore, contrary to Dollar General's view, the idea of striking down a state law as a device or formula that negates a private arbitration agreement predates

[3] The opposite and more accurate view is that defendant is manipulating (i.e., overextending) federal arbitration law to undermine PAGA and the Legislature's public policy choices.

Epic Systems, *Lamps Plus* and *Iskanian*. As a result, Dollar General's contention that the inquiry into "devices and formula" is a new, additional line of FAA preemption analysis is not convincing.

Second, the Legislature had legitimate reasons for enacting PAGA in 2003. The Legislature found and declared that (1) adequate financing of labor law enforcement was necessary to achieve maximum compliance with state labor laws; (2) in some situations the only meaningful deterrent to unlawful conduct is the vigorous assessment and collection of civil penalties; (3) staffing levels for labor law enforcement agencies had declined and were unlikely to keep pace with the future growth of the labor market; and (4) it was therefore in the public interest to allow aggrieved employees, acting as private attorneys general, to recover civil penalties for Labor Code violations, while also ensuring that labor law enforcement agencies' enforcement actions have primacy over private enforcement efforts. (Stats. 2003, ch. 906, § 1.) Thus, for purposes of federal preemption analysis, a PAGA action itself is not a "device" or "formula" that reflects judicial antagonism to the enforceability of private arbitration agreements. Furthermore, *Iskanian*'s anti-waiver rule prevents employer from avoiding PAGA and does not directly address arbitration agreements, private or otherwise.

Third and most significantly, the FAA cannot be frustrated when the matter in question lies outside its scope. Here, the matter in question is a PAGA representative action and, as previously stated, a PAGA action "lies outside the FAA's coverage because it is not a dispute between an employer and an

employee arising out of their contractual relationship. It is a dispute between an employer and the *state*, which alleges directly or through its agents—either the [Labor and Workforce Development] Agency or aggrieved employees—that the employer has violated the Labor Code." (*Iskanian*, *supra*, 59 Cal.4th at pp. 386–387.) Accordingly, an aggrieved employee's pursuit of a PAGA action in a judicial forum does not frustrate the FAA's "principal purpose of ensuring that *private* arbitration agreements are enforced according to their terms" (*Volt Information Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior University* (1989) 489 U.S. 468, 478, italics added) any more than the Labor and Workforce Development Agency's pursuit of the PAGA claim in court would frustrate the FAA. (See *Correia v. NB Baker Electric, Inc.* (2019) 32 Cal.App.5th 602, 619 [the class action claim pursued in *Epic Systems* "differs fundamentally from a PAGA claim" because a PAGA claim is brought on behalf of the state, not on behalf of other employees].)

In sum, we conclude the rule against contractual waivers of PAGA representative claims established in *Iskanian* is not preempted by the analysis contained in *Epic Systems* or *Lamps Plus*. As a result, Dollar General's waiver is not enforceable in this case.

II. THE ARBITRATION AGREEMENT

A. Basic Legal Principles

1. Standards of Review

The standard of review applied to a denial of a motion or petition to compel arbitration depends on the issues raised on appeal. (*Bautista v. Fantasy*

Activewear, Inc. (2020) 52 Cal.App.5th 650, 655 (*Bautista*).) For purposes of this appeal, there are three relevant standards of review.

First, the superior court's resolution of a question of law is subject to our independent or de novo review. (*Bautista*, *supra*, 52 Cal.App.5th at p. 655.) For example, where the facts are not disputed, whether a valid agreement to arbitrate was formed is reviewed de novo. (*Juen v. Alain Pinal Realtors, Inc.* (2019) 32 Cal.App.5th 972, 978 (*Juen*).) Also, in part I of this opinion, we conducted a de novo review of the legal issues raised by Dollar General's contention that the waiver of representative actions contained in its arbitration agreement was enforceable.

Second, the superior court's express or implied findings of fact must be supported by substantial evidence. (*Bautista*, *supra*, 52 Cal.App.5th at p. 655.) The third standard of review, which has not been addressed by the parties, also relates to disputed facts. The superior court's express or implied determination that an appellant did not carry its burden of proof is reviewed on appeal for whether the evidence compels a finding in the appellant's favor as a matter of law. (*Juen*, *supra*, 32 Cal.App.5th at pp. 978–979.) To prevail under this standard, the appellant's evidence must be (1) uncontradicted and unimpeached and (2) of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding. (*Id.* at p. 979.)

2. Proving the Existence of a Contract to Arbitrate

The party seeking arbitration bears the burden of proving the existence of an arbitration agreement by

a preponderance of the evidence. (*Juen*, *supra*, 32 Cal.App.5th at p. 978.) The party opposing arbitration bears the burden of proving by a preponderance of the evidence any defense. (*Ibid*.) The existence of an enforceable arbitration agreement is governed by state law principles for the formation, revocation, and enforcement of contracts. (*Ibid*.)

Based on the foregoing principles, Dollar General had the burden of proving the essential elements of a contract, which are (1) parties capable of contracting, (2) the consent of those parties, (3) a lawful object, and (4) adequate consideration. (Civ. Code, § 1550.) The consent of the parties must be (1) free, (2) mutual, and (3) communicated by each to the other. (Civ. Code, § 1565.) Also, an arbitration agreement must be in writing to be valid and enforceable. (Code Civ. Proc., § 1281.)

A written arbitration agreement does not necessarily need to be signed because "a party's acceptance may be implied in fact [citation] or be effectuated by delegated consent [citation]." (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236 (*Pinnacle*).) There are six theories by which a nonsignatory to a contract may be bound by the contract's arbitration provisions: (1) incorporation by reference, (2) assumption, (3) agency, (4) veil-piercing or alter ego, (5) estoppel, and (6) third-party beneficiary. (*Bautista*, *supra*, 52 Cal.App.5th at p. 657, fn. 6 [none of the theories applied to the PAGA representative action pursued by the plaintiffs; denial of arbitration affirmed]; see Comment, *Nonsignatories in Arbitration: A Good-Faith Analysis* (2010) 14 Lewis &

Clark L. Rev. 953, 957.) In this appeal, Dollar General relies on assumption, agency, and estoppel.

B. Contentions of the Parties

Dollar General contends its arbitration agreement is worded broadly enough to reach the PAGA claim and, under California contract law principles of assumption, agency and estoppel, the state is bound by the arbitration agreement. Relying on these contract theories, Dollar General asserts "California's consent provides an alternative avenue for enforcing the arbitration agreement."[4] Dollar General further asserts that some courts "have ruled summarily that California did not consent to arbitration, but there is no binding or reasoned decision rejecting this argument. Simply put, the premise that California never agreed to arbitrate is incorrect."

Plaintiff contends Dollar General's contract theories fail because (1) Dollar General waived the arguments by not asserting them in the superior court, (2) the contract theories are irrelevant, (3) plaintiff was not the state's agent when she signed the arbitration agreement, (4) the state did not assume plaintiff's personal obligation to arbitrate by not intervening after receiving plaintiff's notice, and (5) plaintiff and the state do not qualify as closely related parties.

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[4] Dollar General's reference to "consent" reflects that the consent of the parties is an essential element to the formation of a contract (Civ. Code, §§ 1550, 1565) and that arbitration " 'is strictly a matter of consent.' " (*Lamps Plus*, *supra*, 139 S.Ct. at p. 1415.)

C. Procedural Issues

1. Waiver of Arguments

Dollar General contends it did not waive or forfeit the argument that the state was bound by plaintiff's arbitration agreement, it addressed consent specifically, and it "set forth the factual and legal basis that supports its assumption and estoppel arguments on appeal." For purposes of this appeal, we assume that Dollar General may pursue its contractual theories.

2. What the Superior Court Decided

Dollar General's claims of superior court error raise questions about what determinations the superior court made in reaching its decision. A more fundamental issue is how an appellate court determines what disputes the superior court resolved.

Our starting point is California's constitutional doctrine of reversible error. (*Herrera*, *supra*, 67 Cal.App.5th at p. 546; see Cal. Const., art. VI, § 13.) Under the doctrine, the superior court's order is presumed correct and the appellant must affirmatively demonstrate prejudicial error. (*Ibid.*) All intendments and presumptions are indulged to support the superior court's order on matters as to which the record is silent. (*Ibid.*; *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.)

A silent record may be avoided by a party seeking or opposing arbitration simply by requesting a statement of decision. (Code Civ. Proc., § 1291; see Code Civ. Proc., § 632; Cal. Rules of Court, rule 3.1590.) Here, Dollar General did not request a

statement of decision and the superior court did not address the contract theories during the hearing or in its written order. Under the rules of appellate procedure, this silence requires us to indulge all presumptions that support the order denying arbitration. Because Dollar General had the burden of proving the existence of an arbitration agreement that was binding on the state, the presumption we indulge is that the superior court impliedly determined Dollar General did not carry its burden of proof.

Having determined what the superior court decided, we next identify the applicable standard of review. We review the superior court's implied failure-of-proof determination to see if the evidence compels, as a matter of law, a finding that the state consented to arbitration. (*Juen*, *supra*, 32 Cal.App.5th at pp. 978–979; see *Martinez v. BaronHR, Inc.* (2020) 51 Cal.App.5th 962, 966 [existence of consent to arbitrate is a question of fact].) Such a finding is compelled when the appellant's evidence is (1) uncontradicted and unimpeached and (2) of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding. (*Juen*, at p. 979.) As described below, Dollar General has not demonstrated a finding that the state consented to arbitration is compelled as a matter of law.

D. Contract Theories

1. Assumption

A nonsignatory "may be bound by an arbitration clause if its subsequent conduct indicates that it is assuming the obligation to arbitrate." (*Thomson-CSF, S.A. v. American Arbitration Assoc.* (2d Cir. 1995) 64 F.3d 773, 777 (*Thomson-CSF*).) For example, in

Gvozdenovic v. United Airlines, Inc. (2d Cir. 1991) 933 F.2d 1100, United Airlines had a collective bargaining agreement with a union representing its flight attendants. (*Id*. at p. 1103.) United Airlines acquired routes and related assets from another airline and agreed to hire the flight attendants assigned to those routes. A dispute arose over the seniority rights of the incoming flight attendants and United Airlines and the union attempted to arbitrate the dispute. (*Id*. at p. 1105.) The incoming flight attendants argued they were not required to arbitrate the dispute because the agreement in question had been entered into before their employment with United Airlines began. The court concluded the incoming flight attendants' "conduct manifested a clear intent to arbitrate the dispute." (*Ibid*.) That conduct included sending a representative to act on their behalf in the arbitration process. (*Ibid*.) As a result, the court determined the incoming flight attendants were bound by the arbitration agreement.

In *Thomson-CSF*, the plaintiff was aware of an agreement that purported to bind it as an affiliate of a signing party. (*Thomson-CSF*, *supra*, 64 F.3d at p. 777.) The plaintiff, however, explicitly disavowed any obligations arising out of that agreement and filed an action seeking a declaratory judgment that it was not liable under the agreement. Consequently, the court concluded the plaintiff's conduct did not establish it assumed its affiliate's agreement to arbitrate. (*Ibid*.)

Here, the record contains little evidence of conduct by the state and the Labor and Workforce Development Agency after plaintiff and Dollar General entered into the arbitration agreement. Dollar General's motion to compel arbitration was

supported by a declaration of its attorney and a declaration of Debbie Roach, "a senior manager, HR Shared Services," for Dollar General's parent company. Neither declaration describes any conduct by the state or its agencies. Some conduct is described in the first amended complaint. It alleges that on October 11, 2017, plaintiff provided written notice to the Labor and Workforce Development Agency of Dollar General's alleged Labor Code violations as required by PAGA and over 65 days passed without a response from the agency. For purpose of this appeal, we join the parties in accepting the truth of these allegations.

As a result, the only conduct by the state or the Labor and Workforce Development Agency before this court is the agency's inaction after receiving the plaintiff's notice. There is no evidence that the state or the agency was aware an arbitration agreement existed. Furthermore, Dollar General's assertion of fact that the state or the Labor and Workforce Development Agency completed an "extensive deliberative and investigative process to select [plaintiff] as its agent" is not supported by a citation to direct or circumstantial evidence. Thus, the assertion appears to be based on supposition, speculation, conjecture or surmise.

Consequently, we conclude Dollar General has not shown its evidence was of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding of an intent to assume the arbitration obligation. (See *Juen*, *supra*, 32 Cal.App.5th at p. 979.) Accordingly, the trial court was not compelled as a matter of law to find in favor of Dollar General on its assumption theory.

2. Agency

Dollar General contends that both contract law and common sense compel parties to comply with their contractual obligations regardless of any subsequent agency relationship with a third party. We disagree.

The party seeking enforcement of an arbitration contract has the burden of establishing the authority of a person who purportedly signed the agreement as an agent on behalf of a nonsignatory party. (*Ermoian v. Desert Hospital* (2007) 152 Cal.App.4th 475, 506 ["burden of proving ostensible agency is upon the party asserting that relationship"]; *Pagarigan v. Libby Care Center, Inc.* (2002) 99 Cal.App.4th 298, 301–302 [skilled nursing facility failed to produce required evidence that children of deceased mother had authority to enter into an arbitration agreement on her behalf]; *Oswald Machine & Equipment, Inc. v. Yip* (1992) 10 Cal.App.4th 1238, 1247 ["[u]nless the evidence is undisputed, the scope of an agency relationship is a question of fact, and the burden of proof rests on the party asserting the relationship"].)

Here, Dollar General has presented no evidence that plaintiff was an actual or ostensible agent of the state when she signed the arbitration agreement. Based on allegations we and the parties have assumed to be true, plaintiff became the authorized agent of the state for purposes of pursuing the PAGA claim in late 2017 when 65 days passed without receiving a response to the PAGA notice she sent to the Labor and Workforce Development Agency.

Dollar General's agency theory also is contrary to the following rule of state law: " 'Without the state's

consent, a predispute agreement between an employee and an employer cannot be the basis for compelling arbitration of a representative PAGA claim because the state is the owner of the claim and the real party in interest, and the state was not a party to the arbitration agreement.' " (*Herrera*, *supra*, 67 Cal.App.5th at p. 549.) The rationale for this rule, set forth in many cases, is that the employee was not acting as the state's agent or assignee when the employee signed the arbitration agreement. (E.g., *Correia v. NB Baker Electric, Inc.*, *supra*, 32 Cal.App.5th at p. 622.) Thus, the state, in its role as principal, is not bound by unauthorized acts taken by the employee *before* the employee became the state's agent.

In sum, the evidence in the record does not compel, as a matter of law, a finding that the state is bound to arbitrate under an agreement that plaintiff signed before she became the state's authorized agent.

3. Equitable Estoppel and Closely Related Parties

Dollar General contends (1) equitable estoppel may be a ground for binding a nonsignatory to an arbitration agreement; (2) the closely related parties doctrine is a form of equitable estoppel; and (3) the state is a closely related party because the state's enforcement interests are intertwined with plaintiff's personal interests. As a result, Dollar General concludes plaintiff's arbitration agreement also binds the state as a closely related party.

Plaintiff contends that (1) no California case law has applied the closely related party doctrine to bind a nonsignatory to an arbitration agreement; (2) the

doctrine, even if applicable in the arbitration context, cannot be applied because the state does not have the high level of involvement necessary to qualify as a closely related party; (3) the essential elements of equitable estoppel do not exist because the PAGA claim alleged is statutory and not inextricably bound up with the contractual obligations of an agreement containing an arbitration clause; and (4) *Garcia v. Pexco, LLC* (2017) 11 Cal.App.5th 782, is distinguishable from the facts of this case because it involved a nonsignatory seeking to bind a signatory to arbitration.

First, we consider the legal question of whether the doctrine of closely related parties should be extended to arbitration agreements. We conclude it should not be extended.

The closely related party doctrine has been applied by California courts to forum selection clauses, but not to arbitration clauses. (See *Bugna v. Fike* (2000) 80 Cal.App.4th 229; *Lu v. Dryclean-U.S.A. of California, Inc.* (1992) 11 Cal.App.4th 1490, 1493–1494; *Net2Phone, Inc. v. Superior Court* (2003) 109 Cal.App.4th 583, 596 [nonsignatory is not bound by agreement's forum selection clause unless nonsignatory is closely related to a signatory to the agreement].) In *Bancomer, S.A. v. Superior Court* (1996) 44 Cal.App.4th 1450, the court explained the closely related party doctrine by stating: "For [defendant] to demonstrate that it was 'so closely related to the contractual relationship' that it is entitled to enforce the forum selection clause, it must show by specific conduct or express agreement that (1) it agreed to be bound by the terms of the purchase agreement, (2) the contracting parties intended

[defendant] to benefit from the purchase agreement, or (3) there was sufficient evidence of a defined and intertwining business relationship with a contracting party." (*Id*. at p. 1461.)

In comparison, California courts have applied the doctrine of equitable estoppel to arbitration agreements and those published decisions have developed principles for analyzing whether estoppel compels arbitration. For example, in *Jensen v. U-Haul Co. of California* (2017) 18 Cal.App.5th 295, the court described the application of equitable estoppel to prevent a nonsignatory from avoiding arbitration:

> "A nonsignatory plaintiff may be estopped from refusing to arbitrate when he or she asserts claims that are 'dependent upon, or inextricably intertwined with' the underlying contractual obligations of the agreement containing the arbitration clause. [Citation.] 'The focus is on the nature of the claims asserted …. That the claims are cast in tort rather than contract does not avoid the arbitration clause.' [Citation.] Rather, ' "[t]he plaintiff's actual dependence on the underlying contract in making out the claim against the nonsignatory ... is … always the sine qua non of an appropriate situation for applying equitable estoppel." ' [Citations.] '[E]ven if a plaintiff's claims "touch matters" relating to the arbitration agreement, "the claims are not arbitrable unless the plaintiff relies on the agreement to establish its cause of action." ' [Citations.] 'The fundamental point' is that a party is 'not entitled to make use of [a contract containing an arbitration

> clause] as long as it worked to [his or] her advantage, then attempt to avoid its application in defining the forum in which [his or] her dispute ... should be resolved.' " (*Id*. at p. 306.)

We conclude the foregoing legal principles defining the application of equitable estoppel to an arbitration agreement should be applied to determine whether plaintiff, as a representative of the state, is equitably estopped from refusing to arbitrate the PAGA claim.

Next, we consider whether Dollar General has demonstrated the evidence in this case compels a finding that equitable estoppel requires the PAGA claim to be arbitrated. As described below, Dollar General has failed to make such a demonstration.

The focus of the PAGA cause of action is alleged violations of the Labor Code. Dollar General has not demonstrated that plaintiff is actually dependent upon the underlying employment contract to make out any one of the statutory violations. More specifically, Dollar General has not shown *a particular provision of the employment agreement* is relied upon to establish a Labor Code violation alleged by plaintiff. Thus, Dollar General has not established plaintiff's pursuit of the PAGA cause of action involves her " 'cherry-picking' the provisions of a contract that [she] will benefit from and ignoring other provisions that don't benefit [her] or that [she] would prefer not to be governed by (such as an arbitration clause)." (*Invista S.A.R.L. v. Rhodia, S.A.* (3d Cir. 2010) 625 F.3d 75, 85; see Comment, *Nonsignatories in Arbitration: A Good-Faith Analysis*, *supra*, 14 Lewis & Clark L. Rev. at p. 962 ["if a nonsignatory sues based on direct contractual benefits or rights, the signatory may

compel arbitration"].) Accordingly, Dollar General has not demonstrated equitable estoppel applies to the PAGA claim pursued in this litigation.

E. Individual Claims

Dollar General asks this court to distinguish between the PAGA claims based on Labor Code violations involving her, which it describes as her individual PAGA claims, and the PAGA claims based on Labor Code violations involving other employees. Dollar General contends "the representative PAGA action brought on behalf of California can be limited in its scope so that the dispute is bilateral, involving an individual PAGA claims concerning only the named plaintiff's violations rather than a representative PAGA claim concerning those of other aggrieved employees." In short, Dollar General seeks arbitration only of the alleged Labor Code violations relating to plaintiff.

We reject this argument because, regardless of whether plaintiff is pursuing civil penalties for Labor Code violations involving her or other employees, (1) she is doing so as a representative of the state and (2) PAGA claims fall outside the arbitration agreement.

First, "[a]ll PAGA claims are 'representative' actions in the sense that they are brought on the state's behalf. The employee acts as 'the proxy or agent of the state's labor law enforcement agencies' and 'represents the same legal right and interest as' those agencies — 'namely, recovery of civil penalties that otherwise would have been assessed and collected by the Labor Workforce Development Agency.'" (*ZB, N.A. v. Superior Court* (2019) 8 Cal.5th 175, 185.) When civil penalties are recovered under

PAGA, 75 percent goes to the Labor and Workforce Development Agency and the remaining 25 percent goes to the aggrieved employees. (*Esparza v. KS Industries, L.P.* (2017) 13 Cal.App.5th 1228, 1240–1241; see § 2699, subd. (i).)

Second, a PAGA claim lies outside the scope of the agreement to arbitrate because "it is not a dispute between an employer and an employee arising out of their contractual relationship. It is a dispute between the employer and the *state*, which alleges … that the employer has violated the Labor Code." (*Iskanian*, *supra*, 59 Cal.4th at p. 386–387.) Regardless of semantics, the fact some of the Labor Code violations involved plaintiff does not change the nature of the PAGA claim and cause a portion of the claim to fall within the scope of the arbitration agreement.

DISPOSITION

The order denying the petition to compel arbitration judgment is affirmed. Plaintiff shall recover her costs on appeal.

APPENDIX C

SUPERIOR COURT OF CALIFORNIA
COUNTY OF KERN
BAKERSFIELD DEPARTMENT 17

Case No. BCV-19-102504

TRICIA GALARSA,

Plaintiff,

v.

DOLGEN CALIFORNIA, LLC,

Defendant.

Filed: September 30, 2020

ORDER

The above entitled cause came on regularly on this date and time with parties and/or counsel appearing as reflected above.

The Court appoints Tara Kunha as the official Court Reporter for this hearing.

Tentative announced in open court.

Matter argued by counsel and submitted.

The Court makes the following findings and orders:

Defendant Dolgen California, LLC's motion to compel individual arbitration of Plaintiff's claims and stay proceedings is denied. The opposition arguments are persuasive.

This motion pertains to Plaintiff's operative First Amended Complaint asserting a single cause of action under PAGA. Defendant's motion offers that as part of the hiring process, Plaintiff was required to review the Dollar General Arbitration Agreement (moving memorandum, pg. 9:20) and Plaintiff electronically signed the DGAA (moving memorandum, pg. 9:11), which included the following language:

> "You expressly waive your right to file a lawsuit in court against Dollar General asserting any Covered Claims. You also waive your right to a jury trial...You and Dollar General may not assert any class action, collective action, or representative action claims in any arbitration pursuant to this Agreement or in any other forum. You and Dollar General may bring individual claims..." (Moving memorandum, pg. 10:14-20)

On this basis, Defendant argues that Plaintiff's PAGA only action should be compelled to individual arbitration. However,

> "*Iskanian* held a ban on bringing PAGA actions in any forum violates public policy and that this rule is not preempted by the FAA because the claim is a governmental claim.
> [...]
> "When an employee signs a predispute arbitration agreement, he or she is signing

> the agreement solely on his or her own behalf and not on behalf of the state or any other third party. Thus, the agreement cannot be fairly interpreted to constitute a waiver of the state's rights to bring a PAGA penalties claim in court (through a *qui tam* action by its deputized employee)." (*Correia v. NB Baker Electric, Inc.* (2019) 32 Cal.App.5th 602, 619, 624)

"An employee's right to bring a PAGA action is unwaivable" (*Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 383). As also stated by the California Supreme Court in *Iskanian*,

> "[w]e conclude that the rule against PAGA waivers does not frustrate the FAA's objectives because, as explained below, the FAA aims to ensure an efficient forum for the resolution of private disputes, whereas a PAGA action is a dispute between an employer and the state Labor and Workforce Development Agency." (*Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 384)

Furthermore, this court may not split the PAGA representative claim into an "arbitrable individual claim" and a "nonarbitrable representative claim." As stated in *Williams v. Sup. Ct.* (2015) 237 Cal.App.4th 642,

> "[the] complaint asserted only a single representative cause of action under PAGA.[...] case law suggests that a single representative PAGA claim cannot be split into an arbitrable individual claim and a

> nonarbitrable representative claim. In *Reyes v. Macy's, Inc.* (2011) 202 Cal.App.4th 1119 [135 Cal.Rptr.3d 832] (*Reyes*), the appellate court held that a PAGA claim may not be brought solely on the employee's behalf, but must be brought in a representative capacity. "Because the PAGA claim is not an individual claim, it was not within the **88 scope of [the employer's] request that individual claims be submitted to arbitration…." (*Id.* at p. 1124, 135 Cal.Rptr.3d 832.) Here, as in *Reyes*, petitioner "does not bring the PAGA claim as an individual claim, but 'as the proxy or agent of the state's labor law enforcement agencies.' " (*Id.*, at p. 1123, 135 Cal.Rptr.3d 832, quoting *Arias v. Superior Court*, *supra*, 46 Cal.4th at p. 986, 95 Cal.Rptr.3d 588, 209 P.3d 923.) Accordingly, petitioner cannot be compelled to submit any portion of his representative PAGA claim to arbitration, including whether he was an 'aggrieved employee.' "
>
> (*Williams v. Superior Court* (2015) 237 Cal.App.4th 642, 649; *see also Huff v. Securitas Security Services USA, Inc.* (2018) 23 Cal.App.5th 745, 756)

This court is not presently persuaded that any legal authorities cited by moving Defendant compel a different conclusion.

The motion to compel arbitration is denied.

Plaintiff's counsel is directed to prepare an order for the Court's signature consistent with this ruling and in line with CRC 3.1312 and to provide notice of entry of such order.

APPENDIX D

9 U.S.C. § 2

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract or as otherwise provided in chapter 4.

APPENDIX E

Cal. Labor Code § 2699

§ 2699. Actions brought by an aggrieved employee or on behalf of self or other current or former employees; authority; gap-filler penalties; attorneys fees; exclusion; distribution of recovered penalties

(a) Notwithstanding any other provision of law, any provision of this code that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency or any of its departments, divisions, commissions, boards, agencies, or employees, for a violation of this code, may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees pursuant to the procedures specified in Section 2699.3.

(b) For purposes of this part, "person" has the same meaning as defined in Section 18.

(c) For purposes of this part, "aggrieved employee" means any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed.

(d) For purposes of this part, "cure" means that the employer abates each violation alleged by any aggrieved employee, the employer is in compliance with the underlying statutes as specified in the

notice required by this part, and any aggrieved employee is made whole. A violation of paragraph (6) or (8) of subdivision (a) of Section 226 shall only be considered cured upon a showing that the employer has provided a fully compliant, itemized wage statement to each aggrieved employee for each pay period for the three-year period prior to the date of the written notice sent pursuant to paragraph (1) of subdivision (c) of Section 2699.3.

(e) (1) For purposes of this part, whenever the Labor and Workforce Development Agency, or any of its departments, divisions, commissions, boards, agencies, or employees, has discretion to assess a civil penalty, a court is authorized to exercise the same discretion, subject to the same limitations and conditions, to assess a civil penalty.

(2) In any action by an aggrieved employee seeking recovery of a civil penalty available under subdivision (a) or (f), a court may award a lesser amount than the maximum civil penalty amount specified by this part if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.

(f) For all provisions of this code except those for which a civil penalty is specifically provided, there is established a civil penalty for a violation of these provisions, as follows:

(1) If, at the time of the alleged violation, the person does not employ one or more employees, the civil penalty is five hundred dollars ($500).

(2) If, at the time of the alleged violation, the person employs one or more employees, the civil penalty is one hundred dollars ($100) for each aggrieved employee per pay period for the initial violation and two hundred dollars ($200) for each aggrieved employee per pay period for each subsequent violation.

(3) If the alleged violation is a failure to act by the Labor and Workplace Development Agency, or any of its departments, divisions, commissions, boards, agencies, or employees, there shall be no civil penalty.

(g) (1) Except as provided in paragraph (2), an aggrieved employee may recover the civil penalty described in subdivision (f) in a civil action pursuant to the procedures specified in Section 2699.3 filed on behalf of himself or herself and other current or former employees against whom one or more of the alleged violations was committed. Any employee who prevails in any action shall be entitled to an award of reasonable attorney's fees and costs, including any filing fee paid pursuant to subparagraph (B) of paragraph (1) of subdivision (a) or subparagraph (B) of paragraph (1) of subdivision (c) of Section 2699.3. Nothing in this part shall operate to limit an employee's right to pursue or recover other remedies available under state or federal law, either separately or concurrently with an action taken under this part.

(2) No action shall be brought under this part for any violation of a posting, notice, agency reporting, or filing requirement of this code, except where the

filing or reporting requirement involves mandatory payroll or workplace injury reporting.

(h) No action may be brought under this section by an aggrieved employee if the agency or any of its departments, divisions, commissions, boards, agencies, or employees, on the same facts and theories, cites a person within the timeframes set forth in Section 2699.3 for a violation of the same section or sections of the Labor Code under which the aggrieved employee is attempting to recover a civil penalty on behalf of himself or herself or others or initiates a proceeding pursuant to Section 98.3.

(i) Except as provided in subdivision (j), civil penalties recovered by aggrieved employees shall be distributed as follows: 75 percent to the Labor and Workforce Development Agency for enforcement of labor laws, including the administration of this part, and for education of employers and employees about their rights and responsibilities under this code, to be continuously appropriated to supplement and not supplant the funding to the agency for those purposes; and 25 percent to the aggrieved employees.

(j) Civil penalties recovered under paragraph (1) of subdivision (f) shall be distributed to the Labor and Workforce Development Agency for enforcement of labor laws, including the administration of this part, and for education of employers and employees about their rights and responsibilities under this code, to be continuously appropriated to supplement and not supplant the funding to the agency for those purposes.

(k) Nothing contained in this part is intended to alter or otherwise affect the exclusive remedy provided by the workers' compensation provisions of this code for liability against an employer for the compensation for any injury to or death of an employee arising out of and in the course of employment.

(l) (1) For cases filed on or after July 1, 2016, the aggrieved employee or representative shall, within 10 days following commencement of a civil action pursuant to this part, provide the Labor and Workforce Development Agency with a file-stamped copy of the complaint that includes the case number assigned by the court.

(2) The superior court shall review and approve any settlement of any civil action filed pursuant to this part. The proposed settlement shall be submitted to the agency at the same time that it is submitted to the court.

(3) A copy of the superior court's judgment in any civil action filed pursuant to this part and any other order in that action that either provides for or denies an award of civil penalties under this code shall be submitted to the agency within 10 days after entry of the judgment or order.

(4) Items required to be submitted to the Labor and Workforce Development Agency under this subdivision or to the Division of Occupational Safety and Health pursuant to paragraph (4) of subdivision (b) of Section 2699.3, shall be transmitted online through the same system established for the filing of notices and requests under subdivisions (a) and (c) of Section 2699.3.

(m) This section shall not apply to the recovery of administrative and civil penalties in connection with the workers' compensation law as contained in Division 1 (commencing with Section 50) and Division 4 (commencing with Section 3200), including, but not limited to, Sections 129.5 and 132a.

(n) The agency or any of its departments, divisions, commissions, boards, or agencies may promulgate regulations to implement the provisions of this part.

APPENDIX F

Dollar General Employee Arbitration Agreement

Please read this entire document carefully. This is an important document that concerns legal rights, so please take your time and consult with an attorney if necessary.

Dolgen California LLC ("Dollar General") has a process for resolving employment related legal disputes with employees that involves binding arbitration. This Dollar General Employee Arbitration Agreement ("Agreement") describes that process and constitutes a mutually binding agreement between you and Dollar General, subject to opt out rights described at the end of this Agreement.

You agree that, with the exception of certain excluded claims described below, any legal claims or disputes that you may have against Dollar General, its parent and subsidiary corporations, employees, officers and directors arising out of your employment with Dollar General or termination of employment with Dollar General ("Covered Claim" or "Covered Claims") will be addressed in the manner described in this Agreement. You also understand that any Covered Claims that Dollar General may have against you related to your employment will be addressed in the manner described in this Agreement.

<u>Class and Collective Action Waiver:</u> You and Dollar General may not assert any class action, collective action, or representative action claims in any arbitration pursuant to this Agreement or in any other forum. You and Dollar General may bring individual claims or multi-plaintiff claims joining together not more than three plaintiffs, provided that the claims are not asserted as a class, collective or representative action. Non-representative, multi-plaintiff arbitrations (up to the three-plaintiff limit) may only be filed if each of the plaintiff's claims: (1) arises out of the same transaction, occurrence, or series of transactions or occurrences; (2) arises out of the same work location; and (3) presents a common question of law or fact. A challenge to a multi-plaintiff action can be initiated by any party by filing a motion to dismiss or sever one or more parties. The arbitrator shall rule upon the motion to dismiss or sever based upon the standards set forth in this Paragraph. NOTE: This waiver does not apply to claims under the National Labor Relations Act.

About Arbitration

Arbitration is a process by which a neutral professional called an arbitrator hears evidence and argument from both sides to a dispute and makes a final, binding decision. There is no judge or jury in arbitration; the arbitrator chosen by the parties makes the final decision on any Covered Claim and decides whether to award you or Dollar General any relief.

How to Begin the Arbitration Process Under this Agreement

When you first become aware that you have a Covered Claim, you must file a written notice of your intent to arbitrate ("Demand") with the American Arbitration Association ("AAA"), a third party dispute resolution organization that administers arbitrations under this Agreement. The Demand must be filed within either (1) the period of the statute of limitations applicable to your Covered Claim, or (2) ninety (90) days after the date a local, state or federal administrative agency issues a notice of a right to sue on your Covered Claim (provided the Covered Claim was filed with such agency within the period required under the law). Any Covered Claim that requires exhaustion of remedies with an administrative agency (such as a discrimination claim requiring filing with the EEOC) may not be filed as a Demand until after the administrative remedies have been exhausted and a notice of right to sue has been issued. Any dispute over the timeliness of the Demand will be referred to the arbitrator for a binding decision.

You have two options for filing your Demand with AAA. The first option is to file online at http://www.adr.org, under AAA's WebFile system. The second option is to file a written notice of your Demand with any AAA office. A list of office locations can be found at http://www.adr.org or by calling AAA at 1-877-495-4185. If you have any questions or need any assistance filing your Covered Claim, you may also contact AAA at the phone number above.

The Demand must set forth the names, addresses, and telephone numbers of the parties; a brief statement of the nature of the Covered Claim; the

amount of money at issue, if any; the remedy sought; and requested hearing location. The Demand must state a legal claim pursuant to a state or federal statute or state or federal common law. The arbitrator will decide any disputes over whether a legal claim has been stated.

At the time you file your Demand, you will be required to pay AAA's filing fee for employees, which is currently $200. To the extent AAA increases the filing fee after this Agreement becomes effective, your portion of the fee will be capped at $200. If you are unable to afford this filing fee, AAA has procedures for you to apply for a fee waiver. Please see http://www.adr.org for details. Dollar General will pay the employer filing fee, AAA administrative costs and fees, the arbitrator's costs and fees, and any employee filing fees that exceed $200.

Notwithstanding the above procedures, you and Dollar General may mutually agree to use another arbitration service of the parties' choosing.

Rules and Procedures

By agreeing to participate in binding arbitration, you and Dollar General acknowledge and agree to the following:

- This Agreement is governed by the Federal Arbitration Act.

- All arbitrations covered by this Agreement will be conducted in accordance with the terms set forth in this Agreement and the Employment Arbitration Rules of AAA (the "Rules"), except as superseded by the terms

of this Agreement. A copy of the current set of Rules is linked below and can be printed. If you lose your copy of the Rules, you may obtain a copy of the Rules by viewing them online at http.//www.adr.org, or you may request a copy in writing to the Dollar General Legal Department, 100 Mission Ridge, Goodlettsville, Tennessee 37072. Where the terms of this Agreement and the Rules conflict, the terms of this Agreement will control.

- The arbitrator will be chosen by the parties from a roster of AAA arbitrators pursuant to the Rules.

- The procedures in this Agreement will be the exclusive means of resolving Covered Claims relating to or arising out of your employment or termination of employment with Dollar General, whether brought by you or Dollar General. This includes, but is not limited to, claims alleging violations of wage and hour laws, state and federal laws prohibiting discrimination, harassment, and retaliation, claims for defamation or violation of confidentiality obligations, claims for wrongful termination, tort claims, and claims alleging violation of any other state or federal laws, except claims that are prohibited by law from being decided in arbitration, and those claims specifically excluded in the paragraph below.

- Covered Claims do not include claims for unemployment insurance benefits, workers' compensation benefits [workers' compensation discrimination and retaliation claims are Covered Claims], whistleblower claims under the Sarbanes-Oxley Act, and claims for benefits under the Employee Retirement Income Security Act. Covered Claims also do not include claims pending in court as of the date this Agreement is signed by you, and claims concerning the scope or enforceability of this Agreement.

- You retain the right to file charges with the Equal Employment Opportunity Commission, any state or local agency or commission enforcing state or local employment discrimination and retaliation laws (including the California Department of Fair Employment and Housing), the National Labor Relations Board, the United States Department of Labor, and the California Labor Commissioner.

- You expressly waive your right to file a lawsuit in court against Dollar General asserting any Covered Claims. You also waive your right to a jury trial. Dollar General waives its right to file a lawsuit for any Covered Claims it may have against you, and Dollar General waives its right to a jury trial. Dollar General will not retaliate against you if you challenge the validity or

enforceability of this Agreement, whether on a concerted basis or individually.

- You and Dollar General both have the right to be represented by a lawyer at all stages of this process, but each party will be responsible for its own attorneys' fees and associated costs. The arbitrator may award attorneys' fees and/or costs to the prevailing party if authorized by the applicable contract, statute or law under which the Claim is brought.

- The scope and timing of discovery will be mutually agreed upon by the parties at the initial case management conference with the arbitrator. If the parties cannot come to a mutual agreement on the scope or timing of discovery, the arbitrator will decide upon the scope and timing, taking into consideration such factors as the nature of the claims asserted, the number of witnesses reasonably anticipated to be called, and the amount in controversy.

- If a discovery dispute arises during the arbitration, the parties shall first attempt to resolve any disputes by mutual agreement. If a discovery dispute cannot be resolved through mutual agreement of the parties, the dispute will be resolved by the arbitrator in a telephone conference call between the parties.

- At the conclusion of the discovery period, either party has the option to file a motion for summary judgment to be decided by the arbitrator prior to any hearing.

- Unless the parties agree otherwise, all arbitrations will be presided over by a single arbitrator.

- The total time period from the filing of the Demand to the arbitration hearing (if there is one), shall not exceed one year. The arbitration hearing shall not exceed five days. The parties may mutually agree to extend or shorten the time frames in this paragraph for any individual arbitration. If one party requests to extend or shorten a time frame in this paragraph, and the other party opposes the request, the arbitrator shall decide whether to extend or shorten the time frame as requested.

- The arbitrator will make a final decision on your Covered Claim that will be binding on you and Dollar General. Each party will have a right to ask the arbitrator to issue a written decision explaining his/her findings of fact and conclusions of law upon which the decision rests.

- The types of relief available in the arbitration will include all relief that would be available to you in a court pursuant to the applicable statute or law under which you bring your Covered Claim.

- Unless otherwise agreed to by both parties, the arbitration will take place in the county in which you were last employed by Dollar General.

- If any parts of this Agreement are found to be invalid, illegal, or unenforceable, the validity, legality, and/or enforceability of the remaining provisions will not be affected by that decision, and any invalid, illegal or unenforceable provisions shall be modified or stricken.

- Nothing in this Agreement is intended to change the at-will nature of your employment with Dollar General or create a contract of employment for a specific period of time.

- **Opt out: You have the opportunity to opt out of this Agreement, meaning that you will not be bound by its terms. If you opt out, Dollar General will not be bound by the terms of this Agreement either. To opt out; you must expressly notify Dollar General of your intention to opt out by filling out and submitting electronically the "Arbitration Opt Out Form" linked on DGme, Dollar General's employee self-service portal, within 30 days of the start of your employment with Dollar General. You will be given instructions on how to access DGme at the beginning of your employment, and**

access instructions are also linked below. If you do not expressly opt out of this Agreement by providing notice to Dollar General as described above within 30 days of starting your employment, you will be bound by the terms of this Agreement if you continue to work for Dollar General after the first 30 days of your employment. Dollar General will not retaliate against you if you choose to opt out of this Agreement.

NAME: Tricia Galarsa **SSN:** XXX-XX-3047

[x] I agree to the terms of the Agreement. I understand and acknowledge that by checking this box, both Dollar General and I will be bound by the terms of this Agreement.

By initialing the box below I certify that the above information is true and correct; and I agree to the conditions of hiring.

Your Initials: TG **Date:** 3/30/2016