SUPREME COURT OF FLORIDA

THE ESTATE OF EDWARD HENRY CLARK,
by and through GAYLE SHOTTS, Personal
Representative,

Petitioner,

CASE NO.: SC08-1774
D.C.A.CASE NO.: 2D07-2635
L.T.C. CASE NO.: 53- 2005CA000421

v.

OP WINTER HAVEN, INC.;
RE WINTER HAVEN, INC.;
TANDEM REGIONAL MANAGEMENT
OF FLORIDA, INC.; TANDEM HEALTH
CARE, INC.; GAIL WARD a/k/a GAIL LURIE
WARD; NANCY C. THOMPSON; MICHAEL
BRADLEY; and IRENA BLACKBURN a/k/a
IRENA TARRAN BLACKBURN (as to
TANDEM HEALTH CARE OF WINTER HAVEN),

Respondents.
_____/

RESPONDENTS' SUPPLEMENTAL ANSWER BRIEF

Daniel E. Dias, Esquire
Florida Bar No. 0099030

Antonio A. Cifuentes, Esq.
Fla. Bar No. 0043605

MANCUSO AND DIAS. P.A
5102 W. Laurel Street, Suite 700
Tampa Florida, 33607
Attorneys for Respondents

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INTRODUCTION

This Court ordered the parties to address the issue of whether the United States Supreme Court decision in *Rent-A-Center West, Inc. v. Jackson*, ____ *U.S.* ____, 130 S. Ct. 2772 (June 21, 2010*)("Jackson"*) affects the instant case. Respondents' Supplemental Answer Brief will address the applicability to the instant case of the *Jackson* decision. As explained below, the Jackson decision clarifies for this Court the analysis required to arrive at the answer to the question of "who decides"?--arbitrator or court--.

ARGUMENT

A. *JACKSON*

In *Jackson* the U.S. Supreme Court considered whether, under the Federal Arbitration Act (FAA), *9 U.S.C Sections 1-16,* a district court may decide a claim that an arbitration agreement is unconscionable, where the agreement explicitly assigns that decision to the arbitrator. Specifically, the question before the Court was who decides whether the delegation provision assigning issues of arbitrability to the arbitrator is valid under federal law.

Antonio Jackson (Jackson) argued that the arbitration agreement was unconscionable in its one-sided coverage of claims subject to arbitration and because it contained discovery provisions that were one-sided and a

provision providing that the arbitrator's fee was to be equally shared by the parties. *Id* at 2780. Justice Scalia found the District Court correctly concluded that Jackson challenged only the validity of the contract *as a whole*. *Id* at 2779. The U.S. Supreme Court reversed the Ninth Circuit on the issue of who had authority to decide whether the arbitration provision was enforceable.

Justice Scalia, citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 126 S. Ct. 1204 (2006), explained that there are two types of challenges under federal law. One type challenges specifically the validity of the agreement to arbitrate. The other challenges the contract as a whole, either on a ground that the directly affects the entire agreement, or on the ground that the illegality of one of the contract's provisions renders the whole contract invalid. Only the first type of challenge is relevant to a court's determination whether the arbitration agreement at issue is enforceable. Justice Scalia concluded by saying that the Court requires the basis of the challenge to be "***directed specifically*** [*emphasis added*] to the agreement to arbitrate before the court will intervene". *Jackson* at 2778.

Justice Scalia then focused on the arguments made by Jackson to determine whether his challenge was directed specifically to the delegation provision and found that Jackson opposed the motion to compel on the

ground that the entire arbitration agreement, including the delegation clause, was unconscionable. *Id* at 2780. An untimely attempt to direct the attack specifically to the arbitration clause was not considered by the Court. *Id* at 2781.

B. SHOTTS

The challenge made by the Personal Representative of the Estate of Edward Clark is based on the illegality of the punitive damages provisions contained in the arbitration agreement and which accordingly render the whole contract invalid. This is the type of challenge which Justice Scalia identified as falling outside of a court's determination whether the agreement at issue is valid. Id at 2778.

The Estate of Shotts challenged the ***entire*** arbitration agreement on public policy grounds at the trial level, in the Second District and in briefs presented to this Court. In its initial brief to this Court, the Estate argued that the Second District's decision is in direct conflict with the decisions of other districts on the issue of whether arbitration provisions which defeat the remedies available under the remedial nursing home statute render the **entire** agreement unenforceable. (p. 45). The Estate has never advanced an argument in any of its filings that the arbitration clause by itself (the clause where the parties mutually assented to arbitrate this dispute) is contrary to

public policy. Under *Jackson*, the arbitration clause is severable from the remainder of the contract and arbitration should be compelled where that clause is not specifically and independently challenged. *Id* at 2778.

As in *Jackson*, the Estate opposed the motion to compel arbitration on the ground that the entire arbitration agreement, including the arbitration clause, was void as against public policy. *Id* at 2779. The Estate did not specifically direct its public policy challenge to the agreement to arbitrate as required by *Jackson*. Instead, the Estate's public policy challenge is directed to punitive damages provisions contained in the remainder of the contract to arbitrate. Under *Buckeye* and *Jackson*, this type of challenge is decided by the arbitrator not the court.

CONCLUSION

Together, *Buckeye* and *Jackson* show that the "arbitration clause" is the specific language contained in the agreement wherein the parties mutually agreed to arbitrate. Under *Buckeye*, and now *Jackson*, that clause is severable from the remainder of the contract and the arbitrator should decide the public policy issue, as in this case, where the clause is not specifically challenged.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been sent by [ ] Hand Delivery [ ] Facsimile [ ] U.S. Mail [X] FedEx to: Susan B. Morrison, Esquire, Law Offices of Susan B. Morrison, P.A., 1200 W. Platt Street, Suite 100, Tampa, Florida 33606, Isaac R. Ruiz-Carus, Esquire, Wilkes & McHugh, P.A., One North Dale Mabry Hwy., Suite 800, Tampa, Florida 33609, Sylvia H. Walbot, Esquire, Matthew J. Conigliaro, Esquire, and Annette Marie Lang, Esquire, Carlton Fields, P.A., P.O. Box 2861, St. Petersburg, Florida 33731, this 11th day of August, 2010.

/s/ Antonio Cifuentes, Esquire
Antonio Cifuentes, Esquire
Florida Bar No. 0043605
Daniel E. Dias, Esquire
Florida Bar No. 0099030
Mancuso & Dias, P.A.
5102 W. Laurel Street, Suite 700
Tampa, Florida 33607
Telephone: (813) 769-6280
Facsimile: (813) 769-6281
Attorneys for Respondents

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing complies with the Florida Rules of Appellate Procedure 9.210 requiring the font size of the type herein to be at least fourteen points if in Times New Roman format.

/s/ Antonio Cifuentes, Esquire
Antonio Cifuentes, Esquire
Florida Bar No. 0043605