**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. 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.**

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# PETITIONER'S SUPPLEMENTAL INITIAL BRIEF ON THE MERITS

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**Susan B. Morrison, Esquire**
Florida Bar No.: 394424

**Isaac R. Ruiz-Carus, Esquire**
Florida Bar No.: 0017004

**LAW OFFICES of**
**SUSAN B. MORRISON, P.A.**
1200 W. Platt Street, Suite 100
Tampa, Florida 33606
Telephone (813) 902-9293
Facsimile (813) 902-9275
**Attorneys for Petitioner**

**WILKES & McHUGH, P.A.**
One North Dale Mabry Hwy.
Suite 800
Tampa, Florida 33609
Telephone (813) 873-0026
Facsimile (813) 286-8820
**Attorneys for Petitioner**

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This Supplementary Initial Brief is submitted in response to this Court's Order dated July 22, 2010, directing the parties to brief the issue of "if and how" the United States Supreme Court's recent decision in *Rent-A-Center West, Inc. v. Jackson,* ____U.S.___, 130 S. Ct. 2772 (June 21, 2010) *("Jackson")* affects the instant case. Accordingly, Petitioner's brief is limited to addressing the *inapplicability* to the instant case of the holding in *Jackson.*

## ARGUMENT

The *Jackson* decision has no affect on the instant case for the following reasons. First, *Jackson* is factually and procedurally distinguishable from the instant case. Second, the *Jackson* arbitration agreement is materially and significantly different than *Shotts'* in that *Jackson's* expressly and exclusively authorizes the arbitrator to decide arbitrability issues, whereas *Shotts'* is silent on this issue. Third, there is no evidence whatsoever in *Shotts* from which the Court could determine the manifestation of intention of the parties to authorize the arbitrator to decide issues regarding his own authority to resolve enforceability issues, whereas *Jackson's* manifestation of assent can be gleaned from the plain language of his agreement. Fourth, the holding in *Jackson* is extremely narrow and is limited to a single discrete issue which is not before this Court in the instant case, *to wit,* whether it is for the court, or the arbitrator, to decide issues of arbitrability ***"where the agreement explicitly assigns that decision to the***

***arbitrator."*** *(emphasis added). Id* at 2773. "The question before us, then, is whether the delegation provision is valid under § 2." *Id.* at 2778. Fifth, the *Jackson* agreement contained two (2) arbitration provisions, one (1) to arbitrate employment claims, and one (1) to authorize the arbitrator to arbitrate enforceability issues, whereas, in *Shotts* there is only a single arbitration provision. In *Jackson,* the Court cited *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 126 S.Ct. 1204, (2006) for the proposition that the two (2) arbitration provisions are severable as a matter of federal substantive law. In contradistinction in *Shotts,* there was only a single arbitration provision and there was no agreement to arbitrate arbitrability issues. Thus, there was nothing to sever, and under *Buckeye* and *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395, 403-404, 87 S.Ct. 1801 (1967), *Shotts'* challenge to the enforceability of the arbitration provision is therefore a matter for the court to decide.

In addition to containing agreements to arbitrate all controversies involving disputes relating to Mr. Jackson's employment by Rent-A-Center, the *Jackson* arbitration agreement contained an express provision, which the Court termed the "delegation provision," *Id.* at 2777, that,

> ***"[t]he Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority*** to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable." *(emphasis added).*

*Id*. at 2775.

The Court ruled that because the parties *expressly and exclusively authorized the arbitrator* to resolve challenges to arbitrability, and because Mr. Jackson *did not challenge* the 'delegation provision' as being unconscionable and unenforceable, his unconscionability defenses should be resolved by the arbitrator and not the court. Unlike *Jackson*, the arbitration agreement in *Shotts* contains no such 'delegation agreement.' Indeed, the agreement is entirely silent on this issue. Nor was there any evidence before the Court in *Shotts* of the parties' clear and unmistakable manifestation of intent to grant the arbitrator exclusive authority to resolve issues of the scope of his own authority over enforceability issues.

Mr. Jackson had challenged the validity of the arbitration agreement on unconscionability grounds based upon what he perceived to be unfair terms that (i) rendered the agreement one sided in that it bound Mr. Jackson to arbitrate all employment-related claims, but did not require Rent-A-Center to arbitrate claims of infringement of intellectual property, unfair competition, and trade secrets, (ii) required the parties to engage in fee-splitting, and (iii) unfairly limited discovery. He did not at any time either in the Ninth Circuit or before the Court address or raise a challenge to the validity of the delegation provision granting the arbitrator ***exclusive authority*** to resolve any issue relating to the enforceability of the agreement

to arbitrate. The Court repeatedly noted that Mr. Jackson did not contest the delegation provision on unconscionability grounds, and stated that "the Ninth Circuit noted that Jackson did not dispute that the text of the Agreement was clear and unmistakable on this point. *Jackson v. Rent-A-Center West, Inc*, 581 F.3d 912, 917 (2009). He also does not dispute it here." *Id.* at 2777. In essence, Mr. Jackson was 'cherry-picking,' challenging one arbitration provision in the trial court and on appeal while tacitly acknowledging the validity of the other, and then doing an about-face before the Supreme Court, asserting for the first time that the because the employment-claims arbitration provision was unconscionable, the separate, unchallenged delegation provision was likewise unenforceable. While Ms. Shotts did raise unconscionability as an avoidance defense, she challenged the enforceability of the single arbitration provision as a whole, as her arbitration agreement did not contain a separate delegation provision.

The Court, citing its earlier opinion in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943, 115 S. Ct. 1920, (1995), determined that the parties' express inclusion of a grant of exclusive authority to the arbitrator evidenced their clear and unmistakable agreement to have the arbitrator decide enforceability issues. In contradistinction, the *Shotts* agreement contained no language from which the court could conclude that the parties

consented to delegate arbitrability issues to the arbitrator. Not only did the agreement lack any such express manifestation of intent, but there was no evidence whatsoever from which the court could determine that the parties intended such. As noted in *First Options,* "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." *Id* at 944. Thus, the Court in *First Options* created a "revers[e]" presumption because it is counter to the presumption we usually apply in favor of arbitration when the question concerns whether a particular dispute falls within the scope of a concededly binding arbitration agreement." *Id* at 944-945. That reverse presumption applies in *Shotts.* In the absence of clear evidence of a manifest intent that the arbitrator should decide enforceability issues, *Shotts* should not be forced to arbitrate.

## CONCLUSION

The *Jackson* opinion has no application to the instant case. In the absence of any evidence of the manifestation of the parties' consent to have the arbitrator decide arbitrability issues, this Court must apply the presumption mandated by *First Options* that the parties did not so agree.

## 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 ] FeEx to: **Antonio Cifuentes, Esq.**, Mancuso & Dias, P.A., 5102 W. Laurel St., Suite 700, Tampa, Florida 33607, and **Sylvia H. Walbolt, Esq., Matthew J. Conigliaro, Esq., and Annette Marie Lang, Esq.,** Carlton Fields, P.A., P.O. Box 2861, St. Petersburg, FL 33731, this 29th day of July, 2010.

_____

Susan B. Morrison, Esquire
Florida Bar No. 394424
**LAW OFFICES OF**
**SUSAN B. MORRISON, P.A.**
1200 W. Platt Street, Suite 100
Tampa, Florida 33606
Telephone: (813)902-9293
Facsimile: (813)902-9275
Attorneys for Petitioner

and

**Isaac R. Ruiz-Carus, Esquire**

Florida Bar No. 0017004
**WILKES & McHUGH, P.A.**
One North Dale Mabry Hwy., Suite 800
Tampa, Florida 33609
Telephone: (813) 873-0026
Facsimile: (813) 286-8820
Attorneys for Petitioner

## 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.

_____

**Susan B. Morrison, Esquire**
Florida Bar No.: 394424