IN THE SUPREME COURT OF FLORIDA

ANGELA I. GESSA, by and through MIRIAM G. FALATEK, her Attorney-In-Fact,

Petitioner,

v.

MANOR CARE OF FLORIDA, INC., et al.

Respondents.
_____/

Case No.: SC09-768

L.T. Case No. 2D07-1928

RESPONDENTS' SUPPLEMENTAL BRIEF

SYLVIA H. WALBOLT
Florida Bar No. 33604
MATTHEW J. CONIGLIARO
Florida Bar No. 63525
CARLTON FIELDS, P.A.
P.O. Box 2861
St. Petersburg, FL 33731
Telephone: 727-821-7000
Facsimile: 727-830-3768

Counsel for Respondents

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ARGUMENT

Rent-A-Center West, Inc. v. Jackson, 130 S. Ct. 2772 (2010), confirms the correctness of the decision below as argued in Point I.C.1. of the Answer Brief. Gessa's remedial limitations challenge is for the arbitrator, not the court.

In her Reply Brief in this Court, Gessa embraced the Ninth Circuit's *Rent-A-Center* decision, likening her public policy challenge to the unconscionability challenge there because both concerned the parties' overall agreement to arbitrate. Rep. Br., at 3-5. The Supreme Court subsequently reversed the Ninth Circuit, holding that the plaintiff's unconscionability challenge was for the arbitrator, not the court. Gessa now retreats from her former position and contends *Rent-A-Center* does not apply because the agreement there included a provision referring enforceability disputes to the arbitrator. She is incorrect.

Rent-A-Center confirms that, for a challenge to be for the court, it must be specifically directed to the making of the agreement to arbitrate disputes—which is more narrow than the entire agreement relating to arbitration. Gessa does not challenge the agreement to arbitrate disputes, which is found in section A.1.1. of the parties' agreement. Instead, she challenges the remedial limitations from section B.1.2. which are incorporated into the arbitration agreement, and she argues they are invalid and void the entire agreement.

That is *not* a challenge to the making of the agreement to arbitrate. It is a

challenge to an entirely different part of the parties' agreement and thus a challenge for the arbitrator, not a court. Under the teachings of *Rent-A-Center*, it is clear that earlier cases so holding were correctly decided. *See, e.g., Hawkins v. Aid Ass'n for Lutherans*, 338 F.3d 801, 807 (7th Cir. 2003) ("[T]he adequacy of arbitration remedies has nothing to do with whether the parties agreed to arbitrate or if the claims are within the scope of that agreement," and thus challenges to remedial limitations "must first be considered by the arbitrator."); *Rollins, Inc. v. Lighthouse Bay Holdings, Inc.*, 898 So. 2d 86 (Fla. 2d DCA 2005) (citing *Hawkins* and other authorities); *see also* Ans. Br., at 17-28 (citing additional authorities).

Simply put, *Rent-A-Center* confirms the distinction between challenges to an "agreement to arbitrate," which are gateway issues for the court, and challenges to an agreement containing the "agreement to arbitrate," which are not. The distinction centers on defining the agreement to arbitrate. Gessa defines it as the 5-page agreement at issue in this case, distinguishing it only from the agreement relating to Gessa's admission to the nursing home. *Rent-A-Center* rejects that view.

Rent-A-Center defined the "agreement to arbitrate" by quoting the Federal Arbitration Act's key language (which is also found in the comparable provision of the Florida Arbitration Code, § 682.02, Fla. Stat.), and holding that the "agreement to arbitrate" is the "written provision . . . to settle by arbitration a controversy . . . ." 130 S. Ct. at 2778 (*quoting* 9 U.S.C. § 2). The Supreme Court explained that the

language meeting this narrow definition is distinct and severable as a matter of law from "the remainder of the contract"—*even if the remainder of the contract is an arbitration agreement*. *Id.* at 2779. In the Supreme Court's words:

> In this case, the underlying contract is itself an arbitration agreement. But that makes no difference. *Application of the severability rule does not depend on the substance of the remainder of the contract.* Section 2 operates on *the specific "written provision"* to "settle by arbitration a controversy" that the party seeks to enforce.

Id. (emphasis added). The Court also explained that the agreement at issue there contained *two* agreements to arbitrate—one to arbitrate employment claims and one to arbitrate enforceability claims. As a matter of law, these provisions were severable not only from the remainder of the contract, but from each other. *Id.* at 2778-79 & n.3 (rejecting "some sort of magic bond between arbitration provisions that prevents them from being severed from each other").

Rent-A-Center accordingly held that the lower court "correctly concluded that Jackson challenged *only the validity of the contract as a whole*." *Id.* at 2779 (emphasis added). That holding is dispositive here because Gessa's challenge is exactly the same. The plaintiff there argued that the agreement's one-sidedness, fee-splitting provision, and discovery limitations rendered the entire agreement unconscionable. So too, Gessa erroneously argues that the remedial limitations are void and invalidate the entire agreement.

Rent-A-Center built on the Supreme Court's earlier decision in *Prima Paint*

Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967), where the plaintiff claimed it was fraudulently induced to enter an agreement containing an arbitration provision but did not argue any fraud specific to the provision itself. Rejecting the dissent's interpretation of *Prima Paint*, which would have construed Jackson's entire arbitration agreement to be the arbitration provision, *Rent-A-Center* explained that "we . . . require the basis of challenge to be directed specifically to the agreement to arbitrate before the court will intervene." 130 S. Ct. at 2778.

Gessa's argument is indistinguishable from the challenge made in *Prima Paint* and held in *Rent-A-Center* to be a challenge for the arbitrator to decide. Gessa makes a broad challenge to the entire agreement, based on the remedial limitations, not to the narrow "written provision . . . to settle by arbitration a controversy" set forth at the outset of the parties' agreement. Under *Rent-A-Center*, the fact that *Prima Paint* involved a consulting services agreement, while this case involves an arbitration agreement, "makes no difference." 130 S. Ct. at 2779.

The key principle underlying *Rent-A-Center*—that the operative "agreement to arbitrate" is less than every provision in the parties' agreement that relates to arbitration—was the subject of several questions at oral argument. *Rent-A-Center* confirms the correctness of Manor Care's position, which rests on the principle that, to promote arbitration, the "written provision[s] . . . to settle by arbitration a

controversy" is viewed narrowly, not expansively as Gessa would have it.

Gessa's Supplemental Brief also seeks to avoid *Rent-A-Center* by asserting that an agreement must clearly reflect any intent to refer arbitrability to arbitration. Manor Care is not arguing that the parties agreed to arbitrate a gateway issue. Manor Care simply maintains that Gessa's challenge to the remedial limitations is not a challenge to the agreement to arbitrate and thus not a gateway issue.

At the oral argument, several questions pointed to the agreement's language that the Florida Arbitration Code "shall govern the arbitration" and queried whether the FAA—and by extension *Rent-A-Center*—applied at all. It does. The parties did not waive the FAA's gateway analysis. They simply invoked the FAC for its detailed procedures once the parties have actually proceeded to arbitration. Not only did Gessa never argue otherwise below or in her principal briefing in this Court, she affirmatively argued that federal law supports her position.

Furthermore, because the FAA and the FAC employ nearly identical language (*compare* 9 U.S.C. §§ 2, 4 *with* §§ 682.02, 682.03(1)), this Court has held that the same test governs the gateway issues analysis under both acts. *Seifert v. U.S. Home Corp.*, 750 So. 2d 633, 636 (Fla. 1999); *see also Auchter Co. v. Zagloul*, 949 So. 2d 1189, 1191 (Fla. 1st DCA 2007) ("[I]t is irrelevant which law applies because the analysis is the same in either case."). *Rent-A-Center* is thus highly persuasive even regarding the FAC and should be followed here.

Respectfully submitted,

SYLVIA H. WALBOLT
Florida Bar No. 33604
MATTHEW J. CONIGLIARO
Florida Bar No. 63525
CARLTON FIELDS, P.A.
P.O. Box 2861
St. Petersburg, FL 33731
Telephone: 727-821-7000
Facsimile: 727-830-3768

Counsel for Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 13, 2010, a copy of the foregoing has been furnished by U.S. Mail to Susan B. Morrison, LAW OFFICE OF SUSAN B. MORRISON, P.A., 1200 W. Platt Street, Suite 1000, Tampa, Florida 33606, Isaac R. Ruiz-Carus, Bennie Lazzarra, Jr. and James L. Wilkes, II, WILKES & McHUGH, P.A., One North Dale Mabry Hwy., Suite 800, Tampa, Florida, 33609; Aram P. Megerian and Bryan Rotella, COLE, SCOTT & KISSANE, P.A., 4301 West Boy Scout Boulevard, Suite 400, Tampa, Florida 33607; Karen L. Goldsmith and Jonathan S. Grout, GOLDSMITH & GROUT, P.A., 2160 Park Ave., No., Winter Park, FL 32789, Steven Geoffrey Giesler, PACIFIC LEGAL FOUNDATION, 1002 SE Monterey Commons Blvd., Suite 102, Stuart, FL 34996; and Cynthia S. Tunnincliff and Ashley P. Mayer, PENNINGTON, MOORE,

WILKINSON, BELL & DUNBAR, P.A., 215 So. Monroe St., 2nd Floor (32301), Tallahassee, FL 32302.

By: _____
Matthew J. Conigliaro
Florida Bar No. 63525

CERTIFICATE OF TYPE SIZE AND STYLE

I HEREBY FURTHER CERTIFY that the type size and style used throughout this brief is 14-point Times New Roman double-spaced, and that this brief fully complies with the requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

By: _____
Matthew J. Conigliaro
Florida Bar No. 63525