SUPREME COURT OF FLORIDA

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

Petitioner,

v.

MANOR CARE OF FLORIDA, INC.; MANORCARE HEALTH SERVICES, INC.; MANORCARE OF AMERICA, INC.; MANOR CARE, INC.; BARBARA PARLATORE a/k/a BARBARA A. KOENING PARLATORE; and DAWN D. BRUNER a/k/a DAWN JONES DEBRUNNER (as to MANOR CARE OF CARROLLWOOD)

Respondents.

CASE NO.: SC09-768
DCA CASE NO: 2D07-1928
LTC: 05-7548

PETITIONER'S SUPPLEMENTAL REPLY BRIEF ON THE MERITS

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ARGUMENT

The Respondents assert that the holding of *Rent-A-Center West, Inc. v. Jackson*,___U.S.____, 130 S.Ct. 2772 (June 21, 2010), would require leaving the issue of the legality of the arbitration agreement to an arbitrator. The Respondents are in error.

In *Rent-A-Center*, Justice Scalia noted that the contract contained multiple arbitration agreements. *Id*. at 2777. In particular, there was a section providing for arbitration of all "past, present or future" disputes arising out of Jackson's employment at Rent-A-Center. *Id*. There was another separate arbitration agreement in which, "[t]he Arbitrator…shall have exclusive authority to resolve any dispute relating to the…enforceability…of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable." *Id.* Justice Scalia observed that the second provision, called the "delegation provision," "is an agreement to arbitrate threshold issues concerning the arbitration agreement." *Id.* The question presented in *Rent-A-Center* was thus not whether the first agreement to arbitrate "past, present or future" employment disputes was valid under §2 of the Federal Arbitration Act, but rather the question presented in *Rent-A-Center* was "whether the delegation provision is valid under §2."

Justice Scalia, writing for the majority, held in *Rent-A-Center* that the latter arbitration agreement was severable as a matter of federal law from the former arbitration agreement. *Id*. at 2778. Since Jackson's challenge was to the former agreement and not the latter "delegation" agreement, his challenge was for an arbitrator, rather than the court. *Id.*

Unlike the contract in *Rent-A-Center*, the instant agreement does not contain a "delegation provision." There is no evidence in the record of the parties' intent to delegate arbitrability issues to the arbitrator. In the instant case, there is a ***single arbitration agreement***. *Accordingly, there is nothing to sever.* Petitioner's challenge is to the validity of the sole arbitration agreement. Thus, under *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006), as well as *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-404 (1967), Petitioner's challenge to the enforceability of the arbitration agreement is for the court to decide.

Justice Scalia stated in the opinion of the Court, that "if a party challenges the validity under §2 of the precise agreement to arbitrate at issue, the federal court must consider the challenge before ordering compliance with that agreement under §4." *Rent-A-Center West, Inc.*, 130 S. Ct. at 2778. Here, Petitioner has challenged the precise agreement to

arbitrate at issue. Thus, the issue is for the court, and not the arbitrator as Respondent contends.

Contrary to Respondents' assertion, Gessa has not "retreated" from her former analysis of the *Rent-A-Center* arbitration agreement. Rather, Petitioner merely points out that it is the *holdings* and the *arbitration agreements* in *Rent-A-Center* that this Court needs to analyze, and not Petitioner's suppositions at oral argument as to what her expectations of the scope and breadth of then--unpublished opinion might be.

Respondent erroneously posits that "Gessa's argument is indistinguishable from the challenge made in *Prima Paint."* Respondent is incorrect. Gessa's arbitration agreement is embodied in her nursing home Admissions Agreement at pg. 40 of 44 with limitation of remedies ($250 K cap, no punitives) incorporated by reference in the arbitration provision. *Prima Paint Corp. v. Conklin,* 388 U.S. 395 (1967), involved a challenge of fraud in the inducement of the *contractas a whole*-as opposed to the arbitration clause itself, and the Court held that a challenge to the contract as a whole is for the arbitrator and not for the courts.

Gessa did not challenge the validity or enforceability of the Admission Agreement in which the single arbitration agreement was contained. She attacked only the enforceability of the *arbitration and*

limitation of remedies provision —not any substantive underlying or ancillary contract. Thus, consistent with *Prima Paint,* because challenges were brought to the arbitration agreement and not to the parties' underlying agreements relative to the admissions, the challenges go to the ***making*** of the arbitration agreements and must be decided by the court.

As stated, there was only a single arbitration clause at issue in *Gessa,* which incorporated the limitations of remedies provisions by reference, whereas there were two separate clauses in *Rent-A-Center,* which the Court found to be severable from one another. *Rent-A-Center's* holdings are therefore inapposite to the discrete issues presented in the instant case.

CONCLUSION

The Supreme Court's decision in *Rent-A-Center* does not control the outcome of the instant case. The parties in the instant case did not expressly agree to arbitrate the enforceability of the arbitration agreement. There is a single arbitration agreement. Petitioner's challenge was to that sole agreement, and is thus for the court, not the arbitrator.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been sent by [ ] Hand Delivery [ ] Facsimile [**X**] U.S. Mail to: **Antonio Cifuentes, Esq.**, Mancuso & Dias, P.A., 2002 N. Lois Ave., Suite 510,

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 ____ day of August, 2010.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Motion complies 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.

____

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