No. 09-497

IN THE

# SUPREME COURT OF THE UNITED STATES

RENT-A-CENTER, WEST, INC.,
Petitioner,

v.

ANTONIO JACKSON,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

## RESPONDENT ANTONIO JACKSON'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Did the Honorable Ninth Circuit Court of Appeals err in holding that under the facts of this case it was for the trial court and not the arbitrator to decide the threshold issue of the enforceability of the arbitration agreement?

## RULE 141(b) STATEMENT OF PARTIES

Respondent incorporates by reference the Statement of Parties as set forth in the Petitioner's Petition for Writ of Certiorari.

TABLE OF CONTENTS

# TABLE OF AUTHORITIES

Treatises



Federal Statutes

Antonio Jackson, ("Respondent") respectfully submits the following brief in opposition to petition for writ of certiorari.

## E: CITATIONS OF OPINIONS

Respondent incorporates by reference the Citations of Opinions contained in Petitioner's Petition for Writ of Certiorari.

## F: STATEMENT OF JURISDICTION

Respondent incorporates by reference the Statement of Jurisdiction contained in the Petitioner's Petition for Writ of Certiorari.

## G: STATUTORY PROVISIONS INVOLVED

This case involves interpretation of Sections 2 and 4 of the Federal Arbitration Act; specifically, when incorporated into an arbitration agreement containing an arbitration clause indicating that the arbitrator shall have the authority to determine the validity of the arbitration agreement, are there circumstances when the Court, and not the arbitrator, shall make that threshold determination?

## H: STATEMENT OF THE CASE AND FACTS

In this case, the Respondent alleged that he was discriminated against based upon his race. He has alleged that his employer, RENT-A-CENTER, INC., failed to promote him based upon his race. (Petitioner's Appendix, pg. 1a)

Upon being hired, and the very same day, the Respondent was presented with a detailed arbitration agreement, which he signed. (Petitioner's Appendix, pg. 2a)

Based upon the repeated denials of his request for promotion, the Respondent filed a complaint in the United States District Court under 42 USC 1981. (Petitioner's Appendix, pg. 8a) The Petitioner, Rent-a-Center, Inc., moved to dismiss based on the fact that the Respondent had signed an agreement to arbitrate employment disputes when he was initially hired. (Petitioner's Appendix, pg. 8a)

The Respondent opposed the motion, claiming that the arbitration clause was unconscionable, and therefore unenforceable, and that the court, and not the arbitrator, should make that determination. The Court, however, dismissed the complaint and mandated arbitration. (Petitioner's Appendix, 9a) Appeal was taken to the Ninth Circuit Court of Appeals.

The Honorable Ninth Circuit, in the published opinion that is the subject of the instant Petition for Writ of Certiorari, reversed the determination of the District Court and found that the Court, and not the arbitrator, should make the determination as to

unconscionability. (Petitioner's Appendix, pg. 7a-20a)

Respondent takes issue with Petitioner's assertion that the intent of the parties was "clear and unmistakable," in that while one portion incorporating AAA arbitration rules indicates the arbitrator should decide arbitrability; however, the agreement also incorporates by reference sections 2 and 4 of the FAA, which clearly leaves room for a court to make the threshold determination of the viability and enforceability of the arbitration clause.

## I: ARGUMENT

### 1. THE HONORABLE COURT HAS ALREADY SPOKEN TO THIS ISSUE AND CLEARLY SET FORTH THE PARAMETERS OF WHEN THE TRIAL COURT SHOULD MAKE THE INITIAL DETERMINATION OF THE ENFORCEABILITY OF AN AGREEMENT TO ARBITRATE AND WHEN THE ARBITRATOR SHOULD MAKE THE INITIAL DETERMINATION, AND THE NINTH CIRCUIT DID NOT ERR IN HOLDING THAT UNDER THE FACTS OF THIS CASE THE TRIAL COURT AND NOT THE ARBITRATOR SHOULD MAKE THE INITIAL DETERMINATION OF UNCONSCIONABILITY.

It is respectfully submitted that the Petitioner is incorrect in its assertion that there is a split amongst the circuit courts of appeal regarding who makes the threshold determination as to the enforceability of an arbitration agreement, even when

the parties have contracted that the arbitrator shall make the determination.

The Honorable Panel of the Ninth Circuit correctly analyzed this case by citing to United States Supreme Court precedent and Ninth Circuit cases following that precedent. There is no real conflict amongst the circuits on the issue raised in the instant Petition for Writ of Certiorari.

The trial court, in reliance on the U.S. Supreme Court case of *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 126 S.Ct. 1204 (2006), found that it is up to the arbitrator to decide if the arbitration agreement in question is enforceable.

The trial court, however, completely misconstrued the *Buckeye* decision. The Ninth Circuit recently had opportunity to address the *Buckeye* holding in *Davis v. O'Melveny & Myers*, 485 F.3d 1066 (9th Cir. 2007), in which the Court stated the following:

> Neither party questioned whether a court-as opposed to an arbitrator-should decide whether the DRP is unconscionable. The Ninth Circuit, sitting en banc and applying *Buckeye Check Cashing, Inc., v. Cardegna*, 546 U.S. 440, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006), recently addressed whether challenges to an arbitration clause or agreement should be decided by a court or an arbitrator. See *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257 (9th Cir. 2006) (en banc). "When the crux of the complaint is not the invalidity of the

> contract as a whole, but rather the arbitration provision itself, then the federal courts [as opposed to the arbitrator] must decide whether the arbitration provision is invalid and unenforceable under 9 U.S.C. § 2 [.]" *Id.* at 1264. The arbitration agreement challenged in this case is only part of the many conditions and terms of Davis's employment relationship with O'Melveny. Striking or upholding the arbitration agreement or severing any of its terms would not otherwise affect the legality of other conditions of her employment. Under Nagrampa, then, the question whether O'Melveny's arbitration agreement is unconscionable is for a court to decide. See *id.*; *cf. Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256, 264-65 (3d Cir. 2003) (exemplifying that a court addresses the unconscionability of an arbitration provision in a suit regarding employment disputes), cited with approval in *Nagrampa*, 469 F.3d at 1271-72.

Exactly like the Plaintiff in the *Davis* decision, striking or upholding the arbitration agreement or severing any of its terms would not otherwise affect the legality of the conditions of the Respondent's employment, an at-will employee.

The trial court erred by looking to the arbitration agreement and not to the employment agreement as a whole as is required under *Buckeye*. The agreement to arbitrate was but one provision of the Respondent's employment arrangement with the Petitioner. The Respondent only challenged the validity of the agreement to arbitrate. Further, the fact that this unenforceable arbitration agreement also includes a provision that the arbitrator is to decide the validity of the arbitration agreement does not change the analysis set forth in the *Buckeye* decision as to the validity of this clause.

As such, it was clearly within the province of the trial court to rule on the validity of the agreement to arbitrate, and the Ninth Circuit did not err in so holding.

Further, there is no conflict among the circuits as claimed by the petitioner. The first case cited by the Petitioner as being inconsistent with the Ninth Circuit is *Terminix Int'l Co., LP v. Palmer Ranch Ltd. P'ship,* 432 F.3d 1327 (11th Cir. 2005). It is respectfully submitted that the *Terminix* decision is wholly consistent with the Ninth Circuit and United States Supreme Court precedent.

> The Supreme Court has recently reaffirmed that the question "whether the parties have a valid arbitration agreement at all" is for the court, not the arbitrator, to decide. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452, 123 S.Ct. 2402, 2407, 156 L.Ed.2d 414 (2003) (plurality opinion). This rule makes

> imminent sense, for in the absence of "clear and unmistakable evidence" that the parties intended the arbitrator to rule on the validity of the arbitration agreement itself.

(*Id.*, at 1332)

First of all, there is no such clear and unmistakable evidence in that the agreement to arbitrate also incorporates sections 2 and 4 of the Federal Arbitration Act, which does leave room for the court to make the threshold determination of arbitrability. Additionally, as the Ninth Circuit pointed out in discussing this decision, the case is easily distinguishable in that unlike the instant matter, the *Terminix* decision contained no allegations that the agreement to arbitrate was made under circumstances of grossly unequal bargaining power and that there was no meaningful agreement to arbitrate in the first instance, which would be a matter for the court to decide, as it was in the Jackson case. (*Jackson v. Rent-a-Center,* Petitioner's Appendix, pg. 16a)

The Petitioner next cites to *Bailey v. Ameriquest Mortgage Co.,* 346 F.3d 821 (8th Cir. 2003) as being inconsistent with the Ninth Circuit holding. However, *Bailey* is also difficult for the Petitioner in that it relies upon *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 106 S.Ct. 1415 (1986), which clearly indicates it is for the court to decide arbitrability:

> It is the court's duty to interpret

> the agreement and to determine whether the parties intended to arbitrate grievances concerning layoffs predicated on a "lack of work" determination by the Company. If the court determines that the agreement so provides, then it is for the arbitrator to determine the relative merits of the parties' substantive interpretations of the agreement. It was for the court, not the arbitrator, to decide in the first instance whether the dispute was to be resolved through arbitration.

(*Id.*, at 651)

Even the *Bailey* court recognized its unique jurisdiction to address the validity of an arbitration clause when fraud or overwhelming economic power is present. Clearly, the Respondent set forth the overwhelming economic power of the Petitioner in the opposition to the motion to compel arbitration.

The Petitioner finally attempts to show a conflict among the circuits by citing to *Awuah v. Coverall North America, Inc.,* 554 F.3d 7 (1st Cir. 2009). This case also presents a problem for the Petitioner in that ultimately, the court held it was, indeed, for the court to decide, and not the arbitrator, if the remedy of arbitration was illusory, which is a sub-category of the broader unconscionability argument.

Further, while there may be some public policy arguments in favor of arbitration, there are strong

public policy arguments that militate against allowing the arbitrator to determine arbitrability. The first, for example, is the fact that the arbitrator has a financial interest in finding an arbitration clause to be enforceable. (See New York University Law Review, Vol. 83, No. 5, "The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law," by Assistant Professor Aaron-Andrew P. Bruhl, pg. 1472)

In addition, to the extent that an arbitration agreement does contain unconscionable provisions, courts routinely refuse to enforce contracts that violate public policy, and contrary to the position taken by the Petitioner and *Amicus Curiae* Pacific Legal Foundation, parties are not free to contract in a manner that violates public policy. (See, for example, *Corn Plus Co-op. v. Continental Cas. Co.*, 516 F.3d 674 (8th Cir. 2008), in which the court recognized the freedom of parties to contract as long as they do not violate public policy.)

## J: CONCLUSION

Respondent respectfully submits that the decision of the Ninth Circuit should not be disturbed. Contrary to the assertions of the Petitioner and *Amicus Curiae*, there is no split among the circuits on the issue of who should decide arbitrability. As such, the Petition for Writ of Certiorari should be denied.

DATED this 17th day of December, 2009.

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