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April 7, 2010

Blake A. Hawthorne, Clerk
Texas Supreme Court
P.O. Box 12248
Austin, TX 78711

Re: *In re Olshan Foundation Repair Company, LLC*, No. 09-0432
(Real Parties in Interest: Kenneth & Vickie Kilpatrick)

In re Olshan Foundation Repair Company, LLC, No. 09-0433
(Real Parties in Interest: Charley & Gladys Tisdale)

In re Olshan Foundation Repair Company, LLC, No. 09-0474
(Real Parties in Interest: Craig & Joy Waggoner)

In re Olshan Foundation Repair Company, LLC, No. 09-703
(Real Parties in Interest: Robert & Marta Tingdale)

POST-SUBMISSION LETTER

Dear Mr. Hawthorne:

This is Olshan's post-submission letter, addressing and clarifying an issue discussed with the Court at oral argument. Please bring this letter to the attention of the Court.

Justices Hecht and O'Neill raised the issue of whether the Agreements in these cases are rendered void because they did not contain certain disclosures required by the Texas Home Solicitation Act, Tex. Bus. & Com. Code chapter 601 ("THSA") (formerly chapter 39). Plaintiffs speculate that the arbitrators will find the Agreements void under the THSA, and argues on this basis that the Court should

deny the arbitrations despite the the contrary holdings in *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006) and *In re Labatt Food Service, L.P.*, 279 S.W.3d 640 (Tex. 2009).

Plaintiffs make no real attempt to distinguish these cases, and there is no basis for distinction. The enforceability of the arbitration clauses under the FAA is not nullified by the possibility that the Agreements in which they are contained may be found void under state law. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 448-49 (2006).

As a matter of federal law, an arbitration clause contained in a contract alleged to be void is severable and enforceable independently of the contract. *Id.* at 446 (“we conclude that because respondents challenge the Agreement, but not specifically its arbitration provisions, those provisions are enforceable apart from the remainder of the contract”); *see also Bess v. Check Express*, 294 F.3d 1298, 1304-05 (11th Cir. 2002) (alleged voidness of contract based on violation of consumer loan laws did not bar enforcement of arbitration clause).

Further, Plaintiffs are asserting a number of claims that do not depend on the enforceability of the Agreements as such, so the arbitrators will have plenty to do regardless of how the THSA issues are resolved. The Plaintiffs agreed to submit to arbitration “any dispute, controversy, or lawsuit between any of the parties to this agreement about any matter arising out of this agreement” This broad clause encompasses all claims pertaining to the transaction, including their claims based on the DTPA and THSA. Any doubts as to the scope of the arbitration clauses must be resolved in favor of arbitration. *LDF Construction, Inc. v. Bryan*, No. 10-08-00315-CV, slip op. at 9-10 (Tex. App.—Waco March 10, 2010, no pet. hist.)

Included in the issues before the arbitrators will be Olshan’s defenses to the THSA claims. For example, Olshan may contend that the claims are barred by waiver, estoppel and election of remedies because Plaintiffs sued for breach of the contracts and the express warranties given by Olshan, thus judicially affirming and ratifying their existence. *See LDF Construction*, slip op. at 13.

Finally, Plaintiffs would apparently have this Court rule that any transaction that violates the THSA is not subject to the FAA. Federal law does not allow this kind of categorical obstacle to the enforcement of arbitration agreements.

A state is not entitled to remove an entire class of cases or claims from the aegis of the FAA in favor of a judicial or administrative forum. *See Preston v. Ferrer*, 128 S. Ct. 978 (2008); *Southland Corp. v. Keating*, 465 U.S. 1 (1984). Notwithstanding a state’s desire to “provid[e] special protection” to a class of persons, it cannot in the pursuit of that goal “override the declared [federal]

policy requiring enforcement of arbitration agreements.” *Southland Corp.*, 465 U.S. at 16 n.11; *see also In re Nexium Health*, 173 S.W.3d 67, 69 (Tex. 2005).

Whether the Agreements violate the THSA, and if so what remedies are appropriate, is a matter for the arbitrators to decide. *See Preston*, 128 S. Ct. at 984 (dispute over management contract alleged to be void must be arbitrated notwithstanding statute requiring adjudication by state agency); *Southland Corp.*, 104 S. Ct. at 858-59 (dispute over franchise agreements must be arbitrated despite fact that agreements violated state franchise statutes), *reversing Keating v. Superior Court*, 645 P.2d 1192, 1202 (Cal. 1982) (plaintiff claimed franchise agreements failed to contain required disclosures, court erroneously holds state may enforce “nonwaivable judicial remedies” in derogation of FAA in order to protect franchise investors).

At the end of the day, Plaintiffs are required to pursue all their claims in arbitration, as they agreed to do when they contracted with Olshan.

Respectfully submitted,

/s/ Stephan B. Rogers

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