IN THE DISTRICT COURT OF APPEAL
FOR THE THIRD DISTRICT
STATE OF FLORIDA

CASE NO.: 3D15-381

Lower Tribunal No. 14-23649 CA

JOSE ARRASOLA AND VANESSA ARRASOLA,

Appellants,

vs.

MGP MOTOR HOLDINGS, LLC,
d/b/a KENDALL MITSUBISHI

Appellee.

Appellants' Initial Brief

Appeal of Non-Final Order Concerning Arbitration

Attorney for the Appellant

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STATEMENT OF THE CASE AND FACTS

In this deceptive business practices case arising out of an attempted car purchase cut short upon Appellee's unauthorized forgery of financing applications, the trial court granted Appellee's motion to compel arbitration of the Arrasolas' claims against the Appellee's car dealership, even though (i) the parties had openly abandoned the buyer's order containing the arbitration clause, (ii) the arbitration clause was substantively and procedurally unconscionable, and (iii) the trial court did not hold an evidentiary hearing. (App. 14–19, 84). This conflicts with *Seifert* [1] and *Basulto*,[2] which require a valid and enforceable agreement to arbitrate, unaffected by abandonment or unconscionability.

Months before bringing this case, the Arrasolas had put in an order for a Mitsubishi Outlander, payable in cash or financing, but no money ever exchanged hands. (App. 34 at ¶ 3, 37 at ¶ 3). Instead, to obtain financing for the purchase and

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[1] *Seifert v. U.S. Home Corp.,* 750 So. 2d 633, 636 (Fla. 1999) (holding that to grant a motion to compel arbitration, a written agreement to arbitrate must still exist, be valid, and not have been waived).

[2] *Basulto, v. Hialeah Automotive*, 141 So. 3d 1145, 1156–57 (Fla. 2014) (holding a court should invalidate an unconscionable agreement to arbitrate, after weighing substantive and procedural unconscionability on a sliding scale).

[3] The Arrasolas note that abandonment should also suffice *waiver* of arbitration. *See, e.g., Strominger v. AmSouth Bank*, 991 So. 2d 1030, 1035 (Fla. 2d DCA 2008) (holding a party *waived* its right to arbitrate by actively participating in litigation); *Klosters Rederi A/S v. Arison Shipping Co.*, 280 So. 2d 678, 681 (Fla. 1973) (holding party not entitled to enforce arbitration under contract based on conduct subsequent to *requesting* arbitration).

[2] *Basulto, v. Hialeah Automotive*, 141 So. 3d 1145, 1156–57 (Fla. 2014) (holding a court should invalidate an unconscionable agreement to arbitrate, after weighing substantive and procedural unconscionability on a sliding scale).

Appellee's commissions, Appellee forged FORM W-2 tax statements and employee paystubs in the Arrasolas' name without their authorization, and submitted these forgeries along with fabricated financial information to myriad financing institutions and credit bureaus; these institutions then contacted the Arrasolas' main business client, causing injury. (App. 35 at ¶¶ 7–9; 38 at ¶¶ 7–9).

The Arrasolas immediately confronted Appellee, who admitted its fraud, cancelled the potential car purchase, and issued an apology letter to the Arrasolas' business client. (App. 35 at ¶¶ 9–12; 38 at ¶¶ 9–12). Both parties thereafter abandoned the buyer's order, never invoking its provisions, performing obligations, or urging performance. (App. 35 at ¶¶ 10–11; 38 at ¶¶ 10–11). The parties mutually understood that there was no valid agreement between them. *Id.*

Months later, the Arrasolas filed the underlying action for fraud, interference with business relationships and defamation, and violations of FDUTPA and the FCCPA. (App. 7–13). The Arrasolas did not sue for breach of contract or rescission because the parties had abandoned any contractual agreement, mutually understanding that there was no agreement to breach or rescind, and because the Arrasolas were never given a copy of the buyer's order. (App. 7–13).

In response to the Complaint, Appellee filed a motion to compel arbitration. (App. 1–19). Therein, Appellee sought to resuscitate the abandoned and invalid buyer's order, claiming that arbitration adhesion clauses required arbitration of the

Arrasolas' action. (App. 14–19). The fine print on the backside of the buyer's order holds waivers of nearly all of a consumer's legal rights, including that:

(i) Any claim brought by a consumer is subject to arbitration, irrespective of whether they involve fraud in the inducement or statutory claims, and regardless of whether the consumer obtains any financing to move forward with actual car purchase;

(ii) The trial court no longer has jurisdiction to determine the validity of the arbitration provision;

(iii) The consumer does not have a right to appeal the arbitration;

(iv) The consumer does not have a right to arbitration by panel;

(v) The consumer does not have the right to choose the arbitrator;

(vi) The consumer does not have the right to class participation;

(vii) The consumer does not have the right to trial by jury;

(viii) The consumer does not have the right to full discovery;

(ix) The consumer does not have the right to participate in a determination of what information it can discover;

(x) The consumer does not have the right to appeal;

(xi) The consumer does not have the right to consolidation; and

(xii) The consumer does not have the right to final injunctive relief (e.g. under FDUTPA).

(App. 19 at §§ H–I).

In contrast, the same adhesion clauses provide a significantly greater degree of power, rights, and influence to Appellee's dealership, including:

(i) The dealership has the right to not arbitrate its own foreseeable claims, such as for repossession or small claims, and instead file those claims in court;

(ii) The dealership has the right to seek self-help remedies without arbitration;

(iii) The dealership has the right to choose the arbitrator, regardless of any apparent bias (e.g., the arbitrator could be one of Appellee's attorneys) and regardless of the cost (e.g., Appellee could have a pre-existing arrangement that must later be paid by consumer); and

(iv) The dealership has the right to participate in the determination of discoverable information, given that it alone selects its arbitrator of choice.

Id. Appellee's arbitration adhesion clauses are entirely lopsided, inure solely to the benefit of Appellee, and eliminate the Arrasolas' rights beyond a reasonable attempt to provide an inexpensive alternative to resolve disputes while maintaining constitutional and statutory guarantees. *Id.* These backside adhesion clauses also bear no signature, initials, or endorsement to reflect the Arrasolas' agreement. *Id.*

The Arrasolas filed a response to the motion to compel, along with supporting affidavits by both Jose and Vanessa Arrasola, advising the trial court that (i) the Arrasolas and Appellee abandoned any attempted purchase of a car; (ii) the arbitration provision asserted was procedurally and substantively unconscionable; and (iii) that an evidentiary hearing must be held to determine procedural unconscionability. (App. 20–39).

At a February 10, 2015 non-evidentiary hearing, the trial court advised that it had read through the filings and then took oral argument from the Arrasolas and the Appellee on the motion to compel. (App. 42–83). Despite the lack of an evidentiary hearing and the Arrasolas' objections thereto, the trial court found that an enforceable purchase contract existed, not abandoned, and that the contract was neither procedurally nor substantively unconscionable. (App. 41–83). On these findings, the trial court entered an order compelling arbitration. (App. 84).

SUMMARY OF ARGUMENT

Even where parties perform the initial formalities of contract formation—i.e. signing—they may still invalidate that contract through conduct inconsistent with its validity and enforceability, or acquiescence thereto. *See, e.g., Maruri v. Maruri*, 582 So. 2d 116, 117 (Fla. 3d DCA 1991). Florida law deems such conduct as abandonment, which renders a contract legally invalid and unenforceable. *Id.* Once

abandoned, a contract may not be specifically enforced. *Gustafson v. Jensen*, 515 So. 2d 1298, 1301 (Fla. 3d DCA 1987).

Appellee has in every way treated the buyer's order as abandoned, invalid, and unenforceable. Appellee immediately failed to adhere to any of its provisions, and both parties acquiesced to these failures. Appellee went so far as to issue an apology letter to put the matter behind it. Given this mutual abandonment, the Court should find that there is no valid and enforceable contract between the parties, reversing enforcement of its arbitration provisions below. *Id.*

Further, arbitration is supposed to be an economical alternative to vindicate legal rights without curtailing rights and remedies available in court. *See, e.g., Romano Ex Rel. Romano v. Manor Care, Inc.*, 861 So. 2d 59, 62–63 (Fla. 4th DCA 2004). However, with consumer adhesion clauses to arbitrate, "there is virtually no bargaining between the parties" and the "business responsible for drafting the contract is in a position to unilaterally create one-sided terms that are oppressive to the consumer." *Basulto v. Hialeah Automotive*, 141 So. 3d 1145, 1160–61 (Fla. 2014). Such arbitration clauses, unequally allocating influence to gain an unjust advantage, are unenforceable as unconscionable. *Id.* at 1157.

Here, Appellee's extensive arbitration adhesion clauses encompass any claim or act by the Arrasolas, yet exempt all of Appellee's foreseeable claims and remedies. Appellee's clauses waive the Arrasola's statutory, constitutional,

discovery, and appellate rights, while empowering the Appellee to select the sole arbitrator. Appellee obtained the Arrasolas' signature to its discriminatory terms by couching them in the complex fine print on the unsigned backside of a pre-purchase order form, provided among other forms without mention of what arbitration is, whether it could be avoided, or how it would affect the Arrasolas. Neither of the Arrasolas attended school beyond the 11th grade, which is apparent. (App. 34 and 37). Weighing this procedural and substantive inequity, Appellee's arbitration provisions are unconscionable and unenforceable.

Additionally, a trial court must hold an evidentiary hearing to determine whether facts support contract formation, abandonment, validity, or unconscionability, and failure to do so is reversible error. *See Rowe Enter. LLC v. Int'l Sys. & Elec. Corp.*, 932 So. 2d 537, 541–42 (Fla. 1st DCA 2006). Here, there were no proper factual findings supporting arbitration because the trial court refused to provide an evidentiary hearing, despite the Arrasolas' requests and objections. Accordingly, this Court should reverse the order compelling arbitration.

STANDARD OF REVIEW

The standard of review of a trial court's ruling on a motion to compel arbitration is *de novo*. *Rowe Enter. LLC v. Int'l Sys. & Elec. Corp.*, 932 So. 2d 537, 539 (Fla. 1st DCA 2006) (reversing order granting motion to compel where trial court failed to provide evidentiary hearing).

BRIEF

I. No valid and enforceable contract to arbitrate exists because the parties abandoned the buyer's order containing the arbitration adhesion clauses

The Florida Supreme Court held in *Seifert v. U.S. Home Corp.*, that there are three elements for courts to initially consider in ruling on a motion to compel arbitration: "(1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration was waived." *Seifert* at 636 (holding that the mere existence of an arbitration agreement in a sales contract was not sufficient to compel arbitration, even where the dispute would not have arisen but for the sales agreement, because none of the allegations in the complaint referred to or mention the sales agreement). If a court confirms all three *Seifert* prongs, that court must then determine whether applicable contract defenses, such as fraud or unconscionability, apply to invalidate the arbitration agreement. *Basulto, v. Hialeah Automotive*, No. 141 So. 3d 1145, 1156 (Fla. 2014).

It is well established in Florida law that abandonment of a contract is a renunciation of the contract, and that neither party can thereafter request specific performance of the abandoned contract's provisions. *Maruri v. Maruri*, 582 So. 2d 116, 117 (Fla. 3d DCA 1991) (holding that parties abandoned contract when one party failed to pay and other party acted in acquiescence); *Gustafson v. Jensen*, 515 So. 2d 1298, 1301 (Fla. 3d DCA 1987) (once abandoned, a contract "may not be

specifically enforced"); *Plant v. Plant*, 320 So. 2d 455, 457 (Fla. 3d DCA 1975 (holding party abandoned contract by failing to obtain insurance policy for benefit of other party as required by the contract); *Sinclair Refining Co. v. Butler*, 172 So. 2d 499, 502 (Fla. 3d DCA 1965) (holding the parties' course of conduct, notwithstanding the written covenants in their agreements, evidenced that they abandoned the covenants [of indemnity]).

Abandonment of a contract may be effected by the acts of one of the parties thereto, where the acts of that party are inconsistent with the existence of a contract and are acquiesced in by the other party—this is tantamount to a rescission of the contract by mutual consent. *Maruri*, 582 So. 2d at 117; *see also Painter v. Painter*, 823 So. 2d 268, 270 (Fla. 2d DCA 2002) (holding that the facts established abandonment of the contract where one party failed to pay and the other party acquiesced to declare the contract void); *McMullen v. McMullen*, 185 So. 2d 191, 193 (Fla. 2d DCA 1966) (holding parties abandoned contract for joint ownership of property where on party later reconveyed property at profit and other party acquiesced). Florida courts have held that arbitration agreements are likewise subject to abandonment. *See, e.g. Dean Witter Reynolds, Inc. v. Fleury*, 138 F.3d 1339, 1342 (11th Cir. 1998) (citing *McMullen*, 185 So. 2d at 193).

Abandonment is similar to discharge by material breach, in which a party to a contract is not entitled to specific performance where that party did not perform

its obligations under the contract; material breach by one party is also a discharge of the other party's obligations thereunder. *See Nacoochee Corp. v. Pickett*, 948 So. 2d 26, 30 (Fla. 1st DCA 2006).

What constitutes abandonment is a question of fact. *Id.* In making this factual determination of abandonment, "considerations of judicial economy have no role to play." *Strominger v. AmSouth Bank*, 991 So. 2d 1030, 1035 (Fla. 2d DCA 2008) (reversing trial court's order compelling arbitration where party abandoned its right to arbitration by conduct). A party may prove abandonment of a contract by showing that the acts of one party are inconsistent with the existence of the contract and that the other party acquiesced in those acts. *Painter v. Painter*, 823 So. 2d 268, 270 (Fla. 2d DCA 2002).

Florida appellate court decisions provide guidance on which factual circumstances suffice to evidence abandonment of a contract: *see Maruri v. Maruri*, 582 So. 2d 116, 117 (Fla. 3d DCA 1991) (abandonment where one party failed to pay and the other party wrote a letter reflecting a desire to not enforce the contract); *Gustafson v. Jensen*, 515 So. 2d 1298, 1301 (Fla. 3d DCA 1987) (abandonment where one party tore up contract); *Rose Printing Co. v. Haggerty*, 584 So. 2d 606, 608 (Fla. 1st DCA 1991) (abandonment where employee admitted contract not working out and stepped down); *McMullen v. McMullen*, 185 So. 2d 191, 193 (Fla. 2d DCA 1966) (abandonment where one party unilaterally conveyed

joint property and other acquiesced to its benefits); *Painter v. Painter*, 823 So. 2d at 270 (abandonment where one party failed to pay amount promised in contract and other party issued letter with statements reflecting acquiescence to non-enforcement); *cf. Posik v. Layton*, 695 So. 2d 759, 762 (Fla. 5th DCA 1997) (stating that the fact that one party continuously urged the other party to comply with the terms of a contract demonstrated lack of abandonment).

Here, the events and communication between Appellee and the Arrasolas reflect that the parties abandoned any agreement with each other. After the Arrasolas discovered Appellee's fraud and confronted Appellee, both parties agreed that there was no enforceable buyer's order between them and acted as such. Neither Appellee nor the Arrasolas attempted in any way to enforce any provision of the buyer's order. Instead, Appellee returned the Arrasolas' trade-in, accepted return of the Outlander, stopped the purchase process, trashed any unsigned draft installment contracts, and wrote a letter to the Arrasolas' client to apologize for its fraud (App. 40). Rather than urging compliance with the terms of the buyer's order, both parties made special effort to undo any purported agreement between them. This is not the behavior of a dealership that believes it has a valid and enforceable contract.

Under Florida law, the parties' behavior triggered mutual abandonment of the contract or acquiescence thereto, paralleling the behavior in *Maruri*, 582 So. 2d

at 117 (one party failed to pay and the other party wrote a letter reflecting a desire to not enforce the contract); *Haggerty*, 584 So. 2d at 608 (act of relinquishing duties because contract was "not working out" resulted in failed consideration and an abandonment), *McMullen*, 185 So. 2d at 193 (one's reconveyance after property contract, and other's acquiescence to benefits, was abandonment), and *Painter*, 823 So. 2d 268 at 270 (one's failure to pay, the other's issuing a letter reflecting acquiescence, was abandonment). Accordingly, the Court should find that the parties mutually abandoned the buyer's order, forgoing any specific enforcement of its terms, and invalidating any agreement thereto.[3] As such, there is no valid arbitration agreement and the Court should reverse the trial court's order granting Appellee's motion to compel arbitration. *Seifert,* 750 So. 2d at 636.

II. Appellee's arbitration adhesion clauses are procedurally and substantively unconscionable under *Basulto v. Hialeah Automotive*

A court may invalidate an agreement to arbitrate for unconscionability. *Basulto v. Hialeah Automotive*, 141 So. 3d 1145, 1157 (Fla. 2014).

[3] The Arrasolas note that abandonment should also suffice *waiver* of arbitration. *See, e.g., Strominger v. AmSouth Bank*, 991 So. 2d 1030, 1035 (Fla. 2d DCA 2008) (holding a party *waived* its right to arbitrate by actively participating in litigation); *Klosters Rederi A/S v. Arison Shipping Co.*, 280 So. 2d 678, 681 (Fla. 1973) (holding party not entitled to enforce arbitration under contract based on conduct subsequent request for arbitration). Florida courts have repeatedly held that a party may waive the contractual right to arbitration if the party has knowledge of the right yet takes actions inconsistent with the right. *Breckenridge v. Farber*, 640 So. 2d 208, 210 (Fla. 4th DCA 1994). These cases recommend a two-prong analysis of whether (1) a party had knowledge of an existing right to arbitrate, and (2) took acts inconsistent with the right. *Id.* at 211.

Unconscionability prevents the enforcement of contractual provisions that are overreaches by one party to gain "an unjust and undeserved advantage which it would be inequitable to permit him to enforce." *Id*. "Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." *Id.*

The absence of meaningful choice when entering into a contract is often referred to as procedural unconscionability, which "relates to the manner in which the contract was entered," and the unreasonableness of the terms is often referred to as substantive unconscionability, which "focuses on the agreement itself." *Id.* Courts should weigh procedural and substantive unconscionability through a balancing or sliding scale approach. *Id.* at 1159. Thus, the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to be unenforceable, and vice versa. *Id.*

A. Appellee's arbitration adhesion clauses are substantively unconscionable

Unreasonableness of the arbitration terms reflects substantive unconscionability. *Basulto*, 141 So. 3d at 1157. One major indicator of substantive unconscionability is that the agreement requires the customers to give up other legal remedies. *Powertel, Inc. v. Bexley*, 743 So. 2d 570, 576 (Fla. 1st DCA 1999). For example, the removal of exposure to class action remedies through an

arbitration clause reflects substantive unconscionability, as it is an advantage that inures only to the drafter. *Id.*; *see also S.D.S. Autos, Inc. v. Chrzanowski*, 976 So. 2d 600, 611 (Fla. 1st DCA 2007) (holding arbitration clause precluding class relief for auto dealerships under FDUTPA was unconscionable).

Here, Appellee's arbitration adhesion clauses are substantively unconscionable, inuring solely to the benefit of Appellee. The extensive language therein encompasses any claim or act by the Arrasolas, but exempts all of Appellee's foreseeable claims and remedies, from self-help to repossession (while still requiring arbitration of the Arrasolas' counterclaim in Appellee's action). (App. 19). Appellee's clauses waive the Arrasolas' right to participate as a class representative or class member in any class claim against Appellee, and preempt all of the Arrasolas' statutory rights. *Id.* (applying to any claim relating to the parties' relationship "whether statutory or otherwise). The Appellee's clauses remove the right to arbitration by a panel and the Arrasolas' right to choose the sole arbitrator. *Id.* ("if the parties cannot agree, the Dealer shall choose"). The arbitration clause also limits the Arrasolas' rights to full discovery and appeal. *Id.* (making an order final and non-appealable).

In sum, given that Appellee's arbitration adhesion clauses are completely one-sided and make no provision to balance the unfair distribution of power, the

clauses are substantively unconscionable and unenforceable. Thus, this Court should reverse the order enforcing them.

B. Appellee's arbitration adhesion clauses are procedurally unconscionable

To determine procedural unconscionability, "a court must look to the manner in which the contract was entered into and consider factors such as whether the complaining party had a meaningful choice at the time the contract was entered into." *Basulto*, 141 So. 3d at 1160–61 (quoting *Murphy v. Courtesy Ford, L.L.C.*, 944 So. 2d 1131, 1134 (Fla. 3d DCA 2006)). Courts must consider whether the consumer had a realistic opportunity to bargain for the terms of the contract or were merely presented on a "take-it-or-leave-it" basis, and whether the consumer had a reasonable opportunity to understand the terms of the contract. *Id.*

Courts must consider all the circumstances surrounding the transaction to determine whether a meaningful choice was present in a particular case; in many cases the meaningfulness of the choice is negated by a gross inequality of bargaining power and the manner in which the consumer entered the contract. *Id.* at 1160. Courts must ask whether each party, considering his obvious education or lack of it, had a reasonable opportunity to understand the terms of the contract and whether important terms were hidden in a maze of fine print and minimized by deceptive sales practices. *Id.* When a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no

knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent (i.e. signing), was ever given to all the terms. *Id.* Thus, the Florida Supreme Court has reiterated that:

> In such a case the usual rule that the terms of the agreement are not to be questioned should be abandoned and the court should consider whether the terms of the contract are so unfair that enforcement should be withheld.

Id.

In the typical case of consumer adhesion contracts, where there is virtually no bargaining power between the parties, the commercial enterprise or business responsible for drafting the contract is in a position to unilaterally create one-sided terms that are oppressive to the consumer, the party lacking bargaining power. *Id.* at 1160–61.

Here, Appellee's arbitration adhesion clause is couched in an order form that appears as a one-page primer to initiate the car purchase process, contingent on payment of the purchase price, financing, execution of an installment payment contract, and title, among other documents. (App. 18). Appellee provided the Arrasolas with its buyer's order among other papers, and the meat of the arbitration clause and its real terms are adhered to the back of Appellee's order and unsigned. (App. 19). Appellee never mentioned the arbitration clause or the backside terms, discussed what arbitration is or how it would affect the Arrasolas, or advised that they could still order the car without agreeing to arbitration. (App. 34–35; 37–38).

Appellee did not provide the Arrasolas with a copy of these backside provisions to read over after execution, and the Arrasolas have no legal training and had no understanding of the rights they were signing away. *Id.* It is apparent in their speech and presence that they have no education beyond the 11th grade. *Id.* Appellee, on the other hand, is an established and large corporate enterprise with significant financial and temporal resources. These resources provide for well-educated attorneys to draft complex fine-print adhesion clauses, to test these adhesion clauses over years of business and litigation, and to train dealership sales staff on how to pitch and close a sale without languishing in the fine print.

Under these circumstances, any consumer choice to arbitrate at Appellee's dealership was negated by Appellee's gross inequality of bargaining power and the manner in which the Arrasolas signed the buyer's order, or there was simply no meaningful choice whatsoever. Accordingly, Appellee obtained consent to its arbitration adhesion clauses by procedurally unconscionable means, and the Court should reverse the order compelling arbitration thereunder.

C. The underlying circumstances parallel those previously held as both procedurally and substantively unconscionable under Florida law

Appellee's arbitration terms and procedure for obtaining consent thereto parallel terms and procedures previously held as both procedurally and substantively unconscionable under Florida law.

In *Prieto v. Healthcare and Retirement Corp. of America*, 919 So. 2d 531 (Fla. 3d DCA 2005), this Court found an arbitration agreement was unenforceable as *procedurally* unconscionable, where the defendant-business included the agreement in a package of numerous documents signed en route to a hospital, to be signed in order to complete admission, without explaining the terms. 919 So. 2d at 533. This Court also found the business's arbitration clause as *substantively* unconscionable because it appreciably diminished protective statutory rights, limited non-economic damages, barred punitive damages and attorney fees, and restricted discovery necessary to prove statutory violations. *Id.* In *Woebse v. Health Care and Retirement Corp. of America*, 977 So. 2d 630 (Fla. 2d DCA 2008), the Second District Court of Appeal found procedural unconscionability where the business did not explain the arbitration provision or give the signatory an opportunity to fully read it before or after signing. 977 So. 2d at 633–34. The *Woebse* court also held the arbitration provision as substantively unconscionable because it deprived the consumer of statutory rights. *Id.* at 633–35.

In *Powertel, Inc. v. Bexley*, 743 So. 2d 570 (Fla. 1st DCA 1999), the First District Court of Appeal found procedural unconscionability in an arbitration clause because it was an adhesion clause and there were deficiencies in notice, and substantive unconscionability because it required customers to give up other legal remedies. 743 So. 2d at 576–77. In *Romano ex rel. Romano v. Manor Care, Inc.*,

861 So. 2d 59 (Fla. 4th DCA 2003), the Fourth District Court of Appeal held an arbitration agreement unenforceable because it failed to provide adequate mechanisms for vindication of statutory rights and a sufficient quantum of procedural unconscionability existed. 861 So. 2d at 63–64. Even though the agreement was not hidden in fine print, the signers were elderly, there was no showing that they had legal training to understand the rights they were signing away, and they were presented with the agreement along with other documents without explanation of their terms and without being told that failure to sign would not affect their ability to stay. *Id.*

Similarly here, the manner in which Appellee procedurally obtained the Arrasolas' execution of its arbitration adhesion clauses, and the egregiously lopsided terms therein, reflect both procedural and substantive unconscionability, rendering the arbitration clause unenforceable. Given that the above Florida precedent holds parallel circumstances and terms as unconscionable, this Court should reverse the order compelling arbitration.

III. The Arrasolas are entitled to a mandatory evidentiary hearing on contract formation, abandonment, validity, and unconscionability

Consumer plaintiffs are entitled to an evidentiary hearing on whether there is a valid agreement to arbitrate between the parties and on unconscionability of that agreement. *See Fi-Evergreen Woods, LLC v. Robinson*, 135 So. 3d 331, 334 (Fla. 5th DCA 2013) (reversing order granting motion to compel without evidentiary

hearing where issue raised on formation); *Crystal Motor Car Co. of Hernando, LLC v. Bailey*, 24 So. 3d 789, 791 (Fla. 5th DCA 2009) (reversing after the trial court expressly found a factual issue without first conducting an evidentiary hearing); *Rowe Enter. LLC v. Int'l Sys. & Elec. Corp.*, 932 So. 2d 537, 541–42 (Fla. 1st DCA 2006) (reversing where trial court failed to hold an evidentiary hearing as to whether there was an agreement to arbitrate between the parties); *Chapman v. King Motor Co. of So. Fla.*, 833 So. 2d 820, 821 (Fla. 4th DCA 2002) (reversing order granting motion to compel and remanding for trial court to conduct an evidentiary hearing on unconscionability); *Merrill Lynch Pierce Fenner & Smith, Inc. v. Melamed*, 425 So. 2d 127, 128 (Fla. 4th DCA 1982).

Here, there has been no evidentiary hearing on formation, abandonment, validity, and unconscionability, because the trial court refused to provide one despite the Arrasolas' requests and objections. (App. 29, 41, 81–82). Appellee's counsel also noted to the trial court that all of the facts were not in front of it in an evidentiary capacity. (App. 69). This failure to provide an evidentiary hearing constitutes reversible error. *Robinson*, 135 So. 3d at 334; *Bailey*, 24 So. 3d at 791; *Rowe Enter. LLC.*, 932 So. 2d at 541–42; *Melamed*, 425 So. 2d at 128. Accordingly, this Court should reverse the order compelling arbitration and instruct the trial court to hold an evidentiary hearing for a proper factual determination on formation, abandonment, validity, and unconscionability.

CONCLUSION

This Court should find that the parties abandoned the buyer's order, rendering it invalid, and that the arbitration adhesion clauses are unconscionable, rendering them unenforceable. This Court should remand the case with instructions for the trial court to vacate its order compelling arbitration and enter an order requiring the trial court to deny the motion to compel arbitration and to enter an order permitting the Arrasolas to proceed in court. In the alternative, this Court should remand the case with instructions for the trial court to vacate its order compelling arbitration and to hold an evidentiary hearing to determine whether the facts support contract formation, abandonment, validity, or unconscionability; to make proper factual findings thereon; and if the trial court find facts supporting either abandonment or unconscionability, to deny the motion to compel arbitration and to enter an order permitting the Arrasolas to proceed in court.

Respectfully submitted,

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CERTIFICATES OF SERVICE

I CERTIFY that, in accordance with Fla. R. Jud. Admin. 2.516, a copy of this notice was served by email and U.S. mail on March 2, 2015, to:

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CERTIFICATE OF COMPLIANCE

I CERTIFY that the foregoing document is in compliance with the Rule's font requirements [Times New Roman 14].

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