SUPREME COURT OF LOUISIANA

Nos. 2004-C-2804; 2004-C-2857

DAVE F. AGUILLARD,

Plaintiff-Respondent,

v.

AUCTION MANAGEMENT CORP., *et al.*

Defendants-Petitioners.

On Writ of Review to the Louisiana Court of Appeal, Third Circuit, Parish of Calcasieu, No. 04-393

ORIGINAL BRIEF SUBMITTED ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-PETITIONERS

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ORIGINAL BRIEF SUBMITTED ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-PETITIONERS

The Chamber of Commerce of the United States (the "Chamber") respectfully submits this brief as *amicus curiae* in support of the Defendants-Petitioners in this action. Although Respondent struggles to introduce additional factual complications into this proceeding, this case in fact presents two straightforward legal questions, the answers to which will affect a wide range of cases: (i) whether an arbitration provision that is not entirely mutual is enforceable despite that nonmutuality, and (ii) whether the fact that an arbitration provision is contained in a standard form contract—a so-called "contract of adhesion"—is any ground for questioning the enforceability of that arbitration provision. The Chamber submits that, properly construed, Louisiana and federal law mandates that even non-mutual arbitration provisions in standard form contracts are fully enforceable, and that the Court of Appeal accordingly erred in not enforcing the arbitration provision at issue in this case.

INTEREST OF THE *AMICUS CURIAE*

The Chamber is the world's largest business federation, representing an underlying membership of more than 3,000,000 businesses and organizations of all sizes. Chamber members operate in every sector of the economy and transact business throughout the United States, as well as in a large number of countries around the world. A central function of the Chamber is to represent the interests of its members in important matters before the state and federal courts, legislatures, and executive branches. To that end, the Chamber has filed *amicus* briefs in numerous cases that have raised issues of vital concern to the nation's business community. In particular, the Chamber has been involved in a wide variety of cases involving the interpretation of the Fed-

eral Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16. The Chamber has also repeatedly appeared as an *amicus curiae* in this Court. *See, e.g., Bonnette v. Conoco, Inc.*, 01-2767 (La. 1/28/03); 837 So. 2d 1219; *New Orleans Campaign For a Living Wage v. City of New Orleans*, 02-0991 (La. 9/4/02); 825 So. 2d 1098.

Many of the members, constituent organizations, and affiliates of the Chamber have adopted as standard features of their business contracts provisions that in appropriate circumstances mandate the arbitration of disputes arising from or relating to those contracts. They use arbitration because it is a prompt, fair, inexpensive, and effective method of resolving disputes with consumers and other contracting parties. In the decision under review, the Court of Appeal refused to enforce an arbitration provision on purported "adhesion" and "non-mutuality" grounds. Because the analysis of the Court of Appeal seems to be based on anti-arbitration animus and might wreak havoc on countless arbitration provisions in contracts entered into by the Chamber's members, the Chamber has a strong interest in having its views on the enforceability of this arbitration provision considered by this Court. The Chamber believes that its participation will assist the Court in its resolution of the issues presented in this case.

BACKGROUND

In response to a sales brochure announcing "Real Estate Auctions" of "Bank-Owned Houses, Lots and Land" (*see* Original Brief Submitted On Behalf Of Dave F. Aguillard, Respondent ("Respondent's Br."), Exh. 1, at 1), which specified that "***Some*** [Properties] Sell Regardless of Price!" (*id.* (emphasis added)), Respondent participated in a public auction for the sale of a house in Sulphur, Louisiana, owned by Petitioner the Bank of New York. *See* Respondent's Br. 2; *Aguillard v. Auction Mgmt. Corp.*, 04-393 (La. App. 3 Cir. 10/13/04); 884 So. 2d 1257, 1258,

writ granted, 04-2804, -2857 (La. 3/11/05). Before taking part in that auction, Respondent was given the two-page contract labeled "Auction Terms & Conditions" that governed the auction (*see* Application Submitted By Bank of New York and its servicer, New South Federal Savings Bank, Defendants/Petitioners ("Application"), Exh. C), which contained an arbitration provision. In particular, that provision specifies:

> Any controversy or claim arising from or relating to this agreement or any breach of such agreement shall be settled by arbitration administered by the American Arbitration Association under [its] rules, and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

See id. at 1; *Aguillard*, 884 So. 2d at 1258.

Respondent's bid was the highest for the property, and accordingly he signed an Auction Real Estate Sales Agreement and submitted the requisite down-payment. However, the owner of that property, Bank of New York, chose to reject the proposed Sales Agreement at the specified purchase price—as it asserts was its right (*see* Application 1).[1] Thereafter, Respondent sued, objecting to the Bank's refusal to sell him the property at the price established at auction. Pursuant to the arbitration provision in the Auction Terms & Conditions, Defendants moved to compel Respondent to arbitrate this matter. The district court denied the motion to compel arbitration, and Petitioners appealed to the Court of Appeal. In a 2-1 decision that court, too, found the arbi-

[1] Although Respondent claims that the defendants engaged in a "bait and switch" by not accepting his bid (Respondent's Br. 3), that is plainly an issue for the arbitrator to decide. The arbitration provision in this case, which requires the arbitration of "[a]ny controversy or claim arising from or relating to" the parties' agreement, is easily broad enough to encompass that dispute. In fact, the Supreme Court has described this exact phrase as "a broad arbitration clause" (*Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 398 (1967)) and has indicated that "insofar as the allegations underlying [a] statutory claim[] ***touch*** matters covered by" the contract, they arise under or relate to the contract for purposes of an arbitration provision employing that broad definition of arbitrable disputes (*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 624 n.13 (1985) (emphasis added)).

tration provision to be unenforceable. In particular, relying on *Sutton's Steel & Supply, Inc. v. BellSouth Mobility, Inc.*, 00-511 (La. App. 3 Cir. 12/13/00); 776 So. 2d 589, and *Simpson v. Grimes*, 02-0869 (La. App. 3 Cir. 5/21/03); 849 So. 2d 740, the court found the arbitration provision to be "adhesionary and [to] lack[] mutuality." *Aguillard*, 884 So. 2d at 1261. This writ proceeding followed.

ARGUMENT

THE ARBITRATION AGREEMENT AT ISSUE IN THIS CASE IS FULLY ENFORCEABLE AS A MATTER OF LOUISIANA AND FEDERAL LAW.

Although the Third Circuit Court of Appeal seems to be willing to pay lip service to the principle that arbitration is favored as a matter of federal and Louisiana law,[2] in fact it routinely relies on strained grounds to refuse to enforce arbitration provisions. Thus, this Court should not only hold that the arbitration provision at issue in this case is enforceable, but in so doing should also clarify that the grounds on which the Court of Appeal relied were entirely inadequate to render a binding arbitration agreement void.

In their Application, Petitioners have fully rebutted each of the specific bases upon which the Court of Appeal relied in refusing to enforce the parties' arbitration provision. *See* Application 5-11. Rather than reiterate those points (*cf.* Supreme Court Rule VII(12)), in this *amicus* brief the Chamber will address two related issues. First, we discuss the reasons why this Court

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[2] *See*, *e.g.*, *Simpson*, 849 So. 2d at 743 ("United States Supreme Court jurisprudence has consistently presented a strong and growing federal policy favoring arbitration of disputes and the enforcement of arbitration clauses and the FAA") (citing *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983)); *see also, e.g.*, *Vishal Hospitality, LLC v. Choice Hotels Int'l, Inc.*, 04-0568 (La. App. 1 Cir. 3/24/05); __ So. 2d __; WL 675651, at *2 ("Louisiana courts have long recognized a strong presumption in favor of arbitration").

should clarify that, under Louisiana and federal law, term-by-term mutuality is not necessary for an arbitration provision to be enforceable. Second, we discuss the need for this Court to clarify the narrow circumstances in which a court may refuse to enforce an arbitration provision on "contract of adhesion" grounds.

A. Term-By-Term Mutuality Is Not Necessary For An Arbitration Provision To Be Enforceable.

One of the Court of Appeal's primary objections to the arbitration provision at issue in this case was its supposed lack of mutuality. According to that court, "the Defendants reserved methods of dispute resolution other than arbitration * * *. In the event of a dispute, the Defendants are able to retain the earnest money deposit, unilaterally cancel the agreement and re-offer the property for sale. The buyer, however, must resort to arbitration to resolve any alleged failure of [the Defendants] to comply with the terms and conditions." *Aguillard*, 884 So. 2d at 1260. The court reasoned that "[i]n order for a contract to be valid both parties must mutually and freely agree to ***all*** of its terms and conditions." *Id.* at 1261 (emphasis added).

The Third Circuit's requirement of term-by-term mutuality in arbitration provisions is legally unsupportable both as a matter of Louisiana law and as a matter of federal law. Louisiana—like every other state—generally does not require term-by-term mutuality in a contract. This Court should clarify that this rule of state law applies with equal force to arbitration provisions. *See* pages 6-9, *infra*. But even if this Court were to agree with the Court of Appeal that Louisiana law would require term-by-term mutuality in arbitration provisions, this Court should hold that such a rule of state law would nonetheless be preempted by the FAA as applied to arbitration provisions subject to that federal statute. *See* pages 9-11, *infra*.

1. This Court should clarify that Louisiana law does not require term-by-term mutuality in any contract, including in arbitration provisions.

There is no support in this Court's case law for the Court of Appeal's supposition that Louisiana law requires every contract to be mutual, let alone that each independent provision of a contract must be mutual. Rather, under this Court's precedents, the relevant question is whether a contract ***as a whole*** is adequately supported by mutual ***consideration***.

As this Court held long ago, "inducements" to contract—additional terms that exist over and above the basic promise that is the purpose of the contract—"cannot be divided into various incidental covenants and sustained only on a finding of a reciprocal consideration for each stipulation. Unless covenants of that nature are considered as being merely part of the moving causes or inducements for making the contract almost none of today's complicated agreements * * * could stand the test of mutuality * * *." *Long v. Foster & Assocs., Inc.*, 136 So. 2d 48, 52 (La. 1961); *see also Seals v. Calcasieu Parish Voluntary Council on Aging, Inc.*, 99-1269 (La. App. 3 Cir. 3/1/00); 758 So. 2d 286, 293; *Caddo Parish Sch. Bd. v. Cotton Baking Co.*, 342 So. 2d 1196, 1198 (La. App. 2 Cir. 1977).

In fact, Louisiana law ***specifically prohibits*** the parsing of a unified contract into separate pieces as to each of which equivalent obligations are required. In overruling an earlier decision holding non-compete agreements to be invalid based on lack of mutuality, this Court explained that the prior ruling "was erroneous as it effected a division of the contract into two parts, one valid and the other invalid, and completely overlooked the obvious fact that the promise not to compete with plaintiff was an integral part of the original bargain, without which defendant

might not have obtained the position." *Martin-Parry Corp. v. New Orleans Fire Detection Serv.*, 60 So. 2d 83, 86 (La. 1952).

A rule that term-by-term mutuality is unnecessary makes perfect sense. In most contracts, each party has a set of distinct rights and obligations. For example, in the classic contract for the sale of goods one party is required to provide the other with those goods while the other is required to pay for those goods—two non-identical undertakings. Similarly, in an employment contract the employee is required to perform specified tasks, whereas the employer is required to pay the employee's wages—again, non-mutual obligations. And if an employer also required an employee to sign a non-compete provision—a non-mutual obligation and an additional obligation on top of the obligation to perform specified tasks—the employee could of course choose whether to work for that employer at the specified compensation, but she could not rely on the lack of mutuality to argue that a court should excuse her from the non-compete obligation. *See Martin-Parry*, 60 So. 2d at 86. In every instance, the presumption is that the parties to a contract have determined that the consideration they are receiving—the other party's ***bundle*** of obligations under the contract—is sufficient in exchange for the ***bundle*** of obligations that the first party is agreeing to undertake.

Furthermore, there is no cause to have a different rule in the context of arbitration provisions. Like any other provision in a contract, an arbitration provision may affect the attractiveness of that contract, considered ***as a whole*** by the parties; it is part of the bundle of obligations that constitute the consideration for one or both of the parties. Thus, even if that arbitration provision were entirely one-sided, the relevant question is not whether that arbitration provision ***in particular*** is "mutual," but rather whether that ***entire contract*** is supported by consideration.

Louisiana is by no means alone in holding that term-by-term mutuality is not required to enforce a contract generally, or more specifically to enforce an arbitration provision in a contract. Indeed, the vast majority of courts throughout the country that have addressed the question have rejected the analysis in the Third Circuit Court of Appeal's trio of decisions and have held that an arbitration provision need not be entirely mutual in order to be enforceable. *See, e.g.*, *Oblix, Inc. v. Winiecki*, 374 F.3d 488, 491 (7th Cir. 2004) ("That Oblix did not promise to arbitrate all of its potential claims is neither here nor there. Winiecki does not deny that the arbitration clause is supported by consideration—her salary. Oblix paid her to do a number of things; one of the things it paid her to do was agree to non-judicial dispute resolution."); *Fazio v. Lehman Bros. Inc.*, 340 F.3d 386 (6th Cir. 2003); *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 180 (3d Cir. 1999); *Doctor's Assocs., Inc. v. Distajo*, 66 F.3d 438, 451-52 (2d Cir. 1995); *Ramirez v. Cintas Corp.*, 2005 WL 658984, at *7 (N.D. Cal. Mar. 22, 2005); *Torrance v. Aames Funding Corp.*, 242 F. Supp. 2d 862 (D. Or. 2002); *Pridgen v. Green Tree Fin. Servicing Corp.*, 88 F. Supp. 2d 655, 658 (S.D. Miss. 2000); *Walther v. Sovereign Bank*, __ A.2d __, 2005 WL 900551, at *9 (Md. Apr. 20, 2005); *Zobrist v. Verizon Wireless*, 822 N.E.2d 531, 541-42 (Ill. App. 2004); *Zuver v. Airtouch Communications, Inc.*, 103 P.3d 753, 766-67 (Wash. 2004); *Conseco Fin. Servicing Corp. v. Wilder*, 47 S.W.3d 335, 342 (Ky. App. 2001); *Rains v. Found. Health Sys. Life & Health*, 23 P.3d 1249, 1255 (Colo. App. 2001); *In re Ball*, 236 A.D.2d 158, 665 N.Y.S.2d 444, 446 (1997); *Willis Flooring, Inc. v. Howard S. Lease Constr. Co. & Assocs.*, 656 P.2d 1184, 1185 (Alaska 1983) ("As one clause in a larger contract, the [arbitration] clause is binding to the same extent that the contract as a whole is binding").

Harris is illustrative. Though confronted with an arbitration provision that, like the one in *Sutton's Steel*, reserved the company's right to go to court against the consumer in certain limited situations, the United States Court of Appeals for the Third Circuit held that the provision must be enforced, explaining: "Modern contract law largely has dispensed with the requirement of reciprocal promises * * * provided that a contract is supported by sufficient consideration." *Harris*, 183 F.3d at 180.

Of course, Louisiana is not bound by the law in other states that mutuality is unnecessary for an arbitration provision to be binding. However, there are many reasons why a reasonable person might accept even an entirely unilateral arbitration agreement, not the least of which might be the belief that it would ultimately result in a lower price for the goods or services being offered. *See Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 594 (1991) (explaining that limiting fora in which cruise line may be sued leads to reduced fares for passengers). Given Louisiana's existing law that mutuality of terms is not required so long as the contract ***as a whole*** is supported by consideration, this Court should reaffirm that this rule applies equally to arbitration provisions.

2. Even if Louisiana law did require term-by-term mutuality in arbitration provisions, such a rule would be preempted by the Federal Arbitration Act.

Even if there were some basis in Louisiana law for deeming mutuality to be necessary to the enforceability of an arbitration provision (*but see* pages 5-9, *supra*), the FAA would expressly preempt that rule of state law. Under Section 2 of the FAA,

> [a]n agreement to arbitrate is valid, irrevocable, and enforceable, *as a matter of federal law*, "save upon such grounds as exist at law or in equity for the revocation of *any* contract." * * * A state-law principle that takes its meaning precisely

> from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2.

Perry v. Thomas, 482 U.S. 483, 492 n.9 (1987) (citations omitted; emphasis in original) (quoting 9 U.S.C. § 2). Thus, agreements to arbitrate may be invalidated on state-law grounds only "*if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts ***generally***." *Id*. (first emphasis in original); *see also, e.g., Oblix*, 374 F.3d at 492 ("If a state treats arbitration differently, and imposes on form arbitration clauses more or different requirements from those imposed on other clauses, then its approach is preempted by § 2 of the Federal Arbitration Act.").

In other words, under the FAA only state-law principles that arose to govern all contractual provisions, not those that sprang into existence only after an arbitration provision was put in issue, may be the basis for invalidating an agreement to arbitrate. Until *Sutton's Steel*, no appellate court in at least the last forty years had found Louisiana law to require equal and mutual obligations as to each individual term of a contract. *See, e.g.*, *Long*, 136 So. 2d at 52; *Martin-Parry*, 60 So. 2d at 86. Rather, the *Sutton's Steel* court invented this "non-mutuality" rule for purposes of the case before it—and the Court of Appeal in this case merely reiterated that arbitration-specific creation (as did the First Circuit in *Vishal*, 2005 WL 675651, at *2). Accordingly, even if the Court of Appeal were correct as a matter of Louisiana law in its interpretation of the mutuality required for an arbitration provision to be enforceable, such an arbitration-specific rule of Louisiana law would be preempted by the FAA.

The Court of Appeal's view that non-mutuality in an arbitration provision renders the provision unenforceable turns back the clock to the days before the FAA was enacted, when courts were free to refuse to enforce arbitration agreements at will. But, as the United States Su-

preme Court held in *Perry*, under the FAA courts may not "rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what * * * the state legislature cannot." 482 U.S. at 492 n.9. Thus, given generally applicable Louisiana law, ***even if*** the arbitration provision in the Auction Terms and Conditions were non-mutual—which it is not—the Court of Appeal's ruling that the provision therefore is unenforceable must be reversed.

B. This Court Should Clarify That Arbitration Provisions In Standard Form Contracts Such As The One At Issue Here Are Not Unenforceable Because They Are "Contracts Of Adhesion."

The Court of Appeal refused to enforce the arbitration provision at issue in this case not only on the ground that it was allegedly non-mutual but also on the ground that it was "adhesionary." *Aguillard*, 884 So. 2d at 1259-61. In particular, the Court of Appeal used this overarching term to object to several specific aspects of that provision—that it purportedly was in a small typeface, was not distinguished from other terms in the contract, was imposed by the party in a superior bargaining position, was part of a contract that could be modified by one party to that contract (though only upon notice and only before the actual auction), etc. *See id.* at 1260-61. As Petitioners have explained in their Application (at 5-11), each of these specific grounds for refusing to enforce the arbitration provision is either factually or legally baseless. But the more general problem here is that the Court of Appeal has taken the concept of a "contract of adhesion" and manipulated it into an open-ended means of striking down any contract—and in particular, any arbitration provision—that it does not like. This Court should clarify the narrow scope of this doctrine.

Under this Court's precedents—as the Court of Appeal correctly noted—a contract of adhesion is "a 'standard contract, usually in printed form, prepared by a party of superior bargaining power for adherence or rejection of the weaker party. Often in small print, these contracts ***sometimes*** raise a question as to whether or not the weaker party actually consented to the terms.'" 884 So. 2d at 1259 (quoting *Golz v. Children's Bureau of New Orleans*, 326 So. 2d 865, 869 (La. 1976) (emphasis added).

However, as Professor Litvinoff notes in his seminal article—which the Court of Appeal quoted from extensively (*see id.*)—the question whether a contract is one "of adhesion" is only the ***start*** of the analysis of whether that contract is enforceable, rather than the ***end*** of that analysis. *See id.* ("'The question, thus, is whether the party gave his consent to the clause in dispute or, when it is clear that it was given, whether that consent was vitiated by error.'") (quoting Saul Litvinoff, *Consent Revisited: Offer Acceptance Option Right of First Refusal and Contracts of Adhesion in the Revision of the Louisiana Law of Obligations*, 47 LA. L. REV. 699, 757-59 (1987)); *see also Golz*, 326 So. 2d at 869 ("The [contract] here raises no substantial question as to consent").

This important step of analyzing whether valid consent to a so-called "contract of adhesion" is in fact lacking ***in the specific instance*** was entirely missing from the Court of Appeal's analysis in this case. Rather, implicit in that court's analysis was the belief that ***all*** "contracts of adhesion" automatically are voidable at the discretion of the weaker party to those contracts. Such a rule would be entirely anarchic, and unsurprisingly has no basis in Louisiana law.

In particular, the Court of Appeal's analysis of the enforceability of the contract at issue in this case lacks ***any*** discussion of the appropriate starting point for the analysis of the enforce-

ability of a contract: the presumption that parties understand and are bound by the contracts that they sign. "It is well settled in Louisiana law that knowledge of the content of an instrument is presumed if a signature is present on that instrument. A party cannot avoid an obligation merely by contending that he had not read it or did not understand it." *Lazybug Shops, Inc. v. Am. Dist. Tel. Co.*, 374 So. 2d 183, 185-86 (La. App. 4 Cir. 1979). In other words, "[t]he law does not compel people to read or to inform themselves of the contents of an instrument which they may choose to sign, but it holds them to the consequences, in the same manner and to the same extent as though they had exercised those rights." *McGoldrick v. Lou Ana Foods, Inc.*, 94-400 (La. App. 3 Cir. 11/2/94); 649 So. 2d 455, 460. *See also Bud Fin. Co. v. Gilardi*, 330 So. 2d 622, 624 (La. App. 4 Cir. 1976) ("One cannot avoid an obligation merely by contending that he had not read it, or that it was not read and explained to him, or that he did not understand its provisions.").

Furthermore, implicit in the Court of Appeal's analysis is the supposition that any contract that is (a) a standard form contract between a company and a consumer, and (b) presented to that consumer on a "take-it-or-leave-it basis" is somehow suspect. *See Aguillard*, 884 So. 2d at 1260 ("Mr. Aguillard was not in a position to bargain regarding the terms of the agreement * * *. He was required to sign the document prior to receiving a bid number and participating in the auction. The Defendants were clearly in a superior bargaining position."). Were this Court to endorse such a rule, it could bring commerce in this State to a screeching halt. ***Ninety-nine percent*** of all contracts in this country are form contracts. *See* John J.A. Burke, *Contract as Commodity: A Nonfiction Approach*, 24 SETON HALL LEGIS. J. 285, 290 (2000). Thus, Professor Litvinoff has noted that "[o]wing to the necessities of modern life a particular kind of contract has been devel-

oped where one of the parties is not free to bargain. That occurs when a business concern carries out its operation through a very large number of contracts entered into with innumerable co-contractants, as in the case with airlines, public utilities, railroad or insurance companies." *Aguillard*, 884 So. 2d at 1259 (*quoting* Litvinoff, *Consent Revisited*, 47 LA. L. REV. at 757-59). Every time one rents a video at Blockbuster, buys or leases a car, buys a cell phone, orders gas service for one's house, etc., one is entering into a form contract—thus obviating the need for and expense of individual bargaining and memorializing of deal-specific terms. Just picture the line at Blockbuster if each time someone went to rent a movie that person could negotiate the number of days that she would be allowed to keep it!

In reality, the question whether a contract is a "contract of adhesion" is usually beside the point. As both this Court and Professor Litvinoff have explained, at times it may be appropriate to question whether the weaker party to a standard form "adhesionary" contract has in fact consented to specific terms in that contract. *See Golz*, 326 So. 2d at 869; Litvinoff, *Consent Revisited*, 47 LA. L. REV. at 757-59. However, that is a ***specific*** question that can and should be analyzed on its own terms and on a case-by-case basis. For example, the Court of Appeal's finding that the arbitration provision in this case was in such a small typeface as to be unconscionable (*see Aguillard*, 884 So. 2d at 1260), while both legally and factually baseless,[3] can be addressed

[3] The contract is in a font size larger than that in a typical Westlaw printout, and is entirely readable. Furthermore, the arbitration provision is in the same font size as the remainder of the contract. *See Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 172 (5th Cir. 2004) (rejecting argument that type size of arbitration provision rendered that clause procedurally unconscionable when it was in the same type size as the remainder of the contract); *see also* Application 5-6.

on its merits. Considering that argument under the catchall question whether the contract is a "contract of adhesion" merely confuses matters.

It is important that this Court clarify that the mere fact that a contract is adhesionary—that is, offered on a take-it-or-leave-it basis to members of the general public—is not in-and-of-itself problematic. Misuse of the concept of "contracts of adhesion" inappropriately renders the vast majority of contracts automatically suspect, and also interferes with careful analysis of the specific challenges that may be raised to any given contract. In this case, for instance, the Court of Appeal clumped together (a) its finding of non-mutuality, (b) its analysis of the typeface of the contract, and (c) its distaste for the contract's change-in-terms provision to hold that, overall, the parties' contract was "adhesionary" and thus unenforceable. *See Aguillard*, 884 So. 2d at 1260-61. When exposed to analysis, each of those ***specific*** attacks on the contract is entirely baseless.[4] This Court should clarify that the lower courts must analyze such specific attacks on their indi-

[4] For example, Respondent's argument that the change-in-terms provision renders the contract problematic ignores the fact that the provision allowed Defendants to change the terms of the contract only upon notice and only before Respondent in fact bid on the property—thus in essence allowing the Defendants to define the specific contractual terms governing the auction up to the time of that auction, at which point the contract became effective. In other words, this case does not involve the kind of change-in-terms provision about which some courts have expressed concerns—one that enables the stronger party to change the terms during the course of an ***ongoing*** contractual relationship. But even in that context, the prevailing rule is that a change-in-terms provision that requires the stronger party to provide notice of any change is not legally problematic. In part for this reason, the United States Court of Appeals for the Fifth Circuit has predicted that this Court would not "use *Simpson*'s reasoning to declare unenforceable every contract with a change-in-terms clause," noting that, "[i]n fact, other Louisiana cases have enforced contracts, including arbitration contracts, that contain such provisions." *Iberia*, 379 F.3d at 173 (citations omitted).

See also pages 5-11, *supra* (explaining why non-mutuality is not a basis for finding a contract to be unenforceable); note 3, *supra* (explaining why the typeface of the arbitration provision was not problematic).

vidual merits, rather than by using the catchall "contract of adhesion" terminology to avoid such careful analysis.

CONCLUSION

This Court should reverse the decision of the Court of Appeal and remand with instructions to grant Petitioners' motion to compel arbitration.

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