IN THE COURT OF APPEALS
FOR THE STATE OF NEW MEXICO

MICHAEL A. POOL; and MICHELLE POOL,

Plaintiffs-Appellees,

v.

DRIVETIME CAR SALES COMPANY, LLC, d/b/a DRIVETIME; and JEREMY MENDOZA,

Defendants-Appellants.

Appeal No: 33,894

Case No:
D-202-CV-2013-09673

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INTRODUCTION

It is beyond doubt that "contracts that unreasonably benefit one party over another are" unenforceable. *Rivera v. Am. Gen. Fin. Services, Inc.*, 2011-NMSC-033, ¶ 46, 150 N.M. 398, 259 P.3d 803, 817 (internal quotation marks omitted). DriveTime's arbitration contract doesn't merely "unreasonably benefit" the company; it systematically disadvantages consumers at every step. The contract allows DriveTime to choose the forum in which it brings its claims, while requiring consumers to arbitrate theirs. Its damages limitation provision prohibits consumers from receiving consequential, punitive, or statutory damages, but imposes no such prohibition on DriveTime. And its confidentiality provision ensures that any awards against the company remain secret, so consumers never know whether their claims against the company are isolated incidents or part of a pattern of misconduct.

In the face of such pervasive unconscionability, DriveTime makes numerous arguments about why this Court should just ignore the problems with the company's contract and compel arbitration anyway. None of these arguments are persuasive. DriveTime's arbitration scheme is egregiously one-sided and grossly unfair. It should not be enforced. The district court's denial of DriveTime's motion to compel arbitration should therefore be affirmed.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. The Pools' Underlying Cause of Action

In the summer of 2012, Plaintiff/Appellees Michael A. Pool and Michelle Pool decided to buy a vehicle for their son, Hunter. [RP 2]. Michelle and Hunter went to DriveTime, a used car dealership, to look for an appropriate vehicle. [*Id.*]. DriveTime's salesperson, Jeremy Mendoza, showed them a 2005 Dodge Durango. [*Id.*]. The Durango, Mr. Mendoza said, had never been in an accident, and he showed them an AutoCheck report to purportedly prove it. [*Id.*]. The only work that had ever been done on the Durango, Mr. Mendoza said, was the replacement of the hood. [*Id.*]. Based on these assurances, the Pools bought the Durango for $16,474.85, financed by a loan of over $16,000 from DriveTime, for which DriveTime charged almost 24% interest. [RP 37-38].

But it turned out that DriveTime's assurances were not true. [RP 2]. Unbeknownst to the Pools, the Durango had been in an accident. [*Id.*]. In fact, it had sustained extensive damage, and the work done to repair it wasn't done well. [*Id.*]. The Pools allege that DriveTime knew about this all along and deliberately hid it from them. [RP 4]. The Durango also suffered mechanical problems that DriveTime refused to fix. [RP 5].

Unable to resolve anything with DriveTime, the Pools filed suit against the company and Mr. Mendoza, the salesperson. [RP 1]. They allege that not only did

DriveTime knowingly mislead them into buying a vehicle that had suffered serious accident damage, the company has a practice of selling vehicles that have been damaged in accidents, without telling consumers. [RP 5]. The Pools brought claims for fraud and for violations of the New Mexico's Unfair Practices Act, seeking both actual damages—for, among other things, the difference between the price they paid for the Durango and its fair market value, and the cost of repairs they were forced to make to the Durango —as well as treble damages under the Unfair Practices Act, punitive damages to deter future misconduct, and attorney fees and costs. [RP 5-6].

B. DriveTime's Arbitration Contract

As a condition of buying the Durango, DriveTime required the Pools to sign an arbitration contract, which was "incorporated" into and "a part of" the financing agreement for the car. [RP 40, 43, 49].

The arbitration contract makes clear that its enforceability is for a court, not an arbitrator to determine. It states: "[N]otwithstanding any language in this Agreement to the contrary, a 'Claim' does not include a dispute about the validity, enforceability, coverage or scope of this Agreement . . .; any such dispute is for a court, and not an arbitrator to decide." [RP 43].

The contract requires arbitration of any "claim, dispute or controversy between" the Pools and DriveTime "arising from or related to," among other

things, the sale of the car, the financing agreement, the financing terms, the Pools' credit application, and any effort by DriveTime to collect on the loan. [RP 43].

But this broad arbitration clause has two exceptions. First, it exempts remedies related to DriveTime's ability to repossess and sell the car if the Pools default on their loan. Specifically, the contract exempts "any self-help remedy, such as repossession or sale" of the vehicle, as well as "any individual action in court . . . that is limited to preventing . . . such self-help remedy and that does not involve a request for damages or monetary relief of any kind." [RP 43].

Second, the arbitration contract exempts claims brought in small claims court. It states that "we [DriveTime] will not require arbitration of any individual Claim you [the Pools] make in small claims court or your state's equivalent court, if any." [RP43]. It also provides that either AAA or JAMS will administer the arbitration. [RP 44, 46]. And both of these organizations require that both parties to a consumer contract—i.e. both the consumer and the company—be permitted to bring claims in small claims court. *See* AAA, Consumer Dispute Rules R-9; JAMS, Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses 2.[1]

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[1] The AAA consumer dispute rules are available at https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTAGE2021425&. JAMS' policy on consumer arbitrations is available at

DriveTime also limits the damages the Pools may receive. The financing agreement states: "Unless prohibited by law, you [the consumer] shall not be entitled to recover from us [DriveTime] any consequential, incidental or punitive damages to property or damages for loss of use, loss of time, loss of profits, or income or any other damages." [RP 40].

The contract provides that the arbitrator's "award shall be kept confidential." [RP 45].

Finally, in the middle of the arbitration contract, in the same small print as the rest of the contract (but bolded), there is a provision stating that if the Pools want to reject the contract, they can do so by sending DriveTime a signed rejection notice by certified mail, return receipt requested, within thirty days. [RP 44].

C. Procedural History

About a month after the Pools filed their Complaint in this lawsuit, DriveTime moved to compel arbitration. [RP 16]. The Pools opposed the motion on the ground that DriveTime's arbitration scheme is unconscionable and, therefore, unenforceable. [RP 65-80]. The arbitration contract, the Pools argued, is not only adhesive, but extremely one-sided. [*See id.*]. The repossession and small claims exceptions, they explained, allow DriveTime to pursue any remedies

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http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Consumer_Min_Stds-2009.pdf.

it is ever likely to need without going to arbitration, while doing nothing for consumers. [RP 70-73]. The damages limitation prohibits consumers from recovering most of the remedies to which they would otherwise be entitled, while imposing no such limitation on DriveTime. [RP 73-77]. And the confidentiality provision shields DriveTime, while providing no benefit to consumers. [RP 78].

After a hearing, the district court denied DriveTime's motion to compel. [RP 102]. Although the court concluded that the arbitration contract is not procedurally unconscionable, it held that it is so substantively unconscionable that it could not be enforced. [Tr. 46-47]. The court found that the contract is "unfairly one-sided." [Tr. 46]. In so holding, it explicitly rejected DriveTime's argument that the damages limitation provision could not be considered simply because DriveTime had placed it in a different part of the contract from the other arbitration provisions. [*Id.*].

This appeal followed. [RP 104].

ARGUMENT

II. THE DISTRICT COURT CORRECTLY HELD THAT DRIVETIME'S ARBITRATION CONTRACT IS SUBSTANTIVELY UNCONSCIONABLE.

DriveTime's arbitration contract has numerous one-sided terms: It provides DriveTime but not consumers a choice of forum; it limits the damages consumers may recover, but imposes no such limitation on DriveTime; and it requires

arbitration awards be kept secret, which means DriveTime has access to them, but consumers do not.[2]

As the New Mexico Supreme Court first explained in *Cordova*, under the doctrine of unconscionability, courts may refuse to enforce "an agreement that is unreasonably favorable to one party while precluding a meaningful choice of the other party." *Cordova v. World Finance Corp.*, 2009-NMSC-021, ¶ 21, 208 P.3d 901 (2009). Unconscionability can be analyzed from substantive and procedural perspectives: Substantive unconscionability addresses "the legality and fairness of the contract terms themselves," while procedural unconscionability concerns "the factual circumstances surrounding the formation of the contract." *Id.* ¶¶ 22-23. If a contract is sufficiently substantively unconscionable, it may be held unenforceable on that basis alone. *Id.* ¶ 32; *accord Rivera,* 2011-NMSC-033, ¶ 54. DriveTime's contract is sufficiently substantively unconscionable.

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[2] The Pools do not contest the permissibility of proceeding under the procedural rules of either AAA or JAMS. *See* Appellants' Br. 41-43.

A. DriveTime's Arbitration Contract Unconscionably Gives DriveTime A Choice of Forum for its Most Likely Claims, While Requiring Consumers to Bring Their Most Likely Claims in Arbitration.

1. One-sided arbitration clauses that provide the drafting party a choice of forum while requiring the non-drafting party to arbitrate are substantively unconscionable.

New Mexico courts have repeatedly refused to allow companies to enforce arbitration contracts that require consumers to arbitrate their claims, but exempt from arbitration the claims the company is most likely to bring.

In *Cordova*, for example, the Supreme Court struck down as substantively unconscionable an arbitration clause in a payday loan agreement that required the borrower to use "mandatory arbitration . . . to settle all disputes whatsoever, while reserving for the lender the exclusive option of access to courts for" the remedies it was "most likely to pursue." *Cordova*, 2009-NMSC-021, ¶ 1. Such a "self-serving arbitration scheme," the court held, "is so unfairly and unreasonably one-sided that it is substantively unconscionable." *Id.* ¶ 32.

Similarly, in *Rivera*, the court refused to enforce a contract that required arbitration of all claims, but exempted "self-help or judicial remedies including, without limitation, repossession or foreclosure" of the property that secured the loan. *Rivera*, 2011-NMSC-033, ¶ 3. "By excepting foreclosure and repossession from arbitration," the court explained, the lender "retained the right to obtain

through the judicial system the only remedies it was likely to need," while still requiring borrowers "to arbitrate any claim [they] may have." *Id.* ¶¶ 53-54. As in *Cordova*, the court held that this asymmetrical arbitration requirement was "unfairly one-sided and void under New Mexico law." *Id.* ¶ 54.

This Court has made clear that a company cannot escape these principles, simply by drafting a contract that, like DriveTime's, *appears* evenhanded if "its *practical effect* unreasonably favors" the company. *Ruppelt v. Laurel Healthcare Providers, LLC*, 2013-NMCA-014, ¶ 18, 293 P.3d 902 (emphasis added); *accord Figueroa v. THI of New Mexico Casa Arena Blanca, LLC*, 2013-NMCA-077, ¶ 29, 306 P.3d 480.

In *Ruppelt*, for example, this Court considered a nursing home contract that required the arbitration of all disputes except claims "pertaining to collections or discharge of residents." *Id.* ¶ 3 (internal quotation marks omitted). Although these carve-outs were "facially bilateral"—either the residents or the nursing home could bring such claims—in practice, they were one-sided: "Common sense dictates that claims relating to collection of fees and discharge of residents are the types of remedies that a nursing home, not its resident, is most likely to pursue." *Id.* ¶ 15. Because the "practical effect" of the arbitration clause was to give the nursing home a choice of forum for its most likely claims, while requiring its residents to

arbitrate their claims, the Court held that it was "unfair and unreasonably one-sided" and therefore unenforceable. *Id.* ¶ 18.

Similarly, less than a year ago in *Dalton*, this Court refused to enforce an arbitration clause in an auto-financing agreement that, although ostensibly neutral, had the practical effect of giving the dealership a choice of forum for its most likely claims, while requiring consumers to arbitrate their claims. *Dalton v. Santander Consumer USA, Inc.*, 2015-NMCA-030, 345 P.3d 1086, 1092 *cert. granted*, 2015-NMCERT-003, 346 P.3d 1163 (No. 35,101, Mar. 23 2015).[3] Like DriveTime's arbitration contract, the arbitration contract in *Dalton* contained a broad provision requiring arbitration of all disputes; but, again like DriveTime's, arbitration contract, the contract exempted from this provision the right to pursue self-help repossession of the vehicle, and the right to bring claims in small claims court. *Id.* ¶ 3. Although theoretically both the car dealership and the car buyer

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[3] The New Mexico Supreme Court has granted certiorari in *Dalton*. *Dalton v. Santander*, No. 35,101, 2015-NMCERT-003, 346 P.3d 1163 (Mar. 23 2015). But *Dalton* remains powerfully persuasive. *Dalton* is a straightforward application of the principle enunciated by the New Mexico Supreme Court in *Cordova* and reaffirmed in *Rivera*, which holds that arbitration contracts are unconscionable where they reserve for the drafter a judicial forum for the drafter's most likely claims, but provide no choice except for arbitration for a consumer's most likely claims.

could take advantage of these carve-outs, in reality, they only benefitted the dealer (and the finance company to which the dealer sold the loan).

As *Dalton* explained, a car dealership's most important remedies in an auto financing transaction are those that allow it to recoup of the value of the loan if the consumer defaults. *Dalton*, 2015-NMCA-030, ¶ 16; *see also Taylor v. Butler*, 142 S.W.3d 277, 286 (Tenn. 2004) ("[I]t is hard to imagine what other claims [a dealership] would have against [a car buyer] other than one to recover the vehicle or collect a debt."). In most cases, this can be accomplished by repossessing the vehicle, selling it, and then collecting any remaining debt in small claims court—precisely the remedies the arbitration contract exempted. *See Dalton*, 2015-NMCA-030, ¶¶ 16-17. Consumers, on the other hand, have no need to repossess the vehicle that they already own. The claims consumers are most likely to bring are fraud and consumer protection claims—claims with damages that exceed the jurisdictional limits of small claims court. *See id.* ¶ 18.

Thus, although the carve-outs in *Dalton* were ostensibly bilateral, their practical effect was to exempt from arbitration all the remedies a dealer would typically need, while requiring consumers to arbitrate their most likely claims. *See Dalton*, 2015-NMCA-030, ¶¶ 16-18. Such a one-sided arbitration scheme, this Court held, is "substantively unconscionable as a matter of law." *Id.* ¶ 23.

2. *DriveTime's arbitration contract has the practical effect of permitting DriveTime to choose the forum for its most likely claims, while requiring that consumers bring their claims in arbitration.*

DriveTime's arbitration contract has the same practical effect as the arbitration contract in *Dalton*. Although it states that "any claim, dispute or controversy" must be arbitrated, DriveTime's contract contains the same two exceptions as the contract in *Dalton*: (1) self-help repossession and sale of the vehicle in the event of default; and (2) claims within the jurisdiction of small claims court. [RP 43].

DriveTime argues that unlike in *Dalton*, only consumers—but not DriveTime—can go to small claims court. Appellants' Br. 32. Not so. The arbitration contract provides that arbitration is to be conducted by either the American Arbitration Association (AAA) or JAMS. [RP 42, 44]. Both of these organizations permit *both* parties to a consumer contract—that is, both the consumer and the company—to bring their claims in small claims court. *See* AAA, Consumer Dispute Rules R-9; JAMS, Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses 2.

As in *Dalton*, although the exceptions for self-help repossession and for small claims court are facially bilateral, they are not neutral. While they are practically useless to consumers, they allow DriveTime to pursue outside of

arbitration the only remedies it is ever likely to need—that is, they allow DriveTime to choose whether or not it wants to arbitrate its most likely claims.

Here's how it works: Under Article 9 of the Uniform Commercial Code, if a borrower defaults, a lender may repossess and then sell the borrower's vehicle "without judicial process," so long as the lender can do so "without [a] breach of the peace." NMSA 1978, §§ 55–9–609, 55–9–610(a) (2001). Because DriveTime's arbitration contract carves out self-help repossession and sale, the company need not arbitrate its repossession claims—it can simply help itself to the cars of defaulting borrowers and sell them. *See Dalton*, 2015-NMCA-030, ¶ 16. Alternatively, if a car cannot be repossessed through self-help—if, for example, a breach of the peace is necessary to recover the car—DriveTime may go to small claims court and seek replevin, a judicial order authorizing repossession. *See* NMSA § 35-11-3 (providing for replevin actions in magistrate court). DriveTime can thus repossess and sell a defaulting borrower's vehicle without ever going to arbitration. And if the sale of the car is not enough to pay off a borrower's debt, DriveTime can typically recover the difference, also without going to arbitration: The company can simply seek a deficiency judgment of up to $10,000 from small claims court. *See id.* ¶ 16. If necessary, DriveTime can even get an order from

small claims court to garnish the borrower's wages until the deficiency judgment is paid off. *See id.* ¶ 16.

Thus, just like the arbitration contract in *Dalton*, DriveTime's contract "affords [it] the option to forego arbitration during the entire typical default process from repossession to sale to deficiency suit to garnishment of wages." *Id.* ¶ 16. And, as in *Dalton*, consumers do not have the same option to choose not to arbitrate their claims. "In contrast to [a car dealer's] most likely claims" for repossession and to recover debt, a borrower's causes of action "are protective of consumers and often provide for punitive damages, attorney fees, statutory damages, or injunctions." *Dalton*, 2015-NMCA-030, ¶ 18. They are therefore "unlikely to meet the jurisdictional limits of small claims court." *Id.* So while DriveTime's arbitration scheme theoretically gives consumers the right to go to small claims court, as a practical matter, that right is meaningless. Consumers' most likely claims cannot be brought in small claims court.[4]

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[4] DriveTime argues that the Pools "made no showing in the District Court that consumers . . . would not benefit from a small claims court judgment of up to $10,000.00." Appellants' Br. 34. But the question is not whether consumers might receive *any* benefit from the small-claims exception; the question is whether the arbitration contract "unreasonably benefit[s] [DriveTime] over" consumers. *Rivera*, 2011-NMSC-033, ¶ 46. Unquestionably, it does. This Court has repeatedly held that where, as here, it is "self-evident" that a carve-out "unfairly favors" the company that drafted it, there is no need for any further showing.

And, of course, the right to self-help repossession is also useless to consumers: They have no need to repossess their own car. DriveTime argues that unlike the carve-out in *Dalton*, DriveTime's self-help carve-out is, in fact, beneficial to consumers, because it allows them to bring a court action to try to prevent DriveTime from repossessing their car.[5] Appellants' Br. 33. But if DriveTime is using self-help to repossess a consumer's car, it has already chosen not to arbitrate its claims. This exception, then, merely allows consumers to defend themselves in court against remedies that DriveTime has already decided not to arbitrate. This purported benefit is not much of a benefit.

For one thing, the law doesn't require notice before repossessing a car. *See* NMSA § 55-9-609. Therefore, in any but the most atypical circumstances, a

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Dalton, 2015-NMCA-030, ¶ 27; *see Figueroa*, 2013-NMCA-077, ¶ 31; *see also King*, 2014-NMSC-024, ¶ 32 ("[S]ubstantive unconscionability can be found by examining the contract terms on their face—a simple task when, as here, all substantive contract terms were nonnegotiable, and embedded in identical boilerplate language.").

[5] DriveTime incorrectly states that the right to go to court to prevent self-help repossession is given only to consumers. Appellants' Br. 32-33. It is not. The contract carves out "*any* individual action in court by one party that is limited to preventing the other party from using such self-help remedy"—regardless of who brings the action. [RP 43 (emphasis added)].

consumer cannot, as DriveTime contends, "go to court to prevent repossession." Appellants' Br. 33. By the time they got there, the car would already be gone.[6]

And even were that not the case—even if consumers could effectively go to court to defend against wrongful repossession by DriveTime—that doesn't change the fact that consumers are prohibited from bringing any affirmative claims against the company anywhere other than arbitration. In fact, DriveTime's arbitration contract explicitly prohibits a consumer who goes to court to stop a repossession from bringing any claim that would provide damages. [RP 43.] DriveTime's arbitration scheme thus suffers from the very same problem as the arbitration scheme in *Dalton*: Consumers are required to arbitrate the claims they are most likely to bring against DriveTime, while DriveTime maintains a choice of forum for the claims it is most likely to pursue.[7] This Court has already held that such a one-sided arbitration scheme is unconscionable. It should do so again here.

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[6] A consumer may be able to get to court in time to enjoin the *sale* of the car, which does require notice, but that does not take away the harm of repossession. Even if a court ultimately decides the car was wrongfully repossessed and requires DriveTime to return it, the consumer will still have gone without the vehicle—and perhaps, therefore, without a way to get to work or take her kids to school—for however long it takes the court to come to that conclusion.

[7] In fact, going to court to try to prevent repossession could impose an additional burden not present in *Dalton*: the possibility of having to litigate the same issue in multiple forums. If a borrower wants to bring a damages claim, she must go to arbitration, even if the basis for the claim is exactly the same as the

B. DriveTime's One-Sided Damages Limitation Provision Renders the Arbitration Contract Unenforceable.

1. The damages limitation provision, as applied to the arbitration contract, is unconscionable.

DriveTime's damages limitation provision is egregiously one-sided. It states: "Unless prohibited by law, you [the consumer] shall not be entitled to recover from us [DriveTime] any consequential, incidental or punitive damages, damages to property or damages for loss of use, loss of time, loss of profits, or income or any other similar damages." [RP 40]. DriveTime, however, is permitted to seek any damages it wants.

DriveTime's requirement that consumers arbitrate on these terms is clearly unconscionable. First, because it bans punitive damages, the damages limitation serves as a prospective waiver of statutory remedies—in this state, "[m]ultiplication of damages pursuant to statutory authority is a form of punitive damages." *Hale v. Basin Motor Co.*, 1990-NMSC-068, ¶ 20, 110 N.M. 314, 320, 795 P.2d 1006, 1012. Therefore, even if the Pools arbitrated their Unfair Practices Act claim and won, the arbitrator could not award the treble damages the statute provides. Such a waiver is unconscionable. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985); *Fiser v. Dell Computer*

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basis for stopping the repossession. This "possibility of dual forums for intertwined defenses and counterclaims imposes an unnecessary and undue burden on the borrower; to [prevent repossession] and also obtain a statutory remedy, he must litigate the same issue twice." *Wisconsin Auto Title Loans, Inc. v. Jones*, 714 N.W.2d 155, 174 (2006).

Corp., 2008-NMSC-046, ¶ 21, 144 N.M. 464, 470, 188 P.3d 1215, 1221 ("It is not hyperbole or exaggeration to say that it is a fundamental principle of justice in New Mexico that corporations may not tailor the laws that our legislature has enacted in order to shield themselves from the potential claims of consumers."). Indeed, the United States Supreme Court itself has stated that it "would have little hesitation in condemning" a provision that operated "as a prospective waiver of a party's right to pursue statutory remedies." *Mitsubishi*, 473 U.S. at 637 n.19. So too this Court should "have little hesitation in condemning" DriveTime's damages limitation provision, which does exactly that.

And the waiver of statutory remedies is not the provision's only problem. The punitive damages ban is unconscionable in and of itself—even apart from the fact that it limits statutory remedies. It prevents consumers from recovering "potentially significant relief," while allowing DriveTime "to evade full responsibility for its actions." *Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256, 267 (3d Cir. 2003); *see also Davis v. Global Client Solutions, LLC*, 765 F. Supp. 2d 937, 942 (W.D. Ky. 2011) (an arbitration contract that "prevents the plaintiff from seeking all remedies available" under statutory or common law is unenforceable); *Vicksburg Partners, L.P. v. Stephens*, 911 So. 2d 507, 523-24 (Miss. 2005) (punitive damages limitation unconscionable); *State ex rel. Dunlap v. Berger*, 211 W. Va. 549, 564 (2002) (same); *Powertel, Inc. v. Bexley*, 743 So. 2d 570, 576 (Fla. Dist. Ct. App. 1999) (same). Moreover, DriveTime also prohibits consumers from

seeking consequential damages, which New Mexico law provides is "prima facie unconscionable" in a consumer contract. NMSA § 55-2-719.

Perhaps worst of all, the damages limitation is entirely one-sided. It prohibits consumers from recovering most kinds of damages, while allowing DriveTime to pursue any damages it wants. There is no question that such a one-sided provision is unenforceable. *See, e.g.*, *Rivera*, 2011-NMSC-033, ¶ 54 (refusing to enforce an "unfairly one-sided" arbitration clause); *Alexander,* 341 F.3d at 267 (holding damages limitation provision substantively unconscionable); *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1173 (9th Cir. 2003) (same); *Stirlen v. Supercuts, Inc.*, 51 Cal. App. 4th 1519, 1539 (1997) (refusing to enforce a one-sided damages limitation provision that prohibited employees, but not their employer, from seeking punitive and statutory damages).

DriveTime barely argues this point. *See* Appellants' Br. 21-22. The company doesn't contend that its damages limitation provision isn't as one-sided as it seems or that it doesn't really require consumers to prospectively waive their statutory rights. DriveTime's only argument is that in some cases, other courts in other jurisdictions have enforced different damages limitation provisions. *See* Appellants' Br. 21-22. This argument is unconvincing.

As an initial matter, the only case DriveTime cites that would be controlling in this Court—the United States Supreme Court's decision in *Mastrobuono*—doesn't say anything about the enforceability of damages limitation provisions. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995). DriveTime cites the case for the proposition that an "arbitration agreement can limit available remedies if it does so unambiguously." Appellants' Br. 22 n.6. But that is not what the case says. The case required the Court to interpret an ambiguous arbitration contract to determine whether it limited the authority of an arbitrator to award punitive damages. *Mastrobuono*, 514 U.S. at 62. The Court held that the contract contained no such limitation. *Id.* at 64. There was therefore no reason for it to even consider whether a punitive damages ban would be enforceable. There was certainly no reason for it to consider the enforceability of a much more extreme damages limitation like DriveTime's. Indeed, if the Supreme Court had considered the contract at issue in this case, there is no question it would have held the damages limitation unenforceable. As explained above, the Supreme Court has already made clear that it would not "hesitat[e] in condemning" a provision that, like DriveTime's, operates "as a prospective waiver of a party's right to pursue statutory remedies." *Mitsubishi Motors*, 473 U.S. at 637.

Nor do the other cases DriveTime cites support the contention that DriveTime's damages limitation provision is not unconscionable. DriveTime's provision is far worse than those at issue in any of the cases it cites—none of those cases enforced an arbitration contract with a one-sided damages limitation that prospectively waived the right to recover statutory remedies and prohibited consumers from seeking most other kinds of damages. And none of the cases cited by DriveTime suggest that such a provision would be enforceable. To the contrary, courts have repeatedly refused to enforce damages limitation provisions in arbitration contracts like DriveTime's. This Court should do the same.

2. The FAA does not require that courts ignore unconscionable arbitration terms simply because they are placed outside the arbitration section of a contract.

DriveTime's primary argument in support of its damages limitation provision is not that the provision is enforceable, but rather that this Court is required to ignore it, regardless of how unconscionable it might be. *See* Appellants' Br. 16-25. The company contends that the Federal Arbitration Act (FAA) prohibits courts considering motions to compel arbitration from considering provisions that are outside the arbitration section of a contract, even if those provisions govern the arbitration proceeding. In DriveTime's view, because it labeled part of its contract "Arbitration Agreement" and "expressly" placed the damages limitation provision outside that section, the court can't consider it—

despite the fact that it unconscionably limits the remedies a consumer could recover in arbitration. *Id.* at 20.[8] If this were the law, DriveTime could require any dispute to be resolved by the company's president or mandate that all disputes be decided in its favor. And so long as the company placed these provisions outside the portion of the contract labeled "Arbitration Agreement," a court could not review them.

But the law does not require courts to turn a blind eye to unconscionable arbitration terms, simply because of where they are located. In deciding whether to compel arbitration, courts may consider any term in the contract that "causes the arbitration of [the plaintiff's] claim . . . to be unconscionable," regardless of where that term is located. *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 74 (2010).

DriveTime's argument to the contrary is based on a profound misunderstanding of United States Supreme Court case law, and in particular the Court's decision in *Prima Paint.* In that case, the Court considered an arbitration clause in a consulting contract between Prima Paint and Flood & Conklin, another

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[8] To be clear, although DriveTime repeatedly states that the section of the contract it labeled "Arbitration Agreement" is "separate" from the other provisions of the financing agreement, it is not. The contract itself explicitly states that the "Arbitration Agreement" is part of the same contract as the rest of the provisions governing the sale and financing of the Pools' vehicle. [RP 40]. And DriveTime concedes the point. Appellants' Br. 2. All of the provisions at issue here are part of a single contract; there is no "separate Arbitration Agreement," *id.* at 25.

paint company. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 397-98 (1967). Prima Paint argued that the arbitration clause was unenforceable because the whole contract was induced by fraud—according to Prima Paint, Flood & Conklin had claimed to be solvent and able to perform the contract, when in fact the company was planning to file for bankruptcy (and, indeed, did so a week after the contract was executed). *Id.* at 398. Prima Paint did not argue that the arbitration clause itself was fraudulently induced, nor did it contend that any of the terms governing the arbitration proceeding were unconscionable. The sole issue the company raised was whether it was fraudulently induced into agreeing to hire Flood & Conklin as a consultant in the first place. This issue, the Court held, was for the arbitrator to decide. *Id.* at 402. Under the FAA, the Court explained, "allegations that go to the validity of the contract in general, as opposed to the arbitration clause in particular, are to be decided by the arbitrator, not the court." *See id.* at 404.

Contrary to DriveTime's contention, *Prima Paint* does not hold that a court deciding whether an arbitration clause is valid may only consider provisions in the section of the contract labeled arbitration. And it certainly does not hold that a company may evade judicial review of unconscionable provisions that govern arbitration, simply by artfully relocating them. All *Prima Paint* says is that courts

may not refuse to compel arbitration, based solely on the contention that the entire contract in which the arbitration clause is contained is invalid. *See Prima Paint*, 388 U.S. at 404. It does not change the general rule that challenges to the arbitration clause itself are for a court to decide. *See id.*; *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445-446 (2006) (explaining that challenges to the validity of the arbitration clause itself are for the court, whereas challenges to the contract that are unrelated to arbitration are for an arbitrator to decide).

DriveTime fails to distinguish between the argument that a contractual provision outside the arbitration clause is itself invalid and the argument that an outside provision "*as applied* to" the arbitration clause "render[s] *that [clause]* unconscionable." *Rent-A-Center*, 561 U.S. at 74. As the Supreme Court itself has made clear, the former is an argument about the contract as a whole, but the latter is an argument about the arbitration clause specifically, and therefore, under *Prima Paint*, it is for a court to decide. *See id.*

Nobody here has argued that DriveTime's damages limitation provision renders the entire financing contract invalid. The problem with DriveTime's damages limitation provision is that it renders *the arbitration contract* invalid, because it means that an arbitrator cannot award consumers the remedies to which they would otherwise be entitled—remedies DriveTime is free to seek. Requiring

a consumer to arbitrate on these terms is plainly unconscionable. The FAA does not prohibit this Court from so holding.[9]

Several courts—including at least two federal courts of appeal—have rejected the contention that a company may avoid judicial scrutiny of unconscionable provisions that would govern the way arbitration is conducted simply by locating those provisions outside of the arbitration section of a contract. *See, e.g.*, *Newton v. Am. Debt Services, Inc.*, 549 Fed. App'x. 692, 694 n.2 (9th Cir. 2013) ("That the damages limitation and fee shifting provisions were located outside of the specific arbitration clause does not mean those provisions cannot be considered when determining unconscionability of the arbitration agreement."); *Kristian v. Comcast Corp.*, 446 F.3d 25, 47 (1st Cir. 2006); *Davis v. Global Client Solutions, LLC*, 765 F. Supp. 2d 937, 942 n.4 (W.D. Ky. 2011); *AT & T Mobility II, LLC v. Pestano*, No. C 07-05463, 2008 WL 682523, at *5 (N.D. Cal. Mar. 7,

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[9] DriveTime notes that, in theory, some consumer claims may not end up being arbitrated. Appellant's Br. 21. For example, if a consumer files a case in court, and DriveTime decides it is better for the company not to arbitrate that particular case, it might allow the case to remain in court, rather than compelling arbitration. *See id.* at 21 n.5. But that's irrelevant to this analysis. What matters is that the damages limitation provision means that consumers are limited in the remedies they may recover in arbitration, while DriveTime suffers no such limitation. A requirement that arbitration be conducted on these terms is unconscionable.

2008).[10] "A contrary conclusion would allow parties to avoid judicial scrutiny merely through clever placement of objectionable arbitration terms." *AT & T Mobility II*, 2008 WL 682523, at *5.

3. The damages limitation provision is not ambiguous.

DriveTime next argues that it is unclear whether the damages limitation provision applies to the Pools' claims. Appellants' Br. 25-26. Therefore, DriveTime contends, before a court rules on whether the provision renders the arbitration contract unconscionable, the contract must be sent to an arbitrator "to ascertain the parties' contractual intent." *Id.* at 26. But the intent of the contract could not be more clear: The agreement states that buyers "*shall not* be entitled to recover from [DriveTime] any consequential, incidental or punitive damages." [RP 40 (emphasis added)]. There is nothing to interpret.

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[10] The handful of district court cases that DriveTime cites to the contrary are at odds not only with other federal courts, but also with United States Supreme Court precedent. *See* Appellants' Br. 23-25. None of the cases the company cites even mentions the Supreme Court's decision in *Rent-A-Center*, which, as explained above, distinguished between a challenge to a contractual term that is unrelated to the arbitration clause at issue and an argument that the contractual term, as applied to the arbitration clause, renders the arbitration clause unconscionable. They simply declare without analysis that terms outside of the arbitration section of a contract may not be considered by a court. This analysis is simply wrong. As explained above, terms outside of an arbitration section may be considered if it would be unconscionable to require a party to arbitrate under those terms. *See Rent-A-Center*, 561 U.S. at 74; *Newton*, 549 Fed. App'x. at 694 n.2. DriveTime's damages limitation provision is precisely such a term.

Contrary to DriveTime's contention, the fact that the damages limitation provision does not apply if it is "prohibited by law" does not render it ambiguous. [RP 40]. It is a basic principle of contract law that illegal provisions are generally unenforceable. *See Niblack v. Seaberg Hotel Co.*, 1938-NMSC-018, 42 N.M. 281, 76 P.2d 1156, 1158. DriveTime's contract merely makes explicit what is implied in every contractual provision—that it cannot be enforced if it is unlawful. If that rendered the provision ambiguous, all contractual provisions would be ambiguous.

Nor is there a conflict between the damages limitation provision—which limits the damages consumers may recover—and the provision giving the arbitrator "the power to award all remedies that would apply if the action were brought in court." Appellants' Br. 27 (internal quotation marks omitted). The latter provision empowers the arbitrator to award any remedies to which a party is entitled; the former clarifies that the remedies to which consumers (but not DriveTime) are entitled are limited. There is no conflict between these two provisions. There is, in fact, nothing whatsoever in the contract that contradicts the damages limitation provision's unequivocal command that consumers "shall not be entitled to recover" most of the damages otherwise available to them.

DriveTime argues that this Court should ignore the damages limitation provision, because an arbitrator might not enforce it. This argument amounts to

the contention that because the damages limitation provision is unlawful, an arbitrator would not enforce it, and because the provision is unenforceable, it cannot be unconscionable. As one court considering a similar argument put it, "[t]o state the premise is to refute [its] logic." *Samaniego v. Empire Today LLC*, 205 Cal. App. 4th 1138, 1147 (2012).

In *PacifiCare*, the United States Supreme Court considered a contract that was ambiguous as to whether it prohibited statutory damages. *PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401, 405 (2003). The Court concluded that the question of how the contract should be interpreted was "antecedent" to the question of whether the contract was enforceable. *Id.* at 407. The Court, therefore, refused to hold the ambiguous contract unenforceable "on the basis of mere speculation" that an arbitrator would interpret it to prohibit statutory damages. *Id.* at 406-07 (internal quotation marks omitted).

The obvious implication of *PacifiCare* is that where a damages limitation provision is *unambiguously* unconscionable, there is no need to send it to an arbitrator for interpretation. *See Kristian*, 446 F.3d at 46. No speculation is necessary here: There is no possible interpretation of the damages limitation provision that would render it enforceable. It is clear under New Mexico law that the provision prohibits statutory damages, as well as most other kinds of damages

consumers are likely to seek. And it is one-sided to boot. There is no doubt that requiring arbitration under these terms would be unconscionable. The Court need not wait for an arbitrator to come to this inescapable conclusion.

4. DriveTime's arbitration contract does not delegate the question of its enforceability to an arbitrator.

DriveTime argues that even if the FAA does not prohibit courts from deciding whether the damages limitation renders the arbitration contract unconscionable, the contract itself does. *See* Appellants' Br. 14-15. DriveTime is wrong. DriveTime contends that "Plaintiffs contractually agreed that any challenge to the enforceability of the Limitation on Damages clause would be decided by the arbitrator, not a court." *Id.* But the Pools never made any such agreement. The arbitration contract has no provision that specifically addresses disputes regarding the damages limitation provision. Nor is there any other contract between the Pools and DriveTime agreeing to send such disputes to the arbitrator.

DriveTime contends that the arbitration contract has a "delegation provision," under which the parties agreed that an arbitrator would resolve the "threshold issues concerning the arbitration agreement" that a court would usually decide. Appellants' Br. 15 (internal quotation marks omitted). But that is simply not true. The contract doesn't have a delegation provision. If anything, it has an

anti-delegation provision. The contract explicitly states that disputes "about the validity, enforceability, coverage or scope" of the arbitration contract are "for a court, and not an arbitrator to decide." [RP 43]. Because the damages limitation provision unconscionably limits the remedies consumers could receive in arbitration, it renders DriveTime's arbitration scheme unenforceable. This is plainly a claim about the enforceability of the arbitration contract, which is—under both the FAA and DriveTime's own contract—a category of disputes a court, and not an arbitrator, must decide.

DriveTime's sole argument to the contrary is that because the company placed the damages limitation provision outside the "Arbitration Agreement" section, any challenge to that provision is not a challenge to the enforceability of the arbitration contract, but rather a challenge to the contract as a whole. *See* Appellants' Br. 15. As explained above, this argument fails. The Pools do not argue—and have never argued—that the problem with the damages limitation provision is that it renders the whole contract invalid. The problem is that it would be unconscionable to require consumers to arbitrate under the extreme limitation DriveTime has placed on the remedies they could receive. The damages limitation provision renders the arbitration contract unenforceable. Contrary to DriveTime's

contention, the contract does not prohibit a court from considering this issue. Rather, the contract requires it.

C. DriveTime's Confidentiality Provision is Unconscionable.

Like many of the terms in DriveTime's arbitration contract, the confidentiality clause—which requires arbitration awards to be kept confidential—appears bilateral, but in practice, it benefits only DriveTime. Because the provision applies only to arbitration and because only consumers are required to arbitrate their most likely claims, the impact of the provision is to impose confidentiality only on cases brought *against* DriveTime, which must be brought in arbitration, but not on the actions DriveTime brings against consumers, which DriveTime can choose whether to arbitrate. There is no benefit to consumers of such one-sided secrecy, but it does give DriveTime a big advantage.

First, the company's ability to keep secret the awards rendered against it "hampers" consumers' ability to investigate whether others have successfully brought similar claims against DriveTime, and therefore whether the company knowingly engaged in a "pattern[] of illegal or abusive practices." *McKee v. AT&T Corp.*, 164 Wash. 2d 372, 398 (2008) (explaining that "[a] confidentiality clause in a contract of adhesion" like DriveTime's "may even help conceal consumer fraud"); *see Cole v. Burns Int'l Sec. Services*, 105 F.3d 1465, 1477 (D.C. Cir. 1997); *see also Aken v. Plains Elec. Generation & Transmission Co-op., Inc.*,

2002-NMSC-021, ¶ 21, 132 N.M. 401, 409, 49 P.3d 662, 670 ("[E]vidence of repeated engagement in prohibited conduct knowing or suspecting it is unlawful is relevant support for a substantial [punitive damages] award.").

And second, the confidentiality provision gives DriveTime an advantage in the arbitration process itself. DriveTime, of course, knows what happened in all of the previous arbitration proceedings in which it participated. The result of the confidentiality provision is to ensure that consumers do not have equal access to this possibly vital information. DriveTime has thus "place[d] itself in a far superior legal posture by ensuring that none of its potential opponents have access to precedent while, at the same time, the company accumulates a wealth of knowledge on how to negotiate the terms of its own unilaterally crafted contract." *Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593, 610 (E.D. Pa. 2007).

DriveTime's brief does not even bother to argue that the confidentiality provision is evenhanded. It doesn't identify a single benefit consumers might gain from having repossessions and deficiency judgments against them be public, while awards against DriveTime remain secret. Instead, DriveTime merely cites a bunch of cases in which courts have upheld other confidentiality provisions. But there is a similar bunch of cases in which courts have held confidentiality provisions to be unconscionable. *See, e.g. Davis v. O'Melveny & Myers*, 485 F.3d 1066, 1078 (9th

Cir. 2007); *McKee*, 164 Wash. 2d at 398; *Schnuerle v. Insight Communications Co., L.P.*, 376 S.W.3d 561, 578 (Ky. 2012); *Bragg,* 487 F. Supp. 2d at 610; *Luna v. Household Fin. Corp. III*, 236 F. Supp. 2d 1166, 1181 (W.D. Wash. 2002).

The relevant question is not whether confidentiality provisions in general are enforceable. The question is whether *DriveTime's* confidentiality provision is enforceable, and that question depends on whether the provision "unreasonably benefit[s]" DriveTime. *Cordova*, 2009-NMSC-021, ¶ 25. There is no question that it does.

DriveTime suggests that the United States Supreme Court has "rejected" the idea that confidentiality provisions in arbitration contracts may be unconscionable. Appellants' Br. 40. Not true. DriveTime cites the Court's decision in *Concepcion* for the proposition that an "arbitration provision can provide 'that proceedings be kept confidential.'" Appellants' Br. 40 (quoting *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1749 (2011)). But it conveniently omits the rest of the quotation. What *Concepcion* actually says is that arbitration "proceedings [may] be kept confidential *to protect trade secrets*." *Concepcion*, 131 S. Ct. at 1749 (emphasis added). There are no trade secrets here. Here, there is no justification whatsoever for confidentiality except to provide DriveTime an

advantage against consumers that bring claims against it. *Concepcion* does not require courts to enforce such a one-sided provision.

And indeed, since *Concepcion*, courts have continued to consider cases in which a party challenges the enforceability of a confidentiality provision in an arbitration clause—and, where appropriate, they have continued to hold that the provision is unconscionable. *See, e.g.*, *Narayan v. Ritz-Carlton Dev. Co., Inc.*, No. SCWC-12-0000819, --P.3d--, 2015 WL 3539805, at *11 (Haw. June 3, 2015); *Henderson v. Watson*, No. 64545, 2015 WL 2092073, at *3 (Nev. Apr. 29, 2015); *Poublon v. Robinson Co.*, 2015 WL 588515, at *8 (C.D. Cal. Jan. 12, 2015); *Longnecker v. Am. Exp. Co.*, 23 F. Supp. 3d 1099, 1110 (D. Ariz. 2014); *Schnuerle*, 376 S.W.3d at 578 (explicitly rejecting the argument that *Concepcion* forecloses courts from finding that a confidentiality provision in an arbitration contract is unconscionable).

Because it does nothing but "unreasonably benefit" DriveTime, DriveTime's confidentiality provision is unconscionable. *Cordova*, 2009-NMSC-021, ¶ 25.

D. The FAA Does Not Require Courts to Enforce Unconscionably One-Sided Arbitration Contracts.

DriveTime argues that the FAA would preempt any ruling that "complete mutuality" is required to enforce an arbitration contract. Appellants' Br. 38. But that is not the issue here. The problem with DriveTime's contract is not that

consumers do not have the exact same obligations as DriveTime does. The problem is that the terms of the contract systematically disadvantage consumers at every turn. *Cf. Zuver v. Airtouch Communications, Inc.*, 153 Wash. 2d 293, 317-19 (2004) ("Zuver, however, *does not* simply argue that the arbitration agreement here lacks mutuality. Rather, she contends that the *effect* of this provision is so one-sided and harsh that it is substantively unconscionable. We agree." (citation omitted)).

It has long been the law that where a contract's "terms are unreasonably favorable to one party [the] contract may be held to be substantively unconscionable." *State ex rel. State Highway & Transp. Dep't v. Garley*, 1991-NMSC-008, ¶ 30, 111 N.M. 383, 389, 806 P.2d 32, 38 (internal quotation marks omitted). The Uniform Commercial Code itself states that the test of unconscionability is whether a contract's terms "are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract." NMSA 1978 § 55-2-302, cmt. 1; *accord State ex rel. King v. B & B Inv. Group, Inc.*, 2014-NMSC-024, ¶ 41, 329 P.3d 658, 673. This is a generally applicable principle of contract law that has nothing to do with arbitration. *See Cordova*, 2009 -NMSC- 021, ¶ 38. Courts in this state, and throughout the country, have consistently refused to enforce contracts that are "grossly unfair"—

regardless of whether the contracts involve arbitration. *See, e.g.*, *King*, 2014-NMSC-024, ¶ 32; *In re Marriage of Iqbal & Khan*, 2014 IL App (2d) 131306, ¶ 41, 11 N.E.3d 1, 14 (refusing to enforce one-sided postnuptial agreement); *Stiglich v. Jani-King of California, Inc.*, 2008 WL 4712862, at *11 (Cal. Ct. App. Oct. 28, 2008) (refusing to enforce one-sided forfeiture clause).

While the FAA requires that arbitration contracts be enforced in the same manner as other contracts, it also provides that they may be revoked for the same reasons as other agreements. *See Concepcion*, 131 S. Ct. at 1746 (explaining that Section 2 of the FAA "permits arbitration agreements to be declared unenforceable upon such grounds as exist at law or in equity for the revocation of any contract" (internal quotation marks omitted)). There is no doubt that under generally applicable contract law, DriveTime's arbitration contract is unconscionably one-sided. As a condition of buying a car, DriveTime requires consumers to give up their right to choose the forum in which their claims are heard and to prospectively waive their right to receive the damages to which they would otherwise be entitled, all while keeping any awards against DriveTime secret. DriveTime, on the other hand, does not give up any of these same rights. It does not discriminate against arbitration to hold that this scheme is "grossly unfair" and should not be enforced. *Cordova*, 2009 -NMSC- 021, ¶¶ 20, 38.

Indeed, both this Court and the New Mexico Supreme Court have explicitly rejected the contention that the FAA requires courts to enforce unconscionably one-sided contracts like DriveTime's simply because they involve arbitration. *See Cordova*, 2009-NMSC-021, ¶ 38; *Dalton*, 2015-NMCA-030, ¶ 29. As the Supreme Court explained in *Cordova*, "[w]e will not allow our courts to be used to enforce unconscionable arbitration clauses any more than we will allow them to be used to enforce any other unconscionable contract in New Mexico." *Cordova*, 2009 -NMSC- 021, ¶ 38.

DriveTime suggests this Court must ignore these rulings because the FAA is a federal law. Appellants' Br. 7-8. Instead, DriveTime contends, this Court must follow the decisions of the federal appellate courts. *See id.* DriveTime is wrong. This Court must, of course, uphold federal statutes. And it must adhere to the decisions of the United States Supreme Court interpreting those statutes. But it need not follow the decisions of lower federal courts. And in fact, this Court is *not permitted* to reject the holdings of the New Mexico Supreme Court. "Appeals in this Court are governed by the decisions of the New Mexico Supreme Court—including decisions involving" the FAA. *Dalton*, 2015-NMCA-030, ¶ 30 (internal quotation marks omitted); *see ASARCO, Inc. v. Kadish*, 490 U.S. 605, 617 (1989) ("State courts . . . possess the authority, absent a provision for exclusive federal

jurisdiction, to render binding decisions that rest on their own interpretations of federal law."); *Lockhart v. Fretwell*, 506 U.S. 364, 375-76 (1993) (Thomas, J., concurring) ("In our federal system, a state trial court's interpretation of federal law is not less authoritative than that of the federal court of appeals in whose circuit the trial court is located."); *State v. Cardenas-Alvarez*, 2001-NMSC-017, ¶ 58, 130 N.M. 386, 410, 25 P.3d 225, 249 (Serna, C.J., concurring) ("[W]here the issue has not been explicitly resolved by the Supreme Court, we are not bound . . . by the Tenth Circuit's interpretation of Supreme Court precedent.").

Even if the Court took DriveTime's suggestion and followed the federal appellate courts, this path would not benefit DriveTime. The majority of federal courts of appeal have held that one-sided arbitration contracts like DriveTime's are unenforceable. *See, e.g., Noohi v. Toll Bros., Inc.*, 708 F.3d 599, 611-613 (4th Cir. 2013); *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC,* 379 F.3d 159, 169-70 (5th Cir.2004); *Ting v. AT&T,* 319 F.3d 1126, 1149 (9th Cir.2003). *Patton*, the Tenth Circuit case upon which DriveTime relies, is an outlier. *See THI of New Mexico at Hobbs Ctr., LLC v. Patton*, 741 F.3d 1162 (10th Cir. 2014).

III. The Arbitration Contract is Procedurally Unconscionable.

As the district court held, DriveTime's arbitration contract is so substantively unconscionable that it is unenforceable, regardless of whether the

contract is also procedurally unconscionable. But the district court was incorrect to conclude that the contract lacked procedural unconscionability.[11]

Procedural unconscionability refers to "inequality in the contract formation." *King*, 2014-NMSC-024, ¶ 27. "Analyzing procedural unconscionability requires the court to look beyond the four corners of the contract and examine factors including the relative bargaining strength, sophistication of the parties, and the extent to which either party felt free to accept or decline terms demanded by the other." *Id.* (internal quotation marks omitted). In particular, a court "should consider whether the agreement is a contract of adhesion, i.e., a standardized contract offered by a transacting party with superior bargaining strength to a weaker party on a take-it-or-leave-it basis, without opportunity for bargaining." *Strausberg v. Laurel Healthcare Providers, LLC*, 2013-NMSC-032, ¶ 35, 304 P.3d 409, 418 (internal question marks omitted).

DriveTime's arbitration contract is clearly a contract of adhesion. DriveTime admits that the arbitration contract is a standardized, pre-printed form contract that the Pools were required to sign as a condition of purchasing the

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[11] DriveTime notes that the Pools did not file a cross-appeal from the district court's ruling on procedural unconscionability. Appellants' Br. 12. There was no need for them to do so. "An appellee need not cross-appeal to raise an issue that would preserve the judgment below." *State ex rel. State Highway & Transp. Dep't v. City of Sunland Park,* 1999-NMCA-143, ¶ 11, 128 N.M. 371, 993 P.2d 85. A ruling from this Court that DriveTime's contract is procedurally unconscionable would support an affirmance of the lower court's decision that it cannot be enforced.

vehicle—that is, that the contract was offered on a take-it-or-leave-it basis, with no opportunity for negotiation. [RP 49]. This is the definition of an adhesive contract.

DriveTime contends that the contract is not unconscionable because although consumers are required to sign the contract, in theory, they can reject it later. *See* Appellants' Br. 12 n.3. In practice, however, this ability to reject the contract after entering it is meaningless. For one thing, consumers are unlikely to know this right to opt out exists. A recent study by the federal Consumer Financial Protection Bureau found that consumers are typically "unaware of any arbitration clause opt-out opportunities they may have been offered." Consumer Financial Protection Bureau, Arbitration Study 11 (2015).[12] DriveTime's contract is no different: The opt-out provision is buried in the middle of the contract, and although it is bolded, it is written in the same small font as the rest of the agreement. [RP 44].

Moreover, DriveTime sets up unreasonable roadblocks for any consumer who does want to opt out. Car buyers cannot simply choose not to sign the arbitration contract when they buy a car or even to send an email to the company afterwards. Instead, they must mail DriveTime a "signed writing" rejecting the contract within thirty days. [RP 44]. For the rejection notice to be effective, it

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[12] The Consumer Financial Protection Bureau's report is available at http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

must include the buyer's name, address, and contract number, and, if it's sent by a third party, evidence that the third party has authority to reject the arbitration contract on behalf of the buyer. [*Id.*]. It also must be sent by certified mail, with a return receipt requested. [*Id.*].

If DriveTime really wanted to allow consumers to choose whether to arbitrate their claims, it could easily provide them that choice up front when they buy their car by allowing them to not sign the arbitration contract. But that is not what DriveTime does. Instead, DriveTime requires all car buyers to agree to its arbitration contract, and then somewhere in the middle of that contract, DriveTime includes an opt-out provision that is difficult to find and difficult to exercise. The only explanation for this procedure is that it is carefully calculated to provide the *appearance* of choice, while preventing consumers from ever actually choosing to reject the arbitration contract. Such a meaningless choice is really no choice at all. *See Clay v. New Mexico Title Loans, Inc.*, 2012-NMCA-102, ¶ 36, 288 P.3d 888, 900 ("agree[ing]" that a similar opt-out provision in a loan contract did not remedy the unfairness of the contract, "particularly when [the opt-out] cannot be done as an option within the [contract] itself but instead must be done in a separate writing").

For this reason, several courts have held that companies cannot remedy the procedural unconscionability of an unfair contract simply by including an opt-out provision consumers are unlikely to actually be able to exercise. *See, e.g.*, *Mohamed v. Uber Technologies, Inc.*, No. C-14-5200 EMC (N.D. Cal. June 9,

2015), at 26; *Gentry v. Superior Court*, 42 Cal. 4th 443, 472 (2007); *Duran v. Discovery Bank*, No. B203338, 2009 WL 1709569, at *5-*7 (Cal. Ct. App. June 19, 2009). And, of course, an opt-out provision does nothing to remedy substantive unconscionability. *See Clay*, 2012-NMCA-102, ¶ 36.

DriveTime does not give consumers any meaningful choice about whether to agree to the arbitration contract, let alone about what provisions the contract should contain. And, as explained above, the contract's terms "are patently unfair to" DriveTime's consumers. *Strausberg*, 2013-NMSC-032, ¶ 35 (internal quotation marks omitted). The contract is therefore "unconscionable and unenforceable." *Id.* (internal quotation marks omitted).

IV. The Unconscionable Provisions Cannot Be Severed.

DriveTime contends that if the Court "were to conclude that a term of the Arbitration Agreement is unconscionable under New Mexico law, the proper remedy would be to sever the term." Appellants' Br. 43. But this is not a case in which *a* term is problematic. DriveTime's arbitration scheme is unconscionable from top to bottom: It requires consumers to arbitrate their claims, while preserving for the company the right to choose the forum for the claims it is most likely to bring; it drastically limits the remedies consumers may seek, while imposing no such limitation on DriveTime; and it requires that arbitration awards be kept confidential, which means consumers are kept in the dark about the result

of other arbitrations against DriveTime, while DriveTime simply amasses more and more information about consumers' claims. Moreover, consumers have no meaningful choice about whether to accept these unfair terms. Such pervasive unconscionability can only be remedied by striking the entire arbitration contract.

In *Cordova*, the New Mexico Supreme Court struck in its entirety a one-sided arbitration contract that required consumers to arbitrate their claims, but permitted the lender that drafted the contract to bring its claims in court. *Cordova*, 2009-NMSC-021, at ¶ 40. "The invalidity" of the contract, the court explained, was not ancillary to the agreement to arbitrate, but rather "involve[d] the arbitration scheme itself." *Id.* The one-sided carve-out for the lender's claims, the court found, was "central to the [contract's] original mechanism for resolving disputes between the parties." *Id.* It could not be severed without rewriting the parties' dispute resolution scheme, "a type of judicial surgery" the court refused to perform. *Id.*

The court came to the same conclusion in *Rivera*, holding that severance could not remedy an arbitration contract that was "laced with unenforceable terms," including a one-sided arbitration scheme. *Rivera*, 2011-NMSC-033, ¶ 56. "This Court's duty," it explained, "is confined to interpretation of the contract which the parties made for themselves." *Id.* (internal quotation marks omitted). It

is not to rewrite the agreement. *Id.* Faced with an arbitration contract that was pervaded with unconscionability, the court concluded that its only option was to strike it entirely.

If anything, DriveTime's arbitration contract is worse than the contracts in *Cordova* and *Rivera*. As in those cases, DriveTime has reserved for itself the right to choose the forum in which it litigates its most likely claims, while requiring consumers to bring their claims in arbitration. This one-sided reservation of the right to choose forum cannot be severed, because it is "central to the overall arbitration scheme," *Ruppelt*, 2013-NMCA-014, ¶ 20. Indeed, if the Court were to sever the one-sided carve-outs from DriveTime's arbitration contract, the result would be to impose on DriveTime an obligation to arbitrate its claims that it never agreed to.

And that is not the only surgery this Court would have to perform to fix DriveTime's arbitration contract. DriveTime's contract is "laced with unenforceable terms," *Rivera*, 2011-NMSC-033, ¶ 56. To render it enforceable, the Court would not only have to rewrite the provisions governing which claims go to arbitration, it would also have to change the damages limitation provision, and rewrite the confidentiality clause. Courts have repeatedly refused to enforce arbitration contracts that would require rewriting so many terms. *See, e.g.*, *Rivera*,

2011-NMSC-033, ¶ 56; *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 35 n.9 (2007).

The FAA imposes upon courts a duty to enforce arbitration contracts "in accordance with their terms." 9 U.S.C. § 4. It does not permit courts to impose new terms. Because arbitration "is a matter of consent," courts may not require parties to arbitrate claims they did not agree to arbitrate or to arbitrate under a different set of terms than the ones they chose—even if doing so is the only way to save an arbitration contract. *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989); *see Rivera*, 2011 -NMSC- 033, ¶ 26. To make DriveTime's arbitration scheme enforceable, the Court would essentially have to draft a new one. This is precisely what the Supreme Court in *Cordova* and in *Rivera* refused to do—and what the FAA does not allow.

DriveTime contends that its contract is different from the contracts in *Cordova* and *Rivera* because neither of those contracts had a severability clause. Appellants' Br. 29. DriveTime is wrong. The arbitration contracts in both *Cordova* and *Rivera* had a severability clause. *See Rivera*, 2011-NMSC-033, ¶ 37; Record Proper at 41, *Cordova*, 2009-NMSC-021 (No. 30,536). Nevertheless, the court in *Cordova* struck the arbitration contract, without even mentioning the severability clause. *Cordova*, 2009-NMSC-021, ¶ 40. And the court in *Rivera*

explicitly held that the contract must be stricken in its entirety *despite* the fact that it had a severability clause. *Rivera*, 2011-NMSC-033, ¶ 37.

As this Court has explained, if a contract contains an unconscionable term that is "so central to the agreement" that it cannot be severed without rewriting the contract, the contract as a whole must be stricken—regardless of whether it contains a severability clause. *Figueroa*, 2013-NMCA-077, ¶ 22. That is exactly the case here. DriveTime's arbitration clause is "permeated" with unconscionability. NMSA 1978 § 55-2-302, cmt. 2 ("Under this section the court, in its discretion, may refuse to enforce the contract as a whole if it is permeated by the unconscionability."). The only way to fix it would be to rewrite it. And that the Court cannot do, at least not without violating the basic premise that contracts—and arbitration contracts, in particular—are a matter of consent.

Furthermore, rewriting DriveTime's contract would allow the company to "circumvent" New Mexico's unconscionability doctrine. *Figueroa*, 2013-NMCA-077, at ¶ 39. Despite imposing a blatantly unconscionable arbitration contract, DriveTime would still be able to compel arbitration of consumers' claims. *Cf. id.*; *Covenant Health & Rehab. of Picayune, LP v. Estate of Moulds ex rel. Braddock*, 14 So. 3d 695, 706 (Miss. 2009) ("[R]ewriting" an unconscionable contract is "an undeserved reward for unconscionable conduct."); Restatement (Second) of

Contracts § 184, cmt. b ("[A] court will not aid a party who has taken advantage of his dominant bargaining power to extract from the other party a promise that is clearly so broad as to offend public policy by redrafting the agreement so as to make a part of the promise enforceable.").

Moreover, the company could continue to include unconscionable provisions in its contract and to routinely enforce these terms, safe in the knowledge that if anyone challenges them, the court will simply rewrite the contract and enforce it anyway. If a severability clause always saves a contract, there would be no reason for DriveTime—or any other company—to refrain from including illegal terms in its agreements, because the worst thing that could happen is that someone challenges them, and the court enforces a watered-down version of what the company wanted. *See Cooper v. MRM Inv. Co.*, 367 F.3d 493, 512 (6th Cir. 2004) ("[A]n employer will not be deterred from routinely inserting such a deliberately illegal clause into the arbitration agreement . . . if it knows that the worst penalty for such illegality is the severance of the clause after [someone] has litigated the matter." (internal quotation marks omitted)); *accord Armendariz v. Found. Health Psychcare Services, Inc.*, 24 Cal. 4th 83, 124 (2000).

Striking the arbitration contract as a whole is not only the proper remedy under the law; it is also helps deter companies from imposing unconscionable

contracts in the first place. This Court should refuse to enforce the arbitration contract in its entirety.

CONCLUSION

For all the foregoing reasons, Appellees respectfully request that this Court affirm the decision below.

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Respectfully submitted,

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REQUEST FOR ORAL ARGUMENT

Pursuant to NMRA Rule 12-214, Plaintiff-Appellees Michael and Michelle Pool respectfully request that this Court hear oral argument of this appeal. The issues raised in this appeal are important, as one-sided and non-mutual arbitration clauses are common in consumer contracts in New Mexico. While New Mexico courts, including this Court, have faithfully enforced arbitration clauses that are fairly drafted, they have also consistently refused to enforce one-sided arbitration schemes that are designed to unfairly advantage the stronger, drafting party.

DriveTime has advanced a sweeping theory of federal preemption under the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* ("FAA"), that would, if accepted, immunize even the most extreme and abusive arbitration clauses from the protections of New Mexico contract law. Courts around the country are divided on the issues presented here. And while the majority of courts (and the better reasoned decisions) side with the Plaintiff-Appellees' position, the scope of the national division and debate warrants oral argument.

STATEMENT OF COMPLIANCE

As required by New Mexico Rule of Appellate Procedure 12-210(G), we certify that this brief complies with the type-volume limitation of Rule 12-210(F)(3). The body of this brief, as defined by Rule 12-210(F)(1), contains 10,893 words. This Brief was prepared using a proportionately-spaced typeface (Times New Roman), and the word count was obtained using Microsoft Word 2010.

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