IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

MICHAEL A. POOL; and MICHELLE POOL,

Plaintiffs-Appellees,

vs.

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

Defendants-Appellants.

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

COA: 33,894

ON APPEAL FROM THE SECOND JUDICIAL DISTRICT COURT, COUNTY OF BERNALILLO
THE HONORABLE VALERIE HULING, PRESIDING

APPELLANTS' BRIEF IN CHIEF

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ORAL ARGUMENT REQUESTED

IDENTITY OF PARTIES AND COUNSEL
Parties to Trial Court's Order on Appeal

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Jeremy Mendoza	Defendant/Appellant
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Trial Judge

The Honorable Valerie Huling	Judge, Second Judicial District Court, Bernalillo County, State of New Mexico

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RECORD ON APPEAL

The record on appeal relevant to Appellants' Brief in Chief consists of a one-volume Transcript of Proceedings and a one-volume Record Proper. None of the proceedings in this case were tape recorded; all proceedings were stenographically recorded. The Transcript of Proceedings of the Motion to Dismiss and Compel Arbitration hearing held on May 8, 2014, will be cited by page number as "[Tr. __]." The Record Proper will be cited by page number as ["RP ____]."

STATEMENT OF COMPLIANCE

This brief in chief complies with the type-volume limitation of Rule 12-213(F) NMRA because it contains 10,331 words as required by Rule 12-213(G) NMRA, excluding the parts of the brief exempted by Rule 12-213(F)(1) NMRA. This brief in chief complies with the typeface requirements of Rule 12-213(F) NMRA and the type style requirements of Rule 12-305(C) NMRA because it has been prepared in a proportionally-spaced typeface using Microsoft Word 2010 in 14-point font for the text and footnotes, and Times New Roman type style throughout.

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I. SUMMARY OF PROCEEDINGS

A. Nature of the Case

Plaintiffs Michael A. Pool and Michelle Pool ("Plaintiffs") assert claims of fraud, violation of the New Mexico Unfair Practices Act ("NMUPA") and unconscionability and seek damages and equitable relief arising out of their purchase of a used 2005 Dodge Durango (the "Vehicle") from Defendants DriveTime Car Sales Company, LLC ("DriveTime") and salesperson Jeremy Mendoza ("Mendoza") (collectively "Defendants").

B. Course of Proceedings

Because Plaintiffs signed an Arbitration Agreement that covers all of their claims, Defendants moved to compel arbitration. [RP 0016]. Plaintiffs opposed the motion, arguing that the Arbitration Agreement is unenforceable because: (1) their purchase contract for the Vehicle contained a "Limitation on Damages" provision that is substantively unconscionable under New Mexico law; (2) the Arbitration Agreement itself is unconscionably one-sided in favor of DriveTime as it (i) excludes self-help remedies such as repossession from arbitration, (ii) contains a confidentiality provision and (iii) prohibits the use of court procedural and discovery rules in arbitration. [RP 0065].

C. Disposition in the Court Below

By Order dated June 3, 2014, the Honorable Valerie Huling, Second Judicial District Court, Bernalillo County, State of New Mexico denied Defendants' motion

to compel arbitration on the ground that the Arbitration Agreement is substantively (but not procedurally) unconscionable. [RP 0102].

II. SUMMARY OF THE FACTS

On July 1, 2013, Plaintiffs and DriveTime entered into a Simple Retail Installment Contract (the "Contract") for purchase of the Vehicle and contemporaneously executed an Arbitration Agreement governed by the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.* [RP 0037-0046]. While the Arbitration Agreement is a separate signed document, it is part of the Contract. The Contract states:

> **Arbitration Agreement**. The arbitration agreement entered into between you and DriveTime is incorporated by reference into and is a part of this simple interest retail installment contract.

[RP 0049]. The Arbitration Agreement likewise provides that "[t]his Agreement is part of, and is hereby incorporated into, the Contract." [RP 0042].

The Arbitration Agreement permits Plaintiffs to select either the American Arbitration Association ("AAA") or JAMS – two of the nation's preeminent arbitration organizations – to administer the arbitration. [RP 0044, 0046]. Both organizations have adopted special rules to ensure that arbitrations between consumers and companies are fair.[1] Both these rules and the Arbitration

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[1] The AAA has confirmed that DriveTime's Arbitration Agreement complies with its Due Process Protocol by posting the Agreement in its public

(continued...)

Agreement require the arbitrator to apply the same substantive law, and award the same remedies, that would apply if Plaintiffs' claims were litigated in court. [RP 0045].[2] Thus, the arbitrator would be authorized to award Plaintiffs punitive damages if they prevail and such damages are permitted by applicable law. These provisions trump any conflicting or inconsistent terms in the Contract, as the Arbitration Agreement provides that "[i]f there is a conflict or inconsistency between this Agreement and the Contract, this Agreement governs." [RP 0045].

On December 11, 2013, Plaintiffs filed their Complaint asserting that DriveTime failed to disclose that the vehicle they purchased had been in a prior accident and deliberately hid the true character of the vehicle in order to induce the sale. [RP 0001]. DriveTime moved to compel arbitration because all of Plaintiffs' claims fall within the scope of the Arbitration Agreement. [RP 0016]. The District

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Consumer Clause Registry, available at www.adr.org. JAMS has also adopted consumer fairness procedures which are available on its website, http://www.jamsadr.com.

2 AAA Consumer Rule 44(a) provides: "(a) The arbitrator may grant any remedy, relief, or outcome that the parties could have received in court, including awards of attorney's fees and costs, in accordance with the law(s) that applies to the case." *See* https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTAGE2021425&. JAMS Streamlined Rule 19(b) provides in pertinent part: "The Arbitrator may grant any remedy or relief that is just and equitable and within the scope of the Parties' agreement, including, but not limited to, specific performance of a contract or any other equitable or legal remedy"). *See* http://www.jamsadr.com/rules-streamlined-arbitration/#Rule19.

Court denied the motion on June 3, 2014. [RP 0102]. On June 13, 2014, Defendants filed their Notice of Appeal. [RP 0001-0104]. The District Court stayed its proceedings pending this appeal. [RP 0114].

III. ARGUMENT

A. Defendants' Contentions on Appeal

Defendants contend that the District Court's denial of their motion to compel arbitration was legally erroneous and should be reversed because the Arbitration Agreement is enforceable under the FAA. In addition, the Arbitration Agreement is not substantively unconscionable, and is therefore enforceable, under New Mexico law.

B. Preservation in the District Court

Defendants preserved their contentions by briefing them in the District Court [RP 0016-0046] and advocating them at oral argument [Tr. 3-21, 34-45].

C. Standard of Review

This Court reviews the denial of a motion to compel arbitration by the District Court *de novo*. *See, e.g., Cordova v. World Fin. Corp. of N. Mex.*, 2009-NMSC-021, ¶ 11, 146 N.M. 256, 260, 208 P.3d 901, 905; *Damon v. StrucSure Home Warranty, LLC*, 2014-NMCA-116, ¶ 6, 338 P.3d 123, 125.

D. New Mexico Courts Strongly Favor Arbitration

"Congress, the New Mexico Legislature, and federal and New Mexico courts have expressed a strong public policy favoring arbitration. This policy ... requires

that the Court compel the parties to adhere to the existing arbitration agreement." *Parrish v. Valero Retail Holdings, Inc.*, 727 F. Supp. 2d 1266, 1281 (D.N.M. 2010); *Barron v. The Evangelical Lutheran Good Samaritan Society*, 2011-NMCA-94, ¶ 14, 150 N.M. 669, 673, 265 P.3d 720, 724 ("The New Mexico Supreme Court 'has repeatedly reaffirmed the strong public policy in this [S]tate ... in favor of resolution of disputes through arbitration.' *Fernandez v. Farmers Ins. Co. of Ariz.*, [1993-NMSC-035, ¶ 8,] 115 N.M. 622, 625, 857 P.2d 22, 25. 'When a party agrees to a non-judicial forum for dispute resolution, the party should be held to that agreement.' *Lisanti v. Alamo Title Ins. of Tex.*, 2002-NMSC-32, ¶ 17, 132 N.M. 750, 754, 55 P. 3d 962, 966"). New Mexico favors arbitration because it promotes judicial efficiency and the conservation of resources. *Santa Fe Techs. v. Argus Networks, Inc.*, 2002-NMCA-30, ¶ 48, 131 N.M. 772, 788, 42 P.3d 1221, 1237; *Dairyland Ins. Co. v. Rose*, 1979-NMSC-021, ¶ 19, 92 N.M. 527, 531, 591 P.2d 281, 285.

E. The FAA Applies and Preempts Inconsistent State Law

Because the Contract involves interstate commerce and states that the FAA governs the Arbitration Agreement, the Court must also apply the FAA and the federal case law interpreting it. *Rivera v. American Gen. Fin. Servs., Inc.*, 2011-NMSC-033, ¶ 15, 150 N.M. 398, 405, 259 P.3d 803, 810. The FAA makes arbitration provisions in contracts involving interstate commerce "valid,

irrevocable, and enforceable." 9 U.S.C. § 2. It creates a "'body of federal substantive law of arbitrability' that 'is enforceable in both state and federal courts.'" *Strausberg v. Laurel Healthcare Providers, LLC*, 2013-NMSC-32, ¶ 30, 304 P.3d 409, 417 (2013) (quoting *Perry v. Thomas*, 482 U.S. 483, 489 (1987)).

"Arbitration is a matter of contract, and the FAA requires courts to honor parties' expectations." *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1752-53 (2011). "[T]he central or 'primary' purpose of the FAA is to ensure that 'private agreements to arbitrate are enforced according to their terms' .... [P]arties are 'generally free to structure their arbitration agreements as they see fit.'" *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1773-74 (2010) (citations omitted); *accord*, *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2308 (2013); *Sanchez v. Nitro-Lift Techs., L.L.C.*, 762 F.3d 1139, 1145 (10th Cir. 2014).

Arbitration is highly favored for its "simplicity, informality, and expedition," *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991). It is particularly well suited for resolving disputes between individuals and companies because it provides "'a less expensive alternative to litigation,'" *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273 (1995) (citations omitted), and promotes "efficient and speedy dispute resolution," *AT&T Mobility*, 131 S. Ct. at 1749. *See also Stolt-Nielsen*, 130 S. Ct. at 1775 (benefits of arbitration include "lower costs" and

"greater efficiency and speed") (citations omitted); *Barron*, 2011-NMCA-95, ¶ 37 (arbitration "generally costs less than litigation and leads to a quicker resolution").

While the interpretation of an arbitration agreement is generally a matter of state law, under the FAA a court may not construe an arbitration agreement in a manner different from the manner in which it construes non-arbitration agreements. State law, whether legislative or judicial, is applicable only "if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." *Rivera,* 2011-NMSC-033, ¶ 17 (emphasis in original) (citing *Perry v. Thomas,* 482 U.S. 483, 492-93 n. 9 (1987)). States cannot invalidate arbitration agreements by applying "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Id.* (citing *AT&T Mobility,* 131 S. Ct. at 1746). Moreover, "[s]tate law is preempted 'to the extent that it actually conflicts with federal law – that is, to the extent that it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1989)).

Plaintiffs argued below that "state courts are perfectly free to interpret the same issues vis-à-vis federal law differently than federal appellate courts." [Tr. 32]. That argument was incorrect insofar as the FAA is concerned. The FAA is

"'the Supreme Law of the Land.'" *Nitro-Lift Techs., LLC v. Howard*, 133 S. Ct. 500, 501 (2012) (per curiam). Because "[s]tate courts rather than federal courts are most frequently called upon to apply the [FAA] ..., [i]t is a matter of great importance" that they "adhere to a correct interpretation of the [FAA]." *Id.*; *accord*, *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1202 (2012) (per curiam); *KPMG LLP v. Cocchi*, 132 S. Ct. 23, 24 (2011) (per curiam).

Under the FAA, courts cannot assume "that arbitration is inferior to litigation." *THI of New Mexico at Hobbs Center, LLC v. Patton*, 741 F.3d 1162, 1165 (10th Cir. 2014). *Patton* held that there are "limits imposed by the FAA on common-law defenses" such as unconscionability. *Id.* at 1168. Such defenses are preempted by the FAA if they "derive their meaning from the fact that an agreement to arbitrate is at issue." *Id.* at 1168. In concluding that the FAA preempted New Mexico unconscionability law, the Tenth Circuit held that a defense based upon generally applicable state law is preempted when the state law is "based on a policy hostile to arbitration." *Id.* at 1170. *See also Strausberg*, 2013-NMSC-032, ¶ 53 (reversing Court of Appeals because the rule adopted by that Court "single[d] out arbitration agreements for special treatment").

F. The FAA's Requirements Are Indisputably Satisfied in This Case

Under the FAA, arbitration must be compelled if (1) interstate commerce is involved, (2) a written arbitration agreement exists and (3) the claims raised in the

lawsuit are covered by the agreement. 9 U.S.C. § 4. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626-28 (1985); *Bernalillo County Med. Ctr. Employee's Ass'n. v. Cancelosi*, 1978-NMSC-086, ¶¶ 4-6, 92 N.M. 307, 308-09, 587 P.2d 960, 961-62. Each of these FAA requirements is indisputably satisfied in this case.

1. Interstate Commerce Is Involved

The FAA defines "commerce" as "commerce among the several states." 9 U.S.C. § 1. In section 2 of the FAA, "the word 'involving' ... signals an intent to exercise Congress's commerce power to the full." *Allied-Bruce Terminix*, 513 U.S. at 273. Congress, in the FAA, exercised "the broadest permissible exercise" of its Commerce Clause power. *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003).

Interstate commerce clearly exists here. Plaintiffs are New Mexico residents and DriveTime is an Arizona limited liability company. [RP 0001]. It is well settled that automobile sales affect interstate commerce. *See United States v. Evans*, 272 F.3d 1069, 1080 (8th Cir. 2001) (purchase of automobile from a commercial used car dealer was itself sufficient to affect interstate commerce), *cert. denied*, 535 U.S. 1029 (2002); *Teamsters Local Union No. 116 v. Fargo-Moorhead Auto. Dealers Ass'n*, 459 F. Supp. 558, 560 (D.N.D. 1978) (automobile sales industry affects interstate commerce). That the Arbitration Agreement explicitly states that the FAA "governs this Agreement" is additional evidence that

the interstate commerce requirement has been satisfied. *See Staples v. The Money Tree, Inc.*, 936 F. Supp. 856, 858 (M.D. Ala. 1996); *Thomas O'Connor & Co. v. Insurance Co. of N. Am.*, 697 F. Supp. 563, 566 (D. Mass. 1988); *Teel v. Beldon Roofing & Remodeling Co.*, 281 S.W.3d 446, 448-49 (Tex. App. – San Antonio 2007, pet. denied).

2. There Is a Written Arbitration Agreement

There is indisputably a signed written Arbitration Agreement between Plaintiffs and Drive Time. [RP 0042-0046].

3. The Broad Arbitration Agreement Covers Plaintiffs' Claims

"[A]s a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Mitsubishi Motors*, 473 U.S. at 626; *accord*, *Sanchez v. Nitro-Lift Techs.*, 762 F.3d at 1147-48 (the FAA has "created a presumption in favor of arbitration"). Thus, "'[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.'" *AT&T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 650 (1986).

The presumption in favor of arbitrability "is particularly applicable" when a "broad" arbitration clause, like DriveTime's, is involved. *AT&T Techs.*, 475 U.S. at 650. The Arbitration Agreement covers, *inter alia*, any claim, dispute or

controversy between Plaintiffs and DriveTime arising from or related to: the Contract; the vehicle or the sale of the vehicle; the relationships resulting from the Contract; and advertisements, promotions or oral or written statements related to the Contract. [RP 0043]. Such "arising from or related to" arbitration clause language has a very broad reach. *See, e.g., Williams v. Imhoff*, 203 F.3d 758, 766 (10th Cir. 2000) ("arising out of" given a "broad construction").

All of Plaintiffs' claims arise from their Contract with DriveTime and their purchase of the vehicle. Plaintiffs allege that DriveTime "induced Plaintiffs to purchase the Durango by intentional and affirmative misstatements" [RP 0005]; defrauded plaintiffs in connection with their purchase of the vehicle [RP 0006]; and committed unfair trade practices in connection with the "sale of the Durango" (*id.*). All of Plaintiffs' statutory and tort claims are clearly within the broad scope of the Arbitration Agreement, and even if there were any doubt, such doubts must be resolved in favor of arbitration.

Finally, Plaintiffs' claims against Defendant Mendoza (a DriveTime employee) are also covered by the Arbitration Agreement, as it expressly applies to "DriveTime, any purchaser, assignee or servicer of the contract, all of their parent companies, and all subsidiaries, affiliates, predecessors and successors, and all officers, directors and employees of any of the foregoing." [RP 0042].

Because all of the FAA's requirements are satisfied in this case, this Court must apply the FAA's federal substantive law of arbitrability.

G. The District Court Erred in Denying Arbitration on the Ground that the Arbitration Agreement Is Substantively Unconscionable

As recently held by the New Mexico Supreme Court, "the party alleging unconscionability ... bears the burden of proof because unconscionability is an affirmative defense." *Strausberg*, 2013-NMSC-32, ¶ 39, 304 P.3d 409, 419. Although Plaintiffs contended in the District Court that the Arbitration Agreement is substantively unconscionable [RP 0067-0080], they failed to carry their burden of proving substantive unconscionability. Accordingly, the District Court erred in denying Defendants' motion to compel arbitration.

1. New Mexico Unconscionability Law

"A New Mexico court may find that a contract or contractual term is unenforceable if the contract or term is procedurally unconscionable, substantively unconscionable, or a combination of both." *Strausberg*, 2013-NMSC-32, ¶ 32, 304 P.3d at 417. The District Court properly held that Plaintiffs failed to prove that DriveTime's Arbitration Agreement is procedurally unconscionable. [RP 0102].[3] Plaintiffs did not file a cross-appeal from that ruling.

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[3] The Arbitration Agreement gave Plaintiffs the unconditional right to reject arbitration by sending a rejection notice to DriveTime within 30 days of entering the Contract. [RP 0044]. Plaintiffs did not do so. [RP 0022]. *See Barron*, 2011-NMCA-094, ¶ 46 (arbitration agreement not procedurally

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"To analyze whether a contract is substantively unconscionable, the court looks to the terms of the contract itself and considers whether the terms of the agreement are commercially reasonable, fair, and consistent with public policy." *Strausberg*, 2013-NMSC-32, ¶ 33, 304 P.3d at 418. A substantively unconscionable contract provision is one that is "grossly unreasonable and against our public policy under the circumstances." *Id.* Moreover, "'[c]ontract provisions that unreasonably benefit one party over another are substantively unconscionable." *Id.*

2. The Arbitration Agreement Is Not Substantively Unconscionable

In the District Court, Plaintiffs alleged that DriveTime's Arbitration Agreement is substantively unconscionable based upon: (1) the Limitation on Damages clause in the underlying Contract; (2) alleged lack of complete mutuality in the Arbitration Agreement; (3) the confidentiality clause in the Arbitration Agreement; and (4) the Arbitration Agreement clause precluding the arbitrator

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unconscionable where consumer had unconditional right to reject arbitration by checking box on nursing home admission form). More than 20 court decisions concur that providing an unconditional right to reject arbitration obviates a claim of procedural unconscionability. *See, e.g., Providian National Bank v. Screws*, 894 So. 2d 625 (Ala. 2003); *Tsadilas v. Providian National Bank*, 13 A.D.3d 190, 786 N.Y.S.2d 478 (N.Y. App. Div. 1st Dep't 2004), *appeal denied*, 5 N.Y.3d 702, 832 N.E.2d 1189, 799 N.Y.S.2d 773 (June 4, 2005); *Webb v. ALC of West Cleveland, Inc.*, No. 90843, 2008 WL 4358554 (Ohio Ct. App., 8th App. Dist. Sept. 25, 2008).

from applying federal or state rules of civil procedure or evidence. None of these arguments precludes this Court from enforcing the Arbitration Agreement.

a. The Contract's Limitation on Damages Clause Does Not Invalidate the Arbitration Agreement

Plaintiffs argue that the following language in the "Limitation on Damages" clause in the Contract is substantively unconscionable under New Mexico law and renders the Arbitration Agreement unenforceable:

> Unless prohibited by law, you shall not be entitled to recover from us any consequential, incidental or punitive damages, damages to property or damages for loss of use, loss of time, loss or profits, or income or any other similar damages.

[RP 0073]. Plaintiffs conceded in the District Court that there is no binding precedent in New Mexico concerning the enforceability of a damages limitation clause. [RP 0074] ("there does not appear to be a published opinion from a New Mexico court on whether a contractual damage limitation provision is substantively unconscionable and unenforceable"). Nevertheless, they argue that this clause in the Contract requires the separate Arbitration Agreement to be jettisoned. Plaintiffs' argument must be decisively rejected for multiple reasons.

i. Plaintiffs Agreed to Have the Arbitrator Decide Their Objection to the Limitation on Damages Clause

As a threshold matter, this Court is not the proper forum for deciding Plaintiffs' argument because Plaintiffs contractually agreed that any challenge to the enforceability of the Limitation on Damages clause would be decided by the

arbitrator, not a court. The Arbitration Agreement expressly states that disputes about the validity or enforceability of the Arbitration Agreement itself are to be decided by a court, but "any dispute or argument that concerns the validity or enforceability of the Contract as a whole ...is for the arbitrator, not a court, to decide." [RP 0043].

The above-quoted language is part of the Arbitration Agreement's "delegation provision," which is "an agreement to arbitrate threshold issues concerning the arbitration agreement." *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 68 (2010). In *Rent-A-Center*, the Supreme Court held that such delegation provisions are enforceable under the FAA because arbitration "is a matter of contract." *Id.* at 69. *See also Concepcion*, 131 S. Ct. at 1748 ("[t]he "principal purpose" of the FAA is to "ensur[e] that private arbitration agreements are enforced according to their terms") (citing *Volt* and *Stolt-Nielsen*).

The Limitation on Damages clause and the Arbitration Agreement are both parts of Plaintiffs' Contract, but they are *separate* parts of the Contract. The Limitation of Damages clause is not contained within the Arbitration Agreement. [RP 0040]. Because Plaintiffs are challenging the enforceability of "the Contract as a whole," and not the Arbitration Agreement specifically, the arbitrator, not a Court, must determine whether the Limitation on Damages clause is enforceable.

ii. Under the FAA's *Prima Paint* Doctrine, the Arbitration Agreement Must Be Enforced Even if the Limitation on Damages Clause Elsewhere in the Contract Is Alleged to Be Unenforceable

The FAA commands the same result that Plaintiffs agreed to contractually – an arbitrator must determine the enforceability of the Limitation on Damages clause in Plaintiffs' Contract. Long-standing U.S. Supreme Court precedent, binding in this case, holds that under the FAA, an arbitration provision is separable from the contract in which it is contained and must be enforced even if it is alleged that other parts of the underlying contract are unconscionable or unenforceable. The court determines the validity of the arbitration provision, but the validity of the underlying contract is a merits issue for the arbitrator.

In *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), the Court held that the parties' arbitration clause was enforceable even though the contract in which it was contained was allegedly fraudulently induced and voidable under state law. The Court distinguished between attacks on the contract containing an arbitration agreement and attacks on the arbitration agreement itself. The Court held that under the FAA, an arbitration clause is separable from the contract in which it is contained. Thus, if the party resisting arbitration interposes a defense to the overall contract, not the arbitration clause specifically, then it is for the arbitrator, not a court, to decide that defense. 388 U.S. at 402-04. *Accord Rent-A-Center,* 561 U.S. at 70 ("a party's challenge ... to the contract as a whole

... does not prevent a court from enforcing a specific agreement to arbitrate"); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444-45 (2006) (arbitration clause enforced even though it was contained in a payday loan agreement alleged to be usurious, illegal and *void ab initio* under state law). As the Supreme Court held in *Rent- a- Center*:

> "[A] party's challenge to ***another provision of the contract***, or to the contract as a whole, *does not prevent a court from enforcing a specific agreement to arbitrate.* '[A]s a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract.'"

Rent-a-Center, 561 U.S. at 70 (emphasis added) (quoting *Buckeye Check Cashing*, 546 U. S. at 445).

This longstanding rule is dictated by Section 2 of the FAA, which provides that a "'written provision' 'to settle by arbitration a controversy' is 'valid, irrevocable, and enforceable,' *without mention* of the validity of the contract in which it is contained." *Rent-a-Center*, 561 U.S. at 70 (emphasis by the Court). Deciding the validity of contract terms beyond the arbitration clause at issue would arrogate power to the courts that Congress, in Section 2 of the FAA, vested in arbitrators. *Id.* Whatever the merits of a challenge to the contract's validity, Section 2 forbids courts from invalidating an arbitration clause contained therein based on a claim directed at the contract "generally." *Prima Paint Corp.*, 388 U.S. at 404. Hence, challenges that "directly affect[]" more than the arbitration

agreement itself are to be "considered by an arbitrator, not a court." *Buckeye Check Cashing,* 546 U.S. at 446.

The severability rule has become "a mainstay of the [FAA's] substantive law." *Nitro-Lift Techs.,* 133 S. Ct. at 503. Unless the party opposing arbitration mounts a specific challenge to "the precise agreement to arbitrate at issue," the courts must treat the arbitration clause "as valid under § 2" and "leav[e] any challenge to the validity of the Agreement as a whole for the arbitrator." *Rent-A-Center,* 561 U.S. at 72; *Buckeye Check Cashing,* 546 U.S. at 446 ("because respondents challenge the Agreement, but not specifically its arbitration provisions, those provisions are enforceable apart from the remainder of the contract").

The severability rule "not only honor[s] the plain meaning of the statute but also the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." *Prima Paint Corp.*, 388 U.S. at 404. The same holds true for a challenge that, while not attacking the parties' agreement wholesale, nonetheless seeks to foreclose arbitration indirectly by "***challeng[ing] ... another provision of the contract[.]***" *Rent-A-Center,* 561 U.S. at 70 (emphasis added). "Application of the severability rule does not depend on the substance of the remainder of the contract," *id.* at 72, for "Section 2 operates on the specific 'written provision' to 'settle by arbitration a controversy' that the party seeks to enforce."

Id. Thus, a half-century of precedent "require[s] the basis of challenge to be directed specifically to the agreement to arbitrate before the court will intervene." *Id.* at 71. These fundamental FAA principles "appl[y] in state as well as federal courts." *Buckeye Check Cashing,* 546 U.S. at 446.

Notwithstanding this binding precedent, the District Court denied DriveTime's motion to compel arbitration because of its concern that *Prima Paint* and its progeny might encourage companies to place controversial provisions (such as the Limitation on Damages provision) outside of the arbitration clause to avoid review. The Court stated:

> You're moving the punitive damages clause out, which would almost always create a problem for the arbitration clause. You just moved it somewhere else. It's part of the arbitration clause. It's just hidden somewhere in the contract.

[Tr. 46]. The Court's concern was fueled by Plaintiffs' argument – made out of whole cloth with nothing in the record to support it – that DriveTime placed the Limitation on Damages clause outside the Arbitration Agreement as part of a "scheme" or "subterfuge"[4] to enhance the enforceability of the Arbitration Agreement while avoiding review of the Limitation on Damages clause. [RP 0076]. According to Plaintiffs, it would be "the height of formalism" to treat the

[4] The pejorative terms "scheme" and "subterfuge" were obviously designed to inflame the District Court. Such jargon reflects the very hostility to arbitration that the FAA was enacted to foreclose.

Limitation on Damages clause as being outside the Arbitration Agreement because "all the consumers' claims have to go to arbitration." [Tr. 22].

The District Court erred in contravening *Prima Paint* by treating a term that is expressly outside of the Arbitration Agreement (the Limitation on Damages clause) as if it were contained within the Arbitration Agreement. The District Court was bound by the FAA to enforce Plaintiffs' Arbitration Agreement according to its terms. *See, e.g.*, *Concepcion*, 131 S. Ct. at 1748. Because Plaintiffs' Arbitration Agreement does not contain the Limitation on Damages clause, the Court could not rewrite the Arbitration Agreement to include it. The District Court erred because compliance with the FAA is mandatory, not discretionary. "[S]tate ... courts must enforce the [FAA] ... with respect to all arbitration agreements covered by that statute." *Marmet Health Care Center*, 132 S. Ct. at 1202. Indeed, the Supreme Court has specifically instructed state courts that once it has interpreted the FAA, "it is the duty of other courts to respect that understanding of the governing rule of law." *Nitro-Lift Techs.*, 133 S. Ct. at 503 (reversing Oklahoma Supreme Court for failing to follow the FAA).

Enforcing Plaintiffs' Arbitration Agreement does not mean that the Limitation on Damages clause will escape review. It means only that the arbitrator, rather than a court, will decide whether Plaintiffs' objection to the Limitation on Damages clause has merit. An arbitration agreement does not alter a

party's substantive rights; it simply changes the forum in which those rights are determined. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (by agreeing to arbitrate, "a party does not forgo ... substantive rights" but "only submits to their resolution in an arbitral, rather than a judicial, forum").

Moreover, the premise of Plaintiffs' argument was faulty. Although Plaintiffs argued in the District Court that the Arbitration Agreement should be re-written to include the Limitation on Damages clause within it because "the damage limitation provision can only come into play in arbitration" [RP 0076], in fact all consumer claims do *not* go to arbitration.[5] Therefore, there was no basis for the District Court to treat the Limitation on Damages clause as if it were a part of the Arbitration Agreement. Nor is it the case, as the District Court surmised, that including a damages limitation clause within an arbitration agreement "almost

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[5] All consumer claims are <u>not</u> arbitrated because: (1) the Arbitration Agreement is *elective*, not mandatory: "any Claim shall be resolved, *on your election or our*, by arbitration under this Agreement." [RP 0044] (emphasis added). Therefore, if one party brings a claim in court and the other party does not move to compel arbitration, the claim stays in court and is not arbitrated; (2) Plaintiffs had the unconditional right to reject the Arbitration Agreement within 30 days of entering into their Contract, without affecting any other aspect of the Contract. However, they chose not to do so [RP 0044]; (3) the Arbitration Agreement provides that small claims court actions brought by Plaintiffs will not be arbitrated; and (4) if DriveTime attempts to repossess or sell the loan collateral through self-help, Plaintiffs can go to court to try to prevent DriveTime from repossessing or selling the collateral. [RP 0043].

always creates[s] a problem for the arbitration clause." [Tr. 46]. On the contrary, scores of courts have enforced arbitration agreements even where a damage limitations clause is contained *within* the arbitration agreement.[6]

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[6] *See, e.g., Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995) (arbitration agreement can limit available remedies if it does so unambiguously); *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 709 (7th Cir. 1994) ("courts would enforce a provision in an arbitration clause that forbade the arbitrator to award punitive damages"); *Davey v. First Command Fin. Servs., Inc.*, No. 3:11–CV–1510, 2012 WL 277968, at *2 (N.D. Tex. Jan. 31, 2012) ("'[p]rovisions in arbitration agreements that prohibit punitive damages are generally enforceable'") (quoting *Investment Partners, L.P. v. Glamour Shots Licensing, Inc.*, 298 F.3d 314, 318 n. 1 (5th Cir. 2002)); *Gilchrist v. Inpatient Med. Servs., Inc.*, No. 5:09-CV-02345, 2010 WL 3326742, at *6 (N.D. Ohio Aug. 23, 2010) (arbitration contract containing limitation on punitive damages was not substantively unconscionable, and employee was compelled to arbitrate a dispute arising under the contract); *Farrell v. Convergent Commc'ns, Inc.*, No. C98-2613, 1998 WL 774626, at *5 (N.D. Cal. Oct. 29, 1998) ("this Court believes, and case law suggests, that limitations on the amount of damages alone does not render an agreement to arbitrate per se unconscionable, as parties are generally free to contract as they see fit"); *Bonar v. Dean Witter Reynolds, Inc.*, 835 F. 2d 1378, 1387 n. 16, 1388 (11th Cir. 1988) (upholding contract provision prohibiting arbitrators from awarding punitive damages); *DeGaetano v. Smith Barney, Inc.*, No. 95 Civ. 1613, 1996 WL 44226, at *6 (S.D.N.Y. Feb. 5, 1996) (holding arbitration agreement valid even though it precluded employee in Title VII sex discrimination action from obtaining attorney fees or punitive damages); *Rosen v. Waldman*, No. 93 Civ. 225, 1993 WL 403974, at *3 (S.D.N.Y. Oct. 7, 1993) (arbitration agreement impacting the parties' ability to obtain punitive damages does not invalidate an arbitration agreement); *The Provident Bank v. Kabas*, 141 F. Supp. 2d 310, 317 (E.D.N.Y. 2001) (upholding validity of arbitration provision which prohibited award of punitive damages and thereby disabled plaintiff from obtaining treble damages under RICO); *Martin v. SCI Mgt. L.P.*, 296 F. Supp. 2d 462 (S.D.N.Y. 2003) (parties to an arbitration agreement may expressly preclude an arbitrator from awarding punitive damages).

In contrast to the District Court herein, but consistent with the FAA and *Prima Paint* and its progeny, numerous courts have held that an attack on contract terms ***outside*** the arbitration clause does ***not*** invalidate the arbitration clause itself. For example, in a closely analogous case, *Day v. Persels & Associates, LLC*, No. 8:10-CV-2463, 2011 WL 1770300 (M.D. Fla. May 9, 2011), the court held that the alleged unconscionability of a contract's "No Liability" provision did not invalidate the contract's separate arbitration clause, and it rejected an argument by the plaintiff that was virtually identical to the argument made by Plaintiffs here:

> The plaintiff asserts that enforcement of the contract will violate public policy because the arbitration provision precludes the arbitrator from awarding punitive damages which are available to her under FDUPTA, the CROA, and common law fraud claims ....
>
> Regardless of what Florida law provides with respect to a damage limitation provision, the Supreme Court's decision in *Buckeye Check Cashing* ... establishes that the determination of that issue is for the arbitrator, and not the court ....
>
> **In this case, the arbitration clause says nothing about damages. Rather, the provision limiting punitive damages is found not in the arbitration provision, but under the separate provision entitled "No liability"** .... Under these circumstances, the plaintiff is therefore requesting the court to rule on matters outside the arbitration clause. However, as indicated, the Supreme Court has held that "a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator." *Buckeye Check Cashing, Inc. v. Cardegna, supra,* 546 U.S. at 449. Consequently, **the issue of the damage limitation**

> **provision does not warrant the denial of the motion to compel arbitration.**

Id. at *4 (emphasis added).

Similarly, in *Abreu v. Slide, Inc.*, No. C 12-00412, 2012 WL 2873772 (N.D. Cal. July 12, 2012), the court stated:

> Plaintiff's second through seventh causes of action do not make any challenge to the arbitration provision of the TOU [Terms of Understanding]. Instead, plaintiff supports these causes of action by challenging portions of the TOU outside the arbitration provision and by asserting claims about defendants' purportedly wrongful conduct in the months preceding their decision to terminate the SPP game .... For instance, plaintiff challenges the TOU's ninety-day limit on recovery of monetary damages and the shortened, one-year statute of limitations clause, neither of which are part of the arbitration provision .... **The validity of the non-arbitration clauses of the TOU are for the arbitrator. This Court is limited to assessing the validity of the arbitration clause based on terms actually contained therein and not based on terms located in other sections of the TOU.** *See Buckeye*, 546 U.S. at 445-46. Therefore, plaintiff's second through seventh causes of action are for the arbitrator.

Id. at *4 (emphasis added). *See also Davis v. Global Client Solutions*, No. 3:10-CV-322, 2011 WL 4738547, at *2 (W.D. Ky. Oct. 7, 2011) ("Because Plaintiffs' first four contentions concern the terms of the Agreement outside of the arbitration provision, their propriety appears outside this Court's mandate. Where this Court concludes that the arbitration provision itself is enforceable, the job of interpreting the contract and resolving its separate conscionability is properly left to the

arbitrator."); *Parsley v. Terminix Int'l Co.*, No. C-3-97-394, 1998 WL 1572764, at *10 (S.D. Ohio Sept. 15, 1998) ("[t]he issue of the enforceability of the limitation of damages provision is an issue for the arbiter, not for the Court").

Therefore, under the FAA, the enforceability of the Arbitration Agreement must be evaluated independently, without consideration of whether the Limitation of Damages clause located elsewhere in the Contract is unconscionable or unenforceable under state law. Plaintiffs' attack on the validity of the Limitation on Damages clause does not invalidate the separate Arbitration Agreement or preclude this Court from enforcing it. The arbitrator must decide whether the Limitation on Damages clause is enforceable. Accordingly, the District Court erred in refusing to enforce DriveTime's Arbitration Agreement on the ground that Contract containing the Arbitration Agreement also contains the Limitation on Damages clause.

iii. Arbitration Cannot Be Denied Based Upon Speculation that the Arbitrator Might Interpret the Limitation on Damages Clause in a Manner Adverse to Plaintiffs

In *PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401 (2003), a group of physicians sued health care organizations under the Racketeer Influenced and Corrupt Organizations Act ("RICO") for failing to reimburse them for services provided. The defendants moved to compel arbitration, which the plaintiffs opposed on the ground that the arbitration agreement contained a clause that

prohibited punitive damages from being awarded. Plaintiffs argued that this limitation on damages precluded them from effectuating their rights under RICO because the statute authorizes treble damages to be awarded. Although the district court and the Court of Appeals for the Eleventh Circuit denied the motion to compel arbitration based upon the remedial limitation, the Supreme Court reversed, holding that it was for the arbitrator to determine the threshold issue of whether "punitive damages" were the same as "treble damages" and that it was unduly speculative to assume that the arbitrator would interpret the clause in a manner adverse to the plaintiffs. The Court stated:

> Given our presumption in favor of arbitration, *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983), we think the preliminary question whether the remedial limitations at issue here prohibit an award of RICO treble damages is not a question of arbitrability [for the court to determine].

538 U.S. at 407 n. 2. *See also Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 361 S.C. 544, 556, 557 606 S.E.2d 752, 758 (2004) ("we hold that the question of whether the clause preventing punitive damages violates public policy as to the SCUTPA is not yet ripe because an arbitrator has not ruled on the issue").

Here, as in *Book*, there are threshold questions concerning the application of the Limitation on Damages clause to Plaintiffs' claims that will require the arbitrator to interpret the Contract to ascertain the parties' contractual intent.

Among other things, the arbitrator will need to construe the language of the Limitation on Damages clause in light of other language in the Contract and the Arbitration Agreement. The Limitation on Damages clause expressly states that it is not applicable if "prohibited by law." [RP 0040]. The Contract also states that "[t]he law of the state of the Dealer's place of business shown in this Contract applies to this Contract." [RP 0039]. The Arbitration Agreement provides that "[t]he arbitrator shall apply applicable substantive law" and "is authorized and given the power to award all remedies that would apply if the action were brought in court." [RP 0045]. The Arbitration Agreement further expressly states that "[i]f there is a conflict or inconsistency between this Agreement and the Contract, this Agreement governs." *Id.* These contractual provisions will need to be interpreted by the arbitrator to determine, for example, whether the Limitation on Damages clause even applies to Plaintiffs given the language of that clause and the Arbitration Agreement. Based upon the foregoing language, Plaintiffs will almost certainly argue to the arbitrator that the Limitation of Damages clause is "prohibited by law" and/or, in any event, that it is trumped by the Arbitration Agreement, which gives the arbitrator "the power to award all remedies that would apply if the action were brought in court." *See, e.g., THI of New Mexico at Vida Encantada, LLC v. Archuleta*, No. Civ. 11-399, 2013 WL 2387752, at *16 (D.N.M. April 30, 2013) (arbitration agreement enforced where one part of contract required

"clear and convincing evidence" before punitive damages would be awarded, but another part of contract said that all contractual provisions were "subject to applicable law," and applicable law in New Mexico was preponderance of the evidence). *Book* holds that questions such as these must be answered by an arbitrator, not a court, and do not prevent the arbitration agreement from being enforced:

> In short, since we do not know how the arbitrator will construe the remedial limitations, the questions whether they render the parties' agreements unenforceable and whether it is for courts or arbitrators to decide enforceability in the first instance are unusually abstract .... [T]he proper course is to compel arbitration.

538 U.S. at 407.

A central tenet of the FAA is that a motion to compel arbitration cannot be denied based upon speculation as to what might happen in the arbitration. *See Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000) (the mere risk that a claimant will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement). Plaintiffs are asking this Court to deny arbitration based upon pure speculation that they will prevail on their claims and that the arbitrator will enforce the Limitation on Damages clause against them. Under the FAA, such conjecture on what might happen to them in arbitration is not a permissible ground for denying arbitration.

iv. Even if the Limitation on Damages Clause Were Found to be Unconscionable, the Proper Remedy Under the FAA Would Be to Sever It, Not Deny Arbitration Altogether

Finally, even if the Court were to review the Limitation on Damages clause and find it to be unconscionable, the proper remedy consistent with the FAA would be for the Court to sever the clause, not to deny enforcement of the Arbitration Agreement. The Contract contains an express severability clause providing that if applicable law "does not allow all the agreements in this Contract, the ones that are not allowed will be void. The rest of this Contract will still be good." [RP 0039].

In the District Court, Plaintiffs argued that pursuant to *Rivera* and *Cordova*, if any unconscionable provisions are found, the entire Arbitration Agreement should be jettisoned rather than the offending provisions severed. [RP 77]. However, *Rivera* and *Cordova* are inapposite because the contracts in those cases did not contain an express severability clause. *See THI of N.M. v. Patton*, No. 11-537, 2012 WL 112216, at *22 n. 9 (D.N.M. Jan. 3, 2012) (where contract contained an express severability provision, court found *Rivera* and *Cordova* distinguishable and held that even if particular provision was unconscionable, severing the provision rather than refusing to enforce the entire arbitration agreement comported with the plain language of the contract and "the policy behind the FAA" and promoted "the central purpose of the parties in entering the agreement to arbitrate"), *aff'd*, 741 F.3d 1162 (10th Cir. 2014).

In *Clay v. New Mexico Title Loans*, 2012-NMCA-102, ¶ 40, 288 P.3d 888, *cert. denied*, 2012-NMCERT-009, 296 P.3d 1207 (2012) (Table), this Court held that "'[t]he critical determination is whether a term is central to the arbitration scheme and cannot be severed without substantially altering the method of dispute resolution contractually agreed upon by the parties.'" *Id.* at 901 (quoting *Rivera*). Here, severing the Limitation on Damages clause would not affect "the method of dispute resolution contractually agreed upon by the parties" because the Limitation on Damages clause is not part of the Arbitration Agreement to begin with. Indeed, as discussed above, the Arbitration Agreement contains its own provisions regarding available damages.

Accordingly, should this Court conclude that the Limitation on Damages clause is unconscionable, it should sever the clause for purposes of this action and enforce the Arbitration Agreement. *See also Ex Parte Thicklin*, 824 So. 2d 723, 734 (Ala. 2002) (invalidating provision prohibiting arbitrator from awarding punitive damages, severing it and enforcing remainder of arbitration clause); *Gannon v. Circuit City Stores*, 262 F.3d 677, 681 (8th Cir. 2001) ("[I]f we were to hold entire arbitration agreements unenforceable every time a particular term is held invalid, it would discourage parties from forming contracts under the FAA and severely chill parties from structuring their contracts in the most efficient manner for fear that minor terms eventually could be used to undermine the

validity of the entire contract. Such an outcome would represent the antithesis of the 'liberal federal policy favoring arbitration agreements.'") (citation omitted).

b. The Arbitration Agreement Is Not Unconscionably One-Sided

i. The Exemption for "Self-Help" Remedies Is Not Unfair to Plaintiffs

In the District Court, Plaintiffs asserted that the Arbitration Agreement is unconscionably "one-sided" because it exempts repossession and other self-help remedies from arbitration but requires consumers to arbitrate claims. [RP 70-73] (citing *Cordova* and *Rivera*). However, contrary to Plaintiffs' allegations, the Arbitration Agreement is not "one-sided." It accords rights to both parties and, if anything, gives Plaintiffs *more* rights to proceed in court than it does DriveTime. The distinctions made in DriveTime's Arbitration Agreement are neither grossly unreasonable nor in violation of public policy. Accordingly, the indicia of unconscionability, as defined in *Cordova*, are completely absent in this case.

The Arbitration Agreement states that either party may elect arbitration of a "Claim" as defined in the Arbitration Agreement. It goes on to state:

> However, notwithstanding any language in this Agreement to the contrary, the term "Claim" does not include (i) any self-help remedy, such as repossession or sale of any collateral given by you to us as security for repayment of amounts owed by you under the Contract; or (ii) any individual action in court by one party that is limited to preventing the other party from using such self-help remedy and that does not involve a request for

> damages or monetary relief of any kind. Also, we will not require arbitration of any individual Claim you make in small claims court or your state's equivalent court, if any. If, however, you or we transfer or appeal the Claim to a different court, we reserve our right to elect arbitration.

[RP 0043].

Importantly, contrary to Plaintiffs' assertions, this language does **not** give DriveTime "the right to go to court for the claims that it is most likely to bring against consumers," as Plaintiffs argued in the District Court. [RP 0070]. "Self-help" remedies such as repossession and sale of collateral, by definition, are exercised *outside* of court, as permitted by New Mexico law. *See* NMSA § 55-9-609(b)(2) (after default, a secured party may take possession of the collateral "without judicial process, if it proceeds without breach of the peace"); *id.* § 55-9-610 ("[a]fter default, a secured party may sell ... or otherwise dispose of any or all of the collateral ..."). And, the exemption from arbitration for small claims applies only to Plaintiffs, not DriveTime. Plaintiffs erred in arguing in the District Court that "DriveTime can use the courts to effect repossession and sale of the collateral" and can "utilize small claims courts to seek 'self-help remedies' and 'repossession' remedies." [RP 0072].

Just as importantly, if Drive Time attempts to repossess or sell the loan collateral through self-help, *Plaintiffs can go to court* to try to prevent Drive Time from repossessing or selling the collateral. [RP 0043]. That is a judicial right that

DriveTime does *not* have. If there is any imbalance, it is in favor of Plaintiffs, not DriveTime.

In the District Court, Plaintiffs argued that their right to go to court to stop self-help repossession by DriveTime and to bring small claims actions against DriveTime is "chimerical" and "of absolutely no use." [RP 0071]. But Plaintiffs provided no support for their self-serving boilerplate argument, and, indeed, there is none. The ability to go to court to stop a repossession clearly has intrinsic value to borrowers such as Plaintiffs because it gives them an opportunity to put a judicial limit on the non-judicial activity that Plaintiffs claim DriveTime cares most about – repossession of the vehicle after default. This is a critical fact that is entitled to substantial weight as the Court considers the practical effect of the self-help remedies exclusion. Although repossession is not involved in this case, the right to go to court to prevent repossession obviously benefits borrowers in situations where repossession is involved.

The carve-out for small claims actions also provides consumers with an "important right," as the Eleventh Circuit Court of Appeals has recognized. *See Jenkins v. First Am. Cash Advance of Ga.*, 400 F.3d 868 (11th Cir. 2005), *cert. denied*, 546 U.S. 1214 (2006) ("[T]he provision providing access to small claims tribunals was intended to benefit ... consumers .... '[A]ccess to small claims tribunals is an important right of Consumers' because it provides 'a convenient,

less formal, and relatively expeditious judicial forum for handling ... disputes' involving small amounts of money."). *Id.* at 879 (citation omitted). Plaintiffs, who have the burden of establishing unconscionability, *see Strausberg*, made no showing in the District Court that consumers – even those with fraud and consumer protection law claims – would not benefit from a small claims court judgment of up to $10,000.00.

ii. *Cordova* and *Rivera* Are Materially Distinguishable

Although Plaintiffs relied heavily on *Cordova* and *Rivera* in the District Court as support for their "lack of mutuality" argument, in fact DriveTime's Arbitration Agreement is materially different than the arbitration clauses in those cases. In *Cordova*, the lender "broadly reserved the option of availing itself directly of any and all 'remedies in an action at law or in equity, including but not limited to, *judicial foreclosure or repossession*.'" 2009-NMSC-021, ¶ 26, 146 N.M. at 263, 208 P.3d at 908 (emphasis added). Similarly, the arbitration clause in *Rivera* exempted from arbitration "Lender's self-help or *judicial* remedies including without limitation, repossession or foreclosure ...." 2011-NMSC-033, ¶ 3, 150 N.M. at 403, 259 P.3d at 808 (emphasis added). Thus, both the *Cordova* and *Rivera* clauses allowed the lender to go to court to enforce its security interest. DriveTime's Arbitration Agreement, which exempts only "self-help" repossession,

does not permit DriveTime to go to court because "self-help" remedies do not involve the courts.

Furthermore, "Cordova had no rights under the form agreement to go to any court for any reason whatsoever ...." 2009-NMSC-021, ¶ 27, 146 N.M. at 263, 208 P.3d at 908.[7] The arbitration provision in *Rivera* permitted the lender to choose between court or arbitration for exempted claims, while foreclosing the borrower from electing arbitration if the lender opted to proceed in court.[8] By

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[7] The arbitration clause in *Cordova* provided:

> Notwithstanding this Agreement, in the event of a Default under the Loan Agreement, Lender may seek its remedies in an action at law or in equity, including but not limited to, judicial foreclosure or repossession. Lender may also exercise its other remedies provided by law (such as, but not limited to, the right of self-help repossession under Article 9 of the Uniform Commercial Code or other applicable law and/or the foreclosure power of sale). This section shall not constitute a waiver of Lender's rights thereafter to seek specific enforcement of its rights under this Agreement in the event Borrower shall assert a counterclaim or right of setoff in such judicial or non-judicial action.

2009-NMSC-021, ¶ 4, 146 N.M. at 259-60, 208 P.3d at 904-05.

[8] The arbitration clause in *Rivera* provided:

> [Rivera] cannot elect to arbitrate Lender's self-help or judicial remedies including without limitation, repossession or foreclosure, with respect to any property that secures any transaction described under the

(continued...)

contrast to both *Cordova* and *Rivera*, Plaintiffs can go to court to try to prevent DriveTime from exercising self-help remedies, and they can also sue DriveTime in small claims court.

Therefore, unlike the arbitration clause in *Cordova* and *Rivera*, the Arbitration Agreement in this case is not only facially neutral, but it operates bilaterally and fairly *in practice*. The *Cordova* and *Rivera* clauses prohibited any and all access to courts by the borrower while reserving to the lender the exclusive option of seeking remedies in court, *see Cordova*, 2009-NMSC-021, ¶¶ 26-27, 146 N.M. at 263, 208 P.3d at 907; *Rivera*, 2011-NMSC-033, ¶ 3, 150 N.M. at 404, 259 P.3d at 808. That is the *opposite* of DriveTime's Arbitration Agreement, which provides borrowers such as Plaintiffs (but not DriveTime) with meaningful relief in court. *See also THI of New Mexico at Hobbs Center, LLC v. Patton*, 2012 WL

(...continued)

> definition of "Covered Claims." In the event of a default under those transactions, Lender can enforce its rights to [Rivera's] property in court or as otherwise provided by law, and [Rivera] cannot require that Lender's actions be arbitrated.
>
> * * *
>
> Provided, however, that Lender can elect to arbitrate such claims and, if such election is made, you shall be bound by such election and the terms of this Arbitration Provision shall govern the proceedings.

2011-NMSC-033, ¶¶ 3, 52, 150 N.M. 403, 413, 259 P.3d 808, 818.

112216, at *21 (rejecting lack of mutuality objection because "[u]nlike the provisions in *Rivera* and *Cordova*, parts of this Exclusion [from arbitration] Clause apply to both parties"; and further emphasizing that "[m]ere inequality ... is not the standard" under New Mexico law since one-sidedness must be "grossly unreasonable").

iii. *Dalton* is Materially Distinguishable

DriveTime's Arbitration Agreement is also materially distinguishable from the agreement found to be substantively unconscionable in *Dalton v. Santander Consumer USA*, No. 33,126, 2014 WL 74673867 (N.M. Ct. App. Dec. 31, 2014). The *Dalton* Agreement not only exempted self-help remedies from arbitration but also exempted all remedies in small claims court. *Id.* at *1. This "afford[ed] Defendant the option to forego arbitration during the entire typical default process from repossession to sale to deficiency suit to garnishment of wages in the magistrate court." *Id.* at *5. By contrast, as discussed above, under DriveTime's Arbitration Agreement *Plaintiffs can go to court for injunctive or declaratory relief* to try to prevent Drive Time from repossessing or selling the collateral. [RP 0043]. Moreover, the small claims court exemption only applies to Plaintiffs, *not DriveTime* (*id.*), so DriveTime *cannot* avoid arbitration by going to court to seek a deficiency judgment or to judicially foreclose on the collateral. *See* 2014 WL 74673867, at *5-6. Therefore, *Dalton* is completely distinguishable.

iv. The FAA Would Preempt Any Ruling that Complete Mutuality Is Required to Enforce a Motion to Compel Arbitration

As demonstrated, DriveTime's Arbitration Agreement does not lack mutuality and is not unconscionably one-sided. In any event, any ruling that the Agreement is unenforceable for lack of complete mutuality would be preempted by Section 2 of the FAA because New Mexico does not require complete mutuality of obligations for all contracts generally. *See, e.g.*, *Vanzandt v. Heilman*, 1950-NMSC-009, ¶ 19, 54 N.M. 97, 105, 214 P.2d 864, 869 (1950) (complete mutuality of obligations not required if there is consideration for the contract as a whole). "Mutuality means both sides must provide consideration." *Bd. of Educ. v. James Hamilton Constr. Co.*, 1994-NMCA-168, ¶ 19, 119 N.M. 415, 420, 891 P.2d 556, 561 ("A valid contract must possess mutuality of obligation .... Mutuality means both sides must provide consideration.").

More particularly, mutuality of remedy is not required in suits for specific performance. "The doctrine of mutuality of obligation and remedy was abandoned in 1950" for suits for specific performance. *McCoy v. Alsup*, 1980-NMCA-035, ¶ 31, 94 N.M. 255, 261, 609 P.2d 337, 343. Thus, "New Mexico law does not require mutuality of remedy for a court to order equitable relief." *McKinney v. Gannett Co., Inc.*, 817 F.2d 659 (10th Cir. 1987). The New Mexico Supreme Court has held that "'a motion to compel arbitration is essentially a suit for specific

performance.'" *Strausberg*, 2013-NMSC-32, ¶ 45, 304 P.3d 420-21 (quoting *McMillan v. Allstate Indem. Co.*, 2004-NMSC-2, ¶10, 135 N.M. 17, 84 P.3d 65).

Under the FAA, arbitration agreements must not be treated differently than other types of contracts. *See Doctors' Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (FAA preempted Montana statute imposing special typographical requirements on arbitration provisions that were not required for other types of contractual provisions). As emphasized in *Concepcion*, generally applicable state laws cannot be "applied in a fashion that disfavor[] arbitration," that "interfere with the fundamental attributes of arbitration" or that "create[] a scheme inconsistent with the FAA." *Id.* at 1747-48. *Concepcion* itself was a case in which "a doctrine normally thought to be generally applicable," *i.e.*, unconscionability, was held to be preempted by the FAA because it was applied "in a fashion that disfavor[ed] arbitration." *Id.* at 1747.

Because New Mexico's general law of contracts does not require that the obligations of the parties be completely mutual in suits for specific performance such as a motion to compel arbitration, there can be no basis for denying DriveTime's motion to compel Plaintiffs' performance with the Arbitration Agreement on the ground that it lacks complete mutuality. Such a ruling would be patently inconsistent with New Mexico contract law and would disfavor arbitration

in favor of court resolution of disputes. Therefore, any such ruling would be preempted by the FAA.

c. The Confidentiality Clause Is Not Unconscionable

Plaintiffs argued in the District Court that the Arbitration Agreement is unconscionable because it states that: "Judgment on the arbitrator's award may be entered in any court with jurisdiction. Otherwise, the award shall be kept confidential." [Tr. 28]. The U.S. Supreme Court and many other courts have rejected that argument. *See Concepcion*, 131 S. Ct. at 1749 (arbitration provision can provide "that proceedings be kept confidential"); *Parilla v. IAP Worldwide Serv., V.I.*, 368 F.3d 269, 280 (3d Cir. 2004) (holding that AAA rules requiring confidentiality were not unreasonable: "[T]here is nothing inherent in confidentiality itself that favors or burdens one party vis-à-vis the other in the dispute resolution process. Importantly, the confidentiality of the proceedings will not impede or burden in any way [the plaintiff's] ability to obtain any relief to which she may be entitled."); *Lloyd v. Hovensa, LLC*, 369 F.3d 263, 275 (3d Cir. 2004) (AAA rules requiring confidentiality not unconscionable); *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1379 (11th Cir. 2005), *cert. denied*, 547 U.S. 1128 (2006) (confidentiality provision did not render arbitration agreement unconscionable); *Iberia Credit Bureau, Inc. v. Cingular Wireless, LLC*, 379 F.3d 159, 175-76 (5th Cir. 2004) ("plaintiffs' attack on the confidentiality

provision is, in part, an attack on the character of arbitration itself .... But part of the point of arbitration is that one 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'") (citation omitted); *Damato v. Time Warner Cable, Inc.*, No. 13-CV-994, 2013 WL 3968765, at *12 (E.D.N.Y. July 30, 2013) ("Plaintiffs' argument that the American Arbitration Association's rule requiring arbitration to be confidential ... is foreclosed by *Concepcion*. The Supreme Court stated in that case, 'The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute. It can be specified, for example, that ... that proceedings be kept confidential to protect trade secrets' .... While the Court did not address directly a claim that an arbitration clause was unconscionable because of a requirement of confidentiality, the writing is on the wall: the confidentiality of proceedings does not, by itself, render an agreement to arbitrate unconscionable.").

d. Prohibiting the Arbitrator from Applying Judicial Rules of Procedure and Evidence Is Not Unconscionable

Plaintiffs also alleged in the District Court that the Arbitration Agreement should not be enforced because it "prohibits the use of rules of procedure and evidence ...." [RP 0078]. But that is the very essence of arbitration, as Congress and the U.S. Supreme Court have observed: "The advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have *simpler*

procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; [and] it is often more flexible in regard to scheduling ...." (H.R. Rep. No. 97-542, p. 13 (1982) (emphasis added), quoted in *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. at 280; *see also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. at 31 ([a]lthough ... [arbitration] procedures might not be as extensive as in the ... courts, by agreeing to arbitrate, a party 'trades the procedures ... of the courtroom for the simplicity, informality, and expedition of arbitration'") (citation omitted); *Concepcion*, 131 S. Ct. at 1748-49 (a principal purpose of the FAA is to "facilitate streamlined proceedings"; "the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution"). The FAA permits parties to specify the procedural rules that will govern the arbitration. *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford, Jr. Univ.*, 489 U.S. at 478.

Here, the parties have agreed to follow the procedural and evidentiary rules of the potential arbitration administrators (the AAA and JAMS). Both the AAA and JAMS provide for discovery and specify in detail the procedures that will apply in the arbitration from the filing of a demand to the arbitrator's award. Indeed, the newly revised AAA Consumer Rules are 44 pages long. As discussed above, both the AAA and JAMS employ policies that ensure that the consumer will

be treated fairly and with due process, and there is no reason to doubt that Plaintiffs will be treated fairly when they proceed to arbitration.

e. Any Offending Provision Can Be Severed

As shown, none of the features of the Arbitration Agreement complained of by Plaintiffs in the District Court are substantively unconscionable. But even 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 and enforce the remainder of the Arbitration Agreement. *See* discussion at pages 29-31, *supra*, which is incorporated by reference. *See also, e.g., Zuver v. Airtouch Commc'ns*, 153 Wash. 2d 293, 320, 103 P. 3d 753, 768 (2004) ("We can easily excise the confidentiality and remedies provisions but enforce the remainder. Indeed, the parties have explicitly expressed their intent for us to do so by agreeing to a severance clause.").

IV. CONCLUSION AND PRAYER

For the foregoing reasons, Appellants respectfully request that this Court reverse the District Court's order denying defendants' motion to arbitration and remand with instructions to grant the motion to compel arbitration and stay the case pending the outcome of the arbitration proceedings. Appellants further request such other relief to which they may be justly and equitably entitled.

V. STATEMENT REGARDING ORAL ARGUMENT

Appellants respectfully request that this Court set this appeal for oral argument. This appeal involves important questions of arbitration law which are of first impression in this Court, including, *inter alia*, whether the Contract's Limitation on Damages clause, which is not part of the Arbitration Agreement, renders the Arbitration Agreement unenforceable, and whether the enforceability of the Contract's Limitation on Damages clause is for the arbitrator to determine pursuant to the severability rule set forth in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006), and *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010).

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 7th day of April 2015, a true and correct copy of the foregoing document was forwarded to the following counsel of record via certified mail, return receipt requested:

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