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' REPLY BRIEF

Frank Alvarez, Esq.
New Mexico Bar No. 27610
Christina Gratke Nason, Esq.
New Mexico Bar No. 7181
Quintairos, Prieto, Wood & Boyer, P.A.
1700 Pacific Avenue, Suite 4545
Dallas, Texas 75201
Telephone: (214)754-8755
Facsimile: (214)754-8744

Mark J. Levin, Esq.
Pro Hac Vice
Pennsylvania Bar No. 26601
BALLARD SPAHR LLP
1735 Market St., 51st Fl.
Philadelphia, PA 19103
Telephone (215) 665-8500
Facsimile (215) 864-8999

Attorneys for Defendants/Appellants

ORAL ARGUMENT REQUESTED

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

DriveTime Car Sales Company, LLC dba DriveTime	Defendant/Appellant
Jeremy Mendoza	Defendant/Appellant
Michael A. Pool	Plaintiff/Appellee
Michelle Pool	Plaintiff/Appellee

Trial and Appellate Counsel

Mark J. Levin (Pro Hac Vice) Pennsylvania Bar No. 26601 Ballard Spahr LLP 1735 Market St., 51st Fl. Philadelphia, PA 19103	Counsel for Defendants/Appellants
Christina Gratke Nason Frank Alvarez Quintairos, Prieto, Wood & Boyer, P.A. 1700 Pacific Avenue, Suite 4545 Dallas, TX 75201	Counsel for Defendants/Appellants
Rob Treinan Treinan Law Office PC 500 Tijeras NW Albuquerque, NM 87102	Counsel for Plaintiffs/Appellees
Robert David Humphreys Lucius James Wallace Humphreys Wallace Humphreys, PC 9202 South Toledo Avenue Tulsa, OK 74137	Counsel for Plaintiffs/Appellees

Trial Judge

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

STATEMENT OF COMPLIANCE

This reply brief complies with the type-volume limitation of Rule 12-213(F) NMRA because it contains 4398 words as required by Rule 12-213(G) NMRA, excluding the parts of the brief exempted by Rule 12-213(F)(1) NMRA. This reply brief 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. ARGUMENT

A. DriveTime's Arbitration Agreement Is Not Unconscionably One-Sided

1. Plaintiffs' Lead Authority, *Dalton v. Santander Consumer USA, Inc.*, Is Materially Distinguishable

Plaintiffs' Answer Brief ("Pl. Br."), relies principally on *Dalton v. Santander Consumer USA, Inc.*, No. 33,126, 2015-NMCA-030, 345 P.3d 1086, in arguing that DriveTime's Arbitration Agreement is substantively unconscionable. (Pl. Br. at 10-16). Plaintiffs claim that the Agreement "suffers from the very same problem as the arbitration scheme in *Dalton*" and that *Dalton* is dispositive of this appeal. *See* Pl. Br. at 16 ("This Court has already held [in *Dalton*] that such a one-sided arbitration scheme is unconscionable. It should do so here again.").

Plaintiffs' attempt to shoehorn this case into *Dalton* must fail because the respective arbitration agreements are fundamentally different. The *Dalton* arbitration agreement not only exempted self-help remedies from arbitration but also exempted small claims court actions by both parties. 2015-NMCA-030, ¶ 3, 345 P.3d at 1089. 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 courts." *Id.* at ¶ 16, 345 P.3d at 1092.

By contrast, DriveTime's Arbitration Agreement is different in two important respects. First, under DriveTime's Agreement, Plaintiffs can go to *any court* with jurisdiction for injunctive or declaratory relief to prevent DriveTime

from repossessing or selling the vehicle. *See* RP 0043 (Agreement exempts "any individual action in court by one party that is limited to preventing the other party from using such self-help remedy"). Plaintiffs admit, as they must, that the ability to go to court to enjoin the sale of a repossessed vehicle is a valuable benefit to borrowers. (*See* Pl. Br. at 16 n. 6). Under NMSA § 55-9-61, a creditor must give a borrower notice before repossessed collateral is sold, so the borrower has a realistic opportunity to seek court relief before the sale. *See In re Excello Press, Inc.*, 890 F.2d 896, 907 (7th Cir. 1989) (purpose of the notice requirement is "to give the debtor an opportunity ... to challenge any aspect of the disposition before it is made"). No such right was given to the borrowers in *Dalton*, where the arbitration clause "severely limit[ed] a borrower's access to judicial redress." 2015-NMCA-030, ¶ 15, 345 P.3d at 1091. Moreover, a court order enjoining the sale of the vehicle is a genuine detriment to DriveTime, not window dressing, since in Plaintiffs' own words "a car dealership's most important remedies in an auto financing transaction are those that allow it to recoup the value of the loan if the consumer defaults." (Pl. Br. at 11).[1]

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[1] Plaintiffs err in arguing that their right to go to court to enjoin the repossession itself "is not much of a benefit" because New Mexico law "doesn't require notice before repossessing a car." (Pl. Br. at 15). The loan contract delineates in detail the circumstances in which a default will occur [RP0039], so borrowers in default are clearly on notice that their vehicles are

(continued...)

Second, DriveTime's small claims court exemption from arbitration applies *exclusively to Plaintiffs, not DriveTime. See* RP 0043 ("we [DriveTime] will not require arbitration of any individual Claim you [Plaintiffs] make in small claims court ....").[2] Plaintiffs nevertheless argue that DriveTime also has the right to go to small claims court without being subject to arbitration because the AAA and JAMS arbitration rules "permit *both* parties to a consumer contract – that is, both the consumer and the company – to bring their claims in small claims court." (Pl. Br. at 12). They disregard, however, that the AAA and JAMS rules also permit the parties to modify the rules. *See* AAA Consumer Rule R-1 ("[t]he consumer and the business may agree to change these Rules"); JAMS Streamlined Rule 2 ("[t]he Parties may agree on any procedures not specified herein or in lieu of these Rules that are consistent with the applicable law and JAMS policies"). DriveTime's Arbitration Agreement changes the AAA and JAMS rules regarding small claims in a way that *benefits* Plaintiffs exclusively, since DriveTime has essentially

(...continued)

subject to repossession. In any event, self-help repossession is a non-judicial remedy that is not pursued in court or in arbitration. (*See* Def. Br. at 32).

[2] Plaintiffs' admission that the Arbitration Agreement "gives consumers the right to go to small claims court" (Pl. Br. at 14) refutes their argument that "consumers are prohibited from bringing any affirmative claims against the company anywhere other than arbitration." (*Id.* at 16). And, they produced *no* evidence to support their boilerplate contention that the right to go to small claims court is "meaningless" because "[c]onsumers' most likely claims cannot be brought in small claims court." (*Id.* at 14).

waived its own right under the rules to bring claims against Plaintiffs in small claims court that are exempt from arbitration. DriveTime's Arbitration Agreement trumps the AAA and JAMS rules, as confirmed by the clause stating that "[i]f there is a conflict or inconsistency between the administrator's rules and this Agreement, this Agreement governs." [RP 0045].

The plain language of the Arbitration Agreement, not Plaintiffs' incorrect and self-serving paraphrase, is controlling. "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.'" *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 599 U.S. 662, 682 (2010) (citations omitted).

DriveTime's Arbitration Agreement plainly and unambiguously states that only Plaintiffs, *not DriveTime*, may bring small claims court proceedings that are exempt from arbitration. Therefore, this Court must reject the following arguments in Plaintiffs' Answer Brief, all of which erroneously assert that DriveTime can avail itself of small claims court jurisdiction without being subject to arbitration:

- "the exception[] ... for small claims court ... allow[s] DriveTime to pursue outside of arbitration the only remedies it is ever likely to need" (Pl. Br. at 12-13);

- "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" (*id.* at 13);
- "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 .... 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" (*id.* at 13-14);
- "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 to garnishment of wages'" (*id.* at 14);
- "DriveTime maintains a choice of forum for the claims it is most likely to pursue" (*id.* at 16).

In sum, DriveTime's Arbitration Agreement is **not** "just like the arbitration contract in *Dalton*" (Pl. Br. at 14). In contrast to *Dalton*, DriveTime's contract

does not permit it to avoid arbitration by going to small claims court to judicially foreclose on the collateral or seek a deficiency judgment. *See* 2015-NMCA-030, ¶ 16, 345 P.3d at 1092. Plaintiffs, moreover, are permitted to go to any court having jurisdiction to attempt to enjoin DriveTime's repossession and sale of the vehicle. Plaintiffs (but not DriveTime) can also bring small claims court actions that are exempt from arbitration. Any imbalance in this arbitration language completely favors *Plaintiffs*, not DriveTime. That cannot be substantively unconscionable under New Mexico law because it is not one-sided or self-serving in favor of DriveTime, the drafter of the contract, nor is it unfair to Plaintiffs.

2. The New Mexico Supreme Court Recently Granted Certiorari to Review *Dalton*

Notwithstanding their heavy reliance on *Dalton*, only in a *footnote* do Plaintiffs – whose counsel also represent the plaintiff in *Dalton* – reveal that the New Mexico Supreme Court has granted certiorari in *Dalton*. *See* Pl. Br. at 10 n. 3 (citing *Dalton*, No. 35,101, 2015-NMCERT-003, 346 P.3d 1163).

Defendants contend that *Dalton* is totally distinguishable on its facts and, in any event, is preempted by the Federal Arbitration Act ("FAA"). (Defendants' Brief in Chief ("Def. Br.") at 37-40; argument at pages 1-6 *supra*, and 8-10 *infra*). But given Plaintiffs' insistence that *Dalton* "remains powerfully persuasive" (Pl. Br. at 10 n. 3), if this Court is inclined to consider *Dalton*, Defendants respectfully suggest that the Court defer its ruling until after the Supreme Court has decided

Dalton and the parties have had an opportunity to submit supplemental briefs concerning the Supreme Court's decision. Not only do Plaintiffs contend that *Dalton* is dispositive of this appeal, but their principal arguments are arguments that the Supreme Court has already agreed to review.

Plaintiffs argue that DriveTime's Arbitration Agreement is "just like the arbitration contract in *Dalton*" because it unconscionably exempts small claims court proceedings from arbitration. (Pl. Br. at 14). In *Dalton*, the Supreme Court has agreed to decide whether "the FAA preempt[s] the conclusion that an arbitration provision is unconscionable if it enables both parties to proceed in small claims court as opposed to arbitration." *Dalton*, No. 35,101, Petition at 2.

Similarly, Plaintiffs argue that if "it is 'self-evident' that a carve-out from arbitration 'unfairly favors' the company that drafted it, there is no need for any further showing." (Pl. Br. at 14 n. 4). In *Dalton*, the Supreme Court has agreed to decide whether this Court "impermissibly require[d] Santander to prove the absence of unconscionability when it concluded it was 'self-evident' the arbitration provision was unconscionable because it enables both parties to proceed in small claims court as opposed to arbitration." *Dalton*, No. 35,101, Petition at 1.

Plaintiffs' core arguments in this appeal and the issues under Supreme Court review in *Dalton* are virtually identical. Accordingly, if this Court is inclined to consider *Dalton*, the Court and the parties would benefit greatly from having the

Supreme Court's guidance before a decision is rendered herein. *See, e.g.*, *State v. Druktenis*, 2004 NMCA-032, ¶ 13,135 N.M. 223, 229, 86 P.3d 1050, 1056 (this Court held appeal in abeyance pending U.S. Supreme Court's disposition of cases potentially governing outcome of appeal).

3. If *Dalton* Were Read as Requiring Complete Mutuality in Order to Enforce a Motion to Compel Arbitration, It Would Be Preempted by the FAA

Citing *Dalton*, Plaintiffs contend that this Court is obligated to adhere to the analyses of the FAA in *Rivera v. American Gen. Fin. Servs., Inc.*, 2011-NMSC-033, 150 N.M. 398, 259 P.3d 803 and *Cordova v. World Fin. Corp. of N. Mex.*, 2009-NMSC-021, 146 N.M. 256, 208 P.3d 901, even if inconsistent with U.S. Supreme Court cases interpreting the FAA.[3] (Pl. Br. at 37). Plaintiffs have it backwards. The FAA is "'the Supreme Law of the Land'" and binds state and federal courts alike. *Nitro-Lift Techs., LLC v. Howard*, 133 S. Ct. 500, 501 (2012) (per curiam) (reversing Okla. Supreme Court). 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) (reversing W. Va. Supreme Court).

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[3] Aside from FAA preemption, both *Rivera* and *Cordova* are also factually distinguishable from this case. (*See* Def. Br. at 34-37).

Accordingly, *THI of New Mexico at Hobbs Center, LLC v. Patton*, 741 F.3d 1162, 1165 (10th Cir. 2014), which held that there are "limits imposed by the FAA on common-law defenses" such as unconscionability, *id.* at 1168, is not "an outlier" that can be easily brushed off. (Pl. Br. at 38). On the contrary, it is consistent with the U.S. Supreme Court's decision in *Concepcion,* which held that 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." 131 S. Ct. at 1747-48.

As shown by Defendants, any ruling that DriveTime's Arbitration Agreement is unconscionable because it lacks 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* Def. Br. at 38-40). Plaintiffs do not even respond to the authorities cited by DriveTime on this basic point. *See* Pl. Br. at 34.

Instead, they claim that DriveTime's Arbitration Agreement should not be enforced because it is "grossly unfair" to consumers, and unconscionability "is a generally applicable principle of contract law that has nothing to do with arbitration." (Pl. Br. at 35). But that does not help Plaintiffs, even aside from the fact that they have not identified any features of the DriveTime Arbitration Agreement that are grossly unfair to them. Plaintiffs cite only *one* New Mexico

non-arbitration case to support that proposition, *State ex rel. King v. B&B Inv. Group, Inc.*, 2014-NMSC-024, 329 P.3d 658, *see* Pl. Br. at 36, and even that case derived its principles of unconscionability from New Mexico appellate decisions invalidating *arbitration agreements* as unconscionable. *See King*, *id.* at ¶ 31, 47, 49, 329 P.3d at 669, 670-75 (citing *Cordova*, *Rivera*, *Fiser v. Dell Computer Corp.*, 2008-NMSC-046, ¶ 19, 144 N.M. 464, 188 P.3d 1215, and *Padilla v. State Farm Mut. Auto. Ins. Co.*, 2003-NMSC-011, ¶ 15, 133 N.M. 661, 68 P.3d 901). *See also Dalton*, No. 35,101, Defendant's Brief in Chief at 38 n.4 (identifying 12 opinions in which New Mexico appellate courts have found arbitration provisions unconscionable).

Discriminating against arbitration in practice contravenes the FAA even if cloaked in the language of "unconscionability" rather than "lack of mutuality." *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." 131 S. Ct. at 1747. Accordingly, the FAA would preempt any ruling that DriveTime's Arbitration Agreement is unenforceable because its arbitration carve-outs render it unconscionable for lack of mutuality.

B. The Damages Provision in the Loan Contract Does Not Render the Arbitration Agreement Unconscionable

Plaintiffs' argument that the damages limitation clause in their loan contract renders the Arbitration Provision unenforceable (Pl. Br. at 17-34) must be rejected because (1) Plaintiffs agreed that an arbitrator would decide the clause's enforceability, (2) under the FAA, the Arbitration Agreement is separately enforceable even if the clause itself is allegedly unconscionable, (3) Plaintiffs merely speculate that the arbitrator will enforce the clause against them and (4) even if found to be unconscionable, it should be severed. (*See* Def. Br. at 14-29).

Plaintiffs totally misread *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63 (2010). The Supreme Court stated that the party opposing arbitration in that case could have argued that certain procedures specified elsewhere *within the arbitration agreement* (a fee-splitting arrangement and a limitation on discovery) rendered the delegation clause of the *arbitration agreement* unenforceable. *Id.* at 74. It did **not** state that a court can consider provisions wholly **outside** the arbitration clause to invalidate the arbitration clause. (*See* Pl. Br. at 22). In fact, *Jackson* expressly held that under the FAA, provisions of a contract outside the arbitration clause do *not* invalidate the arbitration clause itself:

> [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."

Id. at 70-71 (emphasis added; citation omitted). Thus, Plaintiffs argue a point that *Jackson* expressly rejected. The Arbitration Agreement (which in any event is printed as a separate document [RP 0042-RP 0046]) is separately enforceable regardless of whether Plaintiffs are arguing that the loan contract "as a whole," or just "another provision" of the loan contract (*i.e.*, the damages limitation clause) is unenforceable.[4] *Jackson* is binding on this Court.[5] It is Plaintiffs, not Defendants, who "profound[ly] misunderstand ... United States Supreme Court case law." (Pl. Br. at 22).

The cases cited by Plaintiffs (Pl. Br. at 25) similarly misconstrue the FAA and are distinguishable in any event. The unpublished opinion in *Newton v. Am. Debt Services, Inc.*, 549 F. App'x 692 (9th Cir. 2013), misreads *Jackson* in the same manner as Plaintiffs. *See id.* at 694. In *Kristian v. Comcast Corp.*, 446 F.3d

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[4] Plaintiffs err in arguing that the "*Prima Paint*" rule is limited to situations in which the contract as a whole is being challenged. (Pl. Br. at 22-23). As held in *Jackson*, which used the word "or," it also applies to situations in which "another provision" of the contract outside the arbitration clause is being challenged. While Plaintiffs claim they are not arguing that "DriveTime's damages limitation provision renders the entire financing contract invalid" (Pl. Br. at 24), they do argue that "another provision" of the loan contract renders the Arbitration Agreement unenforceable.

[5] Plaintiffs admit that U.S. Supreme Court decisions are "controlling in this Court." (Pl. Br. at 20).

25 (1st Cir. 2006), a damages limitation clause was located outside of the arbitration agreement, but it stated that such limitation of liability applies "in all circumstances," and the same clause had been placed within the arbitration provision in earlier versions of the employment agreement. *Id.* at 47. In *Davis v. Global Client Solutions, LLC*, 765 F. Supp. 2d 937 (W.D. Ky. 2011), arbitration was the "sole" method for resolving disputes; therefore, although the damages limitation clause was located outside the arbitration provision, "damages would only be an issue in the context of an arbitration." *Id.* at 942 n.4. By contrast, in this case, arbitration is elective, not mandatory [RP 0044] and it is not the sole method for resolving disputes, as Plaintiffs are permitted to bring claims in small claims court. Therefore, the applicability of the damages limitation clause is not confined to arbitration. The contract in *AT&T Mobility II, LLC v. Pestano*, No. 07-05463, 2008 WL 682523 (N.D. Cal. Mar. 7, 2008), contained a statute of limitations provision that was located outside the arbitration clause, but the court treated it as part of the arbitration provision because it could operate as a complete bar to arbitration. Such is not the case here. Clearly, the cases cited by Defendants holding that enforcement of the arbitration agreement is not impeded by other terms of the contract (*see* Def. Br. at 23-25) are more consistent with the FAA than the cases cited by Plaintiffs. *See also Paduano v. Express Scripts, Inc.*, 55 F. Supp. 3d 400, 417 (E.D.N.Y. 2014) (citing *Jackson*, court held that a contract provision

allowing the defendant to unilaterally amend any term of the contract, including the arbitration clause, did not render the separate arbitration clause unconscionable).

The damages limitation clause is not an "arbitration term," as Plaintiffs repeatedly argue. (Pl. Br. at 21-22). It is a term of the loan contract that might (or might not) apply in arbitration, but it could also potentially apply in a small claims court action brought by Plaintiffs, or in the District Court if Plaintiffs defeat enforcement of the Arbitration Agreement and litigate their claims in court or if the parties elect not to arbitrate a claim. It is obvious that Plaintiffs are making an argument that, in clear violation of the FAA, singles out arbitration for special treatment, since they "do not argue – and have never argued – that the problem with the damages limitation provision is that it renders the whole contract invalid." (Pl. Br. at 30).

Even though Plaintiffs agreed that the arbitrator, not a court, should determine the validity of the limitation on damages clause,[6] it is pure speculation to conclude that the arbitrator will actually apply it against them. Plaintiffs will argue

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[6] Plaintiffs err in arguing that they did not delegate this issue to the arbitrator. (Pl. Br. at 29-30). The Arbitration Agreement expressly states that disputes concerning the loan contract as a whole (*i.e.*, the non-Arbitration Agreement terms) are for the arbitrator to resolve. [RP 0043]. The limitation on damages clause is part of the contract as a whole, not part of the Arbitration Agreement.

that the clause is prohibited by law and that it is unconscionable (although there is no New Mexico appellate authority on point). They will also argue that it does not apply because the Arbitration Agreement requires the arbitrator to apply applicable substantive law, and the Agreement states that it trumps any contrary terms in the loan contract. [RP 0045].[7] All of these arguments can be made to the arbitrator, but they should not prevent the dispute from going to arbitration in the first place.

C. The Confidentiality Provision Is Not Unconscionable

The Arbitration Agreement states: "Judgment on the arbitrator's award may be entered in any court with jurisdiction. Otherwise, the award shall be kept confidential." [RP 0045]. Although Plaintiffs acknowledge that DriveTime has cited "cases in which courts have upheld other confidentiality provisions" (Pl. Br. at 32),[8] they contend this clause is unconscionable because *DriveTime* has not proved that it is "evenhanded" or a benefit to consumers. (Pl. Br. at 32). Once

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[7] Plaintiffs clearly err in arguing "[t]here is nothing [for the arbitrator] to interpret" (Pl. Br. at 26) because the arbitrator will need to construe the contract language and the applicable law. "[A]n arbitrator may end up interpreting many things in an arbitration agreement." *Perez v. Quest Corp.*, 883 F. Supp. 2d 1095, 1117 (D.N.M. 2012).

[8] Plaintiffs incorrectly argue that Defendants misquoted *Concepcion* by omitting the words "to protect trade secrets." (Pl. Br. at 33). *See* Def. Br. at 41("'The Supreme Court stated in that case [*Concepcion*] ..., [i]t can be specified ... that proceedings be kept confidential to protect trade secrets.'") (citation omitted).

again, Plaintiffs disregard that it is *their* burden to prove unconscionability.[9] *See Strausberg v. Laurel Healthcare Providers, LLC*, 2013-NMSC-032, ¶ 30, 304 P.3d 409, 417.

Plaintiffs have not sustained their burden of proving that the confidentiality provision "'unreasonably benefit[s]' DriveTime." (Pl. Br. at 34) (citation omitted). They argue that the confidentiality provision hampers their ability to discover "whether others have successfully brought similar claims against DriveTime" (*id.* at 31), but in fact it does not, since successful claims by other plaintiffs will have been reduced to judgment in court and will be part of the public record. Moreover, the Arbitration Agreement does not in any way limit the discovery available to Plaintiffs under the AAA and JAMS rules. Plaintiffs' argument is made entirely from whole cloth.

There is a "strong public interest in preserving the confidentiality of arbitration awards." *Fireman's Fund Ins. Co. v. Cunningham Lindsey Claims Mgt., Inc.*, No. 03CV0531, 2005 WL 1522783, at *4 (E.D.N.Y. June 28, 2005).

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[9] Plaintiffs err is postulating that there is "no benefit" to consumers from keeping the arbitrator's award confidential. (*Id.* at 31). There are many reasons why a consumer might want the award to be confidential. For example, the award might reveal embarrassing personal details or sensitive financial or background information about the consumer. And, if the consumer did not prevail in the arbitration, the consumer's lawyer might not want that fact made public.

See also ITT Educ. Servs. v. Arce, 533 F.3d 342, 348 (5th Cir. 2008) (rejecting contention that confidentiality provision rendered arbitration agreement unconscionable); *Vasquez-Lopez v. Ben. Or., Inc.*, 210 Ore. App. 553, 576 (2007) ("any advantage conferred on repeat players and their counsel is marginal and, we conclude, it is roughly offset by the advantage that privacy about their financial affairs confers on plaintiffs"). Plaintiffs' unsupported arguments to the contrary should be rejected.

D. The Arbitration Agreement Is Not Procedurally Unconscionable

Plaintiffs waived their procedural unconscionability argument (Pl. Br. at 38-42) by not raising it in the District Court. There, they argued only that the Arbitration Agreement's 30-day right to reject could not cure the alleged substantive unconscionability of the Agreement. [RP 0077- RP 0079]. At the oral argument, DriveTime's counsel even noted, without objection from Plaintiffs: "[P]rocedural unconscionability has not been addressed whatsoever. So I believe that argument has been waived at this point." [Tr. 34]. *See Wagner v. AGW Consultants*, 2005-NMSC-016, ¶ 22, 137 N.M. 734, 743, 114 P.3d 1050, 1059 (issues not raised and briefed below may not be considered on appeal). In addition, Plaintiffs did not cross-appeal from the District Court's holding that the Arbitration Agreement is not procedurally unconscionable. In any event, as Defendants have

shown, that holding of the District Court was incontestably proper. (Def. Br. at 12-13).

E. Severability

As shown above, Plaintiffs' contentions that the Arbitration Agreement "is unconscionable from top to bottom" (Pl. Br. at 42) and "worse than the contracts in *Cordova* and *Rivera*" (*id.* at 44)[10] are nothing but inflated unsupported rhetoric. Plaintiffs have not carried their burden of proving that any provisions of the Arbitration Agreement are substantively unconscionable. Nevertheless, should this Court conclude otherwise, it should sever any offending provision and enforce the remainder of the Agreement. *See THI of N.M. v. Patton*, No. 11-537, 2012 WL 112216, at *22 n.9 (D.N.M. Jan. 3, 2012), *aff'd*, 741 F.3d 1162 (10th Cir. 2014); *Clay v. New Mexico Title Loans*, 2012-NMCA-102, ¶ 40, 288 P.3d 888, *cert. denied*, 2012-NMCERT-009, 296 P.3d 1207 (Table); Def. Br. at 29-31, 43.

II. CONCLUSION

For the foregoing reasons and the reasons set forth in its Brief in Chief, Appellants respectfully request that this Court reverse the District Court's order

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[10] Plaintiffs claim there were severability clauses in both cases. (Pl. Br. at 45). However, they acknowledge that the *Cordova* court did not "even mention[] the severability clause." (*Id.*). And, in the District Court, they admitted that the alleged severance provision in *Rivera* "didn't show up in the opinion." (Tr. 30).

denying their motion to compel arbitration and remand with instructions to grant the motion and stay the case pending the outcome of the arbitration proceedings.

Alternatively, if the Court believes that the Supreme Court's decision in *Dalton v. Santander* would be instructive in reaching its decision herein, Defendants request that the Court defer its ruling until after the Supreme Court has decided *Dalton* and further request that the parties be provided the opportunity to submit supplemental briefs concerning the Supreme Court's decision.

Respectfully submitted,

By: _____

FRANK ALVAREZ, ESQ.
New Mexico State Bar No. 27610
CHRISTINA GRATKE NASON, ESQ.
New Mexico State Bar No. 7181
Quintairos, Prieto, Wood & Boyer, P.A.
1700 Pacific Avenue, Suite 4545
Dallas, Texas 75201
Telephone: (214)754-8755
Facsimile: (214)754-8744

By: _____

MARK J. LEVIN, ESQ.
Pro Hac Vice
Pennsylvania Bar No. 26601
BALLARD SPAHR LLP
1735 Market St., 51st Fl.
Philadelphia, PA 19103
Telephone: (215) 665-8500
Facsimile: (215) 864-8999

Attorneys for Defendants/Appellants DriveTime Car Sales Company, LLC d/b/a DriveTime and Jeremy Mendoza

CERTIFICATE OF SERVICE

The undersigned certifies that on the 10th day of July 2015, a true and correct copy of the foregoing document was forwarded to the following counsel of record via certified mail, return receipt requested:

Mr. Rob Treinen
500 Tijeras Ave NW
Albuquerque, New Mexico 87102
Counsel for Plaintiff/Appellee

Robert David Humphreys
Lucius James Wallace
Humphreys Wallace Humphreys, P.C.
9202 South Toledo Avenue
Tulsa, Oklahoma 74137
Counsel for Plaintiff/Appellee

CHRISTINA GRATKE NASON, ESQ.