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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

LEE ANNE CARON, Plaintiff and Respondent, v. MERCEDES-BENZ FINANCIAL SERVICES USA LLC et al., Defendants and Appellants.	G044550 (Super. Ct. No. 30-2010-00369466) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Thierry Patrick Colaw, Judge. Reversed and remanded.

Severson & Werson, Scott J. Hyman, Erin S. Kubota, Jan T. Chilton and Donald J. Querio for Defendant and Appellant Mercedes-Benz Financial Services USA LLC.

Tharpe & Howell, Christopher S. Maile, Soojin Kang and Robert A. Olson for Defendant and Appellant Mission Imports.

Rosner, Barry & Babbitt, Hallen D. Rosner, Christopher P. Barry, Angela J. Smith and Hawk Barry for Plaintiff and Respondent.

* * *

Defendants and appellants Mercedes-Benz Financial Services USA LLC, formerly known as DCFS USA LLC (Mercedes Financial), and Mission Imports, doing business as Mercedes-Benz of Laguna Niguel (Mission Imports; Mercedes Financial and Mission Imports are collectively referred to as Defendants), appeal from an order denying their petitions to compel arbitration. Defendants sought to compel plaintiff and respondent Lee Anne Caron to arbitrate her claims based on an arbitration provision included in the Retail Installment Sales Contract she signed to purchase a preowned vehicle from Mission Imports.

Finding itself bound by the recent decision in *Fisher v. DCH Temecula Imports LLC* (2010) 187 Cal.App.4th 601 (*Fisher*), the trial court ruled that (1) the arbitration provision was unenforceable because it waived Caron's right to bring a class action under the Consumers Legal Remedies Act (Civ. Code, § 1750 et seq.; CLRA) and (2) the Federal Arbitration Act (9 U.S.C. § 1 et. seq.; FAA) did not preempt the CLRA's prohibition against class-action waivers. Because it found the CLRA rendered the arbitration provision unenforceable, the trial court declined to rule on Caron's challenge that the arbitration provision was also unconscionable.

Defendants argue the trial court erred because the FAA preempts the CLRA's prohibition against class action waivers and therefore the trial court could not rely on the CLRA as a ground for denying Defendants' petitions. Based on the United State Supreme Court's decision in *AT&T Mobility LLC v. Concepcion* (2011) ___ U.S. ___, ___; 131 S.Ct. 1740 (*AT&T Mobility*), we agree the FAA preempts the CLRA's anti-waiver provision because the provision acts as an obstacle to the FAA's intention of enforcing arbitration agreements according to their terms.

Consequently, we reverse the trial court's order denying Defendants' petitions to compel arbitration and remand this matter for the trial court to consider Caron's unconscionability challenge. If the court finds any term unconscionable, it must also decide whether the term may be severed and the remainder of the arbitration provision enforced.

I

FACTS AND PROCEDURAL HISTORY

In October 2008, Caron purchased a certified preowned Mercedes Benz vehicle from Mission Imports for approximately $50,000. The sales contract Caron signed described the transaction's terms and conditions. A few days later, Caron returned to Mission Imports to purchase an extended warranty for the vehicle and Mission Imports had her sign a new sales contract that recalculated the amount financed.

Approximately one month later, Mission Imports phoned Caron to inform her Mercedes Financial would not finance her vehicle purchase unless she agreed to shorten the length of her installment contract. Caron agreed and Mission Imports had her sign a third sales contract shortening the installment contract to 59 months. Mission Imports backdated both of the later sales contracts Caron signed to the original purchase date. Mission Imports assigned Caron's third and final sales contract to Mercedes Financial.

Each sales contract Caron signed included an identical arbitration provision on the back of the one-page, double-sided agreement. In pertinent part, the arbitration provision stated, "1. EITHER YOU OR WE MAY CHOOSE TO HAVE ANY DISPUTE BETWEEN US DECIDED BY ARBITRATION AND NOT IN COURT OR BY JURY TRIAL. [¶] 2. IF A DISPUTE IS ARBITRATED, YOU WILL GIVE UP YOUR RIGHT TO PARTICIPATE AS A CLASS REPRESENTATIVE OR CLASS MEMBER ON ANY CLASS CLAIM YOU MAY HAVE AGAINST US INCLUDING

ANY RIGHT TO CLASS ARBITRATION OR ANY CONSOLIDATION OF INDIVIDUAL ARBITRATIONS. [¶] . . . [¶] Any claim or dispute, whether in contract, tort, statute or otherwise . . . between you and us . . . which arises out of or relates to your credit application, purchase or condition of this vehicle, this contract or any resulting transaction or relationship (including any such relationship with third parties who do not sign this contract) shall, at your or our election, be resolved by neutral, binding arbitration and not by a court action. . . . Any claim or dispute is to be arbitrated by a single arbitrator on an individual basis and not as a class action. You expressly waive any right you may have to arbitrate a class action. . . . [¶] . . . Any arbitration under this Arbitration Clause shall be governed by the [FAA] and not by any state law concerning arbitration. [¶] . . . If any part of this Arbitration Clause, other than waivers of class action rights, is deemed or found to be unenforceable for any reason, the remainder shall remain enforceable. If a waiver of class action rights is deemed or found to be unenforceable for any reason in a case in which class action allegations have been made, the remainder or this Arbitration Clause shall be unenforceable."

After her purchase, Caron experienced various difficulties with the vehicle and repeatedly returned it to Mission Imports for repairs. Mission Imports, however, could not repair the vehicle to Caron's satisfaction. In May 2010, Caron filed this action against Mission Imports, Mercedes Financial, and Mercedes-Benz USA LLC, alleging various class and individual claims under the CLRA, the Automobile Sales Finance Act (Civ. Code, § 2981 et seq.), and the unfair competition law (Bus. & Prof. Code, § 17200 et seq.). She also alleged additional individual claims for false advertising, intentional and negligent misrepresentation, Vehicle Code violations, and Song-Beverly Consumer Warranty Act (Civ. Code, § 1790 et seq.) violations.

Defendants separately petitioned to compel Caron to arbitrate her individual claims and stay this action under the arbitration provision in the sales contracts. Caron filed a consolidated opposition, arguing the class action waiver in the

arbitration provision rendered the entire provision unenforceable. Citing the recent opinion in *Fisher*, Caron argued the class action waiver was invalid because it required her to waive her statutory right to bring a class action under the CLRA. She asserted the arbitration provision itself contained a "'poison pill'" clause making the entire provision unenforceable if a court found the class action waiver invalid. Caron also claimed the arbitration provision was unconscionable and Defendants failed to properly authenticate the sales contract. In reply, Defendants argued the FAA preempted *Fisher* and prohibited the trial court from invalidating the arbitration provision's class action waiver. Defendants also disputed that the arbitration provision was unconscionable and claimed they adequately authenticated the sales contract.

The trial court denied both petitions "on the grounds that the FAA does not preempt state law and under the CLRA, the arbitration provision is unenforceable as it requires plaintiff to waive her statutory rights to bring a class action in violation of the CLRA anti-waiver provision." The court further explained, "The facts of this case are virtually identical to the facts in *Fisher* . . . which was decided only three months ago. While defendants argue that *Fisher* was wrongly decided or at best incomplete, as it failed to take into consideration one or more U.S. Supreme Court decisions, it is not for this court to determine whether the court of appeal is right or wrong in its analysis. Trial courts are still bound by the principle of *stare decisis*." Because the invalid class action waiver "extinguished" the entire arbitration provision, the court also found the unconscionability issue was "moot." Nor did the court expressly rule on Caron's objection that Defendants failed to adequately authenticate the sales contract.

Defendants both timely appealed from the trial court's order.

II

DISCUSSION

Caron contends we may affirm the trial court's refusal to enforce the arbitration agreement on any one of three independent grounds: (1) Defendants failed to adequately authenticate the sales contract containing the arbitration agreement and therefore failed to meet their burden to show the parties agreed to arbitrate Caron's claims; (2) the CLRA's anti-waiver rule invalidated the arbitration provision's class-action waiver and the provision's poison pill clause rendered the entire arbitration provision unenforceable; and (3) the arbitration provision is unconscionable.

A. *Defendants Adequately Authenticated the Parties' Arbitration Agreement*

Caron argues Defendants failed to authenticate the sales contract containing the arbitration provision because the declaration by Mission Imports' attorney lacked personal knowledge of how the agreement was executed and whether the agreement qualified as a business record. Similarly, Caron argued the employee declaration Mercedes Financial offered failed to authenticate the sales contract because the employee did not witness Caron sign the agreement and failed to establish all of the elements necessary for the agreement to qualify as a business record. Caron's challenge lacks merit because other evidence sufficiently authenticated the sales contract containing the arbitration provision.

Documents must be authenticated before the trial court may receive them into evidence. "[A] document is authenticated when sufficient evidence has been produced to sustain a finding that the document is what it purports to be [citation]. As long as the evidence would support a finding of authenticity, the writing is admissible. The fact conflicting inferences can be drawn regarding authenticity goes to the document's weight as evidence, not its admissibility." (*Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 321 (*Jazayeri*); see also Evid. Code, §§ 1400-1401.)

The authentication methods on which Caron relies are just two of several methods the Evidence Code recognizes for authenticating documents. (*People v. Smith* (2009) 179 Cal.App.4th 986, 1001 (*Smith*).) For example, Evidence Code section 1414 also provides, "A writing may be authenticated by evidence that: [¶] (a) The party against whom it is offered has at any time admitted its authenticity; or [¶] (b) The writing has been acted upon as authentic by the party against whom it is offered."

In *Ambriz v. Kelegian* (2007) 146 Cal.App.4th 1519 (*Ambriz*), the Court of Appeal relied on Evidence Code section 1414 to conclude a plaintiff properly authenticated a portion of a deposition transcript because the defendant had offered a different portion of the same transcript to support their summary judgment motion. (*Id*. at p. 1527.) The *Ambriz* court explained, "[Defendants] admitted the authenticity of the transcript of Detective Pitcher's deposition by seeking to use portions of that deposition in support of their motion for summary judgment. Raising an objection as to lack of authentication of an excerpt from the same deposition defendants themselves relied upon in their motion is disingenuous, unless defendants can establish that the excerpt [plaintiff] offered was not part of the deposition transcript. [Defendants] made no such allegation. [Fn. omitted.]" (*Ibid*.)

Here, the sales contract Defendants offered was a one-page, double-sided document with Caron's signature. The arbitration provision appeared on the back of the document. Caron attached a copy of the front of the same sales contract to her complaint and alleged it was "a true and correct copy" of the agreement for her vehicle purchase. As in *Ambriz*, Caron admitted the sales contract's authenticity by relying on a different part of it and she made no attempt to show the arbitration provision on which Defendants relied was not part of the same agreement. The sales contract's authenticity is further bolstered by the fact the front page of the agreement Defendants offered matched the front page Caron attached to her complaint. (*Smith, supra,* 179 Cal.App.4th at p. 1001

["'Circumstantial evidence, content and location are all valid means of authentication'"]; *Jazayeri*, *supra*, 174 Cal.App.4th at p. 321 [same].)

Defendants adequately authenticated the sales contract containing the arbitration provision and therefore we reject Caron's contrary argument.[1]

B. *The FAA Preempts the CLRA's Anti-Waiver Rule*

1. Standard of Review

"In general, '[t]here is no uniform standard of review for evaluating an order denying a motion to compel arbitration. [Citation.] If the court's order is based on a decision of fact, then we adopt a substantial evidence standard. [Citations.] Alternatively, if the court's denial rests solely on a decision of law, then a de novo standard of review is employed. [Citations.]' [Citation.]" (*Laswell v. AG Seal Beach, LLC* (2010) 189 Cal.App.4th 1399, 1406.) Whether the FAA preempts the CLRA's anti-waiver rule is a purely legal question we review de novo. (*Fisher*, *supra*, 187 Cal.App.4th at p. 612.)

2. Governing Principles Regarding FAA Preemption

The FAA "was designed 'to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate,' [citation] . . . ." (*Volt Info. Sciences v. Leland Stanford Jr. U.* (1989) 489 U.S. 468, 474 (*Volt*).) It applies to all agreements to arbitrate a dispute arising from a contract involving interstate commerce and commands that they

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[1] The trial court did not expressly rule on Caron's authenticity objection, but the court's silence coupled with its ruling on the arbitration provision's class-action waiver establishes the court impliedly overruled Caron's objection. (See *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 526-527.) "A trial court's finding that sufficient foundational facts have been presented to support admissibility is reviewed for abuse of discretion." (*Smith*, *supra*, 179 Cal.App.4th at p. 1001.) The trial court did not abuse its discretion by impliedly overruling Caron's authentication objection.

"shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[2] (9 U.S.C. § 2.)

"'Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. . . .' [Citation.] . . . '[I]n enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.' [Citation.]" (*Perry v. Thomas* (1987) 482 U.S. 483, 489 (*Perry*).) "That national policy . . . 'appli[es] in state as well as federal courts' and 'foreclose[s] state legislative attempts to undercut the enforceability of arbitration agreements.' [Citation.]" (*Preston v. Ferrer* (2008) 552 U.S. 346, 353 (*Preston*).)

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[2] Caron does not dispute her transaction with Mission Imports involved interstate commerce (see *Allied-Bruce Terminix Companies, Inc. v. Dobson* (1995) 513 U.S. 265, 273-275 [phrase "'involving commerce'" is broadly construed to reach the full extent of Congress's authority to regulate interstate commerce]) or that the arbitration clause specifically states, "Any arbitration under this Arbitration Clause shall be governed by the [FAA] and not by any state law concerning arbitration" (*Rodriguez v. American Technologies, Inc.* (2006) 136 Cal.App.4th 1110, 1121-1122 [arbitration governed by FAA, not California law, when arbitration provision states parties shall arbitrate their dispute "'pursuant to the FAA'"]).

Caron nonetheless argues the FAA does not apply and there is no preemption issue because the parties agreed California law governed the interpretation of their contract, including the arbitration clause. Caron relies on the contract's general choice-of-law provision stating, "Federal law and California law apply to this contract." This reliance is misplaced. The specific choice-of-law provision designating the FAA in the arbitration clause governs over the more general choice-of-law provision regarding the entire contract. (*Prouty v. Gores Technology Group* (2004) 121 Cal.App.4th 1225, 1235 ["under well established principles of contract interpretation, when a general and a particular provision are inconsistent, the particular and specific provision is paramount to the general provision"]; Civ. Code, § 1859.) Moreover, the general choice-of-law provision states both federal and California law apply, and therefore the Supremacy Clause mandates that federal law governs if there is a conflict between the two. (*Washington Mutual Bank v. Superior Court* (2002) 95 Cal.App.4th 606, 612 [""""state law is pre-empted to the extent that it actually conflicts with federal law""""].)

"The FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration. [Citation.] But even when Congress has not completely displaced state regulation in an area, state law may nonetheless be pre-empted 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.' [Citation.]"[3] (*Volt, supra*, 489 U.S. at p. 477.)

"The 'principal purpose' of the FAA is to 'ensur[e] that private arbitration agreements are enforced according to their terms.' [Citations.]" (*AT&T Mobility, supra,* 131 S.Ct. at p. 1748; *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.* (2010) 559 U.S. ___, ___ [130 S.Ct. 1758, 1773] (*Stolt-Nielsen*); *Volt, supra,* 489 U.S. at p. 478 [the FAA's "passage 'was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered'"].)

"The FAA's displacement of conflicting state law is 'now well-established,' [citation], and has been repeatedly reaffirmed, [citations]." (*Preston, supra,* 552 U.S. at p. 353.) It preempts state statutes that expressly invalidate arbitration agreements. (See, e.g., *Perry*, *supra*, 482 U.S. at pp. 484, 490 [the FAA preempts California Labor Code provision requiring judicial resolution of certain wage claims

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[3] The California Supreme Court recognizes "'four species of federal preemption: express, conflict, obstacle, and field.' [Citation.] 'First, express preemption arises when Congress "define[s] explicitly the extent to which its enactments pre-empt state law. [Citation.] . . . ." [Citations.] Second, conflict preemption will be found when simultaneous compliance with both state and federal directives is impossible. [Citations.] Third, obstacle preemption arises when "'under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" [Citations.] Finally, field preemption, i.e., "Congress' intent to pre-empt all state law in a particular area," applies "where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation." [Citation.]' [Citations.]" (*Parks v. MBNA America Bank, N.A.* (June 21, 2012, S183703) ___ Cal.4th ___ [2012 Cal. Lexis 5795, *9-*10 (*Parks*).) As stated above, this case presents an obstacle preemption issue.

despite agreement to arbitrate].) The FAA also preempts state statutes that do not expressly invalidate arbitration agreements but have been judicially interpreted to do so. (See, e.g., *Southland Corp. v. Keating* (1984) 465 U.S. 1, 10 [the FAA preempts state statute interpreted by the California Supreme Court to require judicial resolution of claims brought under the California Franchise Investment Law].) Finally, the FAA preempts "state-law rules that stand as an obstacle to the accomplishment of the FAA's objective[]" of enforcing arbitration agreements according to their specific terms. (*AT&T Mobility*, *supra*, 131 S.Ct. at p. 1748.)

In *AT&T Mobility*, the United States Supreme Court recently addressed whether the FAA preempted the so-called "*Discover Bank* rule," which California courts frequently used to find arbitration provisions in certain consumer contracts of adhesion unconscionable because they included a waiver of the consumer's right to bring a class action. (*AT&T Mobility*, *supra*, 131 S.Ct. at p. 1746.) The California Supreme Court created the *Discover Bank* rule because class-action waivers in consumer contracts of adhesion allowed companies to effectively exonerate themselves from liability for cheating large numbers of consumers out of money individually too small for a consumer to bring an individual action.[4] (*Ibid.*)

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[4] In its entirety, the California Supreme Court stated its *Discover Bank* rule as follows: "We do not hold that all class action waivers are necessarily unconscionable. But when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least to the extent the obligation at issue is governed by California law, the waiver becomes in practice the exemption of the party 'from responsibility for [its] own fraud, or willful injury to the person or property of another.' [Citation.] Under these circumstances, such waivers are unconscionable under California law and should not be enforced." (*Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, 162-163 (*Discover Bank*).)

In *AT&T Mobility*, the lower courts refused to enforce the parties' arbitration agreement based on the *Discover Bank* rule. They found the rule "was not preempted by the FAA because that rule was simply 'a refinement of the unconscionability analysis applicable to contracts generally in California.' [Citation.]" (*AT&T Mobility*, *supra*, 131 S.Ct. at p. 1745.) The United States Supreme Court rejected that analysis and held the FAA preempted the *Discover Bank* rule "[b]ecause it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress [in enacting the FAA],' [citation] . . . ." (*Id.* at pp. 1745, 1753.)

The *AT&T Mobility* court explained that arbitration under the FAA is a contractual matter and the parties are therefore generally free to structure their arbitration as they desire. (*AT&T Mobility*, *supra*, 131 S.Ct. at pp. 1748-1749, 1752; *Stolt-Nielsen*, *supra*, 130 S.Ct. at p. 1774; *Volt*, *supra*, 489 U.S. at p. 479.) For example, the parties to an arbitration agreement "may agree to limit the issues subject to arbitration, [citation], to arbitrate according to specific rules, [citation], and to limit *with whom* [they] will arbitrate [their] disputes, [citation]. [¶] 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 the decisionmaker be a specialist in the relevant field, or that proceedings be kept confidential to protect trade secrets. And the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution." (*AT&T Mobility*, at pp. 1748-1749, original italics.)

The Supreme Court emphasized that "'[a] prime objective of an agreement to arbitrate is to achieve "streamlined proceedings and expeditious results,"' . . . . [Citation.]" (*AT&T Mobility*, *supra*, 131 S.Ct. at p. 1749.) Towards that end, the arbitration agreement in *AT&T Mobility* not only required the parties to arbitrate all disputes, but also prohibited the plaintiffs from asserting any class claims or joining any other parties in the arbitration. The *AT&T Mobility* court explained that allowing class

claims would "sacrifice[] the principal advantage of arbitration — its informality — and make[] the process slower, more costly, and more likely to generate procedural morass than final judgment[]" because class claims require procedural formality and necessitate additional and different procedures to protect absent parties' interests. (*Id*. at p. 1751.)

Because the *Discover Bank* rule prevented the parties from achieving the benefits of the bilateral arbitration to which they agreed, the *AT&T Mobility* court found the rule erected an obstacle to the FAA's objective of enforcing arbitration agreements according to their terms. The FAA therefore preempted the *Discover Bank* rule. (*AT&T Mobility*, *supra*, 131 S.Ct. at pp. 1750-1753.)

The plaintiffs in *AT&T Mobility* "argue[d] that the *Discover Bank* rule, given its origins in California's unconscionability doctrine and California's policy against exculpation, is a ground that 'exist[ed] at law or in equity for the revocation of any contract' under FAA § 2" and therefore the FAA did not preempt the rule. (*AT&T Mobility*, *supra*, 131 S.Ct. at p. 1746.) The Supreme Court rejected that argument, explaining the FAA's preemptive effect may "extend even to grounds traditionally thought to exist '"at law or in equity for the revocation of any contract[]"'" when those grounds "have been applied in a fashion that disfavors arbitration." (*Id*. at p. 1747.) The *AT&T Mobility* court concluded the *Discover Bank* rule applied California's unconscionability doctrine in a manner that disfavored arbitration because the rule in its practical application had a disproportionate impact on arbitration agreements. (*Id*. at pp. 1747-1748.)

Caron argues the FAA preempts *only* state laws that single out arbitration for special treatment. She cites several Supreme Court decisions stating, "By enacting § 2 [of the FAA], we have several times said, Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed 'upon the same footing as other contracts.' [Citation.]" (See, e.g., *Doctors Assocs. v. Casarotto* (1996) 517 U.S. 681, 687 (*Doctors Assocs.*).)

The cases Caron cites, however, do not define the limits of the FAA's preemptive effect; they merely describe why the FAA preempted the laws at issue in those cases. (See, e.g., *Doctors Assocs., supra*, 517 U.S. at p. 687 [holding FAA preempted state statute conditioning arbitration agreements' enforceability on compliance with a special notice requirement not applicable to contracts in general].) *AT&T Mobility* makes clear the FAA's preemptive effect extends to any state law that "'stands as an obstacle to the accomplishment and execution of the full purposes and objective of [the FAA].'" (*AT&T Mobility, supra*, 131 S.Ct. at p. 1753; see also *Parks, supra*, ___ Cal.4th ___ [2012 Cal. Lexis 5795, *32 [National Bank Act (NBA) preempts California statute requiring certain disclosures on preprinted checks provided to credit card users because the statute """"stands as an obstacle to the accomplishment and execution of the full purposes and objectives"'" of the NBA"].)

3. The CLRA's Anti-Waiver Rule Stands as an Obstacle to the FAA's Purpose of Enforcing Arbitration Agreements According to Their Terms

The CLRA makes unlawful various "unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer . . . ." (Civ. Code, § 1770, subd. (a).) A consumer who suffers damages because of a prohibited act or practice may bring an action for actual damages, injunctive relief, restitution, and punitive damages. (Civ. Code, § 1780, subd. (a).) The consumer may also bring a class action to recover the same relief on behalf of other similarly situated consumers. (Civ. Code, § 1781, subd. (a).)

The CLRA declares that "[a]ny waiver by a consumer of [its] provisions . . . is contrary to public policy and shall be unenforceable and void." (Civ. Code, § 1751.) Because the CLRA expressly authorizes consumers to bring class actions, this anti-waiver provision renders a consumer's waiver of the right to bring a class action "'unenforceable and void.'" (*Fisher, supra*, 187 Cal.App.4th at p. 613.)

Here, the trial court found this anti-waiver provision invalidated the class-action waiver in the parties' arbitration agreement and therefore the poison pill clause made the entire arbitration agreement unenforceable. The court also found the FAA did not preempt the CLRA's anti-waiver provision. We disagree with this latter conclusion.

No meaningful difference exists between the CLRA's class action prohibition and the *Discover Bank* rule. Both are state-law rules that prevent enforcement of an arbitration agreement according to its terms. As in *AT&T Mobility*, Caron and Defendants' arbitration agreement not only required them to arbitrate all of their disputes, but also prohibited Caron from asserting any class claims or joining any other parties in the arbitration. By limiting the arbitration to Caron's individual claims, the agreement ensured the parties would receive the benefits of contractual arbitration to which they agreed: "'lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.' [Citation.]" (*AT&T Mobility, supra,* 131 S.Ct. at p. 1751.) Applying the CLRA's prohibition against class-action waivers would deprive the parties of those benefits because it would allow Caron to assert class claims and impose the complex, costly, and time-consuming procedures that the Supreme Court in *AT&T Mobility* found so objectionable. (*Id.* at pp. 1750-1751.) Under *AT&T Mobility*'s reasoning, the CLRA's anti-waiver provision stands as an obstacle to the FAA's purpose and objective because it prevented the parties from enforcing their arbitration agreement according to its terms.

The trial court concluded the recent decision in *Fisher* required it to find the FAA did not preempt the CLRA's anti-waiver rule. *Fisher* involved a petition to compel arbitration based on a retail installment sales contract containing the identical arbitration agreement at issue in this case. (*Fisher, supra,* 187 Cal.App.4th at p. 607.) The *Fisher* court found the CLRA's anti-waiver provision invalidated the arbitration

agreement's class-action waiver and that the FAA did not preempt the CLRA's anti-waiver provision. (*Id*. at pp. 613, 617.)

Fisher's preemption analysis did not address whether the CLRA's anti-waiver provision stood as an obstacle to the FAA's purposes and objectives of enforcing arbitration agreements according to their terms. Instead, the *Fisher* court's analysis relied on the FAA's savings clause, which allows courts to deny enforcement of an arbitration agreement on "such grounds as exist at law or in equity for the revocation of any contract." (9 U.S.C. § 2; *Fisher*, *supra*, 187 Cal.App.4th at p. 613.) The *Fisher* court found that California law generally prohibits any contract from impairing statutory rights enacted for a public purpose, and the right to bring a CLRA class action was an unwaivable statutory right enacted for a public purpose. (*Fisher*, at pp. 615-617.) Accordingly, *Fisher* concluded, "The right to bring a [CLRA] class action lawsuit . . . is 'a separate, generally available contract defense not preempted by the FAA.' [Citation.]" (*Id*. at p. 617.)

The Court of Appeal issued the *Fisher* decision *before* the United States Supreme Court decided *AT&T Mobility*. Consequently, the *Fisher* court lacked the opportunity to apply *AT&T Mobility*'s reasoning to its case, particularly whether the FAA's preemptive effect may extend to generally available contract defenses if they are applied in a manner that generally discriminates against arbitration. (*AT&T Mobility*, *supra*, 131 S.Ct. at p. 1747.)

We conclude *Fisher* applied the CLRA's anti-waiver provision in a manner that discriminates against arbitration and therefore the FAA preempts it. Applying the CLRA's anti-waiver provision to class-action waivers in arbitration agreements effectively prevents CLRA claims from being arbitrated even though the CLRA does not expressly prohibit arbitration. If the anti-waiver provision applies, it prevents businesses from enforcing a contract provision calling for arbitration on an individual basis because consumers may avoid arbitration altogether by merely alleging their claims as class

claims. Courts may not order arbitration of class claims unless the parties expressly agree to class arbitration (*Stolt-Nielsen*, *supra*, 130 S.Ct. at p. 1775) and parties rarely, if ever, agree to this because it lacks the benefits that motivate parties to agree to individual or bilateral arbitration (*AT&T Mobility*, *supra*, 131 S.Ct. at pp. 1749-1752).[5] *Fisher* stated it merely applied the generally available contract defense invalidating private contracts that impaired unwaivable statutory rights, but it applied that defense based on a statute that in its practical application discriminates against arbitration. Accordingly, the FAA preempts the CLRA's anti-waiver provision. (*AT&T Mobility*, *supra*, 131 S.Ct. at pp. 1747-1748.)

Although California's Legislature enacted the CLRA's anti-waiver provision for the important goal of protecting consumers, that does not change the analysis or outcome. According to the Supreme Court, "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." (*AT&T Mobility*, *supra*, 131 S.Ct. at p. 1753.)

Caron argues FAA preemption is irrelevant because this action is about class-action waivers, not arbitration. According to Caron, the CLRA would render the class-action waiver unenforceable if Defendants placed it anywhere else in the contract and therefore Defendants may not impart special enforceability to the waiver by placing it in the arbitration provision. Caron misses the point of the foregoing analysis.

Defendants placed the waiver in the arbitration provision to prevent Caron from using class allegations to avoid arbitration altogether. Consequently, the provision is first and foremost an arbitration clause. It merely includes a class-action waiver to ensure the parties arbitrate their claims as agreed. The class-action waiver would

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[5] "[T]he switch from bilateral to class arbitration sacrifices the principal advantage of arbitration — its informality — and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." (*AT&T Mobility*, *supra*, 131 S.Ct. at p. 1751.)

otherwise violate the CLRA, but it survives as part of the arbitration provision because the FAA trumps the CLRA to the extent they conflict.

Caron also argues FAA preemption does not apply because the CLRA's anti-waiver provision acts to invalidate the class-action waiver and then the poison pill clause invalidates the entire arbitration provision before any preemption issue arises. In Caron's view, the poison pill clause shows the parties intended not to arbitrate any claims on a class basis and this interpretation merely carries out that intent. Again, Caron is mistaken. Her interpretation would allow state law to defeat the arbitration provision despite the provision's clear statement that the FAA governs. Caron cannot avoid preemption in this manner.

Finally, Caron contends Defendants attempt to use the FAA to preempt the entire CLRA, but Defendants do no such thing. They merely argue the FAA preempts the CLRA's anti-waiver provision and prevented the trial court from applying it to invalidate the arbitration provision's class-action waiver. The FAA does not prevent Caron from bringing a claim against Defendants under the CLRA or from obtaining the various forms of relief the CLRA authorizes, including actual damages, injunctive relief, restitution, punitive damages, and attorney fees. (Civ. Code, § 1780, subds. (a) & (e).)

Caron concedes "arbitration is perfectly allowable to resolve consumer claims under the CLRA,"[6] and that a contract may require a party to arbitrate a statutory

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[6] To support this statement, Caron cites *Broughton v. Cigna HealthPlans* (1999) 21 Cal.4th 1066, which held that damages claims under the CLRA are arbitrable, but claims seeking public injunctive relief under the CLRA are not. (*Id*. at p. 1072.) Following *AT&T Mobility*, California and federal cases hold the FAA preempts *Broughton*'s holding that certain injunctive relief claims cannot be ordered to arbitration. (*Iskanian v. CLS Transportation Los Angeles, LLC* (June 4, 2012, B235158) ___ Cal.App.4th ___ [2012 Cal.App. Lexis 650, *27-*30] (*Iskanian*); *Kilgore v. KeyBank, N.A.* (9th Cir. 2012) 673 F.3d 947, 962 ["the very nature of federal preemption *requires* that state law bend to conflicting federal law — no matter the purpose of the state law. It is not possible for a state legislature to avoid preemption simply because it intends to do so. The analysis of whether a particular statute precludes waiver of the

cause of action if arbitrating the claim does not impair the party's ability to vindicate his or her rights.[7] Caron fails to explain how requiring her to arbitrate her CLRA claims would prevent her from vindicating her substantive rights under the CLRA. Preventing Caron from obtaining relief on behalf of other consumers or the general public does not prevent Caron from vindicating her rights under the CLRA based on the injuries she suffered. (See *Gilmer*, *supra*, 500 U.S. at p. 32 ["'even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the [statute] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred'"].) There is nothing inherently improper about requiring a party to arbitrate on an individual basis if the party agreed to that procedure. (See *AT&T Mobility*, *supra*, 131 S.Ct. at pp. 1752-1753.)

In sum, we conclude the FAA preempts the CLRA's anti-waiver provision and therefore we decline to follow *Fisher*. Accordingly, the trial court erred in denying Defendants' petitions to compel arbitration on that ground.

C. *Remand for the Trial Court to Decide Caron's Unconscionability Challenges*

Regardless of whether the FAA preempts the CLRA's anti-waiver provision, Caron contends we should affirm the trial court's ruling because several provisions in the arbitration clause are unconscionable. She relies on the general rule that appellate courts must affirm a trial court's order if it is correct on any legal theory. (See, e.g., *Cohen v. DIRECTV, Inc.* (2006) 142 Cal.App.4th 1442, 1447 ["if a trial court's order is correct on any applicable theory of law, the order will be affirmed regardless of the basis for the trial court's conclusion, as we review the correctness of the order, not the

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right to a judicial forum — and thus whether that statutory claim falls outside the FAA's reach — applies only to *federal*, not state, statutes" (original italics)].)

[7] Caron cites *Mitsubishi Motors v. Soler Chrysler-Plymouth* (1985) 473 U.S, 614, 628, 637, and *Gilmer v. Interstate/Johnson Lane* (1991) 500 U.S. 20, 33 (*Gilmer*), to support this latter contention.

reasons given for the order"], overruled on other grounds in *AT&T Mobility, supra,* 131 S.Ct. at pp. 1746, 1753.) Caron further argues we must review the evidence regarding unconscionability in the light most favorable to the trial court's ruling denying Defendants' petitions, and presume the trial court made all findings necessary to support a conclusion the arbitration clause is unconscionable. (See *Flores v. Transamerica HomeFirst, Inc.* (2001) 93 Cal.App.4th 846, 851; *A & M Produce Co. v. FMC Corp.* (1982) 135 Cal.App.3d 473, 489.) Caron, however, misapplies these governing legal principles.

Unconscionability is ultimately a question of law for the court to decide, but factual issues may bear on that determination. (*Baker v. Osborne Development Corp.* (2008) 159 Cal.App.4th 884, 892.) Accordingly, we review a trial court's unconscionability determination de novo, but, to the extent the determination "turned on the resolution of conflicts in the evidence or on factual inferences to be drawn from the evidence, we consider the evidence in the light most favorable to the trial court's ruling and review the trial court's factual determinations under the substantial evidence standard." (*Ibid.*)

In the trial court, Caron asserted an unconscionability argument in opposing Defendants' petitions to compel arbitration. The trial court, however, based its ruling solely on its finding the CLRA invalidated the arbitration provision's class-action waiver and the poison pill clause therefore made the entire provision unenforceable. The trial court did not decide whether any of the arbitration provision's terms were unconscionable. In fact, the trial court expressly refused to reach that issue, finding its CLRA ruling "render[ed] moot [the] issues of substantive [and] procedural unconscionability."

"When the record shows a trial court does not 'undertake the factual inquiry necessary to determine' a question, we may not infer on appeal that factual finding. [Citation.]" (*Bouton v. USAA Casualty Ins. Co.* (2008) 167 Cal.App.4th 412, 422.)

Indeed, "where . . . a respondent argues for affirmance based on substantial evidence, the record must show the court *actually performed* the factfinding function. Where the record demonstrates the trial judge did not weigh the evidence, the presumption of correctness is overcome." (*Kemp. Bros. Construction, Inc. v. Titan Electric Corp.* (2007) 146 Cal.App.4th 1474, 1477, original italics.)

Here, Caron argues we should affirm the trial court's ruling because substantial evidence supports her contention that the arbitration provision is unconscionable. But we cannot affirm the trial court's ruling on that ground because the court declined to decide whether any of the arbitration terms rendered it unconscionable.

We also cannot decide Caron's unconscionability challenge in the first instance because some of her arguments require factual findings that we cannot make. For example, she argues the arbitration provision is hidden and was not brought to her attention, but Mission Imports argues the sales contract adequately highlights the provision and Caron must be presumed to have read it. We cannot resolve this factual dispute because the record does not include a copy of the sales contract as it appeared when Caron signed it.

The sales contract is printed on the front and back of a single piece of paper that is 25 inches long. The copies in the record are blowups of various portions of the sales contract that must be pieced together to see the entire agreement. These pieces do not present an accurate picture of the sales contract Caron signed and whether the arbitration provision was reasonably highlighted in context. Defendants sought to present the original sales contract Caron signed at the trial court hearing, but the court declined to consider it because the court did not need the original to decide the FAA preemption issue. Even one factual dispute prevents us from considering Caron's unconscionability challenge in the first instance because unconscionability is evaluated on a sliding scale: "the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable,

and vice versa." (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 114.)

Even if we agreed with Caron's unconscionability analysis, we would still remand the matter for the trial court to address whether the unconscionable terms could be severed and the remainder of the arbitration provision enforced. The decision whether to sever an unconscionable term from an arbitration provision "is committed to the discretion of the trial court" and the trial court should make that determination in the first instance. (*Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489, 503-504 [remanding case to trial court for it to determine whether an unconscionable term should be severed and the remainder of the arbitration provision enforced], criticized on other grounds in *Iskanian, supra*, 2012 Cal.App. Lexis 650, *25-*27.)

Accordingly, we remand this matter to the trial court for it to (1) resolve all factual issues raised by Caron's unconscionability challenge; (2) decide whether any of the arbitration provision's terms are unconscionable; and (3) decide whether any term it finds to be unconscionable can be severed from the remainder of the arbitration provision.[8]

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[8] After the parties completed their briefing on this appeal, we granted Defendants' application for leave to file supplemental briefs addressing the recent decision in *Sanchez v. Valencia Holding Co., LLC* (2011) 201 Cal.App.4th 74, which held an arbitration similar to the one at issue here was unconscionable. We also granted Caron leave to file a supplemental brief addressing the same case. The Supreme Court granted review in the *Sanchez* case in March 2012 and thereby rendered the parties' supplemental briefing largely irrelevant.

III

DISPOSITION

The order is reversed and the matter remanded for further proceedings consistent with the views expressed in this opinion. Defendants shall recover their costs on appeal.

ARONSON, J.

WE CONCUR:

O'LEARY, P. J.

BEDSWORTH, J.

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

LEE ANNE CARON, Plaintiff and Respondent, v. MERCEDES-BENZ FINANCIAL SERVICES USA LLC et al., Defendants and Appellants.	G044550 (Super. Ct. No. 30-2010-00369466) ORDER MODIFYING OPINION AND GRANTING REQUESTS FOR PUBLICATION; NO CHANGE IN JUDGMENT

It is ordered that the opinion filed herein on June 29, 2012, be modified as follows:

1. On page 2, last sentence of the second full paragraph, delete the words "challenge that" and insert the word "contention" in their place so the sentence reads:

> Because it found the CLRA rendered the arbitration provision unenforceable, the trial court declined to rule on Caron's contention the arbitration provision was also unconscionable.

2. On page 2, delete the last full paragraph, beginning with "Defendants argue the trial court erred" and ending with "agreements according to their terms," and insert the following paragraph in its place:

> Defendants argue the trial court erred because the FAA preempts the CLRA's prohibition against class action waivers. Based on the United States Supreme Court's decision in *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. ___ [131 S.Ct. 1740] (*AT&T Mobility*), we agree the FAA preempts the CLRA's anti-waiver provision because the provision acts as an obstacle to the FAA's goal of enforcing arbitration agreements according to their terms.

3. On page 3, first sentence of the first full paragraph, beginning with "Consequently, we reverse," delete the words "this matter" so the sentence reads:

> Consequently, we reverse the trial court's order denying Defendants' petitions to compel arbitration and remand for the trial court to consider Caron's unconscionability challenge.

4. On page 3, delete the last three sentences of the third full paragraph, beginning with "Caron agreed and Mission Imports" and ending with "contract to Mercedes Financial," and insert the following sentences in their place:

> Caron agreed to sign a third sales contract shortening the installment contract to 59 months. Mission Imports backdated both of the later sales contracts Caron signed to the original purchase date, and assigned Caron's third and final sales contract to Mercedes Financial.

5. On page 4, last sentence of the first partial paragraph, change the word "or" between "remainder" and "this" to the word "of" so the sentence reads:

> If a waiver of class action rights is deemed or found to be unenforceable for any reason in a case in which class action allegations have been made, the remainder of this Arbitration Clause shall be unenforceable.

6. On page 6, delete the first sentence of the second full paragraph, beginning with "Caron argues Defendants failed" and ending with "qualified as a business record," and insert the following sentence in its place:

> Caron argues Defendants failed to authenticate the sales contract containing the arbitration provision because the declaration by Mission Imports' attorney lacked personal knowledge of how the parties executed the agreement and whether it qualified as a business record.

7. On page 6, delete the final sentence of the second full paragraph, beginning with "Caron's challenge lacks merit" and ending with "arbitration provision."

8. On page 6, insert the following new paragraph between the second full paragraph, beginning with "Caron argues Defendants failed," and the third full paragraphs, beginning with "Documents must be authenticated":

> The trial court did not expressly rule on Caron's authenticity objection, but the court's silence coupled with its ruling on the arbitration provision's class-action waiver establishes the court impliedly overruled Caron's objection. (See *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 526-527.) "A trial court's finding that sufficient foundational facts have been presented to support admissibility is reviewed for abuse of discretion." (*Smith, supra*, 179 Cal.App.4th at p. 1001.) The trial court did not abuse its discretion by impliedly overruling Caron's authentication objection because other evidence sufficiently authenticated the sales contract containing the arbitration provision.

9. On page 7, first sentence of the second paragraph, add an "s" to the word "defendant" so the sentence reads:

> In *Ambriz v. Kelegian* (2007) 146 Cal.App.4th 1519 (*Ambriz*), the Court of Appeal relied on Evidence Code section 1414 to conclude a plaintiff properly authenticated a portion of a deposition transcript because the

defendants had offered a different portion of the same transcript to support their summary judgment motion.

10. On page 8, delete footnote 1 and renumber all subsequent footnotes.

11. On page 10, footnote 3, insert ", ___" in the California Reports Fourth citation for *Parks v. MBNA American Bank, N.A.* to provide a pinpoint reference and insert "]"at the end of the Cal. Lexis citation for *Parks v. MBNA American Bank, N.A.* so the citation reads:

(*Parks v. MBNA America Bank, N.A.* (June 21, 2012, S183703) ___ Cal.4th ___, ___ [2012 Cal. Lexis 5795, *9-*10] (*Parks*).)

12. On page 11, delete the first full paragraph, beginning with "In *AT&T Mobility*" and ending with "action.[4] (*Ibid.*)," and insert the following paragraph in its place:

In *AT&T Mobility*, the United States Supreme Court recently addressed whether the FAA preempted the so-called "*Discover Bank* rule" under which California courts found arbitration provisions in certain consumer contracts of adhesion unconscionable because they included a waiver of the consumer's right to bring a class action. (*AT&T Mobility, supra,* 131 S.Ct. at p. 1746.) The California Supreme Court adopted the *Discover Bank* rule to address class-action waivers in consumer contracts of adhesion that allowed companies to effectively exonerate themselves from liability for cheating large numbers of consumers out of money individually too small for a consumer to bring an individual action.[4] (*Ibid.*)

13. On page 11, footnote 4, delete the words "In its entirety, the" at the beginning of the footnote and replace them with the word "The" so the introductory clause reads:

The California Supreme Court stated its *Discover Bank* rule as follows:

14. On page 13, delete the first sentence of the first full paragraph, beginning with "Because the *Discover Bank* rule" and ending with "according to their terms," and insert the following sentence in its place:

> Because the *Discover Bank* rule prevented the parties from realizing the benefits of their bilateral arbitration agreement, the *AT&T Mobility* court found the rule erected an obstacle to the FAA's objective of enforcing arbitration agreements according to their terms.

15. On page 13, at the end of the last paragraph after the citation ending with "(*Doctors Assocs.*).)," add the following sentence:

> Because the CLRA's anti-waiver provision did not exclusively apply to arbitration agreements, Caron concludes its enforcement is not preempted.

16. On page 14, citations at the end of the first paragraph, insert "at p." in the California Reports Fourth citation for *Parks* to provide a pinpoint reference and insert "]" at the end of the Cal. Lexis citation for *Parks* so the citations read:

> (*AT&T Mobility*, *supra*, 131 S.Ct. at p. 1753; see also *Parks*, *supra*, ___ Cal.4th at p. ___ [2012 Cal. Lexis 5795, *32] [National Bank Act (NBA) preempts California statute requiring certain disclosures on preprinted checks provided to credit card users because the statute """"stands as an obstacle to the accomplishment and execution of the full purposes and objectives"""" of the NBA"].)

17. On page 15, delete the last sentence of the first paragraph, beginning with "We disagree" and ending with "latter conclusion," and insert the following sentence in its place:

> Based on the Supreme Court's recent decision in *AT&T Mobility*, we must disagree with this latter conclusion.

18. On page 17, first sentence of the first full paragraph, change the word "goal" to "purpose" so the sentence reads:

Although California's Legislature enacted the CLRA's anti-waiver provision for the important purpose of protecting consumers, that does not change the analysis or outcome.

19. On page 18, footnote 6, insert ", ___" at the end of the California Appellate Reports Fourth citation to *Iskanian v. CLS Transportation Los Angeles, LLC* to provide a pinpoint reference and delete "(*Iskanian*)" from the end of the citation so the citation reads:

(*Iskanian v. CLS Transportation Los Angeles, LLC* (June 4, 2012, B235158) ___ Cal.App.4th ___, ___ [2012 Cal.App. Lexis 650, *27-*30];

20. On page 19, end of footnote 6 after "(original italics)].)," add the following sentence:

Broughton's continued viability, however, is not at issue on this appeal.

21. On page 22, citation to *Brown v. Ralphs Grocery Co.* at the end of the first full paragraph, delete ", criticized on other grounds in *Iskanian*, *supra*, 2012 Cal.App. Lexis 650, *25-*27" so the citation reads:

(*Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489, 503-504 [remanding case to trial court for it to determine whether an unconscionable term should be severed and the remainder of the arbitration provision enforced].)

These modifications do not change the judgment.

Pursuant to California Rules of Court, rule 8.1105(c), and for good cause shown, the requests by defendant and appellant Mercedes-Benz Financial Services USA LLC, and nonparties California New Car Dealers Association, Association of Southern California Defense Counsel, American Honda Motor Co., Inc., American Financial Services Association, California Financial Services Association, California Bankers

Association, and DIRECTV to publish the opinion are GRANTED. The opinion is ordered published in the Official Reports. (Cal. Rules of Court, rule 8.1105(b).)

ARONSON, J.

WE CONCUR:

O'LEARY, P. J.

BEDSWORTH, J.