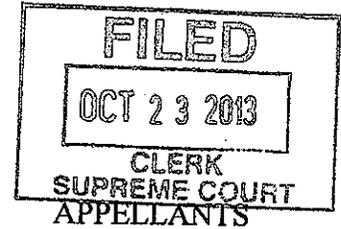


SUPREME COURT OF KENTUCKY
CASE NO. 2012-SC-687



BRITTANY DIXON, PATRICIA TABER
MARTHA ELIZABETH WATHEN-COLLIER,
MONICA SYKES, CANDICE WILLIAMS,
TASHA ALLEN, JESSICA GORDAN,
DARENA PRESCOT, TINA CAIN,
KIMBERLY MILAN AND AMY LEE

V. **BRIEF FOR APPELLANTS**

DAYMAR COLLEGES GROUP, LLC
DAYMAR LEARNING OF PADUCAH, INC.,
DAYMAR LEARNING OF OHIO, INC.
MARK GABIS, AND
DAYMAR LEARNING, INC.

APPELLEES

On Review from Court of Appeals
Case No. 2010-CA-002039-MR
Appeal from McCracken Circuit Court
No. 10-CI-0132
Judge Tim Kaltenbach

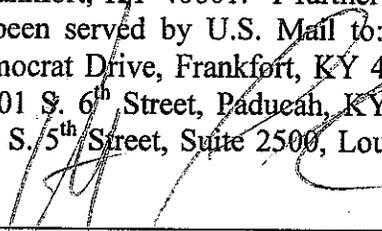
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CERTIFICATE OF SERVICE

I hereby certify that the original and ten copies of this Brief have been sent via UPS overnight delivery to Susan Stokley Clary, Clerk, Kentucky Supreme Court, State Capitol Building, Room 209, 700 Capitol Avenue, Frankfort, KY 40601. I further certify that true and accurate copies of this Brief have been served by U.S. Mail to: Samuel P. Givens, Jr., Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, KY 40106; Hon. Tim Kaltenbach, McCracken Circuit Court, 301 S. 6th Street, Paducah, KY 42003; R. Kenyon Meyer, Dinsmore & Shohl, LLP, 101 S. 5th Street, Suite 2500, Louisville, KY 40202.



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I. INTRODUCTION

Movants, Brittany Dixon, Patricia Taber, Martha Elizabeth Wathen-Collier, Monica Sykes, Candice Williams, Tasha Allen, Jessica Gordan, Darena Prescott, Tina Cain, Kimberly Milan and Amy Lee (collectively “Daymar Students”), were induced to enroll in Daymar College, a for-profit institution, with promises of full credit-transferability, job placement and favorable financial aid terms, among other things. Over time, the Daymar Students learned that these promises were false.

Thereafter, the Daymar Students filed a class action suit against Appellants, Daymar Colleges Group, LLC, Daymar Learning of Paducah, Inc., Daymar Learning of Ohio, Inc., Daymar Learning, Inc. and Mark Gabis (collectively “Daymar” or “Appellants”). Without filing an answer, Daymar filed a Motion to Dismiss the action and compel arbitration. Daymar argued that the Student Enrollment Agreement signed by all the Daymar Students contained an arbitration provision which allowed Daymar to compel arbitration and avoid a lawsuit.

The McCracken Circuit Court denied Daymar’s motion with respect to all eleven Daymar Students, yet compelled four other students to arbitration. Daymar appealed the denial of its motion to compel arbitration with respect to the eleven Daymar Students. The Court Of Appeals reversed ignoring this Court’s opinion in *Schnuerle v. Insight Communs., Co. L.P.*, 376 S.W.3d 561 (Ky. 2012) and the Findings of Fact of the Circuit Court. The Circuit Court’s Judgment denying arbitration should be reaffirmed, and there is ample evidence supported by the Circuit Court’s Findings of Fact for this Court to also find the agreement unconscionable beyond the cost analysis of the Circuit Court.

II. STATEMENT CONCERNING ORAL ARGUMENT

Oral argument would benefit this Court and enable the panel to further distinguish and understand the issues and legal arguments presented herein. The Daymar Students anticipate that the panel would benefit from questioning counsel concerning the record and the issues presented after reviewing the submitted briefs. Accordingly, the Daymar Students request oral argument in this case.

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IV. STATEMENT OF THE CASE

Daymar College is a for-profit institution offering Bachelors and Associates degrees in such fields as Medical Assisting, Paralegal Studies, and Billing and Coding. Over the last several years, Daymar has operated Kentucky campuses in Paducah, Clinton, Madisonville, Russellville, Owensboro, Louisville, Bowling Green, Scottsville, Bellevue and Albany, as well as several in Ohio, Indiana and Tennessee.

Daymar recruits students aggressively and induces students to enroll in and attend Daymar by making material, false and misleading representations, including promising full transferability of Daymar credits to other institutions of higher learning and promising students jobs in their fields of study upon graduation. In fact, virtually no Daymar credits are transferrable and very few students obtain any sort of job in their fields of study after graduation.¹ Daymar's false representations of transferability and job placement induced, and were intended to induce the Daymar Students to enroll in Daymar.

The Daymar Students have brought against Daymar allegations of civil conspiracy, breach of contract, breach of implied contract, fraudulent inducement, violations of Kentucky consumer protection statutes, fraud, negligent misrepresentation, violations of Kentucky antitrust statutes, and violations of Kentucky proprietary education statutes. The Daymar Students attended Daymar College in Paducah, Kentucky during various times over the last several years. They seek to represent a class of similarly situated current and former Daymar Students who have been harmed by Daymar's fraudulent and deceptive business practices.

¹ Trial Court Findings of Fact and Conclusions of Law. ¶¶ 3-14, 23, R. 398-406 (hereinafter "Findings of Fact"), attached hereto at Appendix A.

Each of the Daymar Students signed a Student Enrollment Agreement (“agreement”) when they enrolled. A Daymar Admissions Representative and Campus Director also signed the agreement. The agreement does not identify which of the Appellees is the signatory to the agreement.

The agreement is one page, front and back.² The prospective students only signed the front of the agreement. In addition to the enrollment agreement, a whole package of documents was given to the students, which were not part of the agreement but to the students were indistinguishable. The subject arbitration provision is contained in the last paragraph on the back page of the actual enrollment agreement. It is of the same type and font as the surrounding text and is not specially marked or identified as being an arbitration provision. It is virtually indistinguishable from the other terms on the same page and is printed on small, dense, single-spaced type.

Prospective students had to fill out, sign, and submit the enrollment agreement to attend Daymar. They also had to put their initials next to a statement that read:

I HAVE READ BOTH PAGES OF THIS STUDENT
ENROLLMENT AGREEMENT BEFORE I SIGNED IT
AND I RECEIVED A COPY OF IT AFTER I SIGNED IT.

The Daymar Students were not offered the opportunity to negotiate any of the terms, and the enrollment agreements demonstrate that none of the Daymar Students crossed out or modified any of Daymar’s preprinted terms.³

Also above each student’s signature on the front page is language of incorporation, which reads:

This Agreement and any applicable amendments, which are
incorporated herein by reference, are the full and complete

² Findings of Fact, ¶ 17, R. 403-404.

³ Student enrollment agreements, R. 71-100.

agreement between me and the College. By signing this Agreement, I confirm that no oral representations or guarantees about enrollment, academics, financial aid or career employment prospects have been made to me, and that I will not rely on any oral statements in deciding to sign this Agreement. My enrollment is not complete and this Agreement is not in effect until it is signed by an Authorized College Official.

The incorporating language says nothing about additional terms on the back of the agreement. The incorporating language is not clearly identified and blends in with the rest of the agreement.

It is undisputed that none of the Daymar Students were aware of the existence of the back page to the agreement, which contained the arbitration provision. No one from Daymar told the Daymar Students to turn the agreement over or even that the agreement had a back page. None of the Daymar Students read the back page and it is undisputed that Daymar enrollment representatives knew they did not read the back of the agreement.

The agreement, and all other documents Daymar required the Daymar Students to sign, was drafted wholly by Daymar. There is no evidence that the Daymar Students were given the opportunity to negotiate the agreement or modify any terms before signing. In order to enroll, they were required to sign the agreement the way it was.

The arbitration provision is replete with one-sided terms that require the Daymar Students to abandon numerous statutory and legal rights and are designed to shield Daymar from the consequences of its fraud: (1) Students (who upon graduation typically earn \$9.00 an hour or so as prep cooks or cashiers) must pay half the cost of arbitration, including the arbitrator's substantial fee, thereby virtually ensuring that students (saddled with student loans they already cannot pay) cannot afford to pursue their claims; (2)

recovery is unlawfully limited, requiring students to pay their own attorneys' fees, thereby ensuring that few if any students can pursue claims against Daymar, and; (3) though not stated in this enrollment agreement, students who abide by Daymar's arbitration provision unknowingly waive their constitutional right to a jury trial and right of appeal.

On August 27, 2010, the trial court heard argument on Daymar's motions to compel arbitration, and the parties put forth evidence solely on whether the arbitration provision was unconscionable and whether arbitration would be prohibitively expensive to the Daymar Students. Along with their own testimony, the Daymar Students also called as witnesses Daymar corporate representative, Shannon Jones, and attorney, David Kelly, who offered testimony concerning the expenses of arbitration.

The court heard undisputed testimony that no one from Daymar explained to the Daymar Students what arbitration was or that, by signing the agreement, they were agreeing to arbitrate all claims against Daymar. Daymar had every opportunity to present evidence refuting the Daymar Students' claims that they were unaware that the agreement contained an arbitration provision. Neither Robert Traas, the President of Daymar College Paducah whose affidavit is in the record⁴, nor Shannon Jones, refuted the fact that the Daymar Students were not told about the arbitration provision, that they did not read the arbitration provision or that they were not aware of the back page to the agreement.⁵

Shannon Jones, Daymar's corporate representative, testified that Daymar enrollment counselors "never showed anybody an arbitration clause or went over it with

⁴ Traas Affidavit, R. 167-168.

⁵ 8/27/10 Hearing, at 13:56:10-13:56:15.

them.”⁶ Likewise, when she was Daymar’s director of admissions, she never told any prospective students that they were agreeing to arbitration, even though she was aware of the arbitration provision.⁷ She also never told other admissions counselors to disclose the arbitration provision or explain what it meant or how it would impact the students.⁸

No one from Daymar ever discussed the arbitration provision with Shannon Jones or explained to her what it meant or how to explain it to prospective students.⁹ She testified that her understanding of the arbitration provision was based on her own interpretation.¹⁰

In five years, Jones has never had a prospective student ask what the arbitration provision means.¹¹ If a prospective student were to ever inquire as to its meaning, she testified that she could call Daymar’s corporate attorney, though she was unsure whether that attorney worked in the corporate office or was a private attorney.¹² While there was at least one Daymar employee at Paducah’s campus who could explain every other aspect of the enrollment agreement and financial aid documents filled out by the Daymar Students, there was no one on-site qualified or capable of explaining the arbitration provision.¹³

The Daymar Students felt pressure from the Daymar enrollment personnel to quickly sign the enrollment agreement. While Shannon Jones testified that she met with prospective students for over one hour, most Daymar Students stated they met with

⁶ 8/27/10 Hearing, at 13:50:28-13:50:41.

⁷ 8/27/10 Hearing, at 13:51:10-13:51:27.

⁸ 8/27/10 Hearing, at 13:51:31-13:51:42.

⁹ 8/27/10 Hearing, at 13:52:28-13:52:34; 13:53:21-13:53:26.

¹⁰ 8/27/10 Hearing, at 13:53:08-13:53:11.

¹¹ 8/27/10 Hearing, at 13:55:42-13:55:45.

¹² 8/27/10 Hearing, at 13:57:30-13:57:35.

¹³ 8/27/10 Hearing, at 13:57:40-13:58:00.

Daymar representatives from between thirty (30) minutes to one hour.¹⁴ During this initial 30-60 minute meeting, they were required to take at least one twelve minute test (many took the test multiple times), fill out a questionnaire, go through an interview, view a PowerPoint presentation, and fill out financial aid paperwork, which took much longer than filling out the enrollment documents.¹⁵ Many Daymar Students also took a tour of the Daymar campus. They spent only a few minutes with an enrollment counselor, during which time they were expected to read and sign at least twelve pages of documents.¹⁶

Several Daymar Students testified they went to Daymar simply to acquire information about possibly enrolling at a later date and left the campus shortly thereafter having just enrolled.¹⁷ Martha Collier testified she did not even understand she had enrolled at Daymar until she received a letter from Daymar alerting her that classes were starting soon.¹⁸

During the enrollment process, the Daymar Students were not given the opportunity to read the enrollment documents, to ask questions or even to look at what they were signing.¹⁹ At no time did Daymar representatives ask the Daymar Students if they had any questions about what they were signing. They testified that they were told to sign the enrollment documents now and to read them when they got home.²⁰

¹⁴ 8/27/10 Hearing, at 09:05:57-09:06:18; 10:06:45-10:06:49; 10:08:28-10:08:35; 10:39:53-10:39:55; 11:29:34-11:29:47; 11:55:50-11:55:58.

¹⁵ Findings of Fact, ¶16.

¹⁶ 8/27/10 Hearing, at 09:06:24-09:07:44; 10:08:33-10:09:25; 10:40:48-10:41:25; 11:30:16-11:30:25.

¹⁷ 8/27/10 Hearing, at 09:05:10-09:07:02; 10:06:26-10:07:02; 10:38:50-10:39:18; 11:53:50-11:54:15.

¹⁸ 8/27/10 Hearing, at 11:56:1-11:56:26.

¹⁹ 8/27/10 Hearing, at 09:08:35-09:08:42; 09:12:20-09:12:27; 09:44:08-09:44:20; 10:09:34-10:10:42; 10:41:30-10:41:37; 10:42:44-10:42:50; 10:43:13-10:43:24; 11:32:07-11:32:10; 11:34:10-11:34:30; 12:00:54-12:01:00; 12:03:43-12:03:50.

²⁰ 8/27/10 Hearing, at 09:08:24-09:08:35; 09:11:25-09:11:35; 10:10:25-10:10:42; 10:42:52-10:42:54

The 2007 Daymar Student Handbook, which was given to every new student and is 140 pages long, is presumably what students are to rely upon when they have a question about their education. The handbook never mentions arbitration, even in the section entitled "Student Grievances".²¹

Attorney David Kelly testified as an expert witness at the evidentiary hearing. Kelly has vast experience with arbitration and is knowledgeable concerning the costs of arbitration and arbitration procedures. He offered undisputed testimony that parties are required to pay anticipated arbitration costs up front. The trial court found that the typical arbitrator charges between \$300 and \$350 per hour.²² Should the Daymar Students' claims end up in front of a three-arbitrator panel, the cost could be as high as \$1,050 per hour. According to Kelly, a three to four day arbitration with only one arbitrator can cost tens of thousands of dollars.²³

For the first time, Daymar offered at the evidentiary hearing to "front" all the costs of arbitration.²⁴ It required, however, that if the Daymar Students were not successful at arbitration, they would be required to reimburse Daymar.²⁵ After the trial court denied Daymar's motion to compel arbitration, Daymar changed its offer from agreeing to front the costs of arbitration to agreeing to pay the arbitration fees. Daymar even argued that the trial court misunderstood its first offer, an argument which the trial

²¹ Included in "Brown Envelope # 3", marked as "Plaintiffs' Exhibit 8."

²² Findings of Fact, ¶ 22, R. 405

²³ 8/27/10 Hearing, at 14:30:13-14:30:18.

²⁴ 8/27/10 Hearing, at 15:12:20-15:13:15.

²⁵ 8/27/10 Hearing, at 14:58:03-14:58:07; 15:04:46-15:05:09.

court correctly discarded.²⁶ As the court noted, Daymar was attempting change the court's mind regarding unconscionability after it had already decided the issue.²⁷

David Kelly testified that he has never encountered a situation where the losing party is required to pay all the arbitration costs.²⁸ In fact, while an arbitrator can allocate the costs at the end of the proceeding, Kelly has never seen all costs allocated solely to one party or the other.²⁹

The trial court found that the Daymar Students cannot afford the costs of arbitration. The majority is either unemployed or has very low paying jobs.³⁰ They likewise would be unable to repay Daymar if it fronted the expenses of arbitration and they lost their claims. As both the trial court and Court of Appeals found, Daymar's offer to cover all expenses of arbitration was untimely.

After considering the voluminous briefing by the parties and conducting a day-long evidentiary hearing, the trial court correctly held that the U.S. Supreme Court decision of *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772 (2010) did not apply to this case, and the Court of Appeals agreed.³¹ The trial court refused to compel arbitration of the Daymar Students' claims, believing it unconscionable to require them to pay part of the costs of arbitration when many have an income at or below the national poverty

²⁶ Daymar Motion to Alter, Amend or Vacate, p. 5, R. 418; Order of Dec. 2, 2010, p. 2, R. 514.

²⁷ Order of Dec. 2, 2010, p. 2, R. 514. The Court of Appeals agreed that this belated offer would have had no impact on the conscionability of the cost-splitting provision. Court of Appeals Opinion at pp. 7-8, fn. 5, (hereinafter "Opinion"), attached hereto at Appendix B.

²⁸ 8/27/10 Hearing, at 15:04:11-15:04:25.

²⁹ 8/27/10 Hearing, at 14:47:17-14:47:25.

³⁰ 8/27/10 Hearing, at 09:03:37-09:03:57; 10:05:24-10:05:30; 10:37:13-10:37:15; 11:27:42-11:28:42; 11:48:40-11:48:58.

³¹ In affirming this portion of the findings of fact, the Court of Appeals found that the Daymar students properly challenged the unconscionability of the delegation provision, and stated "we believe the court was correct to review the issue of whether the delegation provisions was conscionable, and to make a determination as to same." Opinion at p. 19.

threshold.³² The trial court concluded it was likewise unconscionable to require the Daymar Students to pay an arbitrator's fees to determine the enforceability of the arbitration provision.³³ The trial court also concluded that each Daymar student owes between \$17,000 and \$34,000 in student loans.³⁴

The trial court was also correct in finding the arbitration agreement was procedurally unconscionable, holding:

The signed arbitration agreements were imposed as a condition of enrollment and were non-negotiable. Plaintiffs had a limited opportunity to read the agreements in an enrollment process that lasted less than ninety minutes. The enrollment process required that they sign numerous other documents in that period. While all of the Plaintiffs could read, many had only a GED, and none had earned a degree beyond high school. None knew, or reasonably could have known, what arbitration was. The agreement was contained in the last paragraph on the back page of a two page contract. The two page contract did not require the students' signature or initials on the second page. The arbitration provisions were not in bold type. Though admissions counselors were present when the enrollment agreements were signed, none explained the significance of the arbitration agreement to the students.³⁵

The trial court's finding of unconscionability based on the cost of arbitration and circumstances surrounding the making of the agreement is correct. However, the trial court could have determined the arbitration provision was unconscionable for other reasons, as well. For instance, the trial court easily could have based its determination on

³² The trial court found the following concerning the Daymar students' employment and income: Brittany Dixon -- \$7.55/ hour, income of \$13,000 in 2009; Amy Lee -- \$9.00 per hour; Darena Prescott -- unemployed; Candice Williams -- unemployed; Martha Collier -- unemployed; Patricia Taber -- income of \$15,311 in 2009; Monica Sykes -- income of \$14,969 (with spouse) in 2009; Tasha Allen -- income of \$15,969 in 2009; Jessica Gordan -- income of \$50,219 (with spouse) in 2008; Tina Cain -- income of \$4,906 in 2009; Kimberly Milan -- income of \$11,480.46 in 2008. Findings Of Fact And Conclusions Of Law 3-14.

³³ Findings of Fact, ¶ 24, R. 406.

³⁴ Findings of Fact, ¶ 23, R. 406.

³⁵ Findings of Fact, ¶ 37, R. 411.

the fact that the students' signatures on the first page of the agreement indicate that the arbitration provision is not integrated with the rest of the agreement.

In a 2-1 decision, the Court of Appeals reversed the conclusions of the trial court,³⁶ ignoring this Court's holding in *Schnuerle v. Insight Communs., Co. L.P.*³⁷

As such, the Daymar Students ask this honorable Court to apply its well-reasoned analysis from *Schnuerle* and reinstate the well-reasoned findings of fact and conclusions of law entered by the trial court.

³⁶ In his dissenting opinion, Judge Lambert wrote "[I] would affirm the findings and conclusions of the trial court in their entirety." Opinion, p. 23.

³⁷ *Schnuerle v. Insight Communs., Co. L.P.*, 376 S.W.3d 561, 577 (Ky. 2012).

V. ARGUMENT

A. Standard of Review

“Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.”³⁸ “[Q]uestions of law [] are reviewed *de novo* and legal conclusions made thereon by the circuit court will not be disturbed absent an abuse of discretion.”³⁹

Despite the well-settled rule of law that an appellate court should not upset a trial court’s findings of fact unless they are unsupported by substantial evidence, the Court of Appeals in this case seemingly ignored the trial court’s findings and imposed its own factual determinations where no showing was made that the trial court’s findings were clearly erroneous. Accordingly, the trial court’s findings of facts should be reinstated, and this Court should apply those facts to the issues presented to determine whether, under the circumstances outlined in the trial court’s order of October 7, 2010, its conclusion that the arbitration agreement in this case is unenforceable was an abuse of discretion.

B. There Is No Valid Agreement to Arbitrate Because The Arbitration Clause Is Not Integrated.⁴⁰

It is impossible, under Kentucky or federal law, for the Daymar Students to be bound by the terms of the second page of the agreement, which includes the arbitration provision, because it is not integrated with the rest of the agreement. Each of the Daymar

³⁸ CR 52.01.

³⁹ *Fischer v. MBNA Am. Bank, N.A.*, 248 S.W.3d 567, 570 (Ky. Ct. App. 2007).

⁴⁰ By choosing not to file a cross motion for discretionary review, Daymar has waived any argument regarding the delegation provision and whether the court is the proper forum to determine the enforceability of the arbitration provision as a whole, and the Court of Appeals’ decision in this regard stands. See *Fischer v. Fischer*, 348 S.W.3d 582, 596 (Ky. 2011)(a respondent is required to file a cross motion for discretionary review “where the judgment of the Court of Appeals affects him negatively, for example, ‘when the judgment fails to give the cross-appellant all the relief he has demanded or subjects him to some degree of relief he seeks to avoid’”).

Students signed their names in the middle of the enrollment agreement and not at the end, therefore all terms that followed the signature, including the arbitration provision, are excluded from the agreement.

According to KRS 446.060, “[w]hen the law requires any writing to be signed by a party thereto, it shall not be deemed to be signed unless the signature is subscribed at the end or close of the writing.” Kentucky courts apply this statute strictly, holding that parties are not bound by matters which do not appear above their signatures unless additional contract terms have been clearly incorporated by reference above the signature line.⁴¹ The incorporating language in the Daymar agreement is not clearly identified and instead, blends in with the rest of the document.⁴² It is interspersed with hundreds of other words over several paragraphs on the front page and the arbitration provision is hidden among an entire back page of lengthy paragraphs.

In *Massey-Ferguson, Inc. v. Utley*,⁴³ the Kentucky Supreme Court held invalid contractual language found after the signature line on the back of a contract, both because of its location after the signature and because the font was the same size as the general contents of the contract. In contrast, this Court in *Hertz Commercial Leasing Corp. v. Joseph*⁴⁴, overturned a trial court’s denial of a motion to compel arbitration in a case where, like here, terms of a contract were printed below the signature line and on the back of the page. The difference was that the *Hertz* agreement contained language that

⁴¹ *Consolidated Aluminum Corp. v. Krieger*, 710 S.W.2d 869, 872-73 (Ky. App. 1986). See also *J.P. Morgan Delaware v. Oryx Arabians II, Ltd.*, 825 F.Supp. 146 (W.D. Ky. 1993).

⁴² See Plaintiffs’ affidavits, R. 122-137.

⁴³ *Massey-Ferguson, Inc. v. Utley*, 439 S.W.2d 57 (Ky. 1969)

⁴⁴ *Hertz Commercial Leasing Corp. v. Joseph*, 641 S.W.2d 753 (Ky. App. 1982).

clearly and distinctly informed the parties that the agreement included terms below the signature line,⁴⁵ while in the present agreement, no such identification exists.

Above the signature line in the *Hertz* contract was the following incorporating language: "If Hertz accepts, Lessee agrees to hire from Hertz, and Hertz agrees to lease to Lessee, the equipment, on all the terms hereof, including the **Terms and Conditions** set forth below."⁴⁶ The Court held that, because the incorporating language was printed in larger letters and darker ink than the surrounding language, the terms found below the signature line were included in the agreement.

Where signatures appear below the incorporating language, which must be conspicuous by being in larger or other contrasting type or color, then those additional provisions, be they on the same page or the rear thereof, are binding upon the parties.⁴⁷

KRS 355.1-201(10) offers the following helpful definition:

Conspicuous, with reference to a term means so written that a reasonable person against whom it is to operate ought to have noticed it. Whether a terms is 'conspicuous' or not is a decision for the court. Conspicuous terms include the following:

1. A heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font or color to the surrounding text of the same or lesser size; and
2. Language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language.

⁴⁵ In *Hertz*, the Court noted that the applicable law required that "where the signatures appear below the incorporating language, *which must be conspicuous by being in larger or other contrasting type or color*, then those additional provisions, be they on the same page or the rear thereof, are binding upon the parties." *Id.* at 756 (emphasis added).

⁴⁶ *Id.* at 755. (Emphasis present in original contract).

⁴⁷ *Id.* at 756. Citing *Childers & Venters, Inc. v. Sowards*, 460 S.W.2d 343 (Ky. 1970).

In the present agreement, the incorporation language differs dramatically from that in *Hertz* and does not meet the statutory definition of “conspicuous”. Here, the language reads:

This Agreement and any applicable amendments, which are incorporated herein by reference, are the full and complete agreement between me and the College. By signing this Agreement, I confirm that no oral representations or guarantees about enrollment, academics, financial aid or career employment prospects have been made to me, and that I will not rely on any oral statements in deciding to sign this Agreement. My enrollment is not complete and this Agreement is not in effect until it is signed by an Authorized College Official.

As the Court of Appeals noted, “[t]he incorporation language does not reference the additional terms on the back of the agreement ...”⁴⁸ It is not clearly identified and blends in with the rest of the Agreement. Further, the incorporating language appears to only be “incorporating” amendments to the Agreement, none of which exist.⁴⁹ Therefore, the Court of Appeals’ reliance on the *Hertz* opinion as grounds for finding that the arbitration agreement was incorporated by reference is misplaced because the language at issue in the student enrollment agreement is extremely distinguishable.

The Court of Appeals found the terms on the back page were incorporated by reference apparently as a result of the Daymar Students initialing a completely separate line which referenced “both pages” of the Agreement in bold, capital letters. The court below overlooked that this line was not found in the same paragraph with the incorporating language and says nothing about the Daymar Students agreeing to terms on the back of the form.

⁴⁸ Court of Appeals opinion at 4.

⁴⁹ At no time has Daymar alleged that the terms on the back of the Agreement, including the arbitration clause, were an amendment to the Agreement and it would be illogical to make this assumption given that the preprinted form was created and given to the students at the same time.

There can be no honest argument that the incorporating language is conspicuous, as it is neither larger nor of contrasting type or color. Further, the language only attempts to incorporate "amendments", which do not exist. The only language that even acknowledges the back page does not indicate that by the student's signature she is in agreement with the provisions found on the back page. Daymar's incorporating language is insufficient to bind the parties to any terms found after the signature line, including the arbitration provision.

C. The Trial Court Properly Determined That The Arbitration Agreement Is Unconscionable And Therefore Unenforceable.

The trial court was correct in finding the arbitration provision unconscionable and its factual findings in this regard should not be disregarded. After listening to the testimony of several witnesses, including several of the Daymar Students, Daymar's Director of Admissions, Shannon Jones, and attorney David Kelly, who testified as an expert on the issue of the cost of arbitration proceedings, the trial court made lengthy and detailed Findings of Facts and Conclusions of Law, outlined in its October 7, 2010 Order, wherein the trial court concluded that the arbitration agreement is procedurally unconscionable. Among the facts considered by the trial court in making this determination is the fact that the arbitration provision is contained in a contract of adhesion drafted by Daymar, obtained by fraud, and imposed on the Daymar Students without the opportunity for negotiation. The specific arbitration clause is hidden from notice in fine print on the back of a preprinted form and contains numerous terms that operate to the severe and disproportionate disadvantage of the Daymar Students by preventing them from enforcing their legal rights and allowing Daymar to shield itself from the consequences of its fraud, all in violation of the law and public policy.

Unconscionability “is used by the courts to police the excesses of certain parties who abuse their right to contract freely. It is directed against one-sided, oppressive and unfairly surprising contracts.”⁵⁰ The doctrine of unconscionability has both a procedural and substantive element. The procedural element focuses on the existence of oppression or surprise, and the substantive element focuses on overly harsh or one-sided results. The Court need only determine that the contract is *either* procedurally or substantively unconscionable, through a “showing [of] oppressive conditions *or* manifestly inequitable results” it need not find both.⁵¹

1. The Arbitration Agreement is Procedurally Unconscionable.

Procedural unconscionability “pertains to the process by which an agreement is reached and the form of an agreement, including the use therein of fine print and convoluted or unclear language.”⁵²

a. The Trial Court’s findings of fact related to the making of the contract were not clearly erroneous.

The Court of Appeals noted the trial court’s findings of facts with regard to the basis for a finding of procedural unconscionability:

The signed arbitration agreements were imposed as a condition of enrollment and were non-negotiable. Plaintiffs had a limited opportunity to read the agreements in an enrollment process that lasted less than ninety minutes. The enrollment process required that they sign numerous documents in that period. While all of the Plaintiffs could read, many had only a GED, and none had earned a degree beyond high school. None knew, or reasonably could have known, what arbitration was. The agreement was contained in the last paragraph on the back page of a two-page contract. The two-page contract did not require the students’ signature or initials on the second page. The arbitration provisions were

⁵⁰ *Conseco Finance Servicing Corp. v. Wilder*, 47 S.W.3d 335, 341-42 (Ky. App. 2001) (citing *Cline v. Allis Chalmers Corp.* 690 S.W.2d 764 (Ky. App. 1985)).

⁵¹ See, e.g., *Louisville Bear Safety Serv. v. S. Cent. Bell Tel. Co.*, 571 S.W.2d 438, 440 (Ky. Ct. App. 1978)(emphasis added).

⁵² *Conseco* at 343 (quoting *Harris v. Greentree Financial Corp.*, 183 F.3d 173 (3rd Cir. 1999)).

not in bold type. Though admissions counselors were present with the enrolment agreements were signed, none explained the significance of the arbitration agreement to the students.⁵³

These findings of fact were based on sufficient evidence presented at the evidentiary hearing and should not be disturbed. "If supported by substantial evidence, the court's finding of fact is not clearly erroneous."⁵⁴ A reviewing court cannot simply substitute its own judgment for that of the trial court, which is in the better position to weigh the evidence and the credibility of the witnesses:

The trial court had sufficient evidence to support its findings. It heard the evidence and saw the witnesses, therefore, was in a better position than this court to make the finding of fact. *Gates v. Gates, supra. McCormick v. Lewis, Ky., 328 S.W.2d 415 (1959); Wells v. Wells, Ky., 412 S.W.2d 568 (1967)*. The finding of fact by the trial court may be set aside only if clearly erroneous. CR 52.01, 7Kentucky Practice, Clay 103. The conclusion which the Chancellor reached is not against the weight of the evidence. *Ingram v. Ingram, Ky., 385 S.W.2d 69 (1964)*. We are unwilling to substitute our decision for his judgment. *Stanifer v. Stanifer, Ky., 242 S.W.2d 981 (1951); Hatfield v. Hatfield, Ky., 417 S.W.2d 218 (1967)*.⁵⁵

As noted by the trial court, the arbitration provision at issue is in *no way* set apart from the remainder of the contract terms. While it occupies its own separate paragraph, it is not highlighted with a separate heading, the important terms are not highlighted in any manner, and nowhere does it mention that the Daymar Students are giving up their right to a jury trial. The Court of Appeals noted the same findings:

[T]he arbitration provision at issue *sub judice* is contained in the last paragraph on the back page. It is of the same type and font as the surrounding text, and was not specially marked or identified as being an arbitration provision.⁵⁶

⁵³ Court of Appeals opinion at 8 (*quoting* the trial court's October 7, 2010 Order at 15.)

⁵⁴ *Black Motor Co. v. Greene*, 385 S.W.2d 954, 956, 1964 Ky. LEXIS 169 (Ky. 1964)(internal citation omitted).

⁵⁵ *Justice v. Justice*, 421 S.W.2d 868, 870, 1967 Ky. LEXIS 94 (Ky. 1967); *see also, Mason v. Randolph*, 304 S.W.2d 913, 915, 1957 Ky. LEXIS 283 (Ky. 1957)(holding that even where directly conflicting evidence was presented to the trial court, the trial court functions as the trier of facts and his findings cannot be set aside unless clearly erroneous).

⁵⁶ Court of Appeals Opinion at 4.

Given the Court of Appeal's seeming agreement on this issue, at least, it cannot be said that the trial court's findings of fact are clearly erroneous. The facts set out by the trial court are thus the operative facts on which this Court must base its decision as to the enforceability of the arbitration provision in dispute.

b. Based on its factual findings, the Trial Court correctly concluded that the arbitration agreement is procedurally unconscionable.

With these facts as the backdrop, the question for this Court turns to whether the circumstances surrounding the making of the agreement render the agreement procedurally unconscionable and thus unenforceable, as concluded by the trial court. Courts use the doctrine of unconscionability to ensure parties do not abuse the right to contract freely. While Kentucky law does not set forth a clearly defined standard, this Court did recently address the procedural unconscionability of an arbitration agreement in *Schnuerle v. Insight Communs., Co. L.P.*,⁵⁷ and in doing so relied on the guidance of other jurisdictions' law on this issue. Other jurisdictions have noted that a finding of procedural unconscionability focuses on "unfair surprise."⁵⁸ Procedural unconscionability:

[P]ertains to the process by which an agreement is reached and the form of an agreement, including the use therein of fine print and convoluted or unclear language...[It] involves, for example, 'material, risk-shifting' contractual terms which are not typically expected by the party who is being asked to 'assent' to them and often appear [] in the boilerplate of a printed form.⁵⁹

⁵⁷ *Supra*, fn. 44.

⁵⁸ *Conseco* at 341.

⁵⁹ *Conseco* at 342 (quoting *Harris v. Green Tree Financial Corp.*, 183 F.3d 173, 181 (3rd Cir. 1999)).

Factors courts use to determine if an agreement is procedurally unconscionable include: 1) if the agreement is offered on a take it or leave it basis⁶⁰; 2) if the language of the agreement is not clear or conspicuous⁶¹; 3) if the agreement is part of a larger document⁶²; 4) if the terms are more favorable to one party⁶³; 5) if the agreement does not adequately explain the arbitration procedure⁶⁴; 6) whether the agreement was adequately explained to the person signing it⁶⁵; and 7) whether the person signing could have reasonably expected that such an agreement would be presented at the time of signing.⁶⁶

This is the approach taken by this Court in *Schnuerle* and in a more recent case, *Energy Home v. Peay*.⁶⁷ Specifically, in *Schnuerle*, this Court addressed the parties' procedural unconscionability arguments and found that the agreement at issue there was not procedurally unconscionable because these factors were not present:

The clause was not concealed or disguised within the form; its provisions are clearly stated such that purchasers of ordinary experience and education are likely to be able to understand it, at least in its general import; and its effect is not such as to alter the principal bargain in an extreme or surprising way. As noted by the trial court "[t]he provision is in clear and concise language. The title is in bold print..."⁶⁸

This Court made a similar determination in *Energy Home*. In that case, the Court considered arguments that an arbitration contract related to the purchase of a mobile home, but separate from the purchase agreement, was unconscionable. In relying on its

⁶⁰ *Howell v. NHC Health Care-Ft. Sanders, Inc.*, 109 S.W.3d 731, 735 (Tenn. Ct. App. 2003); *Broemmer v. Abortion Services of Phoenix, Ltd.*, 840 P.2d 1013, 1016 (Ariz. 1992).

⁶¹ *Wheeler v. St. Joseph Hospital*, 63 Cal. App. 3d 345, 359 (1976); *Howell*, 109 S.W.3d at 734; *In re Southern Indust. Mechanical Corp.*, 266 B.R. 827, 833 (W.D. Tenn. 2001).

⁶² *Howell*, 109 S.W.3d at 734.

⁶³ *Broemmer*, 840 P.2d at 1015.

⁶⁴ *Howell*, 109 S.W.3d at 734.

⁶⁵ *Howell*, 109 S.W.3d at 735; *Broemmer*, 840 P.2d at 1017; *Obstetrics and Gynecologists William G. Wixted, Patrick M. Flanagan, William Robinson, Ltd. v. Pepper*, 693 P.2d 1259, 1261 (Nev. 1985).

⁶⁶ *Broemmer*, 840 P.2d at 1017; *Wheeler*, 63 Cal. App. 3d at 357.

⁶⁷ *Energy Home v. Peay*, 2013 Ky. LEXIS 370, 2013 WL 4608187 (Ky. Aug. 29, 2013).

⁶⁸ *Schnuerle* at 576.

prior decision in *Schnuerle* and its analysis of the *Conseco* and *Concepcion* decisions, this Court again found that the arbitration agreement at issue was not procedurally unconscionable because it was not “hidden or obscured” and “clearly explains that arbitration means giving up the right to ... a jury trial”.⁶⁹ This Court further considered the undisputed fact that not only had the purchaser of the mobile home read the arbitration agreement, he had also viewed a video that explained the arbitration process and requirements.⁷⁰

Unlike the arbitration agreement in *Schnuerle* and *Energy Home*, the factors this Court considered in analyzing procedural unconscionability are implicated in the instant Agreement. Thus, applying the same analysis as that employed by this Court in those two cases, the trial court in this case was correct in determining that the arbitration provision is unconscionable. The arbitration provision at issue is hidden in a sea of boilerplate drafted by Daymar. It is very difficult to find, much less read or understand. It is located on the back of the enrollment agreement and is virtually indistinguishable from the mass of other terms on the same page. It is printed in small, dense, single-spaced type. The fact that the agreement even contains an arbitration provision is not prominent or highlighted in any way.⁷¹ No one from Daymar pointed out the arbitration clause or attempted to explain it. It does not even mention the fact that the student is waiving the right to a jury trial. The arbitration agreement is “so misleading as to amount to a deliberate deception precluding any mutuality of intent or understanding.”⁷² Thus, under

⁶⁹ *Energy Home*, 2013 Ky. LEXIS 370 at *11.

⁷⁰ *Id.*

⁷¹ As this Court noted in *Schnuerle*: “It is fundamental that the prominence of disclosure should be commensurate with the importance of the right being taken away.” *Id.* at 577.

⁷² *Paul Miller Ford, Inc. v. Rutherford*, 2007 Ky.App.LEXIS 494, *11 (Ky. Ct. App. 2007).

the same analysis the Court applied in *Schnuerle*, the arbitration agreement in this case is procedurally unconscionable.

Likewise, any argument by Daymar that the Daymar Students knew or reasonably should have known the contents of the arbitration agreement is not supported by the trial court's findings of fact. The trial court listened to the witnesses, weighing the credibility of each, and specifically found that the Daymar Students were unaware of the existence of the arbitration agreement, that no one from Daymar explained the arbitration provision to them, and that the Daymar Students had a limited opportunity to read the enrollment agreement during a short and busy enrollment process.⁷³ The trial court's findings in this regard are not clearly erroneous and cannot be set aside, since they are supported by sufficient evidence. Furthermore, as the trial court pointed out, the Daymar Students allege that they were fraudulently induced to sign the enrollment agreement, and a party is not presumed to know the terms of agreement when his signature is obtained by fraud:

Finally, Appellant argues that the arbitration clause is unconscionable because Commonwealth Dodge never told her that signing the vehicle purchasing agreement would result in a waiver of her right to trial by jury and appeal. But, "[i]t is the settled law in Kentucky that one who signs a contract is presumed to know its contents, and that if he has an opportunity to read the contract which he signs he is bound by its provisions, *unless he is misled as to the nature of the writing [90] which he signs or his signature has been obtained by fraud.*" *Clark v. Brewer*, 329 S.W.2d 384, 387 (Ky. 1959).⁷⁴

Further, the effect of contracts of adhesion on considerations of procedural unconscionability is equally dependent on factors from other jurisdictions and supports a finding of unconscionability here.⁷⁵ "A finding of a contract of adhesion is essentially a

⁷³ Findings of Fact at 15.

⁷⁴ *Hathaway v. Eckerle*, 336 S.W.3d 83, 89-90, 2011 Ky. LEXIS 21 (Ky. 2011)(emphasis added).

⁷⁵ See generally *Conseco*, *supra*.

finding of procedural unconscionability.”⁷⁶ It is beyond reasonable dispute that the enrollment agreement is a contract of adhesion. “A contract of adhesion is a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.”⁷⁷

Daymar’s own evidence and arguments establish that the arbitration provision is a contract of adhesion. The arbitration provision here was drafted by Daymar, “the party of superior bargaining strength,” and presented to the Daymar Students on a “take it or leave it basis”⁷⁸ -- sign the Agreement or you cannot attend Daymar. As Daymar admitted in its Court of Appeals Brief, “[the Students] could have read the contract, determined that they did not agree with its terms, then left.” This is a classic take it or leave it scenario. The eleven Agreements signed by the Daymar Students are identical, save any revisions made by Daymar. None of the Daymar Students modified or struck-out any of the provisions, and Daymar admits they would not have been allowed to do so. This uniformity and lack of modification alone establish that the Agreements are contracts of adhesion, making them “oppressive”, and strongly suggest that additional consideration should be paid to questions of their procedural unconscionability.

The inclusion of an arbitration clause in the Agreements signed by the Daymar Students is nothing more than surprise and deception on the part of Daymar. The reference to arbitration is in small print and is one of many paragraphs. It does not stand

⁷⁶ *Flores v. Transamerica Homefirst, Inc.*, 93 Cal.App. 4th 846, 853 (2001) (See also *Gatton v. T-Mobile USA, Inc.*, 152 Cal. App. 4th 571, 579 (2007); *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 160 (2005)).

⁷⁷ *Conseco, supra* at 342 (citing *Patterson v. ITT Consumer Financial Corporation*, 14 Cal.App. 4th 1659 (1993)).

⁷⁸ *Jones v. Bituminous Casualty Corp.*, 821 S.W.2d 798, 801 (Ky. 1991).

out visually and no effort has been made to highlight it. It references an agreement to arbitrate, but does not explain the nature and scope of the arbitration provision, what arbitration is, or the rights students would lose by arbitrating. The arbitration provision is “so misleading as to amount to a deliberate deception precluding any mutuality of intent or understanding.”⁷⁹

These facts are supported by sufficient evidence and not clearly erroneous. The trial court’s analysis mirrors that of this Court in *Schnuerle*. Therefore, the trial court’s conclusions cannot be said to amount to an abuse of discretion. As such, the arbitration agreement is procedurally unconscionable, and the trial court’s denial of Daymar’s motion to dismiss should be reinstated.

2. The Arbitration Agreement is Substantively Unconscionable and Therefore Unenforceable.

“Substantive unconscionability ‘refers to contractual terms that are unreasonably or grossly favorable to one side and to which the disfavored party does not assent.’”⁸⁰ As a threshold matter, it is important to note that substantive unconscionability challenges are not necessarily arbitration-specific and thus do not run afoul of the FAA mandates. As such, these arguments are properly considered by a court when a party challenges the enforceability of an arbitration provision. As an example of a substantive unconscionability challenge in a non-arbitration provision, this Court in *Schnuerle* held that a confidentiality provision was substantively unconscionable based on the same principles it used to determine that the arbitration provision in the same agreement was not substantively unconscionable.⁸¹ Under the substantive unconscionability principles

⁷⁹ *Paul Miller Ford, supra* at 11-12.

⁸⁰ *Conseco* at 343 (quoting *Harris v. Greentree Financial Corp.*, 183 F.3d 173 (3rd Cir. 1999)).

⁸¹ *Schnuerle, supra*, at 578.

the Court outlined in *Schnuerle* and applicable to any contract provision in general, the arbitration provision in this case is substantively unconscionable and therefore unenforceable against the Daymar Students.

a. A cost analysis is appropriate when determining whether an arbitration agreement is substantively unconscionable.

Much like the trial court made findings of fact related to the actual “making” of the agreement, the trial court also considered evidence of the Daymar Students’ financial situation (including income and indebtedness) and the costs of arbitration. Specifically, the trial court found, based on significant evidence (both testimonial and documentary), that each Student lacked sufficient funds to cover the likely costs of arbitration alone, and that only one Student had family resources that could potentially cover the costs of arbitration.⁸² Having made these factual findings, the trial court was correct in applying a cost analysis to determine if the arbitration agreement is substantively unconscionable.

The trial court, applying *Conseco Finance Service Corp. v. Wilder*, 47 S.W.3d 335 (Ky. App. 2001) and *Green Tree Financial Corp-Alabama v. Randolph*, 531 U.S.79 (2000), held “an arbitration provision is unenforceable under the FAA or the KUAA as applied to state law claims if arbitration is prohibitively expensive.” The Court of Appeals discarded the trial court’s findings and conclusions. It held:

A very large portion of the citizenry of this Commonwealth would be able to avoid a contractual commitment to arbitrate merely by showing the court that they made less than a certain salary.⁸³

⁸² As discussed above, the trial court’s findings of fact related to the financial situation of the Students and the costs of arbitration should only be disturbed if clearly erroneous and not supported by sufficient evidence. That is not the case here, and the trial court’s findings should not be disregarded.

⁸³ Court of Appeals opinion at 25.

This concern does not justify an appellate court setting aside the sound and reasonable conclusions of a trial court. The Court of Appeals ignored Kentucky and Sixth Circuit precedent permitting a cost-prohibitiveness analysis. Instead, the Court of Appeals held that a cost-prohibitiveness analysis is limited to disputes over the arbitrability of federal statutory claims. It reasoned that where no federal statutory causes of action are alleged, the Federal Arbitration Act (“FAA”) trumps any conflicting state law interest and its pro-arbitration policy outweighs a claimant’s ability to afford arbitration.⁸⁴ However, this does not take into account a state’s legitimate interest in ensuring that its residents can avail themselves of generally applicable contract defenses, as recognized in the Kentucky Uniform Arbitration Act and the Federal Arbitration Act.⁸⁵

The Court of Appeals relied on the Sixth Circuit opinion of *Stutler v. T.K. Constructors, Inc.* for its holding that cost-prohibitiveness analyses are limited to federal statutory claims.⁸⁶ It incorrectly concluded that *Stutler* “clearly limited a cost-prohibitiveness analysis to disputes over the arbitrability of federal statutory claims.”⁸⁷ As a preliminary matter, *Stutler* does not say that a cost analysis is reserved for purely federal statutory claims. Rather, it places the interests of federal statutory claims above those of state statutory claims and addresses whether federal defenses are available to state-law claims. As Justice Moore pointed out in her concurring opinion, the “rejection of the extension of the cost-deterrent defense to state-law disputes as a *matter of federal law* is immaterial to the issue of whether or not such a defense could properly be

⁸⁴ Court of Appeals opinion at 24-25.

⁸⁵ See 9 U.S.C. §2, and KRS 417.050.

⁸⁶ *Stutler v. T.K. Constructors, Inc.*, 448 F.3d 343 (6th Cir. 2009).

⁸⁷ Court of Appeals opinion at 24.

recognized as a matter of state law.”⁸⁸ In fact, numerous other federal and state courts, post-*Stutler*, have applied a cost analysis to strictly state law claims.⁸⁹ Even the United States Supreme Court, in one of the most recent opinions on this issue, has recognized a state law cost-deterrent defense would need to be considered by a court:

Jackson's other two substantive unconscionability arguments assailed arbitration procedures called for by the contract--the fee-splitting arrangement and the limitations on discovery--procedures that were to be used during arbitration under both the agreement to arbitrate employment-related disputes and the delegation provision. It may be that had Jackson challenged the delegation provision by arguing that these common procedures as applied to the delegation provision rendered that provision unconscionable, the challenge should have been considered by the court.⁹⁰

Indeed, it is nonsensical for federal courts to apply a cost analysis to federal statutory claims, while at the same time barring states from applying the same analysis to state statutory claims. Accordingly, the U.S. Supreme Court recognized that “even though contract defenses, e.g., duress and unconscionability, slow down the dispute resolution process, federal arbitration law normally leaves such matters to the States.”⁹¹

In addition to misconstruing the meaning of *Stutler*, the court below also completely ignores the application of *Conseco* to this matter. In *Conseco*, the plaintiffs failed to demonstrate that the arbitration agreements would not afford them the same opportunity to present their claims as would litigation.⁹² The *Conseco* court rejected the *presumption* that arbitration was unconscionable, but it clearly stated that if the

⁸⁸ *Stutler*, 448 F.3d at 347 (Moore, J., concurring)(emphasis in original).

⁸⁹ See, eg, *Cicle v. Chase Bank*, 583 F.3d 549 (8th Cir. 2009); *Montgomery v. Corinthian Colleges*, 2011 U.S. Dist. LEXIS 31651 (N. D. Ill.); *Oesterle v. Atria Mgt. Co.*, 2009 (D. Kan.); *Enderlin v. XM Satellite Radio*, 2008 U.S. Dist. LEXIS 27668 (E. D. Ark.); *Moore v. Ferrellgas*, 533 F. Supp. 2d 740 (W. D. Mi. 2008).

⁹⁰ *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772, 2780, 177 L. Ed. 2d 403, 2010 U.S. LEXIS 4981, (U.S. 2010) (allowing for the possibility of a cost-deterrent defense but disallowing it in this case because the challenge in this case went to the arbitration agreement as a whole, not just to the delegation provision).

⁹¹ *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1760, 179 L. Ed. 2d 742, 2011 U.S. LEXIS 3367, (U.S. 2011).

⁹² *Conseco*, *supra*, at 344.

arbitration agreement, in practice, denied the plaintiffs adequate opportunity to vindicate their substantive claims, it would constitute legitimate grounds for a renewed objection.⁹³

The critical issue for the court in *Conseco* was the denial of an opportunity to present the claim, not cost-prohibitiveness, specifically. Inability to arbitrate at all due to cost-prohibitiveness presents a greater bar to the presentation of a claim than the one-sidedness argued in *Conseco*. As Justice Moore pointed out in her concurring opinion in *Stutler*, *Conseco* “leaves the door open to the possibility of recognizing a cost-related claim of unconscionability”⁹⁴ based on state law:

Thus at the same time that *Conseco* rejected the attempt to avoid an arbitration clause based on a mere presumption of unconscionability, *Conseco* implied that Kentucky law might allow a plaintiff who believes that the costs of arbitration “prevent or unfairly hinder” them from making a meaning presentation of their claims to attach the arbitration clause either pre- or post-arbitration *if* that plaintiff can meet some level of proof about the hindrance caused by the costs of the arbitration procedure.⁹⁵

Likewise, the court below did not consider this Court’s opinion in *Schnuerle*, which was decided just prior to the Court of Appeals rendering its decision in this case and in which this Court clearly indicates that the costs of arbitration may warrant a finding of unconscionability.⁹⁶ In *Schnuerle*, this Court analyzed the enforceability of a class action waiver contained in the written services agreement between the parties, as well as the enforceability of the arbitration agreement contained therein. In upholding

⁹³ *Id.*

⁹⁴ *Id.* at 349 (Moore, J., concurring).

⁹⁵ *Id.*

⁹⁶ Appellants are aware of the outlying opinion from the Middle District of Tennessee, *Dean v. Draughons Jr. College, Inc.*, 917 F.Supp. 751 (M.D. TN Jan. 16, 2013), wherein it concluded that this Court’s decision in *Schnuerle* runs afoul of the U.S. Supreme Court’s opinion in *Concepcion*. However, *Dean* is unpersuasive here for several reasons. First, a foreign district court’s interpretation of Kentucky state law is not binding on this Court. Certainly this Court is in the best position to interpret this state’s laws, in accordance with the parameters set out by the U.S. Supreme Court. Specifically, the district court in *Dean* neglected to consider that the ruling in *Concepcion* was specifically limited to California’s *Discover Bank* rule which deals with class action waivers and which is not at issue here. Further, the district court in *Dean* was primarily concerned with a delegation clause, which is not at issue here. (See FN 49, *supra*.) Finally, the district court did not consider the many other unconscionability arguments that are present in this case.

both, this Court thoroughly analyzed the recent U.S. Supreme Court's ruling in *Concepcion* and its application to the defense of unconscionability. This Court noted that it:

strongly agree[s] with Appellants that *Concepcion* does not disturb the basic principle that an arbitration clause is not enforceable if it fails to provide plaintiffs with an adequate opportunity to vindicate their claims. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985) ("[S]o long as the prospective litigant effectively may vindicate [his] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."); *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 81, 121 S. Ct. 513, 148 L. Ed. 2d 373 (2000) ("the existence of large arbitration costs may well preclude a litigant . . . from effectively vindicating such rights"); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 129 S. Ct. 1456, 173 L. Ed. 2d 398 (2009). Accordingly, arbitration clauses certainly may continue to be struck down as unconscionable if their terms strip claimants of a statutory right, which cannot be vindicated by arbitration, because, for example, the arbitration costs on the plaintiff are prohibitively high; or the location of the arbitration is designated as a remote location.⁹⁷

Based on the above, it was not an abuse of discretion for the trial court to entertain a cost deterrent analysis as part of determining whether an arbitration agreement hinders the Daymar Students from presenting their claims, and thereby conclude that the arbitration agreement is substantively unconscionable. The arbitration provision in this case requires the Daymar Students to split with Daymar the costs and fees of arbitration, including the cost of the arbitrator. The trial court found that this arrangement was unconscionable due to high cost of arbitration and the Daymar Students' low income. "Costs [of arbitration] would be prohibitively expensive to decide the merits of the

⁹⁷ *Schnuerle* 376 S.W.3d at 573 (emphasis added). See also, *Energy Home* 2013 Ky.LEXIS at *11 ("Certainly, unconscionability is one of the grounds upon which any contract may be revoked.")(citing *Concepcion*, *Schnuerle* and *Conseco*.).

claims, or even the enforceability of the arbitration agreement.”⁹⁸ The Sixth Circuit has previously determined that a plaintiff “forced to arbitrate a typical \$60,000 employment discrimination claim will incur costs...that range from three to nearly *fifty* times the basic costs of litigating in a judicial, rather than arbitral, forum.”⁹⁹ The same could be true here.

Pursuant to the Rules of the American Arbitration Association (AAA) that Daymar argues are applicable to any arbitration in this case, the Daymar Students would be required to post substantial sums of money at the outset of the arbitration.¹⁰⁰ At best, the Daymar Students would have to convince the arbitrator at the end of the arbitration proceedings to relieve them of this burden and to be reimburse them for the monies already paid for arbitration—money they do not have.¹⁰¹ At worst, that cost could be allocated to the Daymar Students entirely. This cost and fee splitting “scheme is unconscionable because it imposes on some consumers costs greater than those a complainant would bear if he or she would file the same complaint in court.”¹⁰² It operates as a seriously and disproportionately one-sided burden on a plaintiff’s ability to vindicate her statutory rights and hold defendants accountable for their fraud.

In some cases, the potential of incurring large arbitration costs and fees will deter potential litigants from seeking to vindicate their rights in the arbitral forum. Under *Gilmer*, the arbitral forum must provide litigants with an effective substitute for the judicial forum; if the fees and costs of the arbitral forum deter potential litigants, then that forum is clearly not an effective, or even adequate, substitute for the judicial forum. Second, where that prospect deters potential litigants, the arbitration agreement, or,

⁹⁸ Findings of fact, ¶24, R. 406.

⁹⁹ *Morrison v. Circuit City Stores*, 317 F.3d 646, 669 (6th Cir. 2003).

¹⁰⁰ AAA Commercial Arbitration Rules R-49-R-52, O-8.

¹⁰¹ See affidavits, R. 122-137.

¹⁰² *Ting v. AT&T*, 319 F.3d 1126, 1149 (9th Cir. 2003) (citations omitted).

at minimum, the cost-splitting provision contained within it, is unenforceable.¹⁰³

As the trial court noted, each of the Daymar Students owes \$17,000-\$34,000 in student loans, holds a low paying job or is unemployed, and would be required to pay “significant arbitration costs.”¹⁰⁴ Forcing the Daymar Students to pay half of the arbitration fees and costs is significantly more burdensome and onerous to them than to Daymar. It will cost the Daymar Students a great deal more than if they were to proceed with their case in court, thus the cost and fee splitting provision is unconscionable.

b. Lack of mutual consideration renders the agreement unconscionable.

The arbitration clause at issue here also fails because there is a lack of mutual consideration/obligation. An essential element of every contract is that there be mutuality of obligation by the parties to the agreement. If lacking, an arbitration agreement is unconscionable. “An arbitration agreement may be invalidated for the same reasons for which any contract may be invalidated, including forgery, unconscionability, and *lack of consideration*.”¹⁰⁵

Here, although Daymar’s arbitration agreement appears on its face to require both parties to submit any dispute to arbitration, the reality is that Daymar’s obligation is meaningless. The only claim Daymar would be likely to bring against the student would be a claim for failure to pay for services rendered – for instance, if a student enrolled in a particular program, but then failed to pay his tuition, Daymar may seek to collect the past

¹⁰³ *Morrison* at 659.

¹⁰⁴ Findings of fact, ¶23, R. 406.

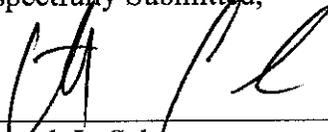
¹⁰⁵ *Fazio v. Lehman Bros., Inc.*, 340 F.3d 386, 393, (6th Cir. 2003)(citing *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 116 S. Ct. 1652, 134 L. Ed. 2d 902, (U.S. 1996)(emphasis added)). See also, *Cooper v. MRM Inv. Co.*, 367 F.3d 493, 498, (6th Cir. 2004)(“Thus, generally applicable state-law contract defenses like fraud, forgery, duress, mistake, **lack of consideration or mutual obligation**, or unconscionability, may invalidate arbitration agreements.”)(emphasis added).

due amounts. However, it is undisputed that the Daymar Students all were induced to obtain student loans to finance their education, to the tune of up to \$34,000. Thus, Daymar has already been paid for its services and has no claim against the Daymar Students for which it is giving up its right to sue. Because Daymar's obligation is a pretense, the arbitration agreement is unconscionable.

VI. CONCLUSION

For the reasons enumerated herein this Court should reverse the Court Of Appeals and reaffirm the McCracken Circuit Court's denial of Daymar's request for arbitration.

Respectfully Submitted,



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VII. APPENDIX

A. Trial Court Findings of Fact and Conclusions of Law

B. Court of Appeals Opinion