IN THE SUPREME COURT FOR THE STATE OF MISSISSIPPI

CASE NO. 2007-CA-01771

ECLECIUS L. FRANKLIN — APPELLANT

VERSUS

KIMBERLY MOORE and DANA BISHOP — APPELLEES

ON APPEAL FROM THE
CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT
OF HINDS COUNTY, MISSISSIPPI

BRIEF OF APPELLEES KIMBERLY MOORE and DANA BISHOP

ORAL ARGUMENT REQUESTED

SUBMITTED BY:

J. HOWARD THIGPEN – BAR [redacted]
BRIAN A. CLARK – BAR [redacted]

THIGPEN & CLARK
16 NORTHTOWN DRIVE
SUITE 204
JACKSON, MISSISSIPPI 39211
PHONE: (601) 957-7776
FAX: (601) 957-7769

ATTORNEYS FOR APPELLEES

IN THE SUPREME COURT FOR THE STATE OF MISSISSIPPI
CASE NO. 2007-CA-01771

ECLECIUS L. FRANKLIN — APPELLANT

VERSUS

KIMBERLY MOORE and DANA BISHOP — APPELLEES

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and/or entities have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court may evaluate possible disqualifications or recusal.

1. Honorable J. Howard Thigpen
Honorable Brian A. Clark
Thigpen & Clark
16 Northtown Drive, Suite 204
Jackson, Mississippi 39211 . . . . . Attorneys for Kimberly Moore and Dana Bishop

2. Kimberly Moore
c/o J. Howard Thigpen, Esq.
Brian A. Clark, Esq.
Thigpen & Clark
16 Northtown Drive, Suite 200-B
Jackson, Mississippi 39211 . . . . . Appellee

3. Dana Bishop
c/o J. Howard Thigpen, Esq.
Brian A. Clark, Esq.
Thigpen & Clark
16 Northtown Drive, Suite 200-B
Jackson, Mississippi 39211 . . . . . Appellee

4. Honorable Myles A. Parker
Honorable Jay Barbour
Honorable Adam B. Emerson
CARROLL, WARREN & PARKER, PLLC
188 E. Capitol Street, Suite 1200 (39211)
Post Office Box 1005
Jackson, Mississippi 39215-1005 . . . . . Attorneys for Eclecius L. Franklin

5. Eclecius L. Franklin
c/o Myles A. Parker, Esq.
Jay Barbour, Esq.
Adam B. Emerson, Esq.
CARROLL, WARREN & PARKER, PLLC
188 E. Capitol Street, Suite 1200 (39211)
Post Office Box 1005
Jackson, Mississippi 39215-1005 . . . . . Appellant

6. Honorable Winston L. Kidd
Post Office Box 327
Jackson, Mississippi 39205-0327 . . . . . Hinds County Circuit Court Judge

RESPECTFULLY SUBMITTED, this the 29th day of May, 2008.

THIGPEN & CLARK

J. HOWARD THIGPEN, ESQ. [redacted]
BRIAN A. CLARK, ESQ. [redacted]

Attorneys for Appellees, Kimberly Moore and Dana Bishop

STATEMENT FOR ORAL ARGUMENT

Pursuant to Rule 34(b) of the Mississippi Rules of Appellate Procedure, Appellees hereby request oral argument. While there are several issues presented before the Court that would assist both the Court and the Bar in later jurisprudence, oral argument would be helpful in addressing three particular issues: (1) whether Mississippi law allows a non-signatory to invoke the agency theory to compel arbitration against a signatory; (2) will this Court allow a non-signatory to invoke an arbitration provision based solely on the second test articulated in *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 534 (5th Cir. 2000); and (3) a proper understanding and application of this Court's rulings in *Russell v. Performance Toyota, Inc.*, 826 So.2d 719 (Miss.1990), *Pitts v. Watkins*, 905 So.2d 553 (Miss.2005) and *East Ford v. Taylor*, 826 So.2d 709, 713 (Miss.2002), as they relate both to when this Court will severe unconscionable terms from an arbitration agreement, yet compel arbitration; and to when the Court will strike the entire arbitration provision and refuse to compel arbitration.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

DOCKETED CASES WITH NO CITE

FEDERAL STATUTES

MISCELLANEOUS

I. STATEMENT OF THE ISSUES

A. Whether the Mississippi Supreme Court will follow the lead of the Fifth Circuit Court of Appeals and apply an abuse of discretion standard for reviewing a trial court's decision regarding whether a non-signatory is allowed to compel an arbitration provision.

B. Whether the Mississippi Supreme Court can decide if Franklin may compel arbitration as a non-signatory since the trial court did not rule on the issue.

C. Whether Mississippi law allows a Franklin, a non-signatory, to utilize the agency theory of invoking arbitration provisions to compel arbitration against the students, signatories, despite the fact that the particulars of this case are wholly incompatible with any of the recognized applications for the agency theory.

D. Whether Franklin, as a non-signatory, has any basis to compel arbitration.

E. Whether the trial court correctly ruled that Moore and Bishop's causes of action for assault against Franklin, as well as the claims related to assault brought against Virginia College, are outside the scope of the arbitration provision.

F. Whether the trial court correctly ruled that Franklin waived his right to arbitration.

G. Whether the Mississippi Supreme Court, in spite of the Mississippi Court of Appeals' ruling in *Va. College, LLC v. Moore*, 2006-CA-02064–COA (Miss. 2008), can affirm, on other grounds, the trial court's opinion denying arbitration.

H. Whether *Russell v. Performance Toyota, Inc.*, 826 So.2d 719 (Miss.1990) mandates the enforcement of the arbitration provision in spite of the fact that the facts of this case are indistinguishable from those in *Pitts v. Watkins*, 905 So.2d 553 (Miss.2005) and *East Ford v. Taylor*, 826 So.2d 709, 713 (Miss.2002).

II. STATEMENT OF THE CASE

In this case, Eclecius Franklin (hereafter "Franklin") appeals from an Order of the Circuit Court of Hinds County (Kidd, W.) denying his Motion to Compel Arbitration against Kimberly Moore and Dana Bishop (hereafter "Moore" and "Bishop" or "these students") both because the assault claims brought against Franklin and Virginia College are outside the scope of the arbitration provision and because Franklin took action inconsistent with arbitration and actively participated in the underlying lawsuit (R. 237-239).

A. PROCEEDINGS BELOW.

Since the procedural history is crucial to the determination of whether Franklin waived his right to arbitrate, the students provide the following time line.

April 25, 2006: These students filed their Complaint (R. 57). **May 1, 2006:** Franklin was served with process (R. 265-267). **June 23, 2006:** Franklin filed: (1) his Answer to the Complaint; and (2) responses to these students' request for admissions (R. 1-2, 14-31). Neither a Motion to Compel Arbitration nor a Motion to Stay was filed by Franklin at this time (R. 1-3). **June 23, 2006:** Virginia College, filed both their Answer and Motion to Compel Arbitration (R. 1). Franklin was not a party to the Motion to Compel Arbitration (R. 1-3). **July 7, 2006:** The students responded to Virginia College's Motion to Compel Arbitration (R - 2). **August 28, 2006:** At the hearing for Virginia College's Motion to Compel Arbitration, Franklin's counsel sat silent. **October 24, 2006:** The Honorable Winston Kidd entered an Order denying Virginia College's Motion to Compel Arbitration (R - 2).

January 26, 2007: Franklin propounded his own discovery upon these students (R. 69-175). At no point within his own discovery propounded upon these students, did Franklin reserve his alleged right to arbitration (R. 69-175). **February 9, 2007:** Franklin requested that these students provide dates upon which they would be available for deposition (R. 69-175).

February 15, 2007: Franklin responded to these students' discovery (R. 69-175). At no point in his responses did he reserve his alleged right to arbitration (R. 69-175).

March 19, 2007: Franklin filed his Motion to Compel Arbitration (R. 3). **May 2, 2007:** These students filed their response to Franklin's Motion to Compel Arbitration. (R. 69-175). **June 29, 2007:** The Honorable Winston Kidd entered an Order, denying Franklin's Motion to Compel Arbitration (R. 237-239).

The students have been fighting arbitration against at least one party for almost two years and have not had the procedural opportunity to complete discovery, not to mention amend the Complaint. Meanwhile, Virginia College has been paid in full, while these students still owe money on their loans.

B. STATEMENT OF RELEVANT FACTS.

The disputes that form the subject of this appeal arose from Franklin's actions and/or omissions toward these students, while he was employed as a teacher for Virginia College, which created an imminent apprehension of harmful or offensive bodily contact (R. 46-47, 65-66). Franklin's actions and/or omissions consisted of: (1) inappropriate sexual behavior; (2) peeking through curtains to watch these students without their clothes; (3) inappropriate touching; (4) inappropriately rubbing his body parts against these students; (5) intentionally inflicting emotional and mental distress; (6) assault; and (7) failing to uphold the standards by which an instructor of massage therapy is held (R. 41-67). Franklin's actions and/or omissions caused these students to suffer considerable damage both physically and mentally (R. 41-67). Virginia College had knowledge of Franklin's actions but did nothing to prevent or stop them.

III. SUMMARY OF ARGUMENT

In this appeal, a non-signatory to an arbitration provision stands before the Court with no, or at best tentative, standing to compel arbitration. The non-signatory attempts to convince the

Court to compel arbitration of assault claims that are not contemplated in the arbitration provision. He attempts to convince this Court to compel arbitration of an unconscionable arbitration provision. His attempts to compel, at their core, are really based upon an alleged favored position under the law and nothing more.

Franklin also acted inconsistent with his alleged right to arbitrate. Initially, Franklin chose to forego arbitration. He remained silent on the issue from the date that he was served with process on May 1, 2006, until the date that notice of his desire to arbitrate was provided to these students on March 7, 2007, three hundred ten (310) days later. Several facts distinguish Franklin's actions from those cases in which this Court found no waiver occurred. Franklin did not file a motion to compel arbitration in conjunction with serving his Answer. Moreover, Franklin sat silent while Virginia College, a co-defendant, filed a Motion to Compel Arbitration, noticed it for hearing, and attended a hearing wherein the Honorable Winston Kidd ruled, denying Virginia College's Motion. Then, Franklin served discovery on the students and asked for deposition dates in which he failed to reserve his right to arbitrate. This was four months after receiving a copy of the clear ruling by the Honorable Winston Kidd on October 24, 2006, wherein the Court ruled that Virginia College had waived their alleged right to arbitrate by participating in the legal process. This ruling placed Franklin on notice that the Honorable Judge considered such procedural activity to constitute waiver.

IV. ARGUMENT

A. STANDARD OF REVIEW.

The grant or denial of a motion to compel arbitration is generally reviewed *de novo*. *East Ford,* 826 So.2d at 713. Findings of fact are given deferential treatment and were subject to the "manifest error/substantial evidence" standard. *Russell,* 826 So.2d at 721. However, these students respectfully request the Court to follow the lead of the Fifth Circuit and apply either an

abuse of discretion standard of review or clear error standard of review for rulings concerning theories for non-signatory enforcement of arbitration provisions.

The Fifth Circuit Court of Appeals has stated that the standard of review applicable to an arbitration dispute depends on the theory of arbitration being discussed. The Court generally reviews the grant or denial of arbitration *de novo*. *Garrett v. Circuit City Stores, Inc.*, 449 F.3d 672, 674 (5th Cir. 2006). However, it used an abuse of discretion standard to review a district court's application of estoppel to decide whether to compel arbitration. *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 528 (5th Cir. 2000). This precedent has been followed by at least one other circuit. *Brantley v. Republic Mortgage Ins. Co., 424* F.3d 392 (4th Cir. 2005). Moreover, the Fifth Circuit had also indicated that a district court's conclusion regarding the existence of an agency relationship should be reviewed for clear error. *Bridas S.A.P.I.C. v. Gov't of Turkmenistan,* 345 F.3d 347, 356 (5th Cir. 2003).

B. WHAT WILL THE COURT CONSIDER?

In a recent case, the Mississippi Court of Appeals ruled that, in spite of a *de novo* review, of arbitration decisions, it would only consider those issues upon which the circuit court first reached a decision. See, *Va. College, LLC v. Moore*, 2006-CA-02064-COA (Miss. 2008).

Yet, this Court has upheld correct rulings for different reasons than the trial court. "This Court has constantly held that if a trial court reaches the right decision, we will affirm that decision even though the trial court may have reached that right decision for the wrong reason." *In re Hood v. State of Miss.*, 958 So.2d 790 (Miss. 2007)(citing, *Aldridge v. West*, 929 So.2d 298, 303 (Miss. 2006)). Further, this Court may affirm a decision on appeal for a different reason than it was decided by the lower court. *See Askew v. Askew,* 699 So.2d 515, 519 n. 3 (Miss.1997)(holding that "a trial court judgment may be affirmed on grounds other than those relied upon by the trial court"); *Stewart v. Walls,* 534 So.2d 1033, 1035 (Miss.1988)(holding that

"this Court will affirm the lower court where the right result is reached, even though we may disagree with the reason for the result"). Moreover, this Court's jurisdiction to affirm an appeal is not limited to those issues raised in the petition for interlocutory appeal; rather, this Court's review may "extend[] to the full scope of the interests of justice." *Pub. Employees Ret. Sys. v. Hawkins,* 781 So.2d 899, 900-01 (Miss.2001)(citing *McDaniel v. Ritter,* 556 So.2d 303, 306-07 (Miss.1989)). It is interesting to note the reasoning of the dissent in *Sanderson Farms, Inc. v. Gatlin,*

> Even though the circuit court decided to deny Sanderson Farms' motion to dismiss on the ground that Sanderson Farms had breached the Agreement and thereby waived the right to compel arbitration, the Gatlins contend that this Court can affirm that decision on other grounds. *The Gatlins are correct.*

Sanderson Farms, Inc. v. Gatlin, 848 So.2d 828, 843 (Miss. 2003)(J.Cobb, dissenting)(emphasis added).

Consistent with previous rulings by this Court, these students presume that, if the Court overrules the trial court, the Court will only overrule its ruling that (1) the assault claims against Franklin and Virginia College are outside the scope of the arbitration provision and (2) that Franklin has waived his right to compel arbitration. "...a trial judge will not be found in error on a matter not presented to the trial court for a decision." *Purvis v. Barnes,* 791 So.2d 199, 203 (Miss.2001)(emphasis added). On the other hand, the Court may uphold the denial of Franklin's Motion to Compel Arbitration for any legitimate reason based on the precedent cited above.

C. THERE IS NO AGREEMENT TO ARBITRATE WITH FRANKLIN.

When confronted with arbitration disputes, this Court has conducted a two-pronged analysis. *East Ford,* 826 So.2d at 713. The Court first determines whether the parties have agreed to arbitration of the dispute; and, if it is determined that they have, then a determination must be made as to whether legal constraints foreclose arbitration of those claims. The first

prong has two sub-factors: (1) whether there is a valid arbitration agreement, and (2) whether the parties' dispute is within the scope of the arbitration agreement. *Ibid.* The Mississippi Supreme Court has stated, "[t]o determine whether the parties agreed to arbitration, we simply apply contract law." *Terminix Int'l, Inc. v. Rice*, 904 So.2d 1051, 1055 (Miss. 2004).

The lower court did not make an initial determination as to whether Franklin and these students agreed to arbitrate or whether alternative grounds for compelling arbitration, such as estoppel, were available to Franklin. The issue was briefed and argued by the parties, however, and Franklin relies heavily on this argument in his briefing. Additionally, Franklin argues that "By concluding waiver by Franklin, the Circuit Court necessarily first concluded that Moore and Bishop in fact entered into valid arbitration agreements." (Appellant's Br. at 14). This is a big assumption on an important issue, especially if this Court follows the Fifth Circuit and applies an abuse of discretion standard of review. Additionally, the argument is not logically sound.[1] Nevertheless, these students must address the issue in this Reply, and the Court can uphold the ruling of the trial court by finding there is no agreement to arbitrate.

Franklin cannot compel arbitration. Despite Franklin's attempts to invoke the arbitration provision, he fails to clearly establish the basis for his alleged right to arbitrate. Franklin's legal analysis is too general and his application is not fact specific. For example, Franklin confuses and jumbles the right to compel arbitration as a party as opposed to the right to compel based on disparate theories of non-signatory enforcement that have been recognized by the courts. A specific and accurate designation of the alleged source of the right to arbitrate, however, is critical to establish both the standard for the decision, as well as the level of "favor" that the Court should credit to the one seeking to enforce an arbitration provision.

[1] For example, a judge, when confronted both with a complex determination of whether a non-signatory could invoke an arbitration provision and with a simple determination that the arbitration provision was too narrow in scope to cover the dispute, could for the sake of judicial economy rule on the issue of scope without making the initial determination. While this might not be the preferred analysis, it does not necessarily follow that the judge has either ruled by implication or committed error in ruling on the scope of the provision.

Additionally, Franklin confuses and jumbles which of these general "non-signatory theories of enforcement" are: (1) specifically applicable to those seeking to compel arbitration against a signatory; (2) specifically applicable to those seeking to compel arbitration against a non-signatory; (3) available to a signatory; and (4) available to a non-signatory.[2] Whether intentional or not, this confusion leads Franklin to an application of the agency theory for compelling arbitration which is unsupported by Mississippi law.

Lastly, but by no means least important, Franklin misconstrues and misapplies these students' Complaint. By so doing, Franklin attempts to bolster his varying arguments for compelling arbitration by a non-signatory against a signatory. A careful analysis demonstrates the converse. There is nothing in the Complaint that gives Franklin a contractual or equitable right to compel arbitration.

1. The Burden to Receive The Favor.

Nothing in the Federal Arbitration Act authorizes a court to compel parties not covered by the agreement to arbitrate their claims. *See, EEOC v. Waffle House, Inc.,* 534 U.S. 279 (2002). "Although there is a strong federal policy favoring arbitration, this federal policy favoring arbitration does not apply to the determination of whether there is a valid agreement to arbitrate between the parties." *Will-Drill Res., Inc. v. Samsom Res. Co.*, 352 F.3d 211, 214 (5th Cir. 2003)(internal quotations and citations omitted). "[F]ederal policy favoring arbitration does not apply to the determination of whether there is a valid agreement to arbitrate between the parties; instead ordinary contract principles determine who is bound." *Fleetwood Enters., Inc. v. Gaskamp,* 280 F.3d 1069, 1073 (5th Cir. 2002). Additionally, a party who seeks to compel arbitration as a non-signatory bears the burden of proving a right to invoke the arbitration

[2] The Honorable Judge Starrett recently acknowledged the significance of these distinctions in *Amstar Mortgage Corp. v. Indian Gold, LLC,* 517 F.Supp.2d 889 (S.D.Miss. 2007). Differing catatories of parties have also been recognized in a recent concurring opinion of the Mississippi Supreme Court. See, *Grenada Living Ctr., LLC v. Coleman,* 2006-CA-00169-SCT (Miss. 2007)(noting this is an area of the law that the Court has struggled mightily to clarify).

provision (this burden is further explained in the sections that follow). As such, Franklin's insistence that he receive a favored position at law is premature.

2. There Is No Agreement To Arbitrate Between Franklin And These Students.

Franklin attempts to demonstrate the existence of a valid agreement to arbitrate on page 14 of his brief. His argument focuses exclusively on the alleged breadth of the scope of the tuition agreement allegedly signed by the students and Virginia College. Without establishing why he has the right to invoke the alleged scope of the agreement, he insists that the alleged breadth of scope gives him the right to compel arbitration. This argument places the cart before the horse. No matter how broad the scope, a party cannot compel another party to arbitrate without establishing a right to so compel.

> [W]e will read the reach of an arbitration agreement between parties broadly, but *that is a different matter* from the question of who may invoke its protections. An agreement to arbitrate is a waiver of valuable rights that are both personal to the parties and important to the open character of our state and federal judicial systems-an openness this country has been committed to from its inception. It is then not surprising that to be enforceable, an arbitration clause must be in writing and signed by the party invoking it.

Westmoreland v. Sadoux, 299 F.3d 462, 465 (5th Cir. 2002)(emphasis added).

There is, of course, no written agreement to arbitrate between Franklin and these students. Franklin implicitly acknowledges this fact in his arguments, even if he does not directly admit it. As such, Franklin must rely on one of the theories of enforcement by a non-signatory to compel arbitration of someone else's written agreement to arbitrate. If Franklin cannot establish a right to compel arbitration based on one of the recognized theories for compelling arbitration from a non-signatory, the discussion of scope is moot.

3. The Contract Defines Who May Seek Arbitration.

While Virginia College's arbitration provision is saturated with ambiguity, the designation of parties is not so plagued. It specifically designates who may seek arbitration. The

Virginia College arbitration provision designates "parties", "the college" and "the student". It does not mention Franklin. Franklin is not the college, the student or a party. As such, Franklin cannot invoke the arbitration provision even under theories of non-signatory enforcement. In such cases, the Court should give deference to the intent of the parties. As the Court reasoned

> The issue in this case is a rather simple question of contract interpretation. By the plain terms of the contract, it is evident that the parties simply did not agree to extend to non-signatories the benefit of the arbitration clause, for they easily could have stated so. The contract clearly reads that disputes may be submitted to arbitration at the election of either Buyer or Seller. Because the defendants are neither the Buyer nor Seller, they are not entitled to enforce arbitration. As we have stated before, this Court must "accept the plain meaning of a contract as the intent of the parties if no ambiguity exists." *B.C. Rogers*, 911 So.2d at 487 (citing *I.P. Timberlands*, 726 So.2d at 108). Moreover, "we do not override the clear intent of the parties, or reach a result inconsistent with the plain text of the contract, simply because the policy favoring arbitration is implicated." *B.C. Rogers*, 911 So.2d at 487 (quoting *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294, 122 S.Ct. 754, 151 L.Ed.2d 755 (2002)).

Qualcomm Inc. v. Am. Wireless License Group, LLC, 2005-IA-01827–SCT (Miss. 2007).

It is also interesting to note that Franklin recognizes that the courts have classified arbitration clauses as either "broad" or "narrow". (Appellant's Br. at 14). Franklin, however, applies these categories solely in the context of his discussion of the scope of the arbitration agreement. Franklin fails to recognize that these categories are also applicable to clauses that determine the parties to an arbitration agreement. Virginia College, as drafter of the arbitration clause, chose a narrow definition of the parties which would be bound by the arbitration provision. The arbitration provision refers only to "parties", "the college" and "the student". The arbitration provision does not contain the broad language regarding the parties to the arbitration provision present in many arbitration provisions. Such language could include "employees", "agents", and "affiliates", should the drafter intend their inclusion. The significance of the narrow language of the arbitration provision related to the designation of parties is discussed in *Fradella v. Seaberry*, 952 So.2d 165 (Miss.2007) and *Parkerson v. Smith,*

817 So.2d 529 (Miss.2002). It seems the Mississippi Supreme Court has been more cautious in applying the theories for non-signatory enforcement of arbitration agreements when faced with a narrow designation of the parties by the arbitration provision.

4. Franklin Has No Basis To Compel Arbitration As a Non-Signatory.

"In order to be subject to arbitral jurisdiction, a party must generally be a signatory to a contract containing an arbitration clause." *Westmoreland*, 299 F.3d at 465. Despite the strong federal policy in favor of arbitration, the Fifth Circuit has noted that it, "will allow a non-signatory to invoke an arbitration agreement only in *rare circumstances*." *Id.* (emphasis added). Theories by which a non-signatory may compel a signatory to arbitrate include: (1) incorporation by reference; (2) assumption; (3) agency; (4) veil piercing/alter ego; (5) estoppel; and (6) third-party beneficiary. See, *Hellenistic Inv. Fund, Inc. v. Det Norske Veritas*, 464 F.3d 514, 517 (5th Cir.2006). These are general theories, however, and not always applicable to every party seeking to enforce arbitration. In fact, a careful reading of *Grigson*, 210 F.3d 524 and its progeny, as well as the precedent of the Mississippi Supreme Court, suggests that when a non-signatory is allowed to compel arbitration against a signatory it is most often based either on the equitable estoppel or third-party beneficiary theories.

Even if the Court allows a generous interpretation of the issues Franklin has raised on appeal, he has raised only agency, estoppel and third party beneficiary arguments.[3] As such, any other potential ground for compelling arbitration by Franklin based on his status as a non-signatory has been waived.

(a) The Agency Theory Does Not Apply.

[3] It is not clear whether Franklin has made a third-party beneficiary argument. Perhaps this theory can be deduced from Franklin's arguments on page 14 of his Brief. These students will respond out of an abundance of caution.

The agency theory recognized by the Fifth Circuit is typically applied when the party seeking to avoid arbitration is the non-signatory. In these cases, the non-signatory is attempting to avoid arbitration by claiming that the one who actually signed the arbitration agreement did not have the authority to bind them. To date, it appears both the Mississippi Supreme Court and the Mississippi Court of Appeals have applied this theory in line with the federal courts. These rulings often involve a patient at a nursing home whose admission papers were signed by a child, administrator or guardian[4], or a lawsuit brought by wrongful death beneficiaries[5], or signature by a surrogate.[6] In these cases, "The party seeking to establish an agency relationship bears the burden of proving it." *McFarland v. Entergy Miss., Inc.*, 919 So.2d 894, 902 (Miss. 2005).

In his Brief, Franklin attempts to apply the agency theory in reverse. In other words, he attempts to apply the theory to allow a non-signatory (Franklin) to compel arbitration against a signatory (these students). He argues that his alleged status as an agent of Virginia College binds these students to arbitrate, irrespective of the fact that he is a non-signatory. In his brief, Franklin claims

> The Plaintiffs have specifically pled that all of the alleged acts and omissions with which they charge Franklin occurred while he was acting as an agent for Virginia College, a signatory to the Tuition Agreements containing the arbitration clauses. R. at 57, ¶¶ 8,36 and 81. By so pleading, the Plaintiffs have bound themselves to arbitrate the claims they assert against Franklin in this litigation.[7]

(Appellant's Br. at 19)(emphasis added). Franklin does not provide the Court with Mississippi precedent or even a legal theory for this unsupported legal application. Moreover, the Fifth Circuit agreed both with the First Circuit and Ninth Circuit, holding that "a nonsignatory cannot

---

[4] See, *Forest Hill Nursing Ctr., Inc.v. McFarlan,* 2007-CA-00327-COA (Miss. 2008) and *Vicksburg Partners, L.P. v. Stephens,* 911 So.2d 507 (Miss.2005).

[5] See, *Cleveland v. Mann,* 942 So.2d 108, 118 (Miss.2006) and *Covenant Health & Rehabilitation of Picayune,L.P. v. Brown,* 949 So.2d 732 (Miss. 2007).

[6] See, *Grenada Living Ctr,* 2006-CA-00169-SCT (Miss. 2007); *Covenant Health & Rehabilitation of Picayune, LP v. Lumpkin,* 2007-CA-00449-COA (Miss. 2008); *Magnolia Healthcare, Inc. v. Barnes;* 2006-CA-00427–SCT (Miss. 2008).

[7] Paragraph 8 of the Complaint is actually found at R-59. Paragraph 36 of the Complaint is actually found at R-66. Paragraph 81 of the Complaint is actually found at R-47.

compel arbitration merely because he is an agent of one of the signatories." *Westmoreland,* 299 F.3d at 466.

Franklin's claims are not supported by even the most liberal application of the agency theory. The court in *Westmoreland* pointed out that even when the federal courts in other circuits recognize some type of agency theory, an agency relationship alone is insufficient to permit a non-signatory to compel arbitration. *Id* at ¶ 22 (citations omitted). Franklin's attempt to present the agency theory as one that can stand on its own is misplaced.

(b) Franklin Is Not A Third-party Beneficiary To The Tuition Agreement.

Franklin appears to argue that his right to compel arbitration flows from his rights pursuant to the Tuition Agreement. To be a third-party beneficiary of a contract, there must be a contract that designates you as a beneficiary. *Brantley,* 424 F.3d 392. In its evaluation of another third-party beneficiary claim, the Mississippi Supreme court stated

> Nothing in the plain language of the arbitration provision indicates a clear intent of the parties to make Brown a third-party beneficiary. She did not sign the contract, was in no way alluded to in the contract, and, based on the record before us, received no benefits from the contract. . . . [T]here is no evidence that the contract was "entered for [her] benefit[;]" *id.*, there is no evidence that any benefit flowed to her as a "direct result of the performance within the contemplation of the parties as shown by its terms[;]" *id.*, or that her suit "spring[s] from the terms of the contract itself." *Id.* As Brown is not a third-party beneficiary to whom the benefits of the contract attach, she is not bound by the arbitration provision.

Adams v. Greenpoint Credit, LLC, *943 So.2d 703*, 708 (¶15) (Miss. 2006)(citing *Burns v. Wash. Savs.*, 251 Miss. 789, 796, *171 So.2d 322*, 325 (Miss. 1965)).

Franklin has no standing or rights that can be connected to the Tuition Agreement. Franklin relies solely on the arbitration provision contained within an addendum to the Tuition Agreement between these students and Virginia College. This Tuition Agreement is drafted as a form of a note or commercial paper. This is demonstrated by the section entitled "Notice to the

Buyer and Buyer's Right to Cancel."[8] This contract appears to have been drafted by the college to: (1) effectuate the payment for tuition; (2) create the right to sell these students' obligation to pay; (3) make the required federal and state disclosures related to any potential third-party creditor; and (4) notify the students of their right to a partial refund upon cancellation. The Tuition Agreement was not drafted for the benefit of Franklin. Franklin is not mentioned in the agreement. Further, no benefits flowed to Franklin from the performance of the Tuition Agreement.

It is far from clear that even Virginia College can rely on the arbitration agreement contained in the Tuition Agreement to compel arbitration against these students for any claims beyond the terms of the Tuition Agreement. The language of the arbitration provision is narrow and the entire Tuition Agreement appears to be drafted to cover issues related to the payment, the note and the required notices. Even if Virginia College can rely on the Tuition Agreement, a finding that Franklin was an intended third-party beneficiary is not plausible.

(c) Franklin Cannot Meet Burden for Estoppel.

Franklin relies on *Grigson,* 210 F.3d 534, for the theory that these students should be estopped from avoiding arbitration. The *Grigson* court found that there were two tests for demonstrating estoppels, the direct-benefits test and the concerted-misconduct test.

The rationale behind these tests is that equity does not permit a signatory to avoid arbitration by clever drafting of the complaint or allow a party to get the benefit of a contract without accepting its responsibilities. At the same time, courts, following Supreme Court precedent, have been very careful not to "override the clear intent of the parties, or reach a result inconsistent with the plain text of the contract, simply because the policy favoring arbitration is

[8] This section contains the following language found in commercial documents as required by federal statute, "Any holder of this consumer contract is subject to all claims and defenses that the debtor could assert against the seller of goods or services obtained pursuant hereto or with the proceeds thereof."

A careful reading of the Complaint, however, demonstrates that these students distinguished the acts committed by Virginia College and Richard Tuttle on the one hand and Franklin on the other. (R-57-58)(noting the distinction between parties and specification of claims against Franklin). The precision of this distinction is all the more striking in light of the standard of notice pleading in Mississippi.

A closer look at each of the paragraphs of the Complaint cited by Franklin supports this distinction. Paragraph 8 can be found in the "Parties" section of the Complaint. The general statements contained therein merely express these students' allegation that Virginia College is liable for the actions of Franklin (R. 59). It says nothing of the source of liability. Paragraph 36 can be found in the "Facts" section of the Complaint. The general statements therein raise a *respondeat superior* type of agency relationship as to Virginia College for the actions of Franklin and Richard Tuttle (R. 66). Again, it says nothing of the source of liability. In fact, paragraph 36 follows paragraphs 32-36 which carefully state the "individual" liability of Franklin, "In addition to the acts or omissions referenced above." (R. 65-66). Paragraph 81 in the Complaint clearly refers to the liability of Virginia College in relation to Franklin's assault claims (R. 47). In no way does this Paragraph support Franklin's attempts to boot-strap himself into the benefits of the Tuition Agreement. Even Franklin recognizes this distinction in his Brief. He distinguishes between these students' educational claims and their assault claims. (Appellant's Br. at 19-20). He incorrectly alleges that these students have asserted their educational claims against Franklin. (Appellant's Br. at 19-20). Though not mentioned by Franklin, paragraphs 18 and 28, which more specifically describe the educational claims, do not mention Franklin (R. 62, 64).

One other mischaracterization must be addressed. Franklin attempts to create "interdependent and concerted misconduct" out of these students' allegations related to Virginia

Credit Ctr., Inc. v. Horton, used the phrases, "arising out of", "in connection with", and "in any way relating to". *Miss. Credit Ctr., Inc.*, 926 So.2d 167, 176 (Miss.2006). The combination of these three phrases leaves little doubt concerning the intended breadth of the agreement. Virginia College's arbitration provision merely uses the phrase "with respect to." Franklin has not demonstrated that this phrase should receive a broad application.

3. Narrow or Broad: Assault And Related Claims Are Not Within The Scope.

Even if the Court decides on a broad interpretation, or decides that the favor for arbitration agreements is so strong that Franklin should get the benefit of the doubt regarding the terminology of the arbitration provision, the assault and related claims are not subject to arbitration. The circuit court properly decided that these assault claims are not within the scope of the arbitration provision. Since these are the only claims brought against Franklin, there is nothing left to arbitrate against him.

In two recent opinions, this Court has clarified that, in spite of its respect for the breadth of the language used in many arbitration provisions, a dispute must at least "touch" matters covered by the contract in order to be arbitrable under the second sub-prong of the first prong of the *East Ford* analysis. See, *Rogers-Dabbs Chevrolet-Hummer v. Blakeney*, 950 So.2d 170, 173 (Miss.2007) and *Smith v. Captain D's, LLC*, 963 So.2d 1116 (Miss.2007). Even if the Court determines the language in the arbitration provision is broad, the Mississippi Supreme Court's ruling and analysis in these cases are determinative of the outcome of this issue in this appeal.

The language in Virginia College's Addendum to the Tuition Agreement is narrower than the language in *Smith*, and it is in no way broad enough to encompass an assault or related claims. Likewise, even under the broadest interpretation of the language, there is no way these students could have anticipated they were agreeing to arbitrate claims related to assault committed by Franklin. Because the basis for the holding in this case is indistinguishable from

the basis for the holdings in *Smith* and *Rogers-Dabbs*, this Court should refuse to compel arbitration of the assault claims against Franklin as well as of any and all of these students' claims related to assault brought against Virginia College.

4. Franklin's Argument For Scope Leads To A Distasteful Result.

In his brief, Franklin attempts to persuade the Court that since the assaults happened in the classroom, they must be related to the Tuition Agreements because these agreements allegedly placed these students in harms way by serving as part of the basis for placing the parties in the classroom. (Appellant's Br. at 15). A similar argument was rejected by the majority in *Smith*, based on the reasoning of the *Rogers-Dabbs* decision. *Smith*, 950 So.2d at 173.

In short, common-sense dictates that based on the facts of a particular case there are certain claims that no reasonable person would agree to submit to arbitration. See, *Rogers-Dabbs,* 950 So.2d at 173. This case requires the same type of common-sense. A precedent of assuming that students who enroll in school should anticipate that they might be inappropriately touched defies common-sense and would be distasteful. This is true regardless of a student's choice of obtaining a degree in mathematics or massage therapy. These types of assault claims are simply not contemplated by parties when contracting for education and training.

5. The Trial Court's Ruling.

In his brief, Franklin does not correctly state the trial court's ruling. Franklin states, "...the Circuit Court erroneously applied *Smith* for the proposition that claims for assault never fall within the scope of any arbitration agreement." (Appellant's Br. at 16)(emphasis in original). This is simply not true. The Honorable Judge ruled that (1) this Court had previously found that unquestionably a claim of assault neither pertains to nor has a connection with an employment contract; and (2) Plaintiffs' cause of action for assault is not within the scope of the

arbitration agreement. A careful reading of the order reveals that the Honorable Judge was simply applying the rationale of the *Smith* case to the case before him. (R. 238). Honorable Judge's ruling was made after reviewing the correspondences from counsel discussing the case law. Even if the Court did rule as Franklin alleges, it would be hard to consider this as reversible error given the distasteful nature of holding that a student could agree to arbitrate such claims.

E. FRANKLIN WAIVED ANY ALLEGED RIGHT TO ARBITRATE.

Even if this Court finds that the arbitration provision within the tuition agreement is valid and enforceable, Franklin waived his right to arbitration by invoking the judicial process and taking action inconsistent with his alleged right to arbitrate, such that the Hinds County Circuit Court's ruling should be affirmed.

With regard to the waiver of one's right to arbitrate, the Supreme Court of Mississippi set out a clear path to follow for those seeking to enforce their arbitration provisions. In Mississippi, a party waives the right to arbitrate when it 'actively participates in a lawsuit or takes other action inconsistent with the right to arbitration.' *Cox v. Howard, Weil, Labouisse, Friederichs, Inc.*, 619 So.2d 908, 913-14 (Miss. 1993). 'Taking advantage of pre-trial litigation such as answers, counterclaims, motions, requests, and discovery obviates the right to arbitration.' *Ibid* at 914. In *Univ. Nursing Assocs., PLLC v. Phillips*, the Mississippi Supreme Court again acknowledged that a party attempting to invoke arbitration may effectively waive that right if the party actively engages in litigation. *Phillips,* 842 So.2d 1270, 1276-77 (Miss. 2003), (citing *Cox*, 619 So.2d at 914).

In *Phillips*, the Court issued a caveat: "As a practice note, parties desiring to seek arbitration should promptly file and present to the trial court a motion to stay proceedings and a motion to compel arbitration." *Phillips,* 842 So.2d at 1277. More recently, in *Century 21*

Maselle & Assoc., Inc. v. Smith, the Court indicated it was "nonplused" by the number of cases involving waiver issues. *Century 21 Maselle & Assoc, Inc.*, 965 So.2d 1031, 1033 (Miss. 2007). In response the Court issued a mandate requiring parties seeking to enforce arbitration provisions to file a "Motion to Compel Arbitration and Stay Proceedings Pending Arbitration" immediately upon discovery that the controversy or suit is subject to an arbitration agreement. *Ibid* at 1038.

1. Franklin's Acts Are Inconsistent With The Right To Arbitrate.

Based on the foregoing authority, the trial court in this case correctly found that Franklin waived his right to arbitrate. The Mississippi Court of Appeals previously ruled that Virginia College, though participating in discovery, had not waived its right to compel arbitration. *Va. College, LLC v. Moore*, 2006-CA-02064-COA (Miss. 2008). Franklin's actions are distinguishable from the actions of Virginia College in at least three ways. First, unlike Virginia College, he did not file his motion to compel arbitration along with his answer. Instead, Franklin waited three hundred ten (310) days from the date of his Service of Process to file his Motion to Compel Arbitration. Second, he did not reserve his right to compel arbitration in conjunction with his participation in the litigation process by both propounding interrogatories, request for production of documents, medical authorizations, employment authorizations, and educational authorizations as well as responding to request for admissions, interrogatories, and request for production of documents.[11] The Court has treated this reservation of rights as a type of mitigating factor. See, *Century 21 Maselle & Assoc., Inc.*, 965 So.2d at 1037. Third, he committed these acts with the full knowledge that the trial court would consider them to be actions inconsistent with the right to arbitrate. This constitutes an action inconsistent with the right to arbitrate committed after obtaining full knowledge of the right. *Pass Termite & Pest*

[11] Even counsel for Virginia College recognizes these shortcomings, and mentioned this to the trial court judge at the hearing. (R. Vol. 4, p. 15).

Control, Inc. v. Walker, 904 So.2d 1030, 1034-35 (Miss.2004). Franklin's discovery propounded upon these students as well as his discovery responses were served after receiving the Honorable Winston Kidd's Order denying Virginia College's Motion to Compel Arbitration.

2. The Spirit Of The Law v. The Letter Of The Law.

Franklin does not bother to explain to the Court why on earth he waited as long as he did to seek to compel arbitration. Instead, Franklin asks this Court to rely on the letter of the law to deny the students a jury trial. Summarizing Franklin's presentation of the law, he appears to believe that as long as he raised the right to compel arbitration in his Answer, there is little that he could have done that would support a finding of waiver. Franklin's arguments do not represent the current status of the law. Even if they do state the letter of the law, they are clearly inconsistent with the spirit of the law.

In *Pass Termite*, this Court stated that the inclusion of the defense of arbitration in an answer is not determinative, but rather is "a factor we may consider along with the other facts existing in [the] case." *Pass Termite,* 904 So.2d at 1033 (internal footnotes omitted). Ultimately, "[t]he question of what constitutes a waiver of the right of arbitration depends on the facts of each case." *Republic Ins. Co. v. PAICO Receivables, LLC,* 383 F.3d 341, 346-47 (5th Cir. 2004)(citing, *Tenneco Resins, Inc. v. Davy Int'l, AG,* 770 F.2d 416, 420 (5th Cir. 1985)). The answer filed by Franklin did raise arbitration as a defense. Like the defendant in *Estate of Grimes v. Warrington*, however, Franklin, without explanation, with full knowledge of the existence of the arbitration provision and represented by counsel chose to forego filing a motion to compel arbitration and, instead, fully participated in discovery. *Estate of Grimes v. Warrington,* 2006-CA-01926-SCT (Miss. 2008). Why? Franklin has offered no explanation.[12]

[12] It appears to these students that it may have something to do with the history of Franklin's representation and his disputes over coverage issues with two insurance companies. Franklin has been represented by two separate law firms in this matter. For whatever reason, Franklin's original counsel decided not to pursue arbitration. For

What is known is that Franklin's "first" counsel, Paul Ott, attended the hearing on Virginia College's Motion to Compel Arbitration and did not participate or raise the issue on behalf of Franklin.[13] Shortly thereafter, Franklin's second counsel entered an appearance. Franklin's requests for leniency might be more understandable if his new counsel had immediately sought to compel arbitration. They did not. Instead, by phone conversation, Franklin's new counsel stated to these students' counsel that he "has marching orders from his client" that his client wanted to move this case along and get it ready for trial, get a scheduling order and get depositions taken. (R. Vol. 4, p. 12).[14] In addition to these representations, nearly four months after the trial judge had entered the order regarding Virginia College, Franklin's counsel served discovery and requested deposition dates for the purpose of taking these students' depositions, fully aware that the circuit court judge would see this as a waiver. These events were not mitigated by simultaneously reserving the right to raise the defense of arbitration. See, *Century 21 Maselle & Assoc., Inc.*, 965 So.2d at 1037.

Counsel for these students recognizes this Court's presumption against and dislike for waiver. This presumption and dislike is confusing and ill applied, however, when presented with a fact pattern such as this. The Mississippi Supreme Court, by way of qualifying its dislike for waiver, has stated,

> *Certainty during litigation favors this Court's effort to ensure judicial efficiency and the expeditious resolution of disputes.* Further, this approach creates an *incentive for parties to be more diligent in submitting defenses.* The result of such an incentive is that the trend will now be that trial courts will learn *early on in the life* of a civil case about the existence of arbitration agreements and *be able to more quickly dismiss disputes* which our trial courts find to be controlled by arbitration clauses.

---

whatever reason, Franklin's new counsel decided to switch horses in mid-stream. These decisions may be intertwined with the status of the coverage disputes.

[13] "First" counsel is in parenthesis because although the firm of Carroll Warren & Parker, PLLC, did not make an appearance and replace Paul Ott until later in the case, counsel for these students had been corresponding with members of Carroll Warren & Parker, PLLC since the inception of the law suit.

[14] This evidence was presented at the hearing. These fact issues were not contradicted by Franklin at the hearing

Pass Termite & Pest Control, Inc., 904 So.2d at 780 (emphasis in original)(internal footnotes omitted). What the Court recognized in this case is that delays in raising arbitration defenses do not only prejudice opposing parties, they also fly in the face of judicial efficiency and the intent of the FAA for speedy and efficient resolution of disputes. Franklin's actions seem to violate the spirit, if not the letter, of the intent of the recent case law and are certainly against the intent of Congress in passing the FAA. See, *In re Tyco Intern. (US) Inc.*, 917 So.2d 773,782 (Miss.2005). These students have been fighting arbitration against one or more of the parties for almost two years. This delay is due, in part, to the failure of both defendants to timely raise the alleged right to arbitrate.

3. Franklin's Waiver Caused Prejudice.

Franklin asserts that "A review of the record makes clear that the Plaintiffs have failed to prove (or even allege) that they suffered detriment or prejudice..." (Appellant's Br. at 10). Franklin overlooks the fact that the issue of prejudice was clearly presented to the trial Court at the hearing. (R. Vol. 4, p. 12). Findings of fact should be given deference. *Russell,* 826 So.2d at 721. Regarding the issue of proof, the Mississippi Supreme Court has stated

> ...when a party, with full knowledge of the existence of an arbitration clause in the contract which is the subject matter of the litigation, makes a conscious decision to proceed with responding to the lawsuit...thereafter invoke the arbitration clause, that party does so at its own peril, and *prejudice to the non-moving party will be presumed* for failure to comply with the provisions of Miss. R. Civ. P. 8

In re Tyco Intern. (US) Inc., 917 So.2d at 780. Such prejudice can be assumed in this case because Franklin made a conscious decision to proceed with responding to the lawsuit after he was aware of his alleged right to arbitrate and after he received the trial court's previous order.

F. THE ARBITRATION PROVISION IS UNCONSCIONABLE.

As previously noted, the circuit court did not rule on whether any principles of state law

render the arbitration provision unenforceable pursuant to the second prong of the *East Ford* analysis. This Court can, however, reach unconscionability for the purpose of upholding the trial court's denial of the motion. It would be judicially efficient to reach the issue in light of the numerous appeals related to the same arbitration provision. However, the Court should not rule against the students. The previous ruling of the Mississippi Court of Appeals recommends remand for further proceedings and an evidentiary hearing, rather than compelling arbitration.

1. The Standard for Unconscionability.

The Federal Arbitration Act provides that arbitration provisions "shall be valid, irrevocable, and enforceable save upon such grounds as exist at law or equity for the revocation of any contract." 9 U.S.C. §2. As such, state law contract principles are used to determine whether an arbitration provision is enforceable. *Doctors Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686-87 (1996). This Court should apply Mississippi contract law to examine Virginia College's arbitration provision as to contract formation, validity and enforceability. *Perry v. Thomas*, 482 U.S. 483, 492 & n.9 (1987); *First Options Chicago, Inc. v. Kaplan,* 514 U.S. 938, 944 (1995), and *Doctor's Assocs, Inc. v. Casarotto*, 517 U.S. at 686. On the basis of general contract law, this Court has invalidated similar unconscionable arbitration provisions. *East Ford,* 826 So.2d 709 (invalidating on grounds of procedural unconscionability) and *Pitts,* 905 So.2d 553 (invalidating on grounds of substantive unconscionability).

2. The Arbitration Provision is Substantively Unconscionable.

This Court has stated, "Substantive unconscionability may be proven by showing the terms of the arbitration agreement to be oppressive." *East Ford,* 826 So.2d at 714. Virginia College's arbitration provision is substantively unconscionable. To reach this conclusion, this Court simply has to follow its own precedent.

(a) The College Reserves Its Access To The Courts Without Providing The Same For The Students.

In paragraph twelve of the Conditions of Enrollment Addendum to Tuition Agreement, which contains the arbitration provision, the College reserves its access to the courts without extending the same access to the students.

> Notwithstanding the provisions of this paragraph, in the event a ***breach of this Agreement is alleged***, ***the College*** shall have the option to seek ***injunctive relief*** in ***any court of competent jurisdiction*** barring further breach of this Agreement pending arbitration. (R 54 and 56)(emphasis added).

In essence, if the college believes the student is in breach of the Tuition Agreement, it can prevent further harm to itself by availing itself of the court system. These students can take no such action. This provision is outrageous; and, when combined with the selection of Alabama as the forum, it is clearly drafted to dissuade students from pursuing their rights under the agreement.

While forcing these students to pursue any remedy in Alabama, Virginia College reserves solely for itself the right to pursue certain remedies and actions in Mississippi. Given the residencies of the parties, the fact that the causes of action arose in the State of Mississippi and that these students are residents of Mississippi and have not subjected themselves to the jurisdiction of the Alabama courts, the only possible "court of competent jurisdiction" for an injunction action by Virginia College as against these students is a state trial court or federal district court in Mississippi. Pursuant to Virginia College's drafting of this arbitration provision, the only party that has any right to file any proceeding or cause of action in Mississippi is Virginia College (R. 54-56). Yet, these students can only arbitrate and only in Alabama (R. 54-56).

(b) The Arbitration Provision Mandates Arbitration in Alabama.

Virginia College's arbitration provision is substantively unconscionable because it forces these students to arbitrate their claims in Alabama. The arbitration provision reads, in pertinent part, "Such arbitration shall take place in Alabama." (R. 54, 56). Neither of these students live in Alabama. This Court has specifically stated, "Substantively unconscionable clauses have been held to include waiver of choice of forum and waiver of certain remedies." *East Ford,* 826 So.2d at 714 (emphasis added). This Court should follow its precedent and find that this term of the arbitration provision is unconscionable.

This is clearly oppressive to force an individual student to engage in arbitration hours away from their home and in a state that they have no contact with or connection to. These students are prejudiced in at least the following ways: (1) having to travel to arbitration each day or bear the expense of staying in Alabama during the arbitration; (2) having to get their witnesses to show up in arbitration each day, provided they are even subject to the jurisdiction of the Alabama courts, and paying the associated expenses; (3) having to get their experts to arbitration each day, and having to pay the associated expenses; (4) pay legal fees and expenses to get their attorney of record to attend arbitration each day, or being forced to retain new counsel; (5) suffering from being separated from family and friends during such a challenging time; and (6) having a Mississippi matter determined by an arbitrator in Alabama in spite of never subjecting themselves to jurisdiction in Alabama.

On the other hand, there is no corresponding burden on Virginia College if they are allowed to arbitrate in Alabama. Virginia College, LLC, operates a college in Alabama and claims to have organized their business under the laws of the State of Alabama.[15] Their parent

[15] In numerous related cases, Virginia College, LLC has joined in removal of the action claiming that the entity is a non-resident of Mississippi because the membership was formed in Alabama and has its principle place of business in Chicago. All of these cases have been remanded. In all of the cases, the United States District Court for the

company has retained a law firm in Alabama that regularly defends them in order to assist in the defense of this case.[16]

(c) The Arbitration Provision Is Grossly One-Sided in Favor of Virginia College, With No Mutual Remedies For These Students.

The arbitration provision is substantively unconscionable because it does not provide mutual remedies to all parties. This Court has chastised corporate defendants who seek to implement such language in their arbitration provisions and has refused to enforce these provisions. *Pitts*, 905 So.2d 553; *Vicksburg Partners*, 911 So.2d at 523-24; and *Rogers-Dabbs*, 950 So.2d at 175 & n.6. There are at least four sections of the Tuition Agreement and Conditions of Enrollment Addendum that contain one-sided, arbitration-related provisions.

First, Paragraph 12 of the Conditions of Enrollment Addendum to Tuition Agreement provides injunctive remedies for Virginia College while precluding these students from seeking the same.

> The arbitrator is authorized to fashion remedies...including determining that the student should be enjoined from certain actions or ***compelled to undertake certain actions***. (R 54 and 56)(emphasis added).

Virginia College herein specifically provides for itself the right to obtain injunctive relief, while precluding these students from doing the same. This is particularly egregious in light of the fact that the provision attempts to provide Virginia College with the right to a mandatory injunction, which is typically disfavored at law. Virginia College maintains its right to seek injunctive relief in a Mississippi court of law while limiting each student's rights and remedies to be handled solely in arbitration in Alabama, without a corresponding right to a mandatory injunction. This

---

Southern District of Mississippi held that it could not rule that the Mississippi Supreme Court would not find a valid cause of action against Virginia College or the individual defendants for their separate liability.

[16] Virginia College LLC's parent Company, Education Corporation of America, has retained Maynard, Cooper & Gale, P.C., in Birmingham, Alabama, to represent them in related cases in Mississippi.

Court has struck down arbitration agreements for lack of mutuality in remedies. See, *Pitts*, 905 So.2d at ¶10. Additionally, this Court is keenly aware of such potential inequalities as demonstrated when this Court pointed out similarly unconscionable clauses even when the consumer failed to raise them. See, *Rogers-Dabbs*, 950 So.2d at 175 & n.6.[17]

Franklin suggests that because the arbitrator is authorized to fashion remedies that make the prevailing party whole, that the Plaintiff has the exact same rights as any other party. This argument is incorrect for at least two reasons. First, the "fashion remedies clause" is ambiguous because it is directly contradicted by other clauses in the Tuition Agreement and Addendum such as the limitation of liability clause. In addition to making the provision procedurally unconscionable, these contradictions nullify the alleged discretion of the arbitrator. Second, this clause, strictly construed, is yet an attempt to limit the students' recovery to "demonstrated losses incurred." As such there is no power vested in the arbitrator to provide equal remedies.

Second, the Conditions of Enrollment Addendum provides legal fees for Virginia College if it is successful in an arbitration action. Paragraph 14 of the Conditions of Enrollment Addendum to Tuition Agreement, entitled "**ATTORNEYS' AND COLLECTION FEES**"[18], states,

> In any ***legal action or arbitration*** between the parties arising out of this Agreement, ***the College***, if it prevails, ***shall be entitled to recover its reasonable attorneys' fees in addition to any other relief to which it may be entitled***. Further, ***the College*** shall be entitled to recover attorneys' or collection agency

[17]The Court stated, "While Blakeney argues unconscionability, he does not attack this particular provision of the arbitration agreement, which is obviously one-sided in favor of Rogers-Dabbs. The exercise of self-help remedies in court is a right which, as a matter of practicality, belongs only to Rogers-Dabbs, and Blakeney enjoys no similar rights of seeking judicial redress." *Rogers-Dabbs*, 950 So.2d at 175 & n.6.

[18] This language, while purporting to state the terms of arbitration, is not contained within the section identified as "ARBITRATION". These students do not understand how to integrate these sections or determine that arbitration-related language is scattered throughout the tuition agreement. (R. 93-100). As such, the arbitration provision is both substantively and procedurally unconscionable.

> fees and interest associated with the ***collection of a delinquent account*** of the student.[19]

The Federal Arbitration Act does not provide for attorneys fees, and fees are only available when provided by contract between the parties. As such, these students are foreclosed as a matter of law from being able to recover fees in arbitration, while Virginia College has attempted to create this right for themselves and other parties seeking to compel arbitration whether they arbitrate or bring a legal action. This could be a huge leveraging point for Franklin should this matter be forced to arbitration. These students would be forced to factor in the potential cost of paying Franklin's attorneys fees in addition to their own when considering the value of their claims and risk factors associated with their case, while not being able to wield the same leverage. This Court has refused to enforce an arbitration provision for precisely this reason. See, *Pitts,* 905 So.2d ¶10.

Third, Virginia College has attempted to limit recovery by the students in an action against itself or a third-party beneficiary to the Tuition Agreement. Paragraph 4 of the Tuition Agreement states, "Recovery hereunder by the debtor shall not exceed amounts paid by the debtor hereunder." (R. 53-57).[20] There is no corresponding limitation on the amount recoverable by the third-party beneficiary or Virginia College. This Court has stated that "clauses that limit liability are given strict scrutiny by this Court and are not to be enforced unless the limitation is fairly and honestly negotiated and understood by both parties." *Pitts*, 905 So.2d ¶13 (citing *Royer Homes of Miss., Inc. v. Chandeleur Homes, Inc*, 857 So.2d 748, 754

[19] Courts often do not give enough weight to the significance of companies' retaining collection rights in the context of arbitration. The leverage that companies have over individuals related to credit reporting and collection is staggering, particularly since many of those remedies such as reporting negative credit actions to credit bureaus are available without having to resort to legal action, and the debtors do not have equal leverage available to counter threats of negative credit reporting or to counter harassing credit collection.

[20] This provision is an arbitration-related provision, but is not mentioned in the section entitled "ARBITRATION". Additionally, there is no definition of "holder" or "debtor". As such it is also procedurally unconscionable.

testimony. For purposes of this appeal, the amounts alleged as damages far exceed the $75,000 threshold. Because more than $75,000.00 in damages has been alleged, the Commercial Rules of the AAA apply by default.

Virginia College's tuition provision is substantively unconscionable because the arbitration fees and costs foreclose any real remedy to the students. Virginia College drafted their arbitration provision such that the Commercial Arbitration Rules apply. Thus, the fees and costs for arbitration are substantial. For a student to merely file to arbitrate a claim he or she must pay up front (1) approximately a Six Thousand Dollar ($6,000.00) initial filing fee; (2) approximately a Two Thousand Five Hundred Dollar ($2,500.00) administrative fee; and (3) an unknown amount of rental costs for the arbitration hearing room, which are not included in the other amounts for expenses and costs. These costs can be determined from an objective review of the AAA documents. These initial fees and costs do not include expenses for witnesses, experts, attorneys, lodging, travel, gas, mileage, meals, exhibits, and other items needed to properly and competently arbitrate a claim. Most importantly, these fees do not include the arbitrators' fees, which according to the AAA Commercial Rules will be determined by the arbitrators' panel biographies. Here, Plaintiffs have met their burden, showing the extreme expense involved in being forced to arbitrate pursuant to the Commercial Rules.

While Franklin and Virginia College have not offered, "reviewing courts should not consider after-the-fact offers...to pay the plaintiff's share of arbitration costs where the agreement itself provides that the plaintiff is liable, at least potentially, for arbitration fees and costs." *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 676 (6th Cir.2003). As such, any allegation by Franklin that the arbitrator can award costs as seen fit or that he will pay the fees should not overcome the unconscionability in drafting.

If this Court should determine that the supplemental consumer rules do apply, it should also hold that the contract at issue here is a contract of adhesion, as the *Supplementary Procedures for Consumer-Related Disputes* only apply to contracts of adhesion. As applied herein, the standard for applying the rules is indistinguishable from that of determining whether a contract is a contract of adhesion. As such, Franklin must either admit that the contract is a contract of adhesion or admit that the supplementary procedures do not apply.

(e) The Procedurally Unconscionable Clauses are Not Reasonably Related to Virginia College's Business Needs.

In *Lambert*, the Court of Appeals of the State of Mississippi incorporated the requirement that to overcome an unconscionable clause, a party seeking to enforce an arbitration provision must show that the provision bears some reasonable relationship to the risks and needs of the business. *Covenant Health & Rehabilitation of Picayune v. Brown*, 949 So.2d 732, 741 (Miss. 2007)(citing *Entergy Miss., Inc. v. Burdette Gin Co.*, 726 So.2d 1202, 1207 (Miss.1998)). Virginia College is required to show that a reasonable relationship existed, and these students request this Court to require such a demonstration from Virginia College. This assumes that they can demonstrate the clauses are not ambiguous and can be given a plausible meaning in the first place, overcoming the prejudice against the drafter.

(f) The Terms of the Arbitration Provision are Atypical of the Type Suggested by the FAA and AAA.

This Court is more likely to find an arbitration provision to be substantively conscionable if the arbitration provision is typical of the arbitration provisions endorsed by the Federal Arbitration Act, the American Arbitration Association or the other forums typically selected by the parties for arbitration. *Vicksburg Partners,* 911 So.2d at 524-45. Examples of these

recommended drafting guides can be found in the attachments to these students' First Motion to Take Judicial Notice.[26]

(g) How Should The Court Determine Whether to Enforce the Arbitration Provision, Or Merely Strike the Unconscionable Clauses?

When faced with unconscionable clauses in arbitration disputes, this Court has taken two paths to resolution. Sometimes, the Court has severed unconscionable terms and left the remainder of the provision intact. *Vicksburg Partners,* 911 So.2d at ¶ 45, *Brown*, 949 So.2d at 741, ¶ 25 (citing *Russell,* 826 So.2d at 724-25). The Court has not ruled, however, that severance and enforcement is always the appropriate remedy when presented with unconscionable clauses in an arbitration provision. This is evident from the cases in which this Court refused to enforce the arbitration provision as a whole due to unconscionable clauses. See, *Pitts,* 905 So.2d 553; *East Ford,*826 So.2d 709. The practitioner must align the facts of a particular case with this diverse, but hopefully distinguishable, precedent. In attempting to put the pieces together, it is helpful to ask five questions that reflect the factors the Court seems to have considered when determining whether to strike the entire provision or just a portion: (1) Is the unconscionable term within the arbitration provision itself or in the underlying contract?; (2) how many unconscionable terms are there and what is the nature of each term?; (3) Is there a relationship between the unconscionable terms in the arbitration agreement and other unconscionable terms in the underlying contract that heightens the unconscionability?; (4) Is the arbitration agreement also procedurally unconscionable?; and (5) Is the contract a contract of adhesion?

(1) Is the Unconscionable Term Within Or Outside The Arbitration Provision?

[26] *See,* Motion to Take Judicial Notice, ¶3(b), (d), (e), (f), and (g)

It is important to note a possible area of distinction in comparing the holdings of *Brown* and *Vicksburg Partners* from the holding in *Pitts*. In both *Brown* and *Vicksburg Partners*, the Court held that the arbitration agreement itself was substantively conscionable.[27] In both these cases, the Court proceeded to strike substantively unconscionable clauses contained in the underlying contract, yet was still able to enforce the arbitration provision with only slight modification.

This is a significant distinction from both the arbitration agreements and the underlying contracts in *Pitts*, *East Ford*, and to some extent the discussion in *Russell*. In *Pitts*, the arbitration clause itself was held unconscionable, in that it provided one-sided access to the courts and a one-sided attorney's fees provision. The inspection agreement at issue in *Pitts* also contained other substantively unconscionable clauses, including a limitation of liability clause. The Court examined both the fact that the arbitration provision itself was unconscionable and the fact that the combination of the arbitration provision with the other unconscionable clauses was prejudicial. *Pitts,* 905 So .2d ¶10. The footnote in *Russell* makes clear that the Court viewed the arbitration agreement in *East Ford* to be substantively unconscionable. *Russell*, 826 So.2d at 726 n. 1. While the Tuition Agreement contains multiple unconscionable clauses outside of the arbitration agreement, Virginia College's arbitration provision falls in line with those cases where procedural uconscionability pervades the arbitration provision itself. In this regard it is more similar to *East Ford* and *Pitts* than to *Vicksburg Partners*, *Brown* and *Russell*.

(2) What Is The Nature Of The Procedurally Unconscionable Term And How Many Unconscionable Terms Are In The Arbitration Provision?

[27] In *Vicksburg Partners*, the Court stated, "Without a doubt, the arbitration provision contained in the body of the parties' admission agreement is enforceable." *Vicksburg Partners,* 911 So.2d at ¶ 34. See, *Brown*, 949 So.2d at 741, ¶ 23. Even though the Court struck a term of the arbitration agreement itself in Brown and Vicksburg Partners, the unconscionable term contained therein was more fully explained in section E.7 of the underlying agreement; and in its analysis, the Court focused on the contents of Section E.7, not the term in the arbitration provision itself.

In *Russell*, the Court also struck an unconscionable provision in an arbitration clause, but still compelled arbitration. *Russell,* 826 So.2d at 724-25. The discussion in *Russell* focuses more on the term in the arbitration provision itself than does the discussion in *Vicksburg Partners* and *Brown.* In *Russell*, the Court suggested it would strike only a portion of the arbitration provision and enforce the remainder of the arbitration provision. In *Pitts*, however, the Court refused to enforce the arbitration provision because it contained substantively unconscionable terms, which is what the students request in this case. So what distinguishes the two sets of cases? The distinction seems to lie in a qualitative and quantitative analysis conducted by the Court.

The qualitative analysis analyzes the types of unconscionability present in the arbitration provision and the underlying contract. In *Russell*, the Court suggested that a clause shortening the statute of limitations would merely be stricken from the contract, yet the arbitration agreement enforced. *Russell*, 826 So.2d at 725. In *East Ford,* and *Pitts*, the Court focused on the fact that the arbitration provision did not provide mutual remedies to the parties or equal access to the courts. The Court appears to view such clauses with a high level of disdain. *East Ford*, 826 So.2d at 714; *Russell*, 826 So.2d at 726 & n.1; and see *Carson*, 149 Fed. Appx. at 294-95 (discussing the ruling in *East Ford*). In another case, the Court suggested it would look for limitations of damages clauses, limitation of claims clauses and waiver of liability clauses when analyzing claims of substantive unconscionability. See, *Miss. Credit Ctr.*, 926 So.2d at 179. The Court also stated, "...the arbitration clause in today's case pales in comparison to the oppressive language contained in the arbitration language in *Pitts*." *Vicksburg Partners,* 911 So.2d at ¶ 48. As such, it appears that the Court weighs different types of substantively unconscionable clauses, but it is unclear which are distasteful enough to require invalidating the entire arbitration provision.

The quantitative analysis asks how many substantively unconscionable terms are present in the arbitration provision. For example, in *Russell*, the Court said it would enforce the remainder of the arbitration provision even if it were to strike a single term that shortened the statute of limitations. *Russell*, 826 So.2d at 725. In *East Ford*, as explained in *Russell*, the arbitration provision contained two substantively unconscionable terms and was not enforced. *East Ford*, 826 So.2d at 714 and *Russell*, 826 So.2d at 726 & n.1. It appears that the number of substantively unconscionable clauses is important to the analysis, but it is not clear if there is a magic number.

(3) Is There A Relationship Between The Unconscionable Terms In The Arbitration Agreement And Other Unconscionable Terms In The Underlying Contract?

The qualitative and quantitative questions have a corollary, an examination of the interaction between the unconscionable clauses in the arbitration agreement and unconscionable clauses in the underlying contract. In *Pitts*, the Court examined the interaction between a limitation of liability clause in the underlying contract combined with an arbitration agreement that contained other substantively unconscionable terms, including a clause shortening the statute of limitations and a limitation of liability clause. *Pitts*, 905 So.2d at ¶ 20. In its analysis, the Court seemed to focus not just on the number of clauses, but how they are integrated. The Court stated, "Furthermore, the interaction of the limitation of liability clause with the arbitration clause renders the Pittses without a meaningful remedy." *Id.*

(4) Is There Procedural Unconscionability?

In *East Ford*, the arbitration agreement was also procedurally unconscionable. See, *Russell*, 826 So.2d at 726 n. 1. While either procedural or substantive unconscionability can be a defense to arbitration, the presence of both seems to strongly support striking the entire

arbitration provision and not compelling arbitration. As discussed below, Virginia College's arbitration agreement is procedurally unconscionable.

(5) *Is The Contract A Contract of Adhesion?*

"...it is beneficial and appropriate to support an argument against a suspect term by demonstrating that the term was contained in...a contract of adhesion." *Vicksburg Partners*, 2005 So.2d at 40. A contract of adhesion has been defined as one that is "drafted unilaterally by the dominant party and then presented on a 'take-it-or-leave-it' basis to the weaker party who has no real opportunity to bargain about its terms. *East Ford,* 826 So.2d at 716. Franklin has pointed out that adhesion contracts are not automatically void. *Brown*, 949 So.2d at 737. At the same time, this court has stated that an arbitration provision is unconscionable when "the weaker party is prevented by market factors, timing or other pressures from being able to contract with another party on more favorable terms or to refrain from contracting at all." *Entergy Miss.*, 726 So.2d at 1207 (emphasis added). The Court has held that encapsulating a one-sided term in a contract of adhesion evidences "garden variety" substantive unconscionability. *Vicksburg Partners*, 2005 So.2d at 42.

(h) The Court Should Refuse to Enforce the Arbitration Provision, Not Merely Strike the Unconscionable Clauses.

Virginia College's arbitration provision itself contains several types of disdainful, one-sided clauses that are not mutual: (1) unequal access to the court system[28]; (2) exclusive rights to the courts in Mississippi[29]; (3) limiting the students to arbitration only in Alabama[30]; (4) one-sided access to mandatory injunctions[31]; and (5) unconscionable fees. As such it is more

[28] Not conscionable pursuant to *Pitts*, 905 So.2d at ¶10.
[29] Not conscionable pursuant to *Pitts*, 905 So.2d at ¶10.
[30] Not conscionable pursuant to *East Ford*, 826 So.2d at 714.
[31] Not conscionable pursuant to *Pitts*, 905 So.2d at ¶10.

distasteful than the arbitration agreement in *Pitts* and far more distasteful than the single clause in *Russell*. The underlying contract, the Tuition Agreement, also contains additional unconscionable terms. It provides attorney's fees for the College, but not the students.[32] (R-54, 56). It attempts to limit the students' damages, but not the College's damages.[33] (R-54, 56). It retains a unilateral right to cancel for the College.[34] (R-53,55).

As was the case in *Pitts* and *East Ford,* the practical effect of these unconscionable terms in the arbitration clauses in this case is a severe limitation of the rights of the students without a corresponding limitation on Virginia College. The blatant instances of substantive unconscionability present in this case are even more alarming, when combined with the fact that there are other unconscionable terms in the Tuition Agreement and the fact that the arbitration agreement is procedurally unconscionable.

Virginia College's arbitration provision, which is contained in the addendum to the Tuition Agreement is presented as a contract of adhesion which supports a finding that it is procedurally unconscionable. Often, parties seeking to invalidate an arbitration provision rely solely on the fact that they were pressured into signing a provision and were not explained the terms of the provision. While these factors were certainly present here, these students add an additional and compelling factor to the mix, a significant economic factor. At the time these students enrolled, there were only two educational institutions in Hinds County, Mississippi offering a degree in massage therapy, and only one that provided federal student loans to pay for tuition (Virginia College).[35] For these students it was either go to Virginia College or don't go at

---

[32] Not conscionable pursuant to *Pitts*, 905 So.2d at ¶10.
[33] Not conscionable pursuant both to *East Ford*, 826 So.2d at 714 and to *Pitts*, 905 So.2d at ¶¶13 and 15.
[34] Not conscionable pursuant to *East Ford* and *Carson*.
[35] See, these students' First Motion to Take Judicial Notice, ¶¶3(h), (i), and (j). Franklin attempts to utilize a list of schools from the website for the Mississippi School of Massage Therapy as evidence for this Court that these students had numerous options from which to obtain their massage therapy degree (R. 198). However, upon careful

all. At the time, the other massage therapy school in Hinds County, Mississippi required tuition payment up front in order to attend (federal student loans were not an option). Due to market factors and the lack of options, these students had no bargaining power at all if they wanted a federal loan.[36] Virginia College was well aware of the federal loan issue, and was in fact relying on it to commit fraud and make misrepresentations.

(i) Other Precedent And Reasoning Supports Finding The Entire Arbitration Provision Unconscionable.

Several other courts have conducted similar analysis when making this determination of whether to sever or refuse to enforce. As the D.C. Circuit recently stated, "If illegality pervades the arbitration agreement such that only a disintegrated fragment would remain after hacking away the unenforceable parts, the judicial effort begins to look more like rewriting the contract than fulfilling the intent of the parties." *Booker v. Robert Half Intn'l Inc.*, 413 F.3d 77, 84-85 (D.C. Cir.2005). This case draws upon the quantitative analysis. The Supreme Court of the State of South Carolina recently refused to enforce an arbitration agreement finding "the arbitration agreement...[is] wholly unconscionable and unenforceable based on the cumulative effect of a number of oppressive and one-sided provisions contained within the entire clause." *Simpson v. MSA of Myrtle Beach, Inc.*, 2007 S.C. (26293). This case draws on the quantitative

---

review it is important to note that the list of schools, as dated at the bottom of the exhibit, is from May 3, 2007 (R. 198). These students enrolled at Virginia College in January of 2003 (R. 53-56). Franklin offers this Court neither relevant nor accurate evidence concerning available options for massage therapy programs in 2003. Moreover, this list in no way provides us with information concerning the availability of federal student loans. These students did not have the means to attend school without the aid of student loans. There were five educational institutions in the State of Mississippi which offered a massage therapy degree in 2003: (1) Virginia College (Jackson, MS); (2) Mississippi School of Massage Therapy (Jackson, MS); (3) Blue Cliff College (Gulfport, MS); (4) The Natural Healing Arts School of Massage Therapy (Tupelo, MS); and (5) Healing Touch School of Massage Therapy (Hattiesburg, MS). Of these five institutions only Virginia College and Blue Cliff College offered federal student loans in 2003. *See*, Motion for Judicial Notice, ¶¶3(h) and (i). One of the other schools listed in Franklin's Exhibit was Southwest Mississippi Community College (R. 198). The attached application from Southwest Mississippi Community College shows that the massage therapy program at this school did not even exist in 2003. *See*, Motion for Judicial Notice, ¶3(j). Further, Delta Tech College, which is also listed in Franklin's Exhibit, did not open a program for massage therapy until January of 2005.

[36] Also, according to the Supplemental Consumer Rules of the AAA, if they apply, this must be a contract of adhesion. If they don't apply, it strengthens the students' arguments that the arbitration is cost prohibitive.

Irrespective of how the Court chooses to view these students' ability to subjectively understand these complex legal terms, there are objective reasons for finding this arbitration provision complex and legalistic. When complicated legal terms are combined with ambiguous clauses related to arbitration, or when a student has to construe several provisions or clauses of two separate documents in order to understand the terms of an arbitration provision, the Court should give more weight to the fact that these are not everyday terms for most people. In such a case, the burden is too heavy to expect the average person to be able to properly construe the terms of the arbitration provision. Stated differently, if when the student understands the definition of the terms used and they still can't make sense of the arbitration provision, then the court should find the arbitration provision is unconscionable.

(b) The Terms of the Arbitration Provision are Not Conspicuous Because They Are Found in Numerous Clauses in Two Separate Documents.

The arbitration-related terms and clauses utilized by Virginia College are so poorly drafted and presented that it is difficult for attorneys to understand and apply them, let alone lay persons. They are difficult to understand not only due to the complexity of individual terms, but because Paragraph 12, which Virginia College chose to mark as the arbitration provision, does not stand on its own two feet (R 54 and 56). The arbitration language contained in Paragraph 12, which Virginia College attempts to enforce, cannot be understood without attempting integrate it with numerous other terms and clauses scattered throughout the Tuition Agreement and the Conditions of Enrollment Addendum to Tuition Agreement. Additionally, most of these terms and clauses are themselves undefined and ambiguous.

Several of the clauses related to arbitration are not located in the section entitled "ARBITRATION". As such, they are inconscpicuous terms related to arbitration that the student must search for, identify, and construe in conjunction with the language contained in

paragraph 12 of the Conditions of Enrollment Addendum which is identified as "ARBITRATION"(R 54-57). The fact that one grouping of clauses is labeled "ARBITRATION" actually contributes to the inconspicuous nature of the arbitration-related language, because it causes the reader to look only to that provision when attempting to determine what the contract has to say concerning arbitration.

(c) The Arbitration-related Terms Conflict.

Some of the clauses contain contradictory terms. One clause states that each party will be responsible for costs and attorneys fees, while the other gives Virginia College the unilateral right to recovery of the same. One clause purports to provide for making the parties whole, while one limits the students' recovery to the amount of tuition paid. One clause describes with broad language that any dispute is to be arbitrated, while another clause refers to "any legal action or arbitration" (R. 54-57).

The arbitration terms in the Tuition Agreement and the Conditions of Enrollment Addendum to Tuition Agreement are a contractual train wreck. Compared to the arbitration provisions reviewed by this Court, as well as the model arbitration provisions provided by the FAA and the AAA, the drafting is sloppy leading to ambiguity, inconspicuousness and inconsistency.[37] Inconspicuous arbitration clauses should not be enforced, inconsistent arbitration clauses cancel each other out, and the Court should not hesitate to refrain from becoming embroiled in an attempt to construe the ambiguous terms related to arbitration any more than it would for any other contract. See, *S. Natural Gas Co. v. Fritz*, 523 So.2d 12, 18 (Miss. 1987) and *Miss. Transp. Comm'n v. Ronald Adams Contractor, Inc.*, 753 So.2d 1077, 1085 (Miss. 2000).

[37] *See*, Motion to Take Judicial Notice, ¶3(b)

> We find that the general provisions of the mail-outs and the specific provisions of the arbitration clause are in conflict (i.e., the general provisions require "use" of the account only, whereas the specific provisions of the arbitration clause require "use" of the account *and* the execution of a signature card), causing ambiguity. Ambiguities in a contract are to be construed against the party who drafted the contract.

Union Planters Bank, Ntl. Assoc. v. Rogers, Executor of the Estate of Rogers, Deceased, 2003-CA-02221-SCT (Miss. 2005)(citations omitted).

(d) The Disparity Between the Parties is Striking.

There can be no legitimate question regarding the disparity of knowledge and sophistication between Virginia College and these students. As this Court has stated before, there is an assumption that a company of Virginia College's size has the advantage. The Court stated,

> There is little or no evidence in the record before this Court regarding the comparative business savvy of the contracting parties here. However, it is reasonable to assume that a large company such as Entergy holds the advantage in that respect. Contrary to Burdette Gin's assertion, the language in the indemnity clause is fairly straight forward, not misleading or complex. ***However***, based upon the legal resources available to Entergy as compared to most of its customers, we find that the factor of "lack of knowledge" weighs in favor of Burdette Gin in this case.

Entergy Miss., 726 So.2d at 1207 (emphasis added). In the case *sub judice*, the arbitration provision is misleading and complex. In light of this, this Court has more of a reason to give more weight to the disparity considerations than it did in *Entergy Miss.*

4. The Arbitration Agreement Is Illusory.

The Tuition Agreement can be unilaterally cancelled at any time by Virginia College in the event of non-payment of fees or tuition, insufficient progress, excessive absences, or unsatisfactory conduct. (R. 54 ¶8 and 56 ¶ 8). Most courts that have considered this issue have held that if a party retains the unilateral, unrestricted right to terminate an arbitration provision or

a contract containing an arbitration provision, the agreement is illusory. See, *Morrison v. Amway*, 020608 FED5, 06-20138[38] and *J.M. Davidson Inc. v. Webster*, 128 S.W.3d 223, 230 at n.2 (Tex.2003).

V. CONCLUSION.

These students respectfully request this court to AFFIRM the holding of the trial court in this matter, not merely because Franklin has waived his right to seek to compel arbitration, but also because Franklin has no standing to compel arbitration and the causes of action for assault and related to assault are not within the scope of the arbitration agreement. The students also request the court to find that the arbitration agreement is illusory and unconscionable and find the arbitration provision is not enforceable.

Virginia College (and thereby Franklin) has not merely attempted to negotiate a new forum in arbitration. As one court reasoned

> This lawsuit is not about arbitration...It is not just that [the company] wants to litigate in the forum of its choice—arbitration; it is that [the company] wants to make it very difficult for anyone to effectively vindicate her rights...That is illegal and unconscionable.

State v. Berger 567 S.E.2d 265 (W.Vir.2002)(citations omitted).

---

[38]Citing, "*Dumais v. Am. Golf Corp.*, 299 F.3d 1216, 1219 (10th Cir. 2002) ("We join other circuits in holding that an arbitration agreement allowing one party the unfettered right to alter the arbitration agreement's existence or its scope is illusory."); *Floss v. Ryan's Family Steak Houses, Inc.*, 211 F.3d 306, 315-16 (6th Cir. 2000) (arbitration agreement was 'fatally indefinite' and illusory because employer 'reserved the right to alter applicable rules and procedures without any obligation to notify, much less receive consent from,' other parties) . . . *Snow v. BE & K Constr. Co.*, 126 F.Supp.2d 5, 14-15 (D.Maine 2001) (citations omitted) (arbitration agreement illusory because employer 'reserve[d] the right to modify or discontinue [the arbitration] program at any time'; 'Defendant, who crafted the language of the booklet, was trying to "have its cake and eat it too." Defendant wished to bind its employees to the terms of the booklet, while carving out an escape route that would enable the company to avoid the terms of the booklet if it later realized the booklet's terms no longer served its interests.'); *Trumbull v. Century Mktg. Corp.*, 12 F.Supp.2d 683, 686 (N.D. Ohio 1998) (no binding arbitration agreement because 'the plaintiff would be bound by all the terms of the handbook while defendant could simply revoke any term (including the arbitration clause) whenever it desired. Without mutuality of obligation, a contract cannot be enforced.') . . . ." *Id.*

CERTIFICATE OF SERVICE

We, J. Howard Thigpen and Brian A. Clark, of counsel for Kimberly Moore and Dana Bishop, do hereby certify that we have this day served via United States mail a true and correct copy of the above and foregoing Brief of Appellees to:

Honorable Jay Barbour
Carroll, Warren & Parker PLLC
188 E. Capitol St., Suite 1200
Jackson, Mississippi 39201-2195
Counsel for Appellants

Honorable Winston L. Kidd
Hinds County Circuit Court Judge
Post Office Box 327
Jackson, Mississippi 39205-0327

THIS, the 29th day of May, 2008.

THIGPEN & CLARK

J. HOWARD THIGPEN, ESQ. [redacted]
BRIAN A. CLARK, ESQ. [redacted]

Attorneys for Appellees, Kimberly Moore and Dana Bishop