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

ECLECIUS L. FRANKLIN — **APPELLANT**

V.

KIMBERLY MOORE AND DANA BISHOP — **APPELLEES**

Appeal from the Circuit Court of
Hinds County, Mississippi
First Judicial District
No. 251-06-408CIV

ORAL ARGUMENT REQUESTED

REPLY BRIEF OF APPELLANT ECLECIUS L. FRANKLIN

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STATEMENT FOR ORAL ARGUMENT

Pursuant to Rule 34(b) of the Mississippi Rules of Appellate Procedure, Appellant, Eclecius L. Franklin, respectfully requests oral argument on the issues presented in the instant appeal. It is respectfully submitted that oral argument will be beneficial to the Court in better understanding the relevant factual and legal issues presented in this matter.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Other Authorities:

I. ARGUMENT

A. Franklin Has Not Waived His Right To Compel Arbitration

As stated by Appellant, Eclecius L. Franklin ("Franklin") in his principal brief, a party cannot, as a matter of well settled Mississippi law, waive its right to compel arbitration unless it substantially invokes the judicial process prior to moving to compel arbitration, and the party opposing arbitration suffered detriment or prejudice as a result thereof. *Century 21 Maselle & Assocs., Inc. v. Smith*, 965 So. 2d 1031, 1036 (Miss. 2007); *Univ. Nursing Assocs., PLLC v. Phillips*, 842 So. 2d 1270, 1278 (Miss. 2003). As the parties opposing arbitration, and because Franklin asserted his right to arbitration as an affirmative defense in his Answer, R. at 27, Kimberly Moore and Dana Bishop ("Plaintiffs") bear a heavy burden in proving the existence of both factors in order to overcome the presumption in favor of arbitration. *See Century 21*, 965 So. 2d at 1036-37 (holding that "parties claiming waiver must offer sufficient evidence at a hearing to overcome the presumption in favor of arbitration"); *Phillips*, 842 So. 2d at 1276 (holding that the presumption against a finding of waiver is particularly strong when the party seeking arbitration asserted its right to arbitration in its answer); *see also Walker v. J.C. Bradford & Co.*, 938 F.2d 575, 578 (5th Cir. 1991) (holding that a party asserting waiver "bears a heavy burden of proof"). That this is the law in this jurisdiction is not disputed by the Plaintiffs in their principal brief.

Not only did the limited acts undertaken by Franklin prior to the filing of his Motion to Compel Arbitration not constitute a substantial invocation of the judicial process, but the Plaintiffs clearly suffered no prejudice as a result of those acts. The Plaintiffs' arguments that Franklin's assertion of his arbitration rights caused them to suffer prejudice in the form of not being able to continue to prosecute their claims in the trial court are wholly undermined by the record. The filing of Franklin's Motion to Compel Arbitration did not operate to automatically

stay the trial court proceedings, and Franklin (nor the other Defendants) requested any such stay. Since the filing of his Motion to Compel Arbitration, the Plaintiffs have made no attempt to continue the prosecution of their claims against Franklin, such as noticing his deposition, serving written discovery upon him, seeking to amend the claims against him, filing any motions with respect to those claims, or seeking a trial setting. The Plaintiffs have failed to do so notwithstanding that there have never existed any legal impediments, such as a stay or motion for protective order filed by Franklin, which prevented or attempted to prevent them from doing so.

In support of their argument that Franklin waived his arbitration rights, the Plaintiffs rely upon in *Century 21* for the proposition that this Court issued a mandate requiring parties to immediately move to compel arbitration upon discovery that a controversy is subject to arbitration. Plaintiffs' Br. 23. The Plaintiffs' reliance upon *Century 21* for this proposition is misplaced, as the mandate issued therein is expressly prospective in nature, and was issued subsequent to the filing of Franklin's Motion to Compel Arbitration. *See Century 21*, 965 So. 2d at 1038 (holding that the mandate of the Court was applicable "[f]rom this day forward"). Franklin filed his Motion to Compel Arbitration on March 19, 2007, R. at 32, while the *Century 21* decision was issued on August 16, 2007.

The Plaintiffs rely upon *In re Tyco Int'l (US), Inc.*, 917 So. 2d 773 (Miss. 2005) in support of their argument that it can be presumed that they were prejudiced by actions undertaken by Franklin prior to the filing of his Motion to Compel Arbitration. Plaintiffs' Br. 23. This reliance is also misplaced, as the defendants in that case did not file their motion to compel arbitration until more than three years after the complaint was filed, and less than one month before trial was set to begin. *In re Tyco*, 917 So. 2d at 781. To the contrary, Franklin asserted his right to arbitration as an affirmative defense in his Answer, that being his initial

filing in this cause, R. at 27, and he formally moved to compel arbitration on March 19, 2007, less than ten months after he was served with process. R. at 32.

The Plaintiffs assert that the trial court made findings of fact, which should be given deference by this Court, that actions undertaken by Franklin prior to the filing of his Motion to Compel Arbitration caused them to suffer prejudice. Plaintiffs' Br. 26. A review of the Order denying Franklin's Motion to Compel Arbitration plainly reveals that the trial court did no such thing. R. at 237-39. Moreover, any purported decisions regarding alleged prejudice reached by the trial court would be conclusions of law that are subject to a de novo standard of review. *EquiFirst Corp. v. Jackson*, 920 So. 2d 458, 461 (Miss. 2006).

The Plaintiffs have not proven, and cannot prove that prior to the filing of his Motion to Compel Arbitration, Franklin substantially invoked the judicial process which caused them to suffer prejudice. Accordingly, the trial court committed reversible error when it ruled that Franklin waived his right to compel the Plaintiffs to arbitrate their claims against him.

B. Franklin Has Standing To Compel Arbitration

Franklin's standing to compel arbitration based upon the arbitration provisions contained in the Plaintiffs' Tuition Agreements has already been established by the trial court, as that court could not have reached its waiver decision without first having concluded, as a matter of law, that Franklin did in fact have standing as a non-signatory to the Tuition Agreements to compel arbitration. Obviously, a party must actually possess a right before it can waive that right. The Plaintiffs' argument that the trial court may not have made that conclusion of law because it may have been too complex is both disingenuous and insulting to that court. Plaintiffs' Br. 7.

Even if the trial court had not concluded that Franklin had standing to compel arbitration, a review of the record and relevant case law makes clear that he has such standing. The Plaintiffs argue, without any supporting authority, that Franklin bears the burden of proving that

he has standing to compel arbitration in this matter. Plaintiffs' Br. 8-9. This argument is without merit, as it is the Plaintiffs' heavy burden, as the party opposing arbitration, to prove that arbitration is not appropriate. *See J.C. Bradford*, 938 F.2d at 578; *Century 21*, 965 So. 2d at 1036; *Phillips*, 842 So. 2d at 1278.

That a non-signatory to a contract containing an arbitration agreement has standing to compel arbitration of claims made against it by a signatory to that contract in certain circumstances is well established under the law of this jurisdiction. *See Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 531 (5th Cir. 2000) (holding that arbitration sought by a non-signatory to a contract containing an arbitration agreement is appropriate when a signatory to that contract relies upon the terms of the contract in asserting their claims against the non-signatory, or when the signatory to a contract containing an arbitration clause makes claims of substantially interdependent and concerted misconduct by both a non-signatory and at least one signatory to the contract); *B.C. Rogers Poultry, Inc. v. Wedgeworth*, 911 So. 2d 483, 492 (Miss. 2005) (stating that "[a] non-signatory should have standing to compel arbitration where the non-signatory has a close legal relationship, such as, alter ego, parent/subsidiary, or agency relationship with a signatory to that agreement"). Prior to the Plaintiffs' representation to the Court that the only claims they are pursuing against Franklin relate to him allegedly assaulting them, Plaintiffs' Br. 20,[1] all three of the aforesaid circumstances were present in this case. With respect to the remaining claims related to alleged assault, Franklin has standing to compel arbitration as a non-signatory to the Tuition Agreements under the "agency" and "substantially interdependent and concerted misconduct" theories.

[1] In their Complaint, the Plaintiffs asserted all nine claims contained therein collectively against all Defendants. Those claims fall into two general categories: (1) educational malpractice, and (2) assault. The Plaintiffs relied upon their Tuition Agreements in making all of their educational malpractice claims, thereby invoking the first *Griggson* circumstance with respect to those claims.

At ¶¶ 8 and 36 of their Complaint, R. at 59, 66, the Plaintiffs allege generally that all of the wrongful acts committed by Franklin occurred while he was acting as an agent for Virginia College. At ¶ 81 of their Complaint, R. at 47, the Plaintiffs specifically allege that Franklin was acting as an agent of Virginia College when he assaulted them. Thus, the Plaintiffs have alleged, on multiple occasions, that when Franklin purportedly assaulted them, he was acting as an agent of Virginia College. Because Virginia College is a signatory to the Tuition Agreements containing the arbitration provisions upon which Franklin relies in seeking to compel arbitration, Franklin has standing to compel arbitration as a non-signatory to those agreements. *Wedgeworth*, 911 So. 2d at 492 (stating that when a non-signatory to a contract containing an arbitration agreement has an agency relationship with a signatory to that contract, the non-signatory has standing to compel arbitration based solely upon that agency relationship). The Plaintiffs have bound themselves to arbitrate the claims they assert against Franklin in this litigation. *See Sullivan v. Protex Weatherproofing, Inc.*, 913 So. 2d 256, 259 (Miss. 2005) (holding that when the plaintiff pleads his allegations in such a way that brings the claims within the scope of an agreement to arbitrate, he "bound himself to arbitrate the claims").

The Plaintiffs have alleged that they put Virginia College on notice of Franklin's inappropriate behavior, and that notwithstanding its knowledge of same, Virginia College continued to employ Franklin which, in turn, resulted in additional assaults being committed against them by Franklin. R. at 47, ¶¶ 78-80. In so doing, the Plaintiffs have charged Franklin and Virginia College with substantially interdependent and concerted misconduct, whereby Franklin, as a non-signatory to the Plaintiffs' Tuition Agreements, can compel arbitration of those claims. *See Grigson*, 210 F.3d at 531; *see also Brown v. Pacific Life Ins. Co.*, 462 F.3d 384, 398-99 (5th Cir. 2006); *Ford Motor Co. v. Ables*, 207 Fed.App'x 443, 448 (5th Cir. 2006); *Jureczki v. Bank One Texas, N.A.*, 75 Fed.App'x 272, 275 (5th. Cir. 2003). The Plaintiffs'

arguments that they do not charge Virginia College with interdependent misconduct with respect to alleged assaults committed by Franklin, Plaintiffs' Br. 17-19, are defeated by their Complaint. The Plaintiffs are bound by the allegations in their Complaint. *Sullivan*, 913 So. 2d at 259.

The Plaintiffs argue that the arbitration provisions contained in their Tuition Agreements specifically designate who may seek arbitration, and that Franklin is not so designated. Plaintiffs' Br. 10-11. The arbitration provisions do no such thing.[2] There is one sentence in the respective Tuition Agreements which requires that any disputes arising out of or with respect to those agreements must be arbitrated, and that sentence reads as follows:

> ARBITRATION: Any dispute arising out of or with respect to this Agreement or any alleged breach of this Agreement (provided such dispute is not resolved by negotiation between the parties within thirty days after notice of such alleged or threatened breach of either party), shall, upon notice by either party to the other party, be resolved by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association.

R. at 54, ¶ 12, R. at 56, ¶ 12. No where in the subject Tuition Agreements is it stated that the rights or obligations created by the arbitration provisions are applicable only to the signatories to those agreements, or that non-signatories may not avail themselves of the common law right to compel arbitration pursuant to the arbitration provisions. R. at 53-56.

By concluding, although erroneously, that Franklin waived his right to compel arbitration in this matter, the trial court necessarily concluded that Franklin, as a non-signatory to the Tuition Agreements containing the arbitration provisions, had standing to compel arbitration. Thus, that issue has been conclusively established, and is not now before this Court. Even if the trial court had not reached its conclusion of law regarding Franklin's standing, it is clear that Franklin has such standing since the Plaintiffs have charged that his alleged assaults occurred while he was acting as an agent for Virginia College, and have also charged Franklin and

[2] The arbitration provisions contained in each Appellee's respective Tuition Agreements are identical. R. at 54, ¶ 13, R. at 56, ¶ 13.

Virginia College with substantially interdependent and concerted misconduct with respect to his alleged assaults. Nothing contained in the Plaintiffs' Tuition Agreements deprives Franklin of his common law right to compel arbitration in this cause.

C. The Plaintiffs' Assault Claims Fall Within The Scope Of The Arbitration Provisions Contained In Their Tuition Agreements

The arbitration provisions contained in the Plaintiffs' Tuition Agreements require arbitration of "any dispute arising out of or with respect to this Agreement or any alleged breach of this Agreement." R. at 54, ¶ 12, R. at 56, ¶ 12 (emphasis added). As stated in Franklin's principal brief, these arbitration provisions are "broad," not "narrow." An example of a "narrow" arbitration provision is one which requires arbitration of "all disputes or controversies arising under this agreement." *See Wedgeworth*, 911 So. 2d at 485. "Narrow" arbitration provisions such as this only require arbitration of disputes literally "arising out of" a contract. *Pennzoil Exploration & Prod. Co. v. Ramco Energy Ltd.*, 139 F.3d 1061, 1067 (5th Cir. 1998).

Examples of "broad" arbitration provisions are those requiring arbitration of any disputes "arising out of" or "relating to" a contract. *Russell v. Performance Toyota, Inc.*, 826 So. 2d 719, 723 (Miss. 2002); *Smith Barney, Inc. v. Henry*, 775 So. 2d 722, 726 (Miss. 2001). "Broad" arbitration provisions require arbitration of any disputes that merely "touch matters covered by the contract." *Pennzoil*, 139 F.3d at 1067-68. "Because broad arbitration language is capable of expansive reach, courts have held that it is only necessary that the dispute 'touch' matters covered by the contract to be arbitrable." *MS Credit Center, Inc. v. Horton*, 926 So. 2d 167, 176 (Miss. 2006).

If the arbitration provisions contained in the Plaintiffs' Tuition Agreements only required arbitration of claims arising out of those agreements, those provisions might be properly be construed as "narrow" as was a similar provision in *Wedgeworth*. However, because those arbitration provisions also require arbitration of any claims with respect to the

subject of the Tuition Agreements, they are "broad" arbitration provisions consistent with this Court's holdings in *Russell* and *Smith Barney*.

In asserting their assault claims against Franklin, the Plaintiffs have charged him with engaging in misconduct while providing the teaching services which they contracted to receive through their Tuition Agreements. As such, the Plaintiffs' assault claims clearly "touch matters covered by the [Tuition Agreements]" whereby those claims must be arbitrated pursuant to the express terms of the arbitration provisions contained therein. *Pennzoil*, 139 F.3d at 1067-68; *Horton*, 926 So. 2d 176; *see also Ables*, 207 Fed.App'x at 447 (holding that an arbitration clause requiring arbitration of any disputes "arising out of or relating to" an automobile retail installment contract required arbitration of plaintiff-purchasers' claims against the non-signatory automobile manufacturer for fraud, conspiracy, negligent training and negligent infliction of emotional distress).

In *Smith v. Captain D's, L.L.C.*, 963 So. 2d 1116 (Miss. 2007), this Court ruled that claims of sexual assault made by an employee against her employer did not fall within the scope of the arbitration provision contained in the employee's employment contract. *Smith* is inapposite to the instant matter. In *Smith*, the Court held that a claim of sexual assault in no way pertained to, or had any connection with employment at a restaurant. *Smith*, 963 So. 2d at 1121. Certainly, no appropriate aspect of employment at a restaurant would involve a person of authority physically touching a subordinate. The opposite is true with respect to the teaching of massage therapy, as there is no dispute that a significant component of instruction in massage therapy involves instructors physically performing massage therapy techniques on their students. In fact, the Plaintiffs specifically allege that Franklin assaulted them as he "attempted to instruct and teach each Plaintiff in the field of massage therapy." R. at 46, ¶ 75. The nature of massage therapy instruction, bolstered by the specific allegations by the Plaintiffs, makes crystal clear that

the Plaintiffs' assault claims against Franklin, at a bare minimum, touch matters covered by their respective Tuition Agreements. As such, those claims fall within the scope of the arbitration provisions to which they agreed to be bound.

The trial court committed reversible error in holding that the Plaintiffs' assault claims did not fall within the scope of the arbitration provisions contained in their Tuition Agreements.

D. The Arbitration Provisions To Which The Plaintiffs Agreed To Be Bound Are Not Substantively Unconscionable

The Plaintiffs argue that the arbitration provisions contained in their Tuition Agreements should not be enforced on the basis of substantive unconscionability. One of the arguments they make in support of their substantive unconscionability argument is that the Tuition Agreements do not provide the parties with equal remedies. Specifically, the Plaintiffs argue that in the event of a breach of the Tuition Agreements, those agreements provide the following remedies to Virginia College, but not to them: (1) Virginia College can seek an injunction while the Plaintiffs cannot; (2) Virginia College can pursue relief in Alabama (through arbitration) or Mississippi (by seeking an injunction), while the Plaintiffs are limited to arbitrating in Alabama; (3) Virginia College is entitled to recover attorney's fees and collection costs in certain situations, while the Plaintiffs are not; (4) the Plaintiffs are limited to recovery of any non-refunded tuition payments as liquidated damages, while Virginia College has no such limitations;[3] and (5) the Plaintiffs only have a limited time within which to cancel their Tuition Agreements, while Virginia College may terminate those agreements at any time. Plaintiffs' Br. 28-34. The Plaintiffs' "lack of mutual remedies" argument is without merit.

The issue before this Court is whether Franklin, not Virginia College, may compel arbitration of the Plaintiffs' claims. Any rights that Virginia College might have under the

[3] This liquidated damages provision is not applicable with respect to the Plaintiffs' claims against Franklin, as that provision applies only in the event of a breach of the Tuition Agreement by Virginia College. R. at 54, ¶ 13, R. at 56, ¶ 13.

Plaintiffs' Tuition Agreements are not relevant to any issue presented in this appeal. All of the Plaintiffs' arguments regarding a purported lack of mutual remedies allege that the Tuition Agreements provide Virginia College, not Franklin, with remedies which are not available to them. The Tuition Agreements do not provide Franklin with any remedies that are not also provided to the Plaintiffs. In fact, the arbitration provisions contained in those agreements expressly provide Franklin and the Plaintiffs with the exact same remedies—to be made whole for any damages incurred by them should they prevail in arbitration. R. at 54, ¶ 12, R. at 56, ¶ 12, wherein it is stated that "[t]he arbitrator is authorized to fashion remedies, which make the prevailing party whole for the demonstrated losses incurred." Clearly, nothing in the Tuition Agreements provides Franklin with any remedies that are not also available to the Plaintiffs.

The Plaintiffs complain that the forum selection clause contained in the arbitration provisions, which states that arbitration shall be held in Alabama, is oppressive because they do not live in Alabama, and because they, their witnesses and their attorneys would be required to travel from Mississippi to Alabama for arbitration. This argument fails factually, as Franklin, a resident of Jackson, Mississippi, R. at 59, ¶ 6, would be subjected to the same "hardships" of having to arbitrate in Alabama as would the Plaintiffs, both of whom are also residents of Jackson, Mississippi, R. at 58, ¶¶ 1-2. This argument also fails as a matter of law.

The Federal Arbitration Act "mandates" that forum selection clauses be strictly enforced. *Nat'l Iranian Oil Co. v. Ashland Oil, Inc.*, 817 F.2d 326, 330 (5th Cir. 1987). "[F]orum selection clauses contained in an arbitration provision must be enforced, even if unreasonable. A forum selection clause establishing the situs of arbitration must be enforced unless it conflicts with an 'explicit provision of the Federal Arbitration Act.'" *Id.* at 332 (emphasis added). As this Court has previously held, a resident of Mississippi having to travel to a neighboring state for arbitration is not unreasonable or oppressive in any manner. *See Russell*, 826 So. 2d at 722-23

(finding substantively conscionable an arbitration agreement which required a Mississippi resident to arbitrate claims in Memphis, Tennessee). Had the forum selection clause in the Plaintiffs' arbitration provisions stated that arbitration would be held in a distant part of the country or the world, that clause would have to be enforced as written. *See Ashland Oil*, 817 F.2d at 330 (holding that forum selection clause providing for arbitration in Iran would have to be enforced against corporate citizen of Kentucky); *Sam Reisfeld & Son Import Co. v. S.A. Eteco*, 530 F.2d 679 (5th Cir. 1976) (holding that forum selection clause providing for arbitration in Belgium would have to be enforced against U.S. company).

Citing *Morrison v. Amway Corp.*, 517 F.3d 248 (5th Cir. 2008), the Plaintiffs argue that Virginia College can unilaterally cancel the Tuition Agreements at any time, making the arbitration provisions contained therein illusory. Plaintiffs' Br. 49-50. This argument misses the mark factually and legally. Pursuant to the terms of the Tuition Agreements, Virginia College[4] could terminate same in the event of a breach by the Plaintiffs (i.e. for cause). R. at 54, ¶ 8, R. at 56, ¶ 8. While the Tuition Agreements did not provide the Plaintiffs with an express right to terminate same in the event of a breach by Virginia College, the agreements did provide them with a remedy in the event of such a breach—the right to seek relief for all resulting damages through arbitration, which would necessarily include termination of the agreement. Moreover, the Tuition Agreements did expressly provide the Plaintiffs with a right of termination that was not available to Virginia College—the right to cancel those agreements even in the absence of any breach. R. at 53, ¶ 3, R. at 55, ¶ 3.

Morrison, a case decided under Texas law, is in no way applicable to the case *sub judice*. In that case, Amway Corporation required its distributors to renew their distributorship agreements on an annual basis. *Morrision*, 517 F.3d at 250. One of the requirements contained

[4] As stated above, noting with respect to any rights available to Virginia College under the Tuition Agreements is relevant to any issue presented in this appeal.

in the distributorship agreements was that the distributors agreed to abide by Amway's Rules of Conduct, including any amendments thereto. *Id.* In September, 1997, Amway announced an amendment to its Rules of Conduct, effective in 1998, which would require its distributors to arbitrate any claims against Amway. *Id.* at 251. Amway then tried to force arbitration of claims made against it by some of its distributors that were based upon a dispute which existed, and about which Amway was aware, prior to September, 1997. *Id.* Finding that Amway could unilaterally amend its rules to provide for, or repeal the right of arbitration in any manner that it felt was beneficial to it, the court held that the arbitration provision upon which Amway relied in trying to compel arbitration was illusory, and therefore unenforceable. *Id.* at 256-57. In the instant matter, the Plaintiffs entered into their respective Tuition Agreements prior to the existence of any disputes between them and Virginia College or its agents. More importantly, those Tuition Agreements do not provide a right of unilateral amendment. To the contrary, those agreements cannot be modified unless done so in a writing signed by Virginia College and the student. R. at 54, ¶ 15, R. at 56, ¶ 15.

The Plaintiffs argue that the arbitration provisions contained in their Tuition Agreements are substantively unconscionable because the fees and expenses associated with arbitration conducted pursuant to the American Arbitration Association's ("AAA") Commercial Arbitration Rules are so excessive that they foreclose any real remedy to the Plaintiffs. Plaintiffs' Br. 34-37. This argument can be quickly addressed, as the Court has previously held that arbitration provisions requiring an individual to submit to arbitration conducted pursuant to the AAA's Commercial Arbitration Rules are substantively conscionable. *Russell*, 826 So. 2d at 723. Moreover, the very rules about which the Plaintiffs complain provide that fees or expenses which are ordinarily called for by those rules can be waived or adjusted in order to avoid economic hardship. *See* AAA Commercial Arbitration Rules R-43 (providing that an arbitrator may

apportion fees and expenses among the parties as he or she deems appropriate); R-49 (providing for the waiver of AAA administrative fees in the event of extreme hardship on the part of any party); and R-50 (providing that an arbitrator may assess any arbitration related expenses against any party as he or she deems appropriate). Between these fee waiving/shifting provisions, and the arbitrator's express authorization to make a party whole for all of their demonstrated losses should they prevail in arbitration, R. at 54, ¶ 12, R. at 56, ¶ 12, the Plaintiffs cannot credibly argue that the arbitration provisions in their Tuition Agreements are substantively unconscionable due to excessive costs. Of course, Franklin is subject to the same fees and expenses as are the Plaintiffs under the subject rules.

Citing *Vicksburg Partners, L.P. v. Stephens,* 911 So. 2d 507 (Miss. 2005), the Plaintiffs argue that this Court is more likely to find an arbitration provision to be substantively conscionable if it is "typical of" provisions endorsed by organizations that regularly conduct arbitrations. Plaintiffs' Br. 37. Neither *Vicksburg Partners*, nor any other authority cited by the Plaintiffs stand for such a proposition. What a private organization feels should be included in an arbitration provision is wholly irrelevant to the issue of whether such a provision is enforceable as a matter of Mississippi law. This argument by the Plaintiffs should be summarily dismissed.

E. If There Are Unconscionable Terms Within the Plaintiffs' Tuition Agreements, Those Agreements Should Be Enforced After The Unconscionable Terms Are Severed

In the event it were to determine that any of the terms contained in the Tuition Agreements are substantively unconscionable (which is respectfully denied), the Court should strike any such terms and enforce the remaining terms. With respect to the presence of unconscionable terms in arbitration agreements, the Court recently acknowledged "our precedent of striking unconscionable terms and leaving the remainder of the agreement in tact." *Covenant*

Health Rehab of Picayune, L.P. v. Brown, 949 So. 2d 732, 735 (Miss. 2007) (compelling arbitration after striking unconscionable terms from an arbitration agreement). When faced with an arbitration agreement that is not unconscionable in its entirety, but instead contains some terms which are unconscionable, severance of the unconscionable terms and enforcement of the remainder of the agreement, rather than invalidation of the entire agreement, is the appropriate action to be taken. *See id.*, *Vicksburg Partners*, 911 So. 2d at 523; *Russell*, 826 So. 2d at 719 (each enforcing arbitration agreements after unconscionable terms contained therein were severed).

Relying upon *Pitts v. Watkins*, 905 So. 2d 553 (Miss. 2005) and *East Ford, Inc. v. Taylor*, 826 So. 2d 709 (Miss. 2002), the Plaintiffs argue that severance and enforcement is not always the appropriate remedy when a court is faced with an arbitration agreement containing some unconscionable terms. Instead, the Plaintiffs posit that the Court must perform a five factor analysis before determining whether to severe and enforce, or invalidate an arbitration agreement containing some unconscionable terms. Plaintiffs' Br. 38-45. This argument is wholly without merit, as neither *Pitts*, *East Ford*, nor any other authority cited by the Plaintiffs have adopted any such analysis, or otherwise support an argument that severance and enforcement is not appropriate when otherwise available.

The arbitration agreement in *Pitts* was found to be substantively unconscionable in its entirety, whereby no portion of the agreement would remain to be enforced once all unconscionable terms contained therein were severed. *Pitts*, 905 So. 2d at 555-56. The arbitration agreement in *East Ford* was found to be procedurally unconscionable. *East Ford*, 826 So. 2d at 717. Thus, based upon the specific facts of those cases, severance and enforcement was not an available remedy. The Plaintiffs' argument that severance and enforcement should not be followed when otherwise available is contrary to this Court's "precedent of striking

unconscionable terms and leaving the remainder of the [arbitration] agreement in tact." *Covenant Health*, 949 So. 2d at 735. One additional argument made by the Plaintiffs is that severance and enforcement should not be followed because their Tuition Agreements do not contain savings clauses providing that if any terms contained therein are deemed to be unenforceable, the remainder of those agreements shall be enforced. Plaintiffs' Br. 45-46. This argument likewise misses the mark, as severance and enforcement was followed in *Russell*, although the contract in which the arbitration agreement was contained in that case had no savings clause. *Russell*, 826 So. 2d at 723.

As discussed above, the requirement that any claims arising out of or relating to the Tuition Agreements be arbitration is contained in the following single provision within the arbitration provision:

> ARBITRATION: Any dispute arising out of or with respect to this Agreement or any alleged breach of this Agreement (provided such dispute is not resolved by negotiation between the parties within thirty days after notice of such alleged or threatened breach of either party), shall, upon notice by either party to the other party, be resolved by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association.

R. at 54, ¶ 12, R. at 56, ¶ 12. Any other terms within the Tuition Agreements that touch upon the subject of arbitration deal with issues relating to arbitration procedures, not the requirement to arbitrate. With respect to the one provision that requires arbitration, the only portion of that provision which the Plaintiffs allege is substantively unconscionable is that which requires that arbitration be conducted pursuant to the AAA's Commercial Arbitration Rules. Plaintiffs' Br. 27-46. Thus, even if the Court were to determine that every provision within the Tuition Agreements about which the Plaintiffs complain was in fact substantively unconscionable, the requirement that "any dispute arising out of or with respect to this agreement or any alleged breach of this agreement . . . shall . . . be resolved by arbitration" would still remain, and should be enforced following severance of any terms that are purportedly substantively unconscionable.

F. The Arbitration Provisions To Which The Plaintiffs Agreed To Be Bound Are Not Procedurally Unconscionable

The Plaintiffs argue that the arbitration provisions contained in their Tuition Agreements are procedurally unconscionable because the provisions contain undefined, complex, legalistic language, are not conspicuous, contain conflicting language, and because there is a disparity of knowledge and sophistication between them and Virginia College. Plaintiffs' Br. 46-49. None of these factors are remotely present.

The only term which the Plaintiffs complain is undefined, complex or legalistic is the term "holder." Plaintiffs' Br. 46. Not only is the term "holder" not one which is difficult to understand, but it is not even found in the subject arbitration provisions. R. at 54, ¶ 12, R. at 56, ¶ 12. The arbitration provisions simply, clearly and unambiguously state that "any dispute arising out of or with respect to this agreement or any alleged breach of this agreement . . . shall . . . be resolved by arbitration." *Id.* There is nothing complex or legalistic about this language, as evidenced by the fact that each time they signed their respective Tuition Agreements, the Plaintiffs certified that they understood the arbitration provision and other "Conditions of Enrollment" contained in those agreements. R. at 53-56. Not only did the Plaintiffs expressly and repeatedly certify their understanding of the arbitration provisions when they signed the Tuition Agreements, but that understanding was also imputed upon them by Mississippi law. *See Pacific Life Ins. Co. v. Heath*, 370 F.Supp.2d 539, 545 (S.D. Miss. 2005); *Coghlan v. Glickman*, 241 F.Supp.2d 643, 653 (S.D. Miss. 2001); *Terminex Int'l, Inc. v. Rice*, 904 So. 2d 1051, 1056 (Miss. 2004); *United States Fire Ins. Co. v. Coggins*, 195 So. 2d 482, 487 (Miss. 1967).

As to any alleged lack of understanding of the meaning of the arbitration provisions, there is no proof in the record to indicate that the Plaintiffs made any attempt to address same by asking questions of Virginia College personnel, or seeking outside advice. Arbitration agreements containing language substantially similar to that in the Plaintiffs' arbitration

provisions have routinely been declared conscionable. *Heath*, 370 F.Supp.2d at 541; *Cleveland v. Mann*, 942 So. 2d 108, 113 (Miss. 2006); *Horton*, 926 So. 2d at 176.

With respect to the alleged lack of conspicuousness of the arbitration provisions within the body of the Tuition Agreements, each Plaintiffs' agreement is only two pages long, whereby every word therein could be read in a matter of a few minutes. R. at 53-56. The first numbered item on page one of each Tuition Agreement expressly warned the Plaintiffs, in bold text, not to sign the agreement before reading it. R. at 53, 55. The third numbered item on page one of each Tuition Agreement expressly warned the Plaintiffs, in all capitalized text, that the agreement would become a legally binding agreement once it was signed and delivered to Virginia College. *Id.* The arbitration provisions are obvious to anyone reading the Tuition Agreements, as the font in which they are printed is no smaller than any other text in the agreements, and as they are denoted by the bold heading "ARBITRATION." R. at 54, ¶ 12, R. at 56, ¶ 12. As previously stated, each Plaintiff certified, on multiple occasions, that they were aware of the terms and conditions contained in their respective Tuition Agreements. R. at 53-56.

In *Vicksburg Partners*, this Court held that an arbitration provision similar to those at issue in this matter was conspicuous, and therefore procedurally conscionable. The arbitration provision in that case was contained in a six page contract, not a two page contract as in the case *sub judice*. *Vicksburg Partners*, 911 So. 2d at 520. Like the arbitration provisions at issue in this case, the arbitration provision in *Vicksburg Partners* was in a font not smaller than any other font in the contract, and was denoted by the bold-faced heading "arbitration." *Id.* The Plaintiffs' arguments regarding alleged inconspicuousness is without merit.

The Plaintiffs argue that a number of terms within the Tuition Agreements are conflicting and therefore ambiguous. None of the terms about which they complain relate to the provision requiring that all disputes arising out of or with respect to the Tuition Agreements be resolved in

arbitration. Plaintiffs' Br. 48. Rather, every alleged contradictory term about which they complain concerns, at best, issues relating to procedures that might be applicable in arbitration. *Id.* To the extent that there are in fact contradictory arbitration-related terms within the Tuition Agreements which create ambiguities, the Court can simply construe any such terms in favor of the Plaintiffs, as the non-drafters of those agreements, and then enforce the agreement as modified. *See AmSouth Bank v. Quimby*, 963 So. 2d 1145, 1152 (Miss. 2007) (construing ambiguities within an arbitration agreement in favor of the non-drafting party and then applying the construed terms to the dispute at hand). Once that is done (and assuming that there are in fact contradictory terms), the Plaintiffs' Tuition Agreements will continue to require that "any dispute arising out of or with respect to this agreement or any alleged breach of this agreement . . . shall . . . be resolved by arbitration." R. at 54, ¶ 12, R. at 56, ¶ 12.

In making their arguments regarding alleged procedural unconscionability, the Plaintiffs complain that they are not as sophisticated or knowledgeable as Virginia College. Plaintiffs' Br. 49. While a significant disparity in sophistication or bargaining power can lead to a finding of procedural unconscionability in certain circumstances, much more than the existence of such a disparity must be shown before a court can reach that finding. *See Horton*, 926 So. 2d at 179. When they entered into their respective agreements, both Plaintiffs possessed high school degrees and had attended community college. R. at 53, 55. The Plaintiffs do not claim to have needed or requested any explanation of the terms contained in the Tuition Agreements when they entered into those agreements,[5] nor do they claim to have unsuccessfully attempted to negotiate any of those terms. As such, the mere fact that the Plaintiffs allegedly possessed a lower level of sophistication or knowledge than that possessed by Virginia College does not rise to the level of procedural unconscionability. *See Horton*, 926 So. 2d at 179 (rejecting the consumer's claim of

[5] Additionally, such an understanding was imputed upon them. *See Heath*, 370 F.Supp.2d at 545; *Coghlan*, 241 F.Supp.2d at 653; *Rice*, 904 So. 2d at 1056; *Coggins*, 195 So. 2d at 487.

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August 07, 2008

Honorable Betty Sephton
Supreme Court Clerk
Post Office Box 117
Jackson, Mississippi 39205

Re: Ecclecius Franklin v. Moore and Bishop
In the Supreme Court of Mississippi
CaseNo. 2007-TS-01771
TLF # 65.0021

Dear Mrs. Sephton:

I write to you on behalf of the Appellees, Dana Bishop and Kimberly Moore, pursuant to Rule 28(j) of the Mississippi Rules of Appellate Procedure. Since the filing of our brief, several pertinent and significant authorities have come to my attention.

Appellees submit to the Court *Asbury Automotive Used Car Center v. Brosh*, 220 S.W.3d 637 (Ar.2005). This case, and the line of cases cited therein, relates to the arguments made in Section IV (C)(1) and Section IV (F)(2)(a) of the Brief of Appellees.

The reason for the supplemental citation is that, while this is not binding precedent, this line of cases demonstrates that lack of mutuality violates the first and second prongs of the *East Ford* analysis, not just the second.

If you have any comments or questions, please give me a call.

With kind regards, I am

Sincerely,

Brian A. Clark

BAC
Enclosure (as stated).
cc: Jay Barbour, Esq.

procedural unconscionability due to an alleged disparity in sophistication and bargaining power because the consumer presented no evidence of a failed to attempt to negotiate the terms of the contract, or a true lack of sophistication in the subject matter of the subject contract).

Finally, the Plaintiffs appear to argue that the subject arbitration provisions are substantively unconscionable because the Tuition Agreements in which they are contained are, allegedly, contracts of adhesion. Plaintiffs' Br. 42-44. Perhaps the Plaintiffs meant to argue that this alleged flaw caused the arbitration provisions to be procedurally unconscionable, as an arbitration agreement contained within a contract of adhesion can lead to a finding of procedural unconscionability if other circumstances are also present. *Vicksburg Partners*, 911 So. 2d at 518. What the Plaintiffs actually intended to argue is of no moment, because there exists no proof in the record to even suggest that the Tuition Agreements are contracts of adhesion.

The Plaintiffs make two factual assertions in support of their argument that the Tuition Agreements are contracts of adhesion—(1) that their respective financial conditions were such that they could not take massage therapy classes without the benefit of financial aid, and (2) that Virginia College was the only institution in the Jackson, Mississippi area that taught massage therapy classes and offered federal financial aid. Plaintiffs' Br. 43-44. These allegations are wholly unsupported by any evidence in the record, as the record is devoid of any evidence to even suggest (1) that the Plaintiffs could not take massage therapy classes without the benefit of financial aid, (2) that they received, or even applied for financial aid in order to take massage therapy classes at Virginia College, (3) that they could not obtain non-federal financial aid (i.e. private bank loans) to use for the payment of massage therapy classes taught at other schools in the Jackson area, or (4) that the Plaintiffs unsuccessfully attempted to enroll in massage therapy classes at other area schools. In fact, the Plaintiffs' assertions regarding their purported need for financial aid is undermined by the following evidence contained in the record: (1) although the

Plaintiffs submitted affidavits to the trial court in support of their argument that the Tuition Agreements are unconscionable, nothing is said therein regarding alleged financial need, R. at 93-100, and (2) the Plaintiffs' respective Tuition Agreements make no mention of financial aid having been applied for or received by either of them. R. at 53-56. A contract of adhesion is one that is "drafted unilaterally by the dominant party and then presented on a 'take-it-or-leave-it' basis as to the weaker party who has no real opportunity to bargain about the terms." *Horton*, 926 So. 2d at 178. There is no proof in the record to indicate that the Plaintiffs attempted unsuccessfully to bargain over the arbitration provisions or other terms contained in the Tuition Agreement. In fact, they make no such allegation in their principal brief. That the record is devoid of any evidence to suggest that the Plaintiffs had no choice but to accept the Tuition Agreements as they were presented makes clear that those agreements were not contracts of adhesion.

II. CONCLUSION

For the reasons stated herein, Appellant, Eclecius L. Franklin, respectfully requests that the Court reverse and vacate the trial court's Order denying his Motion to Compel Arbitration. Franklin further requests that the Court find as a matter of law that the Plaintiffs are required to finally resolve all claims they did or could have asserted against him in the underlying action in binding arbitration, and that the underlying action be stayed until final conclusion of that arbitration.

Although the trial court did not perform all necessary arbitration-related inquiries, specifically those dealing with conscionability, Franklin respectfully submits that this Court can grant all relief requested by him herein since, had the trial court performed all required inquiries, this Court's review of same would be a de novo review. Thus, the same standard of review will apply with respect to this Court's performance of those inquiries, whether they are initially

performed by this Court, or are performed by this Court in review of the trial court's performance of those inquires.

RESPECTFULLY SUBMITTED, this the 12th day of June 2008.

By: ECLECIUS L. FRANKLIN

By: CARROLL WARREN & PARKER PLLC

By: _____
JAY BARBOUR

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CERTIFICATE OF SERVICE

I, Jay Barbour, counsel for the Appellant, Eclecius L. Franklin, do hereby certify that on the 12th day of June, 2008, I have delivered copies of the foregoing Reply Brief of Appellant, Eclecius L. Franklin as follows:

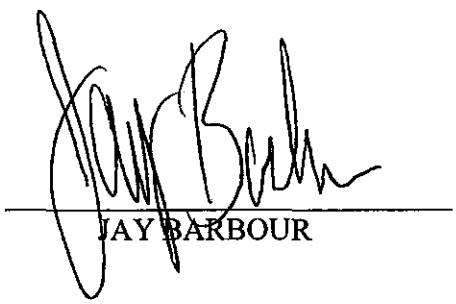
(1) An original and three (3) copies of the Reply Brief have been filed with The Mississippi Supreme Court by **hand delivery** of the same to:

Supreme Court of Mississippi
The Honorable Betty W. Sephton
Office of the Clerk
450 High Street
Jackson, Mississippi 39201-1082

(2) A copy of the Reply Brief has been served by United States Mail, first class postage prepaid to the following:

J. Howard Thigpen, Esquire
Brian Clark, Esquire
Thigpen & Clark
16 Northtown Drive, Suite 200-B
Jackson, Mississippi 39211

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



JAY BARBOUR