COMMONWEALTH OF KENTUCKY
SUPREME COURT
2012-SC-000687-D

BRITTANY DIXON, *et al.* — APPELLANTS

V.

Court of Appeals No. 2010-CA-002039-MR
And
McCracken Circuit Court No. 10-CI-00132

DAYMAR COLLEGES GROUP, LLC, *et al.* — APPELLEES

BRIEF OF APPELLEES

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that copies of this brief were served on January 17, 2014, by Federal Express to Susan Stokley Clary, Clerk of the Kentucky Supreme Court, State Capitol Building, Room 209, 700 Capitol Avenue, Frankfort, KY 40601, and by first class U.S. mail to Samuel P. Givens, Jr., Clerk of the Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky, 40601, Hon. Tim Kaltenbach, McCracken Circuit Court, Courthouse, 301 South 6th Street, Paducah, KY 42003; Kenneth L. Sales and David G. Bryant of Sales, Tillman, Wallbaum, Catlett & Satterley, PLLC, 1900 Waterfront Plaza, 325 W. Main Street, Louisville, Kentucky 40202; and Mark P. Bryant of Bryant Law Center, 601 Washington Street P.O. Box 1876, Paducah, Kentucky 42002-1876. It is further certified that Appellees did not check out the record on appeal.

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STATEMENT CONCERNING ORAL ARGUMENT

This is a case that could be resolved on the law cited in the Court of Appeals' opinion and the Appellees' Brief. Those authorities demonstrate that this Court should affirm the Court of Appeals' opinion compelling arbitration of all claims. The Appellees welcome oral argument, however, if the Court believes it would be helpful.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

I. Procedural background.

The circuit court refused to enforce the arbitration agreement in a two-page student enrollment agreement that the appellants/plaintiffs ("plaintiffs") signed while enrolling at Daymar College in Paducah ("Daymar"). The enrollment agreement contains an agreement to arbitrate (1) any dispute, controversy, or claim arising out of or relating to plaintiffs' enrollment at Daymar, the enrollment agreement, or a breach thereof (the "arbitration provision"); and (2) any dispute as to the scope or enforceability of the arbitration provision (the "delegation provision"). After the circuit court denied the defendants' motions to compel arbitration pursuant to these provisions, the defendants appealed. The Kentucky Court of Appeals reversed. This Court accepted discretionary review on August 21, 2013.

The plaintiffs commenced this lawsuit in February 2010 in McCracken Circuit Court.[1] All of the plaintiffs allege that they were deceived into enrolling at Daymar, and some plaintiffs also allege that they were deceived into purchasing books at inflated prices from Daymar's bookstore. (Amended Complaint, R. 28, ¶¶ 1-15, 21.) The plaintiffs assert 11 causes of action premised on these allegations. (*Id.* at ¶¶ 122-141.)

The defendants moved to compel arbitration of all claims in accordance with the following arbitration provision in the two-page student enrollment agreement each plaintiff signed while enrolling:

> Any dispute, controversy, or claim arising out of or relating to my enrollment at the College, this Agreement, or the breach thereof, shall be resolved by arbitration in the city in

[1] The original complaint was filed by six plaintiffs, five of whom are appellants before this Court. (Complaint, R. 1.) The remaining appellants joined the case as plaintiffs on February 24, 2011. (First Amended Complaint, R. 28.)

> which the campus I attend is located in accordance with the commercial rules of the American Arbitration Association then in effect, and judgment upon the award rendered by the arbitrator may be entered in any court of competent jurisdiction.[2]

The same paragraph of the enrollment agreement also contains the delegation provision, which provides, "All determinations as to the scope or enforceability of this arbitration provision shall be determined by the arbitrator, and not by a court." (*Id.*)

The plaintiffs did not dispute that they signed the enrollment agreement. Nor did they dispute that they initialed a statement on the front page of the agreement indicating that they had read both pages of the enrollment agreement.[3] Nevertheless, the plaintiffs alleged that the arbitration provision was unenforceable for several reasons. (Resp. in Opp., R. 103.)[4] The circuit court scheduled an evidentiary hearing on just two of the issues related to the plaintiffs' challenges to the provision: (1) whether the arbitration provision was unconscionable; and (2) whether arbitration would be prohibitively expensive for the plaintiffs. (July 7, 2010 Order, R 252.)

Before the hearing, the United States Supreme Court decided *Rent-A-Center v. Jackson*, 561 U.S. ___, 130 S.Ct. 2772, 2778-79 (2010), which held that a delegation provision like the one in the enrollment agreement must be enforced in accordance with

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[2] Motion to Compel Arbitration of Issues for Evidentiary Hearing, R. 215 at Ex. 2, p. 2, example attached at Appendix A.

[3] The enrollment agreement, which consists of terms on the front and back side of a single sheet of paper, provides that it is the "full and complete agreement between me and [Daymar] College." (*Id.* at p. 1.) The arbitration provision is on the second page (i.e., the reverse side) of the enrollment agreement, and plaintiffs initialed a statement on the front page of the enrollment agreement – the only text on the page in bold, capitalized letters – affirming, "I HAVE READ BOTH PAGES OF THIS STUDENT ENROLLMENT AGREEMENT BEFORE I SIGNED IT AND I RECEIVED A COPY OF IT AFTER I SIGNED IT." (*Id.* at p. 1.)

[4] The plaintiffs argued that the arbitration provisions were unenforceable because they deprived plaintiffs of the right to a jury trial, because plaintiffs allegedly only acknowledged that they received the enrollment agreement and did not agree to its terms, and because the arbitration provision and enrollment agreement were allegedly unconscionable. (*Id.*)

its terms regardless of the enforceability of the larger agreement in which it is found. In accordance with *Rent-A-Center*, the defendants moved the court to compel arbitration of the issues set for the hearing, which related to the enforceability of the arbitration provision and thus fell within the scope of the delegation provision. (R. 215.)

Before the scheduled evidentiary hearing, the circuit court heard arguments on the defendants' motion to compel arbitration of the issues to be addressed at the evidentiary hearing. (VR No. 1: 8/27/10: 8:40:44, hereinafter "VR1.") The court overruled the defendants' motion "for now" and proceeded to conduct the hearing. (*Id.* at 8:49:53-8:51:39.)

II. The plaintiffs' enrollment process and signing of the enrollment agreement.

At the hearing, five of the plaintiffs – Brittany Dixon, Amy Lee, Darena Prescott, Candice Williams, and Martha Elizabeth Wathen-Collier – testified about the circumstances surrounding the signing of their enrollment agreements. The parties stipulated that other plaintiffs who were present had a substantially similar enrollment process. (*Id.* at 13:36:35-13:40:00.) Shannon Jones, Daymar's Regional Director of Admissions, also testified about the enrollment process. (*Id.* at 13:40:15-14:15:45.)

The plaintiffs signed the enrollment agreement during the admissions process. A prospective student begins the admissions process, which takes place at the Daymar campus, by filling out a prospective-student questionnaire. (*Id.* at 14:01:14-14:01:38.) The prospect then meets with an admissions representative, completes an interview, and views a PowerPoint presentation on available academic programs. (*Id.* at 14:01:39-14:04:00.) The prospective student is then taken to another room, where he or she completes a 12-minute Wonderlic Cognitive Ability Test. (*Id.* at 14:04:01-14:04:30.) All

of these steps take place before the prospective student is presented with the enrollment agreement. (*Id.* at 14:05:01-15:05:49; 14:06:18-14:06:39.)

After completing an application, each plaintiff, like any prospective student, was then presented with the enrollment agreement. Plaintiffs filled in the personal information called for at the top of the enrollment agreement. An admissions counselor asked each plaintiff to "read the document, front and back." (*Id.* at 14:06:40-14:08:30.) Each plaintiff was asked to initial – and did initial – the acknowledgment that she had read both sides of the enrollment agreement. (*Id.* at 14:06:40-14:09:40.) The plaintiffs then signed the enrollment agreement. The plaintiffs were given one document at a time – they were not presented with a stack of documents. (*Id.* at 14:05:10-14:06:55.) All other admissions documents were completed *after* the enrollment agreement. (*Id.* at 14:09:30-14:09:42.) Financial aid paperwork was completed in a different location, with a different Daymar employee, and only after the enrollment process was completed. (*Id.* at 14:07:46-14:08:15.)

There is no dispute that the plaintiffs had the opportunity to read the enrollment agreement. No one prevented plaintiffs from reading the enrollment agreement, and they were not coerced into to signing it.[5] No one pressured plaintiffs to sign quickly. (VR1 at 14:08:48-14:09:23.) They had the opportunity to ask questions about the enrollment agreement and the provisions contained within its two pages, including the arbitration and delegation provisions. The plaintiffs do not dispute that they *could have* read the two-page agreement. The plaintiffs are able to read – they all passed the written assessment which was part of the enrollment process. Plaintiff Wathen-Collier testified

[5] *See, e.g., id.* at 9:08:44-9:08:49; *see also* October 7, 2010 Order, App. A to Plaintiffs' brief at ¶¶ 18, 37.

that when she purchased a home, she read every line of the closing documents. (*Id.* at 12:14:56-12:15:04.) The plaintiffs could have read the enrollment agreement, determined that they did not agree with its terms, and then left.

Instead, after having an opportunity to read the enrollment agreement, each plaintiff signed it. (*See* R. 215 at Ex. 2, p. 2.) Some plaintiffs signed enrollment agreements on multiple occasions. For example, Brittany Dixon signed four enrollment agreements, including one in 2009 and another in August 2010 after this lawsuit was filed and after she had an attorney. (VR1 at 9:41:40-9:43:15.)

Each plaintiff received a copy of the enrollment agreement and took it home with her. (*Id.* at 14:09:24-14:09:29.) The first paragraph of the enrollment agreement contains its cancellation policy, which allows a prospective student to cancel the enrollment agreement and receive a full refund as long as the agreement is cancelled before the student enters school.[6] Thus, even after returning home, the plaintiffs had the opportunity to cancel the enrollment agreement with no further obligation. None elected to do so.

III. The circuit court proceedings on the cost of arbitrating plaintiffs' claims.

Before the testimony of the first plaintiff at the evidentiary hearing, the defendants offered to advance the arbitration costs of any plaintiff whom the Court found could not afford to arbitrate based on the costs charged by the American Arbitration Association (AAA). (VR1 at 8:56:28-8:56:53.) At the end of the hearing, defendants reaffirmed this commitment to advance the costs of the arbitration. (*Id.* at 15:12:45-15:13:14.) The defendants also confirmed this offer in subsequent briefing to the circuit

[6] The enrollment agreement's cancellation policy provides, "I understand that I may cancel this transaction by letter or in person without any penalty or obligation within three (3) working days after the first visit to the College, in which event any payment made by me will be promptly returned to me by the College. If a cancellation is requested more than three (3) days after signing this Student Enrollment Agreement ("Agreement") and making an initial payment, but prior to entering school, I am entitled to a refund of all monies paid." (Mot. to Dis., R. 68, at Ex. 1, p. 1, App. A.)

court, in which the defendants reiterated their commitment to pay all of plaintiffs' AAA filing fees and all fees charged by the arbitrator. (Mot. to Alter, Amend, or Vacate, R. 418, pp. 1-2.) The defendants extended this offer unconditionally and informed the circuit court that they would neither seek nor accept reimbursement from the plaintiffs. (*Id.* at 419.)

At the hearing, the parties presented evidence regarding the cost of arbitrating under AAA rules and the plaintiffs' financial condition. The plaintiffs' expert witness, attorney David Kelly, admitted that a fee waiver or deferral procedure is available under the AAA rules to persons seeking to limit or defer the cost of arbitration. (VR1 at 14:45:35-14:46:20; Def. Ex. 29 to Evid. Hearing, R. #2.) Further, the amount of each plaintiff's filing fee would be determined under the AAA rules by the amount of her claim. (Def. Ex. 30 to Evid. Hearing, R. #2.) Under the consumer rules, for a claim seeking an amount between $10,000 and $75,000, the filing consumer is responsible for one half of the arbitrator's fee, up to a maximum of $375. For claims demanding less than $10,000, the consumer is responsible for no more than $125. (*Id.*) All plaintiffs testified that the amount they paid to attend Daymar was less than $75,000. Kelly testified that he did not think it would take an arbitrator more than "a day, at most" to hear proof on the issue of whether the arbitration provision was unconscionable. (VR1 at 14:52:42-14:53:53.) He admitted that this process would be less expensive than one day-long deposition taken in a traditional court proceeding. (*Id.* at 14:54:18-14:54:36.)

Some plaintiffs also presented evidence of their financial condition. The plaintiffs testified that they have low-paying jobs or are unemployed. Plaintiff Jessica Gordan's income tax return shows that she and her husband had an adjusted gross income of

$50,219 in 2008. Plaintiff Kathy Crowe, who was dismissed to arbitration and is not a party to this appeal, produced an income tax return reflecting an adjusted gross income of $101,878 in 2008. (Def. Exs. 31 and 32 to Evid. Hearing, R #2.)

IV. The opinions of the circuit court and the Court of Appeals.

The circuit court granted in part and denied in part the defendants' motion to dismiss the action to arbitration. (App. A to Plaintiffs' Brief.) Even though the circuit court found that all plaintiffs signed the enrollment agreement and had an opportunity to read it, the court declined to enforce the arbitration provision and delegation provision as to plaintiffs. The circuit court found that the "arbitration agreements signed by Plaintiffs were procedurally unconscionable." (*Id.* at ¶ 37.) Additionally, the court held that because of the cost of arbitrating under the AAA rules and the cost-sharing provision in the arbitration clause,[7] the plaintiffs could not afford to submit their claims to arbitration. (*Id.* at ¶ 38.) Despite the lack of any evidence that any plaintiff was seeking more than $75,000, the court found, "These plaintiffs should not be required to submit claims of less than $75,000, if their claimed damages exceed $75,000, because of the arbitration costs." (*Id.*) The court stated that "[n]one of the Plaintiffs would incur any costs if their claims are not sent to arbitration." (*Id.*) Based on these findings, the circuit court determined that the arbitration provision was substantively unconscionable as to the plaintiffs. (*Id.* at p. 16, ¶ 2.)

In reaching this conclusion, the circuit court relied on cases from the U.S. Supreme Court and the Sixth Circuit holding that arbitration costs could potentially prevent enforcement of an arbitration provision when ***federal statutory claims*** are at

[7] The cost-sharing provision states, "The expenses of the arbitration shall be born[e] equally by the parties to the arbitration, and each party shall pay for and bear the cost of its own experts, evidence, and legal counsel." (App. A, p. 2.)

issue.[8] By holding that the general arbitration provision was unconscionable, the circuit court also overruled the defendants' motion to compel arbitration of plaintiffs' challenges to the enforceability of the arbitration provision.

In a separate portion of the order, the circuit court dismissed to arbitration four plaintiffs – Kathy Crowe and three plaintiffs who did not appear at the evidentiary hearing. (*Id.* at p. 16, ¶ 1.) These individuals, who are not parties to this appeal, subsequently submitted their claims to arbitration before the AAA, and their claims were resolved in defendants' favor by May 31, 2012. (*See* July 20, 2012 McCracken Circuit Court Judgment Enforcing Arbitration Award, Appendix B.)

The defendants filed a timely notice of appeal from the order denying their motions to compel arbitration. (R. 429.) In a 26-page opinion, the Court of Appeals reversed and remanded the circuit court's order denying the defendants' motion to compel arbitration. (Court of Appeals' Opinion, App. B to Plaintiffs' Brief.) The Court of Appeals held that the circuit court erred by finding the arbitration provision procedurally and substantively unconscionable. With respect to procedural unconscionability, the Court of Appeals noted that under longstanding Kentucky law, "a written agreement, duly executed by the party to be held, who had an opportunity to read it, will be enforced according to its terms." (*Id.* at p. 22, citing *Conseco Finance Servicing Co. v. Wilder*, 47 S.W.3d 335, 341 (Ky. App. 2001)). The Court of Appeals determined that there was "nothing unconscionable about the form of the agreement in this instance." (*Id.*) As the court pointed out, the enrollment agreement is only two pages long, and each plaintiff noted by initialing that she had read both the front and back

[8] *Id.* at ¶¶ 32-35 (quoting *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79 (2000); *Morrison v. Circuit City Stores*, 317 F.3d 646 (6th Cir. 2000); and *Mazera v. Varsity Ford Mgmt. Services*, 565 F.3d 997 (6th Cir. 2009)).

of the agreement. (*Id.*) The court also noted that the arbitration provision is not "hidden in a sea of boilerplate," as plaintiffs claim, but rather looks no different than the rest of the agreement. (*Id.* at 23.) Last, the Court of Appeals rejected plaintiffs' argument that the arbitration agreement is unconscionable *per se* simply because it is found in an alleged contract of adhesion. (*Id.*)

As to substantive unconscionability, the Court of Appeals held that the cost-prohibitiveness analysis applied by the circuit court has been clearly limited to the context of federal statutory claims. (*Id.* at pp. 24-25, citing *Stutler v. T.K. Constructors, Inc.*, 448 F.3d 343, 346 (6th Cir. 2006)). The Court of Appeals observed, "In a case involving a federal statutory claim, the court is weighing both the federal policy at issue and the pro-arbitration policy of the FAA. When a federal statutory claim is not involved, the FAA trumps any conflicting state law interest." (*Id.*) The court recognized that "were [it] to uphold the cost-prohibitiveness analysis of the court below, a very large portion of the citizenry of the Commonwealth would be able to avoid a contractual commitment to arbitrate merely by showing the court that they made less than a certain salary." (*Id.* at 25.)

The Court of Appeals remanded the matter to the circuit court "for additional proceedings not inconsistent with this opinion." (*Id.*, p. 26.) The plaintiffs moved for discretionary review, and this Court accepted review on August 21, 2013.

ARGUMENT

As the Court of Appeals properly recognized, the circuit court erred by denying the defendants' motions to compel arbitration. Both Kentucky and federal law require the Court to enforce the arbitration and delegation provisions that each plaintiff agreed to when she signed the two-page enrollment agreement.

Under this Court's recent decisions in *Schnuerle v. Insight* and *Energy Home v. Peay*, the arbitration provision is neither substantively nor procedurally unconscionable. The plaintiffs ask this Court to find that the arbitration provision is unconscionable because the plaintiffs allegedly could not afford the cost of arbitration. The Federal Arbitration Act prohibits this result, which would stand as an obstacle to the accomplishment of the Act's objectives by relegating arbitration in the Commonwealth to situations in which all parties to the agreement were wealthy. This Court should affirm the Court of Appeals and enforce the plaintiffs' voluntary agreement to arbitrate the disputes in this case. By affirming the Court of Appeals' reversal of the circuit court, this Court will ensure that the strong Kentucky and federal policy in favor of enforcing arbitration agreements is served in both this case and future cases.

This Court reviews the circuit court's legal conclusions *de novo* and sets aside findings of fact if they are clearly erroneous and not supported by substantial evidence. *Energy Home Div. of Southern Energy Homes, Inc. v. Peay*, 406 S.W.3d 828 (Ky. 2013).

I. Both Kentucky and federal law favor the enforcement of arbitration agreements.

Both Kentucky and federal law strongly favor the enforcement of agreements to resolve disputes through arbitration. As this Court recently stated, "[I]n Kentucky, unlike most jurisdictions, arbitration enjoys the imprimatur of our state Constitution." *Schnuerle v. Insight Communications Co., L.P.*, 376 S.W.3d 561, 574 (Ky. 2012).[9] It has "long been the public policy of Kentucky that arbitration is a favored method of dispute

[9] Section 250 of the Kentucky Constitution provides, "It shall be the duty of the General Assembly to enact such laws as shall be necessary and proper to decide differences by arbitrators, the arbitrators to be appointed by the parties who may choose that summary mode of adjustment." KY. CONST. § 250.

resolution." *Schnuerle*, 376 S.W.3d at 574. This Court's precedents leave no doubt that "Kentucky law favors the enforcement of arbitration agreements." *Id.*

Federal law also favors the enforcement of arbitration agreements. In this case, the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, applies because the enrollment agreement in which the arbitration clause is found governs a relationship affecting commerce.[10] The FAA mandates that agreements to arbitrate be upheld: "A written provision in any...contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction...shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

Although the FAA applies here, this Court has observed that "[w]hether state or federal law governs makes little practical difference . . . because the Kentucky Uniform Arbitration Act (KUAA) contained in Kentucky Revised Statutes (KRS) Chapter 417 is similar to and has been construed consistently with the FAA." *American Gen. Home Equity, Inc. v. Kestel*, 253 S.W.3d 543, 550 (Ky. 2008) (internal citations omitted). Under both the FAA and Kentucky law, "arbitration agreements must be enforced unless valid grounds for revoking any contract are established." *Id.*

Consistent with these "clear constitutional and statutory authorities favoring arbitration," a party seeking to avoid an arbitration agreement has a "heavy burden." *Schnuerle*, 376 S.W.3d at 575. Once a party has put forth prima facie evidence of an

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[10] The FAA applies when an arbitration provision is contained in a "contract evidencing a transaction involving commerce." 9 U.S.C. §§ 1-2. The FAA's "involving commerce" language is as broad as the scope of Congress' full power under the commerce clause. *Saneii v. Robards*, 289 F.Supp.2d 855, 858 (W.D.Ky. 2003). If the parties' agreement even "affects" interstate commerce, the FAA applies. The enrollment agreement discloses that federal financial aid regulations apply to Daymar College's financial aid programs, and all plaintiffs allege that they were damaged by taking out student loans. (App. A, p. 2.) Thus, the FAA governs.

arbitration agreement, this Court begins its review "with a strong presumption that the general arbitration clause is not unconscionable." *Id.*

II. KRS 446.060 does not prohibit enforcement of the arbitration provision, because it does not apply to the enrollment agreement and does not abolish the doctrine of incorporation by reference.

The plaintiffs argue that the arbitration provision is unenforceable because it is located on the reverse side of the enrollment agreement, and the plaintiffs signed the enrollment agreement at the bottom of the front page. This argument is based on KRS 446.060(1), which states, "When the law requires any writing to be signed by a party thereto, it shall not be deemed to be signed unless the signature is subscribed at the end or close of the writing." The plaintiffs argue that under this statute, the terms on the reverse side of the agreement are unenforceable because they are located after the plaintiffs' signatures.

The plaintiffs' argument is incorrect for two reasons: (1) KRS 446.060(1) does not apply because the law does not require arbitration agreements to be signed; and (2) regardless, the terms on the reverse side of the agreement were incorporated by reference.

When statutory language is unambiguous, this Court enforces the language in accordance with its plain meaning.[11] By its plain terms, KRS 446.060(1) applies only "[w]hen the law requires any writing to be signed by a party thereto...." Consistent with this unambiguous language, this Court held long ago that KRS 446.060(1) (formerly codified at KRS Section 468) applies only to writings that the law requires to be signed by parties. *Terrell v. Commonwealth*, 194 Ky. 608, 240 S.W. 81, 83-85 (Ky. 1922).

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[11] *Jefferson County Bd. of Educ. v. Fell*, 391 S.W.3d 713, 719 (Ky. 2012) ("[W]e first look at the language employed by the legislature itself, relying generally on the common meaning of the particular words chosen, which meaning is often determined by reference to dictionary definitions."); *see also* KRS 446.080(4) (directing that when interpreting Kentucky statutes, "All words and phrases shall be construed according to the common and approved usage of language....").

Because the law does not require arbitration agreements to be signed, KRS 446.060(1) does not apply to the arbitration provision. In *Caley v. Gulfstream Aero. Corp.*, 428 F.3d 1359, 1368 (11th Cir. 2005), the U.S. Court of Appeals for the Eleventh Circuit held that an arbitration agreement need not be signed by the parties to be enforceable. The court stated, "We readily conclude that no signature is needed to satisfy the FAA's written agreement requirement....the overwhelming weight of authority supports the view that no signature is required to meet the FAA's 'written' requirement." *Id.* (citing cases from numerous jurisdictions supporting this view); *see also Seawright v. Am. Gen. Fin., Inc.*, 507 F.3d 967, 979 n.5 (6th Cir. 2007) ("[U]nlike contracts that fall under the Statute of Frauds, arbitration agreements under the FAA need to be written, but not necessarily signed.").

For this reason, the cases relied on by the plaintiffs are readily distinguishable. Each case cited by the plaintiffs involves a commercial-goods contract governed by the Uniform Commercial Code statute of frauds, KRS 355.2-201.[12] KRS 446.060(1) applied in those cases because they involved writings that, unlike arbitration provisions, must be signed to be enforceable.

KRS 446.060(1) would not render the arbitration provision unenforceable even if it were applicable. This Court's predecessor held that KRS 446.060(1) does not abolish the doctrine of incorporation by reference. *Childers & Venters, Inc. v. Sowards*, 460 S.W.2d 343, 345 (Ky. 1970). The terms on the back page of the enrollment agreement are incorporated by reference via language on the front page stating, "**I HAVE READ**

[12] *See Consolidated Aluminum Corp. v. Krieger*, 710 S.W.2d 869 (Ky. App. 1986); *Massey-Ferguson, Inc. v. Utley*, 439 S.W.2d 57 (Ky. 1969); *J.P. Morgan Delaware v. Onyx Arabians II, Ltd.*, 825 F. Supp. 146 (W.D. Ky. 1993); *Hertz Commercial Leasing Corp. v. Joseph*, 641 S.W.2d 753 (Ky. App. 1982).

BOTH PAGES OF THIS STUDENT ENROLLMENT AGREEMENT BEFORE I SIGNED IT AND I RECEIVED A COPY OF IT AFTER I SIGNED IT." Each plaintiff wrote her initials next to this incorporating language, which is the only text on the front page in bold, capital letters. When a party signs below incorporating language, terms on the back page of an agreement are binding under KRS 446.060(1). *Hertz*, 641 S.W.2d at 756.[13]

III. The delegation provision requires an arbitrator to resolve plaintiffs' challenges to the enforceability of the general arbitration provision.

The enrollment agreement contains two arbitration provisions: (1) the "general" arbitration provision requiring arbitration of "[a]ny dispute, controversy, or claim arising out of or relating to my enrollment at the College, this Agreement, or the breach thereof"; and (2) a provision requiring arbitration of any dispute "as to the scope or enforceability of [the] arbitration provision." The U.S. Supreme Court has termed this latter type of provision a "delegation provision." *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. ___, 130 S. Ct. 2772 (2010).

In addition to moving to compel arbitration of the plaintiffs' substantive claims, the defendants moved to compel arbitration of any dispute over the enforceability of the arbitration provision itself. (R. 215.) In *Rent-A-Center*, the U.S. Supreme Court held that when parties have agreed to a delegation provision, courts must enforce it unless there are grounds for revoking *the delegation provision specifically*. *Rent-A-Center*, 130 S. Ct. at 2779. Any general challenge to the larger contract containing the delegation provision – such as a claim that the general arbitration provision is unconscionable – must be decided

[13] Contrary to the plaintiffs' claim, this Court has never held that incorporating language must be conspicuous. The requirement for "conspicuous" language applies only to disclaimers of implied warranties under the Uniform Commercial Code. *Bartlett Aviation v. Dry Lake Coal Co.*, 682 S.W.2d 796, 798 (Ky. App. 1985). There is no general requirement that incorporating language be conspicuous.

by the arbitrator. *Id.* *Rent-A-Center* thus requires courts to "delegate" to an arbitrator the challenges that parties typically raise to the enforceability of arbitration provisions.

Because the plaintiffs raised no challenge that was specific to the delegation provision, the Court need not even address the plaintiffs' argument that the general arbitration provision is unenforceable. Under *Rent-A-Center*, the Court should remand the case to the Court of Appeals with instructions to order the circuit court to compel arbitration of all claims, including the plaintiffs' challenges to the enforcement of the general arbitration provision.

As a threshold matter, the defendants have not waived their argument that the delegation provision is enforceable. The plaintiffs incorrectly contend that because the defendants did not file a cross-motion for discretionary review, they have "waived any argument regarding the delegation provision and whether the court is the proper forum to determine the enforceability of the arbitration provision as a whole...."[14] This is inaccurate. In *Fischer v. Fischer*, this Court clarified that a party should not file a cross-motion for discretionary review unless it is "aggrieved" by the Court of Appeals' judgment, i.e., it suffers "actual harm" as a result of the opinion of the Court of Appeals. *Fischer*, 348 S.W.3d at 595-596. As this Court stated, "the prerequisite to an appeal is actual harm resulting from a judgment below....Any appeal—cross-appeal or otherwise—is only appropriate for an aggrieved party." *Id.* at 595. The Court went on to explain that

> the requirement of a cross-motion for discretionary review should only kick in when the Court of Appeals' judgment—its *result*—wrongs the appellee in this Court, even if only in part. Where the appellee in this Court has raised an issue at the Court of Appeals, which declines to

[14] Plaintiffs' brief, p. 11, n.40 (citing *Fischer v. Fischer*, 348 S.W.3d 582, 596 (Ky. 2011)).

> address it but nevertheless renders judgment wholly in favor of the appellee, a subsequent failure to raise that issue in this Court by way of a cross-motion for discretionary review should not be an absolute bar to this Court's consideration of it.

Id. at 596 (emphasis in original).

Under *Fischer*, the defendants have not waived their argument that the delegation provision is enforceable. The defendants were not required to cross-appeal because they were not aggrieved by the court of appeals' judgment, which provided the very relief the defendants sought: an order requiring arbitration of all claims in this action.[15] And the defendants argued for the enforcement of the delegation provision before both the trial court and the Court of Appeals. Thus, this Court may consider the defendants' argument that the delegation provision is enforceable.

The delegation provision requires arbitration of plaintiffs' arguments that the general arbitration provision is unenforceable. Similar to the delegation provision in *Rent-A-Center*, the delegation provision here provides, "All determinations as to the scope or enforceability of this arbitration provision shall be determined by the arbitrator, and not by a court." (App. A, p. 2.) The plaintiffs' claim that the arbitration provision is unconscionable is a dispute as to "the . . . enforceability of this arbitration provision" and is therefore within the scope of the delegation provision. *See Rent-A-Center*, 130 S.Ct. at 2777.

The plaintiffs did not satisfy their burden under *Rent-A-Center* of establishing that the delegation provision specifically was unenforceable. The plaintiffs challenged only

[15] In addition, the Court of Appeals did not reject the defendants' argument that *Rent-A-Center* applied. The court acknowledged the existence of the delegation provision and then appeared to proceed to evaluate whether *the delegation provision specifically* was unenforceable. (App. B to Plaintiffs' Brief, pp. 10-11, 17-23.)

the broader *arbitration provision*; they did not even attempt to establish that *the delegation provision* was unconscionable. In their response to the defendants' motion to dismiss and compel arbitration, the plaintiffs raised only challenges to the broader arbitration provision, not the delegation provision. (Resp. in Opp., R. 103.) Plaintiffs argued that the arbitration provision was unconscionable because it forced them to forgo a jury trial on *their substantive claims*, was a contract of adhesion, was buried in fine print, and required them to split the cost of arbitrating *their substantive claims* against the defendants. (*Id.*)[16] Even after the defendants moved to compel arbitration of these challenges under *Rent-A-Center*, the plaintiffs did not identify any reason why the delegation provision specifically was unconscionable. (Resp. to Mot. to Comp. Evid. Hearing Issues, R. 254.) Instead, they merely made unavailing attempts to distinguish *Rent-A-Center* and made the unsupported statement that the delegation provision was unconscionable. (*Id.*) The plaintiffs promised to "present evidence of [unconscionability specific to the delegation provision] at the evidentiary hearing." (*Id.* at R. 276.)

At the hearing, the plaintiffs did not deliver on this promise – they presented no evidence directed toward the argument that the delegation provision was unconscionable. Plaintiffs called attorney David Kelly as a witness to support their claim that it would be prohibitively expensive for them to arbitrate *their substantive claims against the defendants*. Kelly did not present any evidence that it would be prohibitively expensive for the plaintiffs to arbitrate only their claim that the arbitration provision is unconscionable. (VR1 at 14:20:50-14:38:00.) Plaintiffs' counsel never asked Kelly how much it would cost to arbitrate a dispute over the enforceability of an arbitration provision, how long it would take to arbitrate such a dispute, or whether an arbitrator

[16] As explained below, these claims are without merit.

would need to conduct a hearing to rule on it. Kelly's only testimony on the cost of arbitrating the enforceability of the arbitration provision came during cross-examination by defendants' counsel. Kelly testified that he did not think it would take an arbitrator more than "a day, at most" to hear proof on the issue of whether the arbitration provision was unconscionable. (*Id.* at 14:52:42-14:53:53.) He admitted this would be less expensive to the parties than one day-long deposition during a traditional court proceeding. (*Id.* at 14:54:18-14:54:36.)

The plaintiffs thus did not establish that the delegation provision specifically is unconscionable. The circuit court erred when it based its refusal to compel arbitration on plaintiffs' alleged inability to afford the cost of arbitrating their substantive claims. (App. A to Plaintiffs' Brief at ¶¶ 22, 24, 38.)[17]

IV. The arbitration provision is not unconscionable.

If the Court proceeds to address the plaintiffs' allegations that the general arbitration provision is unconscionable, the Court should hold that the arbitration provision is enforceable and not unconscionable under Kentucky law. The arbitration provision is a basic, bilateral arbitration clause located in a two-page contract signed by each plaintiff. This Court has never found such an arbitration provision to be unconscionable.

A. The arbitration provision is not substantively unconscionable – it is a basic, bilateral arbitration provision.

A contractual provision is not substantively unconscionable unless it is so "unreasonably or grossly favorable to one side" that the disfavored party cannot be said

[17] Although the circuit court's conclusions of law also mention that plaintiffs could not afford to advance the costs necessary for an arbitrator "to determine the enforceability of the arbitration agreement" nothing presented to the circuit court would support such a conclusion. (*Id.* at ¶ 38.) Accordingly, the circuit court's factual finding that "[c]osts would be prohibitively expensive to decide...the enforceability of the arbitration agreement" is clearly erroneous. (*Id.* at ¶ 24.)

to have assented to it. *Schnuerle*, 376 S.W.3d at 577; *Energy Home*, 406 S.W.3d at 835. A substantively unconscionable contract is "one which no man in his senses, not under delusion, would make, on the one hand, and which no fair and honest man would accept, on the other." *Energy Home*, 406 S.W.3d at 836 (citations omitted).

1. The provision is a standard, bilateral arbitration clause and is therefore not substantively unconscionable under *Schnuerle* and *Energy Home*.

In two recent cases involving arbitration clauses in consumer contracts, this Court has held that "a basic arbitration clause permitting either side to compel arbitration" is not substantively unconscionable. *Schnuerle*, 376 S.W.3d at 577 (affirming enforcement of arbitration provision in consumer contract with Internet service provider); *Energy Home*, 406 S.W.3d at 836 (reversing lower court rulings that arbitration agreement between home manufacturer and purchaser and was substantively unconscionable). As this Court found, an arbitration provision that imposes a bilateral obligation to arbitrate is commercially reasonable and not unconscionable in substance.[18]

In fact, this Court has held that an arbitration provision can be enforceable even if it does not treat the parties equally and is more favorable to the party with superior bargaining power. *Hathaway v. Eckerle*, 336 S.W.3d 83, 89 (Ky. 2011). In *Hathaway*, a car buyer argued that the arbitration provision she agreed to was substantively unconscionable because it permitted the car dealership, but not her, to pursue certain claims in court. *Id.* This Court rejected the buyer's argument, holding that "there is no inherent reason to require that the parties have equal arbitration rights" and that "[t]he

[18] These holdings are consistent with the U.S. Supreme Court's pronouncement that the FAA prohibits states from invalidating arbitration provisions on grounds "that derive their meaning from the fact that an agreement to arbitrate is at issue." *AT&T Mobility v. Concepcion*, __ U.S. __, 131 S. Ct. 1740, 1745 (2011).

potential for uneven remedies does not render [an] arbitration clause unconscionable." *Id.*

The enrollment agreement's arbitration provision is "a basic arbitration clause permitting either side to compel arbitration." *See Schnuerle*, 376 S.W.3d at 577. Like the arbitration clauses in *Schnuerle* and *Energy Home*, the arbitration provision is not "grossly favorable to one side" – it is evenhanded in every respect. The parties are equally bound to resolve by arbitration any dispute, claim, or controversy arising out of plaintiffs' enrollment at Daymar, the enrollment agreement, or a breach of the enrollment agreement. (App. A, p. 2.) The location specified for the arbitration is convenient to the plaintiffs – the hearing must take place in the city where the plaintiff attended Daymar. (*Id.*) The neutral AAA commercial rules govern the arbitration. (*Id.*) In short, the arbitration provision in the enrollment agreement, like the arbitration clause in *Schnuerle*, "has no unique characteristics to distinguish it from any other standard arbitration clause." *Schnuerle*, 376 S.W.3d at 577. Under this Court's recent precedent, such an arbitration provision is not substantively unconscionable.

2. The Court should reject plaintiffs' argument that the arbitration provision is substantively unconscionable because of the alleged cost of arbitrating plaintiffs' claims.

Despite the fact that the arbitration provision is a basic arbitration clause that is evenhanded in every respect, the plaintiffs argue that it is substantively unconscionable because they could not afford the cost of arbitrating their claims. (Plaintiffs' brief, pp. 24-30.) This argument is contrary to both Kentucky and federal law. Neither this Court nor the Court of Appeals has ever held that an arbitration provision was substantively unconscionable because the party seeking to avoid arbitration could not afford to arbitrate state law claims. And for the reasons outlined below, any such holding would be

preempted by the FAA under the U.S. Supreme Court's decision in *AT&T Mobility v. Concepcion*, __ U.S. __, 131 S. Ct. 1740 (2011).

A. This Court's dictum in *Schnuerle*.

The plaintiffs rely primarily on a passage from this Court's opinion in *Schnuerle*, which involved a dispute over the arbitrability of claims brought by a putative class of consumers against their Internet service provider. *Schnuerle*, 376 S.W.3d at 564. In *Schnuerle*, this Court held that under *Concepcion*, the FAA preempts any state law invalidating an arbitration agreement's class-action waiver "as unconscionable based solely upon the grounds that the dispute involves many *de minimis* claims which are, individually, unlikely to be litigated." *Id.* at 568.

In an attempt to distinguish *Concepcion*, the plaintiffs in *Schnuerle* raised three arguments. *Id.* at 572. The last of these three arguments was that *Concepcion* does not prevent courts from striking down class action waivers that prohibit consumers from being able "to vindicate their rights." *Id.* The plaintiffs cited *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), for the proposition that "class action waivers may be stricken when consumers are otherwise unable to vindicate their rights." *Id.* With respect to this argument, the Court stated:

> Finally, we strongly agree with Appellants that *Concepcion* does not disturb the basic principle that an arbitration clause is not enforceable if it fails to provide plaintiffs with an adequate opportunity to vindicate their claims. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985)* ("[S]o long as the prospective litigant effectively may vindicate [his] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."); *Green Tree Financial Corp.-Alabama v. Randolph, 531 U.S. 79, 81, 121 S. Ct. 513, 148 L. Ed. 2d 373 (2000)* ("the existence of large arbitration costs may well preclude a litigant . . . from effectively

> vindicating such rights"); *Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991)*; *14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 129 S. Ct. 1456, 173 L. Ed. 2d 398 (2009)*. Accordingly, arbitration clauses certainly may continue to be struck down as unconscionable if their terms strip claimants of a statutory right, which cannot be vindicated by arbitration, because, for example, the arbitration costs on the plaintiff are prohibitively high; or the location of the arbitration is designated as a remote location. But again, simply the impracticality of pursuing a single, small dollar claim is not regarded as an impediment to vindicating one's rights.

Id. at 573.[19]

It is unclear from this passage whether the Court intended to state that an arbitration provision could be unenforceable due to arbitration costs even in a case involving only *state law* claims. Each of the cases cited by the Court involves the federal common law doctrine of cost-prohibitiveness, which applies only when determining the arbitrability of *federal* statutory claims. This federal common law analysis, which is separate and distinct from an unconscionability analysis under state law, would not apply to the claims in *Schnuerle*, because those claims were brought under Kentucky law. *See Stutler v. T.K. Constructors, Inc.*, 448 F.3d 343, 345-348 (6th Cir. 2006).

This case presents an opportunity for the Court to clarify that the cost-prohibitiveness analysis referenced in *Schnuerle* applies only when *federal* statutory claims are involved. The Court should speak clearly on this point because a contrary ruling would run afoul of the FAA, which is "the supreme law of the land" under the Supremacy Clause. *See* U.S. CONST. art. VI.

[19] The Court went on to uphold the arbitration clause because it determined that the provision did not prevent the plaintiffs from "adequately vindicat[ing] their rights as contemplated in *Mitsubishi*...." *Id.* The discussion of the vindication analysis is dictum because it was not necessary to the Court's judgment.

B. Because this case involves only state law claims, the FAA preempts the cost analysis requested by the plaintiffs and erroneously applied by the circuit court.

Under *Concepcion*, it is apparent that the FAA preempts any holding allowing parties to avoid arbitration of *state law claims* merely because they could not afford the cost of arbitration. The U.S. District Court for the Middle District of Tennessee recently held that under *Concepcion*, the FAA would preempt any Kentucky law cost-prohibitiveness defense to the very arbitration clause at issue in this case. *Dean v. Draughons Jr. College*, 917 F. Supp. 2d 751 (M.D. Tenn. 2013). The court in *Dean* correctly applied *Concepcion* and Kentucky law. In addition, its holding is consistent with several other recent decisions from federal courts confirming that in light of *Concepcion*, the FAA preempts the application of the federal common law *Mitsubishi/Green Tree* cost-prohibitiveness defense in the context of purely state law claims.[20]

In *Concepcion*, the U.S. Supreme Court clarified the standard for determining whether a state law is preempted by the FAA. The Supreme Court began with the basic principle that "our cases place it beyond dispute that the FAA was designed to promote arbitration." 131 S. Ct. at 1749. The Supreme Court looked to the text of 9 U.S.C. § 2, the "primary substantive provision of the Act," which states,

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to

[20] *See Orman v. Citigroup, Inc.*, No. 11 Civ. 7086, 2012 WL 4039850 (S.D.N.Y Sept. 12, 2012) ("The Court cannot identify any cases in which a vindication of statutory rights analysis under the FAA has been applied to state statutory claims. Indeed, applying a vindication analysis to state statutory claims would appear to be incompatible with the Supreme Court's analysis in *Concepcion*."); *Cohen v. UBS Financial Services, Inc.*, No. 12 Civ. 2147, 2012 WL 6041634, *5 (S.D.N.Y. Dec. 4, 2012) ("With respect to Cohen, since he has only asserted state law claims, the Supreme Court's decision in Concepcion precludes the Court from engaging in a vindication of rights analysis as to this plaintiff."); *Kilgore v. KeyBank, Nat. Ass'n*, 673 F.3d 947, 961-962 (9th Cir. 2012) (finding that the *Mitsubishi* cost-prohibitiveness analysis "applies only to *federal* statutory claims") (emphasis in original).

> settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Id. at 1745 (quoting 9 U.S.C. § 2).

As the Court noted, this provision reflects both a "liberal federal policy favoring arbitration" and "the fundamental principle that arbitration is a matter of contract." *Id.* at 1746. Section 2 of the FAA ensures that "courts must place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms." *Id.* (internal citations omitted).

The FAA permits only limited exceptions to this rule. The final phrase of Section 2, known as the savings clause, "permits arbitration agreements to be declared unenforceable 'upon such grounds as exist at law or in equity for the revocation of ***any*** contract.'" *Id.* (emphasis supplied). In *Concepcion*, the Supreme Court held that "[t]his saving clause permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' ***but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.***" *Id.* (emphasis supplied).

Thus, *Concepcion* forbids states from invalidating an arbitration agreement on any ground that applies only to arbitration agreements or that derives its meaning from the fact that an arbitration agreement is at issue. *Id. Concepcion* further confirms that the FAA's preemptive effect extends to doctrines thought to be generally applicable – such as unconscionability – if the doctrine is "applied in a fashion that disfavors arbitration." *Id.* at 1747. In other words, a generally applicable rule is preempted if it has a "disproportionate impact on arbitration agreements." *Id.* Summarizing these principles,

the Supreme Court stated, "Although *§ 2*'s saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." *Id.* at 1748.

Because this case involves only state law claims, the FAA prohibits the application of the cost-prohibitiveness analysis requested by the plaintiffs and applied by the circuit court. A straightforward application of *Concepcion* demonstrates that federal law precludes the result sought by the plaintiffs.

The cost-prohibitiveness analysis applied by the circuit court is fundamentally at odds with the FAA because it is a defense "that appl[ies] only to arbitration" and that "derive[s] [its] meaning from the fact that an agreement to arbitrate is at issue." *Id.* at 1745. There is no generally applicable principle of unconscionability that permits a party to avoid a contractual commitment merely because, at the time the promise is sought to be enforced, the party lacks the financial resources to satisfy his or her contractual obligation. If there were a generally applicable doctrine of "cost-prohibitiveness," the doctrine would, for example, be a defense to a foreclosure action – or to any action for breach of contract based on a party's inability to make a contractually required payment. But there is no such doctrine in Kentucky contract law. Whether a contract is substantively unconscionable turns on an analysis of the terms of the contract *at the time it was made*, not at the time a party seeks to enforce a particular provision.[21] The analysis applied by the circuit court, which looked into the plaintiffs' financial resources *at the time that the defendants sought to enforce their contractual right to arbitration*, has no basis in Kentucky law on unconscionability.

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[21] RESTATEMENT 2D OF CONTRACTS, § 208 ("If a contract or term thereof is unconscionable *at the time the contract is made* a court may refuse to enforce the contract....) (emphasis supplied); *see also Sawyer v. Mills*, 295 S.W.3d 79, 89 (Ky. 2009) (relying on the RESTATMENT 2D OF CONTRACTS).

For that matter, there is no generally applicable state law doctrine that would render a contract unenforceable because it prohibits a party from prosecuting a cause of action. This Court enforces even pre-loss exculpatory contracts. *See Cumberland Valley Contractors, Inc. v. Bell Co. Coal Corp.*, 238 S.W.3d 644, 653 (Ky. 2007). In other words, a party may contractually waive the right to bring a certain claim, and such a waiver is not necessarily unconscionable even though it directly deprives the contracting party of a right to assert a cause of action. *Id.* Although exculpatory clauses have been found unenforceable in the context of *personal injury* claims involving parties with grossly unequal bargaining power, this Court has observed that "there is no published Kentucky state case in which an exculpatory clause was invalidated when only property loss (as opposed to personal injury) occurred." *Id.* The plaintiffs in this case do not assert any personal injury claims.

Similarly, there is no basis in Kentucky law for finding that it is unconscionable to require a party to pay significant expenses to pursue a claim in court. The law of this Commonwealth routinely requires plaintiffs to pay significant sums to fully prosecute a cause of action. In nearly every medical malpractice action, for example, a plaintiff must hire an expert witnesses or witnesses – usually at considerable cost – to avoid dismissal of his or her claims prior to trial. *See, e.g., Blankenship v. Collier*, 302 S.W.3d 665, 670, 675 (Ky. 2010). Additionally, as the Court is aware, in many judicial circuits in Kentucky, the trial court will not schedule a trial date until the parties have hired a private mediator to mediate the case at their shared expense. Yet this Court has never found that this practice is objectionable or unconscionable.

Accordingly, under generally applicable principles of contract law, an arbitration provision could not be held unenforceable merely because, at the time of enforcement, one party allegedly could not afford costs associated with arbitration. The cost-prohibitiveness analysis urged by plaintiffs would be a defense that applies only to arbitration agreements – something that the FAA plainly forbids.

The cost-prohibitiveness analysis, if applied when determining the arbitrability of state law claims, would clearly stand as "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Concepcion*, 131 S. Ct. at 1753. As the Supreme Court has repeatedly emphasized, "[t]he 'principal purpose' of the FAA is to 'ensur[e] that private arbitration agreements are enforced according to their terms.'" *Id.* (citation omitted). In this case, the Court of Appeals properly recognized that the analysis applied by the circuit court would permit "a very large portion of the citizenry of this Commonwealth...to avoid a contractual commitment to arbitrate merely by showing the court that they made less than a certain salary." (App. B to Plaintiffs' Brief, p. 25.) As the Sixth Circuit noted in *Stutler*, applying the *Mitsubishi* cost-prohibitiveness analysis to state law claims "would, in effect, limit the enforcement of arbitration agreements to situations in which all of the parties to the agreement are wealthy." *Stutler*, 448 F.3d at 347. The Sixth Circuit found this to be an "absurd result" and "not what Congress intended when it enacted the FAA." *Id.*

The Court of Appeals rightly saw that if the circuit court's decision were upheld, this result would be enshrined as Kentucky law. The facts of this case illustrate why the circuit court's decision must be reversed to ensure that Kentucky's "paramount interest in the enforcement of arbitration agreements" is more than an empty phrase. *See id.* at 346.

The circuit court held that plaintiff Gordan – who had a household income of $50,219 in 2008 – was not required to arbitrate her claims, because the cost of arbitration rendered the arbitration provision substantively unconscionable. The court reached this result even though Gordan's household income was 17.4% *greater* than the median household income in Kentucky in 2008, which was $41,489.[22] If this Court adopts the circuit court's analysis, well over half of the population of Kentucky may be able to avoid arbitrating disputes that they agreed to arbitrate. Such a holding would plainly have a disproportionate impact on arbitration provisions, and it would stand as an obstacle to Congress's goal of ensuring that agreements to arbitrate are treated the same as any other contract.

In *Dean*, the U.S. District Court for the Middle District of Tennessee recently reached this very conclusion when evaluating the same arbitration provision involved here. The plaintiffs, current and former students of Daymar campuses in Tennessee, asserted state common law and statutory claims against the defendants, who were alleged to operate or control the campuses. *Dean*, 917 F. Supp. 2d at 753. The defendants moved to compel arbitration in accordance with arbitration and delegation provisions contained in an enrollment agreement signed by each plaintiff. *Id.* These provisions were substantively identical to the ones at issue in this case.

The court held that to the extent this Court appeared to recognize a cost-prohibitiveness defense in *Schnuerle*, such a defense is preempted by the FAA unless federal statutory claims are involved. *Id.* at 760-763. As the court found, the cost-prohibitiveness analysis derived from the *Mitsubishi/Green Tree* line of cases is a

[22] Kentucky QuickFacts from the U.S. Census Bureau, http://quickfacts.census.gov/qfd/states/21000.html (accessed January 15, 2014).

doctrine specific to arbitration and "is *not* applicable to 'any' contract within the meaning of the FAA § 2's savings clause." *Id.* at 762 (emphasis in original). The court held that even if this analysis were based on general Kentucky unconscionability principles, "the application of general Kentucky substantive unconscionability principles to preclude enforcement of an arbitration agreement based on cost-prohibitiveness would frustrate the FAA's purposes." *Id.*[23] As the court explained,

> Regardless, the Supreme Court in *Concepcion* found that state law policies that threaten to disproportionately disfavor arbitration agreements are preempted by the FAA. Thus, even if there were some theoretical application of the cost-prohibitiveness doctrine in another context, such as in litigation, it is difficult to see how applying an *ex post facto* cost-prohibitiveness defense would not threaten to frustrate the enforcement of otherwise binding arbitration agreements, thereby running afoul of the FAA's purposes. That is, whether to arbitrate would turn not on the terms to which the parties agreed, but on the amount of money that one party possesses at the time of suit.

Id. at 763.

As is apparent from *Concepcion* and *Dean*, the FAA broadly preempts any state law doctrine that interferes with the FAA's aim of ensuring that arbitration provisions are enforced as written. Shortly after issuing its opinion in *Concepcion*, the U.S. Supreme Court summarily overturned a state court decision that failed to apply the principles of FAA preemption set forth in *Concepcion*. *See Marmet Health Care Ctr., Inc. v. Brown*, ___ U.S. ___, 132 S. Ct. 1201 (2012). In *Marmet*, the Court, in a *per curiam* opinion, reversed the West Virginia Supreme Court's application of a state law rule prohibiting

[23] Although *Dean* was filed in Tennessee, the district court determined that in accordance with a choice-of-law provision in the enrollment agreement, Kentucky law governed the interpretation and enforceability of the arbitration provision. (*See* App. A, p. 2 ("The validity, interpretation, and performance of this Agreement shall be controlled by and construed under the laws of the Commonwealth of Kentucky....").)

enforcement of pre-dispute agreements to arbitrate personal-injury or wrongful-death claims against nursing homes. The Court reiterated that the FAA "requires courts to enforce the bargain of the parties to arbitrate" and "reflects an emphatic federal policy in favor of arbitral dispute resolution." *Id.* at 1203.

Likewise, lower federal appellate courts have recognized that other state law doctrines cannot survive *Concepcion* if they have a disproportionate effect on arbitration agreements. *See, e.g., Kilgore*, 673 F.3d at 958-963. In *Kilgore*, the U.S. Court of Appeals for the Ninth Circuit held that the FAA preempts California's *Broughton-Cruz* rule, which had maintained that plaintiffs could not be required to arbitrate claims for prospective public injunctive relief under a California consumer-protection statute. The Ninth Circuit held that the *Broughton-Cruz* rule did not survive *Concepcion* because it prohibited outright the arbitration of a particular type of claim, running afoul of the FAA. The court noted that the FAA preempted the *Broughton-Cruz* rule regardless of whether the rule was supported by important state policy concerns: "But the very nature of federal preemption *requires* that state law bend to conflicting federal law—no matter what the purpose of the state law." *Id.* at 961 (emphasis in original).

In short, *Concepcion* makes clear that the FAA would preempt the application of a cost-prohibitiveness analysis to determine the arbitrability of state law claims. The Court should therefore reject the plaintiffs' argument that the arbitration provision was substantively unconscionable due to the plaintiffs' alleged inability to afford the cost of arbitration.

3. The circuit court erroneously determined that arbitration was cost-prohibitive for these plaintiffs.

Even if the cost of arbitration could render an arbitration agreement unconscionable, arbitration was not cost-prohibitive in this case. In *Green Tree*, the U.S. Supreme Court held that a party resisting the arbitration of federal statutory claims bears the burden of proving that the cost of arbitration would prohibit the party from meaningfully litigating his or her claims. *Green Tree*, 531 U.S. at 90. If this analysis could constitutionally be applied to state-law claims in Kentucky, the plaintiffs would have the burden of proving that cost prohibited them from meaningfully asserting their claims. The plaintiffs did not satisfy this burden here.

The circuit court erroneously concluded that a cost-sharing provision in the enrollment agreement rendered the arbitration provision substantively unconscionable. (App. A to Plaintiffs' Brief, ¶¶ 21-24, 38.) The cost-sharing provision states, "The expenses of the arbitration shall be born[e] equally by the parties to the arbitration, and each party shall pay for and bear the cost of its own experts, evidence, and legal counsel." (App. A, p. 2.) The defendants are not aware of any Kentucky appellate decision holding that a cost-sharing provision could render an arbitration or delegation provision unconscionable. To the contrary, in *Hathaway*, this Court rejected such an argument and held that a provision requiring each party to "pay its own costs" in arbitration was not unconscionable. *Hathaway*, 336 S.W.3d at 88-89.

Any holding that a cost-sharing provision is unconscionable would be inconsistent with the Kentucky Uniform Arbitration Act, KRS 417.045 *et seq.*, which specifically requires the enforcement of cost-shifting provisions in arbitration agreements. KRS 417.140 states that parties may contract for allocation of the fees and expenses of

arbitration: "***Unless otherwise provided in the agreement to arbitrate***, the arbitrators' expenses, fees and other expenses incurred in the conduct of the arbitration shall be paid as provided in the award." (emphasis supplied). This statute's evident implication is that a cost-sharing provision is enforceable under Kentucky law.

The circuit court incorrectly found that the cost-sharing provision would increase the up-front costs to plaintiffs to arbitrate their claims. In fact, the cost-sharing provision will likely result in the plaintiffs' paying less money up front to arbitrate the enforceability of the arbitration provision than they would pay under the AAA Commercial Rules in the absence of the cost-sharing provision. The cost-sharing provision requires the parties to equally split "the expenses of arbitration" – which include the AAA's administrative fee, the arbitrator's compensation, and other incidental expenses of the AAA arising from the arbitration. *See* AAA Commercial Rules, R-54.[24] The cost-sharing provision goes on to provide that the parties will not equally share, but rather will pay for their own, "experts, evidence, and legal counsel."

If the plaintiffs were proceeding under the AAA Commercial Rules in the absence of the cost-sharing provision, they would be required to pay a $3,350 initial filing fee for the filing of a "nonmonetary claim" (in this case, a claim seeking an adjudication of the enforceability of the arbitration provision). *See* AAA Commercial Rules, p. 40, Table of Fees. If the case were to advance to a hearing, the plaintiffs would be required to pay an additional $1,250 "final fee" before the hearing. *Id.* The plaintiffs would also be required to pay one half of the arbitrator's fee. *Id.* at R-54, R-56 (providing that the parties shall equally bear "expenses of the arbitration, including required travel and other expenses of the arbitrator, [and] AAA representatives....").

[24] Available on the website of the AAA, www.adr.org/.

The cost-sharing provision will likely reduce the up-front costs to the plaintiffs of arbitrating the issue of arbitrability. Under the cost-sharing provision, the defendants would be required to pay half of the initial filing fee and any final fee – fees that would otherwise be paid by the plaintiffs, the parties commencing the arbitration proceeding. With respect to the arbitrator's compensation, the cost-sharing provision does not alter the default position of the AAA Commercial Rules, which requires the parties to equally share the arbitrator's fee, unless the arbitrator in the award assesses expenses against one party. The cost-sharing provision requires the parties shall pay for their own evidence and witnesses, as they would have to do if they were in court. This is also the default position under the AAA Commercial Rules. *See* AAA Commercial Rules R-54. There is no basis in Kentucky law on unconscionability to find that the default position of the AAA Commercial Rules is unconscionable. In *Hathaway*, this Court relied on and favorably cited the AAA Commercial Rules in upholding the cost-sharing provision in the parties' arbitration clause. *Hathaway*, 336 S.W.3d at 88-89.

With respect to the cost of arbitrating plaintiffs' substantive claims, the plaintiffs failed to prove that costs were prohibitive under the cost-prohibitiveness analysis applicable to federal statutory claims. In the context of federal statutory claims, "where...a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." *Morrison v. Circuit City Stores*, 317 F.3d 646, 659 (6th Cir. 2000). The undisputed proof before the circuit court was that the cost of arbitrating would be minimal for any plaintiff seeking less than $75,000. No plaintiff testified that her damages exceeded $75,000. Rather, plaintiffs allege that they were

damaged by taking out loans, and the court found that plaintiffs borrowed between $17,000 and $34,000. (Ex. A to Plaintiffs' Brief at ¶¶ 1, 3-14.) Despite this, the circuit court based its conclusion that arbitration would be prohibitively expensive on its assumption that the plaintiffs' claims would be subjected to the AAA filing fee normally imposed for claims seeking over $75,000 in damages. (*See id.* at ¶¶ 23-24.) The plaintiffs failed to meet their burden on this issue because they introduced no evidence that their claims for damages exceeded $75,000.

Moreover, the undisputed proof was that the AAA has a process in place to seek a waiver or reduction in arbitration fees, and the plaintiffs did not attempt to avail themselves of this process. If a plaintiff may obtain a waiver or seek a reduction in fees, she cannot meet her burden of proving the likelihood of prohibitive costs. Rather, the plaintiff must first seek the waiver in arbitration before attempting to meet her burden. In *Mazera v. Varsity Ford,* 565 F.3d 997, 1004-05 (6th Cir. 2009), the Sixth Circuit held that a cost-splitting provision would not be unconscionable if "Varsity Ford waives or sufficiently reduces the deposit amount for those employees who are likely to be deterred from pursuing their rights because they are unable to pay it." The court suspected "that Varsity Ford would seriously entertain [a] waiver request. Varsity Ford's counsel stated at oral argument that, although he could not predict with certainty how his client would respond to a waiver request, he thought it likely that such a request would be granted." *Id.* The court held that "[i]n light of the waiver provision, we remand the case to the district court" and held that the plaintiff was required to request a waiver of the arbitration fee. *Id.*

The circuit court here failed to consider the AAA's fee waiver or deferral procedure. Because there is an opportunity to obtain a fee waiver under the AAA rules and the plaintiffs did not seek to benefit from it, plaintiffs cannot meet their burden of proving that arbitration of the delegated issues would be cost prohibitive.

Finally, arbitration could not be cost-prohibitive, because Daymar agreed to pay the cost of arbitration. At the outset of the evidentiary hearing, the defendants offered to advance the costs of arbitration. (VR1 at 8:56:28-8:56:53) Daymar made this offer to alleviate the burden of each plaintiff having to pay the arbitration costs in order to arbitrate each claim. At the evidentiary hearing, defense counsel stated, "I have authority and on behalf of my clients commit and represent to the Court and would submit to an order that if the AAA were to determine that the plaintiffs have to pay a fee this court believes excessive, my clients would agree to front those arbitration costs." (*Id.* at 8:56:28-8:56:53). This offer was consistent with the Eighth Circuit's holding in *Dobbins v. Hawk's Enterprises,* which provides a procedure under which a trial court can ensure that arbitration is not cost-prohibitive. 198 F.3d 715 (8th Cir. 1999). In *Dobbins*, the plaintiffs argued that arbitration was cost-prohibitive. *Id.* The Eighth Circuit held that a plaintiff should first "seek a diminution or waiver of fees from the AAA. The district court should also retain jurisdiction over the case to determine if the fee, if not waived altogether, is lowered to a reasonable amount. If the district court finds that the fee is unreasonable given the current financial situation of the [plaintiffs], the district court should accept the [defendants'] offer to pay the arbitration fees." *Id.* at 717.[25] This framework was the basis of Daymar's offer.

[25] In *Dobbins*, the defendant's offer to pay the costs of arbitration was made for the first time at oral argument. *Id.* at 717, n.4.

After the court denied the motion to compel arbitration, defendants expanded their offer and stated, "Daymar hereby commits to pay all fees of the arbitrator and the AAA administrative fees ('costs of arbitration') for the Plaintiffs who were not dismissed to arbitration. Daymar extends this offer without conditions and will not seek or accept reimbursement of these costs even in the event Defendants prevail in arbitration." (Mot. to Vacate, R 419.) In light of this offer, the circuit court clearly erred by invalidating the arbitration provision based on a finding that arbitration was cost-prohibitive for plaintiffs. As a matter of law, arbitration cannot be cost-prohibitive when the party asserting the claim is not required to pay anything.

B. The arbitration provision is not procedurally unconscionable.

The enrollment agreement's arbitration provision is not procedurally unconscionable under *Schnuerle* and *Energy Home*. Procedural unconscionability refers to "the process by which an agreement is reached and to the form of the agreement. It includes, for example, the use of fine or inconspicuous print and convoluted or unclear language that may conceal or obscure a contractual term." *Energy Home*, 406 S.W.3d at 835 (citing *Schnuerle*, 376 S.W.3d at 576-77). Relevant factors in determining if an agreement is procedurally unconscionable include whether the contract's terms are conspicuous and comprehensible, whether they are oppressive, and whether the party seeking to invalidate the contract had a meaningful choice about whether to sign it. *Schnuerle*, 376 S.W.3d at 576. This Court has referred to procedural unconscionability as "unfair surprise" unconscionability. *Id.*

The enrollment agreement's arbitration provision bears none of the hallmarks of procedural unconscionability. This Court and the Court of Appeals have consistently held that the inclusion of an arbitration provision in a consumer contract is not

"oppressive" or unfairly surprising and is therefore not procedurally unconscionable. *Id.*; *Energy Home*, 406 S.W.3d at 835-836; *Conseco Finance Servicing Corp. v. Wilder*, 47 S.W.3d 335, 341 (Ky. App. 2001).

There was nothing oppressive or unfairly surprising about the inclusion of the arbitration provision in the enrollment agreement. The terms of the arbitration provision are in plain language, comprehensible, and are similar to those used in numerous arbitration agreements throughout the Commonwealth. The arbitration provision is not buried in fine print or printed in smaller type than the remainder of the contract. It is clearly visible and set off from the rest of the page as its own paragraph. The arbitration provision was one of just four complete paragraphs on the second page of a two-page contract. This is not a case where an unfairly surprising term was buried deep in a lengthy contract in fine print and couched in confusing "legalese." Instead, the first sentence of the paragraph containing the arbitration provision states, "Any dispute, controversy, or claim arising out of or relating to my enrollment at the College, this Agreement, or the breach thereof, shall be resolved by arbitration." (App. A, p. 2.) Like the provision recently upheld by this Court in *Energy Home*, the arbitration provision here was stated in clear and concise language, was not hidden or obscured, and could be understood by an adult of ordinary experience and intelligence. *Energy Home*, 406 S.W.3d at 836.

The plaintiffs' arguments concerning procedural unconscionability are indistinguishable from the arguments rejected by this Court in *Schnuerle* and *Energy Home*. Like the plaintiffs here, the plaintiffs in *Schnuerle* argued that the arbitration provision was procedurally unconscionable because it was "contained in a non-

negotiable, take it or leave it, adhesion contract." *Schnuerle*, 376 S.W.3d at 576. Likewise, the plaintiffs in *Energy Home* contended that the arbitration provision at issue was unconscionable because they were not permitted to negotiate the terms of the warranty agreement in which the provision was found. *Energy Home*, 406 S.W.3d at 836. In both cases, this Court rejected the argument. As the Court explained, "Adhesion contracts are not *per se* improper. On the contrary, they are credited with significantly reducing transaction costs in many situations." *Schnuerle*, 376 S.W.3d at 576. Similarly, in *Energy Home*, the Court stated that the agreement "was a contract of adhesion only in the sense that he was not given the opportunity to negotiate for the parts of the warranty agreement he liked and to bargain away the parts he disliked; it was presented as a 'take it or leave it' option." *Energy Home*, 406 S.W.3d at 836. As the Court found, "The lack of that option did not make its acceptance compulsory." *Id.*[26] The fact that the plaintiffs did not negotiate any modifications to the enrollment agreement does not render the arbitration provision unconscionable.

The plaintiffs also argue that the arbitration provision is unconscionable because it is located on the back page of a two-page agreement, making it not readily visible to the plaintiffs. In *Schnuerle*, this Court rejected the plaintiffs' argument that the arbitration provision was procedurally unconscionable because it was not readily visible to customers contracting for service on the Internet, who had to navigate to a page

[26] It merits mention that although arbitration provisions are enforced even when they are in contracts of adhesion, the enrollment agreement was not truly a contract of adhesion. Plaintiffs did not allege that they were unable to obtain education from any other source or that they bargained for or were denied an enrollment agreement without an arbitration provision or with a different one. *See Conseco*, 47 S.W.3d at 343 n.24 (not a contract of adhesion because the plaintiffs have "not alleged that they attempted to bargain for a different or for no arbitration clause; nor have they alleged that the principal benefit they sought from this [agreement] was not reasonably available to them from other sources.") Thus, like the contract in *Conseco*, the enrollment agreement was not an adhesion contract.

separate from the main agreement to view the arbitration provision. *Schnuerle*, 376 S.W.3d at 576-577. The Court pointed out that "[t]he method of referring the reader to a different screen is a common practice in most web sites, and even in many written contracts (usually by reference to an addendum)." *Id.* at 577.

This Court should reject the plaintiffs' similar argument that the arbitration clause here is procedurally unconscionable merely because it is located on the reverse side of a two-page agreement. The front page of the agreement referred the plaintiffs to the terms on the back side of the agreement, and each plaintiff confirmed by initialing that she had read the terms on the back page of the agreement. In *Conseco*, the court of appeals held under identical circumstances that "that "[t]he fact that the clause appeared single-spaced on the back of a preprinted form did not render it procedurally unconscionable." *Conseco*, 47 S.W.3d at 343.

The plaintiffs argue that the Court of Appeals erroneously set aside the circuit court's findings of fact related to procedural unconscionability. This is inaccurate. The Court of Appeals did not take issue with the circuit court's findings of fact; it found that the circuit court improperly applied Kentucky law. The Court of Appeals' ruling in this regard is consistent with not only *Schnuerle* and *Energy Home*, but also over a century of Kentucky authority concerning basic principles of contract law. The circuit court found procedural unconscionability based on the following: plaintiffs' testimony that they did not know what arbitration was and that admissions counselors did not offer, unsolicited, to explain the significance of the arbitration provision to them; that the arbitration agreements were a condition of enrollment and non-negotiable; that the time period of less than 90 minutes only offered the plaintiffs a limited opportunity to read the

agreements; and that the arbitration agreement was contained in the last paragraph of the second page of the enrollment agreement in unbolded type. (App. A to Plaintiffs' Brief at ¶ 37.)

These factual findings by the circuit court do not establish procedural unconscionability. As the circuit court acknowledged, the plaintiffs admitted that they had an ***opportunity*** to read the arbitration provision and that they could have asked questions about it. The circuit court specifically found that "***each Plaintiff was permitted to read the entire enrollment agreement before signing it....***" (App. A to Plaintiffs' Brief at ¶ 18) (emphasis supplied). Moreover, there is no dispute that plaintiffs received a copy of the enrollment agreement and could have read it at home and cancelled the agreement without penalty at any time before classes began. The plaintiffs' failure to read the agreement does not render the arbitration provision unenforceable. As this Court's predecessor stated almost 90 years ago, "a person cannot avoid a written contract into which he has entered on the ground that he did not attend to its terms, that he did not read the document which he signed, or that he supposed it was different in its terms, or that it was a mere form. **This text is supported by perhaps 25 or 30 Kentucky cases.**" *Morgan v. Mengel Co.*, 242 S.W. 860, 862 (Ky. 1922) (emphasis added). In *Morgan*, the former Court of Appeals specifically rejected the circuit court's reasoning that the arbitration provision was unconscionable because no one explained it to the plaintiffs: "It is well settled that a person who signs an instrument without reading it, when he has the opportunity to read it and can read, cannot avoid the effect of his signature merely because he was not informed of its contents." *Id.*

The plaintiffs were not deprived of a "meaningful choice" – they had the opportunity to read the enrollment agreement and ask questions about its contents, including the arbitration provision. The fact that they signed the enrollment agreement without doing either does not render the arbitration provision unconscionable.

C. Plaintiffs' receipt of student loans would not render the arbitration agreement unconscionable for lack of consideration.

The plaintiffs argue that the arbitration provision is unconscionable because it was lacking in "mutual consideration/obligation." (Plaintiffs' Brief, p. 30.) Without citing to the record or to any legal authority supporting their position, the plaintiffs contend that defendants' obligation to arbitrate is "meaningless" because Daymar's only potential legal claims against the plaintiffs would be for non-payment of tuition, and Daymar has been paid for tuition through student loans obtained by the plaintiffs. (*Id.*, pp. 30-31.)

The Court should reject this argument for several reasons. First, the plaintiffs waived the argument by failing to raise it before either the trial court or the court of appeals. Second, the plaintiffs are mistaken when they speculate that the only possible claims that the defendants could have against the plaintiffs would be for non-payment of tuition. The arbitration provision is broad and requires arbitration of any claim arising out of the plaintiff's enrollment or the enrollment agreement – this could include any number of claims. In addition, Daymar, like plaintiffs, is obligated to arbitrate claims of the sort brought by the plaintiffs here and would be required to arbitrate those claims even if it desired to proceed in court. It is axiomatic that a mutual exchange of promises constitutes adequate consideration. *See, e.g., Puckett v. Hatcher*, 307 Ky. 160; 209 S.W.2d 742, 745 (Ky. 1948). In short, the arbitration agreement does not lack

consideration merely because the plaintiffs contend that any potential claim by Daymar against the plaintiffs would be without merit.

VI. Regardless, the cost-sharing provision could be severed from the arbitration agreement.

The circuit court committed an error of law by refusing to sever from the arbitration agreement the provision that it found objectionable, the agreement to split the cost of arbitration. The circuit court erred by holding that the relevant inquiry was whether "the intent to sever the cost-splitting provision, from the arbitration provisions, can...be inferred from the language contained in the student enrollment agreement.) (App. B to Plaintiffs' Brief at p. 1.) This is not the proper analysis under Kentucky law to determine whether the cost-sharing provision is severable.

Under Kentucky contract law, the absence of a severability provision does not prohibit the severance of an offensive provision. *Business Men's Assurance Co. of America v. Eades*, 161 S.W.2d 920, 922 (Ky. 1942). Kentucky courts have a policy in favor of enforcing contracts and will strike objectionable provisions to sustain contracts as a whole. In *Apex Contracting, Inc. v. Williams Robinson Constr. Co.*, 581 S.W. 2d 573, 576-577 (Ky. 1979), the Kentucky Supreme Court held that "if the legality of the contract can be sustained in whole or in part under any reasonable interpretation of its provisions, courts should not hesitate to decree enforcement." As long as the elimination of the objectionable provision will not impair the symmetry of the contract as a whole, the court should sever the provision. *Edleson v. Edleson*, 200 S.W. 625, 630 (Ky. 1919). Where a Kentucky court can eliminate a provision, and "[i]ts elimination will not impair the contract, as a whole, or in anywise affect any other provision of it, and hence might be properly considered an independent covenant...this provision is severable and may be

eliminated, because void, and the remainder of the contract be held valid and enforceable." *Id.*

Here, the cost-sharing provision may be eliminated, because it is supported by the parties' mutual promise to equally share the cost of arbitration. It is therefore an "independent covenant" and should be severed from the enrollment agreement if it is found to be objectionable. The circuit court incorrectly focused on whether the agreement's language demonstrated an intent to sever the cost-splitting provision. The issue was not whether the parties intended to sever an unconscionable provision. Rather, the issue was whether the parties intended for the enrollment agreement to contain a series of component parts, or whether the parties intended for the agreement to be treated as so interdependent that no promise would be required to be performed if any other provision of the contract were breached. *See Gilmore & Co. v. Samuels & Co.*, 123 S.W. 271, 274-75 (Ky. 1909).

Severance is particularly appropriate to enforce federal and Kentucky pro-arbitration policy. In order to preserve the larger arbitration provision, a court may sever a cost-splitting provision that it finds objectionable. *See, e.g., Morrison v. Circuit City Stores*, 317 F.3d 646, 674-75 (6th Cir. 2000). In *Schnuerle v. Insight Comm. Co.*, Nos. 2008-SC-789 & 2009-SC-390, 2010 Ky. LEXIS 288, *26-38 (Ky. Dec. 16, 2010) ("*Schnuerle I*"), this Court severed from an arbitration provision the two terms that it found objectionable (a ban on class actions and a confidentiality provision). Although the *Schnuerle I* opinion was later withdrawn following re-argument necessitated by the U.S. Supreme Court's decision in *Concepcion*, it demonstrates that this Court will sever

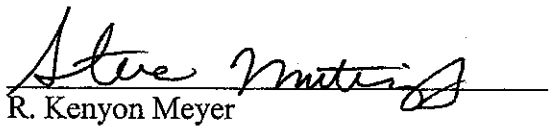
an objectionable provision from an arbitration clause to further the federal and Kentucky policies in favor of enforcing agreements to arbitrate.

Accordingly, the severability of the cost-sharing provision would provide an independent basis for affirming the Court of Appeals' decision even if this Court were to determine that the cost-sharing provision gave rise to unconscionability.

CONCLUSION

For the above reasons and those set forth in the Court of Appeals' well-reasoned opinion, this Court should affirm the Court of Appeals' judgment.

Respectfully submitted,



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APPENDIX

Appendix A	Sample Enrollment Agreement (R. 215 at Ex. 2.)
Appendix B	July 20, 2012 McCracken Circuit Court Judgment Enforcing Arbitration Award