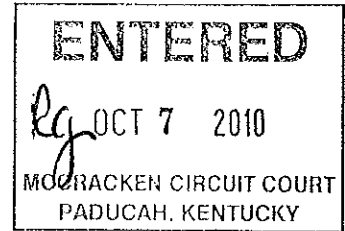


COMMONWEALTH OF KENTUCKY
McCRACKEN CIRCUIT COURT
DIVISION NO. I
CASE NO. 10-CI-0132



BRITTANY DIXON, et al.,

PLAINTIFFS,

VS.

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND
ORDER GRANTING MOTION TO DISMISS IN PART,
AND DENYING MOTION TO DISMISS IN PART**

DAYMAR COLLEGES GROUP, LLC, et al.,

DEFENDANTS.

Defendants having moved to dismiss this action and to compel arbitration; an evidentiary hearing having been held on the motion, limited to the issues of (i) whether Daymar College's arbitration agreement is unconscionable, and (ii) whether arbitration would be prohibitively expensive for the Plaintiffs; and, the Court now being sufficiently advised, makes the following:

FINDINGS OF FACT

1. Plaintiffs are fifteen current or former students of Daymar College, from western Kentucky and southern Illinois, who attended Daymar College in Paducah, Kentucky, by borrowing from \$17,000 to \$34,000 through student loans. They allege the education they received from Daymar College is not what they were promised when they enrolled.

2. Defendants are for-profit corporations who own and operate Daymar Colleges in Kentucky, Indiana, Tennessee, and Ohio. Defendant, Mark Gabis, is alleged to be the president and principal shareholder of the named Defendants.

Plaintiffs attended Daymar College in Paducah, Kentucky, and the facts of this motion concern a student enrollment agreement between the Plaintiffs and Daymar College. Yet, Daymar College is not a named Defendant. The legal relationship between Daymar College and the named Defendants was not resolved at the evidentiary hearing.

3. On October 2nd, 2008, Plaintiff, Brittany Dixon, was a twenty-six year old resident of Paducah, Kentucky, who enrolled in Daymar College in Paducah, Kentucky. At the time of her admission into the College, she was not a high school graduate, but she had earned a GED. She has attended Daymar College for two years in the College's paralegal program. She has borrowed \$30,000 to attend the College. She is employed, now earning \$7.55 per hour. Her earnings in 2009 were approximately \$13,000. She makes monthly payments on her student indebtedness.

4. On April 12th, 2006, Plaintiff, Amy Lee, was a resident of Murray, Kentucky, when she enrolled in the medical assisting-clerical program at Daymar College in Paducah, Kentucky. She was a high school graduate, who has now graduated from Daymar College. She borrowed \$33,000 to attend Daymar College for the twenty-four month program. She is now employed earning \$9.00 per hour. She makes monthly payments on her student indebtedness.

5. On November 12th, 2007, Plaintiff, Darena Prescott, was a resident of Paducah, Kentucky, when she enrolled in the medical assisting-clerical program at Daymar College in Paducah, Kentucky. She was a high school graduate at the time of her enrollment into the College. She has now graduated from Daymar

hearing, after the parties stipulated that her testimony would be substantially similar to those Plaintiffs who testified at the hearing. The total costs for her educational program at Daymar were \$33,663. In 2009, she reported a total gross income of \$15,311. Plaintiffs' amended complaint alleges she acquired significant educational debt from her attendance at Daymar College.

9. On May 31st, 2006, Plaintiff, Monica Sykes, was a resident of Benton, Kentucky, when she enrolled in the medical assisting-clinical program at Daymar College in Paducah, Kentucky. She also did not testify at the evidentiary hearing, after the parties stipulated that her testimony would be substantially similar to those Plaintiffs who testified at the hearing. According to her student enrollment agreement, she was not a high school graduate, but she had earned a GED. The total costs for her educational program at Daymar were \$25,855. In 2009, she reported an adjusted gross income with her husband of \$14,969. Plaintiffs' amended complaint alleges she acquired significant educational debt from her attendance at Daymar College.

10. On October 5th, 2007, Plaintiff, Tasha Allen, was a resident of Paducah, Kentucky, when she enrolled in the paralegal studies program at Daymar College in Paducah, Kentucky. She also did not testify at the evidentiary hearing, after the parties stipulated that her testimony would be substantially similar to those Plaintiffs who testified at the hearing. According to her student enrollment agreement, she was a high school graduate. The total costs for her educational program at Daymar were \$31,394. In 2009, she reported an adjusted

gross income of \$15,969. Plaintiffs' amended complaint alleges she acquired significant educational debt from her attendance at Daymar College.

11. On February 13th, 2006, Plaintiff, Jessica Gordon, was a resident of Calvert City, Kentucky, when she enrolled in the medical assistants program at Daymar College in Paducah, Kentucky. She also did not testify at the evidentiary hearing, after the parties stipulated that her testimony would be substantially similar to the Plaintiffs who testified at the hearing. According to her student enrollment agreement, she was a high school graduate. The total costs for her educational program at Daymar College were \$24,895. In 2008, she and her husband reported an adjusted gross income of \$50,219. Plaintiffs' amended complaint alleges she acquired significant educational debt from her attendance at Daymar College

12. On September 21st, 2007, Plaintiff, Kathy Crowe, was a resident of Metropolis, Illinois, when she enrolled in the billing and coding specialist program at Daymar College (though her student enrollment agreement purports to enroll her in Paducah Technical College in Paducah, Kentucky.) She also did not testify at the evidentiary hearing, after the parties stipulated that her testimony would be substantially similar to those Plaintiffs who testified at the hearing. According to her student enrollment agreement, she was a high school graduate. In 2009, she and her husband reported an adjusted gross income of \$101,878. Of that sum, according to the W-2 wage and tax statements introduced as Defendant's Exhibit 32, \$75,833.50 consisted of earnings of her husband. According to Plaintiff's W-2 wage and tax statements introduced as exhibits, earnings attributable to her were

\$8,676.24. Plaintiffs' amended complaint alleges she acquired significant educational debt from her attendance at Daymar College.

13. On September 15th, 2006, Plaintiff, Tina Cain, was a resident of Paducah, Kentucky, when she enrolled in the medical assisting-clinical program at Daymar College in Paducah, Kentucky. She also did not testify at the evidentiary hearing, after the parties stipulated that her testimony would be substantially similar to the Plaintiffs who testified at the hearing. According to her student enrollment agreement, she was not a high school graduate, but she had earned a GED. The total costs for her educational program at Daymar were \$26,799. In 2009, she reported an adjusted gross income of \$4,906. Plaintiffs' amended complaint alleges she acquired significant educational debt from her attendance at Daymar College.

14. On January 25th, 2006, Plaintiff, Kimberly Milan, was a resident of Paducah, Kentucky, when she enrolled in the medical assisting-clinical program at Daymar College in Paducah, Kentucky. She also did not testify at the evidentiary hearing, after the parties stipulated that her testimony would be substantially similar to those Plaintiffs who testified at the hearing. According to her student enrollment agreement, she was not a high school graduate, but she had earned a GED. The total costs for her educational program at Daymar were \$25,310. In 2008, she and her husband reported an adjusted gross income of \$38,426. According to the W-2 wage and earning statements introduced as Defendant's Exhibit 37, \$11,480.46 in 2008 earnings were hers. Plaintiffs' amended

complaint alleges she acquired significant educational debt from her attendance at Daymar College.

15. Plaintiffs, Jennifer Duncan, Deanna Knight, and Brandy Fowler, were not present at the hearing, and the Plaintiffs submitted no proof as to their financial condition. The Defendants submitted the student enrollment agreements signed by these three Plaintiffs as exhibits to the Motion to Dismiss and Compel Arbitration. Each contains an arbitration provision.

16. The procedure that Daymar College used to enroll each of the twelve Plaintiffs was similar. The Plaintiffs first filled out a prospective student questionnaire. The Plaintiffs then met with an admissions representative, completed an interview, and viewed a powerpoint presentation regarding available programs. After completing the second steps for enrollment, the Plaintiffs were taken to another room to take an assessment test. The prospective students then signed twelve or more enrollment documents and financial forms prepared by Daymar College.

17. One of the documents each of the Plaintiffs signed was a student enrollment agreement. The student enrollment agreement is one page, front and back. Each Plaintiff signed only the front page of the agreement, after initialing that she had read both pages of the agreement. The arbitration provision that is the subject of this proceeding is contained in the last paragraph on the back of the agreement. It states as follows:

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 Paducah, Kentucky, 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. All determinations as to the scope or enforceability of this arbitration provision shall be determined by the arbitrator, not the court. The expenses of the arbitration shall be born 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. The validity, interpretation, and performance of this Agreement shall be controlled by and construed under the laws of the Commonwealth of Kentucky and the standards of accreditation of the Accrediting Commission of Career Schools and Colleges of Technology (ACCSCCT), as the latter are not inconsistent with the former. Students residing in Ohio have the ability to file a complaint by contacting the State Board of Career Colleges and Schools, 35 East Gay Street, Suite 403, Columbus, OH 43215 or the State of Ohio Board of Career Colleges and Schools.

The enrollment agreement provides that the student has three (3) working days after signing the agreement to cancel her enrollment.

18. The entire enrollment process took less than ninety (90) minutes to complete. While each Plaintiff was permitted to read the entire enrollment agreement before signing it, none did. Moreover, the admissions counselors did not attempt to explain the significance of the arbitration agreements to the students, and the waiver of rights entailed by the arbitration agreement. After signing the enrollment agreement and other documents, Plaintiffs were taken to another location where they completed applications for financial aid. Some of the students were awarded small scholarships to entice their enrollment.

19. In the first amended complaint, Plaintiffs assert claims against the Defendants for damages allegedly sustained as a result of the Defendants' solicitation of Plaintiffs to attend Daymar College, representations made to the Plaintiffs by Daymar College, and Plaintiffs' attendance at Daymar College. Their claims contain allegations against Daymar College and its president that they were fraudulently induced to enroll in Daymar College, conspiracy, breach of

contract, violation of Kentucky's Consumer Protection Act, an antitrust violation, and an alleged violation of KRS 165A.310, et seq. Because it is not permitted by CR 8.01(2), Plaintiffs' complaint does not allege any sum of damages other than an amount exceeding the jurisdictional requirements of this Court.

20. Plaintiffs' attorneys have agreed to pursue Plaintiffs' claims in the McCracken Circuit Court on a forty percent (40%) contingency fee basis, and to advance the costs of the litigation there. Plaintiffs' employment contracts provide that Plaintiffs' attorneys may withdraw from their representation of Plaintiffs if Plaintiffs' attorneys decide that it is not prudent to pursue their claims. Plaintiffs' attorneys contend they have no agreement to advance the costs of arbitration.

21. Should the Plaintiffs' claims be dismissed to arbitration, Daymar College's arbitration agreement requires that each Plaintiff pay for her own experts, evidence, and legal counsel.

22. In addition to requiring payment for their own experts, evidence and legal counsel for the arbitration proceeding, Daymar College's arbitration agreement requires that each Plaintiff pay one-half of the arbitration fees prior to the start of the arbitration proceeding. A typical arbitrator charges between \$300 and \$350 per hour. A three to four day arbitration proceeding with one arbitrator can cost significantly more than \$10,000 in arbitration fees for claims asserted in an amount over \$75,000. For a plaintiff claiming over \$10,000 but less than \$75,000, each Plaintiff is responsible for paying one-half of the arbitrator's fees, up to a maximum of \$375. For those claiming under \$10,000, each Plaintiff is responsible for paying one-half of the arbitrator's fees up to a maximum of \$125.

While the Defendants contend that each of the Plaintiffs claims are for less than \$75,000, Defendants' contention is not supported by the averments of the amended complaint, which are limited by CR 8.01(2).

23. Each of the Plaintiffs owe from \$17,000 to \$34,000 in student loans. Each of the Plaintiffs holds low paying jobs or is unemployed. Arbitration would require that Plaintiffs pay significant arbitration costs if they submit claims of over \$75,000 each. Arbitration would require that they pay a filing fees, obtain experts, pay for discovery, and pay for at least one arbitrator to decide their claims.

24. Eleven of the twelve Plaintiffs who appeared and testified (or were available to testify) at the evidentiary hearing could not pay these costs. Were they to assert claims over \$75,000, arbitration costs would be prohibitively expensive. Costs would be prohibitively expensive to decide the merits of the claims, or even the enforceability of the arbitration agreement.

25. Only Kathy Crowe has the family resources to reasonably pay for the arbitration of her claims. She lacks the ability to pay arbitration costs using her own resources based on her 2009 W-2 earnings of \$8,676, assuming she has significant educational debt. A dismissal of this case to arbitration would likely result in eleven of the twelve Plaintiffs being unable to pursue their claims in any forum.

26. Defendants offered to advance the arbitration costs after Plaintiffs presented evidence of their financial condition at the evidentiary hearing. The Defendants offer required, however, that if Plaintiffs' claims were dismissed after arbitration, Plaintiffs would be required to reimburse Defendants for the

arbitration costs. To arbitrate, Plaintiffs would be required to assert claims of less than \$75,000 (even if their alleged damages exceed that limit) or to weigh their chances of success against the possibility of being required to pay Defendants several thousands of dollars if they are not successful.

Based on the foregoing Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

27. In Green Tree Financial Corp-Alabama v. Randolph, 531 U.S. 79 (2000), a party sought to invalidate an arbitration agreement on the grounds that arbitration would be prohibitively expensive. In reviewing this contention, the United States Supreme Court stated, at 91:

Similarly, we believe that where, as here, 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. Randolph did not meet that burden. How detailed the showing of prohibitive expenses must be before the party seeking arbitration must come forward with contrary evidence is a matter we need not discuss; for in this case neither during discovery nor when the case was presented on the merits was there any timely showing at all on the point.

In Green Tree Financial Cop-Alabama v. Randolph, the United States Supreme Court applied the Federal Arbitration Act (FAA) to federal statutory claims. The Plaintiffs' claims in this case are not federal statutory claims.

28. However, in Conseco Finance Service Corp. v. Wilder, Ky. App., 47 S.W.3d 335 (2001), the Kentucky Court of Appeals applied the FAA and the Kentucky Uniform Arbitration Act (KUAA) to a claim under the Kentucky Consumer Protection Act and a claim for a breach of warranty. Citing Green Tree Financial Corp-Alabama v. Randolph, the Kentucky Court of Appeals ruled that

an arbitration provision is unenforceable under the FAA or the KUAAs as applied to state law claims if arbitration is prohibitively expensive. Based on the averments of the complaint, the FAA is likely applicable to this case.

29. In Rent-A-Center v. Jackson, 130 S.Ct. 2772 (2010), the United States Supreme Court decided, under the FAA, when an arbitrator must decide whether an arbitration agreement is unconscionable, and when a court must decide whether an arbitration agreement is unconscionable, where the agreement explicitly assigns that decision to the arbitrator.

30. Under Rent-A-Center, the arbitrator, not the court, must decide if the costs a party must incur to present her claims to the arbitrator on the merits makes the arbitration agreement unconscionable.

31. But, under Rent-A-Center, a court, not the arbitrator, must decide if the arbitration agreement is unconscionable because of the costs of requiring the arbitrator to determine the enforceability of the agreement. Unconscionability under the applicable state (Nevada) contract law required proof the agreement was procedurally and substantively unconscionable.

32. Procedural and substantive unconscionability are explained in §18:10 Williston on Contracts (2010), as follows:

The concept of unconscionability was meant to counteract two generic forms of abuse: the first of which relates to procedural deficiencies in the contract formation process, such as deception or a refusal to bargain over contract terms, today often analyzed in terms of whether the imposed-upon party had meaningful choice about whether and how to enter into the transaction; the second of which relates to the substantive contract terms themselves and whether those terms are unreasonably favorable to the more powerful party, such as terms that impair the integrity of the bargaining process or otherwise contravene the public interest or public policy; terms (usually of an adhesion or boilerplate nature) that attempt to

alter in an impermissible manner fundamental duties otherwise imposed by law, fine-print terms or provisions that seek to negate the reasonable expectations of the nondrafting party, or unreasonably and unexpectedly harsh terms having to do with price or other central aspects of the transaction.

The Kentucky Court of Appeals has recognized unconscionability as a defense to a motion to dismiss and compel arbitration. Valued Services of Kentucky, LLC v. Watkins, Ky. App, 309 S.W.3d 256 (2010); Mortgage Electronic Registration Systems, Inc. v. Abner, Ky. App., 260 S.W.3d 351 (2008).

32. In Morrison v. Circuit City Stores, 317 F.3d 646 (2003), the Sixth Circuit applied Green Tree Financial Corp v. Alabama, 531 U.S.79 (2000). In doing so, the Sixth Circuit invalidated two cost-splitting arbitration provisions, after reviewing the plaintiff's income and comparing the plaintiff's costs to arbitrate versus her costs to litigate in court. The Sixth Circuit stated this analysis must be done on a case-by-case approach, stating at 663:

This analysis will yield different results in different cases. It will find, in many cases, that high-level managerial employees and other with substantial means can afford the costs of arbitration, thus making cost-splitting provisions in such cases enforceable. See, e.g. Williams, 197 F.3d at 764-65 (concluding that individual with six-figure income was not deterred from arbitral forum by cost-splitting provision). In the case of other employees, however, this standard will render cost-splitting provisions unenforceable in many, if not most, cases. See, e.g., Shankle, 163 F.3d at 1234-35 ("Assuming Mr. Shankle's arbitration would have lasted an average length of time, he would have had to pay an arbitrator between \$1,875 and \$5,000 to resolve his claims. Mr. Shankle could not afford such a fee, and it is unlikely other similarly employees could either.")

33. Citing Morrison, the Sixth Circuit, in Mazera v. Varsity Ford Management Services, 565 F.3d 997 (2009), held that requiring that an employee pay arbitration fees of five-hundred dollars (\$500) would invalidate an

arbitration agreement, given the plaintiff's financial resources as a car porter. Mazera involved a suit by an employee against his employer. In Mazera, the Sixth Circuit remanded the case for the district court to determine if the employer would agree to pay all the arbitration fees, win or lose. The arbitration agreement the plaintiff signed in Mazera provided that the employer could elect to pay all of the costs.

34. In Morrison, the Sixth Circuit ruled that an employer's offer to advance the costs of arbitration should not be permitted, when that is not a term of the arbitration agreement, stating at 676:

Because the employer drafted the arbitration agreement, the employer is saddled with the consequences of the provision as drafted. If the provision, as drafted, would deter potential litigants, then it is unenforceable, regardless of whether, in a particular case, the employer agrees to pay a particular litigant's share of the fees and costs to avoid such a holding.

35. In Morrison, the Sixth Circuit ordered both cases to arbitration, despite finding the fee-splitting provisions of the arbitration agreements invalid. Arbitration was ordered because the agreements contained valid severability clauses. Daymar College's arbitration agreement contains no severability clause.

36. When a party signs a contract with a corporation, the party cannot avoid the contract's arbitration clause by recasting a contract dispute as a fraudulent inducement claim against an owner, officer, agent, or affiliate of the corporation. In re Kaplan Higher Education Corporation, Tex., 235 S.W.3d 206 (2007). Therefore, if Plaintiffs are required to arbitrate their claims against the corporate Defendants, they are also required to arbitrate their claims against the president and principal shareholder of the named Defendants.

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

38. Eleven of the twelve Plaintiffs who presented evidence of their financial condition proved they cannot advance the arbitration costs to present their claims on the merits, or to determine the enforceability of the arbitration agreement. 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. All twelve of the Plaintiffs who presented evidence borrowed thousands of dollars to attend Daymar College. Only one of the twelve Plaintiffs, Kathy Crowe, has family resources sufficient to advance arbitration costs. None of the Plaintiffs

would incur any costs if their claims are not sent to arbitration. Under these circumstances, the arbitration agreement is substantively unconscionable with respect to eleven of the twelve Plaintiffs who testified, or whose testimony was stipulated.

**ORDER GRANTING MOTION TO COMPEL
ARBITRATION IN PART AND DENYING MOTION IN PART**

Based on the foregoing Findings of Fact and Conclusions of Law, **IT IS HEREBY ORDERED** as follows:

1. Defendants' Motion to Dismiss and Compel Arbitration is **GRANTED**, with regard to Plaintiffs, Jennifer Duncan, Deanna Knight, Brandy Fowler, and Kathy Crowe. These Plaintiffs shall submit the claims that are plead in the complaint to binding arbitration within sixty (60) days, or otherwise be barred from maintaining or bringing them. With regard to these Plaintiffs, the Court stays the complaint and all attendant proceedings and discovery until the claims have been arbitrated in accordance with the terms of the arbitration agreement.

2. Defendants' Motion to Dismiss and Compel Arbitration is **DENIED**, with regard to Plaintiffs, Brittany Dixon, Patricia Taber, Martha Elizabeth Wathen-Collier, Monica Sykes, Candice Williams, Tasha Allen, Jessica Gordon, Darena Prescott, Tina Cain, Kimberly Milan, and Amy Lee.

ENTERED this 1st day of October, 2010.



**Tim Kaltenbach, Judge
McCracken Circuit Court
Division No. I**

Clerk's Certificate

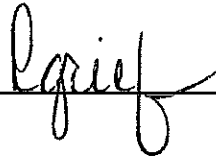
The foregoing Order was entered on this 7 day of October, 2010, and copies mailed to the following:

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**GLEND A RANSOM, Clerk
McCracken Circuit Court**

BY:  D.C.