

4

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TABLE OF CONTENTS

Table of Contents.....	ii
Table of Citations.....	iii
Statement of the Case and Facts.....	1
Summary of the Argument.....	11
Argument.....	13
I. Enforcing the Forum Selection Clause Is Unjust Or Unreasonable.	13
II. The Students' Claims Against Key Bank Are Inextricably Intertwined With Those Against The Four Other Defendants.	22
III. Enforcement Of The Venue Clause Would Be Contrary To Public Policy.	30
IV. The Promissory Notes Are Unconscionable.	32
V. The Unpublished Key Bank Federal Trial Court Orders Cited by Appellants Are Not Legal Precedent, Are Not Binding And Are Not Properly Included In Key Bank's Initial Brief.	37
Conclusion.....	41
Certificate of Service.....	41
Certificate of Compliance.....	42

TABLE OF CITATIONS

Cases

<i>Allen v. Lloyd's of London</i> , 94 F. 3d 923 (4 th Cir. 1996)	38
<i>America Online, Inc. v. Booker</i> , 781 So. 2d 423 (Fla. 3 rd DCA 2001)	14, 16, 20
<i>Aqua Sun Mgmt., Inc. v. Divi Time, Ltd.</i> , 797 So. 2d 24 (Fla. 5 th DCA 2001)	19, 20
<i>Beaubien v. Cambridge Consol., Ltd.</i> , 652 So. 2d 936 (Fla. 5 th DCA 1995)	23, 27
<i>Bellsouth Mobility, L.L.C. v. Christopher</i> , 819 So. 2d 171 (Fla. 4 th DCA 2002)	34
<i>Bennett v. Behring Corp.</i> , 466 F. Supp. 689 (S.D. Fla. 1979)	32
<i>Bombardier Capital, Inc. v. Progressive Mktg. Group, Inc.</i> , 801 So. 2d 131 (Fla. 4 th DCA 2001)	20
<i>Bovis Homes, Inc. v. Chmielewski</i> , 872 So. 2d 1038 (Fla. 2d DCA 2002)	21
<i>Carlson-Southeast Corp. v. Geolithic, Inc.</i> , 530 So. 2d 1069 (Fla. 1 st DCA 1988)	24
<i>Carnival Cruise Lines, Inc. v. Shute</i> , 499 U.S. 585, 111 S. Ct. 1522 (1991)	14, 15
<i>Celmins v. America Online, Inc.</i> , 748 So. 2d 1041 (Fla. 2d DCA, 1999)	21
<i>Copacabana Records, Inc. v. Wea Latina, Inc.</i> , 791 So. 2d 1179 (Fla. 3 rd DCA 2001)	21, 17
<i>Corsec, S.L. v. VMC Int'l Franchising, L.L.C.</i> , 909 So. 2d 945 (Fla. 3 rd DCA 2005)	25
<i>Dept. of Legal Affairs v. District Court of Appeals, 5th District</i> , 434 So. 2d 310, (Fla. 1983)	37

<i>Derrick & Assoc. Path., P.A. v. Kuehl</i> , 617 So. 2d 866 (Fla. 5 th DCA 1993)	21, 22, 29
<i>Dore v. Roten</i> , 911 So. 2d 218 (Fla. 2 nd DCA 2005)	26, 29
<i>First Pacific Corp. v. Sociedade de Emp. e Const., L.T.D.A.</i> , 566 So. 2d 3 (Fla. 3 rd DCA 1990)	30, 31
<i>Girdley Constr. Co., Inc. v. Architectural Exteriors, Inc.</i> , 517 So. 2d 137 (Fla. 5 th DCA 1987)	23, 29
<i>Greenstreet Mgmt., Inc. v. Barke.</i> , 833 So. 2d 183 (Fla. 5 th DCA 2002)	19
<i>Halls Ceramic Tile, Inc. v. Tiede-Zoeller Tile Corp.</i> , 522 So. 2d 111 (Fla. 5 th DCA 1988)	23, 24, 29
<i>Haws & Garret Gen. Contractors, Inc. v. Panhandle Custom Decorators & Supply, Inc.</i> , 500 So. 2d 204 (Fla. 1 st DCA 1986)	31
<i>Interval Marketing Assoc., Inc. v. Sea Club Assoc. IV, Ltd.</i> , 468 So. 2d 262 (Fla. 2 nd DCA 1985)	28
<i>Kohl v. Bay Colony Club Condo., Inc.</i> , 398 So. 2d 865 (Fla. 4 th DCA 1981)	32
<i>Lee v. St. Johns County Brd. of Cnty. Comm.</i> , 776 So. 2d 1110 (Fla. 5 th DCA 2001)	1
<i>Lobaoa-Bleidt v. Lobata</i> , 688 So. 2d 431 (Fla. 5 th DCA 1997)	28
<i>Maas v. Maas</i> , 440 So. 2d 494 (Fla. 2 nd DCA 1983)	36
<i>Manrique v. Fabbri</i> , 493 So. 2d 437 (Fla. 1986)	13, 14, 15, 23, 31
<i>McNair v. Monsanto Co.</i> , 279 F. Supp. 2d 1290 (M.D. Ga. 2003)	25
<i>MGJ Ind., Inc. v. Greyhound Fin. Corp.</i> , 826 F. Supp. 430 (M.D. Fla. 1993)	35

<i>M/S Bremen v. Zapata Off-Shore Co.</i> , 407 U.S. 1, 92 S. Ct. 13, 14, 15, 22, 26, 1907 (1972)	35, 38
<i>Operadora Seryna, S.A. v. Banco Bilbao, S.A.</i> , 762 So. 2d 595 (Fla. 5 th DCA 2000)	19
<i>Peacock Hotel, Inc. v. Shipman</i> , 103 Fla. 633, 138 So. 44 (1931)	35, 36
<i>Roche v. State</i> , 462 So. 2d 1096 (Fla. 1985)	37
<i>SAI Ins. Agency, Inc. v. Applied Sys., Inc.</i> 858 So. 2d 401 (Fla. 1 st DCA 2003)	27
<i>Southwall Tech., Inc. v. Hurricane Glass</i> , 846 So. 2d 669 (Fla. 2 nd DCA 2003)	27
<i>State v. Dwyer</i> , 332 So. 2d 333 (Fla. 1976)	25, 37
<i>State v. Fitzpatrick</i> , 491 P. 2d 262 (Wash. App.)	37
<i>State v. Kirk</i> , 362 So. 2d 352 (Fla. 1 st DCA 1978)	36
<i>Steinhardt v. Rudolph</i> , 422 So. 2d 884 (Fla. 3 rd DCA 1982)	34, 35
<i>Stewart Org., Inc. v. Ricoh Corp.</i> , 487 U.S. 22, 108 S. Ct. 2239 (1988)	15, 35
<i>SunTrust Bank v. Sun Int'l Hotels, Ltd.</i> , 184 F. Supp. 2d 1246 (S.D. Fla. 2001)	33
<i>Ullah v. State</i> , 679 So. 2d 1242, 1244 (Fla. 1 st DCA 1996)	38
<i>Unger v. Publisher Entry Serv., Inc.</i> , 513 So. 2d 674 (Fla. 5 th DCA 1987)	41
<i>Webster v. Royal Caribbean Cruises, Ltd.</i> , 124 F. Supp. 2d 1317 (S.D. Fla. 2000)	9
<i>W.G. Mills, Inc. v. Hughes Supply, Inc.</i> , 816 So. 2d 225 (Fla. 5 th DCA 2002)	28

Statutes

<i>18 United States Code Annotated § 1962</i>	13
<i>Florida Statute § 501.201 et seq.</i>	30
<i>Florida Statute § 559.551 et seq.</i>	10, 30, 31, 39
<i>Florida Statute § 772.101 et seq.</i>	11, 30, 31, 40
<i>Ohio Revised Code Annotated § 1345.01 et seq.</i>	30

Secondary Sources

Webster's II New College Dictionary, (Houghton Mifflin Co. 2001).	16
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STATEMENT OF THE CASE AND FACTS

Key Bank (one of three Appellants and five Defendants) is the national primary lender for vocational student loans not guaranteed by the federal government.¹ Key Bank has created a unique lending market by teaming with and funding financially unsound, unqualified, or corrupt vocational schools effectively secured only by the good credit of students. The students are enticed by the joint advertisements of Key Bank and the vocational school into contracting with Key Bank and taking out loans. (Appellees' App. Tab 1). Key Bank funds the operations of the vocational schools through the issuance of loans ostensibly "to" students who, in fact, never see or control the money.

Key Bank entered an agreement with², or formed a joint business enterprise with TAB Express Int'l, Inc. ("TAB"), (the "Agreement"), the flight school in

¹ "When considering a motion to dismiss, the allegations of the complaint must be accepted as true." *Lee v. St. Johns County Brd. Cty. Comm.*, 776 So. 2d 1110, 1113 (Fla. 5th DCA 2001). This rule must apply as the parties will likely have not conducted, or have been permitted to conduct, discovery, except for the deposition of one of TAB's principals, Robert Adamo. The trial court below granted Key Bank's motion for stay and protective order on discovery before the hearing on the Motion to Dismiss. Appellees' App., Tab 2. The Students argued, unsuccessfully, that discovery should be allowed so that additional facts reflecting the unreasonableness or injustice of enforcing the venue clause could be developed. Appellees' App., Tab 3.

² Adamo Depo., p. 40, line 22- p. 41, line 20. TAB and Key Bank are now litigating the collapse of their business relationship in the United States District Court for the Middle District of Florida, Orlando Division, Case No. : 6:05-CV-00965-ORL-JFF. The Students were the intended third party beneficiaries of the Key Bank-TAB Agreement (TAB's Answer, ¶48.)

Deland, Florida in which the Students³ enrolled. The Students enrolled with and contracted with TAB.⁴ Key Bank performs no due diligence on the business histories, technical qualifications, or financial wherewithal of these schools. Key Bank doesn't even verify if the students are actually enrolled. (2nd Amd. Complaint, ¶ 73). Regardless, Key Bank disbursed the loans in the Students' names directly to the school, with no accounting oversight whatsoever. (2nd Amd. Complaint, ¶¶ 62, 69, 71, 73-75).⁵ This left the operators of the school free to take the money and run, which is what happened.⁶

³ The Plaintiffs/Appellees are comprised of students and their personal guarantors on their promissory notes. For ease of reference, the Plaintiffs will be referred to collectively herein as the "Students."

⁴ This contract with TAB, the *sine qua non* of Key Bank's promissory notes, contains a Volusia County venue clause requiring the Students to bring any action against TAB in Volusia County, Florida:

This Contract and any and all disputes between the parties shall be governed by Florida law. The exclusive venue and jurisdiction for any lawsuit or similar action to enforce or interpret the terms of this Contract or arising out of any other dispute between the parties shall be brought in Volusia County, Florida, and the parties waive any objection to venue or jurisdiction in Volusia County, Florida.

Appellants' App., Tab 4, Ex. K.

⁵ Plaintiffs allege Key Bank had been the sole, or primary, lender of other flight and vocational schools closed under suspicious circumstances in other states including Oklahoma, North Carolina, Wisconsin, Utah, Virginia, Massachusetts, and Pennsylvania (2nd Amd. Complaint, ¶ 73).

⁶ It is also what happened in the Airline Training Academy school debacle recently in Central Florida, as briefly mentioned in the Key Bank *Rios* federal trial court order relied upon by Key Bank (improperly) as authority supporting its Motion to Dismiss and now its Initial Brief. Appellants' App., Tab 2, Ex. 1.

Hundreds of thousands of dollars, with some loans exceeding \$100,000 each, went directly into the coffers of co-Defendant TAB. The money disappeared and TAB closed its doors. The Students, who had relied on the financial backing of Key Bank, based on its joint advertising with TAB, were lured into a false sense of security in signing promissory notes and enrolling in the school.⁷

As a direct result of Key Bank's vocational school scheme with TAB in this case, the Students' personal and professional lives have been traumatized:

- Almost one-quarter of the Students, many with spouses and children, have had to move into the homes of parents or relatives.⁸
- Sixty percent of the Students have had to take money from family and/or friends to pay daily living expenses.⁹
- Seventy-four percent of the Students have had to use credit cards, take out home equity loans, or take out other loans to pay daily living expenses.¹⁰
- Fifteen have met with bankruptcy counselors¹¹
- Fifty-seven percent of the Students have had to sell property to pay daily living expenses, including having to sell homes and liquidate 401k plans.¹²
- Several have gone through divorces as a result of the financial strain.¹³

⁷ Appellants' App. Tab 3, Ex. C (Palin and Samples Affidavits). These affidavits were two of 37 affidavits submitted to the trial court in opposition to the Appellants' Motion to Dismiss.

⁸ *Supra.* (Affidavit of Keith W. Bergen, Elected Spokesperson for the Students).

⁹ *Supra.*

¹⁰ *Supra.*

¹¹ *Supra.*

¹² *Supra.*

¹³ *Supra.* (Roe and Humphrey Affidavits)

Student Gary Roach is "literally homeless."¹⁴ He relies on "his friends' good graces for a temporary place to live."¹⁵ Student Ryan Hartl has had to borrow \$14,000 from his parents to pay for living expenses.¹⁶ Student Scott Kimbrell, who is almost 40 years old and will probably never become a pilot, is now dependent upon his wife for support.¹⁷

Student Scott D. Kimbrell testified:

I am close to 40 years old and my window of opportunity to fly for the airlines is shrinking. It is an extremely frustrating feeling to have left my previous job of 10 years, invest a tremendous amount of time, money and effort to change careers only to be left holding a large debt and no prospects of a successful future.¹⁸

Student Nelson Finkbeiner's father is supporting Nelson and his family of five.¹⁹ Student Nomar Acevedo's monthly living expenses are more than three times his monthly income. He has to borrow money from his mother to support his wife and two kids.²⁰

Student Edward C. Roe testified:

I left my wife and daughter in New Jersey in our brand new home that we had built and lived separate from them for over a year which put an emotional strain on our family relationship

¹⁴ *Supra.* (Roach Affidavit)

¹⁵ *Supra.*

¹⁶ *Supra.* (Hartl Affidavit)

¹⁷ *Supra.* (Kimbrell Affidavit)

¹⁸ *Supra.* (Kimbrell Affidavit)

¹⁹ *Supra.* (Finkbeiner Affidavit)

²⁰ *Supra.* (Acevedo Affidavit)

and finances. After TAB Express closed its doors we had to sell our house and have her quit her job and move to Florida due to financial hardship My wife and I are now going through a divorce. Key Bank continues to demand money from me to pay for a service that was not provided. I am on the verge of bankruptcy.²¹

Student Rex Humphrey testified:

I had a full scholarship plus a stipend I could have used in conjunction with my GI Bill (approx. \$27,000.00/year while enrolled) from graduate school ... and a guaranteed job with the Federal government making at least \$55,000.00/year after that. I turned that down for the dream of flying. I no longer have that opportunity.²²

Student Keith Bergen testified:

I am facing bankruptcy, the loss of my good name, the loss of my excellent credit history, and the hardships that follow as a result of Key Bank's heavy-handedness. Moreover, I do not have the care or means to continue to pursuing [sic] my dream of a flying career Key Bank tried to convince the students to accept a train out option presented to students after TAB's closure, offering more debt, far inferior training for the cost, and which would yield no job opportunities. Key Bank wanted me and all the students to sign away all rights concerning any recuperation of monies they could potentially recoup from TAB as well. During the time of Key Bank's pressuring of students to accept their terms, Key Bank executives ... with their legal counsel present ... boasted of a 100% success rate of legal victories over students in similar circumstances....²³

Student Robert Mack testified:

²¹ *Supra.* (Roe Affidavit)

²² *Supra.* (Humphrey Affidavit)

²³ *Supra.* (Bergen Affidavit)

[After TAB closed], I could not afford to pay utility bills while in Daytona, and lived without electricity for two months until being forced to move back to Tampa. These two months I lived in Daytona with candles and cold showers and no food except for non perishables given to me by my Father and Grandparents.²⁴

Student Bradley Marcantelli testified:

I was attending a very reputable and affordable aviation program in Tulsa, Oklahoma ... KeyBank/TAB offer[ed] reimbursement for training costs and a guaranteed job ... Key Bank sent my money a month early, leaving me with a feeling of obligation that I now had no option but to attend TAB My wife Mindy and I feel trapped in Florida We desire to buy a house and start a family, but this whole mess has put our future on hold indefinitely.²⁵

Student Miroslaw Debski testified:

Since I came to this country I had a dream to be a commercial pilot and I never expected to be in this situation by some bank taking my dream away and destroying my financial life.²⁶

Student Jamie P. Samples testified:

I signed on with TAB Express and moved my family temporarily to Florida because of the time frame quote in advertisements for training with TAB Express and the fact that the financing was with Key Bank. They are all over Ohio I expected to be a Captain, making Captain wages by now, not still doing manual labor at 46 years old I have spent all of my savings, my wife's Roth IRA, live below my standards I am used to and I am only one paycheck from homeless.²⁷

²⁴ *Supra.* (Mack Affidavit)

²⁵ *Supra.* (Marcantelli Affidavit)

²⁶ *Supra.* (Debski Affidavit)

²⁷ *Supra.* (Samples Affidavit)

The descriptions of the Students' hardships are more thoroughly stated in their affidavits, Appellants' Appendix, Tab 3, Ex. C.

The Appellants facilitated, or worse, encouraged, TAB's fraudulent handling of, or at the very least, gross mismanagement of, the Students' loan monies (2nd Amd. Complaint, ¶¶ 1-38, 40, 42-78, 80, 82, 84, 86, 88-94). TAB referred the Students solely to Key Bank for financing. (2nd Amd. Complaint, ¶¶ 16-20). Key Bank then, and without having performed any due diligence into the history or stability of TAB, transferred several million dollars into TAB's operational accounts with absolutely no oversight. (2nd Amd. Complaint, ¶¶ 38-39, 49, 53-56, 61-67).

The Students enrolled in TAB from 2001 through 2005, and took out loans with Key Bank to pay for their flight instruction. (2nd Amd. Complaint, ¶ 14). In effect, the good credit histories of the Students allowed Key Bank to turn a blind eye to TAB's lack of business history, financial history, technical competence, and credit. Now, after TAB shut down and the loan funds disappeared, Key Bank characterizes itself as just another innocent victim despite its history of funding such financially infirm schools. Key Bank then initiated oppressive collection actions against the Students whose dreams have been dashed, due to very actions of Key Bank in joining with TAB in this financially specious business scheme. (2nd Amd. Complaint, ¶¶ 63, 70, 88-91).

Pursuant to the Key Bank-TAB Agreement, Key Bank was the only bank to which TAB referred the Students for the purpose of obtaining student loans. (2nd Amd. Complaint, ¶¶21-26). TAB facilitated the Key Bank loan process. The Students were not expected to pay cash since tuition as high as \$94,000, a cost rivaling many an Ivy-League education, was expected to be prepaid in full to TAB prior to the start of training. (2nd Amd. Complaint, ¶22).²⁸ There was no accounting requirement, or accounting in fact, of the money to ensure it was applied as the Students progressed. Key Bank gave TAB absolute discretion and control over the student loan monies.²⁹ The Students never saw the money and never had any control over it. (2nd Amd. Complaint, ¶¶ 29, 30).

The Students did not obtain their promised educations. They complained to Key Bank and the other Appellants, Green and Madison, about TAB's failures and interferences with flight instruction, but the Appellants did nothing to help the Students. (2nd Amd. Complaint, ¶¶ 32, 45-47, 54-56, 76). While the complaints were mounting, Key Bank continued to jointly market itself with TAB, continued to promote TAB, continued to accept and approve student loans, and Key Bank

²⁸ Loans were as high as \$118,000 for some Students because the Students were also extended what was called a living expense loan, in addition to tuition loans. Regardless, all monies were sent in a lump sum directly to TAB's operational accounts, never to be seen by the Students.

²⁹ Appellants' App., Tab 4; Deposition of Robert A. Adamo, President of TAB Express International, Inc. ("Adamo Deposition"), P. 87, lines 8-25; P. 88, lines 1-3; P. 94, lines 21-25, P. 95, lines 1-2; PP. 127-129.

continued to transfer the loan funds directly to TAB up until June, 2005 when TAB shut its doors. (2nd Amd. Complaint, ¶¶ 45, 77-81). Most of the Students in the case at bar have been stuck with debts of approximately \$100,000 each. (2nd Amd. Complaint, ¶ 26, and Appellants' App., Tab 3). They have nothing to show for these debts.

Key Bank is no stranger to such schemes.³⁰ For example, Key Bank was also the lender for students at the failed Airline Training Academy flight school in Central Florida ("ATA") which also went out of business under suspicious circumstances. (2nd Amd. Complaint, ¶¶ 61-66). According to Robert Adamo, President of TAB, the ATA students (like the Appellees here) were "left in the lurch" once ATA closed.³¹ Moreover, TAB hired Mitch Mitchelson from ATA as TAB's sales and marketing manager.³² Mr. Mitchelson had prior connections with Key Bank while he was at the ATA flight school and the Gulfstream International flight school.³³ Thus, Mr. Mitchelson was the connection between ATA and TAB.

³⁰ Ironically, the unpublished federal trial court orders (improperly relied upon as authority by Key Bank in its Initial Brief) point out Key Bank's intimate familiarity with similar vocational school failures and Key Bank's ability to avoid answering to its borrowers in Florida. In Key Bank's Motion to Dismiss, Key Bank cited the same unpublished federal trial court orders even though they carry no precedential authority. *Webster v. Royal Caribbean Cruises, Ltd.*, 124 F. Supp. 2d 1317, 1324 fn. 5 (S.D. Fla. 2000) (unpublished opinions carry no precedential or persuasive weight).

³¹ Adamo Deposition, P. 56, lines 2-5

³² Adamo Deposition, P.37, lines 1-15.

³³ Adamo Deposition, P. 36, lines 7-20 and P. 39, line 22, P. 40, line 9.

Mr. Mitchelson, on behalf of TAB, negotiated with Key Bank and brought over to TAB his "sales" team from ATA once ATA closed.³⁴

After TAB closed, Key Bank and its agent, Morris Anderson & Associates, Inc., tried to force the students to waive their rights to sue TAB and Key Bank. Key Bank sought to have the Students take out additional "bridge" loans to finish their educations elsewhere, at flight schools that did not offer even a facsimile of what TAB and Key Bank advertised and for which the Students bargained. (2nd Amd. Complaint, ¶¶ 77, 88-91).³⁵ Such "bridge" loans were to be in addition to the original Key Bank loans for which Key Bank is still demanding full payment. (2nd Amd. Complaint, ¶¶ 88-91). When Key Bank's efforts failed to entice the Students to take Key Bank's so-called "train-out" option and go deeper still in debt with Key Bank, Key Bank and its collection agency, Great Lakes, initiated collections on the full debts of the Students on the TAB-Key Bank loans.

On August 31, 2005, the Students filed the underlying action, alleging, among other things, unconscionability, negligent misrepresentation, conspiracy to commit fraud, fraud in the inducement, violation of Florida's Consumer Collection Practices Act, Fla. Stat § 559.551 *et seq.*, Florida Civil Remedies for Criminal

³⁴ Adamo Deposition, P. 40, lines 6-25; P. 166, lines 1-25.

³⁵ Key Bank's attempts at enticing the Students to take out yet more loans with Key Bank involved threats to the Students that any suit against Key Bank would be a "frolic in detour" and that Key Bank would "bury them in litigation" if the Students chose to pursue judicial remedies. (2nd Amd. Complaint, ¶¶ 59, 89).

Practices Act, Fla. Stat. § 772.101 *et seq.*, and violations of Florida common laws. On November 23, 2005, the Appellants, Key Bank, Josette Green, and Robert Madison, moved to dismiss the Complaint, seeking, instead, to force the Students to file a separate suit in Ohio based on the venue clause in the promissory notes.

Oral argument on the Motion to Dismiss was heard on March 2, 2006. The trial judge denied the Motion to Dismiss from the bench after reviewing “all the circumstances.”³⁶ Then, on March 27, 2006, the trial court, after having reviewed the file, considered the arguments of counsel, and being duly advised in the premises, issued its written order denying Key Bank’s Motion to Dismiss. Importantly, the trial court made express findings that: (1) the claims in this action are inextricably intertwined, and (2) the choice of forum clause in the Key Bank promissory notes is unjust and unreasonable.³⁷ This interlocutory appeal followed.

SUMMARY OF THE ARGUMENT

The trial court correctly denied Key Bank’s Motion to Dismiss on the grounds that enforcing the forum clause would be unjust and unreasonable, and that the Students’ claims against Key Bank are inextricably intertwined with the claims against co-defendants, TAB, Great Lakes, Madison, and Green, over none of whom the Students could obtain personal or subject matter jurisdiction in Ohio.

³⁶ Appellants’ App., Tab 7. Transcript of Proceedings on the Hearing on Appellants’ Motion to Dismiss (“Transcript”), P. 58, lines 6-7.

³⁷ Appellants’ App., Tab 8. Order Denying Key Bank, Josette Green, and Robert Madison’s Motion to Dismiss.

Though the enforceability of venue clauses is presumed in Florida, this case fits squarely within Florida's exceptions to enforcement of venue clauses.

The Students have suffered unbearable personal economic trauma due to Key Bank and the Defendants. The Students' economic suffering was just one basis on which the trial court denied Key Bank's motion to dismiss. The Students' claims against Key Bank were found to be inextricably intertwined with the claims against the other four defendants, none of whom is subject to Ohio jurisdiction.³⁸ Most of the witnesses and most of the Students reside in Florida. The causes of action accrued in Florida, and based on their Student Enrollment Contracts with TAB, the Students were required to bring suit against TAB in Volusia County, Florida.³⁹

The crux of the Students' case is the conspiracy and the joint business enterprise and scheme of Key Bank and TAB. The Students' complaint is premised on the notion that but for the Key Bank and TAB joint business scheme or device, the Students would not be in the personal crises for which they are now seeking relief. This TAB/Key Bank joint business enterprise, and the collapse thereof, is

³⁸ Venue is certainly proper in Volusia County if the venue clause is unenforceable, and no contrary argument has been made by the Appellants.

³⁹ Appellants' App., Tab 4, Ex. K.

not governed by the promissory notes, and is the subject of TAB's cross-claim in the case at bar for which TAB is seeking damages against Key Bank.⁴⁰

This information was before the trial court judge when he made his ruling. All these facts collectively provided the trial court more than an adequate foundation to support the finding that enforcement of the forum clause would have been unreasonable and unjust. Based on the foregoing, the trial court's decision denying Key Bank's Motion to Dismiss should be affirmed.

ARGUMENT

I. Enforcing The Forum Selection Clause Is Unjust and Unreasonable.

In Florida, venue clauses are unenforceable if they are unjust or unreasonable under the circumstances. *Manrique v. Fabbri*, 493 So. 2d 437, 440 (Fla. 1986) (adopting the view announced in *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 S.Ct. 1907, 32 L. Ed. 2d 513 (1972)). Florida state courts may protect parties by refusing to enforce forum clauses. "The trial courts of this state can effectively protect a party by refusing to enforce those forum selection

⁴⁰ TAB has cross-claimed against Key Bank and other persons under the following counts: breach of contract, breach of settlement agreement, breach of the duty of good faith, fraudulent misrepresentation, fraudulent inducement as to the settlement agreement, negligent misrepresentation; breach of consulting agreement, and violation of Racketeering Influence and Corrupt Organizations Act, 18 U.S.C. § 1962. TAB also has sued Key Bank in federal district court in the Middle District of Florida, so even if Key Bank's motion to dismiss is granted, Key Bank will be litigating in Central Florida over its relationship with TAB.

provisions which are unreasonable or result from unequal bargaining power." *Manrique* at 442. The trial court correctly denied the Appellants' Motion to Dismiss on the grounds that the forum selection clause was unjust and unreasonable. The facts in this case evidence that enforcing the forum selection clause would have resulted, for all practical purposes, in the Students losing their day in court. *Manrique* at 440, fn 4 (citing *Bremen* at 18).⁴¹

In the purposes behind the rule presuming venue clauses are enforceable lay the seeds of its own abuse. Venue clauses give businesses certainty over where they may be sued, and thus economic efficiency which presumably is passed on to consumers in the form of lower prices. *America Online, Inc v. Booker*, 718 So. 2d 423, 425, fn2 (Fla. 3rd DCA 2001) (quoting *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 111 S. Ct. 1522 (1991)). By prescribing venues distant from the laws of the transaction and from the residences of the consumers, however, businesses can stretch the aim of economic efficiency to perverse extremes effectively depriving consumers of their day in court.

Thus, the laudable promotion of economic efficiency also serves as an incentive for less ethical businesses which use the presumption to effectively shield

⁴¹ When the *Bremen* court stated that the plaintiff must prove that the contractual forum "will be so gravely difficult and inconvenient that he will, for all practical purposes, be effectively deprived of his day in court," such comment was made in the context of a dispute between two highly sophisticated businesses involved in international commerce where the venue clause was an integral part of the negotiations and agreement.

themselves from the consequences of wrongful conduct that would otherwise be checked by the courts lying in the jurisdiction of the resident-consumers. The presumption used ethically promotes economic efficiency whereas the presumption may also be used as a shield for unethical or illegal activity. The presumption of enforceability in the case at bar promotes unethical and illegal behavior unchecked by the courts. This risk of abuse is what underlies the Florida exceptions to enforceability.

The “*Bremen* rule,” cited authoritatively by the *Manrique* court, is that a forum clause should be enforced unless the party opposing it can show (1) enforcement would be unjust *or* unreasonable, *or* (2) the clause is invalid for such reasons as fraud *or overreaching*. *Manrique* at 339 (citing *Bremen* at 15) (emphasis added); See also, *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 23, 108 S.Ct. 2239, 2240 (1988).

Venue clauses are presumably enforceable for the purposes of recognizing “the legitimate expectations of contracting parties.” *America Online, Inc. v. Booker*, 781 So. 2d 423, 424 (Fla. 3rd DCA 2001) (citing *Manrique*) (the unavailability of a class action in Virginia, standing alone, was not enough to show unjustness or unreasonableness). This presumption must be tempered, however, in the context of adhesion, or boiler-plate, contracts that must always be reviewed for fundamental fairness. See, *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595,

111 S.Ct. 1522, 1528 (1991) (form passenger tickets must be judicially scrutinized for fundamental fairness).

There is nothing "legitimate"⁴² about Key Bank's expectation that it could force the Students to file separate actions in Ohio when Key Bank:

- performed no due diligence into the management or technical qualifications of TAB before jointly advertising with it and blessing it as one of Key Bank's "approved" schools;⁴³
- directly sent millions of dollars of the Students' monies to TAB's checking accounts without any regard as to TAB's validity or stability;
- required no accounting oversight;⁴⁴
- expected unsophisticated students to be responsible for the loan monies even though Key Bank's own practices ensured that the students never could possess or control the money; and
- withheld vital information about students' complaints about TAB from new students whose futures were also used as collateral to finance TAB.

A legitimate bargain does not include such overwhelming, one-sided control by a sophisticated party which creates the very market on which it preys.

There was gross overreaching by the Key Bank/TAB business enterprise which tainted every aspect of the enrollment contracts and promissory notes. While

⁴² "Legitimate" is defined as being in compliance with the law; lawful; being in accordance with established or accepted patterns and standards; based on logical reasoning; reasonable; authentic. Webster's II New College Dictionary, (Houghton Mifflin Company 2001).

⁴³ Appellees' App., Tab 1, (national advertisement showing Key Bank logo on full page TAB advertisement)

⁴⁴ Adamo Deposition, P. 87, lines 8-12; P. 94, lines 21-25; P. 95, lines 1-2; P. 127, lines 10-23.

the Students were willing to bank on their futures as pilots in order to better their lives, they could never have imagined the tailspin into which their lives have dropped.

The unconscionable acts and overreaching did not stop there. Key Bank officials told TAB personnel to use the money however they wanted.⁴⁵ Key Bank dismissed the Students' questions when they called asking why the loan monies had been transferred prior to enrollment. (2nd Amd. Complaint, ¶¶ 37, 45). The Appellants refused to help when the Students tried to obtain refunds after they dropped out of TAB when it became apparent that they could not obtain their flight instruction, or when TAB closed in June 2005. When Students called the Appellants, the Appellants told them to call the Defendant Great Lakes. When the Students called Great Lakes, Great Lakes told them to call the Appellants. When the Students told the Appellants they were tired of being run-around by Great Lakes, the Appellants told them they had to resolve the problem with TAB themselves.⁴⁶

Key Bank's 2004 Annual Report indicates that a substantial amount of the education loans made by Key Bank, if not the entirety, is securitized, sold, or otherwise serviced only, thereby limiting the exposure to liability of Key Bank

⁴⁵ Adamo Deposition, P. 87, lines 8-12; P. 94, lines 21-25; P. 95, lines 1-2; P. 127, lines 11-23.

⁴⁶ *Supra*, fn 4. (Marcantelli, Austin, Hartl, and David, Jr. Affidavits)

should these loans default, (Appellees' App., Tab 4). Florida Attorney General Report of Investigation, P. 18.⁴⁷ Indeed, if Key Bank's internal policy was to routinely securitize educational loans, and such business plan proved successful, Key Bank would have little or no incentive to check the stability of said loans in a blind effort to build its corporate asset base. *Id.* Last, Key Bank representative Robert Madison may have personally been relieved from any investigation into the making of these loans or the financial stability of Tab Express. *Id.* Any combination of these factors illustrates the possibility that Key Bank may have been either negligent or complicit with regard to Tab Express' deceptive and/or fraudulent business practices, justifying further investigation by the appropriate government agencies. *Id.*

The Students' lives have been turned upside down as a result of Key Bank's own actions and inactions, and to enforce the forum selection clause would be to reward such unethical business practices. The Students submitted 37 detailed financial affidavits showing substantial hardship caused by the Appellants and which would effectively deny the Students their day in court if this action were to

⁴⁷ In the hearing on the Appellants' Motion to Dismiss, the trial court sustained the Appellants' objection to a reference to the Florida Attorney General's Report of Investigation. The Students referred then and refer now to the Florida Attorney General's report not because it will be admissible at trial, or because it is irrefutable, but because at this early stage of the case, without any substantial discovery having been permitted, reciting such a public document provides an additional modicum of independent support of the Students' assertions of unconscionability on the part of Key Bank.

be dismissed.⁴⁸ Appellants certainly did not refute that the Students suffered significant financial harm as the result of Key Bank's failed joint business enterprise with TAB. Remarkably, Key Bank now strains to paint itself as just an innocent victim of TAB, too.

With huge debts hanging over their heads and with no educations to show for such debts, the Students' only realistic option if they wanted to have their day in court was to collectively file suit in Florida. Effectively, the trial court found this more reasonable and just, especially given the fact that the Students are already bound by the exclusive Florida forum/venue clause in their TAB Student Enrollment Contracts.⁴⁹

Key Bank cites several cases in support of its contention that the denial of its motion to dismiss was reversible error. See *Greenstreet Management, Inc. v. Barker et al.*, 833 So. 2d 183 (Fla. 5th DCA 2002) (involved borrower corporation and its two guarantors); *Aqua Sun Mgt., Inc., v. Divi Time, Ltd.*, 797 So. 2d 24 (Fla. 5th DCA 2001); *Operadora Seryna, S.A. v. Banco Bilbao Vizcaya – Mexico, S.A.*, 762 So. 2d 595 (Fla. 5th DCA 2000) (requiring litigation in Mexico). All of these cases were between businesses, involving bargained-for contracts. Not one of these cases is premised on the argument made in the instant case that enforcement of the

⁴⁸ Appellants' App., Tab 3, Ex. C (Bergen as Spokesperson, Palin, & DeGrave Affidavits).

⁴⁹ Appellants' App., Tab 4, Ex. K.

venue clauses would have been unjust or unreasonable. Certainly, none of these cases involved the level of personal financial devastation the Students have suffered and are suffering, because of the Defendants.

Proper challenges to the enforceability of a venue clause will necessarily be limited to those in which a plaintiff or plaintiffs can, in good faith, allege and support by affidavit, or otherwise, the existence of deleterious motives. Hence, for published opinions, the circumstances in which courts enforce venue clauses are typically devoid of factually supported accusations of wrongdoing. See e.g. *Manrique* (no attempt to allege wrongdoing), *Aqua Sun Mgt., Inc. v. Divi Time, Ltd.*, 797 So. 2d 24 (Fla. 5th DCA 2001) (litigation between 2 corporations). *Bombardier Capital, Inc. v. Progressive Mrktg Group, Inc.*, 801 So. 2d 131 (Fla. 4th DCA 2001) (Defendant Bombardier was a Massachusetts corporation with a principal place of business in Vermont, sued by a Texas corporation in Florida under a contract with a New York venue clause.) In *Booker*, the court held that the unavailability of a class action in the prescribed venue did not “standing alone,” render the clause unenforceable. The case at bar, in contrast, contains myriad allegations, supported by affidavits and otherwise, of improper business practices and aims.

The case of *Bovis Homes, Inc. v. Chmielewski*, 872 So. 2d 1038 (Fla. 2nd DCA 2002), cited by Appellants, involved an assertion the venue clause was ambiguous, not an assertion that enforcement would be unjust or unreasonable.

In the brief opinion of *Celmins v. America Online, Inc.*, 748 So. 2d 1041 (Fla 2nd DCA 1999), cited by Appellants, there was no discussion of whether the plaintiff even attempted to support his assertion that the venue clause was unreasonable.

In *Copacabana Records, Inc. v. Wea Latina, Inc.*, 791 So. 2d 1179 (Fla. 3rd DCA 2001) there was no showing that enforcement of the venue clause would be unreasonable or unjust. The case involved two corporations. The Court found the fact that the plaintiff sued another party in the same action over a transaction without a venue clause did not warrant avoidance of the venue clause. There is no indication in *Copacabana*, however, that the plaintiff alleged the two defendants jointly engaged in wrongful behavior, an allegation which is at the core of the Students' action. Nor did *Copacabana* involve an action against two defendants with venue clauses requiring actions be brought in different locations.

In *Derrick & Assoc. Pathology, P.A. v. Kuell*, 617 So.2d 866 (Fla. 5th DCA 1993), a dispute involving two businesses, this court held a court, in a case with multiple counts, need not be held hostage to other contract counts containing an enforceable venue clause. There was no assertion that the venue clause should not

be enforced because to do so would be unjust or unreasonable. The court held that on remand the trial judge could sever and transfer if he found it “expedient” to do so after all parties have presented their cases to the court. The *Derrick* case did not mandate severance and transfer of the claims, but remanded to the trial court to determine the “expediency” of doing so.

At the very least, Key Bank was negligent in its lending practices, and such negligence should not be rewarded. The *Bremen* Court, in *dicta*, stated that forum clauses should not be enforced if doing so would encourage “negligent conduct.” *Bremen* at 16. A pattern of such negligent conduct is evidenced by none other than the four unpublished federal district court orders Key Bank cites as authority (improperly) in its Initial Brief. See Section V of this Brief, *Infra*. Florida courts should protect Florida citizens victimized by such conduct.

The Court should pay even greater heed to the unreasonableness and injustice of enforcing a foreign venue clause when, as in this case, the financial strain of enforcing the venue clause is occasioned by the very party seeking to enforce it.

II. The Students’ Claims Against Key Bank Are Inextricably Intertwined With Those Against The Four Other Defendants.

The Students’ claims against Key Bank are inextricably intertwined with their claims against TAB, and the other named defendants. Only Key Bank is subject to Ohio jurisdiction over the underlying transactions. The challenged

conduct of Green and Madison occurred in Florida where they reside. (2nd Amd. Complaint, ¶¶ 11, 12). Great Lakes is a Wisconsin corporation doing business in Florida. (2nd Amd. Complaint, ¶ 10). TAB is a Delaware corporation which at all times material hereto conducted the subject business in Volusia County, Florida. (2nd Amd. Complaint, ¶ 9). Rather than have this Court leave Key Bank in this action, the one defendant with a questionably enforceable venue clause, Key Bank, would have this court dismiss the action against all the Appellants, even including its collection agency, Great Lakes, a defendant which does not have the protection of such a clause.

Venue clauses are not to be enforced if doing so would unreasonably result in multiple suits and a splitting of the causes of action. *Halls Ceramic Tile, Inc. v. Tiede-Zoeller Tile Corp.*, 522 So. 2d 111 (Fla. 5th DCA 1988) (court did not enforce venue selection clause in a mutual, freely-agreed-to contract because it would have split causes of action) (citing *Manrique*); and *Girdley Construction Co. v. Architectural Exteriors, Inc.*, 517 So. 2d 137 (Fla. 5th DCA 1987). Assuming *arguendo*, that the venue clause is enforced, Plaintiffs would be required to file suits against Key Bank in Ohio, while maintaining their action against the other four defendants in Florida.

In *Beaubien v. Cambridge Consolidated, Ltd.*, 652 So. 2d 936, 940 (Fla. 5th DCA 1995), this Court refused to enforce a mandatory venue clause in a trust

agreement requiring suit in the Cayman Islands because the beneficiaries could not be brought to court in the Cayman Islands and such was found to be the equivalent of losing one's day in court. This Court should find the Key Bank venue clause in this case equally unenforceable for the same reason, because the Students could not bring four of the five defendants into the Ohio courts.

The Key Bank promissory note is but one part of the Students' claims. The Students' contracts with TAB and the relationship between TAB and Key Bank are at the center of the Students' Complaint (which TAB, in its cross-claim, alleges was a contractual relationship). The Students' Complaint is premised on a triad of relationships: (1) one between Key Bank and TAB; (2) one between TAB and the Students and (3) one between the Students and Key Bank, and only the last implicates the promissory notes and the Ohio venue clause. (2nd Amd. Complaint, ¶¶ 16-66, 74-94). An action otherwise properly and efficiently brought against multiple parties in a single court should not be subject to dismissal, bifurcations and transfers to foreign states simply because one contract among three contains a foreign venue clause. See *Halls* at 112; See generally, *Carlson-Southeast Corporation v. Geolithic, Inc.*, 530 So. 2d 1069 (Fla. 1st DCA 1988). When venue is proper in more than one county, "venue is the plaintiff's prerogative." *Id.*

Green and Madison have no contractual relationship with the Students. As co-Appellants with Key Bank, Green and Madison argue that their actions are so

closely related to the promissory notes that it is reasonably foreseeable that they would be bound to it. They cite *McNair v. Monsanto Co.*, 279 F. Supp. 2d 1290 (M.D. Ga. 2003). In *McNair*, however, the federal district court in Georgia was faced with a review of a motion to transfer venue. It was not faced with the bifurcation of claims. Moreover, all the defendants sought to join in the transfer. "A decision by a federal district court ... is not by any means binding on the courts of this state." *State v. Dwyer*, 332 So. 2d 333, 335 (Fla. 1976). What Green and Madison fail to consider, and what Key Bank fails to mention is that there is no way the Ohio courts could obtain personal jurisdiction over Green and Madison should Key Bank's motion to dismiss be granted. Green and Madison, in their individual capacities, have been sued for their fraudulent actions in Florida. (2nd Amd. Complaint, Counts XIV and XV).

The Students, having relied upon Key Bank's endorsement of TAB as an approved flight school, and having trusted in the joint enterprise between the two companies, never could have foreseen this business enterprise would destroy their dreams, strangle them with debt, and ruin their credits.⁵⁰ *Corsec, S.L. v. VMC Int'l*

⁵⁰ Appellants' App., Tab 3, Ex. C. "I saw TAB Express listed on the Key Bank website in July 2004 as an approved aviation school. Key Bank was also advertised on TAB's website From February 2005 to the present I have suffered large financial losses" (DeGrave Affidavit). "I was also advised by TAB recruiters that Bob Adamo of TAB Express had 'connections' with Key Bank representatives and would be of assistance should my loan applications be refused or contested by Key Bank" (Craft Affidavit).

Franchising, LLC, 909 So. 2d 945, 947 (Fla. 3d DCA 2005) (citing *Bremen*). In *Corsec*, the forum clause was enforceable because whatever inconvenience the plaintiff might have suffered by being forced to litigate in the contractual forum was “clearly foreseeable” at the time of contracting. *Id.* In contrast, here the Students were shell-shocked by the collapse of the Key Bank/TAB enterprise and could not have reasonably foreseen that they would have to pursue actions against Key Bank in Ohio and against TAB, Madison, Green and Great Lakes in Florida.

Moreover, the claims against TAB are so closely related to the claims against the Appellants that it is reasonably foreseeable by TAB that the Appellants would be bound by the mandatory Florida venue clause in TAB’s Student Enrollment Contracts. Had it not been for TAB directing the Students to Key Bank and their enrolling in TAB, the promissory notes would not exist. (2nd Amd. Complaint, ¶ 21-25).⁵¹

Further, the Students’ lawsuit is based on the notion that the Key Bank/TAB joint business enterprise is what caused the Students’ suffering, allegations that are tightly interwoven. In *Dore v. Roten*, 911 So. 2d 218 (Fla. 2nd DCA 2005), the Court did not enforce a forum selection clause because two of the five defendants likely could not have been haled into the court prescribed in the venue clause and because the allegations between the defendants were factually intertwined. *Dore* at

⁵¹ Adamo Deposition, P. 76, lines 10-23. “There were no grants or other banks that were doing student loans.”

221; See also, *Beaubian*. In addition to seeking rescission of the promissory notes, the Students are also seeking monetary damages from all the Appellants.

The Appellants also rely on *Copacabana Records, Inc. v. Wea Latina, Inc.*, 791 So. 2d 1179 (Fla. 3rd DCA 2001) and *Southwall Technologies, Inc. v. Hurricane Glass Shield*, 846 So. 2d 669 (Fla. 2nd DCA 2003) as grounds for stating it is not unreasonable or unjust to require two different lawsuits. However, neither of these cases involved the severance of claims so intertwined that the same facts would have been litigated twice, possibly resulting in conflicting outcomes. Further, these cases involved businesses, not consumers, that actually negotiated their contracts and there were no competing mandatory venue clauses.

Interestingly, in *SAI Insurance Agency, Inc. v. Applied Systems, Inc.*, 858 So. 2d 401 (Fla. 1st DCA 2003), another case cited by Appellants, one reason that the court enforced the venue clause was because the plaintiff failed to seek to invalidate the entire agreement. Although “perhaps [the plaintiff] could have sought to invalidate the entire agreement through its lawsuit, it has not chosen to do so.” *SAI Insurance* at 404. In contrast, the Students seek, among other relief, the complete rescission of the promissory notes on grounds of unconscionability, breach of fiduciary duty, negligent misrepresentation, fraud in the inducement, conspiracy to commit fraud, and defamation of credit. (2nd Amd. Complaint, Counts II, IV, VI, VIII, XIII, XVI, and XVII). The Students are contesting the

validity of the notes in their entireties, in addition to seeking damages from all the Defendants because of lost careers, lost salaries, and dislocation. A “court is not bound to abide by [a venue clause] where, as here, there are compelling reasons not to enforce it.” *W.G. Mills, Inc. v. Hughes Supply, Inc.*, 816 So. 2d 225 (Fla. 5th DCA 2002) (citing *Interval Marketing Associates, Inc. v. Sea Club Associates IV, Ltd.*, 468 So. 2d 262, 263 (Fla. 2nd DCA 1985)).

This Court in *Mills* and the Second DCA in *Interval Marketing* found compelling reasons not to enforce a forum selection clause when, as here, there were several parties and factually intertwined allegations. Granting the Appellants’ Motion to Dismiss would force the students to bring suit in two different states in order to obtain relief when co-defendants, TAB, Green, Madison, and Great Lakes have been properly sued in Volusia County. Additionally, the Ohio venue is far from the residences of most of the Students (Florida), and far from where the vast majority, if not all, of the events underlying the Complaint occurred (Florida). (2nd Amd. Complaint, ¶¶ 1-94).

Requiring two suits would unreasonably and unjustly require the Students to litigate the same facts twice, and prove the same damages, assuming they even have the resources to do so. Piecemeal litigation would result. Duplicative efforts by the courts could produce conflicting, mutually repugnant results. *See, Lobato-Bleidt v. Lobata*, 688 So. 2d 431 (Fla. 5th DCA 1997). The rule against splitting

causes of action requires the Plaintiffs to bring one action to recover all their damages arising out of same matter. *Id.* See *Halls and Girdley Constr.* They have done so here.

This Court, in *Derrick & Assoc. Pathology, P.A. v. Kuehl*, 617 So. 2d 866 (Fla. 5th DCA 1993) (on review of a transfer of venue, not a motion to dismiss), a case relied upon by the Appellants to support their argument that lawsuits can be segregated, suggested to the plaintiff in its closing remarks that it

may wish to reconsider its decision to try counts one and two in Orange County, thereby necessitating trials in both counties. With the parties' consent, the whole case could be transferred to Palm Beach County or remain in Orange County.

Id. at 868. There is no option in the case at bar to transfer this whole case as the Appellants seem to suggest. The motion was one to dismiss counts against one of multiple defendants, not a motion to transfer between intrastate counties, and the Ohio courts could not obtain jurisdiction over four of the five defendants. *Dore* at 221.

Forcing the severance of the claims would not be just or reasonable, and certainly not judicially economical. The Students do not have the resources to maintain two lawsuits and this is because of the Appellants' actions.⁵² When the Students enrolled in TAB and applied for their loans, they could not have foreseen,

⁵² Appellants' App., Tab 3, Ex. C.

nor could they have legitimately bargained for, what has happened to them. They are broke and without their promised educations. The trial court recognized these compelling reasons when it properly denied the Motion to Dismiss.

III. Enforcement Of The Venue Clause Would Be Contrary to Public Policy.

The Students have sued under specific Florida statutes seeking relief. (2nd Amd. Complaint, Counts XVII and XVIII). If this case was required to be brought in Ohio, the Students would lose specific statutory protections and relief because Ohio does not have laws comparable to Florida's Consumer Collections Practices Act ("FCCPA"), *Fla. Stat.* 559.501 et seq., and Florida's Civil Remedies for Criminal Practices Act ("FCRCPA"), *Fla. Stat.* 772.101 et seq.⁵³ This would be contrary to Florida's public policy.

In *First Pacific Corp. v. Sociedade de Empre. Const., LTDA*, 566 So. 2d 3, 4 (Fla. 3rd DCA 1990), the plaintiffs, which were sophisticated parties, sued under FCRCPA and other Florida statutes, and the forum selection clause was deemed unenforceable.

At the time it entered the contract and agreed to the choice-of-forum clause, [Plaintiff] could not foresee that

⁵³ Ohio has no laws comparable to the two Florida statutes under which the Students have sued. Ohio has a consumer protection statute entitled Ohio Consumer Sales Practices Act, *Ohio Revised Code Annotated* § 1345.01 et seq. (2006), but its purpose and remedies are comparable to Florida's Deceptive and Unfair Trade Practices Act, *Fla. Stat.* § 501.201 et seq., which, like the Ohio Act, specifically exempts actions against banks.

it would be subjected to fraudulent treatment. *Under these circumstances, enforcement of the clause would contravene Florida policies incorporated into the statutes under which [Plaintiff] seeks relief.* These statutes were enacted to provide a civil remedy to persons victimized by the criminal activities they enumerate.

First Pacific at 4 (emphasis added) (2nd Amd. Complaint, Counts XVII and XVIII).

Similarly to *First Pacific*, the Plaintiffs in the present case have sued Key Bank and TAB for fraud in the inducement and for violations of FCRCPA. Additionally, they have sued Key Bank and co-defendant, Great Lakes, under FCCPA. Unlike in *First Pacific*, however, the Students never had any meaningful choice over the venue clause, or any other clause for that matter. The Students had to be approved by Key Bank before they were even allowed to enroll.⁵⁴ The TAB “salespeople were instructed ... before you spend hours and hours of prepping this person, you got to make sure they can get in, you can get the money to do this.”⁵⁵

Surely, under Florida’s public policy Florida courts need not allow a corporation, even if it is a national bank, to prey on Florida consumers, or avoid complying with Florida’s basic consumer protection laws (i.e. don’t mislead or withhold vital information from your customers). See generally, *Haws & Garret Gen. Contr., Inc. v. Panhandle Custom Dec. & Supply, Inc.*, 500 So. 2d 204 (Fla. 1st DCA 1986) (citing *Manrique*) (enforcement would have contravened public

⁵⁴ Adamo Deposition, P. 59; Lines 11-24. “The application [for the student loan] is approved prior to enrollment at the school.” *Supra.* at P. 154, Lines 18-24.

⁵⁵ *Supra.*

policy). When considering all of the foregoing, the only equitable, just and reasonable result is to not enforce the venue/forum clause.

IV. The Promissory Notes Are Unconscionable.

The Students' Complaint contains causes of action attacking the conscionability of the promissory notes themselves. (2nd Amd. Complaint, Counts III and IV). When there is a direct action of unconscionability, on a motion to dismiss the court must evaluate the entire contract on a procedural and substantive level. *Kohl v. Bay Colony Club Condominium, Inc.*, 398 So. 2d 865 (Fla. 4th DCA 1981). In *Kohl*, the Court denied a lessors' motion to dismiss and held that an action brought by a class pleading unconscionability could be maintained. *Id.* Unconscionability has long been defined as an "absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." *Id.*, at 867 (citing *Bennett v. Behring Corp.*, 466 F. Supp. 689 (S.D. Fla. 1979)).

The Students had no meaningful choice in entering into the Key Bank promissory notes if enrolling in TAB. (2nd Amd. Complaint, ¶¶ 17-22). TAB, after all, had been jointly advertising its enterprise with Key Bank as a unique and one-of-a-kind program. (2nd Amd. Complaint, ¶¶ 13-20, 27, 28). The Students were referred solely to Key Bank by TAB to fund their flight instruction and TAB facilitated the loan application process because the Students could not conceivably

be expected to pay in cash from personal resources. (2nd Amd. Complaint, ¶¶ 17-30). After leaving jobs, packing their goods and families, and moving to DeLand, most, if not all, of the Students were too far along in the process to realistically consider backing out.

This investment in process is an important factor in weighing whether there was meaningful choice of a venue clause. See, *SunTrust Bank v. Sun Int'l Hotels, Ltd.*, 184 F.Supp.2d 1246, 1261 (S.D. Fla. 2001). In *SunTrust*, the hotel guests were required to agree to a forum selection clause in the standard registration presented to them at their arrival. *Id.* If the guests wanted a hotel room after having traveled to get to the hotel, they had to agree to the forum clause. *Id.* This was one important factor in the *SunTrust* court's refusal to enforce the forum selection clause. While the hotel guests may have been afforded the opportunity to read the forum selection clause at the time of registration, they had no objectively reasonable opportunity to consider and reject it. *Id.*

The Students had absolutely no opportunity or power to negotiate the terms of the promissory notes. As "students," almost by definition, they had limited or no personal financial resources. As a class, they lacked business sophistication to appreciate the ramifications of the contractual provisions. Moreover, and for all practical purposes, had the Students actually desired to negotiate the promissory notes, Key Bank would certainly not have engaged in any give and take. An

absence of any voice in negotiating the terms of a contract is considered a “truly powerful” factor when considering the existence of unconscionability. *Steinhardt v. Rudolph*, 422 So. 2d 884, 892 (Fla. 3rd DCA 1982).

As a result of this procedural unconscionability, the contract terms, including the forum selection clause, unreasonably favor Key Bank. They are substantively unconscionable. The Students, by their very nature of being indebted, former students of TAB, do not have the financial means to bring suit against Key Bank in Ohio.⁵⁶ Most of the Students reside in Florida, and many of them are on the verge of personal bankruptcy.⁵⁷

The unconscionability of the forum selection clause when read together with the arbitration provision, becomes all the more apparent. The arbitration provision requires the debtor to waive his right to a jury trial, restricts causes of action, restricts discovery, eliminates the right to pursue attorneys’ fees, and prohibits joinder.⁵⁸ The arbitration provision and the forum clause act as a one-two punch to deter any legitimate claims against Key Bank. *See, Bellsouth Mobility, LLC v. Christopher*, 819 So. 2d 171 (Fla. 4th DCA 2002) (contractual provision was found substantively unconscionable because it required consumers to waive specific legal remedies). In fact, Key Bank’s ability to continue blindly trusting in its venue

⁵⁶ Appellants’ App., Tab 3, Ex. C

⁵⁷ *Supra*.

⁵⁸ Appellees’ App., Tab 5.

clause, when pursuing similar vocational school schemes outside of Ohio, effectively immunizes it from legal challenges by students everywhere.

No sensible person standing in the Students' shoes, had it not been for Key Bank and TAB's procedural unconscionability, would have allowed these provisions had they been able to negotiate reasonable terms or anticipate what the Students have experienced as alleged in detail in their Second Amended Complaint. *Steinhardt* at 889. Where one party has overreached and gained an unjust and undeserved advantage, which it would be inequitable to enforce, a court of equity should not hesitate to interfere, even if the victimized parties owe their predicament largely to their own stupidity and carelessness. *Peacock Hotel, Inc. v. Shipman*, 103 Fla. 633, 138 So. 44, 46 (1931) (internal citations omitted).

In *MGJ Industries, Inc. v. Greyhound Financial Corp.*, 826 F. Supp. 430 (M.D. Fla. 1993) (citing *Stewart supra*), the plaintiff certainly was not stupid or careless. The court found that the forum selection clause was unenforceable because of the defendant's procurement of the entire loan package, not just the clause itself, through overreaching and fraudulent tactics. The clause "could hardly be considered negotiated or bargained for." *Id.* at 432. Forum clauses that are "affected by fraud" are not to be given controlling weight. *Id.* citing *Bremen*. As in *MGJ*, the Students' loan packages in this case were procured through overreaching and deceptive behavior by the Appellants' and TAB combined.

Even though the law may not protect people from entering into contracts that may be unreasonable or which may lead to hardship, the courts should not enforce contracts when enforcement penalizes a party. *Peacock Hotel* at 638. Such an outcome exists when one can see that no decent, fair-minded person would view the result without being possessed of a profound sense of injustice. *Id.* It is not just the overreaching of Key Bank that has caused the Students' strife. It is the joint effort between Key Bank and TAB, compounded by the tortious behavior of Madison and Green (agents of Key Bank). This combined overreaching is unconscionable, and its effects are unjust and unreasonable. *See generally, Maas v. Maas*, 440 So. 2d 494 (Fla. 2nd DCA 1983) (overreaching found when husband attorney drafted property settlement agreement and had his unrepresented wife sign it); *State v. Kirk*, 362 So. 2d 352 (Fla. 1st DCA 1978) (overreaching defined in prosecutorial sense as being "gross negligence" or "intentional misconduct").

The effect of granting the Appellants' Motion to Dismiss would be a forfeiture of the underlying actions. The Students do not have the means to bring and maintain actions in Ohio – they barely have the resources to maintain the current action. In fact, Key Bank is banking on this. The Appellants' purpose in filing its Motion to Dismiss is to divide and conquer. If this court grants the Motion to Dismiss, it would have the effect of: (1) severing the claims because the Students would be unable to obtain personal jurisdiction over TAB and the other

Defendants in Ohio; (2) causing most, if not all, of the Students to drop their claims due to the increased expense of maintaining two actions; and (3) ultimately, exhausting the Students' limited remaining resources which, tragically, are quickly being sapped in this litigation against Key Bank. Granting Key Bank's Motion to Dismiss would result in the forfeiture of Students' claims.

V. The Unpublished Key Bank Federal Trial Court Orders Cited By Appellants Are Not Legal Precedent, Are Not Binding And Are Not Properly Included In Key Bank's Initial Brief.

In its Initial Brief and Motion to Dismiss, Key Bank selectively cites and improperly relies as authority on four unpublished federal trial court orders,⁵⁹ to which Key Bank was a party, enforcing Key Bank's forum selection clause.⁶⁰ These cases are not reported, not controlling, not persuasive and should be given no weight by this court. *Dwyer* at 335 (Fla. 1976); *Roche v. State*, 462 So. 2d 1096, 1099, fn 2 (Fla. 1985).⁶¹ Even if this Court were to entertain the trial court orders,

⁵⁹ Appellants' Appendix, Tab 2, Ex. 1.

⁶⁰ *Supra*.

⁶¹ Even a published per curiam affirmation (with no written opinion) by a Florida State appellate court has no precedential value. *Dept. of Legal Affairs v. District Court of Appeals, 5th District*, 434 So. 2d 310 (Fla. 1983) citing *State v. Fitzpatrick*, 491 P. 2d 262 (Wash. App.), (unpublished opinions do not become part of the common law). Moreover, citing such unpublished decisions is improper. As the Florida Supreme Court stated:

The second issue is whether it is proper to cite such a decision [unpublished] to a court. It is evident that such a citation from another court has no relevance for any purpose and is properly excluded from a brief or oral argument.

this Court would be substantially in the dark as to the facts and pleadings at issue in the cases resulting in those orders. Moreover, those orders were entered by federal trial courts sitting in diversity jurisdiction, applying federal law to federal principles for evaluating venue clauses. These principles do not govern this venue dispute as this is a state court action. Importantly, these orders were not appealed.⁶²

Moreover, the Key Bank orders only serve to accentuate the importance of fairness in determining whether to enforce a venue clause. The unpublished Key Bank *Throckmorton* order recites the factors to be weighed by a federal court in assessing whether a forum selection clause is reasonable and thus enforceable. Venue clauses are unreasonable under federal law if *any* of the following four factors applies:

“(1) their formation was induced by fraud or overreaching; (2) the complaining party ‘will for practical purposes be deprived of his day in court’ because of the grave inconvenience or unfairness of the selected forum; (3) the fundamental unfairness of the chosen law may deprive the plaintiff of a remedy; or (4) their enforcement would contravene a strong public policy of the forum state.”

Key Bank's *Throckmorton* order, citing *Allen v. Lloyd's of London*, 94 F.3d 923, 928 (4th Cir. 1996) in turn citing *Bremen*, 407 U.S. at 12-13.

Id. at 312. See also *Ullah v. State*, 679 So. 3d 1242, 1244 (Fla. 1st DCA 1996).
⁶² *Supra*.

The Key Bank *Throckmorton* order mentions that affidavits were filed but that the court did not find the plaintiffs would be effectively denied their day in court. The content of those affidavits is not recorded by the Key Bank unpublished *Throckmorton* order. Thus, the *Throckmorton* court properly conducted an evaluation of the facts in reaching its decision, but the trial court in this case and the instant court are without any information about those facts.

If anything, the unpublished federal trial court orders relied upon by the Appellants support the *denial* of their Motion to Dismiss. Conspicuously absent from Key Bank's Motion to Dismiss and its Initial Brief is any mention that in the Key Bank *Murphy* trial court order, the court stated "First, Plaintiff has neither argued nor are there any indications of bad faith, fraud, or overreaching by Defendants." Of course, those elements are pled at length by the Students in the case at bar. In fact, those elements are central to most of the Students' claims.

Absent from Key Bank's Motion to Dismiss and Initial Brief are any admissions that in the unpublished Key Bank *Murphy* order the court stated "Plaintiffs *have not presented any evidence* regarding any physical or financial impediment that would prevent them from litigating their case in Ohio." Key Bank *Murphy* order. (emphasis added). In contrast, in the instant case, the Students have presented evidence of hardship and fraud and overreaching by Defendants.⁶³ Also

⁶³Appellants' App., Tab 3, Ex. C.

absent from Key Bank's Initial Brief is any mention that in the unpublished Key Bank *Murphy* order the trial court noted "Plaintiffs have neither argued, nor is the Court aware of, any remedy that Plaintiff will be deprived of by litigating in federal court in Ohio." For the case at bar, however, Ohio has no statutes comparable to the FCCPA or FCRCPA under which the Students have sued in the instant case.⁶⁴ In the instant case, the Students would be deprived of specific consumer protection laws and specific remedies if this court dismissed this action.

Similar to the Key Bank *Murphy* trial court order's note of an absence of evidence, the unpublished Key Bank *Rios* trial court order, attached to Key Bank's Motion to Dismiss and Initial Brief, cites a lack of evidence to outweigh the parties' selection of a forum in the contract. Again, in contrast, and notwithstanding the trial court order protecting Key Bank from the Students' discovery efforts in this case, the Students at bar present substantial, competent evidence that Key Bank's venue clause should not be enforced.

The unpublished Key Bank *Abel* federal trial court order involves a federal question. That court's conclusions were based on issues the plaintiffs "raised in their brief," a brief not accompanying the order attached to Key Bank's Initial

⁶⁴ The Students have sued under Fla. Stat. § 559.551 *et seq.* (which provides for actual damages, statutory damages, punitive damages, and equitable relief) and Fla. Stat. § 772.101 *et seq.* (which provides for cumulative and supplemental remedies, statutory damages, recovery of attorneys' fees and costs through the appellate levels, and treble damages).

Brief or Motion to Dismiss. Thus, again the trial court in this case and this appellate court are in the dark as to the issues and facts. Lastly, the Key Bank *Abel* court held there was an absence of evidence of financial burden or deprivation of the plaintiff's day in court.

The law Key Bank relies on requires factual questions to be addressed. The Students agree that this Court must review the facts. This Court, for purposes of reviewing this matter *de novo*, should accept all of the assertions in the Students' complaint and their testimony in their affidavits as true. *Unger v. Publisher Entry Service, Inc.*, 513 So.2d 674 (Fla. 5th DCA 1987).

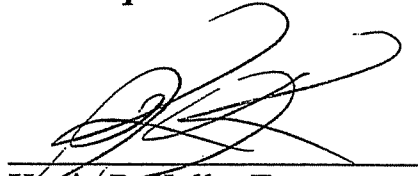
CONCLUSION

Based on the foregoing, the only just and reasonable result is for this Court to AFFIRM the trial court's denial of the Appellants' Motion to Dismiss.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by facsimile and Federal Express delivery this 5th day of July, 2006, to: Pedro F. Bajo, Jr., Esq. and Irene A. Bassel, Esq., Akerman Senterfitt, P.A., SunTrust Financial Centre, 401 East Jackson Street, Suite 1700, Tampa, Florida 33602 and to W. Scott O'Connell, Esq. and Peter N. Tamposi Esq., Nixon Peabody LLP, 900 Elm Street, 14th Floor, Manchester NH 03101-2031,

(Attorneys for Key Bank USA, National Association; Robert Madison; Josette Green; and Great Lakes Educational Loan Services, Inc.); and to Mark H. Hutchison, Esq., Law Office of Mark H. Hutchison, Esq., 1101 West First Street, Sanford, Florida 32771 (Attorneys for Tab Express International, Inc.).



Kevin P. Kelly, Esq.
Amanda G. Simmons, Esq.

CERTIFICATE OF COMPLIANCE

I hereby certify that the font used in the foregoing Answer Brief is Times New Roman 14 point.



Kevin P. Kelly, Esq.
Amanda G. Simmons, Esq.