SUPREME COURT OF THE
COMMONWEALTH OF KENTUCKY
NO. 2011-SC-000668

JPMORGAN CHASE BANK, N.A. **APPELLANT**

v.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2009-CA-002006
JESSAMINE CIRCUIT COURT CASE NO. 03-CI-00635

BLUEGRASS POWERBOATS, *et al.* **APPELLEES**

BRIEF OF APPELLANT JPMORGAN CHASE BANK, N.A.

Respectfully submitted by:

TACHAU MEEK PLC
Dustin E. Meek
Katherine E. McKune

Dustin E. Meek

3600 National City Tower
101 South Fifth Street
Louisville, Kentucky 40202-3120
(502) 238-9900
Counsel for Appellant JPMorgan Chase Bank, N.A.

CERTIFICATE REQUIRED BY CR 76.12(6)

I certify that I served a copy of this brief by Federal Express overnight mail on June 18, 2012, to: Hon. Hunter Daugherty, Jessamine Circuit Court, 101 N. Main St., Nicholasville, Kentucky 40356; and Jerry Anderson, 400 Court Square Bldg., 269 W. Main St., Lexington, Kentucky 40507.

Dustin E. Meek

Counsel for Appellant JPMorgan Chase Bank, N.A.

INTRODUCTION

This appeal arises from an opinion by the Court of Appeals affirming a decision of the Jessamine Circuit Court setting aside its own order to arbitrate and denying Appellant Chase's motion to enforce a final arbitration award dismissing Appellees' claims as untimely. Because Appellees lacked any proper basis for vacating the arbitration award under the Federal Arbitration Act or Kentucky's Uniform Arbitration Act, the trial court erred in denying Chase's motion to confirm the award, and the Court of Appeals erred in affirming that decision.

STATEMENT CONCERNING ORAL ARGUMENT

Appellant seeks oral argument of this appeal and believes it would assist the Court in deciding the issues presented, including resolution of arbitration issues relating to finality and the proper application of this Court's decision in Ally Cat, LLC v. Chauvin, 274 S.W.3d 451 (Ky. 2009).

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

This dispute followed the deposit of a check related to a failed business transaction. Appellee Bluegrass Powerboats was a retail seller of motorboats and watercraft supplies, owned and operated by Appellee James Taylor and his wife. Record ("R"): 4 (Complaint at ¶ 4); R: at separate deposition folder (Deposition of James Taylor, October 26, 2004 ("10/26/04 Taylor Depo."), p. 12). In the spring of 2003, Taylor decided to sell Bluegrass Powerboats to its employee and sales manager, Gregory Shearer. R: at separate deposition folder (10/26/04 Taylor Depo., pp. 10, 27-28). Taylor and Shearer entered into an Asset Purchase Agreement. R: at separate deposition Folder (10/26/04 Taylor Depo., pp. 27-28 and Exhibit 1 to Deposition). Taylor closed his doors as Bluegrass Powerboats on May 31, 2003, and on the next morning, June 1, 2003, Shearer reopened as Bluegrass Marine. R: at separate deposition folder (10/26/04 Taylor Depo., p. 44).

On June 13, 2003, Taylor opened a personal savings account with Chase, depositing $100 to open the account. R: 8 (Exhibit 2 of Count 2 of Complaint). The same day, Shearer drafted a check from Bluegrass Marine to Taylor for $123,102.00 for the purchase of the business (hereafter, "the purchase check"). R: 7 (Exhibit 1 of Count 2 of Complaint). Four days later, on June 17, 2003, Taylor deposited the check into his personal account with Chase. R: 8 (Exhibit 2 of Count 2 of Complaint). The check was later returned for insufficient funds. R: 5 (Complaint at ¶ 12 of Count 2). As a result of the failed sale of the business, Taylor reclaimed the marine business and its assets several days later. R: separate deposition folder (Deposition of James Taylor, November 16, 2004 ("11/16/04 Taylor Depo."), pp. 115-117).

A. The Trial Court Proceedings

Appellees Bluegrass Powerboats and Taylor originally brought claims against Chase and Bank of America to recover on the purchase check and on another check in dispute. R: 2-10 (Complaint). Taylor's personal account at Chase was subject to the terms of an agreement, known as the "Account Rules and Regulations," which were furnished to each new customer according to the affidavit testimony of a Chase district manager named Terri Morsink. R: 112-118 (Attachment A (Affidavit of Terri D. Morsink) to Reply Memorandum in Support of Motion to Dismiss Count II pursuant to CR 12.02 or Alternatively to Stay Further Proceedings Pending Arbitration). This agreement included a provision allowing either party to elect "binding arbitration by the National Arbitration Forum" to "be governed by the Federal Arbitration Act, 9 U.S.C. §§ 1-16." R: 60-91 (Attachment, p. 15 [R: 81], to Motion to Dismiss Count 2 Pursuant to CR 12.02, or, Alternatively, To Stay Further Proceedings Pending Arbitration). This provision stated (emphasis in original):

> **Arbitration**
>
> Either party may, prior to the rendering of a judgment on any claim, dispute or controversy of any nature, whether asserted individually or jointly ("Claim") by either you or Bank One against the other, or against the employees, agents or assigns of the other, arising from or relating in any way to this Agreement or your Account, including claims regarding the applicability of this arbitration provision or the validity of the entire Agreement, elect to have such claim resolved by binding arbitration by the National Arbitration Forum, under the Code of Procedure in effect at the time the Claim is filed. Rules and forms of the National Arbitration Forum may be obtained and Claims may be filed at any National Arbitration Forum office, www.arb-forum.com, or P.O. Box 50191, Minneapolis, Minnesota 55405, telephone 1-800-474-2371. Any arbitration hearing at which you appear will take place at a location within the federal judicial district that includes your mailing address at the time the Claim is filed. This arbitration provision is made pursuant to a transaction involving interstate commerce and shall be governed by the

> Federal Arbitration Act, 9 U.S.C. §§ 1-16. Judgment upon any arbitration award may be entered in any court having jurisdiction. Nothing in this Agreement shall be construed to prevent any party's use of setoff or any other prejudgment or provisional right or remedy, whether or not specifically provided for in this Agreement.
>
> IN THE ABSENCE OF THIS ARBITRATION AGREEMENT YOU AND THE BANK MAY OTHERWISE HAVE HAD A RIGHT OR OPPORTUNITY TO LITIGATE CLAIMS THROUGH A COURT, AND/OR TO PARTICIPATE OR BE REPRESENTED IN LITIGATION FILED IN COURT BY OTHERS, BUT EXCEPT AS OTHERWISE PROVIDED ABOVE, UPON THE ELECTION OF EITHER PARTY, ALL CLAIMS MUST NOW BE RESOLVED THROUGH ARBITRATION. FURTHER, YOU MAY NOT JOIN ANY CLAIM WITH A CLAIM OF ANY OTHER ACCOUNT HOLDER, FOR PURPOSES OF THIS ARBITRATION PROVISION OR OTHERWISE.

Accordingly, Chase moved to stay proceedings on the claim relating to the purchase check in favor of arbitration. *Id.* Appellees argued that there was not an enforceable agreement to arbitrate. Appellee Taylor admitted in an Affidavit that he "signed the signature card" when he opened his account on June 13, 2003, and that he "was handed an envelope." *See* R: 203-206 (Decision and Order of Court, May 5, 2004). But Taylor denied that he had received the "Account Rules and Regulations" agreement containing the arbitration provision. *Id.* Taylor also attested that "I have been in the banking business for most of my adult life. I would not expect an arbitration agreement to be part of the rules and regulations of a private savings account." *Id.*

The trial court made specific findings of fact – which were never withdrawn – squarely rejecting Taylor's testimony. *Id.* Although Chase could not locate the actual signature card signed by Taylor, Chase submitted to the trial court a Supplemental Affidavit of district manager Morsink attaching a "Consumer Signature Card" signed by another new customer on the same day Taylor had opened his account, June 13, 2003. R: 196-199 (Supplemental Affidavit of Terri D. Morsink, Exhibit A). That signature card

expressly stated "I acknowledge receipt of the Bank's deposit account agreement, which includes all provisions that apply to this deposit account, *and agree to be bound by the agreement and terms contained therein.*" (Emphasis added.) Ms. Morsink had previously attested in an earlier Affidavit that "As a part of the bank's regular practice in opening such deposit accounts, each customer was given a packet of information that included the account rules and regulations then in place." R: 112-118 (Attachment A (Affidavit of Terri D. Morsink), p.1, to Reply Memorandum in Support of Motion to Dismiss Count II pursuant to CR 12.02 or Alternatively to Stay Further Proceedings Pending Arbitration). The trial court conducted a hearing, reviewed the evidence produced by both parties, made specific findings of fact, and determined there was an agreement to arbitrate. *See* R: 203-206 ("this Court finds that James D. Taylor did sign the signature card which Terri Morsink states was being used by Bank One during the month of June, 2003 and that, contrary to the affidavit of Mr. Taylor, he was provided a pamphlet titled 'Rules and Regulations'" containing the arbitration provision). Accordingly, the court held "the arbitration provision found in Bank One's account rules and regulations are enforceable in accordance with their terms." *Id.*

The trial court thus stayed proceedings on claims relating to the purchase check and ordered Appellees to arbitration on those claims. *Id.* Meanwhile, Appellees moved forward against Bank of America and Chase in the trial court with separate claims, which were eventually resolved and dismissed. R: 458-459 (Agreed Order, March 28, 2008). The claim relating to the purchase check that was referred to arbitration ("Count Two" or "Arbitration Claim") remained pending but stayed.

B. The Kentucky Arbitration Proceedings

For several years after the trial court's May 2004 order referring the Arbitration Claim to arbitration, Appellees sat on their hands and took no steps to arbitrate. Finally, almost four years after the order to arbitrate had been issued, and while Chase's motion to dismiss the action for failure to assert the Arbitration Claim was pending before the trial court (R:447-454, Chase Motion to Dismiss), Appellees hurriedly filed the Arbitration Claim with the National Arbitration Forum ("NAF"), as provided in the arbitration agreement. R: 474 (Chase's Response to Motion to Set for Trial). Chase responded to the claim and the parties moved forward with the selection of an arbitrator located in Lewis County, Kentucky. *Id.*

Appellees' Arbitration Claim asserted the same allegation as contained in their original Complaint, that Chase had waited too long to dishonor the check Appellee Taylor had deposited into his account.[1] The Arbitration Claim was governed by a statute of limitations set out in KRS 355.4-111 (Kentucky's Uniform Commercial Code), which

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[1] The filings and submissions by the parties to the National Arbitration Forum are not yet part of the Record for citation. This is because the argument which the Court of Appeals ultimately found dispositive – that the arbitrator's decision dismissing Appellees' Claim as untimely under NAF Rule 10 should not be deemed an "award" – was not raised by Appellees until their responsive Brief in the Court of Appeals. Thus that argument was not addressed in the trial court and Appellees did not elect to file a supplemental statement identifying the issue pursuant to CR 76.03(6). When Appellees first raised the argument in their Brief below, Chase sought to supplement the Record with the filings, submissions and communications with the NAF in order to demonstrate "the substantive arguments of the parties that resulted in the arbitrator's award." *See* Appellant's Motion to Supplement Record filed December 21, 2010, p.1. Appellees opposed this motion on the grounds that the "trial court's decision was not based on the arbitration record which Appellant has moved to make part of the record on appeal and was never introduced in the trial court." *See* Appellee's Response to Motion to Supplement Record filed December 27, 2010, p. 2. Ironically – in view of its disposition of the appeal based on an issue not addressed by the trial court – the Court of Appeals denied Chase's motion, ruling that "[t]he documents were not filed in and considered by the trial court prior to entry of the judgment on appeal and therefore, they may not be considered by this Court." *See* Order entered January 1, 2011 (citing CR 75.08). In order to support Chase's challenge to the argument which the Court of Appeals ultimately found dispositive, Chase is filing simultaneously with this Brief another motion with this Court, seeking to supplement the Record with the documents submitted to and created by the NAF.

states "An action to enforce an obligation, duty, or right arising under this article must be commenced within three (3) years after the claim for relief accrues."

Thus, on March 11, 2009, Chase moved to dismiss the Arbitration Claim as untimely under NAF Rule 10 and submitted a memorandum of law with exhibits. *See* R: 474 (Chase's Response to Motion to Set for Trial, at 2); n.1, *supra*. NAF Rule 10 ("Time Limitations") states:

> No Claim may be commenced after the passage of time which would preclude a Claim regarding the same or similar subject matter being commenced in court. This time limitation shall be suspended for the period of time a court of competent jurisdiction exercises authority over the Claim or dispute. This rule shall not extend nor shorten statutes of limitation or time limits agreed to by the Parties, nor shall this rule apply to any case that is directed to arbitration by a court of competent jurisdiction.

On March 26, 2009, Appellees submitted a memorandum opposing dismissal. *See* R: 474 (Chase's Response to Motion to Set for Trial, at 2); n.1, *supra*. Appellees did not raise any of the arguments they eventually presented to the trial court or mention Ally Cat (finality decree issued February 12, 2009). *Id.* On June 25, 2009, the arbitrator selected by the parties decided the timeliness issue and dismissed the Arbitration Claim. R: 479 (Order, attached as Exhibit A to Chase's Response to Motion to Set for Trial) (attached at Appendix Tab 2). The arbitrator found that the parties had entered into a valid written agreement to arbitrate their dispute with the NAF, the matter involved interstate commerce and the Federal Arbitration Act governed the arbitration, and the applicable substantive law supported the decision dismissing Appellees' claims with prejudice. *Id.*

C. Efforts to Enforce Arbitration Award in Trial Court

Appellees never moved to vacate the arbitrator's award pursuant to Section 10 of the Federal Arbitration Act, 9 U.S.C. § 10, or its Kentucky counterpart, KRS 417.160. Instead, on August 13, 2009, Appellees did nothing more than file a motion in the trial court "to place the instant action back on the court's active docket and to set the case for pre-trial or jury trial." R: 463-470 (Motion to Set for Trial). Appellees argued that Ally Cat required the trial court to rule that there was no agreement to arbitrate and their claim on the purchase check should be set for trial. *Id.* Appellees never informed the trial court that the parties had already arbitrated the matter to final award, or that Chase had successfully obtained dismissal of the action with prejudice. *Id.*

Chase opposed Appellees' motion, arguing that they had failed to demonstrate any statutory basis upon which the trial court could vacate the arbitrator's award. R: 473-479 (Chase's Response to Motion to Set for Trial); R: 488-498 (Chase's Sur-Response to Motion). Chase further argued that Kentucky authority clearly establishes that trial courts are to afford great deference to arbitration decisions and that KRS 417.160 limited the scope of the trial court's discretion when reviewing those decisions. *Id.* On September 29, 2009, Chase also moved to confirm the arbitrator's award pursuant to KRS 417.150 because more than ninety days had elapsed without the Appellees having sought to vacate the award under KRS 417.160. R: 513-514 (Chase's Motion to Confirm Arbitration Order). A corresponding deadline of "three months" is set out in Section 12 of the Federal Arbitration Act, 9 U.S.C. § 12.

Over Chase's objections, the trial court determined that because it had stayed the claim at issue rather than dismissing it, the trial court retained jurisdiction to reconsider

its May 2004 order to arbitrate. The trial court then further held that it could rely on the alleged change in the law caused by Ally Cat as a basis for disregarding the arbitration award. R: VR No. __: 9/10/09; 9:21:36; R: VR No. __: 10/1/09; 9:36:18; R: VR No. __: 10/1/09; 9:39:25. Without written findings or conclusions, the trial court granted Appellees' motion and indicated it was prepared to set the case for trial. R: 512 (October 2, 2009, Minute Entry Setting Aside Order to Arbitrate), also attached as Appendix Tab 4; R: VR No. __: 10/1/09; 9:41:40. The trial court also denied Chase's motion to confirm the arbitration award. R: 515 (October 9, 2009, Minute Entry Denying Motion) (also attached as Appendix Tab 3).

D. The Direct Appeal

In October 2009, Chase timely appealed the trial court's decision pursuant to KRS 417.220. The Court of Appeals declined to hear the appeal by oral argument, and on September 30, 2011, the Court of Appeals issued a "not to be published" Opinion affirming the trial court's decision.

Specifically, the Court of Appeals held that the arbitrator's decision was "a dismissal for timeliness" and "not an adjudication on the merits and [did] not constitute an 'award'." *See* Appendix, Tab 1 (Opinion Affirming, p. 2). The Court of Appeals also ruled that because the trial court had stayed rather than dismissed the Appellees' Count Two pending arbitration, there was no final judgment. Thus, the Court held that the trial court was within its jurisdiction to vacate its own order to arbitrate based upon what the Court of Appeals noted as a mistake of law or a change in the law as reflected by Ally Cat. *Id.* at 7. Finally, the Court of Appeals held that because Chase "failed to produce any signed agreement between the parties to arbitrate (indeed failed to produce a

document bearing the signature of *either* party), it was not error for the trial court to set the matter for trial on the grounds that there was no agreement to arbitrate," citing Ally Cat. *Id.* (emphasis in original).

Chase timely filed a motion for discretionary review, which was docketed on November 1, 2011. Chase respectfully submits that the trial court and the Court of Appeals have erred as a matter of law.

ARGUMENT

The trial court made no findings of fact when it denied Chase's Motion to Confirm Arbitration Award, but merely applied legal principles. The Court of Appeals did the same. *See* Appendix, Tab 1 (Opinion, p. 6). The appropriate standard of review for this Court is thus *de novo*. Calhoun v. CSX Transp., Inc., 331 S.W.3d 236, 240 (Ky. 2011) ("we review *de novo* the lower courts' legal conclusions that CSX was entitled to judgment as a matter of law"); Conseco Fin. Servicing Corp. v. Wilder, 47 S.W.3d 335, 340 (Ky. App. 2001) ("Apparently the trial court made no factual findings in this case, but based its ruling solely on the application of certain principles of contract law to the arbitration clause quoted above. Our review, accordingly, is *de novo.*").

Here, Appellees persuaded the trial court to invalidate the arbitrator's decision based upon a putative change in Kentucky law regarding the requirements for agreements to arbitrate. R: 463-470 (Motion to Set for Trial). The courts below erred.

First, the Court of Appeals erred in holding that the arbitrator's decision to dismiss based on the National Arbitration Forum's controlling rule for timely initiating an arbitration proceeding did not constitute an "award" subject to confirmation. On the contrary, the arbitrator's decision was equivalent to a court's decision to dismiss based on

the relevant statute of limitations. The Court of Appeals drew the wrong conclusion after misapprehending the holdings in two cases, Medcom Contracting Serv., Inc. v. Shepherdsville Christian Church Disciples of Christ, Inc., 290 S.W.3d 681 (Ky. App. 2009), and Coldwell Banker Manning Realty, Inc. v. Cushman & Wakefield of Conn., Inc., 980 A.2d 819 (Conn. 2009), and erroneously expanded the trial court's jurisdiction to reconsider its order compelling arbitration. This Court should make clear that an arbitrator's decision, following arguments by the parties, to dismiss a claim brought after the expiration of a prescribed limitations period is an "award" under the Federal Arbitration Act and the Kentucky Uniform Arbitration Act, entitled to the same deference as any other substantive decision issued by the arbitrator.

Second, the Court of Appeals erred when it found significant the trial court's order to *stay* the action, rather than *dismiss* outright the claim that was subject to arbitration. The Court concluded incorrectly that this distinction allowed the trial court discretion to vacate its prior order to arbitrate, even after a final disposition by a Kentucky arbitrator had already occurred. The Court overlooked substantial legal authority that an arbitration order, and certainly an award, terminates the trial court's powers except as to enforcement and subsequent review of that award pursuant to statutory requirements. *See* Ernst & Young, LLP v. Clark, 323 S.W.3d 682, 692 (Ky. 2010) ("We recognize that when a lawsuit is submitted to arbitration, the trial court technically retains jurisdiction over the proceeding while the issues are arbitrated. … [However, w]hen a dispute goes to arbitration, the trial court's broad discretion to decide all issues pertaining to pre-hearing procedures, including discovery, all issues of substantive law, and all evidentiary matters passes to the arbitrator. … The trial court's

function is constricted to the simple entry of a final judgment enforcing the arbitrator's decision.") (citations omitted).

Finally, this Court should reverse the lower courts' misapplication of Ally Cat, LLC v. Chauvin, 274 S.W.3d 451 (Ky. 2009). Unlike the consumer in Ally Cat, evidence admitted and weighed by the trial court demonstrated that Appellee James Taylor signed an agreement with Chase indicating his assent to be bound by the applicable provisions of the account rules and regulations, including the conspicuous arbitration provision. Additionally, as the arbitrator found, Chase's agreement was governed by the FAA, 9 U.S.C. § 1, *et seq.,* and this Court has expressly concluded that Ally Cat has no application to agreements governed by the FAA. *See* Hathaway v. Eckerle, 336 S.W.3d 83, 87 (Ky. 2011), quoting Ernst & Young, LLP v. Clark, 323 S.W.3d 682, 687 n.8 (Ky. 2010). Moreover, even if the FAA were not applicable and Chase were required to proceed under the KUAA, this case would fall within the narrow exception to the venue requirement of Ally Cat. The arbitration had already been heard in Kentucky by a Kentucky arbitrator who decided the dispute by final order and dismissal with prejudice, all several weeks before Appellees first raised any challenge under Ally Cat.

Accordingly, because Appellees never moved to vacate the award or established the statutory grounds for modification set out in Section 10 of the FAA, 9 U.S.C. § 10, or its Kentucky counterparts, KRS 417.160 or 417.170, the trial court was *required* to confirm the award of the arbitrator as timely requested by Chase. *See* R: 513-514 (Chase's Motion to Confirm Arbitration Order, filed October 2, 2009). This Court should reverse the decision by the Court of Appeals and either itself render final

judgment for Chase, or remand for entry of judgment by the trial court confirming the arbitration award and dismissing the underlying action.

A. An Arbitrator's Decision Dismissing a Claim Based on a Claimant's Failure to Initiate Arbitration Within the Prescribed Limitations Period is an "Award" Under the KUAA and FAA.

The Court of Appeals held that the arbitrator's decision dismissing Appellees' Claim was not an arbitration "award" because it was "procedural" in nature and therefore not entitled to deference, confirmation or enforcement. (Appendix, Tab 1, Opinion, p. 6.) In arriving at this conclusion, the Court of Appeals misapprehended the holdings and reasoning in two cases, Medcom Contracting Services, Inc. v. Shepherdsville Christian Church Disciples of Christ, Inc., 290 S.W.3d 681 (Ky. App. 2009), and Coldwell Banker Manning Realty, Inc. v. Cushman & Wakefield of Conn., Inc., 980 A.2d 819 (Conn. 2009).

In Medcom, the Shepherdsville Christian Church filed demands for arbitration with the American Arbitration Association (AAA) against its contractor Medcom and architect Nolan for defective design and construction of its church building. 290 S.W.3d at 682. The Church paid substantial fees to the AAA, but either Medcom or Nolan or both failed to pay its share of arbitration fees. *Id.* at 685. As a result, the AAA canceled the arbitration by letter notification, and the Church returned to the trial court to pursue its case. Medcom and Nolan attempted to exploit the cancellation by arguing that the AAA's termination constituted "an 'award' in their favor under KRS 417.120 upon termination of the arbitration proceeding," and this "award" barred further proceedings. *Id.* at 684-85. Understandably, the trial court and Court of Appeals rejected that

argument, holding that "termination of an arbitration for nonpayment of fees does not constitute an arbitration award under KRS 417.120." *Id.* at 686.

Equally understandable is the decision in Coldwell Banker, where the Connecticut Supreme Court determined that an adverse determination against Coldwell Banker based on untimeliness "did not constitute an arbitration award" because the controlling arbitration manual in that case did "not establish strict time limitations for the submission of arbitrable claims that have the same preclusive effect as a statute of limitations." 980 A.2d at 832. In fact, the decision in Coldwell Banker was made by a grievance committee with no authority even to make arbitration awards, as that power was specifically reserved for another committee named the professional standards committee. *Id.* at 831. The parties' arbitration manual specifically provided that the grievance committee "'does not hold hearings'" and "'does not mediate or arbitrate ... disputes,'" and that "'if the [g]rievance [c]ommittee determines that a matter should not be arbitrated,' that determination may be appealed." *Id.* Instead, the grievance committee in Coldwell Banker concluded that the matter was not appropriate for arbitration after reviewing a number of considerations, and refunded the arbitration fee. *Id.* at 830.

Neither Medcom nor Coldwell Banker supports the novel construction that the Court of Appeals sought to graft onto Kentucky law. Neither case stands for the proposition that an arbitrator's decision based on the claimant's failure to file within an established statute of limitations period constitutes a "default award" or is a decision that can be ignored by the trial court upon a motion for confirmation and enforcement under Section 9 of the Federal Arbitration Act, 9 U.S.C. § 9, or its Kentucky counterpart, KRS

417.150. Not only is the reasoning of the Court below nowhere to be found in the Coldwell Banker decision, it is implicitly rejected in that decision. *See* 980 A.2d at 825-26, 828-29, 830-31 (emphasis added):

> Arbitration is "[a] process of dispute resolution in which a neutral third party (arbitrator) renders a decision after ... both parties have an opportunity to be heard." Black's Law Dictionary (6th Ed. 1990). The decision rendered by the arbitrator upon the controversy submitted for arbitration constitutes the arbitration award. The principal characteristic of an arbitration award is its finality as to the matters submitted "so that the rights and obligations of the parties may be definitely fixed." *Local 63, Textile Workers Union of America, C.I.O. v. Cheney Bros.*, 141 Conn. 606, 617, 109 A.2d 240 (1954), cert. denied, 348 U.S. 959, 75 S. Ct. 449, 99 L. Ed. 748 (1955).
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> ...
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> The dismissal thus did not constitute an arbitration award *because the issue of timeliness was not one of the issues raised by the parties for arbitration*, and the discretionary language preceding the provision suggests that it was not intended to operate as a statute of limitations. ... Indeed, the grievance committee would not have refunded the $500 arbitration fee, as it did in the present case, if the matter had been arbitrated.

This case is thus readily distinguishable from Medcom and Coldwell Banker. In the present case, the parties paid the arbitration fees and mutually selected a Kentucky arbitrator, submitted the statute of limitations issue presented by KRS 355.4-111 to the arbitrator for review and decision under NAF Rule 10, and participated in extensive legal briefing and written advocacy on Chase's motion to dismiss. The arbitrator then issued a final decision that definitively fixed the rights and obligations of the parties and would have terminated the dispute, but for the erroneous decisions by the courts below. *Cf.* Karsner v. Lothian, 532 F.3d 876, 886-87 (D.C. Cir. 2008) (disallowing confirmation under the Federal Arbitration Act of an arbitration panel's "*recommendation* of expungement" of a customer's complaint against a broker-dealer) (emphasis in original)

(citing Black's Law Dictionary (8th ed. 2004) (defining "award" as a "final judgment or decision")).

Indeed, the decision by the Court of Appeals not only reflects a misreading of Medcom and Coldwell Banker, but also is inconsistent with the Court of Appeals' earlier determination in Harlow v. Beverly Health & Rehab. Serv., Inc., 2009-CA-001852-MR, 2010 WL 4669189 (Ky. App. Nov. 19, 2010) (unpublished decision) (a case in which this Court granted discretionary review, 2010-SC-000808D, but was resolved by agreed dismissal of the parties before decision). In Harlow, the Court affirmed the trial court's confirmation of an arbitration decision resulting from a motion for involuntary dismissal made pursuant to NAF Rule 18,[2] as the claimant's action was untimely asserted under the applicable statute of limitation. *Id.* at * 3. The Court specifically held that the arbitrator's determination on the timeliness of the action "was not a dismissal on mere procedural grounds, but a determination on the facts, with prejudice, on the merits." *Id.* (citing Dennis v. Fiscal Court of Bullitt County, 784 S.W.2d 608, 609 (Ky. App. 1990)).

Yet the Opinion below never mentions Harlow or Dennis, much less distinguishes them from this case. The outcomes in Medcom, Coldwell Banker, Harlow and Dennis are unsurprising. They are consistent with the established doctrine recognized in Kentucky and elsewhere that the timeliness of a demand for arbitration is an issue for the arbitrator to decide. *See* Beyt, Rish, Robbins Group, Architects v. Appalachian Regional Healthcare, Inc., 854 S.W.2d 784, 785-86 (Ky. App. 1993),

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[2] The NAF Code of Procedure, Rule 18, permits a party to request an Order or other relief from an Arbitrator or the Director by filing a Request, or motion. As in Harlow, Chase filed a Rule 18 Request for Involuntary Dismissal from the Arbitrator based upon the untimeliness of Claim asserted by Appellees. *See* fn. 1, *supra*.

quoting with approval John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 556-57 (1964).

In Beyt, Rish, one party sought to enjoin the other to force its participation in arbitration, as required by their contract. *Id.* at 785. The party resisting arbitration asserted that the claim was untimely under the applicable statute of limitations. The Court of Appeals held that "The trial court correctly declined to rule on the limitations question," and noted that "The United States Supreme Court has held that the decision on such procedural issues lies not with the courts, but with the arbitrators." *Id.* at 787. *See also* Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 85 (2002) (holding that National Association of Securities Dealers rule regarding timeliness of demand was a question to be determined by the arbitrator not the court); United Steelworkers of America, AFL-CIO-CLC v. Saint Gobain Ceramics & Plastics, Inc., 505 F.3d 417, 420 (6th Cir. 2007) (question whether union's request for arbitration under a collective bargaining agreement was timely was for arbitrator).

Just as the United States Supreme Court, the Sixth Circuit Court of Appeals, and the Kentucky Court of Appeals in Harlow have all concluded that the question of timeliness of a demand for arbitration is one for the arbitrator to decide, so too the arbitrator's thorough determination of that issue here following full legal argument by the parties should be deemed an "award" entitled to deference under the FAA and the KUAA. This Court should hold consistent with Harlow that the Kentucky arbitrator's decision dismissing Appellees' claim based upon the arbitration rules and the applicable statute of limitations was an award entitled to deference under the FAA and the KUAA.

B. The Trial Court's Decision To Stay The Action For Arbitration, Rather Than To Dismiss, Did Not Mean That The Trial Court Retained Discretion After An Arbitration Award To Act Beyond The Review Powers Set Out In The KUAA and the FAA.

Appellees could not satisfy the legal requirements for vacating the arbitrator's award set out in Section 10 of the Federal Arbitration Act, 9 U.S.C. § 10, or its Kentucky counterpart, KRS 417.160. Consequently, they sought to attack the award by asking the trial court to set the underlying case for trial, citing what they described as a change in the law governing arbitration agreements in Kentucky. R: 463-470 (Motion to Set for Trial). The trial court should have limited its review of the motion to whether Appellees had established the existence of any of the statutory grounds for vacating the arbitrator's decision set out in 9 U.S.C. § 10 or KRS 417.160 and KRS 417.170. But instead, the trial court erroneously decided to vacate its original decision that the dispute was subject to arbitration. The trial court reasoned that it retained jurisdiction over the question of the validity of the arbitration agreement because, more than five years earlier, the court had stayed the claim, rather than dismissing it, and ordered the parties to arbitrate. R: VR No. __: 10/1/09; 9:36:18; R: VR No. __: 10/1/09; 9:39:25.

The trial court's decision in May 2004 to stay the action in favor of arbitration, rather than dismiss the claim without prejudice, should not mean that the trial court later had discretion to vacate the arbitration award after the arbitrator had already finally disposed of the claim. The Court of Appeals overlooked other Kentucky authority compelling the conclusion that the trial court's order of arbitration, and certainly the subsequent arbitration decision, resulted in the loss of the trial court's powers, except as to enforcement or review of the arbitrator's decision pursuant to Sections 9 and 10 of the Federal Arbitration Act, 9 U.S.C. §§ 9 and 10, or their Kentucky counterparts, KRS

417.150 and 417.160. *See* Ernst & Young, LLP v. Clark, 323 S.W.3d 682, 692 (Ky. 2010) ("When a dispute goes to arbitration, the trial court's broad discretion to decide all issues pertaining to pre-hearing procedures, including discovery, all issues of substantive law, and all evidentiary matters passes to the arbitrator. ... The trial court's function is constricted to the simple entry of a final judgment enforcing the arbitrator's decision.") (citations omitted); *see also* FIA Card Serv., N.A. v. Callahan, 298 S.W.3d 463, 465 (Ky. App. 2009) (trial court's discretion after arbitration award constrained by KUAA provisions); Artrip v. Samons Constr., Inc., 54 S.W.3d 169, 172 (Ky. App. 2001) ("the source of the court's jurisdiction to act in arbitration matters is wholly derived from the Uniform Arbitration Act."); MBNA America Bank, N.A. v. Bowling, No. 2007-CA-0000956-MR, 2008 WL 3547649 *2 (Ky. App. Aug. 15, 2008) (unpublished opinion) (recognizing similarity and consistent interpretation of KUAA and FAA and "that once an arbitration award has been entered, the parties are no longer permitted to go back and litigate the issue of whether an arbitration agreement existed to begin with") (citations omitted).

Most recently, in Ernst & Young, LLP v. Clark, 323 S.W.3d 682, 692 (Ky. 2010), this Court emphasized the limited role of a trial court after "a dispute goes to arbitration" by way of explaining why the Court should refuse to compel arbitration of claims alleging accounting malpractice in the context of an insurance company's rehabilitation. The Court described how, in that extraordinary context, the General Assembly has sought to "concentrat[e] in the Franklin Circuit Court 'all matters in any way related' to the proceeding to rehabilitate or liquidate an insurance company," and that "[c]ompelling the enforcement of the arbitration agreements in this case would remove virtually all of the

supervisory authority of the Franklin Circuit Court over the adjudication of the Rehabilitator's claims against Ernst & Young and place it in the hands of the arbitrators." 323 S.W.3d at 690. The Court's explanation in Ernst & Young illustrates why the Court of Appeals erred in the present case by concluding that the trial court had retained the power to make rulings of substantive law about the arbitration agreement after referring Count Two to arbitration. *See id.* at 692 (citations omitted):

> We recognize that when a lawsuit is submitted to arbitration, the trial court technically retains jurisdiction over the proceeding while the issues are arbitrated. But, we also recognize that in such situations, the trial court no longer retains the authority to "determine all matters in any way related to the delinquency." KRS 304.33–040(3)(a). When a dispute goes to arbitration, the trial court's broad discretion to decide all issues pertaining to pre-hearing procedures, including discovery, all issues of substantive law, and all evidentiary matters passes to the arbitrator. 4 Am. Jur. 2d. *Alternative Dispute Resolution,* § 157–169 (2007). The trial court's function is constricted to the simple entry of a final judgment enforcing the arbitrator's decision. ... Only if the arbitrator's decision is alleged to have been tainted by fraud or favoritism does the trial court have the ability to intercede. ... Such a substantial reduction of the court's role in a process central to the rehabilitation of an insurance company is inconsistent with our legislature's extensive grant of exclusive jurisdiction to the Franklin Circuit Court.

In this case, there is no special statutory scheme to justify undermining the effect of a referral to arbitration. Instead, laws on arbitration promulgated by the legislature provide the statutory scheme that must be followed. That explains why Chase argued to the trial court that its analysis violated the separation of powers doctrine and allowed the court to alter impermissibly the relief the General Assembly permits after an arbitration award. R: VR No. __: 10/1/09; 9:37:30. Section 250 of the Kentucky Constitution states, "It shall be the duty of the General Assembly to enact such laws as shall be necessary and proper to decide differences by arbitrators, the arbitrators to be appointed

by the parties who may choose that summary mode of adjustment." By delegation of this power and authority, the General Assembly has enumerated in KRS 417.160 and 417.170 the specific grounds for setting aside arbitration awards governed by KRS 417.045 *et seq*. *See* 3D Enterprises Contracting Corp. v. Lexington-Fayette Urban County Gov't., 134 S.W.3d 558, 562-563 (Ky. 2004) ("a court may only set aside an arbitration award pursuant to those grounds set forth in the Act").

Here, the arbitration provision stated that it was to be governed under the Federal Arbitration Act, which should be applicable. *See* Hathaway v. Eckerle, 336 S.W.3d 83, 87 (Ky. 2011) ("[S]ince choice of law provisions are generally valid in arbitration clauses, the Federal Arbitration Act governs the arbitration clause in this matter."). If the courts below could properly disregard the choice of law provision, however, their decision to proceed under Kentucky law and allow the trial court to reconsider and vacate its order improperly encroached on the statutory scheme established by the General Assembly and was unconstitutional.

C. The Decision In Ally Cat Does Not Support The Lower Courts' Refusal To Confirm The Arbitrator's Award.

Citing Ally Cat, the Court of Appeals reasoned "as Chase failed to produce any signed agreement between the parties to arbitrate (indeed, failed to produce a document bearing the signature of *either* party), it was not error for the trial court to set the matter for trial on the grounds that there was no agreement to arbitrate." (Opinion, p. 7) (emphasis in original). The Court erred both factually and legally.

Factually, the Court erred by implying that there was no signed agreement to arbitrate. As described earlier, *see* pp. 3-4 *supra*, the trial court made specific findings of fact – which were never withdrawn – concluding that "contrary to the affidavit of Mr.

Taylor, he was provided a pamphlet titled 'Rules and Regulations,'" and accordingly, "the arbitration provision found in Bank One's account rules and regulations are enforceable in accordance with their terms." *See* R: 203-206 (Decision and Order of Court, May 5, 2004). The trial court's findings were squarely supported by Kentucky's presumption in favor of arbitration. Louisville Peterbilt, Inc. v. Cox, 132 S.W.3d 850, 857 (Ky. 2004) ("once prima facie evidence of the agreement has been presented, the burden shifts to the party seeking to avoid the agreement").

Legally, the Court of Appeals erred by extending the holding of Ally Cat or applying it improperly in four respects. First, the Court erred as a threshold matter by applying Ally Cat to these circumstances because the arbitration provision explicitly stated that it was to be governed by the Federal Arbitration Act. As this Court has clarified, Ally Cat concluded that "the plain language of KRS 417.200 only allows enforcement of arbitration agreements which specifically state that the arbitration is to be held in Kentucky." Ernst & Young, LLP v. Clark, 323 S.W.3d 682, 687, n.8 (Ky. 2010) (citing Ally Cat, 274 S.W.3d at 455). But "*Ally Cat* has no applicability to an arbitration agreement governed exclusively by the Federal Arbitration Act." Id.

As in Harlow v. Beverly Health & Rehab. Services, Inc., 2009-CA-001852-MR, 2010 WL 4669189 (Ky. App. Nov. 19, 2010) (unpublished decision), Chase has cited the procedural aspects of KRS 417.045 *et seq*. following the arbitrator's award, which are identical in all material respect to Sections 9 through 12 of the Federal Arbitration Act, 9 U.S.C. §§ 9-12. *See* American General Home Equity, Inc. v. Kestel, 253 S.W.3d 543, 550 (Ky. 2008) ("[w]hether state or federal law governs makes little practical difference, however, because the [KUAA] is similar to and has been construed consistently with the

FAA"). It is undisputed, however, that Chase's agreement with Appellees was actually governed by the FAA. *See* Hathaway v. Eckerle, 336 S.W.3d 83, 87 (Ky. 2011) ("unlike the arbitration clause in *Ally Cat,* the agreement now before this Court includes a 'choice of law' provision selecting the Federal Arbitration Act as the law governing any dispute between the parties. Therefore, since choice of law provisions are generally valid in arbitration clauses, the Federal Arbitration Act governs the arbitration clause in this matter.").

The Court of Appeals appears to have overlooked this critical distinction when it invoked Ally Cat to hold that because the arbitration provision did not specify that arbitration was to occur in Kentucky, as required by KRS 417.200, "there was no agreement to arbitrate. *Ally Cat, LLC*, 274 S.W.3d at 456." (Opinion, p. 7). Instead, as in Hathaway v. Eckerle, *supra*, because the Federal Arbitration Act governed the arbitration provision in the present case, KRS 417.200 was immaterial and the trial court had subject matter jurisdiction to enforce the arbitration award as Chase requested.

Second, even if the Federal Arbitration Act did not govern this arbitration, the Court of Appeals erred by applying Ally Cat because the circumstances of that case are fundamentally distinguishable. In Ally Cat, the document containing the arbitration clause described a warrantor who was not a party to the underlying transaction, and it was not signed by any real party in interest, including the plaintiff. The plaintiff merely acknowledged receipt of the separate warranty containing the arbitration clause, and unlike Appellee Taylor in the present case, never assented to be bound by that document. 274 S.W.3d at 456.

By contrast, here the trial court found that there *was* an express assent to be bound by the terms of arbitration. In specific findings of fact which were never withdrawn, the trial court found Appellee Taylor "*did* sign the signature card" that explicitly stated "I acknowledge receipt of the Bank's deposit account agreement, which includes all provisions that apply to this deposit account, *and agree to be bound by the agreement and terms contained therein.*" R: 203-206 (emphasis added). The Court of Appeals erred by misunderstanding the Record and mistakenly applying Ally Cat to a dissimilar fact pattern where the claimant had assented to be bound by an arbitration provision. *See also* Hathaway v. Eckerle, 336 S.W.3d 83, 89-90 (Ky. 2011) (authorizing enforcement of arbitration clause by automobile dealership: "'[i]t is the settled law in Kentucky that one who signs a contract is presumed to know its contents, and that if he has an opportunity to read the contract which he signs he is bound by its provisions, unless he is misled as to the nature of the writing which he signs or his signature has been obtained by fraud.'") (citing Clark v. Brewer, 329 S.W.2d 384, 387 (Ky. 1959)).

Third, the Court of Appeals also erred by applying Ally Cat to these circumstances because Appellees did not raise until *after* the arbitration had concluded the issue of whether the arbitration provision identified Kentucky as the venue. *See* Ally Cat, 274 S.W.3d at 455-56 ("*When the issue arises prior to the arbitration hearing*, as it has in this case, and the agreement upon which arbitration is sought fails to comply with the literal provisions of KRS 417.200, the courts of Kentucky are, pursuant to KRS 417.200, without jurisdiction to enforce the agreement to arbitrate.") (emphasis added).

Here, Ally Cat became final on February 12, 2009. On March 11, 2009, Chase moved to dismiss the arbitration as untimely under NAF Rule 10 and submitted a

memorandum of law with exhibits. On March 26, 2009, Appellees submitted a memorandum opposing dismissal. On June 25, 2009, the arbitrator decided the timeliness issue and dismissed the Arbitration Claim. R: 479. Even if Ally Cat were otherwise applicable to this arbitration (but it was not because the arbitration was to be governed by the Federal Arbitration Act), the Court of Appeals erred by extending Ally Cat to circumstances like these where a party waited until after receiving the arbitrator's decision to challenge the enforceability of the arbitration provision.

Fourth, the Court of Appeals also erred by applying Ally Cat to these circumstances because the arbitration actually did occur in Kentucky, and thus the venue requirement in KRS 417.200 was fully satisfied. This Court carefully excluded the present circumstances from the reach of the Ally Cat holding. *See* 274 S.W.3d at 455-56 ("We have not heretofore, and do not now, address the situation in which a similarly defective arbitration clause leads to an action to enforce an arbitration award, where the arbitration hearing did in fact occur within Kentucky. Other considerations may therein arise which are not before us now."). This case presents just the type of situation anticipated by the preceding passage. The arbitration proceedings in this case actually were held in Kentucky, with the parties' mutual selection of a Kentucky attorney as arbitrator. Again, even if the arbitration was not governed by the Federal Arbitration Act and Ally Cat were otherwise applicable, the Court of Appeals erred by extending Ally Cat to circumstances like these where a party waited until after the arbitration proceedings actually concluded in Kentucky to challenge the enforceability of the arbitration provision.

In sum, it ultimately should not matter whether Ally Cat is or is not deemed a "change in the law," as was argued by Appellees and concluded by the trial court. The circumstances of this case should have guided the Court of Appeals to conclude that Ally Cat is of no factual or legal significance.

D. Appellees Never Sought To Vacate The Arbitration Award, Thus KRS 417.150 and Section 9 of the FAA *Require* The Trial Court To Confirm The Award.

The Kentucky Uniform Arbitration Act, codified at KRS 417.045 *et seq.*, provides a comprehensive framework for the adjudication of disputes in the Commonwealth through arbitration. Arbitration is a favorite of the law, and "[g]enerally, much judicial latitude and deference are accorded to an arbitration decision." Lombardo v. Inv. Mgmt. & Research Inc., 885 S.W.2d 320, 322 (Ky. App. 1994). Once a case has been arbitrated, KRS 417.160 sets out narrow circumstances under which a trial court is permitted to vacate an arbitration award. Where those circumstances are not present, the trial court *must confirm* the decision of the arbitrator. 3D Enter. Contracting Corp. v. Lexington-Fayette Urban County Gov't., 134 S.W.3d 558, 562-563 (Ky. 2004). The trial court is not permitted to review the arbitration award to determine if it would have made the same decision, and the trial court is not permitted to assess the equities. *Id.*; *see also* ConAgra Poultry Co. v. Grissom Transp., Inc., 186 S.W.3d 243, 245-246 (Ky. App. 2006).

Similar principles underlie the application and enforcement of arbitration provisions governed by the Federal Arbitration Act in Kentucky courts. *See* Hathaway v. Eckerle, 336 S.W.3d 83, 88-90 (Ky. 2011) (authorizing enforcement of arbitration clause by automobile dealership under the FAA); American General Home Equity, Inc. v. Kestel, 253 S.W.3d 543, 550 (Ky. 2008) ("[w]hether state or federal law governs makes

little practical difference, however, because the [KUAA] is similar to and has been construed consistently with the FAA."); Louisville Peterbilt, Inc. v. Cox, 132 S.W.3d 850, 855 (Ky. 2004) ("Kentucky and national policy have generally favored agreements to arbitrate. ... The FAA establishes that 'any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.'") (citations omitted).

As argued in Chase's Sur-Response Objecting to Motion to Set for Trial and its Motion to Confirm Arbitration Award (R: 492 and 513-514, respectively), the Appellees never moved to vacate the arbitration award in the trial court. As a result, Section 9 of the Federal Arbitration Act, 9 U.S.C. § 9, and its Kentucky counterpart, KRS 417.150, required that the trial court confirm the award upon Chase's timely motion. *See* R: 513-514 (Chase's Motion to Confirm Arbitration Order, filed October 2, 2009).

Section 9 of the FAA provides, in pertinent part:

> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title.

Here, Chase duly sought confirmation of the arbitrator's award "within one year" by motion filed in the trial court, which had subject matter jurisdiction under the arbitration provision. (The arbitration provision stated: "Judgment upon any arbitration award may be entered in any court having jurisdiction.") Likewise, Chase was similarly entitled to confirmation under KRS 417.150, which states, "Upon application of a party,

the court **shall confirm** an award unless, within the time limits hereinafter imposed, grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in KRS 417.160 or 417.170." (Emphasis added.)

Under Section 12 of the FAA, 9 U.S.C. § 12, and its Kentucky counterparts, KRS 417.160(2) and 417.170(1), Appellees were required to move to vacate or modify or correct the arbitration award within no later than "three months" (in the FAA) or ninety days (in KRS 417.170(1)) of its delivery. The arbitrator made his award on June 25, 2009. R: 479. As of ninety days later, on September 23, 2009, Appellees had not (nor have they ever) moved to vacate or modify or correct the arbitrator's award. The only motion Appellees did file sought to have the case set for trial. R: 463-470 (Motion to Set for Trial). Because Appellees never moved to vacate or modify or correct the award pursuant to Section 10 of the FAA, 9 U.S.C. § 10, or its Kentucky counterparts, KRS 417.160 or 417.170, the trial court erred in denying Chase's motion to confirm.

CONCLUSION

Because Appellees failed to move to vacate the arbitration award in this case, and because Appellees have failed to offer any statutory basis for the arbitration award to be vacated, the Federal Arbitration Act and the Kentucky Uniform Arbitration Act require that the award be confirmed. The trial court erred in setting aside its order to arbitrate Count Two and in denying Chase's request for confirmation of the arbitrator's award. Chase respectfully requests that this Court reverse the decision of the Court of Appeals and either itself render final judgment for Chase or remand for entry of judgment by the trial court confirming the arbitration award and dismissing the underlying action.

Respectfully submitted,

TACHAU MEEK PLC
Dustin E. Meek
Katherine E. McKune
3600 National City Tower
101 South Fifth Street
Louisville, Kentucky 40202-3020
(502) 238-9900

Counsel for Appellant JPMorgan Chase Bank, N.A.