Commonwealth of Kentucky
Supreme Court of Kentucky

CASE NO. 2013-SC-000426

Extendicare Homes Inc.
d/b/a Shady Lawn Nursing Home, *et al.*

MOVANTS/
DEFENDANTS

v.

On Appeal from Kentucky Court of Appeal
2012-CA-001936
Trigg Circuit Court
Civil Action No. 12-CI-00100

Belinda Whisman and Tony Adams,
As Co-Administrators of the Estate of
Van B. Adams, Deceased

RESPONDANTS/
PLAINTIFFS

MEMORANDUM RESPONSE TO MOTION FOR RELIEF PURSUANT TO CR 65.09

Respondents, Belinda Whisman and Tony Adams, as Co-Administrators of the Estate of Van Adamns, through counsel and pursuant to CR 76.34(2), herein respond to Movants' *Motion for Relief Pursuant to CR 65.09*, filed July 1, 2013. Respondents oppose.

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This Motion for Interlocutory Relief, made pursuant to CR 65, relates to an attempt by movants Extendicare Homes, Inc., *et al.* ("Movants"), to have an order of the Court Appeals vacated. This order of the Court of Appeals, also stemming from a motion for interlocutory relief, effectively affirmed an order of the Circuit Court of Trigg County denying a motion to compel arbitration in the case of Belinda Whisman and Tony Adams (as Co-Administrators of the Estate of Van Adams) ("Respondents") against Movants.

The Circuit Court's order issued pursuant to the teaching of the recently issued Kentucky Supreme Court case of *Donna Ping v. Beverly Enterprises, Inc.*, 376SW3d 581 (Ky. 2012) (*pet. cert. denied, see Beverly Enterprises, et al. v. Ping, Donna*, 133 S.Ct. 1996 (2013)). The case of *Donna Ping v. Beverly Enterprises* teaches that language in a power-of-attorney does not encompass the power to bind a principal to an alternative dispute resolution (arbitration) agreement—thereby waiving the principal's right to a judicial forum—unless (1) the instrument authorizes such an arbitration agreement, or (2) such power to execute an arbitration agreement would be necessary to the performance of an agency function.

> Absent authorization in the power of attorney to settle claims and disputes or some such ***express authorization*** addressing dispute resolution, authority to make such a waiver is ***not to be inferred lightly***....
>
> Mrs. Duncan's power of attorney, properly construed as giving her daughter authority to manage Mrs. Duncan's property and finances and to make health-care decisions on her behalf, did not thereby authorize Ms. Ping to ***waive***, where there was ***no reasonable necessity to do so***, her mother's access to the courts.

Ping at 593-594 (emphasis added).

To highlight this latter point, this Court also stated:

> [W]e have indicated that an agent's authority under a power of attorney is to be construed with reference to the types of transaction expressly authorized in the document....

Ping at 592.

Ping further specified that wrongful death beneficiaries, holding an independent interest and cause of action in wrongful death, must be parties to said alternative dispute resolution agreements before they will be bound by such agreements. "Arbitration is a matter of contract, however; it is something the contracting parties, or their proxies, must agree to. It is not something that one party may simply impose upon another." *Id.* at 600.

The Adams power-of-attorney at issue here granted the power ***"to make contracts"*** and ***"to institute or defend suits."*** This is the power-of-attorney language upon which Movants rest their right to interlocutory relief. They argue as follows:

1. The Adams power-of-attorney contains a grant of authority (the quoted power-of-attorney language *supra*) sufficient to execute the subject Arbitration Agreement, *i.e.*, sufficient to satisfy the standards of *Donna Ping v. Beverly Enterprises*.
2. Any conclusion that Mr. Adams' power-of-attorney (with the quoted power-of-attorney language *supra*) does not encompass sufficient authority would be violative of the Federal Arbitration Act (FAA), and thus any holding supporting such a conclusion, *e.g.*, potentially that of *Donna Ping v. Beverly Enterprises*, is pre-empted under principles of federal law supremacy.

Movants now move for Interlocutory Relief in this Court pursuant to CR 65.09. Respondents herein replies in opposition to interlocutory relief.

MEMORANDUM

Movants' Motion is ill-founded substantively, and relief must be denied.

Shady Lawn Nursing Home is a nursing home owned, operated, managed, and administered by the Movants. Van Adams was a resident of Shady Lawn Nursing Home from on or about March 1, 2011 until on or about May 19, 2011, the day on which Mr. Adams died. While he was a resident in the Movants' facility, Mr. Adams sustained numerous injuries, including infections; dehydration; falls with bruising; poor hygiene; and ultimately, death. Respondents filed suit for these injuries on April 20, 2012, asserting causes of action of negligence, medical negligence, corporate negligence, violations of the Long Term Care Resident's Rights statute, Kentucky Revised Statutes §§ 216.510, *et seq*, and wrongful death.

Movants filed a motion to dismiss or in the alternative to stay the lawsuit pending alternative dispute resolution proceedings on May 11, 2012, to which Respondents opposed. In support of their motion, Movants proffered an alternative dispute resolution agreement ("arbitration agreement") signed on Mr. Adams' behalf by Mr. Adams' daughter, Belinda Whisman, on March 1, 2011. (**Exhibit C**) In support of Belinda Whisman's authority to execute such an agreement on her father's behalf, Movants offered a power-of-attorney instrument from Mr. Adams to Belinda Whisman dated February 21, 2011, conferring a general power-of-attorney upon the daughter. (**Exhibit D**) This power-of-attorney did not authorize the attorney-in-fact to settle claims and disputes, nor did it authorize alternative dispute resolution. The arbitration agreement at issue here is facially optional and thus its execution was not necessary for Mr. Adams to

> we nevertheless understand *Ping* differently. Significantly, in reaching its decision, the Supreme Court analyzed Kentucky law on agency and found its reasoning consistent with the *Restatement of Agency*:
>
> > Our careful approach to the authority created by a power of attorney is also consistent with the provision in the *Restatement of Agency*... as follows:
> >
> > > (1) An agent has actual authority to take action designated or implied in the principal's manifestations to the agent and acts necessary and incidental to achieving the principal's objectives, as the agent reasonably understands the principal's manifestations and objectives when the agent determines how to act.
> >
> > *Restatement (Third) of Agency* § 2.02 (2006). We are not persuaded either that Ms. Ping did understand, or that she reasonably could have understood her authority under the power of attorney to apply to all decisions on her mother's behalf whatsoever, as opposed, rather, to decisions reasonably to maintain her mother's property and finances and to decisions reasonably necessary to provide for her mother's medical care.
>
> (*citing Ping*, 376 SW3d at 592-593)

ARGUMENT

Reiterating the same principles recited in Respondents' lower court briefing, "[a]n interlocutory order is not appealable unless it divests a party of a right in such a manner as to remove from the court the power to return the parties to their original condition." *Druen v. Miller*, 357 SW3d 547, 549 (Ky.App. 2011) (*citing Ratliff v. Fiscal Court,* 617 S.W.2d 36, 39 (Ky.1981)). Because orders denying motions to compel arbitration are structurally equivalent to orders involving injunctions, they can theoretically be appealable pursuant to CR 65. *Kodak Mining Co. v. Carrs Fork Corp.*, 669 SW2d 917 (Ky. 1984) (judicial expansion of the interlocutory appeal provisions of CR 65 to cover

appeals of arbitration orders, analogizing these orders to those involving injunctions). Such an order could constitute an irreversible change in a party's "original condition." In any event, review of orders made pursuant to CR 60.02 are reviewed for an abuse of discretion. *Kurtsinger v. Board of Trustees of Kentucky Retirement Systems*, 90 SW3d 454, 456 (Ky. 2002).

Movants' expression that "doubts regarding arbitration should be resolved in favor of arbitration" (Movants' Brief at p. 17) misapplies the case law cited and evinces a lack of understanding regarding it. The suggestion that courts should resolve doubts as to ***whether an agreement exists***, *ab initio*, is inaccurate. The burden to prove the existence and efficacy of the Arbitration Agreement was a threshold issue placed upon Movants, and they had the same burden of proof and persuasion as with any other contract. *See Bd. of Trs. of the City of Delray Beach Police & Firefighters Retirement Sys. v. Citigroup Global Mkts., Inc.*, 622 F3d 1335, 1342 (11th Cir. 2010) ("[W]e resolve this issue without a thumb on the scale in favor of arbitration because the 'federal policy favoring arbitration does not apply to the determination of whether there is a valid agreement to arbitrate between the parties.'") (*citing Fleetwood Enters., Inc. v. Gaskamp*, 280 F3d 1069, 1073 (5th Cir. 2002)). While Kentucky law favours the enforcement of arbitration agreements, any policy favouring arbitration comes into play ***only after*** it is determined that a valid agreement to arbitrate exists. *See Mt. Holly Nursing Center v. Crowdus*, 281 S.W.3d 809, 813 (Ky.App. 2008). The burden of proving that a valid, enforceable arbitration agreement exists rests upon the party seeking to compel arbitration. *See* KRS § 417.060; *see also Dutschke v. Jim Russell Realtors, Inc.*, 281 S.W.3d 817, 824 (Ky.App. 2008); 9 U.S.C. § 4 (the trial court shall order arbitration only "upon being

satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue").

I. Pursuant to the teaching of *Donna Ping v. Beverly Enterprises*, Mr. Adams's power-of-attorney did not constitute sufficient authority for the signor's execution of the arbitration agreement.

The Circuit Court of Trigg County grounded its well-reasoned Order fully on *Donna Ping v. Beverly Enterprises, Inc.*, 376 SW3d 581 (Ky. 2012):

> Defendants believe that there is a substantial difference between the General Power of Attorney granted by Ms. Whisman's principal, Van Buren Adams, and that involved in the Ping case. That difference is in the language in the grant to Ms. Whisman "to institute or defend suits concerning my property or rights." Otherwise, the General Power of Attorney to Ms. Whisman appears substantially similar to the language granted to Ms. Ping quoted by the Kentucky Supreme Court. The Ping document contained the following language "[t]o make any and all decisions of whatever kind, nature, or type regarding my medical care, and to execute any and all documents, including, but not limited to, authorizations and releases, related to medical decisions affecting me; and [t]o generally do any and every further act and thing of whatever kind, nature, or type required to be done on my behalf." That Power of Attorney also provided that "the language of this document be liberally construed with respect to the power and authority hereby granted."
>
> * * *
>
> Despite the specific language "to institute or defend suits concerning my property or rights" language in Mr. Adams's general power of attorney durable granted to Ms. Whisman, it is difficult for the undersigned to distinguish that from the rationale of the Kentucky Supreme Court that the "general expressions upon which Beverly relies did not give Ms. Ping a sort of universal authority beyond those expressed provisions" (page 13). Such grants of such "universal authority" would not give Ms. Whisman the understanding that her authority would apply to all decisions on her father's behalf including a waiver of the important right of bringing a lawsuit before a jury rather than before an arbitrator or arbitration panel.

(Exhibit B)

In reviewing the full import of this Court's decision in *Ping*, it is very useful to recall the *Ping* case when it was pending in front of the Kentucky Court of Appeals, as it is this latter court's decision and logic which the Supreme Court implicitly found unpersuasive, and nullified by reversing. In the Court of Appeals *Ping* decision, *Beverly Enterprises v. Ping*, 2010 WL 2867914 (Ky.App. July 23, 2011) (*reversed*), the Court of Appeals attempted to distinguish an older case cited by the plaintiff Donna Ping, *Harding v. Kentucky River Hardwood Co.*, 265 S.W. 429, 431 (1924). The *Ping* plaintiff had cited *Harding* for the proposition that ***powers in a power-of-attorney must be strictly construed.*** "[A]ny power of attorney ***which delegates authority to perform specific acts*** that also contains general words, is ***limited to the particular acts authorized.***" *Harding*, 265 S.W. at 431. The Court of Appeals in *Beverly Enterprises* attempted to address *Harding* by stating, "[t]he case in *Harding*... dealt with a power of attorney that was given for a specific limited purpose."

This Court nullified the distinction made in the Court of Appeals and effectively reminded the Kentucky judiciary of the *Harding* principle, a principle essentially relied upon by the Circuit Court of Franklin County in *Ping*, that all powers-of-attorney are to be strictly construed. The *Ping* Circuit Court had stated:

> Express authority arises from direct, intentional granting of specific authority from a principal to an agent, *Mills Street Church of Christ v Hogan*, 785 S.W.2d 263 (Ky. Ct. App. 1990). For these reasons, (and contrary to the Defendants' characterization of the law during the hearing of their motion), powers of attorney must be strictly construed and closely examined in order to ascertain the intent of the principal.

This principle had old Common Law precedent:

> Generally, a power of attorney must be strictly construed. The instrument will be held to grant only those powers which are

> specified, and the act done must be legally identical with that authorized to be done. A court ***cannot imply authority*** of an attorney-in-fact that ***the power of attorney itself does not express***.

AM.JUR. *Agency* § 28 (emphasis added).

The Adams power-of-attorney has no such express language covering arbitration, nor does it speak to physical torts. It speaks of checks, mortgages, and taxes. It does not refer to issues involving the principal's physical person, such as personal injury torts. Again, nor does the subject power-of-attorney state that the attorney-in-fact may settle or arbitrate any claim. So the power-of-attorney neither covers the subject matter involved here—physical torts—nor does it expressly provide for arbitration or settlements going thereto.

Movants argue that the Adams power-of-attorney provides for the power to contract, and that this necessarily includes the power to contract for arbitration (regarding any subject matter). Additionally, they argue that the instrument's language to "institute or defend suits" provides the power to agree to enter an arbitral forum (thereby waiving the judicial forum) and arbitrate personal injury claims. Not so.

A. Subject matter of the authority in the instrument

The errors in this logic are legion. In addition to neglecting the principles of *Harding v. Kentucky River Hardwood*, *supra*, Movants neglect to consider *Ping*'s quotation from the Restatement that states:

> (1) Unless otherwise agreed, general expressions used in authorizing an agent are limited in application to acts done in connection with the act or business to which the authority primarily relates.
>
> (2) The specific authorization of particular acts tends to show that a more general authority is not intended.

Ping at 592 (*quoting* the Restatement (Second) of Agency).

This means that a double-layered filter exists for power-of-attorney interpretation in Kentucky. If general grants of power are contained in the instrument, these only go to the areas of concern listed in the instrument. If specific acts are listed, there is no general grant of authority at all. The ability to contract is stated in the context of business interests, such as mortgages and taxes. The subject matter here however, is personal injury in the context of a nursing home residence and medical care.

Movants also point to the contract-making power in the Adams power-of-attorney, and point to the U.S. District Court in *Oldham v. Extendicare Homes*. With due respect to the federal court in *Oldham*, the *Ping* decision is not distinguishable based upon the absence of the power to contract in the *Ping* power-of-attorney. The *Ping* power-of-attorney facially encompassed the power to contract. The *Ping* power-of-attorney provided the attorney-in-fact with the power to sell and mortgage real estate, and to sell bonds and securities. Intrinsic to a sale, by definition, is the power to contract. Does the Adams power-of-attorney provide a greater power to contract? No. The Adams power-of-attorney provides the power to contract in the same sentence with checks, mortgages, and taxes, signifying the nature of the contracting contemplated. This is virtually indistinguishable from the contract-making power, regarding real and personal property, inherent in the *Ping* power-of-attorney.

B. Instrument power going to arbitration and the ability to waive jural right

Ping conditionally requires an explicit authorization for arbitration:

> Absent authorization in the power of attorney to settle claims and disputes or some such ***express authorization*** addressing dispute

> resolution, authority to make such a waiver is ***not to be inferred lightly***.

Ping at 593.

Otherwise, the power to arbitrate must be necessary to carry out the other functions of the subject matter falling under the power-of-attorney:

> Mrs. Duncan's power of attorney, properly construed as giving her daughter authority to manage Mrs. Duncan's property and finances and to make health-care decisions on her behalf, did not thereby authorize Ms. Ping to ***waive***, where there was ***no reasonable necessity to do so***, her mother's ***access to the courts***.

Id. at 594 (emphasis added). And, on its face, the arbitration agreement was optional, *i.e.*, unnecessary to Mr. Adams' care.

Likewise, the power to agree to binding arbitration (and waive the judicial forum) as incidental to the power to "institute or defend suits" is nonsense. The power to institute or defend legal suits is not itself a subject matter of the instrument, not a general expression of authorization. It is a specific act listed. Arbitration is not listed. Additionally, this arbitration agreement is not just an institution of a legal proceeding; it is intrinsically a ***waiver*** of the right to proceed in a court of law. Aside from the fact that expressing "institute or defend suits" signals in the common understanding going to court or in front of an administrative agency—thus ***an expressed preference*** for the judicial forum over an arbitral forum—jural waiver is certainly not a specific act not listed in any event.

Simply put, the Supreme Court in *Ping* re-emphasized this principle of the Common Law, explaining its rationale in the context of foreseeability: "[N]othing in Mrs. Duncan's power of attorney suggests ***her intent*** that Ms. Ping make such ***waivers*** on her behalf." *Id.* at 593 (emphasis added). Likewise, nothing whatsoever in the Adams

power-of-attorney suggests that Van Adams intended his agent to have the power to execute pre-dispute agreements to arbitrate and thereby waive his right to sue for torts upon his physical person. The requirement of strict construction and limitation to specific instructions is decisive here.

C. Pre-dispute agreements

Moreover, even a power ***to agree to arbitrate personal injury claims*** would not encompass this particular arbitration agreement. Pre-injury and post-injury arbitration agreements are different species of contract. Even the U.S. Congress has taken note of this. *See* 12 USC § 5518 (In the context of financial consumer protection, while the Bureau of Consumer Financial Protection may not prohibit arbitration agreements entered into after the dispute has arisen, it does have the power to prohibit pre-dispute arbitration agreements.).

For this reason, Movants' settlement analogy—that the ability to institute or defend suits must encompass the ability to settle, *e.g.*, arbitrate them—must fail. Did Mr. Adams' attorney-in-fact have the power to agree to a settlement ***before*** Movants injured Mr. Adams? Movants may believe that their arbitration agreements are akin to a liquidated damages clause (*i.e.*, a pre-dispute settlement) for personal injury, but this cannot possibly be read into the powers granted to the attorney-in-fact. There is nothing in the instrument that shows any such radical intent. Therefore, even if the power-of-attorney had included a power to arbitrate (which it does not), it would not solely thereby include the power to agree on behalf of the principal vis-à-vis a third party, to arbitrate any dispute in perpetuity that might arise in the future, but is not existent at present.

This Court in *Ping* ultimately reasoned (again relying on the Restatement) that there are three categories of particular acts that "will impose on the principal" such dire "consequences" that the authority to engage in those acts will not be inferred. *Ping* at 593. (*quoting* Restatement Third of Agency § 2.02 comment h. (2006)). The first category is crimes and torts. The second category consists of acts that "create no prospect of economic advantage for the principal." The third category is acts that are otherwise lawful but "create legal consequences" that are "significant and separate" from the primary transactions authorized and are "fraught with major legal implications for the principal, such as granting a security interest in the principal's property or executing an instrument confessing judgment." *Id.* Arbitration agreements are in this third category of acts.

In re-emphasizing the principle from the Common Law that powers-of-attorney are to be strictly construed, the Supreme Court in *Ping* explained its rationale in the context of foreseeability: "[N]othing in Mrs. Duncan's power of attorney suggests ***her intent*** that Ms. Ping make such ***waivers*** on her behalf." *Id.* (emphasis added).

The substantive law from *Ping*, upon which the Circuit Court ground its Order, is fully applicable here to deny Movants' underlying motion to compel arbitration. The final question then is: Could the Supreme Court do what it did in *Donna Ping v. Beverly Enterprises*? The answers to this question is unequivocally "YES."

II. The FAA is not offended in any way by a State court construing the powers of a power-of-attorney instrument.

"This Court's opinion in *Ping* does not hold that an agent acting under a durable power of attorney can never bind her principal to an arbitration agreement." (Movants' Brief at p. 1 (emphasis removed)) True. "Nor does it hold that a power of attorney must

explicitly mention "arbitration" in order to empower the agent to enter such an agreement." (*Id.*) It is true that *Ping* does not specify that the word "arbitration" need be used. "Such sweeping rules would undoubtedly be preempted by the FAA." This is far from established.

The FAA provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or ***an agreement*** in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and ***enforceable***, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 USC § 2 (emphasis added). "[A]n agreement." Recognizing the mechanism whereby an agreement may be seen to arise does not fall under the FAA. Only in the event that the agreement does exist is the FAA triggered to mandate complete and strict enforcement of its terms, notwithstanding State law and public policy to the contrary.

Movants cite *Kruse v. AFLAC International, Inc.*, 458 FSupp2d 375 (E.D.Ky. 2006), for the proposition that the FAA trumps State law regarding contract formation *ab initio*. *Kruse* however does not stand for the proposition that "'the federal policy favoring arbitration is taken into consideration even in applying ordinary state law' concerning contract formation" (Movants' Brief at p. 8) *ab initio*. There was no doubt an arbitration agreement in *Kruse* existed. The question was whether it was enforceable as to all the defendants, including those who did not sign it. Whether any contract at all was made, is still a question of State law.

For a Kentucky court to construe the empowering verbiage of a power-of-attorney does not run afoul of the FAA. The focus in *Ping* was on the power-of-attorney language, not the agreement involved. *Ping* merely re-emphasized strict construction of an agency instrument, and happened to do so in the context of resolving an appeal involving arbitration. These principles apply equally to the case at bar.

State law governs the interpretation of a power-of-attorney, the authority therein contained. As the U.S. District for Louisiana once stated, regarding a federal bail bond:

> Even though there seems to be a split of authority as to whether state or federal law governs federal bail bonds, we can find no authority which holds that federal law governs the interpretation or effect of a power of attorney which purports to authorize a person to sign a bail bond on behalf of another. We conclude that the issuance and use of a power of attorney authorizing a person to sign, on behalf of another, a bail bond is governed entirely by state law.

See U.S. v. Bussey, 452 FSupp 891, 895 (D.C.La. 1978). Analogous to the federal bail bond circumstance, while there is no question that federal preemption applies to construe and enforce a FAA contract, State law governs the authority contained in a power-of-attorney going to the question of whether said instrument encompasses the authority to execute the FAA contract.

Movants quote AMERICAN JURIPRUDENCE (Movants' Brief at p. 10):

> [A] person acting in a representative or fiduciary capacity may submit to arbitration any dispute he or she would have the power to settle by compromise or by litigation.

4 AM.JUR.2d *Alternative Dispute Resolution* § 77. Movants neglect to quote the following sentence from this section of AMERICAN JURISPRUDENCE:

> However, such right must be viewed in light of the pertinent statutes of the jurisdictions, which may limit or exclude such right.

Id.

No one disputes that electing binding arbitration intrinsically also means waiver of the right to pursue dispute resolution in a judicial forum. This equivalence is of the essence, for arbitration. And there is no dispute that there is neither anything wrong with electing arbitration, nor is there anything wrong with waiving the right to a judicial forum. Certainly the Kentucky and federal legislatures have both recognized the right for contracts for binding arbitration to be enforced.

A criminal defendant has a right to plead guilty, and to waive trial. It is not encumbering this right to plead guilty to require that an agent pleading guilty on a client's behalf have explicit authority so to do. *See U.S. v. Garcia*, 59 MJ 447, 452 (C.A.A.F. 2004) ("[D]efense counsel had the responsibility of explaining these options [pleading guilty or not guilty] to his client and obtaining the client's fully informed consent as to which path to follow.") Requiring explicitness of authority encumbers nothing.

As *Ping* reaffirms on its face, there is neither prohibition nor encumbrance placed upon a properly-empowered agent contracting for arbitration on behalf of his principal. However, Kentucky has always required more expressions of empowerment, for attorneys-in-fact to take certain actions on a principal's behalf. For instance, when an attorney-in-fact makes a gift to himself, the intention of the principal permitting such must be unambiguously set out on the face of the power-of-attorney instrument. KRS 386.093(6). And while obviously a principal may always confess judgment on his own behalf, in many instances powers-of-attorney are circumscribed from confessing judgment. *See e.g.*, KRS 190.100(c), KRS 286.4 -580, KRS 380.040; *see also* Restatement (Third) of Agency § 2.02, comment h. (*quoted in Ping* at 592). In contrast, regarding any subject matter of arbitration whatsoever, an attorney-in-fact may agree to

arbitrate, so long as this power to agree for arbitration is expressly stated in the instrument. The FAA does not purport to trigger the creation of an arbitration agreement.

If Movants claim that the FAA preempts this Court's law arguably creating a distinction between the attorney-in-fact's ability to execute certain contracts, and that attorney-in-fact's ability to execute an arbitration contract, this would be overreach. Very importantly, this question need not be reached, inasmuch as Kentucky law requiring strict construction applies indiscriminately to contracting via power-of-attorney, whether the contract involves arbitration, or, say, marriage.[2] Nonetheless, the implication of Movants' potential theory here is that the U.S. Congress would have the Constitutional power to simply suspend the States' judicial systems generally, and direct that all State law causes-of-action affecting interstate commerce go to arbitration. Suffice it to say, the FAA evinces no such radical assumption of power on the part of the U.S. Congress.

While presumably no State can use artifice to claim that it would enforce arbitration agreements, but make it practically impossible to make such an agreement, this is not the case at bar. In the final analysis, the question is this: ***Would the reasonable man read Mr. Adams' power-of-attorney and believe that, by virtue of the language of the instrument, its ambit included entering into an optional, pre-dispute, arbitration agreement for personal injury torts?***

Movants point out that "where a state law requires a heightened showing of intent or specificity to find a valid agreement to arbitrate, that law is preempted." (Movants' Brief at p. 12) Movants cite to *Progressive Cas. Ins. Co. v. C.A. Reaseguradora*

[2] One laughs at the comparison, but marriage by proxy, via power-of-attorney, is experiencing a resurgence. *See Tshiani v. Tshiani*, 56 A.3d 311 (Md.App. 2012) (recognizing marriage by proxy under Maryland law). However, strict construction of power-of-attorney in Kentucky would likely mean that even the most broadly-worded general power-of-attorney would not have the power to marry off the principal, without that power being specifically expressed in the instrument.

Nacional De Venezuela, 991 F2d 42 (2nd Cir. 1993). Yet, *Progressive Casualty* referred to a heightened burden of proof to demonstrate ***the existence*** of the contract. That is, a greater showing of intent to make the contract. Here, if there is a requirement of greater specificity of intent, this goes to the intent ***that an agent have the power*** to make the contract, ***not*** greater specificity that the agent intended ***to make it*** (the contract). The federal preference for arbitration does not preempt a State court from construing the language requirements of a power-of-attorney purportedly covering arbitration. This and the common sense Common Law principle that a person has to be party to a contract to be bound under it are not preempted by the FAA.

CONCLUSION

Based upon the foregoing, Movants' *Motion for Interlocutory Relief* must be denied.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing document has been served via U.S. Mail, with sufficient postage thereon to ensure delivery, this 15 day of July, 2013, upon the following:

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