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

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

**APPELLANT**

**VS.**

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

**BLUEGRASS POWERBOATS, et al.**

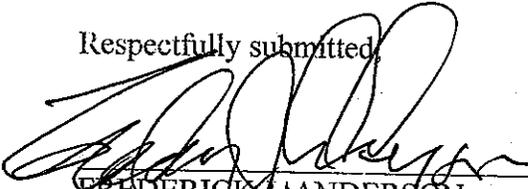
**APPELLEES**

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

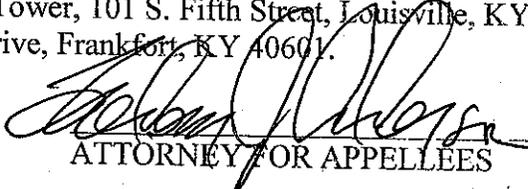
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**CERTIFICATE OF SERVICE PER CR 76.12(6)**

The undersigned hereby certifies that true copies of this brief have been served by mailing same on this 2nd day of November, 2012 to: Hon. Hunter Daugherty, Jessamine Circuit Judge, 101 N. Main Street, Nicholasville, KY 40356; Tachau Meeks, PLC, Dustin E. Meek and Katherine E. McKune, 3600 National City Tower, 101 S. Fifth Street, Louisville, KY 40202; and Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601.

  
ATTORNEY FOR APPELLEES

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## COUNTERSTATEMENT OF THE CASE

The Appellee, James Taylor and Bluegrass Powerboats (hereinafter Taylor), brought suit against Bank of America, Bank One Lexington and Bank One Nicholasville in Jessamine Circuit Court on September 15, 2003 (R. Vol. 1, p. 2). The Appellant, Chase Bank, is successor to Bank of America, Bank One Nicholasville and Bank One Lexington (hereinafter Bank).

This appeal concerns Count 2 of the lawsuit filed in Jessamine Circuit Court. The basis for Count 2 was Bluegrass Marine, a corporation owned by Gregory Shearer, purchased the assets of Bluegrass Powerboats, Inc., a corporation owned by Taylor and his wife. The purchase price was \$123,102.

On June 15, 2003, Taylor opened a savings account with Bank by depositing \$100. On June 17, 2003, Taylor deposited the Bluegrass Marine purchase check into the savings account he opened on June 15, 2003. The check was signed by Shearer on behalf of Bluegrass Marine and was drawn on Bank. Bank accepted the check and deposited it into Taylor's account. On June 18, 2003, Taylor inquired of Bank in person as to whether the \$123,102 check had been credited to his account. He was told it had been credited to his account (R. Vol. 1, pp. 4, 8).

On June 19, 2003, 2 days after Taylor deposited the \$123,102 check into his account at Bank, he obtained a cashier's check in the

amount of \$9,000 drawn on the \$123,102 deposited in his savings account with Bank. On June 20, 2003, Bank mailed Taylor a letter stating his account had been debited by \$123,102. The check deposited two days earlier had been marked NSF (nonsufficient funds) (R. Vol. 1, pp. 7, 8, 9).

Count 2 of Taylor's complaint was based on the Uniform Commercial Code requirement a bank pay or return a NSF check by midnight of the day deposited when the deposited check was drawn on the same bank (R. Vol. 1, pp. 3, 4). Bank did not return the check within 24 hours. Instead, it sent Taylor a letter dated June 20, 2003, informing him the check had been marked NSF. This was three days after Taylor deposited the check into his account at Bank (R. Vol. 1, p. 9). Prior to returning the check marked NSF, Bank issued a \$9,000 cashier's check drawn on these funds.

There were two counts in the complaint filed by Taylor against Shearer. The first count involved the cashing of a check in the amount of \$21,348.12 with a forged endorsement (R. Vol. 1, p. 3). Count 1 was settled. This matter was unrelated to the matter on appeal.

On March 30, 2004, Bank moved the Court to dismiss Count 2 or order arbitration. Bank claimed Taylor was required to arbitrate Count 2 based on Bank's pamphlet entitled Rules and Regulations (R. Vol. 1, pp. 60-62). A copy of Bank's Rules and Regulations were attached as

an exhibit to Bank's motion to dismiss or order arbitration (R. Vol. 1, pp. 66-91).

Taylor filed a response in which he claimed in a sworn affidavit that he never received the Bank's Rules and Regulations pamphlet (R. Vol. 1, p. 109)<sup>1</sup> Further, Bank never produced a signature card signed by Taylor or any other bank account document or agreement signed by Taylor which established the Rules and Regulations had been provided to Taylor or that Taylor expressly agreed to be bound by the terms contained in the Rules and Regulations pamphlet. The Rules and Regulations pamphlet was the document which contained the agreement to arbitrate. Bank relied on an affidavit and supplemental affidavit signed by Bank employee, Terri Morsink, Assistant Bank President/District Manager in Lexington, Kentucky (R. Vol. 2, pp. 192, 196).

Terri Morsink, in her affidavit, referenced a bank signature card. Morsink claimed a bank card signed by a depositor other than Taylor was an example of the bank card used by Bank at the time Taylor opened his Bank One account. The bank signature card produced by Bank was not signed by Taylor (R. Vol. 2, p. 199). The card produced by Bank was signed by an unknown depositor on June 13, 2003. Further, Morsink did not claim in her affidavit that she was the Bank

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<sup>1</sup> James Taylor had been in the banking business most of his life (R. Vol. 1, p. 109, Paragraph 6).

employee who opened Taylor's account or that she had ever met Taylor (R. Vol. 2, pp. 192, 196).

Taylor filed a response in opposition to being ordered to arbitrate in which he claimed he saw no agreement to arbitrate (R. Vol. 2, p. 187). Taylor claimed the card he signed, which the Bank could not produce, did not contain writing requiring arbitration, or an acknowledgment of receipt of the Bank's Rules and Regulations pamphlet. Taylor claimed he did not receive the Rules and Regulations pamphlet, that he did not agree to arbitrate, and did not sign the signature card produced by Morsink (R. Vol. 2, p. 187).

The Jessamine Circuit Court on May 4, 2004, held Count 2 in abeyance and referred the case to arbitration (R. Vol. 2, p. 205). The Court found based on Taylor's and Morsink's affidavits that Taylor signed the bank signature card which acknowledged receipt of The Rules and Regulations Pamphlet. The Court's order was entered May 5, 2004 (R. Vol. 2, p. 205). A copy of the Jessamine Circuit Court's order is in the Appendix marked Exhibit 1).

On May 7, 2004, Taylor filed a CR 59 motion asking the trial court to vacate the Exhibit 1 order, claiming there was no evidence Taylor signed a card agreeing to arbitrate. Taylor argued the Bank had produced no bank signature card or other contract signed by Taylor on which he agreed to arbitrate. Taylor argued his affidavit created an

issue of fact as to whether he signed a card identical to the card produced by Morsink (R. Vol. 2, pp. 207-212). A copy of the bank card produced by Morsink as an example of a bank card used at the time Taylor opened his account is in the Appendix marked Exhibit 2. On June 2, 2004, the trial court overruled Taylor's motion to vacate. (R. Vol. 2, p. 228). Thereafter, neither Taylor nor Bank commenced arbitration. The parties litigated Count 1 in Jessamine Circuit Court. Count 1 was dismissed by agreed order with the issue having been settled on April 30, 2007 (R. Vol. 3, p. 453).

On May 14, 2008, four years after the court referred Count 2 to arbitration, Bank filed a motion in Jessamine Circuit Court to dismiss Count 2 because Taylor failed to initiate arbitration within the statute of limitations contained in KRS 355.4-111 (R. Vol. 3, p. 447). The trial court overruled Bank's motion on April 11, 2008 (R. Vol. 3, p. 460). Taylor commenced arbitration proceedings with the National Arbitration Forum (NAF). Taylor paid all fees and complied with the arbitration procedure, including the selection of the arbitrator.

Bank then filed the same motion with the arbitrator requesting the arbitrator dismiss the arbitration based on KRS 355.4-111 and NAF 10. This was the same issue raised by Bank in the Jessamine Circuit Court. The Jessamine Circuit overruled the motion and did not refer the

timeliness issue to the arbitrator. On June 25, 2009 the arbitrator granted Bank's motion and involuntarily dismissed the arbitration.

On August 14, 2009, Taylor moved the Court to release the stay, to set aside its order to arbitrate, place Count 2 back on the Court's active docket and set it for a pretrial. The basis for Taylor's motion was a case decided on January 27, 2009, Ally Cat, LLC v. Chauvin, 274 S.W.3d 451 (Ky. 2009), which held there must be a valid agreement signed by the parties in order for a court to order arbitration (R. Vol. 3, p. 463). On September 10, 2009, Bank filed a response stating there had been an order entered in the arbitration which dismissed the arbitration. The Rule 18 Order involuntarily dismissing arbitration was attached to the motion. Vol. 3, pp. 473, 479, Exhibit 2 Appellant Brief).

Pursuant to the motion filed by Taylor and the response filed by Bank, the Jessamine Circuit Court, on September 14, 2009, continued Taylor's motion on the docket. A copy of the order continuing Taylor's motion to set aside the order to arbitrate is in the Appendix marked Exhibit 3. The Court, on October 2, 2009, set aside its May 5, 2004 order requiring Taylor to arbitrate (R. Vol. 4, p. 512).

On October 2, 2009, Bank filed a motion to confirm the arbitrators' order involuntarily dismissing the arbitration with prejudice (R. Vol. 4, p. 515). The basis for the Bank's motion was Taylor had not filed a motion to vacate the arbitration order within 90 days pursuant to

KRS 417.170 (R. Vol. 4, p. 513). Taylor had, of course, filed a motion to set aside the Court's order to arbitrate within the 90 day limit for challenging the arbitration order based on no signed agreement. KRS 417.160. The motion was heard on August 14, 2009, within 90 days of the arbitrators' June 25, 2009 order dismissing arbitration. (Appellant Brief, Appendix, Exhibit 2). The court continued the motion to consider if it needed to be affirmatively challenged.

The Jessamine Circuit Court set aside its Exhibit 1 order to arbitrate with full knowledge of the June 25, 2009, arbitration order and refused to confirm the arbitration order after having considered if the arbitration order needed to be affirmatively challenged. The Jessamine Circuit Court overruled Bank's motion to confirm the arbitration order. (R. Vol. 4, p. 515, Appendix Exhibit 3 Appellant Brief). Bank appealed the Jessamine Circuit Court order which denied the motion to confirm the arbitrators' award on October 27, 2009 to the Kentucky Court of Appeals. (R. Vol. 4, p. 517).

The Kentucky Court of Appeals affirmed the Jessamine Circuit Court on September, 30 2011. The Court of Appeals ruled that arbitration was dismissed based on the procedural ground of untimeliness. The Kentucky Court of Appeals ruled the arbitrators never reached the merits of the case. The Kentucky Court of Appeals ruled KRS 417.150, KRS 417.160 and KRS 417.170 were inapplicable to

the instant case. The Court of Appeals ruled the Jessamine Circuit Court vacated its own order to arbitrate, which it had jurisdiction to do. It ruled there was no document bearing the signature of either party agreeing to arbitrate and, therefore, it was not error to dismiss the order to arbitrate. Thereafter, Bank filed a motion for discretionary review with the Supreme Court of Kentucky. The motion for discretionary review was granted.

### ARGUMENT

Appellee agrees the standard of review is *de novo*. Appellee does not agree the courts below erred in failing to confirm the arbitrator's order.

The Kentucky Court of Appeals did not draw the wrong conclusion. First, the trial court ruled prior to commencement of arbitration, the arbitration was not time-barred pursuant to KRS 355.4-111. The issue of the statute of limitations was raised in Jessamine Circuit Court by Bank. The issue of timeliness was decided by the Jessamine Circuit Court and was not referred to arbitration. The issue submitted to the arbitrator was Count II of Taylor's complaint which was whether Bank wrongfully failed to honor or return the check within 24 hours.

The trial court's discretion to vacate its own prior order to arbitrate did not exceed its powers because there was no written signed agreement to arbitrate and therefore the court lacked jurisdiction to

order arbitration. Coldwell Banker Manning Realty, Inc. v. Cushman & Wakefield of Connecticut, Inc., 980 A.2d 819 (Conn. 2009).

Since the court did not have jurisdiction subject matter jurisdiction to order arbitration, and since Taylor objected based on no agreement the arbitrators did not have authority to decide the instant case due to lack of signed contract. Further the issue of timeliness was submitted to the court for decision by Bank thereby waiving the right to arbitrate the issue. Since the trial court lacked jurisdiction as a matter of law it was not required to confirm the arbitration order irrespective of a pleading error. Therefore, the trial court could set aside its own order and not confirm the arbitration order as held by the Kentucky Court of Appeals. The Supreme Court of Kentucky should affirm the Kentucky Court of Appeals.

- I. THE INSTANT CASE WAS FILED IN COURT WITHIN THE LIMITATION PERIOD SET OUT IN KRS 355.4-111, BANK RAISED THE ISSUE OF TIMELINESS IN COURT AND THEREFORE THE ORDER DISMISSING WAS NOT AN ARBITRATION AWARD

KRS 355.4-111, the statute Bank claimed barred Taylor's claim, provided an action to enforce an obligation arising under this article must be commenced within three years after the claim for relief accrues. (Appellant Brief).

The basis for this lawsuit arose on June 19, 2003, when Bank failed to honor the check drawn on Bank deposited 2 days earlier. The

**does not apply.** In other words NAF 10 recognized jurisdiction remained with the court on the issue of statute of limitations when the claim originated in court.

The Kentucky Court of Appeals drew the correct conclusion from Coldwell Banker Manning Realty, Inc. v. Cushman & Wakefield of Connecticut, Inc., 988 2d. (Conn. 2009), which held dismissal based on timeliness is not an award when timeliness was not one of the issues submitted for arbitration. In the instant case, the only issue referred by the Jessamine Circuit Court for arbitration was Count II of the Complaint which was whether Bank violated the statutory requirement a bank must honor or return a check within 24 hours.

The Bank cited The Beyt, Rish, Robbins Group Architects v. Appalachian Regional Healthcare, Inc., Ky.App., 852 S.W.2d 784 (1993), in support of its argument that procedurals such as time limitations for demanding arbitration were to be decided by the arbitrator and not by the court. The issue in Beyt, Rish, Robbins Group was the timeliness of a demand for arbitration. The issue raised in the instant case was commencement of arbitration after demand was made and arbitration ordered.

The arbitration agreement in The Beyt, Rish, Robbins Group provided demand must be made within a reasonable time after the claim arose and not after the date when legal proceedings would be

barred. In the instant case legal proceedings were timely commenced and demand timely made by Bank in 2004. Therefore, the issue of timeliness of demand was not an issue. Initiation of arbitration after arbitration was ordered was the issue in the instant case. Initiation or commencement of arbitration was squarely placed before the Jessamine Circuit Court by Bank. Bank ruled initiation of arbitration was not time barred. This did not what happened in Beyt, Rish Robbins Group.

Further the holding in Beyt, Rish Robbins Group was based on the expansive language of the particular arbitration agreement itself. Id. at 786. The Beyt, Rish Robbins Group Court held the language of the agreement controlled. Therefore whether timeliness is an issue for the court or for the arbitrator depends on the language of the agreement.

In the instant case, the purported non signed agreement contained no time limitation but provided the rules for the arbitration were The Rules of the National Arbitration Forum (NAF).( See page 2 Appellant Brief) NAF 10 provided the time limitation did not apply when timely directed to arbitration by a competent court.

On March 30, 2004 in response to Bank's demand for arbitration the Jessamine Circuit Court held the claim in abeyance and ordered the parties to arbitrate. Timeliness was not raised as an issue. The court did not designate which party was to initiate the arbitration. The purported unsigned arbitration agreement provided either party could initiate

arbitration. Further the agreement provided either party could elect to have the claim resolved by binding arbitration. Bank elected to have the timeliness issue decided by the court. Therefore the arbitrator did not have authority to decide this issue.

The trial court in the instant case ruled the arbitration was not barred by KRS 355.4-111 four years after it referred Count II to arbitration. Neither party had initiated arbitration prior to Bank filing the motion to dismiss for not initiating arbitration within 3 years. The Jessamine Circuit Court overruled the motion and ruled arbitration could proceed. Therefore the issue of timeliness was not to be arbitrated and the order dismissing based on timeliness was not an award

Bank cited to Dennis v Fiscal Court of Bullitt County Ky. App. 784 S.W.2d 608, 609 (1990) in support of its argument the Arbitrator's Involuntary Order of Dismissal was a judgment on the merits. The Dennis case concerned a court action not an arbitration. Statutes of limitations apply to court proceedings. Dennis held an existing judgment rendered on the merits by a Court of competent jurisdiction was conclusive with respect to the facts and issues litigated as to the parties and their privies in all other actions.

In the instant case the Jessamine Circuit Court ruled the case was timely filed and initiation of the arbitration four years later was timely. Therefore the timeliness issue was decided by the court, was conclusive

and not properly raised in the arbitration proceeding. Even the arbitration rule NAF 10 stated the time limitation did not apply to any case referred to arbitration by a court of competent jurisdiction. This clearly put the issue of time limitation under the Court's jurisdiction.

The issue of timeliness was decided by the trial court at Bank's request before arbitration commenced. Therefore, the issue of timeliness was either waived by Bank or *res judicata*. The Kentucky Court of Appeals correctly ruled the Order of Involuntary Dismissal was not an award.

An arbitration is confined to the interpretation of the agreement and arbitrators are without authority to disregard the agreement or to modify plain unambiguous provisions of the agreement. Wyandot Inc. v Local 227 United Food And Commercial Workers Union 205 F.3d 922, 929 (6<sup>th</sup> Cir. 2000). A court is not required to confirm an arbitration decision when it fails to draw its essence from the agreement. *Id.* at 927. An arbitrator is without authority to disregard or modify plain unambiguous provisions of the agreement's language. *Id.* at 929. When an arbitrator disregards the unambiguous terms of the agreement the court may vacate or refuse to confirm the award. *Id.* Further the time limitations in an arbitration agreement may be waived. *Id.* at 976.

In the instant case the Bank waived arbitration of the timeliness issue when it requested the court to decide if arbitration could be timely

initiated four years after ordered. In response to Bank's motion the court ruled arbitration could proceed. Further the arbitrator disregarded the plain unambiguous language of NAF 10 which stated the time limitation did not apply when directed to arbitration by a competent court. Therefore since the arbitrator disregarded the unambiguous terms of NAF 10 and decided an issue not referred to arbitration, the trial court could vacate or refuse to confirm the arbitration order.

Further even though the facts in the instant case are not identical to the facts in Medcom Contracting Services, Inc. v Shepherdsville Christian Church Disciples of Christ, Inc. 290 S.W.3d 681 (Ky. App. 2009) cited by the Kentucky Court of Appeals the analysis is applicable to the instant case. Taylor complied with the trial court order to arbitrate after Bank moved to dismiss based on the arbitration not being initiated four years after ordered. Taylor initiated arbitration and paid the fees. The Court did not order a specific party to initiate the arbitration and pay the fees. The purported unsigned agreement stated either party could initiate the arbitration.

It would hardly be fair to penalize Taylor who complied with the trial court order after the Bank's motion. The unsigned agreement provided either party could commence arbitration. The bank demanded arbitration but did nothing to initiate arbitration. The Bank did nothing but wait four years and move to dismiss because neither it nor Taylor

initiated arbitration. As held in Medcom, Bank's conduct did not merit an award on the merits. Id. At 685. Further since there was no signed agreement, there was no time limitation other than the statute of limitation KRS 355.4-111 for commencing the court action.

II. THE TRIAL COURT RETAINED JURISDICTION TO SET ASIDE ITS ORDER TO ARBITRATE WHEN THERE WAS NO SIGNED AGREEMENT

Before Section 10 of the Federal Arbitration Act, 9 USC Section 10, and its Kentucky counterpart, KRS 417.160, can be considered in deciding whether the trial court correctly set aside its order to arbitrate and refused to confirm the arbitrators' order of involuntary dismissal, the threshold matter of the validity of the arbitration agreement must be determined. Ernst & Young LLP v. Clark, 323 S.W.3d 682, 687 (2010). Arbitration is a matter of contract and a party cannot be required to submit to arbitrate a dispute to which he has not agreed to submit to arbitration. United Steelworkers of America v. Warrior & Gulf Nav. Co., 80 S.Ct. 1347, 1363 U.S. 574, L.Ed.2d. 1409 (1960). Courts look first to whether parties signed a written agreement to arbitrate. EEOC v. Waffle House, Inc., 122 S.Ct. 754, 534 U.S. 279, 151 L.Ed.2d 755 (2002).

Appellant argued the Jessamine Circuit Court lacked jurisdiction over the issue of the validity of the agreement after it ordered the agreement valid, ordered arbitration and the arbitrator entered an

order. However, this is exactly what happened in Saneii v Robards, 289 F.Supp.2d 855 (W.D. Ky. 2003).

In Saneii the court held the claimant was not required to seek a stay of the arbitration in order to preserve an objection to jurisdiction. Id. at 861. In Saneii as in the instant case the claimant unsuccessfully argued the case belonged in court not in arbitration. The court ordered the claimant need not seek a stay of the arbitration to preserve its claim of lack of jurisdiction. The claimant in Saneii also cited to a case to support its argument decided after the court compelled arbitration but before the arbitrator began his proceedings.

Pursuant to KRS 417.150, KRS 417.160 and 9 USC Section 10, the Court lacks jurisdiction to order arbitration when there is no agreement signed by the parties assenting to arbitrate.

The Coldwell Banker Manning Realty Inc. v Cushman and Wakefield of Connecticut, Inc. 293 Conn. 582, 980 A.2d 819, 836 (Conn. 2009) case cited by Appellant held the claim could not be satisfied by arbitration even if submitted for arbitration when the parties were not signatories to the arbitration agreement. In the instant case as held by the trial court and the Kentucky Court of Appeals, the Appellees were not signatories to an arbitration agreement. Since they were not signatories to an agreement to arbitrate, the claim could not be arbitrated even if referred to arbitration. Id., at 836.

As held in Coldwell Banker, the trial court retained subject matter jurisdiction over the parties when the parties were not parties to an arbitration agreement. Id., at 822. Appellees were not signatories to an agreement to arbitrate. The trial court and the Kentucky Court of Appeals correctly ruled the Jessamine Circuit Court retained jurisdiction over Appellee and his claim the arbitration agreement was not valid.

In the instant case, the trial Court ordered arbitration based on an unsigned bank card and a rules and regulations pamphlet. On August 14, 2009, Taylor appeared in court again claiming there was no agreement to arbitrate signed by the parties and cited to Ally Cat, LLC v. Chauvin, 274 S.W.3d 451 (Ky. 2009). Ally Cat was decided after arbitration was ordered by the Jessamine Circuit Court, but before the arbitration occurred and before the arbitrator entered the involuntary dismissal order. The Ally Cat holding was not new law but made it clear there must be a signed agreement by the parties in interest in order for the court to have jurisdiction. Ally Cat made it clear there must be a signed agreement and merely acknowledging receipt of a pamphlet was insufficient to confer jurisdiction on the court to order arbitration.

Ally Cat was based on KRS 417.160. Pursuant to KRS 417.160 and KRS 417.150, and pursuant to the FAA, the trial court had jurisdiction to set aside its order to arbitrate and to deny Bank's motion to confirm the arbitrator's order involuntarily dismissing arbitration.

Court when there was no valid agreement to arbitrate. The venue holding in Ally Cat was not raised in the instant case but would also justify vacating the arbitrators order because the clause in the unsigned agreement did not require arbitration to occur in Kentucky.

On Page 20 of the Appellant Brief, Argument B, Bank argued the Federal Arbitration Act was applicable to the instant case. Bank's argument in the trial court and in the Kentucky Court of Appeals was based on the Kentucky Arbitration Act, KUAA. The FAA was not mentioned. This is the first time Bank argued FAA is the applicable statute. However, since there was no agreement signed by the parties agreeing to arbitration, the choice of law provision contained in the Rules & Regulations pamphlet is not controlling. Further both the FAA and the KUAA required a signed agreement to arbitrate in order for the court to have jurisdiction to order arbitration. Therefore both statutes support the trial court and the Kentucky Court of Appeals decision that the action should proceed in court.

The Appellant also cited Ernst & Young LLP v Clark 323 S.W.3d 682, 687 (Ky. 2010) in support of its position. Ernst is distinguishable from this case because there was no question the arbitration agreement was valid. The issue was a conflict between state law and the FAA. It was acknowledged in Ernst that the court retained jurisdiction over non arbitratable issues such as no agreement.

III. ALLY CAT SUPPORTED THE LOWER COURT'S REFUSAL TO CONFIRM THE ARBITRATION ORDER BASED ON THE HOLDING IN ALLY CAT THAT THERE MUST BE AN EXPRESS AGREEMENT TO ARBITRATE SIGNED BY THE PARTIES BEFORE A COURT HAS JURISDICTION TO ORDER ARBITRATION.

The Court in Ally Cat, LLC v. Chauvin, 274 S.W.3d 457 (Ky. 2009), held for a contract to meet the requirements of KRS 417.050, it must be signed by the parties in interest and parties assent to the term requiring arbitration must be expressed. This was the holding and the basis for Taylor's motion to set aside the Jessamine Circuit Court order to arbitrate and set the matter for pre-trial. (R. Vol. 3, p. 463). Venue was not the basis for Taylor's motion to set aside the order to arbitrate. The motion to set aside the order to arbitrate was based on no signed agreement to arbitrate. The motion was filed within the 90-day period for taking exceptions to the arbitration order.

Pursuant to Taylor's motion to vacate the order to arbitrate and set the matter for per trial based on Ally Cat, the Jessamine Circuit Court set aside its order to arbitrate on October 1, 2009. The order was timely because the issue was raised on August 18, 2009, 54 days after the arbitration order dismissing the arbitration was signed. The Exhibit 1 Court Order contained the finding Taylor signed a bank card and received the Rules and Regulations pamphlet. When the trial court set

The purported non signed arbitration agreement in the instant case provided arbitration was to occur in the federal judicial district that included the claimant's address at the time the claim was filed. The claimants address could have been in a state other than Kentucky at the time the claim was filed. Therefore the language in arbitration clause in the non-signed agreement did not state the arbitration was to be held in Kentucky. According to *Ally Cat* the court could not enforce the award without this language. *Id.* at 455. The situation in which a defective arbitration clause leads to an action to enforce an award when the arbitration occurred in Kentucky was not addressed.

In the instant case there was no arbitration because it was dismissed without authority. The language of the non-signed arbitration agreement did not require the arbitration to occur in Kentucky. Therefore this is another ground for upholding the Kentucky Court of Appeals decision and requiring the matter be set for trial in the Jessamine Circuit Court.

IV. THE TRIAL COURT WAS NOT REQUIRED TO CONFIRM THE ARBITRATION ORDER BECAUSE THERE WAS NO AGREEMENT TO ARBITRATE AND TAYLOR TOOK EXCEPTION TO THE ARBITRATION ORDER BASED ON NO AGREEMENT TO ARBITATE WITHIN 90 DAYS.

The standard of review for reviewing whether the arbitrators exceeded their authority is *de novo*. *Saneii v. Robards*, 289 F.Supp.2d 855, 862 (W.D.Ky. 2003). The Plaintiff in *Saneii* did not move the court

court had already set aside the order to arbitrate based on no signed agreement and based on Taylor having challenged the arbitrator's authority and jurisdiction. Validity of the arbitration agreement under either the FAA or the KUAA was an issue to be decided by the Court, not by the arbitrator.

Further the arbitrator in the instant case did not decide the contract issue referred to it. Instead, it involuntarily dismissed the arbitration based on a ruling the arbitration was untimely which was an issue raised by Bank and decided by the court. The arbitrator lacked authority to decide the timeliness issue when waived by Bank and not referred by the court. See Argument II.

Further, there is no statute of limitation with respect to arbitration. If there was a time limitation, it would have had to be in the signed arbitration agreement. Yet, since there was no arbitration agreement signed by the parties, there was no time limitation other than the limitation for commencing a court action.

Contrary to Bank's argument, Taylor took exception to the arbitration order within 3 months or 90 days of its delivery. The arbitrator dismissed the arbitration on June 25, 2009. (R. 479). On August 14, 2009, Taylor appeared in the trial court arguing the arbitrator lacked jurisdiction to arbitrate the case because there was no

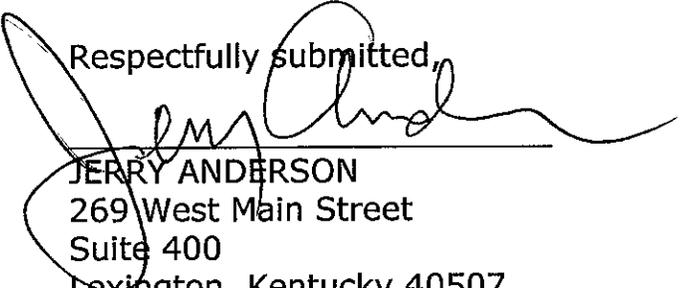
express agreement signed by the parties agreeing to arbitrate as held in Ally Cat LLC v Chauvin 274 S.W.3d 457 (Ky. 2009).

The trial court agreed with Taylor and set aside its order to arbitrate, which included its findings there was an agreement to arbitrate. The court overruled Bank's motion to confirm the arbitrators' order. Pursuant to Saneii, Taylor made it clear in its motion to set aside the order to arbitrate, that it was challenging the arbitration order based on there being no signed agreement to arbitrate. Pursuant to Saneii a pleading error did not deprive the trial court of subject matter jurisdiction to vacate the arbitrator's order. The arbitrator did not have jurisdiction and authority to decide the case. The Jessamine Circuit Court and the Kentucky Court of Appeals were correct in ruling the trial court did not err when it set the matter for trial.

#### CONCLUSION

For the foregoing reasons, the Supreme Court of Kentucky should affirm the Kentucky Court of Appeals decision.

Respectfully submitted,



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APPENDIX

**LIST OF EXHIBITS**

	EXHIBIT
Jessamine Circuit Court Order	1
Bank Signature Card	2
Jessamine Circuit Court Order Passing Motion to Set Aside Order	3