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COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
No. 2021-SC-0431

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SUPREME COURT

MGG INVESTMENT GROUP LP — APPELLANT

v.

BEAM S.A., ET AL. — APPELLEES

ON APPEAL FROM THE COURT OF APPEALS
NOS. 2020-CA-0501-MR, 2020-CA-0505-MR, 2020-CA-0521-MR,
2020-CA-0560-MR, 2020-CA-0600-MR
(FAYETTE CIRCUIT COURT NO. 20-CI-0349)

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CERTIFICATE OF SERVICE

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W. Craig Robertson, III

INTRODUCTION

This is a case in which a debtor horseracing organization purported to sell equine collateral free of a creditor's security interests. The Court of Appeals held that most of the creditor's claims against the purchasers of the collateral were preempted by the federal Food Security Act, 7 U.S.C. § 1631; that the creditor's remaining claims were barred by KRS 413.242; and that equitable tolling did not apply to the claims against one of the purchasers.

STATEMENT CONCERNING ORAL ARGUMENT

MGG Investment Group LP respectfully submits that oral argument would be of assistance to the Court. This case presents several important questions of first impression that involve Kentucky's signature industry and the market for equine lending that supports it. In particular, this case involves issues about the meaning and intent of the Food Security Act, 7 U.S.C. § 1631; the meaning of KRS 413.242; and the applicability of equitable tolling.

STATEMENT OF POINTS AND AUTHORITIES

Page

Statement of points and authorities—continued:

Page

Statement of points and authorities—continued:

Page

Statement of points and authorities—continued:

Page

Statement of points and authorities—continued:

STATEMENT OF THE CASE

This case involves claims brought by appellant MGG Investment Group LP against several purchasers of thoroughbred racehorses (and breeding rights in those horses). The Court of Appeals affirmed the dismissal of the claims against most of the purchasers on the ground that the federal Food Security Act (FSA) preempts Kentucky law, under which buyers of thoroughbreds take subject to any security interest in the horses. That holding was erroneous. The FSA applies only to the sale of a "farm product," which Congress defined in relevant part as "an agricultural commodity," including "a species of livestock such as cattle, hogs, sheep, horses, or poultry used or produced in farming operations . . . that is in the possession of a person engaged in farming operations." 7 U.S.C. § 1631(c)(5). The Court of Appeals never analyzed whether a thoroughbred is a commodity. Because thoroughbreds are not commodities, the FSA does not preempt Kentucky law here.

At the very least, the Court of Appeals erred because the FSA does not apply to the valuable breeding rights in Triple Crown winner American Pharoah, which were surreptitiously sold. Even if a thoroughbred were an agricultural commodity, an intangible right to breed a mare to a particular stallion is not a commodity or a product of any kind. The only reasoning offered by the Court of Appeals was an unexplained citation to an unpublished decision that did not even address the question presented here. This Court should, at a minimum, hold that the purchasers of the breeding rights did not take free of MGG's security interest.

Finally, the Court of Appeals erred by affirming the dismissal of MGG's claims against the remaining purchaser based on a broad interpretation of the procedural rule in KRS 413.242 and a narrow application of equitable tolling. KRS 413.242 requires the holder of a security interest in a horse to "pursue a remedy

against the debtor to the point where a judgment is rendered on the merits or the suit is dismissed with prejudice" before "bring[ing] an action against the purchaser." The Court of Appeals incorrectly held that MGG could not bring its claims against both the debtor and the purchasers in a single action. The Court of Appeals also incorrectly held that equitable tolling of the two-year limitations period in KRS 413.125 is unavailable merely because MGG had a contractual right to inspect the debtors' property.

The Court of Appeals' erroneous holdings effectively foreclose judicial remedies for lenders when equine collateral is surreptitiously sold, which will undoubtedly have a chilling effect on lending to Kentucky's signature industry. This Court should reverse the judgment of the Court of Appeals and remand for further proceedings.

A. Background

1. Appellant MGG Investment Group LP provides financing solutions to midsize and growing companies. In 2016, affiliates of MGG loaned $30 million to Zayat Stables, LLC, with MGG serving as administrative agent and collateral agent. Zayat Stables is a self-described "thoroughbred horseracing organization in the business of breeding and racing elite thoroughbred horses." (Record on Appeal, hereinafter "R. ___," 1522-1523, Vol. XI). The most famous of its horses is American Pharoah, which won the Triple Crown in 2015.

The loans were secured by "[a]ll of the property and assets and all interests therein and proceeds thereof now owned or hereafter acquired by" Zayat Stables. (R. 650, Vol. V; R. 748, Vol. VI). The secured property and assets included "all Equine Collateral," including "[a]ll horses" and "breeding rights, lifetime breeding

rights and/or fractional interests therein." (R. 650-651, Vol. V; R. 752, Vol. VI (emphases omitted)). MGG properly perfected its security interest through filings with the Delaware Secretary of State and the recording offices for other States, including Kentucky. (*See* R. 654-655, Vol. V). This appeal involves American Pharoah and four other horses: El Kabeir, American Cleopatra, Lemoona, and Solomini.

Under the loan agreement, Zayat Stables promised to provide MGG with certificates reporting the sale of any equine collateral. (*See* R. 651-652, Vol. V; R. 809, Vol. VI). It also pledged not to sell any equine collateral except as permitted by the agreement. (*See* R. 652, Vol. V; R. 819, Vol. VI). The parties agreed that any sale would be for fair market value and would occur in the ordinary course of business. (*See* R. 652, Vol. V). Zayat Stables was required to use a percentage of the proceeds of any sale to prepay outstanding principal. (*See id.*; R. 784, Vol. VI).

2. Despite agreeing to those terms, Zayat Stables, its owner Ahmed Zayat, and other members of the Zayat family embarked on a multiyear scheme to sell horses and breeding rights for a fraction of their value and to conceal the sales from MGG. Individual members of the Zayat family, including Zayat Stables president Justin Zayat, purported to sell American Pharoah's breeding rights—among the most valuable in horseracing history—to appellees Orpendale and LNJ Foxwoods free of MGG's security interest. (*See* R. 661-663, Vol. V). The American Pharoah breeding rights were sold for $3.3 million, well below the fair market value of $12.6 million determined by an independent appraiser. (*See* R. 661, 664-665, Vol. V). Although the sales occurred between December 2018 and June 2019, Zayat Stables neither informed MGG of the sales nor prepaid any principal. (*See* R. 661, Vol. V).

At least one of the purchasers of the American Pharoah breeding rights, Orpendale, had knowledge of MGG's security interest. Orpendale previously purchased an interest in a horse from Zayat Stables. As part of that transaction, it obtained a partial lien release from MGG. *See* A6 n.3. Despite that knowledge of MGG's security interest, Orpendale did not seek a lien release when it purported to purchase the breeding rights in American Pharoah.

Zayat Stables also sold interests in several other horses in violation of the terms of the loans. Appellee Yeomanstown Stud purchased a 100% ownership interest in El Kabeir in September 2017. (*See* R. 659, Vol. V). Appellee Hill 'N' Dale purchased a 100% ownership interest in American Cleopatra in a private sale in November 2017. (*See* R. 660, Vol. V). Appellees Flintshire Farm and Brad Sears purchased the breeding rights in Lemoona in March 2019. (*See* R. 665, Vol. V). And appellee McMahon Thoroughbreds purchased a 50% ownership interest in Solomini in December 2019. (*See* R. 667-668, Vol. V). Again, Zayat Stables never informed MGG of the sales nor prepaid any principal. (*See* R. 673, Vol. V). And again, those sales were for millions less than the fair market value determined by the independent appraiser. (*See* R. 659-660, 666, 668, Vol. V).

3. Zayat Stables defaulted on its loans in September 2019. (*See* R. 669, Vol. V). MGG sent a notice of default in December 2019, listing Zayat Stables' failure to make payments starting in September 2019. (*See* R. 669-670, Vol. V; R. 1042-1044, Vol. VII). By January 2020, Zayat Stables owed MGG over $23 million in principal and interest, which was roughly the appraised value of the equine assets sold to the purchasers in this case. (*See* R. 670, Vol. V).

In December 2019, before MGG discovered all of the covert sales, Zayat Stables proposed a liquidation plan. (*See* R. 670, Vol. V). Even in that plan, Zayat Stables continued to conceal its conduct. It stated that the American Pharoah breeding rights and El Kabeir would be among the last assets sold, when in fact they had already been sold in violation of the loan agreement. (*See* R. 671, Vol. V).

4. In January 2020, an appraiser appointed under the terms of the loan agreement informed MGG that the breeding rights in American Pharoah appeared to have already been sold. (*See* R. 671, Vol. V). When MGG confronted Ahmed Zayat, he initially denied the sale of the breeding rights, only to admit it several days later. (*See* R. 672, Vol. V; R. 1048, Vol. VII). Ahmed Zayat continued to conceal the sale of El Kabeir to Yeomanstown Stud, even when MGG specifically asked whether El Kabeir had been sold. (*See* R. 673, Vol. V; R. 1054, Vol. VII). Nevertheless, MGG subsequently discovered that Zayat Stables had surreptitiously sold much of the equine collateral, including interests in El Kabeir, American Cleopatra, Lemoona, and Solomini. (*See* R. 673, Vol. V).

B. Proceedings Below

1. In January 2020—less than a month after discovering the covert sales—MGG filed a complaint against Zayat Stables and Ahmed Zayat in the Fayette Circuit Court. (A6). MGG later amended its complaint to add claims against the third-party purchasers of the equine collateral, as well as other members of the Zayat family. (*See id.*). MGG brought claims for replevin and constructive trust against Orpendale, LNJ Foxwoods, Hill 'N' Dale, McMahon Thoroughbreds, and Yeomanstown Stud; claims for intentional interference with contract against Orpendale and its affiliate, Bemak (which does business as Ashford Stud); and claims for

unjust enrichment against Flintshire Farm and Brad Sears. (*See* R. 682-704, Vol. V). MGG also sought a declaratory judgment that it holds priority security rights over the equine assets at issue. (*See* R. 704-705, Vol. V). All of MGG's claims rest on the premise that the purchasers took title subject to MGG's first, prior, and perfected security interest.

2. Prior to any discovery, the purchasers moved to dismiss or for summary judgment, and the circuit court granted their motions. The circuit court dismissed MGG's claims against Orpendale, LNJ Foxwoods, Flintshire Farm, Hill 'N' Dale, McMahon Thoroughbreds, and Sears on the ground that their purchases were protected by the Food Security Act. That statute provides that "a buyer who in the ordinary course of business buys a farm product from a seller engaged in farming operations shall take free of a security interest created by the seller." 7 U.S.C. § 1631(d). The court concluded in a series of short orders that thoroughbreds are "farm product[s]" within the meaning of the FSA; that Zayat Stables was the seller of each equine interest; and that Zayat Stables was in the business of selling horses. (*See* A31-A52, A63-A68). Because the circuit court determined that the purchasers took title to the equine collateral free and clear under the FSA, it dismissed MGG's claims.

The circuit court also granted summary judgment to Bemak, which had filed an answer and thus could not move to dismiss. The court reasoned that "MGG's sole claim against Bemak is for its role in facilitating Orpendale's acquiring title to the [American Pharoah] breeding rights." (A59). Because the court had already deter-

mined that Orpendale's acquisition of those rights was protected by the FSA, it concluded that Bemak's conduct in facilitating the acquisition could not provide the basis for a tortious-interference claim. (*See id.*).

As to MGG's claims against Yeomanstown Stud, the circuit court dismissed those claims without prejudice on procedural grounds. (*See* A29-A30). It determined that KRS 413.242 barred MGG's claims because MGG had not obtained a judgment against Zayat Stables before bringing claims against Yeomanstown Stud. (*See* A29). The court also held that a two-year limitations period governed. (*See id.*). Because the court concluded that MGG "could," or "may" be able to, invoke equitable tolling, the dismissal was without prejudice. (*Id.*).

3. MGG appealed the dismissal of its claims, and Yeomanstown Stud cross-appealed the decision to dismiss the claims against it without prejudice. The Court of Appeals affirmed the judgments based on the FSA, and it upheld the dismissal but remanded for entry of judgment with prejudice as to Yeomanstown Stud.

First, the Court of Appeals stated that the FSA "expressly preempts" state Uniform Commercial Code (UCC) provisions governing the sale of farm products by including "'notwithstanding any other provision of Federal, State, or local law' within the language of the statute." (A11 (quoting 7 U.S.C. § 1631(d))). The court relied on legislative history suggesting that the FSA was intended to preempt the UCC, as well as an out-of-state case purporting to summarize Congress's policy goals. (A11). The court also emphasized the use of the word "horses" in the definition of a farm product and its conclusion that Zayat Stables was engaged in "farming operations," but it did not address whether a thoroughbred is an "agricultural com-

modity." (A12-A13 (quoting 7 U.S.C. § 1631(c)(5))). Finally, the court cited a provision in the parties' financing agreement that generally required Zayat Stables to "[p]rovide to [MGG] a list of the buyers, commission merchants, selling agents and auctioneers to or through whom the Borrower may sell any of the Equine Collateral pursuant to the provisions of Section 1324 of the Food Security Act of 1985." (A16 (quoting R. 818) (second alteration in original; emphasis omitted)).

Second, with respect to the breeding rights—as distinct from ownership interests in the horses—the Court of Appeals relied on its unpublished decision in *North Ridge Farms, Inc.* v. *Trimble*, No. 82-CA-1305-MR, 37 UCC Rep. Serv. 1280 (1983). (*See* A14-A15). The court did not cite any reasoning from that decision explaining why the right to breed a mare to a particular stallion is a "farm product."

Third, the Court of Appeals upheld the dismissal of the claims against Yeomanstown Stud on procedural grounds, but disagreed with the circuit court's decision to dismiss without prejudice. The court held that KRS 413.242 precludes MGG's claims against Yeomanstown Stud on the ground that the "statute plainly states the legislature intended for creditors to pursue actions against sellers 'to the point where a judgment is rendered on the merits or the suit is dismissed with prejudice' prior to pursuing any action against a purchaser." (A18 (quoting KRS 413.242)). The court then held that equitable tolling was unavailable because MGG did not "exercise[] its inspection rights" under the loan agreement. (A26). On that basis, it remanded for entry of dismissal with prejudice.

STANDARD OF REVIEW

This Court reviews a dismissal for failure to state a claim, including a dismissal based on timeliness, de novo. *See, e.g.*, *Unifund CCR Partners* v. *Harrell*, 509

S.W.3d 25, 28 (Ky. 2017); *American Premier Insurance Co.* v. *McBride*, 159 S.W.3d 342, 345 (Ky. App. 2004). A court should grant a motion to dismiss only if "it appears the pleading party would not be entitled to relief under any set of facts which could be proved." *Unifund*, 509 S.W.3d at 28 (citation omitted). This Court also reviews a grant of summary judgment de novo. *See, e.g.*, *Hollaway* v. *Direct General Insurance Co. of Mississippi, Inc.*, 497 S.W.3d 733, 736 (Ky. 2016). A court should grant summary judgment only if "there is no genuine issue as to any material fact" after "[a]ll factual ambiguities are viewed in a light most favorable to the nonmoving party." *Id.* (citation omitted).

ARGUMENT

MGG's claims against the purchasers of the equine collateral should not have been dismissed, and the decision below would have the catastrophic effect of causing lenders to abandon the thoroughbred industry because equine collateral could be sold nearly with impunity.

First, the FSA does not preempt Kentucky law, under which purchasers of equine collateral take subject to a security interest in the horses. The text of the FSA unambiguously covers only commodities, and the unique thoroughbreds at issue in this case lack the interchangeability that characterizes commodities. Both a subsequent amendment to the Kentucky UCC and the congressional intent behind the FSA support that interpretation. Neither the financing agreement in this case nor the purchasers' other arguments can alter the plain meaning of the statutory text, and the interpretation adopted by the Court of Appeals lacks any precedential support.

Further, even if thoroughbreds were farm products for purposes of the FSA, the breeding rights in American Pharoah would still not be farm products. Congress simply did not intend for breeding rights in elite equestrian athletes to be sold free of a lender's security interest. It is implausible to call the right to breed a particular mare to a particular stallion a "product" of any kind, let alone an agricultural commodity. At a minimum, then, the breeding rights are not farm products within the meaning of the FSA.

Finally, MGG's claims against Yeomanstown Stud are neither procedurally barred nor untimely. As to the former, MGG did not violate the requirement in KRS 413.242 that a creditor cannot bring an "action" against a purchaser before final judgment in an action against the debtor. In concluding that MGG's claims against Yeomanstown Stud are barred by that statute, the Court of Appeals collapsed the distinction between "claims" and an "action," with the illogical result that creditors would rarely, if ever, be able to pursue relief from purchasers of covertly sold collateral. As to timeliness, the fraudulent scheme perpetrated by Zayat Stables over multiple years is an extraordinary circumstance warranting equitable tolling. The holding below that the fraudulent scheme was within MGG's control because it had the contractual right to inspect Zayat Stables' premises is unsupported by precedent and places an unreasonable burden on lenders. For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

I. THE FOOD SECURITY ACT DOES NOT ALLOW THE PURCHASERS TO TAKE THE THOROUGHBRED RACEHORSES AND BREEDING RIGHTS FREE OF MGG'S SECURITY INTEREST

This argument is preserved in MGG's responses to the relevant motions to dismiss and Bemak's motion for summary judgment. (R. 2095-2109, 2121-2128, Vol. XV; R. 2709-2710, 2797-2798, Vol. II (2d Ap.)).

Under the Kentucky Uniform Commercial Code, the general rule is that "a buyer [of goods] in ordinary course of business . . . takes free of a security interest created by the buyer's seller, even if the security interest is perfected and the buyer knows of its existence." KRS 355.9-320(1). The Kentucky version of the UCC, like the UCC itself, contains an exception to that rule for "a person buying farm products from a person engaged in farming operations." *Id.* The general rule in Kentucky is thus that purchasers of farm products take those products subject to any preexisting security interest.

When Congress enacted the FSA in 1985, it preempted the UCC exception, and Kentucky's general rule, in part. The FSA provides that, "notwithstanding any other provision of . . . State . . . law, a buyer who in the ordinary course of business buys a farm product from a seller engaged in farming operations shall take free of a security interest created by the seller." 7 U.S.C. § 1631(d). Although the FSA was intended partially to preempt the UCC, Congress defined "farm products" more narrowly than the UCC does by covering only "agricultural commodit[ies]." 7 U.S.C. § 1631(c)(5). And Kentucky subsequently amended its UCC to clarify that buyers do not take "[e]quine interests . . . including seasons and other rights in connection therewith" free of a security interest. KRS 355.9-102(1)(ah)(5).

The Court of Appeals adopted a novel interpretation of "farm product" that is contrary to the text and purpose of the FSA, as well as decades of practice under

that statute and the UCC. A horse is a farm product under the FSA only if it is a "commodity," which a thoroughbred unambiguously is not. And a breeding right is not a "product," let alone a "commodity." Accordingly, the FSA does not preempt Kentucky law here.

A. Thoroughbred Racehorses Are Not Farm Products Within The Meaning Of The Food Security Act

1. The Court of Appeals failed to give effect to the word "commodity" in the definition of a "farm product." The FSA defines a "farm product" as "an agricultural commodity," including "a species of livestock such as cattle, hogs, sheep, horses, or poultry used or produced in farming operations . . . that is in the possession of a person engaged in farming operations." 7 U.S.C. § 1631(c)(5). A "horse" is thus a "farm product" under the FSA only to the extent it is a "commodity."

The "most logical method of discerning the General Assembly's intent is to look to the plain wording of the statute, assigning the words employed in the statute . . . their ordinary meaning." *Commonwealth* v. *Gamble*, 453 S.W.3d 716, 718 (Ky. 2015) (alteration in original; internal quotation marks and citation omitted); *see also* KRS 446.015. The ordinary meaning of "commodity," in its relevant sense, is a "product or service that is indistinguishable from ones manufactured or provided by competing companies and that therefore sells primarily on the basis of price rather than quality or style." *American Heritage Dictionary* 372 (5th ed. 2016); *see also Oxford English Dictionary* (online ed.) (defining a "commodity" as a "thing produced for use or sale; a piece of merchandise; an article of commerce; in later use frequently [specifically] a raw material, primary product, or other basic good which is traded in bulk and the units of which are interchangeable for the purposes of trading"); *Random House Dictionary* 412 (2d ed. 1987) (defining a "commodity" as "an

article of trade or commerce"); *Webster's Third New International Dictionary* 458 (1961) (defining a "commodity" as "an economic good" and "an article of commerce[; especially] one delivered to a transportation company for shipment").

Courts have recognized in a variety of contexts that the characteristic feature of commodities is their interchangeability. For example, the Connecticut Supreme Court has explained that contracts for telecommunications services were not commodity forward contracts in part because the services were not "essentially interchangeable." *CCT Communications, Inc.* v. *Zone Telecom, Inc.*, 172 A.3d 1228, 1259 (2017). The Federal Circuit has similarly remarked that a "commodity product" is "generally interchangeable regardless of its source." *Bratsk Aluminum Smelter* v. *United States*, 444 F.3d 1369, 1371 (2006).

No one in the "ordinary experiences of daily life," *Devasier* v. *James*, 278 S.W.3d 625, 630 (Ky. 2009), would describe thoroughbreds as interchangeable. A thoroughbred is not a common staple raised to be sold in bulk; rather, it is a unique asset, raised to be held by the owner and used in the horseracing industry. Thoroughbreds may sometimes be bought and sold, but only for the purpose of racing and breeding future thoroughbreds. Each thoroughbred has a value that varies wildly from horse to horse, unlike bushels of wheat or corn. No one would contend that American Pharoah is interchangeable with any other horse, particularly one that did not win the Triple Crown. No one would contend even that the other thoroughbreds in this case, each of which has a different pedigree and race record and each of which is valued at a different amount, are interchangeable with each other.

The Court of Appeals entirely failed to address whether a thoroughbred is a commodity. It instead emphasized that the FSA uses the word "horses" and that

Zayat Stables was purportedly engaged in farming operations. (*See* A13). But a horse—even in the possession of a person engaged in farming operations—is a "farm product" under the FSA only to the extent it is a "commodity." Reading "horses" in context gives the word a perfectly sensible meaning: interchangeable horses used for farm labor may qualify, but thoroughbreds do not. Because thoroughbreds are unique goods that do not fit within the textual meaning of an "agricultural commodity," they are not "farm product[s]" under the FSA.

2. A subsequent amendment to the Kentucky UCC confirms that thoroughbreds were not "farm products" within the meaning of the UCC when Congress passed the FSA. After the FSA was enacted, Kentucky amended its definition of "farm products" to include "[e]quine interests, including, but not limited to, interests in horses, mares, yearlings, foals, weanlings, stallions, syndicated stallions, and stallion shares (including seasons and other rights in connection therewith), whether or not the debtor is engaged in farming operations and without regard to the use thereof." KRS 355.9-102(1)(ah)(5). By that amendment, Kentucky deviated from the ordinary understanding of "farm products" specifically to provide that a buyer of thoroughbred equine interests does *not* take free of a security interest created by the buyer's seller. If thoroughbreds were already "farm products" within the meaning of the UCC, it would have been unnecessary for the General Assembly to expand Kentucky's UCC in the wake of the FSA to include them within the definition of farm products.

Kentucky's expansion of the definition of "farm products" did not correspondingly expand the FSA's definition. A change in Kentucky law does not automatically work a change in federal law, unless there is some reason to believe that federal law

is tied to Kentucky law. The FSA does cover some goods that qualify as a "farm product" under Kentucky's UCC. But Congress defined "farm product" more narrowly than Kentucky's UCC when it included the words "agricultural commodity." And it strains credulity to think that Congress intended to preempt every variation on the UCC, especially one passed by a single State some fifteen years after the FSA's enactment. In any event, the General Assembly's inclusion of equine interests "whether or not the debtor is engaged in farming operations" destroys any equivalence between this new category of farm products and the meaning of "farm products" in the FSA, which protects only buyers of "an agricultural commodity . . . in the possession of a person *engaged in farming operations*." KRS 355.9-102(1)(ah)(5); 7 U.S.C. § 1631(c)(5) (emphasis added). Although Kentucky's amendment was not a response to the FSA and did not alter the FSA's meaning, it is nonetheless evidence of the ordinary meaning of "farm product."

3. The Court of Appeals incorrectly relied on an overly simplified view of the congressional intent behind the FSA. MGG does not dispute that Congress intended partially to preempt the UCC's farm-products exception. (*See* A11). But Congress defined "farm product" more narrowly than the UCC when it used the phrase "agricultural commodity"—a fact the Court of Appeals failed to acknowledge. *Compare* 7 U.S.C. § 1631(c)(5) *with* KRS 355.9-102(1)(ah). The Kentucky General Assembly recognized that fact when, after the adoption of the FSA, it deviated from the plain meaning of "farm product" by adding "[e]quine interests" to the definition of "farm product" in the Kentucky UCC. *See* KRS 355.9-102(1)(ah)(5); p. 14, *supra*. A 30,000-foot view that Congress "intended . . . to shift the potential burden of loss in cases of the sale of farm products" is insufficient to decide this case.

(A13 (citation omitted)). The Court of Appeals was required to interpret the text, including the word "commodity," which is the most reliable indicator of legislative intent. *See, e.g., Darcy* v. *Commonwealth*, 441 S.W.3d 77, 83-84 (Ky. 2014).

To the extent this Court considers legislative history and policy purposes, it is uncontroverted that Congress sought to protect consumers from "higher . . . prices for meat, milk, and eggs, etc." H. Rep. No. 99-271, Pt. I, at 109 (1985). But that goal obviously has nothing to do with thoroughbreds, which Americans "do not customarily consume . . . at the dinner table." *Shadowlawn Farm* v. *Revenue Cabinet, Commonwealth of Kentucky*, 779 S.W.2d 232, 233 (Ky. App. 1989). Congress was self-evidently not worried about the price of breeding rights in a Triple Crown winner purchased at a steep discount by a buyer such as Orpendale that previously manifested its awareness of the security interest. (*See* A6 n.3; R. 647-649, 661, 663-665, 667, 683, 692-694, Vol. V; R. 735, Vol. VI). And there is no indication whatsoever that Congress intended to curtail lending to the thoroughbred industry by making it easier for sophisticated purchasers of equine collateral to take free of a security interest.

4. The financing agreement in this case does not alter the meaning of the FSA. The Court of Appeals is correct that the agreement provides that, if Zayat Stables "sell[s] any of the Equine Collateral pursuant to the provisions of Section 1324 of the Food Security Act of 1985, 7 U.S.C. 1631," it must "[p]rovide to [MGG] a list of the buyers, commission merchants, selling agents and auctioneers." (R. 818; *see* A16-A17). But that provision does not suggest that the parties intended the FSA to govern the sales—not least because no purchaser asserts that it was listed in the manner the provision contemplates. Further, the parties could not, and did not, alter

the language of the FSA through the financing agreement. Nothing any party says in a financing agreement can turn an inherently unique thoroughbred into a run-of-the-mill commodity.

5. The purchasers have also advanced an argument based on the categories of farm products identified in the FSA. That argument—which the Court of Appeals did not adopt—misconstrues the structure of the statute. (*See* Joint Resp. Opposing Mot. Discretionary Review 6-7). Under the FSA, a farm product is "an agricultural commodity such as wheat, corn, soybeans, or a species of livestock such as cattle, hogs, sheep, horses, or poultry used or produced in farming operations, or a product of such crop or livestock in its unmanufactured state . . . that is in the possession of a person engaged in farming operations." 7 U.S.C. § 1631(c)(5). In that definition, "livestock" is listed in a series of subcategories of "commodit[ies]"—"wheat, corn, soybeans, or a species of livestock"—set off by the words "such as." *Id.* If the purchasers were correct that "livestock" is a separate category from "commodit[ies]," then Congress would have included an "or" before "soybeans" to signal that it was the end of the "such as" series of subcategories of "commodit[ies]." Because Congress put the "or" before "a species of livestock," livestock are covered only if they are "commodities."

None of the other statutes cited by the purchasers during this litigation permit their proposed rewriting of the FSA. (*See* Bemak C.A. Br. 8 n.4). *First*, the definitional section for an unrelated federal price-control statute leaves the category of "nonbasic agricultural commodit[ies]" open-ended without excluding livestock or horses. *See* 7 U.S.C. § 1428(c), (d). *Second*, a definition in the Federal Crop Insurance Act unsurprisingly does not expressly address livestock. *See* 7 U.S.C. § 1518.

Third, the definition of "agriculture" in the Kentucky workers' compensation law is perfectly consistent with "livestock" being a subset of "commodities." The definition discusses commodities that can be "plant[ed]," "cultivat[ed]," "produc[ed]," "grow[n]," "harvest[ed]," and "prepar[ed]": namely, non-livestock commodities. KRS 342.0011(18). It then discusses "raising" livestock. *Id.* That definition by no means suggests that livestock are not commodities.

The USDA regulation cited by the purchasers similarly does not affect the meaning of the statute. (*See* Joint Resp. Opposing Mot. Discretionary Review 7). Even if the regulation purported to do so, it would violate the "core administrative-law principle" that "an agency may not rewrite clear statutory terms." *Utility Air Regulatory Group* v. *EPA*, 573 U.S. 302, 328 (2014); *see also Sutton* v. *Transportation Cabinet*, 775 S.W.2d 933, 934 (Ky. App. 1988). In fact, the regulation does no such thing. It merely creates three categories of farm products for purposes of financing statements: "specific commodities, species of livestock, and specific products of crops or livestock." 9 C.F.R. § 205.106. Those categories do not distinguish "agricultural commodities" from livestock; the regulation uses a different phrase ("specific commodities"), and the purchasers fail to explain why that phrase means the same as the patently broader phrase "agricultural commodities."

6. Finally on this point, it is telling that neither the Court of Appeals nor the purchasers have mustered a single persuasive authority for the proposition that a thoroughbred is a "commodity." The scattered references cited below by the purchasers are all insubstantial. (*See* Bemak C.A. Br. 11-12; LNJ Foxwoods C.A. Br. 11 n.32). The opinion in *Turf Express, Inc.* v. *Mason*, 204 So. 2d 730 (Fla. 1967), is dictum from nearly twenty years before the enactment of the FSA, and the word

"commodity" had no legal significance to the decision. *See id.* at 731. The decision in *In re McKillips*, 72 B.R. 565 (Bankr. N.D. Ill. 1987), which held that breeding, raising, and selling show horses is a "farming operation" within the meaning of Section 101(20) of the Bankruptcy Code, provides no evidence of ordinary meaning; by its own admission, the court did "not confine itself to a natural or traditional, or even a dictionary definition of 'farming operation.'" *Id.* at 568. And a conclusory sentence in an unreasoned order of the Louisiana Public Service Commission, *see CCS Vans, Inc.* No. T-12548, 1974 WL 390232, at *1 (Sept. 11, 1974), and a rhetorical description of thoroughbreds as a "beautiful commodity" in a law-review article, *see* John J. Kropp, J. Jeffrey Landen & Daniel C. Heyd, *Horse Sense and the UCC: The Purchase of Racehorses*, 1 Marq. Sports L.J. 171, 174 (1991), have no persuasive value.

No court in any jurisdiction has ever held in a published opinion that thoroughbreds are farm products for purposes of the FSA or the UCC. To the contrary, at least two federal courts have held that thoroughbreds are not farm products even under the broader definition of that term in the UCC context. *See In re Bob Schwermer & Associates, Inc.*, 27 B.R. 304, 308 (Bankr. N.D. Ill. 1983); *In re Butcher*, 43 B.R. 513, 522 (Bankr. E.D. Tenn. 1984). The Court of Appeals failed to cite, let alone distinguish, those cases. Because thoroughbreds are not farm products under the text of the FSA, this Court should reverse the judgment of the Court of Appeals concerning the FSA.

B. Breeding Rights Are Not Farm Products Within The Meaning Of The Food Security Act

Even if the Court of Appeals were correct that thoroughbreds are farm products under the FSA, breeding rights in thoroughbreds clearly are not. Orpendale and LNJ Foxwoods bought only breeding rights in American Pharoah. In so doing,

they purchased the intangible right to breed a mare to American Pharoah. The right to breed two animals is not "livestock" (or any of the other subcategories of "farm product" in the FSA). 7 U.S.C. § 1631(c)(5). In fact, it makes no sense to call a breeding right a "product" at all. Breeding rights are not a good like "wheat, corn, soybeans, or a species of livestock," or "a product of such crop or livestock in its unmanufactured state (such as ginned cotton, wool-clip, maple syrup, milk, and eggs)." 7 U.S.C. § 1631(c)(5). As a federal court has held in the UCC context, a breeding right is a "farm-related *service*, i.e. the insemination of the mare, for a fee." *Butcher*, 43 B.R. at 521 (emphasis added).

Failing even to cite *Butcher*, the Court of Appeals instead relied on its unpublished decision in *North Ridge Farms, Inc.* v. *Trimble*, No. 82-CA-1305-MR, 37 UCC Rep. Serv. 1280 (1983). But that decision did not analyze the question in this case in any depth. Instead, it simply stated the conclusion that a thoroughbred was a farm product under the Kentucky UCC and that the debtor was "engaged in farming operation, i.e., breeding." *Id.* at 1289. The opinion did not explain why a thoroughbred—let alone the breeding right in a thoroughbred—was a farm product.

Congress did not intend to undermine the thoroughbred industry by making breeding rights in a Triple Crown winner nearly worthless as collateral. The Court of Appeals should have given meaning to all of the words in the statutory definition of a "farm product," including "commodity." At the very least, it should not have treated a breeding right as a "farm product." The ordinary meaning and purpose of the FSA indicate that thoroughbreds (and breeding rights in thoroughbreds) are not "farm products" covered by the FSA.

II. MGG'S CLAIMS AGAINST YEOMANSTOWN STUD ARE NEITHER PROCEDURALLY BARRED NOR TIME-BARRED

This argument is preserved in MGG's response to Yeomanstown Stud's motion to dismiss. (*See* R. 1148-1162, Vol. VIII).

The dual holdings of the Court of Appeals regarding KRS 413.242 and the equitable-tolling doctrine effectively leave MGG and similarly situated creditors with no remedy for the covert sale of equine collateral. The General Assembly could not possibly have intended that result, and this Court should reverse the judgment as to MGG's claims against Yeomanstown Stud.

First, MGG's claims against Yeomanstown Stud are not barred by KRS 413.242. Under that provision, the holder of a security interest in a horse is required to "pursue a remedy against the debtor to the point where a judgment is rendered on the merits or the suit is dismissed with prejudice" before the holder "may bring an action against the purchaser . . . of the equine interest." KRS 413.242. MGG brought *claims* against the purchasers in its action against Zayat Stables, not an independent *action* against the purchasers. The legislative purpose behind Section 413.242 is fulfilled by the former approach, because the circuit court can ensure that claims against purchasers do not move forward until the claims against the debtor are prosecuted to finality. And the contrary interpretation adopted by the Court of Appeals has the unreasonable consequence of making it nearly impossible for creditors to recover from purchasers.

Second, even as it concluded that MGG brought its claims against Yeomanstown Stud too early, the Court of Appeals also concluded that MGG did not bring its action against Yeomanstown Stud soon enough. The deceptive scheme in

this case is an extraordinary circumstance justifying equitable tolling under Kentucky law. The contrary holding of the Court of Appeals is unsupported and decidedly inequitable.

A. MGG's Claims Against Yeomanstown Stud Are Not Barred By KRS 413.242

The Court of Appeals concluded that KRS 413.242 required MGG to litigate its claims against Zayat Stables to judgment before it could bring any claims against Yeomanstown Stud. This Court has never addressed Section 413.242. Under the most natural reading of the statutory text, and in light of the unworkable consequences of the contrary reading, MGG complied with Section 413.242.

The Court of Appeals failed to give effect to the distinction between a "claim" and an "action" when it held that KRS 413.242 requires two "separate" actions against the debtor and the purchaser, the latter of which may not be brought until the first reaches "finality." (A18). An "action" is a "civil or criminal judicial proceeding," but a "claim" is "an interest or remedy recognized by law." *Black's Law Dictionary* 28, 240 (7th ed. 1999). MGG did not bring a separate action against Yeomanstown Stud; it brought an action against Zayat Stables, then amended its complaint to add claims against Yeomanstown Stud. The statutory text permits MGG to do exactly that, and that should have been the end of the matter.

The alternative interpretation adopted by the Court of Appeals produces an unreasonable result, and courts "should not suppose that the legislature intended to be intentionally illogical." *Commonwealth ex rel. Conway* v. *Thompson*, 300 S.W.3d 152, 175 (Ky. 2009) (citation omitted). If creditors were required to prosecute an action against their debtors to finality without including any claims against purchasers, they would often be unable to bring claims against the purchasers within the

two-year limitations period. Here, for example, MGG would have had to uncover Zayat Stables' scheme, secure a final judgment against Zayat Stables, and then bring a separate action against Yeomanstown Stud—all within two years. The General Assembly could not have meant to leave a deceived creditor with such an impossibly small window of time to seek relief from the purchaser or a declaratory judgment as to priority over the collateral.

The Court of Appeals expressed concern that MGG's argument "would effectively render KRS 413.242 meaningless," because it would allow the filing of an action that includes claims against both the debtor and purchaser. (A19). But the circuit court could have delayed adjudication of MGG's claims against Yeomanstown Stud until MGG secured its judgment against Zayat Stables. That would allow the purpose of the statute to be achieved without making it nearly impossible for creditors to bring claims against purchasers of fraudulently sold property.

The superior reading of KRS 413.242 is that MGG was permitted to add claims against the purchasers to its action against Zayat Stables. That reading is also the only practical way to protect a creditor's rights. Because there is a sensible reading that is supported by the statutory text and purpose, this Court should reject the Court of Appeals' interpretation of KRS 413.242.

B. Equitable Tolling Applies To MGG's Claims Against Yeomanstown Stud

The Court of Appeals also erred by holding that MGG was not entitled to equitable tolling. (*See* A25-A26). "Equitable tolling pauses the running of, or tolls, a statute of limitations when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action." *Williams v. Hawkins*, 594 S.W.3d 189, 193 (Ky. 2020) (citation omitted). The running of the

two-year limitations period for MGG's claims against Yeomanstown Stud should be tolled because MGG was reasonably diligent and Zayat Stables' repeated deception was an extraordinary circumstance beyond MGG's control. At the very least, MGG should be entitled to amend its complaint against Yeomanstown Stud to add any facts necessary to support equitable tolling.

1. MGG diligently pursued its rights. It began investigating Zayat Stables as soon as it had reason to believe there had been a violation of the loan agreement. (*See* R. 671-672, Vol. V). It repeatedly sought to talk to purchasers of the breeding rights until it successfully did so. (*See* R. 672, Vol. V). It asked Ahmed Zayat about Zayat Stables' actions. (*See* R. 672-673, Vol. V). And it did all of that even though Zayat Stables and Ahmed Zayat repeatedly denied the sale of collateral, including the sale of El Kabeir more than three years after the fact. (*See* R. 659, 671, 673, Vol. V; R. 998, 1054, Vol. VII). When it discovered Zayat Stables' wrongdoing, MGG promptly filed this case.

The Court of Appeals concluded that equitable tolling was unavailable for a novel reason: MGG did not physically inspect Zayat Stables' property. The Court of Appeals identified no case suggesting that such a burdensome step was required under the doctrine of equitable tolling. Yeomanstown Stud has cited this Court's decision in *Williams*. (*See* Yeomanstown Stud C.A. Br. 15-17). But in *Williams*, this Court merely required "a simple Google™ search" or a "review of [public court records]," not a physical inspection of another's property. 594 S.W.3d at 195. The rule adopted by the Court of Appeals would compel MGG to do far more than seek out "readily and publicly available" information. *Id.* at 196; *see also Jackson* v. *Estate of*

Day, 595 S.W.3d 117, 127 (Ky. 2020) (holding that plaintiffs were not reasonably diligent because they failed to review "readily available information in [a] court file").

The decision below is also inequitable as a matter of first principles. Even if MGG had inspected Zayat Stables' premises, there is no guarantee that it would have discovered the scheme. Thoroughbreds may be absent from their owner's property at any given time for a variety of reasons, including breeding or trips to a veterinarian. (*See* R. 1054, Vol. VII). Indeed, Ahmed Zayat concealed the sale of El Kabeir as late as January 2020 by telling MGG that the horse was "standing in Ireland." (*Id.*). It was precisely because of the difficulty of conducting inspections that MGG rarely took advantage of that right. The Court of Appeals improperly turned that provision on its head and punished MGG for its debtor's fraudulent sale of collateral to Yeomanstown Stud.

2. The second requirement for equitable tolling is also satisfied because Zayat Stables' active concealment of its fraudulent scheme was an extraordinary circumstance beyond MGG's control. When the fact of a plaintiff's injury is concealed, the limitations period should be tolled. *See, e.g.*, *Newberg* v. *Hudson*, 838 S.W.2d 384, 390 (Ky. 1992); *In re Milby*, 875 F.3d 1229, 1232-1233 (9th Cir. 2017). Here, Zayat Stables, Ahmed Zayat, and Justin Zayat repeatedly misrepresented to MGG over several years that Zayat Stables had not sold the collateral, including El Kabeir, despite repeated inquiries and contractual duties to keep MGG informed. (*See* R. 671, 673, Vol. V; R. 1054, Vol. VII).

The Court of Appeals did not deny that Zayat Stables' fraudulent scheme constituted an extraordinary circumstance, but the court discounted it as not "beyond [MGG's] control." (A26 (emphasis omitted)). The Court of Appeals cited no

cases for that proposition, and it is elementary that an "affirmative effort to conceal . . . wrongdoing" is, by its very nature, "external to the plaintiff's control." *Edmonson* v. *Eagle National Bank*, 922 F.3d 535, 552 n.5 (4th Cir. 2019) (internal quotation marks and citation omitted). MGG could not have prevented Zayat Stables' fraudulent scheme because Zayat Stables, Ahmed Zayat, and Justin Zayat all made affirmative efforts to conceal El Kabeir's whereabouts. And even if MGG had inspected Zayat Stables' property, it would still have been possible for Zayat Stables to conceal the sale of El Kabeir in exactly the way it did after being confronted by MGG in January 2020. *See* p. 25, *supra*. The scheme to conceal the sales was thus an extraordinary circumstance beyond MGG's control, and MGG is entitled to equitable tolling.

3. Even if the Court were to conclude that MGG has not alleged facts to support equitable tolling, the dismissal should not be with prejudice. Equitable tolling is a fact-intensive determination. *See, e.g.*, *Holland* v. *Florida*, 560 U.S. 631, 654 (2010); *Lee* v. *Haney*, 517 S.W.3d 500, 506 (Ky. App. 2017). Yet the Court of Appeals denied MGG the opportunity to amend its complaint to address the decision on equitable tolling, let alone the opportunity to take discovery. Because additional facts may exist "which, had they been pleaded, would have cured the defects in the complaint, the proper procedure [would be] to dismiss the complaint with leave to amend." *Boone* v. *Gonzalez*, 550 S.W.2d 571, 574 (Ky. App. 1977). In light of the unusual complexity of the covert transactions, MGG is entitled to address any ruling on equitable tolling by amending its complaint.

CONCLUSION

The judgment of the Court of Appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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