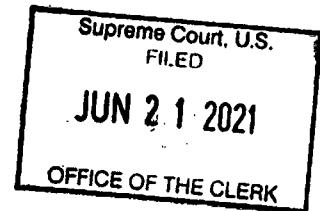


ORIGINAL

No. 20-1804

In the
Supreme Court of the United States
October Term, 20____



In re PETER R. CULPEPPER, Petitioner

PETER R. CULPEPPER,
Appellant - Petitioner,
v.

PROVECTUS BIOPHARMACEUTICALS, INC.,
Appellee - Respondent.

Petition for Writ of Mandamus

PETER R. CULPEPPER
9700 Collier Pass Lane
Knoxville, TN 37922
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Petitioner, Pro Se

QUESTION PRESENTED FOR REVIEW

Whether, under the Federal Arbitration Act (“FAA”), respondent-chancellor abused her discretion in applying the Tennessee Uniform Arbitration Act (“the Act”) when the FAA was expressly mandated by petitioner’s Employment Agreement as drafted by counsel for appellee-respondent, providing for a clear and established legal right to be enforced in petitioner’s filed application for the purpose of seeking vacatur of his arbitration award under the FAA as opposed to the Act.

PARTIES

Peter R. Culpepper
- Appellant - Petitioner

The Honorable Ellen Hobbs Lyle, Chancellor
Davidson County Chancery Court, Part III, Nashville,
Tennessee
- Respondent - Chancellor

Provectus Biopharmaceuticals, Inc.
- Appellee - Respondent

Martha L. Boyd, Esq., Baker, Donelson, Bearman,
Caldwell & Berkowitz, P.C.
- Counsel for Appellee - Respondent

Samuel Lanier Felker, Esq., Baker, Donelson,
Bearman, Caldwell & Berkowitz, P.C.
- Counsel for Appellee - Respondent

RULE 29.6 STATEMENT

Petitioner Peter R. Culpepper is a person and appellee-respondent Provectus Biopharmaceuticals, Inc. is a publicly held corporation.

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PETITION FOR A WRIT OF MANDAMUS

Petitioner Peter R. Culpepper respectfully petitions for a writ of mandamus to review the judgment of the Tennessee Chancery Court for Davidson County.

PRIOR OPINIONS

Petitioner seeks a review of the March 22, 2019 Order of the Tennessee Chancery Court for Davidson County, which is unpublished and is reproduced in the Appendix at A-1. A January 11, 2019 Order referenced in the March 22, 2019 Order is unpublished and is reproduced in the Appendix at A-4.

Petitioner subsequently failed in Tennessee Courts to overturn the ruling. *See Provectus Biopharmaceuticals, Inc. v. Culpepper*, No. M2019-00662-COA-R3-CV, 2020 WL 1867043 (Tenn. Ct. App. Apr. 14, 2020), *perm. app. denied* (Tenn. Aug. 5, 2020). First Tenn. Supreme Court Denial, Appendix at A-10. Petitioner filed a Petition for Writ of Certiorari in this Court on November 3, 2020 raising a federal question regarding Tennessee's adoption of the FAA, which was denied on January 11, 2021. Lastly, Petitioner filed a Petition for Writ of Mandamus in Tennessee, which was denied March 24, 2021, and is unpublished and is reproduced in the Final Tenn. Supreme Court Denial, Appendix at A-11.

JURISDICTION

Petitioner seeks this Court's review of the judgment of the March 22, 2019 Order of the Tennessee Chancery Court for Davidson County under the jurisdiction conferred by 28 U.S.C. § 1651(a).

This petition is timely filed because it was mailed within ninety days of March 24, 2021, the date the petition for mandamus was denied in the highest court below, which was the remaining legal recourse for relief in this matter available to petitioner in Tennessee. Supreme Court Rules 13.1 and 29.2.

CONSTITUTIONAL PROVISION

Supremacy Clause, U.S. Const. art. VI, cl. 2:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

STATUTES INVOLVED

Federal Arbitration Act, 9 U.S.C. § 12:

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

Tennessee Uniform Arbitration Act, Tenn. Code. Ann. § 29-5-312:

Upon application of a party, the court shall confirm an award, unless, within the time limits hereinafter imposed, grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in §§ 29-5-313 and 29-5-314.

STATEMENT OF THE CASE

Procedural History

There are two Tennessee cases pertinent to Petitioner's petition for writ of mandamus that have had mandates issued to lower courts by the Tennessee Supreme Court. One, Petitioner brought a cause of action of alleged legal malpractice against the counsel for the appellee-respondent. *See Culpepper v. Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C.*, No. E2019-01932-COA-R3-CV, 2020 WL 6112985 (Tenn. Ct. App. Oct. 16, 2020), *perm. app. denied*, (Tenn. Mar. 17, 2021). The other is a disputed matter by petitioner regarding his former company that is the subject of this Petition before the Court. *See Provectus Biopharmaceuticals, Inc. v. Culpepper*, No. M2019-00662-COA-R3-CV, 2020 WL 1867043 (Tenn. Ct. App. Apr. 14, 2020), *perm. app. denied* (Tenn. Aug. 5, 2020). The counsel for the appellee-respondent is the same in both instances.

Arbitration Awards 2018

Provectus Biopharmaceuticals, Inc. (hereinafter “Provectus”), appellee-respondent, filed its Petition to Confirm Arbitration Award (“Arbitration”) in the Tennessee Chancery Court for Davidson County pursuant to Tenn. Code Ann. §§ 29-5-312 and 29-5-317 on October 4, 2018. January 11, 2019 Order, Appendix at A-5. Provectus alleged in its Arbitration that it was awarded a recovery in arbitration proceedings filed against petitioner (formerly respondent in lowest court below), Peter R. Culpepper (hereinafter “Culpepper”).

Id., Appendix at A-5. Provectus asserted that the Arbitrator issued an Interim Award on July 12, 2018 pursuant to the Federal Arbitration Act (“FAA”) as required by Culpepper’s Employment Agreement. Interim Award, Appendix at A-12. A final Award likewise pursuant to the FAA was issued on September 12, 2018. Award, Appendix at A-19.

Tennessee Chancery Court of Davidson County Orders
January 11, 2019 Order

Culpepper filed his *pro se* “Answer to Petition to Confirm Arbitration Award” (“Answer”) on November 7, 2018. January 11, 2019 Order, Appendix at A-5. Culpepper timely filed his *pro se* Amended Answer on December 11, 2018. *Id.* at A-6. In the Amended Answer, Culpepper specifically requested “modification or correction of the award.” *Id.* He based his amendment on additional information from the American Arbitration Association. *Id.* Culpepper asserted allegations of a “conflict of interest” with the counsel for Provectus. *Id.* at A-7. Culpepper’s *pro se* efforts to pursue a legal malpractice claim against Provectus’ corporate counsel because of their alleged conflict of interest has resulted in the more recent of the two pertinent opinions upheld by the Tennessee Supreme Court. *See Culpepper*, 2020 WL 6112985. On January 10, 2019, Culpepper secured the assistance of counsel and filed his “Motion to Amend ‘Answer to Petition to Confirm Arbitration Award’ and ‘Amended Answer to Petition to Confirm Arbitration Award’” (hereinafter “Motion to Amend Pleadings”) to further amend his pleading. January 11, 2019

Order, Appendix at A-6. In the Motion to Amend Pleadings, Culpepper requested that the trial court allow the filing of an amended pleading requesting that the court vacate the arbitration award, to provide more detail and clarity to the factual circumstances, and to clarify that he requested that the Tennessee court vacate the Interim Award of July 12, 2018, and the Award of September 12, 2018, pursuant to the provisions of Tenn. Code Ann. § 29-5-313. January 11, 2019 Order, Appendix at A-7 (it was not known by Culpepper at that time that the Act was materially different than the FAA in pertinent instance to his detriment). The trial court denied the Motion to Amend Pleadings filed by Culpepper and granted the Motion for Judgment on the Pleadings filed by Provectus. *Id.* at A-8. Provectus did not clarify to the trial court that the referenced “employment agreement” expressly specified the FAA and not any state law such as under the Tennessee Uniform Arbitration Act (“the Act”). *Id.* at A-5 (The January 11, 2019 Order confirmed and attached the Interim and [final] Awards. *See* Interim Award, Appendix at A-12 and Award at A-19).

March 22, 2019 Order

On February 20, 2019, Culpepper filed a “Motion to Alter or Amend Judgment and Order Pursuant to Rule 59,” which was denied by the trial court. March 22, 2019 Order, Appendix at A-2.

Tennessee Higher Court Appeals 2020 and 2021

Culpepper filed his Notice of Appeal to the Tennessee

Court of Appeals on April 17, 2019, and the Court of Appeals entered its Judgment and Opinion affirming the decision of the trial court on April 14, 2020. *See Provectus*, 2020 WL 1867043. The Court of Appeals held that Culpepper failed to make an application to vacate the arbitration award and failed to state the grounds for vacating the award within 90 days and that the subsequently filed motion and pleadings did not apply to allow relation back to his original pleading. *Id.* at *6. On August 5, 2020, the Tennessee Supreme Court denied the application for permission to appeal by Culpepper. First Tenn. Supreme Court Denial, Appendix at A-10. Culpepper filed a Petition for Writ of Mandamus to the Tennessee Supreme Court on March 15, 2021 which was denied March 24, 2021. Final Tenn. Supreme Court Denial, Appendix at A-11. The Tennessee Supreme Court upheld Culpepper's cause of action for legal malpractice on March 17, 2021. *Id.* at n.1. *See also Culpepper*, 2020 WL 6112985.

United States Supreme Court Petitions 2020 and 2021

Culpepper filed a Petition for Writ of Certiorari in this Court on November 3, 2020, which was denied on January 11, 2021. The instant petition for mandamus relief to this Court is filed June 21, 2021.

Facts

Introduction

Culpepper was employed by Provectus from February 2004 through December 2016, first as its Chief Financial Officer [and Chief Operating Officer] and then as its Interim Chief Executive Officer. *Culpepper*, 2020 WL 6112985, at *10. Culpepper and Provectus had a series of employment agreements over the years, the most recent of which was an Employment Agreement entered into between Provectus and Culpepper dated April 28, 2014 (includes “Chief Operating Officer”). AMENDED AND RESTATED EXECUTIVE EMPLOYMENT AGREEMENT, Appendix at A-26. The Employment Agreement of Culpepper specifically provides under Section 8(b) for arbitration to “be governed by” the FAA and not by any state arbitration law:

(b) Arbitration. Subject to Section 8(a), all Disputes will be submitted for binding arbitration to the American Arbitration Association on demand of either party. Such arbitration proceeding will be conducted in Knoxville, Tennessee, and, except as otherwise provided in this Agreement, will be heard by one (1) arbitrator in accordance with the Commercial Arbitration Rules of the American Arbitration Association then in effect. **All matters relating to arbitration will be governed by the Federal Arbitration Act (9 U.S.C. §§ 1 et. seq.) and not by any state arbitration law.**

AMENDED AND RESTATED EXECUTIVE EMPLOYMENT AGREEMENT, Appendix at A-32 (bolded emphasis added).

Counsel for Provectus drafted Culpepper's Employment Agreement. *Id.* (note lower left of Employment Agreement pages for the counsel Provectus' identifying case and file system markings). On the first page, Provectus is identified as a "Delaware corporation" and Culpepper as "a resident of Knoxville, Tennessee." *Id.* at A-26.

Provectus alleged in its Arbitration that it discharged Culpepper "for cause" based upon an assertion that he had undocumented travel related expenses. Interim Award, Appendix at A-12. Culpepper denies that he was terminated "for cause." *See Culpepper*, 2020 WL 6112985. He alleged a conflict of interest with the counsel for Provectus as his basis to vacate the arbitration award. January 11, 2019 Order, Appendix at A-7.

During the entirety of the arbitration proceedings, Provectus was represented by attorneys of the law firm of Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C. (the "Law Firm" or the "counsel for Provectus") and continued to be represented by the Law Firm in the proceedings before the Tennessee Chancery Court of Davidson County. *Id.* Culpepper was also previously a client of the Law Firm up to and including one day after he was terminated by Provectus, purportedly "for cause." *See Culpepper*, 2020 WL 6112985.

Conflict of Interest and Abuse of Discretion

The basis for the request by Culpepper to apply the FAA instead of the Act for purposes of vacating the arbitration award is because of the strict construction of the language in his employment contract; “All matters relating to arbitration will be governed by the Federal Arbitration Act (9 U.S.C. §§ 1 et. seq.) and not by any state arbitration law.” AMENDED AND RESTATED EXECUTIVE EMPLOYMENT AGREEMENT, Appendix at A-32 (underline for emphasis).

The Law Firm specified the FAA as the governing law in their own drafted Employment Agreement for Culpepper. *Id.* The Law Firm failed to apply the relevant legal premises of the FAA before the respondent-chancellor. January 11, 2019 Order, Appendix at A-4. The respondent-chancellor offered to the Law Firm the opportunity to submit an affidavit responding to the allegations by Culpepper of their “conflict of interest” which the Law Firm declined to provide. *Id.* at A-7 (The Law Firm later in 2019 and 2020 attempted to explain that their “conflict of interest” was somehow waived by Culpepper, although this failed attempt by the Law Firm was not made to the Tennessee Chancery Court of Davidson County. *See Culpepper*, 2020 WL 6112985). The respondent-chancellor abused her discretion in allowing application of the Act rather than the FAA because the FAA was mandated both by Culpepper’s Employment Agreement and the Arbitration. Interim Award, Appendix at A-12.

The Law Firm used the Act rather than the FAA to thwart Culpepper's timely application for vacatur of the arbitration award because the Act is stricter and more specific than the FAA. *See Provectus*, 2020 WL 1867043, at *4 (Regarding the pertinent difference between the Act in Tenn. Code. Ann. § 29-5-312 and the FAA in 9 U.S.C. § 12, the Tennessee Court of Appeals stated, "This difference is significant, because 'grounds' [the Act] is more specific than 'notice' [the FAA].").

Therefore, the respondent-chancellor abused her discretion by applying arbitration law of the state of Tennessee rather than the FAA. Culpepper was ignorant of any difference between the Act and the FAA until he learned the pertinent differences in subsequent legal proceedings. The Law Firm prepared Culpepper's Employment Agreement and then used the Act rather than the FAA in their Tennessee Chancery Court of Davidson County filings in their capacity as counsel for Culpepper's prior company Provectus. The conflict of interest by the Law Firm in legal representation of both Culpepper at the time of his employment at Provectus and Provectus on an ongoing basis contributed directly and proximately to the abuse of discretion of the respondent-chancellor.

Argument

Relief Sought

Culpepper has consistently pled in the lower courts for his application for vacatur of his arbitration award to be heard as permitted by the FAA—nothing more. Therefore, Culpepper seeks this Court to review and reverse the second ruling of the Tennessee Chancery Court of Davidson County to allow his motion to assert a counterclaim to vacate the arbitration award. March 22, 2019 Order, Appendix at A-1.

Arbitration Provision in This Case Expressly Governed by the FAA and Not to the Act

An arbitration clause, such as contained within an employment contract, is generally governed in Tennessee by the Federal Arbitration Act. *Frizzell Constr. Co. v. Gatlinburg, L.L.C.*, 9 S.W.3d 79, 82-84 (Tenn. 1999). Presuming no issues regarding contract formation, the mandatory arbitration provisions for employment-related claims are enforceable in Tennessee when the provisions are within a valid and enforceable agreement. *Allen v. Tenet Healthcare Corp.*, 370 F. Supp. 2d 682, 685-86 (M.D. Tenn. 2005) and *Davis v. Reliance Elec.*, 104 S.W.3d 57, 58-59 (Tenn. Ct. App. 2002), *perm. app. denied* (Tenn. May 5, 2003).

Parties to an arbitration agreement may specify enforcement under either state procedural statutory or common law—also referred to as arbitration law. *See*

Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 590 (2008), *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62-64 (1995), and *Volt Info. Sci., Inc. v. Bd. of Tr. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477-79 (1989). State law may apply provided the pertinent state rules do not conflict with the primary objective of the FAA to enforce agreements to arbitrate. *See DirecTV, Inc. v. Imburgia*, 577 U.S. 47, 53-59 (2015).

However, if the parties intend to replace the FAA with state law, the intent must be clearly expressed. *Mastrobuono*, 514 U.S. at 59-60 (which held that a general choice-of-law provision contained in an agreement is insufficient to invoke that state's arbitration law) and *Owens v. Nat'l Health Corp.*, 263 S.W.3d 876, 882-83 (Tenn. 2007). *See also Coventry Health Care of Missouri v. Nevils*, 137 S. Ct. 1190, 1199 (2017) (the FAA "limits the grounds for denying enforcement of 'written provision[s] in . . . contract[s]' providing for arbitration, thereby preempting state laws that would otherwise interfere with such contracts. §2."). Arbitration clauses must comply with the Act in Tennessee. *See* Tenn. Code Ann. §§ 29-5-301 through 29-5-320. Arbitration agreements are presumed to be "valid, enforceable, and irrevocable" in Tennessee, "save upon such grounds as exist at law or in equity for the revocation . . ." *Id.* at § 29-5-302(a).

Notably, the arbitration clause in Culpepper's Employment Agreement states unequivocally, "All matters relating to arbitration will be governed by the Federal Arbitration Act (9 U.S.C. §§ 1 et. seq.) and not by any state arbitration law." According to the FAA,

“*Notice* of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. 9 U.S.C.A. § 12 (Emphasis added).” *Provectus*, 2020 WL 1867043, at *4. Therefore, “*notice*” under the FAA is governing under Culpepper’s Employment Agreement because the term “*grounds*” is used in the Act as opposed to the term “*notice*” in the FAA. The lower courts have misapplied use of the Act when the FAA was instead required. The Supremacy Clause ensures the preeminence of the FAA when the FAA is the governing law in an agreement. U.S. Const. art. VI, cl. 2.

Burden of Proof on Movant Seeking to Compel Application of the FAA and Not the Act

In Tennessee, the Courts, not arbitrators, resolve disputes regarding whether a valid agreement to arbitrate exists and if the dispute falls within the scope of the agreement. *Tanner v. Am. Bondholder Foundation, LLC*, 2013 WL 6384543, at *2 (M.D. Tenn. Dec. 6, 2013). Furthermore, according to this Court, the burden is on the Petitioner to prove by “clear and unmistakable evidence” the existence of a valid and enforceable contract to arbitrate. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). And, “[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.” *Id.* at 945 (internal citations omitted).

Nevertheless, the FAA was designed in a specific way which courts should not redesign. *See Henry Schein v. Archer and White Sales*, 139 S.Ct. 524 (2019). The FAA has been interpreted as requiring courts to expressly

enforce arbitration agreements according to their terms. *See Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612 (2018). Courts are permitted to refuse to enforce arbitration agreements “upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. However, such grounds have been recognized only for “generally applicable contract defenses, such as fraud, duress, or unconscionability.” *At&t Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (internal citations omitted).

Culpepper and Provectus clearly agreed to enter into an arbitration proceeding as required in Culpepper’s Employment Agreement. The absence of any contract formation issues together with these facts have been stipulated and were not in doubt before the respondent-chancellor. Apparently, the respondent-chancellor did not focus on the FAA because the Law Firm and Provectus cited to the Act. At issue remains the plain language clearly mandated in Culpepper’s Employment Agreement that his claims are arbitrable claims under the FAA because there is no federal statute or regulation that preempts arbitration of Culpepper’s claims under the FAA.

According to the FAA’s plain language, an arbitrable dispute can arise out of either the contract containing the arbitration clause or a transaction evidenced by the contract. *See* 9 U.S.C. § 2. Because the stipulated arbitration proceeding was conducted by the American Arbitration Association as governed by the FAA according to Culpepper’s Employment Agreement, Culpepper may petition for a “[n]otice of a motion to vacate, modify, or correct an award” according to the FAA. *See* 9 U.S.C. § 12. An application for such “notice”

may “make an order vacating the award upon the application of any party to the arbitration—(1) where the award was procured by corruption, fraud, or undue means;” etc. *See* 9 U.S.C. § 10(a).

Culpepper thus has met his burden of proof because of the clearly established legal right to arbitration under the FAA in his contract, including his ability through the FAA to provide “notice” of an application for vacatur where the award was procured as a result of the alleged conflict of interest of the Law Firm.

Presumption in Favor of Arbitration Under the FAA and Not to the Act in this Case

There are key differences between the FAA and the Act in Tennessee, the most germane of which has been addressed in pertinent detail by the Tennessee Court of Appeals. *See Provectus*, 2020 WL 1867043, at *3-5. Central to their Opinion, other than references to the Act and FAA itself, is their analysis of Tennessee cases and those similar in other States. Each of the Tennessee cases addresses arbitration issues where either both the Act and the FAA are implicated by the underlying facts, or by the Act alone. The case of *Provectus* is a case of first impression in Tennessee regarding Culpepper and his argument pursuant to the FAA. 2020 WL 1867043, at *4.

If the FAA had been applied by the respondent-chancellor as governed by Culpepper’s Employment Agreement, there would be no confusion or apparent conflict in this matter for any of the Tennessee courts. Understandably, the lower courts have been led astray from the clear language of Culpepper’s Employment

Agreement because of the conduct of Provectus and the Law Firm. The Tennessee Court of Appeals and the trial court were both under the incorrect assumption that “[t]he parties submitted the dispute to arbitration pursuant to [the Act].” *Provectus*, 2020 WL 1867043, at *1. Further as stated by the Tennessee Court of Appeals:

For its part, Provectus contends the Act treats applications to vacate and applications to modify as separate and distinct. It also contends that the grounds upon which relief is sought must be set forth within the 90-day time frame. Therefore, an application to vacate an award on previously unstated grounds cannot relate back to an application to modify the award. Provectus insists the trial court properly denied Culpepper’s motion to amend on the ground of futility because Culpepper did not file a timely application to vacate the award.

Id. at *2. Provectus is incorrectly advocating for the Act—not the FAA.

Although Culpepper’s Employment Agreement clearly specified governance of arbitration by the FAA, Provectus filed its papers to the lower courts with the knowledge that the Act was materially different from the FAA. Again, for emphasis, as the Tennessee Court of Appeals has stated in response to Culpepper’s caselaw citations (while under the incorrect assumption that the facts were governed by the Act instead of the FAA), “Nevertheless, we are not

persuaded by these decisions, because the language of Tenn. Code Ann. § 29-5-312 is *materially different* from the language found in the parallel provision in the FAA.” *Provectus*, 2020 WL 1867043, at *4 (emphasis added).

Provectus and the Law Firm failed to disclose before the Tennessee courts that the FAA governed the application by Culpepper to vacate the arbitration award. The respondent-chancellor abused her discretion as a result by not allowing Culpepper’s timely application in accordance with the FAA. Provectus clearly chose the FAA to govern the arbitration clause in Culpepper’s Employment Agreement. The Law Firm drafted the contract. There is no ambiguity in the language and the presumption for the FAA to be applied is clear. Provectus and the Law Firm should not now be allowed to selectively ignore the FAA in favor of the Act when it suited them to avoid a proper application by Culpepper for vacatur. Culpepper has a clear legal right for the FAA to be applied as mandated because Culpepper’s legal contractual right as the complaining party has not been enforced.

Appropriateness of Mandamus

According to F. Ferris on Extraordinary Legal Remedies, § 194:

The office of mandamus is to execute, not adjudicate. It does not ascertain or adjust mutual claims or rights between the parties. If the right be doubtful, it must be first established in some other

form of action; mandamus will not lie to establish as well as enforce a claim of uncertain merit. It follows therefore that mandamus will not be granted where the right is doubtful.

Party Denied Right to Arbitrate Under the FAA is Entitled to Mandamus Relief

The History of the Ancient Writ of Mandamus: Mandamus, literally “we command” in Latin, is defined as, “A writ issued by a court to compel performance of a particular act by a lower court or a governmental officer or body, usu. to correct a prior action or failure to act.” *Black’s Law Dictionary*, 1150 (11th ed. 2019) (“The term mandamus . . . seems gradually to have been confined in its application to the judicial writ issued by the kings bench, which has by a steady growth developed into the present writ of mandamus.” (Quoting James L. High, *A Treatise on Extraordinary Legal Remedies* § 2, at 5-6 (1884))).

Thus, this legal maxim is fitting, “quando aliquid mandatur, mandatur et omne per quod pervenitur ad illud.” 5 COKE, 115 (“When anything is commanded, everything by which it can be accomplished is also commanded.”). In order for the writ of mandamus to lie, the petitioner must demonstrate that the act he or she sought to be compelled is required by the law and involves no discretion, and that she has a clear legal right to performance of that act. The command issued by the appropriate higher court then achieves the desired result.

Mandamus in Tennessee and other State and Federal

Courts: The Tennessee Supreme Court has considered the appropriateness of mandamus relief. In *Meighan v. US Sprint Communications Co.*, that court stated, “The writ of mandamus is an extraordinary remedy, whose purpose is to exert the revisory appellate power over the inferior courts where there is no other plain, adequate, and complete method of obtaining the relief to which one is entitled.” 942 S.W.2d 476, 479 (*citing Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980); 52 Am. Jur. 2d *Mandamus* § 12 (1970)). Continuing, “The conclusion is that in extraordinary cases . . . this [court] may, and properly should, issue a writ of mandamus if that action is necessary to protect its jurisdiction or accomplish substantial justice.” *Id.* at 483. Nevertheless, that court did not issue the writ in *Meighan* because it stated that the matter could still be resolved otherwise. As that court stated, “The writ would lie only in the event appropriate relief is requested but denied.” *Id.* In another case, “As this [court] has explained, the issuance of mandamus may be prevented only if another remedy is ‘equally as convenient, complete, beneficial, and effective as mandamus,’ and is ‘sufficiently speedy to prevent material injury.’” *Cherokee Country Club v. City of Knoxville*, 152 S.W.3d 466, 479 (Tenn. 2004) (*citing Meighan*, 942 S.W.2d at 479). Culpepper was not successful in obtaining appropriate relief in Tennessee Courts, including the writ of mandamus, because the highest court in Tennessee ruled it did not have the jurisdiction to hear Culpepper’s Petition. Final Tenn. Supreme Court Denial, Appendix at A-11.

The use of a petition for a writ of mandamus in the context of arbitration appears to be a case of first

impression in Tennessee as is the relation-back provision of Tennessee Rule of Civil Procedure 15.03 noted by the Tennessee Court of Appeals regarding Culpepper's argument. Other State and Federal courts have had the occasion and seen fit to apply writs of mandamus to arbitrations where appropriate. *See* 52 Am. Jur. 2d *Mandamus* § 348 (2021). *See Southland Corp. v. Keating*, 465 U.S. 1 (1984) (although state law invalidated certain federal arbitration provisions, franchisor nevertheless was entitled to arbitrate claims of franchisees where contract provided for arbitration, because federal law validating arbitration provisions preempted state law) and *see General Atomic Co. v. Felter*, 436 U.S. 493 (1978) (a state judge had failed to comply with a prior judgment that he lacked authority under the Supremacy Clause to interfere with a company's absolute right to present its claims to federal forums, including arbitration, and petitioner was granted leave to file a petition for a writ of mandamus against the judge).

In the context of a clear abuse of discretion, note two Texas cases, including, "A party denied the right to arbitrate pursuant to an agreement subject to the FAA does not have an adequate remedy by appeal and is entitled to mandamus relief to correct a clear abuse of discretion." *In re Rubiola*, 334 S.W.3d 220, 223 (Tex. 2011). The Texas Supreme Court also held in the context of a trial court's refusal to properly compel arbitration, "Mandamus will issue if the relator establishes a clear abuse of discretion for which there is no adequate remedy by appeal." *In re 24R, Inc.*, 324 S.W.3d 564, 566 (Tex. 2010). The Texas Court was requested by the relator to "vacate the trial court's order denying its motion to compel arbitration." *Id.*

Mandamus is also appropriate as a remedy for agreements pursuant to the FAA. The Alabama Supreme Court ruled on a matter where the trial court's order was based on state arbitration law instead of the FAA. The Alabama Court then concluded, "The parties' agreement to be governed by the Federal Arbitration Act is express and clear." *Ex parte Palm Harbor Homes, Inc.*, 798 So. 2d 656, 663 (Ala. 2001). And, the relators "have thus shown a clear, legal right to relief." *Id.*

Here in the instant case, Culpepper is likewise requesting this Court to vacate or otherwise reverse the Tennessee Chancery Court of Davidson County's March 22, 2019 Order denying Culpepper's application for vacatur of his arbitration pursuant to the FAA. The Employment Agreement of Culpepper and Provectus to be governed by the FAA is "express and clear."

Mandamus in Cases of First Impression: If a mandamus case relates to a matter of first impression or exceptional importance, it may warrant additional consideration and significance. Of course, mandamus is no substitute if a matter can be resolved in the trial courts. As this Court has stated, "[i]n order to insure that the writ will issue only in extraordinary circumstances this Court has required that a party seeking issuance have no other adequate means to attain the relief he desires." *Allied Chemical Corp.*, 449 U.S. at 35. Culpepper has exhausted all avenues for lower court relief.

Federal courts have issued mandamus in cases involving issues of exceptional importance and first

impression. For example, *see Colonial Times, Inc. v. Gasch*, 509 F.2d 517 (D.C. Cir. 1975) (mandamus was appropriate because the case presented an issue of first impression), *United States v. Hughes*, 413 F.2d 1244 (5th Cir. 1969) (one of the factors that justified the exercise of the “expository and supervisory function” of mandamus included the presence of an issue of first impression), *United States v. United States District Court*, 444 F.2d 651 (6th Cir. 1971) (recognizing its discretion to issue a writ of mandamus when exceptional circumstances exist), and *CBS, Inc. v. Young*, 522 F.2d 234 (6th Cir. 1975) (unassailable application of mandamus).

Notably, the position of this Court is that mandamus is appropriate not only in cases of usurpation of judicial power or clear abuses of discretion, but also when an issue of first impression was manifest. This Court clearly held a writ may be used, “where there is clear abuse of discretion or ‘usurpation of judicial power.’” *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 383 (1953) (internal citation omitted). Citing to *Holland*, this Court expanded on the applicability of its mandamus power to review an “issue of first impression” in order to “settle new and important problems.” *Schlagenhauf v. Holder*, 379 U.S. 104, 111 (1964). The Tennessee issues of first impression regarding the conflict of the FAA and state arbitration law, and also where a new and important problem in the lower courts can exist resulting in an abuse of discretion because of the alleged conflict of interest by the Law Firm, are both in the purview of the duty entrusted to this Court by law in which Culpepper pleads for relief in this Petition.

Culpepper's appeal by permission of *Provectus* to the Tennessee Supreme Court failed under Tenn. R. App. P. 11(a). First Tenn. Supreme Court Denial, Appendix at A-10. Subsequent to that court's denial of Culpepper's permission to appeal *Provectus* is the rendering of the Opinion of the Tennessee Court of Appeals in *Culpepper* that further clarified the alleged conflict of interest of the Law Firm. That latter Opinion was later upheld. In the interim, Culpepper pleaded for reconsideration by the Tennessee Supreme Court of the unique and extraordinary aspects of the conflict of interest that the Law Firm has likewise perpetrated on Tennessee courts by and through their failure to acknowledge that Culpepper's Employment Agreement is governed by the FAA and not any state arbitration law. Nevertheless, Tennessee's Supreme Court lacked jurisdiction to further consider Culpepper's pleadings. Only this Court remains for Culpepper to obtain relief.

PRAYER

For the reasons set forth above in this Petition for Writ of Mandamus, Peter R. Culpepper, appellant-petitioner, respectfully requests that this Court vacate or otherwise reverse the rulings of the Tennessee Chancery Court of Davidson County and the Honorable Ellen Hobbs Lyle, respondent-chancellor, thereby granting Culpepper's Motion to Amend Pleadings, denying Proiectus' Motion for Judgment on the Pleadings and confirmation of the arbitration award, and remand the case to the trial court for a hearing on the merits of the application of Culpepper to vacate the arbitration award.

In conclusion, Petitioner respectfully prays that a writ of mandamus be issued by this Court directed to the respondent-chancellor directing her to vacate her March 22, 2019 Order. Culpepper has no adequate remedy at law and prays for mandamus relief from this Court to enforce the arbitration agreement as governed by the FAA, costs, and grant all further relief, both general and special, as mandated by the premises, and as justice requires.

Respectfully submitted,



Peter R. Culpepper, Petitioner
Pro Se
9700 Collier Pass Lane
Knoxville, Tennessee 37922
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APPENDIX

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IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
20TH JUDICIAL DISTRICT, DAVIDSON COUNTY

PROVECTUS BIOPHARMACEUTICALS,)
INC.,)
Petitioner,)
v.)) CASE NO. 18-1077-III
PETER R. CULPEPPER,)
Respondent.)

**ORDER DENYING RESPONDENT PETER R. CULPEPPER'S MOTION TO ALTER
OR AMEND JUDGMENT AND ORDER PURSUANT TO RULE 59**

This matter came to be heard on March 22, 2019, upon Respondent Peter R. Culpepper's ("Respondent" or "Culpepper") Motion to Alter or Amend Judgment and Order Pursuant to Rule 59. Based on the pleadings, briefs, argument of counsel, and the entire record in this cause, Respondent's Motion to Alter or Amend is not well taken and is denied. The Court stands by its previous Order Confirming the Arbitration Award and Granting Petitioner's Motion for Judgment on the Pleadings and Judgment Confirming the Arbitration Award. As the Court previously held, Respondent failed to file an application to vacate the September 12, 2018 arbitration award (the "Arbitration Award") within 90 days of receiving such award as required by Tenn. Code Ann. § 29-5-313(b). Respondent failed to show the Court made a clear error of law in granting Petitioner Provectus Biopharmaceuticals, Inc.'s ("Petitioner" or "Provectus") Motion for Judgment on the Pleadings and denying Respondent's Motion to Amend "Answer to Petition to Confirm Arbitration Award" and "Amended Answer to Petition to Confirm Arbitration Award."

Based on the pleadings, the Arbitration Award was issued on September 12, 2018 and any application to vacate the Arbitration Award was required to be filed by December 11, 2018 pursuant to Tenn. Code Ann. § 29-5-313(b). Respondent failed to file an application to vacate the Arbitration Award by December 11, 2018. As such, Respondent's attempt to amend his previously filed Answer and Amended Answer to include a counterclaim to vacate the Arbitration Award on January 10, 2019 was untimely. Rule 15.01 of the Tennessee Rules of Civil Procedure is not applicable to the current facts before the Court because the January 10, 2019 Motion to Amend to assert a counterclaim to vacate the Arbitration Award was Respondent's first attempt to vacate the Arbitration Award. The Court finds the authority cited by Respondent is distinguishable from the facts before the Court. Given the limited purview of the Court to review arbitration awards under the Tennessee Uniform Arbitration Act and the State of Tennessee's policy to confirm arbitration awards, the Court finds the Arbitration Award was required to be confirmed in light of the pleadings before the Court and Respondent's failure to timely file an application to vacate the Arbitration Award.

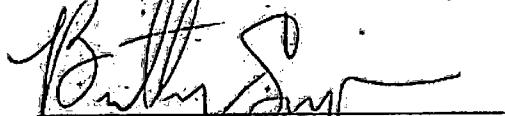
IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED Respondent's Motion to Alter or Amend Judgment and Order Pursuant to Rule 59 is **DENIED**.

IT IS SO ORDERED this ____ day of March, 2019.

CHANCELLOR ELLEN LYLE

Submitted by:

BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ, P.C.

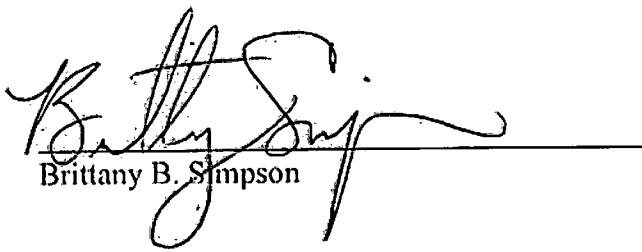


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served by U. S. Mail, postage prepaid, and email on this the 26th day of March, 2019, to the following:

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**IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
20TH JUDICIAL DISTRICT, DAVIDSON COUNTY**

PROVECTUS BIOPHARMACEUTICALS,)
INC.,)
)
Petitioner,)
)
v.)
)
PETER R. CULPEPPER,)
)
Respondent.)

CASE NO. 18-1077-III

**ORDER CONFIRMING THE ARBITRATION AWARD AND GRANTING
PETITIONER'S MOTION FOR JUDGMENT ON THE PLEADINGS**

This matter came to be heard on January 11, 2019 upon Petitioner Provectus Biopharmaceuticals, Inc.'s ("Petitioner" or "Provectus ") Motion for Judgment on the Pleadings, requesting the Court to confirm the arbitration awards that are the subject of Petitioner's Petition to Confirm the Arbitration Award (the "Petition") in this cause. At the hearing, Petitioner was represented by the law firm of Baker, Donelson, Bearman, Caldwell, & Berkowitz, PC and Respondent Peter R. Culpepper ("Respondent" or "Culpepper") was represented by Thomas M. Leveille of the law firm of Tarpy, Cox, Fleishman & Leveille, PLLC. The day before the hearing, Respondent filed an Opposition to the Motion for Judgment on the Pleadings, a Motion to Amend Answer, and a proposed Second Amended Answer and Application to Vacate Arbitration Award. Respondent also filed a Motion to Excuse Compliance with Local Rule 26.04 requesting the Court to accept the late-filed Opposition to the Motion for Judgement on the Pleadings. Petitioner was consulted and agreed all motions could be heard at this hearing, despite lack of compliance with Local Rules, and the Court granted Respondent's Motion to Excuse Compliance with Local Rule 26.04.

It appears to the Court, from the pleadings, briefs, argument of counsel, and the entire record in this cause that Petitioner's Motion for Judgment on the Pleadings is well-taken and should be granted. It further appears that Respondent's Motion to Amend Answer and to file a Counterclaim to Vacate the Arbitration Award is futile and is accordingly denied. The Court makes the following findings and conclusions:

On October 4, 2010, Petitioner filed its Petition to Confirm Arbitration Award, pursuant to Tenn. Code Ann. § 29-5-312 and § 29-5-317, requesting the Court confirm the arbitration awards attached to the Petition as Exhibits B and C (hereinafter collectively referred to as the "Final Award"). Exhibit B is a detailed Interim Award, issued July 12, 2018, finding that Culpepper's termination by Provectus was for cause under his employment agreement and granting monetary recovery to Provectus for Culpepper's improperly obtained expense reimbursement and for amounts owed under a previously executed settlement agreement. Exhibit C was a second detailed Award, issued September 12, 2018, granting Provectus recovery for certain attorneys' fees and costs. The amount of the Final Award in favor of Provectus totaled \$2,819,019.87, with daily interest continuing to accrue pursuant to the terms of the Final Award.

On or around November 7, 2018, Respondent proceeding *pro se*, filed his Answer to the Petition, admitting all material allegations, with the limited exception that Respondent disputed Petitioner's claim for certain items of pre-judgment interest. The initial Answer did not seek to vacate or modify the Final Award. Petitioner responded on November 15, 2018 by filing the Motion for Judgement on the Pleadings that forgoes Petitioner's request for prejudgment interest with respect to the items that Respondent disputed in his Answer and requesting the Court to immediately confirm the Final Award and enter a judgment in the amount of \$2,819,019.87, plus

accruing interest, plus Provectus's costs and attorneys' fees in filing this action. The original hearing date of the Motion for Judgment on the Pleadings was continued at the request of Respondent and reset for December 14, 2018.

On December 10, 2018, Respondent filed a Motion to Request Further Continuance of Hearing Date. On December 11, 2018, Respondent filed an Amended Answer. Respondent did not seek leave by motion to file an amendment to his answer as required under Rule 15.01 of the Tennessee Rules of Civil Procedure or set any hearing to request leave to seek an amendment. The Amended Answer provides for two affirmative defenses. The "First Affirmative Defense" states, "Pursuant to T.C.A. § 29-5-314, Mr. Culpepper requests modification or correction of the award, to the extent that additional information has been obtained by him regarding this matter from the American Arbitration Association subsequent to his previous Answer to this Court." The "Second Affirmative Defense" deals with Respondent's request for a continuance so that he could have additional time to retain counsel. Respondent's Amended Answer was not styled as an application to vacate or modify the Final Award, did not contain a request pursuant to Tenn. Code Ann. §29-5-313 to vacate the Final Award, and failed to provide specific grounds for modifying the Final Award under Tenn. Code Ann. § 29-5-314. The Court granted the Motion to Request Further Continuance and the Motion for Judgment on the Pleadings was continued until January 11, 2019.

On January 10, 2019, Respondent filed a Motion to Amend "Answer to Petition to Confirm Arbitration Award" and "Amended Answer to Petition to Confirm Arbitration Award" ("Motion to Amend"). Attached to the Motion to Amend was a Proposed Second Amended and Restated Answer to Petition to Confirm Arbitration Award and Application to Vacate the Arbitration Award. In this filing, Respondent argued for the first time that the Arbitration Award

should be vacated pursuant to Tenn. Code Ann. § 29-5-313. Tenn. Code Ann. § 29-5-313(b) provides that an application to vacate an arbitration award under Tenn. Code Ann. § 29-5-313 must be made within ninety (90) days after delivery of a copy of the award to the applicant.¹ The Final Award was issued on September 12, 2018 and any application to vacate the Final Award was required to be filed by December 11, 2018 pursuant to Tenn. Code Ann. § 29-5-313(b).

Based on the foregoing, the Motion for Judgment on the Pleadings to Confirm the Arbitration Award is granted. The Court dismisses Respondent's argument that Rule 15.01 of the Tennessee Rules of Civil Procedure should operate to permit amendment to assert a claim to vacate the Arbitration Award. The explicit wording of Tenn. Code Ann. § 29-5-313(b) indicates to the Court that Rule 15.01 of the Tennessee Rules of Civil Procedure does not apply to the facts before the Court. The Court finds there was not a timely application to vacate the Final Award, and therefore the Respondent's Motion to Amend is denied as futile.

Petitioner's counsel may file an affidavit responding to the allegations of a "conflict of interest" located in the Proposed Second Amended and Restated Answer to Petition to Confirm Arbitration Award and Counterclaim to Vacate the Arbitration Award. Due to the late filings by Respondent, Petitioner should have an opportunity to put in the record their version of the facts relating to Respondent's allegations.

A true and correct transcript of the Court's January 11, 2019 ruling is attached as **Exhibit A** and incorporated into this Order. **IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED** that:

1. Respondent's Motion to Excuse Compliance with Local Rule 26.04(e) is **GRANTED**.

¹ Tenn. Code Ann. § 29-5-313(b) provides certain exceptions for the 90 day deadline to file an application to vacate. Respondent has not asserted any of the exceptions, and none of the exceptions are applicable to the current facts before the Court.

2. Respondent's Motion to Amend Answer to Petition to Confirm Arbitration Award and Amended Answer to Petition to Confirm Arbitration Award is **DENIED**.

3. Petitioner's Motion for Judgment on the Pleadings to Confirm the Arbitration Award is **GRANTED** and a Judgment Confirming Arbitration Award shall be submitted for the Court's execution in accordance with the Final Award attached as Exhibits B and C to the Petition.

4. This Order confirms the Final Award which is attached and incorporated into this Order as **Collective Exhibit B**. This action shall remain open solely for the purpose of post-judgment discovery in the manner as outlined in the contemporaneously filed Post-Judgment Scheduling Order.

IT IS SO ORDERED this ____ day of January, 2019.

CHANCELLOR ELLEN LYLE