No. 20-663

**IN THE**

**Supreme Court of the United States**

PETER R. CULPEPPER, Petitioner,

v.

PROVECTUS BIOPHARMACEUTICALS, INC., Respondent.

November 3, 2020.



On Petition For Writ Of Certiorari

To The Court of Appeals of Tennessee

# PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

The Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq., was enacted for the purpose of ensuring that arbitration agreements are valid and enforced. The FAA covers employment agreements that require arbitration to resolve work-related disputes. Congress intended the FAA to protect the enforcement of arbitration agreements as agreed to by the contracting parties. Most states have enacted laws that uphold the validity of arbitration agreements; however, numerous legal questions have arisen that resulted in several cases before the Court. A case of first impression in the State of Tennessee is an unresolved legal question. The FAA provides, "Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or [her] attorney within three months after the award is filed or delivered." 9 U.S.C. § 12. However, Tennessee state law, Tenn. Code Ann. § 29-5-312 provides, "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[.]" The difference between the FAA and the adoption of the FAA by the State of Tennessee is significant, because "grounds" is more specific and unyielding to proper dispute than "notice." The FAA merely requires notice of a motion to vacate or modify within the 90-day time limit; whereas, § 312 mandates that a dissatisfied party assert *all* relevant grounds for modification or vacation.

The question presented is: Whether a state arbitration law that provides a stricter mandate than Congress intended is preempted by the Federal Arbitration Act and the Supremacy Clause, U.S. Const. art. VI, cl. 2.

## RULE 29.6 STATEMENT

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

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Peter R. Culpepper respectfully petitions for a writ of certiorari to review the judgment of the Tennessee Court of Appeals.

## OPINIONS BELOW

The opinion of the Tennessee Court of Appeals (Pet. App. 1a-10a) is not published in an official or regional reporter but is available at 2020 WL 1867043. The case is *Provectus Biopharmaceuticals, Inc. v. Culpepper,* No. M2019-00662-COA-R3-CV (Tenn. App., Nashville, Apr. 14, 2020). The Supreme Court of Tennessee's order denying permission to appeal (Pet. App. 11a) is not published. A related opinion of the Tennessee Court of Appeals (Pet. App. 12a-30a) is not published in an official or regional reporter but is available at 2020 WL 6112985. The case is *Culpepper v. Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C., et al,* No. E2019-01932-COA-R3-CV (Tenn. App., Knoxville, Oct. 16, 2020). Relevant orders of the Chancery Court for Davidson County, Tennessee (Pet. App. 31a-39a) are not published.

## JURISDICTION

The judgment of the Tennessee Court of Appeals was entered on April 14, 2020. Pet. App. 1a. The Supreme Court of Tennessee denied permission to appeal on August 5, 2020. Pet. App. 11a. On November 3, 2020, Petitioner filed a petition for a writ of certiorari to this Court, which has jurisdiction pursuant to 28 U.S.C. § 1257(a).

## RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

The relevant constitutional and statutory provisions are reproduced at Pet. App. 40a.

## INTRODUCTION

Every day, Respondent Provectus Biopharmaceuticals, Inc. struggles adrift without a Chief Executive Officer ("CEO"). Its frustrated stockholders—and the public-at-large because of stalled development of its potentially lifesaving therapies—suffer anemic corporate progress after Provectus wrongly terminated its last CEO, Petitioner Peter R. Culpepper, in December 2016 because of the alleged misconduct of its corporate counsel. Remarkably, *Culpepper and the Court of Appeals of Tennessee at Knoxville* agree on the alleged misconduct of Provectus' corporate counsel as of October 2020 as pled by Culpepper. As the Court of Appeals of Tennessee held, "Upon our review of the pleadings and acceptance as true of all well-pleaded facts contained in the plaintiff's [Culpepper's] complaint and the reasonable inferences that may be drawn therefrom, we [the Court of Appeals of Tennessee] determine that the plaintiff has pled sufficient facts in support of his claim of legal malpractice." Pet. App. 12a. The corporate counsel allegedly committed legal malpractice in their co-representation of Culpepper in 2016 by fabricating evidence for Provectus to terminate him without either notice to him or his knowledge of any conflict. The corporate counsel continued to represent Provectus during the arbitration hearing of Culpepper in May 2018 when fraudulently concealed evidence produced by a third-party post-discovery revealed the alleged legal malpractice of the corporate counsel.

But the Court of Appeals of Tennessee at Nashville held earlier in April 2020 that Provectus could erroneously rely on the Tennessee Uniform Arbitration Act instead of the Federal Arbitration Act under 9 U.S.C. §§ 1 *et. seq. when the two laws conflict.* The FAA is clearly required under the Amended and Restated Executive Employment Agreement which was prepared by the corporate counsel for Culpepper. The holding by the court in April is obviously incorrect to apply conflicting state arbitration law, and its holding also conflicts with federal decisions applying Rule 15 of the Federal Rules of Civil Procedure to cases decided under the FAA. The strict mandate of the Tennessee Act as opposed to the more well-balanced judicial proceedings favored by the FAA thwarted Culpepper's efforts to present evidence to the Tennessee courts to consider the merits of the arbitration award which was procured by corruption, fraud, or other undue means because of the corporate counsel's alleged legal malpractice. The court recognized it was unaware of any decisions in Tennessee or other state courts that directly address this issue of whether to apply Rule 15 to a motion to vacate an arbitration award, yet the court persisted to apply the Tennessee Act which is materially different from the language found in the parallel provision in the FAA. The Supremacy Clause, U.S. Const. art. VI, cl. 2, the FAA, and common sense

require that Provectus hear evidence to determine whether the arbitration award should be vacated. Tennessee cannot simply exempt itself from the requirements of federal law by pointing to a conflicting state law—particularly when that state law is supposed to implement the federal law. This Court should grant the petition for writ of certiorari for plenary review or for summary reversal to bring the State of Tennessee into line with the rest of the country in this important area of contract law. The drafter of the contract—Provectus' corporate counsel—is expressly arguing against the FAA's proper application because state law favors its improper use in their legal arguments to win at any cost.

## STATEMENT

Provectus Biopharmaceuticals, Inc. (hereinafter "Provectus"), Respondent, filed its Petition to Confirm Arbitration Award ("Petition") in the Davidson County Chancery Court pursuant to Tenn. Code Ann. § 29-5-312 on October 4, 2018. Provectus alleges in its Petition that it was awarded a recovery in arbitration proceedings filed against Petitioner Peter R. Culpepper ("Culpepper"). Provectus asserts that the Arbitrator issued an Interim Award on July 12, 2018 pursuant to the FAA, and a final Award pursuant to the FAA on September 12, 2018. Pet. App. 51a-64a. Culpepper filed his *pro se* "Answer to Petition to Confirm Arbitration Award" ("Answer") on November 7, 2018. In the Answer, Culpepper admitted the issuance of the Interim Award and the final Award but specifically requested "modification or correction of the award." The request for modification or correction contained in the original Answer filed by Culpepper was directed at the request by Provectus for an award of pre-judgment interest while Culpepper alleged the impropriety of the Arbitrator directly to the American Arbitration Association ("AAA"). Culpepper filed his *pro se* "Amended Answer to Petition to Confirm Arbitration Award" on December 11, 2018. In the Amended Answer, Culpepper specifically requests that "this Court review the award." In addition to his previous request for modification or correction in relation to pre-judgment interest, Culpepper asserted in the Amended Answer that he had filed a complaint with the AAA "alleging impropriety of the Arbitrator." Culpepper also asserted that he was formerly a client of the attorneys for Provectus and that counsel for Provectus had a conflict of interest in proceeding against Culpepper. Culpepper's *pro se* efforts to pursue a legal malpractice claim against Provectus' corporate counsel because of their conflict of interest has resulted in the more recent opinion by the Tennessee Courts of Appeal. Pet. App. 12a-30a.

On January 10, 2019, Culpepper 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. In the Motion to Amend Pleadings, Culpepper requested that the 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 requests 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, which were understood to be accordance with the FAA as required in the Amended and Restated Executive Employment Agreement by Provectus' corporate counsel. Pet. App. 47a. In an Order entered January 23, 2019, the trial court denied the Motion to Amend Pleadings filed by Culpepper and granted the Motion for Judgment on the Pleadings filed by Provectus. In ruling on the Motion to Amend Pleadings, the Court held as follows:

> 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.

Pet. App. 34a. The Court entered its Judgment Confirming Arbitration Award on the same day awarding money judgment to Provectus on the arbitration award in the amount of $2,625,028.86.

On February 20, 2019, Culpepper filed a "Motion to Alter or Amend Judgment and Order Pursuant to Rule 59." The Motion to Alter or Amend was denied by the trial court by Order entered on April 1, 2019. Pet. App. 37a-39a. In its Order, the trial court found that "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." Culpepper filed his Notice of

Appeal to the Court of Appeals on April 17, 2019. On April 14, 2020, the Court of Appeals entered its Judgment and Opinion affirming the decision of the trial court. Pet. App. 1a-10a. The Tennessee 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. Pet. App. 8a-9a. On August 5, 2020, the Supreme Court of Tennessee denied the application for permission to appeal by Culpepper. Pet. App. 11a.

## STATEMENT OF THE FACTS

Culpepper was employed by Provectus from February 2004 through December 2016, first as its Chief Financial Officer, shortly thereafter also its Chief Operating Officer, and then as its Interim Chief Executive Officer. Culpepper and Provectus had a series of employment agreements over the years prepared by Provectus' corporate counsel, the most recent of which was an Employment Agreement entered into between Provectus and Culpepper dated April 28, 2014. Pet. App. 41a-50a. Provectus alleges in its Petition that it discharged Culpepper "for cause" based upon an assertion—alleged as fabricated—that he had obtained inappropriate and undocumented travel advances and reimbursements totaling over $300,000.00 over a three-year period. Culpepper denies that he was terminated for cause and asserts in his Answer and subsequent legal action against Provectus' corporate counsel that the stated reason was "merely the purported reason for his termination." Pet. App. 92a. During the entirety of the arbitration proceedings and Culpepper's nearly thirteen (13) employment at Provectus, Provectus was represented by attorneys of the law firm of Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C. (the "Law Firm" or "Baker Donelson" or "the Baker Firm") and continued to be represented by the Law Firm in the proceeding before the Davidson County Chancery Court and Tennessee Court of Appeals. Pet. App. 92a. Culpepper was also previously a client of Baker Donelson up to and including one day after he was terminated purportedly "for cause" by Provectus because of the Law Firm's alleged legal malpractice. Pet. App. 12a-30a.

Unknown to Culpepper, while Culpepper was a client of the Law Firm, attorneys of the Law Firm had been involved with investigations of Culpepper and had been interviewed by a fact and expert witness who

ultimately testified at the arbitration hearing relating to the "for cause" termination of Culpepper. Pet. App. 93a. Also unknown to Culpepper at the time, one or more attorneys of the Law Firm recommended to the Board of Directors of Provectus the termination of Culpepper "for cause" on December 27, 2016, while at the same time representing Culpepper individually. Pet. App. 93a. During the arbitration proceedings, Culpepper sought discovery from Provectus including the production of documents from Provectus and Provectus, acting through the Law Firm, produced a number of documents. Three days prior to the beginning of the arbitration hearing, Provectus, acting through the Law Firm, produced additional documents that had not been produced in the original production months earlier. Included within the documents produced were notes from the expert witness of Provectus that reflected an interview by an investigator of Lori B. Metrock, an attorney with the Law Firm, during which the attorney discussed her communications with Culpepper and discussed her impressions of Culpepper including her impression that Culpepper was "negligent." Pet. App. 94a.

Lori B. Metrock also informed the investigator that Culpepper had been kept by Provectus on advice of counsel in order to answer questions by the Securities and Exchange Commission. Culpepper had no knowledge as to the interview of Lori B. Metrock by the investigator or of the existence of the notes of the interview until three days prior to the beginning of the arbitration hearing. Pet. App. 94a. Provectus also produced during the Arbitration Proceedings the minutes of the Meeting of the Board of Directors of Provectus that occurred on December 27, 2016, but the minutes of the meeting were heavily redacted. The parts not redacted reflected that the "directors then extensively discussed Mr. Culpepper's status in the Company and the results of the investigation." Pet. App. 94a. The actual minutes of the discussion are redacted so Culpepper has been unable to identify what was said. It is clear from the unredacted portions of the minutes, however, that both Lori B. Metrock and the expert witness were present for the meeting of the Board of Directors. Pet. App. 94a. The Law Firm terminated its representation of Culpepper by letter directed to Culpepper dated December 28, 2016, one day after recommending his termination for cause. The Law Firm represented Culpepper individually at the same time it was participating in an investigation related to Culpepper and at the time lawyers of the Law Firm recommended the termination of Culpepper "for cause." Pet. App. 95a. At the beginning of the arbitration hearing, counsel for Culpepper addressed the recently discovered circumstances with the arbitrator and requested that the expert witness be excluded from testifying at the hearing. Pet. App. 95a. The

arbitrator declined to grant the request of Culpepper in this regard and declined to allow access to the redacted portions of the Board minutes. Pet. App. 95a. These factual circumstances are the basis for the request by Culpepper to vacate the arbitration award.

## REASONS FOR GRANTING THE WRIT

This case involves a direct conflict between state and federal laws governing arbitration to resolve disputes in the United States. Arbitration should be viewed as an expeditious and economical alternative to litigation. However, when an arbitration award has been procured by corruption, fraud, or other undue means, the Federal Arbitration Act provides an appropriate safety value upon proper notice to vacate the award and proceed anew. The state court held that the state law must prevail in the face of such a conflict; *i.e.*, that the state law preempts the conflicting federal law.

The Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, prohibits unjust arbitration awards based on sufficient notice of a motion to vacate, modify, or correct an award. Tennessee asserts that state law gives it discretion to *ignore* both the FAA and the Employment Agreement of Culpepper established by federal law when it sees fit. The Tennessee Court of Appeals acknowledged that the State's interpretation of state law is directly contrary to the FAA and to federal decisions construing the FAA. The court nevertheless held that the state's interpretation of the state law that purports to implement the FAA preempts the requirements of the FAA and the clear choice of federal law as drafted by the conflicted Law Firm of Baker Donelson in the Employment Agreement. The decision of the court is plainly incorrect and it conflicts with decisions of federal courts to consider these issues. This Court should grant the petition for a writ of certiorari for plenary review or summary reversal.

### I. The Decision Below Directly Conflicts With Decisions Of Multiple Federal Courts.

The Tennessee Court of Appeals held that a state law intended to implement the FAA preempts the requirements of the FAA itself when the state law provides *less* protection from unjust arbitration awards for contracting parties residing within the United States. That decision is contrary to law and logic. It also conflicts with decisions from multiple federal courts. If the

decision below is left undisturbed, the FAA—a statute that Congress enacted to establish "a national policy favoring arbitration," *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984)—will simply not apply to the State of Tennessee's delegated authority to properly implement the FAA and fairly adjudicate Employment Agreements expressly mandating application of the FAA. In 2001, this Court confirmed that the FAA also covers employment agreements that require arbitration to resolve work-related disputes. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001). This Court's intervention is necessary to ensure that federal arbitration and employment contract mandates are not simply discarded in the State of Tennessee.

Rule 15 of the Tennessee Rules of Civil Procedure applies to the Motion to Amend Pleadings filed by Culpepper to allow the amended request to vacate the arbitration award to relate back to the original request filed by Culpepper within the ninety-day period.

The Tennessee courts in this case did first consider the Motion to Amend Pleadings prior to ruling on the Motion for Judgment on the Pleadings but denied the Motion to Amend Pleadings (and thus did not conduct the analysis to test the legal sufficiency of the counterclaim to vacate) on the basis that the requested amendment would be futile because there was no timely request to vacate. In ruling on the Motion to Amend Pleadings, the court held as follows:

> The [c]ourt 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 [c]ourt that Rule 15.01 of the Tennessee Rules of Civil Procedure does not apply to the facts before the [c]ourt. The [c]ourt finds there was not a timely application to vacate the Final Award, and therefore the Respondent's Motion to Amend is denied as futile.

Pet. App. 34a. The court thus held that Rule 15.01 is not applicable in the context of the Tennessee Uniform Arbitration Act to allow an amendment of a pleading that relates back to the original pleading filed seeking to modify, correct, or vacate an arbitration award.

Pursuant to Rule 15.03 of the Tennessee Rules of Civil Procedure, "[w]henever the claim or defense asserted in amended pleadings arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading." Tenn. R. Civ. P. 15.03. Rule 15.03 "is constructed liberally in order to promote the consideration of claims on their merits." *Vincent v. CNA Ins. Co.*, 2002 WL 31863290 at p. 3 (Tenn. Ct. App. Dec. 23, 2002). The goal behind Rule 15 is "to ensure that cases and controversies be determined upon their merits and not upon legal technicalities or procedural niceties." *Doyle v. Frost*, 49 S.W.3d 853, 856 (Tenn. 2001) (quoting *Karash v. Pigott*, 530 S.W.2d 775, 777 (Tenn. 1975)).

Whether Rule 15 applies to applications filed under the Tennessee Uniform Arbitration Act appears to be an issue of first impression in Tennessee. The weight of authority in the Federal Courts, however, addressing the analogous Federal Arbitration Act and the Federal Rules of Civil Procedure is that Rule 15 does apply in relation to motions to vacate, modify, or correct arbitration awards. The Courts of Tennessee have stated that it is appropriate to look to interpretations of the Federal Rules of Civil Procedure for guidance when there is no Tennessee authority under the Tennessee Rules of Civil Procedure. *See Thomas v. Oldfield*, 279 S.W.3d 259, 262, n.3 (Tenn. 2009). The Respondent in the case at hand has pointed to the language of Tenn. Code Ann. §29-5- 313(b) in arguing that Rule 15.01 does not allow an amendment to an application to vacate, modify, or correct an arbitration award after the ninety-day period for making application has run. Tenn. Code Ann. § 29-5-313(b) provides, in relevant part, that "[a]n application under this section shall be made with ninety (90) days after delivery of a copy of the award to the applicant...." Tenn. Code Ann.§ 29-5-313(b).

Section 12 of the FAA contains the following analogous language to the Tennessee Act: "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." 9U.S.C. § 12. In construing this language, under the FAA a number of Federal Courts have ruled that Rule 15 of the Federal Rules of Civil Procedure applies to allow amendments filed after the ninety-day period to relate back to an initial filing within the ninety-day period. The leading case on the issue is *Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378 (11th Cir. 1988). An arbitration award had been entered against the appellant in that case based upon statutory violations by the appellant relating to the

investment account of the appellees. *Bonar* 835 F.2d at 1380-81. Within the three-month period allowed under the FAA, the appellant filed its original motion to vacate or modify the arbitration award alleging several issues but making no allegations of fraud. *Id.* at 1381. The appellants subsequently discovered that an expert witness for the appellees had committed perjury during the arbitration hearing. *Id.* After the three-month period ran, the appellant filed an amended motion to vacate or modify the arbitration award adding the grounds that the award was procured through fraud. *Id.* The trial court denied the motion to amend filed by the appellant and entered a final judgment based upon the arbitration award. *Id.* The appellants subsequently appealed. *Id.*

In addressing the decision by the district court, the Eleventh Circuit Court of Appeals framed the issue as follows: Thus, the issue is whether an amended motion to vacate an arbitration award, filed outside of the three month period and raising additional grounds for vacation, is deemed timely if the original motion to vacate was timely. In challenging the amended motion as untimely, the appellees admit that they have found no cases deciding this issue. Nevertheless, they urge, with no support from the legislative history, that "the [Arbitration Act] does not contemplate a procedure where a timely motion to vacate preserves a right to file additional and separately grounded challenges outside of the three-month period." *Bonar* 835 F.2d at 1381-82. In rejecting the argument that the motion to amend the request to vacate the arbitration award would not be timely, the Eleventh Circuit Court of Appeals held as follows: Since the Arbitration Act provides only that 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, *see* 9 U.S.C. § 12, and contains no provisions governing amendments to timely motions, the Federal Rules of Civil Procedure apply to this issue. Proceedings to vacate or confirm an arbitration award are instituted by the filing of a motion in the district court, *see* 9 U.S.C. §§ 9, 12, just as a normal civil action is commenced by filing a complaint in the district court, *see* Fed. R. Civ. P. 3. Thus, although technically called a "motion," the papers filed by a party seeking to confirm or vacate an arbitration award function as the initial pleadings in post-arbitration proceedings in the district court. Consequently, Rule 15, which governs amended and supplemental pleadings in a civil action, should also apply to amended motions to vacate arbitration awards. *Bonar* 835 F.2d at 1382. The Eleventh Circuit Court of Appeals thus held that the amended motion to vacate related back to the date of the original motion to vacate and was a timely motion. *Id.*

The federal district court in the case of *Passa v. City of Columbus*, 2008 WL 687168 (S.D. Ohio Mar. 11, 2008) was faced with similar circumstances. The plaintiff there had filed suit on behalf of a putative class alleging that the defendants had violated the Fair Debt Collection Practices Act and Ohio statutory provisions. *Id.* at 1. The district court had previously held that the claims were subject to arbitration. *Id.* at 2. The arbitrator ultimately dismissed certain claims of the plaintiff and granted other claims. *Id.* The plaintiff filed a motion in the district court seeking to confirm the award in some aspects and to modify, correct, or vacate the award in other aspects. *Id.* The plaintiff subsequently filed an amended motion asserting additional grounds to vacate the award in part. *Id.* at 3. The defendant argued that the second motion was time barred under 9 U.S.C. § 12 because it was served more than three months after the award. *Id.* at 5. The defendant argued that the "conclusory" allegations made in the first motion could not serve as a "placeholder." *Id.* In response, the plaintiff argued that Fed. R. Civ. P. 15 allowed the filing of the supplemental pleading. *Id.* In addressing the issue, the District Court stated that "the Court must decide whether *Plaintiff's Second Motion* is a timely 'supplement' to *Plaintiff's First Motion* when the *Second Motion* was filed beyond the three-month statutory period, seeks additional relief beyond that in the *First Motion* and abandons grounds for relief raised in *Plaintiff's First Motion.*" *Id.* at 5. In reliance upon the *Bonar* decision as well as the *Dealer Computer* decision discussed below, the District Court held that Rule 15 applied to permit the plaintiff to amend her pleadings outside of the three-month period. *Id.* at 6-7. The District Court held that "in light of the purpose behind Section 12 [of the FAA] and the willingness of federal courts to liberally construe the form of notice, the Court concludes that permitting [the amendment] will not "circumvent Section 12 [of the FAA]." *Id.* at 7.

As noted, the District Court in *Passa* relied upon the case of *Dealer Computer Services, Inc. v. Dub Herring Ford*, 489 F.Supp.2d 772 (E.D. Mich. 2007). The plaintiff there had filed a timely motion to vacate an arbitrator's ruling that allowed the defendants in the case to proceed to arbitration as a class. *Id.* at 774. The plaintiff subsequently filed an amended motion outside of the three-month period. *Id.* at 776. The defendants argued that the amended motion to vacate was not timely because it was filed outside the time required by the FAA. *Id.* In reliance upon the *Bonar* decision, the District Court held that the amended motion was timely as a result of Rule 15 of the Federal Rules of Civil Procedure. *Id.* at 776.

A number of other federal courts have likewise allowed the filing of an amended motion outside of the three-month limitations period to relate back to the first timely filing pursuant to Rule 15. *See, e.g., International Brotherhood. of Teamsters v. United Parcel Service*, 335 F.3d 497, 504-05 (6th Cir. 2003) (ruling that the district court was in error in not allowing an amendment to vacate an award of an arbitrator that was filed more than one year after the original complaint); *BBVA Securities v. Cintron*, 2012 WL 2002304 at pp. 1-2 (D.P.R. June 4, 2012) (allowing the amendment of a motion to vacate an arbitration award pursuant to Rule 15); *Stulberg v. Intermedics Orthopedics, Inc.*, 1999 WL 759608 at pp. 6-7 (N.D. Ill. Aug. 31, 1999) (allowing defendants to amend their motion to vacate arbitration award outside the three-month period to assert new arguments because the original motion was filed within the three month period); *International Chem. Workers Union v. Mobay Chem. Corp.*, 755 F.2d 1107, 1110 (4th Cir. 1985) ("[a]lthough the amendment was filed after the three-months period specified in 9 U.S.C. § 12, it relates back to the date of the original complaint because it arose out of the same occurrence and simply amplified the prayer for 'other relief.'" - citing Rule 15).

The trial court in the case at hand ruled that "[t]he 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." Pet. App. 34a. The court thus held that there was no timely application to vacate the final Award. In ruling upon the Rule 59 Motion filed by Culpepper, the trial court ruled that the amendment would be futile because there was no timely filing of a motion to vacate. Pet. App. 37a-39a. The Tennessee Court of Appeals ruled that it was not persuaded by the reasoning of the federal courts in deciding the applicability of Rule 15. The Court stated that the language of the Tennessee Act is different from the language of the FAA. It is the position of the Culpepper, however, that the reasoning of the federal decisions in conjunction with the liberal policy of the Tennessee Courts in allowing relation back of amendments under Tenn. R. Civ. P. 15.03, make relation back of amendments to vacate arbitration awards just as equally applicable under Tennessee law and federal law. Based upon *Bonar*, *Passa*, and *Dealer Computer* and the other authorities construing the interaction between the Federal Arbitration Act and Rule 15 of the Federal Rules of Civil Procedure, Culpepper respectfully asserts that the trial court was in error in not granting the Motion to Amend Pleadings pursuant to Rule 15.01 of the Tennessee Rules of

Civil Procedure. Culpepper respectfully requested that the Tennessee Supreme Court reverse the ruling of the trial court and the Court of Appeals and vacate both the Order Confirming the Arbitration Award and Granting Petitioner's Motion for Judgment on the Pleadings and the Judgment Confirming Arbitration Award and mandate that the trial court grant the previously filed Motion to Amend Pleadings to allow Culpepper to assert that the arbitration award should be vacated. This Court should grant the petition for a writ of certiorari for plenary review or summary reversal because the Tennessee courts have placed Tennessee law above federal law.

The Tennessee Court of Appeals did of course distinguish some cases allowing the relation-back of post-90-day pleadings under the Federal Arbitration Act, because it merely requires "notice" of a motion to vacate or modify within 90 days post-award. 9 U.S.C. § 12. *See, e.g., Bonar v. Dean Witter Reynolds, Inc.*, 835 F. 2d 1378, 1382 (11th Cir. 1988). But as the court held, the Tennessee (Uniform) Act requires both the petition and the grounds to be urged within 90 days. *Compare* Tenn. Code Ann. § 29-5-312. The Tennessee Court of Appeals relied upon similar decisions under the Uniform Arbitration Act by Courts in Idaho and Massachusetts instead of relying on the *required* Federal Arbitration Act choice of law in Culpepper's Employment Agreement. The confusion perpetrated by Baker Donelson in their arguments despite the clear language on the face of the Employment Agreement clouded the issue of whether to apply federal or state law. Had the Tennessee arbitration law been faithfully enacted according to Congress's intent in the Federal Arbitration Act, there would have been no confusion for the Tennessee courts in this instance.

The decision by the Tennessee Court of Appeals highlights a small, but potentially significant, difference between the Uniform Arbitration Act as adopted by most states and the Federal Arbitration Act that will likely continue to create confusion in lower courts. As explained above, every federal court of appeals and every federal court to address the question of amending a pleading to vacate an arbitration award is in agreement on properly applying the FAA. The Tennessee Court of Appeals' decision directly conflicts with those federal decisions.

To illustrate the starkness of the conflict, consider that Baker Donelson drafted the Amended and Restated Executive Employment Agreement for Culpepper and Provectus. Pet. App. 41a-50a. The Employment Agreement

states in part, "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*." (Emphasis added). Pet. App. 47a. Baker Donelson was the corporate counsel of Provectus against Culpepper in virtually every legal action subsequent to the termination of Culpepper which Baker Donelson caused because of their alleged legal malpractice. Pet. App. 12a-30a. Baker Donelson knew that it had drafted the Employment Agreement to be governed by the Federal Arbitration Act and then failed to ensure that the Tennessee Court of Appeals was both aware of and applied the FAA when Tennessee law was in conflict. Baker Donelson instead allowed the Tennessee courts to improperly apply Tennessee state law because of the Law Firm's alleged misconduct.

The Tennessee Court of Appeals should have rejected the improper argument by Baker Donelson to not apply the FAA, and hold that, "because the supremacy clause of the United States Constitution requires state law to yield to federal law, the FAA should be applied to Culpepper's motions to allow relation back to provide evidence to vacate the arbitration award." The boldness with which the Tennessee courts dismissed conflicting federal law for its own state law underscores the directness of the conflict between its decision and decisions of every federal court of appeals and federal courts to address these issues when arbitration awards may be vacated upon sufficient notice. This Court should intervene to restore federal supremacy principles to Tennessee's (and any other states') arbitration laws.

## II. The Preemption Question Presented Is Important.

The Supremacy Clause of the U.S. Constitution provides that federal law "shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2. The Tennessee Court of Appeals turned that provision on its head when it held that state law trumps conflicting federal law—even when the state law should have comported with federal law because Culpepper's Employment Agreement specifically required the FAA to govern the arbitration.

This Court plays a vital role in policing federal preemption principles. In service of that role, the Court has routinely held that the FAA supersedes state law arbitration requirements that restrain the enforceability of arbitration agreements under federal law. Of course, this Court grants petitions for a writ of certiorari when an outlier court erroneously holds that a state law is *not*

preempted by a conflicting federal law. This Court has held that the FAA preempts a state law or judicial rule at least a dozen times. *See, e.g., Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421 (2017); *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015); *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530 (2012); *Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17 (2012); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Preston v. Ferrer*, 552 U.S. 346 (2008); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995); *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996); *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52 (1995); *Volt Info. Scis. v. Bd. of Trs.*, 489 U.S. 468 (1989); *Perry v. Thomas*, 482 U.S. 483 (1987); *Southland Corp. v. Keating*, 465 U.S. 1 (1984). The Court should grant the petition in this case as well to bring Tennessee back into line with federal law and with every other major court to consider the question presented.

If left undisturbed, the Tennessee Court of Appeals' erroneous decision will seriously undermine Congress's goal of enforcing a national policy favoring arbitration. Through the cooperative regulatory regime established by the FAA, Congress trusted and empowered States to enforce federal arbitration standards by allowing them to run the arbitrations within their borders. But at least implicit in the FAA—backed up by the power of the Supremacy Clause—is the condition that States implement their arbitrations by applying the federal standards and requirements at a *minimum*. States are not free to simply disregard the FAA's mandate as specified in a respective state resident's Employment Agreement. But that is exactly what Tennessee has done. This Court has held regarding the FAA, "9 U.S.C. § 1 *et seq.*, limits the grounds for denying enforcement of 'written provision[s] in . . . contracts[s]' providing for arbitration, thereby preempting state laws that would otherwise interfere with such contracts. § 2." *Coventry Health Care of Mo., Inc. v. Nevils*, 137 S. Ct. 1190, 1199 (2017). "This Court has several times held that those statutes preempt state law." *Id.*

Although the FAA does not contain an express preemption clause, this Court has held because of implied preemption principles that the FAA supersedes state law that "undermine the goals and policies of [the Act]." *Volt Info. Scis.*, 489 U.S. at 477. This Court has noted that the FAA "was designed 'to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate,'" and "[t]he overarching purpose of [the FAA] . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." *Id.* at 478 (*quoting Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219-220 (1985)); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011). *Cf. Volt Info. Scis.*, 489 U.S. at 477 ("While Congress was no doubt aware that the Act would encourage the expeditious resolution of disputes,

its passage was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered." (citations omitted)). Clearly, Tennessee courts have attempted to circumvent the provisions of the FAA because Tennessee state law creates confusion between what is required in order to vacate an arbitration award procured by corruption, fraud, or other undue means.

The Tennessee Court of Appeals' inverse-preemption ruling has serious real-world consequences. Every day, arbitration agreements that require that the FAA govern a potential work-related dispute will be incorrectly adjudicated in Tennessee courts because of the interpretation of the FAA through the lens of the stricter mandate of Tennessee arbitration law. Perhaps even more troubling is when attorneys who draft arbitration clauses seek to purposely avoid the implication of their own language when arguing before Tennessee courts. The largest law firm in the State of Tennessee, Baker Donelson, carries great weight in every courtroom. When attorneys from such a firm purposely avoid the clear language of the FAA and use significantly different language of a parallel state law for their own advantage, the interests of justice are not served.

Tennessee's decision to ignore the language of an employment agreement has adverse consequences for businesses. As noted, Congress intended with the FAA to establish a national policy favoring arbitration and to place "arbitration agreements on equal footing with all other contracts." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006). Furthermore, the FAA "makes contracts to arbitrate 'valid, irrevocable, and enforceable,' so long as their subject involves 'commerce.' [9 U.S.C.] § 2. And this is so whether an agreement has a broad reach or goes just to one dispute, and whether enforcement be sought in state court or federal." *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 582 (2008). When Tennessee opts to ignore those limits, businesses operating within the State face serious uncertainty about what standard their own employment agreements will be subject to. A business that believes it can take advantage of the lax approach adopted in this case may forego investment in cost-effective front-end employment measures. And a business that understands that it must comply with federal arbitration limits and requirements will be at an unfair disadvantage vis-à-vis companies like Provectus and attorneys at the law firm of Baker Donelson to whom Tennessee has given a pass.

The Tennessee courts were wrong to permit state law to dominate federal law,

# APPENDIX A

especially when original arbitration awards specified exclusive federal law. This Court's intervention is vitally important to align state law with federal, and to hold in check attorneys who seek to overrun state courts with confusing arguments that conflict with federal law because their power and influence in a particular state affords attorneys a perceived license to improperly tilt the balance of justice.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted for plenary review. In the alternative, the Court may wish to consider summarily reversing the decision below.

Respectfully submitted,

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