APPENDIX A

FILED
04/14/2020
Clerk of the
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 7, 2020 Session

PROVECTUS BIOPHARMACEUTICALS, INC. v. PETER R. CULPEPPER

Appeal from the Chancery Court for Davidson County
No. 18-1077-III Ellen H. Lyle, Chancellor

No. M2019-00662-COA-R3-CV

The dispositive issue in this appeal is whether an amended pleading that seeks to vacate an arbitration award that was delivered to the parties more than 90 days earlier relates back to the date of the original pleading pursuant to Rule 15.03 of the Tennessee Rules of Civil Procedure when the original pleading only sought to modify the arbitration award. A dispute arose when an employer terminated the employment contract of its chief financial officer. The parties submitted the dispute to arbitration pursuant to the Tennessee Uniform Arbitration Act ("the Act"), Tenn. Code Ann. § 29-5-301 to -320. After the arbitrator issued a monetary award in favor of the corporation, the employer filed a petition to confirm the award in chancery court. Within 90 days of the delivery of a copy of the award to the employee, which is the limitation period set forth in Tenn. Code Ann. § 29-5-314(a) of the Act, the employee timely filed an answer to the petition in which he sought modification of the award with respect to prejudgment interest only. Otherwise, the employee admitted all material allegations in the petition. Significantly, the employee did not seek to vacate the award. After waiving any claim to prejudgment interest, the employer filed a motion for judgment on the pleadings to confirm the arbitration award in all other respects. Before the hearing on the motion, but more than 90 days after a copy of the award was delivered to the employee, the employee filed a Rule 15 motion to amend his answer to assert a counterclaim to vacate the award on grounds not previously raised. The trial court denied the employee's Rule 15 motion to amend the answer as futile on the ground that it was not a timely application to vacate the final award and awarded the employer judgment on the pleadings. The employee appeals, contending the court erred because an amended pleading relates back to the date of the original pleading pursuant to Rule 15.03. We have determined that strict adherence to the 90-day limitation furthers the primary objectives of the Act, which is to bring the arbitration process to a speedy and final resolution. Furthermore, the limitations provided by Tenn. Code Ann. §§ 29-5-312 and -313(b) are more specific than the general relation-back provision of Tenn. R. Civ. P. 15.03. Therefore, we affirm the trial court's denial of the motion to amend the answer as futile on the ground that the employee did not file a

timely application to vacate the final award, and we affirm the entry of judgment on the pleadings in favor of the employer.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

FRANK G. CLEMENT JR., P.J., M.S., delivered the opinion of the Court, in which J. STEVEN STAFFORD, P.J., W.S., and W. NEAL MCBRAYER, J., joined.

Thomas M. Leveille, Knoxville, Tennessee, for the appellant, Peter R. Culpepper.

Martha L. Boyd, Samuel L. Felker, and Brittany B. Simpson, Nashville, Tennessee, for the appellee, Provectus Biopharmaceuticals, Inc.

OPINION

Provectus Biopharmaceuticals, Inc. ("Provectus") employed Peter R. Culpepper ("Culpepper") from February 2004 through December 2016 pursuant to a series of employment agreements. For most of this period, Culpepper served as the chief financial officer, but he also briefly served as the interim chief executive officer.

The employment agreement in effect when this dispute arose required the parties to submit disputes relating to Culpepper's employment to binding arbitration. In December 2016, Provectus gave Culpepper notice that it was terminating his employment "for cause" and asserting a claim to, *inter alia,* recover undocumented travel expenses and funds Culpepper owed. Culpepper took exception to Provectus's decision, and the parties agreed to submit their dispute to binding arbitration before the American Arbitration Association in Davidson County, Tennessee.

On July 12, 2018, the arbitrator issued an interim award in favor of Provectus finding that Provectus terminated Culpepper "for cause" and that Provectus was entitled to a monetary judgment against Culpepper for more than two million dollars. This award included Culpepper's undocumented travel expenses and amounts he owed under a previously executed settlement agreement. The arbitrator issued the final order on September 12, 2018, which addressed Provectus's request for attorneys' fees and costs and awarded Provectus a total of $2,819,019.87. A copy of the final order was delivered to the parties on the same date.

On October 4, 2018, Provectus filed a Petition to Confirm Arbitration Award in Davidson County Chancery Court attaching the July and September awards as exhibits. Culpepper, proceeding *pro se*, timely filed an answer on November 7 asserting as an affirmative defense an application to modify the arbitration award pursuant to Tenn. Code Ann. § 29-5-314 but only with respect to certain items of prejudgment interest. Otherwise, he admitted all material allegations in the petition to confirm the award.

Shortly following, Provectus filed a motion for judgment on the pleadings in which it waived prejudgment interest and asked the court to confirm the final arbitration award in all other respects.

While still acting *pro se* and without seeking leave from the court to amend his answer, Culpepper filed an amended answer on December 11, 2018, in which he requested the court to "review the award" pursuant to Tenn. Code Ann. § 29-5-314 for "a conflict of interest by the opposing counsel and the attendant misconduct of the Arbitrator." Shortly thereafter, Culpepper obtained counsel.

On January 10, 2019, and prior to the hearing on Provectus's motion for judgment on the pleadings, Culpepper's counsel filed a motion seeking leave to amend the answer. Attached to the motion was the proposed "Second Amended Answer"[1] in which he asserted a counterclaim seeking to vacate the arbitration award pursuant to Tenn. Code Ann. § 29-5-313(a)(1). Culpepper alleged that the arbitration award should be vacated on grounds not previously asserted, that (1) it was "procured by corruption, fraud or undue means," (2) the arbitrator was biased, and (3) the arbitrator "refused to hear evidence material to the controversy and so conducted the hearing as to prejudice substantially the rights of Culpepper."

Following a hearing on both motions, the trial court denied Culpepper's Tenn. R. Civ. P. 15 motion for leave to amend his answer and awarded Provectus judgment on the pleadings. The court thereby confirmed the arbitration award with the exception of the award of prejudgment interest that Provectus waived. In pertinent part, the court ruled:

> 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. 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).
>
> . . . . The Court dismisses [Culpepper'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

[1] Culpepper did not properly file his "First Amended Answer" because he did not seek, nor did he obtain, leave of court to amend his pleading pursuant to Rule 15.01 of the Tennessee Rules of Civil Procedure.

> Final Award, and therefore [Culpepper's] Motion to Amend is denied as futile.

Culpepper filed a Motion to Alter or Amend Judgment and Order arguing that the trial court erred by denying his Rule 15 motion to amend. The trial court denied Culpepper's motion to amend the judgment. This appeal followed.

ANALYSIS

The dispositive issue in this appeal is whether an amended pleading that seeks to vacate an arbitration award that was delivered to the parties more than 90 days earlier relates back to the date of the original pleading pursuant to the provisions of Tenn. R. Civ. P. 15.03 when the original pleading only sought to modify the arbitration award.

Because he timely filed his application to modify the arbitration award, Culpepper contends his filing of an amended answer relates back to his original filing regardless of the fact that the amended answer seeks to vacate the award on grounds different from the grounds relied upon to modify the award. 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.

The resolution of this dispute requires us to resolve the apparent conflict between the specific time-limitation provisions of the Act and the relation-back provision of Tenn. R. Civ. P. 15. The construction of statutes and procedural rules are questions of law, which we review de novo without any presumption of correctness. *Lind v. Beaman Dodge, Inc.*, 356 S.W.3d 889, 895 (Tenn. 2011).

When construing statutes, our role "is to ascertain and effectuate the legislature's intent." *Kite v. Kite*, 22 S.W.3d 803, 805 (Tenn. 1997). If the language in a statute is unambiguous, "we must apply its plain meaning without a forced interpretation that would limit or expand the statute's application." *State v. Walls*, 62 S.W.3d 119, 121 (Tenn. 2001); *see Gleaves v. Checker Cab Transit Corp.*, 15 S.W.3d 799, 803 (Tenn. 2000) (reasoning that "it is not for the courts to alter or amend a statute"). When the statute is ambiguous, "we may reference the broader statutory scheme, the history of the legislation, or other sources." *Lind*, 356 S.W.3d at 895. Pursuant to Tenn. Code Ann. § 29-5-320, we are to construe provisions in the Act so "as to effectuate its general purpose to make uniform the law of those states which enact it." Therefore, for guidance, we may turn to other jurisdictions that have adopted the Uniform Arbitration Act. *Arnold v. Morgan Keegan & Co.*, 914 S.W.2d 445, 448 (Tenn. 1996). As for the construction of

procedural rules, the same general rules of statutory construction apply to rules of procedure. *Lind*, 356 S.W.3d at 895. However, in construing a rule of civil procedure, our goal is to ascertain and give effect to the Tennessee Supreme Court's intent in adopting the rule. *Thomas v. Oldfield*, 279 S.W.3d 259, 261 (Tenn. 2009).

The Tennessee Uniform Arbitration Act was adopted "(1) 'to promote private settlement of disputes,' and (2) to ensure the enforceability of private agreements to arbitrate." *Morgan Keegan & Co. v. Smythe*, 401 S.W.3d 595, 603 (Tenn. 2013) (quoting *Pugh's Lawn Landscape Co. v. Jaycon Dev. Corp.*, 320 S.W.3d 252, 257 (Tenn. 2010)) (internal citations omitted). To that end, the Act confers jurisdiction on Tennessee courts to enforce agreements to arbitrate and "to enter judgment on an award thereunder." Tenn. Code Ann. § 29-5-302(b).

Arbitration agreements in private contracts are favored; therefore, "the courts 'play only a limited role in reviewing the decisions of arbitrators.'" *Morgan Keegan & Co.*, 401 S.W.3d at 603 (quoting *Arnold*, 914 S.W.2d at 448). The goal of arbitration "is to avoid what some feel to be the formalities, the delay, the expense and vexation of ordinary litigation." *Arnold*, 914 S.W.2d at 449 (quoting *Boyd v. Davis*, 897 P.2d 1239, 1242 (Wash. 1995)). Parties who agree to submit their dispute to binding arbitration want to "to avoid the courts insofar as the resolution of the dispute is concerned." *Id.* (quoting *Boyd*, 897 P.2d at 1242). For this reason, the Act prevents courts from considering "the merits of an arbitration award even if the parties allege that the award rests on errors of fact or misrepresentation of the contract." *Id.* at 450. "To permit a dissatisfied party to set aside the arbitration award and to invoke the Court's judgment upon the merits of the cause would render arbitration merely a step in the settlement of the dispute, instead of its final determination." *Id.* at 452.

Tennessee Code Annotated, section 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**, in which case the court shall proceed as provided in §§ 29-5-313 and 29-5-314."[2] (Emphasis added). Therefore, the Act "permits the trial court to consider vacating, modifying, or

[2] Tennessee Code Annotated, section 29-5-317 provides that "an application to the court under this part shall be by motion and shall be heard in the manner and upon the notice provided by law or rule of court for the making and hearing of motions." Typically, there are two ways in which a party presents reasons for vacating or modifying an award under the Uniform Arbitration Act: "(1) by filing a petition with the trial court to vacate the award; or (2) by raising reasons supporting vacation in an answer to the other party's petition to confirm." *Simon v. Teton Bd. of Realtors*, 4 P.3d 197, 202 (Wyo. 2000); *see Tarpley v. Searcy*, No. M2000-03094-COA-R3-CV, 2002 WL 870089, at *1 (Tenn. Ct. App. May 7, 2002) (One party filed an "action to confirm the award," and the other party filed an answer requesting vacation of the award.)

correcting an arbitration award **only if grounds for doing so are submitted to the trial court 'within the time limits ... imposed.'"** *NHC Healthcare, Inc. v. Fisher*, No. M2007-02459-COA-R3-CV, 2008 WL 5424012, at *4 (Tenn. Ct. App. Dec. 30, 2008) (quoting *Arnold*, 914 S.W.2d at 448–49) (emphasis added). To further promote "a speedy and final determination," *Arnold*, 914 S.W.2d at 452, **a party must assert his or her grounds for vacating or modifying the award "within ninety (90) days** after delivery of a copy of the award to the applicant." Tenn. Code Ann. § 29-5-313(b) (applications to vacate); Tenn. Code Ann. § 29-5-314(a) (applications to modify) (emphasis added). Otherwise, the court is mandated to confirm the award upon application of a party. Tenn. Code Ann. § 29-5-312.

We find it significant that the statutory scheme not only requires the filing of an application for relief within the 90-day limitation but the application must also state the grounds for such relief.[3] *See id.* Additionally, the grounds for vacating an arbitration award are very distinct from the grounds for modifying an award. The grounds for vacating an arbitration award are limited to circumstances where, *inter alia*, the "award was procured by corruption, fraud, or other undue means," or where there "was evident partiality by an arbitrator." Tenn. Code Ann. § 29-5-313. Conversely, the grounds for modifying an award are limited to circumstances involving an "evident miscalculation of figures" or an award that "is imperfect in a matter of form, not affecting the merits of the controversy." Tenn. Code Ann. § 29-5-314. Thus, the Act not only mandates the filing of an application within the specified time limits, it also mandates that the applicant timely state **the "grounds** . . . urged for vacating or modifying or correcting the award." Tenn. Code Ann. § 29-5-312 (emphasis added).

The foregoing notwithstanding, Culpepper seeks relief from these mandatory requirements via the relation-back provision of Rule 15.03. However, Culpepper has not cited and we are unaware of any decisions in Tennessee or other state courts that directly address this issue. That said, Culpepper urges us to consider federal decisions applying Rule 15 of the Federal Rules of Civil Procedure to cases decided under the United States Arbitration Act (the "Federal Arbitration Act" or "FAA") which is similar to the Act.

Some federal courts have applied Rule 15 to allow a party to amend a timely application to vacate an award to assert additional grounds for vacation, even if the party moved to amend the application outside of the three-month time limit imposed by the FAA. *See Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378, 1382 (11th Cir. 1988); *see also Passa v. City of Columbus*, No. 2:03-CV-81, 2008 WL 687168, at *6–7 (S.D.

[3] If the application to vacate the award is "predicated upon corruption, fraud or other undue means, it shall be made within ninety (90) days after such grounds are known or should have been known." Tenn. Code Ann. § 29-5-313(b).

Ohio Mar. 11, 2008). 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.

The FAA provides, in pertinent part, "***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). However, 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[.]" (Emphasis added). This difference is significant, because "grounds" is more specific than "notice." As such, § 312 mandates that a dissatisfied party assert all relevant grounds for modification or vacation within the 90-day time limit; whereas, the FAA merely requires notice of a motion to vacate or modify.

Two cases decided by the Idaho Supreme Court interpreting a provision that is virtually identical to Tenn. Code Ann. § 29-5-312 highlight the effects of § 312's particular language. In *Driver v. SI Corporation*, a party filed a timely motion to vacate the arbitration award without asserting grounds. 80 P.3d 1024, 1026 (Idaho 2003). The party later filed a brief in support of its motion that specified the grounds for vacation; however, the brief was filed outside of the 90-day time limit imposed by Idaho's Uniform Arbitration Act. *Id.* at 1029. The delay in asserting grounds was due to the fact that the transcript of the arbitration hearing did not become available until after the 90-day deadline. *Id.*

Resolution of the issue required the Idaho Supreme Court to construe I.C. § 7–911, *Driver*, 80 P.3d at 1029, which 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 Idaho Supreme Court interpreted § 7–911 to mean that all grounds for vacation or modification of an arbitration award must be asserted within the time limits imposed by the statute and that a mere motion to vacate or modify the award filed within 90 days was insufficient. *Driver*, 80 P.3d at 1029. Therefore, the court ruled that the motion to vacate the arbitration award was untimely. *Id.*

The Idaho Supreme Court's decision in *Bingham County Commission v. Interstate Electric Company*, 665 P.2d 1046 (Idaho 1983) is also instructive. In *Bingham*, Bingham County filed a timely application to vacate the arbitration award with one ground for vacation. *Id.* at 1048. Eleven months later, at the hearing on the motion to vacate, Bingham County orally asserted an additional ground for vacation, and the trial court considered the additional ground and vacated the award on that basis. *Id.* The Idaho Supreme Court reversed the trial court, determining that the "statutory time limitation is strictly construed and *must* be complied with before a court can vacate any award." *Id.* at

1049 (emphasis in original). Thus, the court held that though the motion to vacate, itself, was timely, Bingham County could not assert additional grounds for vacation outside of the time limit imposed by the statute. *Id.*

Similar to the Idaho Supreme Court, the Massachusetts Supreme Judicial Court in applying a nearly identical provision in its General Law held that "***all challenges*** to an arbitrator's award must be brought within the time frame specified by the statute" to promote "stability and finality of the arbitration process." *Local 589, Amalgamated Transit Union v. Massachusetts Bay Transp. Authy.*, 491 N.E.2d 1053, 1057 (Mass. 1986). The relevant provision in the Massachusetts General Law provides, "Upon application of a party, the superior court shall confirm an award, unless within the time limits, hereinafter imposed grounds are urged for vacating, modifying or correcting the award, in which case the court shall proceed as provided in sections eleven and twelve." G.L.c. 150C, § 10.

The plain language of Tenn. Code Ann. § 29-5-312 requires a dissatisfied party to specify every relevant ground for modifying or vacating an arbitration award within the time limits imposed by the Act. Considering that the Act's purpose is to bring the arbitration process to a speedy and final conclusion, *Arnold*, 914 S.W.2d at 452, we agree with the reasoning of the Idaho and Massachusetts Supreme Courts that parties must strictly adhere to the 90-day time limit. *Driver*, 80 P.3d at 1029; *Massachusetts Bay Transp. Authy.*, 491 N.E.2d at 1057.

That said, Rule 15's relation-back principle generally allows parties to avoid the effect of statutes of limitations when the original pleading was filed within the limitations period and the newly asserted claim arose out of the same conduct, transaction or occurrence set forth in the original pleading. Tenn. R. Civ. P. 15.03; *Hawk v. Chattanooga Orthopaedic Grp., P.C.*, 45 S.W.3d 24, 31 (Tenn. Ct. App. 2000). But the purpose of Rule 15's relation-back principle is to ensure that cases are decided on their merits "and not on rigid technicalities." *Floyd v. Rentrop*, 675 S.W.2d 165, 168 (Tenn. 1984) (quoting *Osborne Enterprises v. City of Chattanooga*, 561 S.W.2d 160, 163 (Tenn. Ct. App. 1977)). The primary objective of the Act, however, is to restrict the role of the courts to decide cases on the merits, prevent delay, and promote finality in the arbitration process. *Arnold*, 914 S.W.2d at 452. When the purposes of a statute and a rule of civil procedure are in conflict, the more specific statutory provision "will be given force and effect" over the more general rule of procedure. *Martin v. Lear Corp*, 90 S.W.3d 626, 629–30 (Tenn. 2002) (quoting *Patterson v. Tennessee Dept. of Labor and Workforce Dev.*, 60 S.W.3d 60, 64 (Tenn. 2001)). Accordingly, the specific requirement of § 29-5-312, that all grounds for vacation or modification shall be asserted within the time limits imposed, must prevail over the more general rule of procedure in order to effectuate the

General Assembly's purpose in enacting the Tennessee Uniform Arbitration Act.[4] Consequently, while Rule 15 is generally applicable in proceedings to confirm, modify, or vacate an arbitration award, *see* Tenn. R. Civ. P. 1, we construe the Act to limit its application in this particular circumstance.

It is undisputed that a copy of the final award in favor of Provectus was delivered to Culpepper on September 12, 2018. Therefore, Culpepper had 90 days from that date within which to make an application to vacate the award and to state the grounds for doing so. He did neither within 90 days. Considering the strict mandate of the Act that all grounds must be asserted within 90 days, we affirm the trial court's decision that the proposed amendment to Culpepper's answer would be futile.[5]

Therefore, we affirm the decision of the trial court to grant Provectus's motion for judgment on the pleadings confirming the arbitration award.

IN CONCLUSION

The judgment of the trial court is affirmed, and this matter is remanded with costs of appeal assessed against Peter R. Culpepper.

FRANK G. CLEMENT JR., P.J., M.S.

[4] Similarly, the Colorado Supreme Court, in a decision discussing the application of the rules of civil procedure to the Uniform Arbitration Act, stated, "Once its provisions come into play, the [Uniform Arbitration Act] imposes a self-contained procedural apparatus, with provisions for challenging an arbitrator's exercise of power." *State Farm Mut. Auto. Ins. Co. v. Cabs, Inc.*, 751 P.2d 61, 64 (Colo. 1988).

[5] The trial court implied in its decision that had Culpepper filed a timely application to vacate the award, Culpepper could have amended his pleading outside of the statutory time limit to assert additional grounds for vacation. We have determined, however, that a party cannot amend a pleading to assert additional grounds for vacation or modification outside of the time limits imposed by the Act. When a trial court reaches the correct result, we will affirm that decision even if we do so on a different basis. *See Hopkins v. Hopkins*, 572 S.W.2d 639, 641 (Tenn. 1978); *see also Arnold v. City of Chattanooga*, 19 S.W.3d 779, 789 (Tenn. Ct. App. 1999).

APPENDIX B

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

PROVECTUS BIOPHARMACEUTICALS, INC. v. PETER R. CULPEPPER

Chancery Court for Davidson County
No. 18-1077-III

No. M2019-00662-SC-R11-CV

ORDER

Upon consideration of the application for permission to appeal of Peter R. Culpepper and the record before us, the application is denied.

PER CURIAM

APPENDIX C

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
July 23, 2020 Session

PETER R. CULPEPPER v. BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWITZ, P.C., ET AL.

Appeal from the Circuit Court for Knox County
No. 1-168-19 Kristi M. Davis, Judge

No. E2019-01932-COA-R3-CV

In this legal malpractice action, the trial court granted judgment on the pleadings in favor of the defendants, determining that the plaintiff had waived any conflict of interest in his signed engagement letter. The court also ruled that the plaintiff's legal malpractice claims were barred by the applicable statute of limitations. The plaintiff has appealed. Upon our review of the pleadings and acceptance as true of all well-pleaded facts contained in the plaintiff's complaint and the reasonable inferences that may be drawn therefrom, we determine that the plaintiff has pled sufficient facts in support of his claim of legal malpractice. We therefore reverse the trial court's grant of judgment on the pleadings with regard to the plaintiff's legal malpractice claim.[1]

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed in Part, Affirmed in Part; Case Remanded

THOMAS R. FRIERSON, II, J., delivered the opinion of the court, in which D. MICHAEL SWINEY, C.J., and JOHN W. MCCLARTY, J., joined.

Peter R. Culpepper, Knoxville, Tennessee, Pro Se.

P. Edward Pratt, Knoxville, Tennessee, and Sam Berry Blair and Ryan A. Strain, Memphis, Tennessee, for the appellees, Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C.; John S. Hicks; Tonya Mitchem Grindon; Martha L. Boyd; Samuel Lanier Felker; Lori B. Metrock; and Lori H. Patterson.

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[1] The plaintiff asserted other claims that were also dismissed by virtue of the trial court's grant of judgment on the pleadings. We note that the plaintiff has not appealed the grant of judgment in favor of the defendants with respect to those claims.

OPINION

I. Factual and Procedural Background

On May 9, 2019, the plaintiff, Peter R. Culpepper, filed a complaint in the Knox County Circuit Court ("trial court") against the following defendants: Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C. ("the Baker firm"); John S. Hicks; Tonya Mitchem Grindon; Martha L. Boyd; Samuel Lanier Felker; Lori B. Metrock; and Lori H. Patterson (collectively, "Defendants"). In his complaint, Mr. Culpepper alleged legal malpractice arising out of Defendants' simultaneous representation of Mr. Culpepper and his former employer, Provectus Biopharmaceuticals, Inc. ("Provectus").[2] Mr. Culpepper filed an amended complaint on May 31, 2019, wherein he alleged, *inter alia*, that Defendants had represented him while also representing and advising Provectus to his detriment and that Defendants had continued to represent Provectus to his detriment after they withdrew from his representation.

In his amended complaint, Mr. Culpepper explained that he was employed as the Chief Financial Officer for Provectus from 2004 until sometime in 2016 when he was named interim Chief Executive Officer. Mr. Culpepper maintained that position with Provectus until his employment termination effective December 28, 2016. According to Mr. Culpepper, Defendants represented him concerning matters before the United States Securities and Exchange Commission ("SEC") on August 4, 2016, and August 11, 2016. Mr. Culpepper alleged that on August 15, 2016, Defendants met with an independent forensic accountant and discussed Mr. Culpepper "with respect to the SEC and other attorney-client privileged and confidential matters WITHOUT his knowledge" (emphasis in original).

Additionally, Mr. Culpepper alleged that Defendants discussed matters regarding Mr. Culpepper and the SEC with Provectus's Board of Directors in 2016, without Mr. Culpepper's knowledge, while simultaneously representing Mr. Culpepper. Mr. Culpepper further averred, *inter alia*, that Defendants presented fabricated documentation to support his ultimate termination for cause by Provectus in December 2016. Mr. Culpepper claimed that Defendants had represented him and Provectus simultaneously despite an obvious conflict of interest and had continued to represent Provectus following termination of his representation on a substantially related matter. Additionally, Mr. Culpepper claimed that Defendants had concealed documentation in support of his claims until May 2018. Mr. Culpepper thus sought damages for legal malpractice, defamation, and false light invasion of privacy; a declaratory judgment regarding the proper amount

[2] Although Mr. Culpepper generally refers to the actions of "defendants," most of the allegations in his complaint are directed toward the Baker firm as a whole. The individually named defendants are attorneys who were apparently employed by the Baker firm at the time of Mr. Culpepper's representation.

owed by him to Provectus pursuant to their settlement agreement; and indemnification for his attorney's fees.

On July 3, 2019, Defendants filed a motion seeking leave to file their answer and accompanying exhibits under seal. In their answer, Defendants denied any liability and asserted various affirmative defenses, including expiration of the applicable statutes of limitation and waiver. Defendants attached to their answer an engagement letter signed by Mr. Culpepper on August 31, 2016. On August 13, 2019, Defendants filed a motion for judgment on the pleadings, asserting, *inter alia*, that Mr. Culpepper had waived any conflicts of interest in his August 31, 2016 engagement letter and had consented to Defendants' continued representation of Provectus, even if such representation was ultimately adverse to Mr. Culpepper's interests. Defendants also asserted that expiration of the applicable one-year statute of limitations barred Mr. Culpepper's malpractice claims.

On September 30, 2019, the trial court entered an order granting judgment on the pleadings in favor of Defendants and dismissing all of Mr. Culpepper's claims. In its order, the court stated in pertinent part:

> The Court rules that in the August 31, 2016 engagement, waiver and consent letter, [Mr. Culpepper] waived all conflicts of interest and consented to Defendants' representation of its other clients, including those clients adverse to [Mr. Culpepper]. [Mr. Culpepper] specifically agreed that he carefully read the foregoing letter and considered all the information necessary and useful in determining whether or not to consent to the representations outlined above. He was encouraged to consult with independent counsel regarding this waiver and consent letter and represented he was fully aware of his legal rights in this regard. The letter also provides, "[u]pon reasoned reflection, I hereby voluntarily consent to the representations by Baker Donelson as outlined above." Therefore, the Court rules [Mr. Culpepper] voluntarily waived all conflicts of interest, which was the crux of the entire Amended Complaint.
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> Further, the Court also rules that the claims in the Amended Complaint are barred by the statute of limitations.
>
> Further, the Court rules that the libel, defamation, and invasion of privacy claims were all determined adversely to [Mr. Culpepper] by the Arbitrator and therefore these claims are estopped.

The trial court thereby dismissed all of Mr. Culpepper's claims with prejudice. Mr. Culpepper timely appealed.

II. Issues Presented

Mr. Culpepper presents the following issues for our review, which we have restated slightly:

1. Whether the trial court erred by granting judgment in favor of Defendants without allowing Mr. Culpepper to argue against a stay of discovery when he was replying to Defendants' motions.

2. Whether the trial court erred by granting judgment in favor of Defendants when Mr. Culpepper purportedly had not knowingly and voluntarily waived all conflicts of interest.

3. Whether the trial court erred by failing to apply the discovery rule to toll the limitations period based on Defendants' alleged fraudulent concealment of their actions.

III. Standard of Review

Tennessee Rule of Civil Procedure 12.03 provides:

> After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

In reviewing a trial court's grant of judgment on the pleadings under Rule 12.03, we are bound to regard as false all allegations of the moving party that are denied by the non-moving party, and to accept all well-pleaded facts of the non-moving party, and the reasonable inferences that may be drawn therefrom, as true. *McClenahan v. Cooley*, 806 S.W.2d 767, 769 (Tenn. 1991). "Conclusions of law are not admitted nor should judgment on the pleadings be granted unless the moving party is clearly entitled to judgment." *Id.* In our review of this case, "all of the facts alleged by the Plaintiff in this case must be taken as true and the issue then before us is whether upon those facts the Plaintiff's complaint states a cause of action that a jury should have been entitled to decide." *Id.* An appellate court "should uphold granting the [Rule 12.03] motion only when it appears that the plaintiff can prove no set of facts in support of a claim that will entitle him or her to relief." *Young v. Barrow*, 130 S.W.3d 59, 63 (Tenn. Ct. App. 2003). "A trial court's legal conclusions regarding the adequacy of a complaint are reviewed de

novo without a presumption of correctness." *Stewart v. Schofield*, 368 S.W.3d 457, 462-63 (Tenn. 2012).

In reviewing pleadings, we "must give effect to the substance, rather than the form or terminology of a pleading." *Id.* at 463 (citing *Abshure v. Methodist Healthcare-Memphis Hosp.*, 325 S.W.3d 98, 104 (Tenn. 2010)). We respect Mr. Culpepper's decision to proceed without benefit of counsel and note that pleadings "prepared by pro se litigants untrained in the law should be measured by less stringent standards than those applied to pleadings prepared by lawyers." *Stewart*, 368 S.W.3d at 462 (citing *Carter v. Bell*, 279 S.W.3d 560 568 (Tenn. 2009); *Hessmer v. Hessmer*, 138 S.W.3d 901, 903 (Tenn. Ct. App. 2003); *Young*, 130 S.W.3d at 63). Although parties proceeding without benefit of counsel are "entitled to fair and equal treatment by the courts," we "must not excuse pro se litigants from complying with the same substantive and procedural rules that represented parties are expected to observe." *Hessmer v. Hessmer*, 138 S.W.3d 901, 903 (Tenn. Ct. App. 2003).

IV. Motion for Protective Order

Mr. Culpepper asserts that the trial court erred by granting judgment on the pleadings without considering the merits of Defendants' motion seeking a protective order, which Mr. Culpepper urges was filed "for the express purpose of avoiding [his] discovery requests." In his appellate brief, Mr. Culpepper proceeds to cite federal precedent analyzing the proper standard for a court's grant of a stay of discovery when a party has filed or intends to file a case-dispositive motion. Defendants contend that Mr. Culpepper's arguments lack merit because (1) the trial court never granted Defendants' motion seeking a protective order, finding it to be pretermitted due to the grant of judgment on the pleadings and (2) Mr. Culpepper has provided an insufficient record to permit review of this issue in any event. Based upon our thorough review of the record, we agree with Defendants on both points.

The record before us contains neither Defendants' motion seeking a protective order nor any responsive pleadings filed by Mr. Culpepper. Defendants assert that there were additional memoranda and other documents filed by the parties relative to this issue that likewise were not included in the record. Moreover, no order disposing of Defendants' motion is contained in the record; instead, the trial court judge noted in her oral ruling granting judgment on the pleadings that such action "pretermit[ted] . . . the issue with respect to the motion for protective order . . . ."

Inasmuch as the trial court never ruled on the motion for protective order, there is nothing for this Court to review. As a Court of appeals and errors, "we are limited in authority to the adjudication of issues that are presented and decided in the trial courts." *Dorrier v. Dark*, 537 S.W.2d 888, 890 (Tenn. 1976). Furthermore, even if the trial court had rendered a decision on this issue, "[t]his Court's authority to review a trial court's

decision is limited to those issues for which an adequate legal record has been preserved." *Taylor v. Allstate Ins. Co.*, 158 S.W.3d 929, 931 (Tenn. Ct. App. 2004).

To the extent that Mr. Culpepper's argument could be construed as advocating that further discovery was required before the trial court considered a grant of judgment on the pleadings, this Court has previously rejected such an argument. In *Sakaan v. Fedex Corp.*, Inc., No. W2016-00648-COA-R3-CV, 2016 WL 7396050, at *5 (Tenn. Ct. App. Dec. 21, 2016), this Court explained:

> A motion for judgment on the pleadings involves the consideration of nothing other than what its title suggests; the motion requests that a court grant judgment based on the pleadings alone. Accordingly, discovery is not necessary to sharpen any factual issues, and the trial court's resolution of the motion is not dependent on anything other than the pleadings.

We therefore conclude that Mr. Culpepper's first issue on appeal is without merit.

V. Waiver and Legal Malpractice Claims

Mr. Culpepper asserts that the trial court erred by granting judgment on the pleadings in favor of Defendants with regard to Mr. Culpepper's legal malpractice claims, which were based on an alleged conflict of interest in Defendants' representation of Mr. Culpepper and Provectus. Mr. Culpepper postulates that (1) Defendants breached Tennessee's Rules of Professional Responsibility with regard to conflicts of interest and (2) he did not and could not knowingly and voluntarily waive the conflicts. In response, Defendants posit that the waiver contained in Mr. Culpepper's engagement letter, undisputedly executed by Mr. Culpepper, was a sufficient basis for the trial court's ruling.

As Mr. Culpepper points out, this Court has previously addressed the issue of whether an alleged breach of a disciplinary rule equates to legal malpractice:

> There is no doubt that the Code of Professional Responsibility ("the Code") does not set the standard for determining the civil liability of an attorney. *See Lazy Seven Coal Sales, Inc. v. Stone & Hinds, P.C.*, 813 S.W.2d 400 (Tenn. 1991). However, that fact does not preclude the possibility that violation of the Code is relevant evidence in a subsequent civil case. *Id.* at 405 ("[T]he standards stated in the Code are not irrelevant in determining the standard of care in certain actions for malpractice"). The Tennessee Supreme Court recognized that the Code may provide guidance in defining a lawyer's obligation to a client. Moreover, in some instances, conduct which violates the Code may also be a breach of the attorney's standard of care. While violation of the Code, standing alone, will not

suffice to prove civil liability, it seems clear that such a violation may be relevant evidence of a breach of the standard of care.

Roy v. Diamond, 16 S.W.3d 783, 790-91 (Tenn. Ct. App. 1999).

With regard to a claim of legal malpractice, this Court has previously elucidated:

> To establish a *prima facie* cause of action for legal malpractice, the plaintiff has the burden of proving each of the following elements: (1) a duty owed by the lawyer; (2) breach of that duty; (3) damages suffered by the plaintiff; (4) the attorney's breach as the cause in fact of those damages; and (5) the attorney's breach as the proximate, or legal, cause of the plaintiff's damages. *See Gibson v. Trant*, 58 S.W.3d 103, 108 (Tenn. 2001). The issues at the heart of this case, therefore, are whether [the attorney] breached his duty to [the client] and if so, whether that breach caused [the client] to suffer damages.
>
> A plaintiff can show breach of the duty owed by an attorney by demonstrating that "the attorney's conduct fell below that degree of care, skill, and diligence which is commonly possessed and exercised by attorneys practicing in the same jurisdiction." *See Sanjines v. Ortwein and Assocs., P.C.*, 984 S.W.2d 907, 910 (Tenn. 1998). Furthermore, with reference to legal malpractice, a plaintiff has been determined to have suffered damages or injury as the result of "the loss of a legal right, remedy or interest, or the imposition of a liability." *See Parnell v. Ivy*, 158 S.W.3d 924, 927 (Tenn. Ct. App. 2004) (quoting *John Kohl & Co. P.C. v. Dearborn & Ewing*, 977 S.W.2d 528, 532 (Tenn. 1998)). "An actual injury may also take the form of the plaintiff being forced to take some action or otherwise suffer 'some actual inconvenience,' such as incurring an expense, as a result of the defendant's negligent or wrongful act." *John Kohl & Co. P.C. v. Dearborn & Ewing*, 977 S.W.2d 528, 532 (Tenn. 1998) (quoting *State v. McClellan*, 113 Tenn. 616, 85 S.W. 267, 270 (1905)). This Court has previously explained that "the mere possibility or probability of injury . . . is not enough for a cause of action for legal malpractice to accrue." *Caledonia Leasing & Equip. Co., Inc. v. Armstrong, Allen, Braden, Goodman, McBride & Prewitt*, 865 S.W.2d 10, 17 (Tenn. Ct. App. 1992). "In order to prove damages in a legal malpractice action, a plaintiff must prove that he would have obtained relief in the underlying lawsuit, but for the attorney's malpractice." *Shearon v. Seaman*, 198 S.W.3d 209, 214 (Tenn. Ct. App. 2005). The plaintiff must also demonstrate a causal connection between the attorney's negligence and the plaintiff's injury. *See Lazy Seven Coal Sales, Inc. v. Stone & Hinds, P.C.*, 813 S.W.2d 400, 407 (Tenn. 1991).

Jones v. Allman, 588 S.W.3d 649, 655-56 (Tenn. Ct. App. 2019), *perm. app. denied* (Tenn. Sept. 19, 2019).

The trial court's grant of judgment on the pleadings concerning Mr. Culpepper's legal malpractice claims was predicated in part on his waiver of any conflict of interest in the signed engagement letter. Defendants attached this engagement letter to their answer filed in this matter. As such, the engagement letter became a part of that pleading and was properly considered by the trial court in its analysis of Defendants' motion for judgment on the pleadings.[3] *See Bartley v. Nunley*, No. E2019-01694-COA-R3-CV, 2020 WL 5110302, at *7 (Tenn. Ct. App. Aug. 28, 2020).

The engagement letter provides as follows in pertinent part:

1. Scope of Representation.

> You will be our client in this matter. We will be engaged to advise you in connection with the SEC investigation entitled Provectus Biopharmaceuticals, Inc. ("Provectus") (H0-13000). Our acceptance of this engagement (the "Matter") does not involve representing you or your interests in any other matter.

2. Fees and Expenses.

> Provectus Biopharmaceuticals Company, Inc. (the "Company") has agreed to pay our fees and costs. We will, therefore, seek payment from the Company.

3. Conflicts.

> We are a large firm with offices in a number of cities in the United

[3] Tennessee Rule of Civil Procedure 10.03 provides:

> Whenever a claim or defense is founded upon a written instrument other than a policy of insurance, a copy of such instrument or the pertinent parts thereof shall be attached to the pleading as an exhibit unless the instrument is (1) a matter of public record in the county in which the action is commenced and its location in the record is set forth in the pleading; (2) in the possession of the adverse party and this fact is stated in the pleading; (3) inaccessible to the pleader or is of such nature that attaching the instrument would be unnecessary or impracticable and this fact is stated in the pleading, together with the reason therefor. Every exhibit so attached or referred to under (1) and (2) shall be a part of the pleading for all purposes.

(Emphasis added.)

States, and we represent many other companies and individuals. Given the breadth of our practice, it is possible that during the time we are representing you, some of our present or future clients will be engaged in transactions, or encounter disputes, with you or the Company. You agree that we may continue to represent, and may undertake in the future to represent, existing or new clients in any matter that is not substantially related to our work for you even if the interests of such clients in those matters are directly adverse to you. At no time would we use or disclose any confidential or proprietary information relating to our representation of you in connection with our representation of another client without your written consent, as appropriate. You should know that, in similar engagement letters with many of our other clients, we have asked for similar agreements to preserve our ability to represent you.

4. Joint Representation.

As you know, we are representing you jointly with the Company, Timothy Scott and Eric Wachter. You have consented to this joint representation. In a situation where our firm represents multiple clients jointly in the same matter, we are free to share confidential information communicated to us by one client with the other joint clients in the course of and in furtherance of the joint representation. We would expect to share information we receive from you with the Company, but we will not necessarily share with you information that we receive from other clients, and you will not be entitled to obtain any confidential information provided to us by any other joint client either during the joint representation or thereafter. Please contact me immediately if you have any objections or concerns regarding this approach.

Based on the information we now have, we are not aware of any actual and present conflicts of interest between you and either the Company, Timothy Scott or Eric Wachter that would preclude this joint representation. However, in any situation in which a lawyer represents more than one client, there is the potential for the clients to have or to develop conflicting interests. If you are aware or become aware of any potential or actual conflict of interest with the Company, Timothy Scott or Eric Wachter, please notify us promptly. Likewise, if we become aware that a conflict has arisen or become apparent, we will notify you promptly.

If a conflict should arise between you and the Company, we will be required to withdraw from representing you, and you may need to engage another attorney to represent you. You agree that, should this occur, we would be free to continue to represent the Company and other joint clients

(except in litigation directly adverse to you in this or a substantially related matter) and that we and they may use any information we have obtained during our representation of you, including any confidential information you may provide to us. This may include sharing information you provide to us with the Company and advising the Company with respect to any issues raised by such information. In addition, if a conflict should arise between you and the Company, Timothy Scott or Eric Wachter, we may be required to withdraw from representing one or more of you, and you may need to engage another attorney to represent you.

You also understand that we may be asked to represent other individuals or entities who, by virtue of their current or former employment with or other relationship to the Company, may seek our advice in connection with these Matters, and you consent to such representation on the same terms as set forth above. You agree to waive any claim of conflict based on our past, current, and future representation of the Company and its current or former officers, employees, directors, etc. As noted above, our fees and costs for representing you in the Matter will be paid by the Company, and you agree that you waive any claim of conflict based upon our receipt of fees from the Company.

You should be aware that joint representation of multiple clients may result in significant benefits for each client, but it may also result in certain risks that might not arise if each client had his or its own separate counsel. Possible benefits may include a common strategy, access to privileged and other information held by other clients in the group, various other tactical advantages, and shared legal fees and costs. There are also potential risks. For example, as explained above, a conflict of interest between or among clients could arise or become apparent, which may require Baker Donelson to withdraw from representing one or more of the joint clients. In addition, the Company has decided as a condition of this joint representation, that confidential or privileged information disclosed to Baker Donelson by individual clients will be shared with the Company and that confidential or privileged information of the Company will not necessarily be shared with individual clients, including yourself. The Company may disclose, or direct us to disclose, to the SEC, or other federal or state regulatory agencies or other third parties confidential or privileged information provided by you and could decide to use such information in a manner that could be disadvantageous to you. And, although you will participate in decisions regarding our representation of you, you will not be consulted on all decisions regarding our representation of the Company or other joint clients in the Matter.

While the Company has agreed that Baker Donelson may represent you in the Matter, you are of course free at any time to consult with any other attorney, including with respect to whether you should enter into this agreement, and to make different arrangements for your representation.

5. Conclusion of Representation.

Either of us may terminate the engagement at any time for any reason by written notice, subject on our part to our professional obligations to you under applicable rules of professional conduct and the terms and conditions set forth in this agreement. Unless previously terminated, our representation of you will terminate upon completion of the services for the Matter described above in paragraph 1. It is understood and agreed that in the event of any termination or withdrawal, we will be entitled to receive any unpaid fees and expenses from the Company. Subsequent invoices sent to collect expenses and/or unpaid balances, and/or accounting records or client lists shall not extend the attorney-client relationship. Unless you engage us after termination of this matter, we will have no continuing obligation to advise you with respect to future legal developments, such as changes in the applicable laws or regulations, which could have an impact on your future rights and liabilities.

A provision at the conclusion of the engagement letter states as follows:

I have carefully read the foregoing letter, considered all information necessary and useful in determining whether or not to consent to the representations outlined above. I have been encouraged to consult with independent counsel regarding this consent to representation, and I am fully aware of my legal rights in this regard. Upon reasoned reflection, I hereby voluntarily consent to the representations by Baker Donelson as outlined above.

Mr. Culpepper's signature appears thereon, dated August 31, 2016. Mr. Culpepper does not dispute that he signed the engagement letter, although he asserts in his brief that he does not specifically remember doing so.

The parties agree that Tennessee Supreme Court Rule 8, Rule of Professional Conduct 1.7 ("RPC 1.7"), applies in this situation. RPC 1.7 states in pertinent part:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Mr. Culpepper has not disputed that Defendants terminated their representation of him in December 2016. Because Defendants allegedly continued their representation of Provectus following termination of their representation of Mr. Culpepper in 2016, the parties are in accord that Tennessee Supreme Court Rule 8, Rule of Professional Conduct 1.9 ("RPC 1.9") would also apply in this situation. RPC 1.9 states as follows:

a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.[4]

[4] Comment 3 to RPC 1.9 provides that matters are "substantially related" if they "involve the same transaction or legal dispute or other work the lawyer performed for the former client" or "if there is a substantial risk that confidential factual information that would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter, unless that information has become generally known."

(b) Unless the former client gives informed consent, confirmed in writing, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by RPCs 1.6 and 1.9(c) that is material to the matter.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter reveal information relating to the representation or use such information to the disadvantage of the former client unless (1) the former client gives informed consent, confirmed in writing, or (2) these Rules would permit or require the lawyer to do so with respect to a client, or (3) the information has become generally known.

Defendants do not dispute that a conflict of interest arose between Provectus and Mr. Culpepper at some point; in fact, the existence of such a conflict was the reason provided by Defendants for terminating their representation of Mr. Culpepper in December 2016. Defendants assert, however, that Mr. Culpepper waived all conflicts of interest with other clients of the Baker firm and gave informed consent to Defendants' continued representation of Provectus in the event such a conflict arose. Although we agree with Defendants that Mr. Culpepper acknowledged his voluntary agreement to the waiver contained in the engagement letter, such acknowledgement is not determinative of the issue of whether Mr. Culpepper's consent was informed.

"Informed consent" is defined in the Rules of Professional Conduct as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Tenn. Sup. Ct. R. 8, RPC 1.0. As our Supreme Court has explained:

> [O]ur rules permit a waiver of a conflict of interest if "(1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents in writing after consultation." Tenn. Sup. Ct. R. 8, RPC 1.7(b). In order to waive a conflict of interest, the petitioner must demonstrate that he fully understands the nature of the conflict and its effect; that he understands his right to the appointment of other counsel if

> necessary; and that, notwithstanding the potential ill effects of continued representation by counsel of record, he desires to proceed. A valid waiver must, of course, not only be made knowingly, but also be made fully and voluntarily in the context of the case.

Frazier v. State, 303 S.W.3d 674, 683-84 (Tenn. 2010) (other internal citations omitted).

Although there is a dearth of case law interpreting the Rules of Professional Conduct in relation to the factual scenario presented in this matter, we note that the comments to RPC 1.7 are instructive to our analysis. For example, comment 6 to RPC 1.7 states: "Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated." As such, it is clear that a client can provide informed consent in order to enable an attorney to undertake concurrent representation that is adverse to that client in certain circumstances. However, when such consent is given, "the information provided [to the client] must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved." *See* RPC 1.7, cmt. 18.

In the case at bar, Mr. Culpepper executed an acknowledgement stating that he had "carefully read" the engagement letter and had "considered all information necessary and useful in determining whether or not to consent to the representations" stated therein. Mr. Culpepper further acknowledged that he had been encouraged to consult with independent counsel regarding his consent to representation. Mr. Culpepper affirmed that he had, upon "reasoned reflection," "voluntarily consent[ed] to the representations by Baker Donelson as outlined above."

The question that remains unanswered, however, is whether Mr. Culpepper was provided information concerning "the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege" or "the potential ill effects of continued representation by counsel of record" such that he could "fully understand[] the nature of the conflict and its effect." *See Frazier*, 303 S.W.3d at 683-84; RPC 1.7, cmt. 18.

Mr. Culpepper posits that his consent was not "informed" in that he was not afforded sufficient information concerning the nature and extent of the conflict and its effect on his individual representation. We note that according to the engagement letter, although Mr. Culpepper expressly agreed that the Baker firm "would expect to share information [the Baker firm] receive[d] from [Mr. Culpepper] with [Provectus]," he also agreed that the Baker firm would not necessarily share information received from

Provectus with Mr. Culpepper. In addition, we note again that the engagement letter expressly provides:

> If a conflict should arise between you and the Company, we will be required to withdraw from representing you, and you may need to engage another attorney to represent you. You agree that, should this occur, we would be free to continue to represent the Company and other joint clients (except in litigation directly adverse to you in this or a substantially related matter) and that we and they may use any information we have obtained during our representation of you, including any confidential information you may provide to us. This may include sharing information you provide to us with the Company and advising the Company with respect to any issues raised by such information. . . .
>
> You agree to waive any claim of conflict based on our past, current, and future representation of the Company and its current or former officers, employees, directors, etc. As noted above, our fees and costs for representing you in the Matter will be paid by the Company, and you agree that you waive any claim of conflict based upon our receipt of fees from the Company.

The letter further explained that although there were benefits to joint representation, there were also risks, such as "that confidential or privileged information disclosed to Baker Donelson by individual clients will be shared with the Company and that confidential or privileged information of the Company will not necessarily be shared with individual clients, including yourself." In addition, the letter provided that Provectus "may disclose, or direct us to disclose, to the SEC, or other federal or state regulatory agencies or other third parties confidential or privileged information provided by you and could decide to use such information in a manner that could be disadvantageous to you." Moreover, the letter clarified that Mr. Culpepper would "not be consulted on all decisions regarding our representation of the Company or other joint clients in the Matter."

Despite the aforementioned language, the letter also included that "[b]ased on the information we now have, we are not aware of any actual and present conflicts of interest between you and either the Company, Timothy Scott or Eric Wachter that would preclude this joint representation." The letter further provided that "if we become aware that a conflict has arisen or become apparent, we will notify you promptly." However, according to the factual allegations contained in Mr. Culpepper's amended complaint, Defendants had met with a forensic accountant and discussed issues concerning Mr. Culpepper on August 15, 2016, without Mr. Culpepper's knowledge. This meeting occurred before Mr. Culpepper signed the conflict waiver on August 31, 2016. Mr. Culpepper alleged in his amended complaint that this meeting with the forensic

accountant ultimately resulted in the fabrication of documentation to support Mr. Culpepper's termination from Provectus for cause. Mr. Culpepper further alleged that he was never made aware of the meeting until documents were disclosed in May 2018. We note that Defendants did not withdraw from their representation of Mr. Culpepper until after his termination from Provectus in December 2016.

Accepting these allegations as true, as we must when reviewing a grant of judgment on the pleadings, we conclude that Mr. Culpepper's complaint stated sufficient facts to support his claim. We reiterate that this Court "should uphold granting the [Rule 12.03] motion only when it appears that the plaintiff can prove no set of facts in support of a claim that will entitle him or her to relief." *Young*, 130 S.W.3d at 63. Mr. Culpepper effectively alleged that Defendants engaged to represent him and continued that representation despite dealing simultaneously with Provectus and third parties to his detriment, thus establishing a potential violation of RPC 1.7. Mr. Culpepper further alleged that Defendants continued to represent Provectus on a substantially related matter after they withdrew from representing him and that Provectus's interests were materially adverse to his interests as a former client, thus establishing a potential violation of RPC 1.9. Such violations of the Rules of Professional Conduct can be evidence of a breach of the standard of care, *see Roy*, 16 S.W.3d at 790-91, and Mr. Culpepper claimed that he was damaged by wrongful termination from his employment and other monetary losses as a result of Defendant's breach of duty. We therefore conclude that Mr. Culpepper properly stated a claim for legal malpractice in his amended complaint. *See Jones*, 588 S.W.3d at 655-56.

Moreover, Mr. Culpepper argues that even if it could be shown that he provided informed consent to the conflict in this matter, not all conflicts are waivable. We agree, observing that comment 15 to RPC 1.7 provides: "Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest." Representation of a client "is prohibited if, in the circumstances, the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation." *Id.* Analysis of this issue requires further factual determination that is inappropriate for judgment on the pleadings.

For the foregoing reasons, we conclude that the trial court improperly granted judgment on the pleadings to Defendants concerning Mr. Culpepper's claim of legal malpractice. We therefore reverse the trial court's grant of judgment on the pleadings to Defendants regarding this issue.

VI. Statute of Limitations

Mr. Culpepper has also raised an issue concerning the trial court's alternative ruling that Mr. Culpepper's legal malpractice claims were barred by the applicable one-

year statute of limitations. Mr. Culpepper contends that the trial court erred by failing to apply the discovery rule to toll the statute of limitations based on Defendants' fraudulent concealment of their August 2016 meeting with the forensic accountant, which occurred without Mr. Culpepper's knowledge and to his detriment.

Our Supreme Court summarized Tennessee's discovery rule applicable to legal malpractice claims in *John Kohl & Co. P.C. v. Dearborn & Ewing*, 977 S.W.2d 528, 532-33 (Tenn. 1998):

> When the cause of action accrues is determined by applying the discovery rule. Under this rule, a cause of action accrues when the plaintiff knows or in the exercise of reasonable care and diligence should know that an injury has been sustained as a result of wrongful or tortious conduct by the defendant.
>
> In legal malpractice cases, the discovery rule is composed of two distinct elements: (1) the plaintiff must suffer legally cognizable damage—an actual injury—as a result of the defendant's wrongful or negligent conduct, and (2) the plaintiff must have known or in the exercise of reasonable diligence should have known that this injury was caused by the defendant's wrongful or negligent conduct. An actual injury occurs when there is the loss of a legal right, remedy or interest, or the imposition of a liability. An actual injury may also take the form of the plaintiff being forced to take some action or otherwise suffer "some actual inconvenience," such as incurring an expense, as a result of the defendant's negligent or wrongful act. However, the injury element is not met if it is contingent upon a third party's actions or amounts to a mere possibility.
>
> The knowledge component of the discovery rule may be established by evidence of actual or constructive knowledge of the injury. Accordingly, the statute of limitations begins to run when the plaintiff has actual knowledge of the injury as where, for example, the defendant admits to having committed malpractice or the plaintiff is informed by another attorney of the malpractice. Under the theory of constructive knowledge, however, the statute may begin to run at an earlier date—whenever the plaintiff becomes aware or reasonably should have become aware of facts sufficient to put a reasonable person on notice that an injury has been sustained as a result of the defendant's negligent or wrongful conduct. We have stressed, however, that there is no requirement that the plaintiff actually know the specific type of legal claim he or she has, or that the injury constituted a breach of the appropriate legal standard. Rather, "the plaintiff is deemed to have discovered the right of action if he is aware of facts sufficient to put a reasonable person on notice that he has suffered an

> injury as a result of wrongful conduct." *Carvell* [*v. Bottoms*], 900 S.W.2d [23,] 29 [(Tenn. 1995)] (quoting *Roe v. Jefferson*, 875 S.W.2d 653, 657 (Tenn. 1994)). "It is knowledge of facts sufficient to put a plaintiff on notice that an injury has been sustained which is crucial." *Stanbury* [*v. Bacardi*], 953 S.W.2d [671,] 678 [(Tenn. 1997)]. A plaintiff may not, of course, delay filing suit until all the injurious effects or consequences of the alleged wrong are actually known to the plaintiff. Allowing suit to be filed once all the injurious effects and consequences are known would defeat the rationale for the existence of statutes of limitations, which is to avoid the uncertainties and burdens inherent in pursuing and defending stale claims.

(Other internal citations omitted.)

In the instant case, Mr. Culpepper stated in his amended complaint that he was unaware of Baker Donelson's meeting with the forensic accountant, which he alleged resulted in the disclosure of privileged communications and, ultimately, the fabrication of documents to justify his termination for cause from Provectus, until documents were disclosed in May 12, 2018 revealing these facts. Mr. Culpepper further alleged that the Baker firm "fraudulently concealed the notes of any meetings it had with [the forensic accountant] about [Mr. Culpepper] until [the forensic accountant] revealed the notes" and that he was not made aware of Defendants' meeting with the forensic accountant until May 12, 2018. Mr. Culpepper has alleged that he therefore could not have and did not discover "facts sufficient to put a reasonable person on notice that he ha[d] suffered an injury as a result of wrongful conduct" until that time. *See John Kohl & Co.*, 977 S.W.2d at 533 (quoting *Carvell v. Bottoms*, 900 S.W.2d 23, 29 (Tenn. 1995)). Mr. Culpepper filed his original complaint on May 9, 2019, which was within one year of the date he claimed to have discovered such facts.

Defendants counter in their appellate brief that Mr. Culpepper knew that he had been terminated in December 2016 and knew that Defendants had continued to represent Provectus in a manner adverse to Mr. Culpepper in 2017 and early 2018. However, these facts do not necessarily establish that Mr. Culpepper was on notice that he had been injured by conduct attributable to Defendants at that time. Defendants further assert that Mr. Culpepper made statements during his March 15, 2018 deposition, taken in the course of arbitration proceedings, accusing Defendants of much of the same conduct alleged in the amended complaint. We note, however, that the trial court neither referred to nor appeared to consider Mr. Culpepper's deposition when granting judgment on the pleadings, which was proper inasmuch as Rule 12.03 directs that the court cannot consider "matters outside the pleadings" when ruling on such motion. *See Bartley*, 2020 WL 5110302, at *8 ("[I]f the trial court had considered [a potential witness's] deposition transcript or his notes, the effect would have been to convert Plaintiffs' motion for a judgment on the pleadings to a motion for summary judgment."). We are likewise bound to consideration of the pleadings alone on appeal. *See Local TV Tenn. LLC v. N.Y.S.E.*

Wolfchase LLC, No. W2017-00675-COA-R3-CV, 2018 WL 1721866, at *4 (Tenn. Ct. App. Apr. 9, 2018).

Based solely on the facts alleged in Mr. Culpepper's amended complaint, which must be taken as true, we determine that the trial court erred in granting judgment in favor of Defendants with regard to Mr. Culpepper's legal malpractice claim predicated upon the statute of limitations and in failing to determine that the discovery rule could be applied. We therefore reverse this portion of the trial court's judgment as well.

VII. Conclusion

For the foregoing reasons, we reverse the trial court's grant of judgment on the pleadings in favor of Defendants with regard to Mr. Culpepper's legal malpractice claim. The balance of the trial court's judgment, which was not appealed, remains in effect. Costs on appeal are assessed to the appellees, Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C.; John S. Hicks; Tonya Mitchem Grindon; Martha L. Boyd; Samuel Lanier Felker; Lori B. Metrock; and Lori H. Patterson. This case is remanded to the trial court for further proceedings consistent with this opinion and collection of costs assessed below.

THOMAS R. FRIERSON, II, JUDGE

APPENDIX D

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 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 than 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

Submitted by:

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

Martha L. Boyd (BPR # 022029)
Samuel L. Felker (BPR # 009045)
Brittany B. Simpson (BPR #031019)
211 Commerce Street, Suite 800
Nashville, Tennessee 37201
(615) 726-5600
(615) 744-5632 (facsimile)
Attorneys for Petitioner Provectus Biopharmaceuticals, Inc.

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 15th day of January, 2019, to the following:

Thomas M. Leveille (BPR# 014395)
Tarpy, Cox, Fleishman & Leveille, PLLC
1111 N. Northshore Drive
Landmark Center North Tower
Suite N-290
Knoxville, TN 37919
Tel (865) 588-1096
Fax (865) 588-1171
tleveille@tcflattorneys.com

Brittany B. Simpson

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. CULPEPPPER'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.

Martha L. Boyd (BPR # 022029)
Samuel L. Felker (BPR # 009045)
Brittany B. Simpson (BPR #031019)
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Nashville, Tennessee 37201
(615) 726-5600
(615) 744-5632 (facsimile)
Attorneys for Petitioner Provectus Biopharmaceuticals, Inc.

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:

Thomas M. Leveille (BPR# 014395)
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Fax (865) 588-1171
tleveille@tcflattorneys.com

Brittany B. Simpson

APPENDIX E

Constitutional and Statutory Provisions

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.

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.

APPENDIX F

Execution Copy

AMENDED AND RESTATED EXECUTIVE EMPLOYMENT AGREEMENT

THIS AMENDED AND RESTATED EXECUTIVE EMPLOYMENT AGREEMENT (this "Agreement") is entered into as of the 28th day of April, 2014 (the "Effective Date"), by and between Provectus Biopharmaceuticals, Inc., a Delaware corporation (the "Company"), and Peter R. Culpepper, CPA, MBA, a resident of Knoxville, Tennessee ("Employee").

WHEREAS, the Company is a development-stage biopharmaceutical company that is primarily engaged in the business of developing prescription drug candidates PV-10 and PH-10, which are ethical pharmaceuticals for treatment of cancers and chronic severe skin afflictions such as psoriasis and atopic dermatitis, a type of eczema. For purposes of this Agreement, and specifically the restrictive covenants set forth herein, the aforementioned activities and all related activities, of whatever nature, either being performed or planned by the Company during any part of the term of this Agreement are to be considered as part of "the Business" protected by this Agreement (sometimes also referred to as "the Company's Business");

WHEREAS, the Company and Employee previously entered into that certain Executive Employment Agreement, dated as of July 1, 2013 (the "Prior Agreement");

WHEREAS, the Company desires to continue to retain Employee as its Chief Financial Officer and Chief Operating Officer, and Employee desires to be so employed by the Company, subject to the terms, conditions and covenants hereinafter set forth; and

WHEREAS, the Company and Employee desire to amend and restate the Prior Agreement to set forth the terms and conditions pursuant to which the Company will continue to retain Employee as its Chief Financial Officer and Chief Operating Officer.

AGREEMENT

NOW, THEREFORE, for and in consideration of the premises, and the agreements, covenants, representations and warranties hereinafter set forth, and other good and valuable consideration, the receipt and adequacy all of which are forever acknowledged and confessed, the parties hereto hereby agree as follows as of the Effective Date:

Section 1. Employment. In reliance on the representations and warranties made herein, the Company hereby agrees to retain Employee to be its Chief Financial Officer and Chief Operating Officer, to perform such duties and services that are consistent with the position of Chief Financial Officer and Chief Operating Officer as may from time to time be assigned to Employee by the Chief Executive Officer and/or the Company's Board of Directors (the "Board").

Section 2. Performance. Employee shall use Employee's best efforts and skills, on a full-time basis, to perform the duties of his employment, as they may be established from time to time by the Board, consistent with the position and office of Chief Financial Officer and Chief Operating Officer occupied by the Employee. Employee shall obey all rules and regulations of the Company, follow all laws and regulations of appropriate government authorities, and be governed by any and all decisions and instructions of the Board.

Section 3. Compensation. Except as otherwise provided for herein, for all services to be performed by Employee in any capacity hereunder, including without limitation any services as an officer, director, member of any committee, or any other duties assigned him, throughout the Employment Period (as defined herein), the Company shall pay or provide Employee with the following, and Employee shall accept the same, as compensation for the performance of his undertakings and the services to be rendered by him:

(a) Base Salary. Employee will be entitled to an annual gross salary of Five-Hundred Thousand Dollars and no cents ($500,000.00) (the "Base Salary"), which shall be paid in accordance with the Company's policies and procedures. Any and all increases to Employee's Base Salary shall be determined by the Compensation Committee of the Company's Board of Directors (the "Committee") in its sole discretion.

(b) Bonus. In addition to the Base Salary, prior to the end of each fiscal year, Employee shall be eligible to receive an annual bonus (the "Annual Bonus") based upon achievement of performance criteria established by the Committee; *provided, however*, that the performance criteria required to be satisfied before any Annual Bonus may be paid, and the amount and terms of any Annual Bonus based upon the extent to which those performance criteria are achieved or exceeded shall be determined by the Committee in its sole discretion.

(c) Equity Awards. With respect to each fiscal year of the Company ending during the Employment Period, Employee shall be eligible to receive an annual equity incentive award upon the terms and conditions as determined in the sole discretion of the Committee.

(d) Benefit Plans. Employee shall receive, subject to the applicable plan, contract, policy or agreement terms, the benefit of all available employee benefit plans, policies, practices, and arrangements, as may be offered by the Company from time to time, including without limitation any stock option or equity plan, defined benefit retirement plan, excess or supplementary plan, profit sharing plan, savings plan, health and dental plan, disability plan, survivor income and life insurance plan, executive financial planning program, other arrangement, or any successors thereto (collectively hereinafter referred to as the "Benefit Plans"). Employee's eligibility and entitlement to any compensation or benefit shall be determined in accordance with the terms and conditions of the Benefit Plans and other applicable programs, practices, and arrangements then in effect.

(e) Vacation and Fringe Benefits. The Employee will be entitled to paid vacations in accordance with policies adopted by the Company with regard to its executives generally. All fringe benefits and perquisites will be in accordance with the Company's existing policies, and the same may be amended from time to time, in the Company's discretion.

(f) Withholding Taxes. The Company shall have the right to deduct from all payments made to Employee hereunder any federal, state, or local taxes required by law to be withheld.

(g) Expenses. During Employee's employment, the Company shall promptly pay or reimburse Employee for all reasonable out-of-pocket expenses incurred by Employee in the

performance of his duties hereunder in accordance with the Company's policies and procedures then in effect. Such policies will be subject to change in the Company's discretion.

Section 4. Restrictions.

(a) Acknowledgements. Employee acknowledges and agrees that during the term of Employee's employment because of the nature of Employee's responsibilities and the resources provided by the Company: (1) Employee will acquire valuable and confidential skills, information, trade secrets, and relationships with respect to the Company's business practices and operations; (2) Employee may develop on behalf of the Company a personal acquaintance and/or relationship with various persons, including, but not limited to, customers and suppliers, which acquaintances may constitute Employee's only contact with such persons, and, as a consequence of the foregoing, (3) Employee will occupy a position of trust and confidence with respect to the Company's affairs and the Business involved, as described earlier, throughout the entire world; (4) the Company's competitors, both in the United States and internationally, consist of both domestic and international businesses, and the services to be performed by Employee for the Company involve aspects of both the Company's domestic and international business; and (5) it would be impossible or impractical for Employee to perform his duties for the Company without access to the Company's confidential and proprietary information and contact with persons that are valuable to the goodwill of the Company. Therefore, Employee acknowledges that if he went to work for or otherwise performed services for a third party engaged in a business similar to the Business of the Company, the disclosure by Employee to a third party of such confidential and proprietary information and/or the exploitation of such relationships would be inevitable.

(b) Reasonableness. In view of the foregoing and in consideration of the remuneration to be paid to Employee, Employee agrees that it is reasonable and necessary for the protection of the goodwill and business of the Company that Employee make the covenants contained in this Agreement regarding the conduct of Employee during and subsequent to Employee's employment by the Company, and that the Company will suffer irreparable injury if Employee engages in conduct prohibited by this Agreement.

(c) Non-Compete. During the term of Employee's employment by the Company, and for a period of twenty-four (24) months following termination of employment, in the event that Employee voluntarily terminates his employment with the Company other than for Good Reason (as defined below) or Employee is terminated for Cause (as defined below), neither Employee nor any other person or entity with Employee's assistance, shall manage, operate, control, be employed by, solicit sales for, participate in, advise, consult with, or be connected with the ownership, management, operation, or control of any business within the United States which is engaged, in whole or in part, in any business that is directly competitive with the Company's Business or any portion thereof.

(d) No Solicitation. In addition, during the term of Employee's employment by the Company, and for a period of twenty-four (24) months following termination of employment, in the event that Employee voluntarily terminates his employment with the Company or Employee is terminated for Cause, neither Employee nor any person or entity with his assistance nor any entity which Employee or any person with his assistance or any person who he directly or

indirectly controls shall, directly or indirectly, (1) solicit or take any action to induce any employee of the Company to quit or terminate their employment with the Company or the Company's affiliates, or (2) employ as an employee, independent contractor, consultant, or in any other position, any person who was an employee of the Company or the Company's affiliates within the preceding six months, *provided that* this paragraph will not prevent the Employee or any other person or entity from providing employment to a person who applied for the employment in response a job listing that was not directed primarily at employees or former employees of the Company.

(e) Confidentiality. Without the express written consent of the Company, Employee shall not at any time (either during or after the termination of Employee's employment) use (other than for the benefit of the Company) or disclose to any other business entity proprietary or confidential information concerning the Company, any of their affiliates, or any of its officers. Neither shall Employee disclose any of the Company's or the Company's affiliates' trade secrets or inventions of which Employee has gained knowledge during his employment with the Company. This paragraph shall not apply to any such information that: (1) Employee is required to disclose by law; (2) has been otherwise disseminated, disclosed, or made available to the public; or (3) was obtained after his employment with the Company ended and from some source other than the Company, which source was under no obligation of confidentiality of which the Employee is aware.

(f) Effect of Breach. Employee agrees that a breach of any obligation in this Section 4 cannot adequately be compensated by money damages and, therefore, the Company shall be entitled, in addition to any other right or remedy available to it (including, but not limited to, an action for damages), to an injunction restraining such breach or a threatened breach and to specific performance of such provisions, and Employee hereby consents to the issuance of such injunction and to the ordering of specific performance, without the requirement of the Company to post any bond or other security.

(g) Other Rights Preserved. Nothing in this Section 4 eliminates or diminishes rights which the Company may have with respect to the subject matter hereof under other agreements, the governing statutes, or under provisions of law, equity, or otherwise. Without limiting the foregoing, this section does not limit any rights the Company may have under any agreement with Employee regarding trade secrets and confidential information.

Section 5. Termination. This Agreement shall terminate upon the following circumstances:

(a) General. This Agreement shall be effective as of the Effective Date and shall terminate on the fifth anniversary following the Effective Date, unless terminated earlier as provided hereunder (the "Employment Period"); provided, however, that this Agreement shall be automatically renewed for successive one (1) year periods, unless Employee or the Company notifies the other in writing at least 120 days prior to the termination date of the Agreement of the party's intent not to renew this Agreement, in which event this Agreement shall terminate on the termination date.

(b) Termination for Good Reason. This Agreement, and the Employee's employment under it, may be terminated by the Employee at any time for Good Reason (as that term is defined in Section 6(c)).

(c) Termination Without Cause. This Agreement, and the Employee's employment under it, may be terminated by the Company without Cause but subject to the provisions of this Agreement. It is expressly understood that Employee's employment is strictly "at will."

(d) Cause. This Agreement may be terminated at any time by the Company for Cause. "Cause" for this purpose shall mean (i) Employee committing a material breach of this Agreement and failing to cure that breach, or to discontinue the activity that is breaching this Agreement, within 30 days after being notified by the Company that failure to cure the breach or to discontinue the breaching activity will result in termination of this Agreement for Cause, or (ii) conviction of the Employee of a crime involving moral turpitude, including such acts as fraud or dishonesty, or (iii) the commission by the Employee of a felony, or (iv) Employee willfully or recklessly refusing to perform the material duties reasonably assigned to him by the Company's Board that are consistent with the provisions of this Agreement, when such willful or reckless refusal does not result from a Disability, or (v) Employee's continued willful or gross malfeasance or nonfeasance of the material duties reasonably assigned to him by the Company's Board that are consistent with the provisions of this Agreement, when such malfeasance or nonfeasance does not result from a Disability.

(e) Death/Disability. This Agreement may be terminated by the Company upon Employee's death or his being unable to render the services required to be rendered by him during the Employment Period for a period of one hundred eighty (180) days during any twelve-month period ("Disability").

(f) Implied Covenant of Good Faith and Fair Dealing. The parties acknowledge that the State of Tennessee recognizes that an implied covenant of good faith and fair dealing is a part of every contract, even an employee at will contract. Although such covenant cannot change the express terms of this contract, such covenant applies to this contract.

Section 6. Effect of Termination.

(a) If Employee's employment is terminated (i) voluntarily by Employee without Good Reason, or (ii) by the Company for Cause, the Company shall pay Employee's compensation only through the last day of the Employment Period and, except as may otherwise be expressly provided in this Agreement or in any Benefit Plan, the Company shall have no further obligation to Employee.

(b) If Employee's employment is terminated by the Company other than for Cause, including any discharge without Cause, liquidation or dissolution of the Company (other than due to bankruptcy), discharge within six (6) months following a Change of Control (as defined below), or a termination caused by death or Disability, or if Employee voluntarily resigns for Good Reason, for so long as Employee is not in breach of his continuing obligations under Section 4, the Company shall continue to pay Employee (or his estate) an amount equal to his Base Salary in effect immediately prior to the termination of his employment for a period of

twenty-four (24) months, to be paid in accordance with the Company's regular payroll practices through the end of the fiscal year in which termination occurs and then in one lump sum payable to Employee in the first month of the fiscal year following termination, as well as pro rated bonuses based upon the bonuses paid with regard to the prior fiscal year, plus benefits on a substantially equivalent basis to those which would have been provided to Employee in accordance with the Benefit Plans described in Section 3(d) of this Agreement. Except as may otherwise be expressly provided in this Agreement, the Company shall have no further obligation to Employee.

(c) For purposes of this Agreement, "Good Reason" shall mean:

(i) a material reduction in the Employee's duties or responsibilities to which he does not agree in advance;

(ii) any failure by the Company to comply with any material provision of this Agreement other than an isolated, insubstantial and inadvertent failure not occurring in bad faith that is remedied by the Company promptly after receipt of notice thereof given by Employee; or

(iii) the requirement by the Company to which the Employee does not consent in advance that the Employee relocate his principal place of employment to a location more than fifty (50) miles outside of Knoxville, Tennessee.

For purposes of this Agreement, "Change of Control" shall mean the sale of all or substantially all the assets of the Company; any merger, consolidation or acquisition of the Company with, by or into another corporation, entity or person; or after the effective date of this Agreement, any "person" (as such term is used in Sections 13(d) and 14(d) of the Securities Exchange Act of 1934, as amended (the "Exchange Act")) becomes a "beneficial owner" (as defined in Rule 13d-3 under the Exchange Act), directly or indirectly, of securities of the Company representing 35% or more of the voting power of the then outstanding securities of the Company.

A resignation by the Employee for Good Reason will not become effective until at least 10 days after the Employee notifies the Company of that resignation. In the event that within ten days after the notice from the Employee, the Company challenges Employee's determination that there is Good Reason, the resignation will be suspended and will not become effective until such, if any, time as it is determined by an agreement between the Employee and the Company that is approved by the Company's Board, or through the procedures described in Section 8, that there is Good Reason, at which time the resignation will become effective and will be deemed to constitute a termination of employment by the Employee for Good Reason. If the Company does not challenge the Employee's determination that there is Good Reason within that ten day period, the Company will be conclusively deemed for all purposes to have agreed that there is Good Reason. While a resignation for Good Reason is suspended, the Employee will continue to be employed by the Company under this Agreement and the Employee and the Company will have all the rights and obligations provided in this Agreement.

(d) On termination of employment, Employee (or if terminated by death or Disability, his executor or his authorized agent) shall deliver all trade secrets, confidential information,

records, notes, data, memoranda, and equipment of any nature that are in Employee's (or his estate's) possession or under his control and that are the property of the Company or relate to the business of the Company.

(e) The obligations of Section 4 through Section 9 of this Agreement shall survive the expiration or termination of this Agreement.

Section 7. Representations and Warranties.

(a) No Conflicts. Employee represents and warrants to the Company that Employee is under no duty (whether contractual, fiduciary, or otherwise) that would prevent, restrict, or limit Employee from fully performing all duties and services for the Company, and the performance of such duties and services shall not conflict with any other agreement or obligation to which Employee is bound.

(b) No Hardship. Employee represents and acknowledges that Employee's experience and/or abilities are such that observance of the covenants contained in this Agreement will not cause Employee any undue hardship nor will they unreasonably interfere with Employee's ability to earn a livelihood.

Section 8. Alternative Dispute Resolution.

(a) Mediation. Employee and the Company agree to submit, prior to arbitration, all unsettled claims, disputes, controversies, and other matters in question between them arising out of or relating to this Agreement (including but not limited to any claim that the Agreement or any of its provisions is invalid, illegal, or otherwise voidable or void or any claim by the Employee that he is entitled to resign for Good Reason) or the dealings or relationship between Employee and the Company ("Disputes") to mediation in Knoxville, Tennessee, and in accordance with the Commercial Mediation Rules of the American Arbitration Association in effect at the time. The mediation shall be private, confidential, voluntary, and nonbinding. Any party may withdraw from the mediation at any time before signing a settlement agreement upon written notice to the other party and to the mediator. The mediator shall be mutually selected by and agreed upon by both Employee and the Company and shall be neutral and impartial. The mediator shall be disqualified as a witness, consultant, expert, or counsel for either party with respect to the matters in Dispute and any related matters. The Company and Employee shall pay their respective attorneys' fee and other costs associated with the mediation, and the Company and Employee shall equally bear the costs and fees of the mediator. If a Dispute cannot be resolved through mediation within ninety (90) days of being submitted to mediation, the parties agree to submit the Dispute to arbitration.

(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. The arbitrator will have the right to award or include in his award any relief

which he deems proper under the circumstances, including, without limitation, money damages (with interest on unpaid amounts from the date due), specific performance, injunctive relief, and other enforcement of this Agreement, reasonable attorneys' fees and costs, provided that the arbitrator will not have the right to amend or modify the terms of this Agreement. The award and decision of the arbitrator will be conclusive and binding upon all parties hereto, and judgment upon the award may be entered in any court of competent jurisdiction. Except as specified above, the Company and Employee shall pay their respective attorneys' fee and other costs associated with the arbitration, and the Company and Employee shall equally bear the costs and fees of the arbitrator.

(c) Confidentiality. Employee and the Company agree that they will not disclose, or permit those acting on their behalf to disclose, any aspect of the proceedings under Section 8(a) and Section 8(b), including but not limited to the resolution or the existence or amount of any award, to any person, firm, organization, or entity of any character or nature, unless divulged (i) to an agency of the federal or state government, (ii) pursuant to a court order, (iii) pursuant to a requirement of law, (iv) pursuant to prior written consent of the other of the Company or Employee, or (v) in connection with a legal proceeding to enforce a settlement agreement or arbitration award. This provision is not intended to prohibit nor does it prohibit Employee's or the Company's disclosures of the terms of any settlement or arbitration award to their attorney(s), accountant(s), financial advisor(s), or family members, provided that they comply with the provisions of this paragraph.

(d) Injunctions. Notwithstanding anything to the contrary contained in this Section 8, the Company and Employee shall have the right in a proper case to obtain temporary restraining orders and temporary or preliminary injunctive relief from a court of competent jurisdiction; provided, however, that the moving party must contemporaneously submit the Dispute(s) for non-binding mediation under Section 8(a) and then for arbitration under Section 8(b) on the merits as provided herein if such Disputes cannot be resolved through mediation.

Section 9. General.

(a) Notices. All notices required or permitted under this Agreement shall be in writing, may be made by personal delivery or facsimile or email transmission, effective on the day of such delivery or receipt of such transmission, or may be mailed by registered or certified mail, effective two (2) business days after the date of mailing, addressed as follows:

To the Company:

PROVECTUS BIOPHARMACEUTICALS, INC.
7327 Oak Ridge Highway, Suite A
Knoxville, TN 37931
Attn: Chief Financial Officer

or such other person or address as designated in writing to Employee.

To Employee:

Peter R. Culpepper, CPA, MBA
Provectus Biopharmaceuticals, Inc.
7327 Oak Ridge Highway, Suite A
Knoxville, TN 37931

or to such other address as designated by him in writing to the Company.

(b) Successors. This Agreement shall not be assignable or transferable (whether by pledge, grant of a security interest, sales contract or otherwise) by the Company, except that the Company may assign this agreement to a successor which acquires all or substantially all of the Company's Business and which agrees in writing to be bound by, and fulfill the Company's obligations under, this Agreement. This Agreement shall be binding upon and shall inure to the benefit of the Company, its permitted successors and assigns, and the Employee and his heirs or legatees. If Employee dies during the term of this Agreement, the obligation to pay salary and provide benefits shall immediately cease; and, absent actual notice of any probate proceeding, the Company shall pay any compensation due for the period preceding Employee's death to the following person(s) in order of preference: (i) spouse of Employee; (ii) children of Employee eighteen years of age and over, in equal shares; (iii) brothers, in equal shares; or (d) the person to whom funeral expenses are due. Upon payment of such sum, the Company shall be relieved of all further obligations hereunder.

(c) Waiver, Modification, and Interpretation. No provisions of this Agreement may be modified, waived, or discharged unless such waiver, modification, or discharge is agreed to in a writing signed by Employee and an appropriate officer of the Company empowered to sign the same by the Committee. No waiver by either party at any time of any breach by the other party of, or compliance with, any condition or provision of this Agreement to be performed by the other party shall be deemed a waiver of similar or dissimilar provisions or conditions at the same time or at any prior to subsequent time. The validity, interpretation, construction, and performance of this Agreement shall be governed by the laws of the State of Tennessee. Except as provided in Section 8, any action brought to enforce or interpret this Agreement shall be maintained exclusively in the state and federal courts located in Knoxville, Tennessee.

(d) Interpretation. The headings contained herein are for reference purposes only and shall not in any way affect the meaning or interpretation of any provision of this Agreement. No provision of this Agreement shall be interpreted for or against any party hereto on the basis that such party was the draftsman of such provision; and no presumption or burden of proof shall arise disfavoring or favoring any party by virtue of the authorship of any of the provisions of this Agreement.

(e) Counterparts. The Company and Employee may execute this Agreement in any number of counterparts, each of which shall be deemed to be an original but all of which shall constitute but one instrument. In proving this Agreement, it shall not be necessary to produce or account for more than one such counterpart.

(f) Invalidity of Provisions. If a court of competent jurisdiction shall declare that any provision of this Agreement is invalid, illegal, or unenforceable in any respect, and if the rights and obligations of the Parties to this Agreement will not be materially and adversely affected thereby, in lieu of such illegal, invalid, or unenforceable provision the court may add as a part of this Agreement a legal, valid, and enforceable provision as similar in terms to such illegal, invalid, or unenforceable provision as is possible. If such court cannot so substitute or declines to so substitute for such invalid, illegal, or unenforceable provision, (i) such provision will be fully severable; (ii) this Agreement will be construed and enforced as if such illegal, invalid, or unenforceable provision had never comprised a part hereof; and (iii) the remaining provisions of this Agreement will remain in full force and effect and not be affected by the illegal, invalid, or unenforceable provision or by its severance herefrom. The covenants contained in this Agreement shall each be construed to be a separate agreement independent of any other provision of this Agreement, and the existence of any claim or cause of action of Employee against the Company, predicated on this Agreement or otherwise, shall not constitute a defense to the enforcement by the Company of any of said covenants.

(g) Entire Agreement. This Agreement and the Recitals (together with the documents expressly referenced herein) constitute the entire agreement between the parties, supersedes in all respects any prior agreement between the Company and Employee and may not be changed except by a writing duly executed and delivered by the Company and Employee in the same manner as this Agreement. This Agreement amends and restates, but does not novate, the Prior Agreement.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement effective as of the date and year first written above.

PROVECTUS BIOPHARMACEUTICALS, INC.

By: _____
Name: Timothy C. Scott
Title: President

EMPLOYEE

_____
Peter R. Culpepper, CPA, MBA

BEFORE THE AMERICAN ARBITRATION ASSOCIATION
EMPLOYMENT ARBITRATION TRIBUNAL

PROVECTUS BIOPHARMACEUTICALS, INC., Petitioner, v. PETER R. CULPEPPER, Respondent.	Case No. 01-17-0005-2136

INTERIM AWARD

I, the undersigned Arbitrator, having been designated in accordance with the arbitration agreement entered into between the above-named parties and having been duly sworn, and having considered the evidence presented by the parties, including numerous exhibits and the testimony of witnesses under oath, and having also considered the witnesses' demeanor, manner of testifying, opportunity to acquire knowledge about the matters to which they testified, and the extent to which the witnesses' testimony has been supported or contradicted by other credible testimony, hereby finds and awards as follows:

This arbitration was commenced by petitioner Provectus Biopharmaceuticals ("Provectus" or "the Company") against its former Chief Financial Officer, Peter R. Culpepper ("Culpepper" or "Respondent") against the background of the discovery and investigation of financial improprieties by the Company's Chief Executive Officer Craig Dees and Dees' abrupt resignation in 2016. Dees' conduct included claiming reimbursement for alleged business expenses which he could not document. As a result, the Company's Board of Directors initiated an investigation which included hiring a forensic accountant, Larry Solinger, to review the support for and payment of reimbursement for business expenses, primarily travel, to Provectus officers. Based upon its investigation, the Board decided there was just cause for Respondent

Culpepper's termination. While it is undisputed that Respondent was an "at will" employee, there are significant financial consequences depending on whether Culpepper's separation was "for cause" or "without cause." If Culpepper's separation had been "without cause," his employment agreement would have entitled him to two years of severance pay and a 50% credit on his repayment obligation pursuant to what is known as the "Kleba Settlement Agreement."

Petitioner presented evidence through Larry Solinger's testimony and report that Culpepper had obtained $294,255 in reimbursement for travel expenses that were undocumented. Culpepper, testifying on his own behalf, presented his "reconciliations" of the expenses, showing considerably lesser amounts than Solinger presented.

The Arbitrator believes that the actions and intentions of the principals in this case must be judged in the context of a relatively new start-up company with only four employees, three of whom, excluding Culpepper, were founders. Seeking to develop drugs for the effective treatment of certain kinds of cancers, primarily with the assistance of subcontractors, Provectus raised tens of millions of dollars on an ongoing basis, out of which the officers paid themselves generous salaries, large bonuses, and other benefits, while never showing a profit. Presumably on the premise that it takes money to make money, the officers, and especially Culpepper, traveled both nationally and internationally on a regular basis to raise money, attend medical meetings, and seek investments, a task which it is admitted Culpepper did very well. The evidence shows that Culpepper was reimbursed $1.7 million over a three year period for alleged business travel and entertainment. Among the damages the Company seeks to recover from Culpepper is the $294,255 identified by Solinger as undocumented travel reimbursement.

Provectus also contends because Culpepper was terminated "for cause" and prior to December 31, 2018, a pre-existing 2014 Settlement Agreement arising out of a stockholder's

derivative suit (Kleba) over allegedly excessive bonuses paid to Culpepper and others requires Culpepper to forfeit a 50% credit toward the $2,400,000 total repayment amount he would otherwise be required to repay the Company. The agreement also obligated Culpepper to pay 25% ($227,750) of the litigation costs incurred in the lawsuit. All cash repayment obligations became immediately payable and bore 10% interest when Culpepper allegedly breached the agreement when he was terminated "for cause." Finally, section (2)(c)15 of the Settlement Agreement allows Provectus to recover all costs and reasonable attorneys' fees incurred in enforcing its rights upon default.

Petitioner also seeks its costs and attorneys' fees permitted under the arbitration clause of the parties' Amended and Restated Executive Employment Agreement. Section 8(b) provides the Arbitrator will have the right to include in any award "any relief which he deemed proper under the circumstances, including . . . reasonable attorneys' fees and costs . . . ." This provision is separate from the attorneys' fees provision in the Kleba Settlement Agreement.

In addition to the damages enumerated above, Petitioner seeks the recoupment of all compensation paid to Culpepper from 2013 to 2016, the period during which Petitioner seeks a finding that Respondent breached his fiduciary duty to the corporation.

Finally, Petitioner contends that Respondent's misconduct regarding improper reimbursement and advances for travel and other business expenses constituted fraud, conversion, constructive fraud, and unjust enrichment, giving rise to a claim for punitive damages.

The factfinder, here the Arbitrator, has had the benefit of presentations by two well-prepared and capable law firms. Also, the actions and intentions of the principals in this case will be judged in the context of a small, start-up company where the founders knew each other

well, and that some amount of trust existed among them, and that the financial controls and procedures initially were somewhat lax. The officers recognized this, which was a reason for seeking someone as a CFO who had the credentials, background and experience that Culpepper represented he possessed. Prior to Culpepper's hire, Provectus had been utilizing outside help, Bible Harris Smith, PC (BHS), a certified public accounting firm, BDO USA, LLP, an auditing firm, and later RSM US LLP, also an accounting and auditing firm. Petitioner continued to utilize the services of these firms after Culpepper was hired. Because of this, Culpepper contends that Petitioner's use of these three firms relieved him of any responsibility for accounting functions. While the evidence establishes that a key duty of Culpepper was to raise capital, the company also sought a CFO who could ultimately be responsible for internal accounting and assure that the company's Securities and Exchange Commission filings (SEC) complied with federal securities law and SEC rules. Relying on Culpepper's resume, the company had reason to believe that they had found someone who could jump right in and assure that proper accounting controls existed, that the day-to-day financial administration was being handled appropriately by the firms already on board, and that he could take care of any SEC filings and similar regulatory requirements. As shown at the hearing all was not as it appeared in Respondent's initial resume[1].

Culpepper's suggestion that he was assigned no specific duties or responsibilities despite his title and that he was not expected, despite the representations on his resume that helped get him hired, to assure proper financial controls were in place and being followed, is disingenuous. For a corporate officer earning more than a half million dollars a year, and who had applied to

[1] Culpepper's resumes, not only the initial one relied upon Provectus when he was hired, but also others identified at the hearing, as well as published articles touting his experience, ability, and giving advice, and bearing his by-line, which he admittedly did not write and was barely familiar with while testifying, do nothing to enhance his credibility.

and represented to Provectus that he had all the tools sought in a Chief Financial Officer, and to still suggest that he did not know what he was supposed to do, and was not bound by or even aware of his employers' Code of Business Conduct or Bylaws, is simply not credible.

According to Culpepper, in addition to having no obligations, to the extent he was even aware of what BHS, BDO or RSM were doing and what they required for a reimbursement to employees from company funds, he never assured himself that it was being done appropriately. He certainly knew how little documentation he personally provided for reimbursement and that large amounts of cash were being approved for Dees without any showing of need, business purpose, or supporting documentation. Even if he did not have full knowledge concerning Dees' recordkeeping practices, Culpepper knew how little he personally provided to obtain reimbursement or advances, and how little accountability he provided for use of the funds.

The Arbitrator is not persuaded that Respondent's "reconciliations" of his expense account after the Solinger findings are credible, and the Arbitrator finds that the Solinger overpayment analysis is a more reliable figure. Respondent's use of reimbursements for canceled airline travel and his inability to account for the cash advances he received for foreign travel show at a minimum a recklessness that cannot be tolerated in a Chief Financial Officer and constitute "just cause" for Culpepper's termination[2]. Had fundraising been Respondent's only responsibility, another analysis might be appropriate.

Provectus points to the airline travel and cash advances for foreign trips as particularly egregious examples of a pattern of unsubstantiated reimbursements which show an intent to defraud the company. Fraudulent intent is often difficult to prove. Sometimes the sheer magnitude of the loss can be sufficient. Here the evidence shows that Respondent allegedly

[2] Because of the Dees situation alone the annual reports and other filings Culpepper certified would understate Dees compensation and incorrectly state that the Company's financial controls were effective.

incurred $1.7 million in travel and entertainment expenses in a three year period for which he sought reimbursement and was found by Solinger to have not been entitled to $294,255 of this amount. Although the examples are numerous and occurred over a significant period of time, the Arbitrator cannot find that the scales tip on the side of intentional fraud as opposed to being grossly inattentive to the responsibility to account for the use of company funds in light of the corporate culture that existed at Provectus at the time[3].

Provectus' damage recovery might be much greater had the Arbitrator been willing to find that Respondent's conduct amounted to fraud and conversion and also constituted a breach of fiduciary duty entitling Provectus to recoup the compensation paid to Culpepper during the period of breach, which could be enough to support a claim for punitive damages. However, the Arbitrator's decision is not an attempt to please or displease each party equally, but reflects the fact that Respondent joined a Company with a loose business culture and limited attention to detail which apparently carried over even to its outside accountants and auditors. From the evidence presented at the hearing, clearly there is enough blame to go around.

For the reasons set out above, the Arbitrator finds that:

1. Respondent Culpepper's termination by Petitioner Provectus was for just cause.

2. Petitioner Provectus is entitled to recover from Respondent Culpepper as follows:

a. The outstanding balance of $109,458.00, plus pre-judgment interest, remaining from the $294,255.00 in undocumented travel expenses.

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[3] In the summary of claims made by Provectus' counsel in his opening statement and in Provectus' post hearing brief the Company seeks reimbursement for $27,678.46 in attorney fees advanced to Respondent during a SEC investigation. This investigation and SEC Order were the subject of discussion during the evidentiary hearing. Respondents' objection to the SEC Order being injected into the arbitration proceedings was based on the Commission's statement in footnote 3 of its Order that "The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding."
In this arbitration proceeding the Arbitrator has made his own independent findings, concluding that Culpepper was careless and reckless, but not finding that he necessarily acted fraudulently or in bad faith. Under the Delaware law cited by the Petitioner, the Arbitrator does not find it appropriate to require indemnification.

b. $2,240,000.00 plus $227,750.00 as Culpepper's share of the litigation costs pursuant to the Kleba Settlement Agreement plus attorneys' fees and costs incurred by the Petitioner in enforcing its rights under Section 2(C)15, plus 10% annual interest beginning December 29, 2016, less any amount previously paid by Culpepper.

c. Except as set out above, each party shall bear its own costs, including attorneys' fees, except as authorized by the Kleba Settlement Agreement, fees of the Arbitrator, and administrative fees of the American Arbitration Association.

d. This Award is in full settlement of all claims and counterclaims submitted to this Arbitration. All claims not expressly granted herein are hereby denied[4].

Within twenty (20) days of the date of this Award, Petitioner's counsel shall present their Petition for reasonable attorneys' fees and costs pursuant to Section 2(C)15 of the Kleba Settlement Agreement in sufficient detail to allow opposing counsel to assess its reasonableness. Unless otherwise settled between the parties' counsel, Respondent shall respond to Petitioner's request within twenty (20) days of Petitioner's filing. Any other damage items awarded above which cannot be definitively calculated and agreed upon by the parties, consistent with the Award, shall also be identified in accordance with the timelines above.

Frank W. Bullock, Jr., Arbitrator

July 12, 2018

[4] In an Interim Order dated May 4, 2018, the Arbitrator granted Provectus' Motion for Summary Judgment on Culpepper's counterclaims for defamation and false light invasion of privacy.

BEFORE THE AMERICAN ARBITRATION ASSOCIATION

EMPLOYMENT ARBITRATION TRIBUNAL

PROVECTUS BIOPHARMACEUTICALS, INC. Petitioner, v. PETER R. CULPEPPER, Respondent.	CASE NO. 01-17-0005-2136

AWARD

The Arbitrator's July 12, 2018 Interim Award provided that, in this hotly-contested case in which the claims, counterclaims, and defenses presented significant issues of fact and law, each party should bear its own costs and attorneys' fees except to the extent costs and attorneys' fees were available to Claimant under the Kelba Settlement Agreement. As directed by the Arbitrator, Claimant Provectus filed its Application for attorneys' fees and costs on July 26, 2018. Respondent Culpepper filed his Response to Claimant's Application on August 15, 2018.

The Arbitrator has carefully reviewed the parties' Application and Response. The awarding of attorneys' fees and costs, whether authorized by statute, contract, or otherwise, is something quite familiar to the Arbitrator who has been called upon to do so on numerous occasions. A bedrock principle is that the fees awarded be fair and reasonable. In this case both parties agree that Tennessee Supreme Court Rule 8, RPC 1.5, provides an appropriate guide for the Arbitrator in this case. In considering the factors listed in RPC 1.5, the Arbitrator considers factors 1, 3, 4, 6, and 7 to be the most relevant.

Respondent argues in his Response that Claimant is seeking 100% of its asserted counsel fees and expenses incurred in this case, although it is only entitled to those fees and costs required to enforce the Kleba Settlement Agreement. Respondent also questions counsel's billing rates and the staffing utilized, which he suggests was excessive in this matter.

In reviewing the time records and itemized fees submitted by Claimant's counsel, the Arbitrator notes that a number of timekeepers, in addition to lead counsel, worked on this case. As Respondent correctly points out, the qualifications of these timekeepers and their usual and customary rates are not revealed, and that the rates of even lead counsel vary on occasions. A review of the time records submitted does reveal the names and the charged rates of the additional 25 timekeepers, but the qualifications and experience of these timekeepers do not appear. The Arbitrator notes that the rates charged by two of the named timekeepers exceed that of lead counsel for the Claimant, although the majority of the time charged is by others at considerably lower rates than the hourly rates of Ms. Boyd and Mr. Felker. Utilizing associates and staffers who can be billed at lower rates benefits the client and, in this case, Mr. Culpepper. However, without documentation of who among the 25 timekeepers is a lawyer, paralegal, or a staffer, and their experience, the Arbitrator cannot exercise his discretion in determining a reasonable charge for their work.

The preparation of this matter required the examination of financial data over a number of years, the work history of the Respondent, and the interactions of Provectus officers, employees, and third-party contractors over several years. This preparation included pretrial discovery, including depositions, and the hiring of a forensic accounting firm. A successful presentation of Claimant's case required substantial legal skills to combat the skills utilized by the Respondent. The Arbitrator has had the opportunity and privilege to become aware of the

fees customarily charged by those of similar skills in this locality and in comparable localities. The result obtained by counsel for the Claimant, while perhaps not as much monetarily as Provectus might have hoped, was still significant. Counsel has had a long relationship with the Claimant, resulting in discounted fees for Provectus which also benefits the Respondent. Claimant's counsel and their law firm enjoy fine reputations and exhibited substantial ability in their work in this case, as did their opposition. The Arbitrator has carefully considered these factors in making a subjective judgment concerning the counsel fees and expenses in this matter.

Respondent has indicated that he understands that the Arbitrator can use his discretion in weighing the reasonableness of the attorneys' fees sought in this case. Looking at the hourly rates charged by lead counsel, the Arbitrator believes they are fair and reasonable. The fact that lead counsel's rates changed during the course of this litigation is reasonably explained by the fact that counsel has had a long relationship with the client, and the Arbitrator recognizes that in long-running cases it is not unusual for fees to be discounted by counsel. Even at the highest levels, the Arbitrator does not find the hourly rates charged by Ms. Boyd and Mr. Felker, about whom some background information is provided and whom the Arbitrator has observed at trial, are unreasonable.

The principle issue raised by Respondent Culpepper is that Claimant is entitled to counsel fees and costs only because of the language of the "Stipulated Settlement Agreement and Mutual Release", paragraph (c)15, which reads: "In the event of any default by Defendant with respect to any term(s) of this Agreement, the Pledge Agreement, or the Option Rescission Agreement, the Corporation shall be entitled to recover all costs and reasonable attorneys' fees incurred in the enforcement of the Corporation's rights in such agreements." (The Kleba Agreement). On this point Respondent is correct. Respondent alleges that because Claimant prevailed on only

one of eight claims, the fees and costs sought must be substantially reduced. When Respondent points to Claimant's costs and fees incurred in preparing summary judgment motions on Respondent's defamation and false light claims, he is closer to the mark than he is when he contends that Claimant's defense of Respondent's counter-claims for breach of his employment agreement and a declaratory judgment in his favor regarding the amount he owes under the Kleba Settlement Agreement should not be compensable.

Respondent suggests two different methods the Arbitrator might consider in exercising his discretion in awarding fees; one would be to award Provectus one-eighth (1/8) of its reasonable fees based on the proposition that Claimant prevailed on only one of eight claims, or two, award thirty percent (30%) of the total reasonable fees as a percentage of damages related to the total damage amount sought. Lastly, Respondent contends that the time and labor expended by Claimant's counsel was "egregious". This raises the question of how much preparation is enough, which is often a difficult question to answer.

The central issue in this case was whether the Respondent was terminated "for cause". If Culpepper's separation had been without cause, his employment agreement entitled him to two years' severance pay and a fifty percent (50%) reduction on his repayment obligation under the Kleba Settlement Agreement.

The Arbitrator found in his July 12, 2018 Interim Award that Respondent's history of unsubstantiated expense reimbursements, especially for airline travel never taken, and cash advances for foreign travel and entertainment never verified, represented a recklessness that could not be tolerated in a Chief Financial Officer, and constituted "just cause" for termination. The Arbitrator ordered repayment to the Claimant for Respondent's undocumented travel

expenses. Such a finding was equivalent to a finding that Respondent had converted company funds to his own use and that he had been unjustly enriched.

In seeking all of the costs and attorneys' fees incurred, Claimant contends that the issue of Respondent's termination for cause was "necessarily intertwined" with its other claims against Respondent and also with Culpepper's counterclaims that he was terminated without cause and that he was entitled to a two for one credit under the Kleba Settlement Agreement.

Respondent's objections to some of the charges for which Claimant seeks reimbursement raise some concern, not because the charges are "wildly excessive" as Respondent claims, but because it is impossible for the Arbitrator to determine if they are in fact reasonable, *i.e.*, the hourly rates of the individuals other than Ms. Boyd and Mr. Felker. Other charges incurred, such as the costs of preparing summary judgment motions on Culpepper's defamation and false light counterclaims, can be properly separated from the enforcement of the Settlement Agreement. Respondent is correct that Claimant did not succeed on all of its claims. However, despite the claims on which the Arbitrator found that the evidence presented did not get over the threshold for fraud or breach of fiduciary duty, this case almost in its entirety revolved around whether Respondent was terminated for "just cause" and whether or not he breached the Kleba Settlement Agreement. Consequently, Provectus is entitled to recover a substantial portion of the reasonably substantiated counsel fees and costs it incurred in this arbitration proceeding.

In this case, in which the Claimant prevailed on the major issue litigated, it is difficult to categorize which of the hundreds of time entries in the record relate or do not relate to litigating the "just cause" issue. However, the Arbitrator recognizes there are some unrelated charges. Also, because of the lack of information necessary to weigh the reasonableness of the rates charged by timekeepers other than Ms. Boyd and Mr. Felker, the Arbitrator finds that Claimant

has not met its burden of establishing a reasonable fee for these 25 additional timekeepers. The Arbitrator will not award counsel fees to the Claimant for work done by lawyers other than Ms. Boyd and Mr. Felker. The Arbitrator agrees that most of the facts and issues in this case were inexplicably intertwined with the "just cause" issue. Therefore, the Arbitrator, in the exercise of his reasonable discretion, will attribute seventy percent (70%) of the fees charged by Ms. Boyd and Mr. Felker to the enforcement of the Kleba Settlement Agreement.

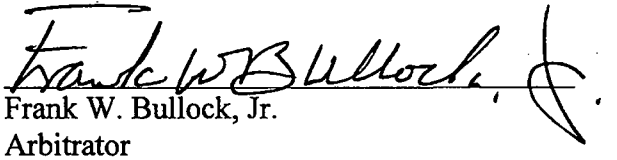
Respondent also raises three issues related to the costs reimbursement sought by Provectus. As for the Solinger fees and expenses of $60,783.18, the Arbitrator finds that the Solinger evidence was important to the "just cause" issue and the charges reasonable. Respondent also objects to fees charged by Sword and Shield. Because the Arbitrator does not have sufficient information to authorize reimbursement for these costs, the Sword and Shield charges are found not be reimbursable. When the Arbitrator ordered in the Interim Award that except as set out, each party should bear its own costs, the Arbitrator intended this to include any fees of the American Arbitration Association, the Arbitrator, and of the court reporter.

For the reasons set out above, Baker Donelson's requested attorney fees of $496,574.00 are reduced by $131,699.00, which represents the fees of 25 timekeepers whose charges are found not to be reimbursable, leaving a balance of $364,875.00. Seventy percent (70%) of this amount ($255,412.50) is awarded to Claimant as reimbursement from Respondent as authorized by the Kleba Settlement Agreement. Claimant is also entitled to recover as part of its costs $60,783.18 representing the fees and expenses of its expert witness Larry Solinger.

Now, therefore, Claimant Provectus Biopharmaceuticals, Inc. is awarded the sum of $316,195.68 from Respondent Peter R. Culpepper.

The fees of the American Arbitration Association totaling $32,260.00, the fees of the Arbitrator totaling $108,148.63 and the fees of the court reporter shall be borne equally by the parties.

September 12, 2018



Frank W. Bullock, Jr.
Arbitrator

IN THE SUPREME COURT OF TENNESSEE

PROVECTUS BIOPHARMACEUTICALS, INC.,	)	
	)	S. Ct. No. _____
Petitioner/Appellee,	)	
v.	)	No. M2019-00662-COA-R3-CV
PETER R. CULPEPPER,	)	Davidson County Chancery Court
	)	Docket No. 18-1077-III
Respondent/Appellant.	)	

APPLICATION FOR PERMISSION TO APPEAL

COUNSEL FOR APPELLANT:

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ORAL ARGUMENT REQUESTED

IN THE SUPREME COURT OF TENNESSEE

PROVECTUS BIOPHARMACEUTICALS, INC.,	)	
	)	S. Ct. No. _____
Petitioner/Appellee,	)	
v.	)	No. M2019-00662-COA-R3-CV
PETER R. CULPEPPER,	)	Davidson County Chancery Court
	)	Docket No. 18-1077-III
Respondent/Appellant.	)	

APPLICATION FOR PERMISSION TO APPEAL

Peter R. Culpepper, Appellant and Respondent in the trial court, pursuant to Rule 11 of the Tennessee Rules of Appellate Procedure, hereby applies to the Supreme Court of Tennessee for appeal by permission from the final decision of the Court of Appeals for the Middle Section of Tennessee. In support of this Application, Peter R. Culpepper states as follows:

I. Judgment of Court of Appeals.

Judgment was entered by the Court of Appeals for the Middle Section of Tennessee on April 14, 2020, affirming the Judgment of the Davidson County Chancery Court. No petition for rehearing was filed in the Court of Appeals by either party. A copy of the Opinion of the Court of Appeals is appended to this Application as Addendum A.

II. Standard of Review.

The trial court granted a Motion for Judgment on the Pleadings and the Court of Appeals affirmed. Making a determination on a motion for judgment on the pleadings is a question of law. Timmins v. Lindsey, 310 S.W.3d 834, 839 (Tenn. Ct. App. 2009). Review of the determinations of the trial court by the Supreme Court on issues of law is *de novo* with no

presumption of correctness. Id.; see also Harman v. University of Tennessee, 353 S.W.3d 734, 736-37 (Tenn. 2011) (in reviewing an order granting a motion for judgment on the pleadings "review is *de novo* with no presumption of correctness").

III. Questions presented for review.

This Application presents the following questions for review:

1. Whether the trial court was in error in granting judgment on the pleadings in favor of the Petitioner without allowing the Respondent to amend his previously filed response to assert the basis for an application to vacate the arbitration award.

2. Whether the trial court was in error in entering its judgment confirming the arbitration award upon an erroneous finding that the Appellant did not file an application to vacate the arbitration award within 90 days of receiving such award as required by Tenn. Code Ann. § 29-5-313(b).

3. Whether the trial court was in error in denying the appellant's Rule 15 Motion to Amend to assert an amended basis for vacating the arbitration award on the asserted basis that the amendment would be futile because it was not timely.

IV. Facts relevant to questions presented for review and Statement of the Case.[1]

Peter R. Culpepper ("Culpepper") was employed by Provectus Biopharmaceuticals, Inc. (hereinafter "Provectus") from February 2004 through December 2016, first as its Chief Financial Officer and then as its Interim Chief Executive Officer. Petition to Confirm Arbitration Award (hereinafter referred to as the "Petition") ¶ 2 (R. Vol. I, p. 1); Answer ¶ 2 (R. Vol. I, p. 34). 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

[1] Because this case involves a Petition to Confirm Arbitration award and the trial court granted judgment based upon the pleadings, the procedural circumstances of the case must be addressed in this Application.

Culpepper dated April 28, 2014. Petition ¶ 5 (R. Vol. I, p. 2); Answer ¶ 5 (R. Vol. I, p. 34). Provectus alleges in its Petition that it discharged Culpepper "for cause" based upon an assertion that he had obtained inappropriate and undocumented travel advances and reimbursements totaling over $300,000.00 over a three year period. Petition ¶ 6 (R. Vol. I, p. 2); Answer ¶ 6 (R. Vol. I, p. 34). Culpepper denies that he was terminated for cause and asserts in his Answer that the stated reason was "merely the purported reason for his termination." Answer ¶ 6. (R. Vol. I, p. 34). These issues were the subject of an arbitration proceeding between the parties that culminated in an arbitration award in favor of Provectus. Petition ¶ 17. (R. Vol. I, p. 4). Provectus also asserted a claim in the arbitration proceeding pursuant to a Stipulated Settlement Agreement dated June 6, 2014, that had been entered into between Provectus and Culpepper. Petition ¶ 8. (R. Vol. I, pp. 2-3).

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") and continued to be represented by the Law Firm in the proceeding before the Davidson County Chancery Court. Second Amended and Restated Answer to Petition to Confirm Arbitration Award and Counterclaim to Vacate Arbitration Award ¶ 11.[2] (R. Vol. I, p. 85). Culpepper was also previously a client of Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C., up to and including one day after he was terminated by Provectus, purportedly "for cause." Second Amended and Restated Answer to Petition to Confirm Arbitration Award and Counterclaim to Vacate Arbitration Award ¶ 12. (R. Vol. I, p. 86).

[2] Culpepper filed a Motion to Amend Pleadings seeking to file the Second Amended and Restated Answer to Petition to Confirm Arbitration Award and Counterclaim to Vacate Arbitration Award in the trial court. The trial court denied the Motion to Amend Pleadings. Order Confirming the Arbitration Award and Granting Petitioner's Motion for Judgment on the Pleadings, p. 4 (Jan. 23, 2019). (R. Vol. I, p. 113). As a result, the factual allegations of the Second Amended and Restated Answer to Petition to Confirm Arbitration Award and Counterclaim to Vacate Arbitration Award are only in the record as a proposed pleading attached to the Motion to Amend Pleadings.

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. Second Amended and Restated Answer to Petition to Confirm Arbitration Award and Counterclaim to Vacate Arbitration Award ¶ 13. (R. Vol. I, p. 86). 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. Second Amended and Restated Answer to Petition to Confirm Arbitration Award and Counterclaim to Vacate Arbitration Award ¶ 14. (R. Vol. I, p. 86).

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. Second Amended and Restated Answer to Petition to Confirm Arbitration Award and Counterclaim to Vacate Arbitration Award ¶ 15. (R. Vol I, p. 86). 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. Second Amended and Restated Answer to Petition to Confirm Arbitration Award and Counterclaim to Vacate Arbitration Award ¶ 16. (R. Vol. I, p. 86). Included within the documents produced were notes from the expert witness of Provectus that reflected an interview by an investigator of Lori 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." Second Amended and Restated Answer to Petition to Confirm Arbitration Award and Counterclaim to Vacate

Arbitration Award ¶ 16. (R. Vol. I, p. 86). Lori 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. Second Amended and Restated Answer to Petition to Confirm Arbitration Award and Counterclaim to Vacate Arbitration Award ¶ 16. (R. Vol. I, p. 86).

Culpepper had no knowledge as to the interview of Lori 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. Second Amended and Restated Answer to Petition to Confirm Arbitration Award and Counterclaim to Vacate Arbitration Award ¶ 17. (R. Vol. I, p. 87). 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. Second Amended and Restated Answer to Petition to Confirm Arbitration Award and Counterclaim to Vacate Arbitration Award ¶ 18. (R. Vol. I, p. 87). The parts not redacted reflected that the "directors then extensively discussed Mr. Culpepper's status in the Company and the results of the investigation." Second Amended and Restated Answer to Petition to Confirm Arbitration Award and Counterclaim to Vacate Arbitration Award ¶ 18. (R. Vol. I, p. 87). The actual minutes of the discussion are redacted so Culpepper has been unable to identify what was said. Second Amended and Restated Answer to Petition to Confirm Arbitration Award and Counterclaim to Vacate Arbitration Award ¶ 19. (R. Vol. I, p. 87) It is clear from the unredacted portions of the minutes, however, that both Lori Metrock and the expert witness were present for the meeting of the Board of Directors. Second Amended and Restated Answer to Petition to Confirm Arbitration Award and Counterclaim to Vacate Arbitration Award ¶ 19. (R. Vol. I, p. 87).

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. Second Amended and Restated Answer to Petition to Confirm Arbitration Award and Counterclaim to Vacate Arbitration Award ¶ 20. (R. Vol. I, p. 87). 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." Second Amended and Restated Answer to Petition to Confirm Arbitration Award and Counterclaim to Vacate Arbitration Award ¶ 21. (R. Vol. I, p. 87).

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. Second Amended and Restated Answer to Petition to Confirm Arbitration Award and Counterclaim to Vacate Arbitration Award ¶ 23. (R. Vol. I, p. 88). 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. Second Amended and Restated Answer to Petition to Confirm Arbitration Award and Counterclaim to Vacate Arbitration Award ¶ 23. (R. Vol. I, p. 88). These factual circumstances are the basis for the request by Culpepper to vacate the arbitration award.

Provectus 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. Petition ¶ 21. (R. Vol. I, p. 1). Provectus alleges in its Petition that it was awarded a recovery in the arbitration proceedings filed against Culpepper. Petition ¶ 17. (R. Vol. I, p. 4). Provectus asserts that the Arbitrator issued an Interim Award on July 12, 2018, and a Final Award on September 12, 2018. Petition ¶¶ 17 and 20. (R. Vol. I, pp. 4-5). Culpepper filed his *pro se*

"Answer to Petition to Confirm Arbitration Award" ("Answer") on November 7, 2018. Answer, p. 1. (R. Vol. I, p. 34). In the Answer, Culpepper admitted the issuance of the Interim Award and the final Award but specifically requested "modification or correction of the award." Answer to Petition to Confirm Arbitration Award, ¶ 17 and ¶ 20 and First Affirmative Defense. (R. Vol. I, pp. 34 -35). The request for modification or correction contained in the original Answer filed by Culpepper was directed at the request by the Petitioner for an award of pre-judgment interest. Answer, First Affirmative Defense, p. 1. (R. Vol. I, p. 34).

The Petitioner filed its "Plaintiff's Motion for Judgment on the Pleadings" and "Plaintiff's Memorandum in Support of Motion for Judgment on the Pleadings" on November 15, 2018. Plaintiff's Motion for Judgment on the Pleadings, p. 1 (R. Vol. I, p. 40); Plaintiff's Memorandum in Support of Motion for Judgment on the Pleadings, p. 1 (R. Vol. I, p. 42).

Culpepper filed his *pro se* "Amended Answer to Petition to Confirm Arbitration Award" on December 11, 2018.[3] Amended Answer to Petition to Confirm Arbitration Award ("Amended Answer"), p. 1. (R. Vol. I, p. 60). In the Amended Answer, Culpepper specifically requests that "this Court review the award." Amended Answer, First Affirmative Defense, p. 1. (R. Vol. I, p. 60). 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 American Arbitration Association ("AAA") "alleging impropriety of the Arbitrator." Amended Answer, First Affirmative Defense, p. 1. (R. Vol. I, p. 60). 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. Amended Answer, First Affirmative Defense, p. 1. (R. Vol. I, pp. 60-61).

[3] Culpepper did not file a motion to amend his prior pleading. December 11, 2018, was exactly 90 days after the Final Award of September 12, 2018.

On January 10, 2019, Culpepper filed[4] 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. Motion to Amend Pleadings, p. 1. (R. Vol. I, p. 78). 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 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. Motion to Amend Pleadings, p. 1. (R. Vol. I, p. 78).

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. Order Confirming the Arbitration Award and Granting Petitioner's Motion for Judgment on the Pleadings, pp. 1-5. (R. Vol. I, pp. 110-14). 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.

Order Confirming the Arbitration Award and Granting Petitioner's Motion for Judgment on the Pleadings, p. 4 (Jan. 23, 2019). (R. Vol. I, p. 113). 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. Judgment Confirming Arbitration Award, p. 1. (R. Vol. I, pp. 123-24).

[4] Prior to this filing, Culpepper represented himself in the Chancery Court proceeding without the assistance of counsel.

On February 20, 2019, Culpepper filed a "Motion to Alter or Amend Judgment and Order Pursuant to Rule 59." Motion to Alter or Amend Judgment and Order Pursuant to Rule 59 (hereinafter "Motion to Alter or Amend"), p. 1. (R. Vol. I, p. 125). The Motion to Alter or Amend was denied by the trial court by Order entered on April 1, 2019. Order, pp. 1-2 (Apr. 1, 2019). (R. Vol. II, pp. 164-65). 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." Order, p. 2 (April 1, 2019). (R. Vol. II, p. 165). Culpepper filed his Notice of Appeal to the Court of Appeals on April 17, 2019. Notice of Appeal, p. 1. (R. Vol. II, p. 174). On April 14, 2020, the Court of Appeals entered its Judgment and Opinion affirming the decision of the trial court. See Opinion (Addendum A). 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. Opinion, pp. 8-9.

V. Reasons supporting review by the Supreme Court.

A. The need to secure the uniformity of decision.

Culpepper filed a *pro se* Answer to the Petition filed by Provectus within 90 days of the Final Award and asked the trial court for modification or correction of the arbitration award. Culpepper subsequently filed a *pro se* Amended Answer also within 90 days of the Final Award and asked the trial court to review the award asserting that he had addressed the impropriety of the Arbitrator and counsel for Provectus. After the 90 day period had passed, Culpepper filed his Motion to Amend Pleadings and asked the trial court to vacate the arbitration award. It is this pleading which the trial court found was the first attempt to vacate the Arbitration Award and found that the request to vacate was not timely and could not relate back pursuant to Rule 15 of the Tennessee Rules of Civil Procedure. Order, p. 2 (Apr. 1, 2019). (R. Vol. II, p. 165).

In addressing this issue, the Court of Appeals stated that the "resolution of this dispute requires us to resolve the apparent conflict between the specific time-limitation provisions of the [Tennessee Uniform Arbitration] Act and the relation-back provision of Tenn. R. Civ. P. 15." Opinion, p. 4 (Addendum A). The Court of Appeals recognized that this issue had not been directly addressed in any Tennessee decisions. While there is thus no conflict within the case law in Tennessee state courts, the Court of Appeals recognized that "[s]ome federal courts have applied Rule 15 to allow a party to amend a timely application to vacate an award to assert additional grounds for vacation, even if the party moved to amend the application outside of the three-month limit imposed by the FAA." Opinion, p. 6 (Addendum A). The Court of Appeals refused to adopt the reasoning of the federal cases on the grounds that the language of the TUAA is "materially different" from the language of the FAA.

Provectus 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. Petition ¶ 21. (R. Vol. I, p. 1). Provectus asserts that the Arbitrator issued an Interim Award on July 12, 2018, and a Final Award on September 12, 2018. Petition ¶¶ 17 and 20. (R. Vol. I, pp. 4-5). Culpepper filed his *pro se* "Answer to Petition to Confirm Arbitration Award" ("Answer") on November 7, 2018. Answer, p. 1. (R. Vol. I, p. 34). In the Answer, Culpepper admitted the issuance of the Interim Award and the final Award but specifically requested "modification or correction of the award." Answer to Petition to Confirm Arbitration Award, ¶ 17 and ¶ 20 and First Affirmative Defense. (R. Vol. I, pp. 34 -35). The request for modification or correction contained in the original Answer filed by Culpepper was directed at the request by the Petitioner for an award of pre-judgment interest. Answer, First Affirmative Defense, p. 1. (R. Vol. I, p. 34).

Culpepper filed his *pro se* "Amended Answer to Petition to Confirm Arbitration Award" on December 11, 2018.[5] Amended Answer to Petition to Confirm Arbitration Award ("Amended Answer"), p. 1. (R. Vol. I, p. 60). In the Amended Answer, Culpepper specifically requests that "this Court review the award." Amended Answer, First Affirmative Defense, p. 1. (R. Vol. I, p. 60). 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 American Arbitration Association ("AAA") "alleging impropriety of the Arbitrator." Amended Answer, First Affirmative Defense, p. 1. (R. Vol. I, p. 60). 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. Amended Answer, First Affirmative Defense, p. 1. (R. Vol. I, pp. 60-61).

[5] Culpepper did not file a motion to amend his prior pleading.

On January 10, 2019, Culpepper filed[6] 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. Motion to Amend Pleadings, p. 1. (R. Vol. I, p. 78). 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 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. Motion to Amend Pleadings, p. 1. (R. Vol. I, p. 78).

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> 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.

Order Confirming the Arbitration Award and Granting Petitioner's Motion for Judgment on the Pleadings, p. 4 (Jan. 23, 2019). (R. Vol. I, p. 113). 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. Judgment Confirming Arbitration Award, p. 1. (R. Vol. I, pp. 123-24).

[6] Prior to this filing, Culpepper represented himself in the Chancery Court proceeding without the assistance of counsel.

Rule 15.01 provides that leave to amend a pleading "shall be freely given when justice so requires." Tenn. R. Civ. P. 15.01. "Tennessee law has a history of favoring amendments." Freeman Indus. LLC v. Eastman Chem. Co., 227 S.W.3d 561, 566 (Tenn. Ct. App. 2006). As a result, the Tennessee Supreme Court has recognized that the language of Rule 15.01 is a restriction on the exercise of pre-trial discretion by a trial court. Branch v. Warren, 527 S.W.2d 89, 91 (Tenn. 1975). As stated by the Supreme Court,

> Rule 15.01 provides that leave (to amend) shall be freely given when justice so requires. This proviso in the rules substantially lessens the exercise of pre-trial discretion on the part of a trial judge. Indeed, the statute (T.C.A. § 20-1505) which conferred a measure of discretion on trial judges was repealed and Rule 15 stands in its place and stead. That rule needs no construction; it means precisely what it says, that 'leave shall be freely given.'

Branch v. Warren, 527 S.W.2d 89, 91-92 (Tenn. 1975). "The rules put forth a liberal policy of permitting amendments in order to ensure determination of claims on their merits." Henderson v. Bush Bros. & Co., 868 S.W.2d 236, 237 (Tenn. 1993).

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 insure 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)).

The trial court ruled that Rule 15 did not apply under the circumstances to allow an amendment to assert a claim to vacate the arbitration award. The Court of Appeals ruled that "the specific requirement of § 29-5-312, that all grounds for vacation or modification shall be asserted within the time limits imposed, must prevail over the more general rule of procedure in order to effectuate the General Assembly's purpose in enacting the Tennessee Uniform Arbitrator Act." Opinion, pp. 8-9 (Addendum A). The Court thus ruled that the Act limits the applicability of Rule 15 under the circumstances.

A number of federal court decisions have allowed amendments to relate back pursuant to Fed. R. Civ. P. 15 in relation to a request to vacate an arbitration award. See, e.g., Bonar v. Dean Witter Reynolds, Inc., 835 F.2d 1378 (11th Cir. 1988); Passa v. City of Columbus, 2008 WL 687168 (S.D. Ohio Mar. 11, 2008); Dealer Computer Services, Inc. v. Dub Herring Ford, 489 F.Supp.2d 772 (E.D. Mich. 2007); International Brotherhood of Teamsters v. United Parcel Service, 335 F.3d 497 (6th Cir. 2003); BBVA Securities v. Cintron, 2012 WL 2002304 (D.P.R. June 4, 2012); Stulberg v. Intermedics Orthopedics, Inc., 1999 WL 759608 (N.D. Ill. Aug. 31, 1999); International Chem. Workers Union v. Mobay Chem. Corp., 755 F.2d 1107 (4th Cir. 1985). The Court of Appeals in this case rejected the reasoning of the federal courts in these cases based upon asserted differences in language between the TUAA and the FAA. The conflict between the time limitation provisions of the TUAA and the relation back provision of Rule 15, the apparently differing language between the TUAA and the FAA, and the conflicting holdings between the Court of Appeals in this case and the holdings in the federal cases addressing the same issue warrant the granting of the Application for Permission to Appeal in this case.

B. The need to secure settlement of important questions of law and of public interest.

As recognized by the Court of Appeals, the Courts of the State of Tennessee have not directly addressed the apparent conflict between the relation back provision of Rule 15 and the time limitation provisions of the TUAA. The Court relied upon Idaho state court decisions and a Massachusetts state court decision in ruling that a party must strictly adhere to the 90 day time limit in the Act and must specify all grounds for modifying or vacating the award with the time limit. The Court of Appeals recognized that a number of federal decisions had applied Rule 15 to allow a party to amend a timely application to assert additional grounds for vacation even past the FAA time limit. Opinion, p. 6 (Addendum A).

The purpose of Rule 15 is to ensure that cases are decided on their merits. Floyd v. Rentrop, 675 S.W.2d 165, 168 (Tenn. 1984). The Courts of Tennessee have ruled that Rule 15 is to be construed liberally. See, e.g., Karash v. Pigott, 530 S.W.2d 775, 777 (Tenn. 1975). The Court of Appeals in the case at hand recognized a restriction on this liberal interpretation of Rule 15. Opinion, p. 9 (Addendum A). The Court of Appeals here ruled that "all" grounds to vacate the arbitration award must be included in a request to vacate filed within the 90 day time frame even though the statute does not expressly use the word "all." There is a need to address this important question of law and of public policy that warrants that this Court grant the Application.

C. The need for the exercise of the Supreme Court's supervisory authority.

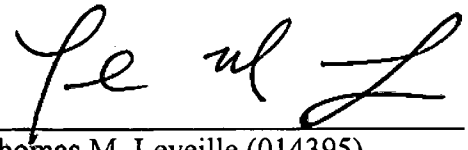
As already set forth above, the trial court and the Court of Appeals came down in favor of a restriction on the liberal amendment policy under Rule 15 and as adopted by the Supreme Court. The ruling by the Court of Appeals adopting this restriction is contrary to similar decisions made by a number of federal courts. The circumstances relating to the decision of the Court of Appeals warrants that the Supreme Court grant the Application in order to exercise its supervisory authority.

V. Conclusion.

Based upon the foregoing, Peter R. Culpepper, Appellant, respectfully requests that this Court grant an appeal by permission pursuant to Rule 11 of the Tennessee Rules of Appellate Procedure from the final decision of the Court of Appeals for the Middle Section of Tennessee in this matter.

Respectfully submitted,

TARPY, COX, FLEISHMAN &
LEVEILLE, PLLC

By: 

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Application for Permission to Appeal has been served upon counsel for the Appellee, Martha L. Boyd, Samuel L. Felker, and Brittany B. Simpson, Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C., Baker Donelson Center, Suite 800, 211 Commerce Street, Nashville, Tennessee 37201, via email at mboyd@bakerdonelson.com, samfelker@bakerdonelson.com, and bsimpson@bakerdonelson.com, and via U.S. regular mail, this the 15 day of June, 2020.

Thomas M. Leveille

IN THE SUPREME COURT OF TENNESSEE

PROVECTUS BIOPHARMACEUTICALS, INC.,	)	
	)	S. Ct. No. _____
Petitioner/Appellee,	)	
v.	)	No. M2019-00662-COA-R3-CV
PETER R. CULPEPPER,	)	Davidson County Chancery Court
	)	Docket No. 18-1077-III
Respondent/Appellant.	)	

BRIEF OF APPELLANT

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ORAL ARGUMENT REQUESTED

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. WHETHER THE TRIAL COURT WAS IN ERROR IN GRANTING JUDGMENT ON THE PLEADINGS IN FAVOR OF THE PETITIONER WITHOUT ALLOWING THE RESPONDENT TO AMEND HIS RESPONSE TO ASSERT THE BASIS FOR AN APPLICATION TO VACATE THE ARBITRATION AWARD.

II. WHETHER THE TRIAL COURT WAS IN ERROR IN ENTERING ITS JUDGMENT CONFIRMING ARBITRATION AWARD UPON AN ERRONEOUS FINDING THAT THE APPELLANT DID NOT FILE AN APPLICATION TO VACATE THE ARBITRATION AWARD WITHIN 90 DAYS OF RECEIVING SUCH AWARD AS REQUIRED BY TENN. CODE ANN. § 29-5-313(b).

III. WHETHER THE TRIAL COURT WAS IN ERROR IN DENYING THE APPELLANT'S RULE 15 MOTION TO AMEND TO ASSERT AN AMENDED BASIS FOR VACATING THE ARBITRATION AWARD ON THE ASSERTED BASIS THAT THE AMENDMENT WOULD BE FUTILE BECAUSE IT WAS NOT TIMELY.

STATEMENT OF THE CASE

Provectus Biopharmaceuticals, Inc. (hereinafter "Provectus"), Petitioner, 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. Petition ¶ 21. (R. Vol. I, p. 1). Provectus alleges in its Petition that it was awarded a recovery in arbitration proceedings filed against Peter R. Culpepper ("Culpepper"). Petition to Confirm Arbitration Award ("Petition") ¶ 17. (R. Vol. I, p. 4). Provectus asserts that the Arbitrator issued an Interim Award on July 12, 2018, and a Final Award on September 12, 2018. Petition ¶¶ 17 and 20. (R. Vol. I, pp. 4-5). Culpepper filed his *pro se* "Answer to Petition to Confirm Arbitration Award" ("Answer") on November 7, 2018. Answer, p. 1. (R. Vol. I, p. 34). In the Answer, Culpepper admitted the issuance of the Interim Award and the final Award but specifically requested "modification or correction of the award." Answer to Petition to Confirm Arbitration Award, ¶ 17 and ¶ 20 and First Affirmative Defense. (R. Vol. I, pp. 34 -35). The request for modification or correction contained in the original Answer filed by Culpepper was directed at the request by the Petitioner for an award of pre-judgment interest. Answer, First Affirmative Defense, p. 1. (R. Vol. I, p. 34).

The Petitioner filed its "Plaintiff's Motion for Judgment on the Pleadings" and "Plaintiff's Memorandum in Support of Motion for Judgment on the Pleadings" on November 15, 2018. Plaintiff's Motion for Judgment on the Pleadings, p. 1 (R. Vol. I, p. 40); Plaintiff's Memorandum in Support of Motion for Judgment on the Pleadings, p. 1 (R. Vol. I, p. 42).

Culpepper filed his *pro se* "Amended Answer to Petition to Confirm Arbitration Award" on December 11, 2018.[1] Amended Answer to Petition to Confirm Arbitration Award ("Amended Answer"), p. 1. (R. Vol. I, p. 60). In the Amended Answer, Culpepper specifically

[1] Culpepper did not file a motion to amend his prior pleading.

requests that "this Court review the award." Amended Answer, First Affirmative Defense, p. 1. (R. Vol. I, p. 60). 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 American Arbitration Association ("AAA") "alleging impropriety of the Arbitrator." Amended Answer, First Affirmative Defense, p. 1. (R. Vol. I, p. 60). 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. Amended Answer, First Affirmative Defense, p. 1. (R. Vol. I, pp. 60-61).

On January 10, 2019, Culpepper filed[2] 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. Motion to Amend Pleadings, p. 1. (R. Vol. I, p. 78). 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 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. Motion to Amend Pleadings, p. 1. (R. Vol. I, p. 78).

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. Order Confirming the Arbitration Award and Granting Petitioner's Motion for Judgment on the Pleadings, pp. 1-5. (R. Vol. I, pp. 110-14). In ruling on the Motion to Amend Pleadings, the Court held as follows:

[2] Prior to this filing, Culpepper represented himself in the Chancery Court proceeding without the assistance of counsel.

> 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.

Order Confirming the Arbitration Award and Granting Petitioner's Motion for Judgment on the Pleadings, p. 4 (Jan. 23, 2019). (R. Vol. I, p. 113). 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. Judgment Confirming Arbitration Award, p. 1. (R. Vol. I, pp. 123-24).

On February 20, 2019, Culpepper filed a "Motion to Alter or Amend Judgment and Order Pursuant to Rule 59." Motion to Alter or Amend Judgment and Order Pursuant to Rule 59 (hereinafter "Motion to Alter or Amend"), p. 1. (R. Vol. I, p. 125). The Motion to Alter or Amend was denied by the trial court by Order entered on April 1, 2019. Order, pp. 1-2 (Apr. 1, 2019). (R. Vol. II, pp. 164-65). 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." Order, p. 2 (April 1, 2019). (R. Vol. II, p. 165). Culpepper filed his Notice of Appeal to the Court of Appeals on April 17, 2019. Notice of Appeal, p. 1. (R. Vol. II, p. 174). On April 14, 2020, the Court of Appeals entered its Judgment and Opinion affirming the decision of the trial court. See Addendum A to Application for Permission to Appeal. 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. Opinion, pp. 8-9.

STATEMENT OF THE FACTS

Culpepper was employed by Provectus from February 2004 through December 2016, first as its Chief Financial Officer and then as its Interim Chief Executive Officer. Petition ¶ 2 (R. Vol. I, p. 1); Answer ¶ 2 (R. Vol. I, p. 34). 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. Petition ¶ 5 (R. Vol. I, p. 2); Answer ¶ 5 (R. Vol. I, p. 34). Provectus alleges in its Petition that it discharged Culpepper "for cause" based upon an assertion that he had obtained inappropriate and undocumented travel advances and reimbursements totaling over $300,000.00 over a three year period. Petition ¶ 6 (R. Vol. I, p. 2); Answer ¶ 6 (R. Vol. I, p. 34). Culpepper denies that he was terminated for cause and asserts in his Answer that the stated reason was "merely the purported reason for his termination." Answer ¶ 6. (R. Vol. I, p. 34). Provectus also asserted a claim in arbitration pursuant to a Stipulated Settlement Agreement dated June 6, 2014, that had been entered into between Provectus and Culpepper. Petition ¶ 8. (R. Vol. I, pp. 2-3).

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") and continued to be represented by the Law Firm in the proceeding before the Davidson County Chancery Court. Second Amended and Restated Answer to Petition to Confirm Arbitration Award and Counterclaim to Vacate Arbitration Award ¶ 11.[3] (R. Vol. I, p. 85). Culpepper was also previously a client of Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C., up to and

[3] Culpepper filed his Motion to Amend Pleadings seeking to file the Second Amended and Restated Answer to Petition to Confirm Arbitration Award and Counterclaim to Vacate Arbitration Award. The trial court denied the Motion to Amend Pleadings. Order Confirming the Arbitration Award and Granting Petitioner's Motion for Judgment on the Pleadings, p. 4 (Jan. 23, 2019). (R. Vol. I, p. 113). As a result, the factual allegations of the Second Amended and Restated Answer to Petition to Confirm Arbitration Award and Counterclaim to Vacate Arbitration Award are only in the record as a proposed pleading attached to the Motion to Amend Pleadings.

including one day after he was terminated by Provectus, purportedly "for cause." Second Amended and Restated Answer to Petition to Confirm Arbitration Award and Counterclaim to Vacate Arbitration Award ¶ 12. (R. Vol. I, p. 86).

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. Second Amended and Restated Answer to Petition to Confirm Arbitration Award and Counterclaim to Vacate Arbitration Award ¶ 13. (R. Vol. I, p. 86). 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. Second Amended and Restated Answer to Petition to Confirm Arbitration Award and Counterclaim to Vacate Arbitration Award ¶ 14. (R. Vol. I, p. 86).

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. Second Amended and Restated Answer to Petition to Confirm Arbitration Award and Counterclaim to Vacate Arbitration Award ¶ 15. (R. Vol I, p. 86). 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. Second Amended and Restated Answer to Petition to Confirm Arbitration Award and Counterclaim to Vacate Arbitration Award ¶ 16. (R. Vol. I, p. 86). Included within the documents produced were notes from the expert witness of Provectus that reflected an interview by an investigator of Lori 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." Second Amended and Restated Answer to Petition to Confirm Arbitration Award and Counterclaim to Vacate Arbitration Award ¶ 16. (R. Vol. I, p. 86). Lori 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. Second Amended and Restated Answer to Petition to Confirm Arbitration Award and Counterclaim to Vacate Arbitration Award ¶ 16. (R. Vol. I, p. 86).

Culpepper had no knowledge as to the interview of Lori 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. Second Amended and Restated Answer to Petition to Confirm Arbitration Award and Counterclaim to Vacate Arbitration Award ¶ 17. (R. Vol. I, p. 87). 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. Second Amended and Restated Answer to Petition to Confirm Arbitration Award and Counterclaim to Vacate Arbitration Award ¶ 18. (R. Vol. I, p. 87). The parts not redacted reflected that the "directors then extensively discussed Mr. Culpepper's status in the Company and the results of the investigation." Second Amended and Restated Answer to Petition to Confirm Arbitration Award and Counterclaim to Vacate Arbitration Award ¶ 18. (R. Vol. I, p. 87). The actual minutes of the discussion are redacted so Culpepper has been unable to identify what was said. Second Amended and Restated Answer to Petition to Confirm Arbitration Award and Counterclaim to Vacate Arbitration Award ¶ 19. (R. Vol. I, p. 87) It is clear from the unredacted portions of the minutes, however, that both Lori Metrock and the expert witness were present for the meeting of the Board of Directors. Second Amended and

Restated Answer to Petition to Confirm Arbitration Award and Counterclaim to Vacate Arbitration Award ¶ 19. (R. Vol. I, p. 87).

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. Second Amended and Restated Answer to Petition to Confirm Arbitration Award and Counterclaim to Vacate Arbitration Award ¶ 20. (R. Vol. I, p. 87). 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." Second Amended and Restated Answer to Petition to Confirm Arbitration Award and Counterclaim to Vacate Arbitration Award ¶ 21. (R. Vol. I, p. 87).

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. Second Amended and Restated Answer to Petition to Confirm Arbitration Award and Counterclaim to Vacate Arbitration Award ¶ 23. (R. Vol. I, p. 88). 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. Second Amended and Restated Answer to Petition to Confirm Arbitration Award and Counterclaim to Vacate Arbitration Award ¶ 23. (R. Vol. I, p. 88). These factual circumstances are the basis for the request by Culpepper to vacate the arbitration award.

LEGAL ANALYSIS

I. Standard of Appellate Review.

Making a determination on a motion for judgment on the pleadings is a question of law. Timmins v. Lindsey, 310 S.W.3d 834, 839 (Tenn. Ct. App. 2009). Review of the determinations of the trial court by the Court of Appeals on issues of law is *de novo*, with no presumption of correctness. Id.; see also Harman v. University of Tennessee, 353 S.W.3d 734, 736-37 (Tenn. 2011) (in reviewing an order granting a motion for judgment on the pleadings "review is *de novo* with no presumption of correctness").

II. Standards for determining Motion for Judgment on the Pleadings.

Pursuant to Rule 12.03 of the Tennessee Rules of Civil Procedure, a motion for judgment on the pleadings may be filed "[a]fter the pleadings are closed but within such time as not to delay the trial." Tenn. R. Civ. P. 12.03. A motion for judgment on the pleadings involves the consideration of nothing more than the pleadings. Sahaan v. FedEx Corp., 2016 WL 7396050 (Tenn. Ct. App. Dec. 21, 2016).

After the Petitioner filed the initial Petition, the Respondent in the case at hand filed pleadings in the trial court seeking to vacate the arbitration award. When a motion for judgment on the pleadings is made by a defendant on a claim (or as here a counter-respondent on a counterclaim), "it is in effect a motion to dismiss for failure to state a claim upon which relief can be granted." Timmins v. Lindsey, 310 S.W.3d 834, 838 (Tenn. Ct. App. 2009). Such a motion tests the legal sufficiency of a complaint. Id. It "admits the truth of all relevant and material averments in the complaint but asserts that such facts cannot constitute a cause of action." Id. All reasonable inferences that may be drawn from those facts must also be taken as true. McClenahan v. Cooley, 806 S.W.2d 767, 769 (Tenn. 1991).

In making a determination on a motion for judgment on the pleadings, the Court must regard as false all allegations of the moving party that are denied by the non-moving party. McClenahan v. Cooley, 806 S.W.2d 767, 769 (Tenn. 1991); Frankenburg v. River City Resort, Inc., 2013 WL 3877617 at p. 2 (Tenn. Ct. App. Apr. 11, 2013). A Rule 12.03 motion should only be granted when it appears that the plaintiff can prove no set of facts in support of a claim that will entitle him or her to relief. Young v. Barrow, 130 S.W.3d 59, 63 (Tenn. Ct. App. 2003). Judgment on the pleadings should not be granted unless the moving party is clearly entitled to judgment. Cherokee Country Club, Inc. v. City of Knoxville, 152 S.W.3d 446, 470 (Tenn. 2004); McClenahan v. Cooley, 806 S.W.2d 767, 769 (Tenn. 1991).

III. Standards for Determining Motion Under Rule 15 of the Tennessee Rules of Civil Procedure.

In addition to filing a response to the Motion for Judgment on the Pleadings, Culpepper requested that he be allowed to file an amended response to the Petition to Confirm Arbitration Award pursuant to Rule 15.01 of the Tennessee Rules of Civil Procedure to more fully assert a request to vacate the arbitration award. Motion to Amend "Answer to Petition to Confirm Arbitration Award" and "Amended Answer to Petition to Confirm Arbitration Award, p. 1. (R. Vol. I, p. 78). Provectus had filed its Petition pursuant to Tenn. Code. Ann. § 29-5-312. Petition ¶ 21. (R. Vol. I, p. 5). That statutory provision provides that "[u]pon 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." Tenn. Code Ann. § 29-5-312. While the Respondent referred to his request to review the arbitration award as an affirmative defense in his original pleading, it is in substance an application to vacate, modify, or correct the arbitration award.

Rule 15.01 provides that leave to amend a pleading "shall be freely given when justice so requires." Tenn. R. Civ. P. 15.01. "Tennessee law has a history of favoring amendments." Freeman Indus. LLC v. Eastman Chem. Co., 227 S.W.3d 561, 566 (Tenn. Ct. App. 2006). As a result, the Tennessee Supreme Court has recognized that the language of Rule 15.01 is a restriction on the exercise of pre-trial discretion by a trial court. Branch v. Warren, 527 S.W.2d 89, 91 (Tenn. 1975). As stated by the Supreme Court,

> Rule 15.01 provides that leave (to amend) shall be freely given when justice so requires. This proviso in the rules substantially lessens the exercise of pre-trial discretion on the part of a trial judge. Indeed, the statute (T.C.A. § 20-1505) which conferred a measure of discretion on trial judges was repealed and Rule 15 stands in its place and stead. That rule needs no construction; it means precisely what it says, that 'leave shall be freely given.'

Branch v. Warren, 527 S.W.2d 89, 91-92 (Tenn. 1975). When the legal sufficiency of the complaint (here a counterpetition) is at issue, the courts have recognized that the better protocol is to grant the motion to amend the pleading which will then afford the adversary the opportunity to test the legal sufficiency of the pleading by way of a Rule 12.02(6) motion to dismiss. Conley v. Life Care Centers of America, Inc., 236 S.W.3d 713, 724 (Tenn. Ct. App. 2007). "The rules put forth a liberal policy of permitting amendments in order to ensure determination of claims on their merits." Henderson v. Bush Bros. & Co., 868 S.W.2d 236, 237 (Tenn. 1993).

Clear precedent in Tennessee case law allows for amendments to occur even after a Rule 12.02(6) dismissal.[4] For example, the trial court in the case of Richland Country Club, Inc. v. CRC Equities, Inc., 832 S.W.2d 554 (Tenn. Ct. App. 1991) had dismissed a cross-claim for failure to state a cause of action and subsequently denied a motion to amend the complaint because it came after the court had directed entry of the final judgment. Id. at 558. The Court of

[4] As indicated, the courts treat a motion for judgment on the pleadings filed by a defendant on a claim the same as a Rule 12.02(6) motion. Timmins v. Lindsey, 310 S.W.3d 834, 838 (Tenn. Ct. App. 2009).

Appeals ruled that the trial court was in error in not allowing the amendment. Id. In so ruling, the Court of Appeals stated that "when the court grants a motion to dismiss for failure to state a claim, only extraordinary circumstances would prohibit the plaintiff from exercising the right to amend its complaint." Id. at 559.

The Court of Appeals has recognized this rule of law in several additional cases. See, e.g., Hill v. City of Memphis, 2014 WL 7426636 at p. 8 (Tenn. Ct. App. Dec. 30, 2014) (quoting the rule that "when the court grants a motion to dismiss for failure to state a claim, only extraordinary circumstances would prohibit the plaintiff from exercising the right to amend its complaint"); Green v. Green, 2008 WL 624860 at p. 9 (Tenn. Ct. App. March 5, 2008) aff'd, 293 S.W.3d 493, 518-19 (Tenn. 2009) (quoting same rule); Freeman Indus. LLC v. Eastman Chem. Co., 227 S.W.3d 561, 566-67 (Tenn. Ct. App. 2006) (quoting the same rule). Indeed, the Court of Appeals in the Freeman Industries case allowed an amendment after a motion to dismiss granted by the trial court was appealed, the dismissal was affirmed in part by the Tennessee Supreme Court, and the case was remanded back to the trial court. Id. at 562. The Court of Appeals also recognized in its ruling that the Tennessee Supreme Court had approved amendments after a dismissal in the case of Tennessee Dept. of Mental Health & Mental Retardation v. Hughes, 531 S.W.2d 299 (Tenn. 1975). The Supreme Court in that case stated as follows:

> We now direct that the motion to dismiss be sustained upon the issue certified here. Nevertheless, a plaintiff, when a motion to dismiss has been sustained, is ordinarily entitled to amend, if in good conscience and within the applicable rules of law, he may do so. Whether counsel for appellee will or will not seek to amend his complaint in light of the ruling which we have made today, we, of course, cannot know. Since amendments to pleadings are ordinarily made in the trial courts, we remand the case for such further proceedings as may be necessary or appropriate.

Tennessee Dept. of Mental Health & Mental Retardation v. Hughes, 531 S.W.2d 299, 301 (Tenn. 1975).

The Supreme Court also recognized the right to amend after a dismissal in affirming the Green decision cited above. The Supreme Court there affirmed that the Court of Appeals was correct in allowing an amendment after a motion to dismiss had been granted. Green v. Green, 293 S.W.3d 493, 518-19 (Tenn. 2009). There is thus clear authority in the Tennessee case law that holds that only extraordinary circumstances would prohibit a plaintiff from exercising the right to amend a complaint even up to and including the time period after a dismissal.

The Courts of Tennessee have likewise ruled that it is error to dismiss a suit on the basis of an original complaint without first considering and ruling on a pending motion to amend. In the case of Henderson v. Bush Bros. & Co., 868 S.W.2d 236 (Tenn. 1993), the defendant filed a motion for summary judgment. Id. at 237. The plaintiff filed a motion seeking to amend his complaint but the trial court granted summary judgment to the defendant without first ruling on the plaintiff's motion to amend the complaint. Id. at 237. The Tennessee Supreme Court held that it was error to grant summary judgment without first ruling on the motion to amend. Id. at 238. The Court relied upon Sixth Circuit authority that held that "it as an abuse of discretion for a district court to dismiss a suit on the basis of the original complaint without first considering and ruling on a pending motion to amend." Id. at 238. (quoting Ellison v. Ford Motor Co., 847, F.2d. 297, 300 (6th Cir. 1988) (internal quotation marks omitted)). The Tennessee Supreme Court thus held that

> the trial court must give the proponent of a motion to amend a full chance to be heard on the matter, must consider the motion in light of the amendment policy embodied in T.R.C.P. 15.01, that amendments must be freely allowed; and in the event the motion to amend is denied, the trial court must give a reasoned explanation for [its] action.

Henderson v. Bush Bros. & Co., 868 S.W.2d 236, 238 (Tenn. 1993). A number of other Tennessee cases have likewise ruled that a claim should not be dismissed without the trial court

first considering a motion to amend filed pursuant to Rule 15.01. See e.g., Cumulus Broad. Inc. v. Shim, 226 S.W.3d 366, 376 (Tenn. 2007) (ruling that trial court should first consider motion to amend complaint before granting summary judgment); Shaw v. Metro. Gov't of Nashville and Davidson County, 2017 WL 6398341 at p. 4 (Tenn. Ct. App. Dec. 14, 2017) (ruling that the trial court was in error in granting summary judgment without first considering a motion to amend); Reynolds v. Tognetti, 2011 WL 761525 at p. 6 (Tenn. Ct. App. Mar. 4, 2011) (vacating a grant of summary judgment and remanding to the trial court for a full hearing regarding an unadjudicated motion to amend the complaint "in light of the policy that amendments are to be freely given"); Oaks v. Stewart, 2000 WL 116038 at p. 1 (Tenn. Ct. App. Jan. 31, 2000) ("A trial court abuses its discretion when it dismisses an action on the basis of the original complaint without first considering and ruling upon a plaintiff's pending motion to amend"); Lowery v. Faires, 1996 WL 718290 at p. 2 (Tenn. Ct. App. Dec. 16, 1996) (ruling that the trial court was in error in granting summary judgment without first making a determination as to a pending motion to amend).

IV. Standards for granting Motion to Alter or Amend Judgment and Order.

After the Court granted judgment on the pleadings in this case, Culpepper requested that the Court alter or amend the Judgment and the Order pursuant to Rule 59.04 of the Tennessee Rules of Civil Procedure. "The purpose of Tenn. R. Civ. P. 59 motions is to prevent unnecessary appeals by providing the trial courts with an opportunity to correct errors *before a judgment becomes final.*" Discover Bank v. Morgan, 363 S.W.3d 479, 489 (Tenn. 2012) (quoting Bradley v. McLeod, 984 S.W.2d 929, 933 (Tenn. Ct. App. 1998) – emphasis added by Discover Bank Court; internal quotation marks omitted). "The motion to alter or amend allows the trial court to correct any errors as to the law or facts that may have arisen as a result of the court overlooking or failing to consider matters." Vaccarella v. Vaccarella, 49 S.W.3d 307, 312 (Tenn. Ct. App.

2001) (quoting Chadwell v. Knox County, 980 S.W.2d 378, 383 (Tenn. Ct. App. 1998)). Rule 59.04 affords litigants a "limited opportunity to readdress previously determined issues and affords trial courts an opportunity to revisit and reverse their own decisions." Baxter v. Heritage Bank & Trust, 2014 WL 1118072 at p. 3 (quoting Harris v. Chern, 33 S.W.3d 741, 744 (Tenn. 2000) – internal quotation marks omitted). A judgment should be amended under Rule 59.04 to correct a clear error of law or to prevent injustice. Baxter v. Heritage Bank & Trust, 2014 WL 1118072 at p. 4 (Tenn. Ct. App. Mar. 19, 2014); Whalum v. Marshall, 224 S.W.3d 169, 175 (Tenn. Ct. App. 2006); Bradley v. McLeod, 984 S.W.2d 929, 933 (Tenn. Ct. App. 1998). Culpepper asserted that the trial court made an error of law in ruling that Rule 15 of the Tennessee Rules of Civil Procedure does not apply in this case to allow the Motion to Amend Pleadings filed by Respondent outside of the ninety day time period for the filing of a motion to vacate to relate back to the original timely filed pleading of the Respondent.

V. 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 Court 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. Order Confirming the Arbitration Award and Granting Petitioner's Motion for Judgment on the Pleadings, p. 4 (Jan. 23, 2019) (R. Vol. I, p. 113). 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.

Order Confirming the Arbitration Award and Granting Petitioner's Motion for Judgment on the Pleadings, p. 4 (Jan. 23, 2019). (R. Vol. I, p. 113). 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 insure 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 (the "FAA") 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 Petitioner 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: "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. § 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. Id. 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 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 v. Dean Witter Reynolds, Inc., 835 F.2d 1378, 1381-82 (11th Cir. 1988). 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 v. Dean Witter Reynolds, Inc., 835 F.2d 1378, 1382 (11th Cir. 1988). The 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 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 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." Order Confirming the Arbitration Award and Granting Petitioner's Motion for Judgment on the Pleadings, p. 4 (Jan. 23, 2019). (R. Vol. I, p. 113). 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. Order Denying

Respondent's Motion to Alter or Amend Judgment and Order Pursuant to Rule 59, p. 2. (R. Vol. II, p. 165).

The 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 TUAA is different from the language of the FAA. It is the position of the Appellant, 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.

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 requests that this 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.

CONCLUSION

For the reasons set forth above, Peter R. Culpepper, Appellant, respectfully requests that the Court reverse the rulings of the trial court denying the Motion to Amend Pleadings, granting the Motion for Judgment on the Pleadings, and confirming the arbitration award, reverse the decision of the Court of Appeals, and remand the case to the trial court for a determination on the merits of the application to vacate filed by the Appellant.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Brief of Appellant has been served upon counsel for the Appellee, Martha L. Boyd, Samuel L. Felker, and Brittany B. Simpson, Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C.; Baker Donelson Center, Suite 800, 211 Commerce Street, Nashville, Tennessee 37201, via email at mboyd@bakerdonelson.com, samfelker@bakerdonelson.com, and bsimpson@bakerdonelson.com, and via U.S. regular mail, this the 15 day of June, 2020.

Thomas M. Leveille

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