

63293-1

RECEIVED  
COURT OF APPEALS  
DIVISION ONE

63293-1  
NO. 63283-1-1

NOV 30 2009

DIVISION I, COURT OF APPEALS  
OF THE STATE OF WASHINGTON

---

THERESA A. DEISHER,

Plaintiff-Petitioner

v.

CELLCYTE GENETICS CORP.; GARY REYS and RON BERNINGER,  
and their marital communities; and JOHN DOE,

Defendants-Respondents

---

ON APPEAL FROM KING COUNTY SUPERIOR COURT

---

BRIEF OF APPELLANT

---

David C. Spellman, Esq.  
WSBA No. 15884  
Christopher B. Wells, Esq.  
WSBA No. 08302  
LANE POWELL PC  
Attorneys for Plaintiff-Appellant  
Theresa A. Deisher

Lane Powell PC  
1420 Fifth Avenue, Suite 4100  
Seattle, Washington 98101-2338  
Telephone: 206.223.7000  
Facsimile: 206.223.7107

2009 NOV 30 PM 4:36  
STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION ONE

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	iii-viii
I. INTRODUCTION/SUMMARY.....	1
II. ASSIGNMENTS OF ERROR.....	4
III. ISSUES RELATED TO THE ASSIGNMENT OF ERROR.....	5
IV. STATEMENT OF THE CASE.....	6
A. In October 2007, Deisher directed her lawyers at Lane Powell to send CellCyte Genetic a written demand asserting her employment claims against the company and its managing officers, Ron Berninger and Gary Reys. After repeated demands for ADR, she commenced an arbitration proceeding in April 2008 with the American Arbitration Association. ....	7
B. After the second and third law firm jointly representing CellCyte, Berninger and Reys withdrew, their new lawyers requested a delay of the arbitration hearing. ....	11
C. In October 2008, a year after the dispute arose, Berninger’s new counsel filed a disqualification motion against Lane Powell in the arbitration and in a separate motion in the federal lawsuit in which Deisher was not a party. ....	13
D. In January 2009, the arbitrator, Terrence Carroll, denied the motion. Berninger subsequently claimed the arbitrator lacked jurisdiction to decide the motion, but the arbitrator ruled he had jurisdiction or that Berninger had waived the objection.....	15
E. Three weeks before the start of the rescheduled arbitration hearing, the trial court granted the unprecedented writ/order reversing the arbitrator’s rulings. ....	16
F. After the notice for discretionary review was filed in March 2009, several material events occurred. ....	18

V. ARGUMENT .....	19
A. The standard of review and scope of review for the issuance of the statutory writ.....	19
B. The four jurisdictional requirements for a writ were not satisfied.....	19
1. A private arbitrator is not a public “officer” and was not “exercising a judicial function” so the first two jurisdictional requirements were not satisfied .....	20
2. The arbitrator did not exceed his authority when he ruled on the disqualification motion, so the third requirement was not satisfied.....	25
3. Berninger failed to prove irreparable injury or an unquestioned error, so the fourth requirement of a lack of an adequate remedy was not satisfied .....	30
4. The granting of the writ conflicts with the arbitration statutes .....	37
C. Even if the writ procedure were to apply, the trial court erred by reversing the arbitrator’s order.....	38
1. The superior court violated the statutory requirements when it failed to review the “in camera” materials that the arbitrator expressly relied upon in making his decision.....	38
2. Both the writ statute and arbitration statutes govern the standard of review and the scope of review of the decisions below .....	40
3. The superior court’s earlier order that the “binding” arbitration was “non-binding” mandatory arbitration subject to de novo review has prejudiced the later decision where the court reviewed the arbitrator’s interlocutory order .....	41
4. The arbitrator did not abuse discretion.....	45
VI. CONCLUSION.....	49

**TABLE OF AUTHORITIES**

<u>CASES</u>	<u>Page</u>
<u>AeroJet-Gen. Corp. v. Am. Arbitration Ass’n</u> , 478 F.2d 248 (9th Cir. 1978).....	37
<u>Andrew v. King County</u> , 21 Wn. App. 566, 586 P.2d 509 (1978).....	40
<u>Benasra v. Mitchell, Silberger &amp; Knupp</u> , 96 Cal. App. 4th 96, 116 Cal. Rptr. 2d 644 (2003).....	28, 45
<u>Brower v. Charles</u> , 82 Wn. App. 53, 914 P.2d 1201 (1996).....	21
<u>Caan Venture Partners, LP v. Salzman</u> , 1996 Conn. Super. Lexis 245 (Jan. 28, 1996).....	28
<u>Cavanaugh v. McDonnell &amp; Co.</u> , 357 Mass. 452, 258 N.E.2d 561 (Mass. 1970).....	38
<u>Cennapharm v. Reys, et al</u> , King County Superior Court Case No. 03-2-27362-7SEA.....	9
<u>Christensen v. United States Dist. Ct.</u> , 844 F.2d 694 (9th Cir. 1988).....	37
<u>City of Bellevue v. Jacke</u> , 96 Wn. App. 209, 978 P.2d 1116 (1999).....	19
<u>City of Hoquiam v. PERC</u> , 29 Wn. App. 319, 628 P.2d 1314 (1981).....	34
<u>City of Kirkland v. Ellis</u> , 82 Wn. App. 819, 920 P.2d 206 (1996).....	1, 2, 36
<u>Clark County Pub. Util. Dist. No. 1 v. Int’l Brotherhood of Elec. Workers, Local 125</u> , 150 Wn.2d 237, 76 P.3d 248 (2003).....	25
<u>Clark County Pub. Util. Dist. No. 1 v. Wilkinson</u> , 139 Wn.2d 840, 991 P.2d 1161 (2000).....	2, 20, 21, 25
<u>Cnty. Care Coalition of Wash. v. Reed</u> , 165 Wn.2d 606, 200 P.3d 701 (2009).....	21
<u>Commanda v. Cary</u> , 143 Wn.2d 651, 23 P.3d 1086 (2001).....	19, 30

<u>Cook Chocolate Co. v. Salomon, Inc.</u> , No. 87-Civ. 5705, 1988 U.S. Dist. Lexis 11929, Comm. Fut. L. Rep. (CCH) ¶ 24,352 (S.D.N.Y. 1988) .....	28
<u>Cord v. Smith</u> , 338 F.2d 516 (9th Cir. 1965), <u>clarified</u> , 370 F.2d 418 (1966) .....	31, 32
<u>Coyler v. Smith</u> , 50 F. Supp. 2d 966 (C.D. Cal. 1999) .....	34
<u>Dahl v. Parquet &amp; Colonial Hardwood Floor Co.</u> , 108 Wn. App. 403, 30 P.3d 537 (2001) .....	6, 41, 43, 45
<u>Davidson v. Kitsap County</u> , 86 Wn. App. 673, 937 P.2d 1309 (1997) .....	45
<u>Dep't of Agric. (DOA) v. State Pers. Bd.</u> , 65 Wn. App. 508, 828 P.2d 1145 (1992) .....	25, 31
<u>Eriks v. Denver</u> , 118 Wn.2d 451, 824 P.2d 1207 (1992) .....	48
<u>Firestone Tire &amp; Rubber Co. v. Risjord</u> , 449 U.S. 368 (1981) .....	34
<u>First Small Bus. Investment Co. of Cal. v. Intercapital Corp. of Or.</u> , 108 Wn.2d 324, 738 P.3d 263 (1987) .....	4, 49
<u>Godfrey v. Hartford Cas. Ins. Co.</u> , 142 Wn.2d 885, 16 P.3d 617 (1995) .....	2
<u>Grays Harbor County v. Williamson</u> , 96 Wn.2d 147, 634 P.2d 296 (1981) .....	2, 20, 21, 22, 24, 31
<u>Green-Boots Constr. Co. v. St. Highway Comm'n</u> , 139 Okla. 108 P. 220 (1929) .....	20
<u>Hall Street Assocs. LLC v. Matel, Inc.</u> , 552 U.S. ___, 128 S. Ct. 1396, 170 L. Ed. 2d 254 (Mar. 25, 2008) .....	44
<u>Hanson v. Shim</u> , 87 Wn. App. 538, 943 P.2d 322 (1997) .....	46
<u>Harleyville Mut. Cas. Co. v. Adair</u> , 421 Pa. 141, 218 A.2d 791, 794 (Pa. 1966) .....	38
<u>Hibbard Brown &amp; Co. v. ABC Family Trust</u> , No. 91-1225, 1992 U.S. App. Lexis 6469 (4th Cir. 1992) .....	28
<u>Hill-Tellman v. Musicians' Union of San Francisco</u> , 67 Cal. App. 279, 227 P. 646 (1924) .....	21
<u>In re Arbitration Between R3 Aerospace, Inc. v. Marshall of Cambridge Aerospace Ltd.</u> , 927 F. Supp. 121 (S.D.N.Y. 1996) .....	30

<u>In re BellSouth Corp.</u> , 334 F.3d 941 (11th Cir. 2003) .....	33
<u>In re Bushkin Assocs.</u> , 864 F.2d 241 (1st Cir. 1989) .....	32
<u>In re Corrugated Antitrust Litig.</u> , 614 F.2d 958 (5th Cir. 1980) .....	33
<u>In re Firestorm 1991</u> , 129 Wn.2d 130, 916 P.2d 411 (1996) .....	4, 49
<u>In re United States for Lord Elect. Co. v. Titan Pac. Constr. Corp.</u> , 637 F. Supp. 1556 (W.D. Wash. 1986) .....	1, 4, 49
<u>Intercapital Corp. v. Intercapital Corp.</u> , 41 Wn. App. 9, 700 P.2d 1213 (1995) .....	35
<u>Jones v. Pers. Resources Bd.</u> , 134 Wn. App. 560, 140 P.3d 636 (2006) .....	21
<u>Malted Mousse, Inc. v. Steinmetz</u> , 150 Wn.2d 518, 79 P.3d 1154 (2003) .....	25, 32
<u>Mansour v. King County</u> , 131 Wn. App. 255, 128 P.3d 1241 (2006) .....	45
<u>Marbury v. Madison</u> , 5 U.S. 137 (1803) .....	21
<u>ML Park Place Corp. v. Hedreen</u> , 71 Wn. App. 727, 862 P.2d 602 (1994) .....	46
<u>Modanlo v. Ahan</u> , 342 B.R. 230 (D. Md. 2006) .....	49
<u>Nat'l Bank of Commerce v. Fountain</u> , 9 Wn. App. 727, 514 P.2d 194 (1973) .....	35
<u>North/South Airpark Ass'n v. Haagen</u> , 87 Wn. App. 765, 942 P.2d 1068 (1997), <u>review denied</u> , 134 Wn.2d 1027 (1999) .....	19
<u>Optimer Int'l, Inc. v. RP Bellevue LLC</u> , 151 Wn. App. 954, 214 P.3d 954 (2009) .....	43
<u>Perez v. Mid-Century Ins. Co.</u> , 85 Wn. App. 760, 934 P.2d 731 (1997) .....	37, 41
<u>Pour Le Bebe, Inc. v. Guess ? Inc.</u> , 112 Cal. App. 4th 810, 5 Cal. Rptr. 3d 422 (2003), <u>review denied</u> , 2004 Cal. Lexis 50 (Cal. Jan. 14, 2004).....	28
<u>PowerAgent v. Electronic Data Sys</u> , 358 F.3d 1187 (9th Cir. 2004).....	46
<u>Price v. Farmers Ins. Co.</u> , 133 Wn.2d 490, 946 P.2d 388 (1997) .....	41

<u>Reinsurance Am., Inc. v. Ace Property &amp; Cas. Co.</u> , 500 F. Supp. 2d 272 (S.D.N.Y. 2007) .....	30
<u>Richardson-Merrell v. Kohler</u> , 472 U.S. 424 (1985).....	34
<u>Ryan v. Ryan</u> , 48 Wn.2d 593, 600, 295 P.2d 111 (1955) .....	35
<u>Sales Creators, Inc. v. Little Shoppe, LLC</u> , 150 Wn. App. 527, 208 P.3d 1133 (2009) .....	44
<u>Schoenduve Corp. v. Lucent Techn., Inc.</u> , 442 F.3d 727 (9th Cir. 2006).....	26
<u>Seattle v. Williams</u> , 101 Wn.2d 445, 680 P.2d 1051 (1984).....	1, 3, 36
<u>SEC v. CellCyte Genetics Corp &amp; Berninger</u> , Case No. C09-1263 .....	18
<u>SEC v. Gary Reys</u> , Case No. C09-1262 (W.D. Wash).....	18
<u>Simply Fit of N. Am. v. Poyner</u> , 579 F. Supp. 371 (S.D.N.Y. 2008).....	29
<u>Skagit Surveyors &amp; Eng'rs, LLC v. Friends of Skagit County</u> , 135 Wn.2d 542, 958 P.2d 962 (1998) .....	30
<u>Small Bus. Co. v. Intercapital Corp.</u> , 108 Wn.2d 324, 738 P.2d 263 (1987) .....	33, 34, 35
<u>State ex rel. Marshall v. Superior Ct. of Snohomish County</u> , 119 Wash. 631, 206 P. 362 (1922) .....	34
<u>State v. Smith</u> , 6 Wash. 496, 33 P. 974 (1893) .....	21
<u>Tamer Labs, Inc. &amp; Cennapharm v. Reys &amp; Berninger</u> , King County Sup. Ct. Case No. 03-2-27362-7SEA .....	40
<u>TLCA LLC v. Cennapharm, Reys and Berninger</u> , King County Superior Court, Case No. 03-2-13177-SEA.....	7
<u>Thorgaard Plumbing &amp; Heating Co. v. King County</u> , 71 Wn.2d 126, 426 P.2d 828 (1967) .....	24
<u>Torrance v. King County</u> , 136 Wn.2d 783, 966 P.2d 891 (1998) .....	21
<u>Tristar Pictures, Inc. v. Director's Guild of Am.</u> , 160 F.3d 537 (9th Cir. 1998) .....	46
<u>United Sewerage Agency of Wash. County v. Jelco</u> , 646 F.2d 1339 (9th Cir. 1981) .....	30, 32, 33
<u>United States v. Standard Oil Co.</u> , 136 F. Supp. 345 (S.D.N.Y. 1955).....	41, 48

<u>Wash. Pub. Employees Ass’n v. Pers. Res. Bd.</u> , 91 Wn. App. 640, 959 P.2d 143 (1998) .....	25, 31
<u>Whitehead v. Gray</u> , 12 N.J.L. 36 (1830) .....	20
<u>Wurttembergische Fire Ins. Co. v. Republic Ins. Co.</u> , No. 86 Civ. 2696-CSH, 1986 U.S. Dist. Lexis 23032 (S.D.N.Y. 1986) .....	28

COURT RULES AND STATUTES

CR 11 .....	10
Rule 6 .....	29
9 U.S.C. § § 201-207 .....	30
9 U.S.C. §§ 9-11 .....	44
MAR 3.1 .....	24
RAP 2.2(a)(3) .....	6
RAP 2.4(b) .....	6
RCW 7.04 .....	25
RCW 7.04A.030(4) .....	43
RCW 7.04A.150 .....	45
RCW 7.04A.160 .....	45
RCW 7.04A.180 .....	37, 41
RCW 7.04A.220 .....	43
RCW 7.04A.230 .....	41, 43, 44
RCW 7.04A.280 .....	6
RCW 7.16 .....	19
RCW 7.16.040 .....	5, 24, 31
RCW 7.16.050 .....	39
RCW 7.16.070 .....	39
RCW 7.16.110 .....	39
RCW 7.16.120 .....	39, 40
RCW 7.16.120(1)-(3) .....	40

RCW 7.16.120(5) .....	40
RCW 7.16.130 .....	39
RCW 7.16.140 .....	19, 20, 21
RCW 11.96A.260 .....	42
RCW 11.96A.260-320 .....	42
RCW 11.96A.270 .....	42
RCW 11.96A.320(7) .....	37
RCW 11.96A.320(9) .....	37

MISCELLANEOUS

David B. Harrison, Annot., <u>Appealability of State Court Granting or Denying Motion to Disqualify Attorney</u> , 5 A.L.R.4th 1251 (1981 and July 2009 Supp.).....	34
Flamm, <u>Disqualification</u> § 35.5, at 695-98.....	34
1 Geoffrey C. Hazard, <u>The Law of Lawyering</u> § 10.4, at 10-12 (2009) .....	46
14 Jack K. Levin, J.D. <u>C.S.J. Certiorari</u> § 5 (2006).....	21
<u>In re Lexington Resources, Inc., Grant Atkins, and Gordon Brent Pierce</u> , SEC Initial Decision Release No. 379, Admin. Proceeding File No. 3-13109, Jun. 5, 2009, .....	19
<u><a href="http://www.sec.gov/Archives/edgar/data/1325279/000105652009000465/secconsentdecreepressrelease.htm">http://www.sec.gov/Archives/edgar/data/ 1325279/000105652009000465/secconsentdecreepressrelea se.htm</a></u> .....	18
Leah Epstein, <u>Comment: A Balanced Approach to Mandamus Review of Attorney Disqualification Orders</u> , 72 U. Chi. L Rev. 667, 680-87 (2005).....	32

## I. INTRODUCTION/SUMMARY

Appellant Theresa Deisher seeks the reversal of a statutory writ and the related ruling on the merits.<sup>1</sup> A writ is an extraordinary remedy reserved for extraordinary situations where there is irreparable injury or an error that is “so clear it would be unquestioned” on appeal.<sup>2</sup> Yet, in this case, there was merely an ordinary situation without irreparable injury and without an obvious error -- the writ should have been quashed.

Respondent Ronald Berninger requested the writ, after the arbitrator, retired judge Terrence Carroll, denied a motion to disqualify Lane Powell PC from representing Deisher in an employment arbitration. The motion was filed a year after Lane Powell began representing Deisher in an employment dispute with Berninger, respondent Gary Reys and their company, respondent CellCyte Genetics. The motion was a “strategic litigation tactic,” when viewed in the context of respondents’ “persistent and continuous efforts” to delay the consideration of the merits as evidenced by their prior and subsequent pleadings.<sup>3</sup>

---

<sup>1</sup> Order Granting Defendant Ron Berninger’s Mot. to Disqualify Lane Powell PC as counsel for Plaintiff and Petition for Writ of Review, CP 2117-18.

<sup>2</sup> An inadequate remedy when an error is so clear that its reversal would be “unquestioned” if it already were before the superior court. City of Kirkland v. Ellis, 82 Wn. App. 819, 827-28, 920 P.2d 206 (1996); Seattle v. Williams, 101 Wn.2d 445, 454-55, 680 P.2d 1051 (1984).

<sup>3</sup> In re United States for Lord Elect. Co. v. Titan Pac. Constr. Corp., 637 F. Supp. 1556, 1562-63 (W.D. Wash. 1986) (describing record of delay in the case and avoidance of legitimate discovery as a substantial basis for viewing disqualification motion with suspicion and for denying the motion).

Berninger failed to meet the four-part test for the issuance of a statutory writ.<sup>4</sup> First, a private arbitrator is not a public “officer” who is subject to a writ.<sup>5</sup> Second, an arbitrator does not “exercis[e] judicial functions.”<sup>6</sup> Third, the arbitrator did not “exceed its jurisdiction”<sup>7</sup> or Berninger waived any jurisdictional objection. Unlike a court’s statutory subject matter jurisdiction, an arbitrator’s jurisdiction is consensual and may be expanded through the parties’ actions, including through the submission of issues for decision by the arbitrator.<sup>8</sup> That is what happened in this case. Fourth, Berninger failed to prove that there was “no adequate remedy at law.” Berninger is neither a present client nor a former client of Lane Powell -- in fact, Lane Powell had sued him in the past. He did not establish the irreparable injury and “unquestioned” error necessary to support an extraordinary writ.<sup>9</sup> In the absence of any of these four elements, the superior court lacked jurisdiction to grant the writ.

---

<sup>4</sup> Clark County Pub. Util. Dist. No. 1 v. Wilkinson, 139 Wn.2d 840, 845, 991 P.2d 1161 (2000).

<sup>5</sup> Grays Harbor County v. Williamson, 96 Wn.2d 147, 150, 634 P.2d 296 (1981) (reversing writ and reinstating arbitrator’s award).

<sup>6</sup> Id.

<sup>7</sup> Wilkinson, 139 Wn.2d at 845.

<sup>8</sup> See, e.g., Godfrey v. Hartford Cas. Ins. Co., 142 Wn.2d 885, 894, 16 P.3d 617 (1995) (“The parties are free to decide if they want to arbitrate. . . and what issues are submitted to arbitration, . . .”).

<sup>9</sup> An inadequate remedy is when an error is so clear that its reversal would be “unquestioned” if it already were before the superior court. City of Kirkland v. Ellis, 82 Wn. App. 819, 827-28, 920 P.2d 206 (1996); Seattle v. Williams, 101 Wn.2d 445, 454-55, 680 P.2d 1051 (1984).

Even if the extraordinary writ was properly granted, the order on the merits was an error. The superior court's failure to consider the *in camera* materials that the arbitrator expressly relied on in his decision violated the statutory requirements. It was also an error invited by Berninger. The superior court's earlier orders that the "binding arbitration" was subject to a trial de novo prejudiced its subsequent decision on the disqualification motion.<sup>10</sup>

Regardless of the standard and the scope of review, the arbitrator did not abuse his discretion. Although Berninger had identified over thirty-five potential witnesses in the arbitration, just two of those potential witnesses, Len Braumberger and Brent Pierce, were Lane Powell clients.<sup>11</sup> Those two potential witnesses had prospectively waived any conflict with Deisher, and had agreed that "Lane Powell could continue to represent Deisher in the employment dispute, if a conflict arose in the future."<sup>12</sup> After the motion was filed, Braumberger and Pierce consulted with independent counsel and ratified their prior consents. The arbitrator was in the best position to determine whether the possible testimony was material, noncumulative, and would warrant a deposition of Pierce in Canada, where he resides, and

---

<sup>10</sup> Orders, CP 677-678; CP 783-785.

<sup>11</sup> Decl. of Spellman on Restructured Representation at 5, CP 1486.

<sup>12</sup> Plf.'s Opp'n to Mot. to Disqualify and Petition for Writ at 3:1-16, 20 n. 52, Supp. CPs [], Appendix B to this brief.

whether the possible deposition testimony would warrant the disqualification of Deisher's counsel.

If this Court were to conduct a de novo review of the arbitrator's order, then the review of the disqualification issue requires the "painstaking analysis of the facts and precise application of precedent,"<sup>13</sup> and "a careful sifting and weighing of the relevant facts and circumstances."<sup>14</sup> Part of the analysis is a balancing of interests which includes looking at the parties' interests and the motion's purpose and timing.<sup>15</sup> Here, the six month delay in filing the disqualification motion and respondents' conduct are independent grounds for denying the motion.<sup>16</sup> The disqualification is "a drastic remedy that extracts a harsh penalty . . . ; therefore, it should be imposed only where absolutely necessary."<sup>17</sup> That necessity was not established and the decision below should be reversed and the arbitrator's ruling reinstated.

## II. ASSIGNMENTS OF ERROR

1. Did the trial court err when it granted the writ?

---

<sup>13</sup> United States v. Standard Oil Co., 136 F. Supp. 345, 367 (S.D.N.Y. 1955).

<sup>14</sup> In re United States for Lord Elect. Co. v. Titan Pac. Constr. Corp., 637 F. Supp. 1556, 1562-63 (W.D. Wash. 1986).

<sup>15</sup> Id. (describing record of delay in the case as a substantial basis for viewing disqualification motion with suspicion).

<sup>16</sup> "A motion to disqualify should be made with reasonable promptness after a party discovers the facts which lead to the motion. This court will not allow a litigant to delay filing a motion to disqualify in order to use the motion later as a tool to deprive his opponent of counsel of his choice after substantial preparation of a case has been completed." First Small Bus. Investment Co. of Cal. v. Intercapital Corp. of Or., 108 Wn.2d 324, 325, 337, 738 P.2d 263 (1987) (citation omitted).

<sup>17</sup> In re Firestorm 1991, 129 Wn.2d 130, 140, 916 P.2d 411 (1996); Titan, 637 F. Supp. at 1562-63.

2. Did the trial court err when it overruled the arbitrator's interlocutory decision?

3. Did the trial court err when it ruled the binding arbitration was subject to a de novo trial?

### **III. ISSUES RELATED TO THE ASSIGNMENT OF ERROR**

1. Were RCW 7.16.040's jurisdictional requirements for a writ of review satisfied? (a) Was the private arbitrator a public officer subject to a writ? (b) Was the arbitrator "exercising judicial functions"? (c) Did the arbitrator exceed his jurisdiction or act illegally? (d) Did Berninger demonstrate that there was no adequate remedy? Did Berninger demonstrate an irreparable injury or unquestioned violation of the law that would result if review of the interlocutory ruling were not granted?

2. If the issuance of the writ was permissible, did the court violate the statutory requirements, when it failed to conduct a hearing on the full record including the *in camera* materials expressly relied upon by the arbitrator in making his decision?

3. Even if judicial review were permissible, did the court commit an error of law, when it directed the arbitrator to withdraw his order, including but not limited to the following: (a) Did the arbitrator have the authority to decide the disqualification motion, or alternatively, did respondents waive any jurisdictional objection, when they raised their

objection only after he denied the motion? (b) Did the court err when it failed to consider the “*in camera*” materials relied upon by the arbitrator? (c) Did Lane Powell have a consentable conflict of interest? (d) Did the delay in filing the disqualification motion waive basis for the motion?

4. When the arbitration clause requires “binding” arbitration, were the court’s earlier orders “confirming that the parties were entitled to de novo review in accordance with the mandatory arbitration rules,”<sup>18</sup> an error that conflicts with the rulings in Dahl v. Parquet & Colonial Hardwood Floor Co.,<sup>19</sup> which directed that ambiguities in a contract should be construed in favor of binding arbitration? Do the earlier orders prejudicially affect the later decision granting the writ that reversed the arbitrator’s decision?<sup>20</sup> Is the subsequent order appealable under RCW 7.04A.280 and RAP 2.2(a)(3)?

#### **IV. STATEMENT OF THE CASE**

**A. In October 2007, Deisher directed her lawyers at Lane Powell to send CellCyte Genetic a written demand asserting her employment claims against the company and its managing officers, Ron Berninger and Gary Reys. After repeated**

---

<sup>18</sup> Order to Compel Compliance, CP 677-678; Reply in Supp. of Mot. for Stay of Arbitration Proceedings CP 255-260 at 9:21-22; see Supp. CPs [ ], Appendix C to this brief.

<sup>19</sup> 108 Wn. App. 403, 411-12, 30 P.3d 537 (2001).

<sup>20</sup> See RAP 2.4(b). Order Granting Defendant Gary Reys’ Mot. for Order Compelling Compliance with TEDRA Procedures (Oct. 31, 2008), CP 677-678, A-407, 408; see, e.g., Mot. to Disqualify and Petition for Writ of Review at 14:1-15 (relying on the earlier orders), CP 789-813; Reply in Supp. of Stay at 9:3-10:2, Supp. CPs [ ], App. C.

**demands for ADR, she commenced an arbitration proceeding in April 2008 with the American Arbitration Association.**

The writ on appeal disqualified Lane Powell from continuing to represent Deisher after the firm had already represented her for nineteen months in the employment dispute. Deisher had asserted claims against CellCyte Genetics, Inc. and its managers and majority shareholders, Gary Reys and Ron Berninger (collectively referred to as “the CellCyte defendants”).<sup>21</sup> Reys and Berninger were also officers and directors of the company, until they resigned as required by a consent decree entered between their company and the Securities and Exchange Commission. That decree was entered five months after this appeal was filed. The SEC’s claims are based in part on the report that Deisher made two years ago.

Deisher is a stem cell scientist who started working for Reys and Berninger and their company in September 2007. Earlier in 2003, Lane Powell had sued Reys and Berninger for securities fraud when they were executives of another biotech company.<sup>22</sup> That same year, Reys and Berninger started CellCyte.

---

<sup>21</sup> Oct. 3, 2007 letter to John Fluke, CP 1105-23; CellCyte Prospectus (July 17, 2007) at <http://sec.gov>.

<sup>22</sup> TLCA LLC v. Cennapharm, Reys and Berninger, King County Superior Court, Case No. 03-2-13177-SEA, Decl. of Christopher B. Wells in Opp’n to Mot. to Disqualify at 2:10-11, CP 1094; Verified St. of Claims at 16:24-17:1 & n.3, Wells Decl. p. 49, CP 1140-41.

Four years later, Deisher retained Lane Powell to investigate her employment claims against Reys and Berninger.<sup>23</sup> She had discovered that they had misled her and investors about the company's primary business platform, a patented stem cell technology.<sup>24</sup> Six weeks after Deisher was terminated by CellCyte, the Seattle Times published in December 2007 an article, "CellCyte shares ride a wave of hype."<sup>25</sup> Several weeks after the article was published, the SEC interviewed Deisher, and Lane Powell represented her in that interview.<sup>26</sup>

In early January 2008, just hours before a second newspaper article, "CellCyte shares plummet; questions raised about CEO's bio,"<sup>27</sup> was published, an anonymous person posted on a website defamatory statements about Deisher's departure from CellCyte including information about her settlement offers to the company and claiming she was the newspaper reporter's source.<sup>28</sup> Several days later, Deisher sent a renewed mediation demand pursuant to the same employment contract,<sup>29</sup> which

---

<sup>23</sup> Decl. of Theresa Deisher, Ph.D. re Mot. to Disqualify at 1:17-25, CP 1312; Decl. of Christopher B. Wells in Opp'n to Mot. to Disqualify at 1:19-2:16, 8:14-20, CP 1093-94, 110; Decl. of David Spellman Concerning Restructured Representation by Lane Powell at 2:6-9; 6:24-7:9, CP 1482-96.

<sup>24</sup> Oct. 3, 2007 letter, CP 1105-1124.

<sup>25</sup> Seattle Times article quoted at CP 66:7-69:2, CP 884:7-887:2

<sup>26</sup> Wells Decl. at 3:9-12, CP 1095.

<sup>27</sup> Seattle Times article quoted at CP 888:12-891:5.

<sup>28</sup> Verified St. of Claims at 35:1-36:21, Decl. of Christopher B. Wells in Opp'n to Mot. to Disqualify at 67-69, CP 1159-1161.

<sup>29</sup> Verified St. of Claims at 8:15-18, Decl. of Christopher B. Wells in Opp'n to Mot. to Disqualify at 40, CP 1132.

Reys and Berninger had used at their prior company and had themselves enforced against that company relying on the earlier version of the Washington Arbitration Act.<sup>30</sup>

Berninger and Gary Reys again refused to mediate, but later changed their minds after new counsel appeared on their behalf.<sup>31</sup> Several weeks before the mediation, a CellCyte manager sent Deisher an email accusing her of false whistle-blowing and vandalism, asking if she planned to move her family, and concluding “Seattle does not seem to be a part of your future.”<sup>32</sup> Two days later, she found human feces outside of her residence.<sup>33</sup> In March 2008, the parties had an unsuccessful mediation. Hours later, counsel for the CellCyte defendants confirmed that that Lane Powell was representing Pierce and another witness, Braumberger, in the SEC inquiry, along with Deisher.<sup>34</sup> The next day Deisher filed suit demanding arbitration and other relief including

---

<sup>30</sup> Ex. E to Decl. of Spellman in Opp’n to Mot. to Stay attaching Defs.’ Mot. to Compel Arbitration and Dismiss Arbitration Proceedings (Sept. 11, 2003) in Cennapharm v. Reys, et al, King County Superior Court Case No. 03-2-27362-7SEA, CP 1751-1817.

<sup>31</sup> Verified St. of Claims at 39:16-17, Decl. of Christopher B. Wells in Opp’n to Mot. to Disqualify at 71, CP 1163.

<sup>32</sup> Verified St. of Claims at 37:15-38:3, Decl. of Christopher B. Wells in Opp’n to Mot. to Disqualify at 69-70, CP 1161-62.

<sup>33</sup> Verified St. of Claims at 38:5-23, Decl. of Christopher B. Wells in Opp’n to Mot. to Disqualify at 70, CP 1162.

<sup>34</sup> Mar. 17, 2008 letter from Duane Morris asking if Lane Powell represented Len Braumberger and Brent Pierce, CP 962-964.

discovery to determine identity of the John Doe defendant.<sup>35</sup> Three days later, the CellCyte defendants filed an “emergency” CR 11 motion to strike Deisher’s motion to temporarily file pleadings under seal -- they claimed her motion placed “defamatory information [the newspaper articles] about defendants into the public record . . .”<sup>36</sup> (Although the emergency motion remarked that Lane Powell also represented two of the defendants in the class-action lawsuit, the CellCyte defendants took no action to disqualify Lane Powell from the arbitration for another six months.)<sup>37</sup> The CellCyte defendants’ emergency motion was denied. Meanwhile, Deisher stipulated to a continuance of her motions while the CellCyte defendants’ counsel went on vacation.

When the CellCyte defendants’ counsel returned from vacation, they filed a motion to compel arbitration relying upon both the Federal Arbitration Act (“FAA”) and the Uniform Arbitration Act.<sup>38</sup> The court granted an order

---

<sup>35</sup> Compl. for Decl. Relief and Demand for Arbitration (seeking declaratory relief and observing a conflict between “binding arbitration” and “de novo appeal,” at 7:24-8:2), CP 9-10.

<sup>36</sup> Defs.’ Mot. for Emergency Relief and Subjoined Decl. at 20:17-20, 3:304, CP 91-104.

<sup>37</sup> In the motion they disclosed the basis for the disqualification motion they belatedly filed six months later -- that Lane Powell lawyer Chris Wells represented one of their co-defendants in the federal securities lawsuits. “There are separate securities lawsuits pending against the Defendants in federal court. One of Plaintiff’s counsel, Chris Wells, represents co-defendants in those cases.” Defs.’ Mot. for Emergency Relief and Subjoined Decl. at 2:7-8, CP 91-104.

<sup>38</sup> Mot. to Compel Arbitration at 4:8-24 (FAA and preemption issues), A-30; at 5:19-20 (“The Agreement dictates that all claims regarding plaintiff’s employment ‘shall be subject to binding arbitration.’”), CP 150-155; Defs.’ Reply in Supp. of Mot. to  
(continued . . .)

compelling the arbitration of the employment-related claims but not of the trespass claims regarding the feces left at Deisher's residence and the claims regarding the statements on the website.<sup>39</sup> Several days after the order, Deisher filed a demand with the American Arbitration Association and later filed a 53-page Verified Statement of Claims submitting all claims to arbitration -- including the trespass claim.<sup>40</sup> Among other relief she sought was severance pay, relief relating to a post-employment noncompete agreement and intellectual property rights, and other relief to require that the CellCyte defendants pay for the arbitration as promised.<sup>41</sup>

In June 2008, the parties agreed to the appointment of retired superior court judge Terrence Carroll as the arbitrator. The next month, nine months after Deisher had made her first demands for mediation, Reys filed with the SEC a report that admitted that CellCyte's patented technology was not validated,<sup>42</sup> just as Deisher had claimed nine months earlier.

**B. After the second and third law firm jointly representing CellCyte, Berninger and Reys withdrew, their new lawyers requested a delay of the arbitration hearing.**

---

(. . . continued)

Compel Arbitration at 2 n.2 (FAA applies and not the Washington Act because the contract is in interstate commerce), CP 255-60.

<sup>39</sup> Order, Dkt. # 56 (Apr. 25, 2008), CP 378-80.

<sup>40</sup> Verified St. of Claims, Decl. of Christopher B. Wells in Opp'n to Mot. to Disqualify at 33-86, CP 1125-78.

<sup>41</sup> Verified St. of Claims, Decl. of Christopher B. Wells in Opp'n to Mot. to Disqualify at 76-85, CP 1168-78.

<sup>42</sup> Plf.'s Opp'n to Stay and Her Req. for Fees at 3:3-8 (Feb. 17, 2009), Supp. CPs, **Appendix A** to this brief.

Between October 2007 and October 2008, CellCyte defendants were jointly represented by three successive firms (Sebris, Busto, James; Duane Morris; and Stokes Lawrence) in the employment dispute with Deisher.<sup>43</sup> In August 2008, their joint counsel withdrew from representing them in the arbitration and in a class-action lawsuit that investors had filed against them in federal court. The basis for the withdrawal was they learned that there was a criminal investigation which created a divergence of interests between Gary Reys, Berninger, and the company.<sup>44</sup>

In the arbitration, Deisher filed a motion for interim relief to remedy CellCyte's failure to pay the arbitration expenses and its claims that the 18-month noncompete restrictions still bound Deisher.<sup>45</sup> Several days later, new counsel appeared in the arbitration for Reys and Berninger, they received a continuance of Deisher's motion for interim relief, requested a delay of the arbitration hearing, and threatened and then filed a "firestorm" of seven motions, including one to terminate the arbitration due their alleged inability to pay for it.<sup>46</sup>

---

<sup>43</sup> Decl. of Deisher re Mot. for Disqualification at 3:2-7, CP 1314.

<sup>44</sup> Supp. Decl. of Robert S. Mahler at 4:13-24, Ex. 18 to Mahler Decl., CP 1360; Wells Decl. re Multiple Mots. at 2:1-11, (investigation included Reys and Berninger), CP 1456.

<sup>45</sup> Plf.'s Opp'n to Mot. for Stay. at 4:3-4, Supp. CPs, App. A; Spellman Decl. in Opp'n to Stay at 1751-1817; Deisher Decl. in Supp. of Extension of Time to Respond to the Disqualification Mot., in Supp. of Mot. for Default, and Interim Relief, and Opp'n to the Termination of the Arbitration (filed in the arbitration but not filed with the court).

<sup>46</sup> Plf.'s Mot. for Recons. of the Oct. 31, 2008 Order at 5:7-17, CP 692-776; 1736; Spellman Decl. at 2-3, CP 1751-1817.

- C. **In October 2008, a year after the dispute arose, Berninger’s new counsel filed a disqualification motion against Lane Powell in the arbitration and in a separate motion in the federal lawsuit in which Deisher was not a party.**

In October 2008, Berninger’s new counsel filed a motion to disqualify Lane Powell from the arbitration and a separate motion seeking similar relief in the federal suit. In federal court, there was a pending a class-action lawsuit that investors had brought against CellCyte, Reys and Berninger, and CellCyte investor Brent Pierce who was being represented by Lane Powell.<sup>47</sup> The lawsuit was based primarily on the claims in the newspaper articles that Reys had engaged in resume fraud and false statements in the “Prospectus and Repeated Misrepresentations Regarding Reys” and marketing pieces promoting CellCyte’s patented technology,<sup>48</sup> which the SEC later claimed Reys and Berninger had approved. Deisher was not a party in the federal lawsuit.

Pierce and Deisher consulted with independent counsel and opposed the disqualification motions. An expert report from Arthur Lachman concluded there were consentable conflicts and identified some erroneous assumptions in the reports of two experts retained by Berninger.<sup>49</sup> In reply, Berninger filed three declarations including two

---

<sup>47</sup> First Amended Consolidated Class Action Compl., CP 885-903.

<sup>48</sup> First Amended Consolidated Class Action Compl. 13:6-17:11, 22:19-27:8, CP 878-883; 869-873.

<sup>49</sup> Decl. of Arthur J. Lachman at 8-13, 16-18, CP 1274-1306.

new expert opinions to which Deisher had no opportunity to respond.<sup>50</sup> On November 20, relying in part on new materials contained in reply pleadings, the federal court granted the disqualification motion.<sup>51</sup>

In the arbitration, Deisher identified the jurisdictional issue, which Berninger later raised, but she acknowledged that regardless of the “hypothetical question about which court might have jurisdiction [over the motion], the respondents have submitted the claim to arbitration, and the Federal Arbitration Act prevents a court from interfering in that process.”<sup>52</sup> She also identified the issues that the arbitrator was in the best position to decide -- some of which involved documents not in the federal court record.<sup>53</sup> In reply, neither Berninger nor Reys contested the submission of the disqualification issue for decision by the arbitrator.

In December, after the federal court order, Lane Powell’s clients consulted again with independent counsel. Lane Powell filed in the arbitration additional pleadings requesting permission to proceed as counsel and responding to the reply declarations and the topics raised in the federal court’s earlier order. CP 1476-96, 1633-35. The parties appeared before the

---

<sup>50</sup> CP 1337-1361.

<sup>51</sup> CP 1464-1472; Decl. of David Spellman Concerning Restructured Representation by Lane Powell at 9:24-15:19, CP 1482-1496.

<sup>52</sup> Amended Opp’n to DQ Mot. and Mot. to Strike at 2:8-13, CP 1364; *Id.* at 7:16-17 (“Did respondents submit some disqualification claims to the arbitrator?”), CP 1369.

<sup>53</sup> *Id.* at 5:8-6:26, CP 7:7-26, CP 1367-1369.

arbitrator, who then postponed the arbitration hearing from January to March, and granted Berninger three weeks to respond to Lane Powell's request.<sup>54</sup>

**D. In January 2009, the arbitrator, Terrence Carroll, denied the motion. Berninger subsequently claimed the arbitrator lacked jurisdiction to decide the motion, but the arbitrator ruled he had jurisdiction or that Berninger had waived the objection.**

After spending a considerable time reviewing the voluminous pleadings and *in camera* materials, arbitrator made a series of rulings denying the disqualification motion. CP 1702-05. One day after the arbitrator signed a formal order, Berninger objected to the arbitrator's authority to decide the disqualification issue. CP 1707-08. In response, Deisher argued that Berninger had waived or was estopped from challenging the arbitrator's authority. CP 1733-36. The arbitrator concluded that he had jurisdiction or that Berninger had waived his objection by failing to raise it before the arbitrator made his decision. CP 1746. He also imposed a constructive trust on the tangible assets of the company, and the parties proceeded with preparations for the arbitration hearing which had been rescheduled to start on March 24, 2009.

---

<sup>54</sup> Plf.'s Opp'n to Stay and Her Req. for Fees at 4:15:5:2, Supp. CPs, App. A.

**E. Three weeks before the start of the rescheduled arbitration hearing, the trial court granted the unprecedented writ/order reversing the arbitrator's rulings.**

Berninger next filed in court a motion to stay the arbitration and petitioned for a writ to compel the arbitrator to withdraw his ruling. Deisher opposed the motion and petition, but the orders were granted without any oral argument. CP 2217-18. Although the form of the order for the writ was drafted "IN THE ALTERNATIVE," the court signed the order "as is" without alteration. Id.

When the disqualification motion was filed in the arbitration, there had already been 60 pleading entries and Deisher had invested over 500 hours in her counsel.<sup>55</sup> The CellCyte defendants had also repeatedly stalled the A.D.R. process.<sup>56</sup> From the time CellCyte received Deisher's demand in October 2007 until October 2008 when the disqualification motion was filed, the CellCyte defendants had six different law firms deal with her lawyers, increasing her fees and costs.<sup>57</sup> For the same period, the company reported incurring over \$1,000,000 in legal and audit expenses.<sup>58</sup>

---

<sup>55</sup> Decl. of Theresa Deisher, Ph.D. re Mot. to Disqualify at 2:1-3:7, CP 1313-14.

<sup>56</sup> Id.; Decl. of Spellman on Restructured at 2:9-26, CP 1483.

<sup>57</sup> Decl. of Theresa Deisher, Ph.D re Mot. to Disqualify at 2:1-3:7, CP 1313-14.

<sup>58</sup> CellCyte Form 10-Q at 5, 23 (Dec. 22, 2008) at <http://www.sec.gov>; Spellman Decl. at 2, CP 1751-1812.

The CellCyte defendants also admitted to the arbitrator that they had spent hundreds of thousands of dollars on the disqualification motions.<sup>59</sup>

When the arbitrator denied the disqualification motion, he specifically relied on *in camera* review of written consents that the sophisticated clients had signed after consultation with independent counsel: “claimant is well-advised by outside counsel and aware in rather excruciating details of the conflicts, real and potential, and has agreed to the proposed structured representation plan. (It should be noted that the client consent forms were submitted to me for ‘in camera’ review.) . . .” Order at Tab A, CP 1702-05. But when the court later reversed the interlocutory order, the court failed to consider that same essential evidence. The ruling stripped Deisher of her chosen counsel just three weeks before the rescheduled arbitration hearing. She is now pro se in the arbitration, while the CellCyte defendants (who claimed inability to pay for the arbitration) are represented by a national law firm, DLA Piper, a west coast law firm, Bullivant, and another local firm. The disqualification motion was brought by these sophisticated opposing parties and not a past or former client of Lane Powell.

---

<sup>59</sup> Feb. 6, 2009 letter from Mahler to Carroll at 3, CP 1738.

**F. After the notice for discretionary review was filed in March 2009, several material events occurred.**

After this Court allowed review, the SEC filed the two complaints against Berninger and Reys, after a twenty-one month long informal inquiry and investigation.<sup>60</sup> The SEC's complaints asserts the multiple securities fraud predicated on the science fraud claims, which Deisher reported up to management before the termination of her employment in October 2007.<sup>61</sup> CellCyte and Berninger have agreed to a consent decree for a permanent injunction not to engage in future violations of the securities laws. CellCyte accepted the resignations of Berninger and Reys as officers and directors,<sup>62</sup> and Berninger agreed not to be an officer or director of a public company for five years and to pay a \$50,000 fine.<sup>63</sup>

The disqualification motion refers to Brent Pierce who is an investor in CellCyte and who was a defendant in the federal class-action lawsuit. After this appeal was allowed, the federal court dismissed the claims against Pierce on a pre-answer motion in September 2009. Appendix D to this brief; ER 201. The disqualification motion also

---

<sup>60</sup> SEC v. CellCyte Genetics Corp & Berninger, Case No. C09-1263, Compl. ¶¶ 22-31, 34-39 (W.D. Wash. 2009); SEC v. Gary Reys, Case No. C09-1262 (W.D. Wash), [www.sec.gov/litigation/complaints/2009/comp21200-reys.pdf](http://www.sec.gov/litigation/complaints/2009/comp21200-reys.pdf).

<sup>61</sup> SEC v. CellCyte Genetics Corp & Berninger, Case No. C09-1263, Compl. ¶¶ 22-31, 34-39.

<sup>62</sup> Sept. 8, 2009 Press release, at <http://www.sec.gov/Archives/edgar/data/1325279/000105652009000465/secconsentdecreepressrelease.htm>.

<sup>63</sup> SEC v. CellCyte Genetics Corp & Berninger, Case No. C09-1263, Compl. ¶¶ 22-31, 34-39.

alludes to the fact that Lane Powell had represented Pierce in an SEC enforcement proceeding regarding Lexington Resources. That proceeding concluded in June 2009, the unappealed decision in that proceeding is for registration and reporting violations (not securities fraud as implied by Berninger), and Deisher, Reys, Berninger, and CellCyte were not witnesses or parties in that proceeding.<sup>64</sup>

## V. ARGUMENT

### A. **The standard of review and scope of review for the issuance of the statutory writ.**

The superior court's decision to issue a writ is reviewed de novo. Commanda v. Cary, 143 Wn.2d 651, 654, 23 P.3d 1086 (2001). The standard of review specified in RCW 7.16.140 provides that issues of law are reviewed to determine whether the decision below was contrary to law.<sup>65</sup>

### B. **The four jurisdictional requirements for a writ were not satisfied.**

"A court will issue a statutory writ of review, pursuant to chapter 7.16 RCW, if the petitioner can show that (1) an inferior tribunal or officer (2) exercising judicial functions (3) exceeded its jurisdiction or acted

---

<sup>64</sup> In re Lexington Resources, Inc., Grant Atkins, and Gordon Brent Pierce, SEC Initial Decision Release No. 379, Admin. Proceeding File No. 3-13109, Jun. 5, 2009, [www.sec.gov/litigation/aljdec/2009/id379cff.pdf](http://www.sec.gov/litigation/aljdec/2009/id379cff.pdf).

<sup>65</sup> 143 Wn.2d at 654; City of Bellevue v. Jacke, 96 Wn. App. 209, 211, 978 P.2d 1116 (1999); North/South Airpark Ass'n v. Haagen, 87 Wn. App. 765, 942 P.2d 1068 (1997), review denied, 134 Wn.2d 1027 (1999); RCW 7.16.120.

illegally, and (4) there is no other avenue of review or adequate remedy at law.” Clark County Pub. Util. Dist. No. 1 v. Wilkinson, 139 Wn.2d 840, 845, 991 P.2d 1161 (2000). “If any of the factors is absent, then there is no basis for superior court review,” id., and the trial court lacks jurisdiction to issue the writ.<sup>66</sup> In this case, each of these four jurisdictional requirements is an independent ground for reversing the decision to issue the writ.

1. A private arbitrator is not a public “officer” and was not “exercising a judicial function” so the first two jurisdictional requirements were not satisfied.

The well-established rule is a private arbitrator is not an “inferior officer . . . exercising judicial functions” for the purpose of a statutory writ. RCW 7.16.040. “There is no precedent for such certiorari . . . So frequent here and elsewhere are arbitrations; so numerous are awards, so invariably is the losing party dissatisfied; . . . that we may presume, if not conclude, that the omission to use the writ of certiorari, is from the conviction of the profession, that it cannot be lawfully done. Whitehead v. Gray, 12 N.J.L. 36, 37 (1830).<sup>67</sup>

---

<sup>66</sup> See, e.g., Grays Harbor County v. Williamson, 96 Wn.2d 147, 150, 634 P.2d 296 (1981) (“the trial court lacked jurisdiction to grant certiorari under RCW 7.16.040.”); Commanda, 143 Wn.2d at 655 (unless the elements are present, “the superior court has no jurisdiction for review.”).

<sup>67</sup> Green-Boots Constr. Co. v. St. Highway Comm’n, 139 Okla. 108, 281 P. 220, 221 (1929) (stating “[t]he [arbitration] board’s progenitor was the contract, not statute. . . . There is no precedent of such a writ in this court, in other states of the Union, (continued . . .)

Statutory writs are issued to public officers and agencies -- not private persons.<sup>68</sup> Berninger's motion cited to Washington decisions involving public employee labor disputes which by their nature involve governmental entities and generally fall outside the statutes governing private arbitration.<sup>69</sup> The motion neglected to reference the prior page of the Jones decision which states: "Statutory certiorari provides a means for courts to review the judicial actions of public officers or organs of government where there is neither a statutory right of appeal nor an adequate remedy of law." The motion also neglected to reference the Jones decision's summary of the holding in the earlier Williamson decision: "The supreme court held no writ of certiorari was available

---

(. . . continued)

in the English Reports. Hence, a cogent and almost irresistible reason results against the present employment of the writ); 14 Jack K. Levin, J.D. C.S.J. Certiorari § 5 at 51 (2006) ("Since the use of certiorari is limited in application to inferior courts, boards, and tribunals created by law, the writ will not lie to remove the proceedings of arbitrators.").

<sup>68</sup> Compare State v. Smith, 6 Wash. 496, 496, 33 P. 974 (1893) ([headnote: "A member of board of regents of agricultural college is not state officer over whom supreme court has original jurisdiction in mandamus proceedings within the meaning of this provision."] with Cnty. Care Coalition of Wash. v. Reed, 165 Wn.2d 606, 614, 200 P.3d 701 (2009) ("a writ of mandamus may be issued to compel a state official to perform an act the law clearly requires as part of the official's duties."); Torrance v. King County, 136 Wn.2d 783, 787-88, 966 P.2d 891 (1998) (constitutional writ to a governmental agency); Brower v. Charles, 82 Wn. App. 53, 59, 914 P.2d 1201 (1996) (Division One) (describing as an element of a two-part test for a writ of prohibition "(1) a state actor is about to act in excess of its jurisdiction . . ."); accord, Marbury v. Madison, 5 U.S. 137, 196 (1803) (mandamus "if awarded, would be directed to an officer of government" and "the officer to whom it is to be directed must be one to whom, on legal principles, such writ may be direct."); Hill-Tellman v. Musicians' Union of San Francisco, 67 Cal. App. 279, 227 P. 646 (1924) (writ not issued to nongovernmental bodies).

<sup>69</sup> Mot. at 13-14 (citing Jones v. Pers. Resources Bd., 134 Wn. App. 560, 566, 140 P.3d 636 (2006) (ruling state employee was not entitled to certiorari ); Clark County Pub. Util. Dist. No. a1 v. Wilkinson, 139 Wn.2d 840, 846-47, 991 P.2d 1161 (2000).), CP 789-813.

because there was no governmental tribunal, board or officer and because there were other avenues of review.”<sup>70</sup>

Berninger’s motion also failed to cite to the trial court the Williamson decision, where the supreme court “reverse[d] the trial court for its failure to quash the writ of certiorari and remand[ed] the cause for reinstatement of the arbitrator’s award.” 96 Wn.2d at 150. Williamson was a county employee who asserted a wage and hour claim that “was submitted to binding arbitration pursuant to a labor agreement between the County and the Union.” Id. at 148. The county petitioned for a writ of review, the trial court granted the writ and modified but did not reverse the award, and cross reviews followed. Id. at 149-150.

The supreme court concluded two of the statutory requirements for the writ were not met:

    Insofar as this case is concerned that statute has three prerequisites: (a) the action must be one of an “inferior tribunal, board or officer”; (b) it must be “exercising judicial functions”; and (c) there must be no other avenue of review of adequate remedy at law. At least two of the three prerequisites are absent here.

Id. at 151-52. The court ruled:

    Since the action did not involve an inferior tribunal, board or officer; may not have involved the exercise of a judicial function; and was subject to a meaningful review, the trial court lacked jurisdiction to grant certiorari under RCW 7.16.040.

---

<sup>70</sup> 134 Wn. App. at 566-68 (underline added).

On the issue of whether the arbitrator was an inferior officer subject to a writ, the court explained:

The general purpose of a writ of certiorari is to “review the official acts of a public officer, or an organ of government.” . . . Initially the County contends an arbitrator, selected with the aid of the Public Employment Relations Commission (PERC) pursuant to WAC 391-21-800-814, becomes a governmental tribunal, board or officer. This position is not well taken.

Under RCW 41.56.125 the method of selecting an arbitrator is optional, a request for names of arbitrators from PERC being only one method. As it turned out the arbitrator ultimately selected was merely one of five names submitted by PERC for consideration by the contesting parties. The arbitrator could just as well have been selected without the assistance of PERC. Final selection remained with the contestants. Further, the arbitrator acquired no power by reason of statute or the PERC proposal. Jurisdiction and power to act were derived from the “Submission Agreement” signed by the parties. That agreement set forth the arbitrator selected, his jurisdiction, the issues involved and the contract provision involved. Note 3. The arbitration was the result of private contract only; there was no governmental “tribunal, board or officer” involved as contemplated by RCW 7.16.040, see *Standow v. Spokane*, supra.

Note 3. This is to be distinguished from the mandatory arbitration provided by RCW 7.06 and the Mandatory Arbitration Rules (which grant a trial de novo upon appeal).

In this case, Deisher is not a public employee and the arbitrator was not appointed by the court, was not paid by the court, and did not sign an oath of office. In contrast, an arbitrator in mandatory arbitration is a

public or governmental officer who signs an oath of office and is paid as a pro tem judge. MAR 3.1; RCW 7.06.040.<sup>71</sup>

Furthermore, an employment contract imposed the duty to arbitrate in this case -- not a statute or court rule. See CellCyte Genetics Executive Employment Agreement § 11 “Arbitration.” CP 130-39. The contract required that the arbitration be administered by the American Arbitration Association, the selection of the arbitrator was governed by the AAA’s employment rules, and the company was required to pay the arbitration fees. Id. § 11(b) “Procedure.” Applying the standard in Williamson: “The arbitration was the result of private contract only; there was no governmental ‘tribunal, board or officer’ involved as contemplated by RCW 7.16.040.” 96 Wn.2d at 152.

Even if the AAA arbitrator were construed to be a “governmental” or “public” officer, it is not clear whether he “exercis[ed] judicial functions” as required by RCW 7.16.040’s second requirement. The Williamson court observed that arbitration is “deemed a substitute for judicial action. It is a procedure designed to reach settlement of controversies, by extra-judicial means, before they reach a point at which one must resort to judicial action.” Id. at 153 (citing Thorgaard Plumbing

---

<sup>71</sup> Surreply in Opp’n to Mot. for Stay and in Supp. of Fees at 3:1-16 & nn.10-14, CP 2107-12.

& Heating Co. v. King County, 71 Wn.2d 126, 132, 426 P.2d 828 (1967)).<sup>72</sup>

2. The arbitrator did not exceed his authority when he ruled on the disqualification motion, so the third requirement was not satisfied.

The third requirement for the issuance of the discretionary writ is when the public officer “exceeded its jurisdiction or acted illegally.” Wilkinson, 139 Wn.2d 840, 845, 991 P.2d 1161 (2000); RCW 7.16.040.

Here, the arbitrator had broad powers. Berninger admitted to this when he invoked the arbitration clause six months earlier and he signed a declaration supporting the CellCyte defendants’ motion to compel arbitration.<sup>73</sup> The motion characterized the arbitration clause as a “comprehensive clause” that limited “relief in court for two reasons: “(1) to obtain ‘provisional’ relief establishing the arbitration process; or

---

<sup>72</sup> Dep’t of Agric. (DOA) v. State Pers. Bd., 65 Wn. App. 508, 514, 828 P.2d 1145 (1992) (following Williamson and exercising the court’s inherent power to review public employee arbitration because statutory writ was not available and stating it was unlikely that board was performing a judicial function when it served as arbitrator); Wash. Pub. Employees Ass’n v. Pers. Res. Bd., 91 Wn. App. 640, 651, 959 P.2d 143 (1998) distinguishing DOA as a case where the PRB was not performing a judicial function because it was acting as an arbitrator); compare Malted Mousse, Inc. v. Steinmetz, 150 Wn.2d 518, 522, 526-530, 532-34, 79 P.3d 1154 (2003) (ruling constitutional writs of review are not available to parties aggrieved in mandatory arbitration under chapter 7.04 RCW and distinguishing “private” arbitration from “common law” arbitration) with Clark County Pub. Util. Dist. No. 1 v. Int’l Brotherhood of Elec. Workers, Local 125, 150 Wn.2d 237, 245-47, 76 P.3d 248 (2003) (granting constitutional writ of review of common law arbitration relating to governmental employees); Plf.’s Opp’n to Mot. to Disqualify at 1:1-26, Supp. CPs [ ], App. B; Surreply in Opp’n to Motion for Stay & in Supp. of Mot. for Fees at 3:1-26, CP 2107-2112.

<sup>73</sup> Decl. of Ronald Berninger in Supp. of Defs.’ Mot. to Compel Arbitration, CP 150-159.

(2) to obtain an injunction preventing the violation of the Agreement . . .”<sup>74</sup> The arbitration clause granted broad powers: the “arbitrator shall have the power to decide **any** motions” and that the “arbitrator shall have the power to award any remedies . . . under applicable law.” Agreement § 11(b) (emphasis added), CP 150-55. The clause contained an even broader scope when it came to the company’s disputes with Deisher: “this Agreement to arbitrate also applies to **any** disputes that the Company may have with the Executive.” Agreement § 11(a) (bold added), CP 150-55.

Consistent with this broad “any disputes” clause and the grant of broad powers to decide “any motions” and “to award any remedies,” Berninger asked the arbitrator for a disqualification order. He filed in federal court a separate disqualification motion, although his proposed order asked the federal court to disqualify Lane Powell “from any further representation” of Deisher.

Referring to the proposed order in federal court, Deisher asserted that Berninger had “not identified any ground upon which the Court may exercise jurisdiction over Deisher’s arbitration. Rather, by also moving to disqualify Lane Powell in the arbitration, Berninger has conceded that the arbitrator has exclusive jurisdiction to decide the issue in that proceeding. See Schoenduve Corp. v. Lucent Techn., Inc., 442 F.3d 727, 732-73 (9th

---

<sup>74</sup> Defs.’ Mot. to Compel Arbitration at 2:15-22, 6:1-4, CP 150-155.

Cir. 2006) . . .”<sup>75</sup> She also observed that that the arbitrator should “decide issues concerning the Apr. 2007 Canaccord presentation and the materiality of Pierce’s testimony on this issue and the letter rogatory” and “whether pump and dump is part of the arbitration is best left to the arbitrator.”<sup>76</sup>

In the arbitration, Deisher observed:

Respondents have several other motions pending in superior court about this very arbitration, including a motion about what claims are subject to arbitration. Regardless of the answer to the hypothetical question about which court might have jurisdiction, the respondents have submitted the claim to arbitration, and the Federal Arbitration Act prevents a court from interfering with that process. Third, there are specific issues for the arbitrator to decide . . . Some of those issues relate to the pleadings in the arbitration and involve potentially confidential materials such as Dr. Kalmes’ testimony on science issues.

Amended Opp’n to DQ Mot. and Mot. to Strike at 2, CP 1364.

Consistent with Deisher’s request, the federal court’s order was limited to that matter. Order at 9:8-9, CP 1464-72. Deisher was not a party in the federal suit, so she was not in a position to offer “a solution less than complete disqualification” in that case. Order at 9:8-9, CP 1472.

---

<sup>75</sup> Opp’n to Mot. to Disqualify Lane Powell at 3 n. 2, Supp. CPs, App. B.

<sup>76</sup> Amended Opp’n at 2 n. 2, CP 1364; Opp’n to Mot. to DQ Lane Powell [Federal Court] at 15 n. 20 (“Berninger has asked the arbitrator to grant letters rogatory to depose Pierce in Canada and to disqualify Lane Powell. Because Berninger has submitted this issue to the arbitrator, it is best decided by the arbitrator, who will determine if Pierce has material testimony and whether to grant such extraordinary discovery in arbitration.”), CP 1087; *Id.* at 15:12-16 (“Whether Deisher has put in issue in her arbitration ‘Pierce’s [alleged] pump and dump scheme,’ is a question best left to the arbitrator, who has access to all the pleadings and documents in the arbitration.”), CP 1087-88.

But in the arbitration she offered one, and the arbitrator agreed with the solution. CP 1702-05. Only after the arbitrator made his ruling, did Berninger raise a jurisdictional objection. CP 1707-08. Courts in other statutes including California have permitted arbitrators to rule on disqualification issues.<sup>77</sup>

---

<sup>77</sup> Benasra v. Mitchell, Silberger & Knupp, 96 Cal. App. 4th 96, 116 Cal. Rptr. 2d 644 (2003) (arbitrators made two interlocutory decisions denying attorney disqualification motions, losing party filed in court a complaint and TRO motion against the law firm; trial court ruled that only the arbitration panel had authority to decide the disqualification motion and granted summary judgment dismissing complaint; the court of appeals reversed the summary judgment against the law firm), aff'd aft. remand, Pour Le Bebe, Inc. v. Guess ? Inc., 112 Cal. App. 4th 810, 5 Cal. Rptr. 3d 422, 465 (2003) (after final award by arbitrators, the trial court confirmed the award and denied a petition to vacate on the basis that the award was attained by undue means as a result of representation by conflicted counsel; the court of appeals affirmed the confirmation order; there was no clear and convincing evidence that the conflict had a substantial impact on arbitration panel's decision), review denied, 2004 Cal. Lexis 50 (Cal. Jan. 14, 2004); see, e.g., Cook Chocolate Co. v. Salomon, Inc., No. 87-Civ. 5705, 1988 U.S. Dist. Lexis 11929, Comm. Fut. L. Rep. (CCH) ¶ 24,352 (S.D.N.Y. 1988) (declining to review arbitration panel's interlocutory decision not to disqualify defendant's counsel; as a general rule, judicial interference would frustrate the purpose of arbitration and there is no compelling necessity or extraordinary circumstance, because moving party "could challenge the arbitrators' award after the process is complete"), 748 F. Supp. 122 (S.D.N.Y. 1990) (following nine day arbitration and award, denying motion to vacate award and referring to prior order stating "Cook will be able to challenge the arbitrators' award after the process is complete" and stating "The time for that challenge has now arrived."); Wurtembergische Fire Ins. Co. v. Republic Ins. Co., No. 86 Civ. 2696-CSH, 1986 U.S. Dist. Lexis 23032 (S.D.N.Y. 1986) (declining to grant a preliminary injunction to disqualify defendants' counsel and ruling: "It is for the arbitrators to control their internal procedures, subject only to the very limited post-award remedies conferred by § 10 of the" FAA and stating "district courts' powers in arbitration are both created and limited by the [FAA]. I find nothing in the statute sanctioning such interference." "Surely irreparable injury is not demonstrated . . . That circumstance, grounded in public policy, cautions courts to refrain from interfering in the arbitral process, rather than granting this unprecedented relief."); Caan Venture Partners, LP v. Salzman, 1996 Conn. Super. Lexis 245 (Jan. 28, 1996) (declining to rule on disqualification motion brought seven months after court stayed action pending arbitration and stating "this court will not interfere with and disrupt the process of arbitration" and ruling attorney disqualification was not within the scope of the public policy exception to arbitration); Hibbard Brown & Co. v. ABC Family Trust, No. 91-1225, 1992 U.S. App. Lexis 6469 (4th Cir. 1992)(affirming denial of motion to enjoin arbitration and affirming dismissing without  
(continued . . .)

The arbitrator ruled that he had jurisdiction and that Berninger waived his jurisdictional objection. February 8, 2009 ruling, CP 1746. The AAA's Rules also barred the jurisdictional objection. National Rules for the Resolution for Employment Disputes. Rule 6, "Jurisdiction," states:

c. A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection. The arbitrator may rule on such objections as a preliminary matter or as part of the final award. (Adding underline.)

Rule 6 corroborates the contract's express authority that the arbitrator had "the power to decide any motions" and "any dispute" raised by the company.

Berninger's petition for the writ cited distinguishable decisions where the parties had not appointed an arbitration panel and the disqualification motion had not been decided by the arbitrators.<sup>78</sup>

---

(. . . continued)

prejudice of disqualification motion and noting "a decision on disqualification by the district court at this time could have the result of interfering with the arbitration process.").

<sup>78</sup> Mot. at 12:4-6, CP 789-813; *Id.* at 12:18-24 (citing *Simply Fit of N. Am. v. Poyner*, 579 F. Supp. 371, 374, 382, (S.D.N.Y. 2008) (granting motion to compel arbitration, staying suit and retaining jurisdiction over any petition to review award; deciding disqualification motion "prior to submitting this matter for arbitration" but denying the motion as premature and stating "Importantly, the present motion is made by plaintiff" and not by clients, one client had signed a waiver of potential conflicts when the firm undertook joint representation, and defendants had not yet taken inconsistent or adverse positions); *Reinsurance Am., Inc. v. Ace Property & Cas. Co.*, 500 F. Supp. 2d 272, 273, (S.D.N.Y. 2007) (denying petition for the court to appoint an umpire under the FAA,

(continued . . .)

Berninger has argued that “[s]ubject matter jurisdiction cannot be waived and may be raised at any time.”<sup>79</sup> Apparently, Berninger does not understand the difference between the statutory subject-matter jurisdiction granted to courts, which cannot be waived, and the consensual jurisdiction granted to arbitrators, which can be waived.

The decisions cited by Berninger also confirmed that the denial of the disqualification motion is a discretionary decision.<sup>80</sup> Just as “the court’s exercise of discretion is not reviewable by extraordinary writ,” Commanda, 143 Wn.2d at 656, so too an arbitrator’s exercise of discretion is not reviewable by extraordinary writ.

3. Berninger failed to prove irreparable injury or an unquestioned error, so the fourth requirement of a lack of an adequate remedy was not satisfied.

---

(. . . continued)

when one of the parties had filed in state court a disqualification motion against opposing counsel who had “previously represented [the insurance company] and possessed potentially prejudicial information”; concluding the disqualification motion was properly before the state court); In re Arbitration Between R3 Aerospace, Inc. v. Marshall of Cambridge Aerospace Ltd., 927 F. Supp. 121 (S.D.N.Y. 1996) (after defendants removed to federal court a special proceeding to disqualify counsel in an arbitration, district court remanded the case because the Convention on the Recognition and Enforcement of Foreign Arbitration Awards, 9 U.S.C. § § 201-207, did not apply to disqualification motion; the motion was brought “[p]riort to the appointment of an arbitrator, . . .”), CP 789-813.

<sup>79</sup> See Opp’n for Discretionary Review at 17 (citing Skagit Surveyors & Eng’rs, LLC v. Friends of Skagit County, 135 Wn.2d 542, 555-556, 958 P.2d 962 (1998)([the superior court acting in appellate capacity has limited statutory jurisdiction and all procedural and jurisdictional requirements must be met to review an administrative order].).

<sup>80</sup> United Sewerage Agency of Wash. County v. Jelco, 646 F.2d 1339, 1351-52 (9th Cir. 1981) (abuse of discretion standard for review of disqualification motion), Poyner, 579 F. Sup. 2d at 384 (“A motion to disqualify an attorney falls within the discretion of the court.”), CP 789-813.

Even if the arbitrator were a person subject to the writ and the arbitrator lacked jurisdiction or acted illegally, Reys failed to establish the fourth jurisdictional requirement that he had no “plain, speedy and adequate remedy at law.” RCW 7.16.040. In Williamson, the supreme court ruled that that the county had failed to satisfy this requirement even though “there is neither a contractual nor statutory means by which the contestants could obtain review of the arbitrator’s award,” because there could be an common law remedy that provided “a meaningful review available ... aside from an extraordinary writ proceeding with its attendant procedures, rules and unique standards of review.” 96 Wn.2d at 154.<sup>81</sup>

Below Berninger conceded he could seek review “following the conclusion of the arbitration,” but he claimed “this is no remedy at all” and cited two Ninth Circuit decisions where former clients pursued appellate review of trial court orders on disqualification motions. Mot. for Disqualification at 14 (citing Cord v. Smith, 333 F.2d 516 (9th Cir. 1964); United Sewerage Agency of Wash. County, Or. v. Jelco, 646 F.2d 1339

---

<sup>81</sup> Dep’t of Agric. (“DOA”) v. State Pers. Bd., 65 Wn. App. 508, 514, 828 P.2d 1145 (1992) (following Williamson and permitting inherent review of public employee arbitration because statutory writ was not available and stating it was unlikely that board was performing a judicial function when it served as arbitrator); Wash. Pub. Employees Ass’n v. Pers. Res. Bd., 91 Wn. App. 640, 651, 959 P.2d 143 (1998) (distinguishing DOA as a case where the PRB was not performing a judicial function because it was acting as an arbitrator).

(9th Cir. 1981)), CP 789-813.<sup>82</sup> Those two decisions are the exception -- not the rule -- and they differ from this case. There, the attorneys changed sides and sued former clients.<sup>83</sup> But Lane Powell is not representing one client against another. Those two decisions were also decided before two of the three decisions by the Supreme Court restricting the appeal of disqualification orders. Since that trilogy of decisions, the First Circuit has ruled: “The common strands which weave their way through the [Supreme Court] trilogy strongly suggest that -- in the great majority of instances -- mandamus would be utterly inappropriate.”<sup>84</sup> Mandamus -- not a writ of review -- is the common means for obtaining the review of an order on a disqualification motion, and a patent error and/or “irreparable” injury are required for the issuance of such a writ.<sup>85</sup>

---

<sup>82</sup> We believe that the superior erroneously ruled that the arbitration was subject to a de novo trial. But even if that ruling is correct it undermines the issuance of a writ. The general rule is a “trial de novo is an adequate remedy at law.” Malted Mousse, Inc. v. Steinmetz, 150 Wn.2d 518, 522, 526-30, 532-34, 79 P.3d 1154 (2003) (stating neither the parties nor the Court of Appeals alleged that a statutory writ of review for mandatory arbitration was proper, trial de novo is an adequate remedy at law).

<sup>83</sup> Cord v. Smith, 338 F.2d 516 (9th Cir. 1965), clarified, 370 F.2d 418 (1966). In that case, the attorney violated the rule that “an attorney who represented one party in a transaction may not represent the other party in an action against his former client, arising out of or closely related to the transaction.” 338 F.2d at 524.

<sup>84</sup> In re Bushkin Assocs., 864 F.2d 241, 243 (1st Cir. 1989); .See generally Leah Epstein, Comment: A Balanced Approach to Mandamus Review of Attorney Disqualification Orders, 72 U. Chi. L Rev. 667, 680-87 (2005) (describing the divergent approaches among circuits: relaxing the standard, tightening the standard, and the Seventh Circuits’ middle way and proposing an alternative).

<sup>85</sup> Bushkin, 980 F.2d at 1121 (mandamus only upon a showing that the district court order was “patently erroneous” and a showing of a clear right to relief, or a demonstrable injustice); In re BellSouth Corp., 334 F.3d 941 (11th Cir. 2003) (following Seventh Circuit and ruling “mandamus is an extraordinary remedy requiring (continued . . .)

The Jelco decision, cited by Berninger, was one of those rare decisions where mandamus was granted -- there the attorneys were suing their own client, and thus the client “could suffer irreparable injury” (information from the representation of the former client could be used against it in trial) if the client were “forced to wait until after trial to appeal. 646 F.2d at 1342, 1344. Although the Ninth Circuit permitted review, it denied the relief, because the complaining client had prospectively consented and waived the conflict. Id. at 1345-46, 1351-52, CP 1069-79. For even stronger reasons in this case, the arbitrator denied the relief since there were prospective consents and reaffirmed consents after consultation with independent counsel.

A decision on a disqualification motion is generally reviewable upon final judgment. See, e.g., Small Bus. Co. v. Intercapital Corp., 108 Wn.2d 324, 327, 738 P.2d 263 (1987) (appeal of disqualification issues after trial and reversing trial court’s decision that had imposed an irrefutable presumption of prejudice from a conflict).<sup>86</sup> Here, there was no

---

(. . . continued)

demonstrable injustice or irreparable injury” and “should lie to remedy an attorney disqualification order only if the district court order is patently erroneous and the petitioners have shown a clear and undisputed right to relief”); In re Corrugated Antitrust Litig., 614 F.2d 958, 962 (5th Cir. 1980) (holding mandamus “will not issue to correct a duty that is to any degree debatable”).

<sup>86</sup> In the 1980s, the United States Supreme Court decided a trilogy of cases ruling disqualification motions were not immediately appealable under § 1291 but suggested mandamus might be a proper means for review in exceptional circumstances. See, e.g., Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 276-77 & n.13, 378

(continued . . .)

disqualifying prejudice to Berninger and Reys -- rather they had been sued by Lane Powell for securities fraud before -- which “was a factor in [Deisher’s] decision to retain the firm” to represent her against them.<sup>87</sup> In these circumstances, they were required to prove a significant ethical breach to have standing to pursue a disqualification claim.<sup>88</sup>

Berninger argues that a non-client may have standing to make a disqualification challenge and cites “FMC Tech. v. Edwards, 420 F. Supp. 2d 1153, 1156 (W.D. Wash. 2006) (nonclient litigant may bring motions to disqualify based on conflicts of interest where conflict ‘impacts the moving party’s interest in a just and lawful determination of her claims’).”

---

(. . . continued)

(1981); Richardson-Merrell v. Kohler, 472 U.S. 424 (1985); Flamm, Disqualification § 35.5, at 695-98; David B. Harrison, Annot., Appealability of State Court Granting or Denying Motion to Disqualify Attorney, 5 A.L.R.4th 1251 (1981 and July 2009 Supp.).

There is an earlier Washington decision, decided before the Small Business Co. decision, where a court issued a temporary writ of prohibition and then quashed a writ in regarding an attorney conflict of interest and the appearance of fairness doctrine in an administrative proceeding. City of Hoquiam v. PERC, 29 Wn. App. 319, 628 P.2d 1314 (1981), rev’d, 97 Wn.2d 481, 646 P.2d 129 (1982). In that case, the court of appeals denied a stay of PERC proceeding, the hearing examiner conducted the hearing, and the conflict issue was later raised on appeal. 29 Wn. App. at 322-24. Accord, State ex rel. Marshall v. Superior Ct. of Snohomish County, 119 Wash. 631, 634, 638, 206 P. 362 (1922) (certiorari proceeding directing trial court to issue a temporary restraining order to prevent threatened destruction of building pending the appeal and stating the disposition was “much influenced” by “the highly probable irreparable injury from the destruction of the building.”).

<sup>87</sup> Decl. of Theresa Deisher re Mot. to Disqualify at 1:20-21, CP 1312.

<sup>88</sup> “The majority view is that only a current or former client of an attorney has standing to complain of that attorney’s representation of interests adverse to that current or former client.” Coyler v. Smith, 50 F. Supp. 2d 966, 969 (C.D. Cal. 1999) (denying disqualification motion and ruling the moving party lacked standing). To prove standing a non-client must show “the ethical breach so infects the litigation in which disqualification is sought that it impacts the moving party’s interest in a just and lawful determination of her claims . . .” Id. at 971-72.

Reply in Supp. of Resp't Berninger's Mot. to Modify at 7-8, CP 255-60. But a critical difference in the FMC decision was that a former client **joined** in the disqualification motion.<sup>89</sup>

Even where a former client brings a disqualification motion, there is no presumption of prejudice. In Small Bus. Co. v. Intercapital Corp., 108 Wn.2d at 329-32, the supreme court ruled that the court of appeals had erred in creating an irrebuttable presumption of prejudice, when there was a finding that no confidential information was transferred through a co-counsel relationship.<sup>90</sup>

In this case, even if the arbitrator's refusal to disqualify Lane Powell were an error, then it was harmless error unless there is proof of some prejudice that affects the result of the case or some substantial right.<sup>91</sup> That

---

<sup>89</sup> FMC Tech. was a trade secret misappropriate case where one the individual defendants, Wattles was jointly represented by counsel with the other defendants. After the lawsuit was settled, Wattles contacted the plaintiff and changed his testimony that documents had not been stolen and thus he became aligned with the plaintiff. 420 F. Supp. 2d at 1155. The plaintiff then brought a second lawsuit that challenged the settlement on the basis of fraud and other theories and Wattles was not joined as a defendant in that suit but rather he had switched sides and was a witness for the plaintiff. When the same law firm that had represented all the defendants in the first suit appeared again in the second lawsuit, the plaintiff filed a motion to disqualify the counsel who had jointly represented all the defendants in the prior suit. One of those defendants, Wattles, sought to intervene in the new suit and disqualify his former counsel. The motion was granted – the law firm would have to discredit a former client as an adverse witness on matters that were the subject of the former representation. Id. at 1162.

<sup>90</sup> Id. at 330-32 (reversing in part Intercapital Corp. of Or. v. Intercapital Corp. of Wash, 41 Wn. App. 9, 700 P.2d 1213 (1995)).

<sup>91</sup> See 108 Wn.2d at 332 (ruling moving party “has shown no prejudice” and ruling the court of appeals erred in reversing prior judgment); Nat'l Bank of Commerce v. Fountain, 9 Wn. App. 727, 733, 514 P.2d 194 (1973); Ryan v. Ryan, 48 Wn.2d 593,

(continued . . .)

proof is absent. Lane Powell's clients signed prospective consents and reaffirmed consents after consultation with independent counsel.

Berninger claims that the prejudice is Lane Powell would "share with Pierce" information discovered in the arbitration and would violate "the existing stay of all discovery in the class action." Mot. at 15, CP 789-813. Yet, that claim collapsed under any scrutiny. First, the protective order in the arbitration restricted the disclosure of information and permits further restrictions such as the classification of information as "Confidential" and "Attorneys' Eyes Only."<sup>92</sup> Therefore, as a result of the order, Lane Powell could not disclose any information obtained in the arbitration with anyone -- including any party in the federal class action suit.

There was no "unquestioned" error committed by the arbitrator that required immediate reversal of the interlocutory order.<sup>93</sup> While Berninger had a meritless claim for a writ, Deisher has a strong claim for appellate

---

(. . . continued)

600, 295 P.2d 111 (1955) (no reversal of trial unless breach of canon of professional ethics was flagrant enough to have prevented a fair trial).

<sup>92</sup> Stipulated Protective Order, Ex. B to Spellman Decl., CP 1757-1817.

<sup>93</sup> To prove an appeal after final judgment or award is an inadequate remedy, they must prove: (1) an error so clear that its reversal would be "unquestioned" if it already were before the superior court and (2) the litigation will terminate once the error is corrected by means of interlocutory review. City of Kirkland v. Ellis, 82 Wn. App. 819, 827-28, 920 P.2d 206 (1996); Seattle v. Williams, 101 Wn.2d 445, 454-55, 680 P.2d 1051 (1984).

relief, because her counsel has been disqualified after representing her for seventeen months in the employment dispute.<sup>94</sup>

4. The granting of the writ conflicts with the arbitration statutes.

While TEDRA has no provision authorizing the interlocutory review of pre-award rulings by arbitrators,<sup>95</sup> the Uniform Arbitration Act permits very limited judicial *enforcement* of pre-award rulings.<sup>96</sup> The result is the same under the FAA: because “[t]he basic purpose of arbitration is the speedy disposition of disputes without the expense and delay of extended court proceedings,” and the Ninth Circuit has warned: “To permit what is in effect an appeal of an interlocutory ruling of the arbitrator would frustrate this purpose.” AeroJet-Gen. Corp. v. Am. Arbitration Ass’n, 478 F.2d 248 (9th Cir. 1978).<sup>97</sup> Other courts have concluded that review of an arbitrator’s interlocutory orders would be

---

<sup>94</sup> Christensen v. United States Dist. Ct., 844 F.2d 694, 697 (9th Cir. 1988) (granting mandamus and stating once a new attorney is brought in, the effect of a disqualification order is irreversible).

<sup>95</sup> RCW 11.96A.320(7) (“final decision in writing within thirty days of the conclusion of the final arbitration hearing”); RCW 11.96A.320(9) (permitting an appeal from the “final decision of the arbitrator” by filing a notice of appeal requesting “a trial de novo appeal on all issues of fact and law.”).

<sup>96</sup> RCW 7.04A.180 (successful party may to file a motion to confirm preaward ruling). Accord, Perez v. Mid-Century Ins. Co., 85 Wn. App. 760, 767, 934 P.2d 731 (1997) (denying pre-award declaratory relief regarding disclosures by arbitrators in a tripartite panel, and stating “Washington court are reluctant to intervene in the arbitration process deferring with good reason to public policy and statutory mandate”); Plf.’s Opp’n to Stay and Req. for Fees at 11:1-26, A-203, Plf.’s Opp’n to Mot. to Disqualify at 8:17-9:12, Supp CP [], App. B.

<sup>97</sup> “It is apparent, therefore, that judicial review prior to the rendition of a final award should be indulged, if at all, only in the most extreme cases.” Id.

“unthinkable”<sup>98</sup> and would create a “hybrid” proceeding, “part judicial and part arbitrational.”<sup>99</sup> In summary, the three arbitration statutes do not authorize the judicial review of an arbitrator’s interlocutory decision; therefore the court erred when it issued the writ.<sup>100</sup>

For these reasons, the four jurisdictional requirements for a writ were not satisfied. A writ is an extraordinary remedy reserved for an extraordinary situation. Here, the only extraordinary situation is Berninger’s forum shopping and delay tactics that transformed arbitration from being an alternative to litigation to being full blown litigation both in the arbitration and in superior court simultaneously. The granting of the writ also conflicts with the public policy favoring arbitration.

**C. Even if the writ procedure were to apply, the trial court erred by reversing the arbitrator’s order.**

1. The superior court violated the statutory requirements when it failed to review the “in camera” materials that the arbitrator expressly relied upon in making his decision.

---

<sup>98</sup> Harleyville Mut. Cas. Co. v. Adair, 421 Pa. 141, 145, 218 A.2d 791, 794 (Pa. 1966).

<sup>99</sup> Cavanaugh v. McDonnell & Co., 357 Mass. 452, 457, 258 N.E.2d 561, 653 (Mass. 1970).

<sup>100</sup> Plf.’s Opp’n to Mot. to Disqualify at 1:1-3, 2:3-7, 8:17-9:12 (no judicial review of preaward decision, no judicial intervention, waiver and judicial estoppel apply and quoting from respondents’ brief in another case construing the same arbitration clause as the law permitting only vacating, modifying or correcting the arbitration award), Supp. CPs [ ], App. B; Plf.’s Opp’n to Stay and Her Req. for Fees at 11:1-10 (final award requirement applies to even disqualification of an arbitrator and other limited statutory exceptions do not apply), Supp. CPs [ ], App. A.

The court violated the statute's procedural requirements. First, the writ violated RCW 7.16.070's requirement that the writ "must command the party" to provide "a transcript of the record and proceedings . . . that may be reviewed by the court . . ." Second, the court violated RCW 7.16.110's requirements that "[w]hen a full return has been made, the court must hear the parties." Third, RCW 7.16.120's requirements for determination of questions involving the merits to be determined were violated.<sup>101</sup> As a result of these violations, the superior court made a rushed decision without considering the *in camera* materials that the arbitrator expressly relied upon in making his decision.

Berninger invited this error when he asked for a writ that combined the hearing for the granting of the writ with the hearing on the merits and (3) the judgment transmitted to the "inferior tribunal, board, officer having custody of the record or proceeding certified up."<sup>102</sup> Deisher preserved this error, when she "reserve[d] the right to a hearing after any writ is granted."<sup>103</sup>

---

<sup>101</sup> Plf.'s Opp'n to Mot. to Disqualify and Petition for Writ at 1:9-19 (arguing several parts of the writ is being "impermissibly collapse[d] into one hearing" and quoting RCW 7.16.110's requirement for a hearing after the writ is granted), Supp. CPs, App. B.

<sup>102</sup> Compare RCW 7.16.130 ("Copy of judgment to inferior tribunal, board or office") with RCW 7.16.050 ("Application for writ – Notice"); RCW 7.16.070 ("Contents of writ"); RCW 7.16.120 ("Questions involving the merits to be determined). Deisher raised and preserved this objection below: "The issuance of the writ has several parts which the CellCyte defendants impermissibly collapse into one hearing. . . . If the writ is granted and served, . . ."). Plf.'s Opp'n to DQ Mot. at 1:9-10, Supp. CPs [ ], App. B.

<sup>103</sup> Plf.'s Opp'n to Mot. to Disqualify and for Writ at 1:9-17, Supp CPs, App. B.

2. Both the writ statute and arbitration statutes govern the standard of review and the scope of review of the decisions below.

When reviewing a decision on the merits pursuant to the writ of review, the superior court should determine, if the arbitrator had jurisdiction, was proceeding in a fashion required by law, and violated any rule of law that prejudiced the relator. RCW 7.16.120(1)-(3); Andrew v. King County, 21 Wn. App. 566, 574, 586 P.2d 509 (1978).<sup>104</sup> The standard for review of any factual determinations by the arbitrator is the “substantial evidence” test. RCW 7.16.120(5).

The arbitration statutes restrict judicial review even further. When the CellCyte defendants filed a motion to compel arbitration, they relied upon both the Federal Arbitration Act and Uniform Arbitration Act.<sup>105</sup> The Uniform Act does not provide a mechanism for a losing party to challenge a preaward ruling. RCW 7.04A.180. RCW 7.04A.230 further limits judicial review of an award to specific categories.<sup>106</sup>

---

<sup>104</sup> RCW 7.16.120, “Questions involving merits to be determined.”

<sup>105</sup> Defs.’ Mot. to Compel Arbitration at 4:9-5:16, CP 150-155. Berninger and Reys enforced the same form agreement at another company and relied upon the Washington arbitration statute which preceded the Uniform Arbitration Act, and asserted the superior court “can only confirm, vacate, or correct the arbitration award.” Defs.’ Mot. to Compel Arbitration and Dismiss Court Proceedings at 9:5-9 in Tamer Labs, Inc. & Cennapharm v. Reys & Berninger, King County Sup. Ct. Case No. 03-2-27362-7SEA, Ex. D to Decl. of David Spellman in Opp’n to Stay, CP 1751-1817.

<sup>106</sup> Price v. Farmers Ins. Co., 133 Wn.2d 490, 496, 946 P.2d 388 (1997) (“Arbitration is a statutorily recognized special proceeding. The rights are controlled by statute. . . . Those referenced statutes state the grounds upon which the trial court may vacate or modify the award.”); Perez v. Mid-Century Ins. Co., 85 Wn. App. 760, 767, 934

(continued . . .)

3. The superior court's earlier order that the "binding" arbitration was "non-binding" mandatory arbitration subject to de novo review has prejudiced the later decision where the court reviewed the arbitrator's interlocutory order.<sup>107</sup>

In support of the issuance of the writ, respondents expressly relied upon an earlier October 31, 2008 order that ruled the applicable standard of review is "de novo review in accordance with the *mandatory arbitration rules*."<sup>108</sup> Deisher had opposed that earlier order and her response in part was that a similar motion "is pending before the arbitrator."<sup>109</sup> She also argued that the term "binding arbitration" was either unambiguous, or if ambiguous, it should be construed against the drafter (Berninger and Reys) and consistent with the rules of construction. The court erroneously adopted Reys' construction.

The employment contract requires:

binding arbitration under the Arbitration Rules set forth in the Revised Code of Washington ("RCW") Sections 11.96A.260 and 11.96A.320 (the "Rules") and pursuant to Washington law.

---

(. . . continued)

P.2d 731 (1997) (affirming summary judgment that denied pre-award declaratory relief and stating "Washington courts are reluctant to intervene in the arbitration process deferring with good reason to public policy and statutory mandate").

<sup>107</sup> Dahl v. Parquet & Colonial Hardwood Floor Co., 108 Wn. App. at 411-12.

<sup>108</sup> Mot. to Disqualify at 14:1-15, Supp. CPs [ ], App. B; Reply in Supp. of Mot. for Stay at 8:15-10:2, Supp. CPs [ ], App. C; Def. Gary Reys' Joinder at 2:1-4:17, CP 2068-84; Plf.'s Opp'n to Def.'s Mot. re TEDRA at 4:15-6:9, CP 489-95 ; Plf.'s Mot. for Reconsid. of the Oct. 31, 2008 Order at 7:5-12:15, CP 692-776. See Order, CP 677-78; Order, CP 779-80.

<sup>109</sup> Plf.'s Opp'n to Def. Mot re TEDRA at 1, CP 489-495.

CP 130-139 (adding underline). RCW 11.96A.260-320 is the A.D.R. procedure in the Trust and Estate Dispute Resolution Act (“TEDRA”) A.D.R. procedure whose purpose is to “resolve trust, estate, and nonprobate disputes” using “arbitrators experienced in trust, estate, and nonprobate matters.” RCW 11.96A.260, “Finding – Intent.” TEDRA does not expressly authorize the adoption of its “mediation followed by mandatory arbitration” procedure outside the trust or estate context. If Deisher had died, then TEDRA would apply to the claims by her estate -- but she has not died. Given the purpose and scope of TEDRA and Deisher’s nonprobate claim, the statute should be construed in a restrictive manner in the employment contract which is also subject to the FAA and the Uniform Act.

RCW 11.96A.270 authorizes the variation of TEDRA’s requirements and rights by agreement. Reys and Berninger had varied those procedures when they used the term “binding arbitration” instead of “non-binding, mandatory” arbitration in the employment contracts that they used and enforced at two companies. They also varied the statute by referring to

binding arbitration under the Arbitration Rules set forth in the Revised Code of Washington (“RCW”) Sections 11.96A.260 and 11.96A.320 (the “Rules”) and pursuant to Washington law.

CP 120-139 (adding underline). “[P]ursuant to Washington law,” the Uniform Arbitration Act imposes specific restrictions on the vacation and confirmation of an arbitration award. RCW 7.04A.220, 7.04A.230.<sup>110</sup> Below, respondents argued that the collective bargaining exception to the act applied -- RCW 7.04A.030 (“arbitration agreements between employers and employees or between employers and associations of employees.”).<sup>111</sup> But that exception clearly did not apply to an employment contract between a single employer and an employee. Deisher also did not waive her rights under the FAA and Uniform Act. There is also an element of waiver and estoppel, because respondents themselves had invoked both the Uniform Act and the FAA in earlier pleadings in this case and in a prior case.<sup>112</sup>

The remedy clause in the arbitration does not resolve any ambiguity in the use of the term “binding arbitration.” It provided

Remedy: Except as provided by the Rules, arbitration shall be the sole, exclusive and final remedy for any dispute. . . .

CP 130-139. That provision did not disclose that the arbitration was not a final remedy -- if someone merely filed a motion for de novo review. As

---

<sup>110</sup> Optimer Int’l, Inc. v. RP Bellevue LLC, 151 Wn. App. 954, 964, 214 P.3d 954 (2009).

<sup>111</sup> Def. Gary Reys’ Reply in Supp. of Mot. for Order Compelling Compliance with TEDRA Procedures at 1:8-17 (citing RCW 7.04A.030(4).), CP 538-45.

<sup>112</sup> CP 150-55, 255-60; Spellman Decl. in Opp’n to Stay, CP 1751-817.

this court stated in Dahl v. Parquet & Colonia Hardwood Floor Co.:<sup>113</sup>

“Once parties contractually agree to binding arbitration, neither of them can say that arbitration is not binding after all,” and “strong public policy favoring finality of arbitration dictates any ambiguity . . . be resolved in favor of binding arbitration . . . This is especially so where the party seeking to invalidate an agreement for binding arbitration was the drafter . . . .”<sup>114</sup> Although the contract expressly waived claims under other statutes, it did not specifically waive the requirements or the policies of the FAA and Uniform Act.<sup>115</sup> Furthermore, the AAA Employment Rules, which respondents also incorporated into the proceeding, distinguish “mandatory nonbinding” arbitration from “mandatory final and binding” arbitration.<sup>116</sup>

Arbitration’s purpose is to be “substitute for, rather than a mere prelude to, litigation,” and, consistent with that purpose, the parties “cannot submit a dispute to arbitration only to see if it goes well for their position before invoking the courts’ jurisdiction.”<sup>117</sup> Here, that purpose is being thwarted through respondents’ concoction of a Frankenstein

---

<sup>113</sup> 108 Wn. App. at 411-12.

<sup>114</sup> Dahl, 108 Wn. App. at 411-12; Sales Creators, Inc. v. Little Shoppe, LLC, 150 Wn. App. 527, 531, 208 P.3d 1133 (2009) (policy favoring binding arbitration).

<sup>115</sup> RCW 7.04A.230 (grounds for vacating the award); 9 U.S.C. §§ 9-11; Hall Street Assocs. LLC v. Matel, Inc., 552 U.S. \_\_\_, 128 S. Ct. 1396, 170 L. Ed. 2d 254, 259 (Mar. 25, 2008) (holding statutory grounds under the FAA are exclusive when applicable).

<sup>116</sup> Plf.’s Mot. for Recons. of the Oct. 31, 2008 order at 14, CP 779-780.

<sup>117</sup> Dahl, 108 Wn. App. at 407.

procedure that has the worst features of each system.<sup>118</sup> The superior court's earlier erroneous ruling that the arbitration was non-binding had a prejudicial effect on its subsequent issuance of a writ to review an interlocutory decision by the arbitrator and compel him to withdraw that ruling.

4. The arbitrator did not abuse discretion.

Review pursuant to a writ is deferential to “the decision of the body that makes the findings and conclusions relevant to the decision”<sup>119</sup> and requires “reasonable inferences to be drawn . . . in light most favorable to the party who prevailed in the highest forum that exercised fact finding authority.”<sup>120</sup> Here, the arbitrator exercised fact finding authority, and other courts have permitted arbitrators to rule on attorney disqualification motions.<sup>121</sup> When a party waits to see if the decision is favorable before challenging an arbitrator's authority, the doctrines of

---

<sup>118</sup> Dahl, 108 Wn. App. at 407.

<sup>119</sup> Mansour v. King County, 131 Wn. App. 255, 262, 128 P.3d 1241 (2006).

<sup>120</sup> Davidson v. Kitsap County, 86 Wn. App. 673, 680, 937 P.2d 1309 (1997); RCW 7.04A.150 (describing arbitration process including arbitrator's powers).

<sup>121</sup> Benasra v. Mitchell, Silberger & Knupp, 96 Cal. App. 4th 96, 116 Cal. Rptr. 2d 644 (2003), aff'd aft. remand, Pour Le Bebe, Inc. v. Guess ? Inc., 112 Cal. App. 4th 810, 5 Cal. Rptr. 3d 422, 465 (2003) (reviewing disqualification order after award), review denied, 2004 Cal. Lexis 50 (Cal. Jan. 14, 2004), see supra n. 77. See also RCW 7.04A.160 (right to representation by a lawyer).

waiver and estoppel bar the challenge.<sup>122</sup> Those doctrines clearly apply in this case.

The employment arbitration differs from the federal suit. In the federal suit, the court weighed the plaintiff investor class' substantial interest to avoid "significant delay and expense" in the proceeding<sup>123</sup> against one defendant's interest in having the attorney of his choice -- when the attorney had not even answered the complaint at the time when the disqualification motion was filed. In contrast, in the employment dispute, Deisher had been working with her chosen counsel for over a year before the disqualification motion was filed.

The conflict of interest analysis is a risk assessment.<sup>124</sup> In support of the disqualification motion, Berninger did not himself testify, and thus he offered no narrative about the actual events and the alignment of claims and parties. Rather, his counsel posed hypothetical scenarios and relied on

---

<sup>122</sup> Hanson v. Shim, 87 Wn. App. 538, 548, 550, 943 P.2d 322 (1997) ("Having sought arbitration of this dispute . . . , [a party] cannot challenge the arbitrator's authority."); id. (party waited to see if an award was favorable before challenging the arbitrator); ML Park Place Corp. v. Hedreen, 71 Wn. App. 727, 737, 862 P.2d 602 (1994) (adopting rule requiring timely objection to arbitrability to preserve the right to challenge the award after participating in the proceeding); PowerAgent v. Electronic Data Sys, 358 F.3d 1187, 1192 (9th Cir. 2004) (estoppel); Tristar Pictures, Inc. v. Director's Guild of Am., 160 F.3d 537, 540 (9th Cir. 1998). Plf.'s Opp'n to Stay and Her Req. for Fees at 10:3-26, Supp. CPs [ ], App. A.

<sup>123</sup> Federal order at 6:13-22 (raising concern that "once trial is underway, bringing in other counsel is no simple matter " and "would result in significant delay."), CP 1469.

<sup>124</sup> 1 Geoffrey C. Hazard, The Law of Lawyering § 10.4, at 10-12 (2009) (assessing the risk and providing an appropriate response).

the class-action complaint's allegations to contend that "CellCyte's fraudulent conduct allegedly involves Pierce and Braumberger" who were not "innocent dupes of the CellCyte defendants" and did not have a "common interest" with Deisher.<sup>125</sup> Yet, those same allegations against Pierce were later dismissed on a preanswer motion nine months after the disqualification order was granted in the class-action.<sup>126</sup> Therefore, history has overtaken the theory that "Deisher will be a directly adverse witness to Pierce" in the class-action suit.<sup>127</sup>

In the employment dispute, the arbitrator was in the best position to weigh the substance and relative credibility of the parties' positions such as the CellCyte defendants' ironic claim that Deisher had no common interest with Pierce in the context of her employment arbitration -- when CellCyte's own securities lawyer had vouched for Pierce when Deisher raised concerns about Pierce's background and in reliance on that vouching Deisher subsequently attended a meeting with Pierce and the representatives of a Canadian broker dealer along with other CellCye employees.<sup>128</sup> The arbitrator was in the best position to decide if the possible testimony about that one meeting was directly adverse to Deisher's position in the employment dispute and if the testimony were

---

<sup>125</sup> Mot. to Disqualify and Pet. For Writ of Review at 17-18, CP 789-813.

<sup>126</sup> Appendix D to this brief, Order Granting Def. Pierce's Mot.

<sup>127</sup> See, e.g., Decl. of John Strait at 6:2-3, CP 1348.

<sup>128</sup> Deisher Decl. in Resp. to Mot. for Letters Rogatory at 4-7, CP 1207-10.

cumulative or were noncumulative and warranted deposing Pierce in Canada (where he resides) and if the deposition would trigger a disqualifying conflict.<sup>129</sup>

The arbitrator reviewed “the posture of the case and the detailed consents and independent counsel for both Ms. Deisher and Mr. Pierce,” “the high burden of proof in showing adverse interest,” the fact that “[a]ll of this has been fully disclosed and explained to Ms. Deisher and Mr. Pierce, through independent counsel, and [Lane Powell] has reasonable structures in place to deal with it – including outside counsel.”<sup>130</sup> Braumberger and Pierce had given prospective waivers/consents that “Lane Powell could continue to represent Dr. Deisher in the employment dispute, if a conflict arose,” and they later ratified these consents when they consulted with independent counsel.<sup>131</sup> The advance and ratified consents are factual findings amply supported by substantial evidence.<sup>132</sup>

---

<sup>129</sup> The disqualification motion relied on a declaration by Nathan McDonald who described the one meeting that both Pierce and Deisher attended. CP 1045-46, 1205-08, 1210. McDonald later resigned as a CellCyte’s chief accounting officer and new management identified “material weaknesses” in the company’s accounting controls. May 18, 2009 Form 10 K at 24-26, at <http://www.sec.gov>.

<sup>130</sup> Plf.’s Opp’n to Mot. to Disqualify and Petition for Writ at 15:9-17, 18:4-6, 20 n.52 (quoting the arbitrator’s ruling and identifying Dec. 11, 2008 disclosure and consents for in camera review), Supp. CP [], App. B.

<sup>131</sup> *Id.* at 3:10-16, 6:13-15, 7:1-3.

<sup>132</sup> *Jelco*, 646 F.2d 1339, 1346 & n.6, 1351 (abuse of discretion standard of review based on the findings of fact), CP 1066-79; *Standard Oil Co.*, 136 F. Supp. at 367; *Eriks v. Denver*, 118 Wn.2d 451, 458, 824 P.2d 1207 (1992) (whether multiple (continued . . .))

Respondents’ “persistent and continuous efforts” to delay the consideration of the merits of this case and even of this appeal further tip the balance of interests against the drastic remedy of disqualification.<sup>133</sup> The six month delay in filing the disqualification motion is an independent basis for affirming the arbitrator’s ruling.<sup>134</sup>

## VI. CONCLUSION

The disqualification motion in the arbitration was a strategic litigation tactic. The arbitrator’s denial of the motion was not an abuse of discretion rising to the level of an unquestioned error that required extraordinary interlocutory relief. The writ should have been quashed, and the superior court’s subsequent disqualification order was an error. That “drastic remedy” was not “absolutely necessary” and “extracted a harsh penalty” on Deisher three weeks before the rescheduled arbitration

---

(. . . continued)

representation is reasonable is a question of fact); Plf.’s Opp’n to Mot. to Disqualify and Petition for Writ at 11:15-12:11, 17:17-19:10, Supp. CPs [], App. B.

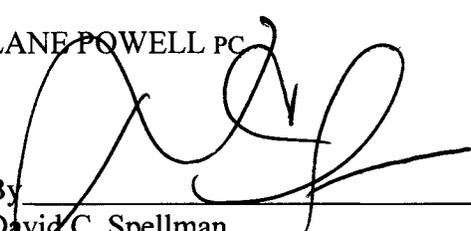
<sup>133</sup> Titan, 637 F. Supp. at 1562-63. Respondents enforced an 18 month noncompete against Deisher but they failed to pay her \$225,000 in severance while they incurred hundreds of thousands of dollars on the disqualification motions, filed a “firestorm” of motions in the arbitration and in court, refused to pay for the arbitration, extended the ADR process by over a year. See, e.g. Plf.’s Opp’n to Stay at 12:9-12, App. A; Plf.’s Opp’n to Mot. to Disqualify at 2:9-6:7, 7:16-18, 10:4-11:14, 20:7-8, App. B. During this brief appeal, respondents have filed seven motions including two motions to modify and two motions for discretionary review of this Court’s interlocutory decision.

<sup>134</sup> First Small Bus. Investment, 108 Wn.2d at 325, 337; Modanlo v. Ahan, 342 B.R. 230, 270 (D. Md. 2006) (5-month delay constituted waiver).

hearing.<sup>135</sup> For these and other reasons, the superior court's decisions should be reversed and the arbitrator's ruling reinstated.

RESPECTFULLY SUBMITTED this 30 day of November, 2009.

LANE POWELL PC

By   
\_\_\_\_\_  
David C. Spellman  
WSBA No. 15884  
Attorneys for Plaintiff-Appellant

---

<sup>135</sup> In re Firestorm, 129 Wn.2d at 140; Titan, 637 F. Supp. at 1562-63.

# **APPENDIX A**

STATE OF WASHINGTON } SS AFFIDAVIT  
COUNTY OF KING } OF MAILING

This undersigned, being first duly sworn, on oath, states: That on this day  
affiant deposited in the mails of the United States of America a properly  
stamped and addressed envelope directed to the attorneys of record of  
defendant, containing a copy of the document to which this affidavit is  
attached.

William Ogden  
Subscribed and sworn to before me this 17th day of February 2009.

Adrienne Zuckerman  
Notary Public in and for the State of Washington,  
residing at Redmond  
My commission expires 10/20/2010

RECEIVED  
THE HONORABLE SUZANNE M. BARNETT  
2009 FEB 17 PM 4:19

KING COUNTY  
SUPERIOR COURT CLERK  
SEATTLE, WA

RECEIVED  
KING COUNTY  
SUPERIOR COURT  
2009 FEB 17 PM 4:28

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

THERESA A. DEISHER, )

Plaintiff, )

v. )

CellCyte Genetics Corp., et al. )

Defendants. )

NO. 08-2-09488-0SEA

PLAINTIFF'S OPP'N TO MOTION FOR  
STAY AND HER REQUEST FOR FEES

I. RELIEF REQUESTED.

Plaintiff Theresa Deisher opposes the motion by defendant Ronald Berninger to stay the arbitration. The stay is predicated on the issuance of statutory writ to either review the arbitrator's decision denying a motion to disqualify Dr. Deisher's counsel or to compel the him to change his ruling. But the Washington Supreme Court and the supreme courts in other states have held that these writs can be issued **only against governmental officers** and not to private arbitrators.<sup>1</sup> The motion "is not warranted by existing law," and there was no "argument for the extension, modification, or reversal of existing law." CR 11(a)(2). Although Berninger cited to a decision that discussed the controlling authority, he failed to address the ruling. After receiving notice of the violation, Berninger declined to withdraw the motions.<sup>2</sup> Therefore, Dr. Deisher requests the award of fees pursuant to CR 11, because the

<sup>1</sup> Grays Harbor County v. Williamson, 96 Wn.2d 147, 152, 634 P.2d 296 (1981); infra at 7-8.  
<sup>2</sup> Decl. of David Spellman in Opp'n to Motion for Stay.

PLF.'S OPP'N TO STAY AND HER REQUEST FOR  
FEES - 1

101

STATE OF WASHINGTON } SS AFFIDAVIT  
COUNTY OF KING } OF MAILING

This undersigned, being first duly sworn, on oath, states: That on this day  
affiant deposited in the mails of the United States of America a properly  
stamped and addressed envelope directed to the attorneys of respondent  
defendant, containing a copy of the document to which this affidavit is  
attached.

THE HONORABLE SUZANNE M. BARNETT

FILED  
KING COUNTY, WASHINGTON

FEB 17 2009

SUPERIOR COURT CLERK

Subscribed and sworn to before me this 17th day of February 2009.

Adrienne Zuckenberg  
Notary Public in and for the State of Washington,  
residing at Redmond  
My commission expires 10/20/2012

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

THERESA A. DEISHER,

Plaintiff,

v.

CellCyte Genetics Corp., et al.

Defendants.

NO. 08-2-09488-0SEA

PLAINTIFF'S OPP'N TO MOTION FOR  
STAY AND HER REQUEST FOR FEES

I. RELIEF REQUESTED.

Plaintiff Theresa Deisher opposes the motion by defendant Ronald Berninger to stay the arbitration. The stay is predicated on the issuance of statutory writ to either review the arbitrator's decision denying a motion to disqualify Dr. Deisher's counsel or to compel the him to change his ruling. But the Washington Supreme Court and the supreme courts in other states have held that these writs can be issued **only against governmental officers and not to private arbitrators.**<sup>1</sup> The motion "is not warranted by existing law," and there was no "argument for the extension, modification, or reversal of existing law." CR 11(a)(2). Although Berninger cited to a decision that discussed the controlling authority, he failed to address the ruling. After receiving notice of the violation, Berninger declined to withdraw the motions.<sup>2</sup> Therefore, Dr. Deisher requests the award of fees pursuant to CR 11, because the

<sup>1</sup> Grays Harbor County v. Williamson, 96 Wn.2d 147, 152, 634 P.2d 296 (1981); infra at 7-8.

<sup>2</sup> Decl. of David Spellman in Opp'n to Motion for Stay.

PLF.'S OPP'N TO STAY AND HER REQUEST FOR  
FEES - 1

122976 0001/1675526.3

ORIGINAL

LANE POWELL PC  
1420 FIFTH AVENUE, SUITE 4100  
SEATTLE, WASHINGTON 98101-2338  
206.223.7000 FAX: 206.223.7107

1 motions are not warranted by law. There is also circumstantial evidence that the motions are  
2 interposed to cause unnecessary delay or needless increase of cost in the litigation.

3 Even if one were to recast the motion to seek an injunction to stay the arbitration,  
4 Berninger cannot satisfy the standards for such extraordinary relief. First, the arbitration rules  
5 granted the arbitrator express authority to decide jurisdictional issues.<sup>3</sup> Second, the arbitrator  
6 ruled that Berninger waived the objection that the arbitrator lacked jurisdiction to decide the  
7 motion. Third, there is no irreparable injury.<sup>4</sup> Courts do not interfere in arbitration  
8 proceedings and disqualification orders are redressable after final judgment. In summary,  
9 Berninger cannot prove either probability of success on the merits or irreparable injury. If the  
10 motions were construed to seek injunctive relief, the contract's "Availability of Injunctive  
11 Relief" provision requires: "[i]n the event either party seeks injunctive relief, the prevailing  
12 party shall be entitled to recover reasonable costs and attorney fees."

## 13 II. STATEMENT OF FACTS.

14 In 2003, Lane Powell sued defendants Gary Reys and Ron Berninger for securities  
15 fraud when they were former executives of Cennapharm Corp.<sup>5</sup> That same year, Reys and  
16 Berninger started a new company, CellCyte Genetics, and they own 62% of its shares and are  
17 its co-managers.<sup>6</sup> Four years later, fearful for her job and reputation, plaintiff Theresa  
18 Deisher, PhD, a CellCyte vice president, retained Lane Powell to investigate her claims  
19 against Reys and Berninger. She had discovered that Reys and Berninger had misled her and  
20 investors about the company's primary business platform, a patented stem cell technology.<sup>7</sup>  
21 Six weeks later, Dr. Deisher was terminated by CellCyte, and she directed Lane Powell to

22 <sup>3</sup>Employment Arbitration Rules and Mediation, Rule 6 Jurisdiction,  
23 <http://adr.org/sp.asp?id=32904#6>, Feb. 14, 2009.

24 <sup>4</sup>Motion for Stay at 2:3-11; 4:15-5:15:4-17

25 <sup>5</sup>TLCA LLC v. Cennapharm, Reys and Berninger, King County superior court, Case No. 03-  
26 2-13177-SEA.

<sup>6</sup>CellCyte Prospectus (July 17, 2007) at <http://sec.gov>.

<sup>7</sup>Decl. of David Spellman Concerning Restructured Representation by Lane Powell at 2:6-9;  
6:18-7:9-filed with the AAA (Dec. 11, 2008), Ex. 22 to Mahler Decl filed Feb. 13, 2009.

PLF.'S OPP'N TO STAY AND HER REQUEST FOR  
FEES - 2

122976.0001/1675526.3

LANE POWELL PC  
1420 FIFTH AVENUE, SUITE 4100  
SEATTLE, WASHINGTON 98101-2338  
206.223.7000 FAX: 206.223.7107

1 send the company a written demand regarding the misconduct by Gary Reys and Berninger.  
2 The company ignored her mediation demands.

3 Dr. Deisher's concerns about CellCyte were justified. Nine months after she made the  
4 demand, Reys filed with the SEC an 8-K report that admitted that CellCyte's patented  
5 technology was not validated.<sup>8</sup> Several weeks later, the Department of Justice commenced a  
6 criminal investigation of the CellCyte defendants and others.<sup>9</sup> Meanwhile, the CellCyte  
7 defendants had dragged out the ADR process with Dr. Deisher.

8 Seven months earlier in January 2008, Dr. Deisher had sent a new mediation demand  
9 pursuant to the employment contract drafted by Reys and Berninger. Reys and Berninger had  
10 used virtually the same form contract for their prior company.<sup>10</sup> The arbitration clause  
11 incorporates both the American Arbitration Association ("AAA") National Rules for the  
12 Resolution of Employment Disputes and RCW "Sections 11.96A.260 through 11.96A.320,"  
13 which is the Trust and Estates Dispute Resolution Act (TEDRA), although the name of the  
14 statute was not used in the contract. (Conceivably, TEDRA might apply if an employee died  
15 and his or her estate had a claim.) Two months after the demand, the parties had an  
16 unsuccessful mediation, and the next day Dr. Deisher filed this suit demanding arbitration and  
17 other relief.<sup>11</sup> Three days later, the CellCyte defendants filed an "emergency" CR 11 motion,  
18 which also confirmed that they had notice of the basis for the disqualification motion they  
19 belatedly filed six months later,<sup>12</sup> followed by other motions. Several weeks later, they filed a  
20 motion to compel arbitration relying upon both the Federal Arbitration Act and the Uniform

21 <sup>8</sup> CellCyte 10-K (July 28, 2008) at  
22 <http://www.sec.gov/Archives/edgar/data/1325279/000118374008000414/f8k.htm>.

23 <sup>9</sup> Supplemental Decl. of Robert S. Mahler at 4:13-24, Ex. 18 to Mahler Decl.

24 <sup>10</sup> Ex. E to Decl. of Spellman in Opp'n to Motion to Stay attaching Defs.' Motion to Compel  
25 Arbitration and Dismiss Arbitration Proceedings (Sept. 11, 2003) in Cennapharm v. Reys, et  
26 al, King County superior court Case No. 03-2-27362-7SEA..

<sup>11</sup> Complaint for Decl. Relief and Demand for Arbitration, Dkt. # 1 (Mar. 18, 2008).

<sup>12</sup> "There are separate securities lawsuits pending against the Defendants in federal court.  
One of Plaintiff's counsel, Chris Wells, represents co-defendants in those cases." Defs.'  
Motion for Emergency Relief and Subjoined Decl. at 2:7-8, Dkt. #18 (Mar. 21, 2008).

PLF.'S OPP'N TO STAY AND HER REQUEST FOR  
FEES - 3

122976.0001/1675526.3

LANE POWELL PC  
1420 FIFTH AVENUE, SUITE 4100  
SEATTLE, WASHINGTON 98101-2338  
206.223.7000 FAX: 206.223.7107

1 Arbitration Act,<sup>13</sup> and the court granted the motion in part.<sup>14</sup> After the CellCyte defendants  
2 refused to privately select an arbitrator, Dr. Deisher filed an arbitration demand with the  
3 AAA. In mid-July, the arbitration pleadings closed, and Dr. Deisher again asked for interim  
4 relief regarding the arbitration expenses, the noncompete and severance.<sup>15</sup> In mid-August,  
5 counsel who was jointly representing the CellCyte defendants withdrew due to a conflict of  
6 interest after they learned that the criminal investigation of CellCyte included as targets Gary  
7 Reys and Berninger and an outside investor, Brent Pierce. From the time CellCyte received  
8 Dr. Deisher's demand in October 2007 until August 2008, CellCyte had three different law  
9 firms deal with her lawyers, increasing her fees and costs. For the same period, the company  
10 reported paying over \$1,000,000 in legal and audit expenses.<sup>16</sup>)

11 On October 3, the CellCyte defendants' new counsel filed motions to disqualify Lane  
12 Powell from representing Brent Pierce in the federal proceedings and Dr. Deisher in the  
13 arbitration. On November 20, the federal court granted the disqualification motion, without  
14 the benefit of oral argument and relying in part on new materials contained in reply  
15 pleadings.<sup>17</sup> In December, Lane Powell filed additional pleadings with the arbitrator  
16 including materials for in camera review, after its clients consulted again with independent  
17 counsel and signed new consents.<sup>18</sup> The CellCyte defendants received three weeks to file  
18

19 <sup>13</sup> Motion to Compel Arbitration at 4:8-24, Dkt. #32 (Apr. 14, 2008). "The FAA applies here  
20 because the parties' relationship implicates interstate commerce, as CellCyte is a national,  
21 publicly traded company. If plaintiff is suggesting that *Nelson* applies to arbitration  
22 agreements governed by the FAA, this position would contradict with *Buckeye's* holdings and  
23 raise federal preemption issues" Defs.' Reply in Supp. of Motion to Compel Arbitration at 2  
24 n. 2, Dkt. # 45 (Apr. 18, 2008).

25 <sup>14</sup> Order, Dkt. # 56 (Apr. 25, 2008).

26 <sup>15</sup> Spellman Decl. in Opp'n to Motions [and] in Supp. of Interim Relief filed with the AAA  
(Oct. 15, 2008); Deisher Decl. in Supp. of Extension of Time to Respond to the  
Termination of the Arbitration filed with the AAA (Oct. 11, 2008).

<sup>16</sup> CellCyte Form 10-Q at 5, 23 (Dec. 22, 2008) at <http://www.sec.gov>.

<sup>17</sup> Decl. of David Spellman Concerning Restructured Representation by Lane Powell at 9:24-  
15:19 filed with the AAA (Dec. 11, 2008): Ex. 22 to Mahler Decl.

<sup>18</sup> Id.

PLF.'S OPP'N TO STAY AND HER REQUEST FOR  
FEES - 4

122976.0001/1675526.3

LANE POWELL PC  
1420 FIFTH AVENUE, SUITE 4100  
SEATTLE, WASHINGTON 98101-2338  
206.223.7000 FAX: 206.223.7107

1 responsive pleadings, and in January 2009, after additional pleadings, the arbitrator made a  
2 series of email rulings denying the disqualification motion. One day after the February 4  
3 formal order was signed, Berninger objected to the arbitrator's authority to decide the  
4 disqualification issue. In response, Lane Powell argued that Berninger had waived and was  
5 estopped from challenging the arbitrator's authority to decide on the motion. The arbitrator  
6 declined to withdraw his order. His ruling is Attachment A to this pleading. He later declined  
7 to grant a stay.

8 The CellCyte defendants have admitted that they have spent hundreds of thousands of  
9 dollars on the disqualification motions.<sup>19</sup> They have repeatedly stalled the A.D.R. process,  
10 first in the mediation, then in the selection of the arbitrator, later failing to pay the arbitrator  
11 resulting in stays, and then seeking continuances of the hearing.<sup>20</sup>

### 12 III. ISSUES PRESENTED

13 1. When the Washington Supreme Court and all other courts considering the  
14 issue have ruled that a statutory writ of review only applies to governmental officers and  
15 tribunals and not to private arbitrators, is there good cause for a stay of the arbitration pending  
16 the application for writs directed to the arbitrator?

17 2. Berninger claims that the arbitrator had no jurisdiction to decide the  
18 disqualification motion<sup>21</sup> and that he may suffer irreparable injury and prejudice if he were  
19 forced to await a final award<sup>22</sup> including that Lane Powell would share with its other client  
20 discovery in the arbitration.<sup>23</sup> Has Berninger made a prima facie claim of probability of  
21 success on the merits and irreparable injury, when the AAA Rules granted the arbitrator

22 <sup>19</sup> Feb. 6, 2009 letter from Mahler to Carroll at 3, Ex. 39 to Mahler Decl.

23 <sup>20</sup> Decl. of Spellman on Restructured at 2:9-26; Ex. 22 to Mahler Decl.; LP's Amended Opp'n  
24 to Req. to Withdraw Order at 3, Ex. 36 to Mahler Decl.; Deisher Decl. at 2:1-3:7, Ex. 12 to  
Mahler Decl.

25 <sup>21</sup> Motion for Stay at 4:15-5:1.

26 <sup>22</sup> Motion for Stay at 2:3-11; 5:4-17.

<sup>23</sup> Motion to Disqualify at 15:13-17 (discovery would be shared and the bell could not be  
unrung).

PLF.'S OPP'N TO STAY AND HER REQUEST FOR  
FEES - 5

122976.0001/1675526.3

LANE POWELL PC  
1420 FIFTH AVENUE, SUITE 4100  
SEATTLE, WASHINGTON 98101-2338  
206.223.7000 FAX: 206.223.7107

1 express authority to rule on jurisdictional issues, when there is precedent that a jurisdictional  
2 objection can be waived and disqualification rulings are reviewed after final judgment, and  
3 when there is a protective order that limits the use of discoverable materials?

4 3. When the motions ignore controlling precedent and are brought for the purpose  
5 of delay and increasing costs and when Dr. Deisher is entitled to recover fees if she is a  
6 prevailing party in defeating injunctive relief, should she be awarded fees pursuant to CR 11  
7 or the contract for opposing these motions?

#### 8 IV. EVIDENCE RELIED UPON.

9 The pleadings in the arbitration and in this action including the Decl. of David  
10 Spellman in Opp'n to Motion for Stay.

#### 11 V. AUTHORITY AND ARGUMENT.

12 **A. Berninger cannot satisfy the four-requirements for the issuance of a writ  
13 of review. The unanimous precedent is a privately selected arbitrator is  
14 not a governmental officer subject to writs.**

15 Berninger acknowledges there is a four-part test for a writ of review. "A court will  
16 issue a statutory writ of review 'if the petitioner can show that (1) an inferior tribunal or  
17 officer (2) exercising judicial functions (3) exceeded its jurisdiction or acted illegally, and (4)  
18 there is no other avenue of review or adequate remedy at law.'"<sup>24</sup> For the first part, he argues  
19 "the Arbitrator is an inferior tribunal" and "[c]ourts have recognized that 'inferior tribunals'  
20 are ones whose decisions are subject to judicial review."<sup>25</sup> But his argument falsely assumes  
21 that the writs can be issued to a nongovernmental person. The two out-of-state decisions that  
22 he cites were in fact writs issued to governmental tribunals.<sup>26</sup>

23 <sup>24</sup> Jones, 134 Wn. App. at 567.

24 <sup>25</sup> Motion to Disqualify at 14:1-3.

25 <sup>26</sup> Id. citing Radke v. Nelson Mill Co., 194 N.W.2d 395, 398 (Mich. Ct. App. 1971); State ex  
26 rel. Cody v. Ohio Supreme Court Bd. Of Comm'rs on Grievances & Discipline, 693 N.E.2d  
829, 830 (Ohio Ct. App. 1997) (ruling court of appeals could not issue mandamus to board  
created by the state supreme court). The name of the first decision is actually "Radke v.  
Employment Sec. Comm'n." These were governmental tribunals.

1 Although Berninger cited to Jones v. the Personnel Resource Bd., 134 Wn. App. 560,  
2 140 P.3d 636 (2006), he ignored the decision's substance. The court affirmed the denial of a  
3 writ of review sought by a state employee of a grievance arbitrated by the Personnel  
4 Resources Board (RRB). The court of appeals ruled that the proceeding was "an  
5 administrative adjudication" involving the interpreting the WAC, and thus there was no  
6 judicial function and no basis for a writ of review. The court of appeals also observed: "The  
7 parties apparently agree that the PRB qualifies as an 'inferior tribunal' under the statute . . ."  
8 Id. at 567. The court of appeals also stated the applicable controlling rule: "Statutory  
9 certiorari provides a means for courts to review judicial actions of public officers or organs of  
10 government . . ." Id. at 566.

11 The Washington Supreme Court has stated several times: "The general purpose of a  
12 writ of certiorari is to 'review the official acts of a public officer, or an organ of government."  
13 Grays Harbor County v. Williamson, 96 Wn.2d 147, 152, 634 P.2d 296 (1981) (citing  
14 Standow v. City of Spokane, 88 Wn.2d 624, 630, 564 P.2d 1145 (1977); Pierce v. King  
15 County, 62 Wn.2d 324, 331, 382 P.2d 628 (1963)). In Jones, the court of appeals described  
16 the relevant holding in the Williamson decision:

17  
18 In Williamson, a nongovernmental arbitrator awarded a county employee back  
19 pay, after finding that the county had violated the collective bargaining  
20 agreement. . . . The Supreme Court held that no writ of certiorari was available  
21 because there was **no governmental** tribunal, board, or officer and because  
22 there were other avenues of review.

23 134 Wn. App. at 567-68 (adding emphasis). In Williamson, the court stated:

24  
25 Initially the County contends an arbitrator, selected with the aid of the Public  
26 Employment Relations Commission (PERC) pursuant to WAC 391-21-800-  
814, becomes a governmental tribunal, board or officer. This position is not  
well taken.

Under RCW 41.56.125 the method of selecting an arbitrator is optional, . . .  
Further, the arbitrator acquired no power by reason of statute or the PERC  
proposal. Jurisdiction and power to act were derived from the "Submission  
Agreement" signed by the parties. That agreement set forth the arbitrator  
selected, his jurisdiction, the issues involved and the contract provision

PLF.'S OPP'N TO STAY AND HER REQUEST FOR  
FEES - 7

122976.0001/1675526.3

LANE POWELL PC  
1420 FIFTH AVENUE, SUITE 4100  
SEATTLE, WASHINGTON 98101-2338  
206.223.7000 FAX: 206.223.7107

1 involved. Fn. 3. The arbitration was the result of private contract only; there  
2 was no governmental "tribunal, board or officer" involved as contemplated by  
3 RCW 7.16.040, see Standow v. Spokane, supra.

4 In this case, the arbitration was the result of a private employment contract.

5 Throughout the nation, the black letter law is these writs issue against governmental  
6 officers and bodies. In 1921, the California Supreme Court held: "We think the absence of  
7 any instance in this state or elsewhere of the issuance of this writ against a nongovernmental  
8 body indicates the writ is not the proper remedy in such instances."<sup>27</sup> That is black letter law  
9 that dates back to Marbury v. Madison, 5 U.S. 137, 169 (1803) which involved a mandamus  
10 writ "if awarded, would be directed to an officer of government" and stated "the officer to  
11 whom it is to be directed must be one to whom, on legal principles, such writ may be  
12 directed."

13 The black letter law is also that the writs do not issue against arbitrators. 14 Jack K.  
15 Levin, J.D., C.S.J. Certiorari § 5 at 51 (2006) summarizes: "Since the use of certiorari is  
16 limited in application to inferior courts, boards, and tribunals created by law, the writ will not  
17 lie to remove the proceedings of arbitrators." One hundred seventy nine years ago, in  
18 Whitehead v. Gray, 12 N.J.L. 36, 37 (1830), the New Jersey Supreme Court quashed a writ to  
19 review the proceedings of private arbitrators and found no precedent for a writ to an  
20 arbitrator:

21 There is no precedent of such a *certiorari*, in this court; in the other states of  
22 the Union; or in the English reports, so far as I am able to learn, either from my  
23 own researches or from the brief of the plaintiff's counsel. Hence a very  
24 cogent and almost irresistible argument results against the present employment  
25 of this writ. So frequent here and elsewhere are arbitrations; so numerous are  
26 awards; so invariably is the losing party dissatisfied; so commonly are the very  
complaints made which are here urged; so usual is it for the unsuccessful  
litigant to suppose, and oftentimes most sincerely, that the arbitrators have  
done too little for him and too much against him; and the common modes of

<sup>27</sup> Hill-Tellman v. Musicians' Union of San Francisco, 67 Cal. App. 279, 227 P. 646 (1924)  
(affirming denial of writ of review for a fine imposed against a member by an unincorporated  
volunteer organization).

PLF.'S OPP'N TO STAY AND HER REQUEST FOR  
FEES - 8

122976.0001/1675526.3

LANE POWELL PC  
1420 FIFTH AVENUE, SUITE 4100  
SEATTLE, WASHINGTON 98101-2338  
206.223.7000 FAX: 206.223.7107

1 redress against awards are deemed so arduous and straitened, that we may  
2 presume, if not conclude, the omission to use the writ of *certiorari*, is from the  
3 conviction of the profession, that it cannot lawfully be done. In *The King v.*  
4 *Whitbread*, Doug. 589, Lord Mansfield said: 'Though great industry has been  
employed, no case was produced in which a *certiorari* has been granted to  
remove proceedings before the commissioners of excise. This circumstance  
alone affords strong ground to suspect that none is grantable."<sup>28</sup>

5 Ninety nine years after the decision by the New Jersey Supreme Court, the Oklahoma  
6 Supreme Court quashed a writ issued to a contractual board of arbitration.<sup>29</sup> The court again  
7 found no precedent for such a writ:

8 The Highway Commission in an agreement with the contractor created the  
board of arbitration. The board's progenitor was the contract, not a statute. . .  
9 . That prerogative writ is one issued to inferior courts, board and tribunals  
10 created by law. There is no precedent of such a writ in this court, in other  
states of the Union, in the English Reports. Hence, a cogent and almost  
11 irresistible reason results against the present employment of the writ.<sup>30</sup>

12 Clearly, the arbitrator in this case is not a governmental officer, and the writ is not  
13 grantable. Berninger also cannot prove the other requirements for the writs such as that the  
14 arbitrator exercised judicial or administrative functions and exceeded his authority and the  
15 absence of an adequate remedy at law.

16 **B. The AAA rules granted the arbitrator express authority to rule on  
17 jurisdictional issues, Berninger waived any objection, and the general rule  
18 is disqualification orders are appealable after final judgment. Therefore,  
he is not entitled to an injunction.**

19 Federal courts on a rare occasion grant a preliminary injunction staying arbitration.  
20 See, e.g., *Textile Unlimited, Inc. v. A.B.MH and Co.*, 240 F.3d 781, 786 (9th Cir. 2001) (cited  
21 by CellCyte defendants last year when they asked the court to preclude the arbitrator from  
22 considering the feces and YoYo claim that Dr. Deisher had submitted to arbitration).<sup>31</sup> In that

23 <sup>28</sup> The Washington Supreme Court has looked to similar early decisions by the New Jersey  
Supreme court as precedent regarding writs. *King County*, 62 Wn.2d at 330-331 (quoting  
24 C.S.J. and New Jersey decisions as to *certiorari*).

25 <sup>29</sup> *Green-Boots Constr. Co. v. St. Highway Com'n*, 139 Okla. 108, 281 P. 220, 221 (1929).

26 <sup>30</sup> 281 P. at 220.

<sup>31</sup> Def. Gary Reys' Reply in Supp. of Motion to Enforce Ct's Apr. 25, 2008 Order at 3:23-4:1  
(Oct. 14, 2008).

1 case, the party contesting the arbitration “never entered into an arbitration agreement,” and the  
2 court properly enjoined the arbitration.

3 In contrast, here, the issue is whether the arbitrator could decide a disqualification  
4 motion. California courts have encouraged arbitrators to rule on such motions, although the  
5 pending motions ignore that those decisions which were submitted to the arbitrator.<sup>32</sup>  
6 Furthermore, the AAA National Rules for the Resolution of Employment Disputes Rule 6  
7 mandates that (1) the arbitrator has “the power to rule on his or her own jurisdiction,” (2) “a  
8 party must object to the jurisdiction of the arbitrator or the arbitrability of a claim . . . no later  
9 than the filing of the answering statement” and (3) “[t]he arbitrator may rule on such  
10 objections . . .”<sup>33</sup> Even without this express power, there is controlling precedent that estoppel  
11 and waiver prevent a party from challenging the arbitrator’s authority to decide an issue if the  
12 party affirmatively requested that the arbitrator rule on the issue as Berninger did here, and  
13 the ruling has been made. See Hanson v. Shim, 87 Wn. App. 538, 550, 943 P.2d 322 (1997).<sup>34</sup>  
14 Berninger's motions also ignore that line of analysis which was also submitted to the arbitrator  
15 and was clearly a basis for his ruling. See Attach. A.

16 <sup>32</sup> Benasra v. Mitchell, Silberger & Knupp, 96 Cal. App. 4th 96, 116 Cal. Rptr. 2d 644 (2003),  
17 aff'd aft. remand, Pour Le Bebe, Inc. v. Guess ? Inc., 112 Cal. App. 4th 810, 5 Cal. Rptr. 3d  
18 422, 465 (2003) (reviewing disqualification order after award), review denied, 2004 Cal.  
19 Lexis 50 (Cal. Jan. 14, 2004).

20 <sup>33</sup> Plf.’s Motion for Recons. of the Oct. 21, 2008 Order at 1:22-2:20, Dkt. #79 (Oct. 24, 2008).

21 <sup>34</sup> PowerAgent v. Electronic Data Sys., 358 F.3d 1187, 1192-93 (9th Cir. 2004) (estoppel  
22 from challenging arbitrator’s decision); Tristar Pictures, Inc. v. Dir.’s Guild of Am., 160 F.3d  
23 537, 540 (9th Cir. 1998); Dunlap v Wild, 22 Wn. App. 583, 587-88, 591 P.2d 834 (1989)  
24 (holding that party who consented to arbitration proceedings was estopped from challenging  
25 their validity to avoid collateral estoppel effect of arbitrator’s decision and stating “[b]y  
26 voluntarily consenting to arbitrate an existing dispute, Dunlap removed from controversy the  
validity of the contractual agreement to arbitrate future disputes.”); cf. ML Park Place Corp.  
v. Hedreen, 71 Wn. App. 727, 731, 736-72, 862 P.2d 602 (1993) (implied waiver, because,  
unlike the CellCyte defendants, the party raised in two preliminary hearings, the arbitration  
hearing, closing argument and post-hearing briefs its objection to the arbitrator’s authority  
and “did not merely state its objection on the record, but rather . . . attempted to reserve it for  
subsequent judicial review.”), review denied, 124 Wn.2d 1005, 877 P.2d 1288 (1994); W.A.  
Botting Plumbing & Heating Co. v. Constructors-Pamco, 47 Wn. App. 681, 685-86, 736 P.2d  
1100 (1987); Croushore v. Buchanan Ingersoll PC, 32 Pa. D&C 4th 142 (C.P., Allegheny, Pa.  
1996).

PLF.’S OPP’N TO STAY AND HER REQUEST FOR  
FEES - 10

122976.0001/1675526.3

LANE POWELL PC  
1420 FIFTH AVENUE, SUITE 4100  
SEATTLE, WASHINGTON 98101-2338  
206.223.7000 FAX. 206.223.7107

1 Finally, there is no irreparable harm. RCW 7.04A.120 (6) requires a party to wait  
2 until a final award to address the disqualification of an arbitrator, and the same rule should  
3 apply to the disqualification of a lawyer. The limited exception to the final award  
4 requirement is RCW 7.04A.180 which permits a party prevailing on a preaward ruling to  
5 request the arbitrator to incorporate the ruling in a partial final award which may be filed in  
6 court and confirmed or vacated. That limited exception does not apply, because the CellCyte  
7 defendants are not the prevailing party. Similarly, RCW 11.96A.310(7), "Decision of the  
8 Arbitrator," requires: "The arbitrator shall issue a final decision in writing within thirty days  
9 of the conclusion of the final arbitration hearing." But there has not been either a final  
10 arbitration hearing or a final decision on the merits.

11 The general rule in Washington, federal and most state courts is disqualification orders  
12 are appealable only after final judgment,<sup>35</sup> "For similar claims may be made almost every  
13 time a lawyer is disqualified" and would "authorize ready interlocutory review" and would  
14 overturn "in effect" the Supreme Court's decision,<sup>36</sup> which creates a presumption against  
15 appealability.<sup>37</sup> Here, the protective order entered in October prevents Lane Powell from  
16 disclosing discovery materials to anyone outside the arbitration; so, Berninger has no basis for  
17  
18

19 <sup>35</sup> Intercapital Corp. v. Intercapital Corp., 41 Wn. App. 9, 13-16, 700 P.2d 1212 (1985) (review  
20 after final judgment), petition for review denied, 104 Wn.2d 1015 (1985), appeal aft. remand,  
21 Small Business Co. v. Intercapital Corp., 108 Wn.2d 324, 327, 738 P.2d 263 (1987); Firestone  
22 Tire & Rubber Co. v. Risjord, 449 U.S. 368, 276-77 & n. 13, 101 S. Ct. 669, 66 L. Ed. 2d 571  
23 (1981); cf. Richardson-Merrell Inc. v. Koller, 472 U.S. 424, 105 S. Ct. 2751, 86 L. Ed. 2d 340  
24 (1985) (order granting motion to disqualify is not appealable but stating in note 13 that  
25 mandamus could be appropriate, but that such a case would require "exceptional  
26 circumstances."); David B. Harrison, Annot., Appealability of State Court Granting or  
Denying Motion to Disqualify Attorney, 5 A.L.R.4th 1251 (1981 and July 2008 Supp.)  
(appearing to showing that nine states as denying appeal [Connecticut, Hawaii, Illinois,  
Louisiana, Massachusetts, Nebraska, Ohio, Pennsylvania, and Texas] and three permitting  
appeal [California, Colorado, and Maryland]).

<sup>36</sup> In re Lewis, 212 F.3d 980, 984 (7th Cir. 2000).

<sup>37</sup> Richardson-Merrell, 472 U.S. 424.

PLF.'S OPP'N TO STAY AND HER REQUEST FOR  
FEES - 11

122976.0001/1675526.3

LANE POWELL PC  
1420 FIFTH AVENUE, SUITE 4100  
SEATTLE, WASHINGTON 98101-2338  
206.223.7000 FAX, 206.223.7107

1 asserting that Lane Powell will disclose information in violation of the protective order.<sup>38</sup> In  
2 short, there is no threatened irreparable harm, just as there is no applicable writ.

3 **VI. CONCLUSION.**

4 Although these motions are clearly not warranted by law, the moving party declined to  
5 withdraw the motions. There is no applicable writ. An arbitrator is not a governmental  
6 officer. Either the arbitrator had the express authority to decide the issues, or Berninger  
7 waived his objection. Courts review only final arbitration awards. Disqualification orders are  
8 generally reviewed only after a final judgment.

9 Here, the disqualification motion is brought by former adversaries whom Lane Powell  
10 sued six years ago and who are now under criminal investigation.<sup>39</sup> They seek to delay  
11 providing testimony under oath and to make this process as expensive as possible. They have  
12 already extended the duration of the A.D.R. to over a year to avoid testifying.<sup>40</sup> Meanwhile,  
13 Dr. Deisher's basic claim of \$225,000 in severance to compensate her for the 18 month  
14 noncompete roughly equals the sum that the CellCyte defendants admit having spent during  
15 the past three months on the disqualification motions,<sup>41</sup> while they simultaneously claimed the  
16 inability to fund the arbitration, after they compelled arbitration in the first place. Either their  
17 motions are frivolous, or their purpose is to cause unnecessary delay and to needlessly  
18 increase the cost of litigation, or they seek injunctive relief which entitles Deisher to fees as  
19 the prevailing party. Thus, there is good cause to award fees against them.

20 This February 17, 2009.

21 LANE POWELL PC

22 By

23 Christopher B. Wells, WSBA No. 08302  
David C. Spellman, WSBA No. 15884  
Attorneys for Plaintiff

24 <sup>38</sup> Stipulated protective order, Ex. C to Spellman Dec. in Opp'n to Stay.

25 <sup>39</sup> Supplemental Decl. of Robert S. Mahler at 4:13-5:6, Ex. 18 to Mahler Decl.

26 <sup>40</sup> Decl. of Theresa Deisher at 2:1-3:10, Ex. 12 to Mahler Decl.

<sup>41</sup> Ex. 39 to Mahler Decl, Feb. 6, 2009 letter from Mahler to Carroll at 3.

PLF.'S OPP'N TO STAY AND HER REQUEST FOR  
FEES - 12

122976.0001/1675526.3

LANE POWELL PC  
1420 FIFTH AVENUE, SUITE 4100  
SEATTLE, WASHINGTON 98101-2338  
206.223.7000 FAX. 206.223.7107

ATTACHMENT A

1  
2  
3  
4 Dear Counsel: This is regarding the request of respondents to withdraw my  
5 order dated February 4, 2009, with reference to the disqualification motion  
6 known to the parties. The request is denied. There are essentially two reasons:  
7 First, in reviewing both the case law provided by counsel and the order  
8 granting me authority to conduct the arbitration, I am persuaded that the  
9 motion by respondent to disqualify opposing counsel is within the authority the  
10 parties gave the arbitrator; Second, I find that the respondents have waived any  
11 objection to my role regarding this motion and would note the following:  
12 (1) The original motion was made in the litigation last October; (2) The  
13 respondents have consistently briefed the matter before me on the merits;  
14 (3) The challenge to the decision was made the day following entry of the  
15 above order. . . .

16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
Email from arbitrator, Ex. 40 to Mahler Decl. filed Feb. 13, 2009.

PLF.'S OPP'N TO STAY AND HER REQUEST FOR  
FEES - 13

122976.0001/1675526.3

LANE POWELL PC  
1420 FIFTH AVENUE, SUITE 4100  
SEATTLE, WASHINGTON 98101-2338  
206.223.7000 FAX: 206.223.7107

1 STATE OF WASHINGTON } SS AFFIDAVIT  
COUNTY OF KING OF MAILING

THE HONORABLE SUZANNE M. BARNETT  
RECEIVED

2009 FEB 20 PM 4: 14

KING COUNTY  
SUPERIOR COURT CLERK  
SEATTLE, WA

2 This undersigned, being first duly sworn, on oath, states: That on this day  
3 affiant deposited in the mails of the United States of America a properly  
4 stamped and addressed envelope directed to the attorneys of record of  
5 defendant, containing a copy of the document to which this affidavit is  
6 attached.

*William [Signature]*

Subscribed and sworn to before me this 20th day of February 2009.

*Adrienne Zuckerman*  
Notary Public in and for the State of Washington,  
residing at Redmond  
My commission expires 10/20/2010

7 SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

8 THERESA A. DEISHER,

9 Plaintiff,

10 v.

11 CellCyte Genetics Corp., Gary Reys and Ron  
12 Berninger and their marital communities, and  
13 John Doe

Defendants.

) NO. 08-2-09488-0SEA  
) ERRATA TO PLF.'S OPP'N TO MOTION  
) FOR STAY AND HER REQUEST FOR  
) FEES AND TO PLF.'S OPP'N TO  
) MOTION TO DISQUALIFY LANE  
) POWELL PC AS COUNSEL FOR  
) PLAINTIFF AND PETITION FOR WRIT  
) OF REVIEW

14 ERRATA

RECEIVED  
2009 FEB 20 PM 4: 13  
KING COUNTY  
SUPERIOR COURT  
CLERK

15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
PLF.'S OPP'N TO MOTION TO DISQUALIFY AND  
PETITION FOR WRIT - i

122976.0001/1677373.1

LANE POWELL PC  
1420 FIFTH AVENUE, SUITE 4100  
SEATTLE, WASHINGTON 98101-2338  
206.223.7000 FAX: 206.223.7107

104

FILED

THE HONORABLE SUZANNE M. BARNETT  
Noted for Hearing without Oral Argument: February 24, 2009

2009 FEB 23 PM 12: 11

KING COUNTY  
SUPERIOR COURT-CLERK  
SEATTLE, WA.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

THERESA A. DEISHER,

Plaintiff,

v.

CELLCYTE GENETICS CORP., GARY  
REYS and RON BERNINGER and their  
marital communities, and John Doe,

Defendant.

No.: 08-2-09488-0SEA

CERTIFICATE OF SERVICE

The undersigned declares as follows:

I am over the age of 18 years, not a party to this action, and competent to be a witness herein. I caused to be delivered a true and correct copy of:

1. Reply in Support of Motion to Disqualify and Petition for Writ of Review; and
2. Certificate of Service

on the parties and at the addresses shown by the method shown:

David C. Spellman	<input checked="" type="checkbox"/>	Via Hand Delivery
Christopher B. Wells	<input type="checkbox"/>	Via U.S. Mail
Portia R. Moore	<input type="checkbox"/>	Via Facsimile
Lane Powell P.C.	<input type="checkbox"/>	Via Email
1420 Fifth Ave., Ste. 4100		
Seattle, WA 98101-2338		
Telephone: 206.223.7000		
Fax: 206.223.7107		
Email: <a href="mailto:spellmand@lanepowell.com">spellmand@lanepowell.com</a>		
Email: <a href="mailto:wellsc@lanepowell.com">wellsc@lanepowell.com</a>		

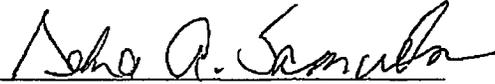
1	Email: <a href="mailto:moorep@lanepowell.com">moorep@lanepowell.com</a> Attorneys for Plf. Theresa A. Deisher	
2		
3	Charles Moure Dan Harris Harris & Moure PLLC 600 Stewart St., Ste. 1200 Seattle, WA 98101 Telephone: 206.224.5657 Fax: 206.224.5659 Email: <a href="mailto:Charles@harrismoure.com">Charles@harrismoure.com</a> Email: <a href="mailto:Dan@harrismoure.com">Dan@harrismoure.com</a> Attorneys for Def. Mark Reys	<input checked="" type="checkbox"/> Via Hand Delivery <input type="checkbox"/> Via U.S. Mail <input type="checkbox"/> Via Facsimile <input type="checkbox"/> Via Email
4		
5		
6		
7		
8	Christopher M. Huck DLA Piper US LLP 701 Fifth Ave., Ste. 7000 Seattle, WA 98104-7044 Telephone: 206.839.4800 Fax: 206.839.4801 Email: <a href="mailto:Christopher.huck@dlapiper.com">Christopher.huck@dlapiper.com</a> Attorney for Def. Gary Reys	<input checked="" type="checkbox"/> Via Hand Delivery <input type="checkbox"/> Via U.S. Mail <input type="checkbox"/> Via Facsimile <input type="checkbox"/> Via Email
9		
10		
11		
12		
13	William R. Squires, III Corr Cronin Michelson Baumgardner & Preece LLP 1001 4 <sup>th</sup> Ave., Ste. 3900 Seattle, WA 98154 Telephone: 206.625.8600 Fax: 206.625.0900 Email: <a href="mailto:rsquires@corrchronin.com">rsquires@corrchronin.com</a> Attorney for Def. CellCyte for limited purpose	<input checked="" type="checkbox"/> Via Hand Delivery <input type="checkbox"/> Via U.S. Mail <input type="checkbox"/> Via Facsimile <input type="checkbox"/> Via Email
14		
15		
16		
17		
18	Honorable Terrence A. Carroll Arbitrator C/O Beth Forbes Case Administrator Judicial Dispute Resolution 1411 Fourth Ave., Ste. 200 Seattle, WA 98101 Telephone: 206.223.1669 Fax: 206.223.0450 Email: <a href="mailto:carroll@jdrllc.com">carroll@jdrllc.com</a> <a href="mailto:bforbes@jdrllc.com">bforbes@jdrllc.com</a>	<input checked="" type="checkbox"/> Via Hand Delivery <input type="checkbox"/> Via U.S. Mail <input type="checkbox"/> Via Facsimile <input type="checkbox"/> Via Email
19		
20		
21		
22		
23		
24	Dwayne Paminto Case Manager American Arbitration Association Western Case Management Center 6795 North Palm Ave., 2 <sup>nd</sup> Floor Fresno, CA 93704	<input type="checkbox"/> Via Hand Delivery <input checked="" type="checkbox"/> Via U.S. Mail <input type="checkbox"/> Via Facsimile <input type="checkbox"/> Via Email
25		
26		

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

Telephone: 877.528.0880	
Fax: 559.490.1919	
Email: <a href="mailto:PamintoD@adr.org">PamintoD@adr.org</a>	

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Seattle, Washington, this 23<sup>rd</sup> day of February, 2009.

  
Debra A. Samuelson

11227503.1

FILED

THE HONORABLE SUZANNE M. BARNETT  
Noted for Hearing without Oral Argument: February 24, 2009

2009 FEB 23 PM 12:12

KING COUNTY  
SUPERIOR COURT CLERK  
SEATTLE, WA.

105

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

9 THERESA A. DEISHER,

10 Plaintiff,

11 v.

12 CELLCYTE GENETICS CORP., GARY  
13 REYS and RON BERNINGER and their  
marital communities, and John Doe,

14 Defendant.

No.: 08-2-09488-0SEA

CERTIFICATE OF SERVICE

16 The undersigned declares as follows:

17 I am over the age of 18 years, not a party to this action, and competent to be a witness  
18 herein. I caused to be delivered a true and correct copy of:

- 19 1. Defendant Ron Berninger's Reply in Support of Motion for Stay of Arbitration
- 20 2. Declaration of Robert S. Mahler in Support of Defendant Ron Berninger's
- 21 3. Certificate of Service

22 on the parties and at the addresses shown by the method shown:

24 David C. Spellman	<input checked="" type="checkbox"/>	Via Hand Delivery
24 Christopher B. Wells	<input type="checkbox"/>	Via U.S. Mail
25 Portia R. Moore	<input type="checkbox"/>	Via Facsimile
25 Lane Powell P.C.	<input type="checkbox"/>	Via Email
26 1420 Fifth Ave., Ste. 4100		
Seattle, WA 98101-2338		

1	Telephone: 206.223.7000	
2	Fax: 206.223.7107	
3	Email: <a href="mailto:spellmand@lanepowell.com">spellmand@lanepowell.com</a>	
4	Email: <a href="mailto:wellsc@lanepowell.com">wellsc@lanepowell.com</a>	
5	Email: <a href="mailto:moorep@lanepowell.com">moorep@lanepowell.com</a>	
6	Attorneys for Plf. Theresa A. Deisher	
7	Charles Moure	<input checked="" type="checkbox"/> Via Hand Delivery
8	Dan Harris	<input type="checkbox"/> Via U.S. Mail
9	Harris & Moure PLLC	<input type="checkbox"/> Via Facsimile
10	600 Stewart St., Ste. 1200	<input type="checkbox"/> Via Email
11	Seattle, WA 98101	
12	Telephone: 206.224.5657	
13	Fax: 206.224.5659	
14	Email: <a href="mailto:Charles@harrismoure.com">Charles@harrismoure.com</a>	
15	Email: <a href="mailto:Dan@harrismoure.com">Dan@harrismoure.com</a>	
16	Attorneys for Def. Mark Reys	
17	Christopher M. Huck	<input checked="" type="checkbox"/> Via Hand Delivery
18	DLA Piper US LLP	<input type="checkbox"/> Via U.S. Mail
19	701 Fifth Ave., Ste. 7000	<input type="checkbox"/> Via Facsimile
20	Seattle, WA 98104-7044	<input type="checkbox"/> Via Email
21	Telephone: 206.839.4800	
22	Fax: 206.839.4801	
23	Email: <a href="mailto:Christopher.huck@dlapiper.com">Christopher.huck@dlapiper.com</a>	
24	Attorney for Def. Gary Reys	
25	William R. Squires, III	<input checked="" type="checkbox"/> Via Hand Delivery
26	Corr Cronin Michelson Baumgardner & Preece	<input type="checkbox"/> Via U.S. Mail
27	LLP	<input type="checkbox"/> Via Facsimile
28	1001 4 <sup>th</sup> Ave., Ste. 3900	<input type="checkbox"/> Via Email
29	Seattle, WA 98154	
30	Telephone: 206.625.8600	
31	Fax: 206.625.0900	
32	Email: <a href="mailto:rsquires@corrcronin.com">rsquires@corrcronin.com</a>	
33	Attorney for Def. CellCyte for limited purpose	
34	Honorable Terrence A. Carroll	<input checked="" type="checkbox"/> Via Hand Delivery
35	Arbitrator	<input type="checkbox"/> Via U.S. Mail
36	C/O Beth Forbes	<input type="checkbox"/> Via Facsimile
37	Case Administrator	<input type="checkbox"/> Via Email
38	Judicial Dispute Resolution	
39	1411 Fourth Ave., Ste. 200	
40	Seattle, WA 98101	
41	Telephone: 206.223.1669	
42	Fax: 206.223.0450	
43	Email: <a href="mailto:carroll@jdrllc.com">carroll@jdrllc.com</a>	
44	<a href="mailto:bforbes@jdrllc.com">bforbes@jdrllc.com</a>	
45	Dwayne Paminto	<input type="checkbox"/> Via Hand Delivery
46	Case Manager	<input checked="" type="checkbox"/> Via U.S. Mail

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

American Arbitration Association Western Case Management Center 6795 North Palm Ave., 2 <sup>nd</sup> Floor Fresno, CA 93704 Telephone: 877.528.0880 Fax: 559.490.1919 Email: <a href="mailto:PamintoD@adr.org">PamintoD@adr.org</a>	<input type="checkbox"/> Via Facsimile <input type="checkbox"/> Via Email
--	--

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Seattle, Washington, this 23<sup>rd</sup> day of February, 2009.

  
Debra A. Samuelson

11227503.1

# **APPENDIX B**

RECEIVED

THE HONORABLE SUZANNE M. BARNETT

2009 FEB 19 PM 4:17

KING COUNTY  
SUPERIOR COURT CLERK  
SEATTLE, WA

KING COUNTY  
SUPERIOR COURT

2009 FEB 19 PM 4:17

RECEIVED  
JUDGE TATE ROOM

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

THERESA A. DEISHER,

Plaintiff,

v.

CellCyte Genetics Corp., Gary Reys and Ron  
Berninger and their marital communities, and  
John Doe

Defendants.

NO. 08-2-09488-0SEA

PLAINTIFF'S OPP'N TO RON  
BERNINGER'S MOTION TO  
DISQUALIFY LANE POWELL PC AS  
COUNSEL FOR PLAINTIFF AND  
PETITION FOR WRIT OF REVIEW

TABLE OF CONTENTS.

	<i>Page</i>
I. RELIEF REQUESTED .....	1
II. STATEMENT OF FACTS .....	2
A. Dr. Deisher was wrongfully discharged by CellCyte resulting from the resume, science, and securities fraud and other misconduct committed by its executive officers and majority shareholders, Gary Reys and Ron Berninger.....	2
III. EVIDENCE RELIED UPON.....	8
IV. ISSUES PRESENTED.....	8
V. ARGUMENT AND AUTHORITIES .....	8
A. The clear public policy prohibits judicial intervention in arbitration proceedings until there is a final award.....	8
B. If the court were to consider reviewing the arbitrator's preaward ruling, Dr. Deisher makes the following partial partial proffer of the reasons why the arbitrator did not abuse his discretion. ....	9

PLF.'S OPP'N TO MOTION TO DISQUALIFY AND  
PETITION FOR WRIT - i

122976.0001/1676419.1

LANE POWELL PC  
1420 FIFTH AVENUE, SUITE 4100  
SEATTLE, WASHINGTON 98101-2338  
206.223.7000 FAX: 206.223.7107

COPY

Received on  
FEB 19 2009  
HARRIS & MOURE

**RECEIVED**  
FEB 19 2009  
BULLIVANT, HOUSER, BAILEY

**RECEIVED**  
FEB 19 2009  
DLA ROPER

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

8	THERESA A. DEISHER,	)	
9		)	
		)	NO. 08-2-09488-0SEA
10	v.	)	
11	CellCyte Genetics Corp., Gary Reys and Ron	)	PLAINTIFF'S OPP'N TO RON
12	Berninger and their marital communities, and	)	BERNINGER'S MOTION TO
	John Doe	)	DISQUALIFY LANE POWELL PC AS
		)	COUNSEL FOR PLAINTIFF AND
	Defendants.	)	PETITION FOR WRIT OF REVIEW

**TABLE OF CONTENTS.**

	<i>Page</i>
I. RELIEF REQUESTED.....	1
II. STATEMENT OF FACTS .....	2
A. Dr. Deisher was wrongfully discharged by CellCyte resulting from the resume, science, and securities fraud and other misconduct committed by its executive officers and majority shareholders, Gary Reys and Ron Berninger.....	2
III. EVIDENCE RELIED UPON.....	8
IV. ISSUES PRESENTED.....	8
V. ARGUMENT AND AUTHORITIES.....	8
A. The clear public policy prohibits judicial intervention in arbitration proceedings until there is a final award.....	8
B. If the court were to consider reviewing the arbitrator's preaward ruling, Dr. Deisher makes the following partial partial proffer of the reasons why the arbitrator did not abuse his discretion.....	9

PLF.'S OPP'N TO MOTION TO DISQUALIFY AND  
PETITION FOR WRIT - i

COPY

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

1. The six month delay in filing the motion waived any right seek disqualification. While there had been no answer filed in the federal investor class action case, the parties in this case had vested time in mediation and filed reams of pleadings in the arbitration before the motion was filed..... 10
2. The review of the arbitrator’s ruling requires the painstaking analysis of facts and precedent, and the reasonableness of consents is a question of fact. .... 11
3. The arbitrator properly looked to both RPC 1.7 and 1.9, which both have consent provisions. .... 12
4. The arbitrator correctly ruled that the employment arbitration differs significantly from the federal investor class-action suit..... 13
5. The arbitrator has broad discretion in conducting this proceeding. He is in the best position to weigh the risks regarding the possibility that Pierce, a Canadian resident, might be a witness in the arbitration. The CellCyte defendants failed to make any showing that Lane Powell’s representation of Dr. Deisher was materially limited by its representation of Pierce in the Lexington administrative proceeding whose evidentiary hearing was concluded two weeks ago..... 15
6. The arbitrator made an in camera review of the consents signed after consultation with independent counsel. He did not abuse his discretion. .... 17
7. The CellCyte defendants have spent hundreds of thousand of dollars on the disqualification motions. .... 20

VI. CONCLUSION ..... 21

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

### I. RELIEF REQUESTED

Plaintiff Theresa Deisher requests the denial of the unprecedented motion by the CellCyte defendants to review an arbitrator's preaward decision. While the arbitration is ongoing Dr. Deisher and her lawyer should not be distracted by frivolous motions filed in the court. Therefore, she requests an award of the fees and costs incurred in responding to these motions. As a matter of law, a writ of review (certiorari) and a writ of mandamus are against governmental officers and not against arbitrators. The writ of mandamus is even more absurd since it concerns only ministerial actions and not discretionary decisions.

The issuance of a writ has several parts which the CellCyte defendants impermissibly collapse into one hearing. The first part is for the court to decide whether a writ can be issued. The answer to that issue here is, no. The second part is if a writ can be issued, then whether the court will exercise discretion to issue he writ. The answer to that issue is also, no. The third part is to decide whether the writ will contain words addressing a **stay** (RCW 7.16.080). The answer here is a stay should not be granted. If the writ is granted and served, then RCW 7.16.110 requires the court to "hear the parties . . . and may thereupon give judgment, either affirming or annulling or modifying the proceedings below." Lane Powell reserves the right to a hearing after any writ is granted. In the meantime, Lane Powell makes this response as a *partial* proffer of the grounds supporting the arbitrator's ruling, if the court were to grant the writ of review.

The six month delay by the CellCyte defendants in filing the motion waived any right to seek disqualification. The CellCyte defendants are not former clients or present clients of Lane Powell, but rather they are former adversaries of Lane Powell. They do not have standing to pursue the writs. In contrast, Lane Powell's clients provided advance consents and later multiple and detailed additional consents after consulting with independent counsel. The arbitrator considered additional evidence and circumstances that were not before Judge

1 Lasnik. In summary, the arbitrator did not abuse his discretion in denying the disqualification  
2 motion.

3 The factual recitation is long given the procedural status. However, those facts  
4 irrelevant if the court applies the established law regarding express authority, waiver and  
5 judicial estoppel, or follows statutory framework the permits the judicial review only of a  
6 final arbitration awards and the public policy favoring arbitration, as set forth in the  
7 opposition to the motion for a stay.

## 8 II. STATEMENT OF FACTS

9 **A. Dr. Deisher was wrongfully discharged by CellCyte resulting from the resume,  
10 science, and securities fraud and other misconduct committed by its executive  
11 officers and majority shareholders, Gary Reys and Ron Berninger.**

12 Plaintiff Theresa Deisher, PhD is a former employee of CellCyte. CellCyte's founders  
13 are defendant Gary Reys and Ron Berninger who own over 62% of the publicly traded  
14 company.<sup>1</sup> In August 2007, Dr. Deisher discovered that Reys and Berninger had misled her  
15 and investors regarding the company's primary business platform, a patented stem cell  
16 technology. Eleven months later, Reys filed with the SEC an 8-K report that admitted that  
17 CellCyte's patented technology was not validated.<sup>2</sup> Several weeks later, the Department of  
18 Justice commenced a criminal investigation. On October 3, 2008, without prior notice,  
19 CellCyte filed motions to disqualify Lane Powell from representing Dr. Deisher in the  
20 arbitration and from representing Brent Pierce in the class action suit brought by CellCyte  
21 investors. The motions filed in open court Dr. Deisher's arbitration complaint, the Verified  
22 Statement of Claims, which the company had previously claimed would violate CR 11 if  
23 Dr. Deisher filed the same document in court.

24 Over one year before the disqualifications motions were filed, Dr. Deisher, fearfully  
25 for her job and reputation, was referred to Lane Powell for advice about employment,

26 <sup>1</sup> CellCyte Prospectus at 25 (July 17, 2007), <http://www.sec.gov>.

<sup>2</sup> CellCyte 10-K (July 28, 2008), <http://www.sec.gov>.

1 intellectual property and securities law regarding her apparent dispute with Reys and  
2 Berninger. During the initial interview, she learned Lane Powell had previously sued Reys  
3 and Berninger for securities fraud when they had been the management team for another local  
4 company.<sup>3</sup> She was also informed that Lane Powell was representing an investor in CellCyte,  
5 Brent Pierce, in another matter.<sup>4</sup> In October 2007, Dr. Deisher was forced to leave CellCyte  
6 and had Lane Powell to send to the company's audit director and outside counsel a letter  
7 documenting the misconduct. She requested a severance package including a release from the  
8 18 month post-employment non-compete covenant so she could continue research in her field.  
9 CellCyte refused to mediate and claimed the non-compete covenant remained in effect.

10 In December 2007, the SEC contacted Dr. Deisher about CellCyte, and Lane Powell  
11 represented her in the informal investigation. The next month, the SEC contacted Len  
12 Braumberger, a media consultant for CellCyte, and Brent Pierce, an investor in CellCyte.  
13 Dr. Deisher authorized Lane Powell to enter into the multiple representation of Braumberger  
14 and Pierce in the investigation on the condition that they granted in *advance written consent*  
15 to any conflict and agreed that Lane Powell could continue to represent Dr. Deisher in the  
16 employment dispute, if a conflict arose in the future.<sup>5</sup>

17 **B. The CellCyte defendants have caused a two or three month A.D.R. process to**  
18 **extend now to over a year. They first insisted on an expensive arbitration**  
19 **procedure, later breached their contractual obligation to pay for the arbitration**  
20 **expenses and have caused Dr. Deisher to pay those expenses and suffer**  
21 **prejudicial delay. They have listed over 30 potential witnesses including Dr.**  
22 **Deisher's counsel.**

23 In January 2008, Dr. Deisher sent CellCyte a demand for mediation pursuant to the  
24 Trust and Estates Dispute Resolution statute which was incorporated into the arbitration  
25 agreement in the company's form employment contract. After an unsuccessful mediation  
26

24 <sup>3</sup> TLCA LLC v. Cennapharm, Reys, Berninger, et al, Case No. 03-2-13177-SEA, King  
25 County superior court.

25 <sup>4</sup> Decl. of David Spellman Concerning Restructured Representation by Lane Powell at 2, 6-7,  
26 (Dec. 11, 2008), Ex. 22 to Mahler Decl. filed on Feb. 13, 2009.

26 <sup>5</sup> Id. at 7-8.

1 session in March 2008, she filed a complaint that demanded arbitration and asked for  
2 declaratory relief regarding the arbitration agreement and the noncompete's and  
3 confidentiality agreement's scope.<sup>6</sup> Dr. Deisher also filed a motion to file documents under  
4 seal due to threats by CellCyte that the publication of her allegations would violate the  
5 contractual confidentiality obligations.<sup>7</sup> In addition, she also filed a motion for an order that  
6 requesting the issuance of a subpoena to a website where the John Doe defendant, "YoYo,"  
7 had published statements about Dr. Deisher's confidential settlement offer to CellCyte, falsely  
8 claiming she was the source of the Seattle Times articles about CellCyte and other false  
9 statements about the reasons she left CellCyte.<sup>8</sup>

10 In response, the CellCyte defendants filed an emergency motion demanding  
11 Dr. Deisher strike her pleadings which allegedly violated CR 11.<sup>9</sup> The court denied the  
12 unusual relief requested by CellCyte.<sup>10</sup> Dr. Deisher stipulated to "meet and confer" regarding  
13 a protective order and what issues could be resolved by arbitration and to postpone any  
14 additional filings while defense counsel left on vacation. When their counsel returned from  
15 vacation, the CellCyte defendants filed a motion to shorten time and a motion to compel  
16 arbitration relying upon both the Federal Arbitration Act and the Uniform Arbitration.<sup>11</sup> Nex,  
17 CellCyte claimed that Lane Powell violated CR 11 when it had filed the motion for a  
18 document subpoena to the website where YoYo made his postings.<sup>12</sup> In response, Lane

19 <sup>6</sup> Complaint for Declaratory Relief and Demand for Arbitration, Dkt. # 1 (Mar. 18, 2008).

20 <sup>7</sup> Motion for Temporary Order Permitting Parties to File Pleadings under Seal Subject to  
Further Order, Dkt. # 7 (Mar. 19, 2008).

21 <sup>8</sup> Motion for Order Authorizing Out-of-State Document Subpoena, Decl. in Supp. of Motion  
for Order Authorizing an Out-of-State Document Subpoena, Dkt. #10 (Mar. 20, 2008).

22 <sup>9</sup> Defs. Motion for Emergency Relief and Subjoined Decl. at 1, 4, Dkt. #18 (Mar. 21, 2008).

23 <sup>10</sup> Dkt. #s 22, 23 (Mar. 25, 2008).

24 <sup>11</sup> Motion to Compel Arbitration at 4:8-24, Dkt. #32 (Apr. 14, 2008). "The FAA applies here  
because the parties' relationship implicates interstate commerce, as CellCyte is a national,  
publicly traded company. If plaintiff is suggesting that *Nelson* applies to arbitration  
agreements governed by the FAA, this position would contradict with *Buckeye's* holdings and  
raise federal preemption issues" Defs.' Reply in Supp. of Motion to Compel Arbitration at 2  
n. 2, Dkt. #45 (Apr. 18, 2008).

26 <sup>12</sup> Opp'n to Out-of-State Subpoena, Dkt. # 39 (Apr. 17, 2008).

1 Powell denied the CR 11 claim<sup>13</sup> and Dr. Deisher argued that compelling arbitration was  
2 premature, because the CellCyte defendants had failed to comply with a prior court order to  
3 meet and confer about the arbitration.<sup>14</sup> On April 25, the court granted in part the motion  
4 compelling arbitration but ruled the post-employment trespass claims, relating to the human  
5 feces left outside of Dr. Deisher's residence several days after she received a threatening  
6 email from a CellCyte manager, were outside the scope of the arbitration.<sup>15</sup>

7 After CellCyte insisted on using the expensive American Arbitration Association  
8 ("AAA") process, Dr. Deisher filed with the AAA a demand, Verified Statement of Claims,  
9 and a response to a counterclaim filed by CellCyte defendants. To save time and money,  
10 Dr. Deisher submitted the trespass and YoYo claim in arbitration. She also asked for interim  
11 relief relating to the unpaid severance payments, the noncompete covenant, the confidentiality  
12 agreement, and CellCyte's breach of its contractual duty to pay for the arbitration.  
13 Eventually, CellCyte agreed to select retired superior court judge Terrence Carroll as the  
14 arbitrator, who was available for a September arbitration hearing. At a scheduling conference  
15 in August, counsel for the CellCyte defendants disclosed that they would be withdrawing.  
16 They also argued that due to the withdrawal it would be unfair to address at that time,  
17 Dr. Deisher's request for interim relief.<sup>16</sup>

18 From the time CellCyte received Dr. Deisher's demand in October 2007 until August  
19 2008, the CellCyte defendants were jointly represented by three different law firms who dealt  
20 with her lawyers at Lane Powell. (For that period, the company reported paying over a  
21

22 <sup>13</sup> Reply in Supp. of Motion for Out-of-State Subpoena, Dkt. # 47 (Apr. 18, 2008).

23 <sup>14</sup> Plf.'s Resp. to Defs.' Motion to Shorten Time and Motion to Compel Arbitration, Dkt. # 35,  
(Apr. 15, 2008).

24 <sup>15</sup> Dkt. # 56 (Apr. 25, 2008).

25 <sup>16</sup> Spellman Decl. in Opp'n to Motions [and] in Supp. of Interim Relief filed with the AAA  
26 (Oct. 15, 2008); Deisher Decl. in Supp. of Extension of Time to Respond to the  
Disqualification Motion, in Supp. of Motion for Default, and Interim Relief, and Opp'n to the  
Termination of the Arbitration filed with the AAA (Oct. 11, 2008).

1 \$1,000,000 in legal and audit expenses.<sup>17)</sup> But in late August, when new counsel appeared,  
2 each CellCyte defendant had separate counsel. The new counsel immediately requested that  
3 the arbitration hearing be delayed until March or April or later. The arbitrator scheduled the  
4 arbitration for mid-January and postponed the consideration of Dr. Deisher's pending motions  
5 for interim relief and discovery subpoenas until late October. Later in the arbitration, the  
6 CellCyte defendants identified 37 potential witnesses including a one of Dr. Deisher's lawyers  
7 with Lane Powell, two lawyers for CellCyte,<sup>18</sup> and Brent Pierce and Len Braumberger.

8 **C. In the federal case, reply declarations by the experts for the CellCyte defendants**  
9 **contained new analysis and conclusions to which Lane Powell had no opportunity**  
10 **to respond.**

11 In September, the CellCyte defendants threatened to file a firestorm of motions. In  
12 early October, the CellCyte defendants filed in this court and in the arbitration seven motions.  
13 In this court, the CellCyte defendants filed a motion to prevent Dr. Deisher from pursuing the  
14 trespass and YoYo claim in the arbitration.<sup>19</sup> Motions to disqualify Lane Powell from  
15 representing Dr. Deisher, Pierce, and Braumberger were filed in the federal court and in the  
16 arbitration.<sup>20</sup> After receiving the motions, Lane Powell's clients consulted with independent  
17 counsel and signed new consents waiving the conflicts.<sup>21</sup> Although Lane Powell offered to  
18 submit the consents for in camera review, but Judge Lasnik did not follow up on the offer.  
19 Before Lane Powell had an opportunity to respond to new materials and arguments included  
20 in the reply materials and without oral argument, Judge Lasnik granted the motion in the

21 <sup>17</sup> CellCyte Form 10-Q at 5, 23 (Dec. 22, 2008), <http://www.sec.gov>.

22 <sup>18</sup> Decl. of Spellman on Restructured Representation at 5:3-26, Ex. 22 to Mahler Decl.

23 <sup>19</sup> Motion to Compel Compliance with Apr. 25, 2008 Order, Dkt. #62 (Oct. 7, 2008).

24 <sup>20</sup> The Motion for Disqualification at 6:25-7:2 mischaracterizes Lane Powell's response to the  
25 Aug. 28, 2008 letter by Berninger's new counsel. Lane Powell asked in an email for the  
26 "factual basis or legal analysis to explain" why Pierce and Braumberger "are indispensable  
witnesses in the proceeding" and reiterated the request in a September 2 letter but Berninger  
failed to provide an explanation. Sept. 2, 2008 letter from Lane Powell, Ex. 18 to Mahler  
Decl. (Oct. 08) attached to Ex. 2 to Mahler Decl. Six days later, Berninger sent additional  
materials to his two experts and filed the disqualification motion almost four weeks later,  
without prior notice or explanation. See Ex. D to Wells Decl. at 125, Ex. 9 to Mahler Decl.

<sup>21</sup> Decl. of Spellman on Restructured Representation at 5:3-26, Ex. 22 to Mahler Decl.

1 federal class action suit and the related investigations. After receiving the order, Pierce and  
2 Braumberger again consulted with independent counsel and signed new consents to  
3 authorizing Lane Powell to continue to represent Dr. Deisher in the employment  
4 arbitration/superior court action.<sup>22</sup>

5 **D. The arbitrator denied the motion by the CellCyte defendants to disqualify Lane**  
6 **Powell. Only after the arbitrator made his ruling did the CellCyte defendants**  
7 **claim that he lacked authority to consider the disqualification motion.**

8 In December, Lane Powell requested permission to continue to represent Dr. Deisher  
9 in the arbitration/state court action but on the condition that Seattle University professor  
10 Patrick Brown, J.D., Ph.D. would represent Dr. Deisher concerning any matters relating to  
11 Brent Pierce or Len Braumberger.<sup>23</sup> Lane Powell submitted for in camera review the written  
12 consents. Lane Powell also stated that it was unlikely that Pierce would testify in the  
13 arbitration, because he resides in Canada and had no material evidence relating the science  
14 fraud, resume fraud, retaliation and other claims asserted by Dr. Deisher. It was also observed  
15 that Reys, Berninger and Pierce were unlikely to testify in the arbitration given the pending  
16 criminal investigation.<sup>24</sup>

17 The CellCyte defendants opposed Lane Powell's request. They stated that they had  
18 spent hundreds of thousands of dollars on the disqualification motions,<sup>25</sup> and they requested  
19 and received one month to prepare a written response.<sup>26</sup> In January, the arbitrator made a

20 <sup>22</sup> Lane Powell's Req. to Proceed as Counsel on All Matters Not Related to Pierce or  
21 Braumberger at 6 (Dec. 11, 2008), Ex. 22 to Mahler Decl.

22 <sup>23</sup> Id.

23 <sup>24</sup> Decl. of Spellman on Restructured Representation at 2:23-26, 4:6-24, Ex. 22 to Mahler  
24 Decl.

25 <sup>25</sup> See Feb. 6, 2009 letter from Mahler to Terrence Carroll at 3 (confirming statement), Ex. 39  
26 to Mahler Decl.

27 <sup>26</sup> Resp't Berninger's Opp'n to Lane Powell's Req. to Proceed as Counsel on All Matters Not  
28 Related to Pierce or Braumberger filed with the AAA (Jan. 6, 2009); Resp't Gary Reys  
29 Joinder in Resp't Berninger's Opp'n to Lane Powell's Req. to Proceed as Counsel on All  
30 Matters Not Related to Pierce or Braumberger filed with the AAA (Jan. 6, 2009); Lane  
31 Powell's Reply in Supp. of Req. to Proceed as Counsel on All Matters Not Related to Pierce  
32 or Braumberger filed with the AAA (Jan. 8, 2008); Lane Powell's Recons. Motion filed with  
33 the AAA.

1 series of rulings and denied the disqualification motion.<sup>27</sup> After the adverse ruling, the  
2 CellCyte defendants asked the arbitrator to withdraw the order and claimed he lacked “subject  
3 matter jurisdiction.”<sup>28</sup> Lane Powell opposed the request and argued that the CellCyte  
4 defendants had waived and were estopped from challenging the arbitrator’s authority to rule  
5 on the issue.<sup>29</sup> On February 10, the arbitrator declined to withdraw his order and ruled had  
6 jurisdiction and gave three reasons why “respondents have waived any objection.”<sup>30</sup> He also  
7 declined to grant a stay pending the application for the writs.

### 8 III. EVIDENCE RELIED UPON

9 The pleadings in the arbitration and the pleadings in this case including the opposition  
10 for a stay?

### 11 IV. ISSUES PRESENTED

12 Should the court defer to the strong public policy favoring arbitration and follow  
13 statutory mandate against intervention in the arbitration proceeding? When the arbitrator has  
14 broad authority concerning jurisdiction and the conduct of the proceeding is judicial  
15 intervention premature?

### 16 V. ARGUMENT AND AUTHORITIES

#### 17 A. The clear public policy prohibits judicial intervention in arbitration proceedings 18 until there is a final award.

19 “Washington courts are reluctant to intervene in the arbitration process deferring with  
20 good reason to public policy and statutory mandate.” Perez v. Mid-Century Ins. Co., 85 Wn.  
21 App. 760, 767, 934 P.2d 731 (1997) (denying pre-award declaratory relief regarding  
22 disclosures by arbitrators). Five years ago, Gary Reys and Ron Berninger seeking to compel  
23 arbitration under the same arbitration clause acknowledged this general rule of law:

24 <sup>27</sup> Order, Ex. 36 to Mahler Decl.

25 <sup>28</sup> Feb. 5, 2009 letter, Ex. 37 to Mahler Decl.

26 <sup>29</sup> Decl. of Spellman in Opp’n to Motion for Stay.

<sup>30</sup> Feb. 10, 2009 email, Ex. 40 to Mahler Decl.

1 A party is not entitled to declaratory judgment or injunctive relief when  
2 the arbitration will resolve a dispute under the contract.<sup>31</sup> . . .

3 The law of Washington is very clear that “[t]he Superior Court’s  
4 authority in arbitration proceedings . . . is limited. It can only confirm,  
5 vacate[,] modify, or correct the arbitration award.”<sup>32</sup> . . .

6 One of the principal reasons why the courts are to stay out of the  
7 arbitration process is that “the purpose of arbitration is to avoid the formalities,  
8 the expense, and the delays of the court system.” Perez v. Mid-Century Ins.  
9 Co., 85 Wn. App. 760, 765-66, 934 P.2d 731 (1997). Further, “the purpose of  
10 arbitration is to settle controversies without litigation.”<sup>33</sup>

11 There is no legal basis to review the arbitrator’s decision at this time. If the arbitrator  
12 were to render a binding final award, then the CellCyte defendants could seek vacation of the  
13 binding award under the Federal Arbitration Act or the Uniform Arbitration Act, RCW  
14 7.04A.230. Any objection to the arbitrator’s ruling also is not ripe, because there is no  
15 showing that Pierce or Braumberger will testify on material issues or the means of that  
16 testimony.

17 **B. If the court were to consider reviewing the arbitrator’s preaward ruling, Dr.  
18 Deisher makes the following partial proffer of the reasons why the  
19 arbitrator did not abuse his discretion.**

20 Lane Powell makes the following partial proffer of the grounds supporting the  
21 arbitrator’s ruling and reserves the right to supplement this proffer if the court decides to  
22 conduct a review.

23  
24 <sup>31</sup> Defs.’ Motion to Compel Arbitration and Dismiss Ct. Proceedings at 6:18-19, Talmer Labs,  
25 Inc., and Cennapharm, Inc. v. Reys and Berninger, King County superior court, Case No. 03-  
26 2-27362-7 SEA, Ex. E to Decl. of David Spellman in Opp’n to Motion to Stay.

<sup>32</sup> Id. at 9:5-7.

<sup>33</sup> Id. at 10:1-7.

1           1.     **The six month delay in filing the motion waived any right seek**  
2                   **disqualification. While there had been no answer filed in the federal**  
3                   **investor class action case, the parties in this case had vested time in**  
                  **mediation and filed reams of pleadings in the arbitration before the**  
                  **motion was filed.**

4           Dr. Deisher has testified about the hardships if she must retain new counsel at this late  
5     date.<sup>34</sup> The CellCyte defendants had repeatedly requested the delay of the arbitration hearing  
6     which was to occur within 61 days of the appointment of the arbitrator unless good cause  
7     were shown. As to the procedural status of the federal case when the disqualification motions  
8     were filed, Rule 12(b) motions had not been filed and the trial was scheduled for eighteen  
9     months later. In contrast, the arbitration hearing was scheduled to be held within 3.5 months,  
10    Lane Powell had been representing Dr. Deisher for over a year in this employment dispute,  
11    and the parties had filed 56 pleadings in the state court action and 29 pleadings in the  
12    arbitration, the parties had incurred substantial fees and costs.

13           Six months before filing the disqualification motion, the CellCyte defendants filed a  
14    pleading confirming that they had notice of the basis for their disqualification motion at that  
15    time:

16                   There are separate securities lawsuits pending against the Defendants in  
17                   federal court. One of Plaintiff's counsel, Chris Wells, represents co-defendants  
                  in those cases.<sup>35</sup>

18           It is the law in Washington that: “[a] right to have opposing counsel disqualified . . .  
19    may be waived by a substantial delay in asserting the right following knowledge of the  
20    grounds for disqualification.” First Small Business Investment Co. of Cal. v. Intercapital of  
21    Ore., 108 Wn.2d 324, 325, 337, 738 P.2d 263 (1987) (quoting headnote [5]; reversing  
22    disqualifications). In Intercapital, the supreme court ruled: “The [disqualification] motion was  
23    properly denied by the trial court on the basis of waiver alone” and stated “The failure to act  
24

25    <sup>34</sup> Decl. of Theresa Deisher, Ph.D Re Motion to Disqualify at 2:1-3:7, Ex. 12 to Mahler Decl.  
26    <sup>35</sup> Defs.’ Motion for Emergency Relief and Subjoined Decl. at 2:7-8, Dkt. # 18 (Mar. 21,  
          2008).

1 promptly in filing a motion for disqualification may warrant denial of the motion.” 108  
2 Wn.2d at 337. Here, the CellCyte defendants waited six months after learning that Lane  
3 Powell also represented Brent Pierce and Len Braumberger in the SEC’s investigation inquiry  
4 before filing the disqualification motions. By the time the motion was filed, Lane Powell had  
5 represented Dr. Deisher in this dispute for over a year, the parties had mediated, they had filed  
6 85 pleadings, and Dr. Deisher had invested substantial preparation of her case by Lane  
7 Powell. During this process, she has been prejudiced. Some of CellCyte’s laptop computers  
8 were “stolen” and the company representative cannot locate emails referring to Dr. Deisher,  
9 and the company has liquidated and disbursed assets that should have been used to pay Dr.  
10 Deisher severance while the noncompete remained in place.<sup>36</sup> In summary, there is a prima  
11 facie showing of the unreasonable six month delay in filing the disqualification motion caused  
12 prejudice to her, and respondents did not carry their burden to justify the delay.<sup>37</sup> The delay  
13 in filing the disqualification motion is an independent basis for affirming the arbitrator’s  
14 ruling.

15 **2. The review of the arbitrator’s ruling requires the painstaking analysis of**  
16 **facts and precedent, and the reasonableness of consents is a question of**  
17 **fact.**

18 When dealing with ethical disputes, courts rely on two guiding principles. First, a  
19 court “cannot paint with broad strokes. The lines are fine and must be so marked.”<sup>38</sup> Second,  
20 “the conclusion in a particular case can be reached only after painstaking analysis of the facts  
21 and precise application of precedent.”<sup>39</sup> Here, the arbitrator did that just that. If the court

22 <sup>36</sup> Decl. of Spellman in Opp’n to Motion for Stay.

23 <sup>37</sup> Compare Mondanlo v. Ahan, 342 B.R. 230, 237 (D. Md. 2006) (5-month delay constituting  
24 waiver); Conley v. Chaffinch, 431 F. Supp. 2d 494, 499 (D. Del. 2006) (9-month delay  
25 constituting waiver) with FMC Techn., Inc. v. Edwards, 420 F. Supp. 2d 1153, 1162 (W.D.  
26 Wash. 2000) (denying delay-based waiver when motion was filed two weeks after motion to  
dismiss was denied and nine months remained before trial).

<sup>38</sup> United States v. Standard Oil Co., 136 F. Supp. 345, 367 (S.D.N.Y. 1955); Funds of Funds,  
Ltd. v. Arthur Andersen & Co., 567 F.2d 225, 227 (2d Cir. 1977).

<sup>39</sup> Id.

1 were to consider the merits of the disqualification motion, then that should be left for separate  
2 hearing which would include reviewing in camera the materials that the arbitrator has  
3 reviewed and supplemental pleadings.

4 The arbitrator was entitled to decide questions of law and fact. Furthermore, when a  
5 lawyer advises clients of potential conflicts of interests and advises them to seek independent  
6 counsel, "then whether the attorney's subsequent multiple representation is reasonable is a  
7 question of fact" rather than a question of law. Eriks v. Denver, 118 Wn.2d 451, 458, 824  
8 P.2d 1207 (1992); Halvorsen v. Halvorsen, 3 Wn. App. 827, 479 P.2d 161 (1970), review  
9 denied, 78 Wn.2d 966 (1971). Furthermore, the arbitrator, like the court "may properly  
10 disregard expert affidavits that contain conclusions of law" and "was entitled to give as much  
11 weight as it thought proper, or no weight at all, to the affidavits." Eriks, 118 Wn.2d at 459.

12 **3. The arbitrator properly looked to both RPC 1.7 and 1.9, which both have**  
13 **consent provisions.**

14 The arbitrator's order states:

15 In reviewing this motion and all the prior pleadings related thereto  
16 (particularly RPCs 1.7 and 1.9, including comments ), it has become clear to  
17 me that counsel's reliance on and efforts to limit discussion to RPC 1.7 are  
18 misplaced. Also, both of the above rules permit the client to consent or, in  
19 effect, waive any conflict. There is no debate that such consent was given  
20 here.

21 There are three reasons why both RPC 1.7 and 1.9 apply. First, it is uncontested that  
22 Braumberger admitted that he was a former client (RPC 1.9), when the disqualification  
23 motion was filed.<sup>40</sup> Second, the federal court's order triggered RPC 1.9's "Duties to Former  
24 Clients." The order terminated Lane Powell's representation of Pierce in the federal case and  
25 its concurrent representation of Pierce and Deisher in the SEC investigation. Third, RPC 1.7  
26 and 1.9 share the common mechanism that a client may grant consent even to conflicts that  
arise in the "midst of a representation." RPC 1.7, comment 5 states:

25 <sup>40</sup> Third-Party Leonard Braumberger's Mem. Regarding Motion to Disqualify Counsel, Ex. 13  
26 to Mahler Decl.

1 Unforeseen developments, such as . . . the realignment of parties in litigation  
2 might create conflicts in the midst of a representation . . . Depending on the  
3 circumstances, the lawyer may have the option to withdraw from one of the  
4 representations to avoid the conflict. The lawyer must seek court approval  
5 where necessary and take steps to minimize harm. See Rule 1.16. The lawyer  
6 must seek to continue to protect the confidences of the client from whose  
7 representation the lawyer has withdrawn. See RPC 1.9(c).

8 RPC 1.9's comment [1] states: "Nor could a lawyer who has represented multiple clients in a  
9 matter represent one or more of the clients against the others in the same or a substantially  
10 related matter, unless all affected clients give informed consent." (Emphasis added.)

11 The leading ethics treatise, Geoffrey C. Hazard, The Law of Lawyering at 13-37, 13-  
12 38 n. 1 (2005-1 Supp.), confirms applicability of both RPC 1.7 and 1.9 and the ethical  
13 permissibility of Lane Powell's representation:

14 When a single lawyer represents two or more clients jointly, . . . there is  
15 always the possibility that the joint representation will end before the lawyer  
16 terminates the relationship with all of the clients. For example, the lawyer  
17 might be dismissed by one of the clients but not the others, or the lawyer might  
18 withdraw from the representation of fewer than all of the clients. When that  
19 happens, the clients no longer represented become former clients, and their  
20 situation must be analyzed according to the rules described in this chapter,  
21 including model rule 1.9. . . . [A]ll joint or common representations, . . .  
22 should be analyzed under Rule 1.7 while they are ongoing, and under Rule 1.9  
23 when some or all of the originally participating clients have become former  
24 clients for one reason or another. (Adding underline.)

25 Clearly, both rules apply. Lane Powell complied with both.

26 **4. The arbitrator correctly ruled that the employment arbitration differs significantly from the federal investor class-action suit.**

The arbitrator ruled:

In that regard, I must note that this arbitration matter differs significantly, both as to parties and subject matter, from the case before Judge Lasnik. Further, given his order, the case is now in a very different posture than prior, vis-à-vis legal representation of Ms. Deisher.

The evaluation of a conflict is a risk based analysis, "the modern approach to conflicts of interest [that] focuses on the degree of *risk* that a lawyer will be unable to satisfy all

1 legitimate interests that compete for attention in a given matter.”<sup>41</sup> The private and public  
2 interest in the federal case materially differed from the employment arbitration/action, both on  
3 a substantive basis and a procedural basis. These differences warranted different results.

4 Substantively, the federal proceedings have different claims. First, there are possible  
5 criminal claims, the specifics of which have not been identified, if they ever come to pass.  
6 Second, there are the security fraud claims based on events that occurred after Dr. Deisher left  
7 CellCyte. In contrast, Dr. Deisher in the employment arbitration is making wrongful  
8 discharge, wage act, breach of contract, unfair competition/unfair practices, tortious  
9 interference and civil conspiracy claims regarding CellCyte, Gary Reys and Berninger. While  
10 Pierce is a defendant in the class action, he is not a defendant/respondent in the employment  
11 arbitration. The CellCyte defendants also did not name him in the arbitration pursuant to CR  
12 12(i), Non party at fault, as party they intend to claim is at fault. They also have not alleged  
13 that Pierce was a party to Gary Reys’ resume fraud, the science fraud, the conspiracy to get  
14 rid of Dr. Deisher and destroy evidence, or the cover-up.

15 Unlike the arbitration, the federal case also has a large additional party, the investor  
16 class that could suffer delay (a continuance or mistrial) and additional “costs” if Lane Powell  
17 had been permitted to proceed with a multiple representation of Dr. Deisher, Pierce and  
18 Braumberger in the federal case, and their interests diverged in the future.<sup>42</sup>

19 As explained earlier, the procedural status in the federal case and in the arbitration  
20 were substantially different as to the hearing dates and client investment in the process.  
21 Furthermore, the effect of the federal court order precluded some future risks: Lane Powell  
22

23 <sup>41</sup> Geoffrey C. Hazard, et al., The Law of Lawyering § 10.4 at 10-12 (2009).  
24 <sup>42</sup> Order expressing concern that “once trial is underway, bringing in other counsel is no  
25 simple matter . . . “would result in significant delay . . . possibly increase costs” and how “the  
26 clients’ interests would be undermined by having unfamiliar counsel conduct a cross-  
examination.” Order at 6:13-22, Ex. 20 to Mahler Decl.

1 going forward is not representing anyone in the federal case and its involvement terminated  
2 when the first round of pre-answer motions were being filed.

3 Clearly, the arbitrator correctly ruled that proceedings were different and that the  
4 federal court's analysis was not binding on him.

5 **5. The arbitrator has broad discretion in conducting this proceeding. He is**  
6 **in the best position to weigh the risks regarding the possibility that Pierce,**  
7 **a Canadian resident, might be a witness in the employment arbitration.**  
8 **The CellCyte defendants failed to make any showing that Lane Powell's**  
9 **representation of Dr. Deisher was materially limited by its representation**  
10 **of Pierce in the Lexington administrative proceeding whose evidentiary**  
11 **hearing was concluded two weeks ago.**

12 The arbitrator has also ruled:

13 . . . As stated earlier and reaffirmed here, I support the legal analysis in  
14 Judge Lasnik's ruling. However, his ruling is not binding on this proceeding  
15 which now presents a much different 'conflict of interest' challenge.

16 Given the posture of this case and the detailed consents and  
17 independent counsel for both Ms. Deisher and Mr. Pierce, have the  
18 respondents met their high burden of proof in showing adverse interest and  
19 removal of LP under a nonconsentable waiver theory? I don't believe so. You  
20 do have a potential conflict where Mr. Pierce might be a witness in the  
21 arbitration proceeding. Collaterally, Ms. Deisher may be a witness in the  
22 federal case but neither she nor Mr. Pierce are represented by LP in that matter.  
23 Likewise, the information provided regarding the Lexington matter persuades  
24 me that a conflict for LP in representing Ms. Deisher in this proceeding is not  
25 likely. This would include also any information developed in the Lexington  
26 matter or arbitration that is adverse to either client.

27 The federal court's order specifically relied upon statements in the reply declarations  
28 supplied by CellCyte's two experts, to which Lane Powell had no opportunity to respond.<sup>43</sup> In  
29 the arbitration, Lane Powell provided responsive materials.<sup>44</sup> The arbitrator has broad  
30

31  
32 <sup>43</sup> Compare Order at 7:1-8:23 (referring to reply declarations by experts for the CellCyte  
33 defendants), Ex. 20 to Mahler Dec. with Decl. of Spellman on Restructured Lane Powell  
34 Representation at 3:4-15, 9:24-15:13 (responding to the reply materials and court's concerns),  
35 Ex. 22 to Mahler Decl. Earlier, Lane Powell's expert had observed that Berninger and his  
36 experts might fall back on a new arguments in their reply materials. Decl. of Arthur J.  
Lachman at 15:18-22.

<sup>44</sup> Decl. of Spellman on Restructured Lane Powell Representation at 3:4-15, 9:24-15:13  
(responding to the reply materials and court's concerns), Ex. 22 to Mahler Decl.

1 authority to decide these and other matters. In addition to Employment Rule 6 (granting the  
2 arbitrator authority to decide jurisdictional issues), Rule 28 states in part:

3 With the exception of the rules regarding the allocation of the burdens  
4 of proof and going forward with the evidence, the arbitrator has the authority  
5 to set the rules for the conduct of the proceedings and shall exercise that  
6 authority to afford a full and equal opportunity to all parties to present any  
7 evidence that the arbitrator deems material and relevant to the resolution of the  
8 dispute. When deemed appropriate, the arbitrator may also allow for the  
9 presentation of evidence by alternative means including web conferencing,  
internet communication, telephonic conferences and means other than an in-  
person presentation of evidence. Such alternative means must still afford a full  
and equal opportunity to all parties to present any evidence that the arbitrator  
deems material and relevant to the resolution of the dispute and when  
involving witnesses, provide that such witness submit to direct and cross-  
examination.

10 The arbitrator also has broad powers concerning evidence. AAA Employment Rule  
11 30 states in part:

12 An arbitrator or other person authorized by law to subpoena witnesses  
13 or documents may do so upon the request of any party or independently. The  
14 arbitrator shall be the judge of the relevance and materiality of the evidence  
15 offered, and conformity to legal rules of evidence shall not be necessary. The  
16 arbitrator may in his or her discretion direct the order of proof, bifurcate  
17 proceedings, exclude cumulative or irrelevant testimony or other evidence, and  
direct the parties to focus their presentations on issues the decision of which  
could dispose of all or part of the case. All evidence shall be taken in the  
presence of all of the arbitrators and all of the parties, except where any party  
is absent, in default, or has waived the right to be present.

18 With these broad powers, the arbitrator is in the best position to evaluate risks and  
19 interest regarding the 37 possible witnesses and the possible conflicts which might arise from  
20 their testimony.

21 There is no evidence that counsel for the CellCyte defendants have contacted Pierce's  
22 counsel in the class action suit, James Smith, Jr., or his lawyer in the federal investigation,  
23 Larry Finegold, to conduct an interview, arrange testimony or discuss the possible discovery.  
24 Neither Gary Reys nor Berninger have offered testimony regarding possible witnesses,  
25 although their counsel claims that Brent Pierce and Braumberger will testify about statements  
26

1 that Dr. Deisher made at an April 10, 2008 meeting in Canada.<sup>45</sup> Dr. Deisher has provided  
2 un rebutted testimony that explains why their testimony would be not relevant, was cumulative  
3 to other statements she made in business records, and that others at the meeting such as Ali  
4 Hamkimzadeh, an investment analyst for Cannacord, had more particular information.<sup>46</sup>  
5 Pierce is probably unavailable due to his residency in Canada and the criminal investigation.  
6 In summary, the arbitrator may or may not authorize taking testimony from Pierce and the  
7 possibility of that testimony does not create an nonconsentable conflict, especially since Dr.  
8 Deisher has separate counsel in place, as does Pierce.

9       Regarding Lane Powell's representation of Pierce in the Lexington proceeding, the  
10 arbitrator ruled that "the information provided regarding the Lexington matter persuades me  
11 that a conflict for [Lane Powell] in representing Ms. Deisher in this proceeding is not likely."  
12 The CellCyte defendants have offered no explanation why Lane Powell's involvement in that  
13 administrative proceeding regarding securities registration and reporting violations would  
14 materially limit its representation of Dr. Deisher in the employment arbitration.<sup>47</sup> The remote  
15 possibility of a conflict arising was reduced further after the evidentiary hearing concluded  
16 two weeks ago, and neither the CellCyte defendants, Pierce nor Dr. Deisher testified.

17       **6. The arbitrator made an in camera review of the consents signed after**  
18       **consultation with independent counsel. He did not abuse his discretion.**

19       The appropriate standard of review is whether there has been an abuse of discretion  
20 based on the findings of fact. United Sewerage Agency of Wash. County v. Jelco, 646 F.2d  
21 1339, 1351 (9th Cir. 1981) (cited by defendants). The issue of consent is a factual finding and  
22 once a party gives advance consent, it may be estopped from revoking consent. 646 F.2d at

23 <sup>45</sup> Motion to Disqualify and Petition for Writ of Review at 5:1-12.

24 <sup>46</sup> Deisher Decl. Resp. to Motion for Letters Rogatory, Ex. C to Wells Decl. at 112-123,  
which is Ex. 9 to Mahler Decl.

25 <sup>47</sup> The CellCyte defendants did not provide to their experts the order instituting proceedings  
26 and an agreed order in Lexington so there was no basis for opinion testimony. Lane Powell's  
Recons. Motion and Req. for Five Minute Oral Argument at 3 n. 2. Ex. 29 to Mahler Decl.

1 1346 & n. 6. This is a case where clients gave advance consents and later ratified the advance  
2 consents with new consents after consulting with independent counsel. None of the clients is  
3 objecting to Lane Powell's representation of Dr. Deisher in the arbitration.

4 The arbitrator's ruling concluded:

5 All of this has been fully disclosed and explained to Ms. Deisher and  
6 Mr. Pierce, through independent counsel, and LP has reasonable structures in  
place to deal with it - including outside counsel if needed.

7 The CellCyte defendants are deceptively paternalistic toward Dr. Deisher. First, they  
8 must have given their own consents to joint representation earlier when one law firm  
9 represented CellCyte, the individual defendants, and other employees. Second, they claim  
10 that Dr. Deisher, a whistleblower, should not be associated with Pierce, who has a long  
11 history of "pump and dump schemes" and "is responsible for the precipitous and disastrous  
12 deterioration in the value of CellCyte's stock."<sup>48</sup> Yet, two years earlier, Gary Reys and  
13 Berninger had introduced Dr. Deisher to Pierce, and Gary Reys' lawyer even vouched for  
14 Pierce. Dr. Deisher testified:

15 13. I believe that it was sometime in November 2006, when Gary Reys and  
16 Berninger told me they were in contact with Brent Pierce. They had  
17 previously been working with Brina Sanft. They were both aware of Pierce's  
18 history. I know this because Brina Sanft alerted me to Brent's history. She  
19 contacted me about the adverse comments on the internet about Brent Pierce.  
20 **After I did my own research and found the adverse comments, I expressed  
my concerns to Gary Reys and Ron Berninger and my inclination to not  
work with them, if they were going that route. I was so upset that Gary  
had James Parson, CellCyte's securities lawyer, phoned me at home and  
assured me that all Brent had done was "sell a few pizzas" to quote Jim.  
Based on that advice, I went ahead and continued to perform consulting  
work for Gary Reys and Berninger.** I later copied Parsons on an email that I  
21 sent to Gary Reys and Berninger concerning problems at CellCyte in  
22 September 2007. He was also copied on the October 3, 2007 letter that my  
23 lawyers sent to John Fluke. Parsons never responded to either communication.  
CellCyte's lawyer, Randy Squires did recently copy Parson on an email  
concerning settlement with me - I am unsure way. Regardless of the purpose

24  
25  
26 <sup>48</sup> Motion to Disqualify at 1:13-16.

1 of that email, I suspect that Parsons has emails and other records that are  
2 relevant to my claims. (Adding emphasis.)<sup>49</sup>

3 Given these circumstances, the CellCyte defendants should be estopped from  
4 contending that Pierce and Lane Powell, Pierce's counsel in the Lexington investigation, were  
5 tainted, since the CellCyte defendants had previously assured Dr. Deisher that Pierce had  
6 done nothing wrong. Dr. Deisher knew her enemy (Gary Reys and Berninger) and retained  
7 Lane Powell who had previously sued Gary Reys and Berninger, and who disclosed its  
8 representation of Pierce in the other matter. Subsequently, Pierce and Braumberger gave  
9 advance consents as a condition before Lane Powell would agree to represent either of them  
10 concerning CellCyte, and after the disqualification order they later gave renewed consents.

11 In contrast, this is not a "hot potato" case where a firm violated the rules by  
12 *concurrently* prosecuting and defending claims against a client without prior consent. Even in  
13 such a case, a firm that violated the rules may obtain post facto relief as when the Bullivant  
14 firm (now representing Berninger) was permitted to withdraw from representing a second  
15 client and continue to represent its first client, which transformed a "concurrent" conflict into  
16 a "former client" conflict, without obtaining any consents.<sup>50</sup> Concerning "hot potato cases," a  
17 national expert on ethics has suggested: "this state of affairs should suggest the  
18 appropriateness of advance consent."<sup>51</sup> Lane Powell sought and obtained just that.

19  
20  
21 <sup>49</sup> Deisher Decl. in Resp. to Motion for Letters Rogatory at 4:16-5:5, Ex. C to Wells Decl. at  
22 116, Ex. 9 to Mahler Decl. A "pump and dump" scheme is not alleged in the employment  
23 arbitration, and Gary Reys and Berninger have offered no evidence that Pierce was involved  
24 in such schemes or that Pierce was responsible for the decline in the share price that occurred  
25 over two months after Dr. Deisher left the company and coincided with the newspaper article  
26 about Gary Reys' resume fraud.

<sup>50</sup> Sabrix, Inc. v. Carolina Cas. Ins. Co., 2003 U.S. Dist. LEXIS 25515 (Jul. 23, 2003) (Attach.  
B), contradicts Bullivant's claim that "a concurrent conflict may not be transformed into a  
conflict with a 'former' client by withdrawal." Resp. to Motion at 9:10-12.

<sup>51</sup> Ronald D. Rotunda & John S. Dzienkowski Legal Ethics: The Lawyer's Deskbook on  
Professional Responsibility § 1.7.5 at 342 (ABA 2008-09).

1 Any concerns are remedied by Professor Brown (who originally referred Dr. Deisher  
2 to Lane Powell) agreeing to a limited representation of her and “assuming exclusive authority  
3 concerning any matters concerning Brent Pierce or Len Braumberger in the arbitration/state  
4 court proceeding.”<sup>52</sup> Pierce and Braumberger’s interests are safeguarded by their independent  
5 counsel.

6 **7. The CellCyte defendants have spent hundreds of thousand of dollars on**  
7 **the disqualification motions.**

8 In a December in person meeting with the arbitrator, the CellCyte defendants made  
9 this admission which was later confirmed in a letter,<sup>53</sup> even while they refused to fund the  
10 arbitration expenses. They claim they are motivated by “one factor alone, that is the fairness  
11 of these proceedings.”<sup>54</sup> Yet, their pending motions fail to address directly and specifically  
12 the arbitrator’s rulings on jurisdiction or the waiver of their objections or to attach their  
13 subsequent letter to the arbitrator, and his ruling denying a stay. They have also declined to  
14 withdraw the motions after they received notification about the line of authority that prevents  
15 a writ from being issued to an arbitrator who is not a governmental officer. As a result, this  
16 response was filed which diverted Dr. Deisher’s counsel from working on the supplemental  
17 pleadings in the arbitration and the oral argument in the arbitration scheduled later this week  
18 on material issues.

19  
20  
21 <sup>52</sup> Dec. 11, 2008 Disclosure and Consents at 2 (for in camera review). From the start, Dr.  
22 Deisher authorized Lane Powell to speak with Pierce on the condition that his claims would  
23 be aligned with hers and “that the initial consultation would not prohibit us from her in the  
24 CellCyte employment matter.” Decl. of Spellman on Restructured Lane Powell  
25 Representation at 7:17-22. Later, Pierce’s two retainer agreements each contained two  
26 prospective consents authorizing Lane Powell to continue to represent Deisher in the  
employment dispute if their interests diverged. Feb. 8, 2008 Engagement, Joint  
Representation, Waiver of Conflicts of Interest and Agreement Not to Disqualify Counsel at  
2, 3; June 25, 2008 Engagement at 2, 3. (Also available for in camera review.)

<sup>53</sup> Feb. 6, 2009 letter at 3, Ex. 39 to Mahler Decl.

<sup>54</sup> Id. at 4.

1 **VI. CONCLUSION**

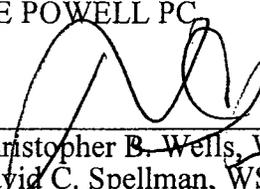
2 There is no legal authority for granting a writ in this case. It cannot be issued against  
3 private persons like arbitrators. Even if there were authority to grant a writ, the writ should  
4 state that it does not stay the arbitration, consistent with the arbitrator's ruling.

5 Through their breach of the arbitration agreement, their diversion of funds from the  
6 ADR, and their inconsistent statements the CellCyte defendants have unclean hands are not  
7 entitled to equitable relief.

8 The CellCyte defendants elected their forum. Last April, they filed a motion to  
9 compel the arbitration of all issues. At that time, they had notice of Lane Powell's multiple  
10 representation of Dr. Deisher and Brent Pierce, but they failed to file a disqualification motion  
11 in superior court. Six months later, in October, they filed a motion asking the arbitrator to  
12 decide one disqualification issue and another motion asking Judge Lasnik to decide the other  
13 disqualification issue. At the same time, they were in breach of the arbitration contract and  
14 refused to make the prepayments for the arbitration. Dr. Deisher then funded the arbitration.  
15 Next, they asked the arbitrator to await Judge Lasnik's ruling. Later, they asked the arbitrator  
16 to follow Judge Lasnik's decision. Now that the arbitrator has made a decision, they ask you  
17 to vacate it and deviated from all precedent. Dr. Deisher has been prejudiced by their  
18 shenanigans, and she should be award the fees incurred for responding to this motion.

19 DATED: February 18, 2009.

20 LANE POWELL PC

21  
22 By   
23 Christopher B. Wells, WSBA No. 08302  
24 David C. Spellman, WSBA No. 15884  
25 Attorneys for Plaintiff  
26

# **APPENDIX C**

1 THE HONORABLE SUZANNE M. BARNETT  
2 Noted for Hearing without Oral Argument: February 24, 2009

3 RECEIVED  
4 FEB 23 2009  
5 LANE POWELL PC  
6 TIME \_\_\_\_\_ ATTY \_\_\_\_\_

7 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
8 IN AND FOR THE COUNTY OF KING

9 THERESA A. DEISHER,

10 Plaintiff,

11 v.

12 CELLCYTE GENETICS CORP., GARY  
13 REYS and RON BERNINGER and their  
marital communities, and John Doe,

14 Defendant.

No.: 08-2-09488-0SEA

DEFENDANT RON BERNINGER'S REPLY  
IN SUPPORT OF MOTION FOR STAY OF  
ARBITRATION PROCEEDINGS AND  
RESPONSE TO PLAINTIFF'S REQUEST  
FOR FEES

1 **I. INTRODUCTION**

2 Defendant Ron Berninger has filed a motion seeking to disqualify Lane Powell PC  
3 (“LPPC”) as counsel for plaintiff, Theresa Deisher, and a petition for writ of review asking the  
4 Court to order the Arbitrator either to (1) withdraw his order allowing LPPC to proceed as  
5 Deisher’s counsel or (2) disqualify LPPC (“disqualification motion”). The disqualification  
6 motion is based upon the existence of an unwaivable conflict of interest among Deisher, a former  
7 employee of CellCyte Genetics Corp., and two other LPPC clients, Brent Pierce and Leonard  
8 Braumberger, both of whom are under investigation by the SEC and the United States  
9 Department of Justice for securities fraud relating to their activities as promoters and  
10 shareholders of CellCyte stock. In a related federal lawsuit brought by a class of CellCyte  
11 investors in which Pierce is a named defendant and Deisher and Braumberger are witnesses,  
12 Chief District Judge Robert Lasnik granted Berninger’s motion to disqualify LPPC because of  
13 the very same unwaivable conflict of interest that underpins the motions pending before this  
14 Court.<sup>1</sup>

15 Deisher’s opposition to Berninger’s request for a stay of the arbitration proceeding  
16 regurgitates an argument made to and rejected by Judge Lasnik. Deisher argues that Berninger’s  
17 disqualification motion and motion for stay filed in this Court “are interposed to cause  
18 unnecessary delay or needless increase of cost in the litigation.” *Plaintiff’s Opp’n* at 2; *see also*  
19 *id.* at 5 (defendants “have repeatedly stalled the A.D.R. process”); *id.* at 12 (defendants “seek  
20 delay . . . and to make this process as expensive as possible.”). Rejecting an identical argument,  
21 Judge Lasnik wrote:

22 The Court considers the possibility that Dr. Berninger has brought  
23 this motion [to disqualify LPPC as counsel for Deisher and others]  
24 as a litigation tactic. Lane Powell argues the timing of the motion  
25 supports that view. However, Dr. Berninger’s current counsel  
raised the conflict issue with Lane Powell within a week after  
making their appearance. Previous counsel had also raised the

26 <sup>1</sup> A copy of Judge Lasnik’s Order is attached as *Exhibit A* to the Declaration of Robert S. Mahler in Support of  
Defendant Ron Berninger’s Reply in Support of Motion to Stay.

1 issue with Lane Powell. The evidence does not support a finding  
2 that this motion is a tactic.

3 *Ex. A to Mahler Decl.* at 3-4. Professor David Boerner, a leading expert in the field of legal  
4 ethics considered the same point. He opined:

5 The fact that the disqualification may cause delay is unavoidable  
6 and, in my opinion, wholly due to the actions and decisions of  
7 LPPC. When LPPC decided to represent Mr. Pierce and Mr.  
8 Braumberger with respect to CellCyte, after it was already  
representing Dr. Deisher, a conflict arose. It is my opinion that  
any reasonable lawyer would have foreseen this conflict and would  
not have entered into the multiple representation of Dr. Deisher,  
Mr. Pierce, and Mr. Braumberger.

9 *Ex. B to Mahler Decl.* ¶ 6.

10 Contemporaneously with the disqualification motion Berninger filed his motion to stay  
11 the arbitration proceedings pending a decision by the Court on the disqualification motion.<sup>2</sup> LR  
12 98.40(b) specifically authorizes a stay of proceedings in connection with a petition for writ of  
13 review, mandamus, or prohibition. Deisher does not dispute this. Instead, the substance of her  
14 opposition is based upon the assertion that Berninger is not entitled to a writ of review.

15 Deisher's arguments are more properly directed to the disqualification motion pending  
16 before Judge Barnett. That motion is scheduled for hearing without oral argument for February  
17 24 and will be decided following Judge Barnett's return to the bench on March 2. In the  
18 meantime, however, the arbitration is proceeding, with a hearing regarding Deisher's discovery  
19 requests scheduled for Wednesday, February 25. Included among Deisher's myriad discovery  
20 requests are efforts to depose Berninger and co-defendant Gary Reys, together with a slew of  
21 document requests which, if provided to Deisher's current counsel, would irreparably cause the  
22 very harm the disqualification motion is intended to prevent. Despite Judge Lasnik's order  
23 disqualifying LPPC from representing Pierce and Deisher, the firm has done everything in its  
24

---

25 <sup>2</sup> A copy of the disqualification motion is attached as *Exhibit C* to the Mahler Decl. The facts giving rise to  
26 Berninger's disqualification motion are set forth fully in that motion at pages 4-12. A copy of the reply in support of  
the motion, filed today, is attached as *Exhibit D*.

1 power to undermine the substance of that order. It continues to represent Pierce in another  
2 matter pending before the SEC which involves another company but is connected to the  
3 allegations made by the CellCyte class action plaintiffs. It also seeks to continue representing  
4 Deisher in this matter. A discovery stay exists in the federal class action matter pending before  
5 Judge Lasnik that bars Pierce or his counsel from obtaining discovery from the CellCyte  
6 defendants. Once LPPC, which continues to represent Pierce, gains access to discovery in this  
7 case—which Pierce is presently barred from obtaining in the class action—there can be no  
8 unscrambling of that egg. Thus, a short stay is necessary to preserve the status quo pending  
9 Judge Barnett’s ruling on Berninger’s disqualification request. As explained below, the harm to  
10 Berninger that would result if the arbitration is allowed to proceed would greatly outweigh the  
11 minimal inconvenience to Deisher resulting from a brief stay. Accordingly, Berninger  
12 respectfully requests that the Court issue a stay of the arbitration proceedings pending a decision  
13 by Judge Barnett on his disqualification motion.

14 Deisher’s opposition also includes a request for fees pursuant to CR 11.<sup>3</sup> Deisher’s CR  
15 11 motion does not need to be resolved in order to decide the stay motion. In any event, the CR  
16 11 motion is based upon arguments Deisher previously made to Judge Barnett. Judge Barnett  
17 summarily rejected those arguments, and it necessarily follows that Berninger cannot be held  
18 liable under CR 11.

## 19 **II. ARGUMENT**

### 20 **A. A stay is warranted under LR 98.40(b) and is necessary to preserve the status quo** 21 **pending a ruling on Berninger’s disqualification motion.**

22 LR 98.40(b) authorizes a stay of proceedings in connection with a petition for a writ of  
23 mandamus, certiorari, or review. By implication, the rule mandates a stay unless (1) the parties  
24 to the underlying action have not been notified or (2) a stay is sought from a judge pro tempore.

---

25 <sup>3</sup> Pursuant to LR 7(b)(5)(B)(vi), Berninger is entitled to submit a 12-page response to Deisher’s CR 11 motion.  
26 Berninger has combined his reply in support of the motion to stay with his response to Deisher’s CR 11 motion, and  
thus he is entitled to submit a 17-page pleading.

1 Deisher does not dispute that LR 98.40(b) mandates a stay in connection with writ proceedings  
2 or even mention the rule in her response.<sup>4</sup> Instead, she focuses on the merits of Berninger's  
3 request for relief, asserting (1) he is not entitled to a writ of review because the Arbitrator is not  
4 an "inferior tribunal," (2) the Arbitrator had jurisdiction to decide whether LPPC should be  
5 disqualified, (3) Berninger waived the right to challenge the Arbitrator's jurisdiction, and (4)  
6 Berninger is not entitled to immediate review of the Arbitrator's ruling.

7         These issues are more properly raised before Judge Barnett in connection with  
8 Berninger's substantive request for relief and are addressed in Section B below responding to  
9 Deisher's CR 11 motion. The issue to be decided with respect to this motion is whether  
10 Berninger is entitled to a stay of the arbitration proceedings pending a decision on the merits of  
11 his disqualification motion by Judge Barnett. Not only is such a stay required under LR  
12 98.40(b), it is necessary to prevent irreparable harm to Berninger. Thus, even in the absence of  
13 LR 98.40(b), a stay is necessary.

14         Berninger's disqualification motion based in part upon the fact that LPPC's duty of  
15 loyalty to its client Brent Pierce will require it to share information with Pierce that it obtains  
16 during the course of discovery in this matter, including the discovery that is the subject of the  
17 February 25 hearing before the Arbitrator. That information is relevant to Pierce's defense of the  
18 federal investor class action lawsuit in which Judge Lasnik has already disqualified LPPC from  
19 representing Pierce and Deisher. Discovery of certain information sought by LPPC, including  
20 the depositions of Berninger and Reys and the production of CellCyte company documents  
21 demanded by Deisher in this action, is barred by an existing stay of all discovery in the class  
22 action.

23         LPPC contends Berninger's concerns are unfounded because there is a protective order in  
24 the arbitration proceedings that prevents LPPC from disclosing information to Pierce. As an

25 \_\_\_\_\_  
26 <sup>4</sup> Deisher suggests, instead, that Berninger's motion to be stay should be characterized as a request for an injunction. Berninger is not seeking an injunction; he is asking for a brief stay pending the disposition of his substantive motion.

1 initial matter, the mere fact that LPPC agrees to withhold relevant information from one of its  
2 existing clients as a condition precedent to continuing as counsel for another of its existing  
3 clients is telling. Professor John Strait put it this way in the section of his declaration in the  
4 federal securities case captioned "Lane Powell's admitted conflicts in the criminal and SEC  
5 investigations require disqualification in the arbitration and federal securities litigation as well:"

6 Information acquired during the period of representation of any  
7 one of Lane Powell's clients in the pending matters must be shared  
8 to the extent that any of the other clients would need to know that  
information to aid in their representation or to make informed  
decisions about their own situation.

9 *Ex. E to Mahler Decl.* at 3-4. Professor David Boerner agreed. "LPPC owes simultaneous duties  
10 to each of its clients to fully disclose all material information which it possesses." *Ex. F to*  
11 *Mahler Decl.* at 2.

12 In any event, LPPC fails to point out that the protective order on which it relies applies  
13 only to the arbitration and not to subsequent proceedings. Judge Barnett has already ruled that  
14 the parties are entitled to a trial de novo following the arbitration. *Ex. G to Mahler Decl.* The  
15 protective order would not apply to the trial de novo, and once the arbitration is concluded, there  
16 would be nothing to prevent LPPC from disclosing the information in question to Pierce.  
17 Indeed, as Professors Strait and Boerner point out, LPPC would be required by its duty of loyalty  
18 to Pierce to do so. Moreover, once LPPC attorneys learn the information that is the subject of  
19 the pending discovery requests before the Arbitrator, that information cannot simply be removed  
20 from their memories in the event the Court ultimately concludes LPPC should have been  
21 disqualified in this case.

22 Given that a trial de novo in this Court is likely following arbitration regardless of the  
23 outcome, any delay caused by a stay of the arbitration is *de minimus* in terms of the overall  
24 litigation. The balance of irreparable harm to Berninger if discovery goes forward against the  
25 minimal delay in order to preserve the status quo pending Judge Barnett's ruling on the  
26 disqualification motion weighs heavily in favor of a stay.

1 **B. Deisher's CR 11 motion must be denied.**

2 Deisher asserts she is entitled to fees under CR 11 because Berninger's disqualification  
3 motion is not "warranted by existing law or a good faith argument for the extension,  
4 modification, or reversal of existing law or the establishment of new law." *Plaintiff's Opp'n* at  
5 1; CR 11. The basis for Deisher's CR 11 request is her assertion that the Arbitrator is not an  
6 "inferior tribunal" and, therefore, his decisions are not subject to a writ of review.<sup>5</sup> Deisher's  
7 argument is predicated upon the theory that this case involves a purely private arbitration and a  
8 writ of review cannot be issued to a private arbitrator. However, as Judge Barnett has already  
9 recognized, this case does *not* involve a purely private arbitration. Instead the Arbitrator's  
10 decision is subject to de novo review in accordance with the mandatory arbitration rules. Thus,  
11 the case upon which Deisher relies to support her CR 11 argument not only is distinguishable but  
12 actually supports Berninger's argument.

13 Deisher further asserts that the Arbitrator had the authority to rule on jurisdictional issues,  
14 that Berninger waived his right to object to the Arbitrator's jurisdiction, and that Berninger  
15 cannot obtain immediate review of the Arbitrator's decision regarding disqualification. It is not  
16 clear whether these arguments are part of Deisher's CR 11 motion or are simply responses to  
17 Berninger's substantive motion. In any event, none of Deisher's arguments are well-taken, and  
18 they certainly do not establish that CR 11 sanctions are warranted.

19 **1. The Arbitrator is an "inferior tribunal" and is therefore subject to a writ of  
20 review.**

21 As Berninger pointed out in his disqualification motion, one of the requirements for  
22 issuance of a writ of review is that the decision sought to be reviewed was issued by an "inferior  
23 tribunal." See RCW 7.16.040; *Jones v. Personnel Resources Board*, 134 Wn. App. 560, 567,  
24 140 P.3d 636 (2006). An "inferior tribunal" is one whose decisions are subject to judicial

25 \_\_\_\_\_  
26 <sup>5</sup> Deisher asserts the other requirements for a writ of review have not been satisfied but offers no argument or  
authority in support of that assertion.

1 review. See *Radke v. Nelson Mill Co.*, 194 N.W.2d 395, 398 (Mich. Ct. App. 1971); *State ex rel.*  
2 *Cody v. Ohio Supreme Court Board of Comm'rs on Grievances & Discipline*, 693 N.E.2d 829,  
3 830 (Ohio Ct. App. 1997).

4 Deisher contends a writ of review “can be issued only against governmental officers and  
5 not to private arbitrators,” citing *Grays Harbor County v. Williamson*, 96 Wn.2d 147, 634 P.2d  
6 296 (1981).<sup>6</sup> Deisher’s reliance on *Williamson* is misplaced for several reasons. First,  
7 *Williamson* notes only that the “**general** purpose of a writ of certiorari<sup>7</sup> is to review the official  
8 acts of a public officer, or an organ of government.” 96 Wn.2d at 152 (emphasis added); see  
9 also *Standow v. City of Spokane*, 88 Wn.2d 624, 630, 564 P.2d 1145 (1977), *overruled on other*  
10 *grounds, State v. Smith*, 93 Wn.2d 329, 336 n.2, 610 P.2d 869 (1980) (same); *Pierce v. King*  
11 *County*, 62 Wn.2d 324, 382 P.2d 628 (1963) (“A purpose of certiorari is to review the official  
12 acts of a public officer, or an organ of government.” (Emphasis added.)). Washington law does  
13 not, as Deisher asserts, limit a writ of review only to governmental officers.<sup>8</sup> In any event, this  
14 Court has the authority to decide the disqualification issue independent of the writ process  
15 because the Arbitrator never had the jurisdiction to make that decision in the first place.

16 Second, this case is readily distinguishable from *Williamson*. In that case, a county  
17 employee filed a grievance through his union. The dispute was eventually submitted to binding  
18 arbitration pursuant to a labor agreement between the union and the county. *Williamson*, 96  
19 Wn.2d at 148. The arbitrator ruled in favor of the employee, and the county then sought review

20 \_\_\_\_\_  
21 <sup>6</sup> Deisher also cites *Jones*, 134 Wn. App. 560, in support of her assertion that the Arbitrator cannot be an “inferior  
22 tribunal.” The *Jones* court did not even address this issue, as the parties agreed the arbitration board constituted an  
23 inferior tribunal. *Jones*, 134 Wn. App. at 567.

24 <sup>7</sup> A writ of review is the same thing as a writ of certiorari. RCW 7.16.030.

25 <sup>8</sup> Moreover, the Washington courts have “treated any application as proper irrespective of the writ asked.” *Tuschoff*  
26 *v. Westover*, 60 Wn.2d 722, 722, 375 P.2d 254 (1962) (court treated petition for writ of prohibition as petition for  
writ of review). If Berninger is not entitled to a statutory writ of review, prohibition, or mandamus, he may be  
entitled to a constitutional writ of review. Such writs may be issued when (1) a statutory writ is not available and (2)  
the decision below is arbitrary, capricious, or contrary to law. *Torrance v. King County*, 136 Wn.2d 783, 787-88,  
966 P.2d 891 (1998).

1 of the arbitration award by filing a petition for writ of review with the superior court. The court  
2 modified the arbitration award, and the employee appealed. He asserted, among other things,  
3 that the trial court should have quashed the writ of review because the requirements for issuance  
4 of the writ had not been satisfied. *Id.* at 149-50.

5 The supreme court agreed with the employee that the writ should not have been issued.  
6 *Id.* at 154. In reaching this conclusion, the court determined that the arbitrator was not an  
7 “inferior tribunal” because his jurisdiction and power to act were derived solely from the  
8 arbitration agreement between the parties and not by statute or rule. *Id.* at 152. The court  
9 explained: “That agreement set forth the arbitrator selected, his jurisdiction, the issues involved  
10 and the contract provision involved. The arbitration was the result of private contract only; there  
11 was no governmental “tribunal, board or officer” involved as contemplated by RCW 7.16.040.”  
12 *Id.* Significantly, the court added, in footnote 3 of its opinion, “This is to be distinguished from  
13 the mandatory arbitration provided by RCW 7.06 and the Mandatory Arbitration Rules (*which*  
14 *grant a trial de novo upon appeal*).” *Id.* n.3 (emphasis added).

15 In this case, the arbitration provision at issue states that the arbitration proceedings will  
16 be conducted in accordance with sections 11.96A.260 through 11.96A.320 of the Trust and  
17 Estate Dispute Resolution Act (“TEDRA”). Thus, unlike the arbitrator in *Williamson*, the  
18 Arbitrator’s power in this case is *not* derived solely from the parties’ agreement. RCW  
19 11.96A.310(5) requires TEDRA arbitrations to be conducted in accordance with RCW ch. 7.06,  
20 which applies to mandatory arbitrations, together with any local rules governing mandatory  
21 arbitrations. RCW 11.96A.310 (9)(a) provides that “[t]he final decision of the arbitrator may be  
22 appealed by filing a notice of appeal with the superior court requesting a *trial de novo* on all  
23 issues of law and fact.” (Emphasis added). Thus, it is clear that the arbitration in this case falls  
24 squarely within the exception set forth in footnote 3 of the *Williamson* decision applicable to  
25  
26

1 cases in which the arbitrator's decision may be reviewed by a trial de novo.<sup>9</sup> At a minimum, this  
2 issue presents a question of first impression, precluding an award of sanctions under CR 11.

3 Deisher's failure to recognize the applicability of footnote 3 is inexplicable in light of the  
4 previous briefing submitted to Judge Barnett regarding the trial de novo issue. In October 2008,  
5 defendant Gary Reys filed a Motion to Compel Compliance With TEDRA Procedures asking the  
6 Court to rule that the parties are entitled to de novo review of the arbitrator's decision. In  
7 support of his request, Reys cited *Malted Mousse, Inc. v. Steinmetz*, 150 Wn.2d 518, 79 P.3d  
8 1154 (2004), in which the court noted the distinction between the Washington Arbitration Act  
9 (RCW ch. 7.04), which provides for limited review of an arbitrator's decision, and RCW ch.  
10 7.06, which authorizes de novo review. Reys explained that, because the TEDRA arbitration  
11 provision incorporated the requirements of RCW ch. 7.06, the parties were entitled to de novo  
12 review. *Ex. H to Mahler Decl.* at 3.

13 After the Court granted Reys' motion, Deisher sought reconsideration. She attempted to  
14 characterize the arbitration in this case as a "private" arbitration governed by RCW ch. 7.04.  
15 Quoting the *Malted Mousse* decision, Deisher stated: "Private arbitration and mandatory  
16 arbitration serve different purposes. As stated, *supra*, the standards by which an aggrieved party  
17 appeals an arbitral proceeding differ between private arbitration and mandatory arbitration. We  
18 hold these standards cannot be intertwined." *Ex. I to Mahler Decl.* at 2 (quoting *Malted Mousse*,  
19 150 Wn.2d at 531-32).

20 Judge Barnett denied Deisher's motion for reconsideration, thus rejecting Deisher's  
21 attempt to characterize the arbitration as a purely private arbitration and confirming that the  
22 parties were entitled to de novo review in accordance with the mandatory arbitration rules. Thus,  
23 Judge Barnett has already implicitly rejected Deisher's assertion that the *Williamson* decision  
24 applies to preclude Berninger from obtaining a writ of review. In light of Judge Barnett's ruling,  
25

---

26 <sup>9</sup> Similarly, Deisher's reliance on cases from other jurisdictions (the most recent of which dates back 80 years) is misplaced—none of those cases involved the de novo review requirement applicable here.

1 Deisher's reliance on *Williamson* to support her assertion that Berninger should be sanctioned for  
2 seeking a writ of review is disingenuous, to say the least.

3 **2. The Arbitrator did not have the authority to decide whether LPPC should be**  
4 **disqualified, and Berninger did not waive his right to assert the jurisdictional**  
5 **issue.**

6 Deisher also argues the Arbitrator had "express authority to decide jurisdictional issues"  
7 and that Berninger waived the right to object to the Arbitrator's jurisdiction over the issue of  
8 whether LPPC should be disqualified. *Plaintiff's Opp'n to Stay* at 2. Deisher is wrong on both  
9 counts. As explained in Berninger's disqualification motion, the law is clear that the Court, not  
10 the Arbitrator, must decide disqualification issues. The law is equally clear that a party cannot  
11 waive the right to contest subject matter jurisdiction.

12 The arbitration provision in the employment agreement between CellCyte and Deisher  
13 provides that the National Rules for the Resolution of Employment Disputes promulgated by the  
14 AAA ("AAA Rules") apply to certain aspects of the arbitration proceedings.<sup>10</sup> *Ex. J to Mahler*  
15 *Decl.* Rule 6(a) of the AAA Rules provides that "[t]he arbitrator shall have the power to rule on  
16 his or her own jurisdiction, including any objections with respect to the existence, scope or  
17 validity of the arbitration agreement."

18 Deisher asserts that Rule 6 applies to allow the Arbitrator to determine whether he had  
19 the authority to decide whether LPPC should be disqualified. Again, she ignores the fact that  
20 Judge Barnett has specifically rejected this argument. Deisher previously sought reconsideration  
21 of an order requiring two of her claims to be withdrawn from the arbitration and submitted to the  
22 Court for decision. In that motion she cited Rule 6 to assert that the Arbitrator, not the Court,  
23 had the power to decide the arbitrability of the claims at issue. *Ex. K to Mahler Decl.* at 2.  
24 Judge Barnett summarily denied Deisher's motion for reconsideration. Thus, Judge Barnett has  
25

---

26 <sup>10</sup> In the event there is a conflict between TEDRA and the AAA Rules, TEDRA "shall take precedence."

1 already concluded that Rule 6 does not apply to prevent the Court from deciding what issues  
2 should be resolved by the Arbitrator.

3 Additional reasons preclude the application of Rule 6 in this case. First, as reflected in  
4 the case law cited by Deisher, issues regarding an arbitrator's jurisdiction ordinarily involve  
5 whether the parties agreed to submit a particular dispute to arbitration. Here, a more  
6 fundamental question is presented—are issues of attorney disqualification beyond the  
7 jurisdiction of arbitrators. *See Bidermann Indus. Licensing, Inc. v. Avmar N.V.*, 570 N.Y.S.2d  
8 33, 34 (N.Y. App. Div. 1991). As numerous courts have recognized, such issues are “not  
9 capable of settlement by arbitration” and must be left to the courts to resolve. *See Simply Fit of*  
10 *N. Am. v. Poyner*, 579 F. Supp. 2d 371, 384 (E.D.N.Y. 2008) (“disqualification of an attorney for  
11 an alleged conflict of interest is a substantive matter for the courts and not the arbitrator”);  
12 *Munich Reins. Am., Inc. v. ACE Prop. & Cas. Ins. Co.*, 500 F. Supp. 2d 272, 275 (S.D.N.Y.  
13 2007) (attorney disqualification issues cannot be decided by the arbitrator); *In re Arbitration*  
14 *Between R3 Aerospace, Inc., and Marshall of Cambridge Aerospace Ltd.*, 927 F. Supp. 121, 123  
15 (S.D.N.Y. 1996) (subject matter of dispute—attorney disqualification—cannot be resolved in  
16 arbitration).<sup>11</sup>

17 Moreover, it is universally recognized that, as a general rule, courts should decide issues  
18 of substantive arbitrability. *See, e.g., Nelson v. Westport Shipyard, Inc.*, 140 Wn. App. 102, 117,  
19 163 P.3d 807 (2007) (citing *John Wiley & Sons v. Livingston*, 376 U.S. 543, 546-47 (1964)).  
20 The only exception is when there is “clear and unmistakable evidence” that the parties intended

21 \_\_\_\_\_  
22 <sup>11</sup> Deisher cites two related California decisions in support of the assertion that the Arbitrator has jurisdiction to  
23 decide attorney disqualification issues. *See Benasra v. Mitchell Silberberg & Knupp, LLP*, 116 Cal. Rptr. 2d 644  
24 (Cal. Ct. App. 2002), *aff'd after remand, Pour le Bebe, Inc. v. Guess?, Inc.*, 5 Cal Rptr. 3d 442 (Cal. Ct. App. 2003).  
25 Neither case discussed whether an arbitrator has jurisdiction to decide disqualification issues. In *Benasra*, the  
26 plaintiffs sued their former counsel alleging a conflict of interest. The law firm moved for summary judgment,  
asserting the plaintiffs' claims were barred by res judicata because an arbitration panel had previously denied the  
plaintiffs' motion to disqualify counsel. *Benasra*, 116 Cal. Rptr. 2d at 647. The court rejected this argument. *Id.* at  
660. The court did not consider whether the arbitrators had the jurisdiction to rule on the disqualification motion in  
the first place because this issue was not before it. Likewise, in *Pour le Bebe*, an appeal in the same case following  
remand, the same panel did not address the jurisdictional issue.

1 otherwise. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002). There is no such  
2 evidence here. First, the arbitration provision at issue does not mention Rule 6 or state that it  
3 applies.<sup>12</sup> Even if Rule 6 were deemed to be incorporated by reference into the arbitration  
4 provision, that provision is contained in an employment agreement between Deisher and  
5 CellCyte. Berninger is not a party to or signatory of that agreement. Under these circumstances,  
6 there is no “clear and unmistakable evidence” that Berninger agreed to allow the Arbitrator to  
7 determine whether he had jurisdiction to decide whether LPPC should be disqualified.

8 Deisher asserts that Berninger has waived his right to challenge the Arbitrator’s authority  
9 to decide the disqualification issue because he initially filed his disqualification motion with the  
10 Arbitrator. As explained above, the Arbitrator did not have subject matter jurisdiction over this  
11 issue. Subject matter jurisdiction *cannot* be waived and may be raised at any time. *Skagit*  
12 *Surveyors & Eng’rs, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 556, 958 P.2d 962  
13 (1998); RAP 2.5(a).

14 Nor did Deisher waive the right to challenge the Arbitrator’s authority to decide his own  
15 jurisdiction. As explained in his disqualification motion, once Berninger recognized that the  
16 Arbitrator did not have jurisdiction to decide the disqualification issue, he immediately asked the  
17 Arbitrator to withdraw his order on the subject and informed the Arbitrator that he would be  
18 seeking a determination on this issue by the Court. The cases relied upon by Deisher are thus  
19 inapposite. *See, e.g., Poweragent, Inc. v. Elec. Data Sys. Corp.*, 358 F.3d 1187, 1189 (9<sup>th</sup> Cir.  
20 2004) (plaintiff had argued that arbitration panel, not court, should decide arbitrability); *W.A.*  
21 *Bottling Plumbing & Heating Co. v. Constructors-Pamco*, 47 Wn. App. 681, 685, 736 P.2d 1100

---

22 \_\_\_\_\_  
23 <sup>12</sup> Courts in other jurisdictions have ruled that, when an arbitration provision states that the arbitration will be  
24 conducted in accordance with AAA Rules, that statement constitutes “clear and unmistakable evidence” that the  
25 parties intend to have the arbitrator determine substantive arbitrability, pursuant to Rule 6. *See James & Jackson,*  
26 *LLC v. Willie Garry, LLC*, 906 A.2d 76, 78 (Del. 2006). Here, however, the parties made no such agreement; the  
arbitration is to be conducted in accordance with TEDRA, not the AAA Rules. The arbitration provision references  
only portions of the AAA Rules and does not incorporate Rule 6. Moreover, the reference to the AAA Rules is not  
sufficient, in and of itself, to confer jurisdiction upon an arbitrator to decide his own jurisdiction—the arbitration  
clause also must (unlike the one in this case) provide for arbitration of *all* disputes. *See id.* at 80.

1 (1987) (defendant's submission of arbitrability of issue to arbitrator could be construed as  
2 waiver).

3 In sum, the Arbitrator did not have subject matter jurisdiction over the issue of LPPC's  
4 disqualification. Only the Court can decide that issue, and AAA Rule 6 does not apply to allow  
5 the Arbitrator to confer jurisdiction upon himself.

6 **3. Berninger is not required to wait until the conclusion of the arbitration to  
7 have the disqualification issue resolved.**

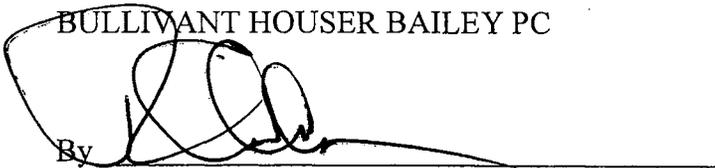
8 Deisher's assertion that Berninger is not entitled to an immediate appeal of the  
9 Arbitrator's disqualification decision completely misses the point. Berninger specifically  
10 acknowledged that fact in his disqualification motion. That is why a writ of review is  
11 appropriate—Berninger has no adequate remedy at law. In addition, Deisher ignored Ninth  
12 Circuit authority recognizing that writ review of the denial of a disqualification motion is  
13 appropriate.

14 **III. CONCLUSION**

15 For the reasons set forth above, Berninger respectfully requests that the Court (1) grant  
16 his motion to stay the arbitration proceedings pending a ruling on his motion for disqualification;  
17 and (2) deny Deisher's motion for CR 11 sanctions.

18 DATED this 23<sup>rd</sup> day of February, 2009.

19 BULLIVANT HOUSER BAILEY PC

20 By 

21 Troy D. Greenfield, WSBA #21578  
22 Robert S. Mahler, WSBA #23913

23 Attorneys for Defendant Ronald Berninger

24 11287745.1

# **APPENDIX D**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

IN RE CELLCYTE GENETICS  
SECURITIES LITIGATION,

This Document Relates To:

All Actions

Case No. C08-0047RSL

ORDER GRANTING DEFENDANT  
PIERCE'S MOTION TO DISMISS

**I. INTRODUCTION**

This matter comes before the Court on defendant G. Brent Pierce's motion to dismiss plaintiffs' second amended consolidated class action complaint pursuant to Fed. R. Civ. P. 9(b) and 12(b)(6). Plaintiffs, who are attempting to represent a class of investors, contend that Pierce violated Sections 10(b) and 20(a) of the Securities and Exchange Act of 1934 and Securities Exchange Commission ("SEC") Rule 10b-5. Specifically, plaintiffs contend that Pierce was responsible for various alleged misrepresentations in a promotional brochure regarding CellCyte.

Pierce argues that plaintiffs have failed to identify any misrepresentations attributable to him, and that their allegations of scienter and loss causation do not satisfy the pleading standards of the Private Securities Litigation Reform Act of 1995

1 (“PSLRA”), 15 U.S.C. §§ 78u-4 *et seq.* Pierce also contends that plaintiffs’ “control  
2 person” allegations are insufficiently pled and must be dismissed.

3 The Court heard oral argument in this matter on September 22, 2009. For the  
4 reasons set forth below, the Court grants the motion.

## 5 II. ANALYSIS

### 6 A. The Complaint.

7 Plaintiffs filed this action on behalf of all persons who purchased the publicly-  
8 traded stock of CellCyte Genetics Corporation (“CellCyte”) between July 16, 2007 and  
9 the date of this lawsuit. Plaintiffs also plan to seek class certification on behalf of  
10 purchasers of CellCyte securities between April 6, 2007 and January 9, 2008. Second  
11 Amended Consolidated Class Action Complaint (“SACC”) ¶¶ 28, 29. CellCyte described  
12 itself as an emerging biotechnology company engaged in the discovery and development  
13 of stem cell therapeutic products. *Id.* ¶ 3. CellCyte’s products would use a patient’s own  
14 cells to treat a variety of conditions non-invasively. The theory of the complaint is that  
15 defendants overstated the viability and availability of CellCyte’s products and the status  
16 of the company’s product development. Plaintiffs allege that when the truth emerged, the  
17 value of CellCyte stock plummeted.

18 In this action, plaintiffs have sued CellCyte, Pierce, Gary Reys,<sup>1</sup> and Ronald  
19 Berninger. Reys and Berninger co-founded CellCyte and served as company officers.  
20 Pierce, a Canadian citizen, is a stock promoter who has been banned from trading  
21

---

22 <sup>1</sup> Plaintiffs also allege that CellCyte and the other defendants misrepresented Reys’  
23 educational and professional background (the “resume fraud”). CellCyte, Reys, and  
24 Berninger filed a separate motion to dismiss, and plaintiffs are in settlement negotiations  
25 with those defendants. Plaintiffs do not assert allegations against Pierce based on the  
resume fraud.

1 securities in Canadian exchanges, from acting as a director or officer of any publicly  
2 traded Canadian company, and from acting as a director or officer of certain issuers.

3 Plaintiffs allege that Pierce continued to operate as a stock promoter in  
4 Washington. He is the president of Stock Group, AG, a stock-promotion firm based in  
5 Zurich with an office in Bellingham. The SACC alleges that CellCyte paid a monthly  
6 consulting fee to Stock Group, AG to promote CellCyte. “Pierce and his company Stock  
7 Group, AG were behind a colorful twelve-page mailer distributed on or about October  
8 2007 to potential U.S. and foreign buyers of CellCyte stock entitled, ‘James Raphael’s  
9 Economic Advice’” (the “Raphael brochure”). SACC at ¶ 24. Plaintiffs allege that  
10 Pierce and Stock Group, AG drafted the brochure’s content and paid for its publication  
11 and distribution.

12 The SACC alleges that Pierce was the “primary author” of the Raphael brochure.  
13 SACC at ¶ 79. Before the brochure was issued, Pierce submitted a Factual Information  
14 Review (“FIR”) document for review and approval. Reys reviewed the content and  
15 initialed each of the pages of the FIR. Id. at ¶ 79. After Reys conducted his review,  
16 plaintiffs allege that Pierce supplemented the brochure’s content with the following  
17 allegedly false statements:

- 18 ● “Now, a practical ‘pill-in-a-bottle’ application puts the miracle of  
19 regenerative medicine within immediate reach.” SACC at ¶ 83.
- 20 ● “The technology is real. It’s here now. It is heading into FDA testing.  
21 Because it’s based on safe, naturally occurring proteins, FDA fast tracking, if  
22 granted, could allow more rapid approval of this revolutionary treatment.” Id.
- 23 ● “Repair your own heart . . . regenerative medicine in on the verge of an  
24 enormous and historic leap forward.” Id.
- 25 ● “Grow-your-own repair tissues! . . . . In the not-too-distant-future doctors  
26 should be able to inject stem cells from the patient’s own body into a vein where  
the stem cells will target the heart to allow growth and repair of heart tissue.” Id.

1 ● CellCyte’s technology used a “patient’s own adult stem cells rather than  
2 controversial embryonic form.” Id. at ¶ 85.

3 ● “[I]n pre-clinical studies over 77% of the stem cells remained in place in the  
4 organ, compared to a mere 1 to 5% by current invasive methods. Id. at ¶ 86.

4 **B. Private Securities Litigation Reform Act.**

5 In 1995, Congress raised the pleading requirements in private securities litigation  
6 to deter the routine filing of shareholder lawsuits whenever a significant change in a  
7 company’s stock price occurred. Congress was particularly concerned with litigation  
8 based on nothing more than (1) speculation that the company “must have” engaged in  
9 foul play and (2) the faint hope that the liberal rules of discovery would turn up some  
10 supporting evidence. See Joint Explanatory Statement to the PSLRA, H.R. Conf. Rep.  
11 No. 104-369 (1995), *reprinted in* 1995 U.S.C.C.N. 730. In order to state a claim under  
12 § 10b of the Exchange Act and Rule 10b-5 plaintiffs “must allege: (1) a misstatement or  
13 omission (2) of a material fact (3) made with scienter (4) on which [plaintiffs] relied (5)  
14 which proximately caused their injury.” DSAM Global Value Fund v. Altris Software,  
15 Inc., 288 F.3d 385, 388 (9th Cir. 2002).

16 Unlike most civil litigation, allegations sufficient to put defendants on notice of the  
17 nature of the claim are insufficient under the PSLRA: private securities plaintiffs must  
18 “specify each statement alleged to have been misleading, the reason or reasons why the  
19 statement is misleading, and, if an allegation regarding the statement or omission is made  
20 on information and belief, the complaint shall state with particularity all facts on which  
21 that belief is formed.” 15 U.S.C. § 78u-4(b)(1). In order to withstand a motion to dismiss  
22 under Fed. R. Civ. P. 12(b)(6), the complaint must, as to each act or omission alleged to  
23 violate the securities laws, “state with particularity facts giving rise to a strong inference  
24 that the defendant acted with the required state of mind.” 15 U.S.C. § 78u-4(b)(2). Thus,

1 private securities plaintiffs must “plead with particularity both falsity and scienter.”

2 Ronconi v. Larkin, 253 F.3d 423, 429 (9th Cir. 2001).

3 In In re Silicon Graphics Inc. Securities Litig., 183 F.3d 970, 975-77 (9th Cir.  
4 1999), the Ninth Circuit evaluated the requirements of the PSLRA, its legislative history,  
5 and the prior practice of the courts and determined that the required state of mind for  
6 purposes of § 78u-4(b)(2) is, at a minimum, a “deliberate recklessness” that reflects some  
7 degree of knowing misconduct. In order to give rise to a “strong inference” of “deliberate  
8 recklessness,” securities plaintiffs may no longer rely on evidence which suggests that the  
9 corporation and/or its officers had a motive and opportunity to defraud the market: rather,  
10 the complaint must allege, with particularity, “facts indicating no less than a degree of  
11 recklessness that strongly suggests actual intent.” 183 F.3d at 979. Recklessness is  
12 defined as “a highly unreasonable omission, involving not merely simple, or even  
13 inexcusable negligence, but an extreme departure from the standards of ordinary care, and  
14 which presents a danger of misleading buyers or sellers that is either known to the  
15 defendant or is so obvious that the actor must have been aware of it.” DSAM Global  
16 Value Fund, 288 F.3d at 389.

17 The Court recognizes that *Silicon Graphics* and its progeny make it very difficult  
18 for private securities litigants: in order to survive a motion to dismiss, plaintiffs must  
19 possess, at the time of filing, evidence that defendants had knowledge of, or were  
20 deliberately reckless regarding, the falsity of public statements at the time they were  
21 made.<sup>2</sup> Simply alleging that statements were knowingly false is not enough. Such

22 \_\_\_\_\_  
23 <sup>2</sup> Plaintiffs can no longer file a claim and hope that discovery will provide the  
24 necessary proof:

25 In the absence of greater particularity and more incriminating facts, we have

1 allegations must be supported with references to the specific facts, documents, and/or  
2 reports. In order to determine whether the complaint gives rise to a strong inference of  
3 intentional or deliberately reckless conduct, the Court must assess the allegations  
4 “holistically,” along with plausible nonculpable explanations for defendant’s conduct.  
5 Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 326 (2007). Although “[t]he  
6 inference that defendant acted with scienter need not be irrefutable . . . [it] must be more  
7 than merely ‘reasonable’ or ‘permissible’ – it must be cogent and compelling, thus strong  
8 in light of other explanations. A complaint will survive . . . only if a reasonable person  
9 would deem the inference of scienter cogent and at least as compelling as any opposing  
10 inference one could draw from the facts alleged.” Tellabs, 551 U.S. at 324. Thus, the  
11 PSLRA compels a rigorous analysis of the complaint to determine whether the  
12 allegations, taken collectively, give rise to a strong inference that defendant lied or was  
13 deliberately reckless.

14 **C. Evidentiary Issues.**

15 In reviewing this motion to dismiss, the Court may consider the SACC, materials  
16 incorporated into the SACC by reference, and matters of which the Court may take  
17

---

18 no way of distinguishing [plaintiffs’] allegations from the countless “fishing  
19 expeditions” which the PSLRA was designed to deter. See H.R. CONF.  
20 REP. 104-369 at 37.

21 Congress enacted the PSLRA to put an end to the practice of pleading  
22 “fraud by hindsight.” See, e.g., Medhekar v. United States Dist. Ct., 99  
23 F.3d 325, 328 (9th Cir. 1996) (holding that Congress intended for  
24 complaints under the PSLRA to stand or fall based on the actual knowledge  
25 of the plaintiffs rather than information produced by the defendants after the  
26 action has been filed).

25 Silicon Graphics, 183 F.3d at 988.

1 judicial notice. Metzler, 540 F.3d at 1061. Pierce has requested that the Court take  
2 judicial notice of the documents attached to the Declaration of Ann Bender in support of  
3 his motion to dismiss. Plaintiffs do not dispute the authenticity of the documents or  
4 object to the Court considering any of them. The attached consulting agreement between  
5 Stock Group, AG and CellCyte and the Rapholz brochure were both referenced in  
6 plaintiffs' SACC, so they are incorporated by reference. Pursuant to Evidence Rule  
7 201(b), the Court also takes judicial notice of the documents, as well as notice of the  
8 Factual Information Review dated August 15, 2007 and the CellCyte Prospectus filed  
9 with the SEC in July 2007.

10 The Court declines to take judicial notice of the two remaining exhibits, which  
11 include (1) the extract list of companies from the Companies Registry, Grand Turk, and  
12 (2) downloaded pages from Yahoo! Finance on March 4, 2009 purportedly reflecting the  
13 price of CellCyte shares. Those documents are not relevant to the outcome of this  
14 motion.

15 **D. Application of the PSLRA to Plaintiffs' Allegations.**

16 **1. Securities Fraud under Section 10(b).**

17 Plaintiffs contend that defendants "engaged in a scheme to deceive the market"  
18 and the "scheme included . . . the promulgation of promotional material by Pierce that  
19 falsely touted [CellCyte's] success." SACC at ¶¶ 124, 150. However, the Supreme Court  
20 has rejected "scheme" or aider and abettor theories of liability under Section 10(b). See  
21 Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, 552 U.S. 148 (2008). Therefore,  
22 plaintiffs cannot prevail on a theory that all of the defendants engaged in a securities  
23 fraud scheme.

24 **a. No False Statements Attributable to Pierce.**

1 To survive a motion to dismiss, a PSLRA complaint must specify each false or  
2 misleading statement made by each particular defendant and the reasons why each one  
3 was false or misleading. 15 U.S.C. §78u-4(b)(1). Pierce contends that the SACC fails to  
4 identify any false or misleading statements made by him. Undisputedly, the SACC does  
5 not contain any direct quotes from Pierce. Instead, plaintiffs attempt to impute statements  
6 made by other defendants to Pierce under the group pleading doctrine. Under that  
7 doctrine, it is presumed that the allegedly false and misleading “group published  
8 information” is the “collective action of officers and directors.” In re GlenFed, Inc. Sec.  
9 Litig., 60 F.3d 591, 593 (9th Cir. 1995). Regardless of whether the doctrine survived the  
10 enactment of the PSLRA, it is inapplicable to these circumstances. Pierce was not a  
11 director, officer, or employee of CellCyte. Nor was he involved in the Company’s  
12 management or the dissemination of public information like SEC filings. Therefore, the  
13 group pleading doctrine cannot be used to attribute statements to Pierce.

14 Plaintiffs also allege that statements in the Rapholz brochure can be imputed to  
15 Pierce. Pierce counters that pursuant to a consulting agreement between Stock Group,  
16 AG and CellCyte, CellCyte was required to, and did, review all of the factual content for  
17 the brochure. Declaration of Ann Bender, (Dkt. #143) (“Bender Decl.”), Ex. A  
18 (consultant agreement states, in all capital letters, that “all . . . consultant prepared  
19 documentation concerning the company . . . shall be prepared by consultant from  
20 materials supplied to it by the company and shall be approved by the company in writing  
21 prior to any dissemination by the consultant”). The Rapholz brochure contains the  
22 following disclaimer: “The factual information contained in this Report specifically  
23 pertaining to CellCyte business, operations or financial records (the “CellCyte Facts”)  
24 have been reviewed and verified for accuracy by CellCyte.” Id., Ex. C at p. 26.

1 Consistent with those disclaimers, Reys approved the FIR document and all of the  
2 statements therein as factually accurate. On that basis, plaintiffs concede that none of the  
3 statements in the FIR, including those statements that were incorporated into the Raphaelz  
4 brochure, is actionable against Pierce. Instead, plaintiffs contend that Pierce drafted  
5 additional falsities and included them, without CellCyte's approval, in the final Raphaelz  
6 brochure. A comparison of the FIR and the Raphaelz brochure reveals that many of the  
7 allegedly "new" falsities appear, verbatim, in the FIR. Only the following statements  
8 were not already in the FIR:

9 ● "Now, a practical 'pill-in-a-bottle' application **puts the miracle of regenerative**  
10 **medicine within immediate reach.**" SACC at ¶ 83 (only the words in bold were "new"  
to the Raphaelz brochure).

11 ● "The technology is real. It's here now." Id.

12 ● "Repair your own heart . . . regenerative medicine in on the verge of an enormous  
13 and historic leap forward." Id.

14 ● "Grow-your-own repair tissues!" Id.

15 Plaintiffs contend that Pierce must have added those statements because they did  
16 not appear in the FIR. Even if that were true, the statements are not actionable against  
17 Pierce. The statements that "regenerative medicine is on the verge of an enormous and  
18 historic leap forward" and "the miracle of regenerative medicine [is] within immediate  
19 reach" are immaterial puffery. Such "loosely optimistic statements" reflecting corporate  
20 optimism are not actionable. See, e.g., City of Monroe Employees Ret. Sys. v.  
21 Bridgestone Corp., 399 F.3d 651, 671 (6th Cir. 2005) (explaining that statements are not  
22 actionable when they are "too squishy, too untethered to anything measurable, to  
23 communicate anything that a reasonable person would deem important to a securities  
24 investment decision") (citing numerous cases).

25 Furthermore, although the above statements are worded slightly differently, they

1 are entirely consistent with statements already contained in the FIR. Compare Rapholz  
2 Brochure (“Grow-your-own repair tissues!”) with FIR at p. 3 (“A heart attack victim  
3 could quite literally be able to grow new heart tissue and regain significant heart function  
4 with the use of their own stem cells.”). Plaintiffs also contend that the additional  
5 statements say “that CellCyte’s technology was already proven and that it had created  
6 products that would be produced and available for market immediately.” Plaintiff’s  
7 Opposition at p. 7 (citing SACC at ¶ 83). By approving the FIR, however, Reys approved  
8 statements to the effect that the technology was already proven: “CellCyte has a  
9 breakthrough patented technology” and citing successful pre-clinical studies. FIR at p. 2.  
10 Because Reys approved the factual accuracy of the statements, they are not attributable to  
11 Pierce.

12 Moreover, despite plaintiffs’ claim to the contrary, the Rapholz brochure did not  
13 state that the products were available for market immediately. In fact, the Rapholz  
14 brochure states that the technology could be available in “as soon as 3 to 5 years” and that  
15 the company had not yet filed an initial new drug application with the FDA. Rapholz  
16 Brochure at pp. 5, 7. The allegedly false statements must be read in context. See, e.g.,  
17 Haskell v. Time, Inc., 857 F. Supp. 1392, 1399 (E.D. Cal. 1994) (“[I]f the alleged  
18 misrepresentation, in context, is such that no reasonable consumer could be misled, then  
19 the allegation may also be dismissed as a matter of law.”). Reading the statements in  
20 context, no reasonable investor would believe that the product was commercially  
21 available immediately as plaintiffs allege. Because the operative complaint fails to  
22 attribute any false or misleading statements to Pierce, it is subject to dismissal.

23  
24 **b. Lack of Scienter.**

1 Reys' verification of the factual content of the Rapholz brochure also renders  
2 implausible the allegation that Pierce knew the statements were false. Plaintiffs have  
3 cited no evidence to show that Pierce knew the statements were false. The SACC alleges  
4 that "he was reckless in failing to obtain such knowledge by refraining from taking those  
5 steps necessary to discovery whether those statements were false or misleading." SACC  
6 at ¶ 153. Plaintiffs, however, have cited no evidence to show that Pierce was responsible  
7 for determining whether the statements were false. In fact, the consulting agreement  
8 placed that responsibility solely with CellCyte. Legally, allegations that a defendant had  
9 access to contradictory information is insufficient to show scienter. See e.g., Lipton v.  
10 Pathogenesis Corp., 284 F.3d 1027, 1035-36 (9th Cir. 2002). As set forth above, the  
11 PSLRA requires more than mere negligence, a motive, or access to the truth. By failing  
12 to allege scienter sufficiently, the SACC fails to state a claim.

## 13 2. Control Person Liability and Leave to Amend.

14 In addition to the Section 10(b) claim, the SACC asserts a claim for "control  
15 person" liability against Pierce under Section 20(a), 15 U.S.C. § 78(a). To state a claim  
16 for control person liability, a plaintiff must adequately allege: (1) a primary violation of  
17 federal securities laws, and (2) that the defendant exercised actual power or control over  
18 the primary violator. See, e.g., Howard v. Everex Sys., Inc., 228 F.3d 1057, 1065 (9th  
19 Cir. 2000).

20 In this case, plaintiffs concede that the SACC does not sufficiently plead that  
21 Pierce is a control person of CellCyte. In light of that concession, they seek leave to  
22 amend. Federal Rule of Civil Procedure 15(a)(2) directs federal courts to "freely give  
23 leave [to amend] when justice so requires." The Court has discretion to deny leave to  
24 amend when the record reveals "undue delay, bad faith or dilatory motive on the party of  
25

1 the movant, repeated failure to cure deficiencies by amendments previously allowed,  
2 undue prejudice to the opposing party by virtue of allowance of the amendment, and  
3 futility of amendment.” Zucco Partners, LLC v. Digimarc Corp., 552 F.3d 981, 1007 (9th  
4 Cir. 2009) (internal citations and quotations omitted). Because the PSLRA is so technical  
5 and demanding, “the drafting of a cognizable complaint can be a matter of trial and  
6 error,” making it even more important to allow the filing of successive pleadings in this  
7 context. Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003).  
8 However, plaintiffs have already amended their complaint twice.

9 Plaintiffs seek leave to amend in two ways. First, they would amend to allege that  
10 Stock Group, AG is a primary violator and Pierce is secondarily liable as a controlling  
11 person of Stock Group, AG. Plaintiffs seek to add allegations that Pierce and Stock  
12 Group, AG authored the text of the Rapholz brochure as part of Stock Group, AG’s  
13 consulting agreement with CellCyte, that Pierce is a control person of Stock Group, AG,  
14 and that he is liable for that entity’s Section 10(b) violations. However, plaintiffs have  
15 not alleged any actionable misstatements or the requisite state of mind by Stock Group,  
16 AG. Instead, plaintiffs contend that Stock Group, AG, presumably via some unnamed  
17 person, is responsible for the same misstatements that they attribute to Pierce. As set  
18 forth above, Reys approved all of the factual content of the Rapholz brochure and the  
19 “added” statements are not actionable. For these reasons, the proposed amendment is  
20 denied as futile.

21 Second, during oral argument, plaintiffs requested leave to amend to include  
22 information found in two SEC complaints, one against Reys and the other against  
23 CellCyte and Berninger (collectively, the “SEC complaints”). The SEC complaints were  
24 filed on September 8, 2009 in the U.S. District Court for the Western District of  
25

1 Washington. Specifically, the SEC complaints allege that in “late 2006,” CellCyte and a  
2 “Canadian stock promoter,” who is undoubtedly Pierce, “conducted a reverse merger  
3 between CellCyte and [a public] shell company,” which was controlled by Pierce, that  
4 made CellCyte a public company. SEC Complaint against CellCyte at ¶ 18.<sup>3</sup> As part of  
5 the reverse merger, CellCyte received approximately \$6 million and Pierce received  
6 approximately 15 million “purportedly ‘freely tradeable’ CellCyte shares. As a result, the  
7 stock promoter controlled about 90% of CellCyte’s public float (the shares outstanding  
8 and available for trading by the public).” *Id.* at ¶ 19. Based on those allegations,  
9 plaintiffs contend that Pierce was a control person of CellCyte because he controlled a  
10 large percentage of its stock. Plaintiffs have alleged only that Pierce was responsible for  
11 misrepresentations in the Rapholz brochure, which was published in the fall of 2007.  
12 However, plaintiffs’ SACC contends that CellCyte’s Prospectus filed with the SEC on  
13 July 11, 2007 stated that Pierce owned 2.7% of the company’s stock as of June 28, 2007.  
14 *Id.* at ¶ 23. According to plaintiffs’ own allegations and the company’s public filings,  
15 Pierce owned only a small percentage of the company’s stock at the time the Rapholz  
16 brochure was disseminated. Even if the Court also considered Pierce’s wife’s stock  
17 holdings, by plaintiffs’ own allegations Pierce controlled only 10% of the company’s  
18 stock at the relevant time. *Id.* An individual’s status as a minority shareholder is  
19 insufficient, without more, to establish control person liability. *See, e.g., In re Gupta*  
20 *Corp. Sec. Litig.*, 900 F. Supp. 1217, 1243 (N.D. Cal. 1994); *In re Flag Telecom Holdings*  
21 *Ltd. Sec. Litig.*, 308 F. Supp. 2d 249, 273-74 (S.D.N.Y. 2004) (explaining that the fact  
22 that an entity owned 30% of a company’s stock and helped found the company was

---

24 <sup>3</sup> According to the SEC complaint against Reys, the reverse merger officially  
25 closed in March 2007.

1 insufficient to establish control).<sup>4</sup>

2 In addition, the Court will not presume that Pierce exercised control based on his  
3 stock holdings. Rather, “[t]here must be some showing of actual participation in the  
4 corporation’s operation or some influence before the consequences of control may be  
5 imposed.” Burgess v. Premier Corp., 727 F.2d 826, 832 (1984) (internal citation and  
6 quotation omitted).<sup>5</sup> Other than noting Pierce’s stock holdings, plaintiffs have not sought  
7 to amend to allege any facts to show any actual participation in the company’s operations  
8 or influence over the same. Nor will the Court permit plaintiffs to conduct a fishing  
9 expedition in the hopes of finding material to support their vague request to amend. This  
10 case has been pending for over a year and a half, and plaintiffs have had ample time to  
11 conduct an investigation and formulate their contentions regardless of the SEC’s actions.  
12 For these reasons, plaintiffs’ request to amend their complaint is denied.

### 13 III. CONCLUSION

14 For all of the foregoing reasons, defendant Pierce’s motion to dismiss (Dkt. #142)

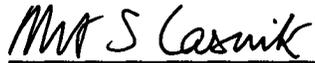
---

15  
16 <sup>4</sup> See also Theoharous v. Fong, 256 F.3d 1219, 1227-28 (11th Cir. 2001)  
17 (dismissing control person claim against an individual who owned 39% of the company’s  
18 stock and could appoint four of nine directors); Aldridge v. A.T. Cross Corp., 284 F.3d  
19 72, 85 (1st Cir. 2002) (declining to impose Section 20(a) liability on controlling  
20 shareholders where there was no evidence that they were “actively participating in the  
21 decisionmaking processes of the corporation”).

22 <sup>5</sup> See also No. 84 Employer-Teamster Joint Counsel Pension Trust Fund v. Am.  
23 West Holding Corp., 320 F.3d 920, 945 (9th Cir. 2003) (explaining that whether  
24 defendant is a control person includes scrutiny of his or her participation in the  
25 company’s day-to-day operations and power to control corporate actions); see also 17  
26 C.F.R. § 230.405 (defining “control” as “the possession, direct or indirect, of the power to  
direct or cause the direction of the management and policies of a person, whether through  
the ownership of voting securities, by contract, or otherwise.”).

1 is GRANTED and the claims in the Second Amended Consolidated Class Action  
2 Complaint against defendant Pierce are hereby DISMISSED.

3  
4 DATED this 23rd day of September, 2009.

5  
6 

7 Robert S. Lasnik  
8 United States District Judge  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

**CERTIFICATE OF SERVICE**

I hereby certify that on November 30, 2009, I caused to be served a copy of the foregoing Brief of Appellant on the following person(s) in the manner indicated below at the following address(es):

**ORIGINAL:**

The Court of Appeals of the  
State of Washington  
Division I  
One Union Square  
600 University Street  
Seattle, WA 98101-4170

- U.S. Mail
- Facsimile
- E-mail
- Legal Messenger

**COPY:**

Attorneys for Gary Reys  
Jeffrey B. Coopersmith  
Christopher M. Huck  
DLA Piper US LLP  
701 Fifth Avenue, Suite 7000  
Seattle, WA 98104-7044  
jeff.coopersmith@dlapiper.com  
christopher.huck@dlapiper.com

- U.S. Mail
- Facsimile
- E-mail
- Legal Messenger

**COPY:**

Attorneys for Ronald Berninger  
Troy D. Greenfield  
Robert S. Mahler  
Deborah L. Carstens  
Bullivant Houser Bailey PC  
1601 Fifth Avenue, Suite 2300  
Seattle, WA 98101-1618  
troy.greenfield@bullivant.com  
bob.mahler@bullivant.com  
deborah.carstens@bullivant.com

- U.S. Mail
- Facsimile
- E-mail
- Legal Messenger

COPY:

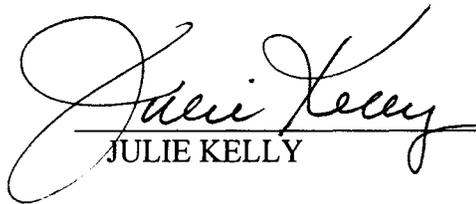
Attorneys for Ronald Berninger  
Charles P. Moure  
Dan Harris  
Harris Moure PLLC  
600 Stewart Street, Suite 1200  
Seattle, WA 98101  
charles@harrismoure.com

- U.S. Mail
- Facsimile
- E-mail
- Legal Messenger

COPY:

Attorney for Theresa A. Deisher  
Patrick Brown  
brownp@seattleu.edu  
Seattle, WA

- U.S. Mail
- Facsimile
- E-mail
- Legal Messenger

  
\_\_\_\_\_  
JULIE KELLY