No. 18-6164

In the
Supreme Court of the United States

JOHN LASCHKEWITSCH,

Petitioner,

v.

RELIASTAR LIFE INSURANCE COMPANY

Respondent.

PETITIONER'S RULE 44 PETITION FOR REHEARING FROM THE FOURTH CIRCUIT COURT OF APPEALS; FILED IN GOOD FAITH, FOR NO PURPOSE OF DELAY, AND WITH SUBSTANTIAL GROUNDS AND CONTROLLING PRECEDENTIAL EFFECTS

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January 10, 2019

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INTRODUCTORY STATEMENT FOR A PETITION FOR REHEARING

This Court and all below courts omitted U.S. Supreme Court, NC Supreme Court, unanimous U.S. Circuit Courts of Appeals precedent and NC law, which hold that ReliaStar must have brought its contest within its two-year contestable time period. Noteworthy, ReliaStar's March 22, 2013 contest (App. A),[1] was over thirteen months beyond two years from the policy's "February 16, 2010 Issue Date." (Pet. App. 4). Also omitted is U.S. Circuit Courts of Appeals precedents, which require that a motion for fees be filed within 0-14 days after judgment. But ReliaStar's fee motion was filed two days untimely. And ReliaStar filed no affidavit of market rates or bill of costs within 14 days after judgment, as required by EDNC Local Rule 54.1.

This Court also overlooked that insured Ben first consulted with a specialist "for possible ALS," which is the "least certain degree" of presumed ALS, on March 23, 2010, beyond a month after the policy was issued, delivered and placed in force. Omitted as well is that ReliaStar filed its contest beyond applicable NC statutes of limitation, accepted premium after notice and knowledge, breached its Agreement, and failed to plead Rule 9(b) particularity, inquire of received statements and prove due diligence and the element of *reliance* in support of its breach and fraud claims.

Moreover, neither this Court nor any court below reviewed ReliaStar's unfair claim settlement and unfair and deceptive trade practices under NC law. ReliaStar altered Ben's application, without his knowledge or consent, and failed to adhere to its Contract, Contestability and Payment of Premium General Provisions, effectuate a fair settlement, deny petitioner's claim within a reasonable time or act reasonably promptly upon claim communications. And ReliaStar committed UDTP violations.

[1] "DE"(district court); "Doc" (4th Cir.); "Pet.App."(Petition for Cert.); and "App." (herein).

REASONS FOR GRANTING A REHEARING AND REVERSING JUDGMENT

I. This Court, The NC Supreme Court, All U.S. Circuit Courts Of Appeals And NC Law Required A Contest During ReliaStar's Contestable Time

"The incontestable clause in a policy of insurance inures to the benefit of the beneficiary after the death of the insured as much as it inures to the benefit of the insured himself during his lifetime." See *Mutual Ins. Co.* v. *Hurni Co.*, 263 U.S. 167, 175-6 (S.Ct. 1923). "The rights of the parties under such an incontestable clause as the one contained in this contract do not become fixed at the date of the death of the insured." *Id.* at 177. "The provision plainly is that the policy shall be incontestable upon the simple condition that two years shall have elapsed from its date of issue; — not that it shall be incontestable after two years if the insured shall live, but incontestable without qualification and in any event." *Id.* We "are constrained to hold that it admits of no other interpretation [other] than that the policy became incontestable upon the sole condition that two years had elapsed." *Id.* at 178. "The instant case is not one in which there is resort to equity for cancellation of the policy during the life of the insured and no opportunity exists to contest liability at law. Nor is it a case where, although death may have occurred, action [was] brought to recover upon the policy, and equitable relief is sought to protect the insurer against loss of its defense by the expiration of the period after which the policy by its terms, is to become incontestable." See *Enelow* v. *New York Life Ins. Co.*, 293 U.S. 379, 384 (S.Ct.1935). "The plaintiff [here ReliaStar] had opportunity in [this] action at law to contest its liability, and before the policy by its terms became incontestable. A 'contest' within the purview of the policy contract has generally been held to mean a present contest in a [district] court, not a notice of repudiation or of a contest to be waged thereafter." *Am. Life Ins. Co.* v. *Stewart*, 300 U.S. at 212, n. 2, 3 (S.Ct. 1937).

Moreover, this Court affirmed the Fifth Circuit in *Northwestern Mutual Life Insurance Co.* v. *Pickering*, 293 F.496, 499 (5th Cir.), *cert. denied*, 263 U.S. 720 [44 S.Ct. 229, 68 L.Ed. 524] (1923). In *Pickering*, the Fifth Circuit held that "Under the terms of the policy now in question, the insurer's right to contest would have been lost, [here ReliaStar's], if [it] had not contested the policy by invoking judicial action to that end within two years from the date the policy took effect, [issue date], not from the date of execution of the policy, which is charged to have been procured by alleged false statements." 293 F. 496. So ReliaStar's "right to contest the policy" was "lost" since ReliaStar did not "invoke judicial action" by February 16, 2012; but, by its own volition, delayed its first contest until March 22, 2013. (App. A, attached).[2]

The NC Supreme Court holding in *American Trust Co.* v. *Ins. Co. of VA*, 173 N.C. 558, at 612-20 (App. B, attached; DE181-29), as cited by this Court and the NC Supreme Court, controls. See *American Life Ins. Co.* v. *Stewart*, 300 U.S. 203, n. 2 (S.Ct. 1937); *Chavis* v. *Southern Life Ins. Co.*, 347 SE2d at 427 (N.C.1986)(App. C). "The modern rule is that a life insurance policy containing a provision that it shall be incontestable after a specified time cannot be contested by the insurer on any ground not excepted in that provision." *Id.* (here, nonpayment of premium). Further, "the incontestable clause covers this defense of the bad health of the insured at the time of the delivery of the policy as well as false and fraudulent statements in the application and the policy and if this is not the legal effect of the clause, why insert it, except for the purpose of deceiving and misleading the insured?" *Id.* at 615-16.

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[2] Pursuant to *Hurni*, *Stewart*, *Enelow* and *Pickering*, ReliaStar had no "opportunity at law" or resort in equity to contest the policy and "lost" its right to "invoke judicial action." (Pet.Apps. 4, 5, p. 3; App. A). And N.C.G.S. 58-58-22(2) controls. *See* Pet.Cert., pp. 6, 7, 8.

Also, "the authorities are practically uniform in holding that an incontestable clause, which gives reasonable time for the insurance company [ReliaStar] to make investigation, is valid, and that it means what it says, and that is that after the time named in the clause has expired no defense can be set up against the collection of the policy, unless it comes within the excepted classes named in the clause itself, which in this case, [just as here], would be the nonpayment of premiums." *American Trust Co.,* N.C. at 615-16. (Emphasis added). "The practical and intended effect of the stipulation is to create a short statute of limitation in favor of the insured, *within which limited period the insurer must, if ever, test the validity of the policy.*" *Id.*, at 616-17. (Emphasis added). Moreover, "While fraud is obnoxious, and should justly vitiate all contracts, the courts should exercise care that fraud and imposition should not be successful in annulling an agreement to the effect that if cause be not found and charged within a reasonable and specific time [two years from the policy's issue date], establishing the invalidity of the contract of insurance should thereafter be treated as valid." *Id.* at 617. (Emphasis added). As further held by the North Carolina Supreme Court, "since the incontestability provision does not expressly permit the company to contest the policy on grounds of material misrepresentations by the insured beyond the two-year limit, ordinary rules of contract construction precludes the company, from asserting this defense[s]." See *Chavis* v. *Southern Life Ins. Co.*, 347 S.E.2d at 428 (N.C. 1986)(App. C)(citing *American Trust Co.* v. *Ins. Co. of Va.*)(App. B).[3] And this Court should follow these NC Supreme Court holdings.

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[3] *American Trust Co.* (App. B) has been cited by this Court and the Second, Fourth, Seventh, Eighth, Ninth, Tenth and D.C. Circuit Courts of Appeals. Upon rehearing, this Court should review contestability precedent from this Court and the NC Supreme Court, which is of a substantial and controlling effect under Rule 44.2. *See also* Pet.Cert., pp. 9-15.

The Fourth Circuit abused its discretion by not following its own precedent. In *Sutton* v. *American Health & Life Ins. Co.*, the court held that "The insurer has a statutory period in which to ascertain the facts and act thereon, and failing so to do it will not be heard to assert defenses precluded by a statute of incontestability." 683 F.2d at 96 (4th Cir. 1982)(N.C.G.S. §58-58-22(2)(two years); Pet.App. 3, p. 4)). As well, in *Provident Mutual Life Ins. Co.* v. *Parsons*, the court held that "...where the policy contains an incontestable clause, limiting the time during which the Company may contest its liability on the ground of fraud or misrepresentation to a relatively short period..." 70 F.2d 863, 866 (4th Cir. 1934). (Emphasis added).

In *Pruco Life Ins. Co.* v. *Wilmington Trust Co.*, "The court expressly rejected the argument that there could not have been a mutual rescission because the terms of the policy would have prevented unilateral rescission (specifically, because the contestable period had expired). The judgment of the district court is *affirmed.*" 721 F.3d 1(1st Cir. 2013); see *Wallach* v. *Aetna Life Ins. Co.*, ("If the two-year period, after which the policy became incontestable, except for nonpayment of premiums, ran for all purposes..., the answer set up no defense[s] and summary judgment was properly granted..."). 78 F. 2d 647, 648 (2d Cir. 1935). *See also Franklin Life Ins. Company* v. *Bieniek*, ("The great weight of authority supports the position that the insurer must at least disavow liability within the contestable period to be relieved — not necessarily by legal action, but some definite step..."). 312 F.2d at 368 (3rd Cir. 1962). And in *Scharlach* v. *Pacific Mutual Life Ins. Co.*, the Fifth Circuit held that "It is true that a clause in a life insurance policy making it incontestable after one year imports [a] contest by litigation, and that a mere denial or repudiation by the insurer of liability... is not a contest...," as here. 9 F.2d 317, 318 (5th Cir. 1925).

"The weight of authority is to the effect that contest, within the meaning of clauses of this kind, means some affirmative or defensive action taken in court." *Rose* v. *Mutual Life Ins. Co. of New York*, 19 F. 2d 280 (6th Cir. 1927). In *Columbian Nat'l Life Ins. Co.* v. *Wallerstein*, the Court held that "The incontestability clause is in the nature a statute of limitation and repose, and while conscious fraud practiced in inducing another to act, to his detriment, is extremely obnoxious, yet the law recognizes that there should be a limitation of time in which an action may be brought or a defense set up." 91 F.2d 351, 352 (7th Cir.1937), *cert. denied,* 302 U.S. 755, 58 S.Ct. 283, 82 L.Ed. 584; *Peake* v. *Lincoln Nat. Life Ins. Co.*, 15 F.2d 303 (8th Cir. 1926)(same)."The purpose of an incontestable clause is to annul all warranties and conditions that might defeat the right of the insured after the lapse of the stipulated time." *Button* v. *Connecticut Gen. Life Ins. Co.*, 847 F.2d at 588 (9th Cir. 1988), *cert. denied,* 488 U.S. 909, 109 S.Ct. 261,102 L.Ed.2d 250. ("A policy must be contested [before the expiration of said period"]). *Stewart* v. *Am. Life Ins. Co.*, 85 F.2d 791,792 (10th Cir. 1936). "Incontestability clauses function much like statutes of limitations. While they recognize fraud and all other defenses, they provide insurance companies with a reasonable time in which to assert such defenses, and disallow them thereafter." *American United Life Ins. Co.* v. *Martinez*, 480 F.3d at 1059 (11th Cir. 2007). Further, "The clause, in effect, if not in form, is a statute of limitations, established by convention, and like the statute is directed to remedies in court." *Densby* v. *Acacia Mutual* Life Ass'n, 78 F.2d at 205-06 (D.C. Cir. 1935).[4]

[4] U.S. Circuit Courts of Appeals contestability precedents required ReliaStar to contest the policy by February 16, 2012 (Pet.App. 4), but which was filed thirteen months untimely. (App. A). Therefore, ReliaStar's claims are barred by precedents from this Court, the NC Supreme Court, and all Circuit Courts of Appeals and should be reheard by this Court since such precedents are of a Rule 44.2 substantial and controlling effect. (Pet.Cert, pp. 12-15).

In addition to this Court, the NC Supreme Court and all U.S. Circuit Courts of Appeals holding that ReliaStar had to bring a court contest within two years from February 16 or 22, 2010 (Pet.Apps. 4,"Issue Date February 16, 2010;" 5, p. 3), North Carolina law, as promulgated by the NC State Legislature, required a contest by ReliaStar within two years from the Issue Date, as well.[5] In particular, N.C.G.S. 58-58-22(2)(Pet.App. 3, p. 4), yet unconsidered by any court, states, in pertinent part:

> Incontestability.–"A provision that the validity of the policy shall not be contested, except for nonpayment of premium, once it has been in force for two years after its date of issue..."

Here, the original February 16, 2010 policy was in force for two years from February 16, 2010 through February 16, 2012, over a month beyond Ben's January 15, 2012 death, since ReliaStar declared the policy paid through February 19, 2012 (Pet.Apps. 45, p. 4, "Premium Paid to: 02/19/2012;" and 51) and deposited premium on March 6, 2012 and on June 11, 2012. (Pet.Apps.12, 13). Nonpayment of premium does not statutorily apply since ReliaStar accepted premium beyond two years. And since ReliaStar admitted the policy was in force through 02/19/2012, "the validity of the policy cannot be contested," pursuant to North Carolina contestability law.

On rehearing this petition, this Court should review *Hurni*, *Enelow*, *Stewart*, *Pickering, Wallerstein and Button; American Trust Co.* and *Chavis* (Apps. B and C); U.S. Circuit Courts of Appeals contestability precedent, pp. 5-6, supra; and N.C.G.S. 58-58-22(2), which all require that ReliaStar bring its contest by February 16, 2012.

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[5] On February 12, 2010 ReliaStar approved Ben's application (Pet.App. 18), which was recorded and dated by Brantley, with AFG, Inc. (App. D; DE 91-1; Brantley Dep. 18:5-20:1, 21:8-25:5, 27:8-29:14; App. E). On February 16, 2010 ReliaStar issued the original policy. (Pet.App. 4). And on February 22, 2010 ReliaStar reissued another policy (Pet.App. 5) "per H/O error." Therefore, February 16, 2010 is the true policy Issue Date. (Pet.App. 4, pp. 8, 9).

II. ReliaStar Filed Its Fee Motion Two Days Untimely And Improperly

The district court entered judgment on May 28, 2014. (App. F; DE 141-1, 2). So ReliaStar's fee motion was due by June 11, 2014, the fourteenth day thereafter. Fed.R.Civ.P. §54(d)(2)(B)(i-iii)(Pet.App. 3, pp. 2, 3). But, ReliaStar untimely filed its fee motion on June 13, 2014. (App. G; DE 144), which the lower courts omitted. And ReliaStar did not file an affidavit of prevailing market rates to support its fee rates, as required by this Court's precedent. *Blum* v. *Stenson*, 465 U.S. 886, 888-96 (S.Ct. 1984). Neither did ReliaStar file a bill of costs by June 11, 2014, pursuant to EDNC Local Rule §54.1 and 28 U.S.C. §1920.[6] (Pet.App. 3, pp. 1, 6). See also *Taniguchi* v. *Kan P. Saipan, Ltd.*, U.S., 132 S.Ct. 1997, 1999-2000, 182 L.Ed.2d 903 (2012).

The Fourth Circuit abused its discretion by disregarding is own precedent. In *Brown & Pipkins, LLC* v. *SEIU,* the lower court held that "Rule 54(d) required the Union to submit a motion for attorneys' fees between 0-14 days *after* the district court issued its order." ("Rule 54 expressly conditions a motion for attorneys' fees on an entry of judgment"). "This the Union failed to do," just as ReliaStar failed to do. 846 F. 3d 716, 730 (4th Cir. 2017). In *Villoldo* v. *Castro Ruz*, the First Circuit held that "A motion for attorney's fees must be filed *no later than* 14 days after the entry of judgment." 821 F.3d 196, 204 (1st Cir. 2016). See also *Tancredi* v. *Met. Life Ins. Co.*, 378 F.3d 220, 227-28 (2d Cir. 2004)(same); *Walker* v. *Astrue*, 593 F. 3d 274, 279 (3rd Cir. 2010)(same); *United Industries, Inc.* v. *Simon-Hartley, LTD*, 91 F.3d 762, 764-6(5th Cir. 1996)(same); *Allen* v. *Murph*, 194 F.3d 722, 724 (6thCir. 1999)(same).

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[6] ReliaStar included costs in its fee motion, filed 16 days after judgment. But, ReliaStar did not file a required "bill of costs." And pursuant to EDNC Local Rule 54.1(a)(3), a bill of costs filed after 14 days from judgment "**shall constitute a waiver**..." (Pet.App. 3, p. 6).

"Neither exception applies here. The Plan missed the deadline under Rule 54(d)(2) and offers no reason for having done so," just as ReliaStar offered no reason either. *Bender* v. *Freed*, 436 F. 3d 747, 750 (7th Cir. 2006)(cited 42 times). "This rule requires the motion be made "no later than 14 days after the entry of judgment," Fed.R.Civ.P. 54(d)(2)(B)...*West* v. *Local 710, International Brotherhood of Teamsters Pension Plan*, 528 F. 3d 1082, 1087 (8th Cir. 2008). *See also Kona Enterprises, Inc.* v. *Estate of Bishop*, 229 F.3d 877, 889 (9th Cir. 2000)(same)(cited 1,471 times, including in *Brown & Pipkins, supra*, 846 F. 3d 716, 730 (4th Cir. 2017); *Quigley* v. *Rosenthal*, 427 F.3d 1232, 1236-8 (10th Cir. 2005)(same). See also App. H, attached.

The fourteen-day limit applies "[u]nless otherwise provided by ... order of the court..." *Tire Kingdom Inc.* v. *Morgan Tire & Auto, Inc.*, 253 F. 3d 1332, 1335 (11th Cir. 2001). Here, the lower court never provided a timely fee order. "The disposition of this case turns on whether the trial court erred in applying the fourteen-day filing requirement in the 1995 amendment to Rule 54 (d)(2)(B)." *Breiner* v. *Daka, Inc.*, No. 00-CV-1611 (D.C. Cir. 2002); *IPXL Holdings, LLC* v. *Amazon.com, Inc.*, 430 F.3d 1377, 1386 (Fed. Cir. 2005)(held: the lower court erred in enlarging the time).[7]

III. This Court Omitted That No Agreement Existed Between The Parties

First, ReliaStar's alleged agreement was not signed or dated and does not list petitioner as a party. Further, such agreement was not made effective by ReliaStar, submitted by petitioner or timely received by petitioner. (Pet.App. 7, pp. 1-8 of 8).

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[7] Since Fed.R.Civ.P. 54(d)(2)(B) and all U.S. Circuit Courts of Appeals require that a fee motion be filed within 0-14 days after the entry of judgment, which ReliaStar failed to do, the lower courts' judgments should be summarily reversed. And this Court, upon rehearing, is requested to review such precedents, including precedent from this Court, which is also of a Rule 44.2 substantial and controlling effect. *See* Pet.Cert., pp. 15-19.

"The reason for holding the instrument void is that it was intended that all the parties should execute it and that each executes it on the implied condition that it is to be executed by the others, and, therefore, that *until executed by all it is inchoate and incomplete and never takes effect as a valid contract...*," just as here. *Hilliard* v. *Thompson,* 81, N.C.App. at 409, 344 S.E.2d at 591-92 (1986)(App. I). So, ReliaStar's 8-page unsigned and undated Agreement is void, pursuant to NC law.

Second, on January 12, 2009 petitioner signed only a 4-page "Application for Appointment," which includes a required Checklist with no reference to or attached "Producer Agreement." (Pet.App. 8, p. 4 of 4, Section K, "General Agent Checklist").

Third, ReliaStar first produced its Producer Agreement within its motion for summary judgment (Pet.App. 7), beyond four years in the future (DE 83-6, Ex. U), which is "nugatory and void for indefiniteness," pursuant to North Carolina law. *Boyce* v. *McMahan,* 285 N.C. 730, 734, 208 S.E.2d 692, 695 (1974)(App. J); *Miller* v. *Rose*, 138 N.C.App. 582, 587-88, 532 S.E.2d 228, 232 (2000)(App. K)(citing *Boyce*).

Fourth, petitioner returned his 4-page "Application for Appointment," 1-page cover sheet and a 1-page copy of petitioner's Life and Health agent license, with a voided check, to AFG, which totaled six pages. (Pet.Apps. 8, 9; DE 181-3, 4). Then on January 22, 2010, Pam Lane, with AFG, marked "Urgent" and faxed five of the six pages, with her cover page, to licensing at "ING/ReliaStar/SLD" at fax number "877-788-5122." (Pet.App. 10, "Number of Pages: 6;" DE 181-5). This proves that petitioner did not receive, sign, date or submit an 8-page Agreement to ReliaStar.

Fifth, petitioner is NOT listed by name as the "Party B. Producer:" or as any other "Party." (Pet.App. 7, p. 1 of 8, 1st ¶). Therefore, petitioner is NOT a party to an Agreement "between the following parties." (Pet.App. 7, p. 1 of 8, "1. Parties").

Sixth, there is no "effective date" within a "Producer's ING Life Companies Application for Appointment and Contract" and no application so named exists or was ever received by petitioner. And petitioner did not sign or date any page, is not an "individual or legal entity" in the "Agreement" and petitioner's "Address: Fax: E-mail:" are not recorded in the alleged "Agreement." (Pet.App. 7, pp. 1 and 8 of 8).

Seventh, neither party signed page 8 of 8 of the alleged "Agreement," such as to be bound by such an "Agreement." (Pet.App. 7, p. 8 of 8; "Company: (Signature), Producer: (Signature))." See *Hilliard* v. *Thompson* (App. I), supra. As a result, the parties did not "assent to the same thing in the same sense and their minds meet as to all terms," see *Normile* v. *Miller*, 313 N.C. 98, 103, 326 S.E.2d 11, 15 (1985); or "show the essential elements of a valid contract," see *Smith* v. *Joyce,* 214 N.C. 602, 604, 200 S.E. 431, 433 (1939); and "`the *intent* and *obligation* of the parties,'" see *Rape* v. *Lyerly,* 287 N.C. 601, 615, 215 S.E.2d 737, 746 (1975).[8] (Emphasis added).

IV. This Court Omitted That ReliaStar Breached Its Producer Agreement

On March 21, 2013, ReliaStar terminated an alleged "Employee Benefits Agent Contract." (Pet.App. 6; DE 95-187). But petitioner was neither an employee of ReliaStar nor a party to such Contract. ReliaStar breached its Agreement again by failing to file a motion to stay or to compel arbitration. (Pet.App. 7, pp. 6, 7, Section IX, General Provisions, D. Arbitration). Moreover, authority over the agreement is effective only when "Each party represents that the person signing this Agreement on its behalf has the authority and capacity to bind the party." (Pet.App. 7, p. 7 of 8, Section IX(I)). However, no party signed the agreement such as to bind either party.

[8] Upon rehearing this petition, the Court is requested to review further NC Supreme Court precedent; no evidence of a received, signed, dated, submitted, mutual or effective Agreement; and ReliaStar's breaches of its alleged Agreement. *See* Pet.Cert., pp. 20-25.

V. This Court Disregarded Insured Ben's March 23, 2010 First Consult With An ALS Specialist "For Possible ALS..."

Insured Ben was **NOT** told that he had ALS at UCSF or diagnosed with ALS by doctor Meltzer or neurologists Van Tran and Charya through January 22, 2010.[9] Rather, on January 22, 2010 Ben had "full power and normal tone in all four limbs, was able to toe-walk, heel-walk and tandem walking... had no abnormal involuntary movements, fasciculations" and was referred to ALS specialist Richard Bedlack at a North Carolina ALS "Certified Center of Excellence" to "make that determination. Wife understands this." (Pet.App. 30, pp. 1-5; Pet.App. 37, p. 5)(emphasis added).

And since fasciculations and muscle weakness are the first signs of ALS (Pet. App. 31, p. 1), Ben did not have ALS on January 22, 2010. Nor did insured Ben have probable, probable lab-supported or definite ALS on March 23, 2010 since he was in "consultation for possible ALS..." with specialist Bedlack. (App. O, 1st sentence).

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[9] See Apps. L, ¶s 1-8; M, p.1; Pet.Apps. 20, "research only" participation; 21, ¶s 17-21; 22, p. 7 of 8, excerpt; 23, California's "ALS Certified Centers of Excellence," which does not include UCSF; 24, Meltzer Dep. 62:7-64:14; 26, questions 3, 8, 52; 27, Van Tran consult; 28, Van Tran Dep. 46:6-25; 29, ¶s 2-12; 30, pp. 1-4, Charya's January 22, 2010 consult with Ben, p. 5, "neuro eval pending...to make that [decision];" 31, p.1, 3rd ¶, the signs of ALS are "weakness of affected muscles and visible fasciculations," the four diagnostic ALS categories are 'Clinically definite,' 'Clinically probable,' 'Clinically probable-Laboratory supported,' and 'Clinically possible;' 32, "Diagnosis," 2nd ¶; 33, "there is no specific confirmation test" and often "false-positive diagnoses;" App. N, "the median time from onset to ALS diagnosis is 11 months;" App. O, the first sentence of Ben's March 23, 2010 consult with specialist Bedlack "for possible ALS...;" 34, the ALS diagnosis categories are "possible, probable lab-supported, probable and definite;" 35, ReliaStar's March 16, 2010 receipt of paid premium; 36, ALS is characterized by progressive weakness and is "yet poorly understood;" 37, p. 4, Story of Robert Dawkins' three years of "inaccurate diagnoses," p. 5; 38, Affidavit of Jerry Dawson, ¶s 3-13; 39, National Institutes Of Health, "No test can provide a definite diagnosis of ALS" and "patients should always obtain a second neurological opinion;" 40, there are multiple differential diagnoses of ALS; App. P, "referral to a tertiary center can have a significant positive impact...;" App. Q, the story of Terry Herring's delayed ALS diagnosis; App. R, p. 2, Fayetteville resident coach Jeff Capel Jr.'s diagnosis of ALS "by doctors at Duke," just like insured Ben; and 43, lines 19-20, Ben's diagnosis of ALS in "late March, 2010." This Court should review Apps. L-R, Pet.Apps. 20-43, and pp. 25-28 in petitioner's petition for a writ.

VI. This Court Omitted That ReliaStar's Contest Was Beyond NC Statutes Of Limitation And NC Supreme Court Limitations Precedent

ReliaStar did not attach Ben's March 15, 2010 delivery amendment (Pet.App. 11) and September 22, 2009 exam (Pet.App. 17) to the policy (Pet.App. 5) and thus cannot contest either. (Pet.App. 5, p. 3, General Provisions, "The Contract," 1st ¶). And Brantley, with AFG, admitted dating and answering Ben's initial application questions and petitioner's Agent's Report on January 22, 2010. See p. 7, n. 5, supra. Also, no other application or medical questions are attached to the policy. (Pet.App. 5, application). Thus, the last dated document attached to the policy is January 22, 2010. And the NC three year statutes of limitation expired on January 22, 2013.[10]

"It is a well-settled rule...that the [3-year] statute of limitations for a breach or fraud claim is not tolled pending the injured party's discovery of the breach...'a plaintiff's lack of knowledge concerning his claim does not postpone the running of the statute of limitations.'" *Pearce* v. *N.C. State Highway Patrol Voluntary Pledge Committee,* 312 S.E. 2d 421, 425-26 (N.C. 1984)(App. S)("Statutes of limitations are inflexible and unyielding... They operate inexorably without reference to the merits of [ReliaStar's] cause[s] of action"); *Shearin* v. *Lloyd,* 246 N.C. 363, 98 S.E. 2d 508, 514 (1957)(App. T); *Lewis* v. *Shaver,* 236 N.C. 510, 73 S.E.2d 320, 321-22 (1952) (App. U); and *Coppersmith* v. *Ins. Co.,* 222 N.C. 14, 17, 21 S.E.2d 838, 839 (1942). *See* Pet.App. 3, p. 3, N.C.G.S. §§1-52(1), (9). Thus, ReliaStar's breach of contract and fraud claims are statutorily barred, pursuant to NC Supreme Court precedent.

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[10] On January 12, 2010 petitioner signed an "Application for Appointment" (Pet.App. 8), which limitations period expired on January 12, 2013. ReliaStar's March 22, 2013 contest (App. A) was over three months and three years beyond the dates in petitioner's application and Ben's application. This Court is requested to review and rehear NC law regarding three year applicable statutes of limitation, which bar ReliaStar's claims. (Pet.Cert., pp. 35-37).

VII. This Court Omitted ReliaStar's Failure To Plead Rule 9(b) Particularity

ReliaStar cannot prove particularity of time, place, or where over its undated and unsigned Agreement, which was not received or submitted by petitioner (Pet. Apps. 7-10), or over Ben's application since Brantley admitted dating and answering Ben's two application medical questions, p. 7, n. 5, supra. Further, ReliaStar cannot contest Ben's unattached delivery amendment and exam. (Pet.Apps. 5, 11, 17). So, ReliaStar cannot plead or prove sufficient Rule 9(b) particularity for its fraud claim.

VIII. This Court Omitted That ReliaStar Failed To Inquire Of Statements

ReliaStar did not inquire of a statement by Ben's spouse that Ben might be ill before issuing the policy (App. V, last three lines) or MIB statements from Mutual of Omaha and North American reporting MIB Codes 200#ZN and 200#EN (Pet.App. 48), which it admitted to represent a "neurological disorder." (App. W, Nelson Dep. 49:2-54:19,61:2-63:11,64:1-68:9,71:11-73:15,74:22-76:8,86:3-89:12,93:13-96:25,105:1-108:3,111:24-114:24 and 116:5-23). See *Columbia National Life Ins. Co.* v. *Rodgers*, 116 F.2d 705 (10th Cir. 1940), *cert. denied.* (App. X).[11] Nor did ReliaStar inquire of notice that Ben had been declined for coverage (Pet.Apps. 17, 49); "Significant MIB codes have been received" (Pet.App. 48, p. 2); "other options" available to check on other stated insurance applications (App. W, Nelson Dep. 40:7-41:4, 41:21-43:12, 96:13-25, 143:5-144:1); with its Application Part 2 or paramedical exam statements from Ben (App. W, Nelson Dep. 47:16-48:1, 60:3-63:11, 72:13-76:8; Pet.App. 53) or notice from Mutual of Omaha of having 5 years of Ben's VA records. (Pet.App. 49).

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[11] (Citing *Supreme Lodge K.P.* v. *Kalinski,* 163 U.S. 289, 16 (S.Ct.1896)). And this Court should rehear ReliaStar's failure to plead particularity, inquire of statements received, and prove due diligence and *reliance* over its claims. *See* App. W, Nelson Dep. 81:1-82:8, 108:16-110:18, 125:1-129:8, 130:12-141:5, 147:18-153:10, 157:1-159:18, 174:12-180:17, 190:9-195:18, 195:23-204:11; and NC Supreme Court precedent. (Pet.Cert., pp. 31-35; & n. 12, below).

IX. This Court Omitted That ReliaStar Accepted Premium After Notice And Alleged Knowledge, Which Applies To Waiver And Estoppel

On February 27, 2012 ReliaStar received notice of Ben's death. (Pet.App. 44, call number 295 from petitioner's phone number 910 286-8008; Pet.App. 4, p. 2, ¶ 4, "Customer Contact Center, 1-877-886-5050). And in March, 2012 ReliaStar began alleging knowledge. (Pet.Apps. 14-16, and 47-50). Thereafter, on March 6, 2012 and on June 11, 2012 ReliaStar accepted and deposited premium. (Pet.Apps.12, 13).[12]

X. This Court Omitted ReliaStar's Unfair Claim Settlement And Unfair And Deceptive Trade Practices

This Court should review petitioner's writ, pp. 37-40 and DE 181-2, ¶s 112-133 (EDNC)(App. Z), which prove that ReliaStar committed unfair claim settlement and UDTP violations in relation to N.C.G.S. §§58-63-15(11)(a), (b), (e), (f), (i) and 75-1.1.

CONCLUSION

Based on the foregoing, judgments of the below courts should be summarily **REVERSED** and the policy proceeds trebled with interest **AWARDED** petitioner.

This the 10th day of January, 2019

Respectfully submitted,

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[12] See *Northern Assurance Co.* v. *Grandview Building Assn.*, 183 U.S. 308, 311 (S.Ct. 1902); *Phoenix Life Ins. Co.* v. *Raddin*, 120 U.S. 183, 194-96 (S.Ct. 1887); See also *Swartzberg* v. *Reserve Life Ins. Co.*, 113 S.E.2d 270, 277-78 (1960) 252 N.C. 150 ("As indicated, with reference to estoppel and waiver, the burden of proof was on the defendant [petitioner] to show that plaintiff [ReliaStar] had paid claims or accepted premiums after it acquired such knowledge or notice"); *Brooks* v. *Hackney*, 329 N.C., 174, 404 S.E.2d at 859 (1991)("A party will not be allowed to accept benefits which arise from certain terms of a contract and at the same time deny the effect of other terms of the same agreement"); and *United States Life Ins. Co. in the City of New York* v. *Blumenfeld,* 92 A.D.3d 487,488-90 (2012) 938 N.Y.S.2d 84 (App. Y). So, ReliaStar waived its right to contest or rescind the policy, which calls for summary REVERSAL by this Court.

Additional material from this filing is available in the Clerk's Office.