

No. 18-_____

**In the
Supreme Court of the United States**

JOHN LASCHKEWITSCH,

Petitioner,

v.

TRANSAMERICA LIFE INSURANCE COMPANY

Respondent.

**ON PETITION FOR A WRIT OF CERTIORARI, OR
SUMMARY REVERSAL ON THE MERITS, TO THE
FOURTH CIRCUIT COURT OF APPEALS**

John Laschkewitsch
Petitioner *pro se*
1933 Ashridge Drive
Fayetteville, NC 28304
(910) 286-8008

June 9, 2018

QUESTIONS PRESENTED FOR REVIEW

1. Whether Petitioner's constitutional due process rights under the Fourteenth Amendment were violated with compelled arbitration proceedings in Los Angeles, California since Petitioner never availed himself within California, had no contact in California, was not present in California prior to the coerced arbitration hearing, and because every service of process filed by Transamerica and the arbitrator were insufficient and/or untimely pursuant to the California Arbitration Act ("CAA")?

2. Whether arbitrability exists over a 4-page Sales Contract, with no arbitration provision or the term arbitration on any page, and such Contract can be linked to a dispute resolution clause within an Independent Producer Contract first received by Petitioner in Transamerica's arbitration demand, and which is not signed or dated by either party, was not made effective, and does not record Petitioner as a party?

3. Whether procedural and substantive unconscionability are present over the adhesive Producer Contract, inequitable party positions, unfair, unequal, and one-sided venue, discovery, and arbitral proceedings, and precedent with the American Arbitration Association, applying California law, as determined applicable by the arbitrator, under 9 U.S.C. § 2 and *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1264-1294 (9th Cir. 2005)(enbanc); and Transamerica induced arbitration by fraud?

4. Whether the arbitrator manifestly disregarded the same laws he determined applicable, failed to draw the essence of his award from any contract, was partial by not hearing all of Petitioner's defenses or any counterclaims, and violated 9 U.S.C. §§ 10(a)(1), (2), (3), and/or (4), and the lower courts erred by disregarding the same?

CORPORATE DISCLOSURE STATEMENT

All parties appear in the caption of the case on the cover page.

Under Rule 29.6, Petitioner is not incorporated, has no incorporated business, and there is no parent or publicly held company owning 10% or more of stock in a corporation owned by Petitioner.

TABLE OF CONTENTS

Questions Presented for Review.....	i
Corporate Disclosure Statement.....	ii
Table of Contents.....	iii
Index to Appendices.....	iv
Table of Cited Authorities.....	vii
Constitutional Amendment, Codes, Rules, and Statutes.....	xiii
Other Authorities.....	xiv
Opinions Below and Jurisdiction.....	1
Statutes and Constitutional Provisions Involved.....	1
Statement of the Case.....	2
A. Introduction.....	2
B. Summary of the Case.....	3
REASONS FOR GRANTING THE PETITION.....	7
I. The arbitrator did not have specific or personal jurisdiction over Petitioner pursuant to this Court's precedent.....	7
II. Arbitrability does not exist with an alleged contract first received with Transamerica's arbitration demand and no <u>advance agreement</u> , <u>arbitration</u> <u>provision</u> , or <u>mutual consent</u> pursuant to precedent from this Court, the NC Supreme Court, and the Fourth Circuit.....	17
III. Transamerica's March 31, 2014 service of its dispute resolution clause and the hearing process were unconscionable and induced by fraud.....	25

IV. The arbitrator knowingly violated 9 U.S.C. §§ 10(a)(1), (2), (3), and (4).....	28
A. The arbitrator's award was procured by fraud, corruption, and/or undue means.....	28
B. The arbitrator was evidently partial to Transamerica.....	29
C. The arbitrator was guilty of misconduct in refusing to hear evidence pertinent and material to the controversy, pursuant to precedent from this Court, the NC Supreme Court, the California Supreme Court, and unanimous U.S. Circuit Courts of Appeal.....	31
D. The arbitrator so imperfectly executed his power such that a mutual, final, and definite award upon the <u>subject-matter submitted</u> was not made.....	37
V. The arbitrator did not draw the essence of his award from any contract.....	38
VI. The arbitrator knowingly and manifestly disregarded the same laws that he first determined to be applicable in his award.....	39
CONCLUSION.....	40
PROOF OF SERVICE.....	41

INDEX TO APPENDICES

APPENDIX 1: The Fourth Circuit's erroneous affirmation

APPENDIX 2: The district court's Rules 60(a), 60(b)(4) erroneous motion denial

APPENDIX 3: The district court's erroneous confirmation

APPENDIX 4: The arbitrator's insufficiently served award

APPENDIX 5: Constitutional Amendment Fourteen, U.S. Codes, Federal Rules,

NC General Statutes, California Arbitration Act Codes, and AAA Rule 57

APPENDIX 6: Petitioner's April 13, 2009 4-page Sales Contract

APPENDIX 7: The incontestable policy contract; issued on August 12, 2009

APPENDIX 8: Transamerica's March 31, 2014 "Independent Producer Contract"

APPENDIX 9: Transamerica's admission; p. 2, ¶ 6

APPENDIX 10: Transamerica's insufficient service of process by First-Class Mail

APPENDIX 11: Ben's "Application Part 2 –Health History"

APPENDIX 12: EMSI's submission of Ben's "Application Part 2"

APPENDIX 13: Ben's "Application Part 1"

APPENDIX 14: Proof that "Application Part 1" only determined Ben's rate class
for a preferred rate and includes no health question

APPENDIX 15: Arbitrator's promised order to determine Petitioner's defenses of
arbitrability, jurisdiction, unconscionability, and the admissibility of evidence

APPENDIX 16: Arbitrator's official notice to determine Petitioner's counterclaims

APPENDIX 17: Arbitrator's granting of a seven calendar day extension for
Petitioner to file his counterclaim fee

APPENDIX 18: AAA Director's notices and guidance that Petitioner could select
his own counterclaim fee, up to \$65,000, and corresponding counterclaim amount

APPENDIX 19: Petitioner's chosen counterclaim amount and counterclaim fee

APPENDIX 20: The AAA Director's bill for fees from Transamerica, not Petitioner

APPENDIX 21: Arbitrator's order to apportion arbitration fees "by way of further
order or award"

APPENDIX 22: Arbitrator's order granting Transamerica's Rule 57 motion

(Remedies for Non Payment) and closing the hearing before "apportioning fees by way of further order or award," as promised by his order and affirmation

APPENDIX 23: Petitioner's AAA "Affidavit for Waiver of Fees"

APPENDIX 24: Arbitrator's insufficient service of his award by electronic mail

APPENDIX 25: Transamerica's untimely service of its petition to confirm

APPENDIX 26: Crump's July 23, 2009 receipt of Ben's Application Part1 and authorization to draft premiums monthly

APPENDIX 27: Petitioner's Production Requests 1-16

APPENDIX 28: Arbitrator's order that Transamerica produce Requests for Production numbers 1, 2, 3, 6, 10, and 16

APPENDIX 29: Transamerica's responses of "nothing further to produce"

APPENDIX 30: Affidavit of Scott Laschkewitsch

APPENDIX 31: North Carolina's "ALS Certified Centers of Excellence"

APPENDIX 32: Pub Med/Medline abstract; "Amyotrophic lateral sclerosis: definition and diagnostic/classification criteria"

APPENDIX 33: Pub Med/Medline abstract; "Amyotrophic lateral sclerosis: considerations on diagnostic criteria"

APPENDIX 34: Ben Laschkewitsch's obituary, lines 19-20

APPENDIX 35: Pub Med/Medline abstract; "Moving toward a predictive and personalized clinical approach in [ALS]: novel developments and future directions in diagnosis, genetics, pathogenesis and therapies"

TABLE OF CITED AUTHORITIES

	Page(s)
<i>AT&T Technologies Inc. v. Communications Workers of America</i> ,	
475 U.S. at 649, 651 (S.Ct.1986).....	20, 22, 28
<i>Allied-Bruce Terminix Cos. v. Dobson</i> ,	
513 U.S. 265, 271 (1995).....	20, 21
<i>American Life Insurance Co. v. Stewart</i> ,	
300 U.S. 203 at n. 1, n. 3 (S.Ct. 1937).....	32
<i>American Trust Co. v. Insurance Co.</i> ,	
173 N.C. 558 at 612-620.....	32, 33
<i>American United Life Ins. Co. v. Martinez</i> ,	
480 F.3d at 1059 (11th Cir. 2007).....	34
<i>Amex Life Assurance Co. v. Superior Court</i> ,	
14 Cal. 4th 1231 (Cal. S.Ct. 1997).....	34
<i>Asahi Metal Industry Co. v. Superior Court of Cal., Solano Cty.</i> ,	
80 U.S. 102, 105, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987).....	11, 12
<i>Boyce v. McMahan</i> ,	
285 N.C. 730, 734, 208 S.E.2d 692, 695 (1974).....	22, 24
<i>Bremen v. Zapata Off-Shore Co.</i> ,	
407 U.S. 1, 15 (1972).....	9
<i>Brenner v. The Little Red School House, Lt'd</i> ,	
302 N.C. at 213, 274 S.E.2d at 210.....	25

Burger King Corp. v. Rudzewicz,

471 U.S. 462, 472 (S.Ct. 1985).....9, 11, 12, 13, 14

Button v. Connecticut General Life Ins. Co.,

847 F.2d at 588 (9th Cir. 1988).....34

Charles Holmes Mach. Co. v. Chalkley,

143 N.C. 181, 183, 55 S.E. 524, 525 (1906).....23

Chavis v. Southern Life Insurance Co.,

347 SE 2d at 427-8 (N.C. 1986).....33

Clay v. United States,

537 U.S. at 527, 123 S.Ct. 1072, 155 L.Ed.2d 88 (2003).....19

Columbian Nat'l Life Ins. Co. v. Wallerstein,

91 F.2d 351, 352 (7th Cir.1937).....34

D & R Const. Co., Inc. v. Blanchard's Grove,

193 N.C. App. 426, 667 S.E.2d 305, 307 (2008).....23

Daimler Ag v. Bauman,

134 S. Ct. 746, 767 (S.Ct. 2014).....13, 16

Dean Witter Reynolds Inc. v. Byrd,

470 U.S. 213, 219-20 (S.Ct. 1985).....20, 22

Densby v. Acacia Mutual Life Ass'n,

78 F. 2d at 205, 6 (D.C. Cir.1935).....34

Dibble v. Reliance Life Ins. Co.,

170 at pp. 208-09 (Cal.1915).....33, 34

Doctor's Associates, Inc. v. Casarotto,

517 U.S. 681, 687, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996).....26

Enelow v. New York Life Ins. Co.,

293 U.S. 379, 384-5 (S.Ct. 1935).....33

Franklin Life Ins. Company v. Bieniek,

312 F. 2d at 368 (3rd Cir. 1962).....34

Goeckel v. Stokely,

236 N.C. 604, 73 S.E.2d 618, 620 (1952).....23

Goodyear Dunlop Tires Operations, SA v. Brown,

131 U.S. 2846 at 2851 (S.Ct. 2011).....13

Hanson v. Denckla,

357 U.S. 235, 253 (1958).....10, 12, 14

Helicopteros Nacionales de Colombia, S. A. v. Hall,

466 U.S. 408, 414 (1984).....11, 13, 15

Hilliard v. Thompson,

81 N.C. App. 404, 409, 344 S.E.2d at 590-91.....24

Howsam v. Dean Witter Reynolds, Inc.,

537 U.S. 79, 83, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002).....22

International Shoe Co. v. Washington,

326 U.S., at 319.....9, 10, 11, 14, 27, 29

Keeton v. Hustler Magazine, Inc.,

465 U.S. 770, 774 (1984).....10, 14

<i>Kulko v. Superior Court of Cal., City and County of San Francisco,</i>	
436 U.S. 84, 93, 98 S.Ct. 1690, 56 L.Ed.2d 132 (1978).....	15
<i>Mastrobuono v. Shearson Lehman Hutton, Inc.,</i>	
514 U.S. 52 at 57-58, n. 9 (S.Ct. 1995).....	19, 20, 22
<i>McGee v. International Life Insurance Co.,</i>	
355 U.S. 220, 222-223 (1957).....	10
<i>Metzinger v. Manhattan Life Ins. Co.,</i>	
[(1969) 71 Cal.2d 423, 428-429 (78 Cal. Rptr. 463, 455 P.2d 391)].....	34
<i>Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,</i>	
473 U.S. 614, 626 (1985).....	19, 20, 21
<i>Morgan Stanley Capital Group Inc. v. Public Util. Dist. No. 1 of Snohomish Cty.,</i>	
554 U.S. 527, 547, 128 S.Ct. 2733, 171 L.Ed.2d 607 (2008).....	26
<i>Murray v. United Food & Commercial Workers Int'l Union,</i>	
289 F.3d 297, 302 (4th Cir.2002).....	17, 25
<i>Mutual Life Ins. Co. of New York v. Hurni Packing Co.,</i>	
263 U.S. 167, 44 S.Ct. 90, 68 L.Ed. 235, 31 A.L.R. 102.....	33
<i>Nagampa v. MailCoups, Inc.,</i>	
469 F.3d 1257, 1264-1294 (9th Cir. 2005)(enbanc).....	5, 27, 29
<i>National Equipment Rental, Ltd. v. Szukhent,</i>	
375 U.S. 311 (1964).....	9
<i>New England Mutual Life Ins. Co. v. Gillette,</i>	
171 F.2d 500 (2nd Cir. 1948).....	34

New York Life Ins. Co. v. Hollender,

(1951) 38 Cal.2d 73, 77-79 [237 P.2d 510].....34

Normile v. Miller,

313 N.C. 98, 103, 326 S.E.2d 11, 15 (1985).....23

Northwestern Mutual Life Ins. Co. v. Pickering,

293 F.496, 499 (5th Cir.) cert. denied,

263 U.S. 720 [44 S.Ct. 229, 68 L.Ed. 524] (1923).....33

Parker v. Glosson,

182 N.C. App. 229, 641 S.E.2d 735, 737 (2007).....22

Peake v. Lincoln National Life Ins. Co.,

15 F.2d 303 (8th Cir.).....34

Pearce v. N.C. State Highway Patrol Voluntary Pledge Comm.,

312 S.E. 2d 421, 425-26 (N.C. 1984).....35

Picot v. Weston,

780 F. 3d 1206, at 1211-15 (9th Cir. 2015).....29

Provident Mut. Life Ins. Co. v. Parsons,

70 F.2d 863, 866 (4th Cir. 1934).....34

Rose v. Mutual Life Ins. Co. of New York,

19 F. 2d 280 (6th Cir. 1927).....34

Scharlach v. Pacific Mutual Life Ins. Co.,

9 F. 2d 317, 318 (5th Cir.1925).....34

Shaffer v. Heitner,

433 U.S. 186, 218 (1977) (STEVENS, J., concurring in judgment).....9

Slaughter v. Swicegood,

162 N.C. App. 457, 461, 591 S.E.2d 577, 581 (2004).....23

Steelworkers v. Warrior & Gulf Nav. Co.,

363 U.S. 574 at 583, n. 7 (S.Ct. 1960).....20, 22

Stewart v. American Life Ins. Co.,

85 F.2d 791,792 (10th Cir.1936).....34

Stolt-Nielsen SA v. Animal Feeds International,

559 U.S. at 681, 130, 1758 (S.Ct. 2010).....21

Supak & Sons Mfg. Co. Inc. v. Pervel Industries, Inc.,

593 F. 2d at 137 (4th Cir. 1979).....20

Sutton v. American Health & Life Ins. Co.,

683 F. 2d at 96 (4th Cir. 1982).....33

Tillman v. Commercial Credit Loans, Inc.,

655 SE 2d 362 at 371 (N.C. 2008).....25

Travelers Health Assn. v. Virginia,

339 U.S. 643, 647 (1950).....10

United Steelworkers of Am. v. Warrior & Gulf Nav. Co.,

363 U.S. 574, 582, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960).....20, 22

Velez-Gomez v. SMA Life Assurance Co.,

8 F.3d 873, 875-76 (1st Cir. 1993).....34

<i>Volt Inform. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.,</i>	
489 U.S. 468, 475-476 (1989).....	20, 22
<i>Walden v. Fiore,</i>	
134 U.S. 1115, 1121 (S.Ct. 2014).....	13, 15, 16
<i>Whiteside v. Teltech Corp.,</i>	
940 F.2d 99,102 (4th Cir. 1991).....	26
<i>Wilson v. Crab Orchard Dev. Co.,</i>	
276 N.C. 198, 171 S.E.2d 873, 884 (1970).....	35
<i>World-Wide Volkswagen Corp. v. Woodson,</i>	
444 U.S. 286, 297 (1980).....	9, 11, 13

**CONSTITUTIONAL AMENDMENT, U.S. CODES, NC GENERAL
STATUTES, CAA CODES, AND RULES**

United States Constitutional Amendment Fourteen.....	9, 13, 14
9 United States Code § 2.....	2, 25, 26, 27
9 United States Code § 10(a)(1).....	28, passim
9 United States Code § 10(a)(2).....	28, passim
9 United States Code § 10(a)(3).....	28, passim
9 United States Code § 10(a)(4).....	28, passim
Federal Rule of Civil Procedure 4(k)(1)(A).....	16
N.C. Gen. Stat. § 1-52(1).....	16, 35
N.C. Gen. Stat. § 1-52(9).....	16, 35
N.C. Gen. Stat. § 1-52(16).....	35
N.C. Gen. Stat. § 25-2-207.....	20

N.C. Gen. Stat. § 58-3-1.....	22, 32
N.C. Gen. Stat. § 58-58-22(2).....	3, 31
CCP § 1282.2.....	28, 30
CCP § 1282.2(a)(F).....	40
CCP § 1282.2(d).....	40
CCP § 1282.6(a).....	28, 39
CCP § 1283.05.....	28, 39, 40
CCP § 1283.1(b)(2).....	28, 30, 39
CCP § 1283.4.....	40
CCP §1283.6.....	6, 16, 39
CCP §1284.3(a).....	6, 39
CCP § 1284.3(b)(1).....	6
CCP § 1284.3(b)(3).....	6
CCP § 1284.3(b)(4).....	6
CCP § 1284.3(c).....	6
CCP § 1287.2.....	6, 31
CCP § 1288.4.....	6, 16
CCP §1290.4(b)(2).....	3, 6, 8, 16, 17, 28, 39

OTHER AUTHORITIES

G. Wilner, 1 Domke on Commercial Arbitration

§ 4:04, p. 15 (rev. ed. Supp. 1993).....20, 22

Twitchell, The Myth of General Jurisdiction,

101 Harv. L.Rev. 610, 628 (1988).....11

American Arbitration Association Rule 57.....	5, 19, 38
Couch, Vol. 8, § 2155b; 18 Couch et al., § 72:71 (2d ed. rev. vol. 1983).....	33
1A John A. Appleman & Jean Appleman, <i>Insurance Law and Practice</i> § 332 (rev. vol. 1981).....	33

PETITION FOR A WRIT OF CERTIORARI

John Laschkewitsch petitions for a writ of certiorari to review the award of the arbitrator, which was improperly and incorrectly confirmed by the district court and erroneously affirmed by the Fourth Circuit Court of Appeals.

Opinions Below

A. Fourth Circuit Court of Appeals, Case Number 17-1950 affirmation, dated March 12, 2018. (Appendix 1).

B. Eastern District of North Carolina, Case Number 5:14-CV-0632-D, denial of Rule 60(a), 60(b)(4) motions, dated 11 October, 2017. (Appendix 2).

C. Eastern District of North Carolina, Case Number 5:14-CV-0632-D, confirmation order and judgment, dated 21 September, 2016. (Appendix 3).

D. American Arbitration Association, Case Number 1-14-0000-078, Final Award, dated June 6, 2016 and served electronically on June 7, 2016. (Appendix 4).

Jurisdiction

The Fourth Circuit Court of Appeals entered judgment on March 12, 2018 (Appendix 1). This Court has jurisdiction under 28 U.S.C. § 1254(1).

Constitutional And Statutory Provisions Involved

Interpretation of the due process element of the Fourteenth Amendment to the United States Constitution is involved, as are 9 United States Codes §§ 10(a)(1), 10(a)(2), 10(a)(3), and 10(a)(4), North Carolina General Statutes, and Codes of the California Arbitration Act (CAA). See APPENDIX 5, pp. 1-9.

STATEMENT OF THE CASE

A. INTRODUCTION

This case regards: (1) applications within a policy issued on August 12, 2009, which became incontestable on August 12, 2011; (2) a Sales Contract, completed and signed on April 13, 2009 and submitted to Crump, in Pennsylvania, on April 14, 2009, which does not include an arbitration provision or the term arbitration, and became barred from any contest on April 13, 2012 by NC's three year statute of limitations; and (3) an alleged Producer Contract, which first existed on March 31, 2014 with printing by Misty A. Murray on her firm's watermarked paper, from an electronic source, and which is not dated or signed, does not record Petitioner as a party with Transamerica, was not made effective by Transamerica, and was first received by Petitioner in April, 2014 with Transamerica's demand for arbitration.

Also omitted by the arbitrator and the lower courts is that Petitioner had no contact in California in person or by any communication; did not submit any part of insured Ben's application; was not issued and did not apply for any contract other than the 4-page Sales Contract; and was never bound to the Producer Contract by precedent from the this Court and the NC Supreme Court. See pp. 3-27, *vide infra*.

Further omitted by the arbitrator and lower courts is that arbitrability does not exist without consent from Petitioner and an advance agreement between both parties, which never occurred here. And never addressed by the arbitrator or lower courts is that the Producer Contract was induced by fraud and that substantive and procedural unconscionability are here present with an adhesive Producer Contract, inequality between the parties, one-sided control by Transamerica, and unequal and unfair procedures over venue, discovery, and hearing time in favor of Transamerica.

B. SUMMARY OF THE CASE

On April 13, 2009 Petitioner recorded and signed a four page Sales Contract, which does not include an arbitration provision or the term arbitration. On April 14, 2009 Petitioner faxed the Sales Contract to Crump Life Insurance Services, Inc. ("Crump") in Harrisburg, Pennsylvania. (App. 6, Sales Contract, pp. 1-4, headers).

Petitioner only agreed by signing the Sales Contract that "if and when any or all of the companies issues to me any Contract(s) for which I hereby apply, I will be bound..." But Petitioner was not issued, did not apply for, and was not bound to any other Contract. (App. 6, p. 4 of 7, Part IV, Signature Section, 2nd ¶, 1st sentence).

The policy and application within was issued on August 12, 2009 and became incontestable on August 12, 2011. (App. 7, p. 1 "August 12, 2009 Date of Issue"). See N.C.G.S. 58-58-22(2) (App. 5, p. 4). Insured Ben Laschkewitsch died on January 15, 2012. (DE 1-3, p. 27). Transamerica approved Petitioner's claim, held the \$500,000 in policy proceeds, and sent Petitioner monthly earned interest checks and account statements for twenty six months. (DE 43-6, 1st and 26th monthly statements).

On March 31, 2014 Misty A. Murray first printed a ten-page "Independent Producer Contract" from an electronic source, which is not signed or dated by either party, does not record Petitioner as a party, was not assigned an effective date by Transamerica (App. 8, p. 1, 1st ¶; App. 9, ¶ 6), and had not previously been received by Petitioner. Murray then attached the non-mutual Producer Contract to the April, 2009 Sales Contract and demanded arbitration by First-Class Mail (App. 10; DE 35-19), which was insufficient service of process. (CCP §§ 1290.4(b)(2), and (c)) (App. 5, p. 8). Hence, Petitioner at no time then or prior had agreed in advance to arbitration.

Transamerica alleges that Petitioner is a party to the Producer Contract, despite that Petitioner is not recorded as a party. (App. 8, p. 1). So, Transamerica convinced the arbitrator that Petitioner somehow became a party by submitting the life insurance application on the life of Ben Laschkewitsch. But evidence overlooked by the arbitrator proves that Joyce Morgan, with EMSI (the paramedical examiner), submitted Ben's "Application Part 2–Health History" to Misha Patel, with Crump, not Petitioner. (App. 11, Ben's "Application Part 2–Health History," App. 12).¹ And Transamerica never proved the identity of who submitted Ben's "Application Part 1" to Crump since Transamerica never sought records from Crump. (DE 35-37, 38, 39).

Factually, Ben, a former life insurance agent, personally recorded and signed his "Application Part 1," secured Petitioner's agent signature, and then took his application home to secure his wife's signature as a witness. (App. 13, p. 3, "Witness to Signature of Owner"). Ben then submitted his own Application Part 1 to Crump. (DE 54-2, ¶s 8-21; Doc. 25, Ex. 1, ¶s 9-26). Further, Transamerica did not rely on Ben's Application Part 1, which contains no health question and was only used to determine whether or not Ben qualified for a preferred rate. (Apps. 13, p. 2; and 14).

The arbitrator ordered a four day hearing in California, despite no advance agreement to arbitrate or contact from Petitioner in California. Prior to the hearing, he finally, after seven months of repeated requests, promised Petitioner, that in his final award he would determine the preliminary issues of arbitrability, jurisdiction, unconscionability, and the admissibility of evidence. (App. 15, 4th ¶; DE 35-10).

¹ "DE" refers to evidence filed in the district court record; No. 5:14-CV-632-D. "Doc." refers to evidence filed in the Fourth Circuit, No. 17-1950, all of which this Court should review, as referenced throughout this petition for summary reversal or a writ of certiorari.

Following the arbitral hearing, the arbitrator agreed to review Petitioner's counterclaims if Petitioner paid the counterclaim fee chosen by the arbitrator. (App. 16; DE 35-12). The arbitrator affirmed his decision by granting Petitioner a one week extension to file a counterclaim fee. (App. 17). The AAA Director then told the arbitrator that Petitioner could select his own counterclaim fee. (App. 18, pp. 1, 8).

Thus, Petitioner pre-sold qualified IRA retirement account funds with a pre-withdrawal fee and tax penalty in order to pay his counterclaim fee. Also, Petitioner was loaned \$27,000.00 from his Father to satisfy the fee amount. Nako confirmed that Petitioner could file a breakdown of counterclaims and chosen fee amount by timely paying a counterclaim fee and breakdown. (App. 18, pp. 1-10). So Petitioner timely filed his counterclaim fee and breakdown. (App. 19, pp. 1-14). Afterwards, Nako billed Transamerica, not Petitioner, for arbitrator fees. (App. 20; DE 42-13).

Petitioner made no arrangement to pay arbitration fees since the arbitrator ordered that he would apportion fees and costs "by way of further order or award," (App. 21), but had not done so. Nonetheless, Transamerica moved under AAA Rule 57 to dismiss all counterclaims for nonpayment of fees. And in less than ten hours of receipt of Petitioner's response (DE 43-8), the arbitrator granted the motion "upon Transamerica's request," before deciding fees, and closed the hearing. (App. 22).

Within his award, the arbitrator erroneously relied upon *res judicata* to avoid determining arbitrability and unconscionability, despite that the arbitrator's award and the district court's order to compel were not final judgments. He also manifestly disregarded this Court's specific and personal jurisdiction precedent by determining he had jurisdiction over Petitioner, though Petitioner had no contact in California.

The arbitrator did not address the admissibility of evidence, as promised by his own order, or Petitioner's defenses of CAA discovery violations and a breached legal process. (DE 36-2, pp. 6-21, and 36). And, as afore-mentioned, no counterclaim of Petitioner's, all eight of which were briefed, were reviewed by the arbitrator, though promised. (App. 4; DE 36-2, pp. 22-37; DE 54-2, ¶s 114-134; Doc. 25, pp. 26-45).

Further, the arbitrator blatantly disregarded both California arbitration law and Petitioner's affidavit of indigence by awarding half of his fees and half of AAA fees, totaling \$27,058.82, against Petitioner. (App. 4, p. 16; App. 23). CCP §1284.3(a) mandates that in all arbitration held in California "no neutral arbitrator or private arbitration company...shall [require] a consumer who is a party to the arbitration pay fees and costs incurred by an opposing party if the consumer does not prevail in the arbitration..." See also CCP §§1284.3(b)(1), (b)(3), (b)(4) and (c)(App. 5, p. 7).

The district court ignored Transamerica's insufficient service of its demand for arbitration (App. 10, DE 35-19; CCP §§ 1290.4 (b)(2) and (c)) (App. 5, p. 8); the arbitrator's insufficient service of his award by electronic mail (App. 24, DE 35-20; CCP §1283.6)(App. 5, p. 7); and that the arbitration award cannot be enforced since Transamerica prematurely filed its petition to confirm eight days after service of the arbitrator's award. (App. 25, DE 35-22; CCP § 1288.4)(App. 5, p. 8). Further, since Petitioner is not a party to the Producer Contract, the district court must have "dismissed the action" under CCP § 1287.2, but did not. (App. 5, p. 8; App. 8, p. 1).

The district court omitted that the arbitrator held Petitioner liable for half of his fees and half of AAA fees by ignoring Petitioner's waiver of indigent status and California law. (App. 23; CCP §§ 1284.3(a), 1284.3(b), and (c))(App. 5, p. 7).

Further, the district court erred by not properly confirming the arbitrator's award, in the amount of \$27,058.82. (App. 4, p. 16). The district court unilaterally increased the arbitrator's award from \$27,058.82 to \$540,723.76, with no authorized basis for doing so. (App. 3, p. 2). Moreover, the district court abused its discretion by not adhering to this Court's precedent regarding specific and personal jurisdiction, arbitrability over no consented to or advance agreement, and unconscionability. And the district court did not address insufficient services of process by Transamerica and the arbitrator, Petitioner's counterclaims and defenses, which the arbitrator promised to review, or the arbitrator's violations of 9 U.S.C. §§10(a)(1), (2), (3) or (4).

The Fourth Circuit found no error in the district court having increased the arbitrator's award from \$27,058.82 to \$540,723.76, a two thousand percent increase. Further, the Fourth Circuit did not address or appear to have reviewed Petitioner's Issues Presented for Review within Petitioner's informal opening and supplemental briefs. See App. 1; Doc. 15, pp. xii, 1-47; Doc. 25, pp. i, ii, 1-47; and Doc. 26, pp. 1-25.

REASONS FOR GRANTING THE PETITION

I. The Arbitrator Did Not Have Specific Or Personal Jurisdiction Over Petitioner Pursuant To This Court's Precedent

On April 13, 2009 Petitioner completed, dated, and signed a 4-page Contract Application for Sales Director ("Sales Contract") in North Carolina. (App. 6). The Sales Contract does not include an arbitration provision or the term arbitration within. On April 14, 2009 Petitioner sent the four pages to Crump Life Insurance Services, Inc. ("Crump") in Harrisburg, PA by facsimile. (App. 6, headers). No other contract, mutual agreement, or arbitration provision was received or submitted to Crump or Transamerica by Petitioner prior to Transamerica demanding arbitration.

On August 12, 2009 the policy was delivered from Crump, in Harrisburg, Pennsylvania, to Petitioner in Fayetteville, North Carolina. (App. 7, p. 1). Then on August 31, 2009 Transamerica applied initial premium, placing the policy in force (DE 42-9). And Petitioner authorized Crump to draft premiums monthly. (App. 26).

Petitioner does not reside in California, never stepped foot within California, and never communicated with any person in California in relation to this contest by any means. On March 31, 2014 Transamerica demanded arbitration from California by First-Class Mail (App. 10, DE 35-19), which was insufficient service of process in accordance with the California Arbitration Act. (CCP §§1290.4(b)(2), (c))(App. 5, p. 8).

Included in Transamerica's untimely filed demand for arbitration was a ten page Independent Producer Contract ("Producer Contract")(App. 8). Petitioner had had not before seen or had possession of such Contract before April, 2014. Petitioner discovered a water mark on the back of each of the ten pages. Petitioner inquired regarding the watermark. Transamerica's counsel, Misty A. Murray, then admitted having printed each page on March 31, 2014, in Los Angeles, CA, from an electronic source, using her firm's watermarked paper. (App. 9, p. 2, ¶6; DE 35-30).

Prior to the arbitration hearing in Los Angeles, California, the arbitrator ordered Transamerica to produce proof of any contact with Petitioner in California. (App. 27, DE 35-7, third production request; App. 28, DE 35-8, order, p. 2, 5th ¶). Transamerica's counsel then twice admitted it had "nothing further to produce." (App. 29, DE 35-9, responses). Therefore, defendant Petitioner had no contact with Transamerica in California, as required by this Court for both specific and personal jurisdiction, prior to attending the arbitration hearing in Los Angeles, California.

The arbitrator promised by order to determine the issue of jurisdiction in his final award (App. 15, DE 35-10); but did not. (App. 4, pp. 9, 10). And during the hearing, Petitioner gave the arbitrator a copy of *International Shoe Co.*, this Court's seminal case on personal jurisdiction, which he manifestly disregarded.

The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful "contacts, ties, or relations." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (S.Ct. 1985) (citing *International Shoe Co. v. Washington*, 326 U.S., at 319). By requiring that individuals have "fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign," *Shaffer v. Heitner*, 433 U.S. 186, 218 (1977) (STEVENS, J., concurring in judgment), the Due Process Clause "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen Corp. v. Woodson*, 444 U. S. 286, 297 (1980). For example, particularly in the commercial context, "parties frequently stipulate in advance to submit their controversies for resolution within a particular jurisdiction." See *National Equipment Rental, Ltd. v. Szukhent*, 375 U.S. 311 (1964). As further held by this Court, where such forum-selection provisions have been obtained through "freely negotiated" agreements and are not "unreasonable and unjust," *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972), their enforcement does not offend due process. (Fourteenth Amendment).

Here, Petitioner had no meaningful "contacts, ties, or relations" in California. Neither did Petitioner have "fair warning" or an advance stipulation of jurisdiction.

Where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, this "fair warning" requirement is satisfied if the defendant has "purposefully directed" his activities at residents of the forum, *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984), and the litigation results from alleged injuries that "arise out of or relate to" those activities. See *Helicopteros Nacionales de Colombia, S. A. v. Hall*, 466 U.S. 408, 414 (1984).

And with respect to interstate contractual obligations, this Court has often emphasized that "parties who 'reach out beyond one state and create continuing relationships and obligations with citizens of another state' are subject to regulation and sanctions in the other State for the consequences of their activities." *Travelers Health Assn. v. Virginia*, 339 U.S. 643, 647 (1950). See also *McGee v. International Life Insurance Co.*, 355 U.S. 220, 222-223 (1957).

The constitutional touchstone remains whether the defendant purposefully established "minimum contacts" in the forum State, which in this case is California. *International Shoe, supra*, at 316. Jurisdiction is only proper where the contacts proximately result from actions by the defendant *himself* that create a "substantial connection" with the forum State. *McGee, supra*, at 223.

In defining when a defendant should "reasonably anticipate" out-of-state litigation, this Court frequently draws from the reasoning of *Hanson v. Denckla*, 357 U. S. 235, 253 (1958). As a rule in these cases, this Court has inquired whether there was "some act by which the defendant purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws;" here California, wherein no activities were conducted.

See *Hanson*, *supra*, 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 287, 297, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980)(Oklahoma court may not exercise personal jurisdiction "over a nonresident automobile retailer and its wholesale distributor in a products-liability action, when the defendants' only connection with Oklahoma is the fact that an automobile sold in New York to New York residents became involved in an accident in Oklahoma"); *Burger King Corp.*, *supra*, 471 U.S. at 462, 474-475, (franchisor headquartered in Florida may maintain breach-of-contract action in Florida against Michigan franchisees, where agreement contemplated ongoing interactions between franchisees and franchisor's headquarters).

See also *Asahi Metal Industry Co. v. Superior Court of Cal., Solano Cty.*, 480 U.S. 102, 105, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987) (Taiwanese tire manufacturer settled product liability action brought in California and sought indemnification there from Japanese valve assembly manufacturer; Japanese company's "mere awareness ... that the components it manufactured, sold, and delivered outside the United States would reach the forum State in the stream of commerce" held insufficient to permit California court's adjudication of Taiwanese company's cross-complaint); *id.*, at 109, 107 S.Ct. 1026 (opinion of O'Connor, J.); *id.*, at 116-117, 107 S.Ct. 1026 (Brennan, J., concurring in part and concurring in judgment). See also Twitchell, *The Myth of General Jurisdiction*, 101 Harv.L.Rev. 610, 628 (1988) (in the wake of *International Shoe*, (which Petitioner gave the arbitrator a hard copy of during the arbitral hearing); "specific jurisdiction has become the centerpiece of modern jurisdiction theory...").

This Court's personal jurisdiction precedents call for a two-part analysis. The "contacts prong asks whether the defendant has sufficient contacts with the forum State to support personal jurisdiction; the reasonableness prong asks whether the exercise of jurisdiction would be unreasonable under the circumstances." *Burger King Corp.*, *supra*, 471 U.S. 462, 475-478, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). "We identified the factors that bear on reasonableness in *Asahi Metal Industry Co. v. Superior Court of Cal., Solano Cty.*, 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987): the burden on the defendant, the interests of the forum State, the plaintiff's interest in obtaining relief in the forum State, and the interests of other sovereigns in resolving the dispute." *Id.*, at 113-114.² See *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984) (asking whether defendant had "continuous and systematic general business contacts").³ Here, as admitted by Transamerica's two responses, Petitioner did not have a single contact, tie, or relation in or within California. See n. 2, below.

² As twice admitted by Transamerica's counsel, it was unable to produce any proof of a contact from Petitioner in California. (App. 27, DE 35-7, third production request; App. 28, DE 35-8, arbitrator's order; App. 29, DE 35-9, Transamerica's two responses). Further, the burden on Petitioner was unreasonable since Petitioner has no income, is the weaker party, and had to sell qualified IRA funds with pre-withdrawal penalties and early distribution tax penalties in order to attend the arbitration hearing in Los Angeles, California, and has been severely harmed. See Fourth Circuit, No. 17-1950, Doc. 25, Ex. 1, Affidavit, ¶¶ 61-85.

³ Here, Petitioner had no meaningful "contacts, ties, or relations" to California, no "fair warning that a particular activity may subject [Petitioner] to the jurisdiction of a foreign sovereign," being California, no stipulation with Transamerica in advance to submit this controversy for resolution in California (App. 6), no "freely negotiated" agreement [which] is not "unreasonable and unjust," no consent to arbitration proceedings in Los Angeles, CA, no "purposefully directed" activities at residents of [California], no contacts in California, no "reach out... beyond [North Carolina] to create continuing relationships and obligations with citizens of [California]," no "purposefully availed" activities or conduct in California, and no "substantial connection" to California. And Transamerica has faced no injuries that "arise out of or relate to" any activities by Petitioner within California.

"In every case where we have applied this test, we have focused solely on the magnitude of the defendant's in-state contacts..." *Daimler Ag v. Bauman*, 134 S.Ct. 746, 767 (S.Ct. 2014), which in this case were none. This Court offered additional guidance in *Goodyear*, adding the phrase "essentially at home" to this Court's prior formulation of the rule. 564 U.S., at ___, 131 S.Ct. at 2851 (S.Ct. 2011) (a State may exercise general jurisdiction where a defendant's "affiliations with the State are so 'continuous and systematic' as to render [the defendant] essentially at home in the forum State"). "We used the phrase "at home" to signify that in order for an out-of-state defendant to be subject to general jurisdiction, its continuous and substantial contacts with a forum State must be akin to those of a local enterprise that actually is "at home" in the State." *Daimler Ag v. Bauman*, 134 S. Ct. 746, 769 (S.Ct. 2014). Here, with no ties or relations to, no contact in California by person, and no form of communication within, Petitioner was never "at home" in the State of California.

"For a State [California] to exercise jurisdiction consistent with due process, the defendant's suit-related conduct must create a substantial connection with the forum State. Two related aspects of this necessary relationship are relevant in this case. *Walden v. Fiore*, 134 S.Ct. 1115, 1121 (S.Ct. 2014). First, the relationship must arise out of contacts that the "defendant *himself*" creates with the forum State. *Burger King Corp, supra*, 471 U.S. 462, 475, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985).⁴

Due process limits on a State's adjudicative authority principally protect the liberty of the nonresident defendant — not the convenience of plaintiffs or third parties. See *World-Wide Volkswagen Corp., supra*, at 291-292, 100 S.Ct. 559.

⁴ All foregoing precedent was briefed (Doc. 15, pp. 11-16), but omitted by the 4th Circuit.

This Court has consistently rejected attempts to satisfy defendant-focused "minimum contacts" inquiry by showing contacts between the plaintiff (or third parties) and the forum State, here being "Crump." See *Helicopteros Nacionales de Colombia, S.A. supra* at 417 ("[The] unilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction").

Second, this Court's "minimum contacts" analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there. See, e.g., *International Shoe, supra*, at 319, 66 S.Ct. 154 (Due process "does not contemplate that a state may make binding a judgment *in personam* against an individual ... with which the state has no contacts, ties, or relations"); *Hanson, supra*, at 251, 78 S.Ct. 1228 ("...a defendant may not be called upon to do so unless he has had the 'minimal contacts' with that State that are a prerequisite to its exercise of power over him"). (Emphasis added).

Accordingly, this Court upholds the assertion of jurisdiction over defendants who have purposefully "reach[ed] out beyond" their State and into another by, for example, entering a contractual relationship that "envisioned continuing and wide-reaching contacts" in the forum State. *Burger King, supra*, at 479-480, 105 S.Ct. 2174. And although physical presence in the forum State is not a prerequisite to jurisdiction, *Burger King, supra*, at 476, 105 S.Ct. 2174, physical entry into the State — either by the defendant in person or through an agent, goods, mail, or some other means — is certainly a relevant contact. See, e.g., *Keeton, supra*, at 773-774.

"If the question is whether an individual's contract with an out-of-state party *alone* can automatically establish sufficient minimum contacts in the other party's home forum, we believe the answer clearly is that it cannot," just as here; *Kulko v. Superior Court of Cal., City and County of San Francisco*, 436 U.S. 84, 93, 98 S.Ct. 1690, 56 L.Ed.2d 132 (1978)(declining to "find personal jurisdiction in a State ... merely because [the plaintiff in a child support action] was residing there").⁵

"A forum State's exercise of jurisdiction over an out-of-state intentional tortfeasor must be based on intentional conduct by the defendant that creates the necessary contacts with the forum." *Walden v. Fiore*, 134 S.Ct. 1115, 1123 (S.Ct. 2014). Here, the arbitrator alleged torts against Petitioner (App. 4, pp. 11-15), despite no finding of a contact from Petitioner within the forum of California, and with personal knowledge that Transamerica's counsel two times admitted that it was unable to produce evidence of a contact from Petitioner.⁶ See n. 2, n. 3, *supra*.

It is undisputed that no part of Petitioner's course of conduct occurred in [California]. See *Walden v. Fiore*, 134 S.Ct. 1115, 1124 (S.Ct. 2014). Petitioner never traveled to, conducted activities within, contacted anyone within, sent anything to, or arrived in person in [California]. "In short, when viewed through the proper lens — whether the *defendant's* actions connect him to the *forum* — petitioner formed no jurisdictionally relevant contacts with [California]." *Id.*

⁵ Transamerica was given an opportunity, by order, to show a contact by in person or through an agent, goods, mail, or some other form or means, but twice admitted that it had "nothing further to produce." See n. 2, *supra*. Also, Transamerica asserted in lower court filings that a contact from Petitioner in California was unnecessary for jurisdiction and that Petitioner consented by first receipt of a contract in April, 2014. (Doc. 18, pp. 28-31).

⁶ Petitioner repeatedly briefed this Court's precedent to the arbitrator, district court, and the Fourth Circuit, which was never addressed by the arbitrator or any lower court.

Petitioner's relevant conduct occurred entirely in [North Carolina]. Petitioner communicated only with third-party Crump in Harrisburg, Pennsylvania, once by facsimile communication (App. 6), but never in person. And the "mere fact that his conduct affected plaintiffs with connections to the forum State [here California] does not suffice to authorize jurisdiction. We therefore reverse the judgment of the Court of Appeals." *Walden, supra*, 134 S.Ct. 1115, 1126 (S.Ct. 2014). (Emphasis added).

As well, "Federal courts ordinarily follow state law in determining the bounds of their jurisdiction over persons." *Daimler AG v. Bauman*, 571 U.S. ___, ___, 134 S.Ct. 746, 753, ___ L.Ed.2d ___ (2014). This is because a federal district court's authority to assert personal jurisdiction in most cases is linked to service of process on a defendant "who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located." See Fed. Rule of Civ. Proc. § 4(k)(1)(A).

Here, Transamerica served its demand over the alleged Producer Contract beyond the North Carolina three year statute of limitations on contracts, N.C.G.S. §§ 1-52(1), (9) (App. 5, p. 3), and by First-Class Mail, which was insufficient service of process, pursuant to the California Arbitration Act ("CAA"). (App. 10, DE 35-19; CCP §1290.4(b)(2))(App. 5, p. 8). Also, the arbitrator served his award by electronic mail, which was insufficient service of process, pursuant to the CAA, which he finally determined applicable in his award. (App. 24, DE 35-20; CCP §1283.6) (App. 5, p. 7). And CCP § 1288.4 mandates that to enforce an arbitral award, a petition to confirm must be filed no earlier than ten days after service of the award. (App. 5, p. 8). However, Transamerica filed its petition eight days after service of the award, which was untimely. (App. 24, award service date; App. 25, filed petition date).

II. Arbitrability Does Not Exist With An Alleged Contract First Received With Transamerica's Arbitration Demand And No Advance Agreement, Mutual Consent, Or An Arbitration Provision Pursuant To Precedent From This Court, The NC Supreme Court, And The Fourth Circuit

The Sales Contract, completed and signed by Petitioner on April 13, 2009, does not include an arbitration provision within or the terms dispute resolution or arbitration on any page. (App. 6, pp. 1-4 of 7). Petitioner only submitted the 4-page Sales Contract (App. 6) and five non-contract pages to Crump, in Harrisburg, PA.

On March 31, 2014 Transamerica's counsel, Misty A. Murray, admittedly printed a 10-page "Independent Producer Contract" from an electronic source using her firm's watermarked paper and attached such "Producer Contract" to Petitioner's April 13, 2009 "Sales Contract." (App. 9, DE 35-30, p. 2, ¶ 6). Murray then attached both together as Exhibit A in Transamerica's "Demand for Arbitration" and served the demand by First-Class Mail, which was insufficient service of process pursuant to the CAA. See App. 10, DE 35-19; CCP §1290.4(b)(2)(App. 5, p. 8).

Petitioner first received the 10-page Producer Contract during the first week of April, 2014, by complete unconscionable surprise, which "inequality was so great that it shocked the conscience" of Petitioner. *Murray v. United Food & Commercial Workers Int'l Union*, 289 F.3d 297, 302 (4th Cir.2002). Significantly, Page 1 of the Producer Contract lists Transamerica only, not Petitioner as a party, and does not include an effective date. Also, no page within is signed or dated by either party. As well, no evidence exists or was produced that proves that any page was received or submitted from either party to the other or previously in either party's possession. (App. 27, p. 6, request sixteen; App. 28, order; App. 29, Transamerica's responses).

The arbitrator erroneously held that Petitioner was bound to the March 31, 2014 Producer Contract by submitting an application to Crump in July, 2009. (App. 4, pp. 3-4). But, evidence proves that Joyce Morgan, with the examiner, EMSI, submitted Ben's application Part 2 to Misha Patel at Crump. (Apps. 11, 12; DE 35-26, 27). And no evidence was produced by Transamerica proving who submitted Ben's Application Part 1 to Crump, which includes no medical questions?⁷ (App. 13).

Notably, the evidence does show that Ben's wife witnessed Ben's application. (App. 13, Application Part 1, p. 3, "Witness"). Further, since Ben's spouse was not present when Ben recorded his application, Ben, a former insurance agent, signed and then submitted his Application Part 1 to Crump after his wife witnessed his Application Part 1 at Ben's residence. See Doc. 25, Ex. 1, Affidavit, ¶s 9-29.

Moreover, the paragraph above Petitioner's signature on page 4 of the Sales Contract states that Petitioner would not be "hereby bound" to another Contract unless first issued and applied for. (App. 6, p. 4) And Petitioner was first issued the Producer Contract, which includes the dispute resolution clause, in April, 2014, and never applied for the unsigned, undated, Producer Contract. (App. 8, pp. 1-10).

From the beginning of arbitration, Petitioner repeatedly requested that the arbitrator determine the issue of arbitrability. Then finally, within less than three months before the arbitral hearing, the arbitrator promised Petitioner, by his order, that he would determine the issues of arbitrability, jurisdiction, unconscionability, and the admissibility of evidence in his final award. (App. 15; DE 35-10).

⁷ Transamerica could have sought records from Crump Life Insurance Services, Inc. in Harrisburg, Pennsylvania, to learn who submitted Ben's Application Part 1, but did not. (App. 27, DE 35-7, tenth request; App. 28, DE 35-8, order; App. 29, DE 35-9, responses).

And in his award, the arbitrator manifestly disregarded the law of this Court by applying *res judicata* to avoid determining arbitrability and unconscionability without a final judgment. *Clay v. United States*, 537 U.S. at 527, 123 S.Ct. 1072, 155 L.Ed.2d 88 (2003). Prejudice by the arbitrator was evident since the arbitrator's award had not been confirmed, appealed, or even petitioned before this Court.⁸

Further, the arbitrator did not determine the admissibility of evidence, as he promised by order (App. 15, DE 35-10), and prejudiced Petitioner by failing to apply this Court's specific and personal jurisdiction precedent. (App. 4, pp. 9-10; pp. 7-16, *supra*). He also showed partiality by refusing to determine Petitioner's defenses of discovery violations and a breached legal process. (DE 36-2, p. 6-21, and 36). And he promised by AAA notice to review Petitioner's counterclaims (App. 16), but then refused to do so "upon Transamerica's request," before he had apportioned his fees by order or award, as promised, and without a reasonable AAA Rule 57 explanation. (Remedies for Nonpayment). And he concurrently closed the hearing. (Apps. 21, 22).

"Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, see, e. g., *Mastrobuono v. Shearson Lehman Hutton, Inc.*, at 57; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985), so the question regarding "who has the primary power to decide arbitrability" turns upon what the parties agreed about *that* matter.

⁸ This Court has held that a federal judgment becomes final "when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari," or, if a petitioner does not seek certiorari, "when the time for filing a certiorari petition expires." *Clay v. United States*, 537 U.S. at 527, 123 S.Ct. 1072, 155 L.Ed.2d 88 (2003). The judgment becomes final at the expiration of the time for seeking such review—when the time for pursuing direct review in this Court, or in state court, expires." *Id.* at 654. Therefore, the arbitrator's holding of final judgment for arbitrability and unconscionability was erroneous.

"If... the parties did *not* agree to submit the arbitrability question itself to arbitration, then the court should decide that question just as it would decide any other question [the parties] did not submit to arbitration, namely, independently... for arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration." See, e. g., *AT&T Technologies*, 475 U.S. at 649; *Mastrobuono*, ante, at 57-58, and n. 9; *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 271 (1995); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* 473 U.S. at 625-26.

Courts should not assume that the parties agreed to arbitrate arbitrability unless there is "clea[r] and unmistakabl[e]" evidence that they did so. *AT&T Technologies*, supra, at 649; *Steelworkers v. Warrior & Gulf Nav. Co.* 363 U.S. 574 at 583, n. 7. And, given the law's permissive policies in respect to arbitration, see, e. g., *Mitsubishi Motors*, supra, at 626, one can understand why the law would *insist upon clarity* before concluding that the parties did *not* want to arbitrate a related matter. Domke § 12.02, p. 156 (issues will be deemed arbitrable unless "it is clear that the arbitration clause has not included" them). See also *Supak & Sons Mfg. Co. Inc. v. Pervel Industries, Inc.*, 593 F. 2d at 137 (4th Cir. 1979). ("We conclude that under N.C.G.S § 25-2-207, the governing law (App. 5, pp. 3, 4), the arbitration clause was not part of the sales contract."). After all, the basic objective in this area is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes, *Dean Witter Reynolds, Inc.*, supra, at 219-220, but to ensure that commercial arbitration agreements, like other contracts, "are enforced according to their terms," *Mastrobuono*, ante, at 54 (quoting *Volt Inf. Sciences*, 489 U.S., at 479).

Moreover, an arbitration agreement must be according to the intentions of the parties. *Mitsubishi Motors*, 473 U.S., at 626. See also *Allied-Bruce*, 513 U.S., at 271. Here, no arbitration provision is in Petitioner's Sales Contract and Petitioner did not intend to arbitrate or agree in advance to arbitrate with Transamerica since Petitioner did not receive notice of a dispute resolution clause until April, 2014.

And this Court has often reiterated the contractual nature of arbitration agreements, careful to avoid forcing parties to resolve their disputes through means not intended at the time of contract formation. *E.g.*, *Stolt-Nielsen*, 559 U.S. at 681, 130 S.Ct. 1758 ("[T]he FAA imposes certain rules of fundamental importance, including the basic precept that arbitration is a matter of consent, not coercion."

Here, there was no consent from Petitioner to arbitrate since no intent was made within Petitioner's Sales Contract to arbitrate; no provision to arbitrate is included within such Sales Contract (App. 6, pp. 1-4); and Petitioner did not receive a dispute resolution clause until receipt of Transamerica's demand for arbitration in April, 2014. (App. 8, p. 7, Section 7.2). Further, the terms of the alleged Producer Contract are that it was never made effective, signed or dated by either party, and lists Transamerica only, not Petitioner, as a party to such Contract. (App. 8, p. 1).

Also, there is no "clear and unmistakable" evidence in Petitioner's Sales Contract of an agreement to arbitrate. (App. 6). And no page within the ten-page Producer Contract lists Petitioner by name. (App. 8). Further, Petitioner never had an "opportunity to review" such contract, as falsely alleged by the arbitrator, which was allegedly held by Crump in Harrisburg, PA, but not in Petitioner's possession. So, Petitioner was coerced to arbitrate over a contract first received in April, 2014.

When deciding whether the parties agreed to arbitrate a certain matter, including arbitrability, courts generally should apply ordinary state-law principles that govern the formation of contracts. See, e. g., *Mastrobuono*, ante, at 62-63, and n. 9; *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 475-476 (1989).⁹ See also G. Wilner, 1 Domke on Commercial Arbitration § 4:04, p. 15 (rev. ed. Supp. 1993). The relevant state law here, NC law, would require the court to see whether the parties objectively revealed an intent to submit the arbitrability issue to arbitration within the sales contract (App. 6).¹⁰

Pursuant to NC law, "A contract does not exist where the parties merely negotiate with anticipation that their agreement will ultimately be memorialized in a later document." *Parker v. Glosson*, 182 N.C.App. 229, 641 S.E.2d 735, 737 (2007). Agreements containing an unmet condition precedent are also unenforceable. *Id.* However, a contract to enter into a future contract may be enforced if it specifies all of the "material and essential terms." *Boyce v. McMahan*, 285 N.C. 730, 734, 208 S.E.2d 692, 695 (1974). Here, Petitioner's April 13, 2009 Sales Contract does not specify any essential terms of an arbitration agreement or memorialize an April, 2014 untimely received dispute resolution clause within a Producer Contract.

⁹ *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002) ("[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he [Petitioner] has not agreed so to submit")(quoting *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960); See also *AT&T Technologies Inc. v. Communications Workers of America*, 475 U.S. at 651 (1986)(DE 54-6)("Arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration.")

¹⁰ North Carolina law is applicable since the incontestable policy was delivered in North Carolina and Petitioner's Sales Contract was made in North Carolina. (N.C.G.S. § 58-3-1). (App. 5, p. 4). And the alleged Producer Contract, including the dispute resolution clause within, was not made effective in any State, signed or dated by either party in any State, and does not record Petitioner as a party with Transamerica. (App. 8, pp. 1-10).

Moreover, before a valid contract can exist under North Carolina law, the parties must "assent to the same thing in the same sense, and their minds meet as to all terms." *Normile v. Miller*, 313 N.C. 98, 103, 326 S.E.2d 11, 15 (1985) (quoting *Goeckel v. Stokely*, 236 N.C. 604, 73 S.E.2d 618, 620 (1952)). Here, Petitioner's Sales Contract (App. 6), as signed by Petitioner on April 13, 2009, does not anticipate memorialization of a later "dispute resolution clause," which is not present within such Sales Contract, and which was first printed by Murray in Los Angeles, CA on March 31, 2014. (App. 9, DE 35-30, p. 2, ¶ 6; App. 8, p. 7, Section 7.2). Neither does Petitioner's Sales Contract specify any of the "material and essential terms" of arbitration or allow the parties to meet minds as to all terms and in the same sense.

Under North Carolina law, the party seeking arbitration must show that the parties mutually agreed to arbitrate their disputes. *D & R Const. Co., Inc. v. Blanchard's Grove*, 193 N.C.App. 426, 667 S.E.2d 305, 307 (2008); *Slaughter v. Swicegood*, 162 N.C. App. 457, 461, 591 S.E.2d 577, 581 (2004). Here, Petitioner did not agree. And no agreement exists since it is not signed, dated, or made effective, and Petitioner is not listed as a party. Thus, Transamerica's burden remains unmet.

In law, this agreement is commonly called mutual assent and is customarily described as a "meeting of the minds." See *Charles Holmes Mach. Co. v. Chalkley*, 143 N.C. 181, 183, 55 S.E. 524, 525 (1906) ("The first and most essential element of an agreement is the consent of the parties, an *aggregatio mentium*, or meeting of two minds in one and the same intention, and until the moment arrives when the minds of the parties are thus drawn together, the contract is not complete, so as to be legally enforceable."). Here, Petitioner NEVER met minds with Transamerica.

"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, and this is especially true where the agreement expressly provides or its manifest intent is, that it is not to be binding until signed.*"

Hilliard v. Thompson, 81 N.C. App. 404, 409, 344 S.E.2d at 590-91. Notably, the parties did not sign, date, or initial any contract page. Nor did Transamerica make the Producer Contract effective or list Petitioner as a party. (App. 8, pp. 1-10).¹¹

"If any portion of the proposed terms is not settled, or no mode agreed on by which they may be settled, there is no agreement." *Boyce v. McMahan*, 285 N.C. 730, 734, 208 S.E.2d 692, 695 (1974). Here, Murray printed the Contract from her firm's watermarked paper on March 31, 2014 (App. 9, ¶ 6; DE 35-30), which was not agreed to prior. Thus, proposed terms of an agreement were not settled, but coerced.

In addition, the arbitrator proved prejudice to Petitioner by disregarding his own order (Apps. 27, 28; DE 35-7, 35-8); specifically, that Transamerica produce:

"A genuine and true copy of document(s) signed by Transamerica and Respondent or by either party which specifically mentions arbitration or dispute resolution or an agreement to arbitrate, including documents related to the delivery of such contract or agreement to Respondent and the date and method of delivery."

See App. 27, p. 6, sixteenth production request; App. 29, Transamerica's two responses of "nothing further to produce." Yet, despite Transamerica's admissions, the arbitrator still held Petitioner liable to the non-received Producer Contract.

¹¹ The Court is requested to review DE 36-23, p. 11 of 11; DE 36-24, p. 12 of 12; DE 36-25, p. 9; DE 36-26, p. 12, and DE 36-27, last two pages, which are all Producer Contracts drafted by Transamerica. Significantly, all of the foregoing contracts require a signature by both parties, at the time of recording, to be bound and agreed to. Also, the Court should review Doc. 15, pp. 22-29 regarding arbitrability, which was omitted by both lower courts.

III. Transamerica's March 31, 2014 Service Of Its Dispute Resolution Clause And The Hearing Process Were Unconscionable And Induced By Fraud

Foremost, the arbitrator promised to address unconscionability in his award (App. 15, DE 35-10), but did not. Rather, the arbitrator determined that *res judicata* was applicable to unconscionability, despite the fact that no previous determination of unconscionability had previously been made. (App. 4, pp. 8, 9). In addition, the arbitrator prejudiced Petitioner by disregarding Ninth Circuit precedent, applying California law, with the American Arbitration Association (AAA), which Petitioner had provided the arbitrator during the hearing.¹² In *Nagrampa v. MailCoups, Inc.* (en banc) (DE 35-4), the Ninth Circuit reversed the arbitrator, with the AAA, and the district court, because *MailCoups* had repeatedly attempted to force Nagrampa, a California resident, to arbitration proceedings in Boston, MA, over an arbitration clause hidden within a larger prolix contract.

Nagrampa is squarely on point with this case since it establishes California law, as declared applicable by the arbitrator (App. 4, p. 8), and involves arbitration proceedings with the AAA. Also, *Nagrampa* clarifies California law over substantive and procedural unconscionability, which are evident more so in this case.

Thus, Petitioner briefed unconscionability to the district court and the Fourth Circuit since the arbitrator failed to determine such. (DE 42, pp. 13-20; Doc. 25, pp. 16-25). So, this Court is requested to review this briefing and n.12 precedents below.

¹² See *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1264-1294 (9th Cir. 2005)(en banc) (applying California law)(DE 35-4). See also *Murray v. United Food & Commercial Workers Int'l Union*, 289 F. 3d 297 (4th Cir. 2002)(DE 54-10); *Brenner v. The Little Red School House, Lt'd*, 302 N.C. at 213, 274 S.E.2d at 210 (DE 54-11); and *Tillman v. Commercial Credit Loans, Inc.*, 655 SE 2d 362 at 371 (N.C. 2008)(DE 54-12), pursuant to 9 U.S.C. § 2.

Here, Transamerica coerced Petitioner to arbitrate in Los Angeles, CA, from Fayetteville, NC, over no arbitration clause or provision or the term arbitration or dispute resolution included within Petitioner's Sales Contract. (App. 6, pp. 1-4).¹³ Transamerica discovered an unsigned, undated, boiler-plated, and ineffective ten-page Independent Producer Contract, printed the ten pages on March 31, 2014, and attached the same to Petitioner's 4-page Sales Contract to demand arbitration. But no page had been previously received by Petitioner, submitted from either party to the other, or mutually consented to and agreed in advance between the parties.

Moreover, every specific contract defense that this Court has acknowledged, as applicable under § 2, relates to contract formation. In *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996), this Court again held that fraud, duress, and unconscionability "may be applied to invalidate arbitration agreements without contravening § 2." All three defenses historically concern the making of an agreement. See *Morgan Stanley Capital Group Inc. v. Public Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527, 547, 128 S.Ct. 2733, 171 L.Ed.2d 607 (2008). (App. 9, p. 2, ¶6).

In this case, the alleged arbitration agreement was unilaterally printed by Murray for Transamerica the same day that Transamerica demanded arbitration. (Apps. 9, ¶6; and 10). And Transamerica never proved previous receipt by Petitioner of such agreement or mutually agreed to terms of arbitration. See pp. 17-25, *supra*.

¹³ "A litigant can compel arbitration under the FAA if he can demonstrate "(1) the existence of a dispute between the parties, (2) a written agreement that includes an arbitration provision which purports to cover the dispute..." *Whiteside v. Teltech Corp.*, 940 F.2d 99,102 (4th Cir. 1991)(DE 54-5). However, in affirming the district court, the Fourth Circuit erred by disregarding its own precedent, which was briefed by Petitioner. (Doc. 15, pp. 22-29). And the district court also abused its discretion. (Apps. 2, 3; DE 42, pp. 13-20).

Thus, with no advance agreement between the parties, and Transamerica's twice admitted inability to prove that Petitioner received an arbitration agreement prior to receipt of its demand in April, 2014, the commencement of arbitration was induced by fraud by Transamerica under 9 U.S.C. § 2.¹⁴ See also Doc. 25, pp. 40-43.

The hearing was also unconscionable. The arbitrator permitted Transamerica to present its case for three days and seven hours of a four day hearing and parade eight or more local witnesses. Petitioner, the weaker party, could not afford to pay witness travel and lodging expenses and had to sell qualified retirement funds and face distribution taxes to attend the hearing. During the final hour given Petitioner, Petitioner requested that the arbitrator immediately consider that Transamerica had not met its burden of proof that Petitioner had a contact in or with California.

Transamerica was then queried again by the arbitrator. But Transamerica still could not produce evidence of a contact from Petitioner in California. Petitioner thus gave the arbitrator a hard copy of *International Shoe Co.*, which the arbitrator rejected since he never addressed this Court's precedent. Petitioner also provided the arbitrator with a copy of *Nagrapma v. MailCoups, Inc.* over unconscionability by applying California law, as determined applicable by the arbitrator, in relation to procedural and substantive unconscionability of the alleged agreement and arbitral proceedings, and with the AAA. But again, the arbitrator rejected the Ninth Circuit (en banc) precedent since he applied *res judicata* to unconscionability with no final judgment and despite that unconscionability had not previously been determined.

¹⁴ See Petitioner's sixteenth production request (App. 27, DE 35-7) and Transamerica's admissions. (App. 29, DE 35-9). This Court is requested to review Petitioner's arguments over substantive and procedural unconscionability (DE 42, pp.13-20; and Doc. 25, pp.16-25) and precedents at n. 12, supra, and to be the first Court to determine unconscionability.

IV. The Arbitrator Knowingly Violated 9 U.S.C. §§ 10(a)(1), (2), (3), and (4)

A. The Arbitrator's Award Was Procured By Fraud, Corruption, And/ Or Undue Means

"Arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration." *AT&T Technologies Inc. v. Communications Workers of America*, 475 U.S. at 651 (1986). Here, there was no agreement in advance. The Sales Contract signed by Petitioner on April 13, 2009 has no arbitration provision or the term "arbitration" included within. (App. 6, pp. 1-4). Further, the alleged "Independent Producer Contract" and dispute resolution clause were received by Petitioner in April, 2014, five years later.

Despite no advance agreement or contact from Petitioner in California, the arbitrator ordered a four day hearing. The arbitrator permitted Transamerica to present thousands of pages of subpoenaed documents and recorded deposition testimony, which was in violation of CCP §§ 1282.2(a)(F), (d), 1282.6(a), 1283.05, and 1283.1(b)(2)(App. 5, pp. 5-6), since Transamerica failed to incorporate CCP § 1283.05 into its dispute resolution clause. (App. 8, p. 7, Sect. 7.2). Ignoring these laws of the California Arbitration Act, none of which conflict with the FAA, and all of which laws the arbitrator determined applicable, was clear error and prejudice by undue means, which has acutely harmed Petitioner. (App. 4, p. 8; DE 54-2, ¶s 58-134; Doc. 25, pp. 16-25, Ex.1, ¶s 61-85). See 9 U.S.C. § 10(a)(1).

During the final arbitral hearing hour, Petitioner noticed the arbitrator that Transamerica had not proven a contact with Petitioner in California regarding his jurisdiction. Murray then replied that she had a few hundred pages to review in order to search for a contact from Petitioner in California.

The arbitrator never followed up regarding no contact from Petitioner in California. Rather, he erroneously determined he had jurisdiction over Petitioner because Petitioner had timely responded to Transamerica's demand and attended the arbitral hearing, with no mention of a prior contact. (App. 4, pp. 9, 10).

During the final hearing hour, Petitioner also gave the arbitrator a hard copy of the Ninth Circuit's *en banc* decision on unconscionable arbitration, *Nagrampa*, supra (DE 35-4), and hard copies of the this Court's seminal case regarding no less than a "minimal contact" required for jurisdiction, *International Shoe*, (DE 35-2), and the Ninth Circuit's case, *Picot v. Weston*, (DE 35-3), which are all on point here. But, the arbitrator did not address this precedent in his award, which are relevant to Petitioner's defenses, and which proves his bias and prejudice by undue means.

Therefore, this case presents an excellent vehicle for this Court to establish precedent requiring arbitrators to hear and address all claims and defenses briefed by the parties and to determine preliminary issues of arbitrability, jurisdiction, and unconscionability pre-hearing or during arbitral hearings, rather than first doing so during rendering an award. Such a holding from this Court would significantly help the public at large by making arbitration proceedings more equitable. Further, since arbitration is increasingly common, this Court has an opportunity, with this case, to establish some precedential standards regarding arbitral fairness.

B. The Arbitrator Was Evidently Partial To Transamerica

Though having promised by his own order to determine unconscionability, arbitrability, jurisdiction, and the admissibility of evidence in his final award (App. 15), the arbitrator applied *res judicata* to arbitrability, with no final judgment.

The arbitrator further applied *res judicata* to unconscionability, with no final judgment and no prior determination ever having been made. Also, the arbitrator did not determine the "admissibility of evidence," as he had promised to do. Further, the arbitrator disregarded this Court's precedent regarding specific and personal jurisdiction, with no California contact, as twice admitted by Transamerica. And the arbitrator did not determine Petitioner's defenses of a breached legal process and CAA discovery violations. (App. 4; DE 36-2, pp. 6-21, and 36). But the arbitrator reviewed and granted all of Transamerica's claims, which was partial to Petitioner.

Further, the arbitrator allowed all of Transamerica's discovery requests, in violation of the California Arbitration Act ("CAA")(CCP §§ 1282.2(a)(F), (d), 1283.05, and 1283.1(b)) (App. 5, pp. 5-6), and denied all of Petitioner's admissions requests and interrogatories, and ten of Petitioner's production requests. (Apps. 27, 28). In addition, the arbitrator failed to address Transamerica's failure to prove a minimal contact from Petitioner in California within his award. (App. 4, DE 42-2, pp. 9, 10).

Moreover, the arbitrator ignored Transamerica's failure to produce its alleged "Producer Agreement," which Transamerica exclusively relies on and was ordered to be produced. (Apps. 27, first request; 28, and 29). As well, the arbitrator did not address Transamerica's failure to produce its complete underwriting file on insured Ben. (App. 27, sixth request). Nor did the arbitrator address Transamerica's failure to produce documents received from or sent to Crump, (n. 7, *supra*; Apps. 27, tenth request; 29). However, most troubling is that the arbitrator disregarded his own order that Transamerica produce delivered proof of "a genuine and true copy"...of "an agreement to arbitrate..." (App. 27, sixteenth request; Apps. 28, 29, responses).

C. The Arbitrator Was Guilty Of Misconduct In Refusing To Hear Evidence Pertinent And Material To The Controversy

Pertinent to this controversy is the policy, and application within, which was issued on August 12, 2009 and became incontestable on August 12, 2011. (App. 7). Yet, the arbitrator refused to hear that the policy and application are incontestable. The arbitrator erroneously allowed Transamerica to contest the application over three years beyond expiration of the statutory and contractual contestable period. (App. 7, p. 6, "Incontestability;" N.C.G.S. § 58-58-22(2))(App. 5, p. 4). Further, the arbitrator refused to hear that no evidence was produced showing that Petitioner received the Producer Contract before receiving Transamerica's arbitration demand and that Misty A. Murray admitted having first printed the Producer Contract on March 31, 2014 with her firm's watermarked paper. (App. 9, p. 2, ¶ 6; DE 35-30).¹⁵

The arbitrator tied Petitioner to the Producer Contract by refusing to hear that Examination Management Services, Inc. ("EMSI") had recorded and submitted Ben's "Application Part 2 – Health History." (Apps. 11, 12). Further unheard, is that Transamerica did not prove who submitted Ben's "Application Part 1" to Crump. (Doc. 25, Ex. 1, ¶s 9-20; App. 27, tenth production request; App. 29, responses).

Regarding the alleged Producer Contract, the arbitrator refused to hear that Transamerica only, not Petitioner, is a party to such Contract, and that the CAA requires dismissal when a respondent is not a party to the arbitration contract or agreement, such as to be bound. (App. 8, p. 1, 1st ¶; CCP § 1287.2)(App. 5, p. 8).

¹⁵ The arbitrator further refused to hear evidence that the 4-page Sales Contract was submitted on April 14, 2009 by facsimile to Crump by Petitioner (App. 6, Sales Contract, headers), but the Producer Contract shows no evidence of having been received or submitted by either party. (App. 8, alleged Producer Contract, headers and footers)(emphasis added).

North Carolina law applies since no contract was made outside of the State of North Carolina. (N.C.G.S. § 58-3-1)(App. 5, p. 4). As held by the North Carolina Supreme Court, "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." *Trust Co. v. Insurance Co.* 173 N.C. 558 at 612. (Doc. 26, Ex. 6). 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?" *Trust Co.*, 173 N.C. 558, at 615-16. "The authorities are practically uniform in holding that an incontestable clause, which gives a reasonable time for the insurance company 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 would be the nonpayment of premiums." *Trust Co.*, at 615-16. 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, establishing the invalidity of the contract of insurance, it should thereafter be treated as valid." *Id.* at 617 (cited by this Court in *American Life Insurance Co. v. Stewart*, 300 U.S. 203 at n. 1, n. 3 (S.Ct. 1937);¹⁶ but, so far refused to be heard.

¹⁶ Since this Court has cited *Trust Co. (NC)*, this Court should adhere to such precedent.

"...the holding of the courts of this country has been almost universally that *every defense* to a policy of insurance embraced within the terms of the 'incontestable clause' is completely lost to the insurer, if it fails to make the defense or *take affirmative action within the time limited by the policy*," *Id.* at 619. "Its effect is not to prevent the insurer from annulling the contract upon the ground of the fraudulent representations of the insured, provided *an action is brought* in the lifetime of the insured and *within two years from the date of the policy*," *Id.*¹⁷

Further held by the NC Supreme Court is that "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, here [Transamerica], from asserting this defense." *Chavis v. Southern Life Insurance Co.*, 347 SE 2d at 427-8 (N.C. 1986)(citing *American Trust Co. v. Insurance Co.*)(emphasis added).¹⁸

Regarding California law, "A provision in a life insurance policy to the effect that after being in force the specified time, it shall be incontestable, precludes any defense after the stipulated period on account of false statements warranted to be true, even though such statements were fraudulently made...." (*Dibble v. Reliance Life Ins. Co.* (1915) 170 Cal. at pp. 208-09).

¹⁷ Since the arbitrator and both lower courts disregarded this North Carolina Supreme Court precedent, as cited by this Court, the arbitrator's award should be vacated, all of Transamerica's claims should be dismissed & Petitioner's counterclaims should be granted.

¹⁸ See also *Enelow v. New York Life Ins. Co.*, 293 U.S. 379, 384-5 (S.Ct. 1935); *Mutual Life Ins. Co. of New York v. Hurni Packing Co.*, 263 U.S. 167, 44 S.Ct. 90, 68 L.Ed. 235, 31 A.L.R. 102; *Northwestern Mutual Life Ins. Co. v. Pickering*, 293 F.496, 499 (5th Cir.) cert. denied, 263 U.S. 720 [44 S.Ct. 229, 68 L.Ed. 524] (1923); *Sutton v. American Health & Life Ins. Co.*, 683 F. 2d at 96 (4th Cir. 1982); Couch, Vol. 8, § 2155b; 18 Couch et al., § 72:71 (2d ed. rev. vol. 1983); & 1A John A. Appleman & Jean Appleman, *Insurance Law and Practice* § 332 (rev. vol. 1981), none of which were heard by the arbitrator or either lower court.

And decisions since *Dibble* have held that even gross fraud by an insured who lied about his health in applying for life insurance falls within the terms of an incontestability provision. (*Metzinger v. Manhattan Life Ins. Co.* [(1969) 71 Cal.2d 423, 428-429 (78 Cal. Rptr. 463, 455 P.2d 391)] [relying on *Dibble*'s holding that fraud as to insured's health condition fell within an incontestability clause when construing [Insurance Code] section 10206]; *New York Life Ins. Co. v. Hollender* (1951) 38 Cal.2d 73, 77-79 [237 P.2d 510] [after the prescribed lapse of time, the incontestability clause 'prevents nullification of the insurance contract for any cause not excepted in the clause']. See also *Amex Life Assurance Co. v. Superior Court*, 14 Cal. 4th 1231 (Cal. S.Ct. 1997). Thus, the arbitrator refused to hear pertinent and material evidence regarding contestability precedent from this Court, the California Supreme Court, the North Carolina Supreme Court, U.S. Circuit Courts of Appeal 1-11, and the D.C. Circuit Court of Appeals.¹⁹

The arbitrator also refused to apply NC law by applying California law to the ineffective, unsigned, and undated Producer Contract (App. 8, p. 1), which does not list Petitioner as a party, was not submitted by Petitioner, and was first received by Petitioner in April, 2014 with Transamerica's arbitration demand. (Apps. 9, 10).

¹⁹ Regarding U.S. Circuit Courts of Appeal contestability precedent, see *Velez-Gomez v. SMA Life Assurance Co.*, 8 F.3d 873, 875-76 (1st Cir. 1993); *New England Mutual Life Ins. Co. v. Gillette*, 171 F.2d 500 (2nd Cir. 1948); *Franklin Life Ins. Company v. Bieniek*, 312 F.2d at 368 (3rd Cir. 1962); *Provident Mutual Life Ins. Co. v. Parsons*, 70 F.2d 863, 866 (4th Cir. 1934); *Scharlach v. Pacific Mutual Life Ins. Co.*, 9 F. 2d 317, 318 (5th Cir.1925); *Rose v. Mutual Life Ins. Co. of New York*, 19 F. 2d 280 (6th Cir. 1927); *Columbian Nat'l Life Ins. Co. v. Wallerstein*, 91 F.2d 351, 352 (7th Cir.1937); *Peake v. Lincoln National Life Ins. Co.*, 15 F. (2d) 303 (8th Cir.); *Button v. Connecticut General Life Ins. Co.*, 847 F.2d at 588 (9th Cir. 1988); *Stewart v. American Life Ins. Co.*, 85 F.2d 791,792 (10th Cir.1936); *American United Life Ins. Co. v. Martinez*, 480 F.3d at 1059 (11th Cir. 2007); and *Densby v. Acacia Mutual Life Ass'n*, 78 F. 2d at 205, 6 (D.C. Cir. 1935).

The only contracts recorded, signed, and agreed to between Petitioner and Transamerica are Petitioner's four page Sales Contract and the incontestable policy contract. Petitioner signed the Sales Contract on April 13, 2009, which Petitioner submitted to Crump on April 14, 2009. (App. 6, pp. 1-4). And the policy contract, issued on August 12, 2009, became incontestable on August 12, 2011. (App. 7, p. 1).

The three year statute of limitations on the Sales Contract expired on April 13, 2012, which the arbitrator refused to hear. N.C.G.S. §§1-52(1), (9) and (16) (App. 5, p. 3).²⁰ North Carolina does not permit tolling over an injured party's discovery. *Pearce v. N.C. State Highway Patrol Voluntary Pledge Comm.*, 312 S.E. 2d 421, 425-26 (N.C. 1984)(DE 54-17). And without due diligence, Transamerica's claims cannot be tolled.²¹ *Rothmans Tobacco Co., Ltd. v. Liggett Grp., Inc.*, 770 F.2d 1246, 1249 (4th Cir. 1985)(citing *Wilson v. Crab Orchard Dev. Co.*, 276 N.C. 198, 171 S.E.2d 873, 884 (1970)). The arbitrator further refused to hear material evidence regarding Insured Ben's March 23, 2010 first specialist consult "for possible ALS," which was over eight months after the policy was issued and in force.²²

²⁰ The arbitrator refused to hear that the alleged Producer Contract cannot be linked to the Sales Contract, which was first contested by Transamerica on March 31, 2014, nearly two years after the applicable NC three year statute of limitations on contracts expired.

²¹ Regarding Transamerica's lack of due diligence, this Court is requested to review DE 36-6, 7, 8, 9, 10, 28, 29, and 30; DE 42-2, pp. 17-19; and DE 52-2, ¶s 2-37 (with referenced citations) since the arbitrator and lower courts refused to hear, review, or address all.

²² Regarding Ben Laschkewitsch's first specialist consult by referral "for possible ALS," which the arbitrator refused to hear, this Court is requested to review Doc. 15, pp. 33-34, Doc. 25, pp. 11-15, all of which the arbitrator had (DE 41-3), but did not hear. Further, the Court should take notice that the arbitrator held that "there is no evidence that Respondent instructed Ben to lie in his answers to the paramedic who was preparing Part 2 of the application" (App. 4, p. 5, lines 11-13, and p. 6, lines 11-16)... and "At that time, this was 'apparently true.' He knew that he probably had ALS and FTD, but had not yet been diagnosed or treated for it, or told by a doctor that he had it." (App. 4, p. 4, lines 18-23). So, as admitted, no false answer was made by Ben in his Application Part 2—Health History.

On August 12, 2009 the incontestable policy was issued. On August 24, 2009, Dr. Meltzer examined Ben and found no reason to refer Ben to a specialist, though he would have if he believed that Ben had an illness. (DE 36-16, Meltzer Dep. 35:15-21). On December 17, 2009 Ben consulted with neurologist Dr. Lucas Van Tran who recorded a normal exam and testified that if he "suspected a 20% chance" that Ben had ALS he would have referred Ben to see a specialist. (DE 36-19, Van Tran Dep. 46:6-25). Moreover, at the end of December, 2009 Ben walked about one mile each day, while holding the leash of a 75 pound aggressive golden retriever. (App. 30, affidavit of Scott Laschkewitsch). See also Doc. 25, Ex.1, ¶s 21-32; DE 54-2, ¶s 25-57.

On January 22, 2010 VA neurologist Dr. Sampath Charya referred Ben to Duke University Medical Center's multidisciplinary ALS Clinic for a March 23, 2010 consult with one of North Carolina's five ALS Certified Centers of Excellence "to make that determination" of whether or not Ben had ALS? (DE 36-20; App. 31). Notably, Dr. Charya recorded full power in all limbs, able to toe-walk, heel-walk, and tandem walk...no fasciculations. (DE 36-20; DE 36, pp. 26-9; Doc. 25, pp. 11-15). And since muscle weakness and a fasciculation are the first signs of ALS, Ben did not have ALS by January 22, 2010, which the arbitrator refused to hear.²³ (App. 32, DE 54-19, p. 1; and App. 33, DE 54-21). Also, the ALS diagnostic categories are possible, possible lab-supported, probable, and definite. (DE 54-20, Table 3, DE 54-23, 24). And Ben's first specialist consult was scheduled by referral "for possible ALS" on March 23, 2010. (DE 36-20, specialist referral for March 23, 2010).

²³ Notably, the arbitrator also held that Ben made no false answer in his Application Part 1. (App. 4, pp. 5, 6, lines 11-16). Yet, the arbitrator held that Petitioner lied about answers in Ben's application, which contradicts his own admissions. See also n. 22, *supra*.

Also, the diagnosis of ALS requires a second opinion by an ALS "expert" in a "multidisciplinary clinic." (DE 54-26, p. 5; DE 54-27). This is highly recommended since "there are false positive diagnoses, temporary ailments with symptoms that mimic ALS (DE 54-28) and people eventually diagnosed with ALS have lived for ten or more years." (DE 54-29; ¶s 3-13, and 18). This is confirmed by the story of Robert Hawkins, an Air Force veteran residing in Fayetteville, NC, just like Ben, who was diagnosed with ALS in 2008 "after three years of inaccurate diagnoses" (DE 54-26, p. 4), Ben's obituary (App. 34, lines 19-20), and the story of Coach Jeff Capel (Doc. 25, Ex. 3, p. 2). And Ben's March 23, 2010 consultation "for possible ALS," was not probable, probable lab-supported, or definite; rather, possible, the least certain ALS diagnostic category. (App. 32, Table 1; App. 35, DE 54-22, "Diagnosis," 2nd ¶).

D. The Arbitrator So Imperfectly Executed His Power Such That A Mutual, Final, And Definite Award Upon The Subject-Matter Submitted Was Not Made

The arbitrator agreed by official notice to review Petitioner's counterclaims (Doc. 25, pp. 26-46); but, attempted to set the counterclaim amount. (App. 16). The arbitrator confirmed that he would consider Petitioner's counterclaims by granting Petitioner a seven day extension to file a counterclaim fee. (App. 17). Then, the AAA Director, Rebecca Nako, notified the arbitrator that Petitioner could select his own counterclaim fee and amount. (App. 18, pp. 1, 8). Nako confirmed that Petitioner could select his own counterclaim amount by giving Petitioner specific guidance on filing the fee amount, per counterclaim, as agreed by the arbitrator to review. (App. 18, pp. 1-10). And Petitioner timely filed his counterclaim breakdown and fee (App. 19), as approved by Nako, and twice agreed to be determined by the arbitrator.

The AAA Director then billed Transamerica, not Petitioner. (App. 20). Next, Transamerica became unhappy with the amount of Petitioner's counterclaims and filed a 2-page motion to dismiss under AAA Rule 57 (Remedies for Nonpayment). As permitted by the arbitrator, Petitioner filed a forty page response. (DE 43-8). Within ten hours of receiving Petitioner's response, the arbitrator granted Transamerica's motion and closed the hearing, before apportioning arbitral fees, which prejudiced Petitioner and was partial to Transamerica. (Apps. 21, 22; Doc. 25, Ex.1, ¶s 26-60).

The arbitrator rejected Petitioner's counterclaims and fee "over AAA Rule 57 upon Transamerica's request," without explanation of a Rule 57 subpart and before apportioning his fees "by way of further order or award," as promised by his order (Apps. 21, 22). And the arbitrator did not address Petitioner's counterclaims in his award (App. 4, p. 16), as he ordered, which proves that he imperfectly executed his power such that a final award upon the subject-matter submitted was not made.²⁴

V. The Arbitrator Did Not Draw The Essence Of His Award From Any Contract

The policy and Ben's application within both became incontestable on August 12, 2011. "The Beneficiary" General Provision within the policy states that "To the extent permitted by law, no death benefit will be subject to the claims of the Beneficiary's creditors or to any legal process against the Beneficiary." (App. 7, p. 3, "Protection of the Death Benefit." (DE 41-4)(emphasis added). The NC three year statute of limitations on the Sales Contract expired on April 13, 2012. And the Sales Contract does not include an arbitration provision or the term arbitration. (App. 6).

²⁴ AAA Rule 57 has six subparts (Rule 57; App. 5, pp. 8, 9) in relation to "Remedies for Nonpayment." The arbitrator penalized Petitioner under Rule 57 for not paying his or AAA fees, despite not having yet apportioned fees by "further order or award." (Apps. 21, 22).

The alleged Producer Contract first existed on March 31, 2014 with Murray's printing such 10-page Contract from an electronic source on her firm's watermarked paper (App. 9, p. 2, ¶ 6), and was first received by Petitioner the first week in April, 2014. The alleged Producer Contract was not made effective by Transamerica and is not signed or dated by Transamerica or Petitioner. And significantly, Transamerica only, not Petitioner, is as a party to the Producer Contract. (App. 8, p. 1, 1st ¶).

VI. The Arbitrator Manifestly Disregarded The Same Laws That He First Determined To Be Applicable In His Award

CCP §1290.4(b)(2) requires that "service outside this State shall be made by mailing the copy of the petition and notice and other papers by registered or certified mail;" but, Transamerica's service of process was by First-Class Mail. (App. App. 5, p. 8; App. 10). CCP §1283.6 requires that the "The neutral arbitrator shall serve a signed copy of the award on each party to the arbitration personally or by registered or certified mail or as provided in the agreement" (App. 5, p. 7); but, the arbitrator's award was served by electronic mail. (App. 24). CCP §§ 1282.2(a)(F), 1282.6(a), and 1283.1(b) mandate that CCP §1283.05 must be "incorporated into" an agreement for any discovery outlined in CCP § 1283.05 to be permitted, including depositions and subpoenas; however, CCP §1283.05 was not incorporated into the Producer Contract and the arbitrator disregarded these CAA Codes by permitting Transamerica unlimited subpoenas and deposition testimony. (App. 5, pp.5-6). And CCP §§1284.3(a) and (b)(App. 5, p. 7) mandate that "no neutral arbitrator or private arbitration company...shall [require] a consumer who is a party to the arbitration pay the fees and costs incurred by an opposing party if the consumer does not prevail...;" but, the arbitrator billed Petitioner for half of all fees. (App. 4, p. 16).

CCP § 1283.4 mandates that "the award shall include a determination of all of the...questions submitted to the arbitrator (App. 5, p. 6);" however, the arbitrator disregarded the "final judgment" element of *res judicata* regarding arbitrability and unconscionability, disregarded precedent from this Court and the Ninth Circuit over specific and personal jurisdiction, erroneously applied California law to the statutes of limitation, failed to address the admissibility of evidence in his award, which he had promised Petitioner by order to determine (App. 15), and did not determine Petitioner's counterclaims (App. 19), as he had twice promised Petitioner he would do by an AAA notice and affirmation. (Apps. 16, 17). Nor did the arbitrator address two of Petitioner's briefed defenses. (DE 36-2, pp. 6-21 and 36; Doc. 25, pp. 26-46).

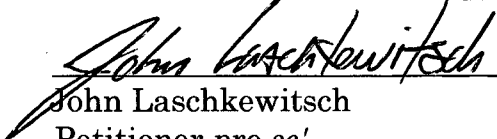
Because CCP § 1283.05 is not "incorporated into" Transamerica's "dispute resolution clause" (App. 8; Section 7.2), the arbitrator had no authority to preside at or exercise powers related to the conduct of the hearing or to hear Transamerica's depositions and subpoenaed documents. See also CCP § 1282.2(a)(F) (App. 5, p. 5). As well, CCP § 1282.2(d) required the arbitrator to hear relevant precedent briefed by Petitioner from this Court, the NC Supreme Court, and the Ninth Circuit, all of which he refused to consider. (App. 4; Doc.15, pp. xii, 11-47; Doc. 25, pp. i, ii, 1-47).

CONCLUSION

Based upon the foregoing, Petitioner's petition should be granted or judgment summarily REVERSED and all of Petitioner's counterclaims GRANTED. (App. 19).

Respectfully submitted,

This the 9th day of June, 2018


John Laschkewitsch
Petitioner *pro se*
1933 Ashridge Drive
Fayetteville, NC 28304
(910) 286-8008