

# In the Supreme Court of Appeals of West Virginia

Docket No. 11-0371

GEORGE A. GRAYIEL, JR.,

*Plaintiff Below / Petitioner,*

v.

APPALACHIAN ENERGY PARTNERS 2001-D, LLP,  
APPALACHIAN ENERGY PARTNERS 2001-S, LLP,  
APPALACHIAN ENERGY PARTNERS 2001 II, LLP,  
APPALACHIAN ENERGY PARTNERS 2003 S-II, LLP,  
BURNING SPRINGS ENERGY PARTNERS 1999, LLP,  
BURNING SPRINGS ENERGY PARTNERS 2000, LLP,  
BURNING SPRINGS ENERGY PARTNERS 2001-S, LLP,  
CHEROKEE ENERGY COMPANY, HAYNES #2 ENERGY  
PARTNERS 2001, LLP, MARTWIN TWIST ENERGY  
COMPANY, LLC, MARTIN R. TWIST, DREW THOMAS,  
TAMMY CURRY TWIST *and* TODD PILCHER,

*Defendants Below / Respondents.*



Appeal from a final order  
of the Circuit Court of  
Putnam County (08-C-378)

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PETITIONER'S BRIEF

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## ASSIGNMENTS OF ERROR

The circuit court erred in:

- requiring Petitioner to prove that the arbitration clauses in the parties' agreements are independently unenforceable, rather than applying West Virginia law and finding those agreements (and their arbitration clauses) unenforceable *en toto*;
- failing to find the agreements' arbitration clauses independently unenforceable, either because they are unconscionable or because they were fraudulently procured;
- refusing to find Respondent Martin Twist's deposition testimony an unresponsive and evasive effort to deprive Petitioner of any opportunity to conduct meaningful discovery; and
- failing to enforce Respondent Twist's offer to repay Petitioner.<sup>1</sup>

## STATEMENT OF THE CASE

### I. Factual Background

#### A. The ponzi scheme.

George Grayiel (Petitioner and Plaintiff below) is a retired United States postal worker. (A.R. 390.)<sup>2</sup> After twenty years of hard work as a mail carrier and clerk, frugal spending, and careful savings, Mr. Grayiel had managed to set aside a modest life savings for what was to be his retirement. (*Id.*)

Then he met Martin Twist. At all relevant times, Twist (Respondent and Defendant below) was the ultimate owner of all of the Company Respondents.<sup>3</sup> Respondents

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<sup>1</sup> This Court's review of the circuit court's dismissal is *de novo*. Syl. pt. 2, *State ex re. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 461 S.E.2d 516 (1995).

<sup>2</sup> References to the Appendix Record—the contents of which were agreed to by the parties—are set forth as "A.R. \_\_\_."

<sup>3</sup> The "Company Respondents" are Appalachian Energy Partners 2001-D LLP ("AEP 2001-D"), Appalachian Energy Partners 2001-S LLP ("AEP 2001-S"), Appalachian Energy Partners 2001-S-II LLP ("AEP 2001-S-II"), Haynes #2 Energy Partners 2001, LLP ("Haynes #2"), Cherokee Energy Company LLC ("Cherokee"), Burning Springs Energy Partners 1999 LLP ("BSEP 1999"), Burning Springs Energy

Drew Thomas (*a/k/a* Andrew Tomljenovich), Tammy Twist Curry, and Todd Pilcher—Twist’s friends and relatives and Codefendants below—served in various capacities as agents or officers of the Company Respondents. In the winter of 1999-2000, Twist and Thomas cold-called Mr. Grayiel at home (A.R. 391), offering to sell him interests in what they told him were ventures to drill oil and gas wells in West Virginia. (*Id.*) Over the next two years, Twist and Thomas mailed to Mr. Grayiel material about the “project” that promised him a “safe investment.” (*Id.*) They even mailed maps of potential drilling sites, projected cash flows from gas production, and information about Twist and his supposed business history. (*See generally* Compl. (A.R. 443).)

Twist and Thomas sent Mr. Grayiel subscription agreements (the “Agreements”). (*See* A.R. 391.) Mr. Grayiel asked Twist and Thomas if either of them had had any past legal problems, and they both denied that they had. (*See id.*) Wholly unaware of Respondents’ pasts, and based on their representations about the “project” and how Respondents planned to “invest” Mr. Grayiel’s money, from January 2000 through December 2001, Mr. Grayiel “invested” in Twist’s scheme. All told, over that two year period, Twist and Thomas eventually bilked Mr. Grayiel of his life savings, nearly *a million dollars*. (A.R. 392.)

Although Twist did initially dribble Mr. Grayiel a very small “return” (*see* A.R. 393), at some point even that dried up, and the Company Respondents somehow managed to become the only “projects” in West Virginia not to make money drilling for oil and gas. Twist also stopped sending the required tax forms (*id.*). Notwithstanding that Twist and Thomas had made themselves very accessible to Mr. Grayiel while they were swindling him out of his money, the two soon disappeared and refused to answer Mr. Grayiel’s phone calls, letters, or requests for meetings. (*Id.*) Mr. Grayiel became suspicious, so he contacted Twist and Thomas

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Partners 2000 LLP (“BSEP 2000”), Burning Springs Energy Partners 2001-S LLP (“BSEP 2001-S”), and Martin Twist Energy Company LLC (“MTE Company”).

and requested an accounting, to review the Company Respondents' tax returns, and for other information. (Compl. ¶ 50 (A.R. 450).) But Twist and Thomas refused to provide the information that Mr. Grayiel requested. (*Id.*)

**B. Some of Twist's other victims.**

Mr. Grayiel was not the only one to be conned, nor was he the only one to become suspicious. An investigator with the United States Securities and Exchange Commission investigating Twist contacted and eventually interviewed Mr. Grayiel. (A.R. 393.) An agent from the Federal Bureau of Investigation contacted and interviewed him about Twist. (*Id.*) And an agent from the Internal Revenue Service contacted and interviewed him. (*Id.*) Although unaware of the fact at the time, Mr. Grayiel eventually learned that Twist and Thomas had failed to comply with the state and federal requirements for the registration of agents or the sale of securities, despite assurances that they had. Twist did not invest the money that Mr. Grayiel gave him for the purposes that it was given, nor did he ever have any intention of doing so. Instead, he wrongfully and unlawfully retained the money—that is, Mr. Grayiel's and his fellow victims' money—to maintain an extravagant lifestyle. (*Id.*)<sup>4</sup>

Twist has managed to leave a wide path of destruction.<sup>5</sup> The allegations and results of the relevant cases demonstrate the unenforceability of the arbitration provisions on

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<sup>4</sup> For example, according to public records, Twist owns at least one jet airplane, referred to in his deposition. [http://registry.faa.gov/aircraftinquiry/NNum\\_Results.aspx?NNumbertxt=394HA](http://registry.faa.gov/aircraftinquiry/NNum_Results.aspx?NNumbertxt=394HA).

<sup>5</sup> This includes several criminal cases of note. In early 2003, Twist fired two of his employees (Hammond and Coker), and they threatened to disclose certain aspects of Twist's "capital intensive" businesses to his investors. See *Coker v. Com. of Kentucky*, Nos. 2004-CA-398 & -428, 2005 WL 2806769, at \*1 (Ky. Ct. App. Nov. 10, 2005), *rev'd on other grounds*, 241 S.W.3d 305 (Ky. 2007). The two sent Twist an anonymous letter demanding "that Twist place a gym bag containing \$150,000.00 at mile-marker 59 on Interstate Highway 64 in Franklin County," and that if he failed, "letters would be sent to each of his investors . . . [that] would include a list of regulatory agencies along with a recommendation urging investors to report Twist to those agencies." *Id.* When they were caught, Coker offered an interesting defense to the extortion charge against him: "Coker referred to Twist's business activities as a 'confidence game' and as a 'pyramid scheme,' and he strongly implied that Twist was a 'con artist' who duped innocent people out of their life's savings. Thus, Coker reasoned that even if the investor

several fronts, including that the clauses are, both by themselves and otherwise, void and voidable, that they are independently unconscionable, that they independently violate public policy, and that they were independently fraudulently procured.

In February 2003, the Alabama Securities Commission entered a Cease and Desist Order against Twist, Cherokee, and three Cherokee or Cherokee-affiliate officers. *See In the Matter of Cherokee Energy Co., LLC*, No. CD-2003-02 (Ala. Sec. Comm'n Feb. 4, 2003) ("Ala. C&D Order").<sup>6</sup> The Alabama Commission found that Cherokee "cold called Alabama residents and engaged in the offer and/or sale of unregistered securities" and that "[r]epresentatives of [Cherokee, Twist, and the other respondents] also failed to disclose to investors and regulatory agencies of a pre-existing Cease and Desist Order . . . ." Ala. C&D Order ¶¶ 6-8 & 11. The Commission found several state and federal securities violations and ordered Twist, Cherokee, and the others to cease and desist from further such activities in Alabama.<sup>7</sup>

In 2005, around a dozen individuals and associated family trustees sued Twist, Tammy Twist Curry, Pilcher, Thomas, and several other related individuals and Twist entities in the Superior Court for San Diego County, California. The California plaintiffs' twenty-count complaint alleged that the defendants engaged in a "nationwide fraudulent oil and gas investment scam" wherein they "fraudulently raised nearly \$25,000,000 from more than 250 investors with material misrepresentations and omissions in their offer and sale of unregistered, unqualified

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information was secret, its exposure could not have impaired Twist's business reputation since Twist was, in his estimation, nothing more than a crook." *Id.* at \*2.

<sup>6</sup> <http://www.asc.state.al.us/Orders/2003/CD-2003-0002.pdf>.

<sup>7</sup> Only after Twist and his attorney offered nearly a half-million dollars to two Alabama residents and represented that the "would not engage in cold calling" did the Alabama Commission vacate the Cease and Desist Order. *See In the Matter of Cherokee Energy Co., LLC*, No. CD-2003-02 (Ala. Sec. Comm'n Apr. 18, 2003), <http://www.asc.state.al.us/Orders/2003/OV-2003-0002.pdf>; *In the Matter of Malory Inv., LLC*, No. CD-2007-19, ¶¶ 34 & 35 (Ala. Sec. Comm'n Dec. 22, 2008) (consent order regarding unlawful sale of securities), <http://www.asc.state.al.us/Orders/2007/CO-2007-0019.pdf>.

securities.” *Arbusto v. Twist*, No. GIC 851627 (Sup. Ct. San Diego County, Calif.) (1st Am. Compl. ¶ 1). The California plaintiffs continued:

In early 1999, defendants, led by Martin Twist . . . , concocted a grant scheme to bilk millions from unsuspecting investors. To elude criminal investigations into his shady coal brokerage business, Twist abandoned his coal brokerage business and started Martin Twist Energy Company, LLC . . . and later Cherokee Energy Company, LLC . . . . Using a purchased database list of Wall Street qualified investors, Cherokee’s unlicensed salespersons cold-called potential investors all over the country . . . offering to sell securities in Cherokee’s oil and gas limited partnerships. In their offer and sale of the securities, the salespersons represented to plaintiffs that under the management of Twist and his oil company, Cherokee, various limited liability partnerships would acquire land leases near the successful Columbia Natural Resources wells in West Virginia.

*Id.* ¶ 2.

The State of Illinois Secretary of State, Securities Department, issued a Consent Order against Malory Investments, *et al.*, materially identical to the State of Alabama’s order for the same April 2003 illegal sales of Cherokee’s and Twist’s securities. *See In the Matter of Malory Inv., LLC*, No. 07-00319, ¶¶ 34 & 35 (Ill. Sec. Dept. Dec. 22, 2008).<sup>8</sup>

On March 8, 2005, Ronda Paul, Securities Examiner for the Department of Public Protection, Office of Financial Institutions (“OFI”), sent Andy Tomljenovic (*a/k/a* Drew Thomas) a letter informing him that the OFI had “received inquiries from other state securities regulators and information from out-of-state investors regarding certain sales of securities representing interests in oil and gas programs . . . .” (03/08/2005 letter from Paul to Tomljenovic.<sup>9</sup>) Ms. Paul requested that Tomljenovic contact the OFI “[s]o that [they] may

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<sup>8</sup> [http://www.cyberdriveillinois.com/departments/securities/administrative\\_actions/2008/december/maloryinvest\\_co.pdf](http://www.cyberdriveillinois.com/departments/securities/administrative_actions/2008/december/maloryinvest_co.pdf)

<sup>9</sup> [http://www.kfi.ky.gov/NR/rdonlyres/E2658BD1-B5E3-4A73-AFD4-557E2DB88DC2/0/AndyTomljenovicAKADrewThomas\\_OrderoftheExeDir.pdf](http://www.kfi.ky.gov/NR/rdonlyres/E2658BD1-B5E3-4A73-AFD4-557E2DB88DC2/0/AndyTomljenovicAKADrewThomas_OrderoftheExeDir.pdf) at Ex. A.

determine whether the securities [he] [was] selling are in compliance with the Kentucky Securities Act . . .” (*Id.*) Thomas’s attorney contacted the OFI, but, as in this case, Thomas never appeared. So on March 29, 2005, the OFI repeated its demand that Thomas appear for questioning. (03/29/2005 letter from Paul to Tomljenovic.<sup>10</sup>) Thomas rebuffed the OFI’s demand, and on May 20, 2005, the OFI ordered Thomas to appear before the agency to explain his sales of Twist’s securities. *See OFI v. Tomljenovic*, No. 2005-AH-012 (Ky. OFI May 20, 2005) (Order).<sup>11</sup> On information and belief, Kentucky revoked Thomas’s license.

In April 2008, the Ohio Department of Commerce distributed a press release entitled *Investors Warned To Be On Guard Against Top 5 Investment Scams*. Coming in at number three on Ohio’s “Top Five Investment Scams,” as the poster child in the category of “con artists pitch schemes that promise quick profits in oil and gas ventures,” *id.*, was none other than Respondent Martin Twist:

The Division of Securities issued 19 cease and desist orders in 2007 in connection with oil and gas offerings. Martin R. Twist, of Louisville, Kentucky, and his companies were the subject of 18 cease and desist orders. Twist was president and chief executive officer of Cherokee Energy Co., and the developer/operator of oil and natural gas wells in Kentucky, West Virginia, Texas and Tennessee. Ohioans invested nearly \$1.2 million in the oil and gas ventures.

As a result of its investigation, the Division of Securities found that Twist was selling unregistered securities, made fraudulent representations in the sale of securities, and failed to disclose material facts in the sale of securities.

On July 14, 2003, the Oklahoma Department of Securities issued a Notice of Opportunity for Hearing on the Department’s Enforcement Division’s Recommendation against Cherokee, AEP 2001-D, and Twist, alleging violations of state securities laws and material

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<sup>10</sup> *Id.* at Ex. C.

<sup>11</sup> *Id.*

misrepresentations. *See In the Matter of: Cherokee Energy Co., L.L.C.*, No. 03-045 (Okla. Dept. of Secs. July 14, 2003).<sup>12</sup> On December 10, 2003, Twist filed an Offer to Settle wherein he would refund, with interest, all of the money that he had taken from Oklahomans and pay a total of \$12,500 in civil penalties. *See In the Matter of: Cherokee Energy Co., L.L.C.*, No. 03-045 (Okla. Dept. of Secs. Dec. 10, 2003).<sup>13</sup> The Oklahoma agency accepted Twist's offer, and the next day, it entered an Order Imposing Civil Penalty against Defendants. *See In the Matter of: Cherokee Energy Co., L.L.C.*, No. 03-045 (Okla. Dept. of Secs. Dec. 11, 2003).<sup>14</sup>

Twist was met with a similarly warm reception in Pennsylvania. Consequently, he settled with that state's Securities Commission under terms similar to his deal with the Oklahoma regulators. *In the Matter of App. Energy Partners 2001-D, LLP*, No. 2002-11-28 (Penn. Sec. Comm'n Apr. 16, 2003).<sup>15</sup>

In the summer of 2003, the West Virginia Securities Division, in response to complaints that it received from at least four of Mr. Grayiel's fellow victims, found that Twist engaged in the unlawful sale of securities. The Commissioner ordered AEP 2001-D, Cherokee, and Twist to cease and desist. *See In the Matter of: App. Energy Partners 2001-D LLP*, No. 03-1291 (W. Va. Sec. Div'n July 29, 2003) (Summary Order to Cease & Desist) (A.R. 347-55). Twist paid an \$11,000 fine, refunded two of the victims' money, and arbitrated with the other two. *Id.* In addition to the instant suit, Twist was also sued in West Virginia by several of his other victims. *See, e.g., Ashbach v. Cherokee Energy Co.*, No. 07-C-1836 (Kanawha County, W. Va., Cir. Ct. Aug. 27, 2007); *Bengfort v. Twist*, No. 07-C-2358 (Kanawha County, W. Va.,

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<sup>12</sup> [securities.ok.gov/Enforcement/Orders/PDF/Cherokee\\_Notice\\_03-045.pdf](http://securities.ok.gov/Enforcement/Orders/PDF/Cherokee_Notice_03-045.pdf).

<sup>13</sup> [securities.ok.gov/Enforcement/Orders/PDF/CherokeeEnergy\\_OfferOfSettlement-03-035.pdf](http://securities.ok.gov/Enforcement/Orders/PDF/CherokeeEnergy_OfferOfSettlement-03-035.pdf).

<sup>14</sup> [securities.ok.gov/Enforcement/Orders/PDF/CherokeeEnergy\\_OrderImposingCivilPenalty.pdf](http://securities.ok.gov/Enforcement/Orders/PDF/CherokeeEnergy_OrderImposingCivilPenalty.pdf).

<sup>15</sup> *See* <http://www.asc.state.al.us/Orders/2003/CD-2003-0002.pdf>.

Cir. Ct. Oct. 7, 2007); *Lenski v. Twist*, No. 08-C-354 (Kanawha County, W. Va., Cir. Ct. Feb. 20, 2008). At least some of these cases continue still to this day.

In July 2004, the Enforcement Unit of the Wisconsin Department of Financial Institutes, Division of Securities, petitioned for a cease and desist order against Twist and certain agents and controlled entities. *See In the Matter of Burning Springs Energy Partners*, No. S-04122(EX) (Wisc. Dept. of Fin. Inst. July 21, 2004).<sup>16</sup> Therein, the Wisconsin regulators found that Twist cold-called his victims and offered them unregistered securities through unregistered agents without notifying anyone of the several existing cease-and-desist orders from the other states. The Division Administrator subsequently granted the petition and ordered Twist and his agents and entities to cease and desist. *See In the Matter of Burning Springs Energy Partners*, No. S-04122(EX) (Wisc. Dept. of Fin. Inst. Aug. 26, 2004).<sup>17</sup>

## II. Procedural Background

On November 30, 2007, Petitioner tendered to Twist his demand that Twist return all of the money that he had taken, plus certain associated statutory costs, fees, interest, and so on. (A.R. 402.) To date, Respondents have not returned Mr. Grayiel's money, despite offering to do so, as discussed later. Mr. Grayiel was thus left with no choice but to sue.

Citing the (unenforceable) arbitration clauses in the Agreements, Respondents moved to dismiss Mr. Grayiel's complaint. Mr. Grayiel opposed the motion, arguing that there remained factual questions as to the Agreements' and the arbitration clauses' enforceability. The circuit court ordered that Mr. Grayiel should have what was supposed to be an opportunity to conduct discovery into the factors that that court needed to analyze Respondents' motion. (A.R. 389.) *In accord Toppings v. Meritech Mortg. Servs., Inc.*, 140 F. Supp. 2d 683, 685 (S.D. W. Va.

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<sup>16</sup> [http://www.wdfi.org/\\_resources/indexed/site/newsroom/admin\\_orders/2004/ma\\_burning\\_pet.pdf](http://www.wdfi.org/_resources/indexed/site/newsroom/admin_orders/2004/ma_burning_pet.pdf).

<sup>17</sup> [http://www.wdfi.org/\\_resources/indexed/site/newsroom/admin\\_orders/2004/ma\\_mrtwist\\_ord.pdf](http://www.wdfi.org/_resources/indexed/site/newsroom/admin_orders/2004/ma_mrtwist_ord.pdf).

2001) (“In order to discharge its obligation to assure there is a valid arbitration agreement, the Court agrees discovery is necessary on the Toppings’ challenges to the Agreement. The Court believes additional factual development is warranted particularly, without limitation, on both the issues of unconscionability and the impartiality and other challenges to the NAF as the chosen arbitral forum.”); *Baughner v. Dekko Heating Techs.*, 202 F. Supp. 2d 847, 849-50 (N.D. Ind. 2002) (denying motion to dismiss or compel arbitration pending discovery on unconscionability of arbitration agreement because information was needed on costs of arbitration and plaintiff’s ability to pay to determine whether provision prevented plaintiff from effectively vindicating federal statutory rights in arbitral forum).

Instead of complying with the circuit court’s order, however, Twist engaged in a campaign to thwart at every turn Mr. Grayiel’s legitimate efforts at discovery. (*See, e.g.*, A.R. 281-82.) In particular, as discussed in detail below, Twist showed up at his deposition, only to refuse to meaningfully answer most of Mr. Grayiel’s counsel’s questions. Mr. Grayiel nevertheless supplemented his response to Respondents’ motion to dismiss as best he could. The circuit court, however, ignored Twist’s misconduct and granted Respondents’ motion. (A.R. 4-10.) As demonstrated here, that decision was clearly erroneous.

#### **SUMMARY OF ARGUMENT**

The circuit court should have applied state law, and specifically West Virginia state law, to the arbitrability of Mr. Grayiel’s claims. Because the Agreements are voidable *en toto*, the arbitration clauses contained within them are unenforceable. Thus, the circuit court should have allowed Mr. Grayiel’s claims to proceed to trial. But even if the circuit court did not err in requiring Mr. Grayiel to prove that the arbitration clauses are independently void, the court erred in finding those clauses enforceable. First, even presented with what Mr. Grayiel was permitted to develop under the circumstances, the circuit court erred in failing to find the clauses

independently unenforceable, both because they are unconscionable and because they were fraudulently procured. Mr. Grayiel offered overwhelming evidence that the clauses fail to meet neutral West Virginia law on contracts, and he offered overwhelming evidence that Twist deceived Mr. Grayiel into executing the arbitration clauses. Finally, the circuit court should have enforced an offer (or novation of an earlier purported offer) to return Mr. Grayiel's "investment."

### STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner requests oral arguments pursuant to Rule 20 because the circumstances of this case and the legal questions thereby presented are both of fundamental public importance. Twist has swindled many people, including many West Virginians. But so far, he has managed to shunt their claims off to arbitration, which he then makes unreachably inconvenient and costly by his vexatious multiplying of expenses, and which can at best only result in an award that Twist has no intention of ever paying. Judicial authority is needed to compel the attendance of recalcitrant witnesses, effectuate adherence to the rule of law, and effectively sanction Twist's behavior. Clarity in the law of arbitration generally and arbitrability also specifically serves the judicial goal of "protect[ing] a party's right to fully and effectively vindicate rights that are secured by the common law for the benefit of citizens generally—such as the right to be free of oppression and fraud," *State ex rel. Dunlap v. Berger*, 211 W. Va. 549, 556 n.3, 567 S.E.2d 265, 272 n.3, *cert. denied sub nom, Friedman's, Inc. v. W. Va. ex rel. Dunlap*, 537 U.S. 1087 (2002), and this case is racked by oppression and fraud, both before and during its litigation.

### ARGUMENT

- I. **The circuit court erred in failing to find (or allow Mr. Grayiel an opportunity to prove) that the Agreements were void *en toto* and instead requiring Mr. Grayiel to attack the arbitration clauses independently.**

A claim in a civil complaint must be arbitrated if and only if the governing arbitration clause at issue is enforceable and the claim is within scope of that clause. *See syl. pt.*

5, *Ruckdeschel v. Falcon Drilling Co., L.L.C.*, 225 W. Va. 450, 693 S.E.2d 815 (2010) (“When a circuit court is presented with the issue of whether an arbitration agreement is applicable, the court must determine the threshold issues of (1) whether a valid arbitration agreement exists between the parties; and (2) whether the claims averred fall within the substantive scope of that arbitration agreement.”); *cf. syl. pt. 2, State ex rel. TD Ameritrade, Inc., v. Kaufman*, 225 W. Va. 250, 692 S.E.2d 293 (2010) (same in cases governed by federal law on arbitration clauses).

First, arbitration “is a matter of consent, not coercion.” *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002) (quoting *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)). The Agreements here each contain a choice-of-law clause in favor of state—not federal—law, thus expressly rejecting application of the FAA.<sup>18,19</sup>

Second, although the arbitration clauses variously specified Kentucky and Indiana law,<sup>20</sup> this case has had no connection to Indiana whatsoever and only a tenuous, remote

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<sup>18</sup> See, e.g., *Tortoriello v. Gerald Nissan of N. Aurora, Inc.*, 882 N.E.2d 157, 168-69 (Ill. Ct. App. 2008) (“Normally, ‘[w]here a contract involving interstate commerce contains an arbitration clause, federal law preempts state statutes even in state courts.’ However, ‘in circumstances where parties to a contract have agreed to arbitrate in accordance with state law, the FAA does not apply, even where interstate commerce is involved.’”) (alterations in original); *Rhodes v. Consumers’ Buylines, Inc.*, 868 F. Supp. 368, 373 (D. Mass. 1993) (“Where . . . parties to a contract containing an arbitration clause have specified that the contract is governed by the law of a particular jurisdiction, a federal court generally may apply the law of the specified jurisdiction, not federal law, to determine the applicability of the arbitration provision.”); *Duffens v. Valenti*, 74 Cal. Rptr. 3d 311, 324 (Cal. Ct. App. 2008) (holding that “[w]here an arbitration provision contains California choice-of-law language, the parties’ intent is inferred that state law will apply for resolving motions to compel arbitration”; holding under state arbitration law that arbitration clause was *not* separable from the entire agreement; and affirming trial court’s order denying motion to compel arbitration); *Awuah v. Coverall N. Am., Inc.*, 554 F.3d 7 (1st Cir. 2009) (recognizing that arbitrability of arbitrability issues is not within Supreme Court of the United States jurisprudence).

<sup>19</sup> Although the Agreements (and the arbitration clauses contained therein) are for a number of reasons void *en toto*, it is nonetheless appropriate to apply state law as required by the Agreements to the analysis of arbitrability in the same manner that, for example, courts assert subject matter jurisdiction “just enough” to decide whether they have subject matter jurisdiction. See, e.g., *Alaska Airlines, Inc. v. United Airlines, Inc.*, 902 F.2d 1400, 1403 (9th Cir. 1990) (“Although the contract was later declared void, it is not inappropriate to apply the choice of law clause to all claims arising out of it . . .”).

<sup>20</sup> Respondents asserted in their initial motion that the Agreements contained choice-of-law clauses in favor of Indiana law. That assertion was incorrect, as more than twice as many of the Agreements contained choice-of-law clauses specifying Kentucky law. (See Agreements.)

connection to Kentucky.<sup>21</sup> Accordingly, West Virginia’s forum rules on choice of law require application of West Virginia state law, not federal law or Kentucky or Indiana state law, to the analysis of the arbitrability of Mr. Grayiel’s claims. *See Liberty Mut. Ins. Co. v. Triangle Indus., Inc.*, 182 W. Va. 580, 585, 390 S.E.2d 562, 567 (1990); *Lee v. Saliga*, 179 W. Va. 762, 770, 373 S.E.2d 345, 353 (1988); syl. pt. 1, *Gen. Elec. Co. v. Keyser*, 166 W. Va. 456, 275 S.E.2d 289 (1981), *modified on other grounds, Lee*.<sup>22</sup>

Third, unhampered by the FAA’s “severability” (*see Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967)) and “neutrality” (*see Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987)) requirements, West Virginia arbitrability law remains powerfully distrustful of form arbitration clauses even in the best of cases, and it imposes neither a severability nor a neutrality requirement. *See, e.g., Dunlap*, 211 W. Va. at 556 n.3, 567 S.E.2d at 272 n.3.<sup>23</sup> The

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<sup>21</sup> On this issue, Twist’s belligerent deposition performance backfired on him: “Q: Why was Jeffersonville, Indiana, selected as the venue for the arbitration? A: I don’t know. . . . Q: Okay. Do you have any connection whatsoever to Jeffersonville, Indiana? A: I don’t know.”) (M. Twist Dep. at 129 (A.R. 118)) As noted above, before moving his offices to Indiana to evade Kentucky securities agency enforcement action, Twist’s agents used Kentucky as a base for defrauding his victims. Lonny Armstrong will testify that Twist left Kentucky to later open an office in Indiana in order to escape Kentucky securities regulators’ scrutiny because Indiana had more lax securities laws. (L. Armstrong Aff. ¶ 14 (A.R. 144).) Surely, though, Twist will not argue that such a connection provides the necessary nexus between this case and either Kentucky or Indiana.

<sup>22</sup> On the other hand, Mr. Grayiel, Twist, Twist’s companies, Defendant Drew Thomas *a/k/a* Andrew Tomljenovic, Twist’s other agents, and Twist’s activities in this case certainly have a significant connection—even if a consistently tragic one—with West Virginia. Mr. Grayiel resides here. The cold-calls that Respondents made to Mr. Grayiel were received here. The wells were supposed to be operated here. Respondents conducted business in West Virginia. They visited the state often and maintained an office here (where, they allege, they kept all of their paperwork before it was “stolen”). (*But see* L. Armstrong Aff. ¶ 10 (the circumstances of this “burglary” are very suspicious) (A.R. 144).) *See also* George Hohmann, *Taxpayers may face lawsuits Carper releases list of largest delinquent accounts; \$2.2 million owed by companies*, CHARLESTON DAILY MAIL, Mar. 17, 2009, 2009 WLNR 5078854 (noting that Kanawha Commission President Kent Carper stated that Twist’s company, Martin Twist Energy, was the sixth worst tax dodger in Kanawha County, hanging the county out to dry for \$129,463).

<sup>23</sup> *See also State ex rel. Saylor v. Wilkes*, 216 W. Va. 766, 613 S.E.2d 914 (arbitration agreement void and also unsupported by independent consideration), *cert. denied*, 546 U.S. 958 (2005); *Davis v. Kitt Energy Corp.*, 179 W. Va. 37, 45 n.16, 365 S.E.2d 82, 90 n.16 (1987) (“It is because of this strong statutory policy that our commercial arbitration law, which favors arbitration, is inapplicable as it deals with rights arising from a contract.”); *Copley v. NCR Corp.*, 183 W. Va. 152, 394 S.E.2d 751 (1990)

result is that the circuit court erred in requiring Mr. Grayiel to prove that the arbitration clauses were *independently* unenforceable. Instead, the circuit court should have applied West Virginia state arbitrability rules and allowed Mr. Grayiel to prove that the Agreements are voidable *en toto* (because they are unconscionable and because they were fraudulently procured), and therefore that the arbitration clauses contained therein are, too, unenforceable.

By requiring Mr. Grayiel to prove that the arbitration clauses were *independently* unenforceable—a requirement that West Virginia law does not impose—the circuit court implicitly applied the FAA. It is understandable why the circuit court did so. After all, according to Exhibit A to Respondents’ motion to dismiss, which purports to be “[t]he pertinent portions of the Subscription Agreements” (*id.* at 2 (A.R. 424)), the arbitration clauses explicitly required that “[t]he Federal Arbitration Act . . . , not state law, shall govern the arbitrability of all Disputes. [State law] shall govern the construction and interpretation of this Agreement, subject to the foregoing provision regarding the Federal Arbitration Act.” (A.R. 429.)

The problem with Respondents’ argument and the circuit court’s holding is that *Exhibit A is not a part of anything George Grayiel ever signed*, but appears instead to be a document fashioned *ad hoc* to support Respondents’ motion.<sup>24</sup> The Subscription Agreements that Mr. Grayiel and Twist *actually signed* do *not* contain any such language, and specifically they did *not* require arbitrability to be decided under the FAA. Some courts have held that under circumstances not present here, a choice-of-law clause requiring application of state law to all

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(under West Virginia law, arbitration clause cannot defeat human rights claim); *Barber v. Union Carbide Corp.*, 172 W. Va. 199, 203, 304 S.E.2d 353, 357 (1983) (“we have chosen to limit the availability of arbitration to knowledgeable commercial parties”); *Bd. of Educ. of the County of Berkeley v. W. Harley Miller, Inc.*, 160 W. Va. 473, 236 S.E.2d 439 (1977) (requiring arbitration to be separately bargained for).

<sup>24</sup> Respondents chose to submit only excerpts that they say are the Subscription Agreements’ arbitration clauses (and the LLP Agreements’, attached thereto as Exhibit B). *But see* W. VA. R. EVID. 106. Counsel for Mr. Grayiel contacted counsel for Respondents and requested the entire document from which Exhibit A was taken. To date, counsel for Respondents has been unable to locate that document, and Mr. Grayiel has no idea what Exhibits A or B to Respondents’ motion to dismiss are.

questions does not require application of state law to arbitrability questions. Here, however, the fact that Twist subsequently *changed* his subscription agreements to specify that arbitrability *was* governed by the FAA—first by an ineffective “amendment” and then by attaching false copies of those agreements to his motion to dismiss—could not be a louder acknowledgment of his understanding that before such effort, arbitrability was *not* governed by the FAA.<sup>25</sup> Petitioner is reluctant to ascribe intent to the presence of Exhibit A to Respondents’ motion to dismiss. Nonetheless, it must not be tolerated.

Accordingly, Mr. Grayiel submits that the Court should reverse the circuit court’s order and remand the case with instructions to allow him to proceed to trial on the question of whether, under West Virginia law, the Agreements (including the arbitration clauses contained therein) are void *en toto* and thus unenforceable.

**II. Even if the circuit court correctly held that Mr. Grayiel’s claims were within the scope of the arbitration clauses and that those clauses were severable, the court nevertheless erred in (1) failing to find those clauses independently unenforceable or (2) failing to hold that, by refusing to answer questions and lying during his deposition, Twist was estopped from enforcing the clauses.**

**A. Based on the evidence before it, the circuit court erred in failing to find that the arbitration clauses were unconscionable.**

West Virginia, Indiana, and Kentucky all apply similar analysis to the determination of whether a contract or a clause therein is unconscionable: “A determination of

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<sup>25</sup> *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), and its progeny do not require otherwise. The decision in *Mastrobuono* to read a choice-of-law clause narrowly as not incorporating state law on arbitrability was based on “the common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it.” *Id.* at 62. Here, that party is Twist. Thus, to whatever extent the choice-of-law clauses are ambiguous as to whether the parties intended to apply federal or state arbitrability law, any such ambiguity must be resolved against Twist. Furthermore, Twist’s subsequent modification of the clause shows how he previously viewed its meaning. Although the broader issue of whether a mere choice-of-law clause requires application of the selected jurisdictions’ arbitrability law is one that this Court is free to decide for itself, it need not resolve that question here, because *contra proferentum* and Twist’s post-Agreement addition of the FAA language easily demonstrate that in this case, the choice-of-law clause should be read to require application of state arbitrability law.

unconscionability must focus on the relative positions of the parties, the adequacy of the bargaining position, the meaningful alternatives available to the plaintiff, and the existence of unfair terms in the contract.” Syl. pt. 4, *Art’s Flower Shop, Inc. v. Chesapeake & Potomac Telephone Co.*, 186 W. Va. 613, 413 S.E.2d 670 (1991) (quotation marks omitted); *accord DiMizio v. Romo*, 756 N.E.2d 1018, 1023-24 (Ind. Ct. App. 2001) (Indiana law); *Conseco Fin. Serv. Corp. v. Wilder*, 47 S.W.3d 335, 343 n.22 (Ky. Ct. App. 2001) (Kentucky law).

“[W]here a party alleges that the arbitration provision was unconscionable or was thrust upon him because he was unwary and taken advantage of, or that the contract was one of adhesion, the question of whether an arbitration provision was bargained for and valid is a matter of law for the court to determine by reference to the entire contract, the nature of the contracting parties, and the nature of the undertakings covered by the contract.” Syl. pt 3, *Bd. of Educ. of the County of Berkeley v. W. Harley Miller, Inc.*, 160 W. Va. 473, 236 S.E.2d 439 (1977); *accord Smithson v. United States Fid. & Guar. Co.*, 186 W. Va. 195, 411 S.E.2d 850, 856 n.8 (1991).

More specifically, this Court has held that with one inapplicable exception:

[e]xculpatory provisions in a contract of adhesion that if applied would prohibit or substantially limit a person from enforcing and vindicating rights and protections or from seeking and obtaining statutory or common-law relief and remedies that are afforded by or arise under state law that exists for the benefit and protection of the public are unconscionable . . . .

Syl. pt. 2, *Dunlap*. See, e.g., *Dunlap*, 211 W. Va. at 561, 567 S.E.2d at 277.

Similarly:

[p]rovisions in a contract of adhesion that if applied would impose unreasonably burdensome costs upon or would have a substantial deterrent effect upon a person seeking to enforce and vindicate rights and protections or to obtain statutory or common-law relief and remedies that are afforded by or arise under state law that exists for the benefit and protection of the public, are unconscionable . . . .

Syl. pt. 4, *Dunlap*. Thus, “determinations of unconscionability must be made on a ‘case-by-case basis’,” *State ex rel. AT&T Mobility, LLC v. Wilson*, 226 W. Va. 572, 703 S.E.2d 543 (2010), “by reference to the entire contract, the nature of the contracting parties, and the nature of the undertakings covered by the contract,” syl. pt. 3, *W. Harley Miller*. This Court’s arbitration cases are “tied to and based upon the facts presented in that particular case,” 703 S.E.2d at 548.

Applying such rules to arbitration clauses, courts typically ask:

1. as to whether arbitration clauses are procedurally unconscionable:
  - a. whether the offeror/drafter afforded the offeree an opportunity to negotiate the arbitration clause, or whether the clause was instead offered take-it-or-leave-it
  - b. the relative experience with, and outcomes in, arbitrated cases as between the parties, versus the relative experience with and outcomes in court proceedings
2. as to whether arbitration clauses are substantively unconscionable:
  - a. whether the specified arbitral forum was chosen to obstruct, rather than facilitate, resolution of claims
  - b. whether the arbitration clause allows certain remedies, like punitive damages, statutory claims, or class-based relief<sup>26</sup>
  - c. the cost of arbitration
  - d. the procedures available in arbitration
  - e. whether the terms are one-sided<sup>27</sup>

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<sup>26</sup> “When an arbitration clause vanquishes the remedial purpose of a statute by imposing arbitration costs and preventing actions from being brought by consumers, the arbitration clause should be held unenforceable.” *Eagle v. Fred Martin Motor Co.*, 809 N.E.2d 1161, 1181-82 (Ohio Ct. App. 2004) (citing *Dunlap*); see also *Fiser v. Dell Computer Corp.*, 188 P.3d 1215 (N.M. 2008) (citing *Dunlap*). Cruelly ironically, the unavailability of class relief is likely irrelevant in this case, thanks to the fact that Twist swindled Mr. Grayiel out of nearly a million dollars. Thus, the Court’s concerns in *Dunlap* about the hurdles to pressing large numbers of low-dollar is probably inapplicable.

<sup>27</sup> See, e.g., *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1179 (9th Cir. 2003).

Even ignoring Twist’s refusal to participate in discovery, the circuit court was presented with overwhelming evidence that could only properly lead to the conclusion that the arbitration clauses in the Agreements themselves are independently unconscionable.

**1. The arbitration clauses in the Agreements are procedurally unconscionable.**

**a. Twist offered the arbitration clauses to Mr. Grayiel on a take-it-or-leave-it basis.**

The arbitration clauses were contracts of adhesion, drafted exclusively by Twist and offered to Mr. Grayiel on a non-negotiable, take-it-or-leave-it basis. (A.R. 77.) *See State ex rel. Clites v. Clawges*, 224 W. Va. 299, 306, 685 S.E.2d 693, 700 (2009) (“Having fully considered the Agreement, we find it to be a contract of adhesion. The entire Agreement is boiler-plate language that was not subject to negotiation and there is no contention in the record that the Petitioner had any role or part in negotiating the terms of the Agreement.”).<sup>28</sup>

**b. Unlike Mr. Grayiel, Twist is a “repeat player” of arbitration.**

“[A]n arbitrator must provide a fundamentally fair hearing.” *Iran Aircraft Indus. v. Avco Corp.*, 980 F.2d 141, 146 (2d Cir. 1992). Thus, one factor that courts take into account is whether one party to an arbitration agreement is a “repeat player.” *See, e.g., Geiger v. Ryan’s*

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<sup>28</sup> The circuit court improperly focused on the fact that Twist bilked Mr. Grayiel out of his life savings by tricking him into signing some twenty agreements over a two-year period, as opposed to stealing it all at once—in other words, that Mr. Grayiel was a victim of the classic ponzi scheme, where the con man dribbles a little money out over a long period of time to encourage “investors” to double up. The conclusion that this somehow demonstrates that “Mr. Grayiel did not feel that he had grossly inadequate bargaining power” (Order at 6 (A.R. 9)) is both illogical and irrelevant. By definition, a person who has grossly inadequate bargaining power throughout the course of a series of swindles is unaware of it; otherwise, he would stop getting swindled. *See, e.g., Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1172 (9th Cir. 2003), *cert. denied*, 540 U.S. 1160 (2004) (“The amount of time Ingle had to consider the contract is irrelevant.”). The fact that Twist conned George into signing twenty “subscription agreements” over a two-year period is instead evidence of exactly the opposite proposition: *i.e.*, it only proves that Twist kept fraudulently luring George deeper and deeper in by throwing him a few pennies every once in a while to keep him funding the pyramid. It certainly does not stand for the proposition that Mr. Grayiel knowingly got scammed.

*Family Steak Houses, Inc.*, 134 F. Supp. 2d 985 (S.D. Ind. 2001) (noting that “repeat players” are likely to have several unfair advantages, including preferential treatment, *etc.*, that make that forum unfair); *cf. Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 96 (2000) (Ginsburg, J., concurring in part and dissenting in part) (“As a repeat player in the arbitration required by its form contract, Green Tree has superior information about the cost to consumers of pursuing arbitration. In these circumstances, it is hardly clear that Randolph should bear the burden of demonstrating up front the arbitral forum’s inaccessibility, or that she should be required to submit to arbitration without knowing how much it will cost her.”) (citations omitted).

Notwithstanding his efforts to prevent Mr. Grayiel from learning about his other arbitrations (discussed below), after arbitrating so many claims of securities fraud against him, Twist is the paradigmatic “repeat player” that Justice Ginsberg warned about. As a frequent flyer with arbitration, he has an unfair advantage over Mr. Grayiel, who has never had any dispute arbitrated. (G. Grayiel Aff. ¶ 14 (A.R. 416).) The circuit court, however, improperly ignored this factor. The circuit court also ignored the fact that after Twist forced the Arbusto family victims into arbitration. And when he got slammed with a six million dollar arbitral award against him (still representing only a fraction of the Arbustos’ total losses), he turned around and tried to get that same arbitrator’s award overturned. Facts like this (and who knows how many more, since Twist refused to comply with court-ordered discovery) make it clear that Twist’s experience with arbitration—both in forcing it and then trying to upset it—allows him to abuse, rather than use, the process.

**2. The arbitration clauses in the Agreements are substantively unconscionable.**

- a. Twist selected Indiana as the forum for arbitration for the *express purpose* of obstructing his victims from seeking restitution for Twist’s fraud.**

In *Clawges*, the Court noted that a forum selection clause would be “troubling to this Court” if that clause required arbitration in a remote jurisdiction. 224 W. Va. at 307 n.4, 685 S.E.2d at 701 n.4 (“A forum selection clause in an employment contract, contained in a contract of adhesion, which requires an employee to arbitrate or litigate his or her employment claims in far-away jurisdictions, remotely removed from the employee’s actual place of employment or residence, would be troubling to this Court. It would also be troubling if such an employment contract required the employee to be subject to the substantive law of a far-away jurisdiction.”).

Although Indiana is not as remote as some places, Twist specifically picked Indiana as the forum for arbitration precisely because he knew it would be inconvenient enough for his victims to seek restitution, thereby perverting the purpose of arbitration. The circuit court ignored the fact that Lonny Armstrong will testify at trial that Twist knew the arbitration clauses by heart and that Twist personally decided to include the location to discourage investors from pressing their rights under the agreements, knowing that it would be prohibitively expensive and inconvenient for them to travel to and lodge in the arbitral forum, hire personal and local counsel, and so on. (L. Armstrong Aff. ¶ 3 (A.R. 143).)

- b. The arbitration clauses deny several important claims and remedies, including statutory causes of action and punitive damages.**

The fact that any clause in a contract denies important claims or remedies otherwise available in a judicial proceeding weighs heavily in favor of finding such a clause unconscionable under any conceivably governing law. In *Mortg. Elec. Registration Sys., Inc. v.*

*Abner*, 260 S.W.3d 351 (Ky. Ct. App. 2008), the Kentucky Court of Appeals invalidated as unconscionable an arbitration clause with limitations the same as those here and for reasons the same as those applicable here. The *Abner* court began by quoting from *Conseco Fin. Serv. Corp.* for the general proposition that a trial court should refuse to enforce an agreement—including an arbitration agreement—that is unconscionable:

The doctrine is used by the courts to police the excesses of certain parties who abuse their right to contract freely. It is directed against one-sided, oppressive and unfairly surprising contracts, and not against the consequences *per se* of uneven bargaining power or even a simple old-fashioned bad bargain.

260 S.W.3d at 354 (citations and footnotes, and indentation omitted). Turning to this Court's holding in *Arnold v. United Cos. Lending Corp.*, 204 W. Va. 229, 511 S.E.2d 854 (1998), for guidance, the *Abner* court noted that “while . . . a bargain is not unconscionable merely because the parties to it are unequal in bargaining position,” 260 S.W.3d at 354, an arbitration clause that contains a “substantial waiver of a parties’ rights” is unenforceable, *id.* The court found that because the plaintiffs would be forced to forego substantial statutory and other rights (including punitive damages) if their claims were arbitrated, the trial court erred in enforcing that provision:

[Plaintiffs] have asserted valid claims under statutes designed to protect consumers from high cost predatory lending practices. . . . *[W]e conclude that the arbitration provision contained in [Plaintiffs]’ contract clearly prevents them from meaningfully pursuing any statutory claims.* Certainly, an arbitrator can resolve claims under [the statutes]. *However, the provision herein explicitly prohibits the arbitrator from modifying the contract or awarding anything other than actual damages. As such, Appellees could in no manner recover any statutory damages to which they may be entitled.* Thus, we conclude that because the arbitration clause deprives Appellees of any substantive remedies, the trial court properly ruled that it is unconscionable and unenforceable.

260 S.W.3d at 355 (emphasis added). *See also Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 658 (6th Cir. 2003) (“The arbitration of statutory claims must be accessible to potential

litigants as well as adequate to protect the rights in question so that arbitration, like the judicial resolution of disputes, will ‘further broader social purposes.’ To put the matter in a slightly different way, [one party] should not be permitted to draft arbitration agreements that deter a substantial number of potential litigants from seeking any forum for the vindication of their rights. To allow this would fatally undermine the . . . statutes, as it would enable [such party] to evade the requirements of [the] law altogether.”).

Even the Supreme Court of the United States has acknowledged that arbitration is a poor means to resolve like Mr. Grayiel’s, noting that “[a]rbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by [statute]” and that many factors “render arbitral processes comparatively inferior to judicial processes in the protection of [statutory] rights.” *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 56-57 (1974).

Here, as to punitive, statutory, or other remedies, the circuit court found that “all remedies available in [the circuit] Court are available in arbitration.” (Order at 6 (A.R. 9).) With all due respect, this finding is incorrect. As to punitive damages, the circuit court’s error in finding that Mr. Grayiel can seek punitive damages in arbitration is, again, understandable. The circuit court was, after all, interpreting (it believed) an arbitration clause that proscribed punitive damages *but* not if “a prohibition of punitive damages by applicable state law would render this provision invalid.” (A.R. 429.) As noted earlier, however, this is *not* an arbitration clause from any of the Agreements between the parties, but one apparently created for purely the circuit court’s benefit. As noted in Twist’s deposition, the *actual* arbitration clause that the parties signed does not contain this proviso (which, after all, would be patently anachronistic in the Agreements, since (as discussed below) Twist did not get the idea to insert it until after this Court’s opinion in *Dunlap*, which was after the Agreements were executed).

Respondents also tendered a document dated December 18, 2003, entitled “Amendment.” (A.R. 41-42.) This document purports to amend one of the twenty Agreements to provide that the arbitration clause’s proscription against the arbitrator awarding punitive damages be amended to include the savings proviso “unless (and solely to the extent that) a prohibition of punitive damages by applicable state law would render this provision invalid.” (*Id.*) But what Respondents failed to point out (and what the circuit court failed to recognize) is that the would-be “Amendment” is unenforceable by Mr. Grayiel. The Agreements contain their own express amendment clauses stating that they may be amended only by a writing executed by *both* a subscriber *and* the partnership. (*See, e.g.*, M. Twist Dep. at 96 (A.R. 109).) Mr. Grayiel never executed the putative Amendment. And Twist refused to say who had the authority to sign any amendment on behalf of the partnerships. (*Id.* at 96-97 (A.R. 109-10).)<sup>29</sup> Furthermore, the proposed amendment also lacked separate supporting consideration.

As to statutory remedies, the arbitration clauses here expressly prohibit the arbitrator from “add[ing] to” the Agreements—just like in *Abner*—and the clause reserving statutory rights to the subscriber is expressly made subject to that limitation in the arbitration clause. Thus, Mr. Grayiel would not be entitled to raise statutory (or other “added”) claims with the arbitrator. Mr. Grayiel seeks statutory damages under certain securities acts designed to prevent the fraudulent and predatory sales of securities. He seeks punitive damages designed to

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<sup>29</sup> The Agreement that Twist was given during his deposition stated, “This subscription agreement may be amended only by a writing executed by both a subscriber and the partnership.” (M. Twist Dep. at 96 (A.R. 109).) In one of his hundreds of vile efforts to be coy, when asked what he understood the language to mean—a simple question—Twist answered, “I would say it means that the subscription agreement may be amended only by a writing executed by both a subscriber and the partnership.” (*Id.* at 101-02 (A.R. 111).) Counsel for Mr. Grayiel attempted to ask Twist another simply yes/no question: Whether Twist understood the Agreements’ amendment clauses to proscribe amendments not signed by both parties. Twist, of course, repeatedly refused to answer, instead simply parroting the clause’s language. (*Id.* at 101-06 (A.R. 111-12).) When asked if he was aware whether Mr. Grayiel had agreed to any proposed amendment, Twist answered, characteristically, “I don’t know.” (*Id.* at 107 (A.R. 112).)

punish egregious offenders like Respondents. But, as in *Abner*, the arbitration clauses here purport to strip him of those rights.<sup>30</sup> Thus, they suffer from the same fatal unconscionability as the ones in *Abner*. Accordingly, under governing state substantive law on the enforceability of contracts generally, the arbitration clauses here are unconscionable and, therefore, unenforceable.

**c. The cost of arbitration will effectively keep Mr. Grayiel from seeking any remedy there.**

The arbitration clauses here fail because they are illusory in that arbitration is inaccessible to Mr. Grayiel. “Even if arbitration is generally a suitable forum for resolving a particular statutory claim, the specific arbitral forum provided under an arbitration agreement *must nevertheless allow for the effective vindication of that claim.*” *Floss v. Ryan’s Family Steak Houses, Inc.*, 211 F.3d 306, 313 (6th Cir. 2000) (emphasis added) (quoted in *Dunlap*), *cert. denied*, 531 U.S. 1072 (2001). Otherwise, it would conflict with one of the very purposes of arbitration—*i.e.*, to provide a suitable alternative forum for plaintiffs’ claims. *Id.* Thus, a plaintiff must be allowed “to make a showing . . . that proceedings ‘in the contractual forum will be so gravely difficult and inconvenient that [the resisting party] will for all practical purposes be deprived of his day in court.’ ” *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 632-33 (1985) (final alteration in original). *See, e.g., Green Tree Fin. Corp.*, 531 U.S. at 92 (arbitration may be invalidated on ground that it “would be prohibitively expensive”); *Morrison*, 317 F.3d at 658 (“If, then, the splitting or sharing of the costs of the arbitral forum under a particular arbitration agreement effectively prevents the vindication of a plaintiff’s statutory rights, those rights cannot be subject to mandatory arbitration under that agreement.”).

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<sup>30</sup> The arbitration clauses were wholly drafted by Twist, and they were offered to Mr. Grayiel on a take-it-or-leave-it basis, with no opportunity to bargain for any of their terms. *See Jones v. Bituminous Cas. Corp.*, 821 S.W.2d 798, 801 (Ky. 1991); *Conseco Fin. Serv. Corp.*, 47 S.W.3d at 342 n.20. It cannot be seriously doubted that Mr. Grayiel, a retired postal worker, and Martin Twist, a career “businessman,” are of even the same order of magnitude of experience in oil or gas contracts, complex business ventures (even fraudulent ones), or the sale of securities (even illegal ones).

The United States Court of Appeals for the First Circuit made the point:

What is the most potent concern is . . . that arbitration in this case may itself be an illusory remedy. In principle, having the arbitrator decide questions of validity may be fine if the parties so agreed; but if the terms for getting an arbitrator to decide the issue are impossibly burdensome, that outcome would indeed raise public policy concerns. If arbitration prevents plaintiffs from vindicating their rights, it is no longer a “valid alternative to traditional litigation.”

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In *Green Tree Fin. Corp. v. Randolph*, the Supreme Court observed: “It may well be that the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum.” 531 U.S. 79, 90 (2000). Several circuits have agreed that where a plaintiff asserts that excessive arbitration costs deprive the plaintiff of an arbitral forum, a threshold issue is presented for consideration by the court.

*Awuah v. Coverall N. Am., Inc.*, 554 F.3d 7, 12-13 (1st Cir. 2009) (citations and parallel citations omitted). As the First Circuit concluded, “all formal dispute resolution involves costs and inconvenience. *But if the remedy is truly illusory, a court should not order arbitration at all but decide the entire dispute itself.*” *Id.* at 13 (emphasis added).

Unsurprisingly, state courts also follow this same analysis. The Oregon court of appeals rejected the defendant’s improper reliance on *Green Tree Fin. Corp.*:

Denial of access to an arbitral forum occurs when the cost of arbitration is large in absolute terms, but also, comparatively, when that cost is significantly larger than the cost of a trial; otherwise, it is the existence of the claim itself and not the forum choice that deters the plaintiff. Defendant points out that the Court in *Green Tree*, while acknowledging the possibility that excessive arbitration costs could make an arbitration agreement unenforceable, also held that, because the record in that case was silent with respect to costs, it was “too speculative to justify the invalidation of the arbitration agreement.” Thus, defendant argues, because plaintiffs in this case did not present any evidence that an arbitration would cost more than a trial, their claim that the cost-sharing term is unconscionable must fail.

We disagree. We find the court's reasoning in [*Lelouis v. W. Directory Co.*, 230 F. Supp. 2d 1214 (D. Ore. 2001),] to be persuasive:

“The arbitration agreement in *Green Tree* did not specify the proportion of arbitration costs to be borne by the plaintiff, the organization that would conduct the arbitration, or the rules that would govern the arbitration. Consequently, the Court would not only have had to estimate the costs involved, but also had to speculate as to the manner in which those costs were to be divided. In the present case, although the specific fee schedule has not been determined, the allocation of costs is stated in the agreement.”

*Lelouis*, 230 F. Supp. 2d at 1224. In this case, as in *Lelouis*, the arbitration agreement *does* allocate costs; no speculation in that respect is necessary. That being the case, we can state with confidence that plaintiffs' cost of arbitration would not only be high in the absolute sense—plaintiffs' estimate of \$1,000, or six months' savings, stands uncontradicted—but high in comparison to a trial. That is because, regardless of whether filing fees are relatively equal in court and arbitration, the fact remains that most of the cost involved in an arbitration will be the arbitrator's fees; in court, by contrast, neither party has to pay for the judge. Under the terms of the arbitration, plaintiffs will have to pay half of the arbitrator's fee for the first day and all of the fees thereafter. That fact alone demonstrates that the cost-sharing provision is sufficiently onerous to act as a deterrent to plaintiffs' vindication of their claim.

*Vasquez-Lopez v. Beneficial Ore., Inc.*, 152 P.3d 940, 951-52 (Ore. Ct. App. 2007). *See also Dunlap*, 211 W. Va. at 565-66, 567 S.E.2d at 281-82.

Mr. Grayiel undoubtedly faces this very same fate and can expect to have Twist do everything he can to inflict further injury via arbitration. In *Arbusto*, for example, after the plaintiffs paid the arbitrator's **\$8,000 filing fee**, Twist then (unsuccessfully) opposed their effort to reduce costs by consolidating their arbitrations.<sup>31</sup> *See Twist v. Arbusto*, No. 4:05-CV-187

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<sup>31</sup> This is (at least) the same fee that Mr. Grayiel can expect here. According to the AAA rules, arbitration of a claim the size of Mr. Grayiel's will include an over \$8,000 initial filing fee (compared to

(S.D. Ind. June 8, 2007) (Order denying Motion for Separate Arbitration hearings). When the arbitrator rejected Twist's efforts, he then disingenuously filed a motion *with the Indiana district court* seeking to *compel* separate arbitrations. *Id.* Ironically, Judge Tinder ruled that because Twist had agreed to submit *that* issue to the arbitrator, he was bound by the arbitrator's rejection of his efforts. *Id.* And just when the California plaintiffs thought that their twisted journey had come to an end after the arbitrator ordered Twist to pay them some \$5,758,299.00, Twist again attempted to punish them by moving to vacate the very arbitration award that he had spent so much time demanding. *See Twist v. Arbusto*, No. 4:05-CV-187 (S.D. Ind. Aug. 22, 2007) (Order granting Motion to Enter Judgment on Arbitration Award). Twist's argument? That the arbitrator had refused Twist's many efforts to continue and prolong the very arbitration itself. *Id.*

Mr. Grayiel was never a wealthy man. Now, thanks to Martin Twist, Mr. Grayiel is a poor man. (G. Grayiel Aff. ¶ 7 (A.R. 415).) Given the position Twist has left him in and the added vexation that he can expect from Twist, Mr. Grayiel will be unable to pay the expected high costs associated with arbitrating this matter and recovering anything. The circuit court failed to even address this critical factor, leading to the erroneous conclusion that the arbitration clauses are not unconscionable.

**d. Inadequate procedures will be available in arbitration.**

The purpose of "discovery is to clarify and narrow the issues . . . so as to efficiently resolve disputes." *State ex rel. Pritt v. Vickers*, 214 W. Va. 221, 226, 588 S.E.2d 210, 215 (2003). Discovery thereby provides "a contest that seeks a fair and adequate resolution of a dispute." *Id.* Axiomatically, then, a process that affords little opportunity for discovery affords

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circuit court's \$145 filing fee), plus an additional fee of \$3,250. *See AAA Commercial Arbitration Rules*, available at <http://www.adr.org/sp.asp?id=29297>. It is believed that Mr. Grayiel's lost opportunity costs (from *legitimate* energy investment opportunities missed) might exceed \$10,000,000. In that case, his share of the arbitration fees alone jump to over \$10,000, or more than *sixty times* the fees he paid in the circuit court, and that is before he ever even starts to pay the arbitrator's fee, *etc.*

less of a chance of its fair and adequate resolution. *See, e.g., Walker v. Ryan's Family Steak Houses, Inc.*, 400 F.3d 370, 378 (6th Cir.), *cert. denied*, 546 U.S. 1030 (2005) (limitations on discovery factor against enforceability of contract clauses). Discovery in arbitration is severely curtailed compared to that available to him before the circuit court. The *AAA Rules of Arbitration* contain substantial limitations on the discovery available. The facts of this case are terribly complicated. Mr. Grayiel will need to discover the history and extent of Twist's fraudulent misrepresentations (complicated by Twist's use of numerous shell companies), the allegations of former employees regarding securities practices, false liens, and so on. Given Twist's past history of fraud and concealment, Mr. Grayiel reasonably expects that discovery will be hard enough even with the power that W. VA. R. CIV. P. 26 affords him. But the circuit court also ignored this important factor.

If the Agreements here did not contain arbitration clauses but instead contained only a provision stating that discovery in court proceedings must be limited to that available under the AAA rules governing arbitration, no court would hesitate for even a moment to strike such a clause down as unconscionable. The fact that such a restriction appears here in arbitration clauses gives the Court more, not less, reason to strike it down (because doing so would be applying neutral contract law).

**e. The arbitration clauses solely benefit Twist.**

The circuit court was persuaded to hold the arbitration clauses not unconscionable by finding that “[t]here are no terms [in those clauses] that apply only to one party” and that “[b]oth parties are equally bound to these agreements.” (Order at 6 (A.R. 9).) With all due respect, that finding is incorrect. Mr. Grayiel had only one single obligation: to give Twist a million dollars, an obligation that he performed at the time that the Agreements were signed. At no point, then, could Mr. Grayiel possibly “breach” any obligation to Twist. Obviously the same

cannot be said of Twist, who had statutory, contractual, fiduciary, and common-law duties to Mr. Grayiel before and during performance of the Agreements. Thus, the only possible dispute that could ever arise between the parties—and thus the only possible dispute that could ever be shunted to arbitration—would be one by Mr. Grayiel against Twist. *See, e.g., Ingle*, 328 F.3d at 1173-74 (“This case presents a broad concern with respect to arbitration agreements between employers and employees. Circuit City argues that the arbitration agreement subjects Circuit City to the same terms that apply to its employees. But this argument is ‘exceedingly disingenuous,’ because the agreement is one-sided anyway. Because the possibility that Circuit City would initiate an action against one of its employees is so remote, the lucre of the arbitration agreement flows one way: the employee relinquishes rights while the employer generally reaps the benefits of arbitrating its employment disputes.”) (footnotes omitted).

For the circuit court to conclude that the arbitration clauses were bilateral was to ignore reality. Forcing arbitration of “all” disputes between the parties is simply a naked effort to cloak a lopsided restriction as a balanced one.

**B. Based on the evidence before it, the circuit court erred in failing to find that the arbitration clauses were the product of fraud.**

Unconscionability is not the only reason a contract clause can be held unenforceable. “[I]f the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the ‘making’ of the agreement to arbitrate—the federal court may proceed to adjudicate it.” *Prima Paint Corp.*, 388 U.S. at 403-04. Fraud consists of a material, false misrepresentation, knowingly made, that induces the victim to reasonably rely thereon to his detriment. *See Hardy v. South Bend Sash & Door Co.*, 603 N.E.2d 895, 901 (Ind. Ct. App. 1992); *United Parcel Serv. Co. v. Rickert*, 996 S.W.2d 464, 468 (Ky. 1999); syl. pt. 1, *Lengyel v. Lint*, 167 W. Va. 272, 280 S.E.2d 66 (1981).

Managing an investment—especially one of a million dollar life savings—is a relationship based on trust. The investor trusts that his money will be honestly invested and managed. If (unlike Respondents) the person managing the investment has a history of lawful, trustworthy conduct, then the investor will be far more likely to accept an investment instrument requiring disputes to be resolved solely by arbitration, with its concomitant limitations. If, however, the person managing the investment has a history of legal problems directly related to his investment trustworthiness (like Respondents), then a potential investor is far more likely to reject an investment offering only arbitration as his sole recourse.

Here, Mr. Grayiel directly asked Twist if Twist, Thomas, or Twist’s other agents had ever had any legal problems—a question designed specifically to assess the likelihood that Mr. Grayiel could expect his own legal problems with the individual Respondents (and, thus, whether he should accept an agreement that allowed only arbitration). To this critical question, Twist answered no. (G. Grayiel Aff. ¶ 4 (A.R. 269).) As Mr. Grayiel later found out, this was *very* false, undoubtedly calculated to deflect Mr. Grayiel’s concern and lure him into “investing” in Twist’s scheme. The circuit court ignored this fact, however, finding only that Mr. Grayiel should have gotten a lawyer. (Order at 6 (A.R. 9).) This evidence alone was independently adequate to require the circuit court to find that the arbitration clauses were separately fraudulently procured. The clauses were also the product of fraud because Mr. Grayiel asked Twist about the arbitration clause and Twist explained that unsatisfied investors still could go to court. (G. Grayiel Aff. ¶ 3 (A.R. 268).) *See, e.g., Granite Rock Co. v. Int’l Bhd. of Teamsters*, 130 S. Ct. 2847, 2855–56 (2010) (“[W]here the dispute at issue concerns contract formation, the dispute is generally for courts to decide.”).

**III. The circuit court erred in refusing to find Defendant Twist's deposition testimony an unresponsive and evasive effort to deprive Mr. Grayiel of any opportunity to conduct meaningful discovery.**

As noted, the circuit court ordered that Mr. Grayiel was to have an opportunity to conduct discovery into whether the arbitration clauses were independently unenforceable. As part of that discovery, Mr. Grayiel attempted to depose Twist and his chief minion, Defendant Drew Thomas *a/k/a* Andrew Tomljenovic on these issues. *See Louisville oil and gas investor accused of bilking clients out of millions of dollars*, LOUISVILLE COURIER-J., Nov. 25, 2009, 2009 WLNR 24005317 (“His [Twist’s] employees included convicted felons who had proven records defrauding consumers — men such as [Defendant] Andy Tomljenovic (also known as Drew Thomas), his brother, the late Damier Tomljenovic, and Alexander ‘Chucky’ White, dance instructors who had been sentenced to probation after being convicted a few years earlier of theft and attempted racketeering for taking nearly \$400,000 from more than a dozen people, mostly elderly women.”). Thomas evaded Mr. Grayiel’s effort to depose him.

And although he showed up, Twist either refused to answer Mr. Grayiel’s counsel’s questions or lied. The circuit court overly-diplomatically characterized Twist’s testimony as “vague” and demonstrative of “memory lapses.” (Order at 3 (A.R. 6).) This characterization wholly fails to capture the level of obstruction and dishonesty exhibited by Twist’s testimony. On the rare occasions when Twist answered something other than “I refuse to answer” or “I don’t recall,” the answer was typically unresponsive and meaningless. When asked whether any other investors had ever called Twist with questions about the meaning of *any* part of the subscription agreements, Twist answered: “Now that I do recall, and the answer was before and is, again, I don’t recall.” (*Id.* at 240 (A.R. 141).) By Petitioner’s count, Twist gave the specific phrase “I don’t recall” as his answer to at least one hundred questions, and some variation of that phrase to at least that many again.

Having established so early on in his deposition that when Twist said “I don’t recall,” this was merely Twist-ese for “I’m not going to tell you,” and having outright refused to answer, either honestly or at all,<sup>32</sup> so many other questions on issues critical to the Court’s resolution of Defendants’ pending motion, Petitioner asked the circuit court to find Twist’s sworn testimony (and Respondent Thomas *a/k/a* Tomljenovic’s evasive absence<sup>33</sup>) to be violations of the Rules and to deem every issue that they have refused to answer as answered against their interest and in favor of Mr. Grayiel interest. *See* W. VA. R. CIV. P. 37.<sup>34</sup> Inexplicably, the circuit court tolerated this abusive behavior by Twist without little discussion. This was clear error, and the circuit court should have sanctioned Twist for this behavior by denying Respondents’ motion to dismiss, or should have held that all of Mr. Grayiel’s counsel’s questions were answered against Twist’s interest (and also thus denied the motion).

**A. Twist’s misconduct prevented Mr. Grayiel from developing evidence on whether the arbitration clauses are procedurally unconscionable.**

As demonstrated, Twist’s experience with arbitration clauses and outcomes in arbitrated and litigated disputes would have aided the circuit court in answering several relevant questions. Unlike Mr. Grayiel, is Twist a “repeat player” before arbitrators that would afford him an unfair advantage? Has he taken steps to fraudulently transfer assets or falsely place liens

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<sup>32</sup> As noted, many of Twist’s answers were false. To the extent that it becomes relevant in any specific instance, whether they were knowingly false, *i.e.*, a lie, will be for the jury. For example, Twist testified that he knew of no state that had ever declared his companies’ conduct illegal. (M. Twist Dep. at 205-07 (A.R. 134).) Twist’s memory on this point has conveniently failed him, as several states (including West Virginia) have found Twist’s and his companies’ conduct to violate securities laws.

<sup>33</sup> Thomas failed to answer the Complaint in this case, which was properly served on him.

<sup>34</sup> This kind of conduct is certainly nothing new for Twist. *See, e.g.*, 2009 WLNR 24005317, *supra* (“Bruce Gadansky, vice president of the Better Business Bureau in Louisville, said it had received numerous complaints against Twist and his companies over the years, including one against Cherokee Energy. ‘We got a letter back from Twist’s office saying they weren’t affiliated with Cherokee,’ Gadansky recalled. ‘The funny thing was, it was written on that company’s letterhead.’”).

against his own property to avoid satisfying arbitration awards?<sup>35</sup> Does he have a history of refusing to comply with arbitrator's orders or pay arbitration awards? Does he file frivolous appeals or objections to arbitration awards against him? Twist, however, refused to answer any questions regarding his experience with arbitration clauses or arbitrated claims. He testified that only the companies involved in this law suit used contracts with arbitration clauses in them. (*Id.* at 33-34 (A.R. 95).) But this is plainly false, as Twist would admit just a few questions later, testifying that one of his many dozens of entities, Kentucky Eagle Energy Company, Inc., indeed used contracts with arbitration clauses well before the transactions at issue here. (*Id.* at 34-35 (A.R. 95); *see also id.* at 66 (A.R. 102).) The true answer is that many of Twist's "investment" companies are or were parties to agreements containing arbitration clauses, as evidenced by the many other lawsuits involving arbitration clauses and non-party Twist companies. (*See, e.g.,* L. Armstrong Aff. ¶ 13 (A.R. 144).)<sup>36</sup>

In fact, Twist refused to so much as even discuss his companies' arbitration clauses or his involvement in their drafting. (*Id.* at 36-38 (A.R. 95-96); *compare id.* at 39 (A.R. 96) ("Q: Have you ever personally drafted an arbitration provision? A: No. Q: Have you ever personally drafted a contract? A: No.") & 55 (A.R. 100) (never revised an arbitration provision) *with* L. Armstrong Aff. ¶¶ 4, 5 & 17 (A.R. 143-44) (Twist was personally involved in drafting

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<sup>35</sup> Lonny Armstrong will testify that Twist shamelessly approached Armstrong immediately after Armstrong's wife had just died with a proposal to fraudulently convey Twist's assets into a new company ("Blue Flame") with Armstrong as the sham head. (L. Armstrong Aff. ¶ 6 (A.R. 144).) Armstrong will also testify that around 2005, Twist concocted a scheme whereby Armstrong would sue Twist for "bonus" money that Twist supposedly owed Armstrong, again in a sham proceeding, in order to have liens placed against Twist's assets to avoid creditors, including his arbitration judgment creditors. (*Id.* ¶ 7 (A.R. 144).) And Armstrong will testify that Twist also transferred assets to Twist's brother, again to evade creditors. (*Id.* ¶ 8 (A.R. 144).) Twist has a documented history of fraudulent conveyances to avoid creditors, *see, e.g., The Dickirson Corp. v. Martin Twist*, No. 06-C-151 (Jackson County, W. Va., Cir. Ct.) (detailing Twist's efforts to fraudulently convey assets to his brother to evade a creditor).

<sup>36</sup> It is believed that Twist has or has had an interest in perhaps hundreds of companies. (*See, e.g.,* Various Company Records (A.R. 206-67).)

and revising his companies' contracts, including the arbitrating clauses, and controlled the money that they spent.) Notwithstanding having just discussed at least one case where he invoked the arbitration clause (the *Arbusto* matter), when asked whether he or his companies had ever invoked an arbitration clause, Twist's selective memory faded again. (See M. Twist Dep. at 127 (A.R. 117).) His discussion of *Arbusto*, coupled with the fact that *Twist's own motion to dismiss* has as exhibits two cases where Twist invoked arbitration clauses (*Dyer* and *Ashbach*) well demonstrate the utter lack of veracity that Twist brought to his deposition.

A recent arbitration of claims against Twist illustrates the relevance of this information all too clearly. After bilking the Arbustos out of \$25,000,000 of their life savings and children's trusts, an arbitrator handed down a ruling against Twist for only \$5,700,000—a fraction of the victims' losses. See *Louisville oil and gas investor accused of bilking clients out of millions of dollars*, LOUISVILLE COURIER-J., Nov. 25, 2009, 2009 WLNR 24005317. In his deposition here, after initially refusing to tell the name of that case, Twist incredibly claimed that he did not even know what the case was about and barely remembered it at all. (M. Twist Dep. at 218 (A.R. 136) (“Q: And who was involved in that [case]? A: I don’t know.”).) He also refused to answer any questions about the case's disposition. (*Id.* at 218-19 (A.R. 136) (“Q: And you don’t remember the result of that one? A: I do, but I’m not answering”).)<sup>37</sup>

Twist repeated this performance when counsel attempted to explore Twist's experience with any cases regardless of whether they had been arbitrated, testifying first that he could not remember how many times his companies had been sued, then that he doubted his

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<sup>37</sup> David Pedley, Twist's attorney in that case (and the same attorney involved in drafting the agreements at issue in this case), demonstrated his and his client's utter contempt for courts and judges by sending a scathing letter to United States Magistrate Judge Cleve Gambill—who had entered a second, \$1,300,000 arbitration award against Pedley's firm (which the arbitrator found had aided and abetted Twist's fraudulent scam). See *Lawyer belittles former judge for arbitration ruling*, LOUISVILLE COURIER-J., Nov. 25, 2009, 2009 WLNR 24005310.

companies had been sued more than five times. (M. Twist Dep. at 125-26 (A.R. 117) (emphasis added).) In fact, court records reveal that Twist and his companies have been parties to lawsuits at least dozens of times in Putnam County and neighboring courts alone. Bizarrely, Twist claimed to not even understand the instant case. (*Id.* at 128 (A.R. 117).)

Twist testified that his companies had only been involved in one arbitration (this is plainly false; *see supra*), and he refused to discuss the result or whether he appealed it (relevant, at least, to the mutuality of the no-appeal provision in the instant arbitration clauses and, thus, their independent enforceability), saying that his companies had “[p]robably not” been to arbitration more than once, and that he could not remember that case, and refusing to discuss anything about that case or its outcome. (M. Twist Dep. at 143-45 (A.R. 120-21) (“I’m not going to answer.”).) Twist “answered” Mr. Grayiel’s questions about circumstances of other times when Twist had been involved in either a court case or arbitration similarly. (*Id.* at 16-17 (A.R. 90-91), 20-23 (A.R. 91-92); *see also id.* at 19-20 (A.R. 91) (refusing to disclose results of the case where he admitted giving testimony); 27-29 (A.R. 93-94) (Twist’s attorney disallowing questions about Twist’s experience with companies other than those Mr. Grayiel had an interest in); *but see* L. Armstrong Aff. ¶ 15 (A.R. 144) (affirming that Twist was so involved with at least three relatively recent cases that he must remember them).)

Twist’s answers to important, clearly relevant questions were frequently so inconsistent as to be plainly false. (*See, e.g.*, M. Twist Dep. at 29-32 (A.R. 94) (testifying that he has no interest in any company, and then refusing to answer).) Twist’s answer to this very important question again goes from “I have none” to “I’m not going to tell you.”<sup>38</sup>

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<sup>38</sup> Twist generally feigned ignorance of his companies’ dealings and finances, stereotypically blaming his many lawyers and saying that they ran the show. This is false; Lonny Armstrong will testify that Twist was involved in every detail of his companies’ transactions and finances, frequently claiming that he knew more than his lawyers. (L. Armstrong Aff. ¶ 9 (A.R. 144).)

**B. Twist’s misconduct prevented Mr. Grayiel from developing evidence on whether the arbitration clauses are substantively unconscionable.**

- 1. Twist prevented Mr. Grayiel from inquiring into whether the specified arbitral forum was chosen to obstruct, rather than facilitate, resolution of claims.**

When Petitioner attempted to elicit the history of who included these clauses and why, Twist would only say that he did not remember. (*See* M. Twist Dep. at 118 (A.R. 115) (“Q: Okay. When the subscription agreements were first created, was it your idea to have an arbitration provision in it or someone else? A: Someone else.”).) As discussed *supra*, Mr. Grayiel identified credible evidence Twist’s testimony is false, evidence that on Respondents’ motion to dismiss, the court should not have ignored.

- 2. Twist prevented Mr. Grayiel from inquiring into whether Twist would maintain that the arbitration clause allows or denies certain claims or remedies.**

As shown, all potentially governing law looks to whether the arbitration clause would require Mr. Grayiel to forego important claims and remedies as a crucial part of the proper independent unconscionability analysis. But when Mr. Grayiel attempted to explore the issue of the agreements’ limitations on damages available to Mr. Grayiel and whether Twist planned on enforcing those limitations, Twist refused to answer counsel’s questions, other than childishly re-reading the Agreements out loud. (*See supra* at note 29.)

- 3. Twist prevented Mr. Grayiel from inquiring into Twist’s experience with the likely costs of arbitration.**

Important in the analysis was Twist’s experience with arbitration and the potential costs to Mr. Grayiel associated therewith. But again, Twist refused to answer Mr. Grayiel’s questions regarding these critical areas. As noted, he refused to tell what cases he had arbitrated, claiming that he has forgotten. He refused to say what the results were. And he refused to answer Mr. Grayiel’s questions regarding his assets and, therefore, his comparative ability to pay

arbitration fees relative to Mr. Grayiel's, another important factor. Twist simply refused to discuss the many and varied cost-multiplying tactics that he has brought to bear in an effort to make arbitration unaffordable in other cases, as in the *Arbusto* matter, discussed earlier.<sup>39</sup>

**4. Twist prevented Mr. Grayiel from inquiring into Twist's understanding of and experience with the procedures that might be available in arbitration.**

Twist's relative sophistication with arbitration includes his understanding of the relevant arbitration procedures and his history abusing them. When Petitioner attempted to ascertain Twist's knowledge of those rules, however, Twist offered to read them into the record. (M. Twist Dep. at 129-30 (A.R. 118).) This is not meaningful discovery, and the circuit court should have found that Twist's refusal to answer estops him from denying that this factor weighs in favor of finding the arbitration clauses independently unenforceable.

**C. Twist's misconduct prevented Mr. Grayiel from developing evidence on whether the arbitration clauses were the product of fraud.**

As discussed, relevant to the proper analysis of Respondents' motion were Twist's role in the decision to employ Respondent Thomas, a felon, as a securities salesman, and what role Twist and Thomas played in fraudulently "explaining" the meaning of the arbitration clauses to Mr. Grayiel. Twist admitted that he knew when Twist hired him that Thomas was a convicted felon. (*See, e.g., id.* at 42-43 (A.R. 97) (Twist hired Thomas) & *id.* at 53-54 (A.R.

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<sup>39</sup> "Even if arbitration is generally a suitable forum for resolving a particular statutory claim, the specific arbitral forum provided under an arbitration agreement must nevertheless allow for the effective vindication of that claim." *Floss v. Ryan's Family Steak Houses, Inc.*, 211 F.3d 306, 313 (6th Cir. 2000), *cert. denied*, 531 U.S. 1072 (2001). Otherwise, it conflicts with one of the purposes of arbitration law—*i.e.*, to provide a suitable alternative forum for plaintiffs' claims. *Id.* Thus, a plaintiff "may attempt to make a showing . . . that proceedings 'in the contractual forum will be so gravely difficult and inconvenient that [the resisting party] will for all practical purposes be deprived of his day in court.'" *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 632-33 (1985) (final alteration in original); *Awuah v. Coverall N. Am., Inc.*, 554 F.3d 7 (1st Cir. 2009); *Vasquez-Lopez v. Beneficial Ore., Inc.*, 152 P.3d 940, 951-52 (Ore. Ct. App. 2007) ("An arbitration agreement is unenforceable under the FAA if it denies a litigant the opportunity to vindicate his or her rights in the arbitral forum. As the Court has noted, '[i]t may well be that the existence of large arbitration costs' effects such a denial.") (large catalog of citations, parallel citations, and footnotes omitted).

100) (Twist knew Thomas was a felon “[b]ack in the ’90s before he came on board” before he hired Thomas.) But predictably, Twist refused to discuss his relationship with Thomas, saying only that he could “not recall.” (*Id.* at 41-42, 45-46 & 50 (A.R. 97-99); *compare id.* at 153 (A.R. 123) (“Q: Okay. What’s the highest role, if any, that Drew Thomas had in any of your companies? A: None. Q: He was not a vice president or any sort of representative of any of your companies? . . . A: He didn’t work for the company. He wasn’t an employee.”) *with Twist v. Arbusto*, No. 4:05-CV-187, at \*4 (S.D. Ind. Aug. 22, 2008) (“Andrew Tomljenovic a/k/a Drew Thomas, *Vice President for Twist Energy and Cherokee, attended the arbitration on behalf of the Twist Entities*”) (emphasis added).)

To date, Respondents’ discovery misconduct has prevented Mr. Grayiel from answering these and other relevant questions. The circuit court discounted the fact that Twist hired a felon to sell securities and the role that Twist and Thomas played in convincing Mr. Grayiel to execute the Agreements, and that decision was erroneous.

**IV. The circuit court erred in refusing to enforce Defendant Twist’s offer to reimburse Mr. Grayiel.**

Twist testified that he offered to return not just the money of “investors” in states whose regulatory agencies had dropped the enforcement hammer on him. (M. Twist Dep. at 208-09 (A.R. 134-35).)<sup>40</sup> He testified that he did so for *all* of his “investors,” saying, “That was another standard operating procedure. *We always offered the investors their investment back as part of our office policy, our company policy.*” (*Id.* at 209 (A.R. 135) (emphasis added).) He also said that he offered to return George’s money, plus interest, “when West Virginia gave us a cease and desist.” (*Id.* at 209-10 (A.R. 135); *see also id.* at 232 (A.R. 139) & 235-36 (A.R. 140)

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<sup>40</sup> *See, e.g., In the Matter of: App. Energy Partners 2001-D LLP*, No. 03-1291 (W. Va. Sec. Div’n July 29, 2003) (Summary Order to Cease & Desist) (A.R. 347). Twist paid an \$11,000 fine, refunded two of the victims’ money, and arbitrated with the other two. *Id.*

(“Q: So you agreed that Mr. Grayiel should get his money back? A: I don’t know whether he should. We offered his money back if he chose to get his money back.”.)

Twist then offered to extend his repayment plan to Mr. Grayiel and to pay back all of the money that Mr. Grayiel seeks to recover in this suit. (*Id.* at 236-37 (A.R. 140-41).)<sup>41</sup> Regardless of whether Twist’s sworn statement is better characterized as a novation of what he testified was his earlier offer or was instead a new offer, Mr. Grayiel immediately accepted the same in his supplemental response to Respondents’ motion to dismiss and moved the Court to enforce the parties’ agreement. The circuit court, however, erroneously made no mention of this in its order. The circuit court should have enforced Twist’s offer to repay Mr. Grayiel.

### CONCLUSION

“A pre-dispute agreement to use arbitration as an alternative to litigation in court may be enforced . . . only when arbitration, although a different forum with somewhat different and simplified rules, is nonetheless one in which the arbitral mechanisms for *obtaining justice* permit a party to fully and effectively *vindicate their rights*.” *Dunlap*, 211 W. Va. at 556 n.3, 567 S.E.2d at 272 n.3 (emphasis added). The preference for arbitration “‘rests on the assumption that the arbitration clause permits relief *equivalent to court remedies . . .*’” *Id.* (emphasis added). It could not be more obvious—painfully to Mr. Grayiel, who has been swindled out of nearly a million dollars by a ruthless serial con artist—that these requirements have not been met in the instant case.

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<sup>41</sup> Twist asserted that he currently lacks the money to repay Mr. Grayiel. (M. Twist Dep. at 236 (A.R. 140).) He then quickly corrected himself, saying that his *companies* lack the money. (*Id.* (“I don’t have the money, or maybe I should say the company doesn’t have the money.”).) As Lonny Armstrong will testify at trial, Twist’s *companies* do not have the money because Twist has raided them for his personal use. Nonetheless, that assertion—however accurate or inaccurate—has nothing to do with Twist’s *liability* to Mr. Grayiel, and Mr. Grayiel will undertake to satisfy his judgment as allowed by law.

Indeed, that fact alone distinguishes this case from the others that this Court has dealt with: George Grayiel is no disappointed jewelry store patron, frustrated cell phone customer, or jilted employee who regretfully elected not to read the fine print before signing it. This is instead a case of arbitration clauses specifically inserted into sham contracts by the blue-collar worker's version of Bernie Madoff for the sole purpose of facilitating the commission of a serious property crime by making the victim's path to restitution as perilous and discouraging as possible. This Court once conceptualized arbitrability cases as lying "[o]n a spectrum going from arbitration as a means of defeating just claims" at one end to "arbitration as a speedy, economical means of conflict resolution" at the other. *W. Harley Miller, Inc.*, 160 W. Va. at 480, 236 S.E.2d at 443-44. It is obvious which end this case lies on.

Twist once stated that "the only thing we guarantee is that we will spend investors' money." *Extortion plot threatened to expose tactics*, LOUISVILLE COURIER-J., Nov. 26, 2009, 2009 WLNR 24094003. That is the only guarantee that he has kept. Evidence demonstrating all of this was before the circuit court. It is difficult to understand why Twist's behavior, both in swindling Mr. Grayiel and in thumbing his nose at the court's order, did not enrage the circuit court. Nevertheless, with all due respect, the decision to allow Twist to once more hide behind sham arbitration clauses and reprehensible discovery misconduct was an error that demands correction.

Accordingly, Petitioner respectfully requests that the Court **FIND** that the arbitration clauses in question are unenforceable, **VACATE** the order of the Circuit Court of Putnam County, and **REMAND** the case with instructions either to order that Twist specifically perform his offer to reimburse Mr. Grayiel or in the alternative to allow Mr. Grayiel's claims to proceed to full discovery and trial.

**CERTIFICATE OF SERVICE**

I hereby certify that on June 2, 2011, true and accurate copies of the foregoing *Petitioner's Brief* were deposited in the U.S. Mail contained in postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

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