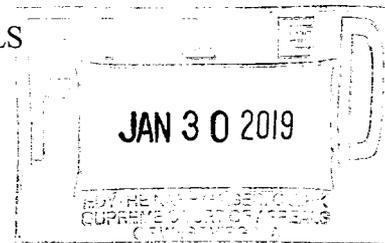


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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

DOCKET NO. 18-0871



DEBRA K. BAYLES,
(Plaintiff Below)

Petitioner,

Appeal from a final order
Of the Circuit Court of Marshall
County (14-C-139)

vs.

JEFFERY N. EVANS, individually
And in his capacity as employee,
Servant, or agent of AMERIPRISE
FINANCIAL SERVICES, INC., AMERIPRISE
FINANCIAL SERVICES, INC., KRISTINA
NICHOLLS, individually, and STEPHEN
BAYLES, individually,
(Defendants Below)

Respondents.

PETITIONER'S BRIEF

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I. ASSIGNMENTS OF ERROR

1. The Circuit Court of Marshall County erred in granting Defendants' (Respondents' herein) Renewed Motion to Dismiss and Compel Mandatory Arbitration, by finding that a valid Arbitration Agreement exists between the parties despite the fact that Plaintiff (Petitioner herein), Debra Bayles is not a signatory to any Arbitration Agreement.
2. The Circuit Court of Marshall County erred in granting Defendants' (Respondents' herein) Renewed Motion to Dismiss and Compel Mandatory Arbitration, as any Arbitration Agreement asserted to be applicable by the Respondents was the byproduct of the Plaintiff's (Petitioner herein) justifiable reliance upon the fraudulent, constructively fraudulent, and/or material misrepresentations on the part of the Respondents; and the Circuit Court failed to make any factual findings with respect to the same.
3. The Circuit Court erred in granting Respondents' Renewed Motion to Dismiss and Compel Mandatory Arbitration by failing to recognize that the Arbitration Agreements relied upon by Defendants (Respondents herein) were unconscionable and therefore void.
4. The Circuit Court erred in granting Respondents' Renewed Motion to Dismiss and Compel Mandatory Arbitration, as, even if the arbitration agreements relied upon by Respondents (Defendants below), the Petitioner's claims fall far outside the scope of the same.

II. STATEMENT OF THE CASE

The instant case regards Petitioner Debra K. Bayles' improper and fraudulent removal as a beneficiary from investment accounts held by Ameriprise for her husband, W. Nelson Bayles, which were funded by a rollover of Mr. Bayles' 401K. The Petitioner (Plaintiff Below), Debra K. Bayles, was married to Nelson Bayles for 22 years and they were married all times material

and relevant to this dispute. *Appendix at 125.* Nelson Bayles, a resident of Cameron, Marshall County, West Virginia, died on March 26, 2013. *Appendix at 124-125.* At the time of his death, he was 64 years of age, had been retired, and had applied for Social Security Disability. *Appendix at 97, 124- 125.*

Nelson Bayles had a 401K pension account with a company called NiSource from his prior employer, upon which his spouse, Petitioner, Debra Bayles, was the beneficiary. During the first half of 2012, Nelson Bayles and his daughter, Respondent, Kristina Nicholls, met with an Ameriprise financial adviser, Respondent Jeffrey N. Evans, to discuss the rollover of that 401K account to another type of investment account. *Appendix at 143-148.* The selection of Respondent Jeffrey N. Evans was not a by chance encounter. Respondent, Kristina Nicholls, had a personal relationship with Ameriprise agent and Respondent, Jeffrey N. Evans. She worked with his spouse, she attended their wedding, and she attended other social events at their house. *Appendix at 136-141, 259.* Petitioner, Debra Bayles, was not advised of this meeting. *Appendix at 97.* Ms. Bayles and her step-daughter, Ms. Nicholls, did not get along. *Appendix at 474.*

At the aforesaid meeting, the parties discussed, in Mrs. Bayles' absence, the idea of rolling over Nelson Bayles' 401K account with NiSource to an Ameriprise IRA. It was determined that this would be impossible to do without the consent of Petitioner, Debra Bayles, who was a spousal beneficiary of the 401K account. *Appendix at 148.*

Accordingly, on June 20, 2012, the Respondent, Jeffrey N. Evans, brought the Petitioner, Debra Bayles, and her husband in for a meeting at his office in Pennsylvania about rolling over the 401K to an IRA. During said meeting, Mrs. Bayles asked respondent Evans how any new account at Ameriprise would affect her status as beneficiary of the 401K proceeds, and whether her beneficiary status could be changed at a later date without her consent. Respondent Evans

warranted to Mrs. Bayles that she was the beneficiary of the rollover funds and represented to her that by executing the spousal consent forms for the 401K her status as beneficiary of the rollover proceeds could not be changed in the future without her consent. The meeting lasted approximately 30 minutes. *Appendix at 125-126, 498-499.*

On that same date, the decedent, Nelson Bayles signed the Ameriprise Brokerage Individual Retirement Account Application, account number 264133, to transfer the NiSource 401K rollover proceeds. This application referred to an agreement containing one of the arbitration clauses at issue herein. No documents were signed by Mrs. Bayles on said day. Mrs. Bayles testified that there was no discussion of any arbitration clause at this meeting. *Appendix at 125-126, 216-232, 332-337.*

Following the meeting, a spousal consent form was sent to Mr. Bayles the holder of the 401K and was presented to Petitioner Debra Bayles. In material reliance upon the representations of Respondent, Jeffery N. Evans, the Petitioner, Debra Bayles, signed the spousal consent form from NiSource on June 26, 2012. *Appendix at 125-126.*

Prior to signing said document, Petitioner, Debra Bayles, again contacted Respondent Evans by telephone and asked him for reassurance that her beneficiary status on the new account would not change in the future if she consented of the rollover of the 401K to Ameriprise by sending in the form. *Appendix at 125-126.* Once again, Respondent Evans represented to Mrs. Bayles that she was the beneficiary going forward and that she would remain so unless she consented to a beneficiary change in the future. *Appendix at 125-126.* But for those representations, Petitioner, Debra Bayles, would never have agreed to sign the spousal consent form and the 401K would have remained intact. *Appendix at 125-126.*

On September 5, 2012, without Mrs. Bayles' knowledge or consent, the decedent, Nelson Bayles, opened a second IRA account with Ameriprise through Respondent Evans. *Appendix at 208-215, 354-361.* According to Respondent Evans, he completed an active portfolio's account application with an assigned account number ending in 961133. The decedent Mr. Bayles allegedly requested that approximately One Hundred Thousand Dollars (\$100,000.00) of the IRA proceeds be directed into an account numbered 961133 and that the remaining balance of funds be retained in the initial account numbered 264133. *Appendix at 208-215,354-361.* The decedent, Nelson Bayles, named his wife and Petitioner, Debra Bayles, the beneficiary of the new account numbered 961133 and containing approximately \$100,000.00, as evinced by the account paperwork. *Appendix at 208-215, 354-361.*

On the same day, and contrary to his prior representations to Mrs. Bayles, Respondent Evans prepared a change of beneficiary form for Mr. Bayles' execution on the initial account numbered 264133, naming his friend and Respondent, Kristina Nicholls, and her brother and Respondent, Steven Bayles, as account beneficiaries. This was done without the knowledge or consent of the Petitioner, Debra Bayles. *Appendix at 223-225, 490.* Both the Brokerage Application and the Portfolios Application refer to pre-dispute arbitration clauses. Neither document was ever signed by Petitioner, Debra Bayles. *Appendix at 208-222.*

At the time the decedent, Nelson Bayles, signed the Brokerage Application he was 63 years of age. When he signed the Portfolios Application he was 64. To the best of Petitioner Debra Bayles' knowledge, other than his employer accounts, Mr. Bayles had never previously dealt with an individual financial advisor and, in fact, didn't even write his own bills as during their marriage either Petitioner or Respondent Nicholls handled writing his bills. The decedent

had a tenth grade education and did not hold any offices or positions requiring extensive paperwork. *Appendix at 125-126.*

On September 24, 2012, Ameriprise allegedly sent a letter addressed to the decedent, Nelson Bayles, which inaccurately showed the Respondents Kristina and Steven as the beneficiaries of both accounts. *Appendix at 236.* Not too long thereafter, Nelson Bayles became hospitalized for surgery. While hospitalized, Mr. Bayles assured Mrs. Bayles that the money in the Ameriprise account was there for her. *Appendix at 490 and 501.*

After Mr. Bayles passed away, Petitioner, Debra Bayles, was installed as the administratrix of his Estate. *Appendix at 916.* Mrs. Bayles called Respondent Evans' office on multiple occasions, following her husband's death, to determine the status of the account held at Ameriprise of which she believed herself to be beneficiary. Respondent Evans' office failed to provide her any information regarding the accounts. This is despite the fact that even he thought there was a conflict as to who the beneficiaries of the accounts were based upon his own files, Mr. Bayles intent, and the paperwork received from the Ameriprise home office. *Appendix at 455-477 and 500.*

When she couldn't get information from Respondent Evans, Mrs. Bayles had her attorney write to him to determine the date of death value of the IRA account. This information was necessary for the completion of the non-probate inventory of the estate appraisement forms. *Appendix at 229 and 477.* Respondent, Jeffery N. Evans, responded indicating only that he could not provide information regarding the accounts without a letter of appointment from the court and written authorization from the executor. *Appendix at 229.*

The Petitioner, Debra Bayles, by counsel, provided her appointment paperwork to Respondent as acknowledged by Respondent Ameriprise on May 29, 2013. *Appendix at 229.*

Mrs. Bayles thereafter obtained new counsel and made a second request for the date of death values and beneficiary information on or about December 12, 2013. *Appendix at 461-462.* Respondent Ameriprise finally responded by sending correspondence with the information requested showing two accounts and Respondents Kristina Nicholls and Stephen Bayles as beneficiaries of both accounts. *Appendix at 230-231.* Petitioner, Debra Bayles, was shocked because she was of the reasonable belief that she was the beneficiary of all of the IRA proceeds. *Appendix at 499-503.*

Despite Respondent Ameriprise's indication that the children were the beneficiaries of the IRA accounts, a clear discrepancy existed in beneficiary forms and files of the Respondents. The Respondents were aware of these discrepancies as evidenced by their own internal emails. *Appendix at 208-207, 455-477.* The emails are quite revealing. They begin by acknowledging the discrepancy and Ameriprise's life events office asking Respondent Evans' office to "ask if the family would agree as to what designation should apply," with Respondent Evans' office asserting that "no they will not agree on this we are sure". *Appendix at 474.* The emails further establish that while Respondent Evans was communicating to his friend, Ms. Nicholls, and her brother that they were beneficiaries of the money, he was telling Petitioner, Debra Bayles, the matter was in the hands of Estate Settlement and he could not say to her or do anything. *Appendix at 471.*

In intra office emails between the life events office of Respondent Ameriprise and Respondent Evans' office, they described in detail the beneficiary discrepancy, talked about how the Respondents could get sued over this, discussed that they needed something in writing from Debra Bayles to contest the beneficiary designations, and/or needed her to institute a "court action" to contest the beneficiary designations. At the same time, Respondent Evans and/or his

office was failing and/or refusing to provide any of this information to Petitioner, Debra Bayles. *Appendix at 455-477.*

Without resolving the discrepancy or even informing Debra Bayles such a discrepancy existed, the Respondents made the unilateral decision that Mrs. Bayles was not an account beneficiary and paid out the entire balance of all the accounts to Respondents, Kristina Nicholls and Steven Bayles. *Appendix at 461.*

When Petitioner, Debra Bayles, found out about this, she believed that she had been lied to. Accordingly, she filed a Complaint with the Circuit Court of Marshall County on September 5, 2014 alleging detrimental reliance, breach of contract, unjust enrichment and negligence. *Appendix at 959.* In response, the Respondents filed a Motion to Dismiss and Compel Mandatory Arbitration on November 19, 2014. The Circuit Court denied said motion on May 19, 2015. *Appendix at 790 and 905.* The Respondents appealed the Circuit Court denial on June 22, 2015. *Appendix at 773-779.* This Court reversed and remanded the Circuit Court decision, finding there were unresolved issues, including whether the arbitration clause was unconscionable and whether any of Mrs. Bayles' claims fell outside the substantive scope of the Arbitration Agreement. *Appendix at 740-757.*

Upon Remand, the Circuit Court granted a Motion to Amend the Complaint permitting the Petitioner to allege fraud and directed a brief period for discovery. *Appendix at 726.* After a limited period of discovery, Respondents Ameriprise and Evans filed a Renewed Motion to Dismiss and Compel Mandatory Arbitration. *Appendix at 522.* The Petitioner filed a response to said motion. *Appendix at 96.* The Circuit Court issued an Order on September 15, 2018, whereby the Circuit Court entered an Order dismissing Plaintiff's claims and ordering mandatory arbitration. This timely appeal follows. *Appendix at 74.*

III. SUMMARY OF ARGUMENT

Petitioner, Debra Bayles, alleges that she was the rightful beneficiary of the proceeds of the Ameriprise accounts at issue. She had a legal right to be named the beneficiary under her husband's 401K account with NiSource, a status that could not have been changed without her consent. Mrs. Bayles detrimentally relied upon misrepresentations made by the Respondents in June of 2012, misleading her into signing a spousal consent form to rollover the proceeds of the NiSource 401K account to an Ameriprise IRA account under the false pretense that her status as beneficiary of those funds would not change. Despite these material representations, the Respondents changed the beneficiary of the rollover funds without Mrs. Bayles' knowledge or consent and removed her as beneficiary. Following the death of Nelson Bayles, the Respondents, knowing that there was a dispute over the funds, nevertheless unilaterally decided that Mrs. Bayles was not a beneficiary of or party to any account held by Ameriprise and released all of the monies to Respondents, Kristina Nicholls and Steven Bayles.

Now, the Respondents audaciously assert that, pursuant to the same IRA account agreements which they have already decided that Mrs. Bayles is not a party to or beneficiary of, she is somehow bound to arbitrate her civil claims against all them pursuant to the terms of those agreements. This position is ridiculous, untenable, and turns West Virginia contracts law on its head. Mrs. Bayles is not a party to any arbitration agreement claimed valid or applicable by the Respondents, she is not a signatory to any of them, and she was conferred no benefit and/or received no consideration from the Respondents. Mrs. Bayles did not agree nor consent to the arbitration of her claims herein. The civil claims pled by her in the underlying action are individual to her and fall far outside of the scope of any arbitration clause claimed applicable by the Respondents.

The Respondents seek to compel the Petitioner, Debra Bayles, to arbitrate tort claims that fall outside of the scope of the agreements the Respondents rely upon agreements to which she is a non-party, and contracts that are the by-product of fraudulent misrepresentations made to Mrs. Bayles. The Respondents now seek to confer upon themselves the benefits of their wrongful conduct and further deny Mrs. Bayles access to the Court by holding her bound to contractual arbitration clauses that would not exist in the absence of their fraud. The arbitration clauses relied upon by the Respondents are procedurally and substantively unconscionable. Consequently, the Circuit Court erred in dismissing the Complaint below and granting mandatory arbitration.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner submits that oral argument is necessary under Rule 20 given the error committed below, being that Petitioner was not a party to the arbitration clause and has her own separate causes of action outside the scope of the arbitration clause. This appeal presents a matter of public importance insofar as it regards the scope of and application of arbitration clauses procured by improper means and/or to non-party, non-signatory consumers. There being no case directly on point to the facts of this case, the Petitioner believes that this matter may present matters of first impression in West Virginia, and/or expand upon or further the scope of the law of contracts with respect to arbitration in this State.

Petitioner submits that a Rule 20 argument and resulting decision will best serve not only the parties herein and the Circuit Court, but other litigants, circuit court judges and members of the bar. As such, full Rule 20 argument and consideration is requested.

V. ARGUMENT

A. Standard of Review

Appellate review of an Order granting a Motion to Dismiss a complaint is de novo. See Syllabus point 2, State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc., 194 W.Va. 770, 461 S.E.2d 516 (1995).

B. The Circuit Court erred in granting the Respondents' Renewed Motion to Dismiss and Compel Mandatory Arbitration, by finding that a valid Arbitration Agreement existed between the parties despite the fact that Petitioner Debra Bayles is not a signatory to any Arbitration Agreement.

As the spouse of the decedent, the Petitioner alleges she had a right to be named as beneficiary under the decedent's 401K with NiSource. Without her consent, that could not be changed under the 401K plan and the proceeds of the plan could not be distributed. This is evident from the NiSource forms and Respondent Evans does not dispute the Petitioner's allegations concerning these rights. *Appendix at 328-330, 443.*

Respondent Evans made representations to the Petitioner that she would be afforded those same beneficiary protections if she consented to the rollover of the NiSource 401K into an Individual Retirement Account (IRA) with Respondent Ameriprise. The Petitioner alleges those representations are not true. An IRA does not contain the same protections under the Employee Retirement Income Security Act of 1974 (ERISA) and Retirement Equity Act of 1984. See Charles Schwab & Co., Inc. v. Debickero, 593 F.3d 916 (9th Cir. 2010). The Petitioner alleged she relied upon respondent's false representations to her detriment and thus gave up important protections. *Appendix at 125-126.* Her claims regarding those misrepresentations are individual claims which do not stem from her being an intended third-party beneficiary of the contracts containing the arbitration clauses, but instead based upon her being a protected spouse.

The federal policy espoused by the Federal Arbitration Act of upholding arbitration agreements to the same level as other contracts was not a repudiation of state contract law, quite the opposite. “When a trial court is required to rule upon a motion to compel arbitration pursuant to the **Federal Arbitration Act, 9 U.S.C. §§ 1–307 (2006)**, the authority of the trial court is limited to determining the threshold issues of (1) whether a valid arbitration agreement exists between the parties; and (2) whether the claims averred by the plaintiff fall within the substantive scope of that arbitration agreement.” **Syl. Pt. 5, Chesapeake Appalachia, L.L.C. v. Hickman, 236 W.Va 421, 781 S.E.2d 198, 203 (2015)**. quoting **Syllabus Point 2, State ex rel. TD Ameritrade, Inc. v. Kaufman, 225 W.Va. 250, 692 S.E.2d 293 (2010)**.

In West Virginia, “[t]he fundamentals of a legal contract are competent parties, legal subject matter, valuable consideration and mutual assent. There can be no contract if there is one of these essential elements upon which the minds of the parties are not in agreement.” **Syl. Pt. 5, Virginian Export Coal Co. v. Rowland Land Co., 100 W.Va 559, 131 S.E. 253 (1926)**. The reason for this is that the Petitioner, Debra Bayles, has no contractual relationship with the Respondents for the purposes of arbitration.

1. There is no meeting of the minds between Petitioner and Respondents. The Petitioner is not a party to the arbitration agreements.

The arbitration clauses at issue lack the *sine qua non* of all valid contracts - a meeting of the minds between the parties. Petitioner is not a party to any arbitration agreement with the Respondents and it is undisputed that the Petitioner Debra Bayles is a non-signatory of any claimed arbitration agreements. Respondent’s counsel, during the deposition of Mrs. Bayles, was certain to point out that the Petitioner, Debra Bayles, didn't sign any Ameriprise documents, didn't open any accounts with Respondent Evans, that Respondent Evans was not her financial advisor, and that "NiSource Consent" makes no reference to Respondent Ameriprise or Evans.

Appendix at 502. Surely in order to be considered a competent party to a contract, one must first be considered a party at all.

“Our case law requires that a party must assent to arbitration before it can be forced into arbitration and denied access to the courts.” **State ex rel. City Holding Co. v. Kaufman**, 216 W.Va. 594, 609 S.E.2d 855, 859 (2004), citing **State ex rel. United Asphalt Suppliers, Inc. v. Sanders**, 204 W.Va. 23, 511 S.E.2d 134, 138-139 (1998). As recently as 2009, the West Virginia Supreme Court of Appeals has reiterated that non-parties to agreements have no standing to compel arbitration, when it stated “...The Home Show, LLC was not a party to the written arbitration agreement and has no standing in this matter.” **Chrihfield v. Brown**, 224 W.Va. 407, 686 S.E.2d 58, 63 (2009). This is in accord with **State ex rel. United Asphalt Suppliers, Inc.** which states “[a] court is not required to compel arbitration between parties who have not agreed to such arbitration” and further states “the policy favoring arbitration does not compel the court to require arbitration of disputes if arbitration was not the intent of the parties.” **State ex rel. United Asphalt Suppliers, Inc., supra at 138-139, citing Collins v. International Dairy Queen, Inc.**, 169 F.R.D. 690, 693-694 (M.D. Ga. 1997).

Ms. Bayles is not the only party in this suit not to sign the arbitration clause, in fact, neither Respondent Stephen Bayles nor Respondent Kristina Nicholls were parties to said agreements. *Appendix at 208-228.*

In West Virginia, “[a] party generally cannot be forced to participate in an arbitration proceeding unless the party has, in some way, agreed to participate.” **Chesapeake Appalachia, L.L.C. v. Hickman**, 236 W.Va. 421, 781 S.E.2d 198, 216 (2015). As the West Virginia Supreme Court of Appeals has held, “[a] court may not direct a nonsignatory to an agreement containing an arbitration clause to participate in an arbitration proceeding absent evidence that

would justify consideration of whether the nonsignatory exception to the rule requiring express assent to arbitration should be invoked.’ Syl. Pt. 9, Chesapeake Appalachia, L.L.C. v. Hickman, 236 W.Va. 421, 781 S.E.2d 198 (2015) quoting Syllabus Point 3, State ex rel. United Asphalt Suppliers, Inc. v. Sanders, 204 W.Va. 23, 511 S.E.2d 134 (1998). “A signatory to an arbitration agreement cannot require a non-signatory to arbitrate unless the non-signatory is bound under some traditional theory of contract and agency law. The five traditional theories under which a signatory to an arbitration agreement may bind a non-signatory are: (1) incorporation by reference; (2) assumption; (3) agency; (4) veil-piercing/alter ego; and (5) estoppel.” Syl. Pt. 10, Id. “[A] court should be wary of imposing a contractual obligation to arbitrate on a non-contracting party. Smith/Enron Cogeneration Ltd. P’ship, Inc. v. Smith Cogeneration Int’l, Inc., 198 F.3d 88, 97 (2d Cir.1999).” Id. at 217.

None of the aforementioned exceptions to the non-signatory rule are applicable in the instant case. The Petitioner is not a signatory to another document that incorporates the subject Arbitration Agreement into that document. There has also been no assumption of the Arbitration Agreement by the Petitioner. Moreover, veil-piercing and/or alter ego theory would have no bearing on an individual such as the Petitioner.

The Respondents argued below that doctrines of agency and/or estoppel rendered the arbitrations agreements applicable to the Petitioner. However, the Respondents’ actions evince that no such relationship exists.

First, the exceptions of estoppel and/or third-party beneficiary status fail as the Respondents have unilaterally taken the position that the proper beneficiaries of the subject accounts are the children of the decedent. The Respondents’ assertion that Mrs. Bayles should be forced to arbitrate her claims is contradicted by their decision that she is a non-party, non-

beneficiary. In fact, Respondent Ameriprise long ago paid out the proceeds of the account to the children. They further denied Petitioner, Debra Bayles, information regarding the subject IRA accounts since she was, according to them, not the beneficiary. *Appendix at 455-457.*

The Respondents took the position at the Circuit Court level that Mrs. Bayles was a non-party. At Paragraph 1, page 11 of the Renewed Motion to Dismiss and Enforce Arbitration, the Respondents state:

On September 24, 2012, Ameriprise mailed a beneficiary confirmation letter ("Letter") to Mr. Bayles at his home address. See Exhibit 10. The letter showed that his two children, Kristina and Stephen, were the beneficiaries of both of his IRA accounts. Mr. Bayles gave the Letter to Kristina for safekeeping. See Exhibit 2 at 38, 39, 60, and 62. The Letter instructed Mr. Bayles to inform Ameriprise of any discrepancy or error in the beneficiary designations. The decedent elected not to do so. See Exhibit 3 at 152. Consequently, the account proceeds from both accounts were paid to Kristina and Stephen following Mr. Bayles' passing on March 26, 2013.

Appendix at 532.

The Respondents expressly asserted in their motion that Mrs. Bayles was not the beneficiary of the subject accounts. However, Mrs. Bayles is considered a beneficiary by the Respondents when it is favorable to them to compel her claims into arbitration. The defense cannot have it both ways. Insofar as the Respondents assert that Mrs. Bayles is not a proper beneficiary of the proceeds of the accounts, the Respondent cannot also claim that she has beneficiary status for the purposes of arbitration.

Regardless, Petitioner Bayles' claims do not arise out of the agreements containing the arbitration clauses and are claims that are individual to her - not claims as an agent of the Estate of Mr. Bayles. The Respondents argued below that Petitioner is bound to arbitrate because of her appointment as Administratrix somehow merges her personal claims with those of the Estate. However, this argument ignores the fact that the claims brought by Mrs. Bayles are not presented

on behalf of the Estate and are claims that belong solely to her. Mrs. Bayles' claims do not arise in her capacity as Administratrix nor are they asserted as such. Rather, her claims arise out of her being misled by the Respondents into giving away a valuable vested right under false pretense.

The Respondents improperly suggest below that Debra Bayles' claims somehow merged with the Estate insofar as she is alleged to have become "in charge" of the Brokerage Account and Portfolios Account upon her appointment as Administratrix. These claims are simply without legal merit as Mrs. Bayles has no control over the Accounts as Administratrix since the Accounts are non-probate assets with designed beneficiaries.

The Brokerage and Portfolio accounts are non-probate property as defined by **West Virginia Code § 11-11-7(a)** which states in pertinent part as follows:

The non-probate personal property to be included on the non-probate inventory form includes, but is not limited to, the following:

- (2) Personal property payable on the death of the decedent to one or more third parties[.]

Further, **West Virginia Code § 11-11-7(b)** states as follows:

For the purposes of this section, "non-probate personal property" means all personal property which does not pass by operation of the decedent's will or by the laws of intestate descent and distribution or is otherwise not subject to administration in a decedent's estate at common law.

The Brokerage and Portfolio Accounts have a designated beneficiary and pass outside of the Estate. Thus, as the personal representative of Mr. Bayles' estate, Mrs. Bayles is not in charge of the distribution of the Brokerage and Portfolios accounts and has no control of their disposition through the Estate channels. As such, the Respondents' claimed agency theory does not apply.

Most importantly, however, is the fact that Mrs. Bayles' claims are not conferred upon her by virtue of her appointment as Administratrix or as an intended third-party beneficiary, but instead based upon rights she had afforded to her before the creation of any of the accounts at issue herein. Her claims arose, unbeknownst to her, when she was being lied to by the Respondents prior to the creation of the IRA, far prior to Mr. Bayles' death, and long prior to her appointment as Administratrix of his Estate. Petitioner only discovered the damage done to her following her husband's passing and her appointment as Administratrix. As such, neither her alleged "intended third-party status," nor her status as Administratrix have any bearing on the arbitrability of her claims of prior fraud and/or detrimental reliance.

In summary, insofar as the Petitioner is a non-signatory to the Arbitration Agreements, it is illegal to compel her claims to arbitration. Not a single exception to this rule applies to this case.

2. The Arbitration Agreement Lacks Consideration.

The arbitration agreement the Defendants seeks to enforce is also invalid as it lacks valuable consideration.

"That consideration is an essential element of and is necessary to the enforceability or validity of a contract is so well established that citation of authority therefor is unnecessary." *First Nat. Bank of Gallipolis v. Marietta Mfg. Co.*, 151 W.Va. 636, 642, 153 S.E.2d 172, 177 (1967). *See also, Cook v. Heck's Inc.*, 176 W.Va. 368, 373, 342 S.E.2d 453, 458-459 (1986) ("Consideration is also an essential element of a contract."); Syllabus Point 1, *Thomas v. Mott*, 74 W.Va. 493, 82 S.E. 325 (1914) ("No promise is good in law unless there is a legal consideration in return for it."); *Sturm v. Parish*, 1 W.Va. 125, 144 (1865) ("That a parol contract or promise without consideration is void, is too well established to require any comment.").

Consideration is an essential element of a valid contract, and it is axiomatic that past consideration already given for a previous agreement cannot constitute valid consideration for a new agreement. Syllabus Point 1, *Cole v. George*, 86 W.Va. 346, 103 S.E. 201 (1920) ("An agreement by one to do what he is already legally bound to do is not a good consideration for a promise made to him."). Put

succinctly, a “promise or contract where there is no valuable consideration, and where there is no benefit moving to the promisor or damage or injury to the promisee, is void.” Syllabus Point 2, *Sturm*, 1 W.Va. at 125.

Chesapeake Appalachia, L.L.C. v. Hickman, 236 W.Va. 421, 781 S.E.2d 198, 215–16

(2015).

Neither party has conferred upon the other party anything of value for the Arbitration Agreement. The Respondents have not provided a valuable service, nor have they promised to provide the Petitioner, Debra Bayles, with a service. Moreover, the Respondents have not provided Mrs. Bayles with anything tangible of value. In fact, nothing the Respondents have done or will do in any manner benefits Mrs. Bayles. They have only taken from her a valuable vested right that pre-existed the subject arbitration agreements at issue.

Therefore, the lack of consideration for any arbitration clause sought to be enforced by the Respondents is fatal to their efforts to enforce the same.

C. The Circuit Court erred in granting Respondents’ Renewed Motion to Dismiss and Compel Mandatory Arbitration, as any Arbitration Agreement asserted to be applicable was a byproduct of the Petitioners’ justifiable reliance upon the fraudulent, constructively fraudulent, and/or material misrepresentation on the part of Respondents; and the Circuit Court failed to make any factual findings with respect to the same.

Even if the court were to find an Arbitration Agreement were to exist between the Petitioner and Respondents, the existence of the same would be the fruits of fraud or constructive fraud on the part of the Respondents. An arbitration agreement procured by means of fraud is unenforceable and subject to invalidation in West Virginia. Moreover, to grant the Defendant’s Motion would be to reward the Respondent for successfully committing either fraud, constructive fraud or material misrepresentation against Petitioner, Debra Bayles.

“Nothing in the **Federal Arbitration Act, 9 U.S.C. § 2**, overrides normal rules of contract interpretation. Generally applicable contract defenses—such as laches, estoppel, waiver, fraud, duress, or unconscionability—may be applied to invalidate an arbitration agreement.’ Syllabus Point 9, ***Brown v. Genesis Healthcare Corp.***, 228 W.Va. 646, 724 S.E.2d 250 (2011).” Syl. Pt. 3, ***State ex rel. Richmond Am. Homes of W. Virginia, Inc. v. Sanders***, 228 W.Va. 125, 717 S.E.2d 909, 912–13 (2011). “Fraud in the procurement of a deed or contract always renders it voidable.” See ***Chesapeake Appalachia, L.L.C. v. Hickman***, 236 W.Va. 421, 781 S.E.2d 198 (2015) (citing Syl. Pt. 1, ***Jones v. Comer***, 123 W.Va. 129, 13 S.E.2d 578 (1941)). It is well settled doctrine that fraud in the procurement of an agreement or the obtaining of some benefit vitiates any right to receive the fruits of the contract or the benefits. See ***Id.*** (quoting Syl. Pt. 2, ***Engeman v. Taylor***, 46 W.Va. 669, 33 S.E. 922 (1899)). The facts of this case clearly support a finding that the subject Arbitration Agreement was secured through means of fraud, constructive fraud or material misrepresentation.

Mr. Bayles first went to meet defendant Evans with his daughter, Defendant Kristina Nicholls. During that meeting, Respondent Evans explained to Mr. Bayles without Debra Bayles’ consent or agreement, that he would not be able to set up an account unless Mrs. Bayles consented. *Appendix at 143-148*. Respondent Evans confirmed in his own deposition that, if Mr. Bayles’ money remained at NiSource, then Respondent Evans could not manage the account. Further, he could not take over management of the account without the consent of Debra Bayles and would receive no compensation for managing said account.

Petitioner, Debra Bayles, alleges that Respondent Evans made material misrepresentations to her that she relied upon prior to signing the spousal consent to rollover the accounts from NiSource and that but for those representations, she would never have signed said

consent. *Appendix at 125-126.* Specifically, Petitioner alleges Respondent Evans made material representations that Petitioner would remain the beneficiary on said accounts even after rollover to an IRA and the same couldn't be changed without her consent. These representations were clearly false, as the Respondents' claim that the beneficiary was changed, and it further paid the proceeds of the IRAs to Respondents, Stephen Bayles and Kristina Nicholls.

But for the misrepresentations to her, Mrs. Bayles would not have signed the consent form and the arbitration agreements in question would not exist since no money would have ever been subject to rollover. As such, under West Virginia law, the arbitration clause must be invalidated as a direct byproduct of fraud, constructive fraud and/or material misrepresentation. This Court should not permit the Respondents to receive the fruits or benefits of an Arbitration Agreement obtained by illegal or improper means.

D. The Circuit Court erred in granting Respondents Renewed Motion to Dismiss and Compel Mandatory Arbitration, by failing to recognize that the Arbitration Agreements relied upon by Respondents were unconscionable and therefore void.

“Nothing in the **Federal Arbitration Act, 9 U.S.C. §2**, overrides normal rules of contract interpretation. Generally applicable contract defenses—such as laches, estoppel, waiver, fraud, duress, or unconscionability—may be applied to invalidate an arbitration agreement.” **Syl. Pt. 9, Brown v. Genesis Healthcare Corp., 228 W.Va. 646, 724 S.E. 2d 250 (W.Va. 2011) (overruled on other grounds, Marmet Health Care Center, Inc. v. Brown, 132 S. Ct. 1201 (2012)).**

“The doctrine of unconscionability means that, because of an overall and gross imbalance, one-sidedness or lop-sidedness in a contract, a court may be justified in refusing to enforce the contract as written. The concept of unconscionability must be applied in a flexible manner, taking into consideration all of the facts and circumstances of a particular case.” **Syl. Pt.**

12, Id.

“A contract term is unenforceable if it is both procedurally and substantively unconscionable. However, both need not be present to the same degree. Courts should apply a ‘sliding scale’ in making this determination: the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the clause is unenforceable, and vice versa.” **Syl. Pt. 20, Id.**

The arbitration agreements contained in Agreement(s) are procedurally unconscionable. “Procedural unconscionability is concerned with inequities, improprieties, or unfairness in the bargaining process and formation of the contract. Procedural unconscionability involves a variety of inadequacies that results in the lack of a real and voluntary meeting of the minds of the parties, considering all the circumstances surrounding the transaction. These inadequacies include, but are not limited to, the age, literacy, or lack of sophistication of a party; hidden or unduly complex contract terms; the adhesive nature of the contract; and the manner and setting in which the contract was formed, including whether each party had a reasonable opportunity to understand the terms of the contract.” **Syl. Pt. 17, Id.**

Mr. Bayles was 63 years of age, had a 10th grade education, lacked sophistication. He had never dealt with his own personal financial advisor and anytime he met with Respondent Evans, he took someone else with him to the meeting. (daughter, wife, brother). According to Debra Bayles, she or Mr. Bayles’ daughter handled his bills. This is further evidenced by Defendant Evans’ notes provided in discovery stating that Kristina handled the bills. *Appendix at 125-126.*

The arbitration clause incorporates by reference the FINRA rules of arbitration. Petitioner argues the FINRA rules are complex. The arbitration clause is a take it or leave it,

without an opt out and therefore, one of adhesion. The meeting lasted 30 minutes and did not afford one the opportunity to even read the contract, let alone understand the terms. In fact, the arbitration clause wasn't read prior to the signing of the document and Respondent Evans stated he ask the client to take it home to read and call if they have any questions. *Appendix at 609-610.*

When weighing all of the factors to consider, they weigh in favor of a finding of procedural unconscionability.

The arbitration clause is also substantively unconscionable. It is unfair and lopsided. Specifically, it is a contract of adhesion, arbitration is enforceable only against the consumer, it limits discovery and the cost of arbitration are unreasonably burdensome.

A contract that lacks mutual, reciprocal obligations (for instance, the weaker party has to arbitrate all claims while the stronger party reserves the right to go to court) may be so one sided and unreasonably unfair to one party that it is unconscionable. Lack of mutuality does not automatically render an agreement unconscionable; the trial court must still assess the agreement in light of the facts and circumstances. **Dan Ryan Builders v. Nelson, 230 W.Va. 281, 737 S.E.2d 550 (2012).**

Both the brokerage agreement and portfolios agreement contain language that would require the parties to arbitrate by signing said agreement; however, Respondents have not signed the agreement. The section where agent, Jeff Evans, signs only indicates he has provided the client with certain documents and not that he or Ameriprise agree to arbitrate any disputes. *Appendix at 208-228.*

Discovery is limited under the FINRA rules of arbitration. Specifically, depositions are strongly discouraged in arbitration. Upon motion, the panel may permit a deposition. Of course,

as outlined below, said motion hearing will cost in excess of \$1000.00 dollars to maybe be able to conduct a deposition. See **FINRA Code of Arbitration 12510**.

Third, the costs of arbitration have a chilling effect on bringing a claim. As recently as October 2012, the West Virginia Supreme Court of Appeals has made it clear that “provisions in a contract of adhesion that if applied would impose unreasonably burdensome costs upon or would have 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, unless the court determines that exceptionable circumstances exist that make the provisions conscionable.” **Grayiel v. Appalachian Energy Partners, 2001-D, LLP, et al., 230 W.Va. 91, 736 S.E.2d 91, 102 (2012)**. Thus, even absent any other basis for unconscionability, the West Virginia Supreme Court has determined that if a contract clause imposes unreasonably high costs or would have a substantial deterrent effect on a person seeking to assert their rights and seek a remedy, that the provision is unconscionable as a matter of law. Further, “if an agreement to arbitrate imposes high costs that might deter a litigant from pursuing a claim, a trial court may consider those costs in assessing whether the agreement is substantively unconscionable. As the United States Supreme Court recognized, ‘the existence of large arbitration costs could preclude a litigant...from effectively vindicating her...rights in the arbitral forum.’” **Id. at 103 (citing Greentree Financial Corp.-Alabama v. Randolph, 121 S. Ct. 513 (2000))**.

For a plaintiff attempting to vindicate their rights “it is not only the costs imposed on the claimant but the risk that the claimant may have to bear substantial costs that deters the exercise of the constitutional right of due process.” **Id.** As noted in **Syllabus Pt. 4 of State ex rel Dunlap v. Burger, 211 W.Va. 549, 567 S. E. 2d 265 (2002)**, the West Virginia Supreme Court

made it clear that when considering an arbitration agreement that the high costs could be considered. The arbitration clause at issue here incorporates the FINRA rules of arbitration. The filing fee alone for the case in arbitration is a minimum in this case of \$1425.00, over five times the filing fee in Circuit Court. Further, the more one claims to be damaged, the higher the cost, See **FINRA Code of Arbitration 12900**. The fee per hearing session is \$1,125.00. **Id 12902**, hearing fees and other costs. Potential prehearing conferences include Discovery Disputes, various motions, witness list and subpoenas, stipulations of fact, scheduling issues, contested issues, and any other matter that will simplify arbitration, with each hearing costing \$1,125.00, plus postponement fees for any postponement of a hearing in an amount equal to the hearing session fee. **Id 12601**. There is also a processing fee. **Id 12903**. The costs alone have such a deterrent effect that even seeking relief is out of reach for some claimants. The corporate defendant has every incentive to file motions to increase the cost of litigation in an effort to make the plaintiff settle for less than is deserved and/or give up all together.

Wherefore, for these reasons, as well as the other arguments herein, the Petitioner argues the arbitration agreements herein are unconscionable.

E. The Circuit Court erred in granting Respondents' Renewed Motion to Dismiss and Compel Mandatory Arbitration, as even if the arbitration agreements were valid, the Petitioner's claims fall far outside the scope of the same.

The Petitioner's claims are not subject to arbitration as they regard claims of fraud, misrepresentation, detrimental reliance, etc., which do not arise out the subject accounts. Those claims are her own individual claims separate and distinct from any claims which could be brought on behalf of the Estate of her late husband.

As argued hereinbefore, prior to signing the spousal consent form consenting to rollover of the 401K account, Petitioner, Debra Bayles, had a lawful right to be the beneficiary of the

funds held in the 401K. That is a right that she would have never willingly given up had she been told the truth. Petitioner Bayles specifically inquired prior to the creation of the Ameriprise Brokerage Account about whether her spousal rights would be protected into the future if she consented to the rollover. *Appendix at 125-126.* Petitioner Bayles relied, to her detriment, upon the false representations of the Respondents. But for these misrepresentations, there would be no spousal consent, no Ameriprise accounts, and no arbitration agreements. Her claims arise out of representations and/or transactions that precede the creation of any arbitration clause. Mrs. Bayles' causes of action exist regardless of whether she is the Administratrix of the Estate of Mr. Bayles or not. If she were removed from that position her causes of action would in no manner be affected. The Respondents cannot steal from the Petitioner her right to be heard by the Courts regarding these misrepresentations by attempting to enforce an arbitration provision against her that was procured by fraud or misrepresentation.

Furthermore, the Court failed to recognize that the Petitioner's claims against Respondents, Kristina Nicholls and Stephen Bayles, are completely outside the scope of the subject arbitration clauses. The Petitioner is not subject to an arbitration agreement between herself and Kristina Nicholls and Stephen Bayles. Her claims against them are not within the scope of any arbitration clause. Even Respondent Ameriprise's agents and employees acknowledge the claims reside outside arbitration. In their emails they state the claims would need to be settled between the parties and require a court order, not an arbitration order. *Appendix at 455-477.*

Therefore, Petitioner maintains causes of action against Respondent Evans and Ameriprise in her own right outside the scope of the Arbitration Agreements and she cannot be made to arbitrate the same.

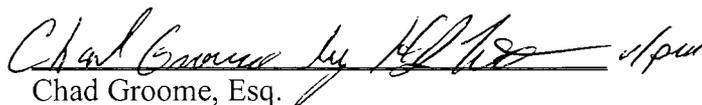
VI. CONCLUSION

Wherefore, for reasons heretofore stated, Petitioner respectfully request entry of an Order reversing the September 15, 2018 order of the Circuit Court of Marshall County, in part, and remanding this matter back to the Circuit Court for a trial on the merits.

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