THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Docket No. 2017-0673

GRAND SUMMIT HOTEL CONDOMINIUM UNIT OWNERS' ASSOCIATION

Plaintiff

v.

L.B.O. HOLDING, INC. dba ATTITASH MOUNTAIN RESORT

Defendant

INTERLOCUTORY APPEAL FROM ORDER OF THE CARROLL COUNTY SUPERIOR COURT PURSUANT TO SUPREME COURT RULE 8

BRIEF OF DEFENDANT-APPELLANT L.B.O. HOLDING, INC. dba ATTITASH MOUNTAIN RESORT

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QUESTION PRESENTED

Whether the trial court erred in determining that the Disputes provision contained in the Management Agreement between the parties did not encompass and bar plaintiff's claims.[1]

TEXT OF STATUTES AND RULES INVOLVED IN THE CASE

9 U.S.C. §2. Validity, irrevocability, and enforcement of agreements to arbitrate

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. §3. Stay of proceedings where issue therein referable to arbitration

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

RSA 542:1 Validity of Arbitration Agreements.

> A provision in any written contract to settle by arbitration a controversy thereafter arising out of such contract, or an agreement in writing to submit to arbitration any controversy existing at the time of the agreement to submit, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. The provisions of this chapter shall not apply to any arbitration agreement between employers and employees, or between employers and associations of employees unless such agreement specifically provides that it shall be subject to the provisions of this chapter.

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[1] Defendant raised this issue in the Trial Court through the following pleadings: (1) Defendant's Memorandum in Support of Defendant's Objection to Plaintiff's Motion to Amend Complaint and Request for Hearing, *see* Appendix ("App.") at 25-50; (2) Defendant's Hearing Memorandum, *see* App. 58-62; (3) Defendant's Motion for Certification of Interlocutory Appeal and Request for Hearing, *see* App. 70-74; and (4) Defendant's Reply Memorandum in Support of Motion for Certification of Interlocutory Appeal and Request for Hearing, *see* App. 81-85; This issue is also presented in the Trial Court's Interlocutory Appeal Statement, *see* App. 89-98.

RSA 542:2 Stay of Proceeding Brought in Violation of Arbitration Agreements.

> If any suit or proceeding be brought upon any issue referable to arbitration under such an agreement in writing for arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

STATEMENT OF THE CASE AND FACTS

Plaintiff Grand Summit Hotel Condominium Unit Owners' Association ("Grand Summit") is comprised of the residential and commercial owners of the Attitash Grand Summit Hotel and Conference Center (the "Condominium Building") in Bartlett, New Hampshire and is a New Hampshire voluntary corporation. *See* Amended Complaint, paras. 3 and 6, App. 13-14. Attitash, as relevant to this action, manages the Association pursuant to a Management Agreement between Grand Summit and Attitash (the "Management Agreement").[2] *See id.* at para. 9, App. 15; *see also* Management Agreement, App. 1-12.[3] Attitash is a Maine corporation with a principal office located at 17409 Hidden Valley Drive, Wildwood, MO 63025. *See* Amended Complaint, para. 4, App. 14.

In the present action, Grand Summit has asserted claims against Attitash as a result of a cooling tower failure at the Condominium Building. *See* Interlocutory Appeal Statement, App. 92-95. Specifically, Grand Summit asserts claims for breach of contract, breach of the covenant of good faith and fair dealing, negligence and a Consumer Protection Act violation, and seeks to recover the cost of renting a temporary cooling tower in 2014, and the cost to repair the original cooling tower in 2015. *Id.* at App. 19-24; *see also* Amended Complaint, paras. 19 and 20

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[2] Attitash also owns approximately 26% of the Condominium Building. *See* Amended Complaint, para. 6, App. 14.
[3] Grand Summit attached a copy of the original Management Agreement dated July 9, 2008 as Exhibit B to its Amended Complaint, but references that the Management Agreement had, at that time, been extended through April 30, 2016. *See* Amended Complaint, para. 9, fn. 6, App. 16. Attitash has attached a copy of the Management Agreement with subsequent extensions through April 30, 2016 at App. 1-12.

(alleging total costs to rent replacement and repair cooling tower of approximately $208,000 in 2014 and 2015), and paras. 28, 33, 39 and 45 (Couts I-IV seeking damages for the costs of cooling tower rental and repair), App. 18, 20-23.

Attitash moved to dismiss Grand Summit's claims on the grounds that they are subject to the "Disputes" provision contained at Article 3.5 of the Management Agreement, and on the grounds that Grand Summit has failed to plead any authority pursuant to which the Grand Summit Board of Directors may maintain this action.[4]

By way of its May 4, 2017 Order, the Superior Court denied Attitash's Motion to Dismiss. *See* May 4, 2007 Order, Addendum to Brief of Defendant-Appellant L.B.O. Holding, Inc. dba Attitash Mountain Resort ("Add.") 1-8. In its Order, among other things, the Court determined that Grand Summit's claims fell outside of the Disputes provision, holding that "[w]hile there are certainly "actual costs" resulting from the allegedly inadequate preparation of the cooling tower for winter and its ultimate failure, the court does not find the Disputes provision to have required mandatory arbitration of all matters leading to the actual costs that were incurred in this case." *Id.*, Add. 8.

Attitash contends that both the cost of renting a temporary cooling tower, and the cost to repair the original cooling tower are "Actual Costs" pursuant to Article 3.3 of the Management Agreement and thus subject to the Disputes provision at Article 3.5 of the Management Agreement. *See* Management Agreement, Article 3.5, App. 4-5. "Actual Cost" is defined at Article 3.3 of the Management Agreement which states, in pertinent part:

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[4] On or about November 21, 2016, Attitash moved to dismiss Grand Summit's Complaint. Thereafter, on or about December 9, 2016, Grand Summit moved for leave to amend its Complaint, to which Attitash objected on the grounds that the Amended Complaint was futile and did not remedy the defects in the original Complaint. The Superior Court heard argument on February 22, 2017 and treated Attitash's combined pleadings as a motion to dismiss the Amended Complaint (which the trial court had endorsed as the operative complaint on December 12, 2016).

> [t]he term "Actual Cost" shall mean the total cost to Manager [Attitash] of operating the Condominium, including: all labor, all associated payroll costs and personnel related costs, the cost of all supplies, the cost of outside services, the cost of utilities, costs and equipment rental incurred for the landscaping, snowplowing, repair, decoration or cleaning of the Property . . . and all other third party costs and expenses fairly attributable to the maintenance and operation of the Association . . . . The intent of the parties is that all costs, charges, and expenses of every kind and description fairly attributable to the operation, management or maintenance of the Association shall be charged to and paid by the Association from the Checking Account.[5]

(Emphasis added). *See* App. 4.

Plaintiff does not dispute that Attitash arranged for and entered into all relevant contracts for third-party services that generated the claims now at issue. *See* Amended Complaint, paras. 19 and 20 (referencing contracts for rental of temporary cooling tower and repair of cooling tower), App. 18.[6]

Article 3.5 of the Management Agreement, the "Disputes" provision, provides that:

> The Board shall have thirty (30) days from the rendition of a statement by Manager for both the Management Fee or of the Actual Cost within with to protest the nature, amount or method by which such amount was determined. If the matter cannot be resolved by the parties within thirty (30) days thereafter it shall be rendered to an independent public accountant for a decision, which decision shall be binding on both parties.

(Emphasis added. *See* App. 4-5.

The Amended Complaint does not plead that the Board protested the "Actual Costs" pursuant to the provisions of Article 3.5. The Board, in fact, did not do so and the time limits to protest those costs have now long since run. *See* Interlocutory Appeal Statement, App. 94-95.

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[5] The "Checking Account" is defined as "the operating account established by the Association and under the control of the Manager." *Id.* at Article 1, App. 2.

[6] Attitash had also entered into all other prior contracts with Mechanical Services, Inc. for cooling tower maintenance and operation at the Condominium Building. *See* Amended Complaint, paras. 12, 14, 15, 17, 21 and 23, App. 16-18.

Grand Summit has not contested that if the Disputes provision covers its claims, those claims are time-barred. *See* Plaintiff's Reply Memorandum to Defendant's Objection to Plaintiff's Motion to Amend Complaint and Request for Hearing (App. 55-56); Plaintiff's Motion to Dismiss Appeal (NHSC Docket No. 2017-0307) (App. 64-68); Plaintiff's Objection to Defendant's Motion for Certification of Interlocutory Appeal and Request for Hearing with Incorporated Memorandum of Law (App. 76-79); Interlocutory Appeal Statement (App. 95); and Association's Memorandum of Law in Support of its Motion for Summary Affirmance (filed in this appeal on or about December 5, 2017), pp. 5-7.

On or about June 1, 2017, following the trial court's May 4, 2017 Order, Attitash filed a Notice of Appeal pursuant to Supreme Court Rule 7, as it asserted a mandatory right to an appeal under section 16(a)(1)(A) of the Federal Arbitration Act (the "FAA"). *See* 9 USC §16(a)(1)(A). Thereafter, on or about June 8, 2017, Grand Summit moved to dismiss Attitash's appeal, which this Court granted on August 1, 2017 (Docket No. 2017-0307). *See* August 1, 2017 Order, App. 69. In its Order, the Court stated that the dismissal was without prejudice to Attitash's ability to raise "the issues in a subsequent appeal either upon conclusion of the entire case in the trial court or by a properly filed interlocutory appeal in accordance with Rule 8." *Id.*

On or about August 7, 2017, Attitash filed a Motion for Certification of Interlocutory Appeal. *See* App. 70-74; *see also* Reply Memorandum in Support of Motion for Certification of Interlocutory Appeal, App. 81-85. On September 27, 2017, the trial court granted Attitash's motion. *See* App. 86-88. Thereafter, on November 14, 2017, the trial court signed the Interlocutory Appeal Statement (App. 86-98), which Attitash filed with this Court on November 17, 2017. The Court then accepted the appeal on January 17, 2018.

STANDARD OF REVIEW

The standard of review on a motion to dismiss "is whether the allegations in the plaintiff's pleadings are reasonably susceptible of a construction that would permit recovery." *Lamprey v. Britton Constr*, 163 N.H. 252, 256 (2012), citing *McNamara v. Hersh*, 157 N.H. 72, 73 (2008). In conducting this review, the Court assumes "the plaintiff's allegations to be true and construe[s] all reasonable inferences in the light most favorable to" the plaintiff. *Lamprey*, 163 N.H. at 256. However, the Court "'need not accept allegations in the [complaint] that are merely conclusions of law.'" *Beane v. Dana S. Beane & Co.*, 160 N.H. 708, 711 (2010), quoting *Konefal v. Hollis/Brookline Coop. School Dist.*, 143 N.H. 256, 258 (1998).

The Court may also consider documents attached to plaintiff's pleadings, as well as documents not disputed by the parties, official public records and documents sufficiently identified in plaintiff's complaint. *See Beane*, 160 N.H. at 711. "The threshold inquiry involves testing the facts alleged in the pleadings against the applicable law." *Lamprey*, 163 N.H. at 256. The Court should dismiss the complaint "[i]f the facts pled do not constitute a basis for legal relief." *Hobin v. Coldwell Banker Residential Affiliates*, 144 N.H. 626, 628 (2000). Moreover, where "the motion to dismiss does not challenge the sufficiency of the plaintiff's legal claim, but instead raises certain defenses, the 'trial court must look beyond the plaintiff's unsubstantiated allegations and determine, based on the facts, whether the plaintiff has sufficiently demonstrated his right to claim relief." *Provencher v. Buzzell-Plourde Assoc.*, 142 N.H. 848, 853 (1998), quoting *Ossipee Auto Parts v. Ossipee Planning Bd.*, 134 N.H. 401, 403-404 (1991).

In determining arbitrability under the FAA, federal substantive law will apply. *See Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984) ("the substantive law the [FAA] created [is] applicable in state and federal courts"). Under federal substantive law, "any doubts concerning

the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

SUMMARY OF THE ARGUMENT

The Disputes provision of the Management Agreement between the parties is a valid, irrevocable and enforceable arbitration agreement pursuant to the FAA. Pursuant to section 2 of the FAA, it is a contract evidencing a transaction involving interstate commerce (the Management Agreement), and it is a written agreement to submit an existing controversy arising under that contract to arbitration. Grand Summit does not contend that grounds for the revocation of the Management Agreement exist either at law or in equity. Moreover, section 2 of the FAA does not require that an arbitration agreement contain a particular process, and it does not require that an arbitrator have any particular education or training (it does not even require that the provision use the word "arbitration").

Grand Summit's claims in this litigation all fall within the scope of the Disputes provision. Under controlling federal law, any doubts concerning the scope of the Disputes provision is to be resolved in favor of arbitration. Here, in each of its four counts, Grand Summit seeks damages that are "Actual Costs" as defined at Article 3.3 of the Management Agreement. As a result, each count "touches matters" covered by the Disputes provision, and must be arbitrated, independent of legal labels.

Pursuant to the Disputes provision (Article 3.5 of the Management Agreement), where Grand Summit protests either the nature of Actual Costs, the amount of the Actual Costs or the manner in which the Actual Costs were determined, it is required to follow the resolution procedure in the Disputes provision. If, after a 30 day period in which to protest an Actual Cost, and a subsequent 30 day period for negotiations between the parties, the parties are unable to

resolve the matter, it "shall be rendered to an independent public accountant for a decision, which decision shall be binding on both parties." *See* Management Agreement, Art. 3.5, App. 4-5.

It is undisputed that Grand Summit did not protest the Actual Costs it now contests pursuant to the Disputes provision. Moreover, Grand Summit's time in which to do so has long since run. As a result, Grand Summit's claims are time-barred and the Court should dismiss its Amended Complaint.

ARGUMENT

I. THE DISPUTES PROVISION IN THE MANAGEMENT AGREEMENT IS A VALID, IRREVOCABLE AND ENFORCEABLE ARBITRATION AGREEMENT PURSUANT TO 9 U.S.C. §2 AND RSA Ch. 542.

A. The Management Agreement Evidences a Transaction Involving Interstate Commerce.

Section 2 of the Federal Arbitration Act (the "FAA") provides, in pertinent part:

> [a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. §2. In interpreting this provision, the United States Supreme Court has held that the "statute 'is based upon . . . the incontestable federal foundations of control over interstate commerce and over admiralty.'" *Southland Corp.*, 465 U.S. at 11 (emphasis added), quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 405 (1967) (additional internal citations omitted). Support for this interpretation and application extends back to the FAA's legislative history, which states in part, "'The purpose of this bill is to make valid and enforcible

[*sic*] agreements for arbitration contained *in contracts involving interstate commerce . . . .*'" *Southland Corp.*, 564 U.S. at 12-13 (emphasis and brackets in original), quoting H.R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924). As such, "[t]he effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24. Moreover, that substantive law "governs [the arbitrability of the dispute] in either state or federal court." *Id.*

The present matter centers on the Dispute provision within the Management Agreement and is "a transaction involving commerce" as that phrase is used in section 2 of the FAA. 9 USC §2 (emphasis added); *see also* 9 USC §1 ("'commerce,' as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation"). In interpreting the phrase "involving commerce," the United States Supreme Court has held that the FAA "embodies Congress' intent to provide for the enforcement of arbitration agreements within the full reach of the *Commerce Clause*." *Perry v. Thomas*, 482 U.S. 483, 490 (1987) (italics in original). As such, the Court has concluded "that the word 'involving' is broad and is indeed the functional equivalent of 'affecting.'" *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273, 274 (1995). The FAA, "therefore cover[s] more than 'only persons or activities *within the flow* of interstate commerce.'" *Id.* at 273 (emphasis in original). *See also Citizen Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003) (*per curiam*) (because the FAA extends to the full reach of the Commerce Clause, "it is perfectly clear that the FAA encompasses a wider range of transactions than those actually 'in commerce' – that is, 'within the flow of interstate commerce'"), quoting *Allied-Bruce Terminix Cos.*, 513 U.S. at 273.

Moreover, it is only necessary "that the 'transaction' in fact 'involve' interstate commerce, even if the parties did not contemplate an interstate commerce connection." *Allied-Bruce Terminix Cos.*, 513 U.S. at 281 (emphasis added).

The present matter falls well within this broad reach. Specifically, it involves a contract for services between Grand Summit, a New Hampshire voluntary corporation and New Hampshire resident, and Attitash, a Maine corporation with a principal place of business in Missouri. *See* Amended Complaint, paras. 3 and 4, App. 13-14. Additionally, the "Actual Costs" of which Grand Summit complains were paid, in large part, to a third-party contractor from Portland, Maine. *See id.* at paras. 12 and 19, App. 16 and 18. These facts are similar to the record in *Allied-Bruce Terminix Cos., supra.* In that case, the Court expressly found that the transaction "involved interstate commerce" where a resident of Alabama entered into a contract with Allied-Bruce Terminix Cos. for the lifetime protection of the resident's home from termite infestation. *See Allied-Bruce Terminix Cos.*, 513 U.S. at 268 and 282. In so holding, the Court referenced only "the multistate nature of Terminix and Allied-Bruce, [and that] the termite-treating and house-repairing material used by Allied-Bruce . . . came from outside Alabama." *Id.* at 282. Further, like in *Allied-Bruce Terminix Cos.*, the plaintiff here does "not contest that the transaction in this case, in fact, involved interstate commerce." *Id.* As a result, and for all of the foregoing reasons, the Management Agreement and the underlying dispute is "a transaction involving commerce."

B. The Disputes Provision is a Written Agreement to Submit a Controversy to Arbitration.

In the present matter, the Dispute provision meets all of the requirements of a valid, irrevocable and enforceable arbitration provision. In addition to "involving commerce" (*see infra.*, pp. 8-10) it meets all other requirements of 9 U.S.C. §2. Namely, it is a written provision

within a contract to submit a controversy arising out of such contract or transaction to arbitration (*i.e.*, submission of the dispute to a third-party neutral for a binding resolution).[7]

Grand Summit's assertion in this matter that the Disputes provision does not describe "a process that includes a dispute resolution akin to arbitration" (and its incorrect attribution of that view to the trial court) is without merit or relevance. *See* Plaintiff's Objection to Defendant's Motion for Certification of Interlocutory Appeal and Request for Hearing with Incorporated Memorandum of Law, App. 78. There is no requirement in the FAA that an arbitration agreement contain any particular process, that it provide for a specific type of presentation of the conflict (such as a hearing, the calling of witnesses, written submissions, affidavits, etc.), or that an arbitrator have any particular training and experience.

In any event, the arbitration provision here does not preclude a hearing (or any other arbitral process). Rather, it is simply silent. It says that "[i]f the matter cannot be resolved by the parties within thirty (30) days thereafter, it shall be rendered to an independent public accountant for a decision, which decision shall be binding on both parties." Management Agreement, Article 3.5, App. 4-5 (emphasis added). The plain language of the Disputes provision neither prevents nor requires the parties to hold a formal hearing. Inherent in the arbitration provision's silence, of course, is the ability of the parties to agree to procedures beyond what it provides, including a hearing. Moreover, the FAA allows that an arbitrator "may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed

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[7] Grand Summit has not (and cannot) argue that "grounds . . . exist at law or in equity for the revocation of" the Management Agreement or the Dispute provision. 9 USC §2. Indeed, Grand Summit has premised its claims for "Actual Costs," in part, on a claim for breach of the Management Agreement. *See* Amended Complaint, paras. 26-29, App. 19-20. *See also Allied-Bruce Terminix Cos.*, 513 U.S. at 281 (holding that the FAA does not allow States to "decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The [FAA] makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal 'footing,' directly contrary to the [FAA]'s language and Congress' intent").

material as evidence in the case." 9 U.S.C. §7 (emphasis added). The fact that the FAA expresses the power to compel witnesses as permissive rather than mandatory further undercuts any argument that a valid arbitration agreement must specifically provide for a hearing. *See id.*

The fact that the Disputes provision does not contain the word "arbitration" is also of no material effect, and its absence does nothing to change the nature and purpose of the provision. The word "arbitration" simply means "the action of arbitrating; *esp*: the hearing and determination of a case between persons in controversy by a person or persons chosen by the parties or appointed under statutory authority instead of a judicial tribunal provided by law." *Webster's Third New International Dictionary* 110 (unabridged ed. 2002) (emphasis added). The Disputes provision does precisely that – it allows for the determination of a controversy concerning "Actual Costs" by a person (an accountant) chosen by the parties. Accordingly, pursuant to 9 U.S.C. §2, the Dispute provision is a "valid, irrevocable and enforceable" agreement to arbitrate.

C. The New Hampshire Arbitration Statute Mirrors the FAA and Requires the Same Result.

Although the FAA and its substantive federal law apply to the present dispute, the result would be the same under New Hampshire law. Like 9 U.S.C. §2, RSA 542:1 provides that written arbitration agreements "shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Its terms do not require any particular process, an arbitrator with a specific type of training and experience, or even that the agreement use the word "arbitration." As a result, the Disputes provision qualifies as a valid, irrevocable and enforceable arbitration agreement under New Hampshire law, as well as under federal law.

II. THE DISPUTES PROVISION ENCOMPASSES PLAINTIFF'S CLAIMS AND BARS THE PRESENT LAWSUIT.

A. Plaintiff's Claims for "Actual Costs" Fall within the Disputes provision.

The underlying "purpose of the [FAA] is to overcome courts' refusals to enforce agreements to arbitrate." *Allied-Bruce Terminix Cos.*, 523 U.S. at 270, citing *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989). The FAA "seeks broadly to overcome judicial hostility to arbitration agreements and that applies in both federal and state courts." *Id.* at 272. In enacting Section 2 of the FAA, "Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Southland Corp.*, 465 U.S. at 10. As a result, "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25 (emphasis added). Indeed, arbitration should not be denied "unless it may be said with 'positive assurance' that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Universal Marine Ins. Co. v. Beacon Ins. Co.*, 588 F. Supp. 735, 737 (W.D.NC 1984) (emphasis added) (citations omitted). *See also Stateside Machinery Co. v. Alperin*, 591 F.2d 234, 240 (3rd Cir. 1979) (referencing a "'federal rule that seemingly requires a clearly expressed intent Not to arbitrate an issue before such issue can be ruled one for judicial determination; and, further, that if the issue is a doubtful one, the doubt is to be resolved in favor of arbitration'") (capitalized emphasis in original, underlined emphasis added), quoting *Singer Co. v. Tappan Co.*, 403 F. Supp. 322, 329 (D.N.J.1975), *aff'd*, 544 F.2d 513 (3d Cir. 1976); *Shaffer v. ACS Gov't Servs.*, 321 F.Supp. 2d 682, 685 (D.Md. 2004) (as a result of national

policy favoring arbitration, "in a 'close-call' on arbitrability, the Court must decide in favor of sending the parties to arbitration") (emphasis added); *Consumer Concepts, Inc. v. Mego Corp.*, 458 F.Supp. 543, 544 (S.D.N.Y. 1978) ("Courts should . . . defer to arbitration between commercial entities unless there is a clear intent that the arbitration clause does not apply; doubts as to the parties' intent are to be resolved in favor of arbitration") (emphasis added).

New Hampshire, although not controlling here, is in accord with federal law. In New Hampshire, where parties have agreed to submit a dispute to arbitration, "it is abundantly clear that [the superior court] does not have jurisdiction to hear" the dispute. *State v. Phillip Morris USA, Inc.*, 155 N.H. 598, 604 (2007) (internal quotations omitted, brackets in original) (affirming Superior Court's dismissal of a lawsuit on the grounds that the dispute fell "squarely under the arbitration provision").[8] Indeed, "there is a presumption of arbitrability when a contract contains an arbitration clause." *John A. Cookson Co. v. N.H. Ball Bearings*, 147 N.H. 352, 355 (2001); *see also Apex Answering Service v. Professional Inbound*, 2011 N.H. Super. LEXIS 117, *8 (Hillsborough County Super. Ct. 2011) (Garfunkel, J.) (same). This presumption will be upheld and all doubts resolved in favor of arbitration in the absence of a determination of "'positive assurance that the [contract] is not susceptible of an interpretation that covers the dispute.'" *John A. Cookson Co.*, 147 N.H. at 356, quoting *Appeal of Town of Bedford*, 142 N.H. 637, 640 (1998).

In the Amended Complaint, there is no doubt that Grand Summit's claims for damages all arise from costs incurred as a result of the cooling tower failure at the Condominium Building. Specifically, plaintiff asserts claims for the cost of renting a temporary cooling tower in 2014, and the cost to repair the cooling tower in 2015. *See* Amended Complaint, paras. 19 and 20, App.18. Both of these claimed costs are "Actual Costs" pursuant to Article 3.3 of the

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[8] *Cf.* RSA 542:2 with 9 USC §3 (both providing for stay of trial where there is a valid arbitration agreement, and RSA 542:3 with 9 USC §4 (both providing for initiation of court action to compel arbitration).

Management Agreement and thus subject to the resolution procedures in the Disputes provision of the Management Agreement.

Where, as here, Grand Summit contests an "Actual Cost," whether it be the nature of that cost, the amount of that cost, or the method by which the amount of the cost was determined, the Disputes provision of the Management Agreement provides that Grand Summit has thirty days from presentment of invoices or other cost information "to protest the nature, amount or method by which such amount was determined." *See id.* at Article 3.5, App. 4-5. After Grand Summit protests such a cost, Attitash and Grand Summit have another thirty days to resolve the dispute. If the parties cannot resolve their differences within that time, the dispute "shall be rendered to an independent public accountant for a decision, which decision shall be binding on both parties." *See id.* (emphasis added).

Plaintiffs do not dispute that Attitash, pursuant to the Management Agreement, arranged for and entered into all relevant contracts for third-party services that generated the costs that plaintiff seeks to recover. *See* Amended Complaint, paras. 19 and 20 (referencing contracts for rental of temporary cooling tower with Mechanical Services, Inc. and repair of cooling tower with Granite State Plumbing & Heating), App. 18; *see also* the May 12, 2014 contract between Attitash and Mechanical Services, Inc. for the rental cooling tower (App. 41-43), and the March 12, 2015 contract between Attitash and Granite State Plumbing and Heating for the repair of the cooling tower (App. 44-50).[9] Plaintiffs also cannot dispute that these costs are Actual Costs pursuant to Article 3.3 of the Management Agreement. Indeed, they meet any number of the descriptions of Actual Costs, including but not limited to:

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[9] These documents were attached as Exhibits 3 and 4 to Attitash's Objection to Plaintiffs' Motion to Amend Complaint. Attitash had also entered into all other prior contracts with Mechanical Services, Inc. for cooling tower maintenance and operation at the Condominium Building. *See* Amended Complaint, paras. 12, 14, 15, 17, 21 and 23, App. 16-18.

- "the cost of outside services;"
- "costs and equipment rental incurred for . . . repair;"
- "third party costs and expenses fairly attributable to the maintenance and operation of the Association;" and
- "costs, charges, and expenses . . . fairly attributable to the operation, management or maintenance of the Association."

See Management Agreement, Article 3.3, App. 4.

It is exactly these costs that Grand Summit contests in this matter and for which it seeks recompense. There can be no doubt as to the underlying and pervasive "cost" basis of Grand Summit's claims, and that they fall squarely within the Disputes provision. Indeed, where the underlying subject matter in dispute – here, the nature of the "Actual Costs" and whether Grand Summit should bear them – falls within the scope of an arbitration provision, the legal theories in which a plaintiff frames that subject matter do not control arbitrability. *See Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 846 (2nd Cir. 1987). To determine if a claim falls within the reach of an arbitration agreement, courts "focus on the factual allegations in the complaint rather than the legal causes of action asserted." *Id.*, citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 622 n.9, 624, n.13 (1985). If the underlying factual allegations "'touch matters' covered by the [arbitration agreement], then those claims must be arbitrated, whatever the legal labels attached to them." *Genesco, Inc.*, 815 F.2d at 846; *see also id.* at 854-856 (finding that allegations of fraud, unfair competition and unjust enrichment claims were subject to arbitration as they were "not wholly independent of" the contract); *see also Fazio v. Lehman Bros., Inc.*, 340 F.3d 386, 395 (6th Cir. 2003) ("[e]ven real torts can be covered by arbitration clauses '[i]f the allegations underlying the claims 'touch matters' covered by the [agreement]"). So, since all of Grand Summit's claims do not just "touch matters," but are based on the "Actual Costs" of the cooling tower rental and repair, all of Grand Summit's claims must

be arbitrated pursuant to the Disputes provision of the Management Agreement. *See Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25 ("the scope of arbitrable issues should be resolved in favor of arbitration").

B. Grand Summit Did Not Comply with the Disputes Provision and Its Claims Are Now Time-Barred.

The Amended Complaint does not plead that Grand Summit protested the "Actual Costs" it claims as damages pursuant to the Disputes provision. Grand Summit, in fact, did not do so, even though it now clearly protests the nature of those costs and its own responsibility to bear those costs. The time limit to protest those costs, however, has long since run. *See* Management Agreement, Article 3.5, App. 4-5.

Moreover, even if the Board had timely protested the costs as required, the dispute would then be subject to a binding decision by an independent public accountant acting as an arbitrator. It would not be subject to judicial determination. As a result, the Amended Complaint should be dismissed.

CONCLUSION AND REQUEST FOR ORAL ARGUMENT

Plaintiff's claims in this matter are subject to and encompassed within the Disputes provision, a valid, irrevocable and enforceable arbitration agreement pursuant to the FAA. As a result, plaintiff may not pursue those claims in Superior Court. Moreover, as the time in which plaintiff might have invoked the arbitration provision has run, its claims are now barred completely. Accordingly, Attitash respectfully requests that this Honorable Court reverse the trial court's May 4, 2017 Order and dismiss plaintiff's complaint with prejudice.

Attitash respectfully requests 15 minutes of oral argument before the full Court. Brendan P. Mitchell will present oral argument for the appellant Attitash.

Respectfully submitted,

L.B.O. HOLDING, INC. d/b/a ATTITASH MOUNTAIN RESORT

By and through its Attorneys,

DEVINE, MILLIMET & BRANCH, PROFESSIONAL ASSOCIATION

Dated: March 5, 2018

By: _____

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that, pursuant to Supreme Court Rule 16(3)(i), rulings below were in writing and copies of same are appended to this brief in an addendum, and further that I have complied with Supreme Court Rules 16(10) and 26 and that two copies of this brief have been sent by United States mail this 5th day of March, 2018, to the following:

Michael D. Ramsdell
Ramsdell Law Firm, P.L.L.C.
46 South Main Street
Concord, NH 03301

_____
Brendan P. Mitchell, Esq.

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ADDENDUM: ORDER APPEALED

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Carroll Superior Court
96 Water Village Rd., Box 3
Ossipee NH 03864

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
http://www.courts.state.nh.us

NOTICE OF DECISION

File Copy

Case Name: **Grand Summit Hotel Condo Unit Owners' Assoc v LBO Holding, Inc d/b/a Attitash Mt Resort**
Case Number: **212-2016-CV-00152**

Enclosed please find a copy of the court's order of May 04, 2017 relative to:

Order on Defendant's Motion to Dismiss

May 04, 2017

Abigail Albee
Clerk of Court

(406)

C: Michael D. Ramsdell, ESQ; Thomas B.S. Quarles, Jr., ESQ; Brendan P. Mitchell, ESQ

NHJB-2503-S (07/01/2011)

THE STATE OF NEW HAMPSHIRE

CARROLL, SS. SUPERIOR COURT

Grand Summit Hotel Condominium Unit Owners' Association, Inc.

v.

L.B.O. Holding, Inc.
dba Attitash Mountain Resort

Docket No. 212-2016-CV-152

ORDER ON DEFENDANT'S MOTION TO DISMISS

The plaintiff, Grand Summit Hotel Condominium Unit Owners' Association, Inc. ("Association"), brings this action against L.B.O. Holding, Inc. ("LBO") for breach of contract, breach of covenant of good faith and fair dealing, negligence, and violation of the consumer protection act in connection with costs associated with a cooling tower serving the condominium.[1] (Court index #10.) LBO moved to dismiss the complaint, arguing (1) the Management Agreement does not authorize the Board of Directors ("Board") to bring this action, and (2) the Management Agreement does not provide authority to sue for a common expense.[2] (Court index #6, #7.) The Association objected. (Court index #12.) On February 22, 2017, the court held a hearing on the motion. Based on the parties' arguments, the facts as pled by the plaintiff, and the applicable law, the court finds and rules as follows.

[1] The court granted the plaintiff's request to amend the complaint, which it did on December 12, 2016. By the amendment, the complaint is now brought by the Association, acting through its Board, rather than being brought by the 420 residential interests.

[2] The motion to dismiss originally raised two additional assertions, which are no longer at issue given the court's order authorizing amendment of the complaint.

FACTUAL AND PROCEDURAL BACKGROUND

The Grand Summit Hotel Condominium (the "Condominium") is a 602 bed condominium hotel in Bartlett, New Hampshire, consisting of 420 quarter-share residential interests and one commercial interest, which is owned by LBO. Together the residential owners hold 74% ownership; LBO has 26% ownership interest. Holding an ownership interest automatically confers membership in the Association. The Association manages the Condominium, through its Board. The Board in turn has contracted for years with LBO as manager of the Condominium, under a Management Agreement.

Mechanical Services, Inc., a heating and cooling contractor ("Mechanical Services") engaged through LBO to provide cleaning and maintenance services to the Condominium's boilers and cooling tower in 2011-2012 and 2-12-2013, submitted a contract for heating and cooling related services for the period April 1, 2013, through March 31, 2014. LBO did not sign or return the contract. In late May or early June 2013, however, LBO requested that Mechanical Services clean and start the cooling tower, which it did on or about June 5, 2013. It billed LBO on a time and materials basis for the work, which LBO paid. After another exchange, Mechanical Services submitted a second proposal for the 2013-2014 period which again LBO did not sign or return. In mid-December 2013, however, LBO sent Mechanical Services one of the earlier contract proposals, signed by LBO on May 1, 2013.

On April 28, 2014, Mechanical Services prepared the cooling tower for the 2014 cooling season and discovered coils damaged by freezing during the winter. The damage made the tower unusable for the 2014 cooling season. LBO contracted with

Mechanical Services for rental of a temporary cooling tower, and with Granite State Plumbing & Heating for repairs, at a combined cost of approximately $250,000 prior to the 2015 cooling season.

On or about May 14, 2014, LBO notified the Association of its contract with Mechanical Services for the April 1, 2013, to March 31, 2014, period and that Mechanical Services claimed to have lost the contract. LBO stated Mechanical Services had not shut down the cooling tower prior to winter 2013-2014 and after, attempts to contact Mechanical Services failed, LBO personnel had drained the cooling tower as best as they could. Also during this period LBO stated the cooling tower appeared to have reached the end of its useful life, at 19 years old, having a total life expectancy of 20 to 30years. It also stated at the Annual Owners Meeting on November 22, 2014, that a coil froze as a result of Mechanical Services' failure to properly winterize the cooling tower.

On or about January 21, 2014, LBO executed a different contract with Mechanical Services for the period February 1, 2014, through January 1, 2015, even though the contract it asserted was in place already covered the period through March 31, 2014.

The Board, authorized retention of a law firm to investigate settlement of its claim against Peak Resorts, the LBO's parent company. The Board authorized the law firm to proceed to litigation if settlement was not achieved and further authorized the residential interest owners to expend funds for the legal expenses. On December 8, 2016, the Board authorized the filing of the Amended Complaint.

A central argument in the motion to dismiss, that the complaint was brought by unnamed residential interests rather than the Association, has since been cured by the court's January 13, 2017, order allowing amendment. The defendant argues, however, that even as amended the complaint is deficient in that the Board had no authority to bring this action and the terms of the Management Agreement bar this action.

The defendant argues the complaint fails to identify valid authority under which the Association asserts its claim. The complaint cites the vote of the Board of Directors to take this action, pursuant to Article III (1)(g) and (n) of the By-Laws when, according to the defendant, neither provision authorizes such action. Section (g) allows actions "to enforce compliance with the Association Articles, By-Laws, Rules and Regulations" but, because the complaint does not allege violation of a bylaw, rule or regulation, the action cannot be maintained.

Further, according to the defendant, section (n) is a 'catch-all" provision that allows the Board to do "such other things and acts not inconsistent with the Condominium Act or with the Declaration which it may be authorized to do by a resolution of the Association." While there have been two resolutions of the Board to take this action, the Association has not so voted. For these reasons, the defendant argued, the complaint should be dismissed.

The plaintiff argues that RSA 356-B:41,I provides the Association with authority regarding maintenance, repair and replacement of common areas. Article III,1 of the By-Laws authorizes the Board to act on the Association's behalf. Section (f) of the By-Laws[3] gives the Board power to provide "for the operation, care, upkeep, replacement and maintenance of all of the Common Area and services of the Condominium. . ."

[3] The complete By-Laws were submitted as an attachment to the Amended Complaint.

Section (g) and the catch-all section (n) provide the Board with authority to bring this complaint. On December 8, 2016, "on behalf of the Association" the Board authorized litigation of these claims.

Regarding the argument that the Disputes provision of the Management Agreement bars this action, the defendant argues the complaint seeks damages for "costs incurred" as a result of the cooling tower failure and thus the Disputes provision of the Management Agreement govern. The Disputes provision reads as follows:

> 3.5 Disputes. The Board shall have thirty (30) days from the rendition of a statement by Manager for both the Management Fee or of the Actual Cost within which to protest the nature, amount of method by which such amount was determined. If the matter cannot be resolved by the parties within thirty (30) days thereafter it shall be rendered to an independent public accountant for a decision, which decision shall be binding on both parties.

The defendant argues this provision mandates binding arbitration on all disputed costs. The plaintiff's failure to submit the charges for replacement cooling and repair of the cooling tower are fatal to this complaint, according to the defendant.

The plaintiff disagrees, asserting this not a dispute over a particular charge, but rather an allegation of a course of conduct involving breach of contract, breach of the covenant of good faith and fair dealing, negligence, and unfair and deceptive business practices under the Consumer Protection Act. The plaintiff argues the Disputes provision is a narrow one, to resolve a dispute over a particular charge or cost, not a mandate that all disputed issues with cost consequences must be arbitrated.

LEGAL STANDARD

When ruling on a motion to dismiss the court must discern whether the allegations stated in the plaintiff's complaint "are reasonably susceptible of a construction that would permit recovery." Plourde Sand & Gravel Co. v. JGI E., Inc., 154

N.H. 791, 793 (2007) (quotation omitted). The court should "assume all facts pled in the plaintiff's writ are true, and . . . construe all reasonable inferences drawn from those facts in the plaintiff's favor." Id. (quoting Berry, 152 N.H. at 410). But, the court need not "assume the truth of statements . . . that are merely conclusions of law." Gen. Insulation Co. v. Eckman Constr., 159 N.H. 601, 611 (2010). The plaintiff must support his legal conclusions and claims with "predicate facts." Id. at 612. The court should test these facts against the applicable law and deny the motion to dismiss "[i]f the facts as alleged would constitute a basis for legal relief." Starr v. Governor, 148 N.H. 72, 73 (2002).

ANALYSIS

Regarding authority to bring this complaint, the court finds the complaint to have been validly filed. The Board authorized litigation of this matter on behalf of the Association. RSA 356-B:41,I grants to a condominium association "all powers and responsibilities with regard to maintenance, repair, renovation, restoration, and replacement" of condominium common areas. The By-Laws of the Condominium authorize the Board to take such action as necessary to provide for the operation and maintenance of common areas and bring legal actions to enforce compliance with the By-Laws, Rules and Regulations, pursuant to By-Laws Article III, I(f)[4] and (g). The motion to dismiss on the basis that the Board was without authority is DENIED.

The court agrees with the plaintiff that what the defendant refers to as a mandatory arbitration clause in the Management Agreement is narrowly drawn, addressing disputes over an "actual cost" with referral to an accountant when a dispute cannot be resolved. There is no requirement that all disputes go to arbitration, in fact

[4] The court agrees with the plaintiff that consideration of the entirety of the By-Laws is permissible in this case, as they were appended to the Amended Complaint. See Beane v. Dana S. Beane & Co. P.C., 160 N.H. 708, 711 (2010).

the word arbitration does not even appear in the Management Agreement. Further, the mechanism set forth, for an accountant to review a particular charge, is a process that would not be appropriate for disputes involving contract negotiation, representations made by the contracting parties, disputes over the effective date of a contract, compliance with the terms of a contract, inadequate work performed by the defendant, and other assertions made by the plaintiff. While there are certainly "actual costs" resulting from the allegedly inadequate preparation of the cooling tower for winter and its ultimate failure, the court does not find the Disputes provision to have required mandatory arbitration of all matters leading to the actual costs that were incurred in this case. The court therefore DENIES the motion to dismiss on the basis that the Management Agreement bars this complaint for lack of arbitration.

In conclusion, the court finds the plaintiff's allegations, as pled, are "reasonably susceptible to a construction that would permit recovery." Beane, 160 N.H. at 711. The defendant's motion to dismiss is DENIED.

So Ordered.

Date: May 4, 2017

Amy L. Ignatius
Presiding Justice