REFILED

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

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

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INTRODUCTION

Plaintiff/Appellee, Grand Summit Hotel Condominium Unit Owners' Association ("Grand Summit") has asserted claims seeking to recover the Actual Costs associated with the rental and repair of a cooling tower at the Attitash Grand Summit Hotel & Conference Center. Despite the relief it seeks, Grand Summit contends that its claims are not encompassed within the Disputes provision at Article 3.5 of the Management Agreement between the Grand Summit and Defendant/Appellant L.B.O. Holding, Inc. dba Attitash Mountain Resort ("Attitash"), and are not subject to arbitration pursuant to that provision. In support of its contention, Grand Summit posits that: 1) New Hampshire law governs the enforceability and scope of the Disputes provision (rather than the Federal Arbitration Act (the "FAA"), its provisions at 9 U.S.C. §2 and resulting substantive federal law); 2) New Hampshire law requires a procedural process "akin" to that found in Superior Court Rule 33; and 3) the Dispute provision provides only an "accounting remedy" that does not encompass Grand Summits claims of breach of contract, breach of the implied covenant of good faith and fair dealing, negligence, and violation of RSA 358-A (even though each count seeks a recovery of Actual Costs).

Grand Summit's contentions, however, do not survive scrutiny. As explained below (and within Attitash's Appellant's Brief, which is incorporated herein as if stated in full), the Management Agreement is a written provision in a contract evidencing a transaction in commerce to settle a controversy by arbitration. As such, it is within the reach of the Commerce Clause and subject to federal substantive law. That federal law dictates that "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).[1] Moreover, the FAA (and RSA 542) does not require any particular procedure for the validity of an arbitration agreement (and does not even require the use of the word "arbitration"). Finally, the Disputes provision, by its plain language, is not limited to an "accounting remedy." While it does specify that disputes will be rendered to an accountant for a binding determination, those disputes specifically include protests concerning the nature of Actual Costs, which is the very thing that Grand Summit contests. Accordingly, as Grand Summit did not invoke the Disputes provision within the time limits for doing so, its claims are now time barred and its Amended Complaint should be dismissed.

ARGUMENT

I. THE FAA GOVERNS THE SCOPE AND APPLICABILITY OF THE DISPUTES PROVISION IN THE MANAGEMENT AGREEMENT

A. Federal Law Preempts New Hampshire Law Concerning the Enforceability and Interpretation of the Disputes Provision.

In the Appellee's Brief, Grand Summit argues, erroneously, that New Hampshire law rather than federal substantive law governs the scope and applicability of the Disputes provision located at Article 3.5 of the Management Agreement. Contrary to Grand Summit's position, the present matter is governed by 9 U.S.C. §2 of the Federal Arbitration Act (the "FAA"), which provides that "[a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

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[1] Although Grand Summit attempts to argue otherwise, New Hampshire law is similarly deferential to arbitration agreements. *See John A. Cookson Co. v. N.H. Ball Bearings*, 147 N.H. 352, 356 (2001) (all doubts will be resolved in favor of arbitration absent a "positive assurance that the [contract] is not susceptible of an interpretation that covers the dispute").

(Emphasis added).[2] In interpreting 9 U.S.C. §2, 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. v. Keating*, 465 U.S. 1, 11 (1984) (emphasis added), quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 405 (1967) (additional internal citations omitted). As such, "[t]he effect of [9 U.S.C. §2] 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. v. Mercury Constr. Corp.*, 460, U.S. 1, 24 (1983). This federal substantive law "governs [the arbitrability of such a dispute] in either state or federal court." *Id.* (emphasis added). Attitash further incorporates and refers the Court to pages 8-12 of its Appellant's Brief.

Grand Summit's citation to *Finn v. Ballentine Partners, LLC*, 169 N.H. 128 (2016) neither alters this analysis, nor effects the applicability of the FAA to the scope, interpretation and enforceability of the Disputes provision. On the contrary, the *Finn* decision expressly recognizes the applicability of section 2 of the FAA to state courts concerning the enforcement of arbitration agreements, and the FAA's creation of "substantive rules that apply to arbitration agreements in both federal and state courts when the contract to arbitrate affects commerce." *Finn*, 169 N.H. at 136, 138. The *Finn* decision instead focuses on whether the arbitrator's final decision at issue in that matter was subject to judicial review under the more deferential standard found in 9 U.S.C. §§9-11, or the less deferential standard of "plain mistake" in RSA 542:6. *See id.* at 138. Even in making its determination that the New Hampshire standard would apply to a judicial review of the arbitrable award in that matter, the Court clearly recognized that "the FAA applied to the extent that it required the parties to arbitrate their dispute" in the first instance. *Id.*

[2] Grand Summit has not disputed that the Disputes provision is a written provision in a contract evidencing a transaction involving commerce.

at 139 (emphasis added). Accordingly, section 2 of the FAA and federal substantive law concerning the enforceability and interpretation of arbitration agreements controls the issue of arbitrability here.

B. The Disputes Provision is an Arbitration Agreement.

Grand Summit next argues, based upon its faulty premise that New Hampshire law governs the determination of the enforceability of the Disputes provision (and a further mistaken understanding of New Hampshire case law), that the Disputes provision is not an enforceable arbitration agreement.[3] In making its conclusory assertion, Grand Summit ignores New Hampshire law that, like federal law, holds "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). Grand Summit further ignores that New Hampshire will uphold this presumption and resolve all doubts 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).[4]

Instead, Grand Summit contends that the Disputes provision is not an arbitration agreement solely because it "does not provide a process akin to arbitration described in Superior Court Rule 33." Appellee's Brief, p.12. It cites no case law or other authority for its position, and makes only a cursory acknowledgement of the complete lack of any delineated procedural

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[3] Although the FAA governs in this matter, the Disputes provision is an enforceable arbitration agreement under either federal or New Hampshire law. *See* Appellant's Brief, pp. 12 and 14.

[4] *Cf. Universal Marine Ins. Co. v. Beacon Ins. Co.*, 588 F. Supp. 735, 737 (W.D.NC 1984) (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") (emphasis added), and other federal citations at pp. 13-14 of the Appellant's Brief

requirements for a valid arbitration agreement in RSA 542:1 (or in 9 U.S.C. §2).[5] Moreover, its selective quotations from Superior Court Rule 33 do not demonstrate a required arbitration procedure under New Hampshire law. On the contrary, an examination of Rule 33 reveals that its provisions are largely discretionary and completely inapplicable here.

Initially, Grand Summit skips over subsection (a) of Rule 33. That subsection provides, "[s]ubject to RSA 542, non-criminal disputes will be assigned to arbitration upon agreement of the parties or as mandated by a written contractual provision." (Emphasis added). The second portion of subsection (a) recognizes the mandatory nature of a contractual arbitration provision such as the Disputes provision, and removes it from the remainder of R. 33. Subsections (b)(1) and (2) concern the submission of a matter to arbitration under the auspices of the Office of Mediation and Arbitration. Subsection (b)(1) allows parties, prior to litigation, to make a written request for arbitration under Rule 33 to the Administrator of the Office of Mediation and Arbitration "if all parties . . . consent." Sup. Ct. R. 33 (b)(1) (emphasis added). Importantly, it does not purport to be an exclusive venue for pre-litigation arbitration and nowhere suggests that a valid arbitration agreement must follow its listed procedures. Indeed, even when parties make a request under subsection b(1), they are free to agree to disregard the procedures of Rule 33 at their election. *See id.* It is only under subsection (b)(2), where the parties submit a written request for arbitration pursuant to Rule 33 after litigation has commenced, that "[t]he administration of the Arbitration Hearing will be conducted pursuant to Superior Court Rule 33."

In the present matter, the parties have not made any such written request, under either subsection (b)(1) or (b)(2), and have not elected to invoke the procedures outlined in R. 33. Moreover, Rule 33 does not even require that parties seeking arbitration through the Office of

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[5] Attitash incorporates herein pp. 10-12 of its Appellant's Brief concerning the lack of any requirement of a particular arbitration process, or any specific qualifications or training for an arbitrator within the FAA or RSA 542.

Mediation and Arbitration always use its delineated procedure. Accordingly, Superior Court Rule 33 has no bearing on the present matter and certainly does not reflect a required procedural process for a valid arbitration agreement under New Hampshire law. *See Volt Info. Sciences v. Leland Stanford Jr. U.*, 4389 U.S. 468, 476 ("[t]here is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate").

II. GRAND SUMMIT'S CLAIMS ALL PROTEST THE NATURE OF THE ACTUAL COSTS ARISING FROM THE FAILURE OF THE COOLING TOWER AND GRAND SUMMIT'S OBLIGATION TO BEAR THOSE COSTS.[6]

Pursuant to Article 3.3 of the Management Agreement, which defines "Actual Cost," it is "[t]he intent of the parties . . . 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 . . . ." Management Agreement, Article 3.3, App. 4. In other words, the parties agree and intend that the Association (Grand Summit) shall be responsible for all of the "Actual Costs" of keeping the Association operational. If the Grand Summit disagrees with an Actual Cost, whether it be the amount of the cost (too much), the method by which the amount was determined (questionable calculation), or the nature of the cost (its essential character or constitution – *i.e.*, whether it is it fairly attributable to the operation, management or maintenance of the Association),[7] it may exercise its right to protest that Actual Cost pursuant to the Disputes provision.

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[6] Attitash incorporates pp. 13-17 of its Appellant's Brief as if stated herein.

[7] *See Webster's Third New International Dictionary* 1507 (unabridged ed. 2002) (defining nature as: 1. "normal and characteristic quality, strength, vigor, or resiliency;" 2a. "the essential character or constitution of something;" 2b. "the distinguishing qualities or properties of something").

Here, Grand Summit claims that it should not have to bear the Actual Costs of the cooling tower rental and repair due to Attitash's alleged breach of contract, breach of the covenant of good faith and fair dealing, negligence and violations of the RSA 358-A. Grand Summit argues that its legal theories for the recovery of Actual Costs are outside of the scope of the Disputes provision. Its claims of malfeasance, however, all challenge the essential character and constitution of the Actual Costs and whether they are fairly attributable to the costs of operation to be paid by Grand Summit – Grand Summit challenges their nature. *See Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 846 (2nd Cir. 1987) (courts "focus on the factual allegations in the complaint rather than the legal causes of action asserted" to determine if the claim falls within an arbitration agreement) citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 622 n.9, 624 n.13 (1985). Since Grand Summit did not protest those Actual Costs in accord with the time limitations in the Disputes provision, its claims are now time barred.

Grand Summit's reliance on *Fit Tech, Inc. v. Bally Total Fitness Holding Corp.*, 374 F.3d 1 (1st Cir. 2004), *Harker's Distribution, Inc. v. Reinhart Food Service, L.L.C.*, 597 F.Supp.2d 926 (N.D. Iowa), and *Powderly v. MetraByte Corp.*, 866 F.Supp. 39 (D.Mass. 1994) is misplaced.[8] Contrary to Grand Summit's position, none of those matters supports a limitation of the Disputes provision to just those protests concerning accountant calculations. In *Fit Tech, Inc.*, the dispute concerned a claim by the seller of fitness centers to additional compensation based upon two earning schedules. In interpreting the arbitration provision, the court held that "[t]he phrase 'any disagreement' refer[red] to earning schedules whose components [were]

[8] In each of these matters, the courts determined that the provisions in question were arbitration agreements despite the absence of the word "arbitration." *See Fit Tech, Inc.*, 374 F.3d at 7 (whether an agreement is for arbitration "does not depend on the nomenclature used in the agreement"); *Harker's Distrib., Inc.*, 597 F.Supp. 2 at 937 (same); *Powderly*, 866 F. Supp. at 42 ("[t]he use of the term arbitrate is not a vital ingredient of an agreement to do so").

defined in detail in the purchase agreement in accounting terms." *Id.* at 8 (emphasis added). In that context, and based on that specific language, the court held that it "makes most sense to read 'any disagreements' as referring to disagreements about *accounting* issues arising in the calculations that underpin the schedules." *Id.* (italics in original, underlined emphasis added).

The same cannot be said of the present matter. While the Disputes provision certainly allows for protests of the amount of an Actual Cost, and the method by which the amount of an Actual Cost is determined, it also more broadly includes disputes concerning the nature of an Actual Cost, which includes whether an Actual Cost is fairly attributable to Grand Summit. This language expands the reach of the Disputes provision beyond an accounting calculation and captures Grand Summit's claims here seeking a recoupment of Actual Costs. Accordingly, the limitations found within *Fit Tech, Inc.* are inapposite. *See Pureworks, Inc. v. Unique Software Solutions, Inc.*, 2014 U.S. App. LEXIS 1212, **14 (6th Cir. 2014) (distinguishing *Fit Tech* and finding that broader language allowed accountant arbitrator to address operational covenants underlying the earn-out report – "the language of the Purchase Agreement did not clearly reflect [a more limited] intent so the presumption of arbitrability prevails"). *See also Villano v. TD Bank*, 2012 U.S. Dist. LEXIS 123013, *21-22 (D.NJ 2012) (criticizing *Fit Tech* as too limited in light of more recent case law "that makes clear the wide berth courts are to give to arbitration provisions").

Harker's Distrib., Inc. is similarly limited and does not aid Grand Summit. *Harker's Distrib., Inc.*, like *Fit Tech*, involved the calculation of additional monies due to the seller (an "earn out") under an asset purchase agreement. In that matter, decided under Illinois law, the court found that the arbitration provision provided only for the resolution of "unresolved [accounting] objections to 'the Purchaser's calculation of the Total Intangible Value.'" *Id.* at

940. As a result, the Court limited the reach of the provision to matters concerning those calculations as opposed to broader issues concerning the effect of certain contract provisions, and issues of contract formation and rescission (mutual or unilateral mistake). *See id.* In contrast, in the present matter, the arbitrator is empowered to resolve disputes concerning the underlying nature of Actual Costs. This broad language plainly extends beyond making or confirming calculations. As a result, the Disputes provision is more expansive than the provision in *Harker's Distrib., Inc.*, and not subject to the same limitations.

Likewise, in *Powderly*, the court found that the arbitration agreement concerned disputes "regarding the calculation of the Net Operating Profit" to determine an employee bonus. *Powderly*, 866 F.Supp. at 42 (emphasis added). Important in the Court's determination, the employment agreement containing the arbitration provision provided a specific formula "defined as 'the annual gross sales revenue of the Company less all sales returns, allowances and discounts, as determined in accordance with generally accepted accounting principals [GAAP] consistently applied.'" *Id.* at 43. As a result, the court found that the agreement only required an accountant to certify that the employer's figures were compiled in accord with GAAP, and did not extend to claims of any wronging not detectable by GAAP. *See id.* Again, the language of the arbitration agreement and the circumstances of the dispute in *Powderly* are more limited and thus distinguishable from the present matter. Here, an accountant arbitrator is empowered to make binding determinations concerning the "nature" of an Actual Cost and its fair attribution to Grand Summit. These are the very issues that Grand Summit has raised in its Amended Complaint and which Grand Summit has agreed to address through the Disputes provision. *See Powderly*, 866 F. Supp. at 42 ("'[w]hen the parties have agreed upon a particular method of

dispute resolution, it should generally be presumed fair'"), quoting *Sheet Metal Workers Intern. Ass'n, Local No. 162 v. Jason Mfg.*, 900 F.2d 1392, 1398 (9th Cir. 1990).

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 Amended 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: May 9, 2018

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that two copies of this corrected brief have been sent by United States mail this 9th day of May, 2018, to the following:

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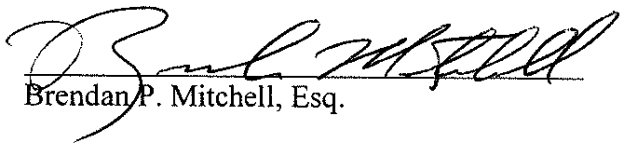

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