THE STATE OF NEW HAMPSHIRE

SUPREME COURT

CASE NO. 2017-0673

GRAND SUMMIT HOTEL CONDOMINIUM UNIT OWNERS' ASSOCIATION, INC.

v.

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

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

BRIEF OF PLAINTIFF-APPELLEE GRAND SUMMIT HOTEL CONDOMINIUM UNIT OWNERS' ASSOCIATION, INC.

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(15 Minutes Oral Argument Requested)

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TEXT OF NEW HAMPSHIRE STATUTES AND RULES

RSA 358-A:2 Acts Unlawful. –
It shall be unlawful for any person to use any unfair method of competition or any unfair or deceptive act or practice in the conduct of any trade or commerce within this state. Such unfair method of competition or unfair or deceptive act or practice shall include, but is not limited to, the following:
I. Passing off goods or services as those of another;
II. Causing likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;
III. Causing likelihood of confusion or of misunderstanding as to affiliation, connection or association with, or certification by, another;
IV. Using deceptive representations or designations of geographic origin in connection with goods or services;
V. Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that such person does not have;
VI. Representing that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used or secondhand;
VII. Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;
VIII. Disparaging the goods, services, or business of another by false or misleading representation of fact;
IX. Advertising goods or services with intent not to sell them as advertised;
X. Advertising goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;
X-a. Failing to disclose the legal name, street address, and telephone number of the business

under RSA 361-B:2-a;
XI. Making false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions; or
XII. Conducting or advertising a going out of business sale:
(a) Which lasts for more than 60 days;
(b) Within 2 years of a going out of business sale conducted by the same person at the same location or at a different location but dealing in similar merchandise;
(c) Which includes any goods, wares, or merchandise purchased or received 90 days prior to commencement of the sale or during the duration of the sale and which are not ordinarily sold in the seller's course of business;
(d) Which includes any goods, wares, or merchandise ordered for the purpose of selling or disposing of them at such sale and which are not ordinarily sold in the seller's course of business;
(e) Which includes any goods, wares, or merchandise consigned for the purpose of selling or disposing of them at such sale;
(f) Without conspicuously stating in any advertisement for any such sale, the date such sale is to commence or was commenced;
(g) Upon the conclusion of which, that business is continued under the same name or under a different name at the same location; or
(h) In a manner other than the name implies.
XIII. Selling gift certificates having a face value of $250 or less to purchasers which contain expiration dates. Gift certificates having a face value in excess of $250 shall expire when escheated to the state as abandoned property pursuant to RSA 471-C. Dormancy fees, latency fees, or any other administrative fees or service charges that have the effect of reducing the total amount for which the holder may redeem a gift certificate are prohibited. This paragraph shall not apply to season passes.
XIV. Pricing of goods or services in a manner that tends to create or maintain a monopoly, or otherwise harm competition.
XV. Failure of a facility, as defined in RSA 161-M:2, or person to comply with the provisions of RSA 161-M regarding the senior citizens bill of rights.
XVI. Failing to deliver home heating fuel in accordance with a prepaid contract.
XVII. Charging or receiving, or soliciting to charge or receive, an unreasonable fee to prepare or aid any prospective applicant, applicant, or recipient in the procurement, maintenance, or securing of any aid or services from the United States Department of Veterans Affairs, the New Hampshire office of veterans services, or any other public agency. For the purpose of this paragraph, an "unreasonable fee" means a fee that is exorbitant and disproportionate to the services performed.

Superior Court Civil Rule 33(b), (i), (j), (m)-(o) Arbitration by Agreement

(b) *Submission of Dispute to Arbitration.*

(1) Prior to the commencement of any lawsuit, if all parties to the arbitration consent, a written request for arbitration may be made to the Administrator of the Office of Mediation and Arbitration. The administration of the Arbitration Hearing will be conducted pursuant to Superior Court Rule 33, unless the parties agree otherwise. In all cases, the parties should utilize the Office of Mediation and Arbitration and the list of approved arbitrators. The parties shall be subject to an administrative fee of $250.00 per party, which shall be paid to the Office of Mediation and Arbitration. Parties who are indigent may petition the superior court for waiver of

the administrative fee.

In cases submitted under subsection (b)(1) of this rule in which administration of the Arbitration Hearing is conducted pursuant to Rule 33, all references in Rule 33(c) through 33(s) to the superior court shall be deemed to refer to the Office of Mediation and Arbitration.

(2) After commencement of any lawsuit, a written request for arbitration shall be made to the Superior Court. In the event that the dispute is pending in a New Hampshire Court, a copy of the written submission shall be sent to the clerk for the appropriate court; and all proceedings in that court will cease. The administration of the Arbitration Hearing will be conducted pursuant to Superior Court Rule 33. …

(i) *Preliminary Hearing.*

(1) At the request of any party, the panel will schedule within 14 days of the request a preliminary hearing with counsel and/or the parties. The preliminary hearing may be conducted by telephone at the panel's discretion.

(2) During the preliminary hearing, the parties and the panel shall discuss and establish a schedule for the hearings, any outstanding discovery issues, any outstanding procedural issues, and to the extent possible a clarification of the issues.

(3) Ex parte communications between a party's counsel and arbitrator are prohibited.

(j) *Hearings: When and Where Held; Notice.*

(1) Hearings shall be held at a place designated by the panel. The hearing date shall be established at the preliminary hearing or by the panel after consultation with counsel and/or the parties. Counsel and/or the parties shall respond to requests for hearing dates within seven (7) days of the request. Counsel or the parties shall be notified in writing at least thirty (30) days before the hearing of the time and place of the hearing. No hearing shall be assigned for Saturdays, Sundays, legal holidays, or evenings unless by the unanimous agreement of all counsel or parties.

(2) Unless excused by the panel, all parties shall be in attendance at the hearing, and each party shall have at least one person present who has authority to authorize settlement. …

(m) *Prehearing Submissions.*

(1) Unless otherwise agreed to at the preliminary hearing, the parties shall exchange a list of witnesses they intend to call, including experts, a short description of the anticipated testimony of each witness, an estimate of the length of direct testimony of each witness, and all exhibits at least thirty (30) calendar days before the arbitration hearing. The parties shall attempt to resolve any disputes regarding the admissibility of exhibits. The exhibits must be premarked and a list of the exhibits submitted, indicating those exhibits that are to be admitted without objection and those exhibits that are objected to.

(2) If the parties intend to offer expert witnesses at the time of the hearing, at least sixty (60)

calendar days before the arbitration hearing an expert disclosure consistent with Superior Court Rule 27 shall be made. Failure to make such a disclosure will result in the exclusion of the expert as a witness at the hearing. Any objection to the sufficiency of the disclosure and, therefore, the admissibility of the expert's testimony will be ruled upon by the panel.

(n) *Case Summary.*

(1) All parties shall submit and exchange no later than ten (10) days prior to the arbitration hearing a double-spaced typewritten summary of not more than four (4) pages upon 8½" x 11" paper of the significant portions of their case.

(2) All such summaries shall contain a written stipulation, or, if counsel cannot agree to file a stipulation, a separate statement by each party, setting forth the following information:

(i) All uncontested facts;

(ii) All contested facts;

(iii) Pertinent applicable law;

(iv) Disputed issues of law;

(v) Specific claims of liability by each party making such claims;

(vi) Specific defenses to liability by each party asserting such defenses;

(vii) An itemized statement of special damages by each party claiming such damages;

(3) All such summaries shall contain a statement of compliance with the exchange requirement.

(4) The purpose of the case summary submission is to apprise the panel of the issues in dispute.

(o) *Securing Witnesses and Documents for the Arbitration Hearing.*

(1) The panel may issue subpoenas for the attendance of witnesses or the production of documents. All parties shall produce for the Arbitration Hearing all witnesses requested in writing by another party that are in their employ or under their control. This shall be done without the need of subpoena.

(2) The testimony of witnesses shall be given under oath.

(3) The plaintiff shall present all of his/her evidence. In the event of multiple plaintiffs, each plaintiff shall present all of his/her evidence. The defendant will then present evidence to support his/her defenses and any counterclaims. In the event of multiple defendants, one

defendant will complete his/her evidence and then the remaining defendants will proceed.

(4) Witnesses will be subject to cross-examination by other counsel (or the opposing party where a party is unrepresented) and the panel. The panel has the discretion to vary this procedure provided the parties are treated fairly, justly, and equally and that each party is given an adequate opportunity to present his/her case.

(5) The panel exercising its discretion shall conduct the proceedings with a view to expediting the hearing and expediting the resolution of the dispute. Therefore, strict conformity to New Hampshire Rules of Evidence is not required, with the exception that the panel shall apply applicable New Hampshire law relating to privileges and work product. The panel shall consider evidence that is relevant and material to the dispute, giving the evidence such weight as is appropriate. The panel may limit testimony to exclude evidence that would be unduly repetitive.

(6) Openings and closing will be allowed and may be made orally or in writing. …

QUESTION PRESENTED

Whether the Trial Court Properly Denied LBO's Motion to Dismiss the Association's Amended Complaint Because the Limited Disputes Provision of the Parties' Management Agreement Does Not Require That the Association's Causes of Action for Breach of Contract, Breach of the Covenant of Good Faith and Fair Dealing, Negligence, and Violation of RSA 358-A Be Submitted to Arbitration.

STATEMENT OF THE CASE AND FACTS

The Parties and the Cooling Tower Dispute

The Attitash Grand Summit Hotel & Conference Center ("Hotel") is a condominium hotel in Bartlett, New Hampshire, that includes 420 quarter-interest share residential units and one commercial unit, which is owned by Defendant-Appellant L.B.O. Holding, Inc. dba Attitash Mountain Resort ("LBO"). App. 14.[1] The residential owners own 74% of the Hotel and LBO owns the remaining 26%. App. 14. All ownership interest holders are members of Plaintiff-Appellee the Grand Summit Condominium Unit Owners' Association, Inc. ("Association"). App. 13-14. The Association's Board of Directors is responsible for arranging for the management of the Hotel. App. 14.

In addition to owning the commercial unit in the Hotel, LBO also manages the Hotel for the Association pursuant to a Management Agreement. App. 15.[2] LBO's management obligations include the following:

> A. Arrange and supervise all repairs and replacements, maintenance, cleaning and decorating of the Common Elements to assure their proper use, operation and Appearance in accordance with the By-Laws of the Association; . . . [and]
>
> I. Negotiate and enter into on behalf of the Association such service and maintenance contracts as may be required in the ordinary course of business including, without limitation, contracts for ground maintenance, electricity, gas, water, snowplowing, telephone, cleaning, decorating, extermination, equipment maintenance, and other services reasonably necessary for the operation of the Association . . . .

[1] "App." refers to the Appendix to LBO's brief. The Amended Complaint appears at App. 13-24.

[2] A copy of the Management Agreement and its extensions through April 30, 2016 appear at App. 1-12.

App. 2-3.

The Hotel is cooled by a single evaporative cooling tower. App. 16. The cooling tower provides heat dissipation and cooling during the summer months. App. 16. The cooling tower coils must be drained of water in the fall at the end of the cooling season. App. 16. In 2011-2012, LBO hired Mechanical Services, Inc., a heating and cooling contractor located in Maine, to provide certain heating and cooling maintenance services. App. 16. The services included: "The cooling tower will be cleaned and started for the cooling season in the spring, and shutdown and isolated for the heating season in the fall." App. 16.

On or about April 26, 2013, Mechanical Services forwarded to LBO a contract proposal to conduct the same heating and cooling maintenance services for the period from April 1, 2013 to March 31, 2014. App. 16. The proposal states that it is valid for 30 days. App. 16. According to Mechanical Services, LBO did not sign and return the contract. App. 16. In late May or early June 2013, LBO requested that Mechanical Services clean and start the cooling tower for the cooling season. App. 17. On or about June 5, 2013, Mechanical Services performed the service. App. 17. Mechanical Services billed LBO on a time and materials basis for the work because there was no yearly contract in place and LBO paid the invoice. App. 17.

On July 9, 2013, LBO's maintenance manager sent an email to Mechanical Services that stated as follows: "I guess you have decided to go with out [sic] a contract for this season? Please let me know if I should be looking for another company to take care of our needs or if you are going to continue servicing us." App. 17. Mechanical Services responded the same day by providing LBO with a new proposal for the period of time from August 1, 2013 to July 31, 2014. App. 17. Like its predecessor proposals, the proposal stated it was valid for 30 days. App. 17. LBO did not sign and return the proposal. App. 17.

In December 2013, after a significant stretch of cold weather, LBO sent a facsimile to Mechanical Services that included the contract proposal signed by Mechanical Services on April 26, 2013, which stated that it remained valid for 30 days. App. 17. The proposal appeared to have been signed by LBO on May 1, 2013. App. 17.

On or about April 28, 2014, Mechanical Services returned to open the cooling tower for the 2014 cooling season and discovered that, although the galvanized cooling tower structure remained in good shape, the coils within the cooling tower had burst and were leaking because of damage caused by freezing during the preceding winter. App. 17. The damaged coils rendered the cooling tower unfit for use during the 2014 cooling season. App. 17.

On May 12, 2014, LBO executed a contract with Mechanical Services for the temporary rental of a cooling tower. App. 18. The rented cooling tower remained at the Hotel for the entire 2014 cooling season at a total rental cost of approximately $108,000. After the 2014 cooling season, a different contractor was contracted to replace the cooling tower coils and to re-pipe the underground PVC lines to the cooling tower. The work was completed prior to the 2015 cooling season at a total cost of approximately $100,000. App. 18.

After contracting for the temporary rental of a cooling tower, LBO told the Association it had a contract with Mechanical Services for the April 1, 2013, to March 31, 2014, period and that Mechanical Services claimed to have lost the contract. App. 18. LBO represented to the Association that Mechanical Services had failed to shut down the cooling tower in the fall of 2013, and after being unable to contact Mechanical Services, LBO personnel had done its best to drain the cooling tower. App. 18. LBO told the Association that a coil in the cooling tower froze because Mechanical Services failed to properly winterize the cooling tower. App. 18. LBO also told the Association that the cooling tower appeared to have reached the end of its useful life at 19 years,

although its life expectancy was 20 to 30 years. App. 18.

On or about January 21, 2014, despite producing a contract that LBO appeared to have signed on May 1, 2013 which purported to cover the period of time from April 1, 2013 to March 31, 2014, LBO executed a contract with Mechanical Services for the period from February 1, 2014 to January 1, 2015. App. 19. The contract included the same sentence as appeared in the contract LBO claimed to have signed on May 1, 2013: "The cooling tower will be cleaned and started for the cooling season in the spring, and shutdown and isolated for the heating season in the fall."

The Association's Causes of Action

The Association filed the Amended Complaint on or about December 10, 2016. App. 24. It asserts four causes of action against LBO. Count I alleges that LBO breached the Management Agreement when it failed to contract with Mechanical Services or another entity to drain the cooling tower in fall 2013, or to otherwise arrange for the necessary maintenance of the cooling tower. App. 20. Count II alleges LBO breached the covenant of good faith and fair dealing implicit in the Management Agreement when it misrepresented to the Association that the cooling tower failed because it was at the end of its useful life or because Mechanical Services failed to properly winterize the cooling tower. App. 21.

Count III alleges negligence as follows:

> LBO, by and through its employees, agents, servants, workmen, contractors, subcontractors, subagents, and/or other designees, acting in the course and scope of his/her employment, negligently, recklessly, and/or carelessly breached its duty of care to the Association through acts and/or omissions that include the following:
>
> a. failing to properly drain the cooling tower after the 2013 cooling season;
>
> b. failing to adequately supervise, train, or otherwise oversee, its employees, agents, servants, workmen, contractors, subcontractors, subagents, and/or other designees to ensure that its work was conducted in a good, safe and workmanlike manner when it drained the water from the cooling tower after the 2013 cooling season;

c. failing to hire or otherwise retain subcontractors, employees, workers or trades who were qualified to maintain the cooling tower;

d. failing to warn the Association of the risk of property damage given the manner in which the cooling tower was maintained after the 2013 cooling season;

e. failing to identify whether water remained in the cooling tower after the 2013 cooling season;

f. creating a hazardous condition that subjected the Hotel to an unreasonable risk of property damage by leaving water in the cooling tower after the 2013 cooling season; and/or

g. failing to exercise due care under the circumstances.

App. 23. Count IV alleges that LBO violated the New Hampshire Consumer Protection Act, RSA 358-A:2, by:

> engag[ing] in an unfair or deceptive act or practice in the conduct of any trade or commerce when it misrepresented to the Association that: (a) the cooling tower failed because it was at the end of its useful life; (b) it had a contract with Mechanical Services that required the heating and cooling company to service the cooling tower at the end of the 2013 cooling season; and (c) the cooling tower failed because Mechanical Services failed to properly winterize the cooling tower.

App. 23.

The "Disputes" Provision of the Management Agreement and the Motion to Dismiss

The parties' Management Agreement states that it is governed by New Hampshire law, App. 6, and contains an Article Three that defines the "Terms of Employment." App. 3. Section 3.1 provides "[t]he Association hereby retains [LBO] as the Association's agent and manager and [LBO] hereby agrees to manage the Condominium in accordance with this Agreement." App. 3. Section 3.3, "Actual Costs; Reimbursement," states in pertinent part as follows:

> The term "Actual Cost" shall mean the total cost to Manager 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, legal, accounting and other similar professional expense,

> and overhead costs allocated to the management of this Association, (such as by way of example, manager 's office costs, equipment and vehicle costs) and all other third party costs and expenses fairly attributable to the maintenance and operation of the Association, as defined in the Bylaws. 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 …. The accepted methodology for calculating the Actual Cost reimbursement for Administrative fees, overhead associated with administrative fee (payroll burdens and associated benefits) along with the PBX operator, shall be calculated based on actual owner occupancy as a percentage of total occupied rooms. Owner occupancy shall include actual owner use at the Attitash Grand Summit Hotel, space Available use (including incoming guests from other resorts with a space Available agreement) as described in the Rental Management Agreement, incoming RCI guests and owner no-shows.

App. 4. The "Disputes," section 3.5, provision provides as follows:

> The Board shall have thirty (30) days from the rendition of a statement by Manager for both the Management Fee or the Actual Cost within which 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.

App. 4-5.

LBO moved to dismiss the Amended Complaint and urged the superior court that the Disputes provision precludes its jurisdiction over the Association's causes of action in favor of mandatory arbitration.[3] App. 29-31. The superior court summarized LBO's argument as follows:

> [T]he 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 defendant argues this provision mandates binding arbitration of all disputed costs. The plaintiff's failure to submit the charges for replacement cooling and repair of the cooling tower are fatal to the complaint, according to the defendant.

Addendum to LBO's brief ("Add.") at 6. By Order dated May 4, 2017, the superior court rejected LBO's argument as follows:

> 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

[3] LBO's alternative theory for dismissal is not a subject of this interlocutory appeal.

> 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 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 terms of the 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 the 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 the complaint for lack of arbitration.

Add. 7-8.

LBO subsequently filed a purported Rule 7 Mandatory Appeal ("NOA") with this Court. *Grand Summit Hotel Condominium Unit Owners' Association v. L.B.O. Holding, Inc. dba Attitash Mountain Resort*, Case No. 2017-0307. LBO asserted that it "notice[d] this appeal as a matter of right pursuant to 9 U.S.C. §16(a)(1)(A), allowing immediate appeals for denials of motions to compel arbitration pursuant to 9 U.S.C. §3 …." NOA, p. 3. By Order dated August 1, 2017, the Court granted the Association's motion to dismiss the NOA as an improperly filed interlocutory appeal. *Id.* at 1. The dismissal was without prejudice to LBO filing a similar appeal either following the conclusion of the entire case or pursuant to a properly filed interlocutory appeal. *Id.* This interlocutory appeal followed.

SUMMARY OF ARGUMENT

The superior court correctly found that the Association's causes of action for breach of contract, breach of the covenant of good faith and fair dealing, negligence, and violation of RSA 358-A alleged in the Amended Complaint are not subject to the limited "Disputes" provision in the parties' Management Agreement. The Disputes provision sets forth an "accountant remedy" that applies only to "protest the nature, amount or method by which the amount of an 'Actual Cost' or 'Management Fee' was determined." The Association does not dispute an Actual Cost or a

Management Fee. The Association accepts the nature, amount and method by which the actual costs for the temporary rental cooling tower and the replacement cooling tower were calculated.

Instead, the Association's causes of action for breach of contract, breach of the covenant of good faith and fair dealing, negligence, and violation of the Consumer Protection Act seek compensatory and statutory damages, plus attorney's fees, for LBO's conduct related to the failure of the cooling tower. The Association's causes of action require proof of legal elements rather than an accounting determination of an Actual Cost. Consequently, the parties' Management Agreement does not require the submission of the Association's causes of action to arbitration and the trial court properly denied LBO's motion to dismiss the Amended Complaint.

ARGUMENT

The Superior Court Properly Denied LBO's Motion to Dismiss Because the "Disputes" Provision in the Parties' Management Agreement Is an "Accounting Remedy" Applicable Only to Protest an Accounting Determination of an "Actual Cost" or "Management Fee." The Limited Provision Is Inapplicable to the Association's Breach of Contract, Breach of the Covenant of Good Faith and Fair Dealing, Negligence, and Violation of RSA 358-A Claims.

A. New Hampshire law, not substantive federal law, controls this appeal although the same result is required pursuant to federal law.

The Association agrees with LBO that the same result is required whether LBO's appeal is decided pursuant to New Hampshire or federal substantive law. LBO's brief, p. 12. However, LBO is incorrect that substantive federal law governs the appeal. The Federal Arbitration Act ("FAA") does not preempt all state law regarding arbitration and New Hampshire law regarding arbitration, not the Federal Arbitration Act ("FAA"), is the controlling law in this appeal.

The purpose of the FAA is well-settled. "Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration, notwithstanding any state substantive or procedural policies to the contrary. The 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 Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983). However, the United States Supreme Court has stated that the FAA does not require the arbitration of all claims; rather, it enforces parties' rights to contractually require arbitration:

> [W]e . . . reject the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims. The Act . . . does not mandate the arbitration of all claims, but merely the enforcement—upon the motion of one of the parties—of privately negotiated arbitration agreements. The House Report accompanying the act makes clear that its purpose was to place an arbitration agreement "upon the same footing as other contracts where it belongs," and to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate.

Dean Witter Reynold, Inc. v. Byrd, 470 U.S. 213, 219-20 (1985). "[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to so submit." *AT & T Technologies, Inc. v. Communication Workers of America*, 475 U.S. 643, 648 (1986).

On the issue of preemption, this Court has recognized, "[t]he federal preemption doctrine effectuates the Supremacy Clause of the United States Constitution[,] … [thereby] ensur[ing] that federal law 'shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.'" *Finn v. Ballentine Partners, LLC*, 169 N.H. 128, 135 (2016) (quoting *State v. Exxon Mobil Corp.*, 168 N.H. 211, 229 (2015)). "Congress may expressly preempt a state law, or it may implicitly preempt a state law through 'field' preemption or 'conflict' preemption." *Id.*

"The United States Supreme Court has held that '[t]he FAA contains no express preemptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration.'" *Id.* (quoting *Volt Info. Sciences v. Leland Stanford Jr. U.*, 489 U.S. 468, 477 (1989)). In *Finn*, this Court rejected the argument that conflict preemption exists and precludes states from enacting laws substantively related to arbitration. 169 N.H. at 136-139. The Court began its analysis by

quoting the pertinent section 2 of the FAA:

> 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.

Finn, 169 N.H. at 136 (quoting 9 U.S.C. § 2). Thereafter, the Court explained that, rather than demonstrating preemption: "Section 2 of the act applies in state courts to prevent anti-arbitration laws from invalidating otherwise lawful arbitration agreements. … However, it does not follow that the FAA applies to state courts in its entirety." *Id.* at 138 (citation omitted).

This Court continued its analysis and explained that "at the heart of the [United States Supreme] Court's FAA preemption doctrine is its effort to enforce Congressional intent by thwarting the recurring refusal of state courts to enforce an otherwise valid contract because it embodied the parties' agreement to arbitrate." *Id.* at 140. The Court distinguished between state laws that impede arbitration and are preempted, and "state rules that slow or change procedures without the potential consequence of invalidating an arbitration agreement [which] are not preempted." *Id.* at 141. "'There 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.'" *Id.* (quoting *Volt*, 489 U.S. at 476).

As the Court noted, in *Volt*, the United States Supreme Court did not find that the FAA "preempted a state court from interpreting a choice-of-law provision as applying state procedural rules." *Finn*, 169 N.H. at 141 (citing *Volt*, 489 U.S. at 470). Thus, "*Volt* demonstrates that not all obstacles to arbitration are repugnant to the FAA." *Id.* "The fact that a state law affecting arbitration is less deferential to an arbitrator's decision than the FAA does not create an obstacle so insurmountable as to preempt state law." *Id.*

In sum, this Court held that "[t]he FAA does not preempt all state-law impediments to arbitration; it preempts state-law impediments to arbitration agreements." *Id.* at 142 (citation omitted). In other words, "'[f]or the FAA to preempt [state law], state law must refuse to enforce an arbitration agreement that the FAA would enforce." *Id.* (citation and quotation omitted).

New Hampshire law, specifically RSA 542:1, does not present an impediment to arbitration. RSA 542:1 expressly preserves parties' contractual rights to arbitration:

> 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.

Accordingly, the FAA does not preempt RSA 542:1. The Management Agreement expressly provides that it is governed by New Hampshire law. App. 6. New Hampshire law, not federal substantive law, controls this appeal.

B. The process set forth in the Disputes provision of the Management Agreement is not arbitration.

RSA 542:1 does not apply to all forms of dispute resolution. Instead, the statute applies only when parties have contractually obligated themselves to resolve a dispute "by arbitration." *Id.* Like the FAA, RSA 542:1 does not define arbitration. However, unlike substantive federal law, the FAA or the Federal Rules of Civil Procedure, New Hampshire law describes the process anticipated for arbitration.

Superior Court Civil Rule 33 describes the process for "Arbitration by Agreement." Superior Court Civil Rule 33 provides the process for arbitrations consented to by the parties and administered by the New Hampshire Judicial Branch Office of Mediation and Arbitration. Super. Ct. Civ. R. 33(b). Pursuant to Superior Court Civil Rule 33, the arbitration process includes all of the following events:

1. a preliminary hearing, if requested by either party;

2. prehearing submissions, including witness lists, a brief description of the anticipated testimony of each witness, and exhibits to be offered during the arbitration hearing;

3. expert disclosures;

4. case summaries to apprise the arbitration panel of disputed issues;

5. a hearing involving direct and cross examination of witnesses, under oath; and

6. written or oral opening statements and closing arguments.

Super. Ct. Civ. R. 33(i), (j), (m)-(o).

It is beyond dispute that the word "arbitration" does not appear in the Management Agreement or its extensions. App. 1-12. Neither may it be disputed that the Management Agreement lacks a process remotely similar to the arbitration process described in Superior Court Civil Rule 33. Section 3.5, Disputes, provides as follows:

> The Board shall have thirty (30) days from the rendition of a statement by Manager for both the Management Fee or the Actual Cost within which 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.

App. 4-5.

Setting aside the issue of the inapplicability of the Disputes provision to the Association's causes of action,[4] the provision does not provide a process akin to arbitration described in Superior Court Civil Rule 33. The Disputes provision provides only that a statement of a protested Management Fee or Actual Cost shall be submitted to an independent accountant. App. 4-5. The only vestige of arbitration is a binding decision will issue. There is no hearing. There is no

[4] The succeeding section of the Association's brief explains that even if the Disputes provision could be construed as providing arbitration, the Association's claims do not fall within the limited scope of the Disputes provision.

opportunity to present witnesses. There is no opportunity to challenge the opposing party's evidence.

RSA 542:1 applies only when parties have contractually obligated themselves to resolve a dispute "by arbitration." It cannot gainfully be said that the Disputes provision even vaguely contemplates the notion of arbitration as provided in Superior Court Civil Rule 33. Thus, the Disputes provision of the Management Agreement does not provide for arbitration even in the limited circumstances to which it is applicable. Consequently, the trial court properly found that the Association's claims were not subject to dismissal in favor of mandatory arbitration.

C. The Disputes provision of the Management Agreement establishes an "accountant remedy" for disputes about Actual Costs and Management Fees. Even if construed as an arbitration provision, the Disputes provision does not compel arbitration for non-accounting legal claims like breach of contract, breach of the covenant of good faith and fair dealing, negligence, and violation of the Consumer Protection Act.

The superior court properly found that the Disputes provision of the Management Agreement is narrowly drawn and does not cover the Association's causes of action for breach of contract, breach of the covenant of good faith and fair dealing, negligence, and violation of RSA 358-A. LBO's reliance on the Disputes and Actual Cost provisions of the Management Agreement misconstrues the limited nature of those provisions and the broader scope of the Amended Complaint. Even if the Disputes provision is construed as an arbitration provision, it does not compel arbitration for the Association's claims because the claims do not challenge LBO's accounting of costs.

"The scope of an arbitration provision contained in a contract presents a question of law for this court." *State v. Philip Morris USA, Inc.*, 155 N.H. 598, 604 (2007) (quoting *John A. Cookson Co. v. N.H. Ball Bearings*, 147 N.H. 352, 355 (2001)). "Such a clause is to be interpreted so as to make it speak the intention of the parties at the time it was made bearing in mind its

purpose and policy." *Id*. (quotation and citation omitted). "Absent evidence establishing the parties' intent, we consider the face of the plaintiff's writ and the terms of the arbitration provisions contained in the parties' contracts." *N.H. Ball Bearings*, 147 N.H. at 355-356.

"While there is a presumption of arbitrability if the contract contains an arbitration clause, we may conclude that a particular grievance is not arbitrable if it is determined with positive assurance that the contract is not susceptible of an interpretation that covers the dispute." *Philip Morris USA, Inc.*, 155 N.H. at 604. "Furthermore, '[t]he principle that doubt should be resolved in favor of arbitration does not relieve a court of the responsibility of applying traditional principles of contract interpretation in an effort to ascertain the intention of the contracting parties.'" *Appeal of Town of Bedford*, 142 N.H. 637, 640 (1998) (quoting *Affiliated Food Distributors, Inc. v. Local Union No. 229*, 483 F.2d 418, 420 (3d Cir.1973), *cert. denied*, 415 U.S. 916 (1974)). Additionally, the contract language itself "may provide sufficient 'forceful evidence of a purpose to exclude the claim from arbitration' …." *Id.* at 642 (citation omitted).

If the plain language of the arbitration provision is broad, a broad range of disputes are subject to arbitration. *See Id.* ("Any dispute, controversy or claim arising out of or relating to calculations performed by, or any determinations made by, the Independent Auditor (including, without limitation, any dispute concerning the operation or application of any of the adjustments, reductions, offsets, carry—forwards and allocations described in subsection IX(j) or subsection XI(i)) shall be submitted to binding arbitration …."); *see also N.H. Ball Bearings*, 147 N.H. at 354 ("[a]ny dispute between the Representative and NHBB, unless relating to the division of commissions, shall be arbitrated in Hillsborough County, New Hampshire at the American Arbitration Association in conformity with the rules of said Association then in effect."). Conversely, when the plain language of the arbitration provision is more restrictive or limited,

arbitration is required for fewer claims. *See Dunn & Sons, Inc. v. Paragon Homes of New Eng., Inc.*, 110 N.H. 215, 218 (1970) (arbitration clause stating "any dispute or disagreement ... concerning ... the terms ... performance ... breach ... or ... interpretation' of the contract" applied only to contract claims, not tort causes of action).

Here, the plain language of the Disputes provision in the Management Agreement limits its applicability to protests about an Actual Cost or a Management Fee.[5] App. 4 ("The Board shall have thirty (30) days from the rendition of a statement by Manager for both the Management Fee or the Actual Cost within which to protest the nature, amount or method by which such amount was determined."). The Actual Cost provision states in pertinent part as follows:

> 3.3 The term "Actual Cost" shall mean the total cost to Manager 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, legal, accounting and other similar professional expense, and overhead costs allocated to the management of this Association, (such as by way of example, manager 's office costs, equipment and vehicle costs) and all other third party costs and expenses fairly attributable to the maintenance and operation of the Association, as defined in the Bylaws. 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 …. The accepted methodology for calculating the Actual Cost reimbursement for Administrative fees, overhead associated with administrative fee (payroll burdens and associated benefits) along with the PBX operator, shall be calculated based on actual owner occupancy as a percentage of total occupied rooms. Owner occupancy shall include actual owner use at the Attitash Grand Summit Hotel, space Available use (including incoming guests from other resorts with a space Available agreement) as described in the Rental Management Agreement, incoming RCI guests and owner no-shows.

App. 4. Thus, the provision merely defines the "total cost to Manager of operating the Condominium" and explains the methodology for calculating and payment of such cost. App. 4.

[5] LBO does not claim that the Amended Complaint involves a Management Fee.

The Disputes provision is inapplicable to the Amended Complaint because there is no actual cost in dispute. As the superior court correctly concluded, there are "actual costs" as a result of the failure to properly winterize the cooling tower and its ultimate failure. Add. 8. However, the Association does not challenge the nature, amount or method by which the actual costs related to the cooling tower were calculated. Instead, the Amended Complaint alleges causes of action for breach of contract, breach of the covenant of good faith and fair dealing implicit in the Management Contract, negligence, and violation of RSA 358-A, based on LBO's misconduct.

As explained in the preceding section of this brief, the Disputes provision does not contain a process akin to arbitration. Moreover, even if the provision could be construed as arbitration, the Association's claims do not fall within the narrow "accountant remedy" set forth in the Disputes provision. A First Circuit Court of Appeals case, *Fit Tech, Inc. v. Bally Total Fitness Holding Corp.*, 374 F.3d 1 (1st Cir.2004), is instructive. *Fit Tech, Inc.* involved an Asset Purchase Agreement ("APA") that included a fixed purchase price and a potential increase in the amount based on the business' performance over the two years after the sale closed. 374 F.3d at 3.

The APA provided a formula and a procedure for calculating the amount and timing of the extra payment. *Id.* The APA also included the following dispute resolution provision the First Circuit deemed an "accountant remedy":

> (e) *Protest Notice.* Within sixty (60) days after delivery to the Sellers of the Advance Earn–Out Schedule or the Earn–Out Schedule, as applicable, the Sellers may deliver written notice (each, a "Protest Notice") to the Buyer of any objections, and the basis therefor, which the Sellers may have to the Advance Earn–Out Schedule or the Earn–Out Schedule, as applicable. Any such Protest Notice shall specify the basis for the objection, as well as the amount in dispute. The failure of the Sellers to deliver a protest notice within the prescribed time period will constitute the Sellers' acceptance of the Advance Earn–Out Schedule and the Earn–Out Schedule set forth therein, as applicable.
>
> (f) *Resolution of the Sellers' Protest.* If the Buyer and the Sellers are unable to resolve any disagreement with respect to the Advance Earn–Out Schedule or the Earn–Out

> Schedule within twenty (20) days following the Buyer's receipt of any Protest Notice, then the items in dispute will be referred to the Accountants for final determination within forty-five (45) days, which determination shall be final and binding on all of the parties hereto. The Accountants shall be engaged by the Sellers and the Buyer regarding the Advance Earn–Out Schedule or the Earn–Out Schedule, as applicable, based upon the written submissions of the Sellers and the Buyer, and the Accountants may, but shall not be required to, audit the Advance Earn–Out Schedule or the Earn–Out Schedule or any portion thereof. The Advance Earn–Out Schedule and the Earn–Out Schedule as ultimately prepared and finalized in accordance with this Section 3.5(f) shall thereafter be deemed to be and constitute the "Advance Earn–Out Schedule" and the "Earn–Out Schedule" respectively, for all purposes.

Id. at 3.

Although the First Circuit found that the substance of the APA was governed by Illinois law, the Court ruled that issue of "[w]hether the accountant remedy is 'arbitration' under the [FAA] is a characterization issue, which in our view is governed by federal law." *Id.* at 6. Applying federal law, the First Circuit found that the accountant remedy, despite not stating the word arbitration, provided a procedure that "resembles classic arbitration." *Id.* at 7. Those procedures included: a final remedy; an "independent adjudicator"; "substantive standards"; and "an opportunity for each side to present its case." *Id.*

Although the First Circuit found that the accountant remedy qualified as arbitration, the Court held that the issues subject to arbitration were limited to "accounting" issues. *Id.* at 8. The First Circuit found that the phrase "any disagreement" referred only to disputes about accounting issues, which the parties would have intended to be resolved by accountants. In contrast, the parties would not have intended to submit disputes about business operations to accountants. The Court explained:

> … it makes no sense to assume that accountants would be entrusted with evaluating disputes about the operation of the business in question. Yes, operational misconduct may well affect the level of earnings and therefore the schedules, but the misconduct itself would not be a breach of proper accounting standards. Nor would one expect accountants to have special competence in deciding whether business misconduct unrelated to accounting conventions was a breach of contract or any implied duty of

fair dealing.

> Thus, the accounting treatment of new membership sales was correctly regarded by the district court as an issue properly reserved for Price Waterhouse; but whether Bally had manipulated the phone system to divert calls from the eight centers to other Bally centers involves not an accounting question but contract interpretation and judgments about reasonable business practices.

Id. The First Circuit also cited additional cases "in which clauses directing certain disputes to accountants were read as implicitly limited to accounting issues." *Id.* at n. 6 (citing *Blutt v. Integrated Health Servs., Inc.,* No. 96 CIV. 3612 LLS, 1996 WL 389292 (S.D.N.Y. July 11, 1996); *Powderly v. MetraByte Corp.,* 866 F.Supp. 39 (D.Mass.1994); *United Steelworkers of Am. v. Nat'l Roll Co.,* No. 89–1491, 1990 WL 10043689 (W.D.Pa. May 3, 1990); *Parker v. Twentieth Century–Fox Film Corp.,* 118 Cal.App.3d 895, 173 Cal.Rptr. 639 (1981)).

Other jurisdictions are in accord with the First Circuit. In *Harker's Distribution, Inc. v. Reinhart Food Service, L.L.C.*, 597 F.Supp.2d 926 (N.D. Iowa 2009), the Court found that an accountant remedy in an Asset Purchase Agreement was easily divisible into those matters subject to arbitration and those outside the scope of the agreement:

> it makes sense to read the agreement to entrust to the accountant any accounting matters involved in determining 'Total Intangible Value['] … [and] to assume that the accountant was entrusted to determine which customers were 'Harker's Only Customers, as part of a determination of 'Total Intangible Value,' where the contract expressly defined 'Harker's Only Customers' on the basis of accounting information about whether Harker's Distribution had served the customer during the pertinent twelve-month period and Reinhart had not. …
>
> On the other hand, it makes no sense to assume that the parties also agreed to submit to the accountant determination of the legal question of the effect of Schedule 2.2(a)(iii), or the inclusion on that Schedule of customers that did not fit the contractual definition of "Harker's Only Customers," or whether there had been a mutual or unilateral mistake as to whether certain customers met the contractual definition of "Harker's Only Customers," let alone the question of what effect, if any, such a mutual or unilateral mistake might have on enforceability or rescission of the Asset Purchase Agreement.

Id. at 940. Thus, the Court held that, although the accountant remedy in the parties' agreement is

arbitration pursuant to state law, it "requires arbitration of only 'accounting' issues – specifically, whether certain customers fit the contractual definition of 'Harker's Only Customers' and the resulting determination of 'Total Intangible Value.'" *Id.* at 942. The Court was equally plain that the accountant remedy did not require arbitration of legal issues:

> The arbitration provision does not require arbitration of other legal issues—such as the effect of Schedule 2.2(a)(iii) or the inclusion on that Schedule of customers that did not fit the contractual definition of "Harker's Only Customers," whether there had been a mutual or unilateral mistake as to whether certain customers met the contractual definition of "Harker's Only Customers," and what effect, if any, such a mutual or unilateral mistake might have on enforceability or rescission of the Asset Purchase Agreement.

Id.

The United States District Court for the District of Massachusetts reached a similar conclusion in *Powderly v. MetraByte Corp.*, 866 F.Supp. 39 (D. Mass. 1994). In *Powderly*, a former employee brought an action against his former employer and its parent company related to the former employer's refusal to pay a contractual bonus based on the company's Net Operating Profit. *Id.* at 41-42. The former employee alleged breach of contract and violation of the Massachusetts Consumer Protection Act against the former employer, and alleged tortious interference with contractual relations against the parent company. *Id.* at 41. The parties' employment agreement defined Net Operating Profit and further provided that it was to be:

> determined by Keithley's[6] financial management in accordance with generally accepted accounting principles and consistent with those used in connection with the preparation of the Company's audited financial statements. In the event Powderly, in good faith, disagrees with Keithley's determination of the Net Operating Profit, Powderly shall provide written notice to Keithley to that effect and Keithley's independent public accountants [Price Waterhouse] shall determine the Net Operating Profit within thirty (30) days of Keithley's receipt of such written notice and such determination ... shall be final, binding and conclusive upon the Company, Powderly and all other persons who may ... have any interest herein.

Id.

[6] "Keithley" refers to the parent company, Keithley Instruments, Inc.

Although the Court found that the accountant remedy was arbitration, it rejected the argument that the former employee's claims were included in the arbitration provision. "'[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to so submit.'" *Id.* at 42-43 (quoting *AT & T Technologies, Inc.*, 475 U.S. at 648). The Court distinguished between a claim about the accounting of the Net Operating Profit and claims of company misconduct that manipulated the Net Operating Profit:

> Powderly's allegations against Keithley and MetraByte, read in the most indulgent light possible, do not concern questions of accounting. Instead, Powderly alleges that the defendants manipulated MetraByte's business in order to insure that the Net Operating Profit would fall short of the bonus target. This manipulation, Powderly alleges, violated the covenant of good and faith and fair dealing, not because it violated GAAP, but because it was done to deprive Powderly of his rights under the Agreement. Inasmuch as Powderly's allegations challenge the defendants' business practices regarding MetraByte, and not the integrity of the accounting techniques used to calculate the Net Operating Profit, the defendants' motion to compel arbitration will be denied.

Id. at 43 (footnotes omitted).

As explained in the preceding section of this brief, the accountant remedy provided in the Disputes section of the Management Agreement is not arbitration under New Hampshire law. However, even if this Court construes the Disputes provision of the Management Agreement as arbitration, the Association's claims of misconduct by LBO and its causes of action for breach of the Management Agreement for LBO's failure to properly maintain or contract for proper maintenance of the cooling tower, breach of the covenant of good faith and fair dealing implicit in the Management Contract based on LBO's misrepresentations, negligence for LBO's breach of its duty of care to the Association through multiple acts and omissions; and violation of RSA 358-A for LBO's unfair and deceitful conduct, do not fall within the scope of the Disputes Provision.

The Disputes Provision is limited to accounting challenges related to actual costs and

management fees. The Association's claims assert legal theories of recovery for misconduct. Consequently, the trial court properly found that the Disputes provision of the Management Agreement does not require arbitration of the Association's claims and correctly denied LBO's motion to dismiss the Amended Complaint.

CONCLUSION

The superior court's denial of LBO's motion to dismiss the Amended Complaint should be affirmed because the Association's causes of action for breach of contract, breach of the covenant of good faith and fair dealing, negligence, and violation of RSA 358-A are not subject to or precluded by the Disputes provision of the parties' Management Agreement related to Management Fees and Actual Costs. The accounting remedy established in the Disputes provision is not arbitration under New Hampshire law. Moreover, even if the Disputes provision could be construed as arbitration, the Association's claims are based on misconduct, not accounting theories, and therefore are not required to be submitted to arbitration.

REQUEST FOR ORAL ARGUMENT

The Grand Summit Hotel Condominium Unit Owners' Association, Inc. requests 15 minutes for oral argument.

Respectfully submitted,

GRAND SUMMIT HOTEL UNIT OWNERS' ASSOCIATION, INC.

By Their Attorneys,

Dated: April 18, 2018

By: _____

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CERTIFICATE OF SERVICE

I certify that on the 18th day of April 2018, I mailed two copies of the foregoing Brief of Plaintiff-Appellee Grand Summit Hotel Condominium Unit Owners' Association, Inc. via first class mail, postage prepaid, to all counsel of record.

Michael D. Ramsdell