## APPENDIX TABLE OF CONTENTS

### OPINIONS AND ORDERS



### OTHER DOCUMENTS

**OPINION OF THE**
**SUPREME COURT OF VERMONT**
**(FEBRUARY 19, 2021)**

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SUPREME COURT OF VERMONT

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COLIN MASSEAU and EMILY MACKENZIE,

v.

SCOTT LUCK, SHARON LUCK, GUY HENNING,
BRICKKICKER/GDM HOME SERVICES, LLC.

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No. 2020-131

On Appeal from Superior Court,
Chittenden Unit, Civil Division

Before: REIBER, C.J., ROBINSON,
EATON, CARROLL and COHEN, JJ.

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ROBINSON, J.

¶ 1. Homeowners Masseau and MacKenzie appeal the trial court's order confirming an arbitrator's ruling dismissing their claims against defendants Guy Henning and Brickkicker/GDM Home Services, LLC. Specifically, homeowners challenge the trial court's referral of the case to arbitration on the ground that the purported arbitration agreement lacked the notice and acknowledgment provisions required under the Vermont Arbitration Act (VAA), and they urge us to vacate the arbitrator's award because the arbitrator exceeded his authority by manifestly disregarding the law. We conclude that the parties' contract affects

interstate commerce, and that the arbitration agreement is therefore governed by the Federal Arbitration Act (FAA) and is not subject to the more exacting notice and acknowledgment requirement of the VAA. We do not decide whether "manifest disregard" of the law is a basis for vacating an arbitrator's award because we conclude that any error in the arbitrator's legal analysis did not rise to the level of "manifest disregard." We thus affirm.

¶ 2. Homeowners allege in their complaint that in 2016, they hired Guy Henning and Brickkicker/GDM Home Services, LLC (collectively "inspectors"), to inspect a house in Essex Junction prior to their closing on the purchase. Henning was aware of homeowners' plans to renovate the home while living there, and thus it was important for him to advise them of the potential hazards associated with stucco ceilings. Inspectors conducted the inspection and did not raise with homeowners the issue of potential asbestos in the house. Homeowners subsequently discovered asbestos and sued inspectors for failing to disclose the possibility that the stucco ceilings contained asbestos.[1]

¶ 3. Inspectors filed a motion to dismiss, arguing in relevant part that the parties were required to arbitrate the dispute pursuant to the arbitration agreement in their contract, and that homeowners failed to state a claim on the merits because the inspection agreement excluded assessment of environmental hazards like asbestos. Homeowners opposed the motion, arguing that the arbitration clause

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[1] Homeowners also sued Scott and Sharon Luck, the sellers of the house. Homeowners subsequently dismissed those claims, and they are not before us in this appeal.

in the parties' contract was invalid because it lacked the required notice and acknowledgment under the VAA, and also because it contained an unconscionable arbitration-selection term, designating an industry-created arbitration service as arbitrator. Alternatively, homeowners argued that there is evidence that the designated arbitration service no longer exists, thereby invalidating the arbitration agreement. With respect to the merits, homeowners argued that the allegations in the complaint were sufficient to support homeowners' various claims.

¶ 4. The trial court concluded that the arbitration agreement was valid and enforceable. In particular, the court explained that the arbitration clause was subject to the FAA rather than the VAA and was compliant with the requirements of the FAA. The court did invalidate the arbitration-selection clause, but not the entire arbitration agreement. The court therefore stayed court proceedings between the parties pending a final judgment following arbitration and directed the parties to arbitrate with a mutually-agreed-upon arbitrator.

¶ 5. The parties chose and met with the arbitrator and agreed that the first issue was to address the merits of inspectors' motion to dismiss homeowners' claims under Vermont Rule of Civil Procedure 12(b)(6). After considering the parties' submissions, the arbitrator determined that the contract was limited in scope and "clearly excluded—by its express terms—any obligation to examine for asbestos." Thus, the arbitrator concluded that there was no factual basis to support homeowners' claims against inspectors. The trial court confirmed the arbitrator's decision and dismissed homeowners' claims.

¶ 6. On appeal, homeowners renew their arguments that the arbitration provision is unenforceable and contend that even if the arbitration agreement is enforceable, this Court should reverse the trial court's confirmation, and vacate the underlying arbitration decision, because the arbitrator exceeded his authority by manifestly disregarding the law. We address these arguments in turn.

## I. Validity of Arbitration Agreement

¶ 7. The two-page (front and back) contract between homeowners and Brickkicker, signed by Henning as agent, stated both below the parties' signatures on the front and at the bottom of the back, "CONTRACT IS SUBJECT TO BINDING ARBITRATION." In addition, paragraph six of ten on the back of the contract stated, "Any dispute . . . shall be submitted to final and binding arbitration under Rules and Procedures of the Expedited Arbitration of Home Inspection Disputes of Construction Arbitration Services, Inc. . . . ."

¶ 8. Under the FAA, written provisions for arbitration are "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. The VAA contains similar language, *see* 12 V.S.A. § 5652(a), but also requires that an enforceable arbitration agreement contain a written acknowledgement that provides "substantially" as follows:

> ACKNOWLEDGMENT OF ARBITRATION.
>
> I understand that (this agreement/my agreement with _____ of _____) contains an agreement to arbitrate. After

> signing (this/that) document, I understand that I will not be able to bring a lawsuit concerning any dispute that may arise which is covered by the arbitration agreement, unless it involves a question of constitutional or civil rights. Instead, I agree to submit any such dispute to an impartial arbitrator.

*Id.* § 5652(b).

¶ 9. Homeowners argue that the VAA applies to the parties' contract and that because the contract here did not contain the required "acknowledgment of arbitration" provision, the arbitration agreement is unenforceable. Alternatively, they argue that the arbitration agreement is void because it includes an unfair arbitration-selection term. Inspectors argue that the FAA applies and preempts the VAA, and that the arbitration agreement is therefore enforceable. They contend that the arbitration-selection term is severable from the rest of the arbitration provision.

¶ 10. The applicability and effect of the VAA as compared with the FAA are questions of law that we review without deference to the trial court's ruling. *Lofts Essex, LLC v. Strategis Floor & Décor Inc.,* 2019 VT 82, ¶ 33, ___ Vt. ___, 224 A.3d 116. We review the trial court's decision to sever the challenged arbitration-selection term for abuse of discretion. *See Armendariz v. Found. Health Psychcare Servs., Inc.,* 6 P.3d 669, 695 (Cal. 2000) (decision whether to refuse to enforce contract as a whole, to enforce remainder of contract without unconscionable clause, or to limit application of any unconscionable clause as to avoid any unconscionable result is reviewed for abuse of discretion).

### A. Applicability of the Notice Requirement in the VAA

¶ 11. We conclude that the notice and acknowledgment requirement of the VAA does not apply to the parties' arbitration agreement in this case. Our analysis, set forth more fully below, proceeds in several steps. First, the reach of the FAA extends to the full extent of Congress's authority under the Commerce Clause. Second, the transaction between the parties in this case falls within the broad scope of Congress's authority under the Commerce Clause. We draw support for this latter conclusion not only from general Supreme Court case law involving the reach of the Commerce Clause, but also from specific cases applying the FAA to intrastate transactions. The authority relied upon by homeowners does not persuade us otherwise. Third, because the FAA preempts contrary state laws, the notice and acknowledgment requirement of the VAA does not apply here, and the arbitration agreement is not invalid or unenforceable on account of any failure to include the notice and acknowledgment language.

¶ 12. If the transaction between the parties falls within Congress's regulatory authority under the Commerce Clause, their arbitration agreement is subject to the FAA. By its plain terms, the FAA applies to "contract[s] evidencing a transaction involving commerce." 9 U.S.C. § 2. The U.S. Supreme Court has said that "involving commerce" is the functional equivalent of "affecting commerce." *Allied-Bruce Terminix Cos. v. Dobson,* 513 U.S. 265, 273-74 (1995). The breadth of this statutory language reflects an intent to apply the law expansively, exercising Congress's "commerce power to the full." *Id.* at 277; *see*

*also Citizens Bank v. Alafabco, Inc.,* 539 U.S. 52, 56 (2003) (noting that the term "involving commerce" signals "the broadest permissible exercise of Congress' Commerce Clause power" and "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 273-74)). The threshold question, therefore, is whether the transaction between the parties in this case falls within the scope of Congress's regulatory power under the Commerce Clause. *See* U.S. Const. art. 1, § 8, cl. 3 ("Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").

¶ 13. Congress's power under the Commerce Clause is broad. It includes the ability to regulate (1) "the use of the channels of interstate commerce," (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities," and (3) "activities that substantially affect interstate commerce." *United States v. Lopez,* 514 U.S. 549, 558-59 (1995). The U.S. Supreme Court has recognized this final category of activities substantially affecting interstate commerce to include: "intrastate coal mining, intrastate extortionate credit transactions, restaurants utilizing substantial interstate supplies, . . . and production and consumption of homegrown wheat." *Id.* at 559-60 (citations omitted).

¶ 14. Applying these general principles, the U.S. Supreme Court has held that the FAA applied to intrastate transactions in two cases that are relevant to our analysis here. In *Allied-Bruce,* following a termite infestation, a homeowner sued the franchisee

of an international exterminator company from whom she had bought a lifetime termite-protection plan. The exterminators invoked the arbitration provision in their contract and sought a stay to allow for arbitration under the FAA. The state courts denied the stay on the basis that when the parties entered into their contract, they "contemplated" a primarily local transaction that was not "substantially" interstate. *Allied-Bruce,* 513 U.S. at 269. The Supreme Court reversed. Rejecting the "contemplation" test, the Court concluded that the relevant question is whether the transaction in fact involved interstate commerce, even if the parties did not contemplate an interstate commerce connection. *Id.* at 281. Applying this test to the facts of the case, the Court noted that the parties did not contest that their transaction did, in fact, involve interstate commerce, and pointed to the multistate nature of both the franchisor and its franchisee, and the fact that the home-repair material used by the franchisee came from out of state, in support of that conclusion. *Id.* At 282. Because the franchisee in the *Allied-Bruce* case was itself a multistate firm, the decision sheds little light on the significance of a local business's franchise arrangement with a national company, but the decision does confirm that the parties' expectations as to the impact of their transaction on interstate commerce are neither relevant nor determinative of the reach of the FAA.

¶ 15. In *Alafabco*, the Court reaffirmed the broad scope of the FAA, holding that debt-restructuring agreements executed in Alabama between an Alabama company and an Alabama bank were subject to the FAA under the "involving commerce" test. 539 U.S. at 57. The Alabama Supreme Court concluded that the

FAA did not apply because there was no showing that the restructured debt was attributable to interstate transactions, that the funds comprising the debt originated out of state, or that the restructured debt was inseparable from any out-of-state projects. *Id.* at 55. The U.S. Supreme Court reversed, relying on the facts that the company had "engaged in business throughout the southeastern United States using substantial loans from the bank" that were implicated by the debt-restructuring agreements; the debt was secured in part by the company's inventory of goods made from out-of-state parts and materials; and the impact of the "general practice" of commercial lending on the national economy. *Id.* at 57-58. The lesson of *Alafabco* for this case is that even where a particular transaction is wholly intrastate with no specific effect on interstate commerce, it is within Congress's reach if "in the aggregate the economic activity in question would represent a general practice subject to federal control." *Id.* at 56-57 (quotation omitted) (alteration omitted).

¶ 16. Although this is a close case, on the basis of these considerations, we conclude that the home-inspection contract between the parties does substantially affect interstate commerce for two reasons. First, inspectors operated their business pursuant to a franchise agreement with a company located outside of Vermont. We lack a sufficient record to determine the extent of impact on interstate commerce arising from this franchise relationship, but conclude that the fact that inspectors' service to homeowners was facilitated at least in part by their transaction in interstate commerce with the national company with whom they have a franchise agreement carries some

weight.[2] Second, although the parties' contract and the ensuing home inspection took place in Vermont, we cannot conclude that the transaction—when considered along with similar transactions "in the aggregate"—falls outside the sweeping scope of the Commerce Clause. Home inspections are frequently preconditions to securing financing to buy a house, and are accordingly integral to the real estate market. As a New York trial court explained persuasively in an unpublished decision addressing the same issue, "Here the inspection facilitates the home's purchase and without a doubt such activity affects commerce." *Johnson v. Ace Home Inspections of Upstate N.Y.*, 52 N.Y.S.3d 246, 2017 WL 1050333, at *2 (City Court, Cohoes Cty. Jan. 19, 2017) (unpub. disposition). We need not determine whether either factor alone would support the conclusion that the parties' transaction was subject to Congress's regulatory authority; together, the two considerations reinforce that conclusion.

¶ 17. The cases relied upon by homeowners do not convince us otherwise. In *Eli Lilly & Co. v. Sav-On-Drugs, Inc.*, a pharmaceutical company argued that the State of New Jersey's attempt to require it to obtain a certificate to do business in the state violated the Commerce Clause because its business dealings in New Jersey were exclusively interstate commerce.

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[2] Inspectors assert in their brief, with no citation to the record, that we should conclude that the transaction affected interstate commerce because they are part of a national home-inspection franchise involved in multistate home inspections, they advertise and schedule through a centralized national website, and they use the same brochures, description of services, paperwork, and inspection report templates. We do not rely on these representations because they were apparently offered for the first time on appeal and lack any support in the record.

366 U.S. 276 (1961). The Court concluded that the company could be required to register because it was engaged in intrastate business but did not suggest that the company was not also engaged in interstate commerce. *See id.* at 282-84. Likewise, in the second case cited by homeowners, this Court concluded that a foreign corporation was engaged in intrastate business in Vermont such that it was required to register under Vermont laws. *Pennconn Enters., Ltd. v. Huntington*, 148 Vt. 603, 606-07, 538 A.2d 673, 675-76 (1987). The context and conclusions in these cases have little bearing on the issue here. In this case, there is no dispute that the parties' contract took place in intrastate commerce. The question, rather, is whether the transaction affects interstate commerce.

¶ 18. Likewise, we are unpersuaded by homeowners' reliance on an unreported federal case from the District of Nevada, where the court concluded it could not "find that home inspections of Nevada homes have a substantial impact on interstate commerce." *Del Webb Cmtys., Inc. v. Partington,* No. 2:08-CV-00571-RCJ-GWF, 2009 WL 3053709, at *17 (D. Nev. Sept. 18, 2009). In that case the court addressed whether a home-inspection company made false statements in interstate commerce in violation of the federal Lanham Act. The court concluded that there was an issue of fact as to whether the company made statements on its website advertising to conduct home inspections in other states, which would have made those statements "in interstate commerce." *Id.* at *16. In this case, the relevant question is not whether any specific allegedly false statements were made in interstate commerce, but whether the transaction in its entirety affects interstate commerce. In sum, we conclude that

the underlying transaction in this case affects interstate commerce and the FAA therefore applies.

¶ 19. Because the FAA applies, it preempts the notice and acknowledgment requirement of the VAA. Although the U.S. Supreme Court has held that state law may be applied "if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally," courts cannot invalidate arbitration agreements under state laws applicable only to arbitration provisions. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686-87 (1996) (emphasis omitted). The FAA therefore preempts the VAA to the extent that the VAA requires a specific notice and acknowledgment. The FAA "mandate[s] the enforcement of arbitration agreements," *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984), except on grounds existing "at law or in equity for the revocation of any contract," 9 U.S.C. § 2. For the above reasons, we reject homeowners' contention that the arbitration agreement is unenforceable because it does not contain the notice and acknowledgement language required by the VAA.[3]

### B. Severability of Arbitration Forum Selection

¶ 20. We also reject homeowners' argument that the trial court improperly excised an unconscionable arbitration forum selection term from the parties' contract rather than striking the arbitration agreement as a whole. Homeowners contend that notwithstanding the severability clause in the parties' contract, the

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[3] Since we conclude that the notice and acknowledgement requirement is preempted, we do not address whether the contract here provided notice sufficient to meet the requirements of 12 V.S.A. § 5652.

arbitration-selection term cannot be excised from the arbitration provision as a whole, and that the fact that inspectors presented them with a contract with an arbitration provision that had been called into question in a prior decision of this Court rendered the contract void. *See Glassford v. BrickKicker,* 2011 VT 118, ¶ 13, 191 Vt. 1, 35 A.3d 1044.

¶ 21. In *Glassford,* this court did not address the validity of the arbitration-selection term; we struck the entire arbitration provision because it was unconscionable when coupled with a limit on liability that is not included in the contract in this case. *See id.* In a separate opinion, Justice Dooley indicated that he would have stricken the limit on liability and remanded for the trial court to consider the conscionability of the arbitration provision in light of, among other things, the allegedly unfair arbitration forum selection term. *Id.* ¶ 35 (Dooley, J., concurring and dissenting).

¶ 22. We need not address the conscionability of the arbitration forum selection term here because the trial court struck it from the contract. Homeowners have cited no authority supporting its argument that defects in the arbitration forum selection term render the entire arbitration provision void as a matter of law. The arbitration-selection term was not central to the purpose of the arbitration agreement, or the contract as a whole, and can be excised without undermining the essential terms and purpose of the contract. *Cf. Armendariz*, 6 P.3d at 774-75 ("If the central purpose of the contract is tainted . . . then the contract as a whole cannot be enforced. If the illegality [or unconscionability] is collateral to the main purpose of the contract, and the illegal [or unconscionable] provision can be extirpated from the contract by means of

severance or restriction, then such severance and restriction are appropriate."); *In re Poly-Am., L.P.*, 262 S.W.3d 337, 360 (Tex. 2008) (concluding that unconscionable provision in arbitration agreement may be severed "so long as it does not constitute the essential purpose of the agreement"); *see also* 9 V.S.A. § 6055(c)(1) ("If a court finds that a standard-form contract contains an illegal or unconscionable term, the court shall: (A) refuse to enforce the entire contract or the specific part, clause, or provision containing the illegal or unconscionable term; or (B) so limit the application of the illegal or unconscionable term or the clause containing such term as to avoid any illegal or unconscionable result.") (effective Oct. 1, 2020).

¶ 23. For the above reasons, we conclude that the arbitration agreement was valid and enforceable and affirm the trial court's order referring the matter for arbitration.

## II. Manifest Disregard of the Law

¶ 24. We also decline to reverse the trial court's confirmation of the arbitrator's dismissal order on the basis that the arbitrator demonstrated manifest disregard of the law. As noted above, the gravamen of homeowners' various claims was that inspectors should have informed them that there was a risk of asbestos contamination in the stucco ceilings in the basement of the inspected home. Inspectors moved to dismiss homeowners' claims on the basis that inspection for asbestos was beyond the scope of the parties' contract. In particular, the contract contained prominently displayed and highlighted statements, on both sides, that "THIS IS A LIMITED INSPECTION." On the

back of the agreement, within an enumerated list of ten conditions, the contract stated,

> The Client acknowledges what is being contracted for is a building inspection and not an environmental evaluation and the inspection is not intended to detect, identify, alert, or disclose any health or environmental concerns regarding the building(s) and/or adjacent property, including, but not limited to, the presence of asbestos. . . .

¶ 25. In responding to inspectors' motion, homeowners relied on a state regulation and several allegations in their complaint that they contend precluded dismissal on the basis argued by inspectors. Administrative Rules for Property Inspectors Rule 3.2(e)(3)(C) specifically provides that an inspector is not required to inspect for "the presence, absence, or risk of asbestos . . . provided, however, that licensees shall report visible and patent evidence of asbestos." Administrative Rules for Property Inspectors, Rule 3.2(e)(3)(C), Code of Vt. Rules 04 030 007, https://sos.vermont.gov/media/1x5acqgz/administrative-rules-for-property-inspectors.pdf [https://perma.cc/V8X9-YXUP]. Homeowners argue that as a legal matter, inspectors had a duty to report "visible and patent evidence of asbestos" notwithstanding any contractual limitations on the scope of the inspection. To establish that inspectors encountered such visible and patent evidence of asbestos, homeowners alleged, "It is commonly known in the housing industry that stucco ceilings installed in the 1970s contained asbestos. This is important information that any housing inspector should have known." They further alleged that Henning was aware that the house was built in 1972, but did

not mention that textured ceilings were likely to contain asbestos, bring up the potential for asbestos in houses built during the 1970s, or state that testing for asbestos may be advisable in houses of that age.

¶ 26. The arbitrator, purportedly addressing inspectors' motion to dismiss pursuant to Civil Rule 12(b)(6), dismissed homeowners' claims on the ground that there was no factual basis to support them. He reasoned that the contract expressly stated that the inspection was not intended to detect, identify, or disclose the presence of asbestos and homeowners could have contracted for a more comprehensive inspection. The arbitrator was unpersuaded by homeowners' citation to the administrative rules governing inspections because there was no allegation to support the claim that there was "visible and patent" evidence of asbestos in the home at the time of the inspection. The arbitrator dismissed as "conclusory" the allegations that it is commonly known in the housing industry that homes built in the 70s with stucco ceilings might harbor hidden asbestos, and that home inspectors should have known this. The trial court affirmed the arbitrator's decision against the homeowners' motion to vacate the ruling, noting that homeowners had authorized the arbitrator to rule on the motion to dismiss, and otherwise declining to revisit the arbitrator's decision.

¶ 27. On appeal, homeowners ask this Court to recognize "manifest disregard of the law" as a basis to vacate the arbitration decision. They contend that failing to do so would deprive Vermonters of their right to a remedy at law which is protected by the Vermont Constitution. *See* Vt. Const. ch. I, art. 4. They argue that the arbitrator manifestly disregarded

the law here by declining to credit their factual allegations and dismissing them as "conclusory" when he was required to accept them as true for the purposes of his evaluation of inspectors' motion to dismiss under Civil Rule 12(b)(6).

¶ 28. The FAA does not expressly authorize courts to vacate arbitration decisions on the basis of arbitrators' legal errors, and whether manifest disregard of the law is a basis for vacating an arbitration decision under the FAA remains an open question. Those courts that have applied a "manifest disregard" standard have applied it narrowly; the standard does not authorize courts to vacate all arbitration decisions shaped by legal error. Because we conclude that the arbitrator's legal error in this case, if any, did not rise to the level of "manifest disregard" as defined by those courts that have applied the standard, we do not address whether the trial court or this Court is empowered to vacate the arbitrator's decision on this basis.

¶ 29. Legal errors are not among the grounds for vacating an arbitration award expressly identified in the FAA. We have stressed that the standard of review of an arbitration award by the trial court or by this Court is very limited. *See Burlington Adm'rs' Ass'n v. Burlington Bd. of Sch. Comm'rs*, 2016 VT 35, ¶ 14, 201 Vt. 565, 145 A.3d 844; *Vt. Built, Inc. v. Krolick*, 2008 VT 131, ¶ 13, 185 Vt. 139, 969 A.2d 80. The FAA provides four bases on which a court can vacate an arbitration award: "where the award was procured by corruption, fraud, or undue means"; where an arbitrator was evidently partial or corrupt; where an arbitrator engages in misconduct that prejudices the rights of any party, such as by refusing to postpone the hearing despite sufficient cause or

refusing to hear pertinent evidence; or "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(a)(1)-(4).

¶ 30. Whether "manifest disregard of the law" is a basis for vacating an arbitration award—either as an additional ground or as a corollary to the statutorily enumerated bases, remains an open question. In *Krolick,* we interpreted the United States Supreme Court's decision in *Hall Street Assocs., LLC v. Mattell, Inc.*, 552 U.S. 576 (2008), as holding that under the FAA a court has no authority to review for an arbitrator's legal errors. 2008 VT 131, ¶ 13 n.2. However, in the wake of a subsequent U.S. Supreme Court decision, we concluded that the U.S. Supreme Court has left open the question of whether manifest disregard of the law is "'an independent ground for review'" of an arbitration award or "'a judicial gloss on the enumerated grounds for vacatur'" under the FAA. *Burlington Adm'rs' Ass'n,* 2016 VT 35, ¶ 15 (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.,* 559 U.S. 662, 672 n.3 (2010)); *see also Weiss v. Sallie Mae, Inc.,* 939 F.3d 105, 109 (2d Cir. 2019) ("[M]anifest disregard remains a valid ground for vacating arbitration awards whether applied as judicial gloss or as an independent basis. . . . " (quotation omitted)). Accordingly, whether courts are empowered to apply the manifest disregard doctrine under either the VAA or FAA is again an open question. *See Burlington Adm'rs' Ass'n,* 2016 VT 35, ¶¶ 16-17.

¶ 31. Even if "manifest disregard" is a basis for vacating an arbitrator's decision, it does not allow a court to do so on the basis of ordinary legal errors. We

have recognized that courts applying the manifest disregard doctrine to vacate arbitration awards do so on a very limited basis, viewing the arbitrator's decision with considerable deference. *See id.* ¶¶ 17-18. The Second Circuit has held that a court may vacate an arbitration award for manifest disregard of the law only where it "finds both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case." *Wallace v. Buttar,* 378 F.3d 182, 189 (2d Cir. 2004) (quotation and alteration omitted); *see also Burlington Adm'rs' Ass'n*, 2016 VT 35, ¶ 18 (recognizing two-pronged test for proving manifest disregard). Manifest disregard of the law is therefore more than "mere error in the law or failure on the part of the arbitrators to understand or apply the law." *Westerbeke Corp. v. Daihatsu Motor Co.,* 304 F.3d 200, 208 (2d Cir. 2002); *see also Giller v. Oracle USA, Inc.,* 512 Fed App'x 71, 73-74 (2d Cir. 2013) (summary order) ("[T]he manifest disregard of law standard essentially bars review of whether an arbitrator misconstrued a contract." (quotation omitted)). A court applying this standard should only vacate an arbitration award "'in those exceedingly rare instances where some egregious impropriety on the part of the arbitrator is apparent,'" such as "'when an arbitrator strays from interpretation and application of the agreement and effectively dispenses [their] own brand of industrial justice.'" *Weiss,* 939 F.3d at 109 (first quoting *T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc.,* 592 F.3d 329, 339 (2d Cir. 2010); then quoting *Stolt-Nielsen S.A.,* 559 U.S. at 671). The arbitration award should be upheld if "the arbitrator has

provided even a barely colorable justification" for the arbitrator's interpretation. *Id.* (quotation omitted).

¶ 32. Given this standard, even assuming that courts are empowered to vacate an arbitrator's decision based on manifest disregard of the law—which we do not decide—the asserted legal error in the arbitrator's decision here does not rise to the level of manifest disregard. Homeowners' argument is that the arbitrator misapplied the standard under Civil Rule 12(b)(6) in evaluating inspectors' motion to dismiss. Homeowners do not contend that arbitrators are necessarily bound by the rules of civil procedure. *Cf. Robbins v. Day*, 954 F.2d 679, 685 (11th Cir. 1992) ("Arbitration proceedings are not constrained by formal rules of procedure or evidence."), *overruled on other grounds by First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 948 (1995). But they emphasize that in this case the arbitrator purported to decide inspectors' motion to dismiss pursuant to Civil Rule 12(b)(6) and then ignored the standards applicable under that rule. Homeowners have not identified an egregious impropriety by the arbitrator, or even a deliberate disregard of the applicable standard; their argument is that the arbitrator's analysis and conclusion are clearly wrong as a matter of law. This kind of straightforward misapplication of the applicable legal standard is not the type of legal error that is grounds for vacating an arbitration decision, even where "manifest disregard" is a recognized basis for vacatur. *See ARMA, S.R.O. v. BAE Sys. Overseas, Inc.*, 961 F. Supp. 2d 245, 269 (D.D.C. 2013) (concluding petitioner's request to vacate based on manifest disregard of summary-judgment standard "fail[s] on the ground that this Court cannot correct errors in an arbitrator's reasoning, even when

[the arbitrator] substantially misapplies an established legal standard"); *Westerbeke Corp.*, 304 F.3d at 208 ("To vacate the award, we must find something beyond and different from a mere error in the law or failure on the part of the arbitrators to understand or apply the law." (quotation omitted)); *cf. Wallace*, 378 F.3d at 193 (holding that "manifest disregard of the evidence" is not proper ground for vacating arbitrator's decision).

¶ 33. For these reasons, we affirm the trial court's order confirming the arbitration decision in this case.

Affirmed.

FOR THE COURT:

/s/ Beth Robinson
Associate Justice

## CONCURRING OPINION BY CHIEF JUSTICE REIBER (JANUARY 29, 2019)

¶ 34. REIBER, C.J., concurring. I reluctantly join the majority's holding—that the parties' contract implicates interstate commerce and that the Federal Arbitration Act (FAA) governs their arbitration agreement—because the United States Supreme Court's recent authority incorporates a broad construction of the FAA that compels this outcome. I write separately to make the point that the FAA was not intended to apply in this instance, and this outcome deprives the citizens of our state a remedy under the Vermont Arbitration Act (VAA) that offers greater protection than the FAA.

¶ 35. The FAA was enacted as a procedural statute, and 9 U.S.C. § 2 makes no express mention of state courts or state law. It provides that an arbitration provision in "a contract evidencing a transaction involving commerce" is valid and enforceable, "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (originally enacted as United States Arbitration Act, ch. 213, § 2, 43 Stat. 883 (1925)). But in 1984, the Court held that § 2 of the FAA created substantive law that applies in both federal and state court, and accordingly preempts state law whenever state law creates requirements that apply to arbitration agreements but not to all contracts. *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984). In effect, *Southland* limits the ability of states to fashion arbitration laws that provide more protection than federal law.

¶ 37. In dissent, Justice O'Connor argued that the Court construed the FAA incorrectly. Her dissent, worth reading in full, makes three key points. First, the Court misread two earlier decisions underlying its holding, neither of which involved state court litigation nor held that the FAA creates substantive law that applies in state court. *Southland*, 465 U.S. at 23-24 (O'Connor, J., dissenting); *see Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404-05 (1967), and *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 23 (1983). Second, the FAA's legislative history unambiguously and conclusively establishes that "the 1925 Congress viewed the FAA as a procedural statute, applicable only in federal courts" and passed it under Congress's authority to control federal court jurisdiction. *Southland,* 465 U.S. at 25 (O'Connor, J., dissenting). Third, §§ 3 and 4 of the FAA explicitly limit the FAA's application to federal courts, so the statutory structure does not support the holding that § 2 applies in state courts. *Id.* at 22, 29. Most legal scholars have agreed with her conclusion. *See*, *e.g.*, M. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 Fla. St. U. L. Rev. 99, 99, 125 (2006) (arguing that judicial construction has rendered FAA "unrecognizable as the law Congress adopted in 1925" and noting that "almost all of the commentators who have written about *Southland* agree that this case was wrongly decided and inconsistent with congressional intent").

¶ 37. But ignoring the clear line of authority cited by Justice O'Connor, subsequent decisions construing the FAA's range broadened its preemptive effect. In *Allied-Bruce Terminix Companies, Inc. v. Dobson,* the

Court interpreted the phrase "involving commerce" in § 2 to encompass the full scope of the Commerce Clause. 513 U.S. 265, 277 (1995). The broad reach of the commerce power extends to economic activities that, even if entirely intrastate, substantially affect interstate commerce in the aggregate. *See United States v. Lopez,* 514 U.S. 549, 558-59 (1995). Following this reasoning, § 2 sweeps up into its fold virtually every commercial contract containing an arbitration provision within the bounds of the FAA—and consequently preempts state arbitration law. Justice Scalia dissented in *Allied-Bruce*, concluding that the Court's FAA jurisprudence "entails a permanent, unauthorized eviction of state-court power to adjudicate a potentially large class of disputes." 513 U.S. at 285 (Scalia, J., dissenting). Justice Thomas also dissented, laying out a persuasive argument that built on Justice O'Connor's dissent in *Southland* and noted that despite a lack of clear congressional intent to preempt, the Court "displaced an enormous body of state law." *Id.* at 293 (Thomas, J., dissenting). The Supreme Court of Alabama summarized the implications for state courts:

> [I]t would be difficult indeed to give an example of an economic or commercial activity that one could, with any confidence, declare beyond the reach of Congress's power under the Commerce Clause, and, by extension, under the FAA. While there can be no per se rule that would preclude a trial court's role in evaluating whether a contract "evidence[es] a transaction involving commerce," . . . a trial court evaluating a contract connected to some economic or commercial activity would rarely, if ever, refuse to compel arbitration

> on the ground that the transactions lacked "involvement" in interstate commerce.

*Serv. Corp. Int'l v. Fulmer*, 883 So.2d 621, 629 (Ala. 2003) (footnote and citation omitted).

¶ 38. We face the same dilemma here. When the Vermont Legislature adopted the Uniform Arbitration Act and enacted the VAA, it added an acknowledgment requirement: to be enforceable, arbitration agreements must contain an acknowledgment, signed by each party, showing that the parties understand that they are agreeing to arbitrate and consequently will not be able to litigate any disputes arising out of the agreement, unless the dispute implicates constitutional or civil rights. 12 V.S.A. § 5652(b); *see Joder Bldg. Corp. v. Lewis*, 153 Vt. 115, 118-19, 569 A.2d 471, 472-73 (1989). The Legislature added this requirement in 12 V.S.A. § 5652, which begins by providing, like the FAA, that an arbitration provision or agreement "creates a duty to arbitrate, and is valid, enforceable, and irrevocable, except upon such grounds as exist for the revocation of a contract." *Id.* § 5652(a). By including the acknowledgment requirement after stating that arbitration agreements are generally valid, the Legislature clearly intended not to disfavor arbitration agreements, but simply to ensure that the parties are adequately informed before they sign the contract that contains this clause. This is because "[b]y agreeing to submit a controversy to arbitration, parties waive important rights, including trial by jury, procedural protections offered by the courts, and appellate review by an independent judiciary." *Knaresborough Enters., Ltd. v. Dizazzo,* 2021 VT 1, ¶ 11, ___ Vt. ___, ___ A.3d ___.

¶ 39. The FAA contains no similar acknowledgment requirement. Because the VAA requirement applies only to arbitration agreements and not to contracts generally, § 2 of the FAA preempts the VAA's acknowledgment requirement whenever an arbitration agreement falls within the FAA's broad jurisdiction. *See Southland*, 465 U.S. at 16. As a result, Vermont's acknowledgement requirement in 12 V.S.A. § 5652(b) is preempted here. *See David L. Threlkeld & Co., Inc. v. Metallgesellschaft Ltd. (London)*, 923 F.2d 245, 249-50 (2d Cir. 1991) (holding that FAA preempts VAA acknowledgement requirement).

¶ 40. The U.S. Supreme Court has acknowledged that "[t]he FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 477 (1989). Rather, state arbitration law is preempted "to the extent that it actually conflicts with federal law—that is, to the extent that it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (quotation omitted). Following this guidance, the Montana Supreme Court concluded that the FAA did not preempt a provision in the Montana Arbitration Act requiring specific notice that a contract contains an arbitration clause. The Court explained:

> Our conclusion that Montana's notice requirement does not undermine the policies of the FAA is based on the Supreme Court's conclusion that it was never Congress's intent when it enacted the FAA to preempt the entire field of arbitration, and its further conclusion that the FAA does not require parties to

> arbitrate when they have not agreed to do so. . . .
>
> Presumably, therefore, the Supreme Court would not find it a threat to the policies of the [FAA] for a state to require that before arbitration agreements are enforceable, they be entered knowingly. To hold otherwise would be to infer that arbitration is so onerous as a means of dispute resolution that it can only be foisted upon the uninformed. That would be inconsistent with the conclusion that the parties to the contract are free to decide how their disputes should be resolved.
>
> Montana's notice requirement does not preclude parties from knowingly entering into arbitration agreements, nor do our courts decline to enforce arbitration agreements which are entered into knowingly.

*Casarotto v. Lombardi*, 901 P.2d 596, 597-98 (Mont. 1995) (quotation omitted), *rev'd sub. nom. Doctor's Assocs. v. Casarotto*, 517 U.S. 681 (1996). However, the U.S. Supreme Court disagreed. It explained that because Montana's notice requirement would invalidate the arbitration provision, the requirement undermined the goals and policies of the FAA, which are "antithetical to threshold limitations placed specifically and solely on arbitration provisions." *Doctor's Assocs. Inc.*, 517 U.S. at 688. Following *Southland*, the Court concluded that the FAA preempted Montana law. *Id.*

¶ 41. The Court's preemption doctrine belies this conclusion. While the Supremacy Clause of the U.S. Constitution empowers the federal government to preempt state law, the Court "assume[s] Congress

does not exercise [this power] lightly" and only displaces state law when it is "absolutely certain that Congress intended such an exercise." *Gregory v. Ashcroft*, 501 U.S. 452, 460, 464 (1991). Thus, the Court presumes "that the historic police powers of the States were not to be superseded by [federal law] unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Neither the text nor the legislative history of the FAA demonstrates any manifest intent to preempt state law, and in the absence of congressional intent, preemption is inappropriate. *See Allied-Bruce*, 513 U.S. at 293 (Thomas, J., dissenting); Moses, *supra,* at 133-34 (explaining that, given lack of congressional intent, "one might expect the Court to tread lightly in the area of FAA preemption" but "[i]nstead, the Court has come down heavily in favor of preemption, leaving little room to the states to regulate in this area").

¶ 42. The result is inconsistent with principles of federalism and harmful to consumers. Under these decisions, "federal courts have increasingly policed, and struck down . . . safeguards on arbitration passed by state legislatures." B. Farkas, *The Continuing Voice of Dissent: Justice Thomas and the Federal Arbitration Act,* 22 Harv. Negot. L. Rev. 33, 47 (2016). State notice requirements, which have been adopted by "a mix of traditionally conservative and liberal" states, are intended to protect consumers and parties with unequal bargaining power by ensuring that they knowingly agree to arbitrate any disputes and forego rights they would have in court. *Id.* at 41 43. As the Montana Supreme Court explained, these requirements do not prevent parties from entering into arbitration agreements or otherwise undermine arbitration

agreements. *Casarotto*, 901 P.2d at 597. Such protections simply do not conflict with the FAA.

¶ 43. Moreover, in this case, there is scant evidence to suggest that the parties' contract implicates interstate commerce. The record reflects that the contract's only connection to interstate commerce is that defendant inspector operates its business under a franchise agreement with a company located outside of Vermont. But the parties to the contract—the homeowner and the individual hired to perform the inspection—are Vermont residents. The contract was signed in Vermont and the work was to take place within Vermont's borders. Yet we cannot conclude that home inspections, in the aggregate, do not substantially affect interstate commerce. So, the FAA applies and preempts Vermont law. While the majority outcome is consistent with the United States Supreme Court's FAA jurisprudence, I write to make the point that the FAA when passed by Congress was not originally intended to preempt state law in such situations.

¶ 44. I am authorized to state that Justice Cohen joins this concurrence.

/s/ Paul L. Reiber
Chief Justice

/s/ Harold E. Eaton, Jr.
Associate Justice

/s/ Karen R. Carroll
Associate Justice

/s/ William D. Cohen
Associate Justice

## ORDER OF THE VERMONT SUPERIOR COURT (JANUARY 29, 2019)

SUPERIOR COURT OF VERMONT
CIVIL DIVISION, CHITTENDEN UNIT

MASSEAU ET Al,

v.

LUCK ET AL.

Docket No. 616-6-17 Cncv

Before: Helen M. TOOR, Superior Court Judge.

### ENTRY REGARDING MOTION

Count 1, Fraud or Non-Disclosure (616-6-17 Cncv)
Count 2, Fraud or Non-Disclosure (616-6-17 Cncv)
Count 3, Fraud or Non-Disclosure (616-6-17 Cncv)
Count 4, Fraud or Non-Disclosure (616-6-17 Cncv)

Title: Motion to Confirm the Award in Arbitrator's Ruling (Motion 7)
Filer: Guy Henning
Attorney: Walter E. Judge
Filed Date: November 14, 2018

Response filed on 12/31/2018 by Attorney Walter E. Judge for Defendant Brickkicker/GDM Home Services, I

Brickkickers/GDM and Guy Hennings Reply;

Response filed on 01/14/2019 by Attorney Thomas C. Nuovo for Plaintiff Emily MacKenzie

Plaintiff's Sur-Reply;

Response filed on 01/22/2019 by Attorney Walter E. Judge for Defendant Brickkicker/GDM Home Services

Plaintiffs in this case sue the sellers from whom they bought their home and the inspector (and inspection company) who did the pre-sale inspection. Plaintiffs allege that there is asbestos in the home, sellers failed to disclose it, and the inspector should have found it. The inspection defendants previously obtained a court order to arbitrate as required by their contract. The arbitrator has issued a ruling dismissing the claims against the inspector defendants, who now seek to enforce that ruling.[1] Plaintiffs object and have filed a motion to vacate the ruling (Motion # 8). The court addresses both motions here.

Plaintiffs argued at a hearing on this matter that an arbitrator does not have the authority to decide a motion to dismiss. However, the arbitrator's decision states that the parties "agreed that the first order of business is to address and decide the pending VRCP 12(b)(6) motion to dismiss." Arbitrator's Decision at 1. It goes on: "The parties have agreed that I may consider all submitted documents in addition to the motion papers and I am empowered to decide the pending motion." *Id.* Thus, any objection to the arbitrator ruling on the motion was waived.

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[1] The gist of the arbitrator's ruling was that the contract expressly excluded from the inspector's duties any duty to look for asbestos inside ceilings.

Plaintiffs also argue that the arbitrator's decision can be reviewed because it showed a "manifest disregard for the law," and assert various reasons why they believe his ruling was wrong. The court does not find any such manifest disregard. Whether this court would have reached the same conclusion is not the issue. Courts "uphold[ ] arbitration awards whenever possible." *Shahi v. Ascend Financial Services, Inc.*, 2006 VT 29, 1110, 179 Vt. 434. The issue is whether the process was fair and whether any statutory basis for reversal appears. *Id.* The court finds no reason to vacate the decision of the arbitrator here.

Plaintiffs' other arguments are all about why the earlier court order to arbitrate was wrong. Judges do not generally revisit earlier judges' rulings in a case without some change in the evidence or the law, and the court declines to do so here. *See Morrisseau v. Fayette*, 164 Vt. 358, 364 (1995).

## ORDER

The arbitrator's ruling is affirmed. The claims against Defendants Henning and Brickkicker/GDM are dismissed. Mediation among the remaining parties shall be done by May 1 as set forth in the existing schedule.

Dated at Burlington this 28th day of January, 2019.

/s/ Helen M. Toor
Superior Court Judge

Notifications:

Thomas C. Nuovo (ERN 3328), Attorney for Plaintiffs
Jeffrey M. Messina (ERN 4786), Attorney for Defendants Scott and Sharon Luck
Walter E. Judge (ERN 3427), Attorney for Defendants Henning and Brickkicker/GDM Home Services,
Samantha V. Lednicky (ERN 7354), Attorney for party 5 Co-Counsel
James W. Spink (ERN 2194), Attorney for Neutral Mediator/Arbitrator/Evaluator James W. Spink

## OPINION AND ORDER OF THE SUPERIOR COURT OF VERMONT ON MOTIONS TO DISMISS (AUGUST 9, 2018)

SUPERIOR COURT OF VERMONT
CIVIL DIVISION, CHITTENDEN COUNTY

COLIN MASSEAU AND EMILY MACKENZIE,

*Plaintiffs,*

v.

SCOTT and SHARON LUCK; GUY HENNING, and BRICKKICKER/GDM HOME SERVICES, INC.,

*Defendants.*

Docket No. 616-6-17

Before: Robert A. MELLO, Superior Judge.

### INTRODUCTION

Plaintiffs have sued the seller and home inspector of their recently-purchased residence in Essex Junction. Per the complaint, unbeknownst to Plaintiffs, the home, built in 1972, contained asbestos in the stucco ceilings. Plaintiffs only discovered this after they had made their purchase. Here is how that happened: after buying their home, Plaintiffs were "scrapping the textured ceiling off in the kitchen" as part of a self-directed home remodel. Compl. at ¶ 17. During the first night after having begun to work, Plaintiffs

discovered, through internet research, that houses built in the 1960s and 1970s "often contain asbestos." Unsure if their home had asbestos, they immediately stopped their attempt to remodel, investigated whether their house indeed had asbestos, learned that there was contamination, and hired contractors to remove the asbestos-containing materials. They also cleaned and abated the residence. *Id.* at ¶¶ 18-24.

Plaintiffs believe that the seller misrepresented their knowledge of the asbestos in their disclosure form. *Id.* at 1 30. They also believe that the inspector was required, by law, to disclose the possibility of asbestos in the stucco ceilings so Plaintiffs could decide whether to obtain a more detailed inspection. *Id.* at ¶ 29. They have asserted three claims against both the seller and the inspector: (1) Violation of Vermont Unfair and Deceptive Acts or Practices (UDAP) (9 V.S.A. § 2453) (*id.* at ¶¶ 31-44); (2) Negligent Misrepresentation (*id.* at ¶¶ 45-50); (3) Breach of Contract or the Implied Covenant of Good Faith and Fair Dealing (*id.* at ¶¶ 51-57). The fourth count of the complaint is against the inspector only: (4) Negligent Inspection. *Id.* at ¶¶ 58-62.

Defendants Guy Henning and Brickkicker/GDM Home Services, Inc. ("The Inspection Defendants") have moved to dismiss under Rule 12(b)(6), advancing three theories,[1] including an assertion that the case should be submitted to arbitration as contracted.

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[1] The inspection defendants explain that the proper entity, with whom Plaintiffs contracted, is GDM Home Services, LLC ("GDM"). Brickkicker is owned by GDM. And GDM is owned by Guy Henning.

## ARBITRATION

The contract between the Inspector Defendants and the Plaintiffs contains a mandatory arbitration clause.[2] Plaintiffs acknowledge that they contracted for arbitration, but have raised four arguments for why the Court should not enforce this agreement: (1) contrary to state law, the clause does not clearly define mandatory arbitration by specifying that the parties cannot bring a lawsuit in court; (2) a similar version of this contract was previously held to be unenforceable by a majority of the Vermont Supreme Court; (3) by moving to dismiss on the merits while simultaneously requesting that the arbitration agreement be enforced, Defendants have waived arbitration; (4) the agreed-to arbitrator has a conflict of

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[2] The front of the agreements says, at the bottom, in all capital letters, "CONTRACT IS SUBJECT TO BINDING ARBITRATION." Pltf's Ex. 4. The back of the contract contains the actual clause, which states, "6. Any dispute, controversy, interpretation or claim for, but not limited to, breach of contract, any form of negligence, fraud or misrepresentation or any other theory of liability arising out of, from or related to this contract, the inspection or inspection report shall be submitted to final and binding arbitration under Rules and Procedures of the Expedited Arbitration of Home Inspection Disputes of Construction Arbitration Services, Inc. The decision of the arbitrator appointed thereunder shall be binding and judgment on the Award may be entered in any court of competent jurisdiction. If no arbitration proceeding is initiated by either party within one year of the date of the inspection report, the failure to initiate the arbitration proceeding will be considered conclusive evidence that the parties are satisfied that each has properly performed their obligations under this agreement and any further action is deemed waived and forever barred." *Id.* The back of the contract also states, in all capital letters "THIS CONTRACT IS SUBJECT TO BINDING ARBITRATION." *Id.*

interest or is non-existent. The Court addresses each of these arguments.

## I. The Arbitration Clause Is Governed by Federal Law, in Which There Is No Separate Acknowledgment Requirement.

### A. Federal Law Governs Arbitration Contracts Involving Interstate Commerce.

The Federal Arbitration Act (FAA) "rests on Congress' authority under the Commerce Clause." *Preston v. Ferrer*, 552 U.S. 346, 349 (2008). It applies "not simply a procedural framework" in federal court; rather, "it also calls for the application, in state as well as federal courts, of federal substantive law regarding arbitration." *Id.* (citing *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984)).[3] But, for federal arbitration law

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[3] *Southland*, which held that federal law favoring arbitration preempts any contrary state law, was arrived at despite significant doctrinal concerns from a diverse set of justices:

- O'Connor, J.: *Southland*, 465 U.S. at 22-36 (O'Connor, J. dissenting) (explaining that the plain language of Sections 3 and 4 of the FAA support the interpretation that the FAA only applies in federal court, not state court proceedings); *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 282 (1995) (concurring) (joining the majority opinion applying *Southland* on stare decisis grounds, while noting, "I continue to believe that Congress never intended the Federal Arbitration Act to apply in state courts, and that this Court has strayed far afield in giving the Act so broad a compass." (citing her dissents in *Perry v. Thomas*, 482 U.S. 483 (1987) and *York International v. Alabama Oxygen Co.*, 465 U.S. 1016 (1984)).
- Scalia, J.: *Allied Bruce*, 513 U.S. at 284 (dissenting) (noting that though he joined two majority opinions in

prior cases applying the FAA to state court proceedings, neither involved a direct challenge seeking to overrule *Southland*. And, explaining further that *Southland* "clearly misconstrued" the FAA. Last, announcing that he will not dissent from future judgments based on *Southland* but will join a majority opinion overturning it if there are four more justices willing to do so).

- Thomas, J.: *Id.* at 286-288 (dissenting) (explaining that at the time of the FAA's passage, arbitration was understood to be a procedural rule, which Congress would not have regulated in state courts), 292-293 (citing the legal standard for field preemption, which requires "absolute certainty" that Congress intended to displace state law, and explaining that, quite to the contrary, Thomas is "sure" that Congress did not intend to "sweep aside" wide-spread state arbitration laws enacted at the time the FAA was passed.); 294 295 (arguing that even if Section 2 of the FAA did preempt state law, requiring enforcement of arbitration agreements in state and federal courts, it does not necessarily follow that such agreements must be enforced with the remedy of specific performance); 296-297 (arguing that it was dicta when, in *Southland* and its progeny, the Court stated that specific performance was the required remedy for violations of an arbitration clause in state court (citing *Southland*, 465 U.S. at 4 (California state law voiding arbitration clauses in franchise agreements preempted—this was dicta because there was no state law holding that such agreements cannot be specifically enforced); *Perry*, 482 U.S. 483 (1983) (California labor law that allowed civil actions in court for wage collection, despite existence of arbitration clause, is preempted).

- Stevens, J.: *Southland*, 465 U.S. at 18 (dissenting on the enforceability of the arbitration clause) (explaining that the scope of preemption under the FAA should be limited and leave unaffected other areas of law that can, in his view, be properly regulated by the states without frustrating the intent of the FAA drafters); *Perry*, 482 U.S. at 493 ("It is only in the last few years that the Court

to apply in state court there is one precondition of consequence here: the case must involve interstate commerce. *See* 9 U.S.C. §§ 1-2; *Southland*, 465 U.S. 1. This requirement is co-extensive with Congress' Commerce power. *Allied-Bruce Terminix Companies, Inc., v. Dobson*, 513 U.S. 265 (1995). So, the Court must determine whether the contract here can be regulated under Congress' Commerce clause power.

### B. The Arbitration Clause "Involves Interstate Commerce."

The Commerce clause grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. Art. I § 8 cl. 3. This includes "commerce among the States, [and does not] stop at the external boundary line of each State, but [continues] into the interior." *Gibbons v. Ogden*, 9 Wheat. 1, 189-190; 194 (1824). Interstate commerce, however, historically was said not to include "commerce, which is completely internal, which is carried on between man and man[4]

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has effectively rewritten the [FAA] to give it a pre-emptive scope that Congress certainly did not intend.").

*Southland* has also been widely criticized by the academy. *See*, *e.g.*, Schwartz, David; "The Federal Arbitration Act and the Power of Congress over State Courts," 83 Or. L Rev 542 (2004); Moses, Margaret; "Statutory Misconstruction; How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress" 34 Fla State Univ Law Rev 99 (2006). But it is also clearly-established mandatory authority.

[4] This gendered syntax, penned in 1824, is outdated, much like the limited conception of the commerce clause asserted in the sentence.

- Scalia, J.: *Allied Bruce*, 513 U.S. at 284 (dissenting) (noting that though he joined two majority opinions in

in a State, or between different parts of the same State, and which does not extend to or affect other States." *Id.* As economies have become more interconnected, however, this limitation has been stretched thin, nearly to a breaking point. *See*, *e.g.*, *Wickard v. Filburn*, 317 U.S. 111, 121 (1942) (Congress can regulate home-grown wheat, intended entirely for personal use, because although one farmer's contribution to the national demand for wheat may be trivial alone, his contribution to that demand, taken together with that of many others similarly situated, is not trivial.).

In *Allied Bruce Terminix Companies, Inc. v. Dobson*, the plaintiff bought a home that turned out to be infested with termites. The seller, prior to the sale, had purchased insurance against this eventuality through a national termite-inspection company and transferred that insurance to buyer. Buyer brought an action for damages against company and seller; company moved to compel arbitration under their contract. The Supreme Court, holding that the FAA was intended to be co-extensive with the commerce clause, found that the FAA applied to the inspection contract for two reasons: the inspection company was a national concern and the company shipped goods into the forum from out-of-state. 513 U.S. at 269, 282.

In *Citizens Bank v. Alafabco, Inc.*, builder sued a bank that had provided financing for construction

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prior cases applying the FAA to state court proceedings, neither involved a direct challenge seeking to overrule *Southland*. And, explaining further that *Southland* "clearly misconstrued" the FAA. Last, announcing that he will not dissent from future judgments based on *Southland* but will join a majority opinion overturning it if there are four more justices willing to do so).

projects in Alabama. 539 U.S. 52 (2003). Builder and bank had recently restructured the debt and agreed to mandatory arbitration. The Alabama Supreme Court reversed an order to submit a contract dispute to arbitration, holding that the restructuring agreement did not have a "substantial effect on interstate commerce." *Id.* at 55. The state court explained that the restructured debt was not an interstate transaction, the funds did not originate out-of-state, nor was it part of an out-of-state project. *Id.* The U.S. Supreme Court reversed, criticizing the state court as "misguided" for "search[ing] for evidence that a 'portion of the restructured debt was actually attributable to interstate transactions' or that the loans 'originated out-of-state' or that 'the restructured debt was inseparable from any out-of-state projects.'" *Id.* at 56.

Instead of analyzing the transaction in this narrow fashion to determine whether a contract is within Congress' Commerce Clause power, the Court explained, trial courts must consider whether "in the aggregate the economic activity in question would represent 'a general practice . . . subject to federal control.'" *Id.* at 57, citing *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948); *Perez v. United States*, 402 U.S. 146, 154 (1971); and *Wickard v. Filburn*, 317 U.S. at 127-128 (1942). Applying this test, the *Alafabco* Court pointed to three reasons sufficient to apply the FAA to the debt restructuring contract:

1) Builder conducted business throughout the southeastern United States;

2) The debt was secured by assets brought to Alabama from out-of-state.

3) The general practice of commercial lending has a "broad impact" on the national economy and Congress' power to regulate this industry is manifest.

Here, Plaintiffs argue that a home inspection does not "substantially affect" interstate commerce. Pltf's Surreply. at 2 (citing *Del Webb Communities, Inc. v. Partington*, 2009 WL 3053709, at *17 (D. Nev. Sept. 18, 2009).[5] In *Del Webb* a developer sued an inspection company for misrepresentations under the Lanham Act. The inspection company advertised its willingness to conduct home inspections for free; in exchange the company would sue developers for building code violations discovered through their inspections. The District Court could not determine on the summary judgment record whether the alleged misrepresentations had been "made in interstate

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[5] Plaintiff also cites to *United States v. Lopez*, 514 U.S. 549 (1995) (holding that the Gun-Free School Zones Act exceeded Congress' commerce-clause power). This case provides little guidance here. As explained below, this Court's task is to determine whether arbitration of home inspection contracts, and the home inspection industry as a whole have a substantial impact on interstate commerce. *Lopez* explained that possession of a gun on school property is "in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." *Id.* at 567. It's rather obvious that any contract for services could "substantially affect" interstate commerce under certain circumstances. And, the Supreme Court has explicitly held that *Lopez* did not "announce a new rule governing Congress' Commerce Clause power over concededly economic activity such as [debt-restructuring agreements.]. *Alafabco*, 539 U.S. at 58. As explained below, just as the Commerce Clause Power was not limited in *Alafabco* from regulating intrastate commercial lending, it cannot be stopped from regulating intrastate home inspections.

commerce" because the content of the company's website, interstate mailings, and interstate marketing phone calls was undeveloped. *Id.* at *16-17. And, the district court reasoned that it "cannot find that home inspections of Nevada homes have a substantial impact on interstate commerce. Any impact would be purely intrastate." *Id.* at *17.

Here, the Court is bound by U.S. Supreme Court precedent. It therefore must reason as that Court did in *Allied Bruce* and *Alafabco*: in the aggregate, contracts entered by a national company to inspect homes substantially impact interstate commerce. Indeed, the Court supposes, it is manifest that the national real estate market would be affected if inspection costs were to rise in response to protracted litigation, if, for example, contracts to arbitrate claims were routinely invalidated. This reasoning utilizes the correct lens to analyze a commerce clause issue, unlike the relatively perfunctory analysis in *Del Webb*, which took an incorrectly narrow view.

Under this analysis, the Inspector Defendants are part of a national home inspection franchise called The BrickKicker. 2011 VT 118 ¶ 2; Def's Resp. to Surreply at 3. Therefore, the Court holds that the FAA applies to the contract between Plaintiffs and the Inspector Defendants.

### C. Vermont Law Disfavoring Arbitration Is Preempted.

Preemption is "[t]he principle (derived from the Supremacy Clause) that a federal law can supersede or supplant any inconsistent state law or regulation. *Black's Law Dictionary*, 1216 (8th ed. 2004). State laws that single out arbitration agreements to make

them unenforceable— for reasons that do not apply to other types of agreements—are preempted by the FAA. *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984). This is because the FAA only specifies common law contract defenses (such as duress or unconscionability) as permissible ways of invalidating such an agreement. *See* 9 U.S.C. § 2; *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011) (explaining that state laws outright prohibiting arbitration are preempted (citing *Preston v. Ferrer*, 552 U.S. 346, 353 (2008)), but so are doctrines normally thought to be neutral, such as duress or unconscionability, when they are "applied in a fashion that disfavors arbitration." (citing *Perry v. Thomas*, 482 U.S. 483; 492, n. 9 (1987)); *see also*, *Marmet Health Care Center, Inc. v. Brown*, 565 U.S. 530 (2012) (state law refusing to enforce nursing home admittance arbitration contract preempted); *Kindred Nursing Centers Ltd. Partnership v. Clark*, 137 S. Ct. 1421, 1426-29 (2017) (state law—requiring clear statement in power of attorney agreement before an agent permitted to contract to arbitrate for principal—is preempted).

In *AT&T*, the Supreme Court analyzed whether the FAA preempted California's Discover Bank rule. Discover Bank allowed consumers to demand class or collective arbitration, even if their contract required individual arbitration. To use the Discover Bank rule, a consumer had to show three things: (1) they had agreed to a contract of adhesion, (2) damages were low, and (3) defendant schemed to cheat consumers. The rationale was that companies should not effectively immunize themselves against small dollar claims by prohibiting, through contract, collective and class actions where the cost of initiating the case would outweigh

any recovery by an individual. If this were allowed, the fashioners of the rule reasoned, consumers would forego meritorious claims because no rational lawyer would take a case where the filing fee is greater than the potential judgment. Thus, consumer contracts could effectively become exculpatory. A 5-4 majority led by Justice Scalia held that the Discover Bank rule, a judicial creation of the California Supreme Court, was preempted by the FAA. *AT&T*, 563 U.S. at 346-47.

Here, Plaintiffs cite to no authority under federal law for their argument that an arbitration clause must specify that it bars the parties from proceeding in court.[6] Instead they rely entirely on state law. *See* Pltf's Opp. at 2 (citing 12 V.S.A. § 5652(b). Because federal law on arbitration applies to this case the Court rejects this argument. *See David L. Threlkeld & Co. v. Metallgesellschaft Ltd. (London)*, 923 F.2d 245, 250 (2d Cir. 1991) ("state statutes such as the Vermont statute directly clash with . . . the Arbitration Act because they effectively reincarnate the former judicial hostility towards arbitration. Accordingly, we hold that . . . the Arbitration Act preempt[s] the Vermont statute.").

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[6] Plaintiffs cite to *Joder Building Corp. v. Lewis*. 153 Vt. 115 (1989). But that case did not mention the issue of preemption. Nor did it mention the Federal Arbitration Act. So, it is of little use here.

## II. *Glassford v. Brickkicker*, a 2011 Case Involving Similar Inspector Defendants, and a Similar Contract, Does Not Invalidate This Arbitration Clause.

The Vermont Supreme Court held, in a fractured 3-2 opinion, that the limitation on liability clause in the Inspector Defendants' contract was unenforceable because it acted in tandem with the arbitration clause to effectively bar all liability. The Court explained that the cost of filing a claim with the arbitrator, as selected in the contract, was greater than the damages allowed by the limitation clause. *See* 2011 VT 118 ¶ 16, 191 Vt. 1. Consumer contracts that in effect contain exculpatory terms are analyzed under *Dalury v. S-K-I Ltd.*, 164 Vt. 329, 332 (1995). A plurality of the Court held under the rationale from *Dalury* that the two offending clauses in tandem were unconscionable and therefore unenforceable; but the majority only invalidated the limitations clause.

Here, the limitation of liability clause used in *Glassford* has been excised from the contract. So, unlike *Glassford*, this contract is not exculpatory. The *Dalury* analysis therefore is of no consequence. Plaintiffs' argument to the contrary is conclusory and unconvincing. They state that the terms of the arbitration clause violate public policy and are "fundamentally unfair."[7] But, they fail to explain how the arbitration

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[7] Plaintiffs misread Justice Dooley's dissent in *Glassford*. Plaintiffs quote a statement by Justice Dooley recounting the argument made by the plaintiffs in the *Glassford* case. But they use that quotation to characterize Justice Dooley's opinion about the fairness of the arbitration clause. Pltf's Opp. at 4. However, Justice Dooley made no such assessment. Rather, after quoting the plaintiff's arguments he explained that he would have

agreement is substantively or procedurally unconscionable. *See*, *e.g.*, *Glassford*, 2011 VT 118 at ¶ 13 (explaining that a court must find substantive or procedural unconscionability to invoke unconscionability doctrine (citing *Val Preda Leasing, Inc. v. Rodriguez*, 149 Vt. 129, 135 (1987)). The Court will not supply a party, represented by competent counsel, with arguments that it has not asserted. And even if it could do so, the gravamen of the unconscionability analysis in *Glassford*—that the limitation of liability clause makes the contract exculpatory—is not present here.

## III. Defendants Have Not Waived Arbitration.

### A. Defendants' Request That the Court Dismiss the Case During the Pendency of the Arbitration Is Denied.

The FAA provides that if a case is filed in *federal court* when it actually is subject to arbitration, a party seeking to enforce the arbitration clause is entitled to a stay "until such arbitration has been had in accordance with the terms of the agreement . . . " 9 U.S.C. ¶ 3 (emphasis supplied). This section of the FAA has not

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remanded for the trial court to assess unconscionability of the arbitration clause alone, rather than, as the majority did, hold that both the arbitration clause and the limited liability clause were unenforceable. Compare *Glassford v. Brickkicker*, 2011 VT 118 at ¶ 35 (Dooley, J. dissenting) and *Id.* at ¶ 30 (explaining, in the majority opinion, that the arbitration clause is unenforceable because Defendants should not benefit from a major component (the arbitration clause) of its "scheme" to "offer an illusory remedy."). A Justice recounting the arguments by one party and remanding a case for further consideration does not mean that he or she has concluded that those arguments are meritorious.

been held to preempt state law. Nor could it. *See*, *e.g.*, *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 289 (1995) (Thomas, J. dissenting) ("Most sections of the [FAA] plainly have no application in state courts, but rather prescribe rules for federal courts . . . [quoting from Section 3]."). As Defendants have noted, the Vermont Supreme Court has allowed for the possibility that dismissal is a proper remedy when seeking to enforce an arbitration agreement. *Hermitage Inn Real Estate Holding Co., LLC v. Extreme Contracting, LLC*, 2017 VT 44, ¶ 43. But, here Defendants have not presented any argument that dismissal is preferential to the more common remedy—a stay pending arbitration. *See* 9 U.S.C. ¶¶ 3-4. Absent a rationale for departing from the norm, the Court adopts the usual remedy to the invocation of an arbitration clause.

### B. Defendants Have Not Waived Their Right to Arbitration by Moving for Dismissal on the Merits in the Same Motion Where They Have Asserted That Right.

A party can waive their contractual right to arbitration by proceeding in court in a fashion that "express[es] its intent to litigate." *Louisiana Stadium & Exposition Dist. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 626 F.3d 156, 159 (2d Cir. 2010). Here, the question is whether a defendant's motion to dismiss, which both invokes the arbitration clause and also argues for dismissal on the merits, constitutes such a waiver?

There is no mandatory authority in state or federal court on this question. And persuasive authorities are split. Some circuits have stated that "a party does

not waive its right to arbitrate merely by filing a motion to dismiss." *Sharif v. Wellness Int'l Network, Ltd.*, 376 F.3d 720, 726 (7th Cir. 2004). Others have refused to find waiver where the Rule 12 motion invokes a jurisdictional defense, *Dumont v. Saskatchewan Government Ins.*, 258 F.3d 880 (8th Cir. 2001), or where, in the court's estimation, the claims are frivolous, *Khan v. Parsons Global Services, Ltd.*, 521 F.3d 421, 427 (D.C. Cir. 2008). One consideration, when a party moves to dismiss on the merits while simultaneously demanding that an arbitration agreement be enforced is that they not get to play "heads I win, tails you lose" by litigating an issue twice: in court, and then at the arbitration. *Hooper v. Advance America, Cash Advance Centers of Missouri, Inc.*, 589 F.3d 917, 922 (8th Cir. 2009). As the court in *Hooper* recognized, "motions to dismiss are not homogeneous." *Id.* Courts are instructed to consider the totality of circumstances. *Id*; *Louisiana Stadium*, 626 F.3d at 159 ("the key to a waiver analysis is prejudice.").

Here the Court concludes that there is no waiver for three reasons:

1) The Court has analyzed the invocation of the arbitration agreement as a threshold question. Therefore, submitting any claims to arbitration, as contracted, will not provide the Inspector Defendants a second bite at the proverbial apple because this Court has refrained from considering the merits here.

2) There was no delay in Defendants' assertion of their right to arbitrate. Rather, they submitted it when their first responsive pleading came due.

3) Furthermore, to whatever extent Plaintiffs may have been prejudiced by having to respond to merits arguments for dismissal, that burden is lessened by the fact that they will still likely have to contend with substantially similar arguments in whatever venue the claims are ultimately decided.

For these reasons, the Court holds that here the Inspector Defendants have not waived their right to arbitration by simultaneously filing a motion to dismiss on the merits.

## IV. Arbitrator's Potential Conflict and Non-Existence Do Not Invalidate the Entire Arbitration Contract.

The contract requires arbitration with "Construction Arbitration Services, Inc." Plaintiffs have argued that this arbitrator has a conflict of interest and that it no longer exists. Defendants concede that if the arbitration clause is enforceable they consent to the use of another arbitrator, and ask to proceed "as if there was no company specified in the contract." Def's Rep. at 12. This is essentially a request to sever the forum selection clause from the mandatory arbitration clause. Indeed, the contract also contains a severability clause.[8]

The "cardinal rule" when interpreting a contract is the intent of the parties. *Sullivan v. Lochearn, Inc.*, 143 Vt. 150, 152 (1983). Severability is also known as

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[8] Any decision invalidating or not enforcing "any provision" of the contract "shall not affect the other provisions of the contract, and the contract shall be construed as if such invalid or enforceable [sic] provision had never been contained in the contract." Pltf's Ex. 4.

"the blue pencil test." This is "[a] judicial standard for deciding whether to invalidate the whole contract or only the offending words. Under this standard, only the offending words are invalidated if it would be possible to delete them simply by running a blue pencil through them, as opposed to changing, adding, or rearranging words." *Black's Law Dictionary*, "Severability" (*see* "Blue-Pencil Test) (10th ed. 2014) (Westlaw). Because the parties contracted to allow courts to use the Blue-Pencil Test the Court holds that the issue of who will oversee arbitration of this case is severable. *See also*, *Dominguez v. Finish Line, Inc.*, 439 F. Supp. 2d 688, 691 (W.D. Tex. 2006) ("Because of this severability provision, the Court finds that the Indiana forum-selection clause does not render the otherwise valid arbitration agreement between the parties invalid or unenforceable.").

Plaintiffs have challenged the existence and impartiality of the contracted arbitrator. And Defendants do not contest that challenge. So, the Court hereby strikes the end of the first sentence[9] of the arbitration clause, starting at the word "under." The first sentence shall now be, in its entirety, the following: "Any dispute, controversy, interpretation or claim for, but not limited to, breach of contract, any form of negligence, fraud or misrepresentation or any other

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[9] This sentence originally stated, "Any dispute, controversy, interpretation or claim for, but not limited to, breach of contract, any form of negligence, fraud or misrepresentation or any other theory of liability arising out of, from or related to this contract, the inspection or inspection report shall be submitted to final and binding arbitration under Rules and Procedures of the Expedited Arbitration of Home Inspection Disputes of Construction Arbitration Services, Inc."

theory of liability arising out of, from or related to this contract, the inspection or inspection report shall be submitted to final and binding arbitration."

## ORDER

The Court hereby stays the proceedings between Plaintiffs and the Inspector Defendants pending the outcome of arbitration. Because the Court has invalidated the arbitrator selection clause, the parties shall meet and confer to identify a mutually-agreed substitute arbitrator. The Inspector Defendants' motion to dismiss, in all other respects, is hereby denied without prejudice.

SO ORDERED this 9th day of August, 2018

Robert A. Mello
Superior Judge

## ARBITRATOR'S DECISION (NOVEMBER 9, 2018)

STATE OF VERMONT, SUPERIOR COURT
CIVIL DIVISION, CHITTENDEN UNIT

COLIN MASSEAU and EMILY MACKENZIE,

*Plaintiffs,*

v.

SCOTT and SHARON LUCK; GUY HENNING, and BRICKKICKER/GDM HOME SERVICES, INC.,

*Defendants.*

Docket No. 616-6-17 Cncv

Pursuant to an ORDER of the Chittenden Unit Superior Court, Plaintiffs and Defendants Henning and GDM (not including the claims against Defendant Luck) must arbitrate their case. The relevant parties have selected James W. Spink as the sole arbitrator.

The parties conferred with the arbitrator on 27 September, 2018 and agreed that the first order of business is to address and decide the pending VRCP 12(b)(6) motion to dismiss the claims of Mr. Masseau and Ms. MacKenzie against GDM and Mr. Henning. The parties have agreed that I may consider all submitted documents in addition to the motion papers and I am empowered to decide the pending motion.

I have now considered all relevant documents and have considered the arguments of counsel.

All claims against GDM and Mr. Henning are DISMISSED. I will briefly state the reasons supporting this decision:

The scope of the contractual undertaking by GDM/Henning is set forth in the contract between these parties and is unmistakably limited in scope. The two page contract (face and reverse) indicates, in several locations, that the inspection is limited in scope. Mr. Masseau chose the "Standard Home/Building Inspection" at a cost of $375. (He could have opted for a more comprehensive inspection—at a much greater cost—but chose not to do so. In addition, he could have opted for an a la carte inspection of one or more environmental or additional services but opted not to).

Significantly, the reverse side of the contract in question states: "The Client acknowledges what is being contracted for is a building inspection and not an environmental evaluation and the inspection is not intended to detect, identify or disclose . . . the presence of asbestos. . . . All of the foregoing items are outside the scope of the services provided under this contract, unless otherwise agreed to in writing and signed by both parties." There is no such additional writing.

At the bottom of page two, the contract states: "There are many aspects pertaining to the condition, function and operation of buildings . . . that go beyond the standard home/building inspection scope and procedure. . . . No list will ever be complete but the items highlighted below serve as a partial list of those items beyond the capacity of our work: . . . Assessment of environmental hazards of any type"

The Administrative Rules For Property Inspectors do not aid Plaintiffs' claims. Rule 3.2 (e)(3)(C) states that (e) General Limitations. The inspector is not required to: (3) determine: (C) the presence, absence, or risk of asbestos . . . or any other environmental hazard. . . provided, however, that licensees shall report visible and patent evidence of asbestos . . . "

There can be, on these facts, no assertion or claim that there was "visible and patent" evidence of asbestos in this home at the time of inspection. Indeed, asbestos wasn't discovered until the new owners began their renovation work on the ceiling. The sellers had represented to the buyers that there was no asbestos in this home; an assertion that the buyers had every right to rely upon and apparently did rely upon. The claims against the Lucks are in no way affected by this decision.

A careful reading of the Complaint (notably paragraphs 10-15, 28-29, 38, 40, 47, 54 and 60 but considering the entire document and all separate theories and claims presented), it is clear that the fundamental assertion of alleged wrongdoing by the inspector is that Mr. Henning and GDM failed to warn or advise these new homeowners of the possibility that there might be hidden asbestos in this house, particularly in the stucco ceiling(s). While it is asserted that it is "common knowledge" that homes built in the 70s or homes with stucco ceilings might harbor hidden asbestos and while it is asserted that Vermont law "requires" an inspector to give people such as these buyers recommendations for further evaluations by specialists (including disclosing the potential existence of asbestos), there is no support offered for these conclusory assertions.

On the contrary, the terms of this contract make clear that there is no such obligation and the Administrative Rules also support the contrary conclusion. The Glassford decision—discussed in the motion papers by both parties—is inapposite on these facts.

Accordingly, I am required to conclude that the terms of the contract between these parties clearly shows that the inspection was limited in scope; clearly excluded—by its express terms—any obligation to examine for asbestos; and was understood by Mr. Masseau to be a standard (limited) inspection. Additional inspection services were made available to plaintiffs but were declined. Taking as true all factual (non-conclusory) allegations of the Complaint, it is clear that there is no factual basis to support any of the plaintiffs' asserted claims against GDM or Mr. Henning.

Again, this decision in no way limits or affects plaintiffs' claims asserted ins heir sellers who remain named defendants in this case.

/s/ James W. Spink
Arbitrator

Dated: 11.9.2018

# INSPECTION CONTRACT
# (OCTOBER 17, 2016)

## 1a. CONTRACT PROVISIONS

### ***THIS IS A LIMITED INSPECTION***
### PLEASE READ CAREFULLY

With payment of the inspection fee as consideration, the Client, whose signature appears on this contract ("Client") and The BrickKicker/GDM Home Services, LLC ("Inspection Company") agree to the full and complete acceptance of the following Contract Provisions and Conditions (see reverse side).

### Inspection

It is our understanding and agreement that this inspection is (a) limited in scope, (b) not a Building Code compliance inspection, and (c) being-was conducted in accordance with all conditions and provisions listed here or on the reverse of this page and are a part of and included with this Property Inspection Report.

### The Standard Home/Building Inspection

The Standard Home/Building Inspection ("Standard Inspection") is a visual, non-invasive examination of the essential external and internal structural components, readily accessible heating, cooling, electrical and plumbing systems of the building as defined under the standards and scope for home inspections established by the American Society of Home Inspectors (ASHI) or the *National Association of Home Inspectors* (NAHI). The Standard Inspection is performed by a generalist who will report the conditions and symptoms observed, but not the cause or remedy.

In the Standard Inspection the inspector will: observe the structural components of the house and garage, wall cladding and trim, roofing, flashing, chimney exterior, decks and balconies. The inspector will operate permanently installed heating systems using normal controls, the central cooling system when weather permits, plumbing fixtures, built-in appliances and a representative number of electrical outlets, doors, and windows. The inspector will also generate a Property Inspection Report addressing those items covered by the Standard Inspection.

In the Standard Inspection the inspector will not: remove floor or wall coverings, move furniture or stored items, open walls or perform any type of destructive testing. The inspector will not dismantle equipment, operate shutoff valves, engage pilot lights or inspect systems that have been shut down. Additionally, the inspector will not inspect items inaccessible because of soil, vegetation, walls, floors, carpets, furnishings or household belongings, water, ice, snow, or other conditions that would be a danger to the inspector. The inspector will not render an opinion or generate a Property Inspection Report addressing those items that are beyond the scope of the inspection.

**The Comprehensive Home / Building Inspection**

The Comprehensive Home/Building Inspection ("Comprehensive Inspection") is conducted by a team of professionals, requires approximately eight hours to complete and requires a second day visit. A Comprehensive Inspection will automatically require a seven to ten day lead time. The Comprehensive Inspection covers all the elements of the Standard Inspection and additionally includes: electric circuit load analysis, heat

distribution by volume analysis, in-depth inspection (which requires dismantling) of furnaces, boilers, heat pumps, central air conditioners. It will also include: heat loss surveys, video cams of main sewer lines and chimneys, and full operational testing of windows, doors, electrical outlets, switches and fixtures. The Comprehensive Inspection is much more costly than the Standard Inspection (a minimum $3,500 fee will be charged) and requires the Clients execution of a separate contract distinct from this contract.

Inspection fee: $3,500.00 minimum (This service must be scheduled separately.)

## Acceptance of the Standard Home/Building Inspection

By virtue of your marked acceptance and initials below, you acknowledge the following:

- You understand the difference between the Standard Home/Building Inspection and the Comprehensive Home/Building Inspection;
- You understand that the Comprehensive Home/ Building Inspection is more costly than the Standard Home/Building Inspection; and
- You agree that the inspection you are contracting for is the Standard Home/Building Inspection, and not the Comprehensive Home/Building Inspection.

Inspection Fee* $ 375.00

☑ Accepted with Client's or Client Agent's Initials:

CNM

* Subject to inspector's on-site review

## Environmental & Additional Services

As part of the document selection that accompanies every inspection report prepared by the Inspection Company, there will be a reference to the environmental and safety concerns of Lead, Asbestos, Radon Gas, Carbon Monoxide, Molds and Mildew. Although testing or inspecting for any of the above service is beyond the scope of the Standard Home/Building Inspection, The Inspection Company may offer testing or inspections of the following elements for an additional charge independent of the Standard Home/Building Inspection. Services accepted are priced below:

☐ Radon $ _____

☐ Termite (wood destroying insects) $ _____

☐ Other $ _____

☐ Other $ _____

Total Environmental and Additional Services:

$ _____

☐ Accepted with Client's or Client Agent's Initials:

_____

## Final Walk-Through

The inspection recites the condition of the property AT THE TIME OF THE INSPECTION ONLY and is not a substitute for the Client's responsibility to perform a complete and thorough pre-settlement walk-through. A non-exhaustive final walk-through checklist is provided as part of the Inspection Report documents for the Client's use. The Inspection Company accepts no responsibility for the final walk-through unless the Inspection Company performs the final walk-through. A final walk-through may be performed by the Inspection Company, at the Clients request, and arranged for an additional fee to be described in a space above.

## Limitations/Use of Inspection Report and Related Services

The inspection findings, any reporting and-or testing results rendered or described above are performed and prepared for the confidential and exclusive use and possession of the Client and are NOT intended to provide complete information about the home-building. Neither the inspection findings, any reporting or testing results should be solely relied upon and/or used to make decisions as to whether or not the home/building should or should not be purchased. The inspection findings, any reporting or testing results are the sole property of the Client and are not transferable to any other party. Disclosure: The Seller may be required to disclose certain issues to the Buyer. Any issues previously disclosed should be considered by the Buyer and communicated to the Inspection Company prior to the above services being performed.

Total Fee All Services $ 375.00

PAYMENT IS REQUIRED AT THE TIME OF SERVICE

Please make check payable to: The BrickKicker

I understand this inspection is being conducted solely for my purposes and use and is not transferable. I agree to the Contract Provisions and Inspection Contract Conditions (on reverse), and acknowledge my responsibility to thoroughly read and carefully interpret the inspection report and its accompanying material. Additionally, I authorize, upon request disbursement of the inspection report and any accompanying materials or documents to those parties designated as my agent or representative pertaining to the transaction associated with this address.

Address Inspection

134 Osgood Hill Rd, Essex Jct, VT 05452

/s/ Colin Masseau

Date 10/17/2016

The BrickKicker, by:

/s/ {illegible}
Agent/Inspector

Date 10/17/2016

CONTRACT IS SUBJECT TO BINDING ARBITRATION
***THIS IS A LIMITED INSPECTION***

## 1b. INSPECTION CONTRACT CONDITION

1. This inspection (a) is limited to the major systems of the building and improvements, (b) renders only the opinion of the inspector and (c) is based upon items readily accessible and observable. This inspection is essentially visual, not technically exhaustive and, in some instances, only provides for sample testing. It does not imply that every defect will be discovered. The Client agrees to accept all risks that are concealed from view, inaccessible to the inspector at time of inspection, or excluded from inspection by the terms and conditions of this agreement. This contract does not include within its scope any of the building's systems, structures, or components which are inaccessible, concealed from view, or which cannot be inspected due to circumstances beyond the control of inspector. It is understood the inspector will not perform invasive testing or examinations, or move furniture or fixtures in order to conduct the inspection.

2. This Property Inspection Report recites symptoms observed, but does not conclusively establish the cause of any such symptom or defect; such cause(s) can only be determined by further detailed investigation. IT IS FULLY UNDERSTOOD AND AGREED that any such investigation and determination is beyond the scope of this inspection.

3. The Client acknowledges that observations communicated to the Client during the course of the inspection, or findings included in the Property Inspection Report, which may be outside the scope of the Standard Home/Building Inspection, are not to be construed to establish a standard or imply an expanded

scope of the inspection. Any such observations or findings are offered merely as additional information.

4. The Client acknowledges what is being contracted for is a building inspection and not an environmental evaluation and the inspection is not intended to detect, identify, alert, or disclose any health or environmental concerns regarding the building(s) and/or adjacent property, including, but not limited to, the presence of asbestos, radon, lead, urea formaldehyde, fungi, mold, conditions related to mold, bio-organic growth, conditions related to animals, rodents, insects, wood-destroying insects or organisms, pathogenic organisms, PCB's, or any other toxic materials or substances contained in the water, air, soils, or building materials or products. All of the foregoing items are outside the scope of the services provided under this contract, unless otherwise agreed to in writing and signed by both parties.

5. As a condition precedent to pursuing any claim against the Inspection Company arising out of this inspection or subsequent Property Inspection Report, no matter the theory of liability, the Client must first provide written notice of the claim to the Inspection Company within a reasonable time after taking possession of the property. Inspection Company must be allowed to re-inspect the subject properly to investigate the claim, BEFORE ANY REPAIRS ARE MADE, except in an emergency, prior to any resolving action. THE CLIENT UNDERSTANDS AND AGREES THAT FAILURE TO GIVE SUCH NOTICE OR OPPORTUNITY TO REINSPECT AS STATED ABOVE SHALL CONSTITUTE A WAIVER OF ANY AND ALL SUCH CLAIMS.

6. Any dispute, controversy, interpretation or claim for, but not limited to, breach of contract, any form of negligence, fraud or misrepresentation or any other theory of liability arising out of, from or related to this contract, the inspection or inspection report shall be submitted to final and binding arbitration under Rules and Procedures of the Expedited Arbitration of Home Inspection Disputes of Construction Arbitration Services, Inc. The decision of the arbitrator appointed thereunder shall be binding and judgment on the Award may be entered in any court of competent jurisdiction. If no arbitration proceeding is initiated by either party within one year of the date of the inspection report, the failure to initiate the arbitration proceeding will be considered conclusive evidence that the parties are satisfied that each has properly performed their obligations under this agreement and any further action is deemed waived and forever barred.

7. Anything to the contrary notwithstanding, payment of the inspection fee within ten (10) days of the inspection is a condition precedent to any right or interest in the inspection, or the Property Inspection Report, and to all claims for relief, redress, or damages against the Inspection Company.

8. No representations or warranties have been made concerning the property's conformance with applicable government building codes or The Comprehensive Environmental Response Compensation and Liability Act 1980 ("CERCLA"), as amended, pertaining to environmental hazards. It is agreed that the inspector will not, as part of this inspection, determine compliance with installation guidelines, construction documents, manufacturers' specifications, building codes, local ordinances, zoning regulations, covenants,

or other restrictions, including local interpretations thereof. The Inspection Company offers no guarantee or warranty, whether express or implied, as to the future condition of the subject property. THE INSPECTION COMPANY EXPRESSLY DISCLAIMS ANY AND ALL EXPRESSED AND/OR IMPLIED WARRANTIES PERTAINING TO THE PROPERTY'S MERCHANTABILITY AND/OR FITNESS FORA PARTICULAR PURPOSE.

The Inspection Company is not an insurer and the Client will obtain from an insurer any insurance the Client desires. The amount the Client pays to the Inspection Company is based entirely upon the services performed by the Inspection Company and the limited liability assumed by the Inspection Company pursuant to this contract is unrelated to the value of the property or the property of others located in the premises. In the event of any loss or injury to person or property, the Client agrees to look exclusively to the Clients' insurer to recover any damages. The Client waives all subrogation and/or other rights of recovery against the Inspection Company that any insurer or other person may have as a result of paying any claim for loss or injury to person or property.

9. If any provision of this contract shall for any reason be held invalid or unenforceable (except for the payment provision contained herein), such invalidity or unenforceability shall not affect the other provisions of the contract, and the contract shall be construed as if such invalid or enforceable provision had never been contained in the contract.

10. The parties agree that this contract contains the entire agreement and understanding between the parties and that its terms are contractual in nature

and supercede all prior agreements and understandings, whether oral or written, between the parties.