

IN RE THE ARBITRATION OF

WALTER and PAIGE SCOTT,

Plaintiffs,

v.

THE TERMINIX INTERNATIONAL  
COMPANY L.P., TERMINIX  
INTERNATIONAL, INC. and  
BRENT VANN,

Defendants.

Civil Action No. 2010-903755

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ARBITRATOR'S DECISION AND AWARD

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This matter comes before the undersigned Arbitrator on Plaintiffs Walter and Paige Scott's ("the Scotts") claim for damages against Defendants, The Terminix International Company, L.P. and Brent Vann (collectively, "Terminix"). Having conducted a hearing on the merits on June 1, 2, and 3, 2011, the undersigned makes the following findings of fact and conclusions of law.

**Introduction**

Terminix, a national provider of termite control services, has serviced the Scotts' home in Mountain Brook, Alabama since 2001. When Terminix began servicing the home in 2001, the home had been serviced by another termite service company, Cook's Pest Control. Termites were discovered in the home in 2001 during Cook's tenure and repairs were made. Allegedly, no live termites have been observed in the home since 2001. However, termite damage was

discovered in 2010 in an area by the window in the lower level of the home. One of the disputes in this case is whether this particular damage is old damage that was not repaired in 2001 or new damage that has resulted from an undiscovered infestation. The Scotts seek compensatory and punitive damages for Terminix's alleged fraudulent conduct.

### **FINDINGS OF FACT**

1. Subterranean termites are cytobiotic creatures, secretive, and difficult to find and see. The presence of live termites can be established either by direct visual sightings or by circumstantial evidence. Subterranean termites live in the soil – the cool zone. Termites live in colonies underground which can contain more than one million termites. Termites come up from the soil into homes and get into structures. They can enter into structures through openings as small as 1/32<sup>nd</sup> of an inch.

2. Structures that connect to the ground are vulnerable to termite infestation. Once termites enter a home, they eat cellulose-containing material, such as wood, books, boxes, carpet-backing, drywall, paper, and furniture. Once a reliable food source is found, termites return to it again and again. Termites eat the wood between the rings in the wood.

3. It is difficult to predict where the damage will occur. Plaintiffs' experts testified that it is a rule of thumb that damage will occur 3 to 5 feet of the termite's entry point. Termite damage extends beyond what is visually observable.

4. The Scotts' home was inspected by Cook's Pest Control in June 1995. The inspection revealed no active subterranean termite infestations. However, the inspection report showed there had been a previous infestation which was treated in 1986.

5. In 2001 the Scotts discovered suspected termite damage in the window sill of a downstairs apartment. They called Cook's Pest Control to determine if it was in fact termite damage. Live termites were indeed found in the window sill area, and the area was repaired. The Scotts themselves paid for the repair since the Cook's bond required it only to retreat the area, not to repair it. The Cook's service was then cancelled.

6. Soon thereafter the Scotts met with a Terminix sales representative. Terminix sells its termite services on the basis of its expertise in the highly regulated termite control industry. The company represented to the Scotts that it would "provide the necessary services to control or protect against subterranean termites." A sales brochure described the Terminix Subterranean Termite Baiting Protection Plan which involved killing subterranean termites in their colonies before they entered customers' homes. As described in the brochure, the system was "the most effective subterranean termite elimination or control method available," and constituted an early warning device that "constantly helps to monitor your property for new subterranean termite colonies."

7. The Scotts decided to purchase the termite control services offered by Terminix in April, 2001. They signed a contract with Terminix for the Termite Baiting System Protection Plan. Terminix agreed, among other things, to install the baiting system, monitor the system, add termite bait to and remove it from the system as appropriate and expected to eliminate or control the termite colony within 6 to 24 months from commencement of this program. The "Inspection Graph" incorporated into the contract recorded termite activity in the downstairs basement window area. Terminix promised to pay for any new subterranean termite-related damage that might occur.

**Terminix Failed to Inform the Scotts that Their Home Didn't Meet Certain Minimum Basic Requirements and Thus Remained Vulnerable to Termite Infestation.**

8. Terminix determines eligibility for its services by reference to certain Minimum Basic Requirements which must be met to successfully control termites. If even one of the criteria isn't met, there is no reasonable chance to prevent infestation and the property doesn't qualify for a renewable contract. Among the eligibility requirements are the following:

(1) Adequate clearance and access to all areas of the understructure (a minimum of 14 inches of clearance should exist between the bottom of the floor joists and the soil in the crawlspace).

(2) Moisture hazards adequately corrected according to Terminix Unit Operations.

(3) Wood members are above outside grade, or structural modification or chemical treatment provided.

(4) Any debris removed from under and around the structure.

(5) No wood members in direct contact with the soil or embedded in concrete.

(6) Termite control treatment applied according to Terminix Unit Operations for conventional constructions, so that all known termite infestations are eliminated and all potential entry points receive adequate coverage. This includes the treatment of foundation, pier and veneer voids; the soil inside and outside foundation perimeters, around piers and soil pipes, etc.

(7) The soil beneath dirt-filled boxed porches and other attached slabs thoroughly treated according to the Terminix Unit Operation that is most appropriate for the conditions present.

(8) Special termite control hazards (fireplace, planter boxes, secondary infestations, multiple voids, etc.) treated according to Terminix Unit Operations.

(9) Structural modifications performed according to Terminix Unit Operations and in compliance with local building codes.

(10) Existing termite damage properly repaired, replaced or clearly described on the graph and acknowledged by the property owners' signature.

(11) A complete inspection made by the supervisor or termite professional-in-charge.

(12) Graph of the job, and/or damage report completed in full detail, including the description and location of repairs, modifications, visible damage, suspected hidden damage, point of previous live infestation, and any other condition that may affect future control or customer relations.

9. Accordingly, Alabama law sets detailed termite treatment standards:

80-10-9-.20 – Termite Treatment Requirements

Minimum requirements for subterranean termite control of eradication in addition to treatment specifications of label and labeling:

(1) Access Openings. Provide suitable access opening to partially excavated areas and to any other areas requiring inspection or treatment for presence of subterranean termites.

(2) Sanitation. Remove all cellulose-bearing debris such as scrapwood, form boards, wood chips, paper, stumps, etc., from underneath or immediately adjacent to a building which would interfere with effective treatment and inspections. This excludes shavings or other cellulose material too small to be raked with the tines of an ordinary garden rake or other suitable implements; large stumps or roots that are too sound to be removed shall be trenched, drilled or rodded and treated provided they are six (6) inches or more from wood superstructure.

(3) Clearance. Provide by excavation, sufficient space for application of proper control measures and inspection by a person to all crawl space areas of a building. In any case, minimum clearance between soil and bottom of floor joists shall be twelve (12) inches, such clearance for subsills or supporting girders shall be eight (8) inches. If foundation footings are less than twelve (12) inches below edges of joists, subsills, or supporting girders, a sufficient back of soil shall be left adjacent to footings for support purposes.

(4) Wood-to-ground contacts. Break all wood-to-ground contacts underneath and outside of structure. Wooden steps, support piers, trellises, lattice work and other such wooden parts of building shall be set on a concrete base or other base which is impervious to termites or shall be altered so that they are not in direct ground contact. The top of concrete base or other base shall be not less than four (4) inches above the ground. If because of financial or other consideration, the property owner does not give written consent to the removal of wood to ground contacts, wood treatment and soil treatment at the point of contact shall be used. Pressure treated piling foundations are excepted from this requirement.

(5) Termite Tunnels. Scrape all subterranean termite tunnels from foundation walls, pillars, pilasters, piers, chimney, and step buttresses, and any pipes and other structures below the sill line.

(6) Treatment of Voids. Approved chemical(s) shall be applied to cracks and voids in foundation walls, piers, pillars, chimneys, pilasters, and step buttresses, and any void created by their placement, and other structure(s) or area(s) likely to be penetrated by subterranean termites. Chemical(s) shall be applied under sufficient pressure to treat all cracks and voids therein below level of application. It shall be the responsibility of the Permittee to adequately treat these areas. In concrete block construction, drilling will not be required where accessibility to voids is already available through construction.

(7) Treatment of Dirt-Filled Area. Treat soil under dirt-filled structures such as porches, carports, driveways, terraces, or other similar

structures attached to the building by voiding, rodding, and/or drilling. It shall be the responsibility of the Permittee to adequately treat these areas.

Spot Treatment. In the event of less than complete treatments (spot treatments), the contract shall specify spot treatment and shall clearly identify the areas treated.

10. Despite Terminix's Minimum Basic Requirements and the requirements of Alabama law, it appears the Scotts' home did not meet the Minimum Basic Requirements and Terminix's treatment did not meet the standards of Alabama law in several respects:

(1) Adequate clearance and access did not exist with respect to certain areas of the Scotts' home, thereby rendering those areas inaccessible to proper inspection and treatment. Among other things, the structural modifications described in Unit Operation 123 should have been performed to treat entrances to the Scott' basement slab plumbing access.

(2) Certain moisture hazards were not adequately corrected in accordance with Terminix's Unit Operations which describe how to properly fix and treat hazards. Among other things, Unit Operation 104 should also have been performed to the basement's plumbing access to provide an access door to inspect or treat the plumbing penetration.

(3) Certain wooden structures were below outside grade and that structural modifications or chemical treatment were not adequately provided to those areas. Among other things, excessive moisture in the Scotts' crawl space were not corrected in accordance with Terminix's Unit Operations which describe how to correct excessive crawl space moisture.

(4) Wooden debris and board scraps had not been removed from underneath certain portions of the Scotts' home. Among other things, the wooden basement bedroom door is below grade and untreated, but Unit Operation 148 was not performed to correct the problem.

(5) Certain wooden structures were in direct contact with the soil around the Scotts' home. Among other things, debris in the form of scrap wood, which created a termite hazard, was left in the crawl space by Terminix in non-

compliance with Unit Operation 109. This operation requires the removal of all cellulosic material.

(6) Termite control treatment was not applied according to Terminix Unit Operations so as to ensure that all potential entry points received adequate coverage. Among other things, wood in the form of an Ivy trellis created problematic wood-to-soil contact.

(7) Soil beneath certain slab areas was not adequately treated. Among other things, termite control treatments were not properly applied around the slab front porch and side porch. The soil beneath these porches should have been treated in accordance with Unit Operation 127 by drilling through the slab to reach and treat the soil.

(8) Certain special termite control hazards were not adequately treated. Among other things, special termite control hazards exist in the form of triple-brick foundation voids. Unit Operation 131 requires drilling and treatment of the voids. The sheathing in the area of the triple-brick foundation walls should have been pulled away, and visually inspected.

(9) Certain necessary structural modifications were not performed as required by Terminix's Unit Operations. Among other things, structural modification should have been made to the crawl space vent walls and to make access to a porch on the front of the house to make these areas accessible for treatment and inspection as required by Unit Operations 107 and the Alabama Termite Code.

(10) Existing termite damage was not clearly described on Terminix's graph.

(11) A properly authorized Terminix representative did not adequately inspect the Scott's home as required by the Minimum Basic Requirements.

(12) The subject graphs did not provide the necessary detail to describe repairs, modifications, visible and suspected damage and other conditions.

**Terminix's Misrepresentations and Failure to Make Structural Modifications  
Contributed to the Scotts' Damages**

11. From the standpoint of proximate cause, one of the Scotts' experts stated that Terminix's misrepresentations and failure to perform the above Unit



Operations contributed to the Scotts' termite damage. Since none of the twelve Minimum Basic Requirements were met, the arbitrator concludes that there was no reasonable chance to prevent infestation and damage before major damage could be discovered. Indeed, even if one Minimum Basic Requirement is not met, the property is at risk of termite infestation.

12. Terminix is well aware of this risk, since its sales literature states: "If any of the Terminix Minimum Basic Requirements . . . cannot be completed for any reason, then a Terminix Guarantee may not be issued." Yet a Terminix Guarantee was issued on the Scotts' home. This, in effect, was a representation that the Scotts' home did not appear to be at risk of further termite infestation and that all of the Minimum Basic Requirements had been met.

13. Yet, a Terminix Termite Baiting System Checklist, completed by a Terminix representative, falsely answered "No" to the question of whether the following conditions existed:

- (1) Extensive termite infestation or damage.
- (2) Stucco/brick/exterior siding over wood frame where wood frame is at or below grade.
- (3) Wood/cellulose material in direct contact with the ground.
- (4) High moisture condition/water leakage.
- (5) Inaccessible crawl space.

14. Contrary to actual conditions at the Scotts' home, the checklist present a false picture. In so doing, it created the false impression that then-

existing conditions did not require correction. If any of the five conditions had been marked “yes” as they truly were, “the structure [would] only qualify for a *Limited Retreatment Plan*. Upon all conditions being corrected and physically verified by and authorized representative of the company, the treated structure may be transferred to the **Subterranean Termite Protection Plan.**”

15. Terminix thus failed to disclose that the twelve Minimum Basic Requirements should have been, but were not, satisfied. The company did not disclose that the home had no reasonable chance to be protected against termite infestation unless major modifications were made to the structure and adjacent grounds to comply with the Minimum Basic Requirements. As noted by the Scotts’ expert, these omissions contributed to the Scotts’ termite damage.

**Terminix’s Operational Guidelines for the Sentricon Baiting System Required Periodic Inspections and Maintenance**

16. Terminix’s treatment plan for the Scotts’ home primarily contemplated the use of termite bait stations rather than chemically treating wood. It used a product called Sentricon created by Dow Chemical. Terminix was the first large company to become an authorized operator qualified to install Sentricon bait systems.

17. The Sentricon bait systems involve the placement of “bait stations” on the ground approximately 10 feet apart. Termites are “baited” by wood located in the stations. The termites feed in the station and consume

termiticides stored in the stations. These termites then release chemical-containing pheromones into the colony upon their return.

18. Terminix's sales literature touted the bait system's superiority over chemical barrier treatments which focused on keeping termites out of the home with little or no effect on the underground colony. According to Terminix, Sentricon stations are strategically placed around homes to help eliminate or control termite colonies. "It is checked periodically and bait is placed in the stations where termite activity is found. Once a colony is eliminated or controlled, monitoring continues to protect your home."

19. Terminix presented the Sentricon baiting system as the best available termite control system for the Scotts. Indeed, the sales literature indicated that termites would be attacked in the yard before they damaged the structure and, perhaps, could eliminate the entire termite colony.

20. A WDO ("Wood Destroying Organism") Application Record dated May 27, 2001 noted the installation of 26 Sentricon Baiting Stations around the home.

21. According to the Sentricon sales materials, it was necessary for Terminix to be especially aggressive in fighting the existing infestation:

"In cases of active structural infestation, your Terminix service professional has a variety of resources to customize a solution to meet your needs. In addition to the exterior baiting system, treatment options may include above ground bait stations placed directly on the infested area, and/or conventional liquid treatment. Once a colony has been eliminated or

substantially reduced, your house will be monitored periodically for signs of new termite activity.”

22. The Sentricon system’s success is predicated upon active management and monitoring of the bait stations. The sales literature informs consumers that they will receive:

- periodic termite monitoring (and baiting if necessary) by a trained Terminix service professional;
- an early warning device that constantly helps to monitor your property for new subterranean termite colonies;
- “[W]e’ll follow-up our initial subterranean termite baiting with timely monitoring of the bait stations.”
- [O]ne of our trained service professionals will monitor your baiting system periodically for signs of active subterranean termites.

23. The purpose of frequently monitoring the Sentricon bait system is to determine if live termites are active in the vicinity and have begun to consume the bait. Monitoring also helps determine whether Terminix needed to replenish the bait. Dow required Terminix to use its Prolix scheduling software to create an electronic record of inspection activity.

24. Terminix’s internal operational guidelines provide that Sentricon stations should be checked for termites at monthly intervals during peak months of termite foraging activity (spring and summer). In the southern United States, where termite pressure is high and the foraging season is longer, Sentricon stations may require monthly inspections until control or elimination has been achieved.

25. If stations are not inspected for extended periods (three months or more) during months of peak termite activity, termites may entirely consume the monitoring device and then abandon the station. According to the operations manual, “[t]his will reduce the effectiveness of the program.”

26. The label for the termite bait, Recruit II, manufactured by Dow and used in the Sentricon stations, contains similar inspection requirements:

“Inspect monitoring devices monthly for the first three months after installation at a site when termites are known to be active. If no termite activity at a site is documented, then monitoring can be done on a bi-monthly or quarterly basis.”

27. Although the Sentricon system contemplated that inspections would occur on a frequent basis, during a period of 71 months there was no inspection of the Scotts’ home in 64 of those months.

**Terminix Was Required by Law and Administrative Directive to Regularly Inspect Alabama Termite Customers’ Homes**

28. According to an online Terminix expert, annual inspections are “wise.” Beyond merely being wise, Terminix was required by law and by an administrative order to conduct annual inspections of its termite customers’ homes.

“Every person engaged in subterranean termite eradication and control work shall make an annual inspection of each job done during the term of the contract and shall report to the building owner in each instance as to whether there has been a reinfestation of subterranean termites.”

§ 2-28-9 Ala. Code (1975); See § 80-10-9-.16(5) Ala. Admin. Code.

29. In a memorandum dated February 5, 1997 from Terminix's Vice President and General Counsel to managers in Birmingham, Huntsville and Hoover, Terminix local offices were reminded that annual inspections on all active subterranean termite contracts must be performed as required by state law and regulations.

30. By administrative order dated April 22, 1997, a settlement was reached between the State of Alabama's Department of Agriculture and Industries and Terminix in which Terminix agreed to perform annual inspections of all properties under subterranean termite contracts. The administrative order noted that, among other things, Terminix was charged with the "[f]ailure to perform annual inspections on properties under subterranean termite contract for the year of 1995 and January, February and March of 1996." Terminix was "ordered to perform annual inspections of all properties under subterranean termite contract" and was directed to pay a civil penalty in connection with its conduct.

31. By email dated May 2, 1997, a Terminix representative provided the rationale for conducting annual inspections. The representative stated, "In any state it's wise to have an annual inspection for termites. Even though you may have entered into a termite agreement with a pest control company it's very easy for termites to find a tiny break in the barrier put down by a termite technician. Generally, if there is a break you will see 'swarmers' during the early spring which is your clue that a 'retreat' is necessary in a particular area."

32. In April, 2003, two years after Terminix began servicing their home, Walter Scott wrote a letter to the Terminix corporate office in Memphis to complain about the level of service. He relayed a series of conversations he'd had with various Terminix personnel about the absence of termite inspections, the failure to service his home for over a year, and the failure to assign his account to a field person. Scott expressed his concern about the situation and the lack of peace of mind it produced. He asked to have the inspections renewed, a station-by-station report of activity, new stations installed, and to know how the stations would be monitored. He also asked to have walls opened to make sure that the home didn't have new termites.

**Thorough Inspections are Necessary to Prevent or Detect Termite Damage**

33. Terminix inspection guidelines require technicians to perform much more than a superficial evaluation of a structure. To the contrary, Terminix's own inspection procedures contemplated a thorough investigation of the Scotts' home.<sup>1</sup>

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<sup>1</sup> Terminix's inspection guidelines list "The Top Ten Things to Remember About Termite Inspections." The top 10 things to remember include:

- (1) Inspections for termites demand thoroughness. Follow procedure and inspect carefully.  
\* \* \* \* \*
- (5) Termite tubes are not always exposed. They are often hidden in cracks. Use a flashlight and inspection mirror to check behind moldings and baseboards.
- (6) Always break tubes open to see if termites are active. On year graph, record termite tubes as active or inactive.
- (7) The graph is the MOST IMPORTANT document in termite control. It records the condition of the structure at the time of the original treatment. *Take the time to complete each graph thoroughly.*  
\* \* \* \* \*

34. Inspectors are expected to evaluate whether the home's construction may contribute to a termite problem, special conditions that might do so, parts of the structure that might extend below the surface, foundation cracks, wooden items near the house, moisture damage or wood decay, wooden window sills, door frames, crawlspaces, basements, sill plates, floor joists, foundation walls, the home's interior basement walls, areas where pipes extend up through the slab, cracks, and behind moldings and baseboards.<sup>2</sup>

35. Terminix's procedures require that technicians look beyond the visible. For example, they state that "Termite tubes are not always exposed. They are often hidden in cracks. Use a flashlight and inspection mirror to check behind moldings and baseboards." "Probe wood that looks suspect or is water-damaged or decayed." "In suspect areas, probe the wood and inspect under the edge of the carpet." "Always break tubes open to see if termites are active."

36. In addition to conducting *thorough* inspections, Terminix's guidelines prescribe *specific procedures* to follow when inspecting. Among these are the following:

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<sup>2</sup> According to Terminix's internal guidelines, inspections are "the critical element in a wood-destroying organism (WDO) control program. Not only will you need to look for signs of wood destroying pests, you will also need to note:

- (1) The type of construction.
- (2) How the construction of the building may contribute to the pest problem.
- (3) How the construction of the building may affect treatment.
- (4) Any conditions (e.g., excessive moisture) contributing to the pest problem.
- (5) Sensitive areas (e.g., walls, heat ducts in the slab) that may affect treatment."



“A. Inspect the exterior as you take measurements and draw the graph.

Note any important details on the graph.”

- Note if brick veneer or stucco extends below the surface of the soil.
- Note cracks in the foundation or other conditions conducive to an infestation.
- Inspect wooden items, such as landscape timbers, firewood, fence posts, and decorative logs, near the house for the presence of termites or carpenter ants.
- Look for moisture damage or wood decay to the fascia boards along the eaves of the house.

\* \* \* \* \*

- Inspect wooden window sills, door frames, and planters.
- Check for foundation vents if a crawlspace is present...

37. Inspect the crawlspace and/or basement, if present...

- Inspect sill plates, headers, and floor joists for signs of termite activity. *Probe* wood that looks suspect or is water-damaged or *decayed*. Note on your graph the areas where activity is found. Also note all visible damage on the graph.
- Inspect foundation walls and piers for termite tubes.
- Inspect pieces of scrap wood or paper on the ground of the crawlspace for termites.
- Look for signs of wood-boring beetles and fungi. Note locations of any activity on the graph.
- Note on the graph areas where wood is decayed, damaged or contains a high amount of moisture. Also note the dampness of the soil. The crawlspace may need more ventilation and/or a moisture barrier.

38. Inspect the interior of the house.
- Check basement areas for signs of termite activity, mud tubes, and damaged wood. In suspect areas, probe the wood and inspect under the edge of the carpet.
  - Inspect window and door frames for mud tubes and/or damage.
  - Inspect thoroughly areas near where pipes or drains extend up through the slats. This is usually in bathrooms and kitchens. Termites readily enter slab homes around pipe openings.

**The Failure to Perform Inspections Caused or Contributed to the Scotts' Damage**

39. Although Terminix contends there is no proximate causation between the failure to perform inspections and the termite damage, this contention ignores the fact that it was a Terminix inspection in February 2010 which discovered the damage. Its technician reported damage in the basement, damage in the crawlspace by the front door, and “window facing near kitchen where replaced before.” The results of the February 2010 inspection process is empirical evidence of the efficacy of inspections.

40. The Scotts' expert's description of the damage found in those areas, as well as Terminix's technician's description of the damage found in February 2010, leaves no doubt that it did not occur overnight and that much of it was observable, visible, and not hidden. (See paragraph 84). Hence, there is also no doubt that consistent, periodic, thorough inspections would have detected this damage at an earlier time. The arbitrator thus concludes that Terminix's failure to perform inspections as required caused or contributed to the Scotts' termite damage.

## Terminix Failed to Disclose that It Lost the Right to Sell or Service Sentricon Products

41. It appears that in 2004 or 2005 Terminix lost the licensing rights to service or sell Sentricon products. Terminix was thus no longer allowed to replenish any of the 26 baiting stations located at the Scotts' home. As noted above, both monitoring and replenishing bait stations are critical to the effectiveness of the system. Yet the Scotts were never informed of the fact that Terminix could no longer do either.

42. Nor were the Scotts informed that Terminix could no longer administer the Sentricon system as designed because it could not properly inspect and record inspections of the monitoring stations due to the lack of Dow's proprietary computer software.

43. Terminix thus did not disclose to the Scotts that the Sentricon stations were ineffective after the loss of the Dow licensing rights. Nevertheless, they continued to collect annual premiums without disclosing all of the material facts.

44. In 2007, the Scotts received a letter from Terminix entitled "Important information About Your Terminix Protection." The letter encouraged the Scotts to "update" their baiting system with another Terminix service, or to convert their baiting system to the Terminix Liquid Defend System. The Scotts were also informed that Terminix would no longer be using the Sentricon Baiting System but without disclosure of the significance of this event.

45. The Scotts then entered into a new contract with Terminix on April 18, 2007 to enroll in the Liquid Defend program. Terminix did not disclose the fact that through the loss of the Dow licensing rights two or three years earlier it had lost the right to offer any Sentricon-related monitoring or termiticide services. Nor did it disclose that the effectiveness of the Sentricon system had been severely impaired with the loss of the Sentricon licensing rights.

46. The April 2007 contract did, however, contain a "Waiver of Minimum Requirements for Subterranean Termite Control," as required by state law. State law requires that if for any reason there are omissions from the minimum requirements for termite treatment, each requirement omission must be explained in writing to the property owner and such writing becomes a part of the contract. In the Scotts' case, Terminix obtained a signed waiver from Walter Scott that it would not treat or drill "brick veneer on hollow block." Scott understood that no chemical treatment would be applied to the brick's open spaces or void because the surrounding ground and wood had already been treated.

#### **Damages to the Scotts' Home**

47. On February 4, 2010, the Scotts learned of newly discovered termite damage to their home. As noted above, a Terminix technician reported damage in the basement, the crawlspace, and the downstairs window facing near the kitchen (an area which had been replaced in 2001). Damage was also found in the bathroom, front of the house, mother-in-law suite, breakfast

nook, and kitchen. Walter Scott then spoke with Terminix about the damage and the company agreed to make repairs.

48. The 2010 inspection also noted damage in the “window facing near downstairs kitchen where replaced before. Under guest bathroom.”

49. The Scotts’ entomological experts examined an interior brick foundation wall adjacent to a basement window and “found it to be spider webbed with termite tubes.” This area was “honeycombed wood with mud packed in the rings of wood.” Another foundation wall immediately above the basement window contained more evidence of termite infestation. Sill plates under the dining room and kitchen showed evidence of termite tunnels. Another foundation wall under the crawlspace showed moisture at levels that would support termite infestation and wood decaying organisms. Cracks in the main level bathroom floor suggested termite damage in the area below this floor. The termite damage in this area could have been detected with proper inspecting. According to Terminix’s inspection guidelines, annual inspections should have thoroughly examined the foundation walls, wooden window sills, sill plates, crawlspaces, and floor cracks, the very areas found to be damaged in 2010.

50. The issue of whether the damage discovered in 2010 is old or new is resolved by Terminix’s own actions. Instead of denying responsibility for the newly-discovered damage, it undertook to make repairs. Thus, whether its actions constitute an admission of liability, an estoppel, or a voluntary

assumption of responsibility, the result is the same: Terminix has acknowledged its responsibility for the damage.

51. As noted above, termite damage has been discovered throughout the home. The damage has necessitated flooring and foundation repair, wall repair, bathroom repair, basement repair, and other demolition, structural, plumbing, drywall, painting, and other work. Further explorations are necessary to determine if additional damage exists. Any attempt to sell the home, even after repairs are completed, will likely require the disclosure of latent defects. Such disclosures will make the home virtually unsellable. According to tax estimates, the value of the structure has decreased in value by 78% from \$215,600.00 to \$47,900.00. One of the Scotts' experts testified that the diminished value of the home ranges between \$450,000.00 to \$550,000.00.

52. Although the Scotts' expert stated that most of the areas having damage were already damaged in 2001, the arbitrator rejects this statement as mere speculation since some of the damage found in 2010 was in the same area that was repaired in 2001. Moreover, since it had a contractual duty to repair only "new" damage, the fact that Terminix agreed to repair the damage is an admission or estoppel establishing that the damage was new. Indeed Terminix's own expert testified that there is no way to distinguish between damage that is 10 days old or 10 years old merely by looking at it. The arbitrator concludes, based on all the circumstances, that the weight of the evidence

establishes that the damage discovered in 2010 occurred after Terminix began servicing the Scotts' home.

### **CONCLUSIONS OF LAW**

#### **Fraudulent Inducement, Fraudulent Suppression, and Fraudulent Misrepresentation**

53. The Scotts allege that Terminix fraudulently induced them into entering a contract, and fraudulently suppressed or misrepresented material information concerning its services.

54. A claim of fraudulent misrepresentation and deceit requires a showing that (i) the defendant willfully misrepresented a material fact to the plaintiff; (ii) with the intent to induce plaintiff to act thereon; and (iii) the plaintiff did, without knowledge of its falsity, act upon the willful misrepresentation to his injury. § 6-5-101 Ala. Code (1975); Castleberry v. Goldome Credit Corp., 408 F. 3d 773 (11<sup>th</sup> Cir. 2005); Bell Aerospace Services, Inc. v. U.S. Aero Services, Inc., 690 F. Supp. 2d (M.D. Ala. 2010); Shuler v. Ingram & Associates, 710 F. Supp. 2d 1213 (N.D. Ala. 2010); AmerUS Life Ins. Co. v. Smith, 5 So. 3d 1200 (Ala. 2008); McCutchen Co., Inc. v. Media General, Inc., 988 So. 2d 998 (Ala. 2008); Osborn v. Custom Truck Sales & Service, 562 So. 2d 243 (Ala. 1990). The evidence in this case is clear that Terminix willfully and deceitfully misrepresented extremely material facts, upon which the Scotts relied to their detriment. From the very outset, Terminix misled the Scotts with respect to the vulnerability of their home to future termite infestation. The consequences to the Scotts have been devastating.

55. At a minimum, Terminix's conduct was reckless, which involves a misrepresentation of material fact without knowledge of the truth or falsity thereof, with the intent to induce the plaintiff to act, and the plaintiff acts thereon to his or her detriment. Ex parte Daimler Chrysler Corp., 952 So. 2d 1082 (Ala. 2006). There is no justification or rational explanation for Terminix's failure to disclose the truth to the Scotts concerning their home's vulnerability to termite infestation. The undisclosed failure of their home to satisfy any of the twelve Minimum Basic Requirements was extraordinarily important for the Scotts to know so as to enable them to take appropriate steps to protect their home against additional infestation. At the same time, it was patently obvious to Terminix that the home would remain vulnerable unless extensive structural and other modifications were made. Terminix did not inform the Scotts of these facts, caused them to believe that the Sentricon Bait System would be a sufficient remedy, and collected substantial annual premiums all to the Scotts' extreme prejudice.

56. The evidence is thus clear that Terminix suppressed the truth concerning the condition of the Scotts' home. Suppression is actionable when the defendant conceals and withholds material facts from the plaintiff and, without knowledge of these facts, acts to his or her injury. Under Alabama law, a claim of fraudulent suppression requires a showing of (i) suppression of material fact; (ii) that defendant has a duty to disclose or communicate; (iii) because of confidential relationships between the parties or because of



circumstances of the case; and (iv) injury resulting as a proximate consequence of the suppression or concealment. § 6-5-102 Ala. Code (1975); Castleberry v. Goldome Credit Corp., 408 F. 3d 773 (11<sup>th</sup> Cir. 2005). Inducement by the plaintiff to act is also a required element. See, e.g., AstraZeneca LP v. State, 41 So. 3d 15 (Ala. 2009); Ex parte Novartis Pharmaceuticals Corp., 991 So. 2d 1263 (Ala. 2008). Fraud in the inducement consists of one party's misrepresenting a material fact concerning the subject matter of the underlying transaction and the other party's relying on the misrepresentation to his or her detriment in executing a document or taking a course of action. Anderson v. Amberson, 905 So. 2d 811 (Ala. Civ. App. 2004); Graham v. First Union National Bank of Georgia, 18 F. Supp. 2d 1310 (M.D. Ala. 1998).

57. As noted above, in 2001 Terminix concealed from the Scotts the true vulnerability of their home in the absence of substantial modifications. The evidence also demonstrates that in 2007, when the Scotts' contract was renewed, Terminix again failed to disclose the truth concerning (i) its failure to perform 64 of 71 periodic inspections; (ii) its failure to maintain the Sentricon baiting stations and replenish them with bait; (iii) the loss of its license to service the Sentricon baiting stations two or three years before the Scotts were switched to a liquid-based system; and (iv) the significance of the above failures as well as the additional risk of termite infestation this created. The Scotts were entitled to know the full scope and range of Terminix's failures, the length of time over which these failures had occurred, and the ongoing failure to disclose the fact

that their home required extensive modifications to reduce the likelihood of termite infestation.

58. The arbitrator finds that the Scotts did not discover the fact that (a) their home was vulnerable to termite infestation in the absence of structural modification; (b) as many as 64 inspections had been missed; (c) the Sentricon bait stations had not been replenished in years; (d) Terminix had lost the right to service the bait stations; and (e) damage was occurring until after new damage was discovered in 2010. For these reasons, this action is not barred by the statute of limitations.

59. Based on the foregoing, the arbitrator concludes that the Scotts were fraudulently induced into entering into contracts with Terminix in 2001 and 2007. Neither the contracts nor the limitations of remedies and damages contained in these contracts are enforceable. Ex parte AIG Baker v. Orange Beach Wharf, LLC, 49 So. 3d 1198 (Ala. 2010); Ex parte Leasecomm Corp., 879 So. 2d 1156 (Ala. 2003); and Hillcrest Center, Inc. v. Rone, 711 So. 2d 901 (Ala. 1997).

60. The arbitrator finds that the Scotts are entitled to an award of compensatory damages to fairly and reasonably compensate them for their losses. The arbitrator is persuaded from the evidence that they have suffered devastating and unnecessary economic and emotional losses as a result of Terminix's conduct.

61. The arbitrator also concludes that Terminix should be punished in the form of punitive or exemplary damages. The purpose of awarding such damages is to punish the defendant and for the added purpose of protecting the public by deterring the defendant and others from doing such wrong in the future.

62. The arbitrator is persuaded, on the basis of clear and convincing evidence, and after taking into consideration the character the degree of the wrong in this case, that Terminix consciously or deliberately engaged in fraud, oppression, wantonness, or malice with regard to the Scotts. Terminix intentionally, recklessly, or deceitfully misrepresented or concealed material facts from the Scotts. Terminix oppressed the Scotts, for they have been subjected to cruel and unjust hardship in conscious disregard of their rights. Terminix's conduct was wanton and occurred with a reckless or conscious disregard of the Scotts' rights and property. Terminix's actions were malicious and gross, for they were without any justification or excuse and occurred in a manner which implies an evil intent. "Gross" misrepresentation or failure to disclose is one that is inexcusable, flagrant, or shameful. § 6-11-20(b)(1) Ala. Code; Wholesale Motors, Inc. v. Williams, 814 So. 2d 227 (Ala. 2001); Alfa Mutual Fire Ins. Co. v. Thomas, 738 Co. 2d 815 (Ala. 1999). Terminix acted wantonly, that is to say, with conscious disregard of the consequences of its actions. It was well aware of the need failed to adequately monitor the Sentricon bait stations it installed at the Scotts' home. Alabama law, Terminix's own operational

guidelines and sales brochure, and Sentricon instructions dictated that the stations should be checked for termites monthly, quarterly, or annually. However, Terminix conducted inspections of its Sentricon stations only seven times during a 71-month period.

63. The egregiousness of Terminix's conduct is underscored by the fact that its Alabama offices were under an administrative directive as of the late 1990s to conduct required annual inspections. The administrative directive obviously was intended to protect the public and property from situations such as those evidenced in this case.

64. The reprehensibility of Terminix's conduct is heightened by the history of infestation of the Scotts' home, a history of which Terminix was well aware. As Terminix knew, the Scotts turned to it because the service they received from their previous service provider had resulted in termite damage.

65. The oppressiveness of Terminix's conduct is underscored by its inexplicable decision to offer full-scale termite protection services to the Scotts without disclosing that their home failed to meet any of the twelve Minimum Basic Requirements for such service. Terminix knew that the Scotts' home—which was in the process of being treated and repaired for termite damage—was exceptionally vulnerable to future infestation. Yet Terminix not only failed to disclose these facts (and, indeed, its checklist falsely represented the actual condition of the home), but failed to inform them of steps needed to be taken to modify the home and reduce the risk of infestation. Instead, Terminix

collected the Scotts' annual premiums and gambled that an infestation would not recur. The Scotts lost that bet.

66. Finally, Terminix withheld the truth from the Scotts regarding the loss of its ability to service and maintain Sentricon products. Terminix had neither the software nor the poison it needed to fulfill its obligations to service and protect the Scotts' home. Yet Terminix did not timely disclose these facts to the Scotts to let them know the risk they faced or to give them the option of switching to another provider or using a chemical barrier to fight termites.

#### **ARBITRATION AWARD**

67. The undersigned arbitrator has carefully sifted through the evidence in this case, deliberated at length, and has soberly come to the above conclusions. The arbitrator concludes that Terminix has deliberately caused the Scotts to suffer for no just cause or excuse. It has ignored administrative orders of the Department of Agriculture. It has ignored its legal obligation and internal directives to periodically inspect and maintain its baiting stations. It has ignored its own Minimum Basic Requirements and failed to bring this issue to the Scotts' attention as required by law. It has ignored its obligation to disclose the truth to the Scotts concerning the condition of their home. Terminix's conduct shocks the conscience, for it knew the devastating consequences of failing to properly service the Scotts' home. The undersigned cannot in good conscience do what Terminix has done by ignoring his own obligation to render a result which will get Terminix's attention and incentivize it to change its behavior.

Accordingly, the arbitrator hereby enters the following decision and award:

**Compensatory Damages**

68. The Scotts have suffered enormous damage to their home. They now have a home which has the economic stigma of having extensive termite damage. The home may well be unmarketable. The Scotts have suffered significant and long-term inconvenience, worry, anguish, uncertainty, aggravation, and emotional distress. Consequently, the arbitrator finds that the Scotts are entitled to recover compensatory damages from The Terminix International Co., LP and Terminix International, Inc. in the amount of \$500,000.00 (FIVE HUNDRED THOUSAND AND NO/100 DOLLARS). However, the arbitrator finds in favor of Defendant Brent Vann for there is insufficient evidence of his involvement in the matters on which liability is based.

**Punitive Damages**

69. Despite herculean efforts by its able and outstanding counsel, Terminix's conduct defies explanation. One can only conclude that the Scotts were deliberately misled starting in 2001 and continuing year after year, and the Department of Agriculture was deliberately ignored during the same period. Consequently, the arbitrator finds that the Scotts are entitled to recover punitive damages from The Terminix International Co., LP and Terminix International, Inc. in the amount of \$500,000.00 (FIVE HUNDRED THOUSAND AND NO/100 DOLLARS).

### Costs and Arbitration Fees

70. The arbitrator finds that Terminix should be liable for all costs and arbitration fees. Claimants may submit a petition for costs for substantially the same costs as would be recoverable in an Alabama circuit court non-jury trial. Although the Scotts are obligated to directly pay the arbitrator for their share of arbitration costs, Terminix shall also reimburse the Scotts for their share of the arbitrator's fees and expenses.

### Conclusion

Accordingly, the arbitrator finds that Plaintiffs Walter and Paige Scott are entitled to recover the total amount of \$1,000,000.00 (ONE MILLION AND NO/100 DOLLARS) against Defendants The Terminix International Company L.P. and Terminix International, Inc., together with the Scotts' share of arbitration fees of \$20,000.00 (TWENTY THOUSAND AND NO/100 DOLLARS). All payments shall be made within 30 days from the date of this Order.

DONE this 11<sup>th</sup> day of January, 2012.

/s/ Kenneth O. Simon  
Kenneth O. Simon, Arbitrator

cc: David R. Creagh, Esq.  
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