CJ Johnson KALKSTEIN, JOHNSON & DYE, P.C. P.O. Box 8568 Missoula, MT 59807-8568 (406) 721-9800 (406) 721-9896 (fax) cj@kalksteinlaw.com

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SHIRLEY E. FAUST, CLERK
By\_\_\_\_\_\_
Deputy

Attorneys for Plaintiffs

IN THE FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

Complaint & Demand for Jury Trial in the above-captioned matter state as follows:

Mellem and

## **COMMON ALLEGATIONS**

1. The Mellems own residential property a , in Missoula ("the Property"). They purchased the Property from sellers in August 2013.

**Complaint and Demand For Jury Trial** 

COME NOW the Plaintiffs,

Mellem, and for their

2.	Inspections, Inc., is a Missoula-based professional home
	inspection service owned and operated by
	certified inspector with the American Society of Home Inspectors
	(ASHI).
3.	As an ASHI-certified inspector, was required to inspect and
	report on the Property in accordance with the ASHI Standards of
	Practice.
4.	acted as officer and agent for and is vicariously liable
	for the acts and omissions alleged against him in this case.
5.	
6.	Prior to the Mellems' purchase, the disclosed mold remediation
	in the basement and attic. had performed mold remediation work in
	the attic for the predecessors in interest, and subsequently
	performed basement mold remediation work during the
	ownership.
7.	
8.	

9.10.

11.

- 12. The Mellems' buy-sell agreement made their purchase contingent upon a home inspection. They contacted I and he inspected the Property on August 5, 2013.
- agreement. He presented a form agreement on the date of inspection that had not been forwarded to the Mellems or their real estate agent in advance of the inspection. Ms. Mellem's real estate agent contacted her by phone and explained that the home inspection. The agreement was then presented electronically to Ms. Mellem. She signed it over her handheld phone while at work in Utah.

- 14. Professional Property Inspection."
- 15. The "Professional Property Inspection" failed to report upon identifiable and material property defects throughout the Property.
- 16. Among other things, the "Professional Property Inspection" failed to identify: (1) grading and drainage defects; (2) structural defects in basement framing and supports; (3) evidence of long-term moisture problems in the basement, including cracks, discolored and rotting wood, rusted foundation metal; (4) residual mold in the basement and attic; (5) siding defects; and (6) gutter defects.
- 17. In support of land conclusion that "the attic appears to have had mitigation for moisture issues," the "Professional Property Inspection" indicated that trusses and sheathing "appear to have been sandblasted and painted with a mold inhibitor paint."
- 18. The attic was never sandblasted.
- 19. The "mold inhibitor paint" identified by leave was improperly applied and did not conceal all mold. Failed to identify an existing mold problem in the attic.
- 20. ASHI Standard 2.2 required that Mr. Rase report "systems and components designated for inspection in these Standards of Practice that

- were present at the time of the home inspection but were not inspected and the reason(s) they were not inspected."
- 21. The "Professional Property Inspection" identified no area of the grounds, basement, foundation, siding, gutters, structural supports, or attic that was not inspected.
- 22. The Mellems discovered the defects outlined herein after purchasing the Property in August 2013. The defects can likely be remedied, but at significant expense.



### **COUNT II – NEGLIGENCE**

27. The Mellems incorporate all prior paragraphs as if fully set forth herein.

- 28. failed to reasonably inspect the Property.
- 29. failed to reasonably report upon identifiable material defects at the Property.
- failed to adhere to applicable standards of care for the home inspection industry, including the ASHI Standards.
- and general damages in amounts to be proved at trial.

# COUNT III – MONTANA HOME INSPECTION TRADE PRACTICES ACT

- 32. The Mellems incorporate all prior paragraphs as if fully set forth herein.
- 33. acts and omissions as outlined herein violated the Montana Home Inspection Trade Practices Act.
- violation(s) of the HITPA have caused the Mellems special and general damages in amounts to be proved at trial.
- The acts and omissions giving rise to violations of the HITPA constitute unfair trade practices entitling the Mellems to treble or increased damages and attorney's fees under the Montana Consumer Protection Act. See M.C.A. §§ 30-14-1002; 30-14-1005; 30-14-103; 30-14-133.

# COUNT IV – MONTANA CONSUMER PROTECTION ACT

- 36. The Mellems incorporate all prior paragraphs as if fully incorporated herein.
- 37. Beyond the per se violation alleged at COUNT III, in pursuing the conduct outlined herein engaged in unfair or deceptive acts or practices in violation of the Montana Consumer Protection Act.
- 38. Such conduct includes unconscionable contract terms, including those effectively eliminating liability, when Mr. Rase knew or should have known that he was not inspecting in compliance with the ASHI Standards or Montana Home Inspection Trade Practices Act.

39.

40. The Mellems are entitled to treble or increased damages and attorneys fees. M.C.A. §§ 30-14-103; 30-14-133.

#### **DECLARATORY JUDGMENT**

- 41. The Mellems incorporate all prior paragraphs as if fully incorporated herein.
- 42. Among other things inspection agreement is adhesive, procedurally and substantively unconscionable, unreasonable in its terms and contrary to public policy.
- 43. The contract attempts to require the arbitration of all claims "except one for inspection fee payment[.]" The clause was not separately called out or conspicuously identified with typeface or emphasis different from that used for other provisions.
- 44. The contract requires that the client contact the home inspector regarding defects within ten days of discovery, and that failure to do so "shall constitute a waiver of any and all claims for said failure to accurately report the condition in question."
- 45. The contract attempts to limit recoverable damages "to an amount equal to the inspection fee paid multiplied by two (2), or to the sum of five hundred dollars (\$500.00), whichever sum shall be less, as liquidated damages, and not as a penalty, and this liability shall be exclusive."
- 46. The contract attempts to restrict the statute of limitations for contract claims (eight years) and tort claims (two or three years) to one year.

- 47. The foregoing clauses, among others, are unenforceable.
- 48. The Mellems seeks a declaration that the home inspection contract is unenforceable in whole or part. They are entitled to attorney fees.

WHEREFORE, the Mellems pray for judgment against the above-captioned Defendants for all special and general damages in amounts to be proven at trial; for their costs of suit; for increased damages under the MCPA; for their attorney fees under the MCPA, the Declaratory Judgment Act, and to the extent not invalidated, the parties' contract; and for such other and further relief as this Court deems just and proper.

### **DEMAND FOR JURY TRIAL**

The Mellems respectfully demand a trial by jury on all issues so triable.

DONE and DATED this 4th day of March, 2014

KALKS JEIN, JOHNSON & DYE, P.C.

C.J. Johnson, E

Attorneys for

Mellam