

In The  
**United States Court of Appeals**  
**For The Sixth Circuit**

—◆—  
**COFFEE BEANERY, LTD, et al.,**  
*Petitioners - Appellees,*

V.

**WW, L.L.C.; DEBORAH WILLIAMS;**  
**RICHARD WELSHANS,**  
*Respondents - Appellants.*

—◆—  
**ON APPEAL FROM THE UNITED STATES DISTRICT COURT**  
**FOR THE EASTERN DISTRICT OF MICHIGAN**  
**AT DETROIT**

—◆—  
**MODIFIED PETITION FOR REHEARING and**  
**SUGGESTION for REHEARING *EN BANC* of APPELLEES**  
—◆—

**Karl V. Fink**  
**Joshua R. Fink**  
**PEAR SPERLING EGGAN**  
**& DANIELS, P.C.**  
**Domino's Farms**  
**24 Frank Lloyd Wright Drive**  
**Ann Arbor, Michigan 48105**

**734-665-4441**

*Counsel for Petitioners - Appellees*

**Harry M. Rifkin**  
**COHAN, WEST, RIFKIN**  
**& COHEN**  
**201 N. Charles Street**  
**Suite 2404**  
**Baltimore, MD 21201**

**410-332-1400**

*Counsel for Respondents - Appellants*

**Mark J. Kriger**  
**LARENE & KRIGER**  
**645 Griswold**  
**Suite 1717**  
**Penobscot Building**  
**Detroit, MI 48226**

**313-967-0100**

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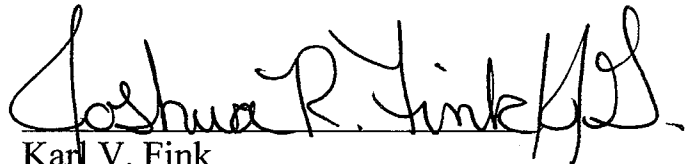
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## Appellees' Statement For Rehearing *En Banc*

The panel decision conflicts with the following decisions of the United States Supreme Court and the United States Court of Appeals for the Sixth Circuit and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions:

1. *Hall Street Associates, L.L.C., v. Mattel, Inc.*, \_\_\_\_ U.S. \_\_\_\_, 128 S.Ct. 1396, 170 L.Ed.2d 254 (2008),
2. *Buckeye Check Cashing, Inc. v. Cardegna*, 126 S.Ct 1204, 546 U.S. 400, 163 L.Ed.2d 1038 (2006),
3. *Prima Paint Corp. v. Flood & Conklin MFG. Co.*, 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed. 2d 1270 (1967),
4. *Green Tree Fin. Corporation-Alabama v. Randolph*, 531 U.S. 79, 121 S. Ct. 513; 148 L. Ed. 2d 373 (2000)
5. *Improv West Assoc., v. Comedy Club, Inc.*, \_\_\_\_ U.S. \_\_\_\_, 129 S.Ct. 45, 172 L. Ed. 2d 6 (2008)
6. *Dawahare v. Spencer*, 210 F.3d 666 (6th Cir. 2000), and
7. *Merrill Lynch, Pierce, Fenner & Smith v. Jaros*, 70 F.3d 418 (6th Cir. 1995).

November 25, 2008



Karl V. Fink

Joshua R. Fink

Pear Sperling Eggan & Daniels, P.C.

Attorneys of Record for Appellees

Coffee Beanery, Ltd.,

JoAnn Shaw

Julius Shaw

Kevin Shaw

Kurt Shaw

Ken Coxen

Walter Pilon

Owen Stern

## INTRODUCTION

Appellees respectfully request rehearing *en banc* from the Court's November 14, 2008 Amended Opinion.

### GROUND FOR REHEARING *EN BANC*

I. On March 25, 2008 the United States Supreme Court issued *Hall Street Associates, L.L.C., v. Mattel, Inc.*, \_\_\_ U.S. \_\_\_ 128 S.Ct. 1396, 170 L.Ed.2d 254 (2008) which held that the grounds for vacating or modifying an arbitration award set forth in §§10 and 11 of the Federal Arbitration Act (“FAA”) 9 U.S.C. §10, §11 are *exclusive*. “Manifest disregard of the law” is not a ground for vacating or modifying an award under §§10 or 11 of the FAA. The panel’s amended decision vacated the arbitration award solely on a finding that the Arbitrator showed “manifest disregard of the law.” The panel’s decision directly conflicts with *Hall Street*, and the panel’s decision does not address or otherwise attempt to follow the earlier *Hall Street* decision or subsequent decisions that have applied *Hall Street*.

II. The panel’s decision in this case is unique because it is the only decision in which a Sixth Circuit Court of Appeals panel has vacated an arbitration award for an arbitrator’s “manifest disregard of the law.” The panel’s application of the “manifest disregard of the law” standard directly conflicts with Sixth Circuit Court of Appeals precedent in *Dawahare v. Spencer*, 210 F.3d 666 (6th Cir. 2000),

and *Merrill Lynch, Pierce, Fenner & Smith v. Jaros*, 70 F.3d 418 (6th Cir. 1995). Those decisions state that “manifest disregard of the law” will only form a basis for vacating an award where the relevant law is clearly defined and the Arbitrator consciously chose not to apply it. Here, the law is not clearly defined and the Arbitrator consciously reviewed and applied the applicable law. The panel’s decision simply states that the panel disagreed with the Arbitrator’s legal conclusion which is impermissible review of the award.

III. The panel exceeded its authority under *Green Tree Fin. Corporation-Alabama v. Randolph*, 531 U.S. 79, 121 S. Ct. 513; 148 L. Ed. 2d 373 (2000) which held that an order compelling arbitration is a final, appealable order, when the order was entered in a matter where only the issue of arbitration was being disputed. Under clear 6th Circuit precedent, and 9 USC 16(a)(3), Appellants would have had to appeal the order compelling arbitration to preserve the issue on appeal. Appellants have waived their right to contest the arbitrability of the disputes because they failed to take an appeal from the order compelling arbitration. The panel exceeded its authority when it ruled on an issue not properly preserved on appeal.

Moreover, Appellants never asserted that the arbitration agreement itself was fraudulently induced. The panel’s decision directly conflicts with *Hall Street*, with *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 400, 126 S.Ct 1204, 163

L.Ed.2d 1038 (2006) which held that arbitration agreements must be treated independently of the parties' underlying contract, and with *Prima Paint Corp. v. Flood & Conklin MFG. Co.*, 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed. 2d 1270 (1967) which held that general fraudulent inducement challenges to a contract should be considered by the Arbitrator when there is an arbitration agreement. The panel did not consider the agreement to arbitrate independently of the franchise agreement when it ruled that the alleged fraudulent inducement of the franchise agreement resulted in the parties not being bound by the arbitration agreement.

## LAW AND ARGUMENT

**I. The Panel's Decision Directly Conflicts With *Hall Street Associates, L.L.C., Petitioner v. Mattel, Inc.*, \_\_\_ U.S. \_\_\_, 128 S.Ct. 1396, 170 L.Ed.2d 254 (2008).**

The panel's November 14, 2008 amended opinion held "because the Arbitrator showed manifest disregard of the law...we REVERSE the judgment of the district court and VACATE the Arbitrator's award." (Opinion at 1). In determining that manifest disregard for the law was a valid basis for vacating the arbitration award, the panel stated "[t]his Court's ability to vacate an arbitration award is *almost* exclusively limited to [the grounds stated in 9 U.S.C.§10(a)(1)-(4)], although it *may also* vacate an award found to be in manifest disregard of the law." (Opinion at 7) (emphasis added). Thus, the panel clearly utilized a legal standard not set forth in §§10 or 11 of the FAA and therefore its decision directly conflicts with the binding precedent of the Supreme Court's earlier March 25, 2008 decision in *Hall Street*. *Hall Street* held without equivocation that the grounds for vacating or modifying an arbitration award under §§10 and 11 of the FAA are *exclusive*.

We granted certiorari to decide whether the grounds for vacatur and modification provided by §§10 and 11 of the FAA are exclusive. We agree with the Ninth Circuit that they are... *Hall Street* at 1401, (internal citations omitted).

\*\*\*\*\*

We now hold that §§10 and 11 respectively provide the FAA's exclusive grounds for expedited vacatur and modification. *Hall Street* at 1403.

\*\*\*\*\*

Expanding the detailed categories [under §10 of the FAA] would rub too much against the grain of the §9 language, where provision for judicial confirmation carries no hint of flexibility. On application for an order confirming the arbitration award, the court “must grant” the order “unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title.” There is nothing malleable about “must grant,” which unequivocally tells courts to grant confirmation in all cases, except when one of the “prescribed” exceptions applies. *Id.* at 1405.

\*\*\*\*\*

But whatever the consequences of our holding, the statutory text gives us no business to expand the statutory grounds. *Id.* at 1406.

\*\*\*\*\*

We agree with the Ninth Circuit that the FAA confines its expedited judicial review to the grounds listed in 9 U.S.C. §§ 10 and 11. *Id.* at 1408.

“Manifest disregard of the law” is not a ground for vacating or modifying an award under §§10 or 11 of the FAA. Accordingly, the panel’s decision directly conflicts with *Hall Street*.

The Court of Appeals for the First Circuit has applied *Hall Street* and stated: “We acknowledge the Supreme Court’s recent holding in [*Hall Street*] that manifest disregard of the law is not a valid ground for vacating or modifying an arbitral award in cases brought under the Federal Arbitration Act (“FAA”).” *Ramos-Santiago v. United Parcel Service*, 524 F.3d 120, 124 (fn. 3) (1st Cir. 2008).

Contrary to *Hall Street* and *Ramos-Santiago*, the panel attempts to limit the holding of *Hall Street* to circumstances where parties have attempted to contract to expand the basis for vacatur beyond §9 of the FAA. By implementing such a

narrow interpretation, the panel ignores the plain language and meaning of *Hall Street* and cases decided after *Hall Street*.

Most notably, the October 6, 2008 decision in *Improv West Assoc., v. Comedy Club, Inc.*, \_\_\_\_\_ U.S. \_\_\_\_\_, 129 S.Ct. 45, 172 L. Ed. 2d 6 (2008) makes it clear that the United States Supreme Court did not intend to limit the application of *Hall Street* to only those situations where the parties attempt to expand the grounds for vacating an award beyond those enumerated in §10 of the FAA. In *Comedy Club, Inc. v. Improv West Assoc.*, 514 F.3d 833 ( 9th Cir. 2008), the Ninth Circuit Court of Appeals reversed the judgment of the district court and vacated an arbitration award on the grounds that the award was in *manifest disregard of the law*. *Id.* at 850. In that case, the court was not faced with parties that had attempted to expand the statutory grounds for vacatur, but instead were applying pre-*Hall Street* law under §10 of the FAA. The United States Supreme Court granted a writ of certiorari, vacated the judgment of the Ninth Circuit and remanded the case to the Ninth Circuit for further consideration in light of *Hall Street*.

The only effect *Hall Street* could possibly have on the Ninth Circuit's opinion is that manifest disregard of the law is not a viable basis for vacating an arbitration award under the FAA. If manifest disregard of the law was a basis for vacatur after *Hall Street*, the United States Supreme Court would have either

denied certiorari or upheld that opinion of the Ninth Circuit. After *Improv West*, there can be no question that the United States Supreme Court has mandated that there are no judicially created grounds for vacating an arbitration award and courts may only apply those grounds stated in §10 of the FAA.

The panel, however, specifically states that it is basing its decision on grounds not found in the provisions of §10 of the FAA. The panel also ignored the fact that since *Hall Street* not one district court or court of appeals has vacated an arbitration award on the basis of the Arbitrator's manifest disregard of the law. The panel fails to cite even one post-*Hall Street* case and instead relies on *Wilko* and the cases that followed *Wilko*, despite the fact that *Hall Street* clearly rejected the type of general review of an arbitrator's legal errors that the panel undertook.

## **II. The Court's Application Of The Manifest Disregard Of The Law Standard Directly Conflicts With Decisions of the Sixth Circuit.**

Assuming, *arguendo*, that manifest disregard of the law remains a viable basis for vacatur of an arbitration award in the Sixth Circuit, the panel's *application* of the standard directly conflicts with established precedent of the Sixth Circuit. The panel's decision is unique because it is the only decision of the Sixth Circuit Court of Appeals to *ever* vacate an arbitration award for "manifest disregard of the law." The Sixth Circuit's obvious reluctance to vacate an arbitration award based upon the manifest disregard of the law should have

resulted in the panel carefully applying the well-articulated standard of the Sixth Circuit, which has been stated as follows:

An arbitration panel acts with manifest disregard if (1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrators refused to heed that legal principle. Thus, to find manifest disregard a court must find two things: the relevant law must be clearly defined and the arbitrator must have consciously chosen not to apply it. *Dawahare v. Spencer*, 210 F.3d 666, 669 (6th Cir. 2000) (internal quotation omitted).

When faced with questions of law, an arbitration panel does not act in manifest disregard of the law unless (1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrators refused to heed that legal principle. *Merrill Lynch, Pierce, Fenner & Smith v. Jaros*, 70 F.3d 418, 421 (6th Cir. 1995)

“Manifest disregard of the law” means more than a mere error in interpretation or application of the law. While the arbitrator may or may not have applied [the law] correctly under the facts of this case, we cannot say that his decision showed a “manifest disregard of the law.” *Anaconda Co. v. International Assoc. of Machinists & Aerospace Workers*, 693 F.2d 35, 37-38 (6th Cir. 1982).

The panel’s decision also conflicts with the decisions of other Circuit Courts, such as the Seventh Circuit, which has stated:

When parties agree to arbitrate their disputes they opt out of the court system, and when one of them challenges the resulting arbitration award he performs so not on the ground that the arbitrators made a mistake but that they violated the agreement to arbitrate, as by corruption, evident partiality, exceeding their powers, etc.--conduct to which the parties did not consent when they included an arbitration clause in their contract. That is why in the typical arbitration, which unlike the one in this case is concerned with interpreting a contract, the issue for the court is not whether the contract interpretation is incorrect or even wacky but whether the arbitrators had failed to interpret the contract at all. *Wise v. Wachovia Securities, LLC*, 450 F.3d 265, 269 (7th Cir. 2002).

Here, the panel simply stated:

The Arbitrator found that the Coffee Beanery “was not required to disclose to [WW<sup>1</sup>] that Kevin Shaw has a felony conviction for grand larceny as it is not the type of felony conviction subject to disclosure.” *We disagree.* (Opinion at 10) (emphasis added).

Mere disagreement with an arbitrator’s legal conclusion has never been a sufficient basis on which to vacate an arbitration award. The panel’s disagreement with the Arbitrator’s legal conclusion reflects the kind of impermissible review of an arbitrator’s legal decision that courts should not undertake. See *Hall Street*, at 1405.

Here, the panel acknowledged that it was not properly applying the “manifest disregard of the law” standard when it stated:

True, we cannot say the Arbitrator’s conclusion that “the non-disclosure [of the felony] did not cause damage to Claimants” constitutes a refusal to heed a clearly defined legal principle.” (Opinion at 11).

That acknowledgment should have ended the inquiry of the panel. The panel could not say that the Arbitrator’s conclusion was a “refusal to heed a clearly defined legal principle” because the Arbitrator expressly considered and applied the relevant law, thereby eliminating any possible finding of “manifest disregard of the law.”

Regarding the alleged felony conviction the Arbitrator stated:

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<sup>1</sup>The panel refers to all Appellants collectively as WW.

The Arbitrator finds that Respondent was not required to disclose to Claimants that Kevin Shaw has a felony conviction for grand larceny as it is not the type of felony conviction subject to disclosure. *Michigan and Maryland franchise law* limit such disclosure to felonies that involve fraud, embezzlement, fraudulent conversion, or misappropriation of property. Furthermore, the non-disclosure did not cause damage to Claimant. (R. 22, Motion to Compel, Exh A; J.A. 449) (emphasis added).

The Arbitrator could not have made the foregoing statement if she had not consciously considered the Michigan and Maryland Franchise laws in concluding that the situation was not the kind of conviction that was subject to disclosure.

Moreover, in order for the award to be in manifest disregard of the law, the panel would also have to specifically find that it was in manifest disregard of the law for the Arbitrator to determine that the failure to disclose did not cause damage to Appellants. The panel's decision does not address this conclusion by the Arbitrator. The arbitrator's award cannot be in manifest disregard of the law if the Arbitrator properly considered the failure to disclose and determined that it did not cause any damage to Appellants.

The panel also failed to establish that the applicable legal principle "is clearly defined and not subject to reasonable debate" as required by *Dawahare, Jaros* and *Anaconda, supra*. For example, the panel looked at Maryland's definition of larceny and concluded, without discussion, that the alleged conviction for grand larceny necessarily was equivalent to a conviction for the misappropriation of property, but the panel never considered Maryland's definition

of misappropriation of property. Misappropriation has been defined as “the application of another’s property or money dishonestly to one’s own use.” *Schinnerer v. Md. Ins. Admin.*, 147 Md. App. 474, 491 (2002). A further examination into Maryland law would have revealed that the Maryland legislature does not use the terms larceny and misappropriation interchangeably. Specifically, unlike the Maryland Franchise Act, which does not expressly require felony convictions for larceny to be disclosed, Maryland Corporations and Associations Code §11-412 has a specific requirement to disclose a felony conviction for larceny or for misappropriation of securities. In holding that it was “a pure question of law whether Shaw’s failure to disclose his prior grand larceny conviction violated the Franchise Act” the panel did not cite or discuss one statute or case that states grand larceny is the type of conviction that must be reported under the Maryland Franchise Act. Instead, the panel merely concludes, with no support, that the legal principle is clearly defined.

**III. The Court’s Ruling That Appellants Can Pursue Their Disputes In Court Instead Of Returning To Arbitration Directly Conflicts With The Federal Arbitration Act, and the Supreme Court Decisions In *Green Tree Fin. Corporation-Alabama v. Randolph*, 531 U.S. 79, 121 S. Ct. 513; 148 L. Ed. 2d 373 (2000); *Hall Street; Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 126 S.Ct 1204, 163 L.Ed.2d 1038 (2006); and *Prima Paint Corp. v. Flood & Conklin MFG. Co.*, 388 U.S. 395; 87 S.Ct. 1801; 18 L.Ed. 2d 1270; (1967).**

The United States Supreme Court has concluded that where, as here, “the District Court has ordered the parties to proceed to arbitration, and dismissed all

the claims before it, that decision is ‘final’ within the meaning of § 16(a)(3), and therefore appealable.” *Green Tree Fin. Corporation-Alabama v. Randolph*, 531 U.S. 79, 88; 121 S. Ct. 513; 148 L. Ed. 2d 373 (2000). See also, 9 U.S.C. §16(a)(3) which states that an appeal may be taken from a final decision with respect to arbitration. Because Appellants never appealed the order compelling arbitration, the issue of whether the disputes are subject to arbitration was never before the panel and the panel’s decision to rule on the whether the parties’ disputes are subject to arbitration is in direct conflict with the United States Supreme Court decision in *Green Tree*.

Even if the panel had the authority to hear Appellants’ untimely appeal of the order compelling arbitration, the panel failed to apply the clearly established precedent *Prima Paint* when the panel determined that the parties did not have to go back to arbitration. In fact, when the panel voided and set aside the entire franchise agreement on fraudulent inducement grounds and held that Appellants could seek their relief in a court of law, it did so without conducting any independent analysis of the validity of the arbitration agreement itself. That result directly conflicts with the Supreme Court decisions in *Buckeye* and *Prima Paint* and further conflicts with *Hall Street*.

In *Hall Street*, the Supreme Court made it clear that the courts should not exceed their limited authority under the FAA or go beyond the express language of

the FAA. There is nothing in §10 of the FAA that would allow a court to vacate an arbitration award and then also order that the parties do not have to go back to arbitration to resolve their disputes. There is, however, language in §4 stating that a court shall order the parties to arbitration “upon being satisfied that the making of the agreement for arbitration...is not in issue.” 9 U.S.C. §4.

The Supreme Court in *Buckeye* stated the law regarding challenges to the contract as a whole versus challenges specifically to the arbitration agreement as follows:

First, as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract. Second, unless the challenge is to the arbitration clause itself, the issue of the contract’s validity is considered by the arbitrator in the first instance. Third, this arbitration law applies to state as well as federal courts. *Buckeye*, at 1209.

Contrary to the FAA and *Buckeye*, the panel never considered the parties’ arbitration agreement separately and the panel did not address a challenge to the arbitration agreement itself. Rather, the panel usurped the Arbitrator’s role by ruling that the contract *as a whole* was fraudulently induced, so the parties did not have to go back to arbitration. The panel held:

Because WW was deprived of a mandatory, statutorily required notice, prior [to] entering into the franchise agreement, and did not have an opportunity to avoid being subjected to the consequences of having entered into the contract (including the requirement to arbitrate such claims), WW should not be bound by the arbitration provisions of the agreement which it was fraudulently induced into signing in violation of the Franchise Act. (Opinion at 12).

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Because the Coffee Beanery failed to disclose Shaw's felony conviction, WW need not resort to arbitration to vindicate its statutory rights but may instead seek appropriate relief in a court of law. (Opinion at 12).

This extraordinary decision by the panel directly conflicts with the Supreme Court decision in *Prima Paint*, which specifically addressed how allegations of fraudulent inducement affect arbitration agreements:

[I]f the claim is fraud in the inducement of the arbitration clause itself -- an issue which goes to the "making" of the agreement to arbitrate -- the federal court may proceed to adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally. *Prima Paint* at 403-404. See also, *Buckeye*, at 1208.

At no time in the district court, or on appeal, did Appellants argue that the arbitration agreement itself was fraudulently induced and, therefore, that issue is not a proper subject for review on appeal. Moreover, there is no record upon which the panel could find that the arbitration agreement itself was fraudulently induced. The district court record regarding the arbitrability of the disputes was not before the panel and therefore the panel had no basis for overturning the district court's decision. As a result, the panel's decision to void the contract (including the agreement to arbitrate) exceeded the panel's authority under the FAA and directly conflicts with binding authority.

The threshold issue of whether the parties' disputes were subject to a valid, binding arbitration was specifically addressed by the district court when it entered its first order compelling arbitration. The panel failed to even mention the district

court's order compelling arbitration or the fact that Appellants never sought to appeal the order compelling the parties to arbitration. Further, the panel's holding that Appellants would not be bound by the arbitration agreement is also inconsistent with the panel's acknowledgement that it was the Appellants who, referencing the Franchise Agreement and the agreement to arbitrate, initiated the arbitration process.

The panel also failed to recognize that under Maryland law the alleged nondisclosure violations of the Maryland Franchise Act have no bearing on the parties' agreement to arbitrate. *Holmes v. Coverall North America, Inc.*, 336 Md. 534, 538; 649 A.2d 365 (1994). The Court in *Holmes* pointed out that violations of the Maryland Franchise Act do not void the franchise agreement, but merely make it voidable. By enforcing the arbitration agreement, the court was merely holding "that the mutual promises to arbitrate constitute a separate agreement contained in the contract in question and that the arbitration clause itself was not in dispute." *Holmes*, at 547.

The arbitrator heard and decided at least 27 separate claims including disputes between the original parties to the Franchise Agreement, (Coffee Beanery and Welshans), disputes involving Welshans' assignee, (WW, LLC), as well as disputes involving eight individuals that were not parties to the Franchise Agreement or the assignment. Regarding all these claims, the Arbitrator stated:

Based on credible evidence as a whole, claimants did not prove their claims of common law fraud by clear and convincing evidence, and did not prove their claims of fraudulent inducement and misrepresentation, negligent misrepresentation, detrimental reliance, and violations of the Michigan and Maryland franchise investment laws, by a preponderance of the evidence. (R. 22, Motion to Compel, Exh A; J.A. 447).

The arbitrator also found that Coffee Beanery, LTD proved “its counterclaim for past due royalties, reasonable attorney and accounting fees and costs and expenses pursuant to the terms of the franchise agreement.” (R. 22, Motion to Compel, Exh A; J.A. 447). The panel, however, only decided the issue of claims under the Maryland Franchise Act when it held that the parties did not have to return to arbitration. The panel’s decision ignores all of the other claims that were decided by the Arbitrator. The panel did not address these findings by the Arbitrator and did not make any finding as to the liability of the individuals that were parties to the arbitration. For instance, the panel’s decision is silent as to the Arbitrator’s finding that Appellants had not proven a claim against the individual Owen Stern. The panel also failed to recognize that Appellants continued to operate the franchise while the parties were in arbitration. The panel’s decision also fails to address the fact that because only Welshans was a party to the franchise agreement there could be no failure to disclose to WW, LLC or to Williams.

The panel ignored the Arbitrator’s finding that:

Claimants failed to timely and effectively tender back the benefits of the franchise (trademarks, equipment, location, etc.) to Respondents. The Arbitrator finds that, contrary to Claimants’ stated intent to rescind the

franchise agreement, Claimants continued to operate the business utilizing the Coffee Beanery trademarks, products and franchise system. (R. 22, Motion to Compel, Exh A; J.A. 449).

The panel failed to address the fact that Welshans was the only Appellant that was an original party to the Franchise Agreement and would have been the only party that could have sought rescission of the Franchise Agreement based on the alleged failure to disclose. Welshans, however, assigned his interest in the Franchise Agreement to WW, LLC and thereafter could not seek rescission. When the alleged failure to disclose occurred, WW, LLC had not been formed. Therefore, WW, LLC was not an original party to the Franchise Agreement and would not be entitled to rescission. Williams was never a party to the Franchise Agreement and therefore there was no agreement for Williams to rescind.

#### **IV. Appellees Were Entitled To Seek Modification Of The Arbitration Award To Correct The Arbitrator's Statement Regarding The Felony Conviction.**

The panel's amended decision is based entirely upon the inaccurate finding that Kevin Shaw was convicted of a felony for grand larceny. In the arbitration, Kevin Shaw testified that 20 years earlier he had been convicted of a felony for the removal of road construction cones. Kevin Shaw did not review his record before testifying and no documents were presented regarding the alleged conviction. Official records, however, show that he was never convicted of a felony (Exhibit 1 hereto). Instead, in 1985 he pled guilty to a charge of larceny under \$100, a

misdemeanor (67<sup>th</sup> District Court of Michigan, Case no. CR08419519), and he has no felony record whatsoever.

Under both 9 U.S.C. §11, and the American Arbitration Association's rules, Appellees had the right to seek to have the district court or the Arbitrator modify the award to correct the erroneous finding that Kevin Shaw had been convicted of a felony. Because the Arbitrator found that the alleged felony was not the type of conviction that needed to be disclosed, the Arbitrator's statement regarding the conviction did not cause Appellants any damage and there was no reason for Appellees to seek modification of the award. Until the panel issued its opinion, Appellees had no reason to seek modification of the award to clarify the fact that Kevin Shaw was never actually convicted of a felony.

### CONCLUSION

For all the reasons stated above, Appellees the Coffee Beanery, Ltd., JoAnn Shaw, Julius Shaw, Kevin Shaw, Kurt Shaw, Ken Coxen, Walter Pilon, and Owen Stern request that the Court grant this Modified Petition for Rehearing *En Banc*, reverse the amended opinion of the panel, and affirm the district court's order confirming the arbitration award and entering judgment in Appellees' favor.

Dated: November 25, 2008



Karl V. Fink

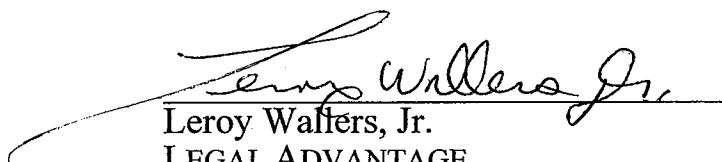
Joshua R. Fink

Attorneys of Record for Appellees

**FILING AND MAILING CERTIFICATE**

In compliance with FRAP Rule 25 and L.R. 25 I hereby certify that on this 25<sup>th</sup> day of November, 2008, I filed with the Clerk's Office of the United States Court of Appeals for the Sixth Circuit the required number copies of this MODIFIED PETITION FOR REHEARING *EN BANC*. I further certify that I mailed via U.S. Mail this same date from Cincinnati, Ohio one copy each to opposing counsel.

The necessary filing and mailing was performed in accordance with the instructions given me by counsel in this case.



Leroy Walters, Jr.  
LEGAL ADVANTAGE  
Suite 200  
432 Walnut Street  
Cincinnati, Ohio 45202

(513) 651-2252

COUNSEL SERVED:

Harry M. Rifkin  
COHAN, WEST, RIFKIN & COHEN  
201 N. Charles Street  
Suite 2404  
Baltimore, MD 21201

410-332-1400

Mark J. Kriger  
LARENE & KRIGER  
645 Griswold  
Suite 1717 Penobscot Building  
Detroit, MI 48226

313-967-0100

*Counsel for Respondents-Appellants*

# **EXHIBIT 1**



# 67th DISTRICT COURT



Case number: CRO8419519

**Plaintiff:** STATE OF MICHIGAN, **VS Defendant:** SHAW, KEVIN VINCENT  
**Attorney:** P22148 WEISS, ROBERT **Attorney:** P34699 MANLEY III  
E **FRANK J.**

Judge/Magistrate: WILLIAM R  
EVANS  
Circuit Judge: JUDGE UNKNOWN

CRIMINAL CASE

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Case	Register of Actions
01/15/1985	COMPLAINT SWORN - WARRANT ISSUED
01/15/1985	DATE OF OFFENSE JULY 27, 1984 L.W. LAMB CO.
01/15/1985	WARRANT TAKEN BY LT LANEY
02/28/1985	WARRANT RETURNED FLINT TWP PD
02/28/1985	BOND POSTED \$200.00/KURT A SHAW TO APP
02/28/1985	FOR ARR. ON MAR.11,1985 8:30AM
03/07/1985	ARRAIGNED BY JUDGE MOSIER
03/07/1985	RETAIN ATTY.
03/07/1985	PRE-TRIAL/EXAM MARCH 18/20, 1985

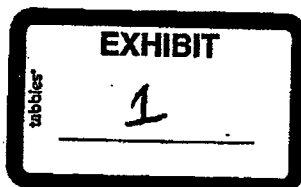
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# 67th DISTRICT COURT



Case number: CRO8419519

**Plaintiff:** STATE OF MICHIGAN, VS **Defendant:** SHAW, KEVIN VINCENT  
**Attorney:** P22148 WEISS, ROBERT **Attorney:** P34699 MANLEY III  
 E. FRANK J.

**Judge/Magistrate:** WILLIAM R  
 EVANS  
**Circuit Judge:** JUDGE UNKNOWN

CRIMINAL CASE

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Case	Register of Actions
03/07/1985	BOND CONTINUED FB 200.00 AS POSTED
03/20/1985	ADJOURNED TO MARCH 25/27, 1985
03/25/1985	ADJOURNED TO APRIL 1/3, 1985 CPA
04/01/1985	ADJOURNED TO APRIL 8/10, 1985
04/08/1985	ADJOURNED TO APRIL 22/24, 1985
04/24/1985	AMENDED CHARGE LARCENY UNDER \$100
04/24/1985	PLED GUILTY AMENDED CHARGE.
04/24/1985	PRE-SENTENCE ORDER/SENTENCE JUNE 3 1985 8:30 AM

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# 67th DISTRICT COURT



Case number: CRO8419519

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**Attorney:** P22148 WEISS, ROBERT **Attorney:** P34699 MANLEY III  
E FRANK J.

Judge/Magistrate: WILLIAM R  
EVANS  
Circuit Judge: JUDGE UNKNOWN

CRIMINAL CASE

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Case	Register of Actions
04/24/1985	PROBATION OFFICER CURTIS
06/03/1985	SENTENCE \$100/\$50/\$5 OR 30 DAYS.
06/03/1985	FINE/COSTS DEFERRED TO SEPTEMBER 11, 1985.
06/03/1985	PROBATION ORDERED 1 YEAR. \$15 O/S FEE.
06/03/1985	PAID IN FULL \$155 FINE AND COSTS.
09/11/1985	PAID PROBATION FEE R# 184646, \$ 45.00
10/11/1985	PAID PROBATION FEE 191524, \$ 15.00

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# 67th DISTRICT COURT



Case number: CRO8419519

**Plaintiff:** STATE OF MICHIGAN, VS **Defendant:** SHAW, KEVIN VINCENT  
**Attorney:** P22148 WEISS, ROBERT **Attorney:** P34699 MANLEY III  
 E FRANK J.

**Judge/Magistrate:** WILLIAM R  
 EVANS  
**Circuit Judge:** JUDGE UNKNOWN

CRIMINAL CASE

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Case	Register of Actions
02/21/1986	PAID PROBATION FEE R# 218653, \$ 75.00
03/03/1986	PET.&ORD.DISCHARGE FROM PROB -

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