

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

THE COFFEE BEANERY, LTD.,  
a Michigan Corporation, JOANNE SHAW,  
JULIUS SHAW, KEVIN SHAW, KURT SHAW,  
KEN COXEN, WALTER PILON, and  
OWEN STERN,

Petitioners,

vs.

Case No. 06-10408

Hon. Patrick J. Duggan

WW, LLC, a Maryland Limited Liability  
Corporation, DEBORAH WILLIAMS, and  
RICHARD WELSHANS,

Respondents.

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**RESPONSE IN OPPOSITION TO  
MOTION FOR RECONSIDERATION**

The Coffee Beanery, Ltd., Julius Shaw, Kurt Shaw, Kevin Shaw, Ken Coxen, Owen Stern, Walter Pilon, and Joanne Shaw (collectively, "Petitioners"), by their undersigned counsel,

oppose Respondents' *Motion for Reconsideration of Order Confirming Arbitration Award and Entering Judgment in Favor of Petitioners* for all the reasons more fully set forth in the accompanying Memorandum, which is incorporated by reference herein.

Respectfully Submitted,

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Dated: June 13, 2007

**MEMORANDUM IN OPPOSITION TO  
MOTION FOR RECONSIDERATION**

**I. INTRODUCTION**

On March 28, 2007, an Arbitrator with the American Arbitration Association issued an Arbitration Award finding in favor of Petitioners herein on all claims. The Award is already an exhibit of record in this case. *See Docket #23 (Response to Motion to Vacate Arbitration Award)*. Thereafter, on April 18, 2007, Respondents moved to vacate the arbitration award, and Petitioners moved to confirm it. On May 23, 2007, this Court decided those motions by entry of an Opinion and Order confirming the arbitration award and entering judgment on the award. On June 4, 2007, Respondents filed the present *Motion for Reconsideration of Order Confirming Arbitration Award and Entering Judgment in Favor of Petitioners*. On June 6, 2007, the Court issued a *Notice Allowing Response to Motion for Reconsideration*. By this response, Petitioners oppose the motion and respectfully request that the Court deny it.

**II. SUMMARY RESPONSE**

Respondents' primary argument for reconsideration is that "the conclusion that Respondents' decision not to accept the rescission offer in the administrative proceeding in Maryland barred their right to seek rescission . . . is clearly in manifest disregard of the law and must be rejected by this Court." *Motion for Reconsideration, pp. 3,5*. However, Respondents extract that statement not from the Arbitration Award, which was the decision on review, but from a paragraph in this Courts' May 23, 2007 Opinion and Order confirming the Award:

Respondents first claim that, under Maryland Franchise Registration and Disclosure Law, they had the power to rescind the franchise agreement within three years of their receipt of the UFOC, if the Coffee Beanery failed to disclose certain information before Welshans executed the franchise agreement. (cite

omitted). *Respondents, however, do not cite the relevant law for the Court.* In any event, pursuant to the Consent Order – which was premised on the violation of Maryland franchise law – the Maryland Securities Commissioner required the Coffee Beanery and Kevin Shaw to offer respondents the opportunity to rescind the franchise agreement by sending them a letter “in substantially the form attached to [the Consent Order] as Exhibit 1 . . . .” *According to that letter, a franchise had to respond within thirty (30) days in order to invoke its right to rescind. Respondents apparently failed to accept the offer within the allotted time period.*

May 23, 2007 Opinion & Order, p. 14 (emphasis added). Two things are readily apparent from this excerpt: (1) Respondents did not bother to cite the relevant law to the Court so that it could more closely (and fully) consider Respondents’ claim, and (2) the Court’s comment on Respondents’ failure to accept the rescission offer in the Consent Order is accurate, albeit perhaps incomplete in light of the current argument.

The primary point is that the Arbitrator *did not rest on that point in denying rescission to Respondents at the arbitration.* The “manifest disregard of the law” standard applies to the *arbitrator’s award*, not to this Court’s short recitation of certain procedural events in a situation where Respondents did not even bother to “cite the relevant law for the Court.” As a practical matter, the Arbitrator expressly decided in her Award:

*Claimants are not entitled to rescission of the franchise agreement and did not prove damages based on alleged violations of Maryland and Michigan franchise investment laws. The Arbitrator found the Claimant Welshans’ version of the events surrounding the receipt of the UFOC not credible. Respondents sent Claimants Welshans the UFOC via Federal Express on May 30, 2003. Claimant Welshans received the UFOC on June 2, 2003 and did not sign the franchise agreement until June 17, 2003. Based on credible evidence, the Arbitrator finds that Respondents timely complied with disclosure requirements.*

. . . .

*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 the Claimants’ stated intent to rescind the franchise agreement, Claimants continued to operate the business utilizing the Coffee Beanery trademarks, products and franchise system. Claimants are not entitled to*

*rescission* and are barred from electing rescission under the Consent Order because they did not accept the rescission offer within the 30-day period.

Docket #23, *Arbitration Award of March 28, 2007*, pp.2-3 (*emphasis added*). The Arbitrator clearly decided that Respondents were not entitled to a rescission remedy on the merits of their factual and legal claims. As a practical matter, Respondents were *still operating their Coffee Beanery Café during the arbitration*.

As a readily apparent arbitration *strategy*, Respondents greatly preferred to confirm the franchise contract, and *not* tender back the benefits of that contract, and to instead seek damages *at law* from Coffee Beanery during the arbitration. This strategy was premised on Respondents' unrealistic expectation that they would prevail on their factual and legal claims during the arbitration and as a result, realize a significant monetary damages award against Petitioners. In the context of an award of damages at law versus an equitable remedy, a large monetary damages award would far outstrip the more modest equitable objectives to be derived from mere rescission of the franchise contract, where the Arbitrator would simply have attempted to put Respondents back in the position they would have been in *but for* execution of the franchise contract in the first place (without any benefit of a large cash award).

The motion for reconsideration should be denied on the merits, although the Court may reasonably choose to amend its May 23, 2007 Opinion and Order for the purpose of making perfectly clear what has always been the case, i.e. that the Arbitrator's denial of a rescission remedy was not based only on Respondents' failure to timely accept the rescission offer in the letter attached to the Consent Order, but on the lack of merit in Respondents' entire case.

### III. LAW AND ARGUMENT

#### A. STANDARD OF REVIEW

The standard of review for a motion for reconsideration is set forth in Eastern District of Michigan Local Rule 7.1(g)(3), which provides:

Generally, and without restricting the court's discretion, the court will not grant motions for rehearing or reconsideration that merely present the same issues ruled upon by the court, either expressly or by reasonable implication. The movant must not only demonstrate a palpable defect by which the court and the parties have been misled but also show that correcting the defect will result in a different disposition of the case.

Thus, "[t]he Court will grant a motion for reconsideration if the moving party shows: (1) a 'palpable defect,' (2) that the defect misled the Court and the parties, and (3) that correcting the defect will result in a different disposition of the case." *Sundberg v. Keller Ladder*, 189 F.Supp.2d 671, 674 (E.D.Mich.2002). "A palpable defect is one which is obvious, clear, unmistakable, manifest, or plain." *Fleck v. Titan Tire Corp.*, 177 F.Supp.2d 605, 624 (E.D.Mich.2001). A motion for reconsideration which presents the same issues already ruled upon by the court, either expressly or by reasonable implication will not be granted. *Czajkowski v. Tindall & Associates, P.C.*, 967 F. Supp. 951, 952 (E.D.Mich 1997).

In *Manning v. Crane*, 2003 WL 21817502 (E.D.Mich), this Court stated the following regarding the standard on motions for reconsideration:

A motion for reconsideration is not to be used as a means to reargue matters already argued and disposed of, *Waye v. First Citizen's Nat'l Bank*, 846 F.Supp.310, 314 n.3 (M.D.Pa.), aff'd 31 F.3d 1175 (3d Cir. 1994), or as an attempt to relitigate a "point of disagreement between the Court and the litigant." *Id.* The motion may only be granted if (1) there has been an intervening change in controlling law; (2) new evidence, which was not available, has become available, or (3) it is necessary to correct a clear or plain error of law or to prevent a manifest injustice. *Bass v. Wainwright*, 675 F.2d 1204 (11<sup>th</sup> Cir. 1982) *see also Harsen v. Zlotnicki*, 779 F.2d 906, 909 (3<sup>rd</sup> Cir. 1985) *cert. denied* 476 U.S. 1171 (1986).

Here, Respondents have not suggested that there has been a “change in controlling law,” probably because there has not been such a change; the standard of review of arbitration awards is well-settled. Respondents have not proffered any “new” evidence, i.e. evidence that was not reasonably available when the motion to vacate and application to confirm were briefed and decided. And, Respondents have not articulated any palpable defect, i.e. a clear or plain legal error, that would have resulted in a different disposition of the motion to vacate and the application to confirm. Instead, Respondents merely attempt to reargue matters already disposed of. Respondents’ *Motion for Reconsideration of Order Confirming Arbitration Award and Entering Judgment in Favor of Petitioners* should be denied.

#### **B. EXHIBITS TO MOTION FOR RECONSIDERATION SHOULD NOT BE CONSIDERED BY THE COURT**

Respondents have attached four exhibits to their motion and brief; a January 2, 2007 letter; an October 5, 2006 letter<sup>1</sup>, and arbitration hearing transcript pages 1779 and 1884-1890. “Where evidence is not newly discovered, a party may not submit that evidence in support of a motion for reconsideration.” *Harsen, supra*, at 909.

Respondents’ exhibits in support of their motion for reconsideration are not “new”; they consist of transcript pages that have been in the possession of the parties for months now, and were actually provided to the Arbitrator for review and consideration *before* the Arbitration Award was issued on March 28, 2007; Respondents had a full and fair opportunity to provide transcript excerpts to this Court in support of their Motion to Vacate, or in opposition to the Application to Confirm, yet Respondents chose not to do so.

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<sup>1</sup> The actual letter filed with Respondents’ *Motion for Reconsideration of Order Confirming Arbitration Award and Entering Judgment in Favor of Petitioners* is dated June 4, 2007. It is undisputed, however, that the original letter was dated October 5, 2006.

Further, given the dates of the proffered letters, it is clear that they were in existence before the Motion to Vacate was filed and if pertinent, could have been timely brought to the Court's attention in connection with briefing on the prior motions.

The conclusion is that Respondents simply did not bother to adequately support their Motion to Vacate. Respondents failed to even attach a copy of the Arbitration Award to their request to vacate it. Respondents attached an *unsigned, unentered* copy of the Maryland Consent Order they so heavily relied upon. In their Motion papers, Respondents failed to cite or analyze the statutory standard applicable to a motion to vacate as set forth in Section 10 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 10. Pages 3 through 17 of Respondents' original Brief, the bulk of their paperwork, consisted merely of a *verbatim* recitation, paragraph by numbered paragraph, of their proposed factual findings and legal conclusions, copied from their post-hearing brief submitted to Arbitrator Barron in February 2007.

Thus, Respondents were apparently intent on simply rearguing their factual case to the Court with a minimum of effort expended to do so. And Respondents failed to articulate a "disregard of the law." At page 12 of this Court's May 23, 2007 Opinion and Order, the Court noted that "respondents fail to point the Court to the relevant portion of the arbitration transcript . . ." That is a continuing theme for Respondents. When Respondents argued that the Arbitrator showed a "manifest disregard of the law," this Court duly noted at page 13 of its Opinion and Order that "respondents fail to cite specific law that they believe the arbitrator disregarded."

The standard of review of the Arbitrator's factual determinations is extremely limited, and this Court noted the well-settled standard that "a federal court may not conduct a reassessment of the evidentiary record." *Nichols v. Brookdale Univ. Hosp. & Med. Ctr.*, 204 Fed. App'x 40, 43 (2d Cir. 2006)(quoting *Wallace v. Buttar*, 378 F.3d 182, 193 (2d Cir. 2004)).

**C. RESPONDENTS ARE NOT ENTITLED TO RECONSIDERATION OF THE COURT'S DECISION REGARDING RESCISSION**

Respondents state, "This court's decision was based on several flawed factual conclusions, most notably the conclusion that Respondents' decision not to accept the rescission offer in the administrative proceedings in Maryland barred their right to seek rescission." Contrary to Respondents' assertion, neither the Court nor the arbitrator held that Respondents were denied rescission solely on the basis that Respondents did not timely accept an offer for rescission under the Maryland administrative proceedings.

Having declined the offer of rescission pursuant to the Maryland administrative proceedings, Respondents could thereafter be awarded a rescission remedy only if they established they were entitled to it under Maryland or Michigan franchise law. Arbitrator Barron, however, clearly held in her Award that Respondents were not entitled to rescission because Respondents did not prove any violations of the Michigan or Maryland franchise disclosure laws:

Claimants are not entitled to rescission of the franchise agreement and did not prove damages based on alleged violations of Maryland and Michigan franchise investment laws. The Arbitrator found the Claimant Welshans' version of the events surrounding the receipt of the UFOC not credible. Respondents sent Claimants Welshans the UFOC via Federal Express on May 30, 2003. Claimant Welshans received the UFOC on June 2, 2003 and did not sign the franchise agreement until June 17, 2003. Based on credible evidence, the Arbitrator finds that Respondents timely complied with disclosure requirements.

Claimants are not entitled to rescission of the franchise agreement and did not prove damages based on the alleged failure to disclose more or different information about Café stores. The Arbitrator is not bound by the apparent conclusions of the Maryland Commissioner or the statements, conclusions or opinions set forth in the Consent Order because the Commissioner was not and is not a Party to the arbitration proceeding, and the Consent Order, by its terms, does not contain admissions of the Parties. Based on the credible testimony of Respondents' witnesses and documentary evidence, the Arbitrator finds, contrary to the statements, conclusions and opinions of the Maryland Commissioner, that

Respondents complied with Maryland (and Michigan) franchise laws regarding disclosure of information related to Café stores.

Claimants WW, LLC and Welshans are not entitled to rescission of the franchise agreement and did not prove damages based on non-disclosure of the Gift Card, DMX and Pepsi contracts. The Arbitrator finds that the Gift Card program and the DMX system were not required programs and that Claimants' participation was voluntary. Claimants did not elect to participate in the Gift Card program. Claimants purchased the DMX system as part of the equipment package and elected to sign the contract and participate in the music program for a monthly fee. The DMX system provided a significant benefit to Claimants' franchise. Although the evidence showed that Pepsi products were required and approved products, Claimants failed to prove by a preponderance of the evidence that a Pepsi contract, subject to disclosure laws, was actually in effect in 2002-2003 when Claimant purchased the franchise. The Arbitrator finds that Claimants failed to show damages caused by or linked to non-disclosure of the three contracts.

*Docket #23 (Arbitration Award of March 28, 2007, pp.2-3).*

The foregoing rulings by the arbitrator firmly establish that, contrary to Respondents' current argument, Respondents were denied rescission by the Arbitrator not just because Respondents had not timely accepted the rescission offer in the Consent Order, but more importantly, the Arbitrator denied rescission to Respondents as a result of her factual findings and legal conclusions on the merits of the rescission request. As for the legal conclusions, the Arbitrator expressly determined that Petitioners had *not* violated Michigan or Maryland franchise disclosure laws and that therefore, Respondents were not entitled to rescission *on the merits of those legal claims advanced during the arbitration.*

In addition to ruling that Respondents were not entitled to rescission under Michigan or Maryland franchise disclosure laws, the arbitrator made the factual findings to the effect that Respondents had not actually taken any steps to rescind the agreement, stating:

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 the Claimants' stated intent to rescind the franchise agreement, Claimants continued to operate the business utilizing the Coffee Beanery

trademarks, products and franchise system. *Claimants are not entitled to rescission* and are barred from electing rescission under the Consent Order because they did not accept the rescission offer within the 30-day period.

In this connection, the Arbitrator was clearly resting on the sound equitable principle that to receive equity, one must perform equity; here, despite having enjoyed numerous opportunities to tender back the *benefits of the franchise agreement* in exchange for the equitable remedy of rescission, Respondents failed to do so.

For all the foregoing reasons, Respondents have mischaracterized the decision of the Court and the Arbitrator regarding rescission and have failed to show any palpable defect in the Court's May 23, 2007 Opinion and Order that would result in a different disposition of this case.

**D. RESPONDENTS ALSO IMPROPERLY ATTEMPT TO REARGUE MATTERS PREVIOUSLY CONSIDERED BY THE COURT**

Respondents' only other alleged basis for reconsideration is that the Arbitrator's decisions were in "manifest disregard of the law." Respondents raised this exact argument in their *Memorandum in Opposition to Motion to Confirm Arbitration Award and in Further Support of Respondents' Motion to Vacate Arbitration Award* and in fact dedicated six pages of their brief to the argument that the arbitrator's decision was in "manifest disregard" of the law. Not only have Respondents only reiterated arguments previously raised, but they have completely failed to allege any "palpable defect" that would lead to a different disposition of this case.

Specifically, Respondents argue that the alleged failures to disclose the Gift Card Program, the Pepsi Contract, the required purchases from U.S. Foodservices, and Kevin Shaw's conviction were violations of the Maryland Franchise Law. These exact same arguments were

raised by Respondents in pages 20-22 of their *Memorandum in Opposition to Confirm Arbitration Award and in Further Support of Respondents' Motion to Vacate Arbitration Award*.

A motion for reconsideration which presents the same issues already ruled upon by the court, either expressly or by reasonable implication, will not be granted. *Czajkowski, supra* at 952.

As previously pointed out in the Court's May 23, 2007 Opinion and Order confirming the arbitration award, Respondents again fail to cite the specific law that they claim the arbitrator disregarded. To satisfy the legal standard, Respondents must show that "the relevant law is clearly defined and that the arbitrator consciously chose not to apply it." *Dahaware v. Spencer*, 210 F.3d 666,669 (6<sup>th</sup> Cir. 2000). The Court has already ruled that Respondents failed to meet the standard, and there is nothing new in the *Motion for Reconsideration* to change that ruling. In any event, a motion for reconsideration must show a palpable defect in the *Court's decision*, not simply rehash old arguments about the arbitrator's decision. Therefore, Respondents' Motion for Reconsideration should be denied.

#### IV. CONCLUSION

WHEREFORE, for all the foregoing reasons, Petitioners respectfully request that this Court deny the *Motion for Reconsideration of Order Confirming Arbitration Award and Entering Judgment in Favor of Petitioners*.

Respectfully Submitted,

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Dated: June 13, 2007

**CERTIFICATE OF SERVICE**

Karl V. Fink hereby certifies that on June 13, 2007, he electronically filed the foregoing paper with the Clerk of the Court using the ECF system, which will send notification of such filing to the following:

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