STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

NABIL SHURAFA, a Michigan Resident, MICHAEL BERSCHBACK, a Michigan Resident, MAIRE GROUP, LLC, a Michigan Limited Liability Company; GALT GROUP, LLC, a Michigan Limited Liability Company; and ROARK RESTAURANT GROUP, INC., a Michigan Corporation;

Plaintiffs,

V.

WILLIAM SMITH, an individual Michigan Resident, VEP I, LLC, a Michigan Limited Liability Company; VEP II, LLC, a Michigan Limited Liability Company; and VEP III, LLC, a Michigan Limited Liability Company.

Defendants.

Case No. 2021-187384-CB

Hon. Victoria Valentine

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SHEA LAW FIRM, PLLC
David J. Shea (P41399)
Ashley D. Shea (P82471)
Attorneys for Plaintiffs/Claimants
26100 American Dr., 2nd Floor
Southfield, MI 48034
(248) 354-0224
David.shea@sadplaw.com
Ashley.shea@sadplaw.com

BUTZEL LONG
Paul M. Mersino (P72179)
Louis F. Ronayne (P81877)
Attorneys for William A. Smith only
150 W. Jefferson, Suite 100
Detroit, MI 48226
(313) 225-7000
mersino@butzel.com
ronayne@butzel.com

OPINION AND ORDER DENYING
PLAINTIFFS' MOTION TO VACATE ARBITRATION AWARD PURSUANT TO MCR 3.602(J)

At a session of Court
held in Oakland County, Michigan
on 1/5/2024

PRESENT JUDGE VICTORIA A. VALENTINE

Before this Court is Plaintiffs/Claimants' Motion to Vacate the Arbitration Award Pursuant to MCR 3.602(J). Initially Plaintiffs filed a Complaint against Smith and the VEP entities in Oakland County Circuit Court. The matter was assigned to Judge Martha Anderson. Smith filed a Motion for Summary Disposition in Lieu of an Answer pursuant

to MCR 2.116(C)(7) and (C)(8) on August 3, 2021. On September 27, 2021, the Court Ordered Smith to file a Motion to Compel Arbitration. On October 12, 2021, the parties stipulated to arbitrate this matter.

Plaintiffs/Claimants filed their Statement of Claim with the American Arbitration Association on January 13, 2022, against Smith for (1) breach of his promise to pay Claimants for the remaining loan payments incurred in the original purchase of the Which The Claimants asserted that William Smith is responsible for a certain debt, and that he ceased payment of the debt owed to Claimants. Claimants also claim that Defendant/Respondent established sham corporate entities to shield himself from liability.

The Arbitration proceeded through the American Arbitration Association ("AAA"). AAA appointed Gene Esshaki as Arbitrator Esshaki issued a written Arbitration Award granting Defendant William A. Smith's Summary Disposition on June 19, 2023.

Claimants request that this Court vacate the Arbitration Award which granted the Respondent/Defendant, Smith, Summary Disposition.

Michigan Court Rule 3.602(J)(2) provides:

> (2) On motion of a party, the court shall vacate an award if:
>
> (a) the award was procured by corruption, fraud, or other undue means;
>
> (b) there was evident partiality by an arbitrator appointed as a neutral, corruption of an arbitrator, or misconduct prejudicing a party's rights;
>
> (c) the arbitrator exceeded his or her powers; or
>
> (d) the arbitrator refused to postpone the hearing on a showing of sufficient cause, refused to hear evidence material to the controversy, or otherwise conducted the hearing to prejudice substantially a party's rights.
>
> The fact that the relief could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award. MCR 3.602(J)(2).

Specifically, the Plaintiffs claim that the arbitrator exceeded his authority by misapplying the law as relates to the statute of frauds.

Alleged Facts

Nabil Shurafa and Michael Berschback owned three Which Wich Franchise Stores through separate entities. A purchase agreement with John Draper II was initiated in 2017, but the transaction did not proceed as planned. Limited liability companies (VEP entities) were formed to operate the stores, with William Smith's involvement becoming known later. The sale faced delays, but assets were handed over, and an amended agreement was executed in 2018, indicating an amount owed to Claimants.

In July 2018, as the sale proceeds were unpaid, Berschback intended to pursue legal action. It is alleged that a meeting was arranged where Smith agreed to cover monthly loan payments on the Which Wich stores in exchange for avoiding a lawsuit. Text messages and a ledger indicate regular payments by Smith, aligned with their agreement. Despite a brief pause during the COVID-19 pandemic, payments resumed after a temporary amendment.

Smith assured payment upon receiving a PPP loan but subsequently stopped payments, violating the agreement. Claimants, facing financial strain, refinanced their home mortgages to settle

the outstanding loans themselves.

An arbitration case proceeded against Draper and the VEP Entities, leading to a final Default award in July 2019, holding them liable to Claimants in the amount of $859,157.02, which was the purchase price minus payments made in the amount of $132,000. The Claimants have been unable to collect against Draper. In addition, on November 7, 2019, Draper was indicted by a Grand Jury on two counts of wire fraud and Draper pled to wire fraud. According to the Arbitrator's Summary Disposition Ruling, Mr. Draper was sentenced to prison, and a Restitution Order entered against him requiring him to pay the amount of the Judgment. (6/19/23 Ruling Upon Respondent's Motion for Summary Disposition, p5).

ARBITRATION AGAINST SMITH AND THE VEP ENTITIES

Smith's First Dispositive Motion in the Arbitration Proceeding

In the Smith arbitration proceeding, Smith filed a Motion for Summary Disposition alleging that his promise to pay the debt was not in writing and therefore was unenforceable in violation of the Statute of Frauds. Arbitrator Esshaki originally denied the motion for Summary Disposition, concluding that there was some form of an agreement between the parties:

> "Having reviewed the motion, brief, opposition and reply, the undersigned denies Respondent's motion to dismiss without prejudice. The limited facts that are currently before the undersigned establish some form of agreement was reached between Respondent Smith and Claimants under which Smith agreed to pay Claimants' monthly mortgage payments. At this point, the precise terms of that agreement, the consideration given or received, and the extent of the obligation is simply unknown. Numerous questions of fact exist preventing the motion from being granted at this time." **(See Plaintiffs's Exhibit X).**

Smith's Second Dispositive Motion in the Arbitration Proceeding

After the parties engaged in discovery including the depositions of Mr. Smith, Shurafa, and Berschback. Smith filed a second motion for Summary Disposition in front of Arbitrator Esshaki arguing that there was no genuine issue of material fact.

CLAIMANTS' POSITION

Claimants allege that they responded to the Motion for Summary Disposition, which was akin to a MCR 2.116(C)(10) motion, by providing documentary evidence to rebut the Motion. Claimants argue to this Court that the Arbitrator ignored the facts and his earlier ruling, and misapplied Michigan law when he dismissed the case on June 19, 2023. **(See Plaintiffs's Exhibit Y).**

Claimants argue that despite an initial acknowledgment by the Arbitrator of the existence of an enforceable agreement that Smith would pay the debt to Claimants, the Arbitrator reversed his ruling and granted Summary Disposition to the Respondent.

Claimants argue that this reversal resulted from a misapplication of Michigan law, leading to the dismissal of the claim without a hearing was erroneous citing: "(1) Smith's agreement to pay either the entire Judgment entered against Draper and the VEP entities or, at minimum, the amount of Claimants' outstanding mortgage payments constitutes a promise to pay the debt of another that falls within the Statute of Frauds (MCL 566.132(1)(b)) and must be memorialized in a signed writing and (2) the VEP entities' corporate veil cannot be pierced because "there is no evidence Smith had any management or control or any involvement at all in the VEP I or VEP III." (Claimants' Brief pages 11-12).

The plea is for this Court to rectify this perceived error.

RESPONDENT'S POSITION

The Respondent/Defendant argues that the Claimants' motion seeks to have this Court invade the fact finding and decision of the Arbitrator. Respondent/Defendant claims that a motion to vacate cannot be used as a ruse to re-litigate the substance of the arbitration issues. See e.g., *Gordon Sel- Way v Spence Bros, Inc,* 438 Mich 488, 497; 475 NW2d 704 (1991)("an allegation that the arbitrators have exceeded their powers must be carefully evaluated in order to assure that this claim is not used as a ruse to induce the court to review the merits of the arbitrators' decision.").

Respondent requests that this Court deny Plaintiffs' motion to vacate the arbitration award under MCR 3.602(J)(5)1 and MCL 691.1705(3)2, and confirm the arbitration award as a judgment under MCR 3.602(L).

JUDICIAL REVIEW OF ARBITRATION AWARDS

"Judicial review of arbitration awards is limited." *Konal v Forlini,* 235 Mich App 69, 74; 596 NW2d 630 (1999). *See also TSP Serv, Inc v Nat'l Standard, LLC*, 329 Mich App 615, 619; 944 NW2d 148 (2019).

"A court may not review an arbitrator's factual findings or decision on the merits." *TSP Serv*, 329 Mich App at 620 (quotation marks and citations omitted). Likewise, the reviewing court cannot engage in contract interpretation, which is an issue for the arbitrator. *Konal*, 235 Mich App at 74. Instead, a court may only review an arbitrator's decision for errors of law. However, not every error of law by an arbitrator requires court intervention. *TSP Serv*, 329 Mich App at 620.

> [W]here it clearly appears on the face of the award or the reasons for the decision as stated, being substantially a part of the award, that the arbitrator through an error in law have been led to a wrong conclusion, and that, but for

> such error, a substantially different award must have been made, the award and decision will be set aside. [*Id.* quoting *Detroit Auto Inter-Ins Exch v Gavin*, 416 Mich 407, 443; 331 NW2d 418 (1982).]

The court's determination of whether there is legal error depends on a review of "the face of the award itself" and not in a review of the arbitrator's mental process. *TSP Serv*, 329 Mich App at 620. A court may not substitute its judgment for that of the arbitrator or review "an arbitrator's mental path leading to the award." *Washington v Washington*, 283 Mich App 667, 672, 675; 770 NW2d 908 (2009). Once the court has "recognized that the arbitrator utilized controlling law, [the court] cannot review the legal soundness of the arbitrator's application of Michigan law." *Id.* at 674.

Additionally, it is "simply outside the province of the courts to engage in a fact-intensive review of how an arbitrator calculated values, and whether the evidence he relied on was the most reliable or credible evidence presented." *Fette v Peters Const Co*, 310 Mich App 535, 545; 871 NW2d 877 (2015) quoting *Washington*, 283 Mich App at 675. "[E]ven if the award was against the great weight of the evidence or was not supported by substantial evidence, [the court] would be precluded from vacating the award." *Fette*, 310 Mich App at 544-545.

APPLICATION

Claimants argue that the Arbitrator exceeded his powers as Smith's promise to pay Claimants' monthly loan payments does not fall within the Statue of Frauds because Smith did not make a special promise to pay the debt of "another" under MCL 566.132(1)(b). Claimant argues that Smith's promise to pay was self-serving.

Claimant states Smith admitted that the agreement to pay Claimants for their monthly loan payments was completely self-serving: " ... so my agreement was to pay them to keep me

out of a lawsuit until they resolved their issue and got a judgment against John Draper." (Claimants cites to Exhibit N, Smith Deposition, pp. 49-50).

Claimants cite to *Trost:* "[i]t is well settled that the statute [of frauds] does not apply when the leading object of the promisor is to serve his own interest, thereby making his promise original, and not collateral." *Trost v. Trost,* No. l:09-CV-580, 2011 WL 4527372, at 11 (W.D. Mich. Sept. 28, 2011) citing *Barbour v. Thomas,* 7 F. Supp. 271, 279 (E.D. Mich. 1933) (relying upon and citing Michigan law).

Claimants also contend that Smith's argument is misplaced where he claimed that he was paying Claimants for them to pay off their loans on the stores, and therefore a writing of the promise was required under the law. Claimants argue that "although an oral promise by a third party to the *creditor* to pay the debt of another is within the statute of frauds and must be in writing, **an oral promise by a third party *to the debtor* is not within in the statute of frauds and is not required to be in writing."** (Emphasis added). *Pratt v. Bates,* 40 Mich. 37, 39-40 (1879); *BRB Printing, Inc v. Buchanan,* 878 F Supp 1049, 1051 (ED MI, 1995); *Barbour v. Thomas,* 7 F Supp 271, 279 (ED MI, 1933). *Gruppuso v. Faraci,* No. 220993, 2001 WL 699938, at *2 (Mich. Ct. App. Mar. 27, 2001) (Claimants cite to Exhibit Z).

Claimants continue to argue that Smith promised to pay Claimants' monthly loan payments were made directly to Claimants, the debtors. There is no allegation Smith promised the creditor, Huntington Bank, that he would pay off Claimants' debt. Further, the monthly payments were made directly into Claimants' Chase bank accounts, Smith never made payments directly to the bank.

The Claimants' argument is not that Smith failed to pay the bank on the mortgage, but that he failed to pay *Claimants* for the debt they assumed with the bank (a debt Claimants paid

off on their own when Smith defaulted under the agreement).

However, Arbitrator Esshaki addressed these arguments in applying the law on page 7 of the Ruling Upon Respondent's Motion for Summary Disposition. The award states as follows:

> In his Reply Brief, Smith asserts that the obligation to pay was in fact an obligation from him to Claimants involving the debt due by Draper to Claimants and not directly the mortgage due to Huntington/SBA. Smith was agreeing to pay a portion of Draper's debt to Claimants to avoid being brought into an expensive legal proceeding with the negative implications that would arise from Smith being joined in such action. Thus, Smith argues, what Claimants are asserting is that he agreed to pay Claimants of portion of the obligation due them from Draper. Such commitment is in fact a collateral promise as opposed to an original promise and falls within the confines of the statute.

Ruling Upon Respondent's Motion for Summary Disposition, p7.

Arbitrator Esshaki concludes:

> Smith is correct that the obligation sought to be imposed upon him in this arbitration by Claimants rests upon a commitment to be liable for the debt of another and by statute must have been made in writing and signed by Smith. It is not contested that no writing exists obligating Smith to pay the debt of Draper to the Claimants, let alone a writing signed by Smith himself.

Ruling Upon Respondent's Motion for Summary Disposition, p8.

Arbitrator Esshaki applied the law to the facts as he deemed appropriate.

This Court is constrained from reviewing the merits of Arbitrator Esshaki's decision. "[A]n allegation that the arbitrators have exceeded their powers must be carefully evaluated in order to assure that this claim is not used as a ruse to induce the court to review the merits of the arbitrator's decision." *Gordon Sel-Way,* 438 Mich at 497.

Claimants next argue that even if Smith's promise fell within the Statute of Frauds, Claimants' breach of contract claim still would not fail because the Statute of Frauds is satisfied by written evidence between the parties.

Claimant states that Courts have held a plaintiff may satisfy the Statute of Frauds with *less* than a signed writing:

> "Typically, a party can meet the requirements of a statute of frauds by presenting a written document or documents that individually or collectively summarize the essential elements of the alleged agreement. See *Fothergill v. McKay Press,* 361 Mich. 666, 676, 106 N.W.2d 215 (1960) ("Normally a memorandum need be only that. It is sufficient if the obligations of each party may be determined from it. It need not have the minutiae of a contract."). Consequently, under MCL 566.132(1), the party seeking to enforce an agreement need not produce a written copy of the agreement, as long as the party can produce some written evidence that establishes the agreement's essential terms." *Huntington Nat. Bank v. Daniel J Aronoff Living Tr.,* 305 Mich. App. 496, 509, 853 N.W.2d 481,488 (2014).

Claimants attached to their Statement of Claim multiple text messages and e-mails that collectively summarize the parties' agreement. Claimant argues that although the arbitrator relied upon these documents to find the existence of an "agreement" in his first ruling denying Smith's motion to dismiss, "he inexplicably gave zero consideration to these communications in his subsequent ruling dismissing the case." Specifically, the e-mail attached as Plaintiff's Exhibit U between Berschback and Smith summarizes the essential elements and terms of the parties' agreement. Claimant argues that it also contains an offer, consideration, and acceptance (i.e., Berschback writes:"... we are willing to defer payment for as long as we are able to defer our SBA loan payments, it looks like a minimum of six months. After the deferment has ended we would continue our agreement for monthly payments or we'd begin collecting processes on the remaining amount of the sale." Smith responds, "This is definitely an acceptable compromise.").

It's not in the purview of this Court to determine if the written evidence establishes an agreement's essential terms to pay the debt of another.

Again, it is "simply outside the province of the courts to engage in a fact-intensive review of how an arbitrator calculated values, and whether the evidence he relied on was the most reliable or credible evidence presented." *Fette v Peters Const Co*, 310 Mich App 535, 545; 871 NW2d 877 (2015) quoting *Washington*, 283 Mich App at 675. "[E]ven if the award was against the great weight of the evidence or was not supported by substantial evidence, [the court] would be precluded from vacating the award." *Fette*, 310 Mich App at 544-545.

Claimant's next argument is that Smith's partial performance of the parties' agreement renders the Statute of Frauds inapplicable.

Even if the Statue of Frauds were applicable and unsatisfied in this matter, Claimants' reliance upon Smith's promise and consequent decision not to pursue Smith within the Draper arbitration prior to the expiration of the contractual statute of limitations period (one year under the Amended APA) would require the agreement be excluded from the Statute of Frauds.

In addition to the other findings by the arbitrator, on the face of the award, Arbitrator Esshaki found "[ ] no one individually signed the amended APA making them personally liable for the payment of the asset purchase price." Therefore, under the Amended APA, the finding of Arbitrator Esshaki appears to be consistent (6/19/23 Ruling Upon Respondent's Motion for Summary Disposition, p5).

Claimant would also have this Court review Arbitrator Esshaki's Award denying Claimant's request to pierce the corporate veil. This Court notes:

> For the corporate veil to be pierced, the corporate entity must be a mere instrumentality of another individual or entity. Further, the corporate entity must have been used to commit a wrong or fraud. Additionally, and finally, there must have been an unjust injury or loss to the plaintiff. There is no single rule delineating when a corporate entity should be disregarded, and the facts are to be assessed in light of a corporation's economic justification

to determine is the corporate form has been abused.

Rymal v Baergen, 262 Mich App 274, 293-294 (2004) citing *Foodland Distrib v Al-Naimi,* 220 Mich App 453, 457 (1996).

Specifically, the face of the arbitration award reads,

> Piercing the corporate veil is a drastic measure which can only be justified where fraudulent conduct has resulted in an injustice and damages to the Claimants. . . Additionally, no facts have been put forth which would justify the drastic remedy of piercing the corporate veil of VEP I and VEP III. No actions were ever taken by Smith that demonstrate that he exercised power and dominion over these entities or that he engaged in fraudulent conduct vis-a-via Claimants.

(6/19/23 Ruling Upon Respondent's Motion for Summary Disposition, p8).

Reciting the law again, "A court may not substitute its judgment for that of the arbitrator or review "an arbitrator's mental path leading to the award." *Washington v Washington*, 283 Mich App 667, 672, 675; 770 NW2d 908 (2009). Once the court has "recognized that the arbitrator utilized controlling law, [the court] cannot review the legal soundness of the arbitrator's application of Michigan law." *Id.* at 674.

This Court respectfully denies Claimants' Motion to Vacate the Arbitration Award. This Court does not find that Arbitrator Esshaki exceeded his powers. This Court confirms the Arbitration Award as a judgment under MCR 3.602(L).

This is a final order and closes the case.

SEAL OF THE 6TH CIRCUIT COURT
/s/Victoria A. Valentine
CIRCUMSPICE
OAKLAND COUNTY MICHIGAN