STATE OF MICHIGAN
IN THE BERRIEN COUNTY TRIAL COURT – BUSINESS COURT DOCKET
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TERRY KOEBEL and
JENNIE KOEBEL,
Plaintiffs,

CASE NO. 2019-0140-CB
HON. DONNA B. HOWARD

v

JERRY KOEBEL, SR., NANCY KOEBEL, JERRY KOEBEL JR, **ANNA KOEBEL,** and **J&A, LLC,**
Defendants.

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OPINION & ORDER ON PLAINTIFFS' MOTION TO VACATE, OR ALTERNATIVELY, MODIFY ARBITRATION AWARD

- and -

ENTRY OF FINAL JUDGMENT

At a session of the Berrien County Trial Court, held
On the 17th day of January, 2024, in the City of
St. Joseph, Berrien County, Michigan

This closed action returns to the Court for a post-dispositional review of an arbitration that took place on March 22, 2023, before Attorney James M. Straub, with the arbitration decision being issued on or about June 13, 2023. Plaintiffs Terry and Jennie Koebel filed their motion to vacate, or alternatively, to modify that arbitration decision on or about September 11, 2023. After

Defendants Jerry Koebel, Jr. and Anna Koebel filed their oppositional brief on or about October 23, 2023, a hearing on the motion to vacate was held before this Court on October 30, 2023. At the conclusion of the parties' oral arguments, the Court took the matter under advisement. The Court, now being otherwise advised in the premises, issues the following Opinion and Order.

I. BACKGROUND

As the parties will recall, the underlying matters arose from a family dispute over farming and dairy operations in the area of Avery Road in Three Oaks, Berrien County, Michigan. Plaintiff Terry Koebel is the son of Defendant Jerry Koebel Sr. and the brother of Defendant Jerry Koebel Jr. (a/k/a "Butch"). It is undisputed that Jerry Koebel Sr. and his wife, Nancy (collectively "the Senior Koebels"), have, individually or through their trusts or other entities, long been owners of the subject farm property in Three Oaks, Michigan. The Senior Koebels' two sons, Terry and Butch, have worked the family farm for decades.

In 2011 or 2012, Terry and Butch agreed with the Senior Koebels to essentially take over certain operations on the farm by renting from the Senior Koebels a part of the farm property, including the dairy parlor and other related buildings. There was a partially-typed, partially handwritten document, dated January 26, 2012, purporting to memorialize the rental agreement between Terry, Butch and the Senior Koebels (Rental Agreement, 1/26/12, attached to Pltfs Brf as **Exh D**). In part the Rental Agreement states:

> This document shall serve as a legally binding agreement between Jerry A Koebel Sr and Nancy Koebel, and their sons Jerry Koebel Jr and Terry Koebel. Jerry Sr and Nance agree to rent the dairy, including the parlor and buildings, located at 16318 Avery Road, Three Oaks, Michigan to their sons, Jerry Jr and Terry for the sum of $1500.00 per month.
>
> ***
>
> This agreement shall remain in effect until the death of the last remaining spouse of Jerry Sr and Nancy Koebel.
>
> Upon the death of the last spouse, ownership of the dairy farm on Westside of Avery Road shall pass directly to Jerry Jr. and Terry.

(Rental Agreement, 1/26/12, Pltfs Brf **Exh D**). It is undisputed that Nancy Koebel never signed the Rental Agreement (Rental Agreement, 1/26/12, Pltfs Brf **Exh D**). Nonetheless, there is no challenge that those parties appeared to have operated more or less consistent with the Rental Agreement, until about February 2018, when Terry and Butch sought to dissolve the partnership they had formed to operate the rented property.

Terry and Butch, with their respective attorneys, hired mediator, Attorney William W. Jack, to assist in the separation of their business interests. As a result of the mediation, a hand-

written settlement agreement was executed by Terry and his attorney, Tim Newhouse, and Butch and Anna, individually ("the Junior Koebels") and on behalf of Defendant J&A, LLC, and their attorney, Mac Wardrop (Sett Agr, 2/5/2018, attached as Pltfs Brf, 9/11/2023, as **Exh A**). The Settlement Agreement states in pertinent part:

> 2. In relation to the sawdust business, Terry Koebel shall pay J&A Koebel the amount of $35,000 on or before March 1, 2018, for the exclusive use and ownership of the "sawdust business" . . . .
>
> ***
>
> 4. The parties shall release any and all past, present or known claims as of today as to all parties.
>
> 5. Terry Koebel shall have reasonable access to all land necessary for his farming operation including grain bin and grain dryer and lean-to **within the power of their lease with the Senior Koebels**.
>
> ***
>
> 8. While there may be additional closing documents prepared, the parties understand this is a binding agreement that may be enforced in Court.
> 9. **The mediator shall retain jurisdiction over this matter and shall act as a binding arbitrator with the power to issue sanctions including costs and fees as he deems appropriate in the event there are disputes arising out of this agreement.**

(Sett Agr, 2/5/18, Pltfs Brf **Exh A**)(emphasis added).

Soon thereafter, another dispute arose when Plaintiffs claimed the Senior Koebels "kicked him off the property" in March of 2018 (Arb Decision, 6/13/23, attached to Pltfs Brf as **Exh C**, citing to Arb Tr, 3/22/2023, p 87, attached to Pltfs Brf as **Exh B**). Plaintiffs and the Junior Koebels, again with their respective attorneys, returned to meet with Attorney Jack. Ultimately, Attorney Jack issued an email to Attorneys Newhouse and Wardrop stating:

> I am sorry we were not more successful today as this clearly is a case that, given the emotions, should resolve. Pursuant to the Settlement Agreement, **I was to act as an arbitrator in any disputes arising out of the settlement agreement** with the authority to issue sanctions in my discretion. **I don't find any breach of the agreement by the signatories to the agreement and therefore am not ordering sanctions.**

(Jack Email, 9/12/2018, attached to Pltfs Brf as **Exh E**)(emphasis added). There is no record of any appeal or challenge issued by either party to Mr. Jack's September 12, 2018 statement or finding.

Relatedly, both of the Senior Koebels later acknowledged their March 2018 decision and letter to deny Plaintiffs access to the subject Avery Road property, but denied being involved or

knowing about the February 5, 2018 Settlement Agreement at the time of their March decision regarding the lease (Arb Decision, 6/13/23, p 5, Pltfs Brf **Exh C**, citing to Arb Tr, 3/22/2023, pp 128, 136 & 139-140, Pltfs Brf **Exh B**). It is undisputed that neither of the Senior Koebels were parties or signatories to the subject Settlement Agreement (Arb Decision, 6/13/23, p 10, Pltfs Brf **Exh C**).

On or about June 26, 2019, Plaintiffs commenced the underlying action in the Berrien County Trial Court specialized business docket against all Defendants, alleging claims of: Breach of Mediated Settlement Agreement (Count I); Fraud/Misrepresentation (Count II); Unjust Enrichment (Count III; Theft & Conversion (Count IV); Detrimental Reliance (Count V); Breach of Contract (Count VI); Slander (Count VII); and Intimidation (Count VIII). On or about February 22, 2021, Defendants filed a separate action against Plaintiffs (Berrien Case No. 2021-0043-CB, "the Related Matter"), alleging claims of: Conversion – from the Junior Koebels (Count I); Conversion – from the Senior Koebels (Count II); Breach of Contract (Count III); Property Damage (Count IV); and Trespass (Count V). After over two years of protracted litigation, the parties reached a global resolution that was placed on the record (before Hon. Dennis M. Wiley) on July 6, 2021. After additional challenges regarding the written memorialization of this settlement, including the appointment of an arbitrator, the Court, after hearing, entered an Order providing in relevant part that:

> Pursuant to the settlement placed on the record in this matter, and with respect to matters in Case No. 21-0043-CB-H, Berrien County Circuit Court ("Related Matter"), the Court orders as follows:
>
> 1. The Defendants shall pay the Plaintiffs $52,500 within thirty (30) days from the date of this Order.
> 2. Counts II through VIII of Plaintiffs' Complaint, and the claims made in such counts, are **dismissed with prejudice** . . . .
> 3. As to Count I of Plaintiffs [sic] Complaint, alleging a breach of mediated settlement agreement, such Count is **dismissed without prejudice and the claims related to the alleged breach of the mediated settlement agreement . . . shall be resolved by an arbitrator** agreed by the parties. . . .
> 4. With respect to the Related Matter, an Order shall enter (a) **dismissing Counts III through V, and the claims made in such counts, with prejudice** and without costs, . . . and (b) **dismissing Counts I and II without prejudice with the claims raised in such Counts to be decided by the arbitration** . . . .
>
> **This Order disposes of the claim and closes the case. MCR 2.602(A)(3).**

(Order, 10/12/2021, ¶¶ 1-4)(emphasis added).[1]

More specifically, although the instant action and the Related Matter were dismissed and closed, the "surviving" claims (*i.e.* dismissed without prejudice) to be arbitrated were: Terry Koebel's claim for breach of the aforementioned 2018 Settlement Agreement against the Junior Koebels (Complaint Count I in the instant action), and the Defendants' respective claims for conversion against Terry and Jennie Koebel (Complaint Counts I and II in the Related Matter). There was no appeal or other challenge by any party to this Court's October 12, 2021 Order.[2]

As mentioned, Attorney Straub was eventually appointed as the arbitrator (*see,* Order, 11/2/2021). It appears from the available record that early in the setting of arbitration proceedings the pleadings and claims between the parties in this action and the Related Matter were essentially consolidated by allowing the involved Defendants (*i.e.* the Junior Koebels) to file responsive pleadings that included a counterclaim, if they desired to do so (Arb Order, 1/18/22, attached to Pltfs Brf as **Exh F**). Apparently, the Junior Koebels filed late responsive pleadings, including their counterclaim. (Arb Order, pp 1-2, Pltf Brf **Exh F**). However, upon Plaintiffs' objection, which was not made until after the Junior Koebels' responsive pleadings were received by Attorney Straub, Attorney Straub denied Plaintiffs' request for dismissal of the Junior Koebels' responsive pleadings as untimely (Arb Order, pp 2-3, Pltf Brf **Exh F**).

After approximately sixteen (16) months of continued arbitration proceedings, on March 22, 2023, Attorney Straub conducted an arbitration hearing with the parties (Arb Tr, 3/22/23, Pltfs Brf **Exh B**). During the arbitration hearing, all the named individual parties testified, and 264 exhibits were admitted (Arb Tr, 3/22/23, pp 4-12, Pltfs Brf **Exh B**). Attorney Straub issued a written opinion on June 13, 2023 (Arb Decision, 6/13/23, Pltfs Brf **Exh C**). Neither the arbitration agreement, nor the arbitration pleadings or post-hearing briefing, if any, were provided to the Court as part of the instant motion, but it is undisputed that Attorney Straub was to decide whether or not

[1] Likewise, on October 12, 2021, an Order of Dismissal was entered in the Related Matter and that case was also closed.

[2] It is undisputed that both actions have remained closed in the circuit court clerk records. However, due to a system error, a notice of intent to dismiss for no progress was inadvertently generated by the Court Clerk's Office on or about August 24, 2023. As the file was long-closed and sent to off-site storage, the Court was not made aware of the erroneous notice until reviewing the file and record upon Plaintiffs' filing of the instant motion to vacate. Therefore, contemporaneously with the issuance of this Opinion and Order, but under separate cover, the Court, pursuant to MCR 2.612(A), will issue an Order striking the notice of intent to dismiss for no progress erroneously issued on or about August 24, 2023.

Defendants, namely the Junior Koebels, breached Paragraph 5 of the Settlement Agreement indicating that "Terry Koebel shall have reasonable access to all land necessary for his farming operation including grain bin and grain dryer and lean-to **within the power of their lease with the Senior Koebels**." (Sett Agr, 2/5/18, Pltfs Brf **Exh A**)(emphasis added).

Based upon the pertinent findings of fact which Attorney Straub sets forth in pages 1 through 6 of the arbitration decision, Attorney Straub concluded in part:

> Regarding the other provisions of the January 2012 agreement renting the dairy to Terry and Jerry Jr., the absence of Nancy Koebel's signature is material. . . . The January 2012 agreement involved the rental (leasing) of the dairy, including the parlor and buildings for longer than a year, so there is no doubt as to the applicability of MCL 566.106. . . . The absence of a signature by a co-owner renders the contract void. *Forge v Smith*, 458 Mich. 198, 206; 580 NW2d 876, 881 (1998); *Fields v Korn* 366 Mich 108, 113 NW2d 860 (1962)[.]
>
> If the 2012 lease was invalid, the Plaintiffs would not be entitled to any leasehold interest in the Avery Road dairy, including the parlor and buildings at the time of the execution of the Settlement Agreement on February 5, 2018. However, even if the January 27, 2012 lease agreement were determined valid, Terry (and Jennie) breached the agreement in 2017 when he (they) decided to shut down the dairy.

(Arb Decision, 6/13/23, pp 7-8, Pltfs Brf **Exh C**). As indicated, Attorney Straub ultimately found that Plaintiffs failed to show there was a breach of Paragraph 5 of the Settlement Agreement, because there was no valid lease rights held by Plaintiffs, and the Senior Koebels were not even parties to the subject Settlement Agreement. In part, Attorney Straub explained that "Plaintiffs knew, or should have known, on February 5, 2018 that the formerly leased dairy farm land (or access to 'other rented ground we were renting from third parties. . . ') was at least potentially not going to be made available to them by the Senior Koebels." (Arb Decision, 6/13/23, p 9, Pltfs Brf **Exh C**). In addition, Attorney Straub noted that, at least as of September 12, 2018, Attorney Jack determined as an arbitrator under Paragraph 9 of the Settlement Agreement (Pltfs Brf, **Exh A**), there was no breach by the Junior Koebels, and no sanction was imposed by him at that time (Arb Decision, 6/13/23, pp 10-11, Pltfs Brf **Exh C**). There is no discussion or decision by Attorney Straub referencing Defendants' purported counterclaims (Arb Decision, 6/13/23, Pltfs Brf **Exh C**).

As outlined above, Plaintiffs filed the instant motion to vacate or modify the arbitration decision in this otherwise closed action, essentially arguing Attorney Straub "acted well beyond the material terms of the contract from which his authority flows by issuing rulings beyond his jurisdiction." (Plfs Brf, 9/11/23, p 4).

II. ANALYSIS

The Court reviews Plaintiffs' motion pursuant to MCR 3.602(J), which reads in relevant part:

> (1) A request for an order to vacate an arbitration award under this rule must be made by motion. **If there is not a pending action between the parties, the party seeking the requested relief must first file a complaint as in other civil actions**. **A complaint or motion to vacate an arbitration award must be filed no later than 21 days after the date of the arbitration award**.
>
> (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.

MCR 3.602(J)(1)-(2)(emphasis added).

It is well-established that generally, "courts have a limited role in reviewing arbitration awards." *TSP Servs, Inc v Natl-Standard, LLC*, 329 Mich App 615, 619; 944 NW2d 148 (2019). A court may not substitute its judgment for that of the arbitrator, *Washington v Washington* 283 Mich App 667, 672-675; 770 NW2d 908 (2009), and it cannot review an arbitrator's factual findings or decision on the merits. *TSP Servs*, 329 Mich App at 619. Thus, even if an award appears to be "against great weight of the evidence" or "not supported be substantial evidence," a court is still precluded from vacating an award. *Fette v Peters Construction Co*, 310 Mich App 535, 544-545; 871 NW2d 877 (2015).

"Instead, a court may only review an arbitrator's decision for errors of law." *Id.* Even when an arbitrator's decision contains an error of law, a court's intervention is only appropriate "where 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 arbitrators 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)(emphasis added). Further, a court's determination of whether there is a legal error does not include a review of the arbitrator's mental process, but

rather, depends on a review of "the face of the award itself." *TSP Servs*, 329 Mich App at 620. Moreover, once a court has "recognized that the arbitrator utilized controlling law, [it] cannot review the legal soundness of the arbitrator's application of Michigan law." *Washington*, 283 Mich App at 674.

A. Procedural Review

First and foremost, the Court finds that Plaintiffs' motion was not properly brought before it under MCR 3.602(J). Examining MCR 3.602(J), this Court is mindful that:

> Michigan courts construe court rules in the same way that they construe statutes. Well-established principles guide this Court's statutory or court rule construction efforts. We begin our analysis by consulting the specific language at issue, and gives effect to the rule maker's intent as expressed in the court rule's terms, giving the words of the rule their plain and ordinary meaning. If the language poses no ambiguity, this Court need not look outside the rule or construe it, but need only enforce the rule as written.

Kloian v Domino's Pizza LLC, 273 Mich App 449, 458; 733 NW2d 766 (2006). As indicated, MCR 3.602(J)(1) plainly states "[i]f there is not a pending action between the parties, the party must first file a complaint as in other civil actions," and that "[a] complaint . . . to vacate an arbitration award must be filed **no later than 21 days after the date of the arbitration award**" (emphasis added). Here, the Court entered its Order in this action on October 12, 2021, which explicitly provided that **all the counts** in this action and the Related Matter were dismissed (¶¶ 2-4), albeit some with prejudice and some without prejudice. While this Court retained jurisdiction (¶ 5), the Order plainly stated that it "**disposes of the claim and closes the case**" (Order, 10/12/21, p 3). Clearly, there is nothing in the Order to suggest to Plaintiffs that this case remained open.

Additionally, given that the arbitration decision by Attorney Straub was issued on June 13, 2023, pursuant to MCR 3.602(J)(1), Plaintiffs had until July 5, 2023[3] in which to file a complaint seeking the vacation or modification of Attorney Straub's decision. Admittedly, Plaintiffs did not timely file a complaint nor their motion in compliance with MCR 3.602(J)(1). Instead, they waited 90 days from the date of Attorney Straub's arbitration decision to file a motion to vacate or modify it in the present case file, which has been closed for over two years. Thus, Plaintiffs erred in belatedly filing the instant motion in this closed action, and without even seeking leave from the Court.

[3] The Court notes that 21 days from June 13, 2023 was July 4, 2023, a day in which the Court was closed in observance of the Independence Day holiday. MCR 1.108.

Contrary to the existing court record, at the October 30, 2023 hearing, Plaintiffs' counsel asserted that he was under the impression that the case was still open, and thus surmised that he was still permitted to file his motion because he did so within 91 days of the arbitration decision, under MCR 3.602(J)(3). Counsel also cited to the notice of intent to dismiss that was issued by the clerk as a basis for his belief that this action was still open. However, the Court finds Plaintiffs' explanation to be without merit under the clear record. First, the long held maxim, "ignorance of the law is no excuse," is aptly applicable here. *Spohn v Van Dyke Pub Sch*, 296 Mich App 470, 488; 822 NW2d 239 (2012). One cannot reasonably review MCR 3.602(J) in preparation for a challenge to an arbitration decision without seeing that there are two different time-limits provided, section (J)(1) providing 21-days, and section (J)(3) providing 91-days. Under the clear and unambiguous language of the Court's October 12, 2021 Order, explicitly dismissing all the claims and closing this case, section (J)(1) applies. Second, Plaintiffs could not have reasonably relied on the errant notice of intent to dismiss in making their decision not to file a new action within 21-days, under section (J)(1), because that mistaken notice of intent to dismiss was not even issued until August 24, 2023, *i.e.* about 50 days <u>after</u> the expiration of the 21-day time limit.

If Plaintiffs sought this Court to vacate the arbitration decision of Attorney Straub, they should have timely initiated such action, through a complaint filed no later than July 5, 2023, or at least sought leave or other relief from the Court to file a later challenge. In failing to do so, Plaintiffs' rights to challenge Attorney Straub's arbitration decision of June 13, 2023 (Pltfs Brf **Exh C**), were not preserved and are time-barred pursuant to MCR 3.602(J)(1).

B. Review of Arbitration Decision

Next, even assuming *arguendo* that Plaintiffs had timely and appropriately filed their challenge to the arbitration decision under MCR 3.602(J), the Court is also unpersuaded by Plaintiffs' substantive arguments of reversible error by Attorney Straub's decision. Michigan law sets forth a limited set of instances in which a Court is required to vacate an award, such as corruption, fraud, undue means, evident partiality, misconduct, and exceeding the arbitrator's powers. MCL 691.1703(1); *see also* MCR 3.602(J)(2)(c). The only category proffered by Plaintiffs' motion to vacate is that Attorney Straub's June 13, 2023 arbitration decision (Pltfs Brf **Exh C**) exceeds his authority in several respects.

Plaintiffs first argue that "[t]he arbitrator exceeded his authority in issuing an award that purports to adjudicate the rights of the parties to that Lease. In addition, the arbitrator acted beyond

his authority when he purported to make rulings of the testamentary effect of the lease . . . That issue was not raised by the parties in the arbitration, nor was it central to the dispute." (Pltfs' Brf, 9/11/23, p 4). Plaintiffs go on to contend that because Attorney Straub mistakenly inferred that Nancy Koebel was a necessary party to the lease, the absence of her signature was immaterial, as she was not a titleholder to the land that was being leased (Pltfs Brf, 9/11/23, p 5). In response, Defendants argue that the lease was in fact at issue (Defs Brf, 10/23/23, p 9). Defendants further assert that even if the Court erred in determining the validity of the lease, his underlying arbitration decision would stay the same. (Def Brf, 10/23/23, pp).

Upon review of Plaintiffs' first challenge, it is difficult to see how the subject lease agreement, which was entered into evidence, discussed at length during the arbitration hearing, and used by Plaintiffs in order to demonstrate how the subject Settlement Agreement was breached—would not be material to Attorney Straub's arbitration decision on a claimed breach. As well-established in Michigan law, an agreement to settle a pending lawsuit is a binding contract, governed by the legal rules applicable to the construction and interpretation of other contracts. *Reicher v SET Enterprises, Inc*, 283 Mich App 657, 663; 770 NW2d 902 (2009). The primary obligation when interpreting a contract is to determine the intent of the parties. *Bodnar v St John Providence, Inc*, 327 Mich App 203, 220; 933 NW2d 363 (2019). "The parties' intent is discerned from the contractual language as a whole according to its plain and ordinary meaning." *Id.* When a contract is clear and unambiguous, the provisions reflect the parties' intent as a matter of law and they are to be construed and enforced as written. *Id.*

As highlighted above, without question, Attorney Straub, as arbitrator was asked to determine, from the evidence presented, if Paragraph 5 of the Settlement Agreement (Pltfs Brf, **Exh A**) was breached by Defendants. Again, the plain language of Paragraph 5 states that "Terry Koebel shall have reasonable access to all land necessary for his farming operation including grain bin and grain dryer and lean-to within the power of their lease with the Senior Koebels." (Sett Agr, 2/5/18, Pltfs Brf **Exh A**)(emphasis added). It follows that in order for Attorney Straub to determine if Terry's rights of access were breached by Defendants, he first would have to understand what those rights were. That is, the clear and unambiguous language of the provision made Terry's "reasonable access," as negotiated, explicitly dependent upon and limited to those "**within the power of their lease with the Senior Koebels**." (Sett Agr, 2/5/18, ¶ 5, Pltfs Brf **Exh A**)(emphasis added).

Consequently, the Court finds the "power of the lease with the Senior Koebels" is material to the access rights negotiated in the Settlement Agreement, and more importantly, pertinent to Attorney Straub's arbitration decision determining whether or not Plaintiffs demonstrated that Defendants had breached that provision of the Settlement Agreement by denying Plaintiffs access to the land under "their lease with the Senior Koebels." Had the parties intended the access to be something other than reasonable access within the power of their lease with the Senior Koebels, such could have been so stated. It was not. As such, Plaintiffs' first challenge of Attorney Straub exceeding his authority by considering the "power of their lease with the Senior Koebels" fails.

Relatedly, the second challenge purporting that Attorney Straub exceeded his authority by addressing certain testamentary issues in the lease with the Senior Koebels, is similarly without merit. Again, Plaintiffs' rights of access were plainly conditioned upon the "power of their lease with the Senior Koebels." (Pltfs Brf **Exh A**). Thus, the lease with the Senior Koebels was clearly pertinent to Attorney Straub's determination of whether there was a breach of the Settlement Agreement by Defendants.

In this case, Attorney Straub substantively decided there was no breach to Plaintiffs' right of "reasonable access" provided in Paragraph 5 of the Settlement Agreement (Pltfs Brf **Exh A**) for primarily two reasons. First, Attorney Straub made the findings, supported by applicable legal authority, that there was no validity or "power of their lease with the Senior Koebels" (Sett Agr, 2/5/18, ¶ 5, Pltfs Brf **Exh A**), upon which the reasonable access of the parties was conditioned. The lease was determined by Attorney Straub to be invalid and/or void under the statute of frauds for leases of property that exceed one (1) year, MCL 566.106, and the lack of Nancy Koebel's signature to that lease (Arb Decision, 6/13/23, pp 7-8, Pltfs Brf **Exh C**).

Second, even if there was power or validity of the lease with the Senior Koebels, Attorney Straub made the additional finding on the evidence presented that it was Plaintiffs, not Defendants, who first materially breached the lease (Pltfs Brf **Exh D**) back in 2017 when "he (they) decided to shut down the dairy." (Arb Decision, 6/13, 23, p 8, Pltfs Brf **Exh C**). As cited by Attorney Straub, "one who first breaches a contract cannot maintain an action against the other contracting party for his subsequent breach or failure to perform." *Alpha Capital Mgt, Inc v Rentenbach*, 287 Mich App 589, 613; 792 NW2d 344 (2010)(internal quotation marks and citations omitted). The Michigan Court of Appeals recently reiterated the well-established law defining a "substantial breach" as follows:

Our Supreme Court has stated that a substantial breach:

> can be found only in cases where the breach has effected such a change in essential operative elements of the contract that further performance by the other party is thereby rendered ineffective or impossible, such as the causing of a complete failure of consideration or the prevention of further performance by the other party. [*McCarty v Mercury Metalcraft Co*, 372 Mich 567, 574, 127 NW2d 340 (1964)(citations omitted).]

> Furthermore, "[o]ne consideration in determining whether a breach is material is whether the nonbreaching party obtained the benefit which he or she reasonably expected to receive." *Holtzlander v Brownell*, 182 Mich App 716, 722, 453 NW2d 295 (1990).

Tindle v Legend Health, PLLC, – Mich App –; – NW2d – (COA Docket No. 360861; April 20, 2023); *see also,* Arb Decision, 6/13/23, pp 8-9, Pltfs Brf **Exh C**).

Plaintiffs have failed to demonstrate how Attorney Straub's findings or application of established law in this respect was reversible error (*i.e.* led to a substantially different result). *Recall, TSP Servs,* 329 Mich App at 619 (court cannot review an arbitrator's factual findings or decision on the merits); *Fette v Peters Construction Co,* 310 Mich App 535, 544-545; 871 NW2d 877 (2015)(court is precluded from vacating an award even if its against great weight of the evidence or not supported be substantial evidence). There is no evidence that has been presented to this Court that would suggest Attorney Straub's decision regarding the invalidity of the lease, and/or even if lease is valid, amounted to anything more than harmless error given the whole of Attorney Straub's arbitration decision. Accordingly, Plaintiffs' first and second arguments pertaining to the arbitrator exceeding his authority or jurisdiction fail.

Plaintiffs next take issue with Attorney Straub's determination that their claim for breach of the Settlement Agreement was time-barred because they never challenged the September 12, 2018 determination of their initial mediator turned arbitrator, Attorney William Jack. Here, the Court agrees with Plaintiffs' challenge, in part only. The Court agrees with Attorney Straub's assessment that Attorney Jack's decision of September 12, 2018 (*i.e.* no breach of access had occurred from what was presented to him at that time), was validly issued at that time as an arbitrator, given the plain and ordinary language of section 9 of the Settlement Agreement (Pltfs Brf **Exh A**; *see also* Arb Decision, 6/13/23, p 10, Pltfs Brf **Exh C**). There is also no dispute that Attorney Jack's arbitration finding was never confirmed by a court, and that Plaintiffs failed to timely challenge Attorney Jack's September 12, 2018 finding pursuant to MCR 3.602(J).

However, the Court agrees with Plaintiffs, but for different reasons than Plaintiffs asserted, that Attorney Straub erred in determining that Attorney Jack's prior arbitration decision had the effect of "bar[ring] the claims in Count I of Plaintiffs[']s Complaint" (Arb Decision, 6/13/23, p 11, Pltfs Brf **Exh C**). More specifically, the Court finds instead that Attorney Jack's prior arbitration finding (*ie*, no breach), which was never sought by any party to be confirmed, vacated, modified, or enforced by this Court, became immaterial upon the later resolution placed on the record, and memorialized in the Court's entered October 12, 2021 Order. That is, by negotiated resolution between the parties of all the claims and defenses that had been asserted in this action, the "surviving" (Count I) claim of whether there was a "breach of a mediated settlement agreement" by Defendants was explicitly ordered to "**be resolved by an arbitrator agreed to by the parties. . . [or] selected by the Court**." (Order, 10/12/21, ¶ 3, p 2)(emphasis added).[4]

As a court speaks through its written orders and judgments, *In re Contempt of Henry*, 282 Mich App 656, 678; 765 NW2d 44 (2009), the plain and unambiguous language of the October 12, 2021 Order, as reflective of the parties' negotiated resolution of their respective claims, must be enforced. There is no condition in the Court's October 12, 2021 Order directing Attorney Straub to decide if Attorney Jack's decision was valid and final, and by the parties' own admissions Attorney Jack's decision in that regard was not even part of the parties asserted claims or defenses going to arbitration. Rather, Attorney Straub, as the appointed arbitrator, was to be the finder of fact and decision-maker of whether Plaintiffs met their burden to demonstrate from the evidence presented at the arbitration of the asserted claim (Count I) in this action – *i.e.* whether Defendants breached Paragraph 5 of the Settlement Agreement (Pltfs Brf, **Exh A**).[5]

With that said, the Court finds that this error and that portion of Attorney Straub's decision, discussing the implications of Attorney Jack's September 12, 2018 emailed arbitrator's finding of no breach of the Settlement Agreement, are superfluous to Attorney Straub's other substantive findings of fact and conclusions of law as it relates to the parties' claims to be arbitrated – *i.e.* whether a breach of the Settlement Agreement occurred. Said differently, even upon finding that

[4] As an aside, the claims (Counts I & II) in the Related Matter, were also "to be decided by the arbitration conducted pursuant to paragraph 3 of this Order." (Order, 10/12/21, ¶ 4, p 3).

[5] To the extent there were counterclaims raised at arbitration, the arbitrator would have needed to decide if Defendants/Counter-Plaintiffs (*i.e.* Plaintiffs in the Related Matter) met their burden to demonstrate from the evidence any asserted counterclaims as well. It is not clear from the briefing or record presented whether any counterclaims went forward to arbitration, but if they had, it is clear that Attorney Straub did not grant Defendants' counterclaims or make an award to Defendants in that respect (Arb Decision, Pltfs Brf **Exh C**).

latter portion of Attorney Straub's decision to be in error, there has been little evidence or legal argument presented to the Court to suggest that this error would have led to a substantially different result, warranting vacation of the arbitration decision. *TSP Servs,* 329 Mich App at 619.

As already discussed at length above, Plaintiffs have failed through their motion to demonstrate a reversible error in Attorney Straub's decision. Thus, based upon there being no valid lease bestowing access rights to Plaintiffs and/or invalidating their rights by Plaintiffs first materially breaching of the lease, it was Attorney Straub's proper decision, as supported by law, that there was no longer an enforceable "power" of the lease upon which Plaintiffs could base a right of access under the Settlement Agreement (Arb Decision, 6/13, 23, pp 8-10, Pltfs Brf **Exh C**).

For these reasons, the Court deems that unnecessary portion of Attorney Straub's decision related to the interplay of Attorney Jack's prior finding as an arbitrator to be harmless error, and not an exceeding of Attorney Straub's authority under MCR 3.602(J) or MCL 691.1703(1), warranting this Court to vacate the arbitration decision.

The Court finds Plaintiffs' final basis for its motion, referencing "other errors" (Pltfs Brf, 9/11/23, pp 8-10), including Attorney Straub's alleged failure to dismiss "Defendants' filed counterclaims" and that Attorney Straub was allegedly not sworn-in prior to the start of the March 22, 2023 hearing, to be unpersuasive. First, there is no question that the arbitration decision (Pltf Brf **Exh C**) does not address or even reference Defendants' counterclaims (*i.e.* presumably the claims in the Related Matter). It is not clear from the briefing or record presented whether any counterclaims went forward to arbitration, but if they had, it is clear that Attorney Straub did not grant Defendants' counterclaims or make an award to Defendants in that respect (Arb Decision, 6/13/23, pp 11-12, Pltfs Brf **Exh C**). Therefore, Plaintiffs' alleged error of Attorney Straub's prior decision denying dismissal of Defendants' counterclaims is moot. *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998)(as a general rule, a court will not decide an issue that presents only abstract questions of law that do not rest upon existing facts or rights or an event occurs that renders it impossible for a reviewing court to grant relief). Here, Attorney Straub's arbitration decision does not grant judgment to Defendants on their purported counterclaims. Therefore, no additional relief is available to Plaintiffs (or Defendants for that matter) on Defendants' counterclaims initially asserted in arbitration, if any.

Moreover, even assuming that this alleged error is not moot, the Court finds Plaintiffs' argument and presented record to be woefully insufficient. For example, Plaintiffs essentially argues that Attorney Straub exceeded his authority under the arbitration agreement, but outside of the one arbitration order (Pltfs Brf **Exh F**), Plaintiffs provide no arbitration agreement, no arbitration pleadings, no other relevant pre-hearing motions or briefs, or post-hearing briefing to support their allegations. As such, the Court finds Plaintiffs have waived the issue by giving it such cursory treatment. *Blazer Foods, Inc v Rest Properties, Inc*, 259 Mich App 241, 252; 673 NW2d 805 (2003).

Similarly, the Court finds Plaintiffs' three-sentence challenge based upon MCR 3.602(E)(1) – swearing-in of arbitrator – is not sufficiently articulated or supported and is also deemed waived. Plaintiffs only show through the arbitration transcript (Pltfs Brf **Exh B**) that *on the record* Attorney Straub was not sworn-in as arbitrator prior to the testimony of the witnesses. However, MCR 3.602(E) does not require that the oath be administered on the record. What other discussions between the parties' counsel and Attorney Straub that occurred prior to March 22, 2023 remains unclear. Plaintiffs' motion and this Court's record evidence is silent on whether Attorney Straub was sworn-in on that day prior to going on the record on March 22, 2023, or on a day prior to March 22, 2023. Again, "[i]t is not sufficient for a party simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998)(internal quotation marks and citation omitted).

More importantly, even if Attorney Straub should have, but failed to take an arbitrator's oath prior to hearing testimony on March 22, 2023, Plaintiffs fail to show this as reversible error. Notably, looking at the narrow circumstances warranting the Court to vacate an arbitration decision, MCR 3.602(J) and MCL 691.1703, failure for an arbitrator to take an oath, by itself, does not fall into any of those stated categories. Rather, as with all the requirements of MCR 3.602, the purpose is to ensure fairness in an arbitral process. *Rembert v Ryan's Family Steak Houses, Inc*, 235 Mich App 118, 160; 596 NW2d 208 (1999). In this instance, by Plaintiffs' cursory argument (merely 3 sentences), they fail to show how the lack of an oath otherwise materially and adversely impacted the fairness of the arbitration proceedings on March 22, 2023, and the resulting written arbitration decision issued by Attorney Straub.

These two alleged "other errors" are moot and/or, at most, harmless, and are not shown to change the underlying appropriate result of Attorney Straub's arbitration decision. Consequently, there is also no cause warranting the Court to vacate Attorney Straub's June 13, 2023 arbitration decision based upon these "other errors." *TSP Servs,* 329 Mich App at 619.

Lastly, the Court addresses Plaintiffs' alternative request for relief, *i.e.* modification of Attorney Straub's arbitration award (Pltf Brf, 9/11/23, pp 2 & 10). Although not cited by Plaintiffs, this Court has the authority to modify an award if "the arbitrator has awarded on a matter not submitted to the arbitrator, and **the award may be corrected without affecting the merits of the decision** on the issues submitted." MCR 3.602(K)(2)(b)(emphasis added). The arbitrator's award is in essence a no cause of action on Plaintiffs' claim of breach of the mediated Settlement Agreement, in favor of Defendants. Other than the above-referenced error as it relates to the application of Attorney Jack's prior finding in 2018, and the purported error of not taking an arbitrator's oath, both of which are not shown to be material, the Court finds Attorney Straub's arbitration decision to be well-reasoned, and legally supported. Nevertheless, to the extent Attorney Straub's entire summary (pp 11-12) of the arbitration decision (Pltf Brf **Exh C**) is considered the award, the Court finds a slight modification can be made without affecting the merits of the decision. More specifically, pursuant to MCR 3.602(K)(2)(b), the Court strikes the summary reference to Attorney Jack's 2018 arbitrator's finding, and thereby, modifies the summary of the arbitration decision as follows:

> **Summary**
>
> The arbitrator finds that there was no valid lease agreement created on January 26, 2012 due to the absence of the signature of Nancy Koebel. Even if the January 2012 agreement is determined to be valid, it was the Plaintiffs who breached it. Subsequent to their breach the Plaintiffs and Defendants Jerry Koebel Jr and Ann Koebel (and their LLC) entered into a mediated Settlement Agreement with benefit of counsel. Plaintiffs were fully aware of the land access question prior to the mediation and signed the Settlement Agreement nonetheless. ~~After being denied access, arbitration proceedings in accordance with ¶9 of the Settlement Agreement took place. Attorney Jack, acting as an arbitrator found that there was no breach of the February 5, 2018 Settlement Agreement. Plaintiffs did not seek to withdraw from the ¶9 arbitration agreement prior to the decision. Plaintiffs have not directly challenged the validity of that arbitration finding in Count I of their Complaint. Whether by common law, or the MUAA, the September 2018 determination by Attorney Jack was final.~~
>
> For the reasons set forth above, Plaintiffs' claims contained in Count I of Berrien County Trial Cause No. 19-0140-CB are denied. A judgment may enter accordingly.

Costs and attorney fees will be addressed in accord with Paragraph 12 of the Final Pretrial Order dated March 10, 2023.

In light of the foregoing, and being otherwise advised in the premises, Plaintiffs' motion to vacate the June 13, 2023 arbitration decision of Attorney Straub is hereby **DENIED**; *provided however*, Plaintiffs' alternative motion to modify the arbitration award is hereby **in part only GRANTED**, with the modification to page 12 of the June 13, 2023 arbitration decision as set forth in the above Opinion.

It is further hereby ordered that, as modified herein (on p 12), the June 13, 2023 arbitration decision and award of Attorney Straub is CONFIRMED, and entered as a FINAL JUDGMENT on the arbitration as a no cause of action in favor of Defendants and against Plaintiffs.

IT IS SO ORDERED. ***This is again a final order and the case shall remain closed.***

DATED: 1/17/2024

/s/ *Donna B. Howard*
HONORABLE DONNA B. HOWARD
Berrien County Trial Court – Civil/Business

Certificate of Service: The undersigned certifies that a copy of the foregoing Opinion & Order was served upon the attorneys and/or parties of record to the above cause by mailing the same to them at their respective addresses as disclosed by the file with postage fully prepaid (or inter-office or courthouse mail-slot, if available) on:

1/17/2024
Date

//s// *Rebecca Witt*
Deputy Clerk/Bailiff