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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0491-21
A-0492-21

LAURENCE J. RAPPAPORT, individually and as a member of RAPAD REAL ESTATE MANAGEMENT, LLC, KABR MANAGEMENT, LLC, KABR MANAGEMENT II, LLC, KABR MANAGEMENT III, LLC, and KABR MANAGEMENT IV, LLC,

Plaintiff-Appellant,

v.

KENNETH PASTERNAK, individually and as a member of RAPAD REAL ESTATE MANAGEMENT, LLC, KABR MANAGEMENT, LLC, KABR MANAGEMENT II, LLC, KABR MANAGEMENT III, LLC, KABR MANAGEMENT IV, LLC, and ADAM ALTMAN, individually and as a member of RAPAD REAL ESTATE MANAGEMENT, LLC, KABR MANAGEMENT, LLC, KABR MANAGEMENT II, LLC, KABRMANAGEMENT III, LLC, and KABR MANAGEMENT IV,

LLC, and MICHAEL GOLDSTEIN,
individually and as a member of
KABR MANAGEMENT III,
LLC, and KABR MANAGEMENT IV,
LLC, JUDE MASON, individually
and as a member of KABR
MANAGEMENT, III, LLC, and
KABR MANAGEMENT IV, LLC,
RAFFI AYNILIAN, individually and
as a member of KABR
MANAGEMENT IV, LLC, THE SARA
PASTERNAK 2008 IRREVOCABLE
TRUST, as a member of KABR
MANAGEMENT, LLC, KABR
MANAGEMENT II, LLC,
and KABR MANAGEMENT III, LLC,
THE RACHAEL PASTERNAK
2008 IRREVOCABLE TRUST, as a
member of KABR MANAGEMENT,
LLC, KABR MANAGEMENT II, LLC,
and KABR MANAGEMENT III, LLC,
THE DANIEL PASTERNAK 2008
IRREVOCABLE TRUST, as a
member of KABR MANAGEMENT,
LLC, KABR MANAGEMENT II, LLC,
KABR MANAGEMENT III, LLC, and
KABR MANAGEMENT IV, LLC, and
THE KABR GROUP, LLC,

Defendants-Respondents.

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LAURENCE J. RAPPAPORT,
individually and as a member of
KABR MANAGEMENT, LLC, and
KABR MANAGEMENT II, LLC,

Plaintiff-Appellant,

v.

KENNETH PASTERNAK,
individually and as a member and
manager of KABR MANAGMENT,
LLC, and KABR MANAGEMENT II,
LLC, ADAM ALTMAN, individually
and as a member and manager of
KABR MANAGEMENT, LLC, and
KABR MANAGEMENT II, LLC,
THE SARA PASTERNAK 2008
IRREVOCABLE TRUST, as a
member and manager of KABR
MANAGEMENT, LLC, and KABR
MANAGEMENT II, LLC, THE
RACHAEL PASTERNAK 2008
IRREVOCABLE TRUST, as a
member and manager of KABR
MANAGEMENT, LLC, and KABR
MANAGEMENT II, LLC, and THE
DANIEL PASTERNAK 2008
IRREVOCABLE TRUST, as a
member and manager of KABR
MANAGEMENT, LLC, and KABR
MANAGEMENT II, LLC,

Defendants-Respondents.

Argued March 28, 2023 – Decided August 11, 2023

Before Judges Geiger, Susswein and Berdote Byrne.

On appeal from the Superior Court of New Jersey, Chancery Division, Bergen County, Docket Nos. C-000077-19 and C-000255-20.

Christopher Nucifora argued the cause for appellant (Kaufman, Dolowich & Voluck, LLP, attorneys; Christopher Nucifora, Erik E. Sardina, Edward P. Abbott, on the briefs).

Howard W. Schub argued the cause for respondents (Kasowitz Benson Torres LLP and Shapiro, Croland, Reiser, Apfel, & Di Iorio, LLP, attorneys; Howard W. Schub and Stuart Reiser, on the brief).

PER CURIAM

In these cross-appeals emanating from an arbitration alleging the wrongful termination of plaintiff, Laurence J. Rappaport, from various limited liability realty companies, and defendants' counterclaim alleging plaintiff's wrongful conduct merited termination of employment, we are asked to consider whether the trial court erred in remanding a second complaint to the arbitrator, erred in issuing an order confirming the arbitration awards resolved all issues between the parties, and declaring Rappaport's membership interest in the entities had been fully redeemed or cancelled pursuant to the arbitration awards.

Because we find (1) Rappaport's interests as a member of the entities was not raised as a claim by either party in arbitration; (2) defendants made representations on the record specifically acknowledging Rappaport's membership interests were not at issue in the arbitration; (3) there was no testimony from any party as to the value of Rappaport's membership interests;

(4) the membership interest claim did not accrue until after arbitration concluded and the arbitrator sua sponte dissociated Rappaport from the entities, and (5) Rappaport did not waive his right to assert membership interest claims in the future, we conclude Rappaport has not had the ability to litigate his membership interest claims. We therefore vacate the trial court's order dismissing the second complaint, reinstate the second complaint, and conclude Rappaport is entitled to litigate claims relating to his membership interests in the entities pursuant to the applicable operating agreements and applicable statute. Further, with respect to the arbitration awards, we modify the awards to the extent there is any inclusion of Rappaport's membership interest, but affirm the awards in all other respects, including the amounts.

I.

This matter concerns a dispute amongst Rappaport and the following defendants: Kenneth Pasternak (Pasternak), Adam Altman (Altman), Michael Goldstein (Goldstein), Jude Mason (Mason), Raffi Aynilian (Aynilian), The Sara Pasternak 2008 Irrevocable Trust, The Rachel Pasternak 2008 Irrevocable Trust, The Daniel Pasternak 2008 Irrevocable Trust, and The KABR Group, LLC. The action arose following Rappaport's removal from his positions as

employee and in his capacity as a manager[1] of the following entities (collectively, the KABR entities): KABR Management, L.L.C. (KABR I), KABR Management II, LLC (KABR II), KABR Management III, LLC (KABR III), KABR Management IV, LLC (KABR IV), and Rapad Real Estate Management, L.L.C. (Rapad).

KABR I, II, III, and IV are real estate investment funds, each owning various parcels of real property, and each subject to its own operating agreement. The funds generate revenue through acquiring and selling real estate and by the rental or development of that real estate. The funds also receive revenue from annual management fees paid by investment funds and profits received from the sale of real property when the fund divests itself of a property. Monies relating to the sale of real property within the funds are distributed to the investors of the particular fund owning the property and the KABR entity overseeing the investment fund. A fund "winds down" when all properties within the fund have been sold. Rapad was formed in 2008 to collectively provide services to the companies, including acquisition assistance, property

[1] We note the operating agreements for each of the companies do not refer to Rappaport as a "manager," but rather as an executive officer. However, because the undisputed record demonstrates the parties utilize the term "manager" when referring to Rappaport in his capacity as an officer, we do the same throughout.

management, development, and disposition of the various parcels. Rapad also receives brokerage fees from investments made by the funds.

Rappaport was a manager of the KABR entities, holding such titles as Chief Executive Officer, Director of Operations, and Chief Operating Officer, also known as a "working member." Rappaport was a founding member of the KABR entities until his removal, first without cause, then purportedly for cause, from his position as Chief Executive Officer and Director of Operations with KABR III and KABR IV, as Chairman and Director of Operations of KABR I, Chief Operating Officer and Director of Operations of KABR II, as Chief Executive Officer and Director of Operations of KABR III, and as manager of Rapad.

While employed as a manager, Rappaport received compensation in several ways: (1) from distributions made to working members of the KABR entities from management fees and development fees paid to the companies; (2) distributions made to working and non-working members of the investment funds from investment fees; and (3) work he performed for the KABR entities as their lawyer through the form of billable time paid to his law firm.

Wholly separate and apart from any compensation he received as an employee, manager, or lawyer, Rappaport is also an investor in the KABR funds.

All of the funds' investors who participate in the promote or carried interest[2] have the opportunity to receive a certain percentage of the equity from the sale of an asset, but only if certain triggering events occur: (1) the asset is sold; and (2) the investors have been paid back their investment at the preferred rate of return as set forth in the investment agreement. Carried interest provides an incentive for investors to initially invest in a fund by offering, but not guaranteeing, a bonus if certain conditions are met at the time the property is sold.

On March 25, 2019, Rappaport filed a complaint and order to show cause in the Chancery Division, General Equity Part (2019 Chancery Action). He brought claims individually and in his capacity as a member of the KABR entities against defendants, asserting defendants unlawfully terminated him from his position as a manager with the KABR entities in January and August 2019. He also sought declaratory relief in the form of a preliminary and final injunction: (1) to grant him access to documents, records and books, financial information, and all documents relating to Rappaport's K-1's and personal

[2] The parties used the term "promote" almost exclusively in testimony during arbitration but use the terms "promote" and "carried interest" interchangeably in their briefing. The arbitrator uses the term "carried interest" exclusively in his awards and we adopt the term "carried interest" as synonymous with "promote."

financial information; (2) to bar defendants from denying him his rights to perform his "Duties and Obligations pursuant to the [operating agreements]" of the KABR entities; (3) to grant him access to the KABR entities' offices; (4) to bar "[d]efendants from receiving any additional monies, compensation and/or distributions from [the KABR entities;]" and (5) to order defendants to indemnify him, hold him harmless, and defend him. Rappaport also raised various claims, such as breach of contract, breach of implied covenant of good faith and fair dealing, breach of the fiduciary duties of good faith, fair dealing, and loyalty, minority member oppression pursuant to N.J.S.A. 42:2C-48(a)(5)(b), and defamation and false light claims against various individual defendants and entities.

Defendants opposed the 2019 Chancery Action and filed a counterclaim. They also moved to compel arbitration pursuant to the various operating agreements. The Chancery Court granted the motion and ordered the parties to submit to binding arbitration.

On July 30, 2019, the parties executed an Arbitration Agreement which provides:

> WHEREAS, the Parties wish to fully and finally resolve their dispute related to the Claim and Counterclaim, and related matters, including but not limited to, any claims that could be asserted by any Party as part of the Claim

> or the Counterclaim or with respect to the dissolution or disassociation of Rappaport from, or Rappaport's employment with, Rapad Real Estate Management, LLC; KABR Management, [L.L.C.]; KABR Management II, LLC; KABR Management III, LLC; and KABR Management IV, LLC (collectively, the "KABR Management Companies") by submitting their claims and defenses to arbitration[.]

The Arbitration Agreement defined the scope of arbitration as follows:

> The scope of the arbitration shall be confined to adjudicating the Claim, Counterclaim, and related matters, including but not limited to, Rappaport's request for injunctive relief pursuant to his Order to Show Cause for Preliminary Injunction Pursuant to [Rule] 4:52 (the Injunction Motion), any claims that could be asserted by any Party as part of the Claim or the Counterclaim or with respect to the dissolution or disassociation of Rappaport from, or Rappaport's employment with, the KABR Management Companies.
>
> . . . .
>
> The Arbitrator shall have no power to materially alter or materially modify the terms and conditions of this Agreement in any manner that materially prejudices the rights of either Party. The Arbitrator shall decide what constitutes a material modification. The Arbitrator shall conduct the hearings in this arbitration, including, but not limited to, the introduction of documents and testimony of the Parties and the non-party witnesses, and shall provide the Parties with a written and reasoned decision, which shall constitute the arbitration award, which shall be final and binding upon the Parties, except as provided in the Act.

In addition, the Arbitration Agreement provided:

> The Arbitrator and arbitration shall be governed procedurally by the Commercial Arbitration Rules and Procedures for Large, Complex Commercial Disputes of the American Arbitration Association currently in effect as of the Effective Date (AAA Rules), and the New Jersey Arbitration Act, N.J.S.A. 2A:23B-1 [to -32] (the Act). To the extent any conflicts between the AAA Rules and the Act [exist], the Arbitrator shall decide which shall govern. The Arbitrator is bound to decide the arbitration in accordance with the substantive laws of the State of New Jersey.

Following the consummation of the Arbitration Agreement, the parties submitted statements of claims to the arbitrator. Rappaport again sought declaratory relief, arguing his removal from the KABR entities was ineffective and seeking reinstatement as a manager and employee. Although he claimed minority member oppression, he did not seek dissolution of the KABR entities, dissociation, a buy-out, or redemption of his investment interests. On the contrary, Rappaport claimed he was entitled to "seek a remedy other than dissolution" pursuant to N.J.S.A. 42:2C-48(a)(5) and (b). In addition, Rappaport sought a variety of injunctive and economic remedies, claiming defendant Pasternak engaged in a systemic campaign to oust him after he refused to participate in a new KABR V fund.

In its claims against Rappaport submitted to the arbitrator, defendants detailed extensive accusations of employee and manager wrongdoing by

Rappaport, including fraudulent misrepresentation, theft of funds via fabricated law firm billings, and breach of fiduciary duties for incompetence. Defendants also asserted the operating agreements for the various companies and funds had been rendered inoperable by the course of conduct amongst the parties. In all, defendants asserted they were entitled to an award in excess of $11 million in damages from Rappaport, declaratory judgment that Rappaport had properly been terminated for cause from all of the KABR entities and was not entitled to any further compensation, and an assessment of arbitration fees and expenses against Rappaport.[3] Like Rappaport, defendants did not seek dissolution of the KABR entities, dissociation of Rappaport, a buy-out of Rappaport's investment interest, or redemption of his interest. They simply sought a declaration he was terminated for cause, which they felt deprived him of any future compensation.

On September 13, 2019, the arbitrator issued a decision denying plaintiff's request for preliminary injunctive relief. He reasoned, due to lack of evidence available at that early point in the proceedings, Rappaport failed to show a likelihood of irreparable harm.

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[3] Defendants did not submit a formal answer to Rappaport's claim in arbitration. Pursuant to the AAA Commercial Rules and Mediation Procedures, defendants were therefore deemed to deny all claims. See Am. Arb. Ass'n, Commercial Arbitration Rules and Mediation Procedures R-5(a) (rev. 2022).

Following a thirteen-day hearing,[4] the arbitrator issued a written arbitration award on July 31, 2020 (Award One), and clarifying awards on October 20, 2020 (Award Two), November 19, 2020 (Award Three), and December 7, 2020 (Award Four). In Award One, the arbitrator denied or dismissed all of defendants' counterclaims but one, and found the KABR entities' operating agreements were valid and enforceable. The arbitrator found defendants failed to prove Rappaport had violated the Rules of Professional Conduct. The arbitrator determined whether Rappaport was lawfully terminated depended on whether "cause" existed for his removal and found defendants did not prove cause existed to terminate him.

With respect to damages for wrongful termination, the arbitrator credited Rappaport's expert, finding defendants "did not present expert testimony to contradict Klein" and Rappaport suffered "substantial damages as a result of this termination." Defendants did not produce an expert to rebut Rappaport's expert, but the KABR entities' accountant, Goldstein, testified as a fact witness on defendants' behalf. The arbitrator awarded Rappaport $4.9 million in damages

[4] Transcripts for all days of the arbitration were not provided as part of the record on appeal. We have reviewed the transcripts for days 1, 2, 5, 6, 7, 9, 10 and 11 as those were the only transcripts provided.

"rather than the range of approximately $5.6 to $6.1M that Mr. Klein identified. That sum includes the claimed interest of $13,000 and 'lost income' of $83,000."

Despite finding he was wrongfully terminated, the arbitrator decided not to reinstate Rappaport, reasoning the workplace environment had been rendered "toxic" by the litigation, and any reinstatement would lead to more "disharmony" at the companies. He stated: "[t]he legitimate interests of the KABR entities, the owners, investors and clients prevail over [Rappaport]'s understandable but curious desire to return to the scene of battle." With respect to carried interest, the arbitrator stated Rappaport was seeking $25 million, but failed to prove he was owed any carried interest at the time of termination. Respondents suggested Rappaport was owed only the value of his capital accounts in KABR I through KABR IV (totaling $13,455), which the arbitrator awarded for carried interest owed at the time of termination.

In all, Award One found defendants wrongfully terminated Rappaport as a member and manager of the KABR entities and violated the covenant of good faith and fair dealing, awarding Rappaport $4,900,000 (including $13,000 in carried interest accrued at the time of his termination and $83,000 in lost profits) less $1,048,853 for one of defendants' counterclaims. Therefore, the net amount due to Rappaport in Award One was $3,851,147.

Award Two clarified the initial award following the parties' motions for reconsideration, clarification, and modification, addressing the timing of payment of the award, and again referred to carried interest. It noted Rappaport sought clarification "although he is not 'looking for a number amount to replace on the carried interest at this point.'" The arbitrator denied the claim stating, "I specifically find that he has not established by a preponderance of the credible evidence the value of his current interest at the time of his termination." The arbitrator also ruled "even if I had awarded carried interest, the amount would be de minimis." Finally, the arbitrator determined an award of prejudgment interest was appropriate and the parties were ordered to confer and ascertain an appropriate amount.

Award Three determined 4.5% interest would be paid on the amount. Award Four calculated that amount based on the $3,851,147 due to Rappaport from Award One as "$190,000 in interest to Rappaport." Defendants paid damages pursuant to the awards on November 3, 2020. Rappaport received and accepted the payment.

On December 24, 2020, Rappaport filed a second complaint in the Chancery Division (2020 Chancery Action), seeking access to the KABR entities' books and records and further carried interest distributions to him in his

capacity as an investor in the KABR funds. On December 28, 2020, defendants filed a motion to confirm the arbitration awards and sought declarations that Rappaport's interest in the KABR entities "including any claimed rights to management or any past or future profits, carried interest, losses or other distributions of any kind or nature whatsoever with respect to such KABR . . . entities, have been fully redeemed and cancelled by virtue of the payments made by [d]efendants to [p]laintiff in accordance with the [a]rbitration [a]wards[.]" On January 15, 2021, defendants filed a cross-motion to dismiss the 2020 Chancery Action and impose sanctions, arguing the 2020 Complaint raised issues already fully and finally resolved by the arbitration awards. Rappaport cross-moved to confirm the arbitration awards on February 17, 2021, or, in the alternative, modify the awards in part as to the cancellation of Rappaport's investor interest in the KABR Entities and his entitlement to carried interest. He argued the arbitrator erred in his application of the Arbitration Agreement, New Jersey law, due process, and principles of equity.

On April 7, 2021, the Chancery Court remanded the second complaint to the arbitrator to address whether the arbitration awards were meant to redeem or cancel Rappaport's membership interest in the KABR entities. Specifically, the Chancery Court found it needed clarification as to whether the awards divested

Rappaport of his membership status with the companies and if the $4,900,000 award made up the full extent of damages due to Rappaport. The remand order did not specify whether the carried interest alluded to in the arbitration awards was for carried interest that had accrued at the time of Rappaport's termination or future carried interest.

On July 21, 2021, the arbitrator issued a Decision of Arbitration on Remand (Award Five). He stated, "I intended that the $4.9 million Award represents full, just and complete compensation to Claimant for his damages against [defendants] both as a manager and member of the KABR Entities." He also foreclosed Rappaport's future carried interest argument, reasoning:

> [Rappaport]'s counsel indicated on the record at the May 26, 2021 oral argument and in a prior telephone conference with the attorneys that "carried interest" is "the only item" he is seeking[,] and that the carried interest is $2.6 million. At least twice I have denied carried interest. [The Chancery Court] at the oral argument indicated that he was not remanding the specific question of carried interest. It is therefore unnecessary to address the additional challenges that [Rappaport] faces [—] the doctrine of functus officio and concerns regarding new evidence.

Post-remand briefs and certifications were submitted to the Chancery Court, and on August 31, 2021, the court confirmed the five arbitration awards, divesting Rappaport of all his interests in the KABR entities, including future

carried interest. Further, the Chancery Court stated "any claimed rights to any past or future profits, carried interest, losses or other distributions of any kind or nature whatsoever with respect to such [KABR entities], have been fully redeemed and cancelled by virtue of the payments made by [d]efendants to [Rappaport] in accordance with the Arbitration Awards[.]" The Chancery Court also ordered Rappaport was not entitled to make any demands upon defendants for an accounting or access to any other financial information concerning the KABR entities, "except as may be necessary for tax reporting purposes[.]"

In discussing the standard of review, the Chancery Court reasoned there are "very limited grounds to disturb, . . . vacate, or modify" an arbitration award. As to Rappaport's argument carried interest was not raised in the arbitration proceedings, the court noted:

> And I know when I first got the original decisions, and it was argued by the plaintiff or by the claimant that carried interest was never discussed and never a part of this.
>
> I just didn't understand that. I mean, he obviously ruled on it, there was a reconsideration.
>
> Even on this remand, carried interest is really the only thing that is being discussed and, you know, again, it is not for me to say would I rule the same way? Would I rule differently?

The Chancery Court also rejected Rappaport's contention the Arbitrator exceeded his authority as the arbitrator:

> He considered the evidence[,] and he made a decision that this was full, just, and complete compensation to Mr. Rappaport, and that [is] in essence interest of this continued carried interest, to say that, all right, he might have lost his job, but he is still a member, he still [is] going to continue I guess in perpetuity to receive this carried interest, I think goes against what was decided.
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> You know, I think it is clear that this, these parties, you know, were no longer going to be affiliated, no matter what you want to call it.
>
> And we get into a lot of semantics in this case, but the bottom line, . . . is that . . . his decision was intended to be full, just, and complete compensation.
>
> You know, he got into this issue of the carried interest ad nauseum, and he ruled on it. He reconsidered it. It was in essence attempted to be raised again[,] and it has continued to be raised.

The Chancery Court issued a separate order on August 31, 2021, dismissing the 2020 Chancery Action with prejudice. This appeal followed.

II.

"To foster finality and 'secure arbitration's speedy and inexpensive nature,' reviewing courts must give arbitration awards 'considerable deference.'" Borough of Carteret v. Firefighters Mut. Benevolent Ass'n, Loc. 67, 247 N.J. 202, 211 (2021) (quoting Borough of E. Rutherford v. E. Rutherford PBA Loc.

275, 213 N.J. 190, 201 (2013)). This court's review of an award, therefore, "is very limited." Bound Brook Bd. of Educ. v. Ciripompa, 228 N.J. 4, 11 (2017) (quoting Linden Bd. of Educ. v. Linden Educ. Ass'n ex rel. Mizichko, 202 N.J. 268, 276 (2010)). The arbitration "award is not to be cast aside lightly" and may only be vacated "when it has been shown that a statutory basis justifies that action." Ciripompa, 228 N.J. at 11 (quoting Kearny PBA Loc. #21 v. Town of Kearny, 81 N.J. 208, 221 (1979)). The party who seeks to vacate the award bears the burden. Minkowitz v. Israeli, 433 N.J. Super. 111, 136 (App. Div. 2013).

"As the decision to vacate an arbitration award is a decision of law, this court reviews the denial of a motion to vacate an arbitration award de novo." Manger v. Manger, 417 N.J. Super. 370, 376 (App. Div. 2010). Pursuant to the New Jersey Arbitration Act, a "court shall vacate an [arbitration] award" when:

> (1) the award was procured by corruption, fraud, or other undue means;
>
> (2) the court finds evident partiality by an arbitrator; corruption by an arbitrator; or misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;
>
> (3) an arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to section 15

> of this act, so as to substantially prejudice the rights of a party to the arbitration proceeding;
>
> (4) an arbitrator exceeded the arbitrator's powers;
>
> (5) there was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection pursuant to subsection c. of section 15 of this act not later than the beginning of the arbitration hearing; or
>
> (6) the arbitration was conducted without proper notice of the initiation of an arbitration as required in section 9 of this act so as to substantially prejudice the rights of a party to the arbitration proceeding.
>
> [N.J.S.A. 2A:23B-23(a).]

N.J.S.A. 2A:23B-24 allows for modification of an arbitration award in certain limited circumstances. It states:

> Modification or Correction of Award
>
> a. Upon filing a summary action within 120 days after the party receives notice of the award pursuant to section 19 of this act or within 120 days after the party receives notice of a modified or corrected award pursuant to section 20 of this act, the court shall modify or correct the award if:
>
> > (1) there was an evident mathematical miscalculation or an evident mistake in the description of a person, thing, or property referred to in the award;
> >
> > (2) the arbitrator made an award on a claim not submitted to the arbitrator and the

award may be corrected without affecting the merits of the decision upon the claims submitted; or

(3) the award is imperfect in a matter of form not affecting the merits of the decision on the claims submitted.

b. If an application made pursuant to subsection a. of this section is granted, the court shall modify or correct and confirm the award as modified or corrected. Otherwise, unless an application to vacate is pending, the court shall confirm the award.

On appeal, Rappaport raises the following issues for our consideration:

POINT I
THE CHANCERY DIVISION COMMITTED REVERSIBLE ERROR BY CONFIRMING AND FAILING TO VACATE THE 2020 ARBITRATION AWARD AND THE 2021 ARBITRATION AWARD BECAUSE THE ARBITRATOR EXCEEDED HIS POWERS UNDER THE PARTIES' ARBITRATION AGREEMENT AND CANCELED RAPPAPORT'S MEMBERSHIP INTEREST IN VIOLATION OF THE SUBSTANTIVE LAW OF NEW JERSEY.

A. The Arbitrator Exceeded his Authority in Divesting Rappaport of His Membership Interest.

1. The Arbitrator Exceeded His Authority in Stripping Rappaport of His Membership Interest in Contravention of the Enforceable KABR Entities' Operating Agreements.

2. By Dissociating Rappaport, the Arbitrator Exceeded His Authority in Violation of the Controlling Limited Liability Company Law.

B. The Arbitrator Exceeded His Authority in Divesting Rappaport of His Membership Interest Without Ordering Rappaport Be Entitled to Receive the Profits, Loses and Distributions He Would Have Received as a Member, Including Carried Interest.

1. Under the KABR Entities' Operating Agreements, Rappaport Is Entitled to the Profits, Losses, and Distributions He Would Receive as a Member.

2. Even If the New Jersey and Delaware Statutes Are Applied, Rappaport Is Still Entitled to Full Compensation Going Forward as if He Were a Member.

3. The Return of the Funds in Rappaport's Capital Account Does Not Preclude Carried Interest Payments under the KABR Entities' Operating Agreements.

4. To the Extent the 2020 Arbitration Award and the 2021 Arbitration Award Denied Rappaport Declaratory Relief, That Is Not a Bar to Rappaport's Rights to Future Distributions, Including Ripened Carried Interest.

POINT II
THE 2020 ARBITRATION AWARD AND 2021 ARBITRATION AWARD SHOULD BE VACATED TO THE EXTENT THE ARBITRATOR EXCEEDED

HIS POWERS UNDER THE PARTIES' AGREEMENT AND VIOLATED DUE PROCESS BY DEPRIVING RAPPAPORT OF HIS MEMBERSHIP RIGHTS TO CARRIED INTEREST IN PERPETUITY.

POINT III
IN FAILING TO MODIFY THE ARBITRATION AWARD TO STRIKE ANY READING THAT DENIES RAPPAPORT OF HIS MEMBERSHIP INTEREST, THE CHANCERY DIVISION COMMITTED REVERSIBLE ERROR IN PERMITTING AN ARBITRATION AWARD ON A CLAIM THAT WAS NEVER SUBMITTED TO THE ARBITRATOR.

POINT IV
THE EQUITIES FAVOR VACATING THE ARBITRATION AWARD ONLY TO THE EXTENT IT BARS RAPPAPORT'S MEMBERSHIP RIGHTS TO FUTURE CARRIED INTEREST DISTRIBUTIONS.

In their cross appeal, defendants raise the following arguments:

POINT I
[THE] SUPERIOR COURT CORRECTLY DENIED APPELLANT'S REQUEST TO MODIFY THE AWARD

A. Carried Interest Was at Issue in The Arbitration

B. The Issue of Appellant's Membership Interest Was Within the Scope of the Arbitration

POINT II

THE SUPERIOR COURT CORRECTLY DENIED APPELLANT'S REQUEST TO VACATE THE AWARD

A. The Award Cannot be Vacated for a Mere Error of Law

B. There Was No Error of Law

C. The Award is Consistent with the AAA Rules

D. Pasternak Did Not "Admit" that Appellant is Entitled to Carried Interest

E. [The Arbitrator] Did Not Misapply the Doctrines of Res Judicata or Collateral Estoppel

POINT III
THE EQUITIES DO NOT FAVOR VACATING THE AWARD

III.

In this appeal, we consider whether arbitration awards that include a claim within the scope of an arbitration agreement, but which all parties specifically excluded in the arbitration may be modified to exclude the award on the omitted claim. Although we find no statutory justification to vacate the awards with respect to the lost income and future income claims resulting from Rappaport's unlawful termination -- claims which were properly presented to the arbitrator -- Rappaport's interest as an investor was not a claim raised in arbitration.

Therefore, we modify the awards pursuant to N.J.S.A. 2A:23B-24(a)(2) to exclude any adjudication of Rappaport's membership interest, including his claim for future carried interest, because we find "the arbitrator made an award on a claim not submitted to the arbitrator and the award may be corrected without affecting the merits of the decision upon the claims submitted."

First, Rappaport's membership interest in the KABR entities was not an issue presented to the arbitrator as a claim to be ruled upon. Defendants clearly stated in their pre-hearing brief, "Rappaport's removal as an officer . . . has nothing to do with his status as an equity owner." (emphasis in original).

Second, no party presented testimony regarding Rappaport's equity interest. Relying on statements made by defendants in their pre-trial submissions, Rappaport did not present expert testimony regarding his membership interest because defendants specifically excluded any claim regarding his equity ownership in their statement of claims and their pre-trial briefs. Klein's expert opinion and supplemental opinion stated Rappaport would have earned between $5,639,000 and $6,139,000 through 2025, without considering any earnings from carried interest from the KABR entities and Rappaport was also entitled to $83,585 in lost income. Defendants did not produce an economic expert to rebut Klein's report. However, lay testimony

they presented from the KABR accountant, Goldstein, made clear carried interest was not at issue in arbitration and not included in his calculations:

> Q. Do you know what carried interest is?
>
> [GOLDSTEIN]. Yes.
>
> Q. Okay. Is carried interest reflected anywhere in Goldstein-1?
>
> [GOLDSTEIN]. No.

Contrary to the arbitrator's statement that Rappaport made a claim for $25 million in carried interest, there was no claim submitted for future carried interest. In fact, the only testimony regarding $25 million came in response to a sua sponte question posed to Rappaport by the arbitrator:

> [THE ARBITRATOR]. With respect to this litigation -- or, rather, this arbitration, are you asserting any claims with respect to your carried interest?
>
> [RAPPAPORT]. I'm asserting the fact that I am entitled to that, and I am fully vested in the carried interest.
>
> [THE ARBITRATOR]. Do you remember [defense counsel] going through some numbers about the damages that you assert in this case? Do you recall him speaking today about that?
>
> [RAPPAPORT]. Yes.
>
> [THE ARBITRATOR]. Do any of those numbers address your carried interest?

> [RAPPAPORT]. No, they do not address the carried interest.
>
> [THE ARBITRATOR]. And what do you estimate your carried interest to be?
>
> [RAPPAPORT]. Last time that it was valued, which was I think 2018, the total carried interest was somewhere in the $25 million neighborhood. I'm not a hundred percent sure.
>
> . . . .
>
> [THE ARBITRATOR]. Okay. And that $25 million estimated number, that's above and beyond the numbers that [defense counsel] was discussing earlier?
>
> [RAPPAPORT]. Yes. That was discussing only the management -- the various management companies in reference to the management-style income, not the carried interest.

This colloquy makes clear Rappaport tried to respond to the arbitrator's question by giving him a ballpark figure representing his future equity stake, but then quickly clarified he did not know what that number would be. Despite the lack of any testimony, expert or otherwise, regarding the value of Rappaport's carried interest, the arbitrator used this $25 million figure in his various awards, then ruled Rappaport had failed to prove that amount.

To the extent Rappaport's entitlement to carried interest was mentioned at all during the arbitration testimony, it was raised by defendants with respect to

their defense, mid-arbitration, when they claimed, without legal support in the operating agreements or the law, Rappaport would be divested of his right to future carried interest if he were found terminated for just cause. Defendant Pasternak testified:

> [PASTERNAK]. The thing that I think would be clearly in my mind beneficial to [Rappaport] is the vesting period then would protect his -- the value of the so-called carrier promote, which is $14 million today which we now claim -- which would be quite different if there was a mitigation to that, that was either a breach of contract or some other kind of causal event.
>
> . . . .
>
> Which is if he's fired for cause . . . ?
>
> [THE ARBITRATOR]. Right.
>
> [PASTERNAK]. I think he would lose . . . the main difference is he would lose the promote or the carried interest.
>
> [THE ARBITRATOR]. What would he get, if anything?
>
> [PASTERNAK]. Nothing.
>
> . . . .
>
> [THE ARBITRATOR]. Okay. That's without prejudice . . . because it was a sua sponte type of question. So try to address it later on. Not try to, I want you to address it in the briefs. Not critical, but relevant.

As noted by the arbitrator, this was a sua sponte question of an issue that had not been raised in the statement of claims or pre-trial briefs. Following this exchange Rappaport's counsel immediately tried to clarify the issue of future carried interest was not part of the arbitration, asking Pasternak:

> [RAPPAPORT'S COUNSEL]. We've talked about Mr. Blaustein[,] who was the B in KABR, correct?
>
> [PASTERNAK]. He was.
>
> [RAPPAPORT'S COUNSEL]. And currently Mr. Blaustein no longer works for the company for years, your own testimony and everyone else's testimony, he still receives promote profits and also operational profits; is that correct?
>
> [PASTERNAK]. He does.

Pasternak also admitted Rappaport was fully vested in his equity with respect to KABR I through IV. Although he believed Rappaport would be divested of his future interest if he was found terminated for cause, he clearly admitted Rappaport would be entitled to future carried interest if the termination was wrongful. Pasternak testified, "[i]f he was entitled to the promoted interest, and we are saying he's not entitled to the promoted interest, that could be worth as much as $36 million." Rappaport's counsel immediately objected, stating, "And I'll just say for the first time, this is the first time we've heard that they're trying to deny him his carried interest."

Later, during cross-examination, Pasternak was asked why he felt Rappaport would not be entitled to carried interest, to which he responded, "I think if you're terminated for cause or not for cause I don't think it speaks to specifically what that right would be and I think that right could very well be in jeopardy." Defendants' legal theory was not supported by the operating agreements or caselaw; regardless, it is undisputed the arbitrator found Rappaport was wrongfully terminated and no cause existed.

Third, neither party raised the issue of dissolution, dissociation, a buy-out, or redemption in their statement of claims, pre-trial briefs, or evidence presented. Although the Arbitration Agreement specifically mentions dissociation as within the scope of the arbitration, neither party sought it. During oral argument on this appeal, both parties conceded the arbitrator was within his authority to order dissociation because Rappaport had pled minority member oppression pursuant to N.J.S.A. 42:2C-48(a)(5)(b), -48(b) which affords a judge or arbitrator a variety of remedies. However, neither party had notice Rappaport's fair value or fair market value interest after dissociation would be included in the arbitration awards. Dissociation occurred only after arbitration testimony had concluded, when the arbitrator ruled, sua sponte, to dissociate Rappaport. This occurred after all of the evidence had been presented

at arbitration. Rappaport's membership claim did not accrue until the arbitrator ruled he was dissociated. The statute is clear:

> a. When a person is dissociated as a member of a limited liability company:
>
> (1) the person's right to participate as a member in the management and conduct of the company's activities terminates;
>
> (2) if the company is member-managed, the person's fiduciary duties as a member end with regard to matters arising and events occurring after the person's dissociation; and
>
> (3) subject to section 44 and Article 10 (sections 73 through 87 of this act), any transferable interest owned by the person immediately before dissociation in the person's capacity as a member is owned by the person solely as a transferee.
>
> [N.J.S.A. 42:2C-47(a).]

It is undisputed Rappaport sought reinstatement as a manager and employee. His membership interests were not before the arbitrator. He did not seek dissolution or dissociation from the KABR entities. His right to redemption or a buy-out accrued only after the arbitrator failed to reinstate him. Likewise, defendants did not seek dissolution, dissociation, or redemption. In opposition to injunctive relief, defendant Altman certified "Rappaport . . . maintains all of

his economic rights." When dissociation occurred, Rappaport continued to own his interests as a transferee.

Fourth, at all times during the course of the arbitration, Rappaport preserved his right to adjudicate his membership claims in the future, including carried interest. In his opening statement, when explaining how each fund worked, Rappaport's counsel explained Rappaport and defendants had formed the first fund, KABR I, which "was formed with $45 million dollars[,]" "to buy, sell, [and] rehab[ilitate]. . . real estate." Thereafter, through limited liability companies formed to manage each fund, investment monies were used to buy real estate. The real estate paid property management fees or construction fees to the particular fund. When property was sold in a fund, distributions were made. In addition, the money in each fund was invested in investment products that paid fees into funds. Rappaport's counsel stated, "[t]his arbitration is about the operating income and distributions from the management companies, not the funds . . . ."

In fact, Rappaport became so concerned the issue of carried interest was being raised mid-arbitration he filed a motion in limine on January 9, 2020, for declaratory relief that he was fully vested in the KABR entities. Noting neither party alleged in their claims to the arbitrator that Rappaport was no longer a

member of the KABR entities, he argued the operating agreements expressly entitle a member "to the profits, losses, and distributions set forth in Articles 3, 4, and 5 of the operating agreements[,]" including carried interest. The arbitrator reserved on the motion and the record is unclear as to whether the motion was ever ruled upon.

Fifth, by its very terms, the awards are limited to the carried interest Rappaport could have been owed "at the time of termination." There was no testimony before the arbitrator as to the value of the parcels still remaining in the funds, and the amount of carried interest Rappaport would be entitled to if those parcels were sold in the future and the preconditions of carried interest were met. The award specifically states it is limited to amounts owed to Rappaport at the time of his termination.

Sixth, the issue regarding the value of Rappaport's membership interest was not ripe until the arbitrator refused to reinstate Rappaport, at which point Rappaport's right to a buyback hearing, presenting fair value or fair market value for the membership interest, accrued. A claim is ripe "when there is an actual controversy, meaning the facts present 'concrete contested issues conclusively affecting' the parties' adverse interest." Platkin v. Smith & Wesson Sales Co., 474 N.J. Super. 476, 496 (App. Div. 2023) (quoting In re Firemen's Ass'n Oblig.,

230 N.J. 258, 275 (2017)). To be considered ripe, a claim must meet two requirements: "(1) the fitness of issues for judicial review; and (2) the hardship to the parties if judicial review is withheld at this time." Ibid. (quoting K. Hovnanian Cos. of N. Cent. Jersey, Inc. v. N.J. Dep't of Env'l Prot., 379 N.J. Super. 1, 9-10 (App. Div. 2005)).

Here, it is undisputed neither party raised the issue of future carried interest in either of their respective statements of claims or provided evidence regarding its value. Because it was not until the arbitrator declined to reinstate Rappaport — effectively dissociating him from the KABR entities — that any claim relating to his carried interest accrued. Thus, the arbitrator ruled on a claim not presented to him, requiring our modification.

Seventh, the Operating Agreements, having been found valid by the arbitrator, give Rappaport the right to carried interest. All of the operating agreements, which the arbitrator found valid and enforceable over defendant's objections,[5] contain the following language:

> 6.3 Upon withdrawal of a Member, the Company shall not terminate, but shall be continued with the remaining Members. The withdrawing Member, after the

[5] Although defendants successfully argued before the trial court the arbitration clauses in the operating agreements were valid and enforceable, at arbitration they argued the operating agreements were not enforceable, a contention the arbitrator rejected.

> effective date of withdrawal, shall no longer be considered a member of the Company, and shall not be entitled to participate in the management and affairs of the Company. Such withdrawing member shall only be entitled to receive the profits, losses and distributions from the Company he would have received as a member.

Eighth, Rappaport did not waive his membership rights by failing to assert them at arbitration. Although the scope of the Arbitration Agreement included any claims that "could be asserted by any Party as part of the Claim or the Counterclaim or with respect to the dissolution or disassociation of Rappaport from, or Rappaport's employment with, the KABR Management Companies," these claims were never asserted by either party. Defendants' waiver argument is belied by the record.

In Block v. Plosia, 390 N.J. Super. 543 (App. Div. 2007), we modified an arbitration award when the arbitrator awarded treble damages pursuant to the Consumer Fraud Act (CFA), despite neither party raising a CFA claim in any pleadings submitted to the arbitrator. We concluded the lack of any pleadings regarding the CFA mandated modification of the arbitration award because "[defendant] was entitled to reasonable notice that he was facing the statutory punch of the CFA before he stepped into the arbitration ring," concluding the statement of issues presented by the homeowner did not put the contractor on

notice of potential CFA liability. Id. at 556. Instead, the CFA became an issue at arbitration only after the arbitrator had awarded treble damages. Id. at 555-56.

Here, although the Arbitration Agreement specifically references dissociation, and the issue is thus "within in scope of the arbitration," precluding the vacating of the award, neither party had notice Rappaport's membership interest would be valued as part of the arbitration. Like Block, the arbitrator issued an award revoking Rappaport's membership interest in the KABR entities, divesting him of any future carried interest payments, without hearing testimony as to the value of those interests and after finding Rappaport had done nothing to merit termination. The statement of claims submitted to the arbitrator by defendants sought damages only for Rappaport's behavior "as a manager, officer and director of the KABR [e]ntities" and specifically excluded his interest as an investor. Such statements were insufficient to ascribe notice to Rappaport he could potentially be divested of his membership interest or future carried interest payments because of his failure to simply invoke his equity interest in KABR entities.

Further, defendants expressly waived claims regarding Rappaport's future carried interest rights by claiming he would be entitled to future carried interest

when it became due as real estate parcels were sold and met the preconditions for promote, unless the arbitrator found Rappaport had been terminated for cause, which defendants failed to prove. During his testimony at arbitration, Pasternak expressly acknowledged that if Rappaport was terminated without cause he would be entitled to those things "beneficial to him" and "the vesting period then would protect . . . the value of the so-called carrier [sic] promote."

Although Tretina Printing, Inc. v. Fitzpatrick & Assocs., Inc., 135 N.J. 349, 358 (1994) outlines a strong presumption in favor of effectuating an arbitration award, we are compelled to modify the awards given both parties' failure to raise the value of Rappaport's membership interest as an issue at arbitration. Because we find no basis to vacate the awards entered on the claims properly brought before the arbitrator for wrongful termination, we affirm those awards as representing Rappaport's lost income and lost future income resulting from his wrongful termination as a manager. By adhering to the specifically defined criteria in modifying an arbitration award, we adhere to the standard set forth in Tretina and uphold the presumption favoring effectuating an arbitration award. Ibid.

To the extent we have not addressed the parties' remaining arguments, they are without sufficient merit to warrant discussion in a written opinion. See

R. 2:11-3(e)(1)(E). We note only the following with respect to the equitable arguments: given the unprepared testimony by Rappaport in response to the arbitrator's sua sponte question that his carried interest had been estimated at $25 million in 2018, the testimony of defendant Pasternak that Rappaport's carried interest could be valued "as high as $36 million," and the arbitrator's finding Rappaport was wrongfully terminated, it is implausible to argue the $4.9 million awarded to Rappaport, the prevailing party, encompassed the value of his future carried interest.

The arbitration awards are modified as set forth herein to exclude any inclusion of Rappaport's membership interest, including any future carried interest accruing after the conclusion of arbitration testimony. All other aspects of the arbitration awards are affirmed. The August 31, 2021 orders entered by the Chancery court are reversed, the second complaint is reinstated, and the matter is remanded to the trial court. We do not retain jurisdiction.

I hereby certify that the foregoing is a true copy of the original on file in my office.