Superior Court of New Jersey

Appellate Division

Docket No. A-000398-24

HUDSON RIVER ASSOCIATES, LLC and 225 RIVER ROAD DFT 2017, LLC, *Plaintiffs-Appellants,* vs. THE PROMEDADE AT EDGEWATER CONDOMINIUM ASSOCIATION, INC., BOARD OF TRUSTEES and L. PERES & ASSOCATES, INC., *Defendants-Respondents.* *(For Continuation of Caption See Inside Cover)*	CIVIL ACTION ON APPEAL FROM THE FINAL ORDERS OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, BERGEN COUNTY DOCKET NO. BER-L-394-24 Sat Below: HON. KELLY A. CONLON, J.S.C.

BRIEF ON BEHALF OF APPELLANTS HUDSON RIVER ASSOCIATES, LLC AND 225 RIVER ROAD DFT 2017, LLC

On the Brief:
STEPHEN P. SINISI, ESQ.
Attorney ID# 282321972

LAW OFFICES OF
STEPHEN P. SINISI, ESQ., LLC
Attorneys for Appellants Hudson River Associates, LLC and 225 River Road DFT 2017, LLC
Two Sears Drive, 2nd Floor, Suite 204
P.O. Box 1458
Paramus, New Jersey 07652
(201) 599-1600
firm@sinisilaw.com

Date Submitted: January 15, 2025

CP COUNSEL PRESS (800) 4-APPEAL • (333664)

RREEF AMERICA REIT II CORP. HH,

Intervenor-Respondent,

vs.

HUDSON RIVER ASSOCIATES, LLC and 225 RIVER ROAD DFT 2017, LLC,

Defendants-Appellants.

EDGEWATER PROMENADE 123, INC. and RIVERVIEW AT CITY PLACE, INC.,

Plaintiff Intervenors-Respondents,

vs.

THE PROMENADE AT EDGEWATER CONDOMINIUM ASSOCIATION, INC., BOARD OF TRUSTEES and l. PERES & ASSOCIATIONS, INC.,

Defendants-Respondents

TABLE OF CONTENTS

Page

TABLE OF JUDGMENTS, ORDERS AND RULINGS BEING APPEALED

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes & Other Authorities:

PRELIMINARY STATEMENT

The New Jersey Arbitration Act mandates that an arbitrator's award be vacated if the arbitrator exceeded his powers. The arbitrator in this case exceeded his powers by making an award that repealed provisions of a condominium Master Declaration, although the Master Declaration provisions were not an issue, and he was not authorized to decide the validity of those provisions. Plaintiffs therefore applied to the court to vacate the arbitrator's award. However, the trial court judge confirmed the award, without making any findings of fact or providing an explanation for her decision.

Plaintiffs, Hudson River Associates, LLC and 225 River Road DFT 2017, LLC, and Defendants The Promenade at Edgewater Condominium Association, Inc., its Board of Trustees, and the Condominium's managing agent, L. Peres & Associates, Inc., had settled litigation between them by entry of a settlement memorialized in a Settlement Term Sheet ("STS"). The litigation concerned the common expense assessments due from Plaintiffs and the number of parking spaces they had to provide for the Condominium. The STS was intended to resolve those issues. With respect to the parking, it incorporated a section of the Condominium's Master Declaration, Section 8.04.03, which required Plaintiffs to provide additional parking in a parking deck to replace parking spaces that had been eliminated by the construction of

their Condominium Units and stated that those replacement parking spaces would become Common Elements of the Condominium. That parking deck, already built at that time, is identified as Future Development Unit A or New Unit A and is owned by Hudson River Associates, LLC.

The STS also stated, "All terms of the Master Declaration and By-Laws shall continue to be in full force and effect other than as expressly amended by the provisions of this Settlement Term Sheet." It made no mention of the Third Amendment to the Master Declaration. Both Section 8.04.03 of the Master Declaration and Section 3(a)(i) of the Third Amendment expressly provide that the parking spaces in the New Unit A parking deck are to be Common Elements of the Condominium.

In the STS, Plaintiffs agreed that they would grant a "permanent easement" to the Association to use the New Unit A parking spaces and would maintain the parking deck. The interpretation of "permanent easement" was the subject of the arbitration. The Plaintiffs asserted that "permanent easement" meant an easement that did not have a specified termination event or date (i.e., was not a "temporary easement") but would last until they completed further development of Future Development Unit B (which currently contains New Unit B). At that time, the parking spaces would be designated as Common Elements, pursuant to Section 8.04.03 and the Third

Amendment, to be managed and maintained by the Association, and the easement would terminate by merger. The Defendants, on the other hand, argued that "permanent easement" meant forever, and that Hudson River Associates and its successors would forever own New Unit A and maintain it for use by the Association.

The arbitrator ruled in favor of Defendants, concluding that the New Unit A parking spaces would forever be owned and maintained by Plaintiff Hudson River Associates and its successors. In so ruling, he repealed Section 8.04.03 of the Master Declaration and Section 3(a)(i) of the Third Amendment, contrary to the express language of the STS. Because he was not authorized to interpret the Master Declaration and certainly was not authorized to invalidate any sections of those documents, his award exceeded his powers. It therefore should be vacated.

Accordingly, Plaintiffs respectfully request that the Appellate Court reverse the trial court's confirmation of the award and now vacate the award.

PROCEDURAL HISTORY

Prior Litigation Related to Current Matter

This action arises out of the challenge of Plaintiffs, owners of two units (New Unit A and New Unit B) in a mixed Residential/Commercial Condominium, to the authority of the Defendants, the Condominium Association and its managing agent. (Pa[1]152-243). New Unit A is a parking deck and New Unit B is an office building. (Pa36). Specifically, the Plaintiffs questioned the amount of their assessment for common expenses for New Unit B and the number of replacement parking spaces Plaintiffs needed to construct in the Condominium to replace parking spaces that had been eliminated by their development of the two units. (Pa152-243). Plaintiffs filed the initial action on January 21, 2020, bearing Docket No. BER-C-19-20 (the "initial action"), seeking a declaratory judgment regarding their rights and obligations in the Condominium and concomitant injunctive relief. (Pa152-243).

Following the filing of the Defendants' Answer and Counterclaim (Pa244-426) and an unsuccessful mediation (Pa145), with the court's approval, the parties agreed to dismiss their claims without prejudice to attempt settlement negotiations. (Pa427-431). After this attempt failed, Plaintiffs filed another Complaint for Declaratory Judgment and Related Relief bearing

[1] "Pa" refers to the Plaintiffs' Appendix.

Docket No. BER-C-36-22 (the "second action"). (Pa432-433). Defendants filed an Answer to the First Amended Complaint and Counterclaim. (Pa434).

Settlement, Dispute and Arbitration

The parties then participated in mediation before the Honorable Harry G. Carroll, J.A.D. (Ret.) which resulted in the execution of a Settlement Term Sheet ("STS") setting forth the preliminary terms of their agreement. (Pa95-99, 435-442). Although Paragraph 1 of the STS provides that it is a "binding" agreement, it also states that the parties will enter into a more formal agreement (Pa436). The Promenade at Edgewater Condominium Association, Inc. approved the STS at its meeting on August 26, 2022. (Pa443-447). Paragraphs 1 and 10 of the STS provide that any dispute relating to its "interpretation or enforcement," or "relating to the terms of the [contemplated] more formal agreement," would be first subject to mediation before Judge Carroll. (Pa436, 439). If the mediation proved unsuccessful, the Parties agreed that Judge Carroll would resolve the dispute by way of "binding and final" arbitration. (Pa439).

A dispute arose between the parties over a term in the STS, specifically, the meaning of the phrase "permanent easement" which is to be granted by the Plaintiffs to the Condominium Association with respect to the New Unit A parking deck. (Pa437). Following an unsuccessful mediation over that dispute

(Pa145), the parties participated in arbitration before Judge Carroll pursuant to Section 10. (Pa100-106, 439). At the arbitrator's request, each party provided its respective statements of issues to be decided at the arbitration. (Pa100-106, 439). On September 25, 2023, Judge Carroll issued his first decision, rejecting Plaintiffs' interpretation of the STS, declaring Defendants as the prevailing party, and awarding Defendants counsel fees. (Pa107-116). On November 27, 2023, Judge Carroll issued another decision rejecting Plaintiffs' application to clarify the September 25, 2023 decision and awarding Defendants counsel fees in the sum of $101,583.00. (Pa117-124).

The Current Summary Action

On January 19, 2024, Plaintiffs filed a Summary Action to vacate the arbitrator's September 25, 2023 and November 27, 2023 decisions/awards (the "Summary Action," Docket No. BER-L-394-24). (Pa34-126, 127-136). Defendants filed a Verified Answer and Counterclaim to the Summary Action and a Cross-Motion, seeking to confirm the arbitration awards. (Pa137-462, 463-477). Plaintiffs filed their Answer to Defendants' Counterclaim. (Pa478-484). Following their respective motions (Pa485-505, 506-517), Edgewater Promenade 123, Inc. and Riverview at City Place, Inc. (hereinafter referred to jointly as "the Residential Units") and RREEF America REIT II Corp. HH ("RREEF") were permitted to intervene. (Pa523-524, 525-526).

RREEF and the Residential Units filed their Intervenor Complaints against Hudson River Associates, LLC and 225 River Road DFT 2017, LLC. (Pa527-534, 535-551, 565-581). Plaintiffs filed their Answers to the Intervenors' Complaints. (Pa597-603, 613-626).

Intervenor RREEF filed a Cross-Motion to dismiss the Residential Units' Intervenor Complaint. (Pa630-677). Plaintiffs and the Residential Units opposed RREEF's Cross-Motion. (Pa678-696).

Defendants' attorney was permitted to withdraw as Defendants' counsel when issues were raised by the Residential Units Intervenor about the nature of Defendants' counsel's representation. (Pa627-629).

Plaintiffs filed a Cross-Motion to Dismiss/Suppress Defendants' Answer and Counterclaim on the grounds that Defendants' attorney had been relieved by the court and Defendants were no longer represented. (Pa697-701). Intervener RREEF opposed Plaintiffs' Cross-Motion. (Pa702-704). The hearing on all pending motions was held on August 30, 2024 (T[2]1-70).

That day, the court entered five Orders: (1) she denied Plaintiffs' application to vacate the arbitration decisions/awards; (2) she suppressed without prejudice Defendants' Answer and Counterclaim; (3) she denied Intervenor RREEF's motion to dismiss the Intervenor Residential Units'

[2] "T" refers to the Transcript of Motion, dated August 30, 2024.

complaint but denied the Residential Units' complaint as moot; (4) notwithstanding the suppression of the Defendants' pleadings, she confirmed the arbitration awards; and (5) she entered an Amended Order dismissing Plaintiff's complaint, confirming the arbitration awards, and dismissing all Intervenor complaints. (Pa1-11, 708-710; T 45-68).

Plaintiffs timely filed a Notice of Appeal from the orders denying vacation of the arbitration awards and confirming the awards, as set forth in Orders (1), (4) and (5) listed above. (Pa12-18).

STATEMENT OF FACTS

Plaintiffs are the owners of Future Development Unit A ("FDU A," containing New Unit A) and Future Development Unit B ("FDU B," containing New Unit B) in The Promenade, a condominium complex. (Pa34, 36, 156-157). New Unit A (or "FDU A") and New Unit B (or "FDU B") are, respectively, a Parking Deck and an Office Building. (Pa36). Plaintiff Hudson River Associates, LLC acquired its ownership by a deed recorded in the Office of the Bergen County Clerk on February 14, 2012 in V Book 0957, Page 1818. (Pa36). Plaintiff 225 River Road DFT 2017, LLC acquired its ownership by a deed recorded in the Office of the Bergen County Clerk on February 26, 2018 in V Book 2872, Page 1437. (Pa36). As the owners of New Unit A and New

Unit B, respectively, Plaintiffs are the successors to the Grantor with respect to the development of those Units. (Pa36).

Defendant The Promenade at Edgewater Condominium Association, Inc. ("the Association") is a condominium association and non-profit corporation which operates and maintains the common areas of The Promenade. (Pa37, 157). Defendant Board of Trustees (also identified as Board of Directors) is the governing body of the Association and is comprised of one Representative appointed by each unit owner. (Pa37, 157). Defendant L. Peres & Associates, Inc. served as the managing agent of the Condominium pursuant to a contract entered into with the Association. (Pa37, 157).

The Promenade is a mixed-use condominium, consisting of commercial units and residential units, created by the recording of a Master Declaration in the Office of the Bergen County Clerk on August 12, 2003, in Deed Book 8604, Page 0001. (Pa36, 44-63, 154, 279-407). The Master Declaration created two Commercial Units, five Residential Units each containing multiple dwellings, a Hotel Unit, a Ferry Dock Unit, and a unit to be developed called the Future Development Unit. (Pa35, 156, 279-407). Pursuant to Section 8.04.1 of the Master Declaration, up to four Condominium units could be built within the Future Development Unit. (Pa35, 310).

Of particular significance to the instant action is Article 8, Section 8.04.03 of the Master Declaration, which reads as follows:

> To the extent the Future Development Unit removes parking spaces from the surface lot to accommodate the structure of the Future Development Unit, Grantor or its successors, at its sole cost, shall provide replacement parking in the to-be-built deck as a Common Element, to be deemed part of the Parking Facilities. …

(Pa35, 311). Furthermore, pursuant to Article 2, Section 2.01 of the Master Declaration, "All of the Parking Facilities shall be deemed part of the Common Elements of the Condominium" except with respect to certain existing leases and certain rights of the Hotel owner. (Pa35, 282-283).

The Master Declaration has been amended by six Amendments. (Pa35, 64-89, 90-94, 225-232). Of relevance to the instant action are the Third Amendment and the Fourth Amendment to the Master Declaration. (Pa35, 64-89, 90-94). The Third Amendment was recorded in the Office of the Bergen County Clerk on September 21, 2004 in Deed Book 0872, Page 136 (Pa35, 64-89). The Fourth Amendment corrected typographical errors in the Third Amendment and was recorded in the Office of the Bergen County Clerk on December 17, 2004 in Deed Book 0875, Page 155. (Pa35, 90-94).

The Third Amendment as corrected by the Fourth Amendment subdivided the Future Development Unit into Future Development Unit A and Future Development Unit B and created New Unit A and New Unit B within

these respective units. (Pa36, 64-89, 90-94). Section 3(a) of the Third Amendment as corrected by the Fourth Amendment states, in pertinent part, the following:

> The parking spaces within New Unit A shall be the exclusive property of the Unit Owner of New Unit A (**other than those described in subsection (i) below**), and shall be allocated as follows:
>
> (i) The number of existing parking spaces within the Future Development Unit that are displaced by the construction of the improvements constituting New Unit A and New Unit B shall be designated by the Unit Owner of New Unit A as Parking Facilities to replace such displaced parking spaces, in accordance with Section 8.04.03 of the Declaration. **Such parking spaces shall be Parking Facilities and Common Elements in accordance with the Declaration** [boldface added].

(Pa36, 67, 90-94).

On July 29, 2022, following mediation, the parties agreed to a settlement of their earlier lawsuit, the primary terms being memorialized in a Settlement Term Sheet ("STS)." (Pa95-99, 435-442). Pursuant to Section 1 of the STS, the parties agreed to execute a more formal agreement memorializing the settlement. (Pa96). Section 1 and Section 10 require any disputes relating to the terms of the STS or the more formal agreement to be mediated with the Honorable Harry G. Carroll, J.A.D. (Ret.) but then if not resolved, decided by Judge Carroll through binding arbitration. (Pa439).

Pursuant to Section 3 of the STS, Plaintiffs' replacement parking obligation for the existing New Unit A and New Unit B was compromised to a

total of 45 replacement parking spaces to be provided on an adjacent property. (Pa437). Those offsite parking spaces are to be subject to an easement for use by the Association but need not be provided until Plaintiffs construct a second unit on Future Development Unit B. (Pa437). In addition, the number of parking spaces will be subject to adjustment if the Plaintiffs alter the use of the Office Building (New Unit B). (Pa437). Section 3 also requires that if any further development of Future Development Unit B results in a need for additional replacement parking as required by Section 8.04.03 of the Master Declaration, Plaintiffs will add such parking spaces. (Pa437).

Section 4(b) of the STS reads, in pertinent part, as follows:

> Plaintiffs shall, within 30 days of the Approval of the Settlement Agreement, execute a permanent easement providing the Association with unencumbered full and complete access to the parking deck located on Future Development Unit A ("Parking Deck") for parking by the Association and its guests and invitees, with the Parking Deck deemed code Complaint by the Borough with the Borough issuing a CO concerning same. The Plaintiffs shall thereafter covenant to keep and maintain the Parking Deck in compliance with all applicable laws and as a useable parking area for the Association and its guests and invitees and shall continue to be solely responsible for the property and casualty insurance, maintenance, snow removal, upkeep, and repair of the Parking Deck. …

(Pa437).

Significantly, the second sentence of Section 9 of the STS states, "All terms of the Master Declaration and By-Laws shall continue to be in full force

and effect other than as expressly amended by the provisions of this Settlement Term Sheet." (Pa439).

During the negotiations regarding the more formal settlement agreement, a dispute arose between the parties regarding the meaning of the phrase "permanent easement" for the Parking Deck in Future Development A, referenced in STS Section 4(b). (Pa437). Unable to arrive at a mediated solution, the parties agreed to arbitrate their dispute, pursuant to Section 10 of the STS. (Pa439). In arbitration, Plaintiffs maintained that this phrase means an easement that did not have a specified termination date, as opposed to a "temporary easement." *See* (Pa100-103, 109-110). Nevertheless, Plaintiffs expected that the easement would terminate when the parking spaces became Common Facilities as required by Master Declaration Sections 2.01 and 8.04.03 and the Third Amendment to the Master Declaration. *See* (Pa100-103, 109-110). That is, as with any easement, it would terminate by common law upon merger when the parking spaces in New Unit A became Common Elements. *See* (Pa100-103, 109-110). Defendants maintained that the phrase means that the parking spaces in the New Unit A Parking Deck would forever be owned by the Owner of New Unit A, subject to the easement, and that the Owner would forever be responsible for maintenance and repair of the parking spaces. *See* (Pa104-106, 110-111).

At the request of the arbitrator, on April 17, 2023, the parties submitted their respective statements of the issues to be decided by the arbitrator. (Pa100-103, 104-106). Each of Plaintiffs' issues contains a statement of fact regarding the language in the Master Declaration of the Condominium, which serves as the premise for the following issue presented, and issues 1 and 2 also recite, respectively, the actual language of the Master Declaration sections referenced. (Pa100-103). Specifically, Plaintiffs' statements read as follows:

> 1. In light of the continued viability of Master Declaration Section 8.04.03 and its express incorporation into Section 3 of the July 29, 2022 Settlement Term Sheet, did the parties agree that the number of additional parking spaces required due to the displacement of parking spaces by the future additional development of Future Development Unit B shall be offset by the number of parking spaces in the Future Development Unit A parking deck?
>
> Section 8.04.03 states:
>
> "To the extent the Future Development Unit removes parking spaces from the surface lot to accommodate the structure of the Future Development Unit, Grantor, or its successors, at its sole cost, shall provide replacement parking in the to-be-built deck [now the Future Development Unit A Parking Deck], as a Common Element, to be deemed a part of the Parking Facilities" [emphasis in Plaintiffs' issue].
>
> 2. Since Section 3 of the Third Amendment to the Master Declaration has never been superseded or voided and the parties did not include any provision in the Settlement Term Sheet or the proposed Seventh Amendment to the Master Declaration voiding the provisions of Section 3 of the Third Amendment to the Master Declaration, did the parties agree that the provisions in Section 3 of the Third Amendment regarding the allocation of parking spaces

> shall remain in effect? [Section 3 of the Third Amendment, as corrected by the Fourth Amendment, was then quoted.]
>
> 3. Since Section 8.04.03 of the Master Declaration mandates that the Future Development Unit A Parking Deck parking spaces are to become Common Elements, did the parties also agree that the plaintiff's obligation to provide a permanent easement to the said Parking Deck and to maintain the Parking Deck, in Section 4 of the Settlement Term Sheet, would terminate upon completion of the future additional development of Future Development Unit B, when the Parking Deck parking spaces would become a Common Element and part of the Condominium Parking Facilities, pursuant to Master Declaration Section 8.04.03, so that the easement would merge into the ownership by the Condominium unit owners?

(Pa101-103)

Defendants' statement of issues includes issues that were not being contested: to wit, number 2, regarding the obligation to provide replacement parking spaces for those eliminated by the further development of Future Development Unit B; number 4, regarding the 45 off-site parking spaces to be constructed by Plaintiffs; and number 5, whether the Plaintiffs are responsible for maintaining and repairing parking spaces they are required to construct. (Pa104-106).

On September 25, 2023, the arbitrator issued his decision, concluding, *inter alia*, that the phrase "permanent easement" in the STS means an easement that lasts forever, requiring the Owner of New Unit A to forever maintain responsibility for maintenance and repair of the parking spaces in

the Parking Deck. (Pa107-116). That interpretation is contrary to the express language in Section 2.01 and Section 8.04.03 of the Master Declaration and in the Third Amendment to the Master Declaration that the parking spaces in the Parking Deck would become Parking Facilities and Common Elements of the Condominium. (Pa64-69, 107-116, 311).

In his subsequent decision dated November 27, 2023, the arbitrator awarded Defendants attorneys' fees as the prevailing party, pursuant to Section 10 of the STS. (Pa117-124). He also denied Plaintiffs' application to clarify his September 25, 2023 decision, stating that the Plaintiffs had put the interpretations of Section 8.04.03 and the Third Amendment in issue by listing two of the issues to be decided as follows:

> Since Section 3 of the Third Amendment to the Master Declaration has never been suspended or voided and the parties did not include any provision in the Settlement Term Sheet or the proposed Seventh Amendment to the Master Declaration voiding the provisions of Section 3 of the Third Amendment, did the parties agree that the provisions in Section 3 of the Third Amendment regarding the allocation of parking spaces shall remain in effect?
>
> Since Section 8.04.03 of the Master Declaration mandates that the Future Development Unit A Parking Deck parking spaces are to become Common Elements, did the parties also agree that the Plaintiffs' obligation to provide a permanent easement to the said Parking Deck and to maintain the Parking Deck, in Section 4 of the Settlement Term Sheet, would terminate upon completion of the future additional development of Future Development Unit B, when the Parking Deck parking spaces would become a Common Element and part of the Condominium Parking

> Facilities, pursuant to Master Declaration Section 8.04.03, so that the easement would merge into the ownership by the Condominium unit owners?

(Pa67-68, 101-102, 311).

The arbitrator's conclusion that Plaintiffs placed the interpretations of the Third Amendment to the Master Declaration and Section 8.04.03 of the Master Declaration in issue because of the parties' statements of issues is incorrect, because the Plaintiffs' references to the Third Amendment and Section 8.04.03 are statements of fact regarding what those provisions state. (Pa64-69, 119-120, 310-311).

Paragraph 9 of the STS clearly states that the terms of the Master Declaration remain in full force and effect other than as expressly amended by the STS. (Pa439). Nothing in the STS expressly amended Section 8.04.03 of the Master Declaration or the Third Amendment to the Master Declaration. (Pa439).

The arbitrator was charged with determining the meaning of the phrase "permanent easement" within the contours of the settlement and as mutually intended by the parties. (Pa64-69, 119-120, 310-311, 437). He was not authorized to ignore or disregard the language of the Master Declaration and the Third Amendment or to amend or

invalidate the Master Declaration or the Third Amendment. (Pa64-69, 119-120, 310-311, 437).

LEGAL ARGUMENT

I. THE STANDARD OF REVIEW BY THE APPELLATE COURT IS DE NOVO

A decision whether or not to vacate an arbitration award is a decision of law. Accordingly, the Appellate Court must review the denial of a motion to vacate *de novo*. Manger v. Manger, 417 N.J. Super. 370, 376 (App. Div. 2010); Pami Realty, LLC v. Locations XIX Inc., 468 N.J. Super. 546, 556 (App. Div. 2021), certif. denied, 251 N.J. 1, 7 (2022); Yarborough v. State Operated Sch. Dist. of City of Newark, 455 N.J. Super. 136, 139 (App. Div. 2018), certif. denied, 236 N.J. 631 (2019); Sanjuan v. Sch. Dist. of W. N.Y., Hudson Cty., 256 N.J. 369, 381 (2024)

Although the appellate court should defer to a trial court's findings of fact if they are supported by substantial credible evidence, Pami Realty, supra, 468 N.J. Super. at 556, the trial court did not make **any** findings of fact and provided no explanation why she believed that the arbitrator had not exceeded his powers by invalidating Section 8.04.03 of the Master Declaration and Section 3 of the Third Amendment. That is another reason why the trial court's decision should not be given any weight.

In the first seventeen (17) pages of her twenty-four (24) page decision, the trial judge essentially summarized the procedural history of the dispute, as well as the arguments/contentions of the parties to either vacate or confirm the arbitrator's decision, respectively (T 45-69). It is noteworthy that the trial judge observed that Defendants were "currently unrepresented" but decided that she would consider the briefing filed, case law, and "relax the court rules pursuant to Rule 1:1-2" (T 52:1-6). She acknowledged that "normally" an application seeking to confirm an arbitrator's award "would have to be done by way of order to show cause, allowing sufficient time for the opportunity to respond" (T 52:7-10) but once again, she chose to relax the rules pursuant to Rule 1:1-2, ostensibly because the matter had been extensively briefed by all parties (T 52: 13-16).

However, that decision was inconsistent with her ultimate decision dismissing Defendants' pleadings. Defendants' counsel had withdrawn as counsel, and an order had been entered permitting substitution of counsel within a fourteen-(14) day period to file their answer (Pa627-629), which Defendants failed to do. Plaintiffs moved to suppress Defendants' Answer pursuant to R.4:37-2(a). The trial court ultimately entered an order dismissing Defendants' answer and separate defenses,

albeit on the return day of the hearing affirming the arbitrator's award, thereby entering an invalid decree (T 61:2-10). We submit that the court therefore erred in accepting Defendants' position and argument.

Predictably, the trial court's decision cited the traditional rationales or principles upholding arbitrators' decisions ("New Jersey favors voluntary arbitration as an efficient means to resolve disputes" …, the "strong preference for judicial confirmation or arbitration awards"… and "reviewing courts must give arbitration awards considerable deference" (T 62:11-25, T 63:1-13). That said, our courts are not expected to merely rubber stamp arbitrators' awards; an arbitrator having rendered an award does not mean that the award is unassailable. Rather, as Plaintiffs argued below, the New Jersey Arbitration Act recognizes that there are grounds to vacate arbitrators' awards. N.J.S.A. 2A:23B-23. Here, where an arbitrator exceeded his powers, the court is duty-bound to vacate the award. N.J.S.A. 2A:23B-23(a)(4). Plaintiffs respectfully submit that this case presents one of the limited number of circumstances warranting judicial review (and vacation) of this arbitrator's award. However, the trial court judge never explained why she did not apply this statute.

In less than two (2) pages, the trial court "clung" to the aforestated principles for upholding arbitrators' awards to summarily reject Plaintiffs' arguments. She eschewed a trial court's duty to perform the requisite judicial review and evaluation of the arguments and to set forth *bona fide* findings and reasons for rejecting the arguments put forth to vacate the arbitrator's awards. Not one single sentence in the trial court's decision discussed or evaluated the arguments asserting precisely why the arbitrator's decisions exceeded his powers and the authority vested in him, pursuant to the New Jersey Arbitration Act. Despite the trial court's recognition that the parties' briefs were comprehensive, the key/core issues or arguments before the court, which are set forth below, were neither properly evaluated nor reconciled within the parameters or "guard rails" established by the New Jersey Arbitration Act. The trial judge's "naked" conclusions were insufficient to perform her duties. Coetis v. Finneran, 83 N.J. 563 (1980); McGhee v. McGhee, 277 N.J. Super 1 (App. Div. 1994). Accordingly, the lower court's decision cannot control.

On the contrary, for the reasons that follow, we respectfully submit that the facts and law presented support the conclusion that the arbitrator exceeded his authority and so warrant vacation of the awards.[3]

II. THE TRIAL COURT'S CONFIRMATION OF THE ARBITRATION AWARDS/DECISIONS SHOULD BE REVERSED, AND THE ARBITRATOR'S AWARDS/DECISIONS VACATED, BECAUSE THE ARBITRATOR EXCEEDED HIS POWERS BY AMENDING OR INVALIDATING SECTION 8.04.03 OF THE MASTER DECLARATION AND THE THIRD AMENDMENT TO THE MASTER DECLARATION, NEITHER OF WHICH WAS IN DISPUTE OR TO BE AMENDED OR INVALIDATED BY THE SETTLEMENT TERMS (Pa1-2, Pa6-8, Pa9-11; T 67:16-68:12).

The arbitrator's awards/decisions in this matter exceeded the arbitrator's power. The arbitrator was required to interpret the terms of the parties' agreement as set forth in the Settlement Term Sheet (STS). The agreement was subject to the Master Declaration unless it expressly amended the Declaration. There was no express amendment to the Declaration. However, the arbitrator interpreted the STS so as to effect an amendment or invalidation of a section of the Master Declaration and its Third Amendment, exceeding his authority.

[3] Plaintiffs had argued that the arbitrator never actually entered any award but rather had rendered decisions that cannot be confirmed (T 10:1-12:25). The trial court noted that the terms "decision" and "award" had been used interchangeably (T 45:10-16) and confirmed them (T 67:16-68:12). Therefore, in this brief we refer to them as decisions or awards.

N.J.S.A. 2A:23B-23a(4) therefore mandates that the awards/decisions be vacated.

A. AN ARBITRATOR'S AWARD MUST BE VACATED IF IT EXCEEDS THE AGREED-UPON AUTHORITY (Pa1-2, Pa6-8, Pa9-11; T 49:14-68:12)

Absent an agreement to the contrary, an arbitrator shall have only such powers as the Arbitration Act, N.J.S.A. 2A:23B-1, *et seq.* ("the Act"), and the agreement of the parties grant to the arbitrator and does not retain the broader powers exercised by a judge. Kimm v. Blisset, LLC, 388 N.J. Super. 14, 25, 34 (App. Div. 2006), certif. denied, 189 N.J. 428 (2007). "An arbitrator worthy of an appointment in the first place must conscientiously respect the limits imposed on his jurisdiction, for otherwise he would not only betray his trust, but also undermine his own future usefulness and endanger the very system of self-government in which he works." Commc'ns. Workers of Am., Local 1087 v. Monmouth Cty. Bd. of Soc. Servs., 96 N.J. 442, 449 (1984) (quoting Schulman, "Reason, Contract, and Law in Labor Relations," 68 Harv. L. Rev. 999 (1955)).

In Commc'ns. Workers, the New Jersey Supreme Court addressed the "core" issue before it, namely, the extent of an arbitrator's authority. It expressly recognized that an arbitrator is limited by the parameters of the parties' contractual delegation. In the present case, the contractual delegation

is set forth in the Settlement Term Sheet/Agreement entered by the parties on July 29, 2022 and those Statements of the Issues, dated April 17, 2023, that were mutually agreed upon by the partes, all of which are subject to the Master Declaration and its Amendments. The Commc'ns. Workers Court stated,

> It is well settled that the arbitrator's authority to resolve a given dispute depends upon the contract between the parties. … Thus, the jurisdiction and authority of the arbitrator are circumscribed by and limited to the powers delegated to him. … These restrictions relate both to the procedure that the arbitrator must apply in resolving disputes and the substantive matters that he may address. Moreover, "[a]ny action taken beyond that authority is impeachable," … and may be vacated on statutory grounds, N.J.S.A. 2A:24–8d (providing for vacation of an award where the arbitrator exceeded or so imperfectly executed his powers that a mutual award upon the subject matter was not made).

Id. at 448-49 [emphasis added, internal citations omitted]. "The language limiting the arbitrator's authority over the resolution of grievances arising out of the terms of the agreement, and denying him the authority to add to, subtract from, or modify its terms, is typical of a narrow, as distinguished from a broad, arbitration clause." Id. at 449. The jurisdiction and authority of an arbitrator are thus established by the powers delegated to him by the parties' contract. County College of Morris Staff Ass'n. v. County College of Morris, 100 N.J. 383, 391 (1985).

If the arbitrator exceeds the arbitrator's powers, N.J.S.A. 2A:23B-23a(4) mandates that the court shall vacate the arbitration award. An arbitrator

exceeds his powers if he ignores the clear, unambiguous language of the agreement, City Ass'n. of Sup'rs. and Adm'rs. v. State Operated School District, 311 N.J. Super. 300, 308, 312 (App. Div. 1998), or disregards the actual terms of the parties' agreement. State, Office of Employee Relations v. Communications Workers of America, 154 N.J. 98, 112 (1998). In this case, the arbitrator ignored the clear, unambiguous language of the parties' agreement, as well as the overriding condominium-governing documents, and disregarded the actual terms of the STS.

An arbitrator's award based upon his interpretation of a contractual term will be accepted if the interpretation is reasonably debatable. Id. Thus, in Borough of Carteret v. Firefighters Mutual Benevolent Association, Local 67, 247 N.J. 202, 205 (2021), for example, the court confirmed the arbitrator's decision that a lieutenant was entitled to a captain's rate of pay as the senior firefighter on duty in the captain's absence, notwithstanding that the position of lieutenant was not expressly mentioned in the contract. At the time the contract was entered into, there was no position of lieutenant so the contract could not have considered that title. The court concluded that it was reasonably debatable that the lieutenant in that situation was included in the reference to the senior firefighter. Id. at 213.

An arbitrator's award will also be upheld if the decision is within the arbitrator's discretion as authorized by the underlying instrument. In Sanjuan v. School District of West New York, Hudson County, 256 N.J. 369 (2024), the Supreme Court reinstated an arbitrator's award demoting the appellant for unbecoming conduct rather than terminating her employment because it found that the controlling statute did not restrict the penalty that an arbitrator may impose. Id. at 385.

On the other hand, in County College, supra, 100 N.J. 383, the Supreme Court vacated the arbitrator's award. He had inserted a requirement in the contract for progressive discipline, which was not included in the contract, and had imposed a suspension on the employee rather than termination. However, dismissal was the only penalty authorized by the contract. Id. at 392-93.

The court in Port Authority Police Sergeants Benevolent Ass'n., Inc. v. Port Authority of New York and New Jersey, 340 N.J. Super. 453 (App. Div. 2001), reversed the confirmation of an arbitrator's award granting a retired sergeant back pay and ordered that the award be vacated because the arbitrator had exceeded her authority. In that case, the sergeant was suspended without pay after being indicted. Following acquittal of the criminal charge, he retired before the Port Authority brought any disciplinary charges against him and thereby avoided disciplinary charges. The arbitrator awarded him back pay on

the grounds that he was acquitted of the criminal charge, but the contract allowed back pay only after completion of departmental disciplinary charges. The court stated, "The arbitrator exceeded her delineated authority by modifying the provisions of the collective bargaining agreement." Id. at 460.

An arbitrator's award also was reversed in City Ass'n., supra, 311 N.J. Super. 300. There, a split arbitration panel concluded that the parties had amended the employment agreement regarding the timing of vacations by past practice. The court concluded that by ignoring the language of the agreement and relying on past practices, the arbitrators had exceeded their powers. Id. at 307-08.

The fact that these cases involved public agencies rather than solely private parties does not undermine their control over the case at bar. Prior to 2003, the earlier version of N.J.S.A. 2A:24-1, *et seq.*, applied generally to arbitrations. N.J.S.A. 2A:23B-1*, et seq.*, became effective January 1, 2003 and replaced the prior version of N.J.S.A. 2A:24-1, *et seq.*, except that the prior statute now governs collective bargaining agreements. Kimm, supra, 388 N.J. Super. at 28. Indeed, N.J.S.A. 2A:23B-23a, regarding the grounds for vacating an arbitrator's award, retained as reason (4) that "an arbitrator exceeded the arbitrator's powers," which had been and remains part of N.J.S.A. 2A:24-8d, "the arbitrators exceeded or so imperfectly executed their powers that a

mutual, final and definite award upon the subject matter submitted was not made." Accordingly, the standards that apply to vacating an arbitrator's decision regarding a public agency's contracts because the arbitrator exceeded his power, pursuant to N.J.S.A. 2A:24-8d, also apply to vacating an arbitrator's decision regarding a private contract pursuant to N.J.S.A. 2A:23B-23a(4).

In Selective Ins. Co. v. National Continental Ins. Co., 385 N.J. Super. 62, 67 (App. Div.), certif. denied, 188 N.J. 218 (2006), for example, the court considered the standard for review in private arbitration. The court cited a comment from Tretina Printing, Inc. v. Fitzpatrick & Associates, 135 N.J. 349, 358 (1994), adopting the concurring opinion of Perini Corp. v. Greate Bay Hotel & Casino, Inc., 129 N.J. 479, 548 (1992) (Wilentz, C.J., concurring): "If the arbitrators decide a matter not even submitted to them, that matter can be excluded from the award."). In Block v. Plosia, 300 N.J. Super. 543, 555 (2007), the court held that where a dispute between private parties was not defined to include a claim for treble damages under the Consumer Fraud Act, the arbitrator lacked authority to impose treble damages.

By the same token, the arbitrator here was limited by the agreement entered into by the parties, that is, the STS. The plain language of the STS incorporates Section 8.04.03 of the Master Declaration. Moreover, it expressly

states in Section 9, in part, "All terms of the Master Declaration and By-Laws shall continue to be in full force and effect other than as expressly amended by the provisions of this Settlement Term Sheet" [emphasis added].

The arbitrator was bound to interpret the agreement subject to these restrictions. See Highland Lakes Country Club & Cmty. Ass'n. v. Franzino, 186 N.J. 99, 115-16 (2006), where the Court explained,

> Our obligation when interpreting contractual provisions is clear. First and foremost, "fundamental canons of contract construction require that we examine the plain language of the contract and the parties' intent, as evidenced by the contract's purpose and surrounding circumstances."

In the event of potentially contradictory terms, the several parts of the contract should be construed to avoid conflict. See Silverstein v. Dohoney, 32 N.J. Super. 357, 364 (App. Div. 1954), aff'd. *sub nomen* Silverstein v. Keane, 19 N.J. 1 (1955); See also State v. Reynolds, 124 N.J. 559, 564 (1991) ("A construction that will render any part of a [contract] inoperative, superfluous or meaningless is to be avoided."). Accordingly, in interpreting the STS, the arbitrator could not change the requirements of the Master Declaration or the Third Amendment. However, in this case, the trial court merely rubber stamped the arbitrator's decision and bypassed any evaluation of this argument, so her decision should not stand.

B. THE MASTER DECLARATION PROVISIONS CONTROL (Pa1-2, Pa6-8, Pa9-11; T 49:14-68:12)

The parties' agreement here, as well as the arbitrator's authority, was circumscribed by the Master Declaration of the Condominium. A condominium is created and established by the recording of a master deed in the office of the county recording officer where the property is located. N.J.S.A. 46:8B-8. Among other provisions, the master deed contains provisions setting forth "restrictions and limitations upon the use, occupancy, transfer, leasing or the disposition of any unit (provided that any restriction or limitation shall be otherwise permitted by law) and limitations upon the use of common elements." N.J.S.A. 46:8B-9(m).

The powers of a condominium association arise not only from the Condominium Act but also from the master deed and bylaws. Thanasoulis v. Winston Towers 200 Ass'n, Inc., 110 N.J. 650, 668 (1988, Garibaldi, J., concurring). Owners of units in condominiums take title subject to the master deed. Cape May Harbor Village and Yacht Club Ass'n, Inc. v. Sbraga, 421 N.J. Super. 56, 70 (App. Div. 2011). The rights and responsibilities of the condominium unit owners thus are controlled by the Condominium Act and the master deed and bylaws. Davis v. Metuchen Gardens Condominium Ass'n, 347 N.J. Super. 345, 347 (App. Div. 2002). Accordingly, the agreement between the parties here is subject to the provisions of The Promenade at Edgewater

Condominium master deed, which was labeled by the developer as the Master Declaration, just as a settlement agreement would be subject to any controlling statute.

The STS agreed to by the parties in this case (Pa437) expressly incorporated Section 8.04.03 of the Master Declaration. It stated, in pertinent part, in Section 3, "Plaintiffs' replacement parking obligation is …subject to … any other replacement parking that may be due Promenade as a result of displaced parking pursuant to Section 8.04.03 of the Master Declaration (**the "Additional Parking"**) resulting from further development of Future Development Unit B." (Pa437). Section 8.04.03 of the Master Declaration (Pa35, 311) reads,

> To the extent the Future Development Unit removes parking spaces from the surface lot to accommodate the structure of the Future Development Unit, Grantor, or its successors, at its sole cost, shall provide replacement parking in the to-be-built deck, as a Common Element, to be deemed a part of the Parking Facilities.

The "to-be-built deck" was built in FDU A and is the FDU A Parking Deck. Furthermore, Master Declaration Article 2, Section 2.01 (Pa35, 282-283) mandates, "All of the Parking Facilities shall be deemed part of the Common Elements of the Condominium, subject to … Existing Leases." Thus, the Master Declaration requires that the parking spaces in the Parking Deck shall become Common Element Parking Facilities of the Condominium.

The Third Amendment to the Master Declaration (Pa64-89), corrected by the Fourth Amendment (Pa90-94), subdivided the Future Development Unit into Future Development Unit A and Future Development Unit B (Section 1) and created New Unit A and New Unit B (Section 2). Section 3, as corrected (Pa36, 67, 90-94), then continues, in part,

> (a) New Unit A. The parking spaces within New Unit A shall be exclusive property of the Unit Owner of New Unit A (**other than those described in subsection (i) below**), and shall be allocated as follows:
>
> (i) The number of existing parking spaces within the Future Development Unit that are displaced by the construction of the improvements constituting New Unit A and New Unit B shall be designated by the Unit Owner of New Unit A as Parking Facilities to replace such displaced parking spaces, in accordance with Section 8.04.03 of the Declaration. **Such parking spaces shall be Parking Facilities and Common Elements in accordance with the Declaration** [boldface added].

In other words, the Third Amendment and the Fourth Amendment also mandate that the FDU A parking spaces are to become Parking Facilities and Common Elements.

As noted above, Section 9 of the STS clearly states, "All terms of the Master Declaration and By-Laws shall continue in full force and effect other than as expressly amended by the provisions of this Settlement Term Sheet." (Pa439). As the arbitrator noted, the STS did not refer to the Third Amendment. Nor did it state that any exception would be created for Section

2.01 or Section 8.04.03 of the Declaration. Thus, neither Section 2.01, Section 8.04.03, nor the Third Amendment were expressly amended. Therefore, the arbitrator's conclusion that the failure to refer to the Third Amendment means that the parties intended that it not control contradicted the clear and unambiguous terms of the agreement as did his determination that Sections 2.01 and 8.04.03 do not apply to the FDU A Parking Deck.

Any argument that these provisions were impliedly repealed is without merit. A master deed provision, like statutes or ordinances, may not be repealed or superseded by implication. Repeal by implication is disfavored, and there is a presumption against an intent to repeal by mere implication legislation, ordinances, and, we submit, condominium governance documents. Thus, every reasonable construction, by courts and arbitrators alike, should be applied to avoid a finding of an implied repeal. Township of Mahwah v. Bergen Cty. Bd. of Taxation, 98 N.J. 268, 281, *cert.* denied *sub nomen* Borough of Demarest v. Mahwah Township, 471 U.S. 1136, 105 S.Ct. 2677, 86 L.Ed.2d 696 (1985). In the absence of any express repealer, Master Declaration Sections 2.01 and 8.04.03 and the Third Amendment cannot be deemed to have been impliedly repealed.

Unlike the discretion granted the arbitrator in the authorizing instrument in Sanjuan, supra, 256 N.J. 369, the controlling agreement here gave the

arbitrator no discretion to ignore the strictures of the agreement. Section 3 of the STS specifically incorporates Section 8.04.03 of the Master Declaration into the agreement, and Section 9 states that all terms of the Master Declaration remain in full force and effect unless expressly amended by the agreement. Thus, the arbitrator could not deviate from the provisions of the Master Declaration and its Amendments and had no authority to ignore these controlling provisions or to invalidate them. Rather, his decision was required to be subject to the controlling authority of the Condominium, that is, the Master Declaration and its Amendments.

C. THE ARBITRATOR DEVIATED FROM THE CONTROLLING AUTHORITY, CONTRARY TO THE STS (Pa1-2, Pa6-8, Pa9-11; T 49:14-68:12)

Despite this basic principle of contract construction and the overriding requirements of the Master Declaration, the arbitrator's September 25, 2023 decision fell wide of the mark with regard to its scope, exceeded the arbitrator's authority, and resulted in the excessive and improper expansion of Plaintiffs' parking/maintenance obligations established by the STS. It achieved this unwarranted result by invalidating provisions of the Master Declaration and the Third Amendment to the Master Declaration although the arbitrator had no authority to do so. His interpretation of the phrase "permanent

easement" voided the restrictions of the Master Declaration preventing their merger requirements.[4]

The issue between the parties was the meaning of the phrase "permanent easement" in the Settlement Term Sheet. On pages 2 and 3 of the arbitrator's September 25, 2023 decision (Pa109-110), the arbitrator explained,

> Plaintiffs assert that their "intent and understanding in agreeing to the Settlement Terms set forth in the [STS] were that the available parking spaces in the current Parking Deck comprising FDU A would serve as replacement spaces for parking spaces displaced by further construction of FDU B. Furthermore, the plaintiffs would indeed maintain the FDU Parking Deck while allowing the Association to use the parking spaces only until FDU B was further developed. The easement would be 'permanent' only if FDU B was not further developed; if FDU B is further developed, the FDU A parking spaces would become a Common Element of the Condominium pursuant to the Master Declaration and so the easement would actually merge into the Common Element[s] and be extinguished.
>
> Plaintiffs acknowledge that Section 4 of the STS requires them to maintain the Unit A Parking Deck and provide an easement for use of the parking spaces in the Parking Deck by the Association and its guests and invitees. However, where Plaintiffs part company with Defendant involves Plaintiffs' assertion that when the STS, the Master Declaration, and its Third Amendment are read together, upon displacement of any parking spaces due to the further

[4] We have referred on occasion to the arbitrator's decision as making the easement "perpetual," in the commonly accepted meaning of "continuing or enduring forever; everlasting." *E.g.*, Dictionary.com, dictionary.com/browse/ perpetual (2024). However, we note that Black's Law Dictionary (12th ed. 2024) lists "perpetual easement" as a synonym for "permanent easement." Nevertheless, the use of the term "perpetual" easement in this brief is used to mean one lasting forever, rather than a "permanent easement" as defined by Black's Law Dictionary as an easement with potentially unlimited duration, as discussed below.

> development of FDU B, FDU A Parking Spaces are to replace them and are to be Common Element Parking Facilities. Stated differently, Plaintiffs contend the "permanent easement" they agreed to provide Defendant in Section 4 of the STS will exist only until Plaintiffs further develop FDU B. Thereafter, the available parking spaces in the Unit A Parking Deck will become a common element pursuant to Section 8.04.03 of the Master Declaration for the use of all Unit Owners; the easement granted by Plaintiffs will be deemed merged and extinguished by operation of law; Plaintiffs will no longer own the Parking Deck or be responsible for its maintenance and repair; and Defendant Condominium Association will then become responsible to maintain it.
>
> However, he rejected the Plaintiffs' arguments and adopted the

Defendants' argument. He wrote on page 7 of his decision,

> I find Defendant's interpretation more persuasive, largely for the following reasons. Defendant expresses:
>
> - The plain terms of the STS describe the easement as permanent without any qualification or limitation.
>
> - Nowhere in the STS is it stated that the Association will ever become the owner of the Parking Deck.
>
> - Nowhere does the STS state that the obligation to repair and maintain the Parking Deck will be transferred to the Association. Rather, Section 4 of the STS specifically states that Plaintiffs are to execute a permanent easement providing the Association with unencumbered full and complete access to the Parking Deck for parking by the Association and its guests and invitees. Thereafter, Plaintiffs are solely responsible for the repair and maintenance of the Parking Deck.
>
> Here, the parties are sophisticated business entities. If Plaintiffs' intent in entering the settlement was to transfer ownership and control of the existing Parking Deck to Defendant Association, Plaintiffs surely possessed the acumen to manifest that intent by clearly spelling it out in the STS. Instead, Plaintiffs now

> attempt to justify their strained interpretation of the STS by relying on the Third Amendment to the Master Declaration that is not even referenced in the STS to bootstrap their argument that the 'permanent easement' is not really permanent but rather will merge and be extinguished upon the further development of FDU B. …(Pa114).

The arbitrator thus decided that the "permanent easement" granted by Plaintiffs could never terminate so that the Plaintiffs or their successors must own Parking Deck A, maintain it, and allow the Association to use its parking spaces in perpetuity.

In deciding what the meaning of the STS was, the arbitrator therefore ignored the overriding authority of the Master Declaration and, in particular, Section 8.04.03, referenced in the STS, and then discounted the Third Amendment because there was no express reference to it in the agreement.[5] His decision invalidated those provisions, eliminating the requirement that bound all Owners that the replacement parking spaces and the Parking Deck A

[5] We also note that the arbitrator's justification for his interpretation that there currently are no available parking spaces in the FDU A Parking Deck which could replace spaces eliminated by further development of FDU B (Pa115) is mistaken and irrelevant. The spaces currently in Parking Deck A are used for parking for the initial FDU B unit, the Office Building. However, the STS recognizes that the number of spaces required may be changed if the use of the current FDU B Office Building is changed. In any event, the issue here is not whether the FDU A parking spaces will be available for the further development of FDU B; if they are not, Plaintiffs will need to create more parking spaces. The issue is whether the FDU A parking spaces will become Common Facilities so that easement will merge, and that issue does not depend upon whether the Plaintiffs will have to create more parking spaces.

parking spaces are to be Common Facilities and Common Elements, maintained by the Association.

Plaintiffs' explanation of what was meant in the STS by the provisions that Plaintiffs would maintain the parking spaces in the FDU A Parking Deck and grant a "permanent" easement to those spaces to the Association was consistent with the controlling authority of the Master Declaration. The term "permanent easement" was meant to differentiate the easement from a "temporary easement" that would have a specified time limit, not necessarily that the easement would be perpetual. Black's Law Dictionary 1834 (12th ed. 2024) and the prior version, Black's Law Dictionary (11th ed. 2019), define "permanent easement" as

> An easement of potentially unlimited duration. • A permanent easement is often named using the form *permanent x easement*, where *x* is a descriptor that identifies the easement's purpose <permanent access easement>. A document creating an easement described as "permanent" might, in fact, specify a condition under which the easement will end, such as non-use for a specified period. — Also termed *permanent right-of-way*; *perpetual easement*; *perpetual right-of-way.* Cf. *temporary easement*.

A "temporary easement," on the other hand is

> An easement of limited duration. • A temporary easement is often named using the form *temporary x easement* where *x* is a descriptor that identifies the easement's purpose <temporary construction easement>. — Also termed *temporary right-of-way.* Cf. *permanent easement*.

Black's Law Dictionary 1840 (12th ed. 2024). Thus, a "temporary easement" has a defined duration, while a "permanent easement" is for a potentially unlimited duration.

Nevertheless, a permanent easement may terminate under certain conditions. Black's Law Dictionary acknowledges that "[a] document creating an easement described as 'permanent' might, in fact, specify a condition under which the easement will end, such as nonuse for a specified period" [emphasis added]. Thus, an easement entitled "permanent" is not necessarily forever. However, a permanent easement does not require any expressed condition to terminate. It also may terminate by law, for example, by merger of the servient and dominant estates. Camp Clearwater, Inc. v. Plock, 52 N.J. Super. 583 (Ch. Div. 1958), aff'd, 59 N.J. Super. 1 (App. Div. 1959), certif. denied *sub nomen* Camp Clearwater, Inc. v. Wilson, 32 N.J. 348 (1960).

Just as the arbitrator before her, the trial judge erroneously failed to recognize that a "permanent" easement clearly is not the same as an easement that lasts forever; if it were, it would make no sense to state that a permanent easement could also be made subject to conditions that would end its existence. On the other hand, the definition of permanent easement is not dependent on whether a condition for termination is expressly stated. The intent of the phrase "permanent easement" in the STS thus meant an easement with no stated

termination date (temporary easement) and which could potentially last forever, but not that it could never terminate. That use of the phrase is consistent with the requirements of Master Declaration Section 8.04.03 and the Third Amendment.

Contrary to the arbitrator's comment, the Plaintiffs did not need to state in the STS that the Parking Deck will become a Common Element if FDU B is further developed. Because the STS is subject to the Master Declaration, specifically Section 8.04.03, and the Third Amendment to the Master Declaration, that condition already exists. Upon further development of FDU B, the FDU A Parking Deck parking spaces will become Common Elements, pursuant to Section 8.04.03 and the Third Amendment. Pursuant to Section 9 of the STS, since these sections were not expressly amended by the STS, the arbitrator could not amend them and Plaintiffs did not need to restate them.

Once the parking spaces become Common Elements, the easement agreed to be given by the Plaintiffs will by law **merge** with the ownership of the Common Elements and terminate. Accordingly, the Plaintiffs' agreement to provide a "permanent" easement to the Association to use the parking spaces does not mean an easement in perpetuity but rather means an easement that does not have an established time frame. In summary, if FDU B is not further developed, the Parking Deck spaces will remain owned by the Owner of New

Unit A and will be subject to the easement, but if FDU B is further developed, the spaces will become Common Elements and the easement will terminate by merger.

By rejecting that interpretation and instead ruling that the FDU A Parking Deck will forever be owned by the Plaintiffs and be subject to an easement in favor of the Association, the arbitrator negated the language of Section 8.04.03 of the Master Declaration and invalidated Section 3(a)(i) of the Third Amendment. However, the validity of Section 8.04.03 of the Master Declaration and the Third Amendment were not issues the arbitrator was asked to decide. The STS did not modify the terms of either of these provisions. Thus, the arbitrator was constrained by, and the parties remain bound by, those provisions; the interpretation of the STS must be consistent with the continuing mandate of the Master Declaration and the Third Amendment making the parking spaces Common Elements. The arbitrator therefore was required to determine the intent of the parties as expressed in the STS based upon and subject to the requirements of Section 8.04.03 and the Third Amendment.

However, the arbitrator disregarded these fundamental legal tenets. Despite the regulation of the parties by the Condominium governing documents and the absence of any authority to re-interpret or invalidate any

provisions of the Master Declaration or its Amendments, the arbitrator ruled that Section 8.04.03 of the Master Declaration and the Third Amendment to the Master Declaration are no longer valid. That decision exceeded his powers.

Because the arbitrator's September 25, 2023 decision (Pa107-116) exceeded his authority, it must be vacated as required by N.J.S.A. 2A:23B-23a(4). Furthermore, because his November 27, 2023 award of attorneys' fees to Defendants (Pa117-124) was based on that decision, it too must be vacated.

III. THE ARGUMENT THAT PLAINTIFFS AUTHORIZED THE ARBITRATOR TO AMEND THE STS CONTRARY TO THE RESTRICTIONS OF THE MASTER DECLARATION BY THEIR STATEMENT OF ISSUES IS WITHOUT MERIT AND MUST BE DISREGARDED BECAUSE THAT DETERMINATION EXCEEDED THE ARBITRATOR'S AUTHORITY AND THE PLAINTIFFS DID NOT SUBMIT ANY QUESTIONS SEEKING INTERPRETATION OF THE GOVERNING DOCUMENTS TO THE ARBITRATOR (Pa1-2, Pa6-8, Pa9-11; T 67:16-68:12).

Having rejected the Plaintiff's application to clarify the arbitration decision because he concluded there were no grounds to do so, the arbitrator had no authority to supplement his award by adding additional reasons for it. Furthermore, an arbitrator may not render a decision on an issue that was not submitted to him, even if one party requested him to do so. Thus, the argument that the Plaintiffs agreed that the arbitrator should interpret the effect of the STS on the Master Declaration and to modify the Master Declaration by the

submission of their statements of issues fails. The issues submitted by the Plaintiffs did not ask the arbitrator to decide the meaning of the Master Declaration provisions or the effect of the STS on them, and the arbitrator did not include his contrary finding in the September 25, 2023 decision. Thus, the arbitrator's interpretation in the supplemental November 27, 2023 decision that the STS superseded Master Declaration Section 8.04.03 and Third Amendment Section 3 cannot stand.

A. THE ARBITRATOR WAS PROHIBITED FROM SUPPLEMENTING HIS REASONS FOR HIS AWARD IN A SECOND DECISION (Pa1-2, Pa6-8, Pa9-11; T 49:14-68:12)

Generally, once an arbitrator has rendered an award, he has no power to modify it. Kimm, supra, 388 N.J. Super. at 26. However, the New Jersey Arbitration Act allows certain exceptions, one of which is to clarify an award. NJ.S.A. 2A:23B-20a(3). The ability to clarify an award, though, does not enable the arbitrator to supplement the reasons for his initial award. "[A]lthough the arbitrator's power to 'clarify' an award is not specifically defined, nothing in the statute bespeaks an intention to authorize the arbitrator to change his or her mind or to reconsider his or her decision in the guise of clarification." Id. at 31.

In the instant case, although the arbitrator referred to Master Declaration Section 8.04.03 and the Third Amendment to the Master Declaration in his

September 25, 2023 decision, when discussing the parties' contentions and appearing to undermine the governing document provisions, he did not expressly state any determination regarding their continued impact. Plaintiff therefore applied to the arbitrator to clarify the September 25, 2023 decision "to preserve the viability of Section 8.04.03 and the Third Amendment" (See Pa119, 147).

The arbitrator concluded, erroneously, in his November 27, 2023 supplemental decision, that the application was for reconsideration, but he also concluded that "Plaintiffs had failed to establish any basis under the New Jersey Arbitration Act to change, correct and/or clarify my Decision" (page 2). Nevertheless, he then stated that his earlier decision was supported by Plaintiffs' statements of the issues.

However, the arbitrator had no authority to further justify his decision, as noted in Kimm. Having determined that the application was for reconsideration and that there were no grounds for any clarification, the arbitrator had no authority to modify his decision; he should have simply denied the application rather than attempt to expand his decision. Accordingly, his supplemental reasons for his initial decision, stated in his November 27, 2023 decision, that the Plaintiffs raised the governing documents as issues in

the matter, should have been vacated and cannot support the argument that the Plaintiffs authorized his decision.

B. THE PLANTIFFS' STATEMENTS OF ISSUES DID NOT AUTHORIZE THE ARBITRATOR TO OVERRULE THE CONDOMINIUM GOVERNING DOCUMENTS (Pa1-2, Pa6-8, Pa9-11; T 49:14-T 68:12)

In any event, even if the arbitrator could base his authority on the Plaintiffs' statements of the issues, his reliance on the references to the governing documents was misplaced and did not grant him any authority. The Supreme Court confirmed in Tretina, supra, 135 N.J. at 358, that an arbitrator may not decide an issue not submitted to him or her. In that case, the Court adopted the concurring opinion of Perini, supra, 129 N.J. at 548-49, as the standard for evaluating an arbitration award. In particular, though, the Court pointed out, "If the arbitrators decide a matter not even submitted to them, that matter can be excluded from the award." Id. at 548 (Wilentz, C.J., concurring).

As pointed out in Point II, in Block, supra, 390 N.J. Super. 543, the court deleted an arbitrator's award of treble damages pursuant to the Consumer Fraud Act, id. at 556, because the parties had never agreed to include consumer fraud claims in the arbitration. The plaintiffs had claimed damages only for breach of contract. Id. at 550. Here, the arbitrator was not asked to interpret the meaning of Section 8.04.03 or the Third Amendment or to determine whether the STS modified their requirements. Rather, he was asked

to determine the parties' intended meaning of the STS in light of the strictures of the Master Declaration and the Third Amendment.

At the request of the arbitrator, the parties submitted statements of the issues to be decided. Plaintiffs' issues read as follows:

> 1. In light of the continued viability of Master Declaration Section 8.04.03 and its express incorporation into Section 3 of the July 29, 2022 Settlement Term Sheet, did the parties agree that the number of additional parking spaces required due to the displacement of parking spaces by the future additional development of Future Development Unit B shall be offset by the number of parking spaces in the Future Development Unit A parking deck?
>
> Section 8.04.03 states:
> "To the extent the Future Development Unit removes parking spaces from the surface lot to accommodate the structure of the Future Development Unit, Grantor, or its successors, at its sole cost, shall provide replacement parking in the to-be-built deck [now the Future Development Unit A Parking Deck], as a Common Element, to be deemed a part of the Parking Facilities" [emphasis in Plaintiffs' issue].
>
> 2. Since Section 3 of the Third Amendment to the Master Declaration has never been superseded or voided and the parties did not include any provision in the Settlement Term Sheet or the proposed Seventh Amendment to the Master Declaration voiding the provisions of Section 3 of the Third Amendment to the Master Declaration, did the parties agree that the provisions in Section 3 of the Third Amendment regarding the allocation of parking spaces shall remain in effect? [Section 3 of the Third Amendment, as corrected by the Fourth Amendment, was then quoted.]
>
> 3. Since Section 8.04.03 of the Master Declaration mandates that the Future Development Unit A Parking Deck parking spaces are to become Common Elements, did the parties also agree that the plaintiff's obligation to provide a permanent easement to the said Parking Deck and to maintain the Parking Deck, in Section 4 of the

> Settlement Term Sheet, would terminate upon completion of the future additional development of Future Development Unit B, when the Parking Deck parking spaces would become a Common Element and part of the Condominium Parking Facilities, pursuant to Master Declaration Section 8.04.03, so that the easement would merge into the ownership by the Condominium unit owners?

The introductory references by the Plaintiffs to the provisions of Master Declaration Section 8.04.03 and the Third Amendment's Section 3 in these statements were statements of fact, not questions to the arbitrator. By setting forth the restrictions of the Master Declaration and the Third Amendment in their issues, Plaintiffs took those as givens. They did not suggest that the applicability of the Master Declaration provisions or its amendments were in issue or to be decided by the arbitrator and did not authorize the arbitrator to invalidate, amend, or even evaluate those provisions.

Rather, the Plaintiffs cited the unchallenged language of the governing provisions and asked the arbitrator only to decide whether or not the parties had agreed to Plaintiffs' propositions that were based on the governing documents. If the arbitrator had found that the parties had not agreed, then there would have been no settlement. The Plaintiffs' presentation of its issues, at the arbitrator's request, did not authorize the arbitrator to negate the Master Declaration provisions.

Nor did the Defendants' proposed issues mean that both parties agreed that their issues were to be decided or that the arbitrator was authorized to

decide them. Thus, for example, the Defendants' inclusion in their issues of language asserting that the easement to be granted by the Plaintiffs "is not subject to expiration" (Pa105) does not demonstrate that Plaintiffs agreed to incorporate that assertion into the arbitrator's authority to decide. "Where only one of the parties believes that the arbitrator was empowered to act, in the absence of evidence of an actual agreement, there is no agreement." Kimm, supra, 388 N.J. Super. at 25.

Plaintiffs did not agree that the arbitrator could conclude that the STS supersedes the Master Declaration requirement that the parking spaces eventually become Common Elements. That the arbitrator was asked by the Plaintiffs to determine the parties' intent in the STS in light of undisputed language contained in the Master Declaration and the Third Amendment thereto did not establish an agreement authorizing the arbitrator to invalidate or amend those provisions. Accordingly, the arbitrator's decision negating the potential conversion of the New Unit A parking spaces to Common Elements and the merger of the easement agreed to by the Plaintiffs was beyond his authority and must be vacated.

CONCLUSION

For the foregoing reasons, the undersigned, attorneys for Plaintiffs, respectfully request that the Court:

1. find that the arbitrator's interpretation of the phrase "permanent easement" in the parties' Settlement Term Sheet to mean that the Plaintiffs must forever own and maintain Parking Deck A and provide an easement to the Condominium Association for use of the parking spaces contradicts Sections 2.01 and 8.04.03 of the Master Declaration and the Third Amendment to the Master Declaration that requires Parking Deck A to become a Common Element upon the further development of FDU B;
2. find that the arbitrator's decision therefore exceeded his authorization by invalidating governing documents of the Condominium to which the STS is subject and which he was not requested by all parties to interpret; and
3. reverse the trial court's confirmation of the arbitrator's September 25, 2023 and November 27, 2023 decisions and instead vacate them.

Respectfully submitted,

/s/ Stephen P. Sinisi

Stephen P. Sinisi
Law Offices of Stephen P. Sinisi
Two Sears Drive, 2nd Floor
P.O. Box 1458
Paramus, NJ 07653-1458
Phone: (201) 599-1600

Attorneys for Plaintiffs-Appellants

Superior Court of New Jersey
Appellate Division

Docket No. A-000398-24

HUDSON RIVER ASSOCIATES, LLC and 225 RIVER ROAD DFT 2017, LLC, Plaintiffs-Appellants, v. THE PROMENADE AT EDGEWATER CONDOMINIUM ASSOCIATION, INC., BOARD OF TRUSTEES, and L. PERES & ASSOCIATES, INC., Defendants-Respondents.	CIVIL ACTION ON APPEAL FROM THE FINAL ORDERS OF THE SUPERIOR COURT OF NEW JERSEY, BERGEN COUNTY DOCKET NO. BER-L-394-24 Sat Below: HON. KELLY A. CONLON, J.S.C.

(For Continuation of Caption See Inside Cover)

BRIEF ON BEHALF OF INTERVENOR/RESPONDENT RREEF AMERICA REIT II CORP. HH

LAW OFFICES OF
THOMAS A. BUONOCORE, P.C.
Attorneys for Intervenor/Respondent, RREEF America REIT II Corp. HH
1719 Route 10, Suite 301
Parsippany, New Jersey 07054
(973) 984-2588
tbuonocore@bt-law.com

On the Brief
THOMAS A. BUONOCORE, ESQ.
Attorney ID# 021591983

MARK E. THOMPSON, ESQ.
Attorney ID# 031422003
Date Submitted: February 18, 2025

RREEF AMERICA REIT II CORP. HH,

Intervenor,

v.

HUDSON RIVER ASSOCIATES, LLC and 225 RIVER ROAD DFT 2017, LLC,

Defendants.

EDGEWATER PROMENADE 123, INC. AND, RIVERVIEW AT CITY PLACE, INC.

Plaintiff Intervenors,

v.

THE PROMENADE AT EDGEWATER CONDOMINIUM ASSOCIATION, INC., BOARD OF TRUSTEES AND L. PERES & ASSOCIATES, INC.,

Defendants.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

The within action concerns only the fate of an arbitration award. After years of contentious litigation between plaintiffs Hudson River Associates, LLC and 225 River Road DFT 2017, LLC (collectively, the "Plaintiffs") and defendants The Promenade at Edgewater Condominium Association, Inc. (the "Master Association"), its Board of Trustees, and its managing agent, L. Peres & Associates, Inc. (collectively, the "Defendants"), their dispute was resolved on July 29, 2022, by way of a comprehensive written Settlement Term Sheet ("STS"), which unequivocally obligated Plaintiffs to, *inter alia*, provide and maintain a permanent easement in the parking deck at the condominium property.

When a dispute arose between those parties concerning Plaintiffs' obligation to provide the permanent easement under the STS, they submitted the dispute to arbitration as prescribed thereunder. An arbitration award favorable to Defendants was issued in 2023.

Plaintiffs thereafter filed a summary action seeking to vacate the award, arguing the award should be set aside because the arbitrator exceeded his authority. Defendants opposed that application and cross-moved to confirm the award, noting the arbitrator had not exceeded his authority but, rather, decided

the very issue the parties placed before him.

RREEF America REIT II Corp. HH ("RREEF"), a member of the Master Association, was granted leave to intervene in the summary action as an interested party. RREEF filed an intervenor complaint seeking to confirm the award and joined in Defendants' cross-motion to confirm the award, adopting and incorporating the arguments and submissions made by Defendants therewith.

After extensive briefing and oral argument, the trial court confirmed the award on August 30, 2024. In so doing, the trial court addressed Plaintiffs' contention that the arbitrator exceeded his authority and squarely rejected same. Although default was entered that same date against the Master Association because it was no longer represented by counsel, the trial court properly considered the arguments and briefs it previously submitted prior to the entry of default, which were also adopted and incorporated by RREEF.

Plaintiffs now ask this Court to overturn the trial court's confirmation of the award and enter an order vacating same. Plaintiffs contend the arbitrator exceeded his authority because his interpretation of the STS conflicts with the terms of the underlying condominium documents. This contention has no merit. The arbitrator was specifically asked to determine whether the STS provided for

a permanent easement or whether the easement would revert back to the Master Association at some future date. The arbitrator unequivocally determined the STS called for a permanent easement, to be maintained by Plaintiffs. This is the very issue the parties submitted to the arbitrator so there is no merit to Plaintiffs' contention that he exceeded his authority in deciding same. Likewise, there is no merit to Plaintiffs' contention that the trial court judge erred in confirming the award and a *de novo* review by this Court will reveal this to be so.

PROCEDURAL HISTORY

The Prior Litigation Proceedings

This matter commenced when Plaintiffs filed an action by way of complaint for Declaratory Judgment captioned 225 River Road DFT 2017, LLC and Hudson River Associates, Inc. v. The Promenade at Edgewater Condominium Association, Inc., the Board of Trustees and L. Peres & Associates, Inc., Docket No. BER-C-19-20. Pa153-243. Defendants filed an Answer and Counterclaim. Pa244-426.

The matter was referred to mediation (Pa145), which proved unsuccessful, after which it was dismissed, without prejudice, by mutual consent of the parties, so that they could continue to negotiate. Pa428-431. The parties further agreed that the litigation could be reinstituted if the matter was not settled by a date certain. Pa428-431.

When settlement negotiations failed, Plaintiffs refiled the Complaint and the case was assigned Docket No. BER-C-36-22. Pa432-433. Defendants refiled their Answer and Counterclaim. Pa434.

The Settlement Agreement

The parties then participated in additional mediation proceedings conducted by the Honorable Harry G. Carroll, J.A.D. (ret.), which culminated

in a binding settlement agreement memorialized by the execution of a Settlement Term Sheet ("STS"). Pa436-440. Although the STS contemplated a more formal agreement, it specifically stated that it was "binding upon approval." Pa436. Paragraphs 1 and 10 of the STS provide that any dispute relating to its "interpretation or enforcement," or with respect to "any disputes relating to the terms of the [contemplated] more formal agreement" are first subject to mediation before Judge Carroll. If the mediation proved unsuccessful, the parties agreed Judge Carroll would resolve the dispute by way of "binding and final" arbitration. Pa436-440.

The salient terms of the STS are as follows:

- Paragraph 4 sets forth Plaintiffs' obligation to provide the Master Association with a "permanent easement" affording the Master Association unencumbered access to and use of the Parking Deck;
- Paragraph 4(b) requires Plaintiffs to be fully responsible for the maintenance and upkeep of the Parking Deck; and
- Paragraph 9 provides that all terms of the Master Declaration and By-Laws shall continue to be in full force and effect unless expressly amended by the provisions of the STS. Pa436-440.

A Dispute Over the Terms of the STS Leads to Arbitration

As a result of their inability to agree on provisions of the more formal agreement and their inability to reach an amicable resolution of their disparate interpretations of certain terms of the STS, the parties submitted their dispute to

Judge Carroll for mediation and, when that failed, for binding arbitration pursuant to Paragraph 10 of the STS, which provides in pertinent part:

> In the event that any dispute arises relating to the interpretation or enforcement of this Agreement, the Parties shall attempt to mediate such dispute before the Honorable Harry G. Carroll. (ret). In the event that the Parties are unable to resolve the dispute through mediation, the Parties shall submit such dispute for arbitration before Judge Carroll, whose decision shall be binding and final. . . . **PARTIES ACKNOWLEDGE THAT THEY ARE EXPRESSLY WAIVING THEIR RIGHT TO HAVE ANY DISPUTE CONCERNING THIS AGREEMENT HEARD IN A COURT OF LAW BY A JUDGE OR JURY.** Pa101-106.

At Judge Carroll's request, each party submitted a statement of issues to be resolved at the arbitration in April of 2023. Pa101-106. Plaintiffs expressly asked Judge Carroll to clarify whether the "permanent easement" provided by Plaintiffs under the STS was really permanent or would terminate in accordance with the Master Declaration. Plaintiffs asked:

> Since Section 8.04.03 of the Master Declaration mandates that the Future Development Unit A Parking Deck parking spaces are to become Common Elements, did the parties also agree that the Plaintiffs' obligation to provide a permanent easement to the said Parking Deck and to maintain the Parking Deck, in Section 4 of the Settlement Term Sheet, would terminate upon completion of the future additional development of the Future Development Unit B, when the Parking Deck parking spaces would become a Common Element and

> part of the Condominium Parking Facilities, pursuant to the Master Declaration Section 8.04.03, so that the easement would merge into the ownership by the Condominium unit owners? Pa102-103.

Thereafter, the parties each submitted arbitration briefs and reply briefs in June 2023 and August 2023, respectively. Pa467.

Judge Carroll then asked the parties to provide a response to three (3) specific questions regarding their dispute. Pa449-456. One of the questions posed by Judge Carroll was:

> Question 3: Is there any indication in the Settlement Term Sheet that upon the further development of [Future Development Unit B], that the easement granted by Plaintiffs to the parking deck will be extinguished and the Condominium Association will become responsible to maintain the parking garage? Pa455.

Each party provided answers to Judge Carroll's questions. Pa449-456. Defendants responded to Question 3 as follows:

> The Association can state unequivocally that the STS makes no provision for the extinguishment of the easement under any circumstances. The decision to include the term "permanent" in the easement grant is plain, unambiguous and not subject to conditions. Similarly, there is no provision in the STS providing for a shifting of the maintenance obligation to the Association. Indeed, the express terms of the STS dictate the opposite. Mainly, "Plaintiffs covenant to immediately make and thereafter keep the Parking Deck compliant with all applicable laws and provide for

> all maintenance and upkeep associated therewith at its sole cost and expense." Pa455.

Plaintiffs responded to Question 3 as follows:

> The answer to the question is yes, as explained by the following: There is no explicit statement in the STS that upon the further development of FDU B, the easement to the parking deck will be extinguished, nor is there any express statement that it will continue. However, the STS does explicitly state in Section 9 that unless expressly amended, the Master Declaration remains in full force. Moreover, the STS explicitly states in Section 3 that displaced parking spaces are to be replaced pursuant to Section 8.04.03 of the Master Declaration, which specifies that they will be in the parking deck to be built, which is now the existing FDU A deck, and will be common elements. In addition, the STS does not amend or eliminate the Third Amendment to the Master Declaration, so that Amendment, as part of the Master Declaration, expressly remains in full force, and 3(a)(i) of the Third Amendment expressly states that parking spaces to replace eliminated spaces in FDU B shall be in the FDU A parking deck and shall be common elements.
>
> Once the parking spaces become common elements, as required by the Master Declaration, the easement granted in favor of the Association and the Condominium owners will merge by operation of law with the common elements and so terminate. By referencing and preserving the Master Declaration (with Amendments), the STS does in fact indicate that upon further development of FDU B, the easement granted by Plaintiffs to the parking deck will be extinguished and the Association will become responsible to maintain the parking garage. Pa450.

Judge Carroll Enters An Award in Favor of Defendants

On September 25, 2023, Judge Carroll entered an award in favor of Defendants. Pa108-116. Judge Carroll expressly rejected Plaintiffs' interpretation of the STS and instead decided that Defendants' construction of the relevant provisions was "more persuasive." Pa114.

Plaintiffs then requested that Judge Carroll clarify certain aspects of his award. Pa119. Plaintiffs argued that Judge Carroll exceeded his authority as arbitrator because his decision had the effect of modifying the Master Declaration and Third Amendment to the Master Declaration for the Master Association, which Plaintiffs claim was not an issue the parties chose to arbitrate. Pa119. Defendants opposed Plaintiffs' request to clarify the award, arguing Judge Carroll had not exceeded his authority. Pa119.

On November 27, 2023, Judge Carroll issued a supplemental decision clarifying his earlier ruling. Pa118-124. (Judge Carroll's September 25, 2023 decision and his November 27, 2023 decision shall be referred to collectively hereinafter as the "Award"). In the November 27, 2023, decision, Judge Carroll noted:

> Contrary to their present argument that I exceeded my authority by rendering interpretations of the Condominium Master Declaration and Third Amendment to the Master Declaration that I was not

> called upon to make, Plaintiffs placed such interpretations squarely in issue in the arbitration proceeding. Specifically, Issue 2 in Plaintiffs' Statement of Issues reads: "Since Section 3 of the Third Amendment to the Master Declaration has never been superseded or voided and the parties did not include any provision in the Settlement Term Sheet or the proposed Seventh Amendment to the Master Declaration voiding the provisions of Section 3 of the Third Amendment to the Master Declaration, did the parties agree that the provisions in Section 3 of the Third Amendment regarding the allocation of parking spaces shall remain in effect?" Additionally, Plaintiffs' Issue 3 reads: "Since Section 8.04.03 of the Master Declaration mandates that the Future Development Unit A Parking Deck parking spaces are to become Common Elements, did the parties also agree that the Plaintiffs' obligation to provide a permanent easement to the said Parking Deck and to maintain the Parking Deck, in Section 4 of the Settlement Term Sheet, would terminate upon completion of the future additional development of the Future Development Unit B, when the Parking Deck parking spaces would become a Common Element and part of the Condominium Parking Facilities, pursuant to the Master Declaration Section 8.04.03, so that the easement would merge into the ownership by the Condominium unit owners?" Pa120.

In addition to noting that the Plaintiffs had squarely put this issue before him to decide, Judge Carroll added:

> the fact that I rejected the interpretations relative to the Condominium Master Declaration and Third Amendment urged by Plaintiffs, as they relate to the provisions in the parties' Settlement Term Sheet, does not equate to exceeding my authority in doing so. Nor did my Decision purport to invalidate the Master

> Declaration or any of the other condominium documents, as Plaintiffs now contend. Rather, I determined that Defendants' interpretation of the STS was correct notwithstanding the provisions of the Master Declaration and any Amendments thereto. Pa120.

The Present Litigation

On January 19, 2024, Plaintiffs filed an Order to Show Cause and Verified Complaint seeking to vacate the Award pursuant to Rule 4:67-1(a). Pa34-136. Defendants filed an Answer and Counterclaim. Pa137-462. Defendants also filed opposition to Plaintiffs' Order to Show Cause seeking to vacate the Award and their Cross-Motion to confirm the Award pursuant to N.J.S.A. 2A:23B-22. Pa463-477.

The Intervenor Motions

On April 14, 2024, Edgewater Promenade 123, Inc. and Riverview at City Place, Inc., owners of residential units in the Master Association (the "Residential Units"), moved to intervene in the action as interested parties. Pa485-505. On June 12, 2024, RREEF moved to intervene as an interested party as owner of the commercial unit of the Master Association. Pa506-517. Both motions were granted by Order dated June 20, 2024. Pa523-526.

On June 28, 2024, RREEF filed its intervenor complaint, which sought to confirm the Award. Pa527-534. On July 1, 2024, the Residential Units filed

their intervenor complaint seeking to vacate or modify the Award and other various relief. Pa535-551. Plaintiffs filed answers as to both intervenor complaints. Pa597-601; 613-626.

On July 3, 2024, Defendants' attorney moved to be relieved as counsel due to a perceived conflict of interest. Pa552-564. Defendants' attorney's motion to be relieved as counsel was granted by Order dated July 17, 2024. Pa627-629.

On August 2, 2024, RREEF filed opposition to Plaintiffs' order to show cause seeking to vacate the Award, joined in Defendants' cross-motion to confirm the Award, and cross-moved to dismiss the intervenor complaint filed by the Residential Units and for other various relief. Pa630-677. In further support of Defendants' cross-motion to confirm the Award, RREEF incorporated by reference the statement of facts and procedural history set forth in the briefs and certifications submitted by Defendants in support of same, and argued that Judge Carroll did not exceed his authority and Plaintiffs presented nothing to show that he did or to otherwise disturb the Award. T 28-5 – T30-23.

On August 9, 2024, the Residential Units opposed RREEF's cross-motion. Pa678-696. On August 13, 2024, Plaintiffs moved to dismiss/suppress

Defendants' pleading on the basis they were no longer represented by counsel. Pa697-701.

All pending motions and cross-motions were scheduled for oral argument on August 30, 2024. T4-4 – T7-5. Following oral argument by counsel, the lower court issued its decision, where it rejected Plaintiffs' contention that Judge Carroll exceeded his authority as arbitrator, finding "his award fell within the scope of his charge." T67-16. Thus, Plaintiffs' application to vacate the Award was denied. Pa1-2. The court also granted Defendants' cross-motion to confirm the Award. Pa6-8. In addition, although noting it was essentially moot, the court suppressed Defendants' pleading without prejudice. Pa708-710. The court also denied RREEF's cross-motion to dismiss the Residential Units' pleading and dismissed both intervenors' complaints as moot. Pa3-5; T68-5. The court thereafter entered an Amended Order denying Plaintiffs' application to vacate the Award, dismissing Plaintiffs' complaint, confirming the Award, and dismissing the intervenor complaints filed by RREEF and the Residential Units. Pa9-11.

COUNTERSTATEMENT OF FACTS

RREEF hereby incorporates the Statement of Facts set forth in Plaintiffs' Brief dated January 15, 2025, and supplements same with the following.

At the request of Judge Carroll, on April 17, 2023, Defendants submitted a statement of issues to be decided in arbitration. Pa105-106. Defendants submitted the following issue to be decided:

> 1. Whether Plaintiffs are obligated to provide a permanent easement allowing the Association to access and use the existing parking deck, located in future Development Unit A ("**FDU A**"), ("**Parking Deck**") that is not subject to expiration;
>
> * * *
>
> 5. Whether Plaintiffs are responsible to maintain and repair the Parking Deck and any spaces created to satisfy their Additional Parking Obligation under the STS. Pa105-106.

LEGAL ARGUMENT

I. THE STANDARD OF REVIEW IS *DE NOVO*

The standard of review of a lower court's decision to vacate or confirm an arbitration award is *de novo*. See Minkowitz v. Israeli, 433 N.J. Super. 111, 136 (App. Div. 2013)(noting the review of a motion to vacate an arbitration award is *de novo*). In reviewing a lower court's decision to confirm or vacate an award, the reviewing court must be mindful of New Jersey's "strong preference for

judicial confirmation of arbitration awards." Suanjuan v. Sch. Dist. of W. N.Y., Hudson Cty., 256 N.J. 369, 381 (2024)(*quoting* Middletown Twp. PBA Loc. 124 v. Twp. of Middletown, 193 N.J. 1, 10-11 (2007)).

Plaintiffs acknowledge that the standard of review of their challenge to the lower court's confirmation of the Award is *de novo*. Pb18. Nevertheless, they contend the lower court made certain errors that present grounds for reversal. Specifically, Plaintiffs contend the lower court erred by

1. failing to make findings of fact or provide an explanation for its decision; Pb18-22.

2. considering Defendants' position and arguments because Defendants were not represented by counsel on the return date of the motions PB18-22; and

3. allowing Defendants and RREEF to seek confirmation of the Award by motion rather than an order to show cause. Pb19.

None of these contentions have merit.

First, the lower court clearly reviewed and considered all materials and arguments submitted by the parties in determining the Award should be confirmed. Indeed, at the outset of its decision, the court noted "I appreciate all the parties' comprehensive and well thought out arguments today, as well as the voluminous briefing. I have considered it all. Okay? And I have considered your arguments here today and I'm prepared to rule on this matter." T45-1. The

trial court's lengthy recitation of the facts and parties' arguments demonstrates it considered and understood the facts and issues. T45-1 - T49-5. After reviewing the parties' arguments and reciting applicable case law, the lower court provided its analysis "on the narrow issue of whether the arbitrator exceeded his powers to warrant a vacation of the arbitration award." T66-23 – T67-1. This is the very issue that was presented to the court by Plaintiffs as the basis for their application to vacate the Award. After identifying the issue to be decided, the court expressly found that Judge Carroll's "award did fall within the scope of his charge." The court also found Plaintiffs failed to establish any of the legally recognizable factors that would allow the Award to be vacated. T67-16 – T68-12. Accordingly, the lower court's decision was supported by ample findings.

As for Plaintiffs' second alleged error by the court – its consideration of the arguments and submissions by Defendants – this is also without merit. Plaintiffs filed their order to show cause seeking to vacate the Award on January 19, 2024. Pa34-136. Defendants then opposed that application and submitted their own cross-motion to confirm the Award on March 15, 2024. Pa463-477. These documents were submitted when Defendants were still represented by counsel and before default had been entered for lack of legal representation.

Thus, there was no error in the court considering submissions received on behalf of Defendants prior to the withdrawal of counsel or the entry of default.

Moreover, the submissions by Defendants were expressly adopted and incorporated by reference in RREEF's own filing and arguments before the lower court. After RREEF was granted leave to intervene, it filed opposition to Plaintiffs' application to vacate the Award and argued in favor of its confirmation, where it expressly relied upon the statement of facts and procedural history set forth in the briefs and certifications submitted by Defendants in support of their cross-motion to confirm the Award. RREEF argued that Judge Carroll did not exceed his authority and Plaintiffs presented nothing to show that he did or to otherwise disturb the Award. T 28-5 – T30-23. Thus, the lower court was presented with ample information to reject Plaintiffs' contention that Judge Carroll exceeded his authority. Both Defendants and RREEF provided the lower court with arguments as to why Plaintiffs' motion to vacate the Award should be rejected. Even if those parties submitted nothing to the lower court, there would still be no basis to disturb its decision since it was Plaintiffs' burden to demonstrate the Award should be disregarded and they clearly failed to carry that burden. See, e.g., Minkowitz, 433 N.J. Super. at 136 (noting the party seeking to vacate an arbitration award

bears a "heavy" burden to establish a basis to vacate under the Uniform Arbitration Act).

The third and final error Plaintiffs contend was committed by the lower court was its relaxation of the requirement that an application to confirm an arbitration award be done by order to show cause (presumably under N.J.S.A. 2A:24-7). This, too, is meritless. Plaintiffs themselves had already filed an order to show cause seeking to vacate the Award. Defendants (and the intervenors) filed opposition thereto in addition to cross-motions to confirm the Award. Thus, Plaintiffs were already provided the opportunity to fully address the issue of whether the Award should be confirmed or vacated and there was no harm in allowing the application to confirm the Award to proceed by motion rather than an order to show cause.

Accordingly, there is no merit to the contentions that the lower court committed reversable error. On the contrary, the lower court provided Plaintiffs with a full and fair opportunity to demonstrate that the Award should be vacated and they failed to do so.

Moreover, since this Court's review of the decision to confirm the Award is *de novo* it would not matter even if the lower court had erred in making that decision. As demonstrated below, Plaintiffs present no basis to vacate or

otherwise disturb the Award and the lower court's decision to confirm the Award should be affirmed.

II. THE AWARD IS PRESUMPTIVELY VALID AND PLAINTIFFS HAVE PRESENTED NOTHING THAT PRECLUDED ITS CONFIRMATION

A *de novo* review of the record in this matter demonstrates that none of the limited circumstances that permit vacation of an arbitration award are present. The Award is presumptively valid and Plaintiffs failed to demonstrate any of the narrowly tailored statutory bases set forth in N.J.S.A. 2A:23B-23 of the New Jersey Uniform Arbitration Act that permit its vacation. The New Jersey Supreme Court has held "[a]rbitration awards are favored by the courts and are generally presumed to be valid." Local No. 153 v. Trust Co. of N.J., 105 N.J. 442, 448 (1987). The Supreme Court further held that "every intendment is indulged in favor of the [arbitration] award and is subject to impeachment only in a clear case." Barcon Assocs., Inc. v. Tri-County Asphalt Corp., 86 N.J. 179, 187 (1981)(citations omitted). Under the New Jersey Arbitration Act, "the scope of [judicial] review of an arbitration award is narrow. Otherwise, the purpose of the arbitration contract, which is to provide an effective, expedient, and fair resolution of disputes, would be severely undermined." Fawzy v. Fawzy, 199 N.J. 456, 470 (2009).

New Jersey's public policy favors arbitration. "[T]here is a strong preference for judicial confirmation of arbitration awards." Minkowitz, 433 N.J. Super. at 135 (quoting Linden Board of Ed. v. Linden Ed. Assoc., 202 N.J. 268, 276 (2010)). As a result, "courts grant arbitration awards considerable deference." Borough of East Rutherford v. East Rutherford PBA Local 275, 213 N.J. 190, 201 (2013). Consequently, the scope of review of an arbitration award is narrow. "Because arbitration is so highly favored by the law, the presumed validity of the arbitration award is entitled to every indulgence, and the party opposing confirmation has the burden of establishing statutory grounds for vacation." Pressler & Verniero, Current N.J. Court Rules, comment 3.3.3 to R. 4:5-4 (2025); see also Minkowitz, 433 N.J. Super. at 136 (noting the party seeking to vacate an arbitration award bears a "heavy" burden to establish a basis to vacate under the Uniform Arbitration Act).

When presented with a motion to vacate an arbitration award, a court's "review is informed by the authority bestowed on the arbitrator by the [N.J.S.A. 2A:23B-23 of the New Jersey Uniform Arbitration Act]." Minkowitz, 433 N.J. Super. at 135 (alteration added). "The Act states a court may vacate an arbitration award *only* upon proof" of the statutory grounds under the Act. Id. (emphasis in original). In Tretina Printing, Inc. v. Fitzpatrick & Assocs., 135

N.J. 349 (1994), the Supreme Court established a strict standard of review of private contract arbitration, limited by a narrow construction of the grounds set forth in N.J.S.A. 2A:23B-23. Accordingly, a reviewing court may vacate an arbitration award only if one or more of the narrowly prescribed provisions of N.J.S.A 2A:23B-23 are present. N.J.S.A. 2A:23B-23 provides:

> a. Upon the filing of a summary action with the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if:
> (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.

A. JUDGE CARROLL DID NOT EXECEED HIS AUTHORITY AS ARBITRATOR

Here, the only ground for relief cited by Plaintiffs is the allegation that Judge Carroll exceeded his powers contrary to N.J.S.A. 2A:23B-23(a)(4). Specifically, Plaintiffs contend Judge Carroll exceeded his authority when he ruled the permanent easement in the Parking Deck set forth in the STS was, in fact, permanent, because this conflicted with Section 8.04.03 of the Master Declaration, which provides such parking shall be a common element to be maintained by the condominium unit owners. This argument has no merit.

First, there is no question that the issue of whether the permanent easement agreed to in the STS replaced and superseded the Master Declaration was expressly submitted to Judge Carroll. Paragraph 10 of the STS expressly states all disputes arising thereunder shall be submitted to arbitration before Judge Carroll, whose decision shall be final and binding. Thus, when a dispute arose about the scope of the permanent easement it was submitted to Judge Carroll to resolve. Before the arbitration began, the parties submitted the specific issues they wanted Judge Carroll to decide. The first issue submitted by Defendants was:

> 1. Whether Plaintiffs are obligated to provide a permanent easement allowing the Association to access and use the existing parking deck, located in future Development Unit A ("**FDU A**"), ("**Parking Deck**") that is not subject to expiration; Pa105.

Defendants also asked:

> 5. Whether Plaintiffs are responsible to maintain and repair the Parking Deck and any spaces created to satisfy their Additional Parking Obligation under the STS. Pa106.

Plaintiffs, too, submitted the issue of the permanent easement to Judge Carroll, asking:

> Since Section 8.04.03 of the Master Declaration mandates that the Future Development Unit A Parking Deck parking spaces are to become Common Elements, did the parties also agree that the Plaintiffs' obligation to provide a permanent easement to the said Parking Deck and to maintain the Parking Deck, in Section 4 of the Settlement Term Sheet, would terminate upon completion of the future additional development of the Future Development Unit B, when the Parking Deck parking spaces would become a Common Element and part of the Condominium Parking Facilities, pursuant to the Master Declaration Section 8.04.03, so that the easement would merge into the ownership by the Condominium unit owners? Pa102-103.

After the parties submitted their issues to Judge Carroll, including the nature of the permanent easement, Judge Carroll asked the parties to provide a response to certain questions, one of which was:

> Question 3: Is there any indication in the Settlement Term Sheet that upon the further development of [Future Development Unit B], that the easement granted by Plaintiff to the parking deck will be extinguished and the Condominium Association will become responsible to maintain the parking garage? Pa455.

Both parties provided answers to this question, with Defendants arguing the STS expressly provides for a permanent easement that cannot be extinguished and Plaintiffs arguing the easement will be extinguished and become a common element in accordance with the Master Declaration. Plaintiffs never objected to this question on the basis it was beyond the arbitrator's authority. On the contrary, both parties squarely put this issue before Judge Carroll and presented their respective arguments as to why the STS did or did not require Plaintiffs to provide a permanent easement. It is remarkable that Plaintiffs would now contend this issue was beyond the authority of Judge Carroll to decide when they admittedly asked him to decide the issue.

Plaintiffs contend Judge Carroll exceeded his authority because his interpretation of the STS deviated from the provisions of the Master Declaration. This contention is nonsensical. The mere fact that Judge Carroll's decision had the effect of modifying the terms of the Master Declaration does not mean he

exceeded his authority. The parties had a dispute regarding their respective obligations under the Master Declaration. The purpose of the STS was to resolve that dispute to avoid further litigation. When a dispute then arose as to the terms of the STS, the parties submitted the dispute to arbitration as required thereunder. Judge Carroll was not charged with determining the parties' rights and obligations under the Master Association – he was charged with interpreting the STS. Judge Carroll decided the issues he was asked to decide – nothing more, nothing less.

Moreover, when Plaintiffs asked Judge Carroll to clarify his initial decision, he agreed and expressly rejected the contention that he exceeded his authority by deciding that the permanent easement in the STS was, in fact, permanent. In rejecting Plaintiffs' argument that he exceeded his authority, Judge Carroll noted:

> Contrary to their present argument that I exceeded my authority by rendering interpretations of the Condominium Master Declaration and Third Amendment to the Master Declaration that I was not called upon to make, Plaintiffs placed such interpretations squarely in issue in the arbitration proceeding. Specifically, Issue 2 in Plaintiffs' Statement of Issues reads: "Since Section 3 of the Third Amendment to the Master Declaration has never been superseded or voided and the parties did not include any provision in the Settlement Term Sheet or the proposed Seventh Amendment to the Master Declaration voiding

> the provisions of Section 3 of the Third Amendment to the Master Declaration, did the parties agree that the provisions in Section 3 of the Third Amendment regarding the allocation of parking spaces shall remain in effect?" Additionally, Plaintiffs' Issue 3 reads: "Since Section 8.04.03 of the Master Declaration mandates that the Future Development Unit A Parking Deck parking spaces are to become Common Elements, did the parties also agree that the Plaintiffs' obligation to provide a permanent easement to the said Parking Deck and to maintain the Parking Deck, in Section 4 of the Settlement Term Sheet, would terminate upon completion of the future additional development of the Future Development Unit B, when the Parking Deck parking spaces would become a Common Element and part of the Condominium Parking Facilities, pursuant to the Master Declaration Section 8.04.03, so that the easement would merge into the ownership by the Condominium unit owners?" Pa120.

In addition to noting that the Plaintiffs had squarely put this issue before him to decide, Judge Carroll added:

> the fact that I rejected the interpretations relative to the Condominium Master Declaration and Third Amendment urged by Plaintiffs, as they relate to the provisions in the parties' Settlement Term Sheet, does not equate to exceeding my authority in doing so. Nor did my Decision purport to invalidate the Master Declaration or any of the other condominium documents, as Plaintiffs now contend. Rather, I determined that Defendants' interpretation of the STS was correct notwithstanding the provisions of the Master Declaration and any Amendments thereto. Pa120.

Judge Carroll could not have been any clearer. He only considered the issues placed before him by the parties, which squarely included the issue of whether the easement provided for in the STS was permanent or would terminate upon the future development of additional parking, as Plaintiffs claimed. Judge Carroll was clear that in deciding this issue, he was only interpreting the terms of the STS – his decision did not invalidate the Master Declaration.

Paragraph 9 of the STS clearly states "[a]ll terms of the Master Declaration and By-Laws shall continue to be in full force and effect other than as expressly amended by the provisions of this Settlement Term Sheet." Pa439. Plaintiffs argue the STS does not expressly amend the Master Declaration, so Judge Carroll exceeded his authority when he interpreted the STS in a manner that modified a portion of the Master Declaration. This argument ignores that in entering into the STS, the parties were necessarily agreeing to modify the terms of the Master Declaration. The STS itself is an express, self-evident modification of the parties' rights and obligations under the Master Declaration, entered into as a means of compromise to avoid continued litigation. Indeed, as Plaintiffs acknowledge, under Section 3 of the STS, Plaintiffs' replacement parking obligation as prescribed by the Master Association was compromised to 45 spaces to be provided on an adjacent property. Pb11-12. This differs from

the terms of the Master Declaration. The effect of Section 3 of the STS is to amend the Master Declaration yet Plaintiffs never claimed Judge Carroll exceeded his authority in enforcing this provision as written. This is no different for Section 4 of the STS, where Plaintiffs expressly agreed to the permanent easement and obligation to maintain same, notwithstanding that this differs from the terms of the Master Declaration. Pa437.

Plaintiffs cite the seminal case of Tretina Printing, Inc. v. Fitzpatrick & Associates, 135 N.J. 349, 358 (1994) for the proposition that "[i]f the arbitrators decide a matter not even submitted to them, that matter can be excluded from the award." Pb28. With this there can be no disagreement. Had Judge Carroll decided issues that were not submitted to him, his decision on those issues could be disregarded. But that is not what happened here, where the parties expressly requested that Judge Carroll decide if the STS provided for a permanent easement or if that easement could be terminated. Judge Carroll did not decide any issue that was not squarely placed before him by the parties. Thus, Plaintiffs' reliance on Tretina does not further their argument that the Award should be vacated because, clearly, Judge Carroll did not exceed his authority. Indeed, if Judge Carroll exceeded his authority in deciding this issue, then what issue was he given to decide?

Moreover, the authorities Plaintiffs rely upon in support of their argument that the Award should vacated involved public sector disputes, which applied the "reasonably debatable" standard, which is clearly not applicable to arbitration of disputes in the private sector. As noted in Tretina, the "reasonably debatable" standard applicable in the public sector does not apply in private sector disputes. Thus, the authorities cited by Plaintiffs involving challenges to arbitration awards in public sector disputes have no application here.

B. THE STS DID NOT REPEAL THE MASTER DECLARATION

Plaintiffs contend Judge Carroll's authority was "circumscribed by the Master Declaration" and he exceeded his authority when his decision conflicted with the terms of the Master Declaration, which had the effect of repealing same. Neither of these contentions have merit.

First, there is nothing in the record that supports Plaintiffs' contention that Judge Carroll's authority was limited by the terms of the Master Declaration. On the contrary, the parties specifically asked Judge Carroll whether Plaintiffs were required to provide a permanent easement, as specified in the STS, or if the easement was temporary, and would revert back to the Master Association in accordance with Section 8.04.03 of the Master Declaration. Plaintiffs

specifically put this issue squarely within Judge Carroll's authority when they asked:

> Since **Section 8.04.03 of the Master Declaration** mandates that the Future Development Unit A Parking Deck parking spaces are to become Common Elements, did the parties also agree that the Plaintiffs' obligation to provide a permanent easement to the said Parking Deck and to maintain the Parking Deck, in Section 4 of the Settlement Term Sheet, would terminate upon completion of the future additional development of the Future Development Unit B, when the Parking Deck parking spaces would become a Common Element and part of the Condominium Parking Facilities, pursuant to the Master Declaration Section 8.04.03, so that the easement would merge into the ownership by the Condominium unit owners? Pa102-103 (emphasis added).

Plaintiffs never limited Judge Carroll's authority to decide this issue or asserted that his authority was "circumscribed" by the Master Declaration as they now contend. Even after Judge Carroll specifically clarified the parties' issues and asked if the STS was meant to deviate from Section 8.04.03 of the Master Association, Plaintiffs never objected. In their response to this question, Plaintiffs never argued or even intimated that Judge Carroll was not authorized to decide this issue. Instead, Plaintiffs argued this issue should be decided in its favor. Pa450. It was only after Judge Carroll ruled in Defendants' favor that

Plaintiffs claimed he exceeded his authority by deciding the very issue they placed before him.

Further, contrary to Plaintiffs' contentions, the Award did not repeal any part of the Master Declaration, including Section 8.04.03. Judge Carroll was not tasked with interpreting the terms of the Master Declaration. The matter concerned only the parties' obligations under the STS. That is all that was submitted to Judge Carroll and all that he decided. In rejecting Plaintiffs' contention that he exceeded his authority, Judge Carroll succinctly noted:

> Nor did my Decision purport to invalidate the Master Declaration or any of the other condominium documents, as Plaintiffs now contend. Rather, I determined that Defendants' interpretation of the STS was correct notwithstanding the provisions of the Master Declaration and any Amendments thereto. Pa120.

The Master Declaration is still in force and effect and Plaintiffs' argument that the Award somehow repealed same is nothing more than a desperate attempt to avoid the obligations imposed by the Award.

Simply stated, the parties asked Judge Carroll to interpret the terms of the STS. They did not qualify this request by saying his interpretation must not conflict with the Master Declaration or any other documents. Neither party limited Judge Carroll's authority in interpreting the STS in any way. Under

Plaintiffs' theory, Judge Carroll was only authorized to interpret the STS to the extent he agreed with Plaintiffs' position, which was clearly never the parties' intention.

C. JUDGE CARROLL'S INTERPRETATION OF THE TERM "PERMANENT" WAS PROPER AND CORRECT

Plaintiffs contend that even though the STS states the easement set forth therein shall be "permanent," the parties actually intended that the easement be temporary. Plaintiffs cite Black's Law Dictionary to distinguish between permanent and temporary easements and allege Judge Carroll's failure to make the same distinction and come to the same conclusion requires that the Award be vacated. This argument is fatally flawed.

First, Plaintiffs' tortured interpretation of the term permanent borders on being frivolous. In essence, Plaintiffs contend that the term "permanent easement" can and often is qualified by a condition under which the easement will cease to exist. Plaintiffs juxtapose this definition with that of a "temporary easement," which has a limited duration. Pb38-39. Plaintiffs then argue that because a permanent easement can be conditioned upon the happening of some future event, this is what the parties meant when they included that term in the STS.

However, there is no such qualifying language in the STS as to the permanent easement. Paragraph 4 of the STS plainly states Plaintiffs shall provide a permanent easement to the parking deck and shall thereafter keep and maintain same. Pa437. There is no qualifying language such that the easement would cease upon the happening of some future event, such as future development of additional parking, as Plaintiffs now contend. The parties could have included such language but did not do so. They also could have included language that the permanent easement was subject to the provisions of Section 8.04.03 of the Master Declaration, but, again, did not do so. Thus, the fact the parties "could" have placed conditions on the permanent easement does not mean they intended to do so.

Judge Carroll made this point abundantly clear in the Award when he stated:

- The plain terms of the STS describe the easement as permanent without any qualification or limitation.

- Nowhere in the STS is it stated that the Association will ever become the owner of the Parking Deck.

- Nowhere does the STS state that the obligation to repair and maintain the Parking Deck will be transferred to the Association. Pa114.

Judge Carroll added:

> Here, the parties are sophisticated business entities. If Plaintiffs' intent in entering into the settlement was to transfer ownership and control of the existing Parking Deck to Defendant Association, Plaintiffs surely possess the acumen to manifest that intent by clearly spelling it out in the STS. Instead, Plaintiffs now attempt to justify their strained interpretation of the STS by relying on the Third Amendment to the Master Declaration that is not even referenced in the STS to bootstrap their argument that the "permanent easement" is not really permanent but rather will merge and be extinguished upon the future development of FDU B. In hindsight, while Plaintiffs may regret their decision to permanently undertake the responsibility for the existing Parking Deck, their unexpressed intent to foist that responsibility on Defendant must fail when the STS clearly evinces a contrary intent and understanding. Pa114.

Second, even if Judge Carroll mistakenly interpreted the term "permanent" as used in the STS, this would not provide a basis to disturb the Award. In a concurring decision that was ultimately adopted by the Court in Tretina, Chief Justice Wilentz declared that prior precedent allowing for the vacation of arbitration awards based upon errors of law or fact should be overruled, noting that the effect of such precedent:

> is to convert arbitration into litigation by subjecting it to judicial review to see if the arbitrators made legal errors – just as if the arbitrators were judges and the arbitration a lawsuit. We need a new rule, one that is true to our arbitration statute. Arbitration awards should be what they were always intended to be: final, not subject to judicial review absent fraud, corruption,

> or similar wrongdoing on the part of the arbitrators. Parties who choose arbitration should not be put through a litigation wringer. Whether the arbitrators commit errors of law or errors of fact should be totally irrelevant. The only questions are: were the arbitrators honest, and did they stay within the bounds of the arbitration agreement?

Perini Corp. v. Greate Bay Hotel & Casino, Inc., 129 N.J. 479, 519 (1992). Cases decided since Tretina have confirmed that the appropriate judicial scope of review of an arbitration award does not include mistakes of law or facts. See, e.g., Empire Fire & Marine Ins. Co. v. GSA Ins. Co., 354 N.J. Super. 415, 421 (App. Div. 2002).

III. THE PARTIES EXPRESSLY AUTHORIZED JUDGE CARROLL TO INTERPRET THE STS AND PLAINTIFFS REQUESTED THAT HE CLARIFY HIS DECISION

After Judge Carroll issued his decision on September 25, 2023, Plaintiffs requested that he reconsider same and clarify certain aspects of his ruling. Specifically, Plaintiffs argued Judge Carroll exceeded his authority because his decision had the effect of modifying the Master Declaration and Third Amendment to the Master Declaration, which Plaintiffs claim was not an issue the parties chose to arbitrate. Pa119. Remarkably, Plaintiffs now claim that even though they asked Judge Carroll to clarify his earlier decision, the fact that

he did so provides grounds to vacate the Award. This argument is fatally flawed for several reasons.

First, in Section III.A. of their Brief, Plaintiffs' argument that Judge Carroll was prohibited from supplementing his reasons for the Award was never raised below. Accordingly, Plaintiffs are prohibited from raising this issue for the first time on appeal. See N.J. Div. of Youth & Family Servs. v. M.C. III, 201 N.J. 328 (2010)(issues not raised below will ordinarily not be considered on appeal unless they are jurisdictional in nature or substantially implicate the public interest).

Second, Plaintiffs cite no authority for the position that an arbitration award can be disregarded if an arbitrator supplements the reasoning for his award. N.J.S.A. 2A:23B-23 provides the limited scenarios where an arbitration award may be disturbed and the fact that an arbitrator elects to supplement his decision is not such a scenario. This is even more evident in a situation where, such as here, one party requests that the arbitrator revisit and reconsider his decision.

In Section III.B of their Brief, Plaintiffs also contend the statement of issues they submitted did not authorize him to overrule the governing documents of the Master Association. This ignores the fact that Plaintiffs expressly asked

Judge Carroll to determine what effect, if any, the STS would have on their future parking obligations under the Master Declaration. Plaintiffs put this issue squarely before Judge Carroll. It is astounding that Plaintiffs now claim Judge Carroll exceeded his authority by deciding the very issue they put before him. Judge Carroll was tasked with deciding the terms of the STS, which included Plaintiffs' provision of a permanent easement for the Parking Deck. This is all that Judge Carroll did. He did not "negate" provisions of the Master Declaration, as Plaintiffs contend. Judge Carroll simply interpreted the STS to mean that the permanent easement that Plaintiffs agreed to was, in fact, permanent and that Plaintiffs agreed to maintain same in perpetuity, notwithstanding any provisions in the Master Declaration to the contrary.

CONCLUSION

Plaintiffs have not and cannot present any evidence to overcome the presumptive validity of the Award. They cannot establish any of the grounds for vacation of the Award under N.J.S.A. 2A:23B-23 because there is nothing improper about the Award or Judge Carroll's conduct in arriving at same. The parties expressly agreed to submit any dispute regarding the STS to binding arbitration. When a dispute arose regarding the interpretation of the STS, it was submitted to Judge Carroll to decide. One issue presented for Judge Carroll's determination was whether the permanent easement included in the STS was intended to be permanent or would be extinguished in the future once additional parking was provided. Judge Carroll concluded the STS clearly and unambiguously called for a permanent easement, with no conditions, and noted the parties easily could have limited the easement if that was their intention.

There is nothing objectionable about Judge Carroll's plain reading of the STS and certainly nothing that suggests he exceeded his authority in deciding this issue. The lower court considered all the evidence and arguments submitted by the parties and determined there was no basis to disturb the Award. The lower court was already in possession of the briefs and supporting certifications submitted by Defendants when it decided this issue, so it was of no moment that

default was entered against Defendants when the motions to confirm/vacate the Award were decided. Moreover, RREEF had already intervened in the matter by that point and expressly incorporated the papers submitted by Defendants in support of the cross-motion to confirm the Award.

Based on the foregoing, it is respectfully requested that the decision of the lower court confirming the Award be affirmed.

LAW OFFICES OF
THOMAS A. BUONOCORE, P.C.
Attorneys for Intervenor/Respondent,
RREEF America REIT II Corp. HH

By: /s/ Thomas A. Buonocore
THOMAS A. BUONOCORE, ESQ.

February 18, 2025

JUSTIN D. SANTAGATA, ESQ. (NJ ID 000822009)
COOPER LEVENSON
1125 Atlantic Avenue, 3rd Floor
Atlantic City, NJ 08401
P: 609-247-3121
E: jsantagata@cooperlevenson.com
Attorney for Respondents The Promenade at Edgewater Condominium Association, Inc., Board of Trustees, the Promenade at Edgewater Condominium Association, Inc., and L. Peres & Associates, Inc.

HUDSON RIVER ASSOCIATES, LLC AND 225 RIVER ROAD DFT 2017, LLC, Plaintiff-Appellant, v. THE PROMENADE AT EDGEWATER CONDOMINIUM ASSOCIATION, INC., BOARD OF TRUSTEES, AND L. PERES & ASSOCIATES, INC. Defendant-Respondent.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-000398-24 ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY LAW DIVISION BERGEN COUNTY DOCKET NO. BER-L-0394-24 SAT BELOW: KELLY A. CONLON, J.S.C. Civil Action
RREEF AMERICA REIT II CORP. HH, Intervenor-Respondent, v. HUDSON RIVER ASSOCIATES, LLC AND 225 RIVER ROAD DFT 2017, LLC Defendant-Appellants.	

EDGEWATER PROMENADE 123, INC. AND RIVERVIEW AT CITY PLACE, INC.,

Plaintiff Intervenors-Respondents,

v.

THE PROMENADE AT EDGEWATER CONDOMINIUM ASSOCIATION, INC., BOARD OF TRUSTEES AND L. PERES & ASSOCIATIONS, INC.

RESPONDENTS THE PROMENADE AT EDGEWATER CONDOMINIUM ASSOCIATION, INC., BOARD OF TRUSTEES, THE PROMENADE AT EDGEWATER CONDOMINIUM ASSOCIATION, INC., AND L. PERES & ASSOCIATES, INC. 'S BRIEF IN OPPOSITION TO APPEAL

Dated: March 19, 2025

On the brief: Justin D. Santagata, Esq.; Samantha Carmody, Esq.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

TABLE OF APPENDIX

Vol. 1: DA1-193

INTRODUCTION

Appellant Hudson River Associates LLC and 225 River Road DFT 2017 LLC's ("**Daibes**")'s appeal of a confirmed arbitration award is utterly remarkable for its total disregard of the standard of review on appeal. While it is true that the standard of review for a motion to vacate an arbitration award is de novo, that standard is limited to review of the limited statutory bases for vacating such an award under the New Jersey Arbitration Act. It is not a wholesale de novo review, but review for: (1) corruption, fraud, undue means; (2) evident partiality or misconduct; (3) refusal to postpone a hearing, refusal to consider material evidence, or refusal to properly conduct a hearing so as to substantially prejudice a party; or (4) the arbitrator exceeds his powers. Minkowitz v. Israeli, 433 N.J.Super. 111, 136 (App. Div. 2013). The only basis argued by Daibes is that the arbitrator exceeded his powers and the only argument for that— despite myriad purportedly different arguments— is that the arbitrator interpreted the language of a contract in a manner with which Daibes disagrees. That is not remotely sufficient to vacate an arbitration award.

For the reasons set forth below by Appellee Promenade at Edgewater Condominium Association Inc. and Peres & Associates Inc. ("**Promenade**"), the Court should affirm the arbitration award because "it is the arbitrator's construction that is bargained for, and not a court's construction…[S]o far as the arbitrator's

decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." Policemen's Benev. Ass'n v. City of Trenton, 205 N.J. 422, 429 (2011).

FACTUAL AND PROCEDURAL BACKGROUND[1]

The facts are mostly not in dispute. For brevity, Promenade sets forth only those material facts that frame its arguments below and otherwise adopt the facts submitted by Appellee RREEF America REIT II Corp HH ("**REIF**").

I. Overview of Promenade

Promenade is the master association for a mixed-use residential and commercial development at 225 River Road in Edgewater, New Jersey, including a hotel. (Da24, 128-130.) REIF controls the commercial units other than the "Future Development Unit[s]," which are controlled by Daibes.[2] (Pa515.) The "Future Development Units" were originally contemplated as "a second hotel, a commercial/retail or office building, or additional residential apartments." (Da31.) Only an office building has been built. (Da30.) As part of the office building, the parking deck is used by the office building and built by Daibes' predecessor. (Pa36.)

[1] Combined for brevity.
[2] The referenced entities are or were owned or controlled by Fred Daibes.

I. The settlement clearly contemplates impact on other governing documents, if "necessary"

Daibes' appeal is essentially directed to whether the arbitrator was permitted by the settlement to determine that other governing documents were amended by the settlement. (Pb31.) But the settlement plainly contemplates amendments may be necessary:

> It is expressly agreed that Plaintiffs…will collectively approve any necessary amendments to the Master Declaration and/or Bylaws ("**Condo Documents**"), as contemplated hereby.

(Pa438.) So it was certainly within the arbitrator's jurisdiction to consider the "Condo Documents" as a whole. See also Pa437 (referencing potential amendment).

II. The dispute submitted to the arbitrator

The arbitrator was charged with interpreting the settlement and, in particular, this disputed language [emphasis added]:

> Plaintiffs shall, within 30 days of the Approval of the Settlement Agreement, execute a permanent easement providing the Association with unencumbered full and complete access to the parking deck located on Future Development Unit A ("Parking Deck") for parking by the Association and its guests and invitees…The Plaintiffs shall thereafter covenant to keep and maintain the Parking Deck…as a usable parking area for the Association and its guests and invitees and shall continue to be **solely** responsible for the property and casualty insurance, maintenance, snow removal, upkeep, and repair of the Parking Deck.

(Pa437.) While Daibes argues a lot about the meaning of "permanent easement," the language clearly states that Daibes will be "solely responsible," without qualification.

The settlement additionally provides:

> Plaintiffs' replacement parking obligation is compromised to a total of 45 spaces. The Association shall not require that Plaintiffs provide these 45 replacement parking spaces until Plaintiffs seek to further develop any portions of the Future Development Unit (Units A or B…)

(Pa437.) The dispute over "replacement parking obligation" is, in large part, how the settlement arose.

The "replacement parking obligation" paragraph of the settlement expressly states it is a "compromise[]"; as part of that "compromise[]," the "permanent easement" paragraph of the settlement was created. (Da137 n.1.)[3] This is established through the litigation preceding the settlement. After Daibes sued Promenade in 2020, Promenade counterclaimed for, among other things, Daibes' failure to provide "replacement parking." (Pa272.)

"Replacement parking" is contemplated by the master declaration:

> To the extent the Future Development Unit removes parking spaces from the surface lot to accommodate the structure of the Future Development Unit, Grantor…at its sole cost, shall provide replacement parking in the to-be-built deck, as a Common Element, to be deemed a part of the Parking Facilities.

[3] Submitted pursuant to R. 4:6-1(2) because there is a dispute about what was raised before the arbitrator and this document contains a statement by a party to negotiations at issue in this appeal.

This obligation requires the greater of the number of parking spaces required by law or "required by "Note7(a) on Exhibit G" to the master declaration. (Da183-184.) (Da32.) Completely omitted from Daibes' appeal, however, is the dispute over *how to calculate "replacement parking."* (Da118.)

In the arbitration, the parties submitted competing expert reports on the amount of displaced parking caused by Daibes via the office building and parking deck. Promenade's expert estimated the displacement at *298 parking spaces*. (Da143.) Thus, the settlement provided a highly favorable *existing* "replacement parking obligation" to Daibes of *only 45 parking spaces* that Daibes was permitted to *defer to the future*, but Daibes had to provide the "permanent easement" to make up for *already-existing* displaced parking.[4] (Da143.) Had Promenade agreed to take the parking deck as a "common element," rather than a "permanent easement," it would have become responsible for millions of dollars in necessary improvements. (Id.)[5] That very large part of this story is not mentioned by Daibes.

The arbitrator expressly references these trade-offs, both in pre-award questioning and in the award itself. Here are the two pertinent questions:

> 1. Assuming hypothetically a further development of FDU B requires 100 additional parking spaces, and there are 50 extra spaces available in the existing parking deck, is it your position that Plaintiff

[4] Any displacement by the "Future Development Units" is subject to an additional "replacement parking obligation."

[5] The expert's report estimates $4,825,000 in improvements to the parking deck and on-grade parking, a substantial portion of which is improvement to the parking deck.

> can offer the new 100 space requirement with the 50 in the existing parking deck finding the extra 50 spaces elsewhere, whether in an adjacent surface lot or new parking garage?
>
> 2. As a corollary to Question #1, is it your position that presently there are not additional parking spaces available in the existing parking deck that could be used in the scenario presented above.

(Pa452.) The parties agreed there were no further "available" spaces in the parking deck for future "offsets." (Pa449, 543.) The parties disagreed on whether the parking deck could be used at all for such future "offsets" because Daibes was required to provide the greater of the parking spaces required by the master declaration or as required by law and the "compromise[]…replacement parking obligation" in the settlement was for *existing displacement*. (Pa453; Da118.) In his award, the arbitrator consequently states that it "strains credibility for Plaintiffs to assert they can provide additional parking for any new FDU B development in the existing parking deck when…no such available parking presently exists…" (Pa115.) "In hindsight, while Plaintiffs may regret their decision to permanently undertake the responsibility for the existing Parking Deck, their unexpressed intent to foist that responsibility on Defendant must fail…" (Pa114.)

LEGAL ARGUMENT

Daibes' appeal is basically tautological: the arbitrator was charged with interpreting the settlement that incorporates the governing documents, but that

interpretation could not change the governing documents. Every argument made by Daibes follows this pattern.

I. The standard of review here is highly circumscribed

A lot of proverbial ink is spilt here on the standard of review, but the standard of review is not an open question.

As set forth in Tretina v. Fitzpatrick & Assocs., 135 N.J. 349, 358 (1994), the Supreme Court has adopted Chief Justice Wilentz's concurrence in Perini Corp. v. Greate Bay Hotel & Castino, Inc., 129 N.J. 479, 519 (1993), for the standard of review under the New Jersey Arbitration Act:

> Basically, arbitration awards may be vacated only for fraud, corruption, or similar wrongdoing on the part of the arbitrators. [They] can be corrected or modified only for very specifically defined mistakes as set forth in *[N.J.S.A.* 2A:24-9]. If the arbitrators decide a matter not even submitted to them, that matter can be excluded from the award. For those who think the parties are entitled to a greater share of justice, and that such justice exists only in the care of the court, I would hold that the parties are free to expand the scope of judicial review by providing for such expansion in their contract; that they may, for example, specifically provide that the arbitrators shall render their decision only in conformance with New Jersey law, and that such awards may be reversed either for mere errors of New Jersey law, substantial errors, or gross errors of New Jersey law and define therein what they mean by that. I doubt if many will. And if they do, they should abandon arbitration and go directly to the law courts.

Tretina specifically rejected the plurality in Perini Corp's "reasonably debatable" standard in favor of Chief Justice Wilentz's far more limited standard. Tretina, supra at 359.

Since then, this Court and the Supreme Court have clarified this standard of review without changing it. In private sector arbitration under the New Jersey Arbitration Act, "the appropriate judicial scope of review does not encompass errors of law or facts." Empire Fire & Marine Ins. Co. v. Gsa Ins. Co., 354 N.J.Super. 415, 421 (App. Div. 2002). This Court reviews confirmation or vacation of an arbitration award de novo, but only as to whether the trial court properly applied the limited standard of review for arbitration awards under the New Jersey Arbitration Act. Fawzy v. Fawzy, 199 N.J. 456, 470 (2009). "The judiciary has no role in the determination of any substantive issues that the parties have agreed to arbitrate." Curran v. Curran, 453 N.J.Super. 315, 321 (App. Div. 2018).

The only asserted basis for overturning the arbitrator here is that he "exceeded his powers." While this is a basis under the New Jersey Arbitration Act, it is not an expansive one, as somehow articulated by Daibes. The public sector arbitration precedent almost uniformly-cited by Daibes is entirely distinct from the private sector. "Arbitration in the context of a labor dispute differs from private-contract arbitration in important ways. Parties enter commercial contracts voluntarily. They act without any compulsion to deal with each other instead of with some other party. The arbitration clause in their contracts represents a way to settle disputes informally should any arise. In a labor agreement, however, the parties must deal with each other. They have no choice." Tretina, supra at 362. For this reason, Tretina rejects

public sector arbitration precedent for the standard of review for private sector arbitration. Id.

No precedent of this state has ever used the "reasonably debatable" standard" cited by Daibes for private sector arbitration under the New Jersey Arbitration Act.[6] (Pb25.) In an attempt to close this un-closeable loop, Daibes argues that the language of the statute governing collective negotiations or bargaining agreements[7] previously applied to private sector arbitration. (Pb27.) That is true, but very unhelpful to Daibes. The pertinent prior language was: "where the arbitrators exceeded or so imperfectly executed their powers that a mutual, final and definite award upon the subject matter submitted was not made." N.J.S.A. 2A:24-8(d). The New Jersey Arbitration Act does not contain the *extra language* of "or so imperfectly executed their powers." N.J.S.A. 2A:23B-23(a)(4). Different language, of course, signifies a different intent. Mondsini v. Local Fin. Bd., 458 N.J.Super. 290, 302, 204 A.3d 907, 913 (App. Div. 2019). "So imperfectly exceeded" could be read to include "reasonably debatable"; "exceeded," by itself, does not. See

[6] Unpublished opinions have used similar language, but only by citing to public sector arbitration precedent.

[7] Collective negotiation agreements are those implemented under New Jersey's Employee Employer Relations Act; collective bargaining agreements are under the Federal Labor Relations Act. Troy v. Rutgers, 168 N.J. 354, 359 n.1, 774 A.2d 476, 478 (2001).

State v. Hoffman, 149 N.J. 564, 579 (1997) (where adverb only qualifies a term once when the term is used multiple times signifies a different intent).[8]

This Court has been careful not to expand "exceed the scope of their powers" into something beyond Tretina. For example, even where an arbitrator has clearly erred on a statute of limitations, this Court has conceived such error as "undue means," not "exceed the scope of their powers." Griffin v. Burlington Volkswagen, Inc., 2014 N.J.Super.Unpub. LEXIS 2269 at *8 (App. Div. Sep. 18, 2014). See Ukrainian Nat'l Urban Renewal Corp. v. Joseph L. Muscarelle, Inc., 151 N.J.Super. 386, 400 (App. Div. 1977) ("only when an arbitrator made clear his intention to decide a dispute according to the law, rather than according to his own view of the equities in the situation, would the reviewing court invoke the undue means grounds and reverse the award for a clear mistake in the interpretation and application of the legal rule").

In summary, the Court's review of the arbitrator's interpretation of the settlement is far more limited than "reasonably debatable," even if there is some residue of review available under "exceed the scope of their powers." "Exceed the

[8] This Court has said that "arbitrators exceed the scope of their powers when they disregard the terms of the parties' contract or rewrite the contract for the parties," but it has only done this by citing to public sector arbitration precedent. See e.g. Pepper v. Sadley, 2013 N.J.Super.Unpub. LEXIS 1257 at *4 (App. Div. May 24, 2013).

scope of their powers" has traditionally only meant deciding an issue not presented or not subject to arbitration. Tretina, supra.

Viewed in this very correct light: the only proper question for review is whether the arbitrator was permitted to determine that the "permanent easement" paragraph of the settlement superseded any contrary language in the governing documents. He clearly was *because, among other things, Daibes submitted that issue*.

II. The arbitrator properly determined the issues submitted to him

The only proper question for review need not detain the Court very long. As already explained by both Daibes and REIF, the parties each submitted issues to the arbitrator expressly and impliedly asking him to determine how the settlement impacted the governing documents. (Pb15-17.) Daibes' briefing to the arbitrator expressly acknowledges and argues this issue:

> Rather, the issues to be decided are: 1) whether, pursuant to the agreed upon Settlement, the FDU A parking spaces will offset Plaintiffs' obligation for replacement parking spaces for the further development of FDU B; and 2) whether, under the Settlement, the FDU A parking spaces will become common elements upon the further development of FDU B so that the easement will merge and terminate. Plaintiffs' arguments regarding those issues were set forth in our initial

(Da193.)[9]

Here, the dispute was defined by the parties, including Daibes, to include how the settlement impacted the governing documents. Contra Block v. Plosia, 390 N.J.Super. 543, 554-555 (App. Div. 2007) (arbitrator could not consider statutory claims not properly submitted). The parties' submission of issues to the arbitrator was the "functional equivalent of notice pleading," id., and Daibes was certainly on notice that the settlement's impact on the governing documents was at issue. That issue was, of course, tried without objection and on consent. R. 4:9-2; see N.J.S.A. 2A:23B-9 ("waives any objection"). Only after the arbitration award did Daibes proclaim that the issue was not submitted.

III. The arbitrator's award was based on the contract

Ignoring the dispute about how much the Court can actually review the arbitrator's interpretation of the contract, it is clear that the interpretation is supported by both law and fact and cannot be vacated.

First, when parties to a contract address similar issues in the contract with different language they are presumed to intend a different result. See e.g. Restat 2d of Contracts, § 202; In re Brophy, 13 N.J.Misc. 462, 464 (1935). The settlement plainly and expressly provides that Promenade will take the "On-Grade Parking

[9] Submitted pursuant to R. 4:6-1(2) because there is a dispute as to what was raised before the arbitrator.

Area as a common element." (Pa438.) It plainly does not say that for the parking deck. (Pa437.)

Second, a contract must be interpreted consistent with its purpose and so as not to yield absurd results. Barila v. Bd. of Educ. of Cliffside Park, 241 N.J. 595, 615-616, (2020). The purpose of the settlement was in part to "compromise[]" Daibes' "replacement parking obligation" for displacement by the office building and parking deck by allowing Daibes to defer construction of 45 additional parking spaces for use by Promenade in exchange for Promenade's "permanent easement" over the parking deck.

Third, Daibes' reliance on the master declaration and third amendment is misplaced because the language of those governing documents do not support Daibes' interpretation and it ignores the fourth amendment, which Daibes dismisses as typographical. (Pb10.) The master declaration refers to the "to-be-built-deck" for "replacement parking" as a "common element," but the parking deck[10] was already built at the time this dispute arose and Daibes did not insist on it being a "common

[10] The governing documents here are all convoluted, to put it mildly, and far more complicated than they need to be. It appears that the parking deck is part of "Future Development Unit A" and the office building is part of "Future Development Unit B." (Pa36.) At the arbitration, Promenade disputed that the third amendment, which created two separate "Future Development Units," was valid because it addressed development that did never occurred. (Pa111.) The third amendment clearly refers to townhomes that were not built. (Pa67.) Regardless, the third amendment clearly contemplates that the parking deck itself will displace parking insofar as it contains parking for the office building only. (Pa67).

element." The third amendment then says that the parking deck "shall be designated by" Daibes as a "common element." (Pa67.) The fourth amendment then changes this to "**may be designated**" [emphasis added]. (Pa90.) *Daibes then chose to enter the settlement and agree to a "permanent easement," rather than force the designation of the parking deck as a common element*. Why? Because Daibes *did not want to pay to create the necessary "replacement parking" displaced by the office building and parking deck*. See W. Jersey Title & Guar. Co. v. Indus. Tr. Co., 27 N.J. 144, 153 (1958) (waiver by election).

Fourth, though it should not even be considered by the Court for the reasons already stated, Daibes' "merger by law" interpretation of the settlement utterly fails. Two elements must be satisfied for a "permanent" easement to "merge by law": "unity of title in the dominant and servient estates" and "circumstances evidence[ing] an intent to extinguish." Landy v. Cahn, 348 N.J.Super. 592, 594 (App. Div. 2002). For the reasons already set forth, there was no "intent to extinguish," no expressed or implied condition that the "permanent easement" would end, contrary to its name.

But Daibes' argument actually runs completely over itself because the third amendment clearly states *there will be no unity of title with Promenade for the "servient estate," i.e. the parking deck*. Instead, the third amendment states that merger will occur *with "New Unit B," owned by Daibes*. (Pa69.) The third

amendment states that Promenade shall only receive "displaced parking spaces" as "common elements," *not the parking deck*. (Pa67.) Thus there could *never be* unity of title in the way Daibes' fatuously suggests.

IV. The trial court properly confirmed the arbitration award

Daibes does not really challenge anything directly about what the trial court did, *which is actually what is on appeal*, other than a few sentences saying the trial court rendered "naked conclusions." (Pb21.)

First, the trial court relayed the history of the dispute, the limited standard of review of an arbitration award, reciting Tretina, and held that the arbitrator acted within "the scope of his charge." (1T:64-68.) That is really *the only finding of fact/conclusion of law required here*, as already set forth at length.

Second, the trial court properly considered all submissions, including Promenade's, even though Promenade's counsel had withdrawn by the time disposition. The trial court was not only permitted to do this under R. 1:1-2, but would have been required to independently assess the arbitration award even if Promenade had defaulted from the outset. R. 4:43-2. Obviously, REIF defended and cross-moved to confirm the arbitration award separately anyway as an "intervenor as of right" under R. 4:33-1. (Pa523.) In other words: much of the procedural history set forth by Daibes is totally irrelevant and intended solely to kick up dust on an otherwise straightforward appeal.

Third, to the extent that Riverview at City Place Inc.— the association for residential owners— asserted to the trial court that the arbitration award implicated other issues that were not submitted to the arbitrator, such as increase in "common area maintenance" charges, those issues were, in fact, not submitted to the arbitrator and are subject to proper adjudication at later date, if necessary. (Pa492.) That is not before the Court, nor is it before the Court whether those issues would be arbitral under the settlement or subject to litigation under the governing documents (which do not contain an arbitration clause).[11]

Fourth, for transparency's sake, Daibes has filed yet another litigation against Promenade, docketed C-196-24. It is pending a motion to dismiss.

Fifth, and finally, Daibes' argument that the arbitrator wrongly supplemented his award really beggars description. Daibes' request to the arbitrator to "clarify" his award was nothing but an impermissible request for reconsideration. See Pa119 ("essentially a motion for reconsideration"). "Nothing in the statute bespeaks an intention to authorize the arbitrator to change his or her mind or to reconsider his or her decision in the guise of clarification." Kimm v. Blisset, LLC, 388 N.J.Super. 14, 31 (App. Div. 2006). Having made the improper request, Daibes then somehow argues the arbitrator was wrong to respond. No precedent could possibly be cited for

[11] Daibes vaguely attacks the arbitrator's award as a "decision" and somehow procedurally flawed. N.J.S.A. 2A:2B-19 does not delineate any particular form for an award other than "shall make a record of an award…"

this sequence of events because it is so absurd. But it does not matter: the "clarification" adds nothing to the arbitration award that was not already there.

CONCLUSION

"Arbitration should be an end to litigation, not the beginning of it." Ukrainian Nat'l Urban Renewal Corp., 151 N.J.Super. at 401. But, to Daibes, arbitration was but the first step in a never-ending struggle to defeat a contract— the settlement— it signed. The Court should end this swiftly in Promenade's favor based on established principles for review of arbitration awards in the private sector.

Respectfully submitted,

/S/

JUSTIN D. SANTAGATA

Superior Court of New Jersey

Appellate Division

Docket No. A-000398-24

HUDSON RIVER ASSOCIATES, LLC and 225 RIVER ROAD DFT 2017, LLC, *Plaintiffs-Appellants,* vs. THE PROMENADE AT EDGEWATER CONDOMINIUM ASSOCIATION, INC., BOARD OF TRUSTEES and L. PERES & ASSOCATES, INC., *Defendants-Respondents.* *(For Continuation of Caption See Inside Cover)*	CIVIL ACTION ON APPEAL FROM THE FINAL ORDERS OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, BERGEN COUNTY DOCKET NO. BER-L-394-24 Sat Below: HON. KELLY A. CONLON, J.S.C.

REPLY BRIEF ON BEHALF OF APPELLANTS HUDSON RIVER ASSOCIATES, LLC AND 225 RIVER ROAD DFT 2017, LLC

LAW OFFICES OF
STEPHEN P. SINISI, ESQ., LLC
Attorneys for Appellants Hudson River Associates, LLC and 225 River Road DFT 2017, LLC
Two Sears Drive, 2nd Floor, Suite 204
P.O. Box 1458
Paramus, New Jersey 07652
(201) 599-1600
firm@sinisilaw.com

On the Brief:
STEPHEN P. SINISI, ESQ.
Attorney ID# 282321972

Date Submitted: April 14, 2025

CP COUNSEL PRESS (800) 4-APPEAL • (379859)

RREEF AMERICA REIT II CORP. HH,

Intervenor-Respondent,

vs.

HUDSON RIVER ASSOCIATES, LLC and 225 RIVER ROAD DFT 2017, LLC,

Defendants-Appellants.

EDGEWATER PROMENADE 123, INC. and RIVERVIEW AT CITY PLACE, INC.,

Plaintiff Intervenors-Respondents,

vs.

THE PROMENADE AT EDGEWATER CONDOMINIUM ASSOCIATION, INC., BOARD OF TRUSTEES and l. PERES & ASSOCIATIONS, INC.,

Defendants-Respondents

TABLE OF CONTENTS

Page

TABLE OF JUDGMENTS, ORDERS AND RULINGS BEING APPEALED

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes & Other Authorities:

PRELIMINARY STATEMENT

In their Briefs, Defendants misstate both law and fact to rebut Plaintiffs' showing that the trial court erred when it confirmed the arbitration award because the arbitrator exceeded its powers when he amended or invalidated the Master Declaration. Accordingly, based on the arguments in Plaintiffs' initial brief and the arguments below, the Court should reverse the trial court's confirmation of the award.

PROCEDURAL HISTORY

Plaintiffs hereby incorporate by reference the "Procedural History" section of their initial brief.

STATEMENT OF FACTS

Plaintiffs hereby incorporate by reference the "Statement of Facts" section of their initial brief.

LEGAL ARGUMENT

POINT I

THE PROMENADE DEFENDANTS' BRIEF SHOULD BE SUPPRESSED BECAUSE IT CONTAINS REFERENCES TO ALLEGED FACTS THAT ARE NOT PART OF THE RECORD IN THIS CASE AND RAISES ARGUMENTS NOT MADE TO THE TRIAL COURT. (Pa1-2, Pa6-8, Pa9-11; T 49:14-68:12)

Defendants are alleging facts not supported by any evidence in the record and raised arguments not presented to the trial court. Their Brief(s) should be suppressed.

The record on appeal consists of the papers filed with the court below. R. 2:5-4(a). "[I]t is inappropriate and may be actionable for an attorney to include facts outside the record." Pressler & Verniero, N.J. Court Rules, Comment 4.5 R.2:6-2 (Gann 2024). Also, an issue not raised to the trial court should not be considered on appeal. North Haledon Fire Co. No. 1 v. Borough of North Haledon, 425 N.J. Super. 615, 631 (App. Div. 2012). Defendants have repeatedly ignored these rules.

For example, Defendants' reference to the Plaintiffs as "Daibes" is inappropriate. Defendants claim that both Plaintiffs are owned or controlled by Fred Daibes (DB at p. 1 n. 1[1]), but Mr. Daibes is not a party in this litigation,

[1] Key: "PIB" refers to Plaintiffs-Appellants' initial Brief. "Pa" refers to Plaintiffs' Appendix. "DB" refers to Defendants/Respondents' Brief. "Da"

and there is nothing in the record indicating that Mr. Daibes owns or controls the Plaintiffs.(DB at p. 2).

Also improper is referral to Defendants' expert report (DB at p. 5; Da138-162). The arbitrator did not refer to any expert reports (Pa108 to Pa124), and no expert testimony was provided. The parties agreed "no testimony would be presented but rather the issues would be decided based on the briefs submitted and answers to limited questions … posed to counsel" (Pa109). Significantly, no expert report was presented to the trial court. The comments by Defendants (DB at p. 5) regarding the expert report and the costs of improving the Parking Deck are inadmissible hearsay and another example of alleging evidence and facts outside the record.

Defendants also misquote the Third and Fourth Amendments (DB at pp. 13 to 14), and in particular, Third Amendment §3(a) (Pa67), which recites:

> (i) … **Such parking spaces shall be Parking Facilities and Common Elements in accordance with the Declaration** [boldface added].

Plaintiffs rely upon Third Amendment §3(a)(i), as corrected by the Fourth Amendment, for the conclusion that the parking spaces in the New Unit A Parking Deck are to become Common Elements in accordance with Master

---

refers to Defendants' Appendix. "IB" refers to Intervenor RREEF's/Respondent's Brief.

Declaration §8.04.03. It states that the Parking Facilities shall be designated **to replace** the Common Element parking spaces that had been displaced by the construction of New Units A and B and that the parking spaces in New Unit A **shall be** Parking Facilities and Common Elements, but does not set a timetable.

The claim that the Fourth Amendment made the designation optional (DB at p. 14) is false. Section 1(b) of the Fourth Amendment reads, "Section 3(a)(ii) of the Third Amendment is hereby amended by deleting each instance of the word 'shall' and replacing it with the word 'may'" (Pa92). Section 3(a)(ii) of the Third Amendment concerns parking for Residential Units (Pa67); the Fourth Amendment made that subsection optional for the Owner of New Unit A. (Pa92). It is irrelevant here.

The claim that the Parking Deck is to merge with New Unit B (DB at p. 14) also is false. The Third Amendment Section 6 required merger of New Units A and B if they both were owned by the same entity (Pa69), but that Section was deleted by Fourth Amendment §3 (Pa92). Also, New Units A and B are not owned by a common owner (Pa36, ¶¶11, 12). Moreover, that argument was not raised below and should not be considered by the Court. Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973); State v. Robinson, 200 N.J. 1, 20 (2009); Grillo v. State, 469 N.J. Super. 267, 279 (App. Div. 2021). For these misrepresentations, Defendants' Brief should be suppressed.

POINT II

DEFENDANTS' ARGUMENTS SHOULD BE REJECTED BECAUSE THEY MISCHARACTERIZE THE ISSUES PRESENTED TO THE ARBITRATOR. (Pa1-2, Pa6-8, Pa9-11; T 49:14-68:12)

Defendants and Intervenor RREEF misinterpret what a "permanent easement" is, change the issues that the Plaintiffs had submitted to the arbitrator and subsequently the trial court, and incorrectly assume that the issues presented by Defendants were agreed upon by the parties, just as the arbitrator did. Plaintiffs always maintained that the interpretation of the Settlement Term Sheet (STS) was constrained by the language of Master Declaration §8.04.03 and Third Amendment §3(a)(i) and that the arbitrator had no authority to modify those provisions. Defendants' unilateral contrary issues were not what the parties agreed upon. Accordingly, Defendants' arguments are without merit.

Defendants' primary mistake is their claim that a "permanent easement" lasts forever and that because the STS did not refer to a temporary easement, Plaintiffs agreed to an easement that would last forever, meaning that the Parking Deck parking spaces would never become Common Elements. Clearly, Defendants do not understand what a permanent easement is. This is demonstrated by RREEF's erroneous comments that the parties asked the arbitrator whether Plaintiffs were required to provide a permanent easement or a temporary easement (IB at p. 29) and that Plaintiffs intended the easement to

be temporary (IB at p. 32). Defendants argue that because the arbitrator was asked to interpret the phrase "permanent easement," he was authorized to overrule the Condominium governing documents. That is incorrect. The issue is what the parties intended by the term.

As Plaintiffs pointed out in the initial Brief (PIB at p. 38), a permanent easement does not necessarily last forever. Black's Law Dictionary 1834 (12th ed. 2024) defines "permanent easement," in pertinent part, as "An easement of potentially unlimited duration …." A "temporary easement," on the other hand is "An easement of limited duration …." Black's Law Dictionary 1840 (12th ed. 2024). A "temporary easement" has a defined duration, while a "permanent easement" is for a potentially unlimited duration. However, a permanent easement may merge into the servient estate. Camp Clearwater, Inc. v. Plock, 52 N.J. Super. 583 (Ch. Div. 1958), aff'd, 59 N.J. Super. 1 (App. Div. 1959), certif. denied *sub nomen* Camp Clearwater, Inc. v. Wilson, 32 N.J. 348 (1960).

Defendants' argument that the easement from Plaintiffs could not merge (DB at p. 14) is meritless. Master Declaration §5.01(c) (Da12) defines the Common Elements to include all easements, rights and privileges appurtenant to the Condominium land. See N.J.S.A. 46:8B-3d(iv) & (viii), defining common elements to include appurtenances for the operation of the condominium and other items defined as common elements in the master deed. An easement in

favor of the Association is a Common Element, owned in common by all Unit Owners. N.J.S.A. 46:8B-3o; 46:8B-6. Where a property that is subject to an easement in favor of the Association becomes a Common Element, also owned by all Unit Owners, there is unity of title. The easement merges into the Common Element. Defendants' alternate claim that the Unit A Parking Deck is to merge with New Unit B (DB at p. 14) is false. In addition, Defendants' arguments were not raised to the trial court and so are improper here. North Haledon Fire Co., supra, 425 N.J. Super. at 631; Nieder, 62 N.J. at 234; Alloway v. Gen. Marine Indus., L.P., 149 N.J. 620, 643 (1997). The Court should disregard them.

The Condominium governing documents require that the New Unit A parking spaces become Common Elements. They then will be owned by all Unit Owners. The easement to the Association to use the spaces will be an asset of the Association, also owned by all Unit Owners. Thus, when the parking spaces become Common Elements, there will be unity of title between the dominant and servient estates, and the easement will merge with the property. That the easement was permanent does not prevent merger.

The STS Section 9 states, in part, "All terms of the Master Declaration and By-Laws shall continue to be in full force and effect other than as expressly amended by the provisions of the Settlement Term Sheet." (Pa439). The

arbitrator could not invalidate any Master Declaration or Third Amendment provisions not expressly changed by the STS. There is no express provision in the STS amending Master Declaration §8.04.03 or Third Amendment §3(a)(i). The arbitrator therefore had no authority to interpret "permanent easement" in a manner that the parking spaces cannot become Common Elements. Furthermore, because there is no express statement in the STS changing Section 8.04.03 or Section 3(a)(i), there was no reason to state that the parking spaces would become Common Elements or to clarify that the permanent easement might merge into them.

Defendants have concurred that "[i]f the arbitrators decide a matter not even submitted to them, that matter can be excluded from the award." Tretina v. Fitzpatrick & Associates, 135 N.J. 349, 358 (1994), adopting Chief Justice Wilentz's concurrence in Perini Corp. v. Greate Bay Hotel & Casino, Inc., 129 N.J. 479, 519 (1993) (DB at p. 7). By construing the phrase "permanent easement" to mean an easement lasting forever, the arbitrator barred the parking spaces from becoming Common Elements, which exceeded his authority. Although the arbitrator claimed that he had not invalidated any provision of the Condominium documents, he conceded that he had contradicted the governing documents when he stated, "I determined that Defendants' interpretation of the

STS was correct **notwithstanding** the provisions of the Master Declaration and any amendments thereto" (Pa120). (emphasis added)

Indeed, even the Intervenor RREEF acknowledged that the arbitrator had modified the terms of the Master Declaration (IB at p. 24) although he had not been charged with determining the rights and obligations under the Master Declaration (IB at p. 25). By declaring that the easement will continue forever, the arbitrator improperly invalidated provisions of the Master Declaration that would make the New Unit A parking spaces Common Elements, contrary to the express language of the STS. The Section referred to by Defendants to justify their position that the arbitrator could amend the Master Declaration (DB at p. 3) is Section 5 of the STS. (Pa438).

The amendments referenced by the STS are those made necessary by sections that expressly contradict provisions of the Master Declaration and/or Bylaws: Section 2, changing Plaintiffs' assessment obligation and making the Owner of FDU B solely responsible for the services and maintenance around its Unit; Section 3, compromising Plaintiffs' obligation for replacement parking spaces; and Section 7, requiring an amendment regarding attendance at meetings (Pa436 to Pa439).

This limitation is made clear by the second sentence of Section 9 (Pa439). The STS provisions that expressly amend the Master Declaration sections are

Sections 2, 3 and 7. (Pa436-439) Under Section 9, the arbitrator was not authorized to interpret any terms in the STS so as to amend other sections of the Master Declaration. (Pa439). Thus, the arbitrator could not interpret the phrase "permanent easement" in such a way that would invalidate Section 8.04.03 or Section 3(a)(i). Notably, neither Defendants nor RREEF nor, for that matter, the trial court have attempted to explain away the second sentence of Section 9 of the STS; they simply ignore it.

Defendants' claims that Plaintiffs submitted the issue of the meaning of "permanent easement" and that Plaintiffs "impliedly" asked the arbitrator to determine how the settlement impacted the governing documents (DB at p. 11) are false. To reach this conclusion, Defendants rely on a single page from what it identifies as "Plaintiff's arbitration brief" (Da193), which is taken out of context.

Defendants in fact have misstated the issues submitted to the arbitrator by selecting only portions of the Statement of Issues submitted by Plaintiffs (DB at p. 11). RREEF also has misidentified the Plaintiffs' issues, claiming that Plaintiffs asked the arbitrator to clarify whether the "permanent easement" "was really permanent or would terminate" (IB at p. 6). As noted in the initial Brief

(PIB at 14 to 15), Plaintiffs submitted three statements of issues. Each statement was prefaced with a description of Master Declaration §8.04.03 or Third Amendment §3(a)(i). (PIB at pp. 14 to 15; Pa101-103). Following each preface, Plaintiffs asked whether the parties agreed with the requirement then stated.

Thus, the arbitrator was asked if, within the constraints of the Master Declaration and Third Amendment, the parties had agreed to these three requirements. Plaintiffs never authorized him to exceed the boundaries of the governing documents or to interpret terms in the STS so as to invalidate portions of the Master Declaration or the Third Amendment other than as modified by Sections 2, 3, and 7. The arbitrator could have decided that the parties had agreed to the propositions set forth by Plaintiffs or had not agreed and, if the latter, that there was no agreement. However, he could not interpret the phrase "permanent easement" to amend and invalidate Master Declaration §8.04.03 or Third Amendment §3 (a)(i).

If an arbitrator exceeds the authority granted to him, his decision must be vacated. N.J.S.A. 2A:23B-23(a)(4) expressly states that the court shall vacate an arbitration award if the arbitrator "exceeded the arbitrator's powers." Defendants' attempt to negate this requirement by arguing that the "reasonably debatable" standard does not apply (DB at pp. 8 to 9), is without merit. Since they claim that the reasonably debatable standard does not apply, Defendants

obviously are not claiming that the arbitrator's decision was reasonably debatable.

The statute expressly states that where an arbitrator exceeds his authority, his decision must be vacated. The cases cited by Plaintiffs, involving both public arbitrations and private arbitrations (PIB at pp. 26 to 28), verify this. Moreover, in Ukrainian Nat. Urban Renewal Corp. v. Joseph L. Muscarelle, Inc., 151 N.J. Super. 386, 398 (App. Div. 1977), cited by Defendants (DB at p. 10), the Court stated, "The 'exceeds-their-powers' test of N.J.S.A. 2A:24-8(d) has consistently been construed to require the reviewing court to determine 'whether or not the interpretation of the contractual language contended for by the party seeking arbitration is reasonably debatable in the minds of ordinary laymen.'" Defendants have cited no law showing this standard was eliminated when the "exceeds the arbitrator's powers" language was carried over to N.J.S.A. 2A:23B-23(a)(4).[2]

In light of the express language of the second sentence of STS Section 9

[2] Defendants' claim that the "reasonably debatable" standard does not apply to private sector arbitrations under the N.J. Arbitration Act (DB at p. 9), is belied by their own reference at DB at p. 10. In *Griffin v. Burlington Volkswagen, Inc.*, No. A-3228-12T3 (App. Div. Sep. 18, 2014) (slip op. at 8-9), this Court noted that the applicability of the six-year statute of limitations to claims based on malicious prosecution and abuse of process was not reasonably debatable and vacated the arbitrator's dismissal of those claims.

that "[a]ll terms of the Master Declaration and By-Laws shall continue to be in full force and effect other than as expressly amended by the provisions of this Settlement Term Sheet," (Pa439) the arbitrator had no right to invalidate the Master Declaration provisions not expressly amended by the STS is not debatable. The arbitrator could not interpret the STS to invalidate Master Declaration §8.04.03, which was specifically incorporated into the STS, or Third Amendment §3(a)(i), which was not mentioned in the STS at all. The arbitrator was bound by the Master Declaration and its recorded amendments. The answer to Defendants' question "whether the arbitrator was permitted to determine that the 'permanent easement' paragraph superseded any contrary language in the governing documents" (DB at p. 11) is "no".

Defendants' statement that the parties agreed that there were no available spaces in the Parking Deck at that time (DB at p. 6) is irrelevant, as was the arbitrator's reliance upon it.

Defendants' attempt to refute the limits on the arbitrator's authority (DB at pp. 12 through 15) also fail, as follows:

(i) Defendants' comment that the Promenade will take on the On-Grade Parking Area as a common element (DB at pp. 12 to 13) refers to STS Section 4(e),which states that after Plaintiffs have constructed the specified on-grade parking, the Association will become responsible for the maintenance and

insurance (Pa437 to Pa438). That provision was necessary because Section 4(d) makes Plaintiffs responsible for installing these parking spaces; Section 4(e) clarifies that once constructed, Plaintiffs' responsibilities end. Similar language for the Parking Deck was not necessary because the Deck had already been built and the Third Amendment specifies its status.

(ii) The statement that the STS compromise was merely deferring creating 45 parking spaces in exchange for the "permanent easement" (DB at p. 13) is incorrect. The STS has several provisions of give and take by both parties.

(iii) As discussed in Point I, Defendants' third argument regarding the language of the Third and Fourth Amendments (DB at pp. 13 to 14) likewise fails because Defendants misquote those documents. Defendants' conclusions about merger also fail, as discussed above.

Defendants' Section IV adds nothing to their argument and so does not require any extensive response. They essentially confirm that the trial court did not provide any specific reasons for its decision (DB at p. 15). So too does RREEF (IB at pp. 15 to 16). Defendants' third and fourth points (DB at p. 16) are irrelevant. In addition, their comments regarding the arbitrator's statement of additional reasons in his supplemental decision does not refute Plaintiffs' point in the initial Brief that once the arbitrator decided the request was for reconsideration, he should have simply denied it and not attempted to further

justify his prior decision. Contrary to RREEF's argument (IB at p. 36), Plaintiffs have not claimed that the arbitrator's supplemental decision requires vacation of his initial decision; the point is that his supplemental reasoning is invalid and so has no effect. Furthermore, that issue was raised to the trial court in Plaintiffs' Trial Brief. (Plaintiff's Trial Brief, at pp. 13-19, 22, 25, 28-30).

RREEF's claim that Plaintiffs never asserted that the arbitrator was circumscribed by the governing documents (IB at p. 30) is obviously false. The arbitrator never asked about such authority. Plaintiffs' issues indicated such limitation, asking whether the parties agreed on the meaning of the phrase in light of the language of Sections 8.04.03 and 3(a)(i). When the arbitrator rendered his decision, Plaintiffs asked for clarification that Sections 8.04.03 and 3(a)(i) still controlled (Pa119). When he failed to confirm their continued validity, Plaintiffs sought to vacate his decision. Plaintiffs clearly asserted the limitations imposed.

CONCLUSION

For the foregoing reasons, Defendants' and Intervenor RREEF's objections have no merit. We therefore respectfully request that the Court reverse the trial court and vacate the arbitrator's decisions.

Respectfully submitted,

/s/ Stephen P. Sinisi
Stephen P. Sinisi