FILED, Clerk of the Supreme Court, 27 Aug 2024, **088645**

Supreme Court of New Jersey

Docket No. 088645

LAURENCE J. RAPPAPORT, Individually and as a Member of Rapad Real Estate Management, LLC, KABR Management, LLC, KABR Management II, LLC, KABR Management III, LLC and KABR Management IV, LLC, *Plaintiff-Respondent,* – vs. – KENNETH PASTERNAK, Individually and as a Member of Rapad Real Estate Management, LLC, KABR Management, LLC, KABR Management II, LLC, *(For Continuation of Caption See Inside Cover)*	:	CIVIL ACTION ON PETITION FOR CERTIFICATION FROM THE FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DOCKET NOS. A-000491-21 and A-000492-21 Sat Below: HON. RICHARD J. GEIGER, J.A.D. HON. RONALD SUSSWEIN, J.A.D. HON. MARITZA B. BYRNE, J.A.D.

SUPPLEMENTAL BRIEF OF PLAINTIFF-RESPONDENT LAURENCE J. RAPPAPORT AND IN RESPONSE TO THE BRIEF SUBMITTED BY *AMICUS CURIAE* NEW JERSEY CIVIL JUSTICE INSTITUTE

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KABR Management III, LLC and KABR Management IV, LLC; ADAM ALTMAN, Individually and as a Member of Rapad Real Estate Management, LLC, KABR Management, LLC, KABR Management II, LLC, KABR Management III, LLC, and KABR Management IV, LLC; MICHAEL GOLDSTEIN, Individually and as a Member of KABR Management III, LLC, and KABR Management IV, LLC; JUDE MASON, Individually and as a Member of KABR Management III, LLC, and KABR Management IV, LLC; RAFFI AYNILIAN, Individually and as a Member of KABR Management IV, LLC; THE SARA PASTERNAK 2008 IRREVOCABLE TRUST, as a Member of KABR Management, LLC, KABR Management II, LLC and KABR Management III, LLC; THE RACHAEL PASTERNAK 2008 IRREVOCABLE TRUST, as a Member of KABR Management, LLC, KABR Management II, LLC and KABR Management III, LLC; THE DANIEL PASTERNAK 2008 IRREVOCABLE TRUST, as a Member of KABR Management, LLC, KABR Management II, LLC, KABR Management III, LLC and KABR Management IV, LLC; THE KABR GROUP, LLC; JOHN DOES 1 through 20 and XYZ CORPORATIONS 1 through 20,

Defendants-Petitioners.

LAURENCE J. RAPPAPORT, Individually and as a Member of KABR Management, LLC and KABR Management II, LLC,

Plaintiff-Respondent,

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– vs. –

KENNETH PASTERNAK, Individually and as a Member and Manager of KABR Management, LLC and KABR Management II, LLC; ADAM ALTMAN, Individually and as a Member and Manager of KABR Management, LLC and KABR Management II, LLC; THE SARA PASTERNAK 2008 IRREVOCABLE TRUST, as a Member and Manager of KABR Management, LLC and KABR Management II, LLC; THE RACHAEL PASTERNAK 2008 IRREVOCABLE TRUST, as a Member and Manager of KABR Management, LLC and KABR Management II, LLC; and THE DANIEL PASTERNAK 2008 IRREVOCABLE TRUST, as a Member and Manager of KABR Management, LLC and KABR Management II, LLC,

Defendants-Petitioners.

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PRELIMINARY STATEMENT

In this private arbitration, it is undisputed that Defendants-Petitioners Kenneth Pasternak, Adam Altman, Michael Goldstein, Jude Mason, Raffi Aynilian, The Sara Pasternak 2008 Irrevocable Trust, The Daniel Pasternak 2008 Irrevocable Trust, The Rachel Pasternak 2008 Irrevocable Trust, and the KABR Group, LLC ("Defendants") wrongfully terminated Plaintiff-Respondent Laurence J. Rappaport ("Rappaport") in bad faith as an officer and manager from various limited liability realty companies ("KABR Entities"). This Court should affirm the Appellate Division's ruling here, which gave "considerable deference" to the arbitration award when it limitedly modified the award to exclude a declaration that Rappaport's membership interest and the future carried interest that emanated therefrom had been fully redeemed and cancelled. (See 19a, 38a-39a.) In doing so the Appellate Division adhered to this Court's jurisprudence which outlines a "strong presumption in favor of effectuating an arbitration award" by not questioning the merits of the award. (See ibid.) Instead, it simply limited its review of the record and the award to the "specifically defined criteria" set forth in the New Jersey Arbitration Act, N.J.S.A. 2A:23B-1, et seq. (the "Act"). (See 38a, 39a.)

The Defendants' proposed bright-line rule that a reviewing court must defer to an arbitrator's statements alone and "only look at the cover page [of]

the award" runs afoul of well-established, precedential case law, which does not permit courts to rubber stamp arbitration decisions. Instead, binding precedent directed the Appellate Division here to engage in a review of the "whole record" to determine whether the limited bases for modifying or vacating an award as enumerated in the New Jersey Arbitration Act exist. Regardless, even defendants own "cover page test" fails because the trial court found that none of the arbitration pleadings included any claim to redeem, buyout, dissociate, or value Rappaport's equity interest. Instead, on initial review of the four corners of the award, the Chancery Court found a plain reading of the award ambiguous and ordered a remand for clarity.

Indeed, in analyzing the correctness of the trial court's decision with respect to the award in this case, the Appellate Division's review of the record before the arbitrator was consistent with federal and New Jersey law. Both require appellate courts to conduct a searching review of the whole record—an exercise that does not diverge from the law cited by the Defendants and the latest Amicus Curiae, the New Jersey Civil Justice Institute ("NJCJI"), nor the general presumption favoring effectuating an award on the issues of merit. Reviewing the record to determine whether an issue was raised and according proper deference to the arbitrator are not mutually exclusive tasks. They can be

accomplished together, as evidenced by the Appellate Division's decision in this case.

Here, by modifying the award to exclude any inclusion of Rappaport's membership interest, the Appellate Division excluded a damages remedy that Rappaport had no notice was going to be decided at arbitration, was not properly before the arbitrator, and had been disclaimed at every turn by the Defendants and Rappaport as an issue in the arbitration. In doing so, the Appellate Division prevented an undeserved, inequitable windfall of millions of dollars from flowing to the Defendants, who the arbitrator correctly found to have acted in bad faith in wrongfully terminating Rappaport's management roles.

The Defendants admit they used Rappaport's portion of future carried interest payments, which were owed to Rappaport as a member, to pay their portion of the award to Rappaport for their bad acts. By limitedly modifying the Award, the Appellate Division prevented the Defendants from doing so. Thus, not only was the Appellate Division well within its power to limitedly modify the arbitration award in the manner in which it did, but in doing so, it furthered basic principles of fairness and due process that are at the heart of our judicial system. The Appellate Division's decision should be affirmed in its entirety.

STATEMENT OF THE CASE

As this is a supplemental brief, Rappaport relies on the "Statement of the Case/Statement of Matters Involved" set forth in his opposition brief for a detailed recitation of the facts and procedure. (See generally Rappaport's Br. at pp. 4-8.) However, in their supplemental brief, upon which the NJCJI relies, (NJCJI Br. at 4), the Defendants misstate the record, which Rappaport addresses below.

A. KABR Entities Execute Consents Wrongfully Terminating Rappaport's Management Titles, Stop Payment of His Manager Compensation, and Continue to Pay Him Carried Interest as Member.

After nearly a decade in his roles as an officer and director of the KABR Entities, the Defendants wrongfully terminated Rappaport from those titles by executing a series of written consents beginning in January 2019. (See Pa394-Pa403.)[1] The titles listed in the January 2019 consents are those agreed upon by the parties in the controlling operating agreements of the KABR Entities. (See Pa115 ¶¶ 18-21; Pa117 ¶¶ 31-33; Pa119 ¶¶ 44-45; Pa121¶¶ 58-59; Pa123 ¶¶ 72-73.)

---

[1] All references to filings in the Appellate Division conform with R. 2:6-8 and R. 2:12-8. Rappaport mirrors his citation to the Defendants' Appendix in Support of Petition for Certification dated October 11, 2023 for ease of reference (e.g., 1a, 2a, and so forth). Rappaport cites to the Defendants' supplemental brief dated June 24, 2024 as "Pet. Supp. Br." Rappaport cites to the New Jersey Civil Justice Institute's amicus brief as "NJCJI Br."

The written consents executed by Defendants stated that Rappaport was being removed as **an officer and director, <u>not as a member</u>**:

> For KABR I: "RESOLVED, that Laurence J. Rappaport be, and hereby is, removed with Cause as Chairman and Director of Operations of the Company." (<u>See</u> Pa400 (Written Consent of the Members KABR Management, LLC dated August 31, 2019).)
>
> For KABR II: "RESOLVED, that Laurence J. Rappaport be, and hereby is, removed with Cause as Chief Operating Officer and Director of Operations of the Company." (<u>See</u> Pa401 (Written Consent of the Members KABR Management II, LLC dated August 31, 2019).)
>
> For KABR III: "RESOLVED, that Laurence J. Rappaport be, and hereby is, removed as Chief Executive Officer and Director of Operations of the Company." (<u>See</u> Pa396 (Written Consent of the Members KABR Management III, LLC dated January 29, 2019).)
>
> For KABR III: "RESOLVED, that Laurence J. Rappaport be, and hereby is, removed with Cause as Chief Executive Officer and Director of Operations of the Company." (<u>See</u> Pa402 (Written Consent of the Members KABR Management III, LLC dated August 31, 2019).)
>
> For KABR IV: "RESOLVED, that Laurence J. Rappaport be, and hereby is, removed as Chief Executive Officer and Director of Operations of the Company." (<u>See</u> Pa397 (Written Consent of the Members KABR Management IV, LLC dated January 29, 2019).)
>
> For Rapad: "RESOLVED, that Laurence J. Rappaport be, and hereby is, removed as Chief Executive Officer and Director of Operations of the Company." (<u>See</u>

Pa403 (Written Consent of the Members RAPAD Real Estate Management, LLC dated January 29, 2019).)

Although the Defendants allege that Rappaport was terminated "as officer and member of KABR and the KABR [E]ntities," see Pet. Supp. Br. at 5, the written consents submitted, both those executed prior to the arbitration agreement and those executed two days after Defendants submitted their arbitration pleading, make no reference to terminating Rappaport as a member. (See Pa394-Pa403.) This was unsurprising, as there was no mechanism to "terminate" a member under the operating agreements. In any event, the Defendants admitted that the consents constituted a "vote[] to remove Rappaport as an officer," (Pra15), that he was still a member, (Pra11 ("Rappaport is a minority member"), and that "he maintains all of his economic rights" and "economic interests" despite the termination of his titles. (Pra15, Pra33, Pra34.)

After executing the written consents, the Defendants stopped paying Rappaport guaranteed payments and his proportional share of the management and construction fees earned by the KABR Entities, to which Rappaport was entitled as an officer. (See, e.g., Pa2092.) However, they continued to make carried interest payments to Rappaport as was his right as a member of the KABR Entities. (See Pa2092; Pa891.)

B. Rappaport Files Suit Seeking Reinstatement as an Officer and Damages Related to His Management Compensation; Defendants Represent that His Equity Interest and Economic Rights that Flow from it Are Not Affected by His Termination.

Shortly after his wrongful termination as an officer, (see Pa234-Pa237), Rappaport filed suit ("2019 Chancery Action") by way of verified complaint and order to show cause. (See Pa111-83.) The 2019 Chancery Action sought to address the illegal actions taken by the Defendants, including Rappaport's improper removal as a manager of the KABR Entities. (See Pa131-Pa137; Pa140-Pa160; Pa140-160.) The 2019 Chancery Action made clear that Rappaport's ongoing membership rights were being frustrated by the Defendants' wrongful termination of his "officer related roles" because, amongst other reasons, as a member, he was not afforded a vote in contravention of the controlling operating agreements. (See, e.g., Pa134-Pa137, ¶¶ 110 – 137.) The ad damnum clauses sought declaratory relief that the consents—which terminated Rappaport's management titles—be nullified and that Rappaport could continue to perform his duties and obligations to supervise and manage the KABR Entities as an officer. (See Pa143-Pa144.) The 2019 Chancery Action did not seek any declaration with respect to Rappaport's membership interest. (See ibid.) It also did not include a claim for carried interest, nor cancellation or redemption of Rappaport's membership interest. (See generally

Pa1678-Pa1714, Pa140-Pa182; see also 1T7-17 to 7-20; accord 1T48-21 to 48-25.)

In opposition to the 2019 Chancery Action, Defendants expressly stated that "Rappaport is also a minority member in each of the KABR Entities," (See Pra11), despite the termination of his titles as an officer in the KABR Entities:

> **[T]he members voted to remove Rappaport as an officer** from KABR III and IV on January 29, 2019. Rappaport was also placed on administrative leave. **Rappaport's compensation has been unaffected and he maintains all of his economic rights.**

(Pra15 (emphasis added).) In the same writing, Defendants put Rappaport on notice that his wrongful termination as an officer did *not* trigger dissociation or divesture of his membership interest: "Here, [Rappaport's] removal as an officer of two of the four KABR Entities does not constitute minority oppression – **it has nothing to do with his status as an equity owner.** There are other minority investors who do not have officer titles at the KABR Entities...." (See Pra33 (emphasis original).) In doing so, Defendants **certified** to the court multiple times that "Rappaport is a member" who "maintains all of his economic rights," that flow from his membership notwithstanding the termination of his management role with the KABR Entities. (See Pra3, Pra6, Pra11, Pra15, and Pra17.)

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C. The Parties Agree to Arbitrate and None of the Parties Assert a Claim to Dissociate, Redeem, Buy-Out or Otherwise Terminate Rappaport's Membership Interest or its Value.

Shortly thereafter, the parties agreed to arbitrate the claims in the 2019 Chancery Action. (See, e.g., Pa196-Pa205.) As acknowledged by the arbitrator, the scope of the arbitration was limited to "the claims asserted in the [2019 Chancery] Action, as well as any other claims that could be asserted by any Party before the Arbitrator in accordance with the law of the State of New Jersey." (See Pa208.)

The parties explicitly agreed that the arbitration would be governed "by the Commercial Arbitration Rules and Procedures for Large, Complex Commercial Disputes of the American Arbitration Association currently in effect as of [July 30, 2019] ("AAA Rules"), and the New Jersey Arbitration Act, N.J.S.A. 2A:23B-1, et seq." (See Pa198.) The parties further expressly agreed that the Arbitrator was bound to decide the arbitration in accordance with the substantive laws of the State of New Jersey. (See id.) The parties also agreed that "the arbitration shall be conducted pursuant to the AAA Rules and the [New Jersey Arbitration] Act...." (See Pa200.) Finally, the parties agreed that the arbitrator had "no power to materially alter or materially modify the terms and conditions of this Agreement in any manner that materially prejudices the rights of either Party." (See Pa199.)

Following consummation of the Arbitration Agreement, the parties submitted statements of claims to the arbitrator. (See 11a.) Rappaport sought declaratory relief that his removal from the KABR Entities was wrongful and that reinstatement as a manager and officer of the KABR Entities was warranted. (See 11a.) He did not seek any dissolution of the KABR Entities, nor any dissociation, buy-out of his carried interest, or redemption of his membership interest in the KABR Entities. (See 11a.) Though the Defendants cite to references in Rappaport's claim document that his termination as an officer impacted "Rappaport's expectation of his membership interest" and that he brought the claim "as a member, chief executive officer, and a manager" of the KABR Entities, (Pet. Sup. Br. at 8), Rappaport's right to serve as manager was vested in his membership right to vote on the management of the KABR Entities, (see, e.g., Pa572), as detailed in his statement of claim to the arbitrator. (See Pa310-Pa319, ¶¶ 19-79.)

The Defendants' counterclaim accused Rappaport of employee and managerial wrongdoing. It sought a declaratory judgment that Rappaport had been properly terminated for cause as an officer. The counterclaim sought $11 million in damages. (See 12a.) The Defendants expressly limited their counterclaim to Rappaport's "behavior **as a manager, officer and director of the KABR Entities**." (See Pa387 (emphasis added).) Like Rappaport, the

Defendants did not seek dissolution of the entities, dissociation of Rappaport, a buy-out of Rappaport's membership, or redemption of his carried interest. (See 12a.) As recognized by the Appellate Division, such "statements were insufficient to subscribe notice to Rappaport [that] he could potentially be divested of his membership interest or future carried interest payments because of his failure to simply invoke his equity interest in [the] KABR entities." (See 37a.) Regardless, the Appellate Division recognized the Chancery Division's holding that "there was never any claim[] raised in the complaint or the counterclaim that specifically was addressing divesting [Rappaport] of, quote/unquote, the membership." (See 1T47-22 to 49-4.)

D. After Filing Claims in Arbitration, the KABR Entities Continue to Pay Rappaport His Economic Membership Right to Carried Interest and Twice Disavow that the Claim Has Any Effect on His Economic Rights as an Equity Owner.

After the parties submitted their claims in August 2019, the KABR Entities continued to pay Rappaport his carried interest flowing from his ownership, despite having terminated his titles, while stopping any payments for management fees, construction fees and carried interest. (See, e.g., Pa891.) At his deposition, Defendant Pasternak advised Rappaport to "check his mailbox" for his carried interest distribution from an asset sale. (See Pa1691-Pa1694; Pa2092-Pa2093; Pa209.)

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Meanwhile, when the arbitrator addressed Rappaport's pending request for a preliminary injunction in September 2019, the Defendants continued to disavow that the arbitration claims had anything to do with Rappaport's ownership interest or the carried interest that flows from it. (See Pa1886 and Pra33) (Rappaport's "removal as an officer … **has nothing to do with his status as an equity owner**")(emphasis in original).) In doing so, the Defendants relied on their own certifications, which reconfirmed that "Rappaport is a member" and "maintains his economic interest" regardless of the claim they filed with the arbitrator. (See Pa1886, Pra11, Pra15, Pra 33, and Pra34.)

The Defendants repeated and emphasized this same point to Rappaport and the arbitrator just three business days before the start of the arbitration hearing in January 2020. (See Pa1904 ("Plaintiff's removal as an officer does not constitute minority oppression – **it has nothing to do with his status as an equity owner** [as t]here are other minority investors who do not have officer titles (emphasis original).)

E. During the Arbitration Hearing, Both Parties Deny that Rappaport's Membership Interest and Carried Interest Are Part of Their Damages Submitted to the Arbitrator, who Sua Sponte Requests Testimony Regarding the Value of Rappaport's Interest.

During the arbitration, the Defendants denied that Rappaport's membership interest and carried interest were part of the Defendants' claim for damages related to his termination. (See Pa2172; Pa2230.) Because it was not

at issue, the Defendants acknowledged that their damages projections did not include any equity distributions for carried interest that would be paid to Rappaport, Pasternak, or Altman as members. (See id.) The Defendants' damages projections likewise did not identify Rappaport's capital account as payment for his equity, in lieu of any future carried interest payments. (See id.) The expert with respect to Rappaport's damages disavowed that membership interest and carried interest were part of his projections on the claims actually submitted. (See, e.g., Pa1514.)

On the opening day of arbitration, as counsel and Rappaport engaged in direct testimony regarding the operating agreements, the arbitrator sua sponte questioned Rappaport about the rights to ongoing distributions related to the vesting provisions in the operating agreements, which was relevant to Rappaport's claim that he was vested in the unpaid management fees of the KABR Entities, despite his wrongful termination as a manager:

> [ARBITRATOR]: That's your interpretation. I'm not agreeing with it or disagreeing. But there's nothing in the agreement which specifies temporarily, time, does it.
>
> [RAPPAPORT]: No, it just says he continues to receive what the other partners receive until the point –
>
> [ARBITRATOR]: It's talking about a withdrawing member?
>
> [RAPPAPORT]: Yeah, yes.
>
> [ARBITRATOR]: Now, if it was a withdrawing members – well, one of the reasons that a member is considered as withdrawn, if he's declared insane, right?

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> [RAPPAPORT]: Yes.
> [ARBITRATOR]: So, if I'm member and I'm declared insane, live another 30 years, I'm entitled to profits through that period?
> [RAPPAPORT]: Yes.
> [ARBITRATOR]: My question does not suggest an answer or mindset on my part, but I want to clarify that that is the intent, as you see it.
> [RAPPAPORT]: That is my "intent" – that is the "intent" that I see in the document.
> [COUNSEL]: Let me ask a clarifying question.
> Q. [To Rappaport]: If an original member were to die and they're fully vested, would their estate be entitled to receive any interest in the profits losses and distributions?
> A. [From Rappaport]: The same percentages if he had just withdrawn for other reasons.

(See Pa1436.) After direct sua sponte questions, counsel directed the arbitrator to the fact that, under the operating agreements, Rappaport was entitled to his lost profits if and when the Court determined that his management termination was wrongful. The Defendants admitted at the hearing that Rappaport was vested in the future carried interest of the KABR Entities. (See Pa461-Pa4624 (Pasternak admitting that Rappaport was a vested member in the profits, losses, and distributions of the KABR Entities).) To further the point, Rappaport then confirmed that the parties' prior statements regarding damages did not account for carried interest because it was not part of the parties' purported damages:

> Q: Do you remember Mr. Schub going through some numbers about damages that you assert in this case? Do you recall him speaking today about that?
> A: Yes.

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> Q: Do any of those numbers address your carried interest?
> A. No they do not address carried interest.

(See Pa1440.) Rappaport was expressly disclaiming any purported value of his carried interest as part of the damages to his claims. (See id.) In their submissions to this Court, the KABR Defendants obfuscate Rappaport's disclaimer by replacing it with ellipses. (See Pet. Supp. Br. at 10.) Rappaport simply did not seek a payout for future carried interest during the arbitration hearing.

Moreover, as correctly acknowledged by the Appellate Division, contrary to the arbitrator's statement that Rappaport made a claim for $25 million in carried interest, there was no claim submitted for future carried interest:

> To the extent Rappaport's entitlement to carried interest was mentioned at all during the arbitration testimony, it was raised by defendants with respect to their defense, mid-arbitration, when they claimed, without legal support in the operating agreements or the law, Rappaport would be divested of his right to future carried interest if he were found terminated for just cause…. As noted by the arbitrator, this was a sua sponte question of an issue that had not been raised in the statement of claims or pre-trial briefs.

(See 28a-30a (referencing sua sponte questions from arbitrator and responsive testimony by the Defendants found at Pa467-Pa468).) As the Appellate Division found "Rappaport's counsel immediately tried to clarify [that] the issue of future carried interest was not part of the arbitration" by having the

Defendants' witness admit that non-working members continue to receive their carried interest, which they admitted. (See 30a (referring to Pa467-Pa468).) The Appellate Division further confirmed that the Defendants "admitted that Rappaport was fully vested in his equity with respect to KABR I through IV," and "admitted Rappaport would be entitled to future carried interest if the termination was wrongful." (Ibid.) As the Appellate Division stated the Defendants' witness testified that the value of his membership "could be worth as much as $36 million," The Appellate Division confirmed that Rappaport's counsel immediately objected, stating, "And I'll just say for the first time, this is the first time we've heard that they're trying to deny him his carried interest." (Ibid.)

F. After the Hearing Closed, Rappaport Objects to Post-Hearing Consideration of His Membership Interest or Any Obligation to Prove the Value of Carried as Violative of Due Process and the New Jersey Arbitration Act and the Parties Exclude His Membership and Future Carried Interest from the Negotiated List of Post-Hearing Issues to Be Decided by the Arbitrator.

At closing, Rappaport objected to any order addressing future carried interest as a clear violation of "due process" by Defendants before the arbitration hearing:

> Before pre-arbitration, the carried interest was not an issue. It was not raised in the pleadings for good reason. KABR continued to pay Mr. Rappaport's carried interest, even after they issued consents allegedly terminating him as CEO from the KABR entities.

> Respondents testified during their depositions that Mr. Rappaport was continued to be paid carried interest in November 2019, well after he was terminated from the company, and after the claimed documents were filed.

(See Pa1102.) Rappaport objected to any order that deprived him of his carried interest as a "textbook violation of due process as it was never raised and he was never on notice." (See id.)

In addition to the absence of any claim or counterclaims for divesture, dissociation, buyout, or value of Rappaport's membership carried interest, the parties submitted a post-hearing list of issues to the arbitrator. (See Pra37-Pra40.) The list was requested by the arbitrator to be "a joint stipulation of the legal issues" that the arbitrator was to decide. (See Pa1115.) None of issues submitted included any claim to disassociate or divest Rappaport of his membership interest and associated future carried interest, or any issue requiring Rappaport to prove the value of his membership interest or future carried interest. (See Pra37-Pra40.) There was no claim in the post-hearing list of issues to buy out Rappaport's membership interest for the balance of his capital account, to disassociate Rappaport, or divest him of his membership interest.[2]

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[2] To the extent the Defendants attempt to equate their claim that "Respondents properly terminated Claimant" to a divestiture claim, see Pra38, such an argument fails, as the signed consents terminated Rappaport as an officer and director but not as a member, see Pa394-Pa403, and Rappaport was found to have been improperly terminated as an officer and director in bad faith. (See Pa234-Pa237.)

In Rappaport's post-hearing, pre-Award submission, Rappaport repeatedly argued that any claim to disassociate or divest him of his membership interest and the value of his future carried interest that flows from it would violate the Arbitration Agreement, AAA Rules, the New Jersey Arbitration Act, and due process. (See Pa1196-Pa1203.)

G. The Award Finds Rappaport's Termination Wrongful, then Strips Rappaport of the Value of Membership Because He Did Not Prove its Value, Despite the Absence of Any Claim; The Trial Court Finds No Claim Asserted, and the Appellate Division Correctly Modifies the Award on this Limited Issue, while Otherwise Affirming the Award.

After the ruling that the Defendants had wrongfully terminated Rappaport as a manager, the arbitrator analyzed all of the claims submitted to him by the parties, finding for Rappaport in some and denying others. (See generally Pa207-Pa242.) The merits of all of the claims, however, did not discuss, address, or otherwise implicate Rappaport's membership interest or its value. Instead, in deciding damages, the arbitration award provided gross compensatory damages to Rappaport of $4.9 million for wrongful termination (See Pa240-Pa245), inclusive of $13,000 for Rappaport's capital account. In doing so, the arbitrator oddly stated that Rappaport "has not established by a preponderance of the credible evidence the value of his current interest at the time of his termination," despite Rappaport not being on notice that his membership interest was at risk or that he had to prove its value. (See Pa2248.)

The Defendants interpreted the award as dissociating Rappaport's interest and barring him from the very economic rights they repeatedly claimed and certified were not at issue in the case. The Defendants then triggered a carried interest distribution to the other members and used Rappaport's portion of rightfully owed carried interest ($2.6 million) to pay the balance of the compensatory award owed to Rappaport—in essence, paying Rappaport with his own money. (See 2T26-13 to 15.)

Rappaport thereafter filed a motion to modify or vacate the award only to the extent that it encompassed the dissociation or divesture of his membership interest and the carried interest that flowed from it. (See Pa1382.) In its initial review of the award, the Chancery Division found that the award was ambiguous at best because—amongst other reasons—there was no claim in the arbitration pleadings for divesture, dissociation or valuation of Rappaport's membership interest. (See 1T7-17 to 7-20; 1T47-22 to 49-4.) After remanding to the arbitrator for clarity, the Chancery Division felt that despite the statutory authority requiring courts to modify awards on claims not actually submitted, it was bound to award as written. (See Pa1-Pa8.) Rappaport appealed the confirmation of the award and the denial of the required modification. (See Pa9; Pa30-Pa33.)

On appeal, the Appellate Division reviewed de novo the trial court's legal conclusion that there were no grounds to modify the award. (See 20a.) In doing so, it adhered to the tenants of this Court's jurisprudence by applying "a strong presumption in favor of effectuating" the award, providing the award "considerable deference," and modifying the award only because "it has been shown that a statutory basis justifies the action." (See 19a, 20a, 38a.) Specifically, the Appellate Division found eight separate reasons why the value of Rappaport's membership interest, including any future carried interest accruing after the conclusion of the arbitration hearing, was not an issue submitted to the arbitrator. (See 26a-36a.) The Court then declined to vacate the award, deferred to the award as to those claims that were actually submitted to the arbitrator, and remanded the matter back to the Chancery Division. (See 39a.) The Defendants' certified petition followed.

ARGUMENT

The Defendants' latest submission is best characterized as one of misdirection, arguing for the first time that the parties delegated authority to the arbitrator to decide whether a claim was actually submitted to the arbitrator. They do so under the mistaken guise that "whether a claim was actually submitted to the arbitrator" to warrant review under N.J.S.A. 2A:23B-24(a)(2) is the same as "threshold issues" of arbitrability, which addresses whether a

claim is arbitrable within the scope of the arbitration agreement. Arbitrability does not address the propriety of an arbitrator—after the arbitration hearing has occurred, and all the evidence has been submitted, and after the award is rendered—ruling upon an issue that the parties never actually submitted to the arbitrator for consideration.

The Defendants similarly attack the Appellate Division's application of a plenary review of the legal issue of the trial court's decision to confirm the award and deny the motion to modify or vacate the award, misstating that the Appellate Division performed a de novo review of the merits of the arbitration award. Rather, the Appellate Division stated plainly that it reviewed the trial court's "denial of a motion to vacate an arbitration award de novo" and, in so doing, gave "considerable deference" to the arbitration award because its "review of an award … is very limited," and, as such, "is not be cast aside lightly and may only be vacated when it has shown that a statutory basis justifies that action." (See 19a-20a.) Despite its review of the record, the Appellate Division expressly did not perform a plenary review of the *merits* of the arbitrator's findings.

In doing so, the Appellate Division "adhere[d] to the standard set forth in Tretina Printing, Inc. v. Fitzpatrick & Assocs., Inc., 135 N.J. 349 (1994) and uph[e]ld the presumption favoring effectuating an arbitration award by holding "no basis" to disturb the trial court's decision not "to vacate the award on those

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claims properly brought before the arbitration for wrongful termination … as manager." (See 38a.) This Court's own jurisprudence as well as Third Circuit law calls for courts to apply the same searching review of the "record as a whole" on appeal of a trial court's decision to confirm, modify, or vacate the award, while giving deference to the merits of the award itself. See Metromedia Energy, Inc. v. Enserch Energy Servs., Inc., 409 F.3d. 574, 579 (3d Cir. 2005), cert. denied, 546 U.S. 1089 (2006) and Bound Brook Bd. of Ed. v. Ciripompa, 228 N.J. 4, 13 (2017). By the same measure, had the Chancery Division initially modified or vacated the award—rather than confirm—the task of the Appellate Division would be the same: a plenary review of the Chancery Division's decision while giving deference to the merits of the award on the claims actually submitted.

The NJCJI's arguments fare no better.[3] The NJCJI's doomsday arguments of the collapse of arbitration should fall on deaf ears, as courts in this State have already applied the same standard as the Appellate Division in this case to review decisions of trial courts vacating or modifying awards, without any indication that those past decisions has made parties "less inclined to rely on arbitration as a tool for alternative dispute resolution." (NJCJI Br. at p. 19.)

[3] In accordance with the Court's order, Rappaport has submitted one brief addressing both the Defendants' supplemental brief, and the amicus curiae brief filed by the NJCJI.

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POINT I

THE APPELLATE DIVISION CORRECTLY DEFERRED TO THE ARBITRATION AWARD WHEN PERFORMING A SEARCHING REVIEW OF THE CHANCERY COURT'S DENIAL OF THE MOTION TO VACATE OR MODIFY.

As recognized by this Court, the legislature codified the scope of review of an arbitration award in N.J.S.A. 2A:23B-23(a), and -24(b), the latter of which dictates that a "court shall modify or correct the award if: … (2) the arbitrator made an award on a claim not submitted to the arbitrator and the award may be corrected without affecting the merits of the decision upon the claims submitted." Fawzy v. Fawzy, 199 N.J. 456, 470 (2009). "As can be seen from those provisions and, as might be expected, the scope of review of an arbitration award is narrow." Id. Although limited, this deferential standard "is not a rubber stamp, and [a court's] review must focus upon the record as a whole."

The United States Supreme Court similarly recognizes that courts of appeal should apply ordinary standards when reviewing a trial court's decision upholding arbitration awards, i.e., deciding questions of law de novo. See First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 939 (1995). Like the New Jersey Arbitration Act, the Federal Arbitration Act similarly requires modification of awards for a matter not submitted. Hall St. Associates, L.L.C. v. Mattel, Inc., 552 U.S. 576, 586 (2008) (citing 9 U.S.C. § 11).

The Third Circuit has similarly mandated that when reviewing a trial court's decision to confirm, modify, or vacate, its "review must focus upon the record as a whole." Metromedia Energy, 409 F.3d. at 579. This Court adopted that exact standard in Ciripompa, 228 N.J. at 13.

Here, the Appellate Division performed a searching review of the trial court's decision to confirm and refusal to modify or vacate. In doing so, it did not speak to, much less disturb, the substantive merits of the arbitrator's decision on claims actually raised, i.e., Rappaport's wrongful termination and the Defendants' counterclaims.

POINT II

THE APPELLATE DIVISION'S DECISION FOLLOWS THIS COURT'S PRECEDENT AND ALIGNS WITH FEDERAL JURISPRUDENCE.

The NJCJI's case-specific argument (and by extension, that of the Defendants) that the Appellate Division ran afoul of the applicable statutes and longstanding jurisprudence providing that courts owe deference to arbitrators when reviewing their decisions—simply by reviewing the record and modifying the arbitration award—fails for many reasons. An appellate court's review of the record before the arbitrator to determine whether a lower court correctly ruled that an issue was properly raised to the arbitrator is not precluded by the ultimate deference it owes to the arbitrator. See, e.g., Ciripompa, 228 N.J. at 13 ("[A] highly deferential standard ... is not a rubber stamp, and our review must

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focus upon the record as a whole") (quoting Metromedia Energy, 409 F.3d. at 579).

Indeed, a searching review of the record before the arbitrator is not just necessary, but mandated, in order to correctly rule on whether the trial court's finding that a claim was appropriately submitted in the context of an arbitration was proper—albeit within the narrow parameters that the court below readily acknowledged it was bound by, and to which it unmistakably adhered—and does not, in and of itself, constitute reversible error. Ciripompa, 228 N.J. at 11-18. To permit otherwise would render any review a mere impermissible "rubber stamping" in contravention of the delineated statutory authority that mandates the reviewing court modify or vacate an award. Id. at 13.

"It is the parties, not the arbitrator, who decide the issues submitted." Matteson v. Ryder Sys. Inc., 99 F.3d 108, 114 (3d Cir. 1996). Here, the issues submitted by the parties at the onset of arbitration and post-hearing did not include any claim to divest, dilute, dissociate, or otherwise redeem Rappaport's membership interest, or the value of his membership interest. (See Pa387, Pa1886; Pa1904, Pra15, Pra33, Pra37-Pra40.)[4] Thus, the modification of the

[4] Any post-hearing briefing by the parties as to the value of his carried interest was over the due process objections of Rappaport. Regardless the joint statement of issues negotiated and submitted by the parties did not include any buyout, redemption, dissociation of Rappaport's carried interest, his membership interest, or its value. (See Pra37-Pra40.)

award on this basis was proper. See Tretina, 135 N.J. at 358 ("If the arbitrators decide a matter not even submitted to them, that matter can be excluded from the award."); see also Block v. Plosia, 390 N.J. Super. 543, 552 (App. Div. 2007) (while recognizing that "[t]he judicial power to set aside an arbitration award is limited," nevertheless holding that "an arbitration award may be modified if 'the arbitrator made an award on a claim not submitted to the arbitrator and the award may be corrected without affecting the merits of the decision upon the claims submitted[.]'") (citing N.J.S.A. 2A:23B–24(a)(2)).

None of the cases cited by the Defendants or the NJCJI stand for the extraordinary proposition that an appellate court, upon reviewing the correctness of a trial court's action, may only conduct a review of the four-corners of "the opinion" issued with an arbitration award, (see NJCJI Br. at 14), or must otherwise limit its scope of review to the "cover page," in order to accord that arbitrator proper deference. (See Pet. Supp. Br. at 29-30.) To be sure, a court is more than capable of reviewing the arbitration record and, at the same time, according appropriate deference to an arbitrator's merits findings.

There is no evidence that the Appellate Division did anything other than that here, where it left the entire arbitration award intact, save for its limited modification of the award on the discrete issue of whether Rappaport's divestiture or dissociation in the KABR Entities and attendant surrender of his

carried interest in the KABR Entities, or equity value, had been submitted by the parties to the arbitrator so as to warrant its inclusion within the award. The Appellate Division found eight separate reasons why "the value of Rappaport's interest including any future carried interest accruing after the conclusion of the arbitration testimony" was not an issue submitted to the arbitrator, while adhering to the standards set forth in Tretina to "find no basis to vacate the awards entered on the claims" actually submitted to the arbitrator for "his wrongful termination as a manager" and the Defendants' counterclaims. (See 26a-39a.)

In support of the Defendants' position, the NJCJI argues that both federal and New Jersey law favor arbitration awards and emphasizes the deference owed to arbitrators by reviewing courts. Of course, there is no disputing that the law favors arbitration. There is similarly no disputing that deference is owed to arbitrators by reviewing courts. The NJCJI is wrong, however, where it argues that reviewing courts must defer, nearly entirely, to every conclusion of the arbitrator. Courts are under no such mandate, and none of the authority proffered by the NJCJI lends support for its position.

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The NJCJI relies on Brennan v. CIGNA Corp., 282 Fed. App'x. 132 (3d Cir. 2008)[5] and Metromedia Energy, supra, in support of their argument. The NJCJI's reliance is misplaced.

The very case law on which the NJCJI—and by extension the Defendants rely—confirms that the Appellate Division appropriately modified the award here. In Brennan, the Third Circuit explained that "[a]n arbitrator has the authority to decide only the issues that have been submitted for arbitration by the parties." Id. at 136 (citing Certain Underwriters at Lloyd's London v. Westchester Fire Ins. Co., 489 F.3d 580, 584 (3d Cir. 2007)). "However, where an arbitration award rationally can be derived from either the agreement of the parties or the parties' submission to the arbitrator, it will be enforced." Id. at 136-37 (citing Acands, Inc. v. Travelers Cas. and Sur. Co., 435 F.3d 252, 258 (3d Cir. 2006)). The issue in Brennan was whether the award, which awarded emotional distress damages for a "hostile work environment," a claim the defendants argued was not raised by the plaintiffs in arbitration proceedings, could nevertheless be rationally derived from the parties' submission to the arbitrator. Id. at 136.

[5] Brennan is a non-precedential opinion. "Such opinions are not regarded as precedents that bind the court ...." 3d Cir. I.O.P. 5.7.

In analyzing the issue, the Third Circuit Court of Appeals reviewed not only the decision of the arbitrator, which awarded damages "relating to discriminatory treatment," but also the amended complaint submitted to the arbitrator, and the testimony of the plaintiffs. Id. at 137. In a resounding rejection of the NJCJI's argument that the Appellate Division in this case erred by conducting too "probing" of a review of whether the issue of Rappaport's divestiture and disassociation from the KABR Entities had been submitted to the arbitrator, the Third Circuit Court of Appeals made abundantly clear that it "...exercises **plenary review** over the district court's decisions concerning the scope of the parties' submission to the arbitrator and the validity of the arbitration award." Id. at 135 (citing Metromedia Energy, 409 F.3d at 579) (emphasis added). For it to do so, of course, the Third Circuit Court of Appeals in Brennan needed to do what the Appellate Division did here, which is review the record that was before the arbitrator.

In both Brennan and Metromedia Energy, like the Appellate Division in this matter, the Third Circuit Court of Appeals applied "plenary review" over the lower courts' decisions concerning the scope of the parties' submission to the arbitrators to determine whether statutory grounds for vacation or modification existed. Like the Appellate Division here, in both Brennan and Metromedia Energy, the Third Circuit Court of Appeals articulated that "this

deference is not a rubber stamp, and our review must focus upon the record as a whole," language quoted by this Court in Ciripompa, to reverse the Appellate Division's decision to strike a trial court's vacation of an arbitration award. Ciripompa, 228 N.J. at 13.

The Appellate Division here acknowledged it owed "considerable deference," that its "review of [the] award, therefore 'is very limited,'" that it cannot "cast aside lightly" the award, and it may only be vacated or modified "'when it has been shown that a statutory basis justifies that action.'" (See 19a-20a (quoting Borough of Carteret v. Firefighters Mut. Benevolent Ass'n Loc. 67, 247 N.J. 202, 211 (2021) and Ciripompa, 228 N.J. at 11).) Notably, in reviewing the record before the arbitrator, the Appellate Division here did exactly what the Third Circuit Court of Appeals did in Brennan: exercise plenary review over the lower court's decision to confirm the arbitration award, which was based upon the lower court's consideration of the scope of the parties' submission to the arbitrator—the same issue decided by the district court that the Third Circuit Court of Appeals reviewed in Brennan. (See ibid. (citations omitted).)

Indeed, the Brennan court, like the Appellate Division here, acknowledged the deference owed to the arbitrator, but also carefully reviewed the record at arbitration before rendering its decision. The Brennan court noted that "[t]he entire crux of the amended complaint is the allegation that black employees were

treated differently than white employees," and that "[p]aragraph 81 of the amended complaint expressly alleges that '[s]imilar unlawful and improper actions, including the *unfair treatment, harassment,* lack of promotion and termination experienced by [one of the plaintiffs] have been the fate of other black employees....'" The court further noted that the testimony established that the plaintiffs "were subjected to condescending, belittling and offensive verbal treatment from their supervisor to which white employees were not subjected," and, thus, that the award could be rationally derived from the submission to the arbitrator. Id. Thus, taken together, the court held that it was "not obvious from the opinion that the arbitrator acted outside the scope of his authority," because, notwithstanding the arbitrator's use of the phrase "hostile work environment," the arbitrator found that the plaintiffs were "subjected to racially disparate treatment taking the form of demeaning verbal abuse and hostility, the very claim at the heart of plaintiffs' amended complaint and the submission to the arbitrator." Id.

Obviously implicit in the Third Circuit's decision was that the findings of the arbitrator were consistent with what is commonly understood to be a "hostile work environment," and that even though such a claim was not alleged by plaintiffs, they alleged the functional equivalent by stating in their amended complaint that they were subjected to disparate treatment because of their race,

which was corroborated by their testimony at arbitration. Thus, the court could not find that it was "obvious" that the arbitrator exceeded his authority, as the issue, for all intents and purposes, was "at the heart" of the plaintiffs' claim and submission to the arbitrator. Id.

By contrast, here, Rappaport's divestiture and disassociation from the KABR Entities was anything but "at the heart of" the Defendants' submission to the arbitrator. In fact, the Defendants disclaimed that Rappaport's membership interest and the value of his equity would be affected by the arbitration and, at every stage of the arbitration, and Rappaport objected to any post-hearing attempt to inject the value of membership interest as a due process violation in light of the Defendants' disclaimer of that issue. In addition, the parties' damages witnesses all testified that the value of Rappaport's membership and the carried interest that flowed from it were not part of the case, and the parties' negotiated, post-hearing list of issues that the arbitrator was to decide did not include any reference to divesture, dissociation, or valuation of his membership or carried interest.

As the Brennan court did, the Appellate Division reviewed and correctly recognized that the issue did not appear anywhere in the pleadings or claim documents, whether filed in state court prior to the arbitration commencing or during the arbitration itself, and that any testimony was elicited in response to

sua sponte questioning regarding the vesting provisions of the operating agreements. Moreover, as the Appellate Division correctly recognized, the Defendants reaffirmed not once, not twice, but three times on the eve of arbitration that they would not pursue the issue. And, when the testimony abruptly and tangentially touched on the issue of carried interest—for the very first time, ever—during the arbitration hearing, Rappaport vehemently objected, given that it was being raised for the first time during the proceeding, thereby infringing on his fundamental due process rights. Notwithstanding the fact that the Defendants discussed carried interest for the first time during the arbitration, at the conclusion of the arbitration, in light of the dispute over whether the raising of the issue was proper, the parties, at the direction of the arbitrator, and in order to definitively establish the scope of the issues to be decided by the arbitrator, submitted lists of issues for the arbitrator to decide. The issue of Rappaport's divestiture, disassociation, buyout or the value of his carried interest was not among those included in the submitted lists.

Brennan is clearly of no use to the NJCJI. On one hand, consistent with Metromedia Energy, supra, it stands for the proposition that courts should do what the Appellate Division did here, which is conduct a searching review of the record to determine whether a trial court properly ruled on a motion to modify or confirm an arbitration award because an issue was properly before an

arbitrator. See Metromedia Energy, 409 F.3d at 579 ("When confronted with an allegation that the arbitrators exceeded their authority by resolving an issue the parties did not intend to submit, we will review the arbitrator's interpretation of the parties' intentions under a 'highly deferential' standard. Nonetheless, this deference is not a rubber stamp, and **our review must focus upon the record as a whole** in determining whether the arbitrators manifestly exceeded their authority in interpreting the scope of the parties' submissions") (emphasis added); accord Ciripompa, 228 N.J. 4, 13 (2017) (same).

And, on the other hand, Brennan highlights the stark contrast between a situation where an issue had been effectively raised before the arbitrator, and here, where it obviously was not. Under the circumstances here, the conclusion that the arbitrator acted irrationally by divesting Rappaport of his interest in the KABR Entities is inescapable. For good measure, the Appellate Division did not, as the NJCJI says, "second-guess[]" the findings of the arbitrator. In fact, it did not engage in any guesswork at all. Rather, it highlighted in detail all of the foregoing reasons why it was modifying the award—and it did so given its keen awareness of the deference generally owed to arbitrators. Of course, had it modified the award without explaining the degree to which it had analyzed the record, its decision would have been significantly more vulnerable to reversal.

POINT III

THE PARTIES' ARBITRATION AGREEMENT SUPPORTS THE APPELLATE DIVISION'S LIMITED MODIFICATION OF THE ARBITRATION AWARD.

"Because of the favored status afforded to arbitration, '[a]n agreement to arbitrate should be read liberally in favor of arbitration.[;]' [t]hat favored status, however, is not without limits." Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A., 168 N.J. 124, 132 (2001) (quoting Marchak v. Claridge Commons, Inc., 134 N.J. 275, 282 (1993)). "In dispensing even treatment to arbitration agreements, basic contract formation and interpretation principles still govern, for there must be a validly formed agreement to enforce." Kernahan v. Home Warranty Adm'r of Fla., Inc., 236 N.J. 301, 307 (2019) (citing Volt Info. Scis., Inc. v. Bd. of Trs., 489 U.S. 468, 478 (1989); Garfinkel, 168 N.J. at 132).

"[A]rbitration agreements are to be 'construed according to the usual methods of contract interpretation whereby a mutual, reasonable and meaningful design is sought from the language used by the parties and maximum effect is given to their intention…'" Hudik-Ross, Inc. v. 1530 Palisade Ave. Corp., 131 N.J. Super. 159, 165 (App. Div. 1974) (quoting Keppler v. Terhune, 88 N.J.Super. 455, 462 (App. Div. 1965)). "In interpreting a contract, '[i]t is not the real intent but the intent expressed or apparent in the writing that controls.'"

Garfinkel, 168 N.J. at 135 (quoting Quigley v. KPMG Peat Marwick, LLP, 330 N.J. Super. 252, 266 (App. Div.), certif. denied, 165 N.J. 527 (2000)).

The Defendants base their claim that the scope of the arbitration agreement included Rappaport's claim for carried interest on the following "Whereas" clause in the arbitration agreement:

> WHEREAS, the Parties wish to fully and finally resolve their dispute related to the Claim and Counterclaim, and related matters, including but not limited to, any claims that could be asserted by any Party as part of the Claim or the Counterclaim or with respect to the dissolution or disassociation of Rappaport from, or Rappaport's employment with, Rapad Real Estate Management, LLC; KABR Management, LLC; KABR Management II, LLC; KABR Management III, LLC; and KABR Management IV, LLC (collectively, the "KABR Management Companies") by submitting their claims and defenses to arbitration;

Suppl. Brief at 6. This clause is simply prefatory and immediately precedes the operative clauses of the arbitration agreement, which follow on from that point:

> NOW, THEREFORE, in consideration of the mutual promises and undertakings contained herein, the receipt and sufficiency of which are mutually acknowledged, **the Parties hereto agree as follows**:

(See Pa197) (emphasis added).) It is from this point in the arbitration agreement that the operative provisions begin.

The Defendants' reliance upon this prefatory "whereas" clause, however, is utterly misplaced. In the statutory interpretation context, such prefatory

language is normally just an explanation or statement preceding the enactment clause. See Asbury Park Press v. Ocean Cty. Prosecutor's Office, 374 N.J. Super. 312, 324 (Law. Div. 2004). Furthermore, as the United States Supreme Court has noted, "'where the text of a clause itself indicates that it does not have operative effect, such as 'whereas' clauses in federal legislation ..., a court has no license to make it do what it was not designed to do.'" Hawaii v. Off. of Hawaiian Affs., 556 U.S. 163, 175 (2009) (quoting District of Columbia v. Heller, 554 U.S. 570, 578, n. 3 (2008)).

In the specific context of contract interpretation, it has been held that a "whereas" clause will not create any rights beyond those established by the operative terms of the contract. See Electra Realty Co. Inc. v. Kaplan Higher Educ. Corp., 825 Fed. App'x 70, 73 (3d Cir. 2020) ("A recital provision, though it may provide background information or serve as an interpretative aid, does not control over the operative terms of a contract."); see also Grynberg v. F.E.R.C., 71 F.3d 413, 416 (D.C. Cir. 1995) ("[I]t is standard contract law that a Whereas clause, while sometimes useful as an aid to interpretation, cannot create any right beyond those arising from the operative terms of the document."); Trecom Business Systems, Inc. v. Prasad, 980 F. Supp. 770, 773 (D.N.J. 1997); see also C.J.S. Contracts § 314.

The lack of any intent on the part of the parties to give any operative effect to such prefatory language is also clear, as there is no provision in the arbitration agreement incorporating the "whereas" clauses. Furthermore, operative provisions of the arbitration agreement note that prefatory materials are excluded from being enforced. For example, Section 14.B. of the arbitration agreement provides that "[t]he article headings of this Agreement are for convenience only and are not to be given any effect whatsoever in construing this Agreement." (See Pa203.) Thus, the Defendants' reliance on the prefatory "whereas" clauses is erroneous.

By contrast, while the parties agreed that a dissociation or divesture claim was arbitrable, the parties were obligated to submit claims and counterclaims specifically identifying the claims, issues, and damages they were seeking the arbitrator to decide. (Pa1644; N.J.S.A. 2A:23b-9.) The parties agreed that those claims, issues and damages could not be amended absent written notice in advance of the arbitration hearing. (Pa1644.) As the trial court found, there was no claim to divest, dissociate, redeem or buyback Rappaport's membership interest to permit valuing Rappaport's interest or right to future carried interest. (See 1T7-17 to 7-20; 1T47-22 to 49-4.) The Appellate Division confirmed this reality in its review. (See 27a, 37a.)

The Defendants and the NJCJI also argue that the arbitration agreement gives the arbitrator unfettered power to render a decision with respect to the matters before him. This argument, however, is utterly contrary to the language of the arbitration agreement and fails to recognize the incorporation of the limitations in the New Jersey Arbitration Act and the limitations on the scope of the arbitration.

"A basic tenet of contract interpretation is that contract terms should be given their plain and ordinary meaning." Kernahan, 236 N.J. at 321. The contract should be read "as a whole in a fair and common sense manner." Hardy ex rel. Dowdell v. Abdul–Matin, 198 N.J. 95, 103 (2009). Furthermore, "the clarity and internal consistency of a contract's arbitration provisions are important factors in determining whether a party reasonably understood those provisions and agreed to be bound by them." NAACP of Camden Cnty. E. v. Foulke Mgmt. Corp., 421 N.J. Super. 404, 425 (App. Div. 2011).

New Jersey courts have long held that "[a] contract 'should not be interpreted to render one of its terms meaningless.'" C.L. v. Div. of Med. Assistance & Health Servs., 473 N.J. Super. 591, 599 (App. Div. 2022) (quoting Porreca v. City of Millville, 419 N.J. Super. 212, 233 (App. Div. 2011), certif. denied, 177 N.J. 222 (2003)); see also Cypress Point Condo. Ass'n, Inc. v. Adria Towers, L.L.C., 226 N.J. 403, 416 (2016) (in interpreting an insurance policy,

"the court's responsibility is to give effect to the whole policy, not just one part of it"). Additionally, a more specific term or provision controls over a more general term or provision. See Bauman v. Royal Indem. Co., 36 N.J. 12, 22 (1961) ("In the interpretation of a contractual instrument, the specific is customarily permitted to control the general and this ordinarily serves as a sensible aid in carrying out its intendment."); see also C.L., 473 N.J. Super. at 599-600 (citing Gil v. Clara Maass Med. Ctr., 450 N.J. Super. 368, 378 (App. Div. 2017); Homesite Ins. Co. v. Hindman, 413 N.J. Super. 41, 48 (App. Div. 2010)).

The interpretation proposed by the Defendants ignores the guardrails referenced in various operative portions of the arbitration agreement. For example, Section 2.B. of the arbitration agreement provides that "[t]he Arbitrator shall have no power to materially alter or materially modify the terms and conditions of this Agreement in any manner that materially prejudices the rights of either Party." (See Pa199.) Section 2.A. of the arbitration agreement also provides that "[t]he Arbitrator and the arbitration shall be governed procedurally by the Commercial Arbitration Rules and Procedures for Large, Complex Commercial Disputes of the American Arbitration Association currently in effect as of the Effective Date ("AAA Rules"), and the New Jersey Arbitration Act, N.J.S.A. 2A:23B-1, et seq. (the "Act")." (See Pa198.) This

limitation is also repeated in Section 2.F. (Pa200 ("the arbitration shall be conducted pursuant to the AAA Rules and the Act").) Perhaps, most importantly for this appeal, Section 2.B. of the arbitration agreement provides that the arbitration award "shall be final and binding upon the Parties, **except as provided in the [New Jersey Arbitration] Act**." (See Pa199) (emphasis added).)

The New Jersey Arbitration Act requires "requires that the party initiating an arbitration provide all other parties with notice of the proceeding in a manner 'that is reasonably necessary to inform the[m] ... in [the] ordinary course." Block, 390 N.J. Super. at 552 (quoting N.J.S.A. 2A:23B-2(a))(emphasis original). The New Jersey Arbitration Act required the Defendants to give notice "in a record to [Rappaport] in the manner agreed between the parties." N.J.S.A. 2A:23B-9 (emphasis added). The notice shall describe the nature of the controversy and the remedy sought. Ibid. (emphasis added). "[T]he manner agreed between the parties," as outlined in the Arbitration Agreement, in which to provide notice to another party was by way of AAA Rules 5 and 6, which required the counterclaim include "a statement setting forth the nature of the counterclaim and include the relief sought and the amount involved," which such amount cannot be increased after the close of the hearing and any new

claim or counterclaim must be made in writing and filed with the AAA. (Pa1644.)

The arbitrator, the trial court, and the Appellate Division all agreed that the Statement of Claims by both parties did not raise a claim for dissociation, and in fact, the parties expressly excluded such a claim in their pretrial briefs, and post-trial submissions. The statement of issues identified after the close of the hearing did not include any claim for dissociation. The written amount of damages sought by the Defendants was $11 million, which expressly excluded any value of Rappaport's membership interest and any future payment of carried interest that flowed from it. The amount of damages sought by Rappaport likewise excluded the same value.

The AAA Rules also prohibit any added claim or expansion of damages after the arbitration hearing begins without written consent of the parties, which did not occur here. See AAA Rules 4, 5, and 6. Such written notice is the equivalent of notice pleading under the Court Rules. The Arbitration Act requires courts to modify an award when the award addresses an issue not actually submitted to the arbitrator.

In light of the limitations imposed by the New Jersey Arbitration Act, the Defendants' claim that the arbitrator was somehow imbued with unfettered power to render any and all decisions on any and all matters between the parties

with no oversight or court review is simply untenable given the plain language of the arbitration agreement.

POINT IV

THE "WOLF-CRIES" OF THE DEFENDANTS AND THE NJCJI THAT THE APPELLATE DIVISION'S UNPUBLISHED, NON-PRECEDENTIAL DECISION IN THIS PRIVATE ARBITRATION WILL RENDER THE BENEFITS OF ARBITRATION ILLUSORY ARE MERITLESS.

The arguments by the Defendants and NJCJI—that affirmance of the decision below will dilute arbitration generally and, in turn, lead to more litigation in the courts—could not be more incorrect. Arbitration is hamstrung when parties to it have no judicial redress, not when courts take minimal, statutorily-authorized action to modify awards where appropriate. Here, the arbitrator sua sponte injected an issue with several million dollars riding on it into its award—Rappaport's divestiture or disassociation in the KABR Entities—despite the issue not appearing anywhere in the pleadings or claim documents, whether filed in state court prior to the arbitration commencing or during the arbitration itself, despite the Defendants reaffirming three times on the eve of arbitration that they would not pursue the issue, despite Rappaport vehemently objecting to the mention of the issue by the Defendants for the first time during the arbitration proceeding (notwithstanding their prior representations that it would not be raised), and despite the parties' submissions

at the conclusion of arbitration of a list of issues to be decided by the arbitrator, which did not include Rappaport's divestiture or disassociation.

Where, as here, the arbitrator commits such an egregious error, irrespective of its financial magnitude (which, here, dwarfs the award actually rendered), the parties to the arbitration must be able to seek relief from the courts. If such aggrieved parties were prevented from doing so and were forced to accept nearly any decision of an arbitrator, regardless of how flawed, as the NJCJI is advocating for, there would be no reason for individuals to choose to submit their dispute or future dispute to arbitration. A forum where an arbitrator wields unbridled power and is insulated from judicial review is hardly an appealing forum for an individual seeking to resolve a dispute. Thus, this is the scenario under which courts would be flooded with disputed claims otherwise well-suited for arbitration. Here, merely because the Appellate Division modified the arbitration award does not mean that arbitration in the broad sense is at risk. It is not. Courts have modified awards on similar grounds, <u>see, e.g.</u>, <u>Block</u>, <u>supra</u>, without the collapse of arbitration.

POINT V

THE EQUITIES FAVOR THE APPELLATE DIVISION'S MODIFICATION OF AN AWARD THAT STRIPPED THE VICTIM OF A WRONGFUL TERMINATION OF MILLIONS OF DOLLARS OF EQUITY INTEREST AND PERMITTED THE BAD ACTORS TO PAY THE PENALTY WITH THE VICTIM'S OWN MONEY.

This case is the reason that statutory authority and case law permit courts to retain oversight of arbitrators. At arbitration, it was found that there was "no cause" regarding the validity of Rappaport's termination as an officer and director of the KABR Entities. Yet, despite Rappaport's victory on this issue, by virtue of the arbitrator stripping Rappaport of his membership interest and carried interest, without notice to Rappaport, the Defendants reaped the benefit, as they were able to pay the whole award of Rappaport's damages with the money that Rappaport was already entitled to in the form of the carried interest taken from him without notice by the arbitrator in violation of his due process rights. The KABR Defendants admit to doing so. (See 2T26-13 to 15.)

Indeed, because the arbitrator divested Rappaport of his membership interest and stripped him of his carried interest, the Defendants realized a windfall of millions of dollars, as, by their own admission, they used what should have been Rappaport's $2,600,000 carried interest distribution to pay part of the compensatory damages due to Rappaport as a result of their wrongful actions. (See 2T26-13 to 15.) The Appellate Division said it best:

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> ....given the unprepared testimony by Rappaport in response to the arbitrator's sua sponte question that his carried interest had been estimated at $25 million in 2018, the testimony of defendant Pasternak that Rappaport's carried interest could be valued "as high as $36 million," and the arbitrator's finding Rappaport was wrongfully terminated, it is implausible to argue the $4.9 million awarded to Rappaport, the prevailing party, encompassed the value of his future carried interest.

(39a.) This case is the quintessential example of why courts are permitted to modify arbitration awards in the absence of notice to parties about a claim. Where not given, the consequences are immense and irreparable. Here, in effect, at arbitration, the losing party won. This is the very antithesis of fairness—the bedrock of due process. See Block, 390 N.J. Super. at 552 ("notice is vital as a matter of fundamental fairness."). Thus, principles of equity lend considerable support to the Appellate Division's opinion, as well.

CONCLUSION

For these reasons, the Court should affirm the Appellate Division's decision to modify the arbitration award to "exclude any inclusion of Rappaport's membership interest, including any future carried interest accruing after the conclusion of arbitration testimony," and otherwise affirming the award. (See 39a.)

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