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# Supreme Court of New Jersey

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Docket No. 088645

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

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## BRIEF AND APPENDIX IN SUPPORT OF PETITION FOR CERTIFICATION ON BEHALF OF DEFENDANTS-PETITIONERS

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Date Submitted: October 11, 2023



KABR Management III, LLC and :  
KABR Management IV, LLC; :  
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Management, LLC, KABR :  
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Management II, LLC, KABR :  
Management III, LLC, and KABR :  
Management IV, LLC; MICHAEL :  
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LLC; THE SARA PASTERNAK :  
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LLC, KABR Management II, LLC :  
and KABR Management III, LLC; :  
THE RACHAEL PASTERNAK :  
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Member of KABR Management, :  
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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.* :

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LAURENCE J. RAPPAPORT, :  
Individually and as a Member of :  
KABR Management, LLC and :  
KABR Management II, LLC, :  
*Plaintiff-Respondent,* :



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## **PRELIMINARY STATEMENT**

In overturning the results of a private-sector arbitration award in this case, the Appellate Division discarded this Court's decades-long precedent instructing courts to give heightened deference to an arbitration determination. The Appellate Division's opinion throws into confusion the proper scope of appellate review of private-sector arbitration awards and must be corrected.

Here, the arbitrator, former Chief Justice James R. Zazzali (ret.) ("Arbitrator"), held thirteen days of hearings and additional days of oral argument and reviewed "a record of almost 10,000 pages of pleadings, transcripts, briefs, exhibits, and correspondence." The Arbitrator concluded that Plaintiff had been wrongfully terminated and awarded him \$4.9 million for both his membership and management interests in KABR ("Arbitration Award"). The Arbitrator specifically and repeatedly found -- and the record reflects -- that Plaintiff's membership and management interests were within the scope of the arbitration and presented during the arbitration proceedings.

In direct contravention of the holdings in Tretina Printing Inc. v. Fitzpatrick & Associates, Inc., 135 N.J. 349 (1994), and Perini Corp. v. Grete Bay Hotel & Casino, Inc., 129 N.J. 479 (1992), the Appellate Division reviewed the record de novo and made its own factual findings, affording no deference to the Arbitration Award. The panel disagreed with the Arbitrator's conclusion

that the value of Plaintiff's membership interest in KABR was litigated in the arbitration and remanded for new proceedings on that issue without vacating the entirety of the Arbitration Award.

The Appellate Division clearly erred. Plaintiff's membership interest and the value of that interest were presented to the Arbitrator. The panel's error stemmed from its misunderstanding of the record and, in particular, its mistaken belief that the Arbitrator questioned Plaintiff sua sponte about carried interest when, in fact, Plaintiff's attorney did the questioning. The record shows that Plaintiff introduced his claim to carried interest and its value.

The value of Plaintiff's membership interest -- including what was referred to in the arbitration as his share of carried interest -- was raised repeatedly by the parties. And the Arbitrator repeatedly stated that he ruled on that issue. The Appellate Division did not heed this Court's warning about the heightened deference owed to a private-sector arbitration award. In adopting Chief Justice Wilentz's concurrence in Perini, the Tretina Court announced that a heightened standard of deference would apply in private-sector arbitration awards and that such awards should be "final, not subject to judicial review absent fraud, corruption, or similar wrongdoing on the part of the arbitrators." Tretina, 135 N.J. at 357 (quoting Perini, 129 N.J. at 519 (Wilentz, C.J., concurring)). The panel abandoned that approach.



Additionally, if the Appellate Division believed that the Arbitrator wrongly based Plaintiff's \$4.9 million award on the value of his combined management and membership interests, then the panel should have vacated the entirety of the award. Under the New Jersey Arbitration Act ("NJAA"), a court may modify an arbitration award on a claim only if the "claim [was] not submitted to the arbitrator and the award may be corrected without affecting the merits of the decision upon the claims submitted." N.J.S.A. 2A:23B-24. Here, the Arbitrator expressly held that the \$4.9 million damages award was intended to compensate Plaintiff for all of his losses, including his interests as both a manager and member of KABR. Accordingly, if the membership interest was not litigated, the Appellate Division erred by permitting the entire \$4.9 million award to stand solely on Plaintiff's management interest.

Certification is warranted because (1) the Appellate Division decision is in direct conflict with this Court's precedent and the NJAA, (2) the issues raised are of general public importance, and (3) the panel's failure to adhere to a standard of heightened deference in reviewing a private-sector arbitration award is in the interest of justice. See R. 2:12-4.

### **STATEMENT OF THE MATTER PRESENTED**

- I. The Parties Agree to Arbitrate All Claims Related to Rappaport's Dissolution or Dissociation from KABR.

On March 25, 2019, Plaintiff-Respondent Laurence Rappaport (“Rappaport” or “Claimant”), filed a 23-count complaint against Defendants-Petitioners alleging that he was wrongly terminated as an officer and member of KABR<sup>1</sup> (“2019 Action”). (See Pa111-83.) Defendants moved to compel arbitration pursuant to operating agreements with enforceable arbitration clauses. The parties entered into a Stipulation and Order of Dismissal and agreed to arbitrate all disputes before the Hon. James Zazzali (ret.). (Pa184-90.)

The parties agreed to arbitrate any disputed issues regarding Rappaport’s interests as a member and manager of KABR. The Arbitration Agreement stated:

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 . . . (collectively, the “KABR Management Companies”) by submitting their claims and defenses to arbitration.

[(Pa197 (emphasis added).)]

The Arbitration Agreement provided that it would be governed by the

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<sup>1</sup> KABR is a real estate management business and includes KABR Management, L.L.C. (KABR I), KABR Management II, LLC (KABR II), KABR Management III, LLC (KABR III), KABR Management IV, LLC (KABR IV), and Rapad Real Estate Management, L.L.C. (Rapad).

Commercial Arbitration Rules of the American Arbitration Association, the NJAA, and New Jersey law, with any conflict to be decided by the arbitrator. (Pa198.) It also provided that the arbitrator would provide a reasoned award and his ruling would be final and binding except as provided by the NJAA. (Ibid.)

II. The Arbitrator’s Initial Award: “I deny the requested \$25M in carried interest.”

On August 29, 2019, Rappaport submitted twenty-five Arbitration Claims against Defendants seeking compensatory damages for his termination as both a manager and a member of KABR. (Pa306-84). He sought reinstatement or, alternatively, compensation for his management and membership interests. (Pa337-84.) Defendants sought a declaration that Rappaport “has properly been or may be terminated from all of the KABR Entities and is not entitled to any further compensation” from KABR. (Pa387-93.)

In early 2020, during a 13-day evidentiary hearing, the Arbitrator listened to the testimony of multiple witnesses and reviewed hundreds of exhibits. (Pa1881.) The Arbitrator heard substantial testimony concerning Rappaport’s claim for damages, including lost profits and carried interest and the direct correlation between those types of compensation.<sup>2</sup> Defendants disputed

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<sup>2</sup> Carried interest is a performance fee rewarding KABR for profitable management of the KABR Funds’ investments. After management fees are paid

Rappaport's claim for carried interest. (Pa1319-23.)

In a January 9, 2020 mid-arbitration motion, Rappaport sought declaratory relief that he was fully vested in the KABR entities. (Pa1092.) He urged the Arbitrator to "enter a judgment requiring that various compensation due him as a member of the KABR Entities continue to be paid pursuant to the terms of the operating agreements for KABR Entities." (Ibid.) The Appellate Division acknowledged that Rappaport's motion was a claim of entitlement to "carried interest." (34a.)

On January 14, 2020, Rappaport testified that he was asserting a claim for both lost profits and \$25 million in carried interest. (Pa1440; Da4.) On direct examination, Rappaport engaged in the following colloquy with his attorney.

[RAPPAPORT'S COUNSEL]: With respect to this . . . arbitration, are you asserting any claims with respect to your carried interest?

[RAPPAPORT]: I'm asserting the fact that I am entitled to that and I am fully vested in the carried interest.

. . .  
[RAPPAPORT'S COUNSEL]: And what do you estimate your carried interest to be?

[RAPPAPORT]: Last time that it was valued, which was I think 2018, the total carried interest was somewhere in the \$25 million neighborhood. I'm not a hundred percent sure.

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and KABR Fund investors are paid back their capital plus a preferred return, the Funds and KABR, and, therefore, the managers, split any excess returns.

[(Pa1440.)]

Rappaport's counsel also addressed Rappaport's entitlement to carried interest in his closing.

Now, your Honor, section 6.3 of the operating agreements all clearly state that any member that leaves the company for whatever reason is entitled to . . . the carried interest in perpetuity, as he would receive as a member.

. . .  
Mr. Rappaport is fully vested in the management companies, including KABR Management I through IV and Rapad. We ask that the monies outlined in the independent expert report of EisnerAmper be awarded, there be a full award of all future carried interests, all monies distributed of the operating income until dissolution in perpetuity . . .

[(Pa1101; Pa1104-05.)]

In his Post-Hearing Brief, Rappaport sought a declaratory judgment, arguing that he should be reinstated as a member and manager of KABR and that he was entitled to continued distributions. (Pa1203-04.) Alternatively, he sought substantial damages for lost profits (which included treble damages) plus \$25 million for his membership right to carried interest. (Pa1203.)

In their Post-Hearing Brief, Defendants argued that Rappaport was, at most, entitled to his capital accounts but not lost profits. (Pa1243-1330.) Defendants also argued that under the Operating Agreements, a dissociated member or a member forced to withdraw was not entitled to carried interest

and, in any event, Rappaport failed to prove the value of any carried interest. (Pa1319-21.)

In issuing his Interim Final Arbitration Award (“Initial Award”), the Arbitrator acknowledged the nature and scope of the dispute under the Arbitration Agreement and stated that he was applying New Jersey law. (Pa207-42.) The Arbitrator found Rappaport was wrongfully terminated. Nevertheless, in discussing the factors set forth in the New Jersey Revised Uniform Limited Liability Company Act (“RULLCA”), N.J.S.A. 42:2C-1 to -94, the Arbitrator denied Rappaport’s request for a declaration (1) nullifying his termination, (2) reinstating him as CEO, and (3) entitling him to compensation in perpetuity under the various operating agreements.

The Arbitrator awarded Rappaport damages in the amount of \$4,900,000 (including a return of his invested capital of \$13,455), minus \$1,048,853 credited to Defendants for a management-fee counterclaim. Rappaport received a net award of \$3,851,147. (Pa239-42.) In a section titled “Carried Interest,” the Arbitrator expressly rejected Rappaport’s request for carried interest.

The Arbitrator noted that “Rappaport seeks carried interest, claiming that he is owed \$25M on carried interest as of 2018.” (Pa237.) The Arbitrator accepted Defendants’ arguments that Rappaport “failed to prove the value of any carried interest in KABR I through IV [and] is not entitled to carried

interest.” (Ibid.) In exercising his discretion, the Arbitrator stated, “I deny the requested \$25M in carried interest but I award Claimant the sum of \$13,455,” adding that a \$4.9 million award was a “fair and just result.” (Pa237; Pa241.)

III. The Final Award: Rappaport “has not established by a preponderance of the credible evidence that he has proven carried interest.”

Rappaport requested that the Arbitrator reconsider the Initial Award. Rappaport argued that he was entitled to future carried interest payments as a member of KABR. (Pa1332-44.) The Arbitrator issued his second award (“Final Award”) and affirmed his denial of any carried interest to Rappaport. He stated, in relevant part:

I denied Claimant’s request for \$25M in carried interest but awarded \$13,455, the total value of his capital account in KABR I through IV. . . . I previously denied the Claimant’s request of \$25M. That decision stands. I denied the claim in an exercise of discretion after a review of the entire record. . . . I find that Claimant has not established by a preponderance of the credible evidence that he has proven carried interest . . . [or] the value of his current interest at the time of his termination.

[(Pa244-63 (emphasis added).)]

IV. Superior Court’s Order Remanding the Award: “Chief Justice Zazzali could not have been clearer, that he was denying carried interest.”

In December 2020, Rappaport demanded an accounting and commenced a second action against Defendants in the Superior Court, Chancery Division,

Bergen County (“2020 Complaint”).<sup>3</sup> (Pa298; Pa1679-1714.) Rappaport’s 2020 Complaint raised ten separate counts for relief against Defendants, all of which were already fully litigated in the arbitration.

Defendants filed a motion in the 2019 Action to confirm the Award. (Pa185-90.) Rappaport filed a competing motion in the 2019 Action for an order confirming the Arbitration Award to the extent that it did not deprive him of his status as a member of KABR, or, alternatively vacating or modifying the Award. Defendants moved to dismiss the 2020 Complaint.

At a hearing in Superior Court, Rappaport argued that “the Chief Justice found that [the Operating Agreements] are enforceable and valid, and that [he is] entitled to all compensation as if he was a member forever.” (1T31-25 to 32-2.)<sup>4</sup> Defendants replied that the Arbitrator had twice rejected Rappaport’s claim for carried interest as a member of KABR. (1T14-14 to 14-16.) The court remanded to the Arbitrator to resolve that dispute. (1T6-8 to 6-23.)

V. The Arbitrator: The \$4.9 million Award compensates Rappaport for his damages “as a manager and member of the KABR Entities.”

On remand, the parties submitted briefs on the issue of whether the Award

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<sup>3</sup> Defendants fully paid the amounts due under the Award.

<sup>4</sup> The Superior Court held hearings on the parties’ various motions on March 26, 2021 and August 31, 2021. “1T” refers to the March 26, 2021 hearing transcript; and “2T” refers to the August 31, 2021 hearing transcript.



fully compensated Rappaport for his interests both as a manager and member of KABR. The Arbitrator held a hearing during which Rappaport's counsel admitted that "the only item" Rappaport sought through his actions and motion practice was "carried interest." (Pa2089-2113; Pa2288.)

In entering his "Remand Order," the Arbitrator explained that he had denied Rappaport's claim for carried interest multiple times and that he "intended that the \$4.9 million Award represent full, just and complete compensation to [Rappaport] for his damages against [Defendants] both as a manager and member of the KABR Entities." (Pa2286-98.)

VI. The Confirmation Order: "[T]he [A]rbitrator carefully reviewed and considered the record."

Following the Remand Order, at a hearing to decide whether to confirm the Arbitration Award, the trial court noted that the purpose of the Arbitration Agreement "was to resolve all the claims between the parties." (2T50-8 to 50-22.) He stated that the parties could not "have really presented much more of a record" and that "the [A]rbitrator carefully reviewed and considered the record." (2T55-21 to 56-2.) And he found that carried interest was repeatedly raised throughout the arbitration. (2T59-17 to 59-24.) The court confirmed the award, rejecting Rappaport's arguments that the Arbitrator had exceeded his authority or misapplied New Jersey law. (2T60-19 to 61-8.) Rappaport appealed.

VII. The Panel: "Rappaport's membership interest in the KABR entities was not

an issue presented to the arbitrator as a claim to be ruled upon.”

The Appellate Division reversed the trial court’s confirmation of the Arbitration Award. The Appellate Division rejected the Arbitrator’s ruling that Rappaport submitted a \$25 million claim for carried interest. It held that “Rappaport’s membership interest in the KABR entities was not an issue presented to the [A]rbitrator as a claim to be ruled upon.” (26a.) The Appellate Division disregarded Rappaport’s direct testimony that he was asserting a claim for \$25 million in carried interest, mistakenly finding that the testimony was given in response to sua sponte questioning by the Arbitrator. (27a; 39a.) The appellate court acknowledged that “the Arbitration Agreement specifically references dissociation” and that Rappaport asserted a claim for minority oppression, which triggered the Arbitrator’s authority to dissociate him as a member and value his membership interest. Nevertheless, it incongruously found that “neither party had notice [that] Rappaport’s fair value or fair market value interest after dissociation would be included in the arbitration award.” (31a; 37a.) The panel affirmed the Arbitrator’s award in all respects, except to the extent the Award included damages for Rappaport’s membership interest in KABR. The panel imposed its own award of \$4.9 million in damages for Rappaport’s interest solely as a manager, and reinstated Rappaport’s claim for additional damages for the value of his membership interest.

### **QUESTIONS PRESENTED**

(1) Whether the Appellate Division erred by violating the dictates of Tretina by disregarding the Arbitrator's Award and making its own fact findings after the parties submitted their dispute to binding arbitration?

(2) Where the Arbitration Award covered damages for both management and membership interests, did the Appellate Division err in letting the entire Award stand after vacating the portion covering membership interest?

### **ERRORS COMPLAINED OF AND GROUNDS FOR CERTIFICATION**

(1) This Court held in Tretina that a court must confirm an arbitration award in the absence of egregious wrongdoing or one of the very specific mistakes delineated by the Legislature. 135 N.J. at 358. In Tretina, the Court adopted Chief Justice Wilentz's concurrence in Perini in which he expounded on the limited scope of judicial review in private-sector arbitration awards. Id. at 357-58. In that concurrence, he asserted that "[a]rbitration 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. . . . They can be corrected or modified only for very specifically defined mistakes as set forth in [the arbitration statute]." Id. at 357-58 (quoting Perini, 129 N.J. at 548 (Wilentz, C.J., concurring)). "[M]odification or correction of awards based on factual errors, is extremely limited." Perini, 129 N.J. at 542.

This Court has recognized that “[p]arties enter commercial contracts voluntarily” and “act without any compulsion to deal with each other.” Tretina, 135 N.J. at 362. “Parties who choose arbitration should not be put through a litigation wringer. . . . The only questions are: were the arbitrators honest, and did they stay within the bounds of the arbitration agreement?” Perini, 129 N.J. at 519.

The Appellate Division did precisely what Tretina forbids in reviewing a private-sector arbitration -- it conducted a de novo review of the record, weighed witness testimony, and determined whether a claim was adequately presented to an arbitrator, affording no deference to the arbitrator’s findings. Whether Rappaport had a membership interest (or a right to any carried interest) was indisputably within the scope of the Arbitration Agreement. The parties presented evidence addressing the issue, and the Arbitrator ruled on that issue. The panel’s opinion undermines the highly deferential review standard set forth in Tretina. Courts do not have a roving commission to upset an arbitrator’s honest and reasoned decision that an issue was adequately raised and properly fell within the scope of the arbitration.

Second, the Appellate Division ignored not only the record, but also the heightened standard of review articulated in Tretina by impermissibly expanding the scope of judicial review and allowing the reviewing court to

reverse an award where it disagrees with the arbitrator's conclusions. In so doing, the Appellate Division has established a dangerous precedent -- in conflict with nearly thirty-years of precedent -- by providing a new avenue for a reviewing court to substitute its judgment for that of the arbitrator.

The parties chose a non-judicial forum to resolve their disputes and bargained for the Arbitrator to render a decision on their claims. The Appellate Division overstepped its limited role. Instead of determining whether the Arbitrator committed an egregious error, the panel played an active fact-finding role. But it is not the function of a reviewing court to correct an arbitrator's factual mistakes or scour the record for one. Here, the panel substituted itself for an experienced and seasoned Arbitrator. In doing so, it misconstrued the record, made factual and legal errors, and undermined the sanctity and finality of arbitration awards. Allowing such a precedent to stand will distort the role of courts in reviewing private-sector arbitrations.

Third, the Appellate Division committed a gross factual error in finding that Rappaport only testified about the value of his membership interest in response to sua sponte questions by the Arbitrator. Rappaport testified on his direct examination (and reaffirmed in his post-hearing brief) that he was seeking \$25 million in carried interest. That testimony was in response to questions from his attorney, not the Arbitrator. The panel's distorted view of the record

led to its mistaken belief that the Arbitrator injected the issue of carried interest to the surprise of an unwary party. That mistake, in part, explains the panel's overstepping its bounds.

(2) The Appellate Division clearly erred in holding that the Arbitrator ruled on a matter not submitted to him. But even if the panel were correct, it was required to vacate the entirety of the Award and remand for new proceedings. The Arbitrator intended the Arbitration Award to encompass Rappaport's interests as both a manager and member of KABR. Yet, the panel held that the Arbitration Award was only applicable to Rappaport's interest as a manager and not as a member. The panel had no authority to hold that an Award intended to cover both management and membership interests represented solely Plaintiff's management interest. In so doing, the panel -- contrary to the explicit language of N.J.S.A. 2A:23B-24 -- improperly modified the award in a manner directly at odds with the merits of the Arbitrator's decision.

This modification of the Award flies in the face of Tretina, which concluded that "the Legislature intended that courts correct mistakes that are obvious and simple-errors that can be fixed without a remand and without the services of an experienced arbitrator." 135 N.J. at 360. The panel's decision, reallocating damages to only half of the issues decided by the Arbitrator, undermines the clear legislative intent of N.J.S.A. 2A:23B-24 and rewrites this

Court's jurisprudence. The panel's decision must be reversed.

### **COMMENTS ON THE APPELLATE DIVISION'S DECISION**

#### **I. The Appellate Division Erred in its Review of the Award.**

Neither the case law nor the NJAA empowers the Appellate Division to conduct what, in effect, occurred here -- a de novo review of a private-sector arbitration award. By broadening the scope of judicial review, the Appellate Division opinion, if left uncorrected, will encourage courts to second-guess an arbitrator's award and become entangled in the arbitration process.<sup>5</sup>

Here, sophisticated parties elected to have their dispute decided by an experienced arbitrator and avoid the civil justice process. The appellate court did not review the arbitration award under Tretina's heightened standard of deference. Nor did it limit its review to determining if "the arbitrators [were] honest, and did they stay within the bounds of the arbitration agreement." Perini, 129 N.J. at 519. Courts must be reminded that a disagreement with an arbitrator about whether an issue was adequately presented during an arbitration is not a basis to modify an arbitration award. Here, the Arbitrator stated multiple

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<sup>5</sup> Although the opinion is an "unpublished" decision, it is posted on the internet and widely accessible on Google, Westlaw, and LexisNexis. It hardly needs stating that the bench and bar will be influenced by this opinion if it stands. See Law Journal Editorial Board, Tread Carefully in Citing Unpublished Opinions, N.J. L.J. (Sept. 18, 2022) <https://www.law.com/njlawjournal/2022/09/18/tread-carefully-in-citing-unpublished-opinions/?slreturn=20230905110544>.

times that he “denied carried interest” and concluded that “the \$4.9 million Award represents full, just, and complete compensation to [Rappaport] for his damages against [Defendants] both as a manager and member of the KABR Entities.” (Pa2286-89.) The Appellate Division disregarded not just the Arbitrator’s determination but also the trial court’s confirmation of the Award. The panel simply made its own finding that carried interest was not submitted to the Arbitrator despite a record that clearly indicated otherwise.

In making that determination, the Appellate Division did not afford the requisite deference to the Arbitrator, who conducted lengthy and thorough arbitration proceedings over many days of hearings and reviewed thousands of pages of pleadings, briefs, and other relevant documents. This case illustrates the perils that arise when a reviewing court sheds its deferential role and attempts to become a factfinder. Regrettably, the panel misread the hearing transcript and wrongly concluded that the Arbitrator, not Rappaport’s attorney, raised the issue of carried interest during testimony. It was Rappaport who testified that he was entitled to \$25 million in carried interest in responding to questions by his counsel. It was Rappaport who requested \$25 million in damages for carried interest in his attorney’s summation and his post-hearing brief. The panel misconstrued the record, which distorted its review of the Arbitration Award.



The standard of review of private-sector arbitration agreements is an issue of general public importance and a matter of grave concern to the bar as alternative dispute resolution has become a more frequent and feasible way of resolving cases outside of the judicial process. The bar needs to know whether Tretina stands for what it says. The Appellate Division referenced Tretina in a scant two sentences, without any analysis of the principles guiding this Court's opinion in that case. (See 38a.) Every ground for granting certification is presented here.

## II. The Appellate Division Erred in Modifying the Award.

Although N.J.S.A. 2A:23B-24 states that an award can be modified or corrected where an arbitrator renders an award on a claim not submitted to the arbitrator, a reviewing court may do so only if “the award may be corrected without affecting the merits of the decision upon the claims submitted.” The Appellate Division breached that statutory directive. The Arbitrator awarded Rappaport \$4.9 million to compensate him for his interests as both a manager and member of KABR. (Pa2289.) Nevertheless, the Appellate Division “modified” the Award by allowing the entire \$4.9 million Award to stand as damages solely for Rappaport's interest as a manager. The panel exceeded the scope of review provided by the NJAA.

The panel's opinion, moreover, is in conflict with this Court's precedents.

As explained by Chief Justice Wilentz’s concurrence in Perini, “modification or correction is allowed . . . when the arbitrators awarded upon a matter not submitted to them . . . unless they had to do so in order to decide that which was submitted[.]” 129 N.J. at 541-42 (citation and internal quotation omitted) (emphasis added). Here, the panel determined that the Arbitrator was within his rights to dissociate Rappaport under the Arbitration Agreement. (31a.) Having done so, the Arbitrator awarded Rappaport damages for his interest as a manager and a member of KABR. Nevertheless, the Appellate Division affirmed the totality of the damages award, even though it vacated the portion related to Rappaport’s membership interest.

Under Tretina and Perini, and the NJAA, if the Appellate Division believed the Arbitrator ruled on a matter not submitted to him, it was obligated to either let the Award stand (because the Arbitrator had to consider Rappaport’s claim for damages as a member in order to decide Rappaport’s related claim for damages as a manager) or modify the award by vacating the damages award in toto. What it could not do was vacate half of the arbitration award.

This issue also meets the standard for certification.

### **CONCLUSION**

For the foregoing reasons, Defendants-Petitioners respectfully request that the Court grant this Petition for Certification.

**CERTIFICATION OF COUNSEL**

The undersigned counsel for Defendants-Petitioners hereby certify that this petition presents substantial questions and is filed in good faith and not for the purposes of delay.

Respectfully Submitted,

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