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.

BRIEF OF PLAINTIFF-RESPONDENT IN OPPOSITION TO PETITION FOR CERTIFICATION

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Defendants-Petitioners.

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

Plaintiff-Respondent,

– 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.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes and Other Authorities:

PRELIMINARY STATEMENT

In this private arbitration, it is undisputed that the arbitrator found 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 of certain companies ("KABR Entities"). It is also undisputed that the arbitrator held all of the controlling operating agreements to be valid and enforceable. The arbitrator awarded Rappaport a net amount of more than $3.8 million dollars for wrongful termination as an officer.

Yet, despite neither party asserting any claim for dissociation, divesture, or a buy-out of Rappaport's membership interest in the KABR Entities, the arbitrator sua sponte stripped Rappaport of his membership interests and his future carried interest contrary to the operating agreements, the arbitration agreement as well as New Jersey and Delaware law for $13,000, which was the then-value of his capital account. The arbitrator did so for the express reason that Rappaport failed to prove by a preponderance of the evidence the value of his membership interest. The result unjustly rewarded the Defendants for their bad faith termination of Rappaport with a windfall of millions of dollars.

Recognizing that the Chancery Court erred in confirming an arbitration award on a claim not asserted in any of the pleadings, the Appellate Division vacated the confirmation and modified the award to exclude any redemption of Rappaport's membership interests, including any future carried interest accruing after the conclusion of arbitration testimony. The Appellate Division otherwise affirmed the arbitration award in an unpublished, nonprecedential opinion.

In Tretina Printing, Inc. v. Fitzpatrick & Associates, Inc., 135 N.J. 349 (1994), this Court held that if "arbitrators decide a claim not even submitted to them, that matter can be excluded from the award." New Jersey lawmakers reaffirmed Tretina, by adopting the Revised Uniform Arbitration Act, N.J.S.A. 2A:23B-1 et seq. (2003) ("RUAA"), which requires a court to modify or correct the award if the arbitrator made an award on a **claim** not submitted and the award may be corrected without affecting the merits of the claims actually pleaded.

The Defendants ask this Court to grant certification to instead hold that arbitration awards are not subject to judicial review "absent fraud, corruption or similar wrongdoing" in direct contravention of the RUAA. No court has ever accepted this position since the passage of the RUAA. Even Tretina itself required modification for claims not submitted.

The Defendants also ask this Court to decide whether the Appellate Division erred by not vacating the entire award and instead confirming that

portion of the damages for Rappaport's wrongful termination as a manager, claims which were actually pleaded. The Appellate Division modified the award to exclude damages for divestiture of Rappaport's membership interest, including any future carried interest accruing after the conclusion of arbitration testimony. See 39a. The $13,000 in damages for the value of Rappaport's capital account does not affect the merits of the claims for wrongful termination as a manager and officer that were actually submitted to the arbitrator. The Appellate Division effectively applied Tretina and the RUAA.

Finally, neither question presents an issue of recurring importance or meaningful conflict. Despite their breathless claims that the Appellate Division's per curium, unpublished, non-precedential opinion "throws into confusion the proper scope of appellate review of private-sector arbitration awards," and "raise[s issues] of general public importance," the Defendants point to no evidence that courts apply the modification statute improperly. At the same time, the precise requirement of the Defendants to plead a dissociation and divesture claim in private arbitration before obtaining an order divesting or dissociating an LLC member has arisen infrequently, if at all, no doubt because the distinction only matters in cases in which the party fails to do so, but the arbitrator still divests the member. Instead, as the Appellate Division recognized, the interest of justice warrants its decision and order. See, e.g., 39a.

QUESTIONS PRESENTED

1. Whether the Appellate Division was correct in applying Tretina and the RUAA's requirement that courts must modify arbitration awards to strike those damages that the arbitrator determined a party failed to prove when that claim that was not pleaded, was disavowed by the parties, and was not part of the statement of issues submitted to the arbitrator post-hearing.

2. Whether the Appellate Division was correct in modifying only that portion of the award concerning damages that divested Rappaport of his membership interest, rather than vacating the whole award on claims actually pleaded.

STATEMENT OF THE CASE/STATEMENT OF MATTERS INVOLVED

After nearly a decade in his roles as an officer and director at the KABR Entities, the Defendants wrongfully terminated Rappaport from those titles, by executing a series of written consents in January and August 2019. See Pa394-Pa403.[1] Specifically, Defendants' written consents stated that Rappaport was being removed as an officer and director, not as a member. See id.

With the execution of these written consents, Defendants stopped paying Rappaport guaranteed payments and his proportional share of the management

[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' Brief in Support of Petition for Certification dated October 11, 2023 as "Pet. Br."

and construction fees earned by the KABR Entities, to which certain employees and managers were entitled. See, e.g., Pa2092. However, Defendants continued to make carried interest payments to Rappaport as was his right as a member of the KABR Entities. See Pa2092; Pa891. Rappaport initiated an action by way of verified complaint and order to show cause as a result of the wrongful termination of his titles ("2019 Chancery Action"). See Pa111-Pa183.

In opposition to the order to show cause, Defendants expressly stated that "Rappaport is also a minority member in each of the KABR Entities," 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, Plaintiff'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).

The dispute was submitted to arbitration pursuant to an arbitration agreement. 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." Pa208. In the first instance, the claims asserted in the 2019 Chancery Action did not include a claim for carried interest, nor cancellation or redemption of Rappaport's membership interest or rights as a nonworking member of the KABR Entities. See generally Pa1678-Pa1714, Pa304-Pa384, Pa385-Pa393; see also 1T7-17 to 7-20; Accord 1T48-21 to 48-25.

The parties' arbitration claims submitted on August 19, 2019 did not include a claim for carried interest or cancellation or redemption of Rappaport's membership interest. See Pa304-Pa384, Pa385-Pa393. In fact, the opening paragraph of Defendants' statement of claim was clear as to the scope of their claim: "[Defendants] submit this Statement of Claims against Laurence J. Rappaport for ... behavior **as a manager, officer and director of the KABR Entities**." See Pa387 (emphasis added).

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." 37a.

Defendants then expressly waived any claim as to Rappaport's membership interest and future carried interest rights in the arbitration by representing not once, but twice, to the arbitrator, in written submissions that Rappaport's wrongful termination as an officer "**has nothing to do with his status as an equity owner**," including in a submission three business days before the start of the hearing. See Pra33 (emphasis original), Pa1904 (emphasis original).

Moreover, while disavowing that Rappaport's membership interest, including rights to future carried interest, were part of the arbitration, the Defendants continued to pay Rappaport carried interest as a member during the pendency of arbitration despite stopping his compensation as a manager by way of management fees. See Pb9-Pb13; Pb17-Pb18. During the arbitration, the Defendants denied that Rappaport's membership interest and carried interest were part of the Defendants' projections for damages. See ibid; Pa2172. The expert with respect to Rappaport's damages likewise disavowed that membership interest and carried interest were part of his projections on the claims actually submitted. See, e.g., Pa1514. After the arbitration hearing, the parties submitted a post-hearing list of issues for the arbitrator to decide, none

of which addressed a claim to dissociate, divest, or buy-out Rappaport of his membership interest and associated carried interest. See Pra37-Pra40.

After the hearing, Rappaport repeatedly argued that any claim to dissociate or divest him of his membership interest would violate the arbitration agreement, American Arbitration Association ("AAA") Rules, the RUAA, and due process. See Pa1196-Pa1203. After ruling that the Defendants had wrongfully terminated Rappaport, the arbitrator analyzed all the claims submitted to him by the parties, finding for Rappaport in some and denying others. 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 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. Pa2248.

REASONS FOR DENYING THE PETITION

Neither the actions of the Appellate Division nor the Defendants' arguments regarding the application of the case law present any novel issue

worthy of this Court's review. The Appellate Division applied straightforward precedent and applied it in the correct manner.

I. The First Question Presented Does Not Warrant Review.

A. The Appellate Division's Decision is Correct.

As the Appellate Division described in detail on pages 25 through 39 of its opinion, and as Rappaport addressed at length in his appellate briefs (i.e. on pages Pb7-Pb23, Pb70-Pb72, Prb1-Pbr28), there was no claim in any of the arbitration pleadings for divesture and dissociation, the Defendants' pre-hearing actions confirmed that divesture was not part of the arbitration, and Rappaport's efforts to raise due process violations by permitting divesture post-hearing does not negate the reality that the arbitrator sua sponte divested Rappaport of his membership interest and his right to future carried interest flowing therefrom, when such a claim was not ripe, not raised in the arbitration, and disavowed by the Defendants as part of the arbitration until after the close of evidence.

In Tretina and the RUAA, a court is required to modify an award when the arbitrator rules on a claim not submitted. The Defendants nevertheless repeat tired arguments that Rappaport's arbitration pleading did seek damages for termination as a member. This is patently false.

Nor did the Appellate Division misapply Tretina in its opinion modifying the damages portion of award to reflect the claims actually submitted. The

Appellate Division, in fact, left untouched any issue regarding the wrongful termination of Rappaport as an officer and director. Moreover, despite the lack of an express claim for dissociation, the Appellate Division permitted dissociation of Rappaport under the guise of the arbitrator's powers pursuant to the minority oppression statute, even though doing so would permit dissociating the prevailing party who had been wrongfully terminated in bad faith. The Appellate Division simply addressed the reality that Rappaport's right to the value of his membership interest did not become ripe until the award sua sponte dissociated him, and that he was not on notice of his obligation to prove its value. Since the arbitrator sua sponte forced a buy-out of his membership interest, including post-award future carried interest, due process, ripeness, the RUAA, and Tretina, all required modification for the limited purpose of addressing the damages for a remedy not pleaded.

B. Contrary to the Defendants' Assertion, There Is No Conflict with Other Decisions nor Is It a Matter of Public Importance.

The Appellate Division's opinion is not precedential. It is unpublished. It affects only the parties to the case. Tellingly, the Defendants do not cite to a single decision of any court in conflict with the Appellate Division's application of the modification requirements under the RUAA. Instead, the Defendants rely on familiar boilerplate about the deference owed to arbitration awards, but this is not the typical private party arbitration. As this Court held in the very case

the Defendants cite, arbitration awards must be modified when they rule on claims not submitted to the arbitrator. Tretina, 135 N.J. at 358.

In an attempt to evade this reality, the Defendants' submission is a memorandum of misdirection to the Court. As detailed herein, the Defendants misrepresent the record—from the claims actually asserted, to the award actually rendered, to the undisputed arbitration evidence, to the arguments Rappaport actually presented to Appellate Division.

C. The Interests of Justice Warranted the Appellate Division's Order.

The interests of justice weigh in favor of leaving the Appellate Division's decision undisturbed. The arbitrator, trial court, and Appellate Division all recognize that Rappaport was the prevailing party who had been wrongfully terminated in bad faith as an employee and manager of the KABR Entities. See, e.g., 31a. He was a founding member of the company; he is the "R" in "KABR". See 7a; Pa1402. Yet, without notice, he was divested of his membership interest and the cash flow generated therefrom. See 31a; 37a. One of the KABR Entities alone paid in excess of $8,000,000 in carried interest to its members only two weeks after the award, and Defendants admittedly used their undeserved windfall of 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. If the Appellate Division's

decision is disturbed, the Defendants will have paid the "damages" for their bad faith termination of Rappaport entirely with funds to which Rappaport is entitled as part of any improper divestiture of his interest.

D. This Case is a Poor Vehicle.

This case is a poor vehicle to resolve the Defendants' first question in any event. This is a private arbitration, predicated on specific contract provisions, an arbitration agreement, statement of claims, and identifiable rules under the AAA governing procedure, all of which result in a very specific set of circumstances that have no bearing on future arbitrations generally.

II. The Second Question Presented Does Not Warrant Review.

The Defendants also ask this Court to decide whether the Appellate Division erred in not vacating the entire award and instead merely modifying the award to allow Rappaport to pursue his now ripe claims for valuation of his interest in the KABR Entities when the other claims touched on issues unrelated to his membership interest, i.e. bad faith termination as a manager. That the Appellate Division vacated a sua sponte remedy has no bearing upon the merits of the other claims that were pleaded, litigated, and arbitrated by the parties. Moreover, Rappaport's right to value his membership interest, including future carried interest since the closing of the hearing, is now ripe for adjudication.

The Defendants do not attempt to cite any case that conflicts with the Appellate Division's decision to modify the award to exclude the unripe membership interest. This matter has even less merit of importance as it is entirely driven by the rights and remedies afforded to Rappaport under the controlling operating agreements, as well as the scope of the pleadings. The merits of the wrongful termination claim are unaffected by the Appellate Division's modification of the award's sua sponte step in divesting Rappaport of his membership for $13,000 when those claims were not raised, nor ripe.

COMMENTS WITH RESPECT TO THE APPELLATE DIVISION'S DECISION

Contrary to the Defendants' contention, the Appellate Division did not make new factual findings in violation of the scope of appellate review articulated in Tretina and its prodigy. Instead, the Appellate Division engaged in a straightforward application of the N.J.S.A. 2A:23B-24 and Tretina to modify the award:

> Although Tretina[] outlines a strong presumption in favor of effectuating an arbitration award, we are compelled to modify the awards given both parties' failure to raise the value of Rappaport's membership interest as an issue at arbitration. Because we find no basis to vacate the awards entered on the claims properly brought before the arbitrator for wrongful termination, we affirm those awards as representing Rappaport's lost income and lost future income resulting from his wrongful termination as a manager. By adhering to the specifically defined criteria in

> modifying an arbitration award, we adhere to the standard set forth in Tretina and uphold the presumption favoring effectuating an arbitration award.

38a. The Appellate Division recognized that some of the trial court's legal conclusions in confirming and failing to modify the award were inconsistent with well-established law and a plain reading of the statute requiring modification. As self-announced, the Appellate Division followed the established standard of review and limitedly modified the award because Rappaport's membership interest was not a claim pleaded in the arbitration. 38a.

Both the trial court and Appellate Division agreed that there was no claim in any of the pleadings for divestiture or dissociation of Rappaport as a member of the KABR Entities. See 31a; Prb3-Prb4. Yet, as they did in the Appellate Division, see Db54, the Defendants similarly misrepresent Rappaport's statement of claims in this Court. See Pet. Br. 5. Defendants misrepresent that Rappaport's statement of claims sought "damages for his termination as both a manager and a member of KABR" including "reinstatement or, alternatively, compensation for his management and membership interests." Their assertion is simply false. The Appellate Division stated as much:

> Following the consummation of the Arbitration Agreement, the parties submitted statements of claims to the arbitrator. Rappaport again sought declaratory relief, arguing his removal from the KABR entities was ineffective and seeking reinstatement as a manager and employee. Although he claimed minority member

> oppression, he did not seek dissolution of the KABR entities, dissociation, a buy-out, or redemption of his investment interests. On the contrary, Rappaport claimed he was entitled to "seek a remedy other than dissolution" pursuant to N.J.S.A. 42:2C-48(a)(5) and (b). In addition, Rappaport sought a variety of injunctive and economic remedies, claiming defendant Pasternak engaged in a systemic campaign to oust him after he refused to participate in a new KABR V fund. In its claims against Rappaport submitted to the arbitrator, defendants detailed extensive accusations of employee and manager wrongdoing by Rappaport….
> Like Rappaport, defendants did not seek dissolution of the KABR entities, dissociation of Rappaport, a buy-out of Rappaport's investment interest, or redemption of his interest. They simply sought a declaration he was terminated for cause, which they felt deprived him of any future compensation.

11a-12a. Rather, "[D]efendants specifically excluded any claim regarding [Rappaport's] equity ownership in their statement of claims and their pre-trial briefs." 26a. As the Appellate Division correctly identified: "neither party raised the issue of dissolution, dissociation, a buy-out, or redemption in their statement of claims, pre-trial briefs, or evidence presented. Although the Arbitration Agreement specifically mentions dissociation as within the scope of the arbitration, neither party sought it." 31a. In fact, none of the KABR Entities' operating agreements permit a buy-out. See 35a-36a; Pb42-Pb47. Moreover, nowhere in the ad damnum clause of Rappaport's claims for declaratory relief and minority oppression did Rappaport seek such a declaration or a buy-out for his membership interest. See Pa340-Pa341, Pa374-Pa378.

There can be no argument against the fact that the arbitrator acted sua sponte in dissociating Rappaport. There was no claim for dissociation, no one requested Rappaport be dissociated, and in each pre-hearing submission to the trial court and to the arbitrator, the Defendants expressly disavowed any dissociation claim, stating three times that Rappaport's "removal as an officer … **has nothing to do with his status as an equity owner**." See Pa387, Pa1886; Pa1904 (emphasis original), Pra15, Pra33 (emphasis original). The Defendants emphasized that point at each step of the dispute. In their first written response to the Complaint in the trial court, in reliance on the same statement to the arbitrator in opposition to a preliminary injunction in arbitration (after the arbitration claim had been submitted), and again in the days before the hearing. See ibid. The post-hearing issues jointly created and submitted by the parties made no mention of Rappaport's membership interest, dissociation, divesture, or carried interest. See ibid. That the arbitrator then awarded $13,000 in damages on those exact claims not pleaded warranted modification.

With the Defendants making clear that his removal as an officer "**ha[d] nothing to do with his status as an equity owner**," Pa1904 (emphasis original); Pra33 (emphasis original), Rappaport had no notice that he had to prove the value of his membership interest. He simply had no notice that his membership interest was at risk before the arbitrator sua sponte inserted the issue into the

award. The first time Rappaport became aware of the fact that he had to prove the value of his membership interest (and not his income as a manager) was in the arbitration award. 31a-32a; 34a-35a.

The statute and case law are clear and unambiguous: "the 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." RUAA at § 2A:23B-24(a)(2); Block v. Plosia, 390 N.J. Super. 543 (App. Div. 2007); accord Tretina, 135 N.J. at 358. Here, dissociation, divesture, and fair value or fair market value of Rappaport's membership interest were expressly disavowed by the Defendants as part of the arbitration. Rappaport similarly disavowed such a claim existed. The arbitrator sua sponte divested Rappaport of his membership interest for the value of his capital account. The remaining claims for lost wages as a result of wrongful termination and the merits of the wrongful termination claims are unaffected by the Appellate Division's correction of award in so far as it backs out a claim which was not submitted to the arbitrator and was disavowed by the parties. Other courts have performed a similar straight forward modification of an award under parallel circumstances. See, e.g., Block, 390 N.J. Super. at 543, 552-57 (modifying arbitration award when the arbitrator awarded treble damages pursuant to the New Jersey Consumer Fraud

Act despite neither party raising a CFA claim in any pleading submitted to the arbitrator because the defendant "was entitled to reasonable notice he was facing the statutory punch of the CFA before he stepped into the arbitration ring").

While the Defendants make much of Rappaport's counsel addressing carried interest in his closing after the arbitration hearing had concluded, see Pet. Br. at 7, Rappaport's counsel rightfully asserted that Rappaport was not on notice that carried interest and divesture were part of the arbitration:

> This is another example of [Defendants] attempting to violate Mr. Rappaport's due process rights, oppress and punish him. Before pre-arbitration [sic], the carried interest was not an issue. It was not raised for good reason. KABR continued to pay Mr. Rappaport's carried interest, even after they issued consents terminating him as CEO from the KABR entities. [Defendants] testified during their depositions that Mr. Rappaport continued to be paid carried interest in November 2019, well after he was terminated from the company, and after the claim[] documents were filed.

Pa1102. Regardless, even then, Rappaport was neither asserting a claim to be divested of his membership interest nor pleading for a net payout of future carried interest. That the arbitrator then did so without notice to Rappaport prohibited due process to Rappaport by denying him the opportunity to prove its value. Doing so required modification as detailed by the Appellate Division.

This is especially true as the Appellate Division rightly held that the award is limited to the carried interest Rappaport could have been owed "at the time of

termination" and "the value of his membership interest was not ripe until the arbitrator refused to reinstate Rappaport," only then did his claim for future carried interest accrue. See 34a.

Moreover, the Defendants similarly miss the mark with respect to any colloquy regarding Rappaport's single statement in 13 days of testimony related to the value of carried interest. Upon sua sponte questioning from the arbitrator regarding the vesting provisions of the operating agreements, relevant to Rappaport's claim that he was vested in the unpaid management fees, Rappaport acknowledged that he was vested in the profits, losses, and distributions of the KABR entities. See PA1426- Pa1436. Rappaport then confirmed that the parties' discussion of damages during opening that day, 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.
> Q: Do any of those numbers address your carried interest?
> A. No they do not address carried interest.

Pa1440. Rappaport was expressly disclaiming any purported value of his carried interest as part of the damages to his claims. See id. Defendants obfuscate Rappaport's disclaimer by replacing it with ellipses. See Pet. Br. at 6. Defendants' efforts to impermissibly transmute Rappaport's partial statement

during the hearing into a claim by Defendants to dissociate, divest, and buy out Rappaport is improper. See Bound Brook Bd. of Educ. v. Ciripompa, 228 N.J. 4, 10-18 (2017) (arbitrator erred by "re-characterization of Count II [which] erroneously tasked the Board with substantiating charges it did not file with evidence it did not proffer").

There was no claim for a divesture, dissociation, or buyout. The Defendants expressly disavowed such a claim. So did Rappaport. After all evidence had been introduced, the joint statement of issues submitted by the parties to the arbitrator did not raise dissociation, divesture, buyout or the value of his membership interest. See Pra38-Pra40.

That the arbitrator then sua sponte dissociated and divested Rappaport for the value of his capital account because Rappaport failed to prove the value of his membership interest when Rappaport was not on notice of any claim against him justifies the Appellate Division's application of the RUAA. See 28a-32a. The Appellate Division's modification of the arbitration award to carve out a remedy for a claim that was never asserted, expressly disavowed by the Defendants prior to the arbitration hearing, and not ripe aligns with Tretina's mandate to modify awards on claims not submitted. See 11a-12a; 34a-38a.

CONCLUSION

For the foregoing reasons, the petition for certification should be denied.

Dated: November 16, 2023

Respectfully submitted,

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