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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 RESPONSE TO THE BRIEF SUBMITTED BY THE *AMICUS CURIAE* COMMITTEE FOR DISPUTE RESOLUTION

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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.

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PRELIMINARY STATEMENT

Plaintiff, Laurence J. Rappaport ("Rappaport"), submits this brief in response to the Committee for Dispute Resolution's arguments contained in its amicus brief, filed in support of the appeal of Defendants, 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Trust, The Rachel Pasternak 2008 Irrevocable Trust, and the KABR Group, LLC ("Defendants"), who seek to overturn a non-precedential, unpublished opinion by the Appellate Division limitedly modifying a private arbitration award to exclude a remedy not pleaded by the parties—dissociation, divesture, or a buy-out of Rappaport's membership interest in the KABR Entities—yet *sua sponte* injected by the arbitrator, who 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-book-value of his capital account, on the basis that Rappaport failed to prove by a preponderance of the evidence the value of his membership interest, an incomprehensible decision that resulted in Defendants enjoying a windfall of millions of dollars for their bad-faith termination of Rappaport. Rather than assist this Court in any fashion, the Committee confuses

the issues, mistakes the record below, including the Appellate Division's own findings, and conflates the standards that should apply to this case.

Specifically, the Committee repeatedly attacks the decision below for not having a "statutory basis for vacatur" when the plain reading of the opinion below states that it was not vacating the arbitration awards but instead modifying the awards to remove a single remedy that the arbitrator *sua sponte* injected into the case. Vacation of an arbitration award under the Revised Uniform Arbitration Act, N.J.S.A. § 2A:23B-1 et seq. ("RUAA") is governed by a completely different section of the RUAA. The Committee's discussion of **vacating** awards for wrongdoing or fraud is irrelevant to whether **modification** under the RUAA is appropriate. Its discussion obfuscates the issues, of which there are none that implicate public importance. At base, the matter before this Court involves a non-precedential, unpublished, fact-intensive appeal predicated on whether a specific claim was pleaded and disclaimed by the parties in a private arbitration proceeding—which has no impact on future litigants other than the parties to this case.

On petition further grounds to reject the Committee's arguments exist because, rather than being a "friend of the court," the Committee is simply an agent of Defendants. The timing of the Committee's filing—10 days after amicus briefs were due—reflects a coordinated effort between itself and

Defendants because the Committee failed to move for an extension of time to file and instead simply relied on Defendants' pending motion to file out-of-time. The Committee also submitted its initial, deficient papers within hours of Defendants' reply brief, regurgitating the same arguments. Removing all doubt as to the coordination efforts between the Committee and the Defendants—and Defendants attempt to use the Committee as a vehicle through which to reiterate their arguments—is the fact that the firm representing the Committee has represented KABR in the past (even when Rappaport was actively serving as CEO of KABR), and that counsel of record for the certification in support of the Committee's motion for leave to appear as *amicus curiae* recently sat on this Court's Committee on Complementary Dispute Resolution with counsel of record for Defendants.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

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.

[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

With the execution of these written consents, Defendants stopped paying Rappaport guaranteed payments and his proportional share of the management and construction fees earned by the KABR Entities, to which 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**

(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."

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.[2] 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

[2] Pursuant to R. 2:6-8, "Pb" refers to Brief of Plaintiff-Respondent in Opposition to Petition for Certification submitted November 16, 2023.

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 then book-valued capital account. In doing so, the arbitrator explained 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. Pa2248.

The arbitration award was litigated in the Chancery Court, which confirmed the award. (Pa6-Pa8). On August 11, 2023, in an unpublished opinion, the Appellate Division, in recognizing that the Chancery Court erred in confirming an arbitration award on a claim not asserted in any of the pleadings, 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. Rappaport v. Pasternak, No. A-0491-21, 2023 WL 5163391 (N.J. Super. Ct. App. Div. Aug. 11, 2023). The Appellate Division otherwise affirmed the arbitration award in an unpublished, nonprecedential opinion. Id. Specific to the purpose of this brief, on December 7, 2023, the Committee filed a motion for leave to appear as *amicus curiae*. After the Court marked the motion deficient on December 13, 2023, the Committee filed an amended motion on December 27, 2023. On January 30, 2024, Rappaport opposed the motion. On April 12, 2024, the Court granted the Committee's motion and issued a supplemental briefing schedule, pursuant to which this brief is respectfully submitted.

Importantly, the firm representing the Committee was previously retained by Rappaport on behalf of Defendants when Rappaport served as CEO of the

Defendant entities. See Certification of Laurence J. Rappaport in Opposition to Motions for Leave to Appear *Amicus Curiae* and to File Within Time by the Committee for Dispute Resolution, at ¶ 1. Schumann Hanlon Margulies, LLC—then Schumann Hanlon, LLC—was retained to perform work for the Defendant entities in connection with a KABR project in Jersey City prior to Rappaport's wrongful termination. (See id. at ¶ 2.) The firm for the Committee has an established history of representing Defendants. (See id. at ¶ 3.) Additionally, counsel for the Committee recently served on this Court's Committee for Complementary Dispute Resolution with counsel of record for Defendants in this case. (See id. at ¶ 4.)

LEGAL ARGUMENT

The transparent and untimely attempt by Defendants to take multiple bites at the apple through coordinated efforts with the Committee aside, the Committee's arguments are without merit.

POINT I

THE AMICUS MISSTATES THE RECORD, CONFUSES THE MODIFICATION STATUTE WITH THE VACATION STATUTE, AND CONFLATES THE APPELLATE DIVISION'S NON-PRECEDENTIAL, UNPUBLISHED DECISION REGARDING A PRIVATE ARBITRATION.

The Committee argues that the Appellate Division did not have a "statutory basis for vacatur." See Ab6; see also Ab4 (criticizing the court below for its role in "review and vacation of arbitral awards"). Yet, there was no vacatur; the Appellate Division did not "vacate the awards." See 38a.[3] Rather, it simply was "compelled to modify the awards" given Defendants' failure to raise divesture or dissociation of Rappaport's membership interest as a claim in the arbitration. See id. Discussion of the standards for vacating an arbitration award ignores the decision below and constitutes an attempt to confuse the Court, the antithesis of "assist[ing] in the resolution of an issue of public importance." See R. 1:13-9(a).

Even assuming *arguendo* that the Committee's intent was to extend its argument to modification of the award, such an argument is similarly unavailing. The Committee's position that courts reviewing a motion to modify an award pursuant N.J.S.A. § 2A:23B-24(a)(2) "should [be] limited to the statutory search for fundamental wrongdoing or fraud in the proceedings" ignores a plain reading of the RUAA and Tretina Printing, Inc. v. Fitzpatrick & Assocs., Inc., 135 N.J. 349 (1994). Cf. Ab6.

[3] 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).

Under the RUAA's "Grounds for Modification or Correction of Award," a court must "must modify or correct the award if: … (2) the arbitrator made an award on a claim not submitted or 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). By contrast, under RUAA's "Vacating Award" subsection, the RUAA provides that a court must vacate an award if "(1) the award was procured by corruption, fraud or other undue means." RUAA at §2A:23B-23(a)(1).

Even then though, the RUAA provides five additional situations in which the reviewing court must vacate the award, see RUAA at §§ 2A:23B-23(a)(2)-(6), four of which do not require a showing of "corruption" or "fraud." Notably, the RUAA requires vacating due to "corruption, fraud or other undue means," "**or**" for any of the reasons articulated in subsections (a)(2)-(6). To the extent that the Committee is regurgitating Defendants' position[4] that subsection (a)(1)'s "corruption, fraud or other undue means" requirement must be transmuted to every other basis for vacation or modification ignores a plain reading of the RUAA.

[4] Compare Ab6 ("review should have been limited to the statutory search for fundamental wrongdoing or fraud in the proceeding.") with Prb 3 ("The panel in this case erred in modifying the Arbitration Award because there was no hint of fraud, corruption, or similar wrongdoing by the Arbitrator.").

The "fraud, corruption, or other wrongdoing" language does not even appear in the modification subsection of the RUAA. The issue raised by the parties in this Court focuses solely on the Appellate Division's modification of the award. In fact, the Appellate Division expressly held that there was no evidence of fraud or corruption and dismissed any contention that the award should have been vacated on those grounds. 37a-38a. The joint efforts of the Defendants and the Committee to transmute the "fraud or corruption" standard to an entirely separate section of the statute is misleading and without merit.

Their joint efforts similarly fail under a plain reading of Tretina. The Tretina Court provided the standard for review of an arbitration award under the statute that preceded the RUAA. First, the Court stated that "[b]asically, arbitration awards may be **vacated** only for fraud, corruption, or similar wrongdoing on the part of the arbitrator." Tretina, 135 N.J. at 358 (quoting Perini v. Greate Bay Hotel & Casino, Inc., 129 N.J. 479, 548-49 (1992) (emphasis added)). The Court next stated that arbitration awards "can be **corrected or modified** only for very specifically defined mistakes as set forth in [N.J.S.A. § 2A:24-9.]"[5] Id. (emphasis added). The Court next provided an

[5] The RUAA superseded N.J.S.A. § 2A:24-9 effective 2003. See, e.g., Hojnowski v. Vans Skate Park, 375 N.J. Super 568, 576 n.2 (App. Div. 2005) ("The provisions of N.J.S.A. 2A:24–1 to –11 were superseded by N.J.S.A. 2A:23B–1 to –32, effective January 1, 2003. N.J.S.A. 2A:23B–31 provides that

additional rationale for modifying the award: "If the arbitrators decide a matter not even submitted to them, that matter can be excluded from the award." Id. (citing Perini, 129 N.J. at 548-49). Like the RUAA, this Court's announcement in Tretina provides a basis for modifying an award that does not require "fraud, corruption, or other wrongdoing." See id. For good reason, the prior statute—N.J.S.A. 2A:24-9—did not require "fraud, corruption or similar wrongdoing" to modify or correct an award. See Tretina, 135 N.J. at 355 (quoting N.J.S.A. 2A:24-9).

Moreover, the Committee makes the same fundamental error that Defendants make in conflating the arbitrability of any claim under the arbitration agreement and whether a claim is actually pleaded in the claim documents. While the Committee makes much of AAA Rule 7 in so far as an arbitrator has "the power to rule on his or her own jurisdiction," including the arbitrability of a claim, it ignores the AAA's requirement that any new or different claim or counterclaim must be in writing and filed with AAA and a copy shall be provided by the other party. See Pa1644. There is no dispute that neither party submitted a divesture and dissociation claim, see 11a-12a, and, as the Appellate Division noted, Defendants "specifically excluded any claim regarding

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"an arbitration agreement made before the effective date of this act is governed by N.J.S. 2A:24–1 et seq.").

[Rappaport's] equity ownership in their statement of claims and their pre-trial briefs." See 26a.

The Committee's discussion of AAA Rule 7 likewise conflates the issues raised in the petition for certification. See Pb4. As to the AAA Rules, the Committee focuses its submission on whether a claim is arbitrable within the scope of the arbitration agreement when those claims are actually pleaded. But the issue here does not implicate AAA Rule 7. Instead, the actual issue in this case is that there was not a claim for dissociation or divesture pleaded under AAA Rule 6. See Pa1644. By addressing a different issue that is not present in this matter, the Committee frustrates the parties' efforts to resolve the issues raised by the petition. The Court should refuse to entertain the Committee's misfire. See, e.g., Bethlehem Tp. Bd. of Ed. V. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 48-49 (1982).

Likewise, the Committee's reliance on a non-precedential Third Circuit opinion is similarly misplaced. See Mb5-Mb6 (quoting Richardson v. Covenrall N. Am., Inc., 811 F. App'x 100, 103 (3d Cir. 2020)). Richardson addresses the power of an arbitrator to make the determination of whether a claim actually pleaded is arbitrable, i.e. whether a claim actually pleaded is within the scope of the parties' agreement to arbitrate similar claims. Richardson did not deal with

a remedy or claim adjudicated by the arbitrator that was not pleaded in the arbitration.

By contrast, the issue on appeal here is not about whether the arbitrator, if presented with a dissociation claim, could have arbitrated such a claim, or whether he had the authority to make that determination. Compare Richardson, supra, with Block v. Plosia, 390 N.J. Super. 543, 552-555 (App. Div. 2007) (distinguishing between a party's argument that a claim was within the scope of the arbitration agreement (arbitrability) and whether the claim was in fact pleaded to satisfy the notice requirements of the RUAA). Instead, this case is about the fact no such claim was pleaded, yet the arbitrator *sua sponte* dissociated and divested in violation of well-established law, the RUAA, and this Court's precedent. See 10a-12a, 26a, 37a-38a. See also Block, 390 N.J. Super at 552-555 and Tretina, 135 N.J. at 358 (internal citations omitted).

The Committee's obfuscation of a fact-sensitive, nonprecedential, private dispute by discussing issues irrelevant to this case in a coordinated effort with Defendants to regurgitate the arguments Defendants make in their briefs does not "assist in the resolution of an issue of public importance." R. 1:13-9(a),

CONCLUSION

For all of these reasons and on the basis of the authority cited herein, Rappaport respectfully requests that the Court affirm the judgment of the Appellate Division.

Respectfully submitted,

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