CLAREMONT CONSTRUCTION GROUP, INC., Plaintiff/Respondent, v. ARC NJ, LLC, Defendant/Appellant. .	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-003246-23 TRIAL COURT DKT NO.: MRS-C-11-24 CIVIL ACTION On Appeal from the Superior Court of New Jersey , Chancery Division: Morris County Sat Below: Hon. Frank J. DeAngelis

BRIEF OF DEFENDANT-APPELLANT ARC NJ, LLC

Dated: October 17, 2024

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PRELIMINARY STATEMENT

Defendant-Appellant Arc New Jersey, LLC ("Arc") submits this brief in support of its appeal from three Orders of the Superior Court of New Jersey, Morris County, Chancery Division (the "Trial Court") dated June 12, 2024. The Orders granted Plaintiff-Respondent Claremont Construction Group, Inc.'s ("CCG's") motion to confirm an arbitration award (the "Award"), denied Arc's motion to vacate the Award, denied Arc's motion to modify the Award to correct mathematical and form errors, and denied Arc's motion for leave to assert a counterclaim for setoff of monies owed to Arc by CCG.

The arbitration which culminated in the Award concerned Arc's and CCG's respective rights and obligations pursuant to the parties' Project Transfer Agreement ("PTA") by which CCG transferred its rights in certain construction projects to Arc in exchange for Arc's payment to CCG of 65% of the Estimated Gross Profits ("EGP") for each project (made by way of "Installment Payments"). Importantly, the only projects that were subject to this payment obligation were those that achieved the status of "Backlog Project" under a procedure expressly and unambiguously set forth in the PTA.

The parties were unable to agree on the status of certain projects or the EGPs associated with those projects, and CCG ultimately terminated the PTA. Pursuant to the PTA, the parties then commenced and participated in an arbitration (the "Arbitration") in an attempt to resolve those and other disputes.

On January 19, 2024, the Arbitrator issued a preliminary award in which he ignored the explicit terms of the PTA, imposed extra-contractual obligations on Arc concerning the Installment Payments, mis-transcribed certain projects' EPGs from documents upon which he claimed to have relied, and miscalculated the interest owed on any supposedly overdue payments. Even after extensive motion practice resulting in some corrections, the final iteration of the Award still contains several computational and form errors.

CCG moved (prematurely) to confirm the Award in the Trial Court and Arc cross-moved to vacate or modify the Award. Arc also sought to assert a counterclaim for setoff against the Award for the amounts CCG owes Arc as its subcontractor on project called the Hackensack Project, because CCG, as an inoperative entity, will be unable to pay the judgment Arc will eventually obtain in that arbitration, which is currently ongoing (the "Hackensack Arbitration").

On June 12, 2024, by way of three separate Orders, the Trial Court improperly affirmed the Award, denying Arc's motion to vacate, motion to modify, and motion for leave to assert a counterclaim for setoff. In its decision, the Trial Court makes mistakes of both law and fact. First, the Trial Court determined that the Arbitrator based its conclusion that the parties agreed to certain projects' EGPs by a "course of their dealings with each other," even though the Arbitrator, in the Award, did not once opine on the parties' course of dealing or provide any supporting case law. The Trial Court also ignored the

clear terms of the PTA regarding the necessary steps for a Project to become subject to EGP payments.

As for Arc's motion for modification, the Trial Court disregarded the Award's blatant computational and form errors and oversimplified the issue as one dealing with the "method" of applying interest rates to an award. Aside from the other errors concerning the transcription of data from the exhibits and interest on incomplete projects, the error in the interest calculation is not in "method," but rather in the order of mathematical operations used to calculate the interest, resulting in an inappropriately inflated award to CCG.

Finally, the Trial Court determined that Arc's setoff claim should be determined in the Hackensack Arbitration, failing to recognize that in its claim for setoff, Arc is not seeking to debate the merits of its claim but rather protect its eventual judgment in the Hackensack Arbitration so it may collect the money owed to it even though CCG is no longer an operating entity. The Hackensack Arbitration arbitrator does not have jurisdiction over the Award.

Given the numerous errors in the Award, this Court should vacate the Award, or, alternatively modify the Award to correct both the interest calculations and the EGPs for the awarded projects so that the EGPs match those stated in the documents upon which the Award was purportedly based. In the event the Award is not vacated, this Court should permit Arc to assert a claim for setoff for the amount owed to Arc by CCG on the Hackensack Project.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

A. The Parties' Arbitration

CCG and Arc were parties to an arbitration pending before the American Arbitration Association ("AAA") captioned Claremont Construction Group, Inc. v. Arc New Jersey, LLC, Case No. 02-22-0002-2868 (the "Arbitration"). Da132-144.

The Arbitration concerned the parties' rights and obligations under the parties' Project Transfer Agreement ("PTA"), pursuant to which CCG was to transfer to Arc rights in certain projects in exchange for Arc's payment to CCG of 65% of the estimated gross profit ("EGP") for those projects, but only if the projects achieved the status of a "Backlog Project" under a procedure expressly set forth in the PTA. Da53-55; Da60-61.

The evidentiary hearing in this Arbitration took place over eight days: June 19, 20, 21, and 22 and August 21, 22, 23, and 24, 2023. Da132. Following post-hearing briefing and oral argument, and the Arbitrator entered a Final Award for the Arbitration on January 19, 2024 (the "Final Award"). Da132-144.

The Final Award contained several computational and technical errors. Pursuant to Rule 51(a) of the AAA Construction Industry Arbitration

[1] These two sections are intertwined and combined here for the Court's convenience.

Rules, Arc submitted its Motion to Modify the Final Award to Correct Computational and Technical Errors to the AAA on February 1, 2024 (the "Motion to Modify"). Da160-182. The Arbitrator granted in part Arc's Motion to Modify, issuing a Disposition of Application for Modification of Award on February 22, 2024 (the "First Disposition") that acknowledge the technical errors in the Final Award and directed the parties to calculate the interest that accrued on certain ongoing projects. Da235-36. Following further briefing by the parties on their competing interest calculation methodologies, the Arbitrator issued a Final Disposition of Application for Modification of Award on March 25, 2024 (the "Second Disposition"), accepting some of the modifications to the Final Award that were sought by Arc. Da255-262. The Arbitrator then issued a Final Disposition of Application for Modification of the Parties' Proposed Corrected Final Award on April 12, 2024 (the "Corrected Final Award"), which included as Exhibit A the parties' jointly submitted Proposed Corrected Final Award to capture the Arbitrator's rulings without prejudice to Arc's rights to further challenge the Arbitrator's erroneous calculations as allowed by law. Da242-248.

The Corrected Final Award revises the interest calculations in the Final Award and provides that Arc shall pay CCG a net amount of $3,889,835.14. Da242-248 Aside from the modification of the interest

calculation, the Corrected Final Award reaffirms the Final Award issued on January 19, 2024, the First Disposition, and the Second Disposition.[2] Id.

The Final Award, the First Disposition, the Second Disposition, and the Corrected Final Award will be referred to collectively as the "Award" for purposes of this Brief.

B. The Award

The $3,889,835.14 awarded to CCG is comprised of four determinations: (1) the amount of EGP, as defined in the PTA, that the Arbitrator determined Arc owed CCG on various construction projects, (2) the contractual interest owed by Arc to CCG on the EGP awarded by the Arbitrator, (3) the preconstruction expenses CCG owed Arc for work Arc performed for CCG on various projects, and (4) the statutory interest owed by CCG to Arc on the unpaid preconstruction expenses. Da242-248. Those specific figures are as follows:

[2] Pursuant to the Rule 51 of the AAA's Construction Industry Arbitration Rules and Mediation Procedures, to which the Arbitration was subject, "[t]he arbitrator is not empowered to redetermine the merits of any claim already decided." R. 51. Da164. Therefore, the Arbitrator lacked the power to reconsider and correct his contradictory determinations, and Arc could only seek relief in the Trial Court as its only available recourse to remedy the Arbitrator's ultra vires determinations.

Description	**Amount**
EGP Award owed to CCG	$4,310,849.48
Interest on EGP Award (corrected)	$365,644.67
Preconstruction Expenses owed to Arc	($732,533.75)
Interest on Preconstruction Expenses	($54,125.26)
SUM	$3,889,835.14

Id.

Despite acknowledging some of the technical errors in the Award, the Arbitrator failed to remedy several blatant errors in his decision concerning his interest calculations and his award of EGP for ten projects.

To the extent pertinent, the facts relating to the parties underlying disputes are embedded in the Argument below.

C. Trial Court Procedural History

On January 23, 2024, CCG prematurely filed a Complaint in the Superior Court of New Jersey, Morris County, Chancery Division (the "Trial Court") seeking judgment confirming of the Award. Da38-44. CCG also sought and obtained an Order to Show Cause, pursuant to Rule 4:67-2 (Summary Actions). Da45-48. On February 12, 2024, Arc submitted an Answer to CCG's Complaint [Da145-153], and, contemporaneously, a motion to dismiss the Complaint or, in the alternative, leave to file a counterclaim for setoff against CCG [Da154-155].

Arc moved for leave to file a counterclaim for setoff because separate from the parties' PTA, CCG failed to pay Arc $2,084,220.03 on a construction subcontract by which Arc served as a subcontractor to CCG on the Hackensack Project. Da149-151.[3] Pursuant to the dispute resolution provision in the subject subcontract, the parties are currently engaged in an arbitration concerning the unpaid portion of the subcontract contract price for the project (the "Hackensack Arbitration"). Da528-551.

In accordance with the Trial Court's April 19, 2024 Scheduling Order [Da 239-248], Arc also filed a motion to dismiss the complaint and to vacate the Award, or, alternatively, to modify the Award ("Arc's Motion to Vacate or Modify") [Da249-250].

On June 12, 2024, the Trial Court issued an Order confirming the Award, rejecting Arc's Motion to Vacate or Modify, and awarding Judgment in favor of CCG and against Arc in the amount of $3,889,835.14, plus interest. Da6-33. The Court also denied Arc's motions to dismiss by way of two Orders.

[3] CCG commenced an action in the Superior Court of New Jersey, Morris County, Chancery Division to enjoin the arbitration to which Arc filed a cross-motion to compel the arbitration. Da530-531. By Orders dated August 30, 2024, the Chancery Court denied CCG's motion to enjoin the arbitration and granted Arc's motion to dismiss the complaint and motion to compel arbitration. Da528-551. Pending resolution of CCG's motion for reconsideration, the Hackensack Arbitration will proceed. Da552.

Da34-37. On June 21, 2024, Arc filed its Notice of Appeal, appealing the three Orders. Da1-5.

The $3,889,835.14 Judgment awarded to CCG is over-secured by a $10 million payment bond procured by Arc to secure its obligations under the PTA. Da504-509.[4]

Almost immediately following the entry of the Judgment and Arc's subsequent appeal, Arc filed a Motion to Stay Execution of the Judgment Pending the Appeal ("Motion to Stay"), identifying the parties' Payment Bond that fully secures the Judgment. Da498-499. On July 19, 2024, the Trial Court granted Arc's Motion to Stay, ordering that execution of the Judgment was stayed pending Arc's appeal and finding that CCG had not "identified any reason" that approval of the Payment Bond as a form of security in lieu of a

[4] Specifically, the PTA requires Arc's obligations to CCG under the PTA to be "secured by a credit instrument or payment bond in a form acceptable to CCG . . . in the amount of Ten Million and No/100 Dollars ($10,000,000.00)." Da513. Arc's obligations to CCG includes the "Project Installments" at issue in the Arbitration plus interest. Da512. Just before executing the PTA, Arc dutifully obtained a bond dated May 31, 2019 (the "Payment Bond") from Travelers Casualty and Surety Company of America and Liberty Mutual Insurance Company (the "Sureties"). Da504-509. CCG accepted the form of Payment Bond, which by its terms "remain[s] in full force and effect until Arc "satisf[ies] its payment obligations under Section 1.7 and Article 3 of the [PTA]." Da504. Further, the "Sureties' obligations hereunder shall not arise unless . . . [Arc] is in default under the [PTA] by failing to satisfy its payment obligations under Article 3 of the [PTA]." Id.

redundant supersedeas bond "would be inadequate or unjust" (the "Order to Stay"). Da517-526.

CCG filed a motion for summary disposition, a motion to expedite the appeal, and motion to vacate the stay which this Court denied in full by Order dated September 6, 2024. Da527.

ARGUMENT

The Appellate Court "review[s] de novo a trial court's legal conclusions, including decisions to affirm or vacate arbitration awards." Pami Realty, LLC v. Locations XIX Inc., 468 N.J. Super. 546, 556 (App. Div. 2021) (internal citation omitted) (citing Yarborough v. State Operated Sch. Dist. of City of Newark, 455 N.J. Super. 136, 139 (App. Div. 2018)). The Appellate Court must "give deference to a trial court's factual findings if they are supported by substantial, credible evidence in the record but not to the application of law to those findings." Id. (citing sources); see also Del Piano v. Merrill Lynch, Pierce, Fenner & Smith Inc., 372 N.J. Super. 503, 507 (App. Div. 2004) (holding that when reviewing a trial court's decision vacating or confirming an arbitration award, findings of fact must be accepted if not clearly erroneous and questions of law are decided de novo).

Here the Arbitrator exceeded his powers by ignoring the clear terms of the PTA and imposing extra-contractual obligations on Arc. The Arbitrator also made objective errors in his calculation of interest and transcription of the

EGP from the Arbitration exhibits into the Award. The Trial Court erred when confirming the Award in both the Trial Court's rendition of the facts and its application of those facts to the law. The Trial Court also erred when it deprived Arc of the ability to assert a counterclaim for setoff against the Award, and its proposed alterative relief (that Arc file its setoff claim in the proceeding that is determining the amount of the setoff) is simply not feasible.

POINT I

THE TRIAL COURT ERRED BY CONFIRMING THE AWARD AND ENTERING JUDGMENT BECAUSE THE ARBITRATOR'S EXTRA-CONTRACTUAL FINDINGS CLEARLY AND IRRATIONALLY EXCEED THE POWERS GRANTED TO HIM UNDER THE PTA [DA31-32]

The Arbitration involved a controversy arising under a single fully integrated agreement—the PTA. The PTA is the sole source of the parties' rights and obligations. In rendering the Award, however, the Arbitrator wholly abandoned the PTA. Indeed, he strayed so far from his responsibility to interpret and apply the PTA that he created from whole cloth new and uncontemplated obligations by which he dispensed "his own brand of industrial justice."

In confirming the Award and rejecting Arc's arguments regarding the parties' obligations under the PTA, the Trial Court made two erroneous findings: (1) the Arbitrator, in ignoring the explicit language of the PTA, "found that an agreement [on the projects' EGPs] was made pursuant to the

parties' conduct in the course of their dealings with each other," and (2) Arc failed to "highlight any provision or term in the relevant contracts requiring that the parties enter into a written agreement to transform a project into a Backlog Project." Da31-32.

First, the Arbitrator did not, when concluding the parties agreed to certain EGPs for various projects, cite to or describe the parties' course of conduct. Instead he relied solely on worksheets created by Arc that supposedly (but did not) contain the EGPs he awarded. Da6-7. Second, the process by which a project is elevated to "Backlog" is not simply by written agreement and Arc did not assert as such in it Motion to Vacate or Modify. Rather the process has six steps, some of which involve the amendment of certain schedules in the PTA, and, importantly, one of which is the parties' agreement on a project's EGP, which, for the projects at issues, did not occur. See infra Point I.B.

Therefore, the Trial Court not only made mistakes of fact (i.e, the Arbitrator's justification of his EGP determinations and why projects at issue were not elevated to Backlog status) but also did not properly apply the law to the facts that do exist (i.e., an arbitrator cannot stray from the terms of the parties' contract and here, the Arbitrator created his own contractual obligations).

A. Under New Jersey law, an arbitrator exceeds his powers when he disregards the terms and conditions of the parties' agreement

New Jersey's Arbitration Act provides that "the court shall vacate an award made in the arbitration proceeding if . . . (4) an arbitrator exceeded the arbitrator's powers." N.J. Stat. Ann. § 2A:23B-23(a)(4).

As for a breach of contract cases, the meaning of the phrase "an arbitrator exceeded the arbitrator's powers" has been clearly established. "To be enforced, an arbitration award must draw its essence from the terms of the agreement executed between the parties." Knecht v. 225 River St., L.L.C., No. A-4793-10T3, 2012 WL 1020005, *3 (N.J. Super. Ct. App. Div. Mar. 28, 2012). (citing Cnty. Coll. of Morris Staff Assoc. v. Cnty. Coll. of Morris, 100 N.J. 383, 392 (1985)) [Da555]. An arbitrator exceeds his powers when he "disregard[s an] agreement's terms that are clearly and unambiguously expressed." Id. at *4. "Although arbitrators in the private sector have broad discretion in determining legal issues, they may not disregard terms and conditions set forth in the agreement. Nor may an arbitrator rewrite the contract for the parties." Id.; see Withum, Smith & Brown v. Coast Auto. Grp., Ltd., No. A-2026-10T1, 2012 WL 489020, at *3 (N.J. Super. Ct. App. Div. Feb. 16, 2012) ("In other words, because an arbitrator's powers are derived from the express terms of an agreement to arbitrate, he exceeds those powers by disregarding the terms of that agreement." (citing sources)) [Da563].

For example, in Knecht v. 225 River St., L.L.C. the Appellate Division affirmed the trial court's decision to set aside an arbitrator's award that found that the plaintiff was entitled to the return of her deposit in a failed real estate transaction. Id. at *1 [Da553-54]. The Appellate Division affirmed the trial court's finding that the arbitrator exceeded the scope of his authority by making "a better contract for plaintiff than that for which she bargained." Id. at *4 [Da555]. Specifically, the arbitrator "add[ed] new terms[,] looked beyond the four corners of the agreement and altered unambiguous terms" by ignoring the specific time limitations expressly stated in the parties' agreement concerning plaintiff's ability to obtain a mortgage or the return of her deposit. Id. at *3 [Da555]; see also Pepper ex rel. Pepper v. Sadley, No. A-3459-11T2, 2013 WL 2257842, at *2 (N.J. Super. Ct. App. Div. May 24, 2013) ("Arbitrators exceed the scope of their powers when they disregard the terms of the parties' contract or rewrite the contract for the parties. . . . To be enforced, an arbitration award must draw its essence from the terms of the agreement executed between the parties.") (citing Cnty. Coll. of Morris Staff Assoc., 100 N.J. at 391) (other internal citations omitted) [Da558]; Sutter v. Oxford Health Plans LLC, 675 F.3d 215, 220 (3d Cir. 2012), as amended (Apr. 4, 2012) ("[W]hen the arbitrator strays from interpretation and application of the agreement and effectively 'dispenses his own brand of industrial justice, he exceeds his powers and his award will be unenforceable.") (quotation marks

omitted) (quoting Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 671 (2010)); see also id. at 219-20 ("An arbitrator . . . subjects his award to judicial vacatur . . . when he . . . issues an award that is so completely irrational that it lacks support altogether."), aff'd, 569 U.S. 564 (2013).

B. The operative terms of the PTA that preclude the result reached in the Award.

The PTA is clear and unambiguous and neither party argued otherwise. Therefore, the Arbitrator was not interpreting an ambiguous contract, he was applying the terms of an unambiguous contract and did so incorrectly. Under New Jersey law, nothing outside of the "four corners" of the PTA should be used to glean the parties' intent. Namerow v. PediatriCare Assocs., LLC, 461 N.J. Super. 133, 140 (Ch. Div. 2018) ("When presented with an unambiguous contract, the court should not look outside the 'four corners' of the contract to determine the parties' intent, and parol evidence should not be used to alter the plain meaning of the contract.").

Per the PTA, CCG transferred its rights in certain projects to Arc in exchange for Arc's payment to CCG of 65% of the EGP for those projects if and only if they were to achieve the status of a Backlog Project under a procedure expressly and unambiguously set forth in the PTA. Da54-56, Da60 [PTA §§ 1.7(a), 1.6(a)(ii)(A)(1), 1.6(a)(ii)(B)(1), 3.1]. The well-defined classification of projects under the PTA are : (1) Backlog Projects, (2) Pipeline

Rights, and (3) Additional Pipeline Rights. Da51-52 [PTA §§ 1.1(a), 1.1(b)(i); 1.1(b)(ii)]. The EGP-sharing obligations stated in the PTA apply exclusively to Backlog Projects. Da55 [PTA §§ 1.7(a)].

Specifically, by its express terms, the PTA only obligates Arc to share EGP on projects that meet the definition of a Backlog Project—meaning the projects listed on Schedule 1.7(a) of the PTA, and those Pipeline Rights or Additional Pipeline Rights that transform to the status of a Backlog Project (then to be referred to as an "Additional Backlog Project") by satisfying the six specifically stated conditions for such transformation. Id. These requirements were so important to the parties that they are stated redundantly in four separate provisions of the PTA. Da51-52; Da54-55 [PTA §§ 1.1(b)(i); 1.6(a)(ii)(A)(1); 1.6(a)(ii)(B)(1); 1.7(a)].

The six conditions that must be satisfied for a Pipeline Right to become an Additional Backlog Project subject to sharing of EGP are: (i) as the name "Pipeline Rights" implies, CCG must own and control a right that is subject to transfer to Arc; (ii) the parties must come to an agreement as to the price of Arc's work; (iii) the Pipeline Right must be embodied in a Construction Contract with Arc for Arc's work; (iv) Arc and CCG must agree to EGP for the Pipeline Right, (v) as required by both Section 1.1(b)(i) and 1.6(a)(ii), Schedules 1.1(a) and 1.(b), the PTA "shall be amended" to remove the Pipeline Right from Schedule 1.1(b) and add such Right as an Additional Backlog

Project on Schedule 1.1(a); and (vi) Schedule 1.7(a) shall be amended to include such Additional Backlog Project and the agreed upon EGP (collectively, the "Additional Backlog Conditions). Id. Pursuant to Section 9.8 of the PTA, which was wholly ignored by the Arbitrator and the Trial Court, the required amendments to the Schedules 1.1(a), 1.1(b). and 1.7 to satisfy the Additional Backlog Conditions must be made " . . . only by execution of an instrument in writing signed by both of the Parties." Da81 [PTA § 9.8].

The PTA merely identifies EGP as a term that "shall be negotiated by the Parties in good faith." Da54 [PTA § 1.6(a)(ii)]. It is highly likely that the vast universe of variables at play in determining EGP in multiple project scenarios rendered it impracticable for the parties to develop a one size fits all "process" for determining EGP. Thus, they defaulted to the duty to negotiate in good faith based on the variable circumstances presented in any given project. They included the Additional Backlog Conditions in the PTA to avoid controversy by ensuring a documented meeting of the minds concerning which projects were to be subject to EGP-sharing formula in the PTA.

In the Arbitration, CCG did not make any claim that Arc breached the PTA by failing to negotiate EGP in good faith. See generally Da264-278. The PTA does not include a provision expressly addressing the consequences of the parties' failure to reach agreement as to EGP as to construction projects performed by Arc. The PTA does, however, state the Additional Backlog

Conditions, and those conditions are not satisfied in the absence of an agreement as to EGP despite the parties good faith efforts. Da51-52; Da54-55. The PTA leaves no room for CCG to receive or retain payment in any form for projects that are not properly qualified to elevate to the status of a Backlog Project by satisfying each of the six Additional Backlog Conditions.

C. The Arbitrator's extra-contractual findings clearly and irrationally exceed the powers granted to him under the PTA

Despite the PTA's clear requirements (i.e., the Additional Backlog Conditions) regarding the transformation of a project to a Backlog Project subject to EGP payments and the PTA's failure to include a method to calculate EGP other than requiring good faith negotiations, the Arbitrator went far beyond the scope of the parties' agreement by: (1) transforming projects into Backlog Projects despite no agreement among the parties as to EGP and in the complete absence of any written amendment of the PTA signed by both parties,[5] (2) claiming to rely on documents that were not signed by both parties and not prepared or identified as amendments to establish EGP as a contractual right or obligation, (3) abandoning the forecast figures in the documents that were

[5] Under New Jersey law, a Court will enforce the unambiguous terms of a contract, including a requirement that amendments be made by writing, unless there is clear and convincing evidence to prove wavier of the writing requirement. *Home Owners Constr. Co. v. Glen Rock*, 34 N.J. 305, 316 (1961) ("[The writing requirement may be expressly or impliedly waived by the clear conduct or agreement of the parties or their duly authorized representatives.").

erroneously treated by the Arbitrator as amendments to the PTA and, instead, relying exclusively on the provably incorrect EGP claimed by CCG in its Statement of Claim, and (4) determining that a project known as Bayonne 3 was subject to the PTA despite the fact that it was never eligible to be elevated to the status of a Backlog Project, and for the additional simple reason that Arc's executed the contract for that project after the date as of which the Arbitrator deemed the PTA to have been terminated by CCG. Da132-144.

The validity of the Arbitrator's interpretation of the PTA is not "reasonably debatable." Knecht, 2012 WL 1020005 at *2 (affirming the trial court's determination that "the arbitrator's interpretation of the contractual language was not reasonably debatable" and that the "arbitrator exceeded the scope of his powers by disregarding the clear terms of the parties' contract") [Da554]. Here, the Arbitrator far exceeded his powers by completely straying from the terms of the PTA and the express condition precedents for EGP liability to arise.

1. The Arbitrator improperly transformed projects into Backlog Projects subject to EGP-sharing despite the parties having no meeting of the minds regarding this transformation or the EGP for any of the subject projects.

By its express terms, the PTA only obligates Arc to share EGP on projects that meet the definition of a Backlog Project—meaning the five projects listed on Schedule 1.7(a) of the PTA, and those Pipeline Rights that

transform to the status of a Backlog Project by satisfying the six specifically stated conditions for such transformation. CCG acknowledged, however, that not a single Pipeline Right transitioned to become an Additional Backlog Project in accordance with the requirements that were so important that they are stated redundantly in four separate provisions of the PTA. Da280-288 [Tr. 357:19-358:5, 398:20-401:10].

Yet, in the exercise of extra-contractual powers, the Arbitrator proceed to award CCG unpaid EGP amounts on 10 non-Backlog projects, based on the EGP CCG alleged in its Fourth Amended Detailed Statement of Claim (the "CCG's Statement of Claim") that was amended during the Arbitration hearing. Da276.

In its Statement of Claim, CCG falsely claimed the parties agreed to an EGP for five non-Backlog projects: (1) Englewood, (2) NJCU II, (3) Miller Street (Phase II), (4) Frederick Douglas Park, and (5) Park Ridge B&M. Da268-273. CCG admitted that the parties did not agree to EGP (and therefore did not satisfy the Additional Backlog Project Conditions) for four projects: (1) E'Port, (2) St. Lucy's Shelter, (3) St. Peter's Dorm, and (4) Barclay Street. Da269-273. Nevertheless, in the complete absence of supporting proof, CCG alleged that EGP was established for these four projects by an alleged "prior course of dealing." Da269-272. Finally, CCG asserted that because Arc entered into a contract for a project known as Bayonne 3 with an "affiliate

of . . . Claremont's client and investor," Arc also owed CCG EGP payments for that project. Da273.

The record is clear, however, that the parties not agree on the EGP for any of these ten projects and there was no course of dealing excusing the Additional Backlog Conditions, which is precisely why the Arbitrator did not so much as acknowledge CCG's course of dealing contrivance as alleged in its Statement of Claim. Da137-139. However, the Arbitrator still adopted CCG's claim that these projects somehow magically morphed into Backlog Projects and adopted CCG's proposed EGPs for those projects. He did so based purely on his mistaken determination that Arc included forecasted preliminary EGPs for those projects on documents it shared with CCG. See infra Point I.B.2. However, as explained infra, none of the subject projects were elevated into an Additional Backlog Project in accordance with the unambiguous terms of the PTA.

To summarize, the Arbitrator determined the following EGPs applied to both the Backlog[6] and non-Backlog projects:

[6] Arc does not dispute the EGPs for the Backlog Projects, as those were agreed to by the parties. Da88. Arc's position as to any unpaid EGP for the two Backlog Projects at issue was that any remaining EGP payments Arc owed CCG was exceeded by the preconstruction expenses CCG owed Arc (and which Arc was awarded by the Arbitrator). Da137.

	Backlog Project	**EGP Agreed to By Parties**
1	Bayonne 1	$2,287,259.00
2	Park Ridge	$2,558,823.00

	Non-Backlog Project	**EGP Alleged by CCG and Accepted by the Arbitrator**
1	Englewood	$2,700,000.00
2	NJCU II	$2,984,202.00
3	E'Port	$1,247,401.00
4	St. Peter's Dorm	$2,784,288.00
5	St. Lucy's Shelter	$565,701.04
6	Barclay Street	$1,254,739.00
7	Miller St. (Phase II)	$122,000.00
8	Park Ridge B&M	$8,000.00
9	F. Douglass Park	$53,000.00
10	Bayonne 3	$2,670,000.00

Da137-139; Da276.

2. The Arbitrator improperly relied on forecasts submitted by Arc that were not prepared or identified as amendments to the PTA.

In the Award, the Arbitrator held that ten non-Backlog projects at issue were subject to the PTA's EGP-sharing and adopted CCG's alleged EGP amounts for those projects based on his conclusion that "[t]he EGP for these projects . . . . were included time and time again in the update calculations provided by ARC to Claremont which set forth the EGP, amounts paid, and amounts owed." Da137. The Arbitrator acknowledged that there were "no formal amendments to the PTA" or "at times formal agreements as to EGP," but disregard of the parties' contractual obligations was of no consequences

because, as the Arbitrator concluded, the projects and "EGP figures" were included in the updates and Arc made payments toward these "claimed EGP[s]." Da138.[7]

The referenced "updates" were in fact emails from Arc to CCG with excel spreadsheet attachments and can be grouped into two categories. The first were marked as CCG Exhibits Nos. 5-12 and consist of emails from an Arc representative to a CCG representative that listed Arc's calculations of its quarterly installment payment it was wiring to CCG for ongoing projects (the "Financial Reporting"). Da291-345. The second were marked as CCG Exhibits Nos. 15-22 and consist of forecasts Arc's principal sent to CCG's principals to update CCG's principals on current and the then anticipated but not yet certain future projects (the "Forecasts"). Da347-390. These Forecasts were prepared by Arc and shared with CCG at its request to forecast EGP and Installment Payments, as evidenced by their titles: "Preliminary Project Installment Schedule" and "PTA Forecast." See, e.g., Da368, Da373, Da383. While forecasting for possible but still uncertain future revenue and expenses for prudent business management purposes, the spreadsheets did not purport to and did not in fact serve to amend the PTA. Stephen Sciaretta acknowledged that

[7] See also Da135 ("ARC sought to change the EGP that had been either agreed upon and/or shown on its updates . . . ."); id. at Da136 ("Claremont either uses the figures established in the PTA or EGP as set forth in the series of updates provided by ARC.").

the referenced spreadsheets could have been intended for budgeting and planning. Da282 (Tr. 341:7-23). They are not, therefore, exclusively identifiable to any claimed amendment of the PTA.

The Financial Reporting and Forecasts did not anywhere contain the EGPs asserted by CCG for at least five of the ten non-Backlog Projects at issue, see infra Point I.B.3. They did not and could not serve as amendments to the PTA per the very terms of the PTA. There is simply no testimony anywhere in the record that these were intended to or did in fact amend the PTA.

Further, as compiled in an exhibit presented to the Trial Court, the provisional EGPs listed in the Financial Reporting (against which Arc made provisional payments) changed over time, so these documents could not serve as alternative successive "amendments" without the final email dated January 4, 2022 being considered to be the final amendment. Da392.

3. The Arbitrator abandoned the figures contained in the Forecasts and relied exclusively on CCG's EGP calculations that were, to the extent challenged, not supported in the Financial Reporting or Forecasts, to establish the amounts the EGP erroneously awarded in the Award.

Incredibly, the Arbitrator compounded his erroneous treatment of the Financial Reporting and Forecasts as amendments to the PTA by then abandoning those very spreadsheets in determining the amount of the EGPs awarded for five of the non-Backlog projects in favor of simply defaulting to the amounts alleged by CCG in its last of 5 iterations of its Statement of Claim.

He doubled down on the exercise of powers he did not possess despite stating that his EGP determinations are based solely on the figures Arc provided to CCG. See supra Point I.B.2. This internal inconsistency in the Award speaks volumes about the lengths to which the Arbitrator went in improperly supplying terms in the PTA to achieve an outcome that far exceeded his powers.

Setting aside for the moment the Bayonne 3 Project,[8] the Arbitrator adopted CCG's unsupported EGPs on four projects. When comparing the awarded EGP on those four projects to the amount listed on the financial spreadsheets for those four projects, the difference is $1,970,334.04. The four projects at issue are (1) E'Port, (2) St. Peter's Dorm, (3) St. Lucy's Shelter, and (4) Barclay Street, and the difference in EGP figures are summarized as follows:

[8] Arc never listed an EGP for the Bayonne 3 Project, and therefore, the unique errors associated with computation of this EGP are addressed infra.

Project Name	**EGP Forecasted by Arc but Not Accepted by CCG(CCG Ex. Nos. 5-12)**	**EGP Listed in CCG's Statement of Claim and Adopted by Arbitrator**	**Difference Between Arc's Admitted EGP and CCG's Demand**
E'Port	$1,000,000.00	$1,247,401.00	$247,401.00
St. Peter's Dorm	$1,404,371.00	$2,784,288.00	$1,379,917.00
St. Lucy's Shelter	$501,000.00	$565,701.04	$64,701.04
Barclay Street	$976,424.00	$1,254,739.00	$278,315.00
		SUM	$1,970,334.04

Da137-139; Da276; Da291-345.

Not only is the Arbitrator incorrect in his finding that Arc provided the EGPs claimed by CCG for these four projects, but he also incorrectly determined that throughout the parties' relationship "ARC sought to change the EGP that had been either agreed upon and/or shown on its updates, . . . because of unanticipated conditions encountered during the construction process." Final Da135; see id. at Da136 ("There was competing testimony about the causes of the purported increases in cost with CCG alleging poor management by ARC and ARC alleging, among other things, interference at some job sites by Donald Sciaretta and matters not contemplated at the time EGP was 'established' or shown on the updates prepared by ARC."). In fact, as demonstrated by the summary of the CCG Exhibit Nos. 5-12, Arc never once altered or attempted to alter the EGPs as a result of actual impacts to gross profits, including those

impacts resulting from the COVID pandemic. Da392. For each of the four non-Backlog projects at issue, Arc's final forecasted EGP was the highest number proposed throughout the parties' relationship. Id.

Finally, the provisional forecasted EGPs listed in these documents, which were never accepted by CCG, changed over time, so these documents could not serve as variable "amendments" of the PTA for the simple reason that they were never accepted as such by CCG. Id.

In any event, if the Financial Reporting and Forecasts amended the PTA, the EGPs for the ten non-Backlog projects per the last iteration of either CCG Exhibits 5-12 or 15-22, are as follows:

	Project Name	**EGP Proposed by Arc (Jan. 4, 2022 email)**
1	Englewood	$2,700,000.00
2	NJCU II	2,984,202.00
3	E'Port	$1,000,000.00
4	St. Peter's Dorm	$1,404,371.00
5	St. Lucy's Shelter	$501,000.00
6	Barclay Street	$976,424.00
7	Miller St. (Phase II)	$122,000.00
8	Park Ridge B &M	$8,000.00
9	F. Douglass Park	$53,000.00
10	Bayonne 3[9]	N/A

Da343.

[9] Note the "Bayonne" listed in CCG Exhibit Nos. 5-12 is actually Bayonne 1 and not Bayonne 3, a project at issue in the arbitration.

4. The Arbitrator improperly found the Bayonne 3 project was subject to the PTA despite the parties never agreeing to an EGP for this project

The Arbitrator exceeded his powers by completely disregarding the PTA and the law by finding that the Bayonne 3 project is subject to sharing of EGP under the PTA. Ignoring that the project did not meet any of the Additional Backlog Conditions, the Arbitrator erroneously concluded that (1) Bayonne 3 "was a project that was on the Pipeline list created by ARC for several years," (2) non-Backlog project Bayonne 3 was an extension of the Backlog Project Bayonne or "Bayonne 1," and (3) James Puleo, an Arc employee, was "brought over" to Arc by CCG and "charged" with getting this project for Arc. Da138.

First, Bayonne 3 never appeared on the Financial Reporting. Da291-345. Arc provisionally and temporarily listed Bayonne 3 on the Forecasts during a 15 month period (not for a period of "years" as mistakenly stated by the Arbitrator) when it could have been reasonably considered for eventual transformation to an Additional Backlog Project subject to EGP sharing.[10] Da351; Da356; Da365; Da368; Da373. The project, however, was abandoned by the developer. As demonstrated by a summary exhibit of the

[10] Even the EGP provisionally listed for Bayonne 3 in the Forecasts is not the amount demanded by CCG or determined by the Arbitrator. Da351; Da356; Da365; Da368; Da373.

information contained in CCG Exhibit Nos. 15-22, only much later was it resurrected without CCG's involvement under circumstances that caused it to be far outside the purview of the PTA. Da394.

As admitted by CCG, the parties never agreed to an EGP for Bayonne 3. Da273. Here again, the Arbitrator did not base his award for EGP on the Bayonne 3 project on any rationale tied to the legal grounds necessary to establish a "course of dealing. " Instead, in far exceeding the powers granted to him by the express terms in the PTA, he blindly adopted the EGP proposed by CCG ($2,670,000.00) without a shred a proof that the project was properly recognized by the parties as an Additional Backlog Project that was subject to sharing of EGP under the PTA. Da138; Da276.

The Arbitrator's decision to include Bayonne 3 as subject to the PTA's EGP-sharing based on the fact that Arc's employee, James Puleo, was the primary contact for the work exceeds the Arbitrators' powers because it ignores the entirely different set of expressly stated conditions that were necessary for Bayonne 3 to be elevated to Backlog Project status. Da138. His determination regarding Bayonne 3 is just another example of the Arbitrator straying from the contract and using extraneous and inconsequential circumstances to determine if a project is subject to EGP.

In addition, the Arbitrator made no effort to calculate EGP or justify his acceptance CCG's proposed EGP for this project. Not only did Arc

never list the Bayonne 3 project on the Financial Reporting it sent to CCG, Da291-345, but it also only listed Bayonne 3 for a short period of time in its forecasts, predicting a different EGP altogether. Da351; Da356; Da365; Da368; Da373; Da393.

Finally, in the Award, the Arbitrator concluded that "the Sciarettas admittedly severed the relationship with Mr. Ciminelli and ARC sometime in 2021 and confirmed same by email of December 28, 2021. . . . This was at least a de facto termination of the PTA." Da139. In response to CCG's claim for EGP payments on projects that have not yet begun but CCG claims to have referred to Arc, the Arbitrator held that CCG was not entitled to EGP for these projects because "the PTA was never intended to be a 'referral' fee arrangement." Da140. While the Arbitrator is accurate in his conclusion, he must apply that logic to Bayonne 3, as the Bayonne 3 contract is dated December 29, 2021, one day after the termination date of the PTA as determined by the Arbitrator. Da396. The Arbitrator's finding that Bayonne 3 is subject to the PTA even though ARC executed the contract for this project after the PTA was terminated is therefore contradictory to his other findings and exceeds his powers as Arbitrator.

5. The Trial Court's conclusion that the Arbitrator based his findings on the parties' course of conduct is erroneous and not supported by the record [Da31-32]

In confirming the Award, the Trial Court erroneously stated that the Arbitrator determined the parties' agreement on EGP "was made pursuant to the parties' conduct in the course of their dealings with each other." Da31. This conclusion is incorrect, and whether this error is one of law or fact is of no matter; the Trial Court's decision must be vacated.

The Award does not anywhere mention the phrase "course of dealing" and does not cite a single case discussing the legal criteria for amending or forming a contract based on a course of dealing. Da132-144. The Arbitrator was very clear in the Award that his decision regarding CCG's entitlement to EGP payments and the amount of those EGP payments was based purely on the Financial Reporting Arc provided to CCG (for a wholly different purpose), and (because Bayonne 3 does not appear on the Financial Reporting) the Forecasts that Arc created for CCG's benefit. Da137 ("The EGP for these projects were either formally agreed to in the PTA (i.e., Backlog Projects only) or were included time and time again in the update calculations provided by ARC to Claremont which set forth the EGP, amounts paid, and amounts owed.").[11]

[11] The "update calculations" referenced by the Arbitrator throughout the Award are those marked at the Arbitration as CCG Exhibit Numbers 5-12, which list the EGP

POINT II

THE TRIAL COURT ERRED BY DENYING ARC'S MOTION TO MODIFY THE AWARD BECAUSE THE AWARD CONTAINS MANY ERRORS IN THE CALCULATION OF INTEREST AND DESCRIPTION OF THE PROJECTS AT ISSUE [DA32]

In addition to exceeding his power, the Arbitrator made several mathematical miscalculations and errors to form, which do not affect the merits of Arbitrator's finding (that Arc owes CCG payments of EGP despite the parties not agreeing to an EGP for any project other than those listed in the PTA).

> Under New Jersey law, the court shall modify or correct the award if:
>
> > (1) there was an evident mathematical miscalculation or an evident mistake in the description of a person, thing, or property referred to in the award . . .
> > [or]
> > (3) the award is imperfect in a matter of form not affecting the merits of the decision on the claims submitted.
>
> N.J. Stat. Ann. § 2A:23B-24(a).

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offered by Arc and the amount Arc had "paid against" those EGPs. Da291-345. The Arbitrator's discussion of the Hackensack Project, in which he explains that the reason he is denying CCG's claim for EGP on this project is that "the update sheets . . . for many months showed the amount due to Claremont to be the amount previously paid, that is $191,381.00," [Da138] is evidence that "updates" referred to by the Arbitrator are CCG Exhibit Numbers 5-12. The only documents that reflect this figure are found in the Financial Reportings marked as CCG Exhibit Numbers 5-12.

The statue directs the court to correct any errors. N.J. Stat. Ann. § 2A:23B-24(b) ("If an application made pursuant to subsection a. of this section is granted, the court shall modify or correct and confirm the award as modified or corrected."); Tretina Printing, Inc. v. Fitzpatrick & Assocs., Inc., 135 N.J. 349, 360 (1994) ("The clear implication . . . is 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.").

In denying Arc's motion for modification, the Trial Court misstated the issues, concluding that the dispute is not a "mathematical error" but rather the "method of application of the interest rates to the parties' award," and highlighting the Arbitrator's attempt to fix his interest miscalculations. Da32. However, the proper calculation of interest (which when misapplied is indeed a mathematical error) is one of four errors in the Award and despite the Arbitrator's best efforts, his calculations are still incorrect.

The four distinct computational and/or form errors in the Award consist of: (1) two interest miscalculations; (2) the contractually mandated fee for St. Lucy's and Bayonne 3 and Bayonne 3's current project progress; (3) the EGPs listed in Arc's Financial Reporting/Forecasts; and (4) Bayonne 3's disappearance on the final iterations of the supposed "amendments" to the PTA.

Below is a description of these miscalculations and errors, and in the Trial Court, Arc created an exhibit of alternative calculations to remedy those errors ("Alternative Calculations"), which it provided to the Trial Court in conjunction with its Motion to Vacate or Modify the Award. Da474-483. Tab 1 of the Alternative Calculations is the breakdown of the current Award, to be used as comparison to the proposed alternative calculations. Da474-75.

Importantly, Arc is not questioning the Arbitrator's evaluation of evidence. Instead, Arc has identified blatant mathematical errors and errors in the description of EGPs, neither of which relate to the substantive merits of the Arbitrator's decision (whether or not Arc owed CCG EGP payments for the projects at issue) but rather are so obvious and objective, they must be corrected by this Court.

A. The Miscalculation of Interest

The interest calculation in the Award is the product of two errors: (1) the interest is calculated on the full amount owed by each party, rather than the net amount owed to CCG, and (2) the Arbitrator's correction to the interest on the four on-going projects improperly discounts payments made by Arc by the percentage of project completion.

1. The interest on the unpaid EGP claim must be calculated on the net amount due

In the Award, the amount of interest owed on the unpaid EGP claim was determined by applying the interest rate (7.75%) to the amount of unpaid EGP awarded to CCG (accounting for the ongoing project's completion). Arc, however, was awarded $732,533.75 for unpaid preconstruction expenses owed to it by CCG. Da141-142. Because CCG owed Arc the preconstruction expenses, Arc never owed CCG the complete EGP award, and Arc cannot be liable for interest on the full amount. Rather, the interest must be calculated on the net amount owed to CCG.

This error is mathematical and computational and does not require any evaluation of the evidence.

Tab 1 of Alternative Calculations shows the calculation of the Award using the preconstruction expense as an offset before interest is calculated (under the heading "Same as above - Precon as a offset of CCG before Interest Calc"). Da475. The correct Award incorporating this correction is $3,855,459.28.

2. The modification to the interest was improperly calculated because it included prior payments into amount due rather than using that number as an offset to total amount owed

In his modification, the Arbitrator improperly inflated the interest calculation on the ongoing projects because he discounted the payments made

by Arc by the percentage of project completion. For the purpose of calculating interest, the Arbitrator used an improperly inflated balance due for EGP because he reduced the total amount of EGP that Arc paid prior to July 6, 2022 by the percentage of project completeness, which makes no sense - mathematically or otherwise. Da260. The Arbitrator artificially decreased the amounts paid by Arc while artificially increasing the amounts of principal upon which the interest rate was applied.

CCG is only entitled to be compensated each quarter for an EGP based on project completeness, and Arc's prior payments are lump sums that should not be similarly reduced by a percentage of completion. Arc's prior payments reduce the total amount owed to CCG each quarter after taking project completeness into account. In other words, the interest for the ongoing projects is calculated against an EGP amount that includes an offset for previous payments Arc made for that project, but in the Award that offset is improperly reduced by project progress. This method artificially lowers the credit Arc deserves for the prior payments by reducing the amount previously paid by the percentage of project completion. For example:

CORRECT METHOD TO CALCULATE EGP OWED FOR ONGOING PROJECT
(85% project progress x EGP owed) – amount of prepayment

vs.

INCORRECT METHOD USED BY ARBITRATOR
(85% project progress) x (EGP owed – amount of prepayment)
(85% project progress x EGP owed) - (85% project progress x amount of prepayment)

Tab 2 of Alternative Calculations shows the calculation of the Award correctly applying Arc's previous payments at the full value at the time the payment was made. Da477. The correct Award should be $3,887,292.71, and if the Court includes preconstruction expense as an offset as explained supra, the Award is further reduced to $3,852,916.85.

B. Errors in the description of St. Lucy's and Bayonne 3

The EGPs for St. Lucy's (which was also listed in the Financial Reporting) and for Bayonne 3 are stated in the projects' contracts. If St. Lucy's and Bayonne 3 are subject to the EGP-sharing (despite the parties' lack of agreement as to EGP), the Award lists the incorrect EGPs, and the Court should correct those figures.

The accurate EGPs are explained infra, and Tab 3 of Alternative Calculations shows the calculation of the Award using the corrected values for St. Lucy's and Bayonne 3 (along with the interest calculations above) is $3,693,413.80. Da479. In addition, as demonstrated in Tab 3, because Bayonne 3 is still ongoing, Arc is not obligated to pay CCG $280,401.69 until project completion, and the Award should be modified to reflect as much.

1. St. Lucy EGP Calculation.

The Arbitrator adopted CCG's proposed EGP for St. Lucy's ($565,701.04) despite a lack of the parties' agreement as to EGP, but this amount contradicts the fee stated in that project's agreement ($500,998.00). Da463. Given this contractual provision, the St. Lucy's EGP as stated in the Award is an error that must be corrected to reflect the fee expressly stated in the agreement for the project, otherwise the fee is being calculated on the full value of the contract that already contains the fee. St. Lucy's EGP should therefore be adjusted to $500,998—the only EGP amount Arc ever provided to CCG for St. Lucy's when calculating Arc's installment payments for the project—and the Award should be reduced by $64,703.04.

$565,701.04 - $500,998.00 = $64,703.04

2. Bayonne 3 EGP Calculation

CCG arrived at its proposed EGP for the Bayonne 3 project (which the Arbitrator adopted without further explanation) of $2,670,000 using an incorrect oversimplified formula, applying the 3% contractor's fee to the total contract sum of $89,000,000 [Da400, Bayonne Contract §§ 5.1.1, 5.2.1] and demanding to be paid 65% of that amount.

$89,000,000 x 3% = $2,670,000 x 65% = $1,735,500

However, the Bayonne 3 Project's Agreement states that the contractor's fee is $2,502,246, or 3% of the cost of work, (which does not

include insurance, CCIP, subcontractor default insurance, or the contingency). Da435 (stating that the fee for the Bayonne 3 project is $2,502,246). Sixty-five percent of that EGP is $1,626,460.

$83,408,188 x 3% = $2,502,246 x 65% = $1,626,459.90

Therefore, the Award for unpaid EGP should be reduced by $109,040.

$1,735,500 - $1,626,459.90 = $109,040.10

Second, the Bayonne 3 Project is ongoing, with an expected final completion date in August 2024. Da236; Da245-46. Pursuant to the PTA, Arc was to pay CCG the EGP in quarterly installments based on the percent complete of the project. Da60. As of the date of the Award (as amended), the Bayonne 3 Project was 82.76% complete. Da245-46. Therefore, as of the date of the Award, Arc was only liable for 82.76% of the EGP payments, and the Arbitrator disregarded this clear contractual provision in awarding CCG the full EGP for Bayonne 3. The amount remaining on the unpaid Bayonne 3 EGP is $299,200.20 based on the current Award ($1,735,500- $1,436,299.80 = $299,200.20). Da245-46. The amount remaining on the unpaid Bayonne 3 EGP is $280,401.69 based on the corrected EGP ($1,626,459.90 - $1,346,058.21 = $280,401.69). This amount was not due and owing at the time of the Award.

C. Errors in the description of E'Port, St. Peter's, and Barclay

As explained supra, even if the Financial Reporting and Forecasts served amendments to the PTA that transformed projects into Backlog Projects subject to EGP-sharing, the Arbitrator improperly determined the EGP for four projects (not including Bayonne 3): (1) E'Port, (2) St. Peter's Dorm, (3) St. Lucy's Shelter, and (4) Barclay Street. Supra Part I.B.3. Per the Financial Reporting, the last-in-time "amendment" is an email dated January 4, 2022[12] that lists the following EGPs for those projects:

Project Name	EGP Forecasted by Arc but Not Accepted by CCG
E'Port	$1,000,000.00
St. Peter's Dorm	$1,404,371.00
St. Lucy's Shelter	$501,000.00
Barclay Street	$976,424.00

Da392.

Tab 4 of Alternative Calculations calculates the correct Award incorporating the corrections listed above, along with the correct EGP amounts for E'Port, St. Peter's Dorm, and Barclay Street. Da481. The correct Award importing these calculations is $2,307,456.44. Id.

[12] Note that the Arbitrator also determined there was "de facto termination" of the PTA on December 28, 2022. Da139. In that respect, the last-in-time amendment to the PTA by the Financial Reporting is actually CCG Exhibit No. 11, an email dated October 1, 2021, which lists these same amounts. Da333-338.

There is no analysis or evaluation of the evidence required in order to reach the conclusion that the Award lists the incorrect EGPs. The Award states that the Arbitrator is relying on the Financial Reporting and Forecasts in awarding EGP, and the Financial Reporting and Forecasts do not list the EGPs awarded. Da392. This error is indeed an error in the "description of a . . . thing" and renders the Award "imperfect in a matter of form not affecting the merits of the decision." N.J. Stat. Ann. § 2A:23B-24(a). Arc is not disputing the evidence, but pointing out that the factual evidence upon which the Arbitrator relies literally does not list the numbers the Arbitrator listed as the Award. Transcribing the incorrect number is the same as stating that 2 + 2 = 5.

D. Error in including Bayonne 3 as subject to the PTA's EGP-sharing

Tab 5 of Alternative Calculations calculates the Award incorporating the corrections listed above, along with reducing the Bayonne 3 EGP to $0, given that Bayonne 3 never appeared in the Financial Reporting and last appeared on the Forecasts over a year before Arc's execution of the Bayonne 3 contract. Da483.

If the Financial Reporting and Forecasts are "amendments" to the PTA, not only is Bayonne 3 never listed on the Financial Reporting but it was also not listed on the last three Forecasts, and therefore should not be subject to the parties' EGP-sharing agreement. Da394. Bayonne 3's inclusion on the Forecasts is not a debatable issue causing any re-evaluation of the evidence. Its

removal from the supposed amendments to the PTA means that it is not subject to the provisions of the PTA.

The correct amount of Award incorporating these calculations is $615,221.93. Da483.

POINT III

THE TRIAL COURT ERRED IN DENYING ARC'S MOTION TO ASSERT A COUNTERCLAIM FOR SETOFF BECAUSE EQUITY MANDATES THE AMOUNT OF THE AWARD BE REDUCED TO REFLECT CCG'S OFFSETTING OBLIGATION TO ARC [DA32-33]

The Trial Court erred in denying Arc's motion for leave to file a counterclaim for a setoff of the Award in the amount Arc is owed by CCG for the Hackensack Project. See Rule 4:67-4(a); Perretti v. Ran-Dav's Cnty. Kosher, Inc., 289 N.J. Super. 618, 624 (App. Div. 1996) ("[I]t is evident that leave [to assert a counterclaim] must be obtained so as to afford the trial court an opportunity to manage the litigation between the necessary parties, providing for expeditious resolution of those issues that can be addressed quickly, and more thorough development of those that require plenary treatment.").

The Trial Court denied Arc's request for leave to assert a counterclaim, asserting that Arc's counterclaim for setoff should be decided in the Hackensack Arbitration. Da32-33. However, the Trial Court's decision ignores the reason Arc must be able to assert a claim for setoff against the Award, namely that CCG is no longer operating [Da232] and therefore will not

be able to remedy Arc once Arc obtains a judgment in the Hackensack Arbitration.

In New Jersey, a claim for setoff "is an offsetting claim arising out of a completely independent and unrelated transaction . . . ." Ho v. Rubin, 333 N.J. Super. 599, 606, (Ch. Div. 1999), aff'd, 333 N.J. Super. 580 (App. Div. 2000). A defendant's claim for setoff need not arise from the same transaction as plaintiff's claim, rather a "setoff may be awarded for any amount to which the defendant is entitled." Beneficial Fin. Co. of Atl. City v. Swaggerty, 86 N.J. 602, 609, 432 A.2d 512, 516 (1981); Est. of Gimelstob v. Holmdel Fin. Servs. Inc., No. A-3341-18T3, 2021 WL 19220, at *14 (N.J. Super. Ct. App. Div. Jan. 4, 2021) ("[S]etoff is an equitable right that provides for affirmative recovery on a claim that may be independent of the transaction upon which plaintiffs' claims were based.") [Da577].

The Court's broad equitable powers should be applied to avoid the windfall payment to CCG that would result if Arc were compelled to pay the amount awarded in the Judgement without regard to CCG's obligation to Arc for payment of the amount due to Arc from CCG under the Hackensack Project subcontract. Cooper v. Nutley Sun Printing Co., 36 N.J. 189, 199 (1961) ("[T]he court has the broadest equitable power to grant the appropriate relief [and t]he court can and should mold the relief to fit the circumstances [but only with knowledge of] what the circumstances are."); Matejek v. Watson, 449 N.J.

Super. 179, 183 (App. Div. 2017) ("[A] court's equitable jurisdiction provides as much flexibility as is warranted by the circumstances."). To achieve justice and equity, the amount of the provisional offset must be the amount sought by Arc in the ongoing Hackensack Arbitration, which is $2,084,220.03 based on indisputable accounting of amounts of the adjusted subcontract price less the payments made by CCG. Da207-208; Da493.

While ordinarily, the Court will exercise it equitable discretion to set off one judgement against another judgment, the same rationale in those cases applies under the facts here. See Atanasio v. Silverman, 11 N.J. Super. 116, 119 (Law. Div. 1950) ("It has long been our rule that the right to have one judgment set off against another is within the discretion of the court."); aff'd, 7 N.J. 278 (1951) (citing State Bank of Trenton v. Coxe, 8 N.J.L. 172 (Sup.Ct. 1825)); see id. ("Also, that a court of equity, in the exercise of a sound discretion, will direct one judgment to be set off against another, whenever such relief does not run counter to any established principle of law or equity.") (citing Murray v. Skirm, 73 N.J.Eq. 374, 69 A. 496 (E. & A. 1908)). "This power [to set off judgments] is inherent in the ability and right of the court to control its judgments in order to achieve justice and equity." Hobson Const. Co. v. Max Drill, Inc., 158 N.J. Super. 263, 266-67 (App. Div. 1978) (citing Kristeller v. First Nat'l Bank, Jersey City, 119 N.J.L. 570, 572 (E. & A. 1937)).

Arc is not asking this Court to determine the merits of its claims against CCG for nonpayment; instead Arc is asserting that in order to avoid an inequitable windfall payment to CCG that exceeds Arc's net indebtedness to CCG, Arc must be permitted to assert a counterclaim for setoff against the Award.

It is not possible for Arc to assert this claim for setoff in the pending Hackensack Arbitration as determined by the Trial Court. That arbitration concerns the amount of the setoff but not whether or not the amount should be deducted from the Award. Instead, the proper place to seek this relief is in the Court in which the Award is being challenged.

CONCLUSION

Two sophisticated parties entered into a fully integrated and unambiguous agreement (the PTA), and the Arbitrator far exceeded his powers by completely disregarding that agreement in finding that certain projects were magically elevated to Additional Backlog Project status for which EGP is due to CCG. The Trial Court, in turn, blindly deferred to the Arbitrator's ultimate conclusions, taking upon itself to remedy the obvious deficiencies of the Award by assuming the Arbitrator relied on evidence upon which he did not (and which doesn't exist) and by ignoring the multiple mathematical and form issues with the Award.

Arc does not seek relief from the Court because it is simply dissatisfied with the outcome of the Arbitration. Dissatisfaction could arise only if the Arbitrator was required to resolve some ambiguity in the parties' PTA and in doing so rejected the interpretation argued by Arc. That is not the case here. The PTA's terms are not ambiguous as it clearly lays out the necessary steps for a project to become subject to the parties' EGP-sharing agreement. It is undisputed that those contractually required steps were not satisfied. It is also undisputed that the Arbitrator made clear errors when calculating the interest and transcribing the EGP figures into the Award.

For the reasons set forth above, Arc respectfully requests that the Court reverse the Trial Court's incorrect legal and factual determinations and vacate the Award or, alternatively, remand this matter to the Trial Court to modify the Award accordingly.

Dated: Buffalo, New York
October 17, 2024

PHILLIPS LYTLE LLP

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CLAREMONT CONSTRUCTION GROUP, INC.,

Plaintiff/Respondent,

v.

ARC NJ, LLC,

Defendant/Appellant.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO.: A-003246-23

CIVIL ACTION

On Appeal from the Superior Court of New Jersey
Morris County | Chancery Division

Docket No.: MRS-C-11-24

Sat Below: Hon. Frank J. DeAngelis

BRIEF OF PLAINTIFF-RESPONDENT CLAREMONT CONSTRUCTION GROUP, INC.

Dated: November 18, 2024

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Plaintiff/Respondent Claremont Construction Group, Inc. ("Claremont" or "CCG") respectfully submits this brief in opposition to the appeal filed by Defendant/Appellant Arc NJ, LLC ("Arc") of the Trial Court's June 12, 2024 Orders ("June 12 Orders").

PRELIMINARY STATEMENT

The issue before the Court is simple, and that is merely to affirm the confirmation of an arbitration award. In fact, New Jersey has a ***strong preference*** for judicial confirmation of arbitration awards and does not permit courts to revisit an arbitrator's merits rulings. The Trial Court thus cited the "substantial deference to arbitration awards" and found "no basis" to vacate/modify the Arbitrator's decision. Cutting against the public policy goals of arbitration—speedy, inexpensive, and final—Arc rehashes the same flawed arguments it made to the Arbitrator, and again below to the Trial Court. This Court should confirm the Trial Court's refusal to second-guess the Award.

Prompt confirmation of arbitration awards by the courts is not only favored but required in order to preserve the integrity and viability of the arbitration process as an alternative means of dispute resolution. Confirmation is the rule, not the exception. The Trial Court was presented with an arbitration award that was well-reasoned, supported by the record, and rendered by an experienced arbitrator—after a full 8-day hearing, live testimony from 14

witnesses, post-trial findings of fact and conclusions of law, oral and written closing statements, post-trial briefing, and several post-award submissions ("Arbitration" / "Arbitrator" / "Award").

In a transparent effort to delay and frustrate Claremont's ability to enforce the Award and collect on its judgment, Arc opposed the motion to confirm the Award, moved to vacate and/or modify on frivolous grounds, and now appeals on the same exact bases. Arc's appeal is predicated on inappropriate attempts to re-consider arbitral evidence and re-litigate the Arbitration proceedings. Even more bad faith is Arc's legally meritless request to offset Claremont's fully adjudicated post-trial ***Award*** (now a judgment) with Arc's late-filed and extraneous ***claims***, asking this Court to further forestall Claremont's ability to collect on its nearly $4 million Award while Arc pursues newly fabricated claims against Claremont, which could take ***years*** to fully adjudicate. Arc's strategy is shamelessly transparent and unsupported by any precedent.

Make no mistake about what is occurring in this appeal—Arc lost the Arbitration, lost at the Trial Court, and now wants this Court to nonetheless order a do-over. That is not how arbitration works. As the Trial Court properly recognized, this is not a de novo review of the Arbitration's entire (and lengthy) record, as much as Arc wishes it were so.

Here, in contesting the Arbitrator's and Trial Court's decisions to award Claremont damages and interest thereon, Arc seeks to drag this Court into the Arbitration's weeds, asking the Court to revisit the merits of a tried-to-completion Arbitration, and to even reconsider evidence presented at trial (appending approximately 22 trial exhibits herein, including Arc's additional self-created "exhibits" summarizing various of those exhibits, Da391-94). To that end, Arc rehashes flawed arguments fully considered and ultimately rejected by the Arbitrator (after substantial briefing and testimony) and based on his determinations as to relevancy, burden of proof, and weighing of the evidence and witness credibility. Judge DeAngelis correctly deferred to the Arbitrator's findings and rejected Arc's attempts to re-argue its lost case in the Trial Court. None of Arc's arguments had any merit whatsoever and, in any event, the Arbitrator's merits rulings cannot be reexamined or disturbed absent the ***narrow*** and ***statutorily inapplicable bases*** in the New Jersey Arbitration Act.

Arc therefore has clearly failed to meet its heavy burden to establish that the Award should be vacated or modified, and the Court should accordingly deny Arc's appeal in full and affirm the Trial Court's June 12 Orders. And finally, Arc's proposed counterclaim is a blatantly transparent (and impermissible) attempt to further stall Claremont's collection efforts with respect to the Award and should not be permitted into this summary action.

STATEMENT OF FACTS & PROCEDURAL HISTORY[1]

A. Arc Purchases and Agrees to Pay Claremont Pursuant to the May 31, 2019 Project Transfer Agreement

This case centered on a Project Transfer Agreement ("PTA") between Claremont and Arc, pursuant to which Claremont's retiring principals sold their New Jersey general construction management business to Arc, a Buffalo-based construction entity looking to expand into New Jersey. Da39. Rather than Arc paying "any upfront payment at all for [Claremont's] long-standing and successful construction business," the PTA created an earn-out process in which Arc would take over Claremont's already-ongoing contracts (the "Backlog Projects"). Da134 (the Award).[2]

Also, over the following 36 months, Claremont would receive a percentage of the profits on new projects generated from Claremont's legacy clients and business relationships (the "Pipeline Projects"). Da134. If Arc successfully obtained a construction contract on any Pipeline Project, "the PTA contemplated that an 'Estimated Gross Profit' ('EGP') would be established for

[1] For the convenience of the Court, this brief combines the recitation of facts procedural history, as those matters are intertwined.

[2] Claremont generally cites to the Award in this section for the more appropriate factual recitation (i.e., the factual record as developed before the Arbitrator).

each project and the EGP would be split between Claremont (65%) and ARC (35%)." Da134.

An "estimated gross profit" did not equate to—and is inherently distinguishable from—an "actual" profit. See Da134. The PTA contemplated a process whereby over the three-year period from May 2019 to May 2022, rather than Arc paying the purchase price for Claremont up front: (i) Claremont and Arc would estimate a project's profits at the very outset of the project; (ii) Arc would pay Claremont 65% of that EGP during the course of the project in quarterly installments, no matter what happened on the actual project or with respect to actual profits; and (iii) Arc would then either keep the remaining profits or shoulder the losses (if any). Da134. Despite Arc constructing a multitude of projects transferred to it under the PTA, Arc nonetheless withheld $5,209,900.68 from Claremont, which represented Claremont's total "share of EGP" across thirteen (13) separate projects. See Da136.

B. Claremont Commenced Arbitration to Seek the Return of the Wrongfully Withheld EGP

On July 5, 2022, Claremont filed a Demand for Arbitration with the American Arbitration Association pursuant to its Construction Arbitration Rules. Da39. On August 3, 2022, Arc filed an Answering Statement and Counterclaim in the Arbitration. Da39. Thomas J. Rossi, Esq. served as the parties' Arbitrator, who the parties jointly selected given his vast and impressive

experience in the construction industry (35+ years of practice, professor of Construction Law at St. John's University School of Law, presided over 200 arbitration proceedings, etc.).[3] Da40. The Arbitration consisted of discovery requests, substantial document productions, depositions, expert reports, motion practice, pre-trial submissions, a full trial, witness testimony from 14 individuals, post-trial submissions, post-trial arguments, and a reasoned Award. The parties consented to this arbitral process as a full and final determination of the parties' contractual rights under the PTA and all related contracts. See Da144.

In the Arbitration, Claremont established, and the Arbitrator found, that Claremont's 65% EGP "was to be established toward the beginning of the project," for each project, no matter what actually happened during the lifetime of the actual project—i.e., Claremont's money was ***guaranteed***. Da134-35. The Arbitrator thus rejected Arc's strained interpretation that the PTA required "six steps" before Arc could be liable to Claremont for nonpayment. App. Br. at 12. As the Arbitrator found, "witnesses and correspondence admitted into evidence established that a main component of the deal for [Claremont] was that they would not accept 'execution risks' on the projects." Da134. This finding further undercuts Arc's tried-and-rejected contention that the EGPs "changed over

[3] https://www.rcsklaw.com/attorneys.html.

time," App. Br. at 24, which argument itself inherently conflicts with its contrived "six-step" Backlog Project process and the Arbitrator's finding that "Claremont objected to most of these changes in EGP." Da135. Arc, on the other hand, "would keep 100% of the additional profits" but, again, Claremont could ***never*** receive less than "65% of the established EGP." Da134. This transaction, the Arbitrator found, "appeared to be advantageous to both parties," as Claremont could "reap up to $40,000,000.00 from contracts" under the PTA, and Arc "established a foothold in the New Jersey market…without a significant capital investment." Da134-35.[4]

Arc thus obtained a turn-key construction company from Claremont for $0 out-of-pocket, and then crafted myriad bad faith pretextual reasons for withholding millions of Claremont's earn-out money for several years, including to this day. Da135-36. At the Trial Court, Arc asserted all of the same exact arguments it asserted in the Arbitration, which it now hopes to re-assert and re-litigate here in the Appellate Division. See Da581-82. After eight days of evidentiary hearings, the Arbitrator saw through Arc's counterclaim gymnastics

[4] If a project lost money, that risk would be borne by Arc, which was, after all, purchasing a business. Claremont, as seller, and determined not to lose money while selling its multi-million dollar business, expressly carved itself out of any post-execution risks, and that agreement was embodied in the evidence in the case and credited by the Arbitrator in his Award. See Da134-35.

and held Arc to finally live up to its obligations under the PTA for projects handed to it on a silver platter. Da137-38.

The Arbitrator found, for example, that: "Arc sought to change the EGP that had either been agreed upon and/or shown on its updates, and in some cases paid in part or in full, because of unanticipated conditions encountered during the construction process." Da135. As established during the Arbitration, "Claremont objected to most of these changes in EGP arguing that EGP was not 'actual' profits, and that it did not assume any 'execution risk'"; and "that any difficulties or losses encountered during the prosecution of the work were to be borne by Arc ***with Claremont still entitled to its 65% of the established EGP*** regardless of 'actual' gross profits earned by Arc." Da135 (emphasis added). The Arbitrator accordingly held "that Claremont is entitled to the sums claimed for unpaid EGP for projects that have been awarded and/or performed." Da137.[5]

[5] Notably, despite Arc's attempt to offset Claremont's Award herein with its unadjudicated claim on the Hackensack Project, the Arbitrator awarded Claremont $0 on the Hackensack Project, finding "a credit [was] due back." Da138. The Arbitrator therefore did not award Claremont the $899,051.20 remaining due from Arc to Claremont on the Hackensack Project, and yet Arc impermissibly seeks to blatantly violate the entire controversy doctrine and litigate the Hackensack Project both in a newly filed arbitration and in this Court. Regardless, Arc's proposed "setoff" counterclaim is already being heard in the Superior Court of New Jersey (Docket No. MRS-C-55-24) and before the American Arbitration Association (Case No. 02-24-0000-7582), and thus has no place here in a ***third*** forum.

It was not until Arc's ***Fourth*** Amended Statement of Counterclaim that it asserted, for the first time, that because the parties did not apply wet signatures to separate formally notarized documents, that Claremont was apparently owed nothing (and, astonishingly, Claremont owed Arc money), and that Arc gets to keep 100% of the EGPs on all jobs. Compare Pa006 ¶ 25 (Arc's 3rd Amended Statement of Counterclaim), with Pa028 ¶ 61 (Arc's 4th Amended Statement of Counterclaim). In fact, despite purchasing Claremont, gaining new business, and establishing its foothold in New Jersey, Arc sought an incredible $17,459,885.48 from Claremont in a wildly contrived counterclaim. Pa036 (Arc's Table of Damages). The Arbitrator heard and considered substantial testimony on Arc's counterclaim and awarded Arc only $732,533.75 as reimbursement for preconstruction expenses, finding the remainder of Arc's purported damages "unpersuasive" and "highly speculative." Da140.

Arc's counterclaims were nothing more than a thinly veiled attorney-manufactured attempt to sell a legal-escape-hatch theory to the Arbitrator, whereby Arc could keep 100% of the profits earned under the PTA for itself and need not pay Claremont any of its 65% earn-out—at all. The law, the facts, and plain common sense defeated Arc's nonsense position.

On January 19, 2024, the Arbitrator awarded Claremont $4,310,849.48 on its claim for unpaid EGPs, plus contractual interest, and awarded Arc

$732,533.75 as reimbursement for preconstruction expenses. Da143. Thus, the Arbitrator awarded Claremont a net award in the amount of $4,043,887.27. Da144.

C. Claremont Seeks to Confirm the Arbitration Award

After Claremont filed this action to confirm the Award on January 23, 2024, Arc filed a motion to modify the Award on February 1, 2024, asserting the same arguments it would later assert in the Trial Court, and the same arguments it has re-asserted here in this Court. Da160-63. The Arbitrator denied Arc's motion to modify any portion of the $4,310,849.48 principal award, but found, with regard to the award of interest only, that the interest needed to be recalculated pursuant to a new formula (with a different start date and with respect to select projects only). Da235-36. The Arbitrator otherwise expressly held that, "[i]n all other respects, the Award dated January 19, 2024 is reaffirmed and remains in full force and effect."[6] Da236. The parties thereafter agreed to a "Corrected Final Award" to Claremont in the net amount of $3,889,835.14, which the Arbitrator entered on April 12, 2024. Da242.

[6] Contrary to Arc's unsupported assertion that the Arbitrator "accept[ed] some of the modifications to the Final Award that were sought by Arc," App. Br. at 5, the Arbitrator entirely rejected Arc's proposed damages recalculations. Da235 ("the request for modification is denied…I find no justification to modify the award").

At the Trial Court, Arc decried that the Arbitrator exceeded his powers merely because the Arbitrator ruled against Arc. See Da581-82. In Arc's view, the only acceptable outcome was the Arbitrator weighing the evidence and interpreting the PTA in Arc's favor, and anything less was apparently a statutory violation of the New Jersey Arbitration Act. Arc's challenges in the Trial Court hinged upon reasserting the same considered-and-rejected arguments from the Arbitration based on Arc's flawed interpretation of what constitutes "a Backlog Project." See App. Br. at 12 (restating Arc's continually rejected idiosyncratic interpretation of the PTA with respect to a "six-step process" for a project to become a "Backlog Project"). The Arbitrator, however, had already rejected Arc's strained (and bad faith) PTA interpretation and found that Arc agreed to pay, and does in fact owe, Claremont its 65% EGP share under the "projects that have been awarded and/or performed." Da137.

D. The Trial Court Correctly Finds No Basis to Disturb the Award and Properly Confirms the Award

On June 7, 2024, after the parties fully briefed the issues, the Trial Court held oral argument on Claremont's motion to confirm the Award and Arc's cross-motion to vacate / modify / assert a counterclaim. On June 12, 2024, the Trial Court entered an Order Confirming Arbitration Award and Entering Judgment, awarding Claremont $3,889,835.14, plus post-award interest of

$20,648.00, for a total award of $3,910,483.14, with per diem interest in the amount of $825.92 continuing to accrue as of June 7, 2024. Da6-7.

At the outset of its reasoning, the Trial Court highlighted that "courts grant substantial deference to arbitration awards"; that "arbitration is 'meant to be a substitute for and not a springboard for litigation'"; and that "[a]rbitration should spell litigation's conclusion, rather than its beginning." Da30. In addition to those underlying policy objectives, the Trial Court also cited the narrow statutory bases, pursuant to N.J.S.A. 2A:23B-23, under which a court will vacate an arbitration award. Da30-31. Accordingly, after considering the parties' arguments, public policy, and the New Jersey Arbitration Act, the Trial Court found "no basis in which to vacate the Arbitrator's decision." Da 31. The Trial Court thus rejected Arc's argument that the Arbitrator "exceeded his powers" and held that Arc "has not provided sufficient evidence that the Arbitrator contradicted the express language of the contracts at issue." Da31 (adding "it is clear that the Arbitrator considered the issue and the parties' arguments" under the PTA).

The Trial Court also disposed of Arc's two additional demands. First, regarding Arc's request that the Trial Court modify the Award under N.J.S.A. 2A:23B-24(a), the Trial Court held that Arc "has not established that there exists 'an evident mathematical miscalculation' or that the award 'is imperfect in a

matter of form not affecting the merits of the decision on the claims submitted.'" Da32. The Trial Court found that "[r]ather than a mathematical error in need of correction, the dispute is over the method of application of the interest rates to the parties' award," a plainly impermissible request under N.J.S.A. 2A:23B-24(a). And, with regard to Arc's "proposed counterclaim," the Trial Court found that Arc "acknowledges that the Hackensack Project is subject to arbitration and in fact, has made a demand for arbitration in connection with the Hackensack Project. Da32 (adding that Arc's proposed counterclaim must be decided in the presently pending separate arbitral forum); see also Da492 (Arc's Demand for Arbitration).

The June 12 Orders thus (i) confirmed the Award, (ii) denied Arc's motion to vacate/modify the Award, and (iii) denied Arc's request to offset the Award with an unadjudicated collateral claim pending in a separate arbitration. These rulings are the result of the Trial Court's consideration of the parties arguments, are well-reasoned, and should be affirmed.

Arc nonetheless filed this appeal, seeking to re-argue, once again, that:

(1) The Trial Court erred by confirming the Arbitration Award and entering judgment because the Arbitrator's extra-contractual findings clearly and irrationally exceed the powers granted to him under the parties' contract;

(2) The Trial Court erred by denying Appellant's motion to modify the Arbitration Award because the Arbitration Award contains many

errors in the calculation of interest and description of the projects at issue; and

(3) The Trial Court erred in denying Appellant's request to assert a counterclaim for setoff because equity mandates the amount of the Arbitration Award be reduced to reflect Respondent's offsetting obligation to Appellant.

[Da581-82.]

These are the same exact clear-cut legal issues already presented in the Trial Court. Further, on July 19, 2024, and in the face of Claremont's opposition thereto, the Trial Court stayed its Order Confirming Arbitration and Entering Judgment pending Arc's current appeal based on a payment bond obtained by Arc pursuant to the PTA's requirements. App. Br. at 9; Da517. Claremont thereafter filed a motion for summary disposition, a motion to expedite this appeal, and a motion to vacate the stay, which were all denied in full by the Appellate Division's September 6, 2024 Order. Da527.

Despite a full trial on these contractual issues, Arc hopes the Appellate Division—without the benefit of the entire arbitral evidentiary record, nor the advantage of hearing and weighing witness testimony and credibility—will review the PTA and Arbitration record *de novo* and come to a different and more favorable conclusion to Arc. Again, however, that is not the way arbitration works. The issue before the Court now is simple, and that is merely to affirm

the Trial Court's confirmation of an arbitration award that was not the product of fraud, corruption, or any wrongdoing.

Claremont accordingly requests, once fully briefed, that this appeal be heard/considered at the Appellate Division's earliest convenience.

LEGAL ARGUMENT

It is well-established that "[a]n arbitrator's award is not to be cast aside lightly." Kearny PBA Local No. 21 v. Town of Kearny, 81 N.J. 208, 221 (1979). "Arbitration awards should be what they were always intended to be: Final, not subject to judicial review absent fraud, corruption, or similar wrongdoing on the part of the arbitrators." Tretina Printing, Inc. v. Fitzpatrick & Assocs., Inc., 135 N.J. 349, 357 (1994). In contract interpretation cases, such as here, "[t]he polestar of [an arbitrator's] construction of a contract is to discover the intention of the parties." Kearny PBA Local, 81 N.J. at 221. And, "[s]o long as the arbitrator's interpretation of the contractual language is 'reasonably debatable,' a reviewing court is duty-bound to enforce it," which, in the private-arbitration realm (as here), is restricted to errors "so egregious that one need only look at the cover page, at the award, to know that a horrible mistake had been made." N.J. Transit Bus Ops., Inc. v. Amalgamated Transit Union, 187 N.J. 546, 548 (2006); Perini Corp. v. Greate Bay Hotel & Casino, Inc., 129 N.J. 479, 542 (1992). Thus, "the party seeking to vacate it bears a heavy burden." Del Piano

v. Merrill Lynch, Pierce, Fenner & Smith Inc., 371 N.J. Super. 503, 510 (App. Div. 2004).

Here, as the Trial Court recognized, Arc simply misapplies N.J.S.A. 2A:23B-23(a)(4) as some sort of catch-all, arguing that the Arbitrator exceeded the scope of his authority merely because he interpreted the PTA in Claremont's favor. Courts, however, only vacate awards under N.J.S.A. 2A:23B-23(a)(4) in the most obvious and under the most egregious of circumstances, none of which are remotely applicable here. See, e.g., Block v. Plosia, 390 N.J. Super. 543, 555 (App. Div. 2007) (holding the arbitrator exceeded his authority when he awarded plaintiff homeowners treble damages for defendant contractor's breach of contract under the New Jersey Consumer Fraud Act, as the parties had not included consumer fraud or treble damages as issues subject to arbitration, and modifying the award by excising the treble damages); Kimm v. Blisset, LLC, 388 N.J. Super. 14, 24 (App. Div. 2006) (vacating a supplemental arbitration award for counsel fees because the arbitrator was not authorized by statute or contract to decide a post-award application); Minkowitz v. Israeli, 433 N.J. Super. 111, 148 (App. Div. 2013) (finding arbitrator had exceeded his authority by acting as both the mediator and arbitrator). The AAA, for example, was

founded "***with the specific goal of helping to implement arbitration as an out-of-court solution to resolving disputes***."[7]

Here, Arbitrator Rossi weighed the facts and the law (as extensively briefed by the parties and testified to during a full trial) and entered a reasoned Award in favor of Claremont. As recognized by the Trial Court, there was no fraud, corruption, or blatant wrongdoing by Arbitrator Rossi. He simply rejected Arc's misguided and unpersuasive theories.

POINT ONE

NO BASIS IN LAW EXISTS TO DISTURB THE ARBITRATOR'S AWARD

Arc's attack on the Award hinges on the clearly erroneous contention that the Arbitrator exceeded his powers under N.J.S.A. 2A:23B-23(a)(4) via "several blatant errors," which boil down to Arc simply being discontent with the Arbitrator crediting Claremont's interpretation of the PTA over that of Arc's. App. Br. at 7; see ERG Renovation & Constr., LLC v. Delric Constr. Co., Inc., 2015 N.J. Super. Unpub. LEXIS 58, at *22 (App. Div. Jan. 12, 2015) ("[D]issatisfaction with the way the rules were applied or the ultimate result does not establish that the arbitrator exceeded his powers and is simply not a sufficient basis to vacate his award."), at Pa051; see also Withum, Smith &

[7] https://www.adr.org/about-us (emphasis added).

Brown v. Coast Auto. Grp., Ltd., 2012 WL 489020, at *4 (App. Div. Feb. 16, 2012) ("defendants confuse the arbitrator's *authority* to render an award with the *basis* for that award"), at Da563. However, Arc does not assert that the Arbitrator evidenced impartiality, entered his Award through corruption, fraud, or undue means, determined issues not submitted to him, or otherwise prejudiced Arc. The Arbitrator's decision is thus "binding and not reviewable for any error of law." Id.

Chief Justice Wilentz, in his concurrence in Perini, which the Court adopted in Tretina, set forth the standard as follows:

> Basically, arbitration awards may be vacated only for fraud, corruption, or similar wrongdoing on the part of the arbitrators. [They] can be corrected or modified only for very specifically defined mistakes as set forth in [N.J.S.A. 2A:24-9]. If the arbitrators decide a matter not even submitted to them, that matter can be excluded from the award. For those who think the parties are entitled to a greater share of justice, and that such justice exists only in the care of the court, I would hold that the parties are free to expand the scope of judicial review by providing for such expansion in their contract; that they may, for example, specifically provide that the arbitrators shall render their decision only in conformance with New Jersey law, and that such awards may be reversed either for mere errors of New Jersey law, substantial errors, or gross errors of New Jersey law and define therein what they mean by that. I doubt if many will. And if they do, they should abandon arbitration and go directly to the law courts.
>
> [129 N.J. 479, 548-49 (1992).]

The Perini concurrence established that an "error of law" need "be so egregious that one need only look at the cover page, at the award, to know that a horrible mistake had been made" such that "one could say that there was fraud or corruption or some similar wrongdoing that requires vacating the arbitrators' award." Id. at 542. The Perini concurrence added further, regarding "errors of fact," that "the only tenable conclusion from the statute itself is that errors of fact, whether gross or ordinary, lead to neither vacation nor modification and correction." Id.

To be sure, in Tretina, the New Jersey Supreme Court expressly adopted Chief Justice Wilentz's concurring opinion in Perini, holding that "a majority of the Court now agrees that the correct standard of review is…the standard set forth in the Chief Justice's opinion concurring in the judgment in Perini." 135 N.J. at 358. The Court added that, "in reviewing voluntary private-sector arbitration awards," such as here, "[t]hat standard is as follows: Basically, arbitration awards may be vacated only for fraud, corruption, or similar wrongdoing on the part of the arbitrators. [They] can be corrected or modified only for very specifically defined mistakes as set forth in [N.J.S.A. 2A:24-9]…." Id.

Simply put, the parties' private-sector Award at issue here is not the result—nor does Arc even suggest it is the result—of "fraud, corruption, or

similar wrongdoing on the part of the [Arbitrator]" and, as such, no such basis exists for Arc to vacate or modify Arbitrator Rossi's Award.

A. Arc Cannot Reargue the Merits of the Arbitrator's Award

Arc's arguments before this Court are the same exact word-for-word contentions submitted to the Arbitrator in post-trial briefing that the Arbitrator heard, considered, and rejected in his Award for Claremont—and heard, considered, and rejected by the Trial Court. See Ukrainian Nat'l Urban Renewal Corp. v. Joseph L. Muscarelle, Inc., 151 N.J. Super. 386, 396 (App. Div. 1977) ("An arbitrator's factual determinations concerning the merits of the dispute submitted to him are not reviewable by the court as such."). Furthermore, a court reviewing an arbitrator's decision may not substitute its own judgment for that of the arbitrator, "regardless of the court's view of the correctness of the arbitrator's interpretation." N.J. Transit Bus Ops., 187 N.J. at 554.

Arc wants to re-litigate what it believes "the operative terms of the PTA preclude" and do not preclude. App. Br. at 15. But because Arc's absurdly warped PTA interpretation failed in the Arbitration, which theorized that Arc should be permitted to purchase Claremont *and* be paid $17 million for doing so, Arc decries that the Arbitrator "dispensed his own brand of industrial justice." App. Br. at 11; see also Cnty. Coll. of Morris Staff Ass'n v. Cnty. Coll. of Morris, 100 N.J. 383, 390 (1985) ("to the extent possible, arbitration should

spell the conclusion to litigation rather than the beginning of it"). The Arbitrator found Arc's position attempting to flout its payment obligations under the PTA to be neither factually nor legally correct—and the Trial Court confirmed, finding that "the Arbitrator considered the issue and the parties' arguments…and thus, did not exceed his powers." Da31-32.

The PTA, for example, contemplated "good faith" negotiations on EGP, so as to permit the parties to work cooperatively over the ensuing three-year period. Da54 § 1.6(a)(ii)(A)(1). However, in the Arbitration, Arc attempted to argue that, despite Claremont transferring many projects to Arc, Arc actually withheld its agreement on the projects' EGPs, and so Arc should simply be permitted to pay nothing. See, e.g., App. Br. at 17 ("The PTA does not include a provision expressly addressing the consequences of the parties' failure to reach agreement as to EGP as to construction projects performed by Arc."); but see Barila v. Bd. of Educ. of Cliffside Park, 241 N.J. 595, 616 (2020) (noting interpretative inquiry includes avoiding "absurd results"). The Arbitrator considered the evidence and found EGPs "were either formally agreed to in the PTA or were included time and time again in the update calculations provided by ARC to Claremont which set forth the EGP, amounts paid, and amounts owed." Da137. Thus, the Arbitrator did not credit Arc or its witnesses' testimony that these amendments were merely "forecasted preliminary EGPs,"

as Arc attempts to re-argue yet again here. App. Br. at 21; see also Da138 ("I do not find persuasive ARC's argument that the updates were mere 'forecasts' and that the payments mere conditional advances.").

In confirming the Award, the Trial Court noted that the Arbitrator "found that an agreement was made pursuant to the parties' conduct in the course of their dealings with each other." Da31. The Trial Court therefore aptly concluded that it "does not find that the Arbitrator's decision is contrary to the express terms of the parties' contracts," and so the Arbitrator "did not exceed his powers." Da 32.

The PTA states that the parties should continually update and "amend" the Backlog list and the Pipeline list on Schedules 1.1(a) and 1.1(b), respectively. Da52 § 1.1(b)(i) ("Schedules 1.1(a) and 1.1(b) will be amended by CCG and Arc to add such projects…."). Arc later pivoted and contended the month before trial, for the first time, that because the parties did not apply wet ***signatures*** to separate/additional formal contract amendments, that the Backlog list was never appropriately updated and Claremont was therefore apparently owed nothing (and, astonishingly, owed Arc money), and that Arc gets to keep 100% of the EGPs on all projects. Compare Pa001-14 (Arc's 3rd Amended Statement of Counterclaim), with Pa015-32 (Arc's 4th Amended Statement of Counterclaim). For obvious reasons, this reality-spin was simply unavailing and

unpersuasive to both the Arbitrator and the Trial Court. Thus, the Arbitrator did not "improperly supply terms in the PTA to achieve an outcome that far exceeded his powers," App. Br. at 25, but rather the Arbitrator (and Trial Court) saw through Arc's bad faith post-hoc created-for-litigation theory, outright rejected it based on the evidence presented, and ruled under the PTA.

B. The Arbitrator's Well-Reasoned Award Considered Ample Evidence and Testimony Displaying the Parties' Agreements

Arc nonetheless incorrectly states on appeal that "[t]here is simply no testimony anywhere in the record that these [Arc-provided Backlog lists and Pipeline lists] were intended to or did in fact amend the PTA." App. Br. at 24. However, Claremont testified ***at length*** that Arc took the laboring oar and "amended the [PTA] schedules," which Claremont considered to be "effectively an amendment to that pipeline schedule."[8] Pa038 (June 19 Tr. at 141:3-20) & Pa040-41 (June 20 Tr. at 400:7-20, 436:1-25 ("[Arc] said, you know what, I have to get to amending these schedules and sending them to you. And [Arc] started doing that pretty diligently.")). It is therefore flatly inaccurate for Arc to assert that the Arbitrator held that Arc owed Claremont unpaid sums on many

[8] In its appellate brief, Arc confusingly (and inaccurately) states that "CCG acknowledged, however, that not a single Pipeline Right transitioned to become an Additional Backlog Project…" App. Br. at 20. This is obviously an absurd proposition that is directly contradicted by Claremont's own testimony, the arbitral record, and, indeed, by the entire purpose of the Arbitration and the damages for unpaid monies sought by Claremont therein.

different projects "without a shred [of] proof." App. Br. at 29. Rather, the Arbitrator weighed substantial evidence and testimony in reaching his well-reasoned findings.

Indeed, Arc argued out of both sides of its mouth. Arc testified at depositions on the one hand that the EGPs that were in Schedule 1.7(a) of the PTA for the Backlog Projects were *all* amended by mutual assent via a less formal method of reciprocated agreement. Pa043 (Arc Dep. Tr. at 89:9-21 ("It was based on some sort of understanding after the fact")). And, Arc contended on the other hand (when trial neared) that, on second thought, because the parties did not formally "sign" separate "amendments" to more formally update the list containing the Backlog Projects, Arc should actually get all of its money back *and* be awarded another $8 million in damages (which the Arbitrator rejected as unsupported and "highly speculative"). Da140. On that point, however, Arc admitted during cross-examination at trial that such a position was indeed ***not*** a good faith position. Da488 (Aug. 22 Tr. at 270:21-24 (Q: "Yes or no: Is paying zero within the spirit of this?" A: "I would think that there's some payment that Claremont is due.")); Da491 (Aug. 23 Tr. at 235:16-21 (Q: "You want your money back…because you're saying all of that does not count?" A: "We want our money back.")).

Rather, the arbitral record unequivocally established that over a multi-year period, Claremont and Arc continually updated the Backlog and Pipeline lists via new versions exchanged in good faith of Backlog and Pipeline schedules, in-person mutual agreements, and many email communications. The Arbitrator credited these agreements within his Final Award as establishing EGP pursuant to the PTA. Da137 ("EGP for these projects were either formally agreed to in the PTA or were included time and time again in the update calculations provided by ARC to Claremont which set forth the EGP, amounts paid, and amounts owed.").

The correct legal test, of course, is intent of the parties—what did they agree to, and what was the meeting of the minds? In that vein, and assuming that the PTA's writing requirement was not impliedly waived (which it was, see infra), there were writings—a lot of writings—between the parties presented as evidence in the Arbitration. Arc often sent Claremont schedules updating the PTA's lists of Backlog Projects, the Pipeline Projects, and the EGPs for each. Arc testified to these facts. Arc thus offered "amendments" to the Backlog/Pipeline project schedules, to which Claremont generally accepted, and which Arc then performed and paid against accordingly. The Arbitrator agreed, Da138 ("These affirmative, voluntary actions by ARC are clear admissions of EGP calculation and monies owed"), and the Trial Court acknowledged that the

Arbitrator's weighing of such evidence was a proper exercise of his powers, Da31-32.

Where the parties agreed on the amended/updated schedules, that agreement is binding (notwithstanding the lack of a wet signature). See Jang Won So v. EverBeauty, Inc., 2018 N.J. Super. Unpub. LEXIS 4, at *2-3 (App. Div. Jan. 2, 2018) (finding email exchange sufficient to create binding agreement), at Pa054; Weichert Co. Realtors v. Ryan, 128 N.J. 427, 436-37 (1992) ("where an offeree gives no indication that he or she objects to any of the offer's essential terms, and passively accepts the benefits of an offeror's performance, the offeree has impliedly manifested his or her unconditional assent to the terms of the offer").

The mutual exchange of writings (and the parties' intent to be bound by them) established in the Arbitration that the parties had a meeting of the minds and intended to formally update the Backlog and Pipeline lists. See Da137-38 ("The fact that on some projects there were no formal amendments to the PTA or at times formal agreements as to EGP is overcome by the inclusion of the projects and EGP figures in the updates, and perhaps more importantly, the actual payment of more than 60% of the claimed EGP…These affirmative, voluntary actions by ARC are clear admissions of EGP calculation and monies owed."). Although Arc argued in the Arbitration, again in the Trial Court, and

implausibly argues again here, that these were mere "forecasts submitted by Arc that were not prepared or identified as amendments to the PTA," App. Br. at 22, the Arbitrator expressly found: "I do not find persuasive ARC's argument that the updates were mere 'forecasts' and that the payments mere conditional advances." Da138. Thus, Arc's argument—despite obtaining multiple projects from Claremont *and* paying Claremont quarterly EGP installments on those projects as required under Section 3.1 of the PTA for more than two years—that it should have its payment obligations to Claremont reversed and returned (with an additional $8 million in "highly speculative" damages added in)—was appropriately tried, considered, and rejected multiple times below.

As the parties further briefed to the Arbitrator, parties can also impliedly modify the writing requirement to their contract, and the parties' multi-year course of conduct and performance in this case clearly established that understanding. Under New Jersey law, parties are free to modify their contracts—including those that "require that changes to the contract must be made in writing"—so long as the "proposed modification by one party to a contract [is] accepted by the other to constitute mutual assent to modify." Namerow v. PediatriCare Assocs., LLC, 461 N.J. Super. 133, 144 (Ch. Div. 2018) (quoting McGrath v. Poppleton, 550 F. Supp. 2d 564, 571 (D.N.J. 2008)); Home Owners Constr. Co. v. Borough of Glen Rock, 34 N.J. 305, 316 (1961)

("the writing requirement may be expressly or impliedly waived by the clear conduct or agreement of the parties or their duly authorized representatives"). And, "[w]hen looking for mutual assent, a court will take these outward expressions and ask 'what meaning the words should have conveyed to a reasonable person cognizant of the relationship between the parties and all of the antecedent and surrounding facts and circumstances.'" Pagnani-Braga-Kimmel Urologic Assoc., PA v. Chappell, 407 N.J. Super. 21, 28 (Law Div. 2008) (quoting Esslinger's Inc. v. Alachnowicz, 68 N.J. Super. 339, 344 (App. Div. 1961)).

Arbitrator Rossi considered and found persuasive Claremont's position and evidence establishing the parties' mutual assent, over the course of several years, establishing EGPs on a project-by-project basis via in-person meetings and shared writings. The Trial Court correctly upheld the Arbitrator's well-reasoned findings and confirmed the Award. This Court should do the same and affirm the June 12 Orders.

C. No Statutory Basis Permits a Court to Disturb the Award

Therefore, no statutory basis justifies vacating the Award. Kearny PBA Local, 81 N.J. at 221. Arc's reliance on the unpublished case Knecht v. 225 River Street, LLC is misplaced, as that simple dispute concerned only the return of a security deposit with respect to the purchase of a condominium, pursuant to

which the buyer did not meet the one express contract condition precedent for the return thereof. App. Br. at 13 (citing 2012 WL 1020005 (App. Div. Mar. 28, 2012)). The court there found "the arbitrator's interpretation of the contractual language was not reasonably debatable" and held the arbitrator exceeded his authority by nonetheless awarding the buyer the return of her security deposit. 2012 WL 1020005, at *2, 4. Da554. On the other hand, here, a plain reading of the PTA ***requires*** that Arc pay Claremont 65% in EGPs on the projects transferred to Arc.

Despite the PTA's 65% requirement, Arc contends that "the Arbitrator exceeded his powers by ignoring the clear terms of the PTA and impos[ed] extra-contractual obligations on Arc." App. Br. at 10, 18 ("the Arbitrator went far beyond the scope of the parties' agreement"), 29 ("straying from the contract and using extraneous and inconsequential circumstances"). As the Trial Court recognized, however, the Arbitrator did not disregard the PTA's terms, but rather applied those plain terms (and hours of testimony about the parties' intent) to the facts undergirding the parties' performances under the PTA, and awarded Claremont 65% EGPs on the projects that Arc was awarded and/or performed pursuant to the PTA. See, e.g., Kearny PBA Local, 81 N.J. at 221 ("Any number of interpretative devices have been used to discover the parties' intent. These include consideration of the particular contractual provision, an overview of all

the terms, the circumstances leading up to the formation of the contract, custom, usage, and the interpretation placed on the disputed provision by the parties' conduct.").

Arc accordingly falls far, far short of establishing its heavy burden that the Arbitrator's interpretation of the PTA, and the parties' rights and obligations thereunder, was not "reasonably debatable." N.J. Transit Bus, 187 N.J. at 548 ("So long as the arbitrator's interpretation of the contractual language is 'reasonably debatable,' a reviewing court is duty-bound to enforce it."); see also Perini, 129 N.J. at 542 (defining private-contract arbitration "errors of law" as those "so egregious that one need only look at the cover page, at the award, to know that a horrible mistake had been made"). Arc complains that the Arbitrator "went far beyond the scope of the parties' agreement" by "abandoning the forecast figures." App. Br. at 18. However, as explained repeatedly above, the Arbitrator considered eight days' worth of testimony and hundreds of exhibits demonstrating the parties' agreements on EGPs (and gave zero weight to the made-for-litigation concept of "forecasts"). Da138. The Trial Court agreed.

The Arbitrator thus weighed the evidence and rendered a decision perfectly in line with the PTA, awarding 65% EGPs on the projects. There is nothing in the Award, nor does Arc suggest so, that remotely suggests that "one could say that there was fraud or corruption or some similar wrongdoing that

requires vacating the arbitrators' award." Perini, 129 N.J. at 542. Arc's dissatisfaction with the ultimate result does not establish that the Arbitrator exceeded his powers and is simply not a sufficient basis to vacate his Award.

POINT TWO

ARC IS NOT ENTITLED TO A MODIFICATION OR CORRECTION OF THE AWARD

Arbitration awards can only be modified or corrected under extremely narrow and explicitly defined circumstances, none of which exist here. Having already failed to convince the Arbitrator and the Trial Court to modify or correct the Award, Arc now asks this Court to modify or correct the Award under N.J.S.A. 2A:23B-24(a)(1) ("evident mathematical miscalculation"), or under N.J.S.A. 2A:23B-24(a)(3) ("the award is imperfect in a matter of form not affecting the merits"). Again, this Court's "scope of review of an arbitration award is narrow," and the Arbitrator's Award "is entitled to a presumption of validity." Fawzy v. Fawzy, 199 N.J. 456, 470 (2009); Township of Wyckoff v. PBA Local 261, 409 N.J. Super. 344, 354 (App. Div. 2009); see also Borough of East Rutherford v. E. Rutherford PBA Local 275, 213 N.J. 190, 201 (2013) ("To ensure finality, as well as to secure arbitration's speedy and inexpensive nature, there exists a strong preference for judicial confirmation of arbitration awards."). Here, Arc is not entitled to a modification or correction of the Award, as similarly determined by the Trial Court.

A. Arc Impermissibly Asks the Court to Examine Arbitral Evidence (Based on Its Own Erroneous Interpretations of the Evidence) and Refashion New Damages Figures

Arc claims the Arbitrator made "blatant computational and form errors" in arriving at the final arbitration award. App. Br. at 3. Arc had the burden of demonstrating evident mathematical miscalculations or imperfections as to form in the Award. Instead, Arc merely disputes the factual evidence relied upon by the Arbitrator in rendering his Award, arguing that the Arbitrator "mis-transcribed certain projects' EGPs from documents" in evidence, and so, to assist, "Arc created an exhibit of alternative calculations." App. Br. at 2, 34.

That is, Arc asks this Court to review evidence that supported pieces of Claremont's award at several construction projects, and demands that "the Court should correct those figures." App. Br. at 37. "Correcting" an arbitration award's damages figures inherently requires a re-evaluation of evidence, i.e., an exercise beyond the scope of appellate review. Arc explicitly asks this Court, for example, to reevaluate the "Financial Reporting" evidence from the Arbitration to craft new damages figures. See App. Br. at 40-41. Arc also asks the Court to re-evaluate the award as to the Bayonne 3 project, which, in Arc's view, is "not a debatable issue causing any re-evaluation of the evidence," despite again pointing to the "Forecasts," i.e., arbitral ***evidence*** that the Arbitrator already found to be "not [] persuasive." App. Br. at 41; Da138.

Despite all that, Arc inconsistently concludes that the alleged errors are "mathematical and computational and does not require any evaluation of the evidence." App. Br. at 35. Such arguments are precluded from trial or appellate court review. See Ukrainian Nat'l Urban Renewal, 151 N.J. Super. at 396 (holding arbitrator's review of evidence which led to "factual determinations concerning the merits of the dispute…are not reviewable by the courts"). Arc's project-specific analyses underlying the EGP awards for various projects stray *far* afield from N.J.S.A. 2A:23B-24(a)'s intention to only "correct mistakes that are obvious and simple."

Arc thus failed to demonstrate evident mathematical miscalculations or imperfections as to form by the Arbitrator. A court is only empowered to correct or modify "simple arithmetical errors, such as 2 + 2 = 5, or obvious mistakes in identification, such as 14 Hill Street instead of 41 Hill Street." Tretina, 135 N.J. at 359; see also Kimm, 388 N.J. Super. at 31 (excluding attack on award on grounds of imperfection "if the claim of imperfection is addressed to the merits of the award"). The Trial Court correctly found that Arc failed to identify any "evident mathematical miscalculation." Da32. Instead, Arc dives ***deep*** back into the merits and into the evidence itself to conclude "the Award lists the incorrect EGPs, and the Court should correct those figures," App. Br. at 37,

vying for this Court to adopt a different set of figures ***considered and rejected by the Arbitrator***. These arguments have no merit.

B. Arc Continues to Misconstrue N.J.S.A. 2A:23B-24

Arc's current modification request here is effectively Arc's fourth bite at the apple. On February 1, 2024 (thirteen days after the Award), Arc filed a motion to modify with the Arbitrator, accusing the Arbitrator of misevaluating evidence and asking him to revisit evidence to refashion a new award. See Da160. The Arbitrator rejected Arc's request and found "the Award dated January 19, 2024 is reaffirmed and remains in full force and effect including ARC's obligation to pay all amounts awarded to Claremont." Da236. He did, however, ask the parties to recalculate Claremont's award of interest based on a different start date, "which interest shall be paid when calculated by the parties." Da236. When the parties could not agree on the recalculation of the award of interest, the parties submitted competing orders to the Arbitrator, wherein Arc (for its second bite) attempted to offset Claremont's award of interest with Arc's proposed damages. The Arbitrator rejected Arc's proposed order, and found that Claremont's award of interest "should be calculated as shown on the tables at page 4 of [Claremont's] Proposed Corrected Final Award." Da255. The Arbitrator entered that Award on April 12, 2024. Da242-43.

Arc then made the same claims to the Trial Court (for its third bite) that the Arbitrator made "mathematical errors" both in the calculation of interest, and "in the description of EGPs," which Arc repeats here. App. Br. at 34. On the award of interest, the Trial Court correctly held that "[r]ather than a mathematical error in need of correction, ***the dispute is over the method of application of the interest rates to the parties' award***." Da32 (emphasis added). Nonetheless, clinging to faulty legal logic, Arc believes that "the proper calculation of interest [] when misapplied is indeed a mathematical error." App. Br. at 33 ("despite the Arbitrator's best efforts, his calculations are still incorrect"). Arc once again badly misconstrues N.J.S.A. 2A:23B-24.

Arc essentially asks this Court to stretch Tretina's clear language, limiting modification to "simply arithmetical errors, such as 2 + 2 = 5," to something unrecognizable such that parties can dispute an arbitrator's applied damages *formula* after-the-fact. Tretina, 135 N.J. at 360 ("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"). And, to be sure, these are Arc's own words: "the error in the interest calculation is not in 'method,' but rather in the order of mathematical operations." App. Br. at 3. Again, however, this is simply not what the law permits.

Arc's arguments belie its assertions that the Arbitrator simply committed an evident mathematical error or imperfection as to form. Rather, implicit in Arc's argument is that the Arbitrator improperly evaluated documentary evidence and incorrectly resolved discrepancies in that evidence in Claremont's favor. See App. Br. at 35-36 ("the Arbitrator improperly inflated the interest calculation on the ongoing projects because he discounted the payments made by Arc…which makes no sense - mathematically or otherwise"). Arc does not point to a single *computational* error or "imperfection" or inaccuracy in the Award's calculations, but rather merely suggests that the Arbitrator somehow misevaluated conflicting documentary evidence, and Claremont's award of interest should have been "offset" by other alleged amounts—going as far as proposing a "correct method to calculate" interest, and submitting "Alternative Calculations." App. Br. at 36-37. Such a challenge is not within the scope of review available in court. Ukrainian Nat'l Urban Renewal, 151 N.J. Super. at 398.

Absent compelling public policy reasons, even an arbitrator's errors of law or fact do not provide a trial court with a basis to disturb the arbitration award. Selective Ins. Co. v. Nat'l Cont'l Ins. Co., 385 N.J. Super. 62, 67 (App. Div. 2006). "[T]he judiciary has no role in the determination of any substantive issues that the parties have agreed to arbitrate." Curran v. Curran, 453 N.J.

Super. 315, 321 (App. Div. 2018). Arbitrator Rossi rendered a detailed and comprehensive arbitration award based upon his review and assessment of the evidence presented by the parties, and he set forth the basis in support of his award to Claremont in his Final Award. Arc provided no "obvious or simple" miscalculation showing "evident" mathematical errors by the Arbitrator.

Accordingly, with the absence of any evident mathematical miscalculation or imperfection as to form, the Court must reject Arc's request to correct or modify the Award.

POINT THREE

ARC'S REQUEST FOR LEAVE TO FILE A COUNTERCLAIM IS IMPROPER

The Court should additionally deny Arc's improper request to file a counterclaim in this summary proceeding to confirm an arbitration award, and Arc should not be permitted to obtain a de facto stay of the enforcement of the Award by bringing a new frivolous claim.

N.J.S.A. 2A:23B-22 sets forth the standard for confirming an arbitration award and states that a party to an arbitration may seek confirmation of its award via summary action. And, for the Court's part, "the court ***shall issue a confirming order*** unless the award is modified or corrected pursuant to section 20 or 24 of this act or is vacated pursuant to section 23 of this act." Id. (emphasis added). In other words, Arc can file a motion to vacate, modify, or correct the

Award—but Arc cannot file a counterclaim seeking "setoffs" within a summary proceeding to confirm an arbitration award.[9]

> From the judiciary's perspective, once parties contract for binding arbitration, all that remains is the possible need to: enforce orders or subpoena issued by the arbitrator, which have been ignored, N.J.S.A. 2A:23B-17(g); confirm the arbitration award, N.J.S.A. 2A:23B-22; correct or modify an award, N.J.S.A. 2A:23B-24, and in very limited circumstances, vacate an award N.J.S.A. 2A:23B-23. If not for this limitation on judicial intervention of arbitration awards, "the purpose of the arbitration contract, which is to provide an effective, expedient, and fair resolution of disputes, would be severely undermined."
>
> [See Curran, 453 N.J. Super. at 321 (citation omitted.]

Permitting Arc's requested counterclaim threatens to thwart or complicate enforcement of the Award, transforming the character of the Arbitration as an excuse to postpone the enforcement of the Arbitrator's ruling. Arc cannot re-litigate construction claims in this ***summary action***, commenced only to confirm the Award. Such an obvious end-run around enforcement of an arbitration award cannot be countenanced. See Barcon Assocs. v. Tri-County Asphalt Corp., 86 N.J. 179, 187 (1981) (permitting the parties to engage in extended discovery of fact issues was counterproductive to the goal of arbitration to be a forum "of providing final, speedy and inexpensive settlement of disputes"); see

[9] See also R. 4:67-5 ("The court shall try the action on the return day, or on such short day as it fixes.").

also Fertilizer Corp. of India v. IDI Mgmt., Inc., 517 F. Supp. 948, 963 (S.D. Ohio 1981) ("[A] confirmation proceeding is not an original action; it is, rather, in the nature of a post-judgment enforcement proceeding. In such a proceeding a counterclaim is clearly inappropriate.").

In support of its request for leave to file its setoff-based counterclaim in this summary action, Arc cites to Perretti v. Ran-Dav's Cnty. Kosher, Inc., which, at best, demonstrates that Arc's proposed counterclaim belongs in the Law Division. See App. Br. at 43. In Perretti, although the defendants were permitted to raise their "civil rights violations and tort claims" in an action by the Attorney General, which itself "alleg[ed] violations of state kosher regulations," the appellate panel nonetheless remanded because ***the trial court should have severed and transferred the counterclaims***. Id. at 625. Perretti actually supports Claremont's position that, at best, Arc's proposed counterclaim should be severed and transferred to the Law Division.[10] However, Perretti does not stand for the proposition that courts should permit setoff-counterclaims in actions to confirm arbitration awards (such as here), and Arc

[10] Arc's proposed counterclaim is already the subject of litigation, also before the Honorable Frank J. DeAngelis, J.S.C., in the Chancery Division, Docket No. MRS-C-55-24, wherein Claremont filed a Verified Complaint and Order to Show Cause, seeking to preliminarily and permanently enjoin Arc's legally barred Hackensack Project claims commenced in arbitration, see Da492 (i.e., the claims at issue in Arc's proposed counterclaim). That matter is currently on appeal, A-000-457-24.

cites zero authority for such an absurd suggestion. Indeed, arbitration's "goal of providing final, speedy and inexpensive settlement of disputes" dictates exactly the opposite. Barcon, 86 N.J. at 187.

Moreover, on April 29, 2024, Arc filed a Demand for Arbitration with the American Arbitration Association. Arc NJ, LLC v. Claremont Constr. Grp., Inc., Case No. 02-24-0000-7582. Da492. Therein, Arc mirrors the allegations in its proposed counterclaim. Compare Da495 ("[Arc] files this Demand for Arbitration…pursuant to the dispute resolution procedures of the parties June 1, 2019 Agreement for the construction of project located at Block 408, Lot 11, 389 Main Street in Hackensack…resulting in a balance due to Arc of $2,084,220.03"), with Da149 (Arc's February 12, 2024 Proposed Counterclaim) ¶ 36 ("Plaintiff owes Defendant at least $2,084,220.03 for Defendant's work on the Hackensack Project"). In fact, as alluded to in Arc's April 29 Demand for Arbitration on the Hackensack Project, that contract's dispute resolution provision requires claims be decided in arbitration—not court—and thus Arc is also barred from asserting its counterclaim in this venue, yet another reason Arc's motion for leave to file a counterclaim must be denied. The Trial Court agreed: "The [Trial] Court does not find any basis for [Arc's] assertion that its proposed counterclaim for setoff should be decided in a different forum than the Hackensack Arbitration." Da32-33.

At bottom, Rule 4:67 is designed simply "to afford the trial court an opportunity to manage the litigation between the necessary parties, ***providing for expeditious resolution of those issues that can be addressed quickly***." Perretti, 289 N.J. Super. at 624 (emphasis added). Arc's proposed counterclaim, centered on the Hackensack Project, would require extensive discovery and evidentiary proofs at a trial—notwithstanding the fact that the parties already comprehensively litigated the Hackensack Project at the Arbitration (and will ultimately be barred under the entire controversy doctrine, see Docket Nos. MRS-C-55-24 & A-457-24). There is simply no avenue for "expeditious resolution" for the parties to re-litigate the Hackensack Project in this Court. To the extent that the Court is willing to overlook the entire controversy doctrine and grant Arc leave to file its counterclaim (which it should not), Claremont requests that the Court order the counterclaim severed and transferred to the Law Division. Arc's counterclaim is a blatantly transparent and desperate attempt to further stall Claremont's collection efforts with regard to the Award and should not be allowed.

CONCLUSION

Accordingly, Claremont requests that this Court affirm the Trial Court's June 12 Orders confirming the Award, denying Arc's motion to vacate/modify, and denying Arc's request to file a counterclaim in this summary action.

Respectfully submitted,

GIBBONS P.C.

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Dated: November 18, 2024

CLAREMONT CONSTRUCTION GROUP, INC.,	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION
Plaintiff/Respondent,	DOCKET NO.: A-003246-23
v.	TRIAL COURT DKT NO.: MRS-C-11-24
ARC NJ, LLC,	CIVIL ACTION
Defendant/Appellant. .	On Appeal from the Superior Court of New Jersey , Chancery Division: Morris County
	Sat Below: Hon. Frank J. DeAngelis

REPLY BRIEF OF DEFENDANT-APPELLANT ARC NJ, LLC

Dated: December 4, 2024

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PRELIMINARY STATEMENT

Defendant-Appellant Arc submits this reply brief in further support of its appeal from three Orders of the Trial Court and in response to Plaintiff-Respondent CCG's brief in opposition ("Opposition").

In an attempt to obfuscate the Trial Court's mistakes in both law and fact in confirming the Award, CCG mischaracterizes New Jersey law on the standard for vacating an arbitration award and discusses red herring issues that have no bearing on the validity of the Award itself. While the grounds for declining to confirm an arbitration award are narrow, they are not limited to instances of arbitrator fraud and corruption. It is sufficient that that the Arbitrator clearly and irrationally disregarded the written terms of the parties' PTA. Further, there is no support whatsoever for CCG's argument that the Award was based on some unwritten amendment to the PTA that was purportedly formed with the parties' mutual assent. The Award contains no discussion of any such amendment.

CCG also improperly conflates the distinct and alternative grounds requiring the Court to modify the Award, and instead lumps together the different mathematical and transcription errors and erroneously claims that the Court may only correct "simple" errors. CCG, however, ignores the fact that correcting these errors requires the Court only to either perform simple

mathematical operations or properly transcribe EGPs from the record to the Award.

Finally, CCG fails to respond to Arc's arguments regarding its setoff claim, i.e. that Arc is not seeking a substantive ruling on the merits of its claims concerning nonpayment on the Hackensack Project but rather the imposition of a provisional setoff of its claims from the Award to avoid an indisputable windfall to CCG. CCG ignores the Trial Court's finding and recycles its previously asserted arguments, incorrectly asserting that Arc is not allowed to assert a counterclaim in a summary action (which is false) and Arc is trying to debate the merits of the claim in this forum (which it is not).

ARGUMENT

POINT I

CONTRARY TO CCG'S ARGUMENT, A FINDING OF FRAUD OR MISCONDUCT IS NOT NECESSARY TO VACATE AN ARBITRATION AWARD WHERE, AS HERE, THE ARBITRATOR PLAINLY IGNORES, MISAPPLIES, AND EXCEEDS THE POWERS EXPRESSLY GRANTED IN THE PARTIES' AGREEMENT

CCG mischaracterizes New Jersey's standard for vacating an arbitration award. It blatantly disregards an explicit state statute that provides six grounds upon which a Court may vacate an award to create a faulty foundation for its argument that Arc's opposition to confirmation must fail because it has not demonstrated fraud or misconduct on the part of the arbitrator. Opp. at 18.

Importantly, the Trial Court in its Statement of Reasons did not anywhere adopt the fraud or misconduct "standard" improperly advocated by CCG. The Trial Court correctly acknowledged the six circumstances upon which confirmation of an award must be denied. N.J. Stat. Ann. § 2A:23B-239(a). It also properly observed that "an arbitrator may not disregard the terms of the parties' agreement." Da30-31 (quoting Cnty. Coll. of Morris Staff Ass'n v. Cnty. Coll. of Morris, 100 N.J. 383, 391 (1985)).

Despite CCG's repeated claims, vacating an arbitration award does not require a showing that the award is "the product of fraud, corruption, or any wrongdoing." Opp. at 15, 17, 19. Nor is it that the party seeking to vacate an award must demonstrate an error of law "so egregious that one need only look at the cover page, at the award, to know that a horrible mistake had been made." Opp. at 15, 19, 30 (citing Perini Corp. v. Greate Bay Hotel & Casino, Inc., 129 N.J. 479 (1992)).

As to the supposed "fraud, corruption, and wrongdoing" standard, while CCG cites Tretina Printing, Inc. v. Fitzpatrick & Assocs., Inc., 135 N.J. 349 (1994) repeatedly for this proposition,[1] a closer look at this 1994 case along with the applicable statute at the time, reaffirms that "fraud, corruption, or any

[1] Notably, while the Trial Court cited Tretina and Perini, it was in the context of describing CCG's arguments. Da10, Da24-25. The Trial Court did not otherwise discuss Tretina or Perini anywhere in its opinion.

wrongdoing" is but one of several reasons a Court may vacate an arbitration award.

The Supreme Court decided Tretina in 1994 when a majority of the Court, facing a lack of unanimity on the standard of review of arbitration awards, adopted the principals set forth by Chief Justice Wilentz in his concurring opinion in Perini Corp. v. Greate Bay Hotel & Casino, Inc., 129 N.J. 479 (1992). See 135 N.J. at 358. However, the Tretina Court was relying upon N.J. Stat. Ann. § 2A:24-8, the state statute in effect at the time of its decision. That statute provided that a court must vacate an arbitration award under four circumstances:

> a. Where the award was procured by corruption, fraud or undue means;
>
> b. Where there was either evident partiality or corruption in the arbitrators, or any thereof;
>
> c. Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause being shown therefor, or in refusing to hear evidence, pertinent and material to the controversy, or of any other misbehaviors prejudicial to the rights of any party;
>
> d. Where the arbitrators exceeded or so imperfectly executed their powers that a mutual, final and definite award upon the subject matter submitted was not made.

135 N.J. at 355 (emphasis added).

Thus, three of the four grounds upon which a court could vacate an award sounded in fraud or misconduct, and the fourth required a resulting award that was not "mutual, final and definite." Id.

By comparison, the statute applicable to this private sector Arbitration became effective January 1, 2003 and provides that a Court shall vacate an arbitration award if:

> (1) the award was procured by corruption, fraud, or other undue means;
>
> (2) the court finds evident partiality by an arbitrator; corruption by an arbitrator; or misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;
>
> (3) an arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to section 15 of this act, so as to substantially prejudice the rights of a party to the arbitration proceeding;
>
> (4) an arbitrator exceeded the arbitrator's powers;
>
> (5) there was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection pursuant to subsection c. of section 15 of this act not later than the beginning of the arbitration hearing; or
>
> (6) the arbitration was conducted without proper notice of the initiation of an arbitration as required in section 9 of this act so as to substantially prejudice the rights of a party to the arbitration proceeding.

N.J. Stat. Ann. § 2A:23B-23(a).

The 2003 version of the statute (the one that applies here) includes the first three prongs of the 1994 version concerning fraud and misconduct, but explicitly changed the fourth stated ground (an arbitrator exceeding his powers) to remove the heightened standard that the resultant award was not "mutual, final and definite." Id.; Tretina 135 N.J. at 355 The 2003 statute also provides two additional reasons (subsections 5 and 6) that have nothing to do with fraud or corruption.

Even if the explicit removal of a qualifier in subsection 4 was not significant, the case law that followed this enactment of this version of the statute demonstrates that an arbitrator's disregard of the terms of the parties' agreement—even without the indicia of fraud, corruption, or wrongdoing—is an abuse of the arbitrator's powers necessitating the vacating of an award. See, e.g, Knecht v. 225 River St., L.L.C., No. A-4793-10T3, 2012 WL 1020005, *3 (N.J. Super. Ct. App. Div. Mar. 28, 2012) (holding that an arbitrator exceeds his powers when he "disregard[s an] agreement's terms that are clearly and unambiguously expressed.") [Da555]; Creative Waste Mgmt., Inc. v. Bay Owners Ass'n, Inc., No. A-0360-10T2, 2011 WL 2416857, at *5 (N.J. Super. Ct. App. Div. June 17, 2011) (affirming the lower court's decision to vacate an arbitration award and explaining that "the Arbitration Act sets

limits on the arbitrator's power to control the procedures at arbitration [and f]ailure to honor those limits provides grounds to vacate an arbitration award") [Dra13-19].

CCG appears to acknowledge that a Court can vacate an award without a finding of fraud or misconduct because in its Opposition, CCG provides several examples of this Court's prior decisions to vacate awards for reasons other than arbitrator fraud or misconduct. Opp. at 16 (citing Block v. Plosia, 390 N.J. Super. 543, 555 (App. Div. 2007); Kimm v. Blisset, LLC, 388 N.J. Super. 14, 24 (App. Div. 2006); Minkowitz v. Israeli, 433 N.J. Super. 111, 148 (App. Div. 2013)).

CCG also misleadingly implies that an additional or perhaps alternate standard for a court to vacate an arbitrator's award is that the arbitrator's "'errors of law' had to be so egregious that one need only look at the cover page, at the award, to know that a horrible mistake had been made." Opp. at 15, 19, 30. CCG fails to note that this convenient quote is lifted from the concurring opinion of Chief Justice Wilentz in Perini and is the only time the phrase appears in New Jersey jurisprudence. 129 N.J. at 542. This language is not even used or cited by the Tretina Court, and it should not be swept into some overarching impossible-to-meet standard that CCG created by stitching together convenient quotes from a variety of opinions.

In sum, under New Jersey law, an award must be vacated when an arbitrator exceeds his powers by disregarding the terms of the parties' agreement, which is exactly the case here when the Arbitrator improperly transformed projects into Backlog Projects subject to EGP-sharing and supposedly determined the amount of those EGPs from documents that did not qualify as amendments to the PTA. Initial Br. Point I.

POINT II

BY FAILING TO EVEN ADDRESS THE ISSUE, CCG CONCEDES THAT THE TRIAL COURT IMPROPERLY DETERMINED THAT THE ARBITRATOR'S AWARD RELIED ON PROOF OF SOME PHANTOM COURSE OF DEALING ALTERING THE TERMS OF THE PTA

CCG provides no response to Arc's point in its Initial Brief that the Trial Court erred in its conclusion that the Arbitrator's failure to apply the explicit language of the parties PTA was excused because he found an agreement as to the EGPs "was made pursuant to the parties' conduct in the course of their dealings with each other." Da31-32.

As addressed in Arc's Initial Brief, the Arbitrator did not base his determination of EGPs on any alleged course of dealing. Initial Br. Point I.C.5. Instead, the Arbitrator was very clear in the Award that his decision regarding CCG's entitlement to EGP payments and the amount of those EGP payments was based purely on the Financial Reporting Arc provided to CCG (for a wholly different purpose). Da137 ("The EGP for these projects were

either formally agreed to in the PTA (i.e., Backlog Projects only) or were included time and time again in the update calculations provided by ARC to Claremont which set forth the EGP, amounts paid, and amounts owed.").

CCG, however, does not address this point in its Opposition, and instead doubles down on the Trial Court's mistake of law and fact, incorrectly claiming that the Arbitrator "considered and found persuasive [CCG's] position and evidence establishing the parties' mutual assent, over the course of several years, establishing EGPs on a project-by-project basis." Opp. at 28.[2]

While the parties may have briefed the issue of mutual assent or course of dealing in its post-Arbitration briefing, CCG cannot escape the fact that the Arbitrator did not base his ultimate decision on the parties' course of dealing or any implicit agreement to waive the requirement for amendments to the PTA to be written. The Trial Court made an error of both law and fact in its reasoning when confirming the Arbitrator's EGP determinations, and CCG fails to address this error.

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[2] Despite CCG's claims, the undisputed change to the EGPs for the Backlog Projects listed in the PTA (not EGPs for projects that were supposedly elevated to Backlog Project status after the PTA was executed) was not the product of the parties "mutual assent via a less formal method of reciprocated agreement." Opp. at 24. Rather, the EGPs for projects that existed at the time of the execution of the PTA (in other words, projects Arc took over mid-construction) were subject to other provisions of the PTA like cost-reserve agreements for unanticipated issues [Da55 (PTA § 1.7(a)(i))] or credits for underbillings determined after PTA execution [Da56 (PTA § 1.7(b)(i))], resulting in agreed-upon alternations to those listed EGPs.

POINT III

CCG MISSTATES THE STANDARD OF REVIEW NECESSARY TO MODIFY AN ARBITRATION AWARD, BUT IN ANY EVENT, THE ERRORS IN THE AWARD ARE "OBVIOUS AND SIMPLE"

In response to Arc's arguments concerning the modification of the Award, CCG oversimplifies the distinct errors in the Award and fabricates a standard of review that is not controlling in New Jersey.

Arc's motion for modification of the Award was based on four distinct errors made by the Arbitrator: (1) errors in the calculation of interest owed on ongoing projects, (2) errors in the description of EGPs for two projects that were subject to contracts specifically listing those EGPs, (3) errors in the transcription of three projects' EGPs, and (4) errors in including the Bayonne 3 project in the EGP award because Arc never listed it in the Financial Reporting and Arc did not include it in the latest-in-time Forecasts. Initial Br. Point II.

CCG groups these errors into one category and claims they can only be corrected by the Court if they are "simple arithmetical errors, such as 2 + 2 = 5, or obvious mistakes in identification." Opp. at 33, 35 (citing Tretina, 135 N.J. at 359). This dicta from Tretina, however, is found in that Court's discussion of the dissenting opinion in which the dissenting Justice opined that the Court should remand the matter to the arbitrator to fix an ambiguity in the calculation of the award. Tretina, 135 N.J. at 360. A majority of the Court disagreed, finding that the alleged issue with the award was the omission of a

party's claim and not a math error, rejecting the request for modification outright. Id. The Court explained that even if the award contained an error, it should not be remanded to an arbitrator because the Court is empowered to correct "mistakes that are obvious and simple-errors that can be fixed without a remand and without the services of an experienced arbitrator." Id. at 360.

This language, however, did not create a new standard for modification of arbitration awards, and the Tretina Court did not hold that the only mistakes that justify modification to an award must be "obvious and simple." Opp. at 33. Such a conclusion would mean an award that contains an obvious but more complicated mistake must be confirmed, which is an absurd result. Instead, if this Court determines the errors in the Award are too complicated to fix on its own, it should vacate the Award and allow the parties to resolve the dispute pursuant to their dispute resolution procedure.

In any event, the mistakes made by the Arbitrator are obvious and simple mathematical or transcription errors that do not require the reevaluation of evidence in order to correct. Arc provided the corrected calculations of interest in Tabs 1 and 2 of its Alternative Calculations. Da475, Da477. Correctly applying mathematical operations (PEMDAS: parentheses, exponents, multiplication and division, and addition and subtraction) is not a "method" of calculating interest, and mistakes in the order of operations are computational errors that can be easily corrected by the Court.

Similarly, the Court can easily correct the EGPs awarded for the St. Lucy's and Bayonne 3 projects by using the figures which appear in those projects' construction contracts. Da463, Da400.

As for the most obvious mistake regarding the transcription of EGPs into the Award, the Arbitrator clearly stated the documents upon which he was relying to derive those figures (the Financial Reportings) but then either did not include those figures in the Award or included figures for projects that did not appear in those documents (like the Bayonne 3 project). Da137-138. The corrections that need to be made to the Arbitrator's EGP determinations do not require this Court to re-evaluate any evidence; the Court must only observe the numbers contained in the documents the Arbitrator explicitly incorporated into the Award [Da291-345] and update the values in the Award to reflect the values that appear on those documents (and reduce the EGP to 0 for projects that do not appear on those documents).

These errors—based in math or transcription from one document to another—do not require a re-evaluation of the evidence. Rather, they can be easily corrected by simply updating the values in the Award to reflect the values actually stated in the record.

POINT IV

CCG FAILS TO ADDRESS THE ERRORS IN THE TRIAL COURT'S REASONING REGARDING ARC'S SETOFF CLAIM AND IT ALSO INCORRECTLY ARGUES THAT THE SETOFF CLAIM IS ONE THAT REQUIRES A DETERMINATION OF PAYMENT LIABILITY

CCG fails to address the Trial Court's erroneous determination regarding Arc's setoff claim and instead repeatedly and incorrectly insists that Arc is prevented from asserting such a claim in this proceeding and the setoff claim is one that can only be resolved with an full-fledge investigation into the merits of Arc's nonpayment claims on the Hackensack Project.

The Trial Court denied Arc's request to assert a counterclaim for a setoff of the monies owed to Arc on a separate project because the Trial Court determined that this counterclaim could be decided in the Hackensack Arbitration. Da32-33. The Trial Court did not hold that Arc could not assert a counterclaim for setoff in the summary proceeding. In its Initial Brief, Arc succinctly addressed why its claim for setoff not only could not be heard in the Hackensack Arbitration, but also why its counterclaim is not one that requires a merits-based inquiry into liability for nonpayment. Initial Br. Point III.

In its Opposition, however, CCG completely ignores the Trial Court's determination and reasserts its baseless claim that Arc is procedurally prevented from asserting a counterclaim, relying on generic case law discussing judicial deference to arbitration awards. Opp. at 37-41. There is

simply no support for CCG's claim that the only counterclaim Arc is permitted to assert is one to vacate, modify, or correct a final arbitration award, which is likely why the Trial Court did not base its decision on such a preposterous theory. Indeed, Rule 4:67 which requires a party to seek leave of court to assert a counterclaim in a summary actions demonstrates that counterclaims may be asserted in a summary action. Rule 4:67-4(a); see also Perretti v. Ran-Dav's Cnty. Kosher, Inc., 289 N.J. Super. 618, 624 (App. Div. 1996) ("[Rule] 4:67–4(a) limitation on asserting a counterclaim or cross-claim in a summary action is not a prohibition.").

CCG also incorrectly states that Arc is attempting to "re-litigate construction claims," via its setoff claim [Opp. at 38], and mischaracterizes Arc's proposed counterclaim by selectively quoting only one paragraph in Arc's Answer describing the amount owed to Arc [Opp. at 40]. But see Da149-150 (Arc's Answer with proposed counterclaim which specifies Arc is seeking "a set off in the amount of its claim for payments owed on the Hackensack Project against any judgment issued in Plaintiff's favor under the Final Award."). As explained in its Initial Brief, Arc's claim for setoff is for provisional relief to avoid an inequitable windfall to CCG should this matter proceed to a final decision before the Hackensack Arbitration. Arc's proposed counterclaim would not "require extensive discovery and evidentiary proofs at trial," [Opp. at 41] because it is simply asking the Court to offset the Award

with the amount to be determined by the Hackensack Arbitration. Nor is it a claim in the separate litigation concerning the Hackensack Arbitration [Opp. at 39, n. 10], because that proceeding (currently on appeal) concerns only CCG's meritless attempt to enjoin Hackensack Arbitration based on the entire controversy doctrine.[3]

CONCLUSION

CCG's recycled arguments fail to address the Trial Court's incorrect legal and factual determinations, and Arc respectfully requests that the Court vacate the Award or, alternatively, remand this matter to the Trial Court to modify the Award accordingly and permit Arc to assert a setoff counterclaim.

Dated: Buffalo, New York
December 4, 2024

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[3] On October 15, 2024, in response to CCG's motion for reconsideration, the Trial Court reaffirmed its decision that the issues in the Arbitration at issue here are distinct from the issues in the Hackensack Arbitration; thus, the entire controversy doctrine is not implicated and the Hackensack Arbitration must continue. Dra1-12. Therefore, CCG's claim that the Arbitrator already considered Arc's Hackensack Project claims in the PTA Arbitration [Opp. at 8, n.5] is completely false. Arc has not yet litigated its nonpayment claims but will do so for the first time in the Hackensack Arbitration.