CLAREMONT CONSTRUCTION GROUP, INC.,

Plaintiff/Appellant,

v.

ARC NJ, LLC,

Defendant/Respondent.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO.: A-000457-24

CIVIL ACTION

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

Docket No.: MRS-C-55-24

Sat Below: Hon. Frank J. DeAngelis

BRIEF OF PLAINTIFF-APPELLANT CLAREMONT CONSTRUCTION GROUP, INC.

Dated: March 11, 2025

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Appellant Claremont Construction Group, Inc. ("Claremont" or "CCG") appeals the trial court's orders ("August 30 Orders") denying Claremont's request for injunctive relief and granting Respondent Arc NJ, LLC's ("Arc") motions to dismiss the complaint with prejudice and compel arbitration.

PRELIMINARY STATEMENT

There exists inherent unfairness in forcing parties and courts to rerun a course previously run. Claremont and Arc arbitrated a complex dispute that spanned multiple construction projects, and multiple contracts, and yet Arc seeks, and the trial court permitted, a second arbitration to move forward as to one of those construction projects. New Jersey's entire controversy doctrine precludes Arc's strategic piecemeal litigation.

Claremont transferred more than a dozen construction projects to Arc, in exchange for estimated profits on those projects, pursuant to a Project Transfer Agreement ("PTA"). Arc did not fully pay on 13 of those transferred projects, and so Claremont commenced arbitration against Arc (and Arc counterclaimed). The Arbitrator awarded Claremont, after an 8-day trial, approximately $4 million on 12 of the 13 transferred projects—the one exception: the "Hackensack Project," whereby the Arbitrator offset Claremont's damages ($899,051.20) with Arc's alleged damages ($2.1 million). But, in a last ditch attempt to avoid paying Claremont the $4 million judgment, Arc commenced a

second arbitration just 17 days later, seeking more damages it claims it is owed on the Hackensack Project. Claremont applied to the trial court for injunctive relief, but the trial court incorrectly denied that request.

The trial court erred in denying Claremont's application for injunctive relief under the entire controversy doctrine ("ECD") (and/or res judicata) and allowing Arc to proceed with a second arbitration regarding the Hackensack Project. The ECD, as codified in New Jersey Court Rule 4:30A, mandates that all claims arising from a *single controversy* must be resolved in *one action* to avoid fragmented litigation and ensure a comprehensive resolution of disputes.

Claremont and Arc's ***entire*** relationship centered on ***one*** overarching agreement (the PTA), which transferred ***all*** Claremont's projects, including the Hackensack Project, from Claremont to Arc. The parties' first arbitration subsumed and encompassed all transferred projects under the PTA—there were hours of testimony, dozens of exhibits, and extensive damages calculations submitted about all transferred projects—including the Hackensack Project.

Arc was legally obligated to include all counterclaims related to these projects in that arbitration (and it did). The Arbitrator's decision to offset Claremont's damages on the Hackensack Project (down to $0.00) based on Arc's counterclaim demonstrates that the Hackensack Project was fully litigated in the first arbitration. Arc asks the New Jersey courts to bless and condone its

strategic piecemeal "gotcha" litigation tactics, whereby Arc apparently intentionally held back a secret claim related to the Hackensack Project, only to spring it after it lost the first arbitration. To allow that claim to proceed would be to sanction litigation gamesmanship of the highest degree.

Allowing Arc to initiate additional one-off arbitrations for each of the PTA's transferred projects (under Arc's theory it could presumably file a dozen separate arbitrations now—one for each project) contravenes the ECD's purpose of *avoiding piecemeal litigation* and ensuring that all related claims are adjudicated in a single proceeding. The factual circumstances giving rise to the Hackensack Project dispute were already addressed—at great length—in the first arbitration, and Arc had, at minimum, a fair and reasonable opportunity to raise all setoff claims during that proceeding (and it did). The trial court's decision to nonetheless compel a second arbitration undermines the doctrine's goal of judicial efficiency and fairness by allowing Arc to bifurcate the dispute and potentially initiate an unknown amount of additional arbitrations.

The trial court's denial of Claremont's request for injunctive relief was therefore erroneous. The ECD bars Arc's second arbitration regarding the Hackensack Project, as all related claims should have been fully resolved in the first arbitration. The Appellate Division should therefore reverse the trial court's August 30 Orders and grant Claremont's request for injunctive relief.

STATEMENT OF FACTS & PROCEDURAL HISTORY[1]

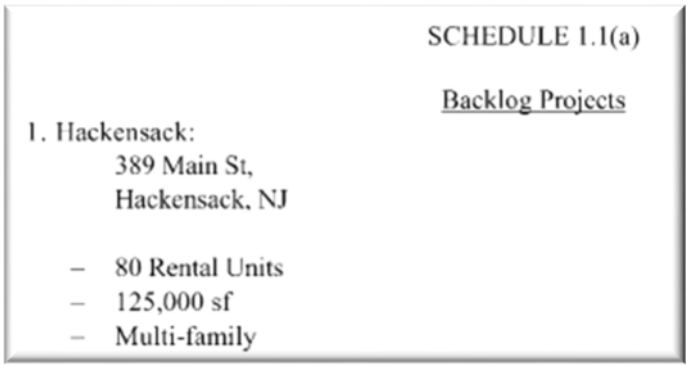
A. Background Preceding the Dispute (Pa75)

Claremont was a general contractor and construction management firm. Pa75 ¶ 6. Arc is also a general contractor and construction management firm which, on May 31, 2019, purchased Claremont's general construction management business. Pa75 ¶¶ 7-8. The parties structured the deal as an "earn-out" via a "Project Transfer Agreement" (the PTA), whereby Claremont immediately transferred its ongoing construction projects (the "Backlog Projects") to Arc and funneled future projects over a 3-year period to Arc (defined in the PTA as "Pipeline Projects") and, in exchange, Arc agreed to pay Claremont 65% of the "estimated gross profits" ("EGP") on those projects. Pa75-76 ¶¶ 9, 11, 13. Claremont sold its business to Arc as part of the retirement of Claremont's two principals (Stephen and Donald Sciaretta), and thus the parties agreed to this "earn-out" payment structure. Pa75 ¶ 9. Despite those facts, Arc nonetheless stiffed Claremont's retirees on more than $5 million in payments.

Schedule 1.1(a) of the PTA identified the five Backlog Projects being transferred from Claremont to Arc, which notably included, as the very first

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

project: **The Hackensack Project**. Pa76 ¶ 11.



SCHEDULE 1.1(a)

Backlog Projects

1. Hackensack:
   389 Main St,
   Hackensack, NJ

   - 80 Rental Units
   - 125,000 sf
   - Multi-family

[Pa123.]

Section 1.5(a) of the PTA governs the "Transfer of Backlog Projects," wherein:

> ARC and CCG acknowledge and agree that each Backlog Project is a Project in which ***ARC shall serve as a subcontractor of CCG*** with respect to such Project and perform all of the obligations (and, subject to the terms of this Agreement, receive all of the benefits) of CCG under the construction contract with the Owner for such Project (each, a "Completion Contractor Backlog Project" and collectively, the "Completion Contractor Backlog Projects").
>
> [Pa90 (emphasis added).]

Section 1.5(b) of the PTA governs the Completion Contractor Backlog Projects and adds:

> With respect to each Completion Contractor Backlog Project, ***ARC and CCG shall enter into a subcontract agreement*** as it relates to the construction agreement for such Completion Contractor Backlog Project, utilizing AIA Document A401 (*Standard Form of Agreement between Contractor and Subcontractor*) or

> such other subcontractor agreement as may be required by a lender or third party owner…(each, a "Completion Contractor Backlog Project Construction Agreement").
>
> [Pa90 (emphasis added).]

The parties executed the PTA on May 31, 2019. The next day, on June 1, 2019, Claremont and Arc, pursuant to Section 1.5 of the PTA, entered into an AIA Document A401-2017 Standard Form of Agreement Between Contractor and Subcontractor, which designated Claremont as the "Contractor" and Arc as Claremont's "Subcontractor" for the Hackensack Project. Pa595. Arc thus had no privity with the owner of the Hackensack Project ("Owner"), and the Hackensack Project "Completion Subcontract" required that "the Contractor [Claremont] shall make progress payments on account of the Subcontract Sum to the Subcontractor [Arc]." Pa607 § 11.1 (Progress Payments).

Meanwhile, Schedule 1.7(a) of the PTA provided the ***agreed-upon*** EGP for the Hackensack Project: $1,677,588.00.

SCHEDULE 1.7(a)

Estimated Gross Profit for Backlog Projects

Backlog Project	Backlog Project Estimated Gross Profit
HACKENSACK	$1,677,588
BAYONNE CYPRESS	$1,866,847
SOMERSET BROWNSTONES	$1,659,698
MILLER ST	$ -
PARK RIDGE	$3,238,052

[Pa125.]

Thus, Claremont's 65% EGP share on the Hackensack Project (65% of $1,677,588.00) was $1,090,432.20. Pa76 ¶ 15. Arc performed poorly at Hackensack, including delays, cost overruns, and mismanagement. Pa176 ¶ 18. Arc only paid Claremont $191,381.00 in EGP payments on the Hackensack Project and refused to pay the remaining $899,051.20. Pa77 ¶ 16.

Arc's poor performance caused the Owner of the Hackensack Project to stop paying Claremont under the construction contract between Claremont and the Owner. See Pa176 ¶ 19. Claremont accordingly commenced a separate arbitration against the Owner under the Claremont-Owner contract (the "Sonehan Arbitration"). See Pa907. Claremont invited Arc to join that arbitration (because it was Arc's subcontracted work with which the Owner was dissatisfied), but Arc declined because it had no contractual privity with the Owner—in other words, Arc knew that its right to payment at Hackensack came exclusively from the Hackensack Project Completion Subcontract, and not the Claremont-Owner contract, under which Claremont stopped paying Arc ***in December 2020***.[2] See Pa344 at 501:5-19.

[2] The arbitration panel in the Sonehan Arbitration awarded Claremont the net total $435,087.70 on September 15, 2023 under the Claremont-Owner prime contract at the Hackensack Project. But this separate arbitration between Claremont and the Owner is wholly irrelevant to the dispute between Claremont and Arc at the Hackensack Project, as Arc has never had any payment rights under the Claremont-Owner contract, but rather Arc's payment rights at the Hackensack Project flow only

Arc, instead, not getting paid under the Hackensack Project Completion Subcontract by Claremont (due to the Owner's nonpayment to Claremont, which was due to Arc's poor performance), opted not to sue Claremont but rather strategically elected to not pay Claremont any of the additional $899,051.20 in contractually-mandated EGP payments remaining to Claremont with respect to the Hackensack Project (arguing that, instead, Arc was owed $2.1 million at the Hackensack Project). See Pa535 at 147:17-148:2. In fact, Arc stiffed Claremont's retirees on $5,209,900.68 in total EGP payments across thirteen (13) construction projects that Claremont transferred to Arc. Pa186 ¶ 111. Stated differently, Arc not only knew it had a damages claim against Claremont on the Hackensack Project ***years*** before the parties' first arbitration (a ripe claim), but Arc weaponized its alleged damages against Claremont to avoid paying Claremont millions.

B. Claremont Sues Arc for Nonpayment (Pa77)

On July 5, 2022, Claremont filed a Demand for Arbitration with the AAA pursuant to its Construction Arbitration Rules (the "First Arbitration") that put Arc's performance on the projects—most significantly the Hackensack Project—squarely at issue. Pa77 ¶ 18. Claremont's Demand for Arbitration

---

from the Hackensack Project Completion Subcontract—which was at issue in the First Arbitration.

stated:

> Claremont has a claim for breach of contract against ARC, which includes (but is not limited to) claims regarding:
>
> - ARC's **failure to complete the Backlog Projects in accordance with the terms and conditions of the construction agreements governing such Backlog Projects [e.g., the Hackensack Project]**, which includes (but is not limited to) ARC's ineffective project management, poor quality control, and lack of transparency, which has caused costly delays and estrangement of long-time Claremont clients;
>
> - ARC's obligation to indemnify CCG for certain claims caused by ARC's above-referenced breaches **of the PTA and construction agreements**;[3]
>
> - ARC's failure to pay Claremont the required 65% of the estimated gross profit ("EGP") on the Backlog Projects…
>
> [Pa77 ¶ 19 (emphases added).]

Thus, there was no question that Arc's performance (or lack thereof) was a factual issue before the Arbitrator. In fact, the Arbitrator heard eight full days' worth of testimony about Arc's actual construction management performance across the many transferred construction projects. Pa210, 300, 705, 785, 430,

[3] It is critical to this appeal to highlight that Claremont initiated the First Arbitration not as some "limited-issue arbitration," but rather as a general dispute under the PTA "***and***" under the construction agreements subsumed therein.

497, 617, 842. The Hackensack Project was the single-most disputed project, spanning across seven of the eight trial hearing days, and encompassing testimony on not just EGP, but also Arc's work ***as a subcontractor***, which further included a bulk submission of Arc's business records at, specifically, Hackensack (***the only project*** for which Arc mass-submitted business records into evidence). Pa543 at 180:23-181:2.

At the First Arbitration, Arc did not dispute that the PTA entitled Claremont to EGP payments on the Hackensack Project. However, Arc did allege that it was entitled to offsetting credits against those EGP payments. Specifically Arc counterclaimed and alleged that "Arc is currently owed $2.1 million dollars…on the Hackensack Project"—i.e., monies allegedly owed to Arc under the Hackensack Project Completion Subcontract. Compare Pa201 ¶ 46 (allegation in the First Arbitration), with Pa584 (Demand commencing Second Arbitration). Arc further sought "an award declaring that Claremont is not entitled to any further payments on the Hackensack Project" "due to the unique issues on that project." Pa201, 207 ¶¶ 46, 79-80. Thus, the First Arbitration was not "limited" to merely examining how much EGP Arc owed to Claremont for the Hackensack Project—because that exercise would be simple, as Section 1.7(a) of the PTA precisely set the EGP at $1,677,588.00 (Pa125)—but rather Arc expressly sought, by way of its own pleading, a Hackensack

Project offset "due to the unique issues on that project." Pa207 ¶ 79; see also Pa703-04.

That is, Arc continuously (and, ultimately, successfully,) argued to the Arbitrator that Arc's EGP payments to Claremont should be offset (down to $0.00) due to the "serious issues with the project." Pa574; see also:

Arc NJ
Project Installment Calculation
Jan - Mar 2020

		Actual					
Job	Project	Jan Profit to Date	Dec Profit to Date	Jan Profit	PA Cost Adjust	Jan Profit	CCG (65%)
0001	Bayonne	768,362	711,841	56,521	1,490	58,011	37,707
0002	Englewood	303,053	232,988	70,065		70,065	45,543
0003	HC West (NJCU 2)	559,825	437,811	122,014	6,007	128,021	83,214
0004	Somerset	254,130	119,502	134,628	3,855	138,483	90,014
0005	Park Ridge	824,398	683,190	141,208	2,860	144,067	93,644
0007	St Peter's Dormitory	* late start, no work this quarter				0	0
0006	EPort	* late start, no work until mid March				0	0
0009	Hackensack	* EGP cannot be determined until Owner changes resolved				0	0
		2,709,768	2,185,332	524,435	14,212	538,647	350,121

[Pa906 (trial exhibit reflecting Claremont's EGP for Hackensack ("CCG (65%)") offset down to "0"—by Arc—because "EGP cannot be determined until Owner changes resolved").]

C. Trial Testimony Underscores Arc's Fair and Reasonable Opportunity to Explore All Amounts Due Under the Multiple Agreements Between Claremont and Arc at the Hackensack Project (Pa291)

During the First Arbitration, on day 1, Claremont testified with respect to the Hackensack Project Completion Subcontract between Claremont and Arc and Arc's awful performance on the Hackensack Project. Pa241-42 at 121:16-

122:17. Claremont's now-retired Vice President, Stephen Sciaretta, testified that although the PTA included an EGP for the Hackensack Project of $1,677,588.00, Arc began to unilaterally decrease the Hackensack EGP without Claremont's agreement, see supra Pa125 & Pa906, explaining that "it's a job that became monumentally difficult…being significantly delayed in the field," and Arc wanted to account for reductions based on occurrences out ***in the field***. Pa241-42, 244 at 121:1-123:17, 130:8-131:8; see also Pa207 ¶¶ 78-80 (seeking an award declaring that Arc "was not obligated to make any further [EGP] Installment Payments on the Hackensack Project due to the unique issues on the project"). As evidenced above, unpaid change orders (due to, *inter alia*, "Owner changes") were an integral part of "the unique issues on the project." On cross-examination, Arc introduced its Hackensack Project Completion Subcontract into evidence, Pa316 at 391:2-14, and made the point that revenue thereunder, and therefore EGP, was "forecasted at zero" based on in-the-field changes. Pa318 at 397:16-398:3. In other words, despite the PTA expressly setting an agreed-upon EGP, Arc unilaterally decreased the Hackensack EGP because, as testified by Arc, Arc was owed money under the Hackensack Project Completion Subcontract, thus obviating its requirement to pay any more Hackensack EGP.

On day 2 of the trial, a principal from the ownership group at the Hackensack Project, Max Dorne, testified *extensively* regarding the Project. Mr.

Dorne testified with respect to his understanding of Arc's obligations under the Hackensack Project Completion Subcontract, including Arc's "multiple delay issues," and his resulting reluctance to sign off on certain "change orders" related to Arc's work at the Project. Pa336-38 at 472:4-473:15, 478:11-24. The Hackensack Project change orders thus became established, through evidence and testimony, as a key component supporting Arc's express allegations in its Counterclaim that (i) the Project experienced "unique issues," (ii) that Arc was "owed $2.1 million" at the Project, and (iii) that "Arc is entitled to an award declaring that Claremont is not entitled to any further payments on the Hackensack Project." Pa201, 207 ¶¶ 46, 79-80. The Arbitrator heard and considered the entire litany of issues present at the Hackensack Project.

On cross-examination of Mr. Dorne, Arc's counsel further questioned whether "executing on a particular project can be complicated by change orders issued by an owner," and inquired into specific change orders themselves. Pa358 at 557:14-558:14 (regarding "change orders" on "the design of the amenity package"). In other words, Arc queried directly into amounts it believed it was owed under the Hackensack Project Completion Subcontract (offsetting Hackensack EGP amounts due to Claremont under the PTA).

Moreover, in its post-trial submission, Arc argued that it "had to address many unexpected design issues, including a complete change to the project's

amenity package in the first quarter of 2020." Pa401. Thus, see supra at 11, evidencing Arc's position in Q1 2020 ("Jan - March 2020") that "Owner changes" decreased the Hackensack EGP down to $0.00. Dealing with "Owner changes," and other change orders, is something that can *only* occur within the scope of the Hackensack Project Completion Subcontract (not the PTA)—thus underscoring the arbitration not as a piecemeal "limited-issue" arbitration, but rather as an all-encompassing arbitration stemming from the same series of transactions. Arc further contended that Claremont allegedly "agreed to pause the EGP discussions on this project given the ***multiple issues on the job*** and the possibility that it was already overpaid." Pa426-27 (emphasis added).

During Arc's case-in-chief, on day 1, Arc's president, Frank Ciminelli, testified that "we would reconcile Hackensack's estimated gross profit once we had a better sense of what was going on [in the field]." Pa495 at 257:11-16. On day 2, Mr. Ciminelli testified further that:

> Q. Arc's work on [the Hackensack Project] was done on a completion contract?
>
> A. Yes.
>
> **Q. Has Arc been paid for its work on the Hackensack project?**
>
> **A. Not in full, no.**
>
> **Q. What is Arc's claim of unpaid work on the Hackensack project?**

A. I believe we have an outstanding balance of about $1.8 million.

Q. So despite the fact that you haven't been paid on the work, Claremont is now seeking $900,000 of EGP on the work?

A. Apparently.

...

Q. What was the impact of the disruptions to the flow of the job?

A. Well, subs started to get frustrated because they weren't, you know, they weren't getting their change orders approved and therefore, they can't bill for them. That inevitably gets the subcontractors' guard up. You can't ask them to do the work and it starts to disrupt what's going on.

Q. Did that have any impact on your discussions around EGP for the Hackensack project?

A. Yeah. Yes. By the time you get to -- again the sale and **the changes orders are still not being acted upon now** -- I don't know if they're in dispute or not. It's opaque to me but clearly, they are not being approved for whatever reason. And so revenue, cost is -- you know, forecasting of cost is going on and revenue doesn't look like it is going to move **so estimated gross profit is now, you know, put into peril**.

Q. And did you have discussion with representatives of Claremont regarding that?

A. Yeah. End of 2020 we said, I can't forecast an estimated gross profit here so I need to freeze it. We already made some provisional payments on

Hackensack and they were of a magnitude that would suggest that, you know, we may have already overpaid. **So until such time as there was some action on some of the change orders which ultimately impacted our revenue then we couldn't re-forecast that estimated gross profit.**

…

A. And somewhere along the way our CFO added a footnote [Hackensack "EGP cannot be determined until Owner changes resolved"]. **Now the project is complete and finally gets to a TCO and in addition to not being able to ever reconcile estimated gross profit we continued to incur costs.** And because that new owner wouldn't act on changes but these changes are now, some of which are, you know, impacted by either the enhancements on the first and second floor or the spray foam issue and then subsequent issues that were brought up by the permitting or inspection authorities that required changes, those subcontractors will not come back to this project and do them.

So I end up prepaying for all those changes because they're threatening to leave the project, which would have totally compromised Claremont's ability to close out the project. So in good faith I continued to pay subcontractors without any payment from the owner on any of the change orders in order to get the project to final completion. Cash flow perspective we are completely upside down by $680,000. So that footnote was put in there. Claremont is now in their dispute with the owner and the hope is that we can at least get this project back to break even and then we have to figure out how to true up. That's why that footnote was added.

Q. Did that true up ever occur?

A. No.

> ...
>
> Q. Is that your position now, that you think you overpaid on Hackensack?
>
> A. Based on where we ended up, yes.
>
> Q. But your position about that is because the owner stopped paying. Correct?
>
> A. Yeah. Claremont is in a dispute with the owner that they sold the project to. And that is the nexus of why we're upside down by in excess of $600,000 because we kept on paying even though Claremont couldn't realize payment to satisfy their obligation on the contract.
>
> [Pa535-37 at 147:14-148:2, 152:2-153:6, 156:4-157:6 (emphases added); Pa668 at 201:8-19.]

At bottom, there was ***extensive*** testimony on the Hackensack Project through all four (4) days of Claremont's case-in-chief, and during the first three (3) days of Arc's case-in-chief. Pa210, 300, 705, 785, 430, 497, 617. After Arc presented the above testimony (that Arc has not been paid for the Hackensack Project, and so Arc should not have to pay Claremont EGP for the Project) Arc tendered "Arc's business records made and kept in the ordinary course of business concerning the Hackensack job. We have identified those as starting with Arc Exhibit 185 -- 181 through 241." Pa543 at 180:23-181:2. Again, this is the only Project for which Arc mass-submitted business records. Arc also alleged that it "suffered business losses in the amount of not less than $5,481,397

in its New Jersey based activities undertaken in connection with the PTA," which included the above-referenced alleged losses at the Hackensack Project. Pa204 ¶ 60. And Arc submitted an expert report and proffered expert testimony to support its claim to reimbursement of these alleged losses.[4] See Pa577 at 10.

D. The Arbitrator's Final Award Awarded Claremont All Unpaid EGP—Except for the Hackensack Project (Pa573)

On January 19, 2024, the Arbitrator awarded Claremont all unpaid EGP amounts sought across twelve (12) of thirteen (13) construction projects transferred to Arc—with the one exception being the Hackensack Project. Compare Pa186 ¶ 111, with Pa573-75. After considering substantial testimony and dozens of exhibits on the Hackensack Project alone, the Arbitrator found that this Project "is [the] one exception to [the] EGP ruling." Pa574. The Arbitrator cited to both the PTA and the Hackensack Project Completion Subcontract, noted the "serious issues with the project," and found that "a credit [was] due back" to Arc.[5] Pa574. The Arbitrator accordingly awarded Claremont

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[4] The First Arbitration consisted of discovery requests, substantial document productions, depositions, expert reports, motion practice, pre-trial submissions, a full eight-day trial, live witness testimony from 14 individuals, post-trial submissions, post-trial arguments, and a reasoned Award.

[5] For the avoidance of confusion, or distortion by Arc, the Award states that "the [EGP] figures moved at times and in some instances because [Claremont], in good faith, realized that a credit might be due back." ***I find this to be the case with the Hackensack Project***." Award at 7 (emphasis added). In other words, the Arbitrator found that a credit was indeed due back to Arc on the Hackensack Project.

$0.00 on the Hackensack Project, thus offsetting Claremont's entire EGP award (despite the express terms of the PTA) with "credit" given to Arc's Hackensack EGP-offsetting Counterclaim. Pa575.

	The total award for EGP owed is calculated as follows:
	$5,209,900.68
	($899,051.20) (Hackensack)
Total Due	$4,310,849.48

[Pa575.]

On February 1, 2024, Arc launched its campaign to avoid paying the $4 million judgment, first with a Motion to Modify the Award. The Arbitrator denied Arc's motion and affirmed Claremont's principal award ($4,310,849.48), but found separately, with regard to the award of interest only, that the interest needed to be recalculated pursuant to a new formula. Pa924. On April 12, 2024, the Arbitrator entered his "Corrected Final Award," which the New Jersey Superior Court confirmed on June 13, 2024 over Arc's objections. Pa925; Pa932.[6]

[6] Desperate to avoid paying, Arc appealed the confirmation of the Award. Appellate Docket No. A-003246-23. Argument has been scheduled for March 18, 2025.

E. Arc Continues Its Desperate Attempt to Avoid Paying the $4 Million Arbitration Award by Commencing a Second Arbitration (Pa582)

On April 29, 2024, just seventeen (17) days after the Arbitrator entered the Corrected Final Award, Arc initiated a new arbitration against Claremont (the "Second Arbitration"). Pa582-84. Arc transparently commenced the Second Arbitration in a desperate attempt to avoid paying Claremont's $4 million dollar judgment in hopes of relitigating claims regarding the Hackensack Project. Arc's Demand for Arbitration states:

> Arc asserts breach of contract claims against CCG for nonpayment [at the Hackensack Project]. Pursuant to the Agreement, CCG was to pay Arc $12,380,213.61. Arc is also entitled to $364,254.00 in approved ***change orders*** (Change Order Nos. 7 through 43) and $957,165.60 in pending PCMs. To date, however, Arc has only been paid $11,617,413.18, ***resulting in a balance due to Arc of $2,084,220.03***."
>
> [Pa584 (emphases added); compare with Pa606 (Hackensack Project Completion Subcontract) § 10.1 (Subcontract Sum = "$12,380,213.61").]

The Second Arbitration comes on the heels of the First Arbitration, wherein the Arbitrator awarded Claremont $0.00 (on an otherwise clear-cut 65% EGP formula), due to, *inter alia*, and in his words, the "serious issues with the project." Pa574. But for Arc's $2.1 million nonpayment claim, the Arbitrator's Award evinces no other reasoning for offsetting Claremont's $899,051.20 EGP claim down to $0.00. See Pa568-80. While the Award could have been more

explicit on this point, there is no alternative reasonable way to read the Award other than the Arbitrator offset the Hackensack EGP with Arc's counterclaims related to ***on-the-project subcontractor issues***. In essence, in the Second Arbitration, Arc seeks a double recovery by both offsetting Claremont's $899,051.20 Hackensack EGP claim *and* recovering an additional $2.1 million (the exact amount alleged in its own pleading in the First Arbitration!).

F. Claremont Requests Injunctive Relief Enjoining the Second Arbitration, But the Trial Court Nonetheless Ordered the Second Arbitration to Proceed (Pa23)

On June 20, 2024, Claremont filed a Verified Complaint and an Order to Show Cause, seeking injunctive relief to enjoin the Second Arbitration. Pa74. On July 18, 2024, Arc filed its opposition and filed cross-motions seeking to dismiss the Verified Complaint with prejudice and to compel the Second Arbitration. Pa699-700. The trial court held argument on the parties' motion on August 6, 2024. Transcript of Motion (filed Nov. 26, 2024) ("Mtn. Tr.").

During the hearing, counsel for Claremont pointed out the obvious—that "[t]he PTA, the project transfer agreement, subsumed all the parties' relationship"; that Claremont would not have agreed to "have a separate arbitration for each subcontract underneath the PTA"; and that it would be absurd to suggest that "we should have [fragmented] arbitrations," one for the PTA and one for each project." Mtn. Tr. at 12:11-17. Counsel for Claremont

added, moreover:

> That's just plainly not was agreed to. That's plainly not what was contemplated. It's not what we pleaded in our arbitration demand. We put all the subcontracts at issue…that made all their counterclaims on the subcontracts compulsory and they brought them. They brought their [$]2.1 million Hackensack claim and Arbitrator Rossi heard the evidence and decided it and set it off against each other.
>
> [Mtn. Tr. at 12:18-13:1.]

In response, counsel for Arc argued, incredibly, that multiple disjointed arbitrations are necessary due to the PTA's (inapplicable) arbitration-consolidation provision,[7] thus concluding that "yes…there [would] have to be 12 different arbitrations on 12 different projects." Mtn. Tr. at 19:5-7. The trial court apparently agreed with Arc. Pa23-24.

On August 30, 2024, the trial court entered two orders: one denying Claremont's request for injunctive relief; and one granting Arc's motion to

[7] The "Consolidation or Joinder" provision referenced here can be found at Section 6.3.5 of the Hackensack Project Completion Subcontract. Pa604. The provision states that "either party ***may*** consolidate an arbitration conducted under this agreement with any other arbitration to which it is a party…" Id. Thus, this section indicates, conversely of Arc's argument, that either party "may" combine multiple arbitrations between Claremont and Arc. But, this provision was never invoked one way or the other, by either party, both of whom introduced the Hackensack Project Completion Subcontract into evidence during the First Arbitration. See, e.g., Pa316 at 391:2-17. Also, to state the obvious, the Hackensack Project Completion Subcontract was already properly being argued within the jurisdiction of an arbitral forum.

dismiss Claremont's Verified Complaint with prejudice, and compelling the Second Arbitration. Pa23-24, 45-46. In its Statement of Reasons, the trial court made two primary findings.

First, the trial court held that "the Second Arbitration, also referred to as the Hackensack Arbitration, is not precluded by the First Arbitration by the entire controversy doctrine" because the First Arbitration included only "[Claremont's] claim for unpaid EGP on the projects subject to the PTA" and did not include "[Arc's] claim for which it was the subcontractor." Pa65. The trial court accordingly found that "[Arc] did not have a 'fair and reasonable opportunity to have fully litigated' its claim for damages as a subcontractor in the First Arbitration." Pa65-66 ("applying the entire controversy doctrine would be inequitable when considering that [Arc] did not have the opportunity to litigate its claim").

Second, without any analysis, the trial court incorrectly concluded that "[Arc's] claim was not ripe at the time of the First Arbitration since [Claremont] had not yet obtained a final judgment in the arbitration against the owner [of the Hackensack Project] until after the First Arbitration concluded." Pa66. This "ripeness" conclusion was clearly incorrect. As previously noted, Claremont's separate arbitration against the Owner of the Hackensack Project (the Sonehan Arbitration) centered on a contract between only Claremont and the Owner—

not a contract with Arc. The conclusion that Arc's "claim as a subcontractor" against Claremont did not ripen until the culmination of that separate arbitration is plainly wrong (and entirely unexplained by the trial court's decision).[8]

G. Claremont Moved for Reconsideration of the Trial Court's August 30 Orders Due to the Trial Court Overlooking Critical Evidence of the Hackensack Project at the First Arbitration (Pa960)

On September 12, 2024, Claremont moved for reconsideration of the Trial Court's August 30 Orders. Pa960. On October 15, 2024, the trial court again denied Claremont's request for injunctive relief, largely for the same reasons. See Pa11-12.

First, the trial court erroneously found that "[t]he First Arbitration dealt exclusively with Plaintiff's claim for unpaid EGP on the projects," whereas "[t]he Second Arbitration will address [Arc'] claim for payment as a subcontractor [under the Hackensack Project Completion Subcontract]." Pa21. The trial court accordingly held that "[t]he two claims arise from different contractual agreements and obligations" and "do not arise from the same nexus of facts…" Pa21. This is untrue, inefficient, and promotes disjointed/piecemeal litigation and the strategic holding back of claims between parties.

And with respect to Arc's claim of "ripeness," the trial court held that

[8] Also, it further logically follows, then, that Arc can only be entitled, at maximum, to the amounts Claremont received from that separate arbitration with the Owner.)

"[Arc] could not know if [Claremont] would pay the alleged amounts in question," and "[i]t was only after the confirmation of the [Sonehan Arbitration] award that [Arc] ***could be sure that they would receive a fractional amount***." Pa21 (emphasis added); see also supra note 2 ("arbitration panel there awarded Claremont the net total $435,087.70"). The trial court was wrong to connect the ripeness of Arc's claim *against Claremont*, *under the Hackensack Project Completion Subcontract*, with the timing of the separate Sonehan Arbitration. The trial court merely asserted its erroneous ripeness holding in a conclusory fashion without any analysis, at all. And the trial court apparently ignored entirely the fact that ***Arc put its claim to $2.1 million at the Hackensack Project in its Counterclaim in the First Arbitration***.

H. Claremont Is Entitled to Injunctive Relief Enjoining the Second Arbitration (Pa4)

After the trial court granted Claremont's application for a mandatory stay pending appeal per R. 2:9-5(c) ("the stay of the arbitration shall be granted"), Claremont timely commenced this appeal. Pa1.

Claremont filed this appeal and seeks the following:

(1) An Order reversing the trial court's order dismissing Claremont's Verified Complaint with prejudice;

(2) An Order reversing the trial court's denial of Claremont's request for permanent injunctive relief enjoining the Second Arbitration;

(3) An Order reversing the trial court's findings with respect to the entire controversy doctrine (and/or res judicata) and "ripeness"; and

(4) An Order reversing the trial court's order compelling the Second Arbitration.

[See Pa68.]

LEGAL ARGUMENT

POINT ONE

ARC'S $2.1 MILLION HACKENSACK PROJECT CLAIM WAS A COMPULSORY COUNTERCLAIM BELONGING IN THE FIRST ARBITRATION, AND THE ENTIRE CONTROVERSY DOCTRINE BARS ARC FROM BRINGING THIS CLAIM IN A SUBSEQUENT PROCEEDING (Pa21, Pa43-44)

Under the ECD, R. 4:30A, Arc is barred from bringing any further Hackensack Project claims in a subsequent arbitration, as ***all claims*** relating to the Hackensack Project and/or the PTA and/or the Hackensack Project Completion Subcontract were compulsory counterclaims within the First Arbitration. In order to achieve the ECD's goals of preventing the fragmentation of litigation, judicial efficiency, and fairness to the parties involved, Claremont is entitled to injunctive relief barring Arc from asserting further claims against Claremont that are borne out of the same factual nexus—that is, the parties' relationship created under PTA.

Specifically, here, the factual nexus is the PTA and all the projects transferred thereunder. Not only did the PTA require Arc to pay EGP installments to Claremont, but (for example) Section 1.5 of the PTA set a series

of transactions into motion, requiring that "ARC shall serve as a subcontractor of CCG with respect to" each of the PTA's five Backlog Projects. Pa90 § 1.5(a). The PTA thus created the general contractor – subcontractor relationship at (for example) the Hackensack Project, indeed mandating that "ARC and CCG shall enter into a subcontract agreement…utilizing AIA Document A401." Pa90 § 1.5(b). And the parties did exactly that, entering into the AIA Document A401 Hackensack Project Completion Subcontract (signed June 1, 2019), pursuant to the express directives of the PTA, and did so the *day after* entering into the PTA (May 31, 2019). Pa595. In other words, the parties do not get the Arc-as-subcontractor-of-Claremont relationship without the dictates of the PTA. The PTA (and its ancillary agreements) thus formed the entire nexus of the parties' relationship.

For over ninety years, our courts have established that the ECD requires the ***mandatory joinder*** of all claims in a single action. See Smith v. Red Top Taxicab Corp., 111 N.J.L. 439, 440-41 ("No principle of law is more firmly established than that a single or entire cause of action cannot be subdivided into several claims, and separate actions maintained thereon."). The ECD is "so deeply rooted in the administration of the judicial system…that it attained constitutional status." Prevratil v. Mohr, 145 N.J. 180, 187 (1996). Indeed, Justice Brennan, writing for the New Jersey Supreme Court, recognized the

ECD's design and purpose "for the just and expeditious determination in a single action of the ultimate merits of an entire controversy between litigants. It is a fundamental objective of [the ECD] to avoid the delays and wasteful expense of the multiplicity of litigation which results from splitting of a controversy." Ajamian v. Schlanger, 14 N.J. 483, 485 (1954).

"Under the doctrine, therefore, 'a defendant failing to raise a germane counterclaim will be estopped from proceeding thereon in a subsequent separate action.'" Consultants v. Chem. & Pollution Scis., Inc., 105 N.J. 464, 473 (1987) (quoting Pressler, *Current N.J. Court Rules*); R. 4:30A ("Non-joinder of claims required to be joined by the entire controversy doctrine shall result in the preclusion of the omitted claims"); R. 4:7-1 ("A defendant, however, either failing to comply with R. 4:30A (entire controversy doctrine) or ***failing to set off a liquidated debt or demand*** or a debt or demand capable of being ascertained by calculation, shall thereafter be precluded from bringing any action for such claim or for such debt or demand which might have been so set off." (emphasis added)). Successive claims constitute one controversy for purposes of the ECD where the claims "arise from related facts or the same transaction or series of transactions." DiTrolio v. Antiles, 142 N.J. 253, 267 (1995). Here, Arc's renewed claims in the Second Arbitration (a) relate to Project-specific facts already litigated in the First Arbitration, and (b) arise

under the Hackensack Project Completion Subcontract (i.e., part of the same series of transactions subsumed within the PTA).

Despite the doctrine's clear objective to prevent the multiplicity/waste of successive-yet-related litigations, Arc nonetheless expressly admitted on the record that "yes…there [would] have to be 12 different arbitrations on 12 different projects…because there's 12 different arbitration clauses." Mtn. Tr. at 19:5-16. This nonsensical admission underscores that Arc indeed had a "fair and reasonable opportunity" to litigate all damages stemming from the Hackensack Project, but apparently intentionally and strategically opted to hold this claim back in a wait-and-see approach as to whether it was successful in the First Arbitration. The Court should not condone the strategic holding-back of known claims. Even if it is a close call based on the "same nexus" or "series of transactions," when in doubt, a party ***must*** bring all its related counterclaims. Claremont litigated *all* its claims against Arc in a single proceeding, in good faith. See Pa172. The gamesmanship of trying to sneakily preserve a claim, yet softly litigate it in the First Arbitration (and use it for a credit/setoff), but also keep the powder partly dry, is blatantly out-of-bounds and inequitable.

The trial court therefore erred in ruling that Arc did not have a "fair and reasonable opportunity" to litigate its Hackensack Project Completion Subcontract claim. Pa65; see also DiTrolio, 142 N.J. at 267 (reiterating that an

objective of the ECD is "the avoidance of piecemeal decisions"); Wm. Blanchard Co. v. Beach Concrete Co., 150 N.J. Super. 277, 294 (App. Div. 1977) ("withholding is by definition unfair if its effect is to render the pending litigation merely one inning of the whole ball game"); Crispin v. Volkswagenwerk, A.G., 96 N.J. 336, 348 (1984) (requiring "that a party who has elected to hold back from the first proceeding a related component of the controversy be barred from thereafter raising it in a subsequent proceeding").

Here, Arc expressly alleged in its Counterclaim in the First Arbitration that it is "owed $2.1 million" on the Hackensack Project. Pa201 ¶ 46. Arc also sought "an award declaring that Claremont is not entitled to any further payments on the Hackensack Project." Pa207 ¶ 80. It is therefore beyond dispute that Arc knew of its $2.1 million Hackensack claim throughout the entirety of the First Arbitration. And Arc either argued these alleged damages in the First Arbitration (which Arc undoubtedly did, in part), or Arc elected to withhold this claim in that proceeding. The trial court therefore erred by relegating Arc's express $2.1 million claim in its Counterclaim as mere "background information." Pa21. The trial court's reasoning goes more to "res judicata" and ignores completely the ECD (and the prohibition against claim-splitting)—the trial court acknowledged that Arc ***knew*** of its $2.1 million claim, but nonetheless blessed Arc's decision to withhold that claim and spring it on

Claremont in a Second Arbitration. This is plainly impermissible (and makes no logical sense with respect to the trial court's simultaneous holding on "ripeness").

Stated differently, ***how can Arc not have had a "fair and reasonable opportunity" to litigate its claim when it was alleged in its own pleading?*** The trial court inappropriately brushed this critical fact aside as mere "background information," while moreover ignoring the many days' worth of testimony and evidence on Hackensack, including (i) Arc's subcontractor performance at Hackensack, (ii) testimony regarding change orders and Arc being "upside down" on money it alleges it is owed at Hackensack, and (iii) the Arbitrator's Award finding "serious issues with the project" that supported offsetting Claremont's EGP award down to $0.00.

For its part, Claremont pleaded its claim to $899,051.20 in EGP owed on the Hackensack Project. Pa176 ¶ 17. The PTA states, in clear print, that Hackensack EGP shall be "$1,677,588":

Backlog Project	Backlog Project Estimated Gross Profit
HACKENSACK	$1,677,588

[Pa125.]

65% of $1,677,588.00 is $1,090,432.20. Pa76 ¶ 15. The PTA required that Arc pay Claremont 65% of the EGP on each project, i.e., $1,090,432.20 for

Hackensack. Pa88 § 1.6(a)(ii)(A)(1); Pa570. Arc only paid Claremont $191,381.00 in EGP payments on the Hackensack Project and refused to pay the remaining $899,051.20.[9] Pa77 ¶ 16.

In response, Arc's Counterclaim sought to offset Claremont's Hackensack Project EGP damages, and sought "an award declaring that Claremont is not entitled to any further payments on the Hackensack Project." Pa201, 207 ¶¶ 46, 80. In other words, Arc ***knew*** of its offsetting Hackensack damages claim, and thus not only had a fair and reasonable opportunity to bring that offsetting claim, but was compelled to do so as a compulsory counterclaim.

Nothing stood in Arc's way from bringing that claim. There were no agreements to limit the First Arbitration, or to claim-split on Hackensack (or any of the other projects). Pa703-04. Indeed, the notion that Claremont's retiring principals would agree to such a granular level of claim-splitting is, to put it

[9] Arc has also argued that Section 1.7(a)(i) of the PTA permitted Arc to unilaterally decrease the Hackensack Project EGP down to $0.00. Not only is the scant testimony from Arc on this theory merely self-serving, this argument was not credited, at all, by the Arbitrator in his Award. See generally Pa568-80. Moreover, that provision only required the parties to "provide for a project specific cost reserve amount relating to any issue that has been identified by CCG in connection with the Hackensack Project." Pa92 § 1.7(a)(i). It further required that all "issues shall be resolved within sixty (60) days" and that "EGP shall be ***increased*** by the amount of such reduction or the full amount of the cost reserve, as applicable." Pa92. But, the parties never established any "cost reserve" for any construction project, and Arc actually *decreased* the Hackensack EGP well after the 60-day deadline; and so this provision, and all Arc's arguments relating thereto, are wholly inapplicable.

mildly, absurd. The Arbitrator also did not bar Arc from asserting its claims connected to the Hackensack Project and, indeed, entertained (and likely "credited") them. See Pa574. To hold otherwise would subject Claremont—who brought all of its claims against Arc under the PTA (and under all subsumed agreements thereunder) in one proceeding—to the uncertainty of not even knowing what inning of the ballgame it is in with Arc. Further, the Arbitrator already heard extensive testimony on the Hackensack Project and found it was "a project fraught with difficulty." Pa574. What if the next arbitrator thinks the Project went great? The endless uncertainty inherent in allowing Arc to bring subsequent arbitrations—on *any* of the projects litigated in the First Arbitration—is exactly what the ECD was created to guard against.

Therefore, the trial court misapplied the ECD's "fair and reasonable" standard because "the central consideration is whether the claims…arise from related facts or the same transaction or series of transactions." Liriano v. Liberty Mut. Ins. Co., 474 N.J. Super. 130, 145 (App. Div. 2021). The ECD does **not** require "that there be a 'commonality of legal issues,'" but rather "[t]he determinative factor is whether distinct claims are aspects of a single larger controversy because they arise from interrelated facts." Id. (citing Wadeer v. N.J. Mfrs. Ins. Co., 220 N.J. 591, 605 (2015) and DiTrolio, 142 N.J. at 271). Here, the PTA *created* the entire relationship between Claremont and Arc, and

explicitly directed the parties enter into a further series of transactions, e.g., the Hackensack Project Completion Subcontract. Pa90 § 1.5. Before the PTA, Claremont and Arc were strangers, and the parties have not done any business together since. The PTA thus created the general contractor – subcontractor relationship on each Backlog Project, and the parties' dispute over EGP owed on the Hackensack Project arose out of both the PTA *and* the Hackensack Project Completion Subcontract.

Conversely to what Arc now says, the First Arbitration was never a "limited-issue" PTA-only arbitration. Pa703-04. And, to be sure, Arc will be unable to point to any such agreements between Claremont and Arc to that end—because, indeed, no such claim-splitting agreements ever existed. The PTA *both* expressly listed the Hackensack Project's $1,677,588.00 EGP *and* expressly required that "ARC and CCG shall enter into a subcontract agreement" for each Backlog Project (e.g., the Hackensack Project). Pa125 & Pa90. In accordance with the PTA's requirements, the parties entered into the Hackensack Project Completion Subcontract. Pa595. Thus, any dispute for EGP payments under the PTA further required, as a compulsory counterclaim, any offsetting disputes for monies allegedly owed under any PTA-subsumed subcontract. Claremont and Arc had no business relationship before these agreements and have had no dealings since. The PTA and the Hackensack Project Completion Subcontract,

inherently, arise from "the same transaction or series of transactions"—all borne of the PTA and Arc's interrelated work as a subcontractor to Claremont at the many different project sites (including the Hackensack Project). Indeed, in the Second Arbitration, Arc re-asserts ***the exact same allegation*** (that it is entitled to $2.1 million at the Hackensack Project)!

The trial court therefore erred in denying Claremont's request for injunctive relief.

POINT TWO

THE TRIAL COURT ERRED WITH RESPECT TO THE SONEHAN ARBITRATION AND RIPENESS (Pa21, Pa44)

Arc alleges that its claim for nonpayment at the Hackensack Project stems exclusively from Claremont's alleged nonpayment to Arc under the Hackensack Project Completion Subcontract. See Pa584 (commencing the Second Arbitration under the Hackensack Project Completion Subcontract). Thus, the trial court's finding that Arc's claim against Claremont under that subcontract somehow did not "ripen" until the conclusion of the Sonehan Arbitration—a separate arbitration between different parties under a different contract—is plain error.

In its Statement of Reasons, the trial court stated:

> as to the issue of whether [Arc] should have asserted its claim in the First Arbitration, the Court finds that

> [Arc's] claim was not ripe at the time of the First Arbitration since [Claremont] had not yet obtained a final judgment in the [Sonehan] arbitration against the owner, Sonehan, until after the First Arbitration concluded.
>
> [Pa66.]

First, the trial court's conclusion in this regard is clear error: the award against Sonehan had been entered on September 15, 2023—two-and-a-half months before the First Arbitration hearings were deemed closed (on November 28, 2023). Pa922. In other words, the Sonehan Arbitration had concluded in full while the First Arbitration was still ongoing and the record was open. Compare Pa922, with Pa569 ("The hearings were deemed closed on November 28, 2023."). Moreover, Claremont addressed the Sonehan Arbitration award in its October 17, 2023 post-trial briefing to the Arbitrator; and, in Arc's post-hearing brief, Arc argued that it "has not been paid for its work [as a subcontractor] on Hackensack, and has an outstanding balance…" Pa400-02. So, in Arc's own words, it had a ripe claim while the First Arbitration record was open and inserted its non-payment issue squarely before the arbitrator.[10]

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[10] See, e.g., McNally v. Providence Washington Ins. Co., 304 N.J. Super. 83, 92 (App. Div. 1997) ("if during the pendency of litigation, a constituent claim arises which is part of the entire controversy, the claimant must seek leave to file a supplemental pleading thereby submitting to judicial discretion the determination of whether the claim should be joined in that action or reserved for a subsequent suit, and if the claimant fails to so move, he will ordinarily be barred from raising the claim in a subsequent suit"); see also Bendar v. Rosen, 247 N.J. Super. 219, 237

Second, regardless, the Hackensack Project was completed in December 2020—***two years*** before the First Arbitration even commenced in earnest. See Pa344 at 501:15-16. The work at issue in Arc's $2.1 million claim was performed by Arc and its subcontractors in 2019-2020. That run-of-the-mill non-payment claim ripened, at the latest, in December 2020 (i.e., upon Claremont's alleged nonpayment to Arc under the Hackensack Project Completion Subcontract). See, e.g., Pa607 (Payments). What precluded Arc from bringing its non-payment claim against Claremont for several years? The trial could not, and thus did not, answer that question. The claim was ripe because Arc had an "enforceable right" against Claremont. The idea that Arc did not have an "enforceable right" until *after* the Sonehan Arbitration concluded is simply erroneous—nothing in the Sonehan Arbitration (where Arc was not a party) affected Arc's ability to sue Claremont for its alleged debt.

Plainly, Arc could have brought its claim to unpaid monies under the Hackensack Project Completion Subcontract as early as December 2020 (when Arc finally secured the TCO for the Project). Section 11.2 of the Hackensack Project Completion Subcontract, for example, requires that:

> Within 30 days following issuance by the Architect of

(App. Div. 1991) (determining that ECD and judicial economy militate in favor of requiring assertion of cross-claim for contribution in underlying tort action, even though "technically a right of contribution does not arise until a tortfeasor has paid more than his pro rata share").

> the Certificate for Payment covering such substantially completed Work, the Contractor shall, to the full extent allowed in the Prime Contract, make payment to the Subcontractor, deducting any portion of the funds for the Subcontractor's Work withheld in accordance with the certificate to cover costs of items to be completed or corrected by the Subcontractor.

Pa609 § 11.2. Similarly, Section 11.3 required Claremont to issue "Final Payment" to Arc, which "constitut[es] the entire unpaid balance of the Subcontract Sum…within seven days after receipt of payment from the Owner," ***or if "the Contractor does not receive timely payment…final payment to the Subcontractor shall be made upon demand."*** Pa609 § 11.3 (emphasis added). Arc thus had ripe claims on unpaid balances at the Hackensack Project at, and before, the time of the First Arbitration.

A claim ripens "when there is an actual controversy, meaning that the facts present 'concrete contested issues conclusively affecting' the parties' adverse interests." Matter of Firemen's Ass'n Obligation, 230 N.J. 258, 275 (2017); see also Metromedia Co. v. Hartz Mountain Assocs., 139 N.J. 532, 535 (1995) (adding cause of action accrues when "the party seeking to bring the action ha[d] an enforceable right," e.g., when the alleged breach occurs). Indeed, Arc alleged it was owed $2.1 million in the First Arbitration, Pa201 ¶ 46, and now alleges it is owed that same $2.1 million in the Second Arbitration, Pa584, proving that it

knew of a valid enforceable right at that time.[11]

Accordingly, the trial court's ruling on the issue of ripeness is both hinged upon an incorrect factual basis, and misstates the law as to ripeness.

POINT THREE

THE TRIAL COURT ERRED IN ITS FAILURE TO CONSIDER EVIDENCE FROM THE FIRST ARBITRATION REGARDING ARC'S PERFORMANCE AS A SUBCONTRACTOR AT THE HACKENSACK PROJECT (Pa21, Pa43)

The trial court failed to consider the many hours' worth of relevant testimony, spanning seven (7) days, regarding Arc's performance at the Hackensack Project ***as a subcontractor***. In its demand initiating the First Arbitration, Claremont expressly put Arc's work as a subcontractor at issue: "Claremont has a claim for breach of contract against ARC" for, *inter alia*, "ARC's failure to complete the Backlog Projects, in accordance with the terms

[11] As stated, the trial court's August 30, 2024 Statement of Reasons seems to suggest that Arc, in having to wait for the conclusion of the Sonehan Arbitration, can be entitled to no greater recovery than that achieved by Claremont in the Sonehan Arbitration. See supra at 24-25 ("[i]t was only after the confirmation of the [Sonehan Arbitration] award that [Arc] could be sure that they would receive a fractional amount"). If Claremont is incorrect on that point, however, then the Sonehan Arbitration had no bearing whatsoever on Arc's alleged $2.1 million claim against Claremont, and Arc could have brought it any time after December 2020 (and certainly during the First Arbitration). So, a question remains regarding whether Arc's claim is indeed capped at the Sonehan recovery; and, if not, then why would Arc have to wait for the Sonehan Arbitration to conclude to bring its claim against Claremont?

and conditions of the [subcontract] construction agreements governing such Backlog Projects." Pa172; see also Pa90 § 1.5(b) ("ARC and CCG shall enter into a subcontract agreement" for each "Backlog Project," e.g., Hackensack). All claims with respect to the PTA-based subcontracts between Claremont and Arc were, therefore, compulsory within the First Arbitration.

To be sure, Arc's poor performance as a subcontractor at several projects was squarely at issue, especially concerning the Hackensack Project (where the Arbitrator found "serious issues with the project" permeated, Pa574), and Arc even testified that its work and its alleged entitlement to unpaid monies at Hackensack should be considered in reducing the EGP Arc owed to Claremont. See also Pa176 ¶ 18 ("ARC's performance on the Hackensack project was poor…"). Whether the Arbitrator ultimately credited this testimony or not in his Final Award[12] is irrelevant—the fact remains that Arc had a "fair and reasonable opportunity" to, and indeed did, argue its claim for offsetting

[12] But, to be sure, the Arbitrator absolutely credited this testimony. The record reflects that the only project the Arbitrator did not award Claremont any EGP was Hackensack. The PTA expressly set the Hackensack EGP at $1,677,588.00, and the PTA provided that Claremont's EGP share on all projects was 65%—i.e., $1,090,432.20 at Hackensack. Arc only paid Claremont $191,381.00, and so Claremont brought a claim for the remaining $899,051.20. Simple math, yet the Arbitrator awarded Claremont $0.00. While the final award could have been written more clearly, the record confirms that the Arbitrator's award to Claremont of $0.00 was based on offsetting subcontractor monies owed to Arc—on a project where Arc put into evidence its entitlement to a "credit" for subcontract work, and testimony on Hackensack spanned seven separate hearing days.

damages it sustained as a subcontractor at the Hackensack Project, including introducing the Hackensack Project Completion Subcontract into evidence. Pa316 at 391:2-14. Thus, Arc's claim in the Second Arbitration is a (now-barred) aspect of a single larger controversy arising from the relationship created by the PTA, transactions set in motion by the PTA, and projects governed by the PTA. To be certain—why else would Arc have spent hours in its counterclaim case-in-chief testifying about its performance on Hackensack—and uncompensated work—if it was unrelated, as it now contends?

For example, during the First Arbitration, Arc testified that "we were a subcontract[or] to [Claremont]" at the Hackensack Project. Pa502 at 16:20-17:1. But, because "the change orders are still not being acted upon…***estimated gross profit is now, you know, put into peril***." Pa536 at 152:2-20. In other words, Arc argued (or, at minimum, had a fair and reasonable opportunity to do so) that unpaid change orders directly offset its obligation to make EGP payments to Claremont. Arc reiterated this point the following arbitration-hearing day, agreeing that Arc "overpaid on Hackensack…because the owner stopped paying." Pa668 at 201:8-23. In line with that testimony, Arc's own pleading in the First Arbitration alleged "the parties agreed that Arc was not obligated to make any further [EGP] Installment Payments on the Hackensack Project given the number of issues Arc inherited from Claremont ***when it took***

over as contractor on that project." Pa201 ¶¶ 45-46 (adding "Arc is currently owed $2.1 million dollars by the owner on the Hackensack Project").

The trial court erroneously ignored this pivotal testimony that links Arc's allegations related to its alleged entitled to unpaid monies *as a subcontractor* at the Hackensack Project to its reasons why Arc should receive an *offsetting credit* and should not be required to pay any additional EGP payments to Claremont. These are textbook "aspects of a single larger controversy because they arise from interrelated facts." DiTrolio, 142 N.J. at 271. In the First Arbitration, the Arbitrator implicitly acknowledged that he could not divorce Claremont's Hackensack-EGP claim from the explicitly referenced "serious issues" at that Project (including nonpayment by the Owner)—in other words, the Arbitrator found it unfair to reward Claremont EGP money on Hackensack when Arc was still owed so much money on Hackensack.

The trial court additionally failed to consider or address "CCG Ex. 005" in the First Arbitration, which states that ***EGP for Hackensack "cannot be determined until Owner changes resolved"***:

Arc NJ
Project Installment Calculation
Jan - Mar 2020

		Actual					
Job	Project	Jan Profit to Date	Dec Profit to Date	Jan Profit	PA Cost Adjust	Jan Profit	CCG (65%)
0001	Bayonne	768,362	711,841	56,521	1,490	58,011	37,707
0002	Englewood	303,053	232,988	70,065		70,065	45,543
0003	HC West (NJCU 2)	559,825	437,811	122,014	6,007	128,021	83,214
0004	Somerset	254,130	119,502	134,628	3,855	138,483	90,014
0005	Park Ridge	824,398	683,190	141,208	2,860	144,067	93,644
0007	St Peter's Dormitory	* late start, no work this quarter				0	0
0006	EPort	* late start, no work until mid March				0	0
0009	Hackensack	* EGP cannot be determined until Owner changes resolved				0	0
		2,709,768	2,185,332	524,435	14,212	538,647	350,121

[Pa906.]

The "Owner changes" noted in the above EGP "Project Installment Calculation" chart—an Arc-created document—include, as repeatedly testified to by Arc, the Owner's design changes and unapproved/unpaid change orders. That is, with this exhibit as one example, Arc argued (successfully) to the Arbitrator that its EGP obligations to Claremont should be offset down to $0.00 by the $2.1 million allegedly owed to Arc at the Hackensack Project. See Pa201 ¶ 46 ("Arc is currently owed $2.1 million by the owner on the Hackensack Project."). But, even if that point (which plays more to res judicata) is debatable due to the vagueness of the Arbitrator's Award, the Court is still left with the inescapable conclusion that Arc's attempted Second Arbitration (seeking $2.1 million allegedly owed to it on the Hackensack Project) was already part of a "single larger controversy" during the First Arbitration, and thus is barred by the entire controversy doctrine.

To be sure, in the Second Arbitration, Arc seeks to reassert its alleged entitlement to "approved change orders [at the Hackensack Project] resulting in a balance due to Arc of $2,084,220.03." Pa584. Again, though, whether the Arbitrator ultimately credited the evidence and testimony supporting Arc's position that it was entitled to offsetting credits at the Hackensack Project (which he did) is irrelevant. It is abundantly clear that Arc had a "fair and reasonable opportunity" in the First Arbitration to litigate its claim for offsetting damages, see Pa201 ¶ 46, it sustained as a subcontractor at the Hackensack Project.

These inherent contradictions and errors provide ample basis for the Appellate Division to reverse the August 30 Orders.

CONCLUSION

Accordingly, Claremont respectfully requests that this Court vacate and reverse the August 30 Orders, and that the Court enter a permanent injunction to restrain and stay the Second Arbitration.

Respectfully submitted,

GIBBONS P.C.

Attorneys for Plaintiff-Appellant Claremont Construction Group, Inc.

/s/ Kevin W. Weber
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Michael A. Conforti

Dated: March 11, 2025

CLAREMONT CONSTRUCTION GROUP, INC., Plaintiff/Respondent, v. ARC NJ, LLC, Defendant/Appellant. .	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-000457-24 CIVIL ACTION On Appeal from the Superior Court of New Jersey, Chancery Division: Morris County Docket No.: MRS-C-55-24 Sat Below: Hon. Frank J. DeAngelis

BRIEF OF DEFENDANT-RESPONDENT ARC NJ, LLC

Dated: April 7, 2025

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PRELIMINARY STATEMENT

Defendant-Respondent Arc New Jersey, LLC ("Arc") submits this brief in opposition to the appeal taken by Plaintiff-Appellant Claremont Construction Group, Inc. ("CCG") from two Orders of the Superior Court of New Jersey, Morris County, Chancery Division (the "Trial Court") dated August 30, 2024 ("Initial Orders") and a subsequent Order dated October 15, 2025 (the "Reconsideration Order") in which the Court, upon CCG's motion, reconsidered its Initial Orders and for a second time denied CCG's requested relief.

The Initial Orders (i) denied CCG's motion to enjoin an arbitration commenced by Arc concerning its claims against CCG for non-payment for Arc's work on a project known as the Hackensack Project (the "Hackensack Arbitration"), (ii) granted Arc's motion to compel the Hackensack Arbitration, and (iii) dismissed with prejudice CCG's complaint seeking to enjoin the Hackensack Arbitration, which relief was denied to CCG as a matter of law by way of the Trial Court's denial of injunctive relief. Upon CCG's motion for reconsideration, the Trial Court reconsidered the Initial Orders, reiterated the lack of foundation in CCG's attempt to enjoin the Hackensack Arbitration, and confirmed in all respects its Initial Orders.

CCG's appeal of the Initial Orders and the Reconsideration Order (collectively, the "Orders") centers exclusively on the entire controversy

doctrine. Asserting the same arguments that were twice rejected by the Trial court, CCG insists again here that the parties' prior arbitration arising from a dispute under the parties' commercial contract called the Project Transfer Agreement ("PTA") either should have or did include Arc's nonpayment claims against CCG arising from Arc's performance on the Hackensack Project under a completely separate agreement with a separate and substantively different dispute resolution provision.

The Trial Court correctly concluded on two separate occasions that the fully adjudicated PTA controversy that was the subject of the PTA Arbitration and the unadjudicated controversy arising from the Hackensack Project under a separate contract do not share common questions of fact or law and are governed by two distinct dispute resolutions provisions under two separate contracts dealing with entirely different commercial transactions. Further, even assuming arguendo that these two controversies (one dispute arising under a contract for the transfer of rights to perform certain construction contracts and one dispute arising under a subcontract for the performance of construction work on a particular project) had overlapping facts and law (which they did not), the controversy arising from the Hackensack Project was not ripe for disposition at the time of the PTA Arbitration was conducted.

Importantly, although the Trial Court undoubtedly reached the correct substantive result—that the entire controversy doctrine does not apply

and Arc is entitled to pursue its nonpayment claims in the Hackensack Arbitration—the application of the doctrine is a question of jurisdiction to be decided solely by the arbitrator. Pursuant to the unambiguous terms of the dispute resolution clause of the Hackensack Subcontract, the parties clearly and expressly consented that the AAA rules would apply to any arbitration commenced pursuant to the agreement. The AAA rules, in turn, clearly and expressly provide that the arbitrator has exclusive authority to determine the arbitrability of a dispute, not the Court. CCG's challenges to the validity of the Hackensack Arbitration rests on the applicability of the entire controversy doctrine, which is a question of arbitrability. Consequently, the Trial Court should have referred the parties to the arbitrator in the Hackensack Arbitration to resolve the issue.

This Court should either confirm the Trial Court's Order denying CCG's attempt to enjoin the Hackensack Arbitration or vacate the Orders solely on the basis that the application of the entire controversy is a question of arbitrability for the arbitrator and remand the case to the arbitrator.

STATEMENT OF FACTS

A. The Parties' Arbitration

Arc and CCG were parties to a Project Transfer Agreement ("PTA"), pursuant to which CCG transferred its rights in certain projects to Arc in exchange for Arc's payment to CCG of 65% of the estimated gross profit ("Estimate Gross Profits" or "EGP") for those projects, but only if the projects achieve the status of a "Backlog Project" under a procedure expressly set forth in the PTA. Pa91-92. The PTA's dispute resolution clause states:

> The Parties further agree that any unresolved controversy or claim arising out of or relating to such Dispute that is not resolved by mediation shall be settled by a single arbitrator in arbitration administered by the American Arbitration Association pursuant to its Construction Industry Arbitration Rules.

Pa119.

One of the projects that was transferred to Arc under the PTA was a project known as Block 408, Lot 11, 389 Main Street, Hackensack, NJ (the "Hackensack Project"). Pa123. Pursuant to a contract dated June 1, 2019, Arc became CCG's completion subcontractor, essentially assuming responsibility to complete the then incomplete work under CCG's prime contract with the owner of the Hackensack Project (the "Hackensack Subcontract"). Pa594-595. The Hackensack Subcontract's dispute resolution clause provides in pertinent part as follows:

> § 6.2 Binding Dispute Resolution
> For any Claim subject to, but not resolved by mediation pursuant to Section 6.1, the method of binding dispute resolution shall be. . . Arbitration pursuant to Section 6.3 of this Agreement."
>
> . . . .
>
> § 6.3.5 Consolidation or Joinder
> § 6.3.5.1 Subject to the rules of the American Arbitration Association or other applicable arbitration rules, either party may consolidate an arbitration conducted under this Agreement with , any other arbitration to which it is a party provided that (1) the arbitration agreement governing the other arbitration permits consolidation; (2) the arbitrations to be consolidated substantially involve common questions of law or fact; and (3) the arbitrations employ materially similar procedural rules and methods for selecting arbitrator(s).

Pa603-Pa604.

Therefore, any claims arising under the Hackensack Subcontract could be combined with another arbitration only if three factors were met: (1) the other arbitration's agreement permitted consolidation, (2) common questions of fact and law, and (3) similar rules. As explained below, in this case, these factors were not met.

B. The PTA Arbitration

During the course of the parties' contractual relationship under the PTA, disputes arose concerning the calculation of EGP to be paid by Arc to CCG as consideration for the transfer of rights to perform the multitude of

construction contracts that were to be transferred by CCG to Arc pursuant to the PTA. As a result, CCG and Arc submitted their disputes under the PTA to arbitration before the American Arbitration Association (the "AAA") to be resolved in a case captioned Claremont Construction Group, Inc. v. Arc New Jersey, LLC, Case No. 02-22-0002-2868 (the "PTA Arbitration"). Pa568-580. Arc and CCG both filed competing statements of claims and/or counterclaims. Pa174-Pa188 (CCG's Fourth Amended Statement of Claim); Pa191-Pa209 (Arc's Fifth Amended Statement of Counterclaim). It bears emphasis that the subject matter of the PTA Arbitration was confined to the (i) the entitlement to EGP, and (ii) the calculation of the amount of EGP due to CCG. Disputes regarding performance of work under the multitude of separate contracts and subcontracts for the performance of work on the projects transferred to Arc under the PTA (all of which had separate dispute resolution provisions) were decidedly not within the purview of the PTA Arbitration.

The evidentiary hearing in the PTA Arbitration took place over eight days: June 19, 20, 21, and 22 and August 21, 22, 23, and 24, 2023. Pa568. Following post-hearing briefing and oral argument, the hearings were deemed closed on November 28, 2023, and the Arbitrator entered a Final Award for the Arbitration on January 19, 2024 (the "Final Award"). Pa568-Pa569; see also Pa377-Pa429 (Arc's Post-Hearing Brief); Da5-Da7 (excerpts of CCG's Post-Hearing Brief).

The Final Award contained several computational and technical errors. Following several rounds of post–Final Award briefing, the Arbitrator issued a corrected Final Award on April 12, 2024, which incorporated the January 19, 2024 Final Award and the Arbitrator's rulings on the parties' claims for and defenses to modification of the Final Award. Pa923-Pa931.

C. CCG's Arbitration with the Owner of the Hackensack Project

Almost at the exact same time CCG and Arc were participating in the PTA Arbitration, CCG was involved in a separate arbitration with the owner of the Hackensack Project, Sonehan Clinton Court Urban Renewal, LLC ("Sonehan"). Pa907-922. The arbitration between CCG and Sonehan dealt with issues directly impacting the amount CCG owed Arc for Arc's work as a subcontractor on the Hackensack Project. Id. That final judgment in favor of CCG and against Sonehan for $435,087.70 was entered on November 17, 2023. Da9-Da10. Notably, the evidentiary hearing for the PTA Arbitration between Arc and CCG took place in June and August 2023, months before the CCG's Award in its arbitration with Sonehan was confirmed. Pa568.

D. Arc's Unadjudicated Hackensack Project Claims

At the time Arc became CCG's subcontractor on the Hackensack Project in June 2019, it was clear the project was facing significant delays and execution issues arising from CCG's performance as prime contractor. Pa574 ("It was admittedly a project fraught with difficulty acknowledged from the start with an exception from liquidated damages and credible testimony that there were serious issues with the project."). Eventually, CCG stopped paying Arc for its work on the Hackensack Project. Pa402.

Once the final judgment was entered in CCG's arbitration with the owner of the Hackensack Project, Arc's claim for nonpayment on the Hackensack Project against CCG became ripe. By letter dated January 26, 2024, Arc sent CCG a letter demanding payment of $2,084,220.03, which is the balance CCG owes Arc for Arc's work. Da12-Da13. CCG rejected Arc's demand. Da15-Da16.

Pursuant to the dispute resolution clause of the Hackensack Subcontract, Arc requested a mediation with the AAA. Da18. The parties participate in a mediation on June 4, 2024, but were unable to resolve their claims. Da3 ¶ 17. Arc thereafter (also pursuant to the dispute resolution clause) commenced an arbitration to resolve its Hackensack Project claims (the "Hackensack Arbitration"). Da25-Da27.

Rather than participate in the Hackensack Arbitration, which is expressly mandated by the parties' agreement, CCG filed the instant action on June 20, 2024. Pa73-Pa86. CCG also unilaterally and without Arc's consent directed the AAA to stay the Hackensack Arbitration pending resolution of this action. Da29. The AAA complied, and the Hackensack Arbitration is currently stayed pending the final resolution of CCG's claim for injunctive relief in this proceeding. Da29.

The following timeline further clarifies the sequencing of the PTA Arbitration and the arbitration between CCG and the owner of the Hackensack Project, Sonehan (the "Sonehan Arbitration").

Date	**Event**	**Appendix**
5.23.23 to 6.27.23	Sonehan Arbitration Hearing	Pa907
6.19.23 to 6.22.23	PTA Arbitration Hearing (first week)	Pa568
8.21.23 to 8.24.23	PTA Arbitration Hearing (second week)	Pa568
10.17.23	PTA Arbitration post-hearing briefs submitted	Pa377-Pa429
11.17.23	Final Judgment entered in Sonehan Arbitration	Da9-Da10
11.28.23	Conclusion of PTA Arbitration oral argument on post-hearing brief	Pa568-Pa569
1.19.24	Issuance of PTA Arbitration Final Award	Pa568-Pa580
4.12.24	Issuance of PTA Arbitration corrected Final Award	Pa923-Pa931

E. Arbitrability Issue

On June 1, 2019, the parties entered into the Hackensack Subcontract, which clearly embodies the parties' agreement that any dispute

arising under the Hackensack Subcontract shall be resolved by arbitration "administered by the American Arbitration Association in accordance with its Construction Industry Arbitration Rules in effect on the date of this Agreement." Pa603. The applicable rules (those in effect on June 1, 2019) were the Construction Industry Arbitration Rules and Mediation Procedures ("Construction Rules") effective July 1, 2015 ("2015 Construction Rules"). Da64-Da175. Rule 9(a) of the Regular Track Procedures provides that:

> The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement.
>
> Da124.[1]

Rule 9 first appeared in the AAA's Construction Rules in 2001. Compare Da178-Da274 (2000 Construction Rules) with Da328 (2001 Construction Rule 9(a)). While there were various amendments to the Construction Rules leading up to the effective date of the Hackensack Project Subcontract in 2019, Rule 9(a) remained unchanged. Da124.

For comparison, and as will be further discussed infra, the AAA's Commercial Arbitration Rules and Mediation Procedures ("Commercial Rules")

[1] Because the amount at issue in the Hackensack Arbitration is greater than $1,000,000, the Procedures for Large, Complex Construction Disputes applies. Those supplemental rules specifically provide, however, that they "are designed to complement the Regular Track of these Rules," and do not provide a rule that conflicts with Rule 9. Da107-Da109.

include a rule similar to Rule 9. Rule 7(a) of the Commercial Rules provides that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim, without any need to refer such matters first to a court." Da544. Rule 7(a) first appeared in the AAA's Commercial Rules in 2000, then titled Rule 8(a). Da386; see also Da405-Da465 (1996 Commercial Rules containing no rule concerning an arbitrator's ability to determine his own jurisdiction).

In sum, the AAA adopted this substantive rule on jurisdiction in 2000 for the Commercial Rules and in 2001 for the Construction Rules.

PROCEDURAL HISTORY

On June 20, 2024, CCG filed a complaint seeking relief on a single claim to enjoin arbitration (the "Complaint") in the Superior Court of New Jersey, Morris County, Chancery Division (the "Trial Court") asserting only one cause of action and seeking only one category of relief: injunctive relief to enjoin, restrain, and dismiss the Hackensack Arbitration. Pa74-Pa84. CCG also moved by Order to Show Cause to Enjoin Arbitration, again seeking only to preliminarily and permanently enjoin and dismiss the Hackensack Arbitration. Pa586-Pa591. On July 18, 2024 Arc filed a Motion to Dismiss the Complaint with Prejudice ("Motion to Dismiss") and a Motion to Compel completion of the pending Hackensack Arbitration ("Motion to Compel"). Pa699-Pa702.

By Orders dated August 30, 2024, the Trial Court denied CCG's Order to Show Cause seeking to enjoin the Hackensack Arbitration and granted Arc's motion to compel arbitration and dismiss the Complaint (the "Initial Orders"). Pa44. Concerning the threshold issue of whether the Court or the arbitrator was to determine the application of the entire controversy doctrine, the Trial Court found that "the Court, not arbitrator, is to decide the issue of whether the Second Arbitration is precluded by the entire controversy doctrine." Pa42. The Trial Court then went on to find that during the PTA Arbitration, Arc did not have a "fair and reasonable opportunity to have fully litigated" its claims for nonpayment concerning the Hackensack Project and the Final Award did not indicate that damages to CCG were offset by Arc's claims as the subcontractor on the Hackensack Project. Pa43. The Court also correctly concluded that Arc's Hackensack Project claims were not ripe at the time of the PTA Arbitration because CCG (the general contractor that engaged Arc to act as completion subcontractor) had not yet obtained a final award in its arbitration with the Hackensack Project owner. Pa20.

Dissatisfied with the Trial Court's well supported finding that the entire controversy doctrine could not and does not apply to Arc's Hackensack Project claims, on September 12, 2024, CCG filed a Motion for Reconsideration of Orders Entered August 30, 2024 ("Motion for Reconsideration"). Pa960-Pa961. By Order dated October 15, 2024, the Trial Court granted CCG's

Motion for Reconsideration of the Orders, reconsidered those Orders with further extensive submissions, and, upon reconsideration, again denied the relief sought by CCG, issuing a second thorough Statement of Reasons detailing the Court's analysis and reasoning ("Reconsideration Order," and together with the Initial Orders, the "Orders"). Pa11-Pa22.

On October 18, 2024, CCG then filed a motion to stay the Hackensack Arbitration pending the resolution of this appeal. Pa962-Pa963. By Order dated November 22, 2024, the Trial Court relied upon the relaxed standards for a stay pending appeal under Rule 2:9-5(c) in granting CCG's motion for a stay of the Hackensack Arbitration pending CCG's appeal of the Orders. Pa970-Pa977.

ARGUMENT

The Appellate Court reviews de novo "issues involve contract interpretation and the application of case law to the facts of the case." Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cantone Rsch., Inc., 427 N.J. Super. 45, 57 (App. Div. 2012). See also Manalapan Realty, L.P. v. Twp. Comm. of Twp. of Manalapan, 140 N.J. 366, 378 (1995) ("A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference."). As it applies here, determinations of the arbitrability of a claim are reviewed de novo. Interactive Brokers, LLC v. Barry for Osiris Fund Ltd. P'ship, 457 N.J. Super. 357, 364 (App. Div. 2018).

On the other hand, the Appellate Court typically reviews a Trial Court's decision relating to injunctive relief for abuse of discretion. Horizon Health Ctr. v. Felicissimo, 135 N.J. 126, 137 (1994) ("The authority to issue injunctive relief falls well within the discretion of a court of equity."); Matter of City of Newark, 469 N.J. Super. 366, 387 (App. Div. 2021) ("We generally review findings of th[e] factors [for injunctive relief] for an abuse of discretion."). While the Appellate Court will review a decision relating to injunctive relief de novo if the disputed issue is a question of law [Stoney v. Maple Shade Twp., 426 N.J. Super. 297, 307 (App. Div. 2012)], in this case, the application of the entire of controversy doctrine is a question grounded in facts concerning the scope of the PTA Arbitration and the ripeness of Arc's Hackensack Project claims.

Here, the Trial Court's threshold determination that, based on its interpretation of the applicable arbitration rules, it must decide the arbitrability of the dispute is incorrect and should be reviewed de novo. The rules applicable to this dispute state in no uncertain terms that the arbitrator must determine his own jurisdiction. Whether or not the entire controversy applies to preclude Arc from pursuing its claims is a question of jurisdiction, and even though the Trial Court reached the correct result, it did not have the jurisdiction to do so.

If, however, the Appellate Court determines that the Trial Court was vested with the power to determine arbitrability despite the above cited

AAA Rule stating otherwise, then the Appellate Court should review the Trial Court's Orders denying CCG's request for a permanent injunction (which consequently lead to the dismissal of the Complaint) only for abuse of discretion. It was well within the Trial Court's purview to determine if CCG was entitled to equitable relief in the form of a preliminary and permanent injunction.[2]

POINT I

THE TRIAL COURT ERRED IN RULING THAT IT HAS JURISDICTION TO DECIDE THE ISSUE OF ARBITRABILITY DESPITE THE PARTIES' AGREEMENT TO THE CONTRARY [PA42]

The Trial Court improperly relied upon arbitration rules that do not apply to this action to conclude that even though the rules upon which the parties agreed provide that the arbitrator must determine his own jurisdiction, it is the Trial Court's prerogative to decide whether the Hackensack Arbitration was precluded by the entire controversy doctrine. Pa42.

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[2] In addition to denying CCG's request for equitable relief, the Trial Court also granted Arc's Motion to Dismiss and Motion to Compel. While the Appellate Court typically reviews those decision de novo, here the dismissal of the Complaint and the subsequent Order that CCG participate in the valid Hackensack Arbitration are natural consequences of the Trial Court's initial and primary determination denying CCG's request for injunctive relief. Santana v. SmileDirectClub, LLC, 475 N.J. Super. 279, 285 (App. Div. 2023) (motion to compel arbitration); Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C., 237 N.J. 91, 108 (2019) (motion to dismiss). Therefore, given that the Trial Court's decision was one based in equity, the Appellate Court should review the Orders for abuse of discretion.

While the Trial Court's ultimate decision that the entire controversy doctrine does not bar Arc's Hackensack Project claims is correct, it was not the Trial Court's decision to make. Given that the Trial Court accepted Arc's arguments in total in denying in all respects the injunctive relief sought by CCG, Arc has not appealed the Trial Court's determination. Nevertheless, this Court is faced with the threshold issue of whether or not it has jurisdiction to resolve arbitrability, or whether that issue must be referred to the arbitrator.

A. The parties agreed to arbitrate arbitrability by incorporating the AAA rules into the arbitration clause of the Hackensack Subcontract

Arc and CCG explicitly incorporated of the AAA's Construction Rules into their agreement to arbitrate disputes arising under the Hackensack Subcontract, and, consequently, agreed to arbitrate arbitrability.

For cases that involve a version of the AAA rules that include the subject jurisdictional rule, "the incorporation of the AAA rules into the arbitration provision clearly and unambiguously expresse[s] the parties' intent to empower the arbitrator to determine arbitrability." Schmidt v. Laub as trustee for Carol L. Glatstian Living Tr., No. A-0620-19T1, 2020 WL 2130931, at *5 (N.J. Super. Ct. App. Div. May 5, 2020) [Da546-551]. As is the case here, the applicable rules of the AAA at issue in Schmidt granted to the arbitrator the power to rule on the scope of his own jurisdiction. In declining to resolve an issue with respect to the arbitrator's powers, the Court in Schmidt found that the

parties' agreement to submit disputes to AAA arbitration "constitute[d] clear and unmistakable evidence that the parties agreed to arbitrate arbitrability." Id. (quoting Oracle Am., Inc. v. Myriad Grp. A.G., 724 F.3d 1069, 1074 (9th Cir. 2013)); see Dillon v. Typaldos, No. SOM-C-12102-04, 2006 WL 1381625, at *12 (N.J. Super. Ct. Ch. Div. May 19, 2006) [Da552-563] (holding that "the parties expressly agreed for an arbitrator to determine issues of arbitrability by incorporating the rules of the American Arbitration Association," and "[t]he Circuit Courts that have addressed the issue have agreed that where arbitration agreements incorporate the AAA rules, the parties have expressly agreed to allow the arbitrator to decide arbitrability"); In re EnCap Golf Holdings, LLC, No. CIV.A.08-5178DMC, 2009 WL 2488266, at *4 (D.N.J. Aug. 10, 2009) [Da564-567] (holding that the parties' contract's incorporation of the AAA Construction Rules "constitutes clear and unmistakable evidence" that "the arbitrator shall have the authority to determine jurisdiction").

Here, the Hackensack Subcontract expressly states (1) the parties agreed to arbitrate their Hackensack Project-related disputes, and (2) such arbitration would be conducted "in accordance with its Construction Industry Arbitration Rules in effect on the date of this Agreement" [Pa603], which rules require issues relating to arbitrability to be decided by the arbitrator. Rule 9(a) of the Construction Industry Rules in effect at the time of the execution of the contract (June 1, 2019) provides that "[t]he arbitrator shall have the power to rule

on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." Da124. The parties therefore have expressly agreed to allow the arbitrator in the Hackensack Arbitration decide the arbitrarily of the dispute.

B. The applicability of the entire controversy doctrine is an issue of arbitrability

The application of the entire controversy is a question of arbitrability, and the parties' express incorporation of the AAA rules into its arbitration, including Rule 9(a), means that the parties have expressly agreed that the arbitrator must decide whether Arc's claims are barred by this doctrine.

In determining that it must decide arbitrability, the Trial Court relied almost exclusively on Raritan Plaza I Assocs., L.P. v. Cushman & Wakefield of N.J., Inc., 273 N.J. Super. 64, 71 (App. Div. 1994). Pa41. The Raritan Court, however, held that "the preclusionary principles of the entire controversy doctrine [which] would bar the second arbitration proceeding . . . is fundamentally a question of arbitrability . . . ." Id. at 71 (emphasis added). See also Morgan Stanley & Co. v. Druz, No. A-0076-10T1, 2013 WL 68712, at *5 (N.J. Super. Ct. App. Div. Jan. 8, 2013) [Da571-Da578] ("Our courts have held that . . . issues [concerning the application of res judicata or the entire controversy doctrine] are threshold arbitrability matters for resolution by a court

in the first instance." (emphasis added)). Here, as explained supra and unlike in Raritan, the parties agreed the arbitrator would decide questions of arbitrability.

Raritan Court's further explanation that arbitrability was, in that case, "within the province of the court," 273 N.J. Super. at 71, does not undermine the fact that here, that question is within the province of the arbitrator by virtue of the parties' express agreement in the Hackensack Subcontract to submit to Rule 9, among other applicable AAA Rules. The arbitration at issue in Raritan was commenced on May 21, 1993 and the Appellate Division issued the Raritan decision in May 1994. Id. at 68. The parties' dispute concerned the payment of real estate commissions, id., making it a commercial dispute. Id. The AAA commercial rules in effect in 1992 when the Raritan arbitration was commenced and in 1994 when the Raritan court issued its decision did not include a rule that delegated to the arbitrator the power to determine the arbitrability of a dispute. See Da467-Da481 (1992 Commercial Rules for arbitrations filed on or after May 1, 1992); Da483-Da543 (1993 Commercial Rules amended and effective November 1, 1993), Da405-Da465 (1996 Commercial Rules amended and effective July 1, 1996 which amended the 1993 Commercial Rules). Indeed, as explained supra, that rule did not come into effect in the AAA's Commercial Rules until 2000. Da377-Da403.

Thus, the Raritan Court did not address the impact of the AAA's jurisdictional rules [i.e., Rule 9(a)] because that rule did not exist at that time, and the Court's decision concerning a court's ability to decide the application of the entire controversy doctrine on a pending arbitration does not apply here, where two sophisticated parties expressly agreed that the arbitrator would decide arbitrability of the dispute.

Notably, the three cases that rely on Raritan for the proposition that a court determines arbitrability do not implicate the AAA's Rules—or any other rules that include a provision akin to AAA Rule 9(a). Rather, those cases are inapposite here because they involve the analysis of arbitrations with the Financial Industry Regulatory Authority ("FINRA") or its predecessor— the National Association of Securities Dealers. See Sweeney v. Sweeney, 405 N.J. Super. 586, 592 (App. Div. 2009); Carino v. Allstate Fin. Servs., LLC, No. A-5717-09T4, 2011 WL 1364150, at *2 (N.J. Super. Ct. App. Div. Apr. 12, 2011) [Da579-583]; Morgan Stanley, 2013 WL 68712, at *2 [Da571-Da578]. FINRA's arbitrational rules do not include a rule bestowing upon the arbitrator the power to determine his own jurisdiction. Da584-Da685.

A fourth case that relied on Raritan concerned a factual disagreement over whether the parties' contract contained an arbitration clause and did not concern the entire controversy doctrine. First Tek Techs., Inc. v.

PAC Corp., No. A-4769-08T3, 2010 WL 773197, at *1 (N.J. Super. Ct. App. Div. Mar. 9, 2010) [Da568-Da570].

In addition to relying on the Trial Court's holding in Raritan—which is not applicable given the creation of Rule 9(a) well after that Court's decision—the Trial Court also distinguished the wording of Rule 7(a) of the AAA Commercial Rules to Rule 8(a) of the AAA Construction Rules (the ones applicable here) to conclude that Rule 8(a)'s omission of a certain phrase means that the parties did not agree that the arbitrator was to decide the issue of arbitrability. Pa41-Pa42. Specifically, while Construction Rule 8(a) provides that an arbitrator has the power to rule on his own jurisdiction and notes that that power includes (but is not limited to) the scope of an arbitration agreement, the current Commercial Rule 7(a) adds the phrase "including . . . the arbitrability of any claim or counterclaim." Da544. However, the inclusion of this phrase in Commercial Rule 7(a) is nondispositive. The record demonstrates that the Commercial Rules and the Construction Rules were amended at various times and not in tandem. Da64-Da543. There is no evidence in the record that the phrasing of one set of rules should have any weight when interpreting the other. Here, AAA Construction Rule 9 could not be more clear: the arbitrator must determine his own jurisdiction, i.e., whether a claim can be heard in arbitration.

Therefore, the preclusive consequences of the entire controversy doctrine is a question of arbitrability that must be resolved by the arbitrator in matters that are subject to the AAA Rules for construction and commercial cases. If the Appellate Court chooses to address this threshold issue, it should vacate the Orders and remand to the arbitrator the question of arbitrability.

POINT II

THE TRIAL COURT CORRECTLY DENIED CCG'S MOTION FOR INJUNCTIVE RELIEF BECAUSE THE PARTIES DID NOT AND COULD NOT LITIGATE THE MERITS OF THE HACKENSACK DISPUTE IN THE PTA ARBITRATION [PA21-PA22, PA43-PA44]

Regardless of whether the Trial Court or the arbitrator should determine the application of the entire controversy doctrine, the Trial Court was correct that CCG did not meet the standard for injunctive relief.

While the standard for injunctive relief, whether preliminary[3] or permanent[4] has several distinct prongs, the Trial Court's opinion focused on just

[3] When considering a request for preliminary injunctive relief a court must consider: "[1] whether plaintiffs ha[ve] demonstrated a reasonable probability of success on the merits; [2] whether a balancing of the equities and hardships weigh[s] in favor of injunctive relief; [3] whether substantial and irreparable injury [i]s imminent; and [4] whether the entry of injunctive relief [i]s in the public interest." McKenzie v. Corzine, 396 N.J. Super. 405, 413-14 (App. Div. 2007) (citing Crowe v. DeGioia, 90 N.J. 126, 132-34, (1982) (other citations omitted).

[4] When resolving a request for permanent injunctive relief, New Jersey courts rely upon the factors listed in the Restatement (Second) of Torts which include:

one: the likelihood of success of CCG's claim that the entire controversy doctrine[5] precluded Arc from pursuing its Hackensack Project claims.

Throughout its Brief, CCG first incorrectly claims that Arc asserted a counterclaim for its Hackensack Project claim in the PTA Arbitration and fully litigated those claims during the hearings, disingenuously stitching together bits and pieces of Arc's pleading and testimony. See, e.g., CCG's App. Br. at 2. However, CCG then also claims that Arc had a full and fair

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> (1) the character of the interest to be protected;
> (2) the relative adequacy of the injunction to the plaintiff as compared with other remedies;
> (3) the unreasonable delay in bringing suit;
> (4) any related misconduct by plaintiff;
> (5) the comparison of hardship to plaintiff if relief is denied, and hardship to defendant if relief is granted;
> (6) the interests of others, including the public; and
> (7) the practicality of framing the order or judgment.

Sheppard v. Twp. of Frankford, 261 N.J. Super. 5, 10 (App. Div. 1992) (citing Restatement (Second) of Torts § 936 (1977)).

[5] CCG's Complaint, Order to Show Cause, and Appellate Brief make passing references to res judicata. Pa84; Pa586; CCG's App. Br. at 2. However, the entire controversy doctrine "stems directly from the principles underlying the doctrine of res judicata [and is] more preclusive than . . . res judicata." Bank Leumi USA, v. Kloss, 243 N.J. 218, 227 (2020) (citations omitted). In its Orders, the Trial Court did not address the application of res judicata to this dispute. Given CCG's failure to separately address res judicata and New Jersey jurisprudence on the preclusiveness of the entire controversy doctrine, Arc will similarly focus its arguments on the entire controversy doctrine, while maintaining its objection that res judicata also does not prevent the Hackensack Arbitration from proceeding.

opportunity to litigate its Hackensack Project claims but failed by holding back a "secret claim" as part of its "strategic piecemeal 'gotcha' litigation tactics." CCG's App. Br. at 2-3. Neither is true, and the Trial Court correctly found that not only did the claims in the PTA Arbitration concern completely separate issues of fact and law than the claims asserted in the Hackensack Arbitration, but also Arc's Hackensack Project Claims were not ripe at the time of the PTA Arbitration and could not be asserted.

A. The Trial Court correctly determined that CCG could not demonstrate a reasonable probability of success on the merits because Arc could not and did not assert its Hackensack Project claims in the PTA Arbitration.

In determining that the Arc was not precluded from pursuing its claims in the Hackensack Arbitration, the Trial Court made two determinations: (1) the PTA Arbitration and the Hackensack Arbitration involved different contractual rights and legal issues, and (2) Arc's claims concerning the Hackensack Project were not ripe at the time of the PTA Arbitration and therefore, Arc could not assert them. Pa21-22, Pa43-44.

The entire controversy doctrine "requires that all aspects of the controversy between those who are parties to the litigation be included in a single action," but the application of the doctrine "is left to judicial discretion based on the factual circumstances of individual cases." Brennan v. Orban, 145 N.J. 282, 291 (1996); Spolitback v. Cyr Corp., 295 N.J. Super. 264, 268-69 (App. Div. 1996) ("[T]he principles at the heart of the entire controversy

doctrine preclude plaintiffs from litigating . . . issues of which they were aware at the time of the prior dispute settlement proceeding and arbitration, and which were ripe and amenable to resolution through the . . . . dispute settlement procedure.").

Courts will refrain from applying the entire controversy doctrine to a latter action, if the party against whom it is applied did not have a "fair and reasonable opportunity to have fully litigated that claim in the original action." Karpovich v. Barbarula, 150 N.J. 473, 481 (1997). "[A] court should not preclude a claim under the entire controversy doctrine if such a remedy would be unfair in the totality of the circumstances and would not promote the doctrine's objectives of conclusive determinations, party fairness, and judicial economy and efficiency." Bank Leumi USA, v. Kloss, 243 N.J. 218, 227-28 (2020) (citations omitted). Importantly, with regards to arbitration, "[t]he preclusionary consequences of the entire controversy doctrine must consequently be cautiously applied to litigation involving limited-issue arbitration and only where necessary to achieve the purposes and policy of the doctrine." Jersey City Police Officers Benev. Ass'n v. City of Jersey City, 257 N.J. Super. 6, 14–15 (App. Div. 1992).

1. The Trial Court correctly determined that the claims at issue in the Hackensack Arbitration are distinct from those at issue in the PTA Arbitration, and the Arbitrator did not award Arc any damages related to its Hackensack Project claims [Pa21, Pa43-44]

The Trial Court correctly held that the PTA Arbitration "dealt exclusively with Plaintiff's claims for unpaid EGP on the projects," but the Hackensack Arbitration "will address Defendant's claims for payment as a subcontractor." Pa21.

CCG attempts to create a "nexus" between the PTA Arbitration and Arc's nonpayment claims on the Hackensack Project when none exists, at least not on sufficient to invoke the entire controversy doctrine. CCG App. Br. at 27. CCG is completely incorrect in its claim that the PTA created "the general contractor-subcontractor relationship." Id. Arc did not become a subcontractor to CCG by way of the PTA; the PTA was a commercial transaction involving the transfer of a business. Pa87-168. The Hackensack Subcontract is a separate contract whereby Arc agreed to serve as CCG's subcontractor on a specific project and whether the parties entered that subcontract the day after or a year after they entered the PTA is of no consequence. Pa594-Pa616. The PTA may have created an obligation of CCG to enter into a subcontract with Arc for particular projects, but CCG's obligations to Arc under the Hackensack Subcontract has nothing to do with CCG's requirement to enter into the

subcontract in the first place. These agreements have separate arbitration clauses and create distinct and separate obligations.[6]

Here, the issues in the PTA Arbitration and the issues in the Hackensack Arbitration do not arise from related factors or the same transaction. The PTA Arbitration was focused exclusively on the parties' rights under the PTA, in particular the Installment Payments Arc owed to CCG based on an EGP the parties had agreed to negotiate before Arc began work on the Project. Final Award at 4. The Hackensack Arbitration, on the other hand, deals with an entirely separate subcontract (the Hackensack Subcontract) and CCG's liability for failure to pay Arc for work Arc actually performed as a subcontractor. These district claims do not arise from the same transaction and they are governed by distinct dispute resolution provisions in distinct transaction-specific agreements. The parties' obligations pursuant to the PTA is not "interrelated" with Arc's performance as a subcontractor under an entirely different contract.

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[6] CCG makes much ado about Arc's counsel's comment during oral argument that Transcript of Motion filed Nov. 26, 2025 ("Tr.") that if there were 12 contracts between Arc and CCG to perform subcontract work on 12 different projects, then there would need to be 12 different arbitrations. While that is indeed the case because each project would have its own dispute resolution procedures and involve its own unique set of facts, Arc's counsel later pointed out that in this case, there would only be four separate arbitrations because there were only four Backlog Projects for which Arc became CCG's subcontractor. Tr. 19:5-16.

As the Trial Court found, any testimony or discussion concerning the parties' performance as to specific projects was limited to the impact of that performance on obligations arising under the PTA, namely the amount of that project's EGP. Pa574-575 (discussing the impact of CCG's performance on the amount of EGP Arc owed CCG for the Hackensack Project). The PTA Arbitration was not about Arc's performance or CCG's liability for nonpayment in its role as general contractor for the subcontracts it held with Arc on various projects. The estimated gross profit on a project had nothing to do with the amount CCG must pay its subcontractor (Arc) for the work it performed on the project.

CCG's claim that testimony on the Hackensack Project, "spanned seven separate hearing days" [CCG's App. Br. at 40 n.2] is not supported by any citation to supporting proof in the record. There is none. The only issue before the Arbitrator in the PTA Arbitration was the amount of the Hackensack Project's EGP and whether, pursuant to the terms of the PTA, Arc owed CCG any further payments toward that amount. While there was as a matter of necessity testimony elicited about the Hackensack Project (along with testimony about every other of the several projects that were the subject of the PTA), that evidence concerned only the specific issue in front of the Arbitrator— if the parties agreed on an EGP for the Hackensack Project and the agreed-upon amount. Arc's principal's testimony and written statements concerning the

Hackensack Project's issues, including owner's payments, were what was supposed to be the parties' PTA-mandated good faith negotiations concerning the EGP for that project, an EGP the parties eventually agreed would be zero in light of the issues Arc inherited. Those discussions did not concern the amount Arc was owed by CCG pursuant to the Hackensack Subcontract. As demonstrated by the Final Award, the Arbitrator concluded that the EGP was not "set in stone," but "moved at times," and due to unspecified "serious issues with the projects," the amount due to CCG was $191,381.00, which Arc had already paid. Pa574. While the Arbitrator did reference a "credit" due back to Arc, his decision to deny CCG's $899,051.20 claim for unpaid EGP payments on the Hackensack Project was, obviously, only a decision on the unpaid EGP payments on the Hackensack Project and not a decision regarding the money owed to Arc in its role as subcontractor for CCG, which was not and could not have been presented or considered at any point during the PTA Arbitration. In other words, the Arbitrator's denial of CCG's claim for unpaid EGP on the Hackensack Project was due to the fact that the parties could not agree on an EGP for such a problematic project and, therefore, Arc was not liable to make any EGP payments to CCG (and overpaid by the amount of payments Arc did make); the denial of CCG's claim was not a determination of lability on CCG's part for the amount owed to Arc for its work under the separate completion subcontract with CCG as prime contractor.

The Trial Court properly rejected CCG's disingenuous assertions that Arc submitted to the PTA Arbitration its claims for payment due under the completion subcontract for Hackensack Project. CCG does nothing more than stitch together pieces of Arc's Statement of Counterclaim and Post-Hearing Brief that, in context, pertain exclusively to the issue of whether Arc was liable under the PTA for the payment of any additional EGP for the Hackensack Project. Pa207 ¶ 80; see CCG's App. Br. at 10, 13, 25 (incorrectly equating the Hackensack Project issues with Arc's statement that it is still owed payment from CCG for the work it performed on the project). The task at hand in the PTA Arbitration was to determine if the Hackensack Project had any Estimate Gross Profit. All of the proof concerning the Hackensack Project related to Arc's position that there was no Estimated Gross Profit because the project was demonstrably unprofitable.

In fact, Arc's statement in paragraph 80 of its Statement of Counterclaims is grouped with paragraphs 78 and 79 of its pleading under its Seventh Claim for declaratory judgment, which make clear the "payments" referenced in paragraph 80 refer to the "Installment Payments" of EGP per the parties' PTA and have nothing to do with Arc's payments for work performed as CCG's subcontractor on the Hackensack Project. Pa207 ¶¶ 78, 79. Arc's Seventh Claim was solely for an award declaring that Arc does not owe CCG

any further EGP payments pursuant to the PTA, and nowhere seeks payment for its unpaid subcontract work on the Hackensack Project. Pa207 ¶¶ 78-80.

Similarly, in Arc's Post-Hearing Brief, Arc states as a matter of fact that it is still owed approximately $1.8 million for its work on the Hackensack Project. In the three preceding pages of its brief, Arc also states as a matter of fact the litany of problems on the Hackensack Project caused by CCG prior to Arc's involvement that continued to haunt the project after took over from CCG. It is plainly evident that such statements of facts were made for the sole purpose of substantiating Arc's claim that CCG was not entitled to additional EGP on the Hackensack Project due to the ongoing impact of the problems that predated Arc's involvement, which rendered the project unprofitable without any basis for any further EGP payment. Indeed, Arc's only claim is that the parties "could not arrive at a final EGP," and therefore CCG's claim for unpaid EGP on this project should be denied. Pa500. CCG completely misconstrues Arc's Post-Hearing Brief by incorrectly claiming that Arc had placed its non-payment issue on the Hackensack Project "squarely before the Arbitrator." CCG App. Br. at 36. Nothing could be further from the truth. Arc's reference to an overpayment to CCG was due to the fact that it had already paid CCG $191,381.00 in EGP for a project that was not going to have any profits due to the issues Arc was forced to inherit. Pa427.

CCG's reliance on the excerpts of the testimony of Arc's principal and owner, Frank Ciminelli, is similarly misplaced. CCG's App. Br. 14-17, 31-32. In that testimony, Mr. Ciminelli was explaining, in response to CCG's questions regarding issues on the Hackensack Project, why Arc was "upside down" on the project. Pa535-37. As Mr. Ciminelli explained, Arc "continued to pay subcontractors without any payment from the owner on any of the change orders in order to get the project to final completion." Pa537 at 156:21-24. Mr. Ciminelli's testimony does not connect the amount Arc is owed on the Hackensack Project for its role as subcontractor with the amount of the EGP payments Arc would eventually make to CCG under the PTA. Mr. Ciminelli's agreement with CCG's counsel that Arc "overpaid [EGP] on Hackensack," was because Arc did overpay CCG for EGP payments on the Hackensack Project. As explained by the PTA Arbitrator and the Trial Court, Arc inherited many issues from CCG when it took over the project, which forced the parties to rethink the EGP (as was allowed for this particular project under the PTA). Pa43-Pa44; Pa668 at 201:8-13.

CCG also misleads the Court by claiming that Arc's performance at Hackensack was "a factual issue before the Arbitrator," purely because CCG inserted a reference to Arc's completion of Backlog Projects in its initial demand for arbitration. CCG's App. Br. at 9; Pa77. Importantly, CCG never asserted a claim concerning Arc's performance under the Hackensack

Subcontract (or any other Backlog Project) in any of the five iterations of its Statement of Claim. The only reference to Arc's performance on the Hackensack Project was in CCG's claim for declaratory judgment that Arc must indemnify CCG for any losses arising from its performance on the Backlog Projects pursuant to the indemnification clause of the PTA, further demonstrating that the PTA Arbitration solely concerned the parties rights and obligations under the PTA. Pa188.

As further proof of the parties' agreement to limit the issues in the PTA Arbitration, neither party offered any proof that would be necessary to prosecute and defend Arc's claims for payment for its work on the Hackensack Project. For good reason, neither party introduced proposed change orders, executed change orders, owner payment applications, subcontractor payment applications, timesheets, etc. Issues relating to the project accounting on the Hackensack Project and the amount due to Arc as a result thereof were simply not delegated to the arbitrator in the PTA Arbitration.

Finally, it is completely false that Arc's claim for business loss in the PTA Arbitration "included the above-referenced alleged losses at the Hackensack Project." CCG's App. Br. at 18. CCG inserts this unsupported conclusory statement at the end of its lengthy diatribe on Arc's discussion of the Hackensack Project issues, likely in the hopes the Appellate Court ignores the fact that it fails to support such an outlandish claim with either an affidavit or

support in the record. CCG misleadingly quotes Arc's claim for business loss damages and then adds its own unsupported conclusion ("which included the above-referenced alleged losses at the Hackensack Project"), but disingenuously places the citation to Arc's Statement of Counterclaim at the end of its sentence, to make it seem as though Arc included the Hackensack Project claims in its business loss claim. This is false and Arc never made such a statement. In fact, the amount of Arc's business loss claim was based entirely on its audited financial statements that did not include the outstanding balance owed to it under the Hackensack Subcontract.

2. The Trial Court correctly determined that Arc's claims in the Hackensack Arbitration were not ripe at the time of the PTA Arbitration [Pa21-Pa22, Pa44]

The Trial Court correctly held that Arc's Hackensack Project claims were not ripe for adjudication at the time of the PTA Arbitration. Arc had no claim for unpaid monies until CCG (the contractor) obtained final judgment in an arbitration with Sonehan (the owner) three months after the PTA Arbitration hearings concluded. Pa568 (Final Award listing the last hearing date of the PTA Arbitration as August 24, 2023); Da9-Da10 (November 17, 2023 Judgment for the award issued in CCG's arbitration with the owner). It is entirely possible that CCG would have recovered from Sonehan all of the money CCG owed to Arc and, as a result, paid Arc's claim in full. Instead judgment was

entered only for $435,087.70, a fraction of the amount CCG owes Arc. Pa907-Pa922.

If CCG had desired to resolve the Hackensack Project claims in the PTA Arbitration, it could have easily waited to commence the PTA Arbitration until after its arbitration with the owner was completed and judgment entered, but instead it demanded that Arc submit to the PTA Arbitration on the claims under the PTA that existed at the time—to the exclusion of claims arising from the performance of constructions contracts assigned to Arc under the PTA. See Spolitback, 295 N.J. Super. at 270 (holding that "plaintiffs cannot be held to have made a preclusive choice to arbitrate issues of which they were unaware at the time they submitted known claims for resolution by that procedure").

In its quest to prove that Arc's claim was ripe at the time of the PTA Arbitration, CCG fabricates a timeline of irrelevant dates. For example, CCG incorrectly asserts that the Sonehan Arbitration concluded on September 15, 2023, citing the date on the last page of the "Reasoned Award of the Panel of Arbitrators." CCG's App. Br. at 36; Pa907-Pa922. However, as demonstrated by the PTA Arbitration, an award issued in an arbitration conducted by the American Arbitration Association is not final until the parties' have exhausted their rights to request modification to the award. See, e.g., Pa923-Pa931 (Final Disposition of Application for Modification of the Parties' Proposed Corrected Final Award). And the New Jersey's Arbitration Act

expressly provides that a Court can confirm, vacate, or modify an arbitration award. N.J. Stat. Ann. § 2A:23B-22. Here, the award issued in the Sonehan Arbitration was not final until the parties exhausted their ability to seek modification of the award and the Court confirmed the award. The Court eventually confirmed the award on November 17, 2023, almost three months after the conclusion of the hearing in the PTA Arbitration and one month after the parties submitted their post-hearing briefing in the PTA Arbitration. Da9-Da10. Therefore, CCG's claim that the Sonehan Arbitration "had concluded in full" while the PTA Arbitration was ongoing is false. CCG's App. Br. at 36.

CCG also incorrectly asserts that Arc could have brought its Hackensack Project claims as early as December 2020 CCG's App. Br. at 37. However, Arc did not have a contractual relationship with the owner of Hackensack Project. It was acting as a subcontractor of CCG and, consequently, Arc was only in privity with CCG. Pa594-Pa616. CCG and CCG alone was the only party in privity of the contract with the owner. In other words, only CCG could bring a claim against the owner for its failure to pay (which is presumably the reason CCG has failed to pay Arc). Therefore, it would have been entirely premature for Arc to pursue a claim for unpaid monies until CCG obtained final judgment in the Sonehan Arbitration on November 17, 2023, and it became apparent Arc was not going to be paid the full amount it is

owed from CCG.[7] Metromedia Co. v. Hartz Mountain Assocs., 139 N.J. 532, 535 (1995) ("For purposes of determining when a cause of action accrues so that the applicable period of limitation commences to run, the relevant question is when did the party seeking to bring the action have an enforceable right." (citation omitted)).

Further, Arc's acknowledgment in its October 17, 2023 post-hearing brief of the amount CCG owed it for its work on the Hackensack Project is not indicative of the "ripeness" of its claim on that date. CCG had stopped paying Arc pursuant to its subcontract during Arc's performance on the Hackensack Project in 2020, and, as CCG has repeatedly pointed out, Arc even referenced this nonpayment in its Statement of Counterclaim, which was filed well before its post-hearing brief. Pa191-Pa209; Pa377-Pa429. The fact that Arc also referenced this nonpayment in its post-hearing briefing is not dispositive of the issue of ripeness.

"Fairness in the application of the entire controversy doctrine focuses on the litigation posture of the respective parties and whether all of their

[7] It is not true that the Court suggested that Arc is entitled to "no greater recovery than that achieved by Claremont in the Sonehan Arbitration." CCG's App. Br. at 39 n.11. CCG did not join Arc as a party in the Sonehan Arbitration (and it did it have a basis to do so) and while CCG is obligated to pay over to Arc the amount of the of the partial award CCG obtained (for which Arc is still waiting payment), the award does not fulfill CCG's obligation to Arc as subcontractor, making the Hackensack Arbitration a necessary vehicle for Arc to fully pursue its right to payment.

claims and defenses could be most soundly and appropriately litigated and disposed of in a single comprehensive adjudication." DiTrolio v. Antiles, 142 N.J. 253, 277 (1995). Clearly, Arc could not have "soundly and appropriately" litigated its dispute regarding the Hackensack Project until it knew there was a dispute, i.e. until it knew that CCG was only going to pay Arc a fraction of the amount Arc was owed because the Award in the Sonehan Arbitration was less than the amount CCG owed to Arc. Therefore, the Court's determination that Arc's Hackensack Project claims were not ripe at the time of the PTA Arbitration is not arbitrary, capricious, or unreasonable and not subject to reconsideration.

Incredibly, CCG acknowledges that its arbitration with the owner necessarily concerned Arc's claims for unpaid work on the Hackensack Project, which therefore must be separate from the issues litigated in the PTA Arbitration. For example, in CCG's Post-Hearing brief submitted in the PTA Arbitration CCG stated:

> CCG brought claims for non-payment (effectively, on behalf of Arc) against the owner in arbitration, the owner countersued for millions, and the panel recently (on September 15, 2023) awarded CCG the net total of $435,087.70. That judgment has not yet been affirmed nor paid by the owner. Once CCG is actually paid by the owner, various reconciliations must be made (including deductions for the payment of legal fees, arbitration costs/expenses, etc.). The net funds will be transferred to Arc. That recovery has no impact on the EGP due for CCG.

Da6 (emphasis added).

Therefore, not only does CCG acknowledge that it is indebted to Arc for at least this portion of the Hackensack Project claims, but CCG admits that its recovery from the owner (allegedly on Arc's behalf) was separate from the EGP supposedly owed by Arc to CCG on that project. Therefore, it cannot be true that the parties "fully litigated" all claims relevant to the Hackensack Project in the PTA Arbitration [CCG's App. Br. at 2] if, as CCG admits, CCG was also pursuing Arc's claims for payment on the Hackensack Project in a separate arbitration at the exact same time.[8]

3. The dispute resolution clauses of the parties' agreements prevented Arc from bringing its Hackensack Project claims in the PTA Arbitration

While not addressed by the Trial Court, CCG failed to demonstrate probability of success for the additional reasons that the arbitration provisions

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[8] In the past, CCG has paradoxically claimed that Arc never raised its Hackensack Project claims in the PTA Arbitration. See Da15-Da16 (CCG's counsel claiming that "[t]o the extent this Hackensack claim had any merit (which it does not), Arc is nevertheless barred from bringing it because it did not bring it during the AAA proceeding between Claremont and Arc that was filed in July 2022 and concluded with a Final Award on January 19, 2024."); Da35 (". . . Arc's newly minted Hackensack claim is clearly barred by the Entire Controversy Doctrine. For unknown reasons, Arc apparently decided to withhold bringing this claim in the parties' recently completed arbitration, only to try to spring it on Claremont now, after Claremont won the arbitration and obtained a $4 million award against Arc."). CCG apparently has now strategically reversed its position, now claiming that Arc fully litigated these claims in the PTA Arbitration.

of the PTA and the Hackensack Subcontract do not permit the parties to combine the issues arising under each in one arbitration. "It is elementary that a party to a contract is not obligated to submit a dispute arising under it to arbitration unless he has undertaken by his contract to do so . . . ." Moreia Const. Co. v. Wayne Twp., 98 N.J. Super. 570, 575-76 (App. Div. 1968) (citing sources). New Jersey courts acknowledge that "[w]hile public policy favors the arbitration process, and contracts should be read liberally to find arbitrability if reasonably possible, there survives the principle that parties choosing not to submit to arbitration 'have a right to stand upon the precise terms of their contract.'" Id. (quoting Goerke Kirch Co. v. Goerke Kirch Holding Co., 118 N.J. Eq. 1 (1935)). Courts are not empowered to "rewrite the contract merely because one might conclude that it might well have been functionally desirable to draft it differently to broaden the scope of arbitration in view of the nature of the subject matter of the contract, or indeed to make every dispute of any nature between the parties arising thereunder the subject of arbitration." Id.

The dispute resolution procedures of the parties' Hackensack Subcontract provides that:

> Subject to the rules of the American Arbitration Association or other applicable arbitration rules, either party may consolidate an arbitration conducted under this Agreement with , any other arbitration to which it is a party provided that (1) the arbitration agreement governing the other arbitration permits consolidation; (2) the arbitrations to be consolidated substantially

> involve common questions of law or fact; and (3) the arbitrations employ materially similar procedural rules and methods for selecting arbitrator(s).

Hackensack Subcontract § 6.3.5.1. All three factors (the permission for consolidation, common questions of law or fact, and similar rules) must be present in order for the parties to consolidate claims arising under the Hackensack Subcontract with another arbitration. Here, at least two of those factors were missing.

First, the PTA's limited scope dispute resolution clause does not permit consolidation, providing only that "any unresolved controversy or claim arising out of or relating to such Dispute that is not resolved by mediation shall be settled by a single arbitrator in arbitration administered by the American Arbitration Association pursuant to its Construction Industry Arbitration Rules." Pa119.

Second, the issues in the PTA Arbitration do not share common questions of law or fact with Arc's Hackensack Project claims. The PTA Arbitration did not pertain to claims for amounts due under construction contracts assigned under the PTA and instead was confined to the parties' dispute concerning EGP, as defined in the PTA. Pa573-576. The PTA Arbitration was by design and by agreement a limited-issue arbitration.[9]

[9] The parties agreed to exclude Arc's payment claims on the Hackensack Project from the PTA Arbitration because they did not desire to have multiple

Therefore, even if Arc's claims regarding the Hackensack Project was ripe for adjudication, which it was not (see supra Point II.A.2), Arc could not pursues its Hackensack Project claims in the PTA Arbitration.

arbitrations under multiple contracts within the larger PTA Arbitration. Da2 ¶ 5. The parties certainly did not have an agreement that the PTA Arbitration would be to arbitrate all disputes under all construction contracts—all of which had their own dispute resolution provisions.

B. CCG also failed to meet the remaining factors necessary to obtain injunctive relief

While the Trial Court's decision did not reference the remaining factors that a party must establish to obtain injunctive relief, CCG failed to establish those requirements as well. First, CCG failed to demonstrate that a balancing of the hardships weighs in favor of granting it preliminary injunctive relief. In reality, the only hardship faced by CCG if the Hackensack Arbitration moves forward is that it will expend money on legal fees and possibly pay a judgment, which is not only not irreparable harm, see infra, but also does not outweigh the harm to Arc if it is forced to further delay a litigation it commenced six months ago. Any delay in the Hackensack Arbitration threatens Arc's ability to successfully pursue its claims as witnesses are harder to reach, memories fade, and documents disappear.

Second, CCG will not suffer substantial or irreparable injury if the Hackensack Arbitration were to proceed while the Court considers the merits of its claim that the arbitration is barred by the entire controversy doctrine. "Harm is generally considered irreparable in equity if it cannot be redressed adequately by monetary damages." Crowe, 90 N.J. at 132–33. "It is universally accepted that '[t]he availability of adequate monetary damages belies a claim of irreparable injury.'" Delaware River & Bay Auth. v. York Hunter Const., Inc., 344 N.J. Super. 361, 364 (Ch. Div. 2001) (quoting other sources) (citations

omitted). If CCG proceeds with the Hackensack Arbitration, the only damages it will suffer is money damages, and therefore, emergency injunctive relief is not necessary.

Third, the entry of injunctive relief is certainly not in the public interest. The Hackensack Arbitration concerns a dispute that is wholly separate from the dispute at issue in the PTA Arbitration and is not an attempt at piecemeal litigation. CCG's App. Br. at 3, 24. Arc has not received the opportunity to litigate its Hackensack Project claims, and it is certainly not in the public interest to deny parties their right to bring claims in the proper judicial forum.

Finally, for all the reasons explained supra, CCG was also not entitled to permanently enjoin the Hackensack Arbitration. Not only will CCG not be successful on the merits of its claims (because the entire controversy are not applicable) but also the harm to Arc resulting from a permanent injunction would greatly outweigh any harm to CCG if the Court denied its requested relief. Sheppard, 261 N.J. Super. at 10 (listing the factors to be analyzed by a court when considering permanent injunctive relief). Arc has a legitimate and unresolved $2.1 million claim against CCG for work Arc performed on a project. CCG has not compensated Arc for its work, and if the Hackensack Arbitration were permanently enjoined, Arc would be unfairly prevented from pursuing its claims.

CONCLUSION

For the reasons set forth above, Arc respectfully requests that the Court affirm the Trial Court's Orders dismissing CCG's Complaint with prejudice and compelling the Hackensack Arbitration or, alternatively, vacate the Orders and direct that the application of the entire controversy is a jurisdictional question to be decided by the arbitrator.

Dated: Buffalo, New York
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CLAREMONT CONSTRUCTION GROUP, INC.,

Plaintiff/Appellant,

v.

ARC NJ, LLC,

Defendant/Respondent.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO.: A-000457-24

CIVIL ACTION

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

Docket No.: MRS-C-55-24

Sat Below: Hon. Frank J. DeAngelis

REPLY BRIEF OF PLAINTIFF-APPELLANT CLAREMONT CONSTRUCTION GROUP, INC.

Dated: April 24, 2025

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PRELIMINARY STATEMENT

New Jersey's entire controversy doctrine ("ECD") is simple—parties to a dispute must resolve the *whole dispute* and *all related claims*, at one time, or be barred thereafter. The reasons are obvious. Piecemeal litigation is unpractical, inefficient, and inconsistent. Claremont's claims in the First Arbitration included all claims related to a dozen construction projects, including the Hackensack Project, and thus the ECD required Arc to assert any related counterclaims or offsets it had for those same projects, including that very same Hackensack Project. Indeed, Arc included an ***express allegation*** in its pleading that it was owed $2.1M for unpaid work at Hackensack, seeking an offset to the profit-sharing it owed Claremont on the dozen construction projects at issue.

Arc's Second Arbitration is a transparent attempt to avoid paying the $4M award entered against it after trial. This gamesmanship cannot be condoned. While the benefits and goals of the ECD are simple, in Arc's view, Claremont and Arc should apparently have "12 different arbitrations on 12 different projects…because there's 12 different arbitration clauses." That inefficient suggestion makes zero practical sense. And this is the overarching issue on appeal: either Arc can proceed with 12 piecemeal arbitrations, or it cannot bring any of them (including the Second Arbitration regarding Hackensack, again).

Arc's argument requires the Court to permit blatant claim-splitting—

which is anathema to the ECD. Arc believes that profit sharing (EGPs) due to Claremont for each construction project must be fragmented and litigated separately from amounts allegedly due to Arc from Claremont for the construction work performed on each project. It makes no sense whatsoever to litigate Arc's monetary claims in a dozen separate proceedings from Claremont's monetary claims—all with respect to the very same construction projects. The claims are related and must be litigated and set-off together. This is what occurred in the First Arbitration, where Claremont's $899K EGP claim on the Hackensack Project was reduced to $0, and effectively set-off by the Arbitrator against the $2.1M that Arc pleaded it was due on that same project.

The fact that Arc believes there can be "12 different arbitrations" exposes the need for injunctive relief. What happened is obvious: Arc lost the trial, had a $4M award entered against it, immediately looked to avoid paying, and, within days, commenced the Second Arbitration in a transparent attempt to leverage against the $4M award. It cannot possibly be the correct outcome that Claremont must be exposed to a series of further arbitrations against Arc—a party with whom Claremont's relationship stemmed entirely from a global agreement (the PTA) meant to govern the parties' entire relationship. The ECD required Claremont and Arc to resolve their claims against each other in <u>one</u> case—not in 5, or 6, or 12 separate cases. Arc's monetary counterclaims against

Claremont—most specifically those related to the Hackensack Project—were compulsory and, if not asserted in the First Arbitration, were waived.

One of the following must be true with respect to the First Arbitration: (a) Arc knew it had a $2.1M offsetting Hackensack claim, presented evidence, and effectively won that issue (Claremont received $0 on this profit-sharing claim); (b) Arc knew it had a $2.1M Hackensack claim but strategically did not litigate it, instead waiting to spring it at a later date; or (c) Arc incorrectly believed its $2.1M claim was not ripe and failed to bring it. The record clearly supports (a), and Claremont has cited record evidence and Arc's own testimony to that end. Arc's opposition brief indicates both (b) and (c), which are both barred by the ECD. As to (b), Arc cannot surreptitiously hold back a known claim (compulsory counterclaim) and spring it at a later date in a new matter against the same party. That would be unfair and inequitable piecemeal litigation, and defy the ECD's basic goals. And as to (c), the Hackensack Project had been completed *years* earlier and the claim was obviously ripe and known (the exact amount ($2.1M) was discussed in Arc's own pleading).

At bottom, the parties already had their day in court. Arc's attempts to search for additional offsets against the $4 million judgment must be laid to rest. For these reasons, Claremont respectfully requests that this Court reverse the August 30 Orders and enter permanent injunctive relief against Arc.

LEGAL ARGUMENT

I THE ECD BARS THE SECOND ARBITRATION (Pa21, Pa34-44)

In situations where a party seeks to enjoin a second arbitration under the ECD, such as here, the Appellate Division found "that the harm to a party would be *per se* irreparable." Raritan Plaza I Assocs. v. Cushman & Wakefield, 273 N.J. Super. 64, 71 (App. Div. 1994). And although Arc incorrectly believes that the trial court's ECD ruling should be reviewed for "abuse of discretion," Opp. at 14, "[t]he application of res judicata and the entire controversy doctrine are questions of law and, accordingly, we review those issues de novo." Mansour v. Chiacchio, 2022 N.J. Super. Unpub. LEXIS 330, at *10 (App. Div. 2022).

Arc's contention that it completed "the Hackensack Project under a completely separate agreement with a separate and substantively different dispute resolution provision" is demonstrably inaccurate, as the ***global*** PTA expressly subsumed, pursuant to Section 1.5(b), several different completion subcontracts, which included the Hackensack Project Completion Subcontract. Pa123, Pa125. Opp. at 2. Although Arc posits that this is "not [] sufficient to invoke the entire controversy doctrine," Opp. at 26, the New Jersey Supreme Court has explained that the ECD requires joinder of ***all claims in one action*** that arise from "the same transaction or series of transactions but need not share common legal theories." Bank Leumi USA v. Kloss, 243 N.J. 218, 226 (2020).

Underscoring that Arc was required to join its Hackensack claims (as arising from the same transaction or series of transactions under the PTA), Arc acknowledges that the "[t]he PTA may have created an obligation of CCG to enter into a subcontract with Arc for particular projects," including the Hackensack Project. Opp. at 26. Thus, even if Arc's alleged Hackensack Project claim does not "share common legal theories" with Claremont's EGP payments at Hackensack, the PTA created a sufficient nexus for ***all*** Hackensack Project claims (i.e., Claremont's profit-share EGP claim and Arc's non-payment claim) to be brought in one action, so they could be offset against each other.

Arc also ties itself in knots with respect to its work under the Hackensack Project Completion Subcontract and its importance in the First Arbitration. On the one hand, Arc asserts that the First Arbitration "was not about Arc's performance...on various projects." Opp. at 28. However, this is objectively disproven by the record—the First Arbitration consisted of *substantial* testimony on Arc's Hackensack performance. See, e.g., Pa176 ¶ 18, Pa243 at 127:4-19. On the other hand, Arc repeats in opposition here the same argument it made in the First Arbitration, that "the parties eventually agreed [the Hackensack EGP] would be zero in light of the issues Arc inherited"—an

intrinsically subcontractor-performance aspect of the Hackensack Project.[1] Opp. at 29 (adding it was "such a problematic project"). Thus, according to Arc, subcontractor-related issues in-the-field at the Hackensack Project ultimately reduced Claremont's profit share on the Hackensack Project down to $0, despite being contractually set by Schedule 1.7(a) of the PTA. Pa125.

Further, Arc flatly contradicts the record when it states that its "role as subcontractor…was not and could not have been presented or considered at any point during the [First] Arbitration." Opp. at 29. This is wrong for many reasons, such as (1) Arc's role as a subcontractor on the Project was introduced and testified to at length ***by Arc's principal***;[2] (2) Arc entered its subcontract for Hackensack, and other project correspondence, into evidence during trial;[3] and so (3) Arc clearly had a "fair and reasonable opportunity" to litigate the Hackensack Project claims in the First Arbitration (including the $2.1M offset it pleaded in its counterclaim). While the Arbitrator's Award could have been clearer on the justification for a "credit," it bears repeating that this is the only project in which Claremont's EGP profit-share claim was reduced to $0 (down

[1] Claremont has consistently refuted that the parties ever came to any such "agreement," which would be inherently antithetical in an action "involving the transfer of a business." Opp. at 26.

[2] Pa502 at 16:20-17:1 ("we were a subcontract[or] to [Claremont]" at Hackensack); Pa536 at 152:2-20 (at Hackensack, because "the change orders are still not being acted upon…estimated gross profit is now, you know, put into peril").

[3] Pa316 at 391:2-14 (admitting Hackensack Completion Subcontract into evidence).

from $899K), and it is the Project on which Arc put in its most substantial proofs as to offsets or credits due to Arc for site issues / unpaid construction work.

Arc accuses Claremont of doing "nothing more than stitch[ing] together pieces of Arc's Statement of Counterclaim." Opp. at 30. But each piece of Arc's pleadings in the First Arbitration gives rise to mandatory offsetting claims, see R. 4:7-1 (failure to offset debt or demand results in waiver), and signals that Arc, in fact, knew about its ripe Hackensack claims and either only brought the claim in small pieces (while largely holding it back), or opted to hold it back completely. Neither of these deceptive legal games are permitted under the ECD, and thus the ECD must protect Claremont against "12 different arbitrations."[4] Arc's opportunity to litigate the Hackensack Project (including its obligation to do so under the ECD) should not be conflated with *res judicata* (i.e., whether Arc's offsetting Hackensack claims were actually fully litigated).

Arc also struggles to avoid the reality of its own arguments requesting an offset in its own post-trial briefing to the Arbitrator, which further evidence it having a "fair and reasonable opportunity" with respect to Hackensack Project claims. Pa401 (citing the "Hackensack Completion Contract," and arguing it "has not been paid for its work on Hackensack"). In opposition, Arc

[4] In opposition, Arc now states that "there would only be four separate arbitrations because there were only four Backlog Projects," Opp. at 27 n.6, but this is still alarming and remains the same exact type of piecemeal litigation the ECD prohibits.

acknowledges that "such statements of fact were made for the sole purpose of substantiating Arc's claim that CCG was not entitled to additional EGP on the Hackensack Project due to the ongoing impact of problems…which rendered the project unprofitable." Opp. at 31. This admission is crucial because:

- the PTA set the Hackensack EGP at $1,677,588.00, Pa125;
- Claremont's 65% EGP profit-share was $1,090,432.20, Pa76;
- Arc only paid Claremont $191,381.00, thus contractually owing Claremont the unpaid portion of $899,051.20, Pa77;
- Claremont never agreed to amend the contractually-set Hackensack EGP, and thus asserted a claim in the First Arbitration for the unpaid $899,051.20, Pa186 ¶ 111;
- at trial, Arc testified that it stopped paying EGP to Claremont because "Arc's claim of unpaid work on the Hackensack project"—under the subcontractor "completion contract"—was "about $1.8 million," Pa535 at 147:14-148:2;
- and yet, Arc now falsely and inconsistently states in opposition that it did not "place[] its non-payment issue on the Hackensack Project 'squarely before the Arbitrator.'" Opp. at 31.
- Simply put, Arc cannot, in good faith, argue that it did not make sufficient subcontractor profits to pay Claremont its 65% EGP share, and also argue that it did not have a "fair and reasonable opportunity" to litigate its unpaid work claim for Hackensack.

Further, Arc argues that "the parties' agree[d] to limit the issues in the PTA Arbitration." Opp. at 33. This is both unsupported by the record and outlandish. Claremont, and its two retiring principals, intended the First Arbitration to be a full and final resolution of any and all disputes between the parties under the global PTA and its series of various subcontracts with Arc. Arc wants this Court to believe that Claremont agreed to carve-out and save-for-

another-day other claims on these same construction projects. This shocks the conscience—why would Claremont ever agree to such a granular level of claim-splitting and arbitrate half-a-dozen or a dozen times over with Arc? Obviously, it would not. In opposition, Arc meagerly points out that "neither party introduced proposed change orders, executed change orders…etc." Opp. at 33. Of course, Arc did introduce the Hackensack Project Completion Subcontract, and did testify about change orders. Pa316; Pa536. However, Claremont had no reason to introduce these documents into evidence for its case-in-chief; whereas, Arc was free to present its offsetting counterclaims however it wanted, and Arc chose not to admit these contract documents into evidence.

Finally, as previewed in Claremont's opening brief (Mov. Br. at 22 n.7), Arc argues that multiple piecemeal arbitrations are *required* by the PTA's (inapplicable) arbitration-consolidation provision. Opp. Br. at 5. Obviously, this is a red herring. This is further nonsensical ***when the parties were already litigating the Hackensack Project in an arbitration***. The clause only requires arbitration as the forum for dispute resolution, and permits consolidation had there been multiple concurrent arbitrations ongoing. The arbitration-consolidation provision is simply not relevant to this litigation, nor should it be interpreted to lead to the absurd result that—in spite of the ECD—the parties must engage in multiple disjointed arbitrations.

II ARC'S RIPENESS ARGUMENT IS LEGALLY FLAWED, AS ARC HAD AN "ENFORCEABLE RIGHT" ON ITS NON-PAYMENT BREACH OF CONTRACT CLAIM YEARS AGO (Pa21, Pa44)

Arc incorrectly believes "Arc had no claim for unpaid monies until CCG (the contractor) obtained final judgment in an arbitration with Sonehan (the owner) three months after the PTA Arbitration hearings concluded." Opp. at 34. If Arc were truly waiting for the Sonehan Arbitration to end for its claim to be ripe, then Arc can only be entitled to—at most—the reward Claremont received therein (minus reconciliations/deductions for costs/expenses, etc.).

In the Sonehan Arbitration, Claremont received $435,087.70 from the Owner. Pa921. Yet, in the Second Arbitration, Arc demands $2.1M, which exactly mirrors its alleged claim in the First Arbitration that "Arc is currently owed $2.1 million by the owner on the Hackensack Project." Pa201 ¶ 46. It is obvious that the "ripeness" argument is nonsensical, and Arc could have asserted—and did assert—a $2.1M claim against Claremont in the First Arbitration, as the Project had finished ***long*** ago (in December 2020, ***over four-and-a-half years ago***). See Metromedia v. Hartz Mountain, 139 N.J. 532, 535 (1995) (finding claim accrues when party has "an enforceable right," which arises "immediately upon completion of the [contractual] services"). Moreover, the Hackensack Project Subcontract between Claremont and Arc was ***not*** a "pay-if-paid" subcontract, and so Arc's non-payment claim against Claremont was

not sitting "unripe" until Claremont's judgment against Sonehan. See JPC Merger Sub v. Tricon Enters, 474 N.J. Super. 145, 164 (App. Div. 2022) (holding contract must contain "clear and unequivocal language that unambiguously sets forth the parties' intention and agreement that owner payment is a condition precedent to the general contractor's obligation to pay the subcontractor"). Thus, Arc's nonpayment claim against Claremont under the Hackensack Project Subcontract ripened when Arc completed its work at the Project (December 2020) and Claremont allegedly failed to pay Arc its contract balance, sometime in December 2020 or shortly thereafter in early 2021.

Finally, the timing of the awards undermines Arc's "ripeness" contention. Claremont received the Sonehan Arbitration award on September 15, 2023. Pa922. Meanwhile, Arc continued to argue its Hackensack claims and defenses in the First Arbitration, until "the hearings were deemed closed on November 28, 2023." Pa569. It was not until ***after*** the Arbitrator hit Arc with a $4 million judgment that Arc, once again, demanded $2.1 million from Claremont for the Hackensack Project.[5] The timing is not mere coincidence, but rather represents a calculated decision by Arc to wait-and-see how the Arbitrator ruled in the First

[5] A Second Arbitration would provide Arc a double-recovery on Hackensack. The Arbitrator awarded Claremont $0 on its Hackensack claim, which must have been due to Arc's offsetting counterclaim for unpaid work. If Arc can now pursue its $2.1 million claim *again*, then it stands to reap a windfall, getting both a $899,051.20 "credit" in the First Arbitration and a $2.1 million claim in the Second Arbitration.

Arbitration before re-springing the claim on Claremont as post-judgment leverage. Thus, the legal question is not one of ripeness, but rather is one of purposeful claim-splitting (or, possibly, res judicata).

III THE PARTIES NEVER INTENDED TO DELEGATE ARBITRABILITY TO AN ARBITRATOR (Pa21, Pa43)

This is not Arc's appeal, nor did Arc cross-notice an appeal of the trial court's ruling that it may decide issues of arbitrability under the ECD as applied through the AAA Construction Industry rules. See In re Hill, 241 N.J. Super. 367, 372 (App. Div. 1990) ("Where the appeal is untimely, the Appellate Division has no jurisdiction to decide the merits of the appeal."). Thus, the Court here has no jurisdiction to hear Arc's new appeal on arbitrability.

Even if the Appellate Division had jurisdiction to review that issue, and assuming the applicability of the ECD was theoretically a delegable question of arbitrability—which it is not, see Raritan Plaza, 273 N.J. Super. at 70-71 ("the trial court should have stayed the second arbitration proceeding until it resolved the issue as to whether defendant's present [] dispute is barred by the entire controversy doctrine")—here, the parties' agreement does not reflect "clear and unmistakable" evidence of an intent to delegate such issues to an arbitrator.

In Morgan v. Sanford Brown Institute, the New Jersey Supreme Court took guidance from the FAA and observed that "the law presumes that a court, not an arbitrator, decides any issue concerning arbitrability." 225 N.J. 289, 304

(2016). So, the parties themselves must expressly and unambiguously "delegate to an arbitrator the issue of whether they agreed to arbitrate a particular dispute." Id. at 303. Moreover, "[a]n agreement to delegate arbitrability to an arbitrator…must satisfy the elements necessary for formation of a contract." Id. at 295. "***Silence or ambiguity*** in an agreement does ***not*** overcome the presumption that a court decides arbitrability." Id. (emphases added). Thus, with any doubt about the parties' intent, courts must decide arbitrability issues.

Importantly, Arc never raised an arbitrability challenge in the trial court, and Arc cannot cite to any place in the trial court record where such a challenge was raised by Arc. Rather, the trial court raised the issue *sua sponte*. The Third Circuit, however, has described the "clear and unmistakable" standard as "onerous" and requiring an "express" and "unambiguous" expression of intent to delegate arbitrability to the arbitrator. Chesapeake Appalachia, LLC v. Scout Petroleum, LLC, 809 F.3d 746, 753 (3d Cir. 2016). Indeed, courts in this circuit have held that the correct approach is "the more nuanced approach directed by the Third Circuit—an approach that requires the Court to do more than scour the relevant contract for the magic letters 'AAA.'" HealthplanCRM, LLC v. AvMed, Inc., 458 F. Supp. 3d 308, 323 (W.D. Pa. 2020). Thus, because the Hackensack Project Completion Subcontract arbitration provision—when coupled with Arc's decision to **not** challenge the Court's jurisdiction to

determine arbitrability (as in Morgan)—"gives good reason to doubt that delegation was the parties' intent, questions of arbitrability should remain with the Court, even if the contract incorporates the AAA rules." Id. at 323.

In fact, there are **no** published cases in New Jersey supporting the notion that either the applicability of the ECD may be delegated to an arbitrator, or that the issue of arbitrability may be delegated to the arbitrator under the AAA's ***Construction*** Industry Rules, which are narrower than the ***Commercial*** Rules. The AAA's Commercial rules and procedures state:

> R-7. Jurisdiction
>
> **(a)** The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.

In this case, the parties instead chose the AAA's Construction Industry rules:

> R-9. Jurisdiction
>
> **(a)** The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement.

Clearly, the AAA Commercial Rules are more expansive and expressly permit "arbitrability" being delegated to the arbitrator—while the Construction Industry rules noticeably ***do not***.

In an analogous example, in Stockling v. Evicore Healthcare MSI, the parties' arbitration provision incorporated the Employment Arbitration Rules.

2024 WL 3409444, at *4 (D.N.J. 2024). Unlike the Commercial Rules, the Employment Rules mirror *exactly* the Construction Industry Rules:

6. Jurisdiction

a. The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.

And accordingly, in Stockling, the court found that "[t]he language of the delegation clause…does not indicate a 'clear and unmistakable' intent to divert issues of arbitrability to an arbitrator, and is directly disputed by Plaintiff, so judicial determination is required." Id. at *2; see also DCK N. Am., LLC v. Burns & Roe Servs. Corp., 218 F. Supp. 3d 465, 474 (W.D. Pa. 2016) ("the parties' [Construction Industry] arbitration provision is distinguishable from…those cases from other circuits where reference to Rules evidenced a clear and unmistakable intent to arbitrate the question of arbitrability"). Similarly, here, neither the parties' arbitration provision nor the parties' calculated decision to permit the trial court to determine arbitrability and the applicability of the ECD meets the "onerous" standard for referral to arbitration.

CONCLUSION

Accordingly, Claremont respectfully requests that this Court vacate and reverse the August 30 Orders, and that the Court enter a permanent injunction to restrain and stay the Second Arbitration (and all further arbitrations).

Respectfully submitted,

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