SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Docket No.: A-001416-24 T01

FISK HOLDINGS, INC., f/k/a FISK ALLOY, INC.,

Plaintiff-Appellant,

– v. –

JANET M. GREEN,

Defendant-Appellee

Civil Action

On Appeal from the Final Judgment of the Superior Court of New Jersey Law Division, Passaic County

Trial Court
Docket No. PAS-L-000242-21

Sat Below: Hon. Thomas J. LaConte, J.S.C.

Date: March 17, 2025

OPENING BRIEF OF PLAINTIFF-APPELLANT FISK HOLDINGS, INC.

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Preliminary Statement

This case involves a dispute between a company, Plaintiff-Appellant Fisk Alloy, Inc. ("Fisk Alloy"), and its former employee, Defendant-Respondent Janet M. Green ("Green"). The employment agreement between the parties provided that Green would receive certain compensation following her termination, the amount of which was to be based on the company's value as determined following a contractual appraisal process. Instead of the appraisal occurring immediately following Green's termination, as the employment agreement envisioned, Green demanded arbitration of claims against Fisk Alloy for fraud and breach of the implied duty of good faith and fair dealing. The arbitrator ruled for Fisk Alloy on the fraud claim and Green on the breach claim and ordered that the parties obtain the appraisal. The trial court confirmed this award and the appraisal took place thereafter.

Then, under the purported rationale of merely enforcing the already confirmed arbitration award, the trial court refused to consider any of Fisk Alloy's challenges to the conclusions of or methodologies used in the appraisal. In the trial court's view, because the previously confirmed arbitration award directed the parties to *obtain* an appraisal of the company, the court could then "confirm" that appraisal—that is, enter a judgment award based upon the valuation opinion of the appraiser—in a summary proceeding as though the appraisal were *itself* a final and binding arbitration award. The trial court thus disregarded Fisk Alloy's contractual right to arbitrate its challenges to the appraisal. But even worse, the trial court refused to subject the appraisal to *any*

scrutiny, including the limited review to which actual arbitration awards are subject before confirmation.

First by stripping Fisk Alloy of its contractual arbitration right, and then by refusing to consider Fisk Alloy's challenges on the merits, the trial court effectively deemed a deeply flawed appraisal inviolate under any standard of review, in any tribunal, ever. That startling result violates the parties' contract, New Jersey law, and basic notions of fairness.

The court exacerbated its error by then awarding interest at a rate that was not even arguably granted in either the appraisal or the actual arbitration award. Even if the trial court had been correct in its belief that the appraisal could be "confirmed" as an arbitration award, the court's judgment would have to be limited to matters that were addressed and resolved *in* the appraisal. It is black-letter law, after all, that an "arbitration award may only be enforced as written." 2 Domke on Commercial Arbitration § 42:1.

In this case, the employment agreement entitled Green to interest at the applicable midterm federal rate in effect at a particular point in time, as explained in detail below. The parties dispute what rate the employment agreement requires, and that dispute plainly falls within the employment agreement's broad arbitration provision. Instead of honoring the parties' agreement and referring the issue to arbitration, though, the trial court simply awarded Green her requested rate, resulting in Green receiving more than $2.1 million in interest. And if this *ultra vires* interest award were not bad enough, the court by its own admission sided with Green based not on the contract's language but on the court's view of Fisk Alloy's culpability in the already-

resolved, underlying dispute. The trial court had no authority to disregard the employment agreement and, based upon its view of the equities as gleaned from an incomplete record, award remedies beyond the limited relief granted in the original arbitration, much less on an issue over which it lacked jurisdiction in the first place.

To remedy the trial court's serious errors on these and other issues, this Court should vacate the trial court's purported "confirmation" of the appraisal and its final judgment, and remand with instructions to deny Green's motion to confirm the appraisal and grant Fisk Alloy's cross-motion to compel arbitration.

Procedural History

Fisk Alloy initiated this action by verified complaint and order to show cause on January 19, 2021, in an attempt to require Green to participate in a contractually required appraisal process. Pa1[1]; Pa18. Green opposed Fisk Alloy's motion for preliminary injunctive relief and moved to stay this litigation and compel arbitration on the basis that all disputes between the parties were subject to final and binding arbitration. Pa23. The trial court held a hearing on March 4, 2021, at which it denied Fisk Alloy's motion and granted Green's request for a stay and to compel arbitration. See 1T22–25 [2]; Pa33.

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[1] Pa = Plaintiff-Appellant's Appendix.

[2] 1T = Transcript of Order to Show Cause Hearing dated March 4, 2021
2T = Transcript of Motion dated March 19, 2024
3T = Transcript of Motion dated December 3, 2024

Following a multi-day arbitration hearing conducted in September and October 2022, the arbitrator issued a Final Award on February 21, 2023 granting certain remedies and denying any other relief. Pa56. The trial court confirmed the Final Award by consent order on May 16, 2023. Pa35. That consent order directed the parties to obtain an appraisal as required by their employment agreement and the Final Award. Id. The parties engaged an appraiser, who issued an appraisal on September 12, 2023.

As relevant to this appeal, Green thereafter filed a motion to confirm the appraisal as "the final arbitration award and to obtain a final judgment." Pa37. Fisk Alloy opposed Green's motion and filed its own motion to compel arbitration, so that its challenges to the appraisal could be decided, as required by the parties' contract. Pa75.

The trial court held argument on March 19, 2023, 2T, and December 3, 2024, 3T, denying Fisk Alloy's cross-motion to compel arbitration on March 19, 2024, Pa77, and issuing a judgment order on December 3, 2024, Pa79. Through those orders, the trial court held that it, rather than an arbitrator, would decide threshold questions of arbitrability, that Fisk Alloy could not arbitrate its challenges to the appraisal, and that the trial court would not consider the challenges. The trial court also ruled on disputed issues, such as the applicable interest rate, that had not been arbitrated. Id. Fisk Alloy timely filed its notice of appeal on January 16, 2025. Pa90.

Statement of Facts

A. Green and Fisk Alloy Enter Into an Employment Agreement Containing a Binding Arbitration Provision

Fisk Alloy manufactures high-quality copper-alloy wire for use in a variety of conductor and connector products in the aerospace, automotive, defense, medical, and electronics industries, among others. Pa2, ¶ 3. On April 1, 2010, Fisk Alloy entered into the employment agreement (the "Employment Agreement") with Green by which she would serve as Fisk Alloy's part-time Chief Financial Officer. Pa2, ¶ 5; Pa43 (employment agreement). The parties amended the Employment Agreement three times, on February 15, 2011, October 10, 2018, and December 20, 2019, to reflect Green's changing responsibilities within the company. Pa2, ¶ 5; Pa3, ¶ 11. The Employment Agreement had a 10-year term, to run from April 1, 2010, until December 31, 2020. Pa2, ¶ 6. It was not renewed following its expiration on December 31, 2020. Pa2, ¶ 7.

The Employment Agreement gave Green certain "Stock Appreciation Rights," referred to herein as SARs. Section 5.2 of the Employment Agreement explains that Green's SARs give her "the right to receive, in cash, the appreciation in value of one (1) share of Common Stock,[3] as calculated in accordance" with Section 5.2(a). Pa44, § 5.2(a). Section 5.2(a) provides that the

[3] The value of one share of Common Stock in the Employment Agreement is the value of all of the Common Stock of the Company divided by 111.11. The value of Green's SARs is that amount, minus the Strike Price, multiplied by 11.11, plus a gross-up for the difference between taxes that she is required to pay because her SARs are compensation expense and treated as indebtedness under the financial statements of the company and the taxes that she would have had to pay had they actually been common stock. See Pa43.

value of the SARs is "an amount equal to the excess of (i) the 'Current Market Price' … of a share of Common Stock … as of the 'Trigger Date' … over (ii) the Strike Price," referred to as the "Spread." Pa44, § 5.2(a). (The Trigger Date means, in relevant part, the date of Green's termination of employment. Id.) Green is entitled to an "Appreciation Payment" consisting of the value of the Spread multiplied by the number of SARs granted to Green. Id. Green held 11.11 SARs. Id. Separately, Green is entitled under the Employment Agreement to a "Gross-Up Amount" for taxes. Pa45, § 5.2(b). One-third of the Appreciation Payment and the entire Gross-Up Amount were to be paid within 75 days of the Trigger Date, with the balance paid in 28 equal quarterly payments, plus interest at the "applicable midterm federal rate as of the date of the Initial Payment." Pa45, § 5.2(c).

Rather than set a value to Green's Appreciation Payments ex ante, the parties agreed to a formula by which their value could be calculated following an appraisal process. Pa44, § 5.2. Under that formula, determination of Green's Appreciation Payment requires a determination of the Current Market Price of the Company's Common Stock, which depends on the manner in which the company's stock is traded. Id. Because Fisk Alloy is a closely held corporation, the Current Market Price is determined by Section 5.2(a)(ii) of the Employment Agreement, which defines that term as the amount the holder of one "share of Common Stock would receive, on a fully diluted basis in accordance with generally accepted accounting principles, if all assets and liabilities of the Company were sold for the 'Appraised Value' … as of the Trigger Date and the Company were liquidated and dissolved." Pa44, § 5.2(a)(ii). "'Appraised Value'

means the fair market value of the Company … as determined by a written appraisal," and the "Fair market value" refers to the price that would be paid "by the most likely hypothetical buyer for a 100% interest in the equity capital of the Company." Id.

The Employment Agreement prescribes the method by which the written appraisal is to be obtained. It first allows the appraisal to be "prepared by an appraiser that is acceptable to the Company and Green." Id. However, if the parties are unable in good faith to agree on an appraiser, then Section 5.2(a)(ii) provides that Green and Fisk Alloy shall each select an appraiser, and the two selected appraisers "shall select a third appraiser who shall be directed to prepare such Appraisal." Id.

Section 12 of the Employment Agreement is the arbitration clause. It broadly provides that "any controversy, claim or dispute arising out of or in any way relating to this Agreement, Green's employment by the Company, or the ending of such employment ... shall be settled by final and binding arbitration." Pa50, § 12.1. Section 12.1 provides further that "[a]rbitration shall be conducted according to the Employment Arbitration Rules & Procedures of JAMS in effect at the time a claim is filed." Id. Certain kinds of claims or disputes are excluded from the arbitration provision, including those for workers' compensation or unemployment compensation benefits; those to compel arbitration under the agreement, to enforce a final arbitration award, or for equitable relief in aid thereof; and claims based on a pension or benefit plan that contains its own arbitration provision. Pa50, § 12.2.

B. Fisk Alloy Sues Green for Refusing to Engage in the Contractual Appraisal Process, and the Trial Court Refers the Dispute to Arbitration

Green's employment with Fisk Alloy terminated upon the expiration of the Employment Agreement on December 31, 2020. Pa2, ¶ 7. December 31, 2020 thus became the Trigger Date for determining the value to Green's SARs under Section 5.2(a)(ii). Pa44.

Green sought to leapfrog the contractual appraisal process triggered upon her termination. Instead of agreeing to either of Fisk Alloy's two proposed appraisers or identifying her own, less than two weeks after the Trigger Date, Green filed a demand for arbitration with JAMS, which asserted various claims about the value of her SARs. Pa9, ¶ 35. Fisk Alloy filed this lawsuit on January 19, 2020, seeking a preliminary injunction compelling Green to participate in the contractual appraisal process. See Pa1; Pa19.

Green in turn sought to stay this litigation and compel arbitration. Pa23. In seeking a stay, Green argued that, "[i]n accordance with the Agreement and Rule 11(c)[4] JAMS Employment Arbitration Rules and Procedures, questions of arbitrability must be decided by the arbitrator." Pa26, ¶ 7. Agreeing, the trial court denied Fisk Alloy's motion for a preliminary injunction and granted Green's request to stay the litigation and compel arbitration. Pa33.

[4] Green's application for a stay cited the JAMS rules effective July 15, 2009, in which the authority to determine arbitrability is granted in Rule 11(c). That provision was renumbered to Rule 11(b) in the subsequent versions, but was substantively unchanged.

C. The Arbitrator Enters, and the Trial Court Confirms, a Final Award Directing the Parties to Obtain an Appraisal Under the Contractual Process Set Forth in Section 5.2

Green asserted in the arbitration claims for breach of the implied duty of good faith and fair dealing and for fraud, related to issuance of a $12.5 million dividend to Fisk Alloy's principal on December 30, 2020, and Fisk Alloy's preparation of a 2020 five-year plan that she claimed was insufficiently optimistic about the company's future. Pa58. In his Final Award, issued February 21, 2023, the arbitrator found in Fisk Alloy's favor on Green's fraud claim, but found for Green on the good faith and fair dealing claim. Pa58.

For relief, the arbitrator ordered that the parties "act promptly to appoint an Appraiser or Appraisers" to "expeditiously" prepare the written appraisal required under Section 5.2 to value Green's SARs. Pa62. The arbitrator directed that the parties "not give the Five-Year Plan to the Appraiser … unless both Parties agree that it has been properly updated to reflect all information, known or knowable prior to January 31, 2021, that reflects" on the company's value as of the Trigger Date. Pa65. The arbitrator further directed (Pa66) that:

> Respondent shall pay Claimant whatever is owed to her, as per Section 5.2(c) and (e) of the Agreement, and as per the sequence of payments set forth in Section 5.2(c) and (e) of the Agreement, with the first such payment to be made promptly after the result is rendered in the Appraisal process, along with interest at the rate specified in Section 5.2(c)(ii) of the Agreement on that amount, which interest shall accrue from what would have been the date of payment under Section 5.2(c) and (e) of the Agreement had this Arbitration proceeding not been brought until the date of the first payment.

The arbitrator noted several times in the Final Award the limited scope of his authority under the Employment Agreement. He was "to make findings regarding whether" Fisk Alloy violated "any [of Green's] express or implied rights," but he was "not, as the Arbitrator, to determine the value of [Green's] SARs, or to conduct the contractually required Appraisal or to dictate to the Appraiser … how to conduct the Appraisal." Pa60. Similarly, while he directed that the parties advise the appraiser that Fisk Alloy's balance sheet as of the Trigger Date should have an additional $12.5 million in cash listed as an asset, "[h]ow the Appraiser … consider[s] in the valuation of the SARs that cash is to be considered an asset, is up to that person." Pa61, Pa61 n22. "In other words," the arbitrator continued, "I decline to take a view on how assets are, or any given asset is, to be valued." Pa61 n22. That was so because, as the arbitrator correctly found and the contract unambiguously requires, the arbitrator's "authority is to adjudicate and remedy the claims of breach of duty and fraud, and not to conduct the actual valuation of the SARs." Pa58.

On May 16, 2023, the trial court entered a consent order confirming the Final Award. Pa35. The court directed that "[t]he parties shall follow the procedures outlined in Section [5.2(a)[5]] of Green's Employment Agreement and the Arbitration Award for purposes of valuing Green's Stock Appreciation

[5] The trial court's order refers to "Section 5.3(a)." This appears to be a scrivener's error, as Section 5.3 does not contain an (a) subsection, and the appraisal process is set forth in Section 5.2(a).

Rights." Id. The court also noted that the "parties consent to this Court having jurisdiction to enforce the terms of the Arbitration Award." Id.

D. The Parties Obtain an Appraisal

The parties started the appraisal process in May 2023. Pa141, ¶ 23. After receiving information from and meeting with the parties, the appraiser provided a 71-page draft appraisal report on Thursday, August 31, 2023. Pa141, ¶¶ 27–28. Under the engagement letter with the Appraiser, the parties were entitled to submit comments to the draft appraisal so that errors in assumptions or calculations could be corrected before the appraisal became final. Pa70. However, due to the appraiser's travel plans, he required that the parties submit written feedback on the report within three business days. Pa141, ¶ 28. The appraiser issued the Appraisal on September 12, 2023 (the "Appraisal"), which largely ignored Fisk Alloy's feedback. Pa142.

E. The Trial Court Denies Fisk Alloy's Motion to Compel Arbitration and Refuses to Consider Challenges to the Appraisal

Seeking to foreclose Fisk Alloy from arbitrating its challenges to the Appraisal, Green quickly filed a purported "motion to confirm the final arbitration award and to obtain a final judgment." Pa37. In that motion, Green characterized the Appraisal (which she did not attach as an exhibit) as an arbitration award subject to confirmation. Id. In her proposed order, Green requested that the trial court "confirm" the Appraisal and enter judgment against Fisk Alloy for $14,360,553, plus interest, with this figure "consisting of" $9,842,000 as the appraised value of her SARs, "plus the appraised amount of

gross-up for taxes, $3,067,000; plus interest" of $1,451,553.[6] Pa73. Green further requested interest on the remaining quarterly payments at the rate of 4.13%. Pa41.

Fisk Alloy opposed Green's motion to "confirm" the Appraisal and cross-moved to compel arbitration of Fisk Alloy's challenges to the Appraisal as set forth in Fisk Alloy's demand for arbitration filed with JAMS. Pa 75; Pa136. Fisk Alloy also sought arbitration of Green's requested interest rate, which was not the subject of the prior arbitration, and claims arising from Green's knowing submission to the appraiser of information post-dating January 31, 2021, in an attempt to bias the appraiser. Pa136.

Fisk Alloy charged that the appraiser made legal errors, failed to consider relevant evidence, exceeded his authority under his engagement letter, the Employment Agreement, and the arbitrator's Final Award, and failed to follow generally accepted principles and practices of appraisers in the field. Pa142, ¶ 33. Specifically, the Appraisal considered and relied upon information improperly supplied by Green that was neither known nor knowable as of January 31, 2021, contrary to the confirmed Final Award and the Employment Agreement. Among other things, Green submitted and the appraiser considered:

- Fisk Alloy's audited financial statements for the year ending December 31, 2021, which did not exist until March 2022, more than 14 months after the arbitrator's deadline of January 31, 2021;

- Fisk Alloy's quarterly budgets prepared after January 31, 2021;

[6] Green's initially requested interest through October 20, 2023; the final judgment awarded interest through January 2, 2025.

- Written correspondence from May 2021 concerning a possible business combination in Germany;

- Initial projections, prepared in March 2021, for the possible German operation's development; and

- Reports from 2021 concerning a purported competitor of Fisk Alloy despite the appraiser having been informed that the correct competitor was a sister company.

Pa142, ¶ 35. The Appraisal also contained a number of computational errors and inconsistencies, including:

- Using the wrong tax rates and methodology in calculating the tax gross-up, as well as the income tax credits that would be due Green for expenses incurred in pursuing the arbitration and related work.

- Assigning a higher value per share of common stock before the gross-up for taxes than the value of a share of the common stock, despite the Employment Agreement requiring that they be the same.

- Failing to exercise independent judgment, as required by the final arbitration award, on how to treat the $12.5 million dividend to determine what effect, if any, the dividend had on the company's value.

- Determining that certain cash and marketable securities were excess, ignoring the working capital required for the appraiser's predicted significant percentage increase in revenue.

- Including add-backs for assets that Fisk Alloy previously determined it was uneconomic to subdivide and lease.

Pa142, ¶ 35. Finally, the appraiser exceeded his contractual authority by calculating the Gross-Up Amount for taxes. Pa144, ¶¶ 39–46.

In addition to these direct challenges to the Appraisal, Fisk Alloy sought arbitration of Green's claimed entitlement to a higher interest rate than the Employment Agreement allowed and the Final Award determined. Pa144,

¶¶ 39–46. The appropriate interest rate under the contract was neither arbitrated and made part of the Final Award nor considered in the Appraisal, and therefore could not be "confirmed" in a summary proceeding. Id.

The trial court heard argument and issued a partial ruling from the bench on March 19, 2024. The court was "firmly of the opinion that the arbitration that was envisioned by the agreement has already taken place," and that "the appraiser [*sic*] is the implementation of the arbitration award." 2T at 35:17–36:1. In the trial court's view, the Appraisal was "a final award, and it does not go back for another arbitration." 2T at 36:8–11. Fisk Alloy attempted to bring to the court's attention its challenge to the appraiser's calculation of the Gross-Up Amount for taxes, but the court refused to consider the argument, stating: "If it's in the appraisal it's done. … I'm not going to revisit things that the appraisal already decided." 2T at 42:25–43:2. The trial court thereafter entered an order denying Fisk Alloy's cross-motion to compel arbitration. Pa77.

F. The Trial Court Purports to "Confirm" the Appraisal

At the March 2024 hearing, the trial court reserved ruling on certain other issues, including, as relevant here, Fisk Alloy's challenge to Green's requested interest rate, which it then took up at a later hearing on December 3, 2024. 2T at 38:16–39:6, 41:20–42:23.

At the December 2024 hearing, Fisk Alloy argued, as it had in its briefing, that the dispute over what interest rate applies to the Appreciation Payments was subject to binding arbitration under the Employment Agreement and had not been addressed in the prior arbitration because Green did not put it at issue. 3T at 13:12–18, 14:3–16. The court rejected that out of hand. 3T at 13:22–24 ("Well

we're not going to arbitration again, so you can put that one aside. That's done.").

Fisk Alloy then explained that, under the Employment Agreement, interest is to be awarded at the applicable midterm federal interest rate as of the "Initial Payment." 3T at 24:14-26:9. "Initial Payment" is a defined term referring to a date no later than "75 days after the applicable Trigger Date." Pa46, §§ 5.2(c)(i), (ii). The Trigger Date was December 31, 2020, which means that the contractual interest rate was the midterm federal rate as of 75 days later, March 15, 2021. 3T at 18:13–20:19; 24:8–25:23. The midterm rate as of that date was 0.62%. Id.

The court recognized that "Initial Payment" was a defined term under the contract, but it did not apply that term's meaning. 3T at 34:9–21. Instead, the court purported to "look[] at the totality of the circumstances in this case and what Fisk has done" and concluded that "to rule that Fisk is entitled to pay interest at a rate sub one percent would be such a fundamental miscarriage of justice that it would bear—it would underscore what has already been found, and that is that Fisk has breached the covenant of good faith and fair dealing and that would be another example of that." 3T at 34:9–21. The trial court accordingly awarded Green her requested interest rate of 4.12%, which was the midterm federal rate as of September 2023. Pa79.

The court entered judgment in Green's favor for $15,083,148.91, which consisted of $9,842,000 as the appraised value of Green's Stock Appreciation Rights, a "gross-up for taxes" of $3,067,000, "plus interest accrued to January 2, 2025 of $2,174,148.91." Pa80. The court ordered Fisk Alloy to pay Green $8,512,815.91 by January 2, 2025, and that the balance of $6,560,733 be paid

quarterly in 28 equal installments of $234,311.89, plus quarterly interest of 4.12%. Id.

The trial court's judgment order mistakenly awarded Green interest on the Gross-Up Amount, resulting in Green receiving an extra $516,853.73 in interest. The parties agreed that this was a mistake, writing three letters to the court (two from Green, one from Fisk Alloy) asking that it correct the mistake. Pa83; Pa85; Pa88. The trial court has taken no action on the parties' requests.

Standards of Review

This Court reviews *de novo* a trial court order granting or denying a motion to compel arbitration "because the validity of an arbitration agreement presents a question of law." Ogunyemi v. Garden State Med. Ctr., 478 N.J. Super. 310, 315 (App. Div. 2024). The Court "owe[s] no deference to the interpretive analysis of … the trial court," and instead "construe[s] the arbitration provision with fresh eyes." Morgan v. Sanford Brown Inst., 225 N.J. 289, 303 (2016).

In its review of an order confirming an arbitration award, this Court likewise "owe[s] no special deference to the trial court's interpretation of the law and the legal consequences that flow from the established facts." Yarborough v. State Operated Sch. Dist. of City of Newark, 455 N.J. Super. 136, 139 (App. Div. 2018).

Argument

The impact of the trial court's decision, in total, is that the Appraisal has reached some kind of supra-judicial status, immune from challenge on any

ground, in any forum—whether arbitral or judicial—forever. That result violates the Employment Agreement and New Jersey law.

I. The Trial Court Exceeded its Authority by Deciding the Threshold Issue of Arbitrability (2T at 35:17–36:11, 42:25–43:2; 3T at 13:22–24)

The trial court's first error was to usurp the arbitrator's authority to determine questions of arbitrability, in plain violation of the Employment Agreement and controlling precedent. That error was foundational: Because the trial court lacked jurisdiction to decide threshold questions of arbitrability, it likewise lacked jurisdiction to "confirm" the Appraisal or award Green her requested relief. Vacatur and remand is therefore mandatory and the Court need go no further.

The Federal Arbitration Act "reflects the fundamental principle that arbitration is a matter of contract." Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 67 (2010). That principle is embodied in Section 2 of the FAA, under which any contractual provision providing that a "controversy … arising out of" the contract be "settle[d] by arbitration … shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. In that manner, the FAA "requires that arbitration agreements be placed 'on an equal footing with other contracts' and enforced according to their terms." Morgan, 225 N.J. at 303 (quoting Rent-A-Ctr., 561 U.S. at 67); 9 U.S.C. § 2. The New Jersey Arbitration Act is in accord, "using terms nearly identical to those of the FAA." Kernahan v. Home Warranty Adm'r of Florida, Inc., 236 N.J. 301, 318 (2019); N.J.S.A. 2A:23B-1, et seq.

As a consequence of arbitration's fundamentally contractual nature, parties can agree to arbitrate threshold or "'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." Rent-A-Ctr., 561 U.S. at 70. Such "delegation clause[s]," Morgan, 225 N.J. at 303, must be enforced so long as the contract "clearly and unmistakably" establishes the parties' intent to delegate to the arbitrator the authority to determine arbitrability, AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 649 (1986).

Once a court determines that the parties have entered a valid arbitration agreement, which is undisputed here, it then asks "whether there is 'clear and unmistakable' evidence" of intent to delegate arbitrability. Cottrell v. Holtzberg, 468 N.J. Super. 59, 71 (App. Div. 2021). If there is, then the court must refer the matter for arbitration. In such circumstances, the court "possesses no power to decide the arbitrability issue[,] … even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless." Henry Schein, Inc. v. Archer & White Sales, Inc., 586 U.S. 63, 68 (2019).

For at least four reasons, the Employment Agreement between Fisk Alloy and Green clearly and unmistakably delegates the authority to decide threshold questions of arbitrability to the arbitrator. The trial court therefore erred as a matter of law in making that determination itself, and its "confirmation" of the Appraisal and subsequent final judgment should be vacated and the case remanded with instructions to grant Fisk Alloy's motion to compel arbitration.

First, the Employment Agreement contains a broad arbitration clause, the validity of which is not in dispute. Section 12.1 provides that "any controversy, claim or dispute arising out of or in any way relating to this Agreement, Green's employment by the Company, or the ending of such employment, including, without limitation, any claim arising under this Agreement," shall be "settled by final and binding arbitration." Pa50, § 12.1. Whether a given issue is subject to arbitration under the Employment Agreement is itself a "controversy … or dispute arising out of or … relating to" the agreement. See Wells Fargo Advisors, LLC v. Sappington, 884 F.3d 392, 396 (2d Cir. 2018) (provision that "'*any* controversy or dispute' arising from the employment relationship is subject to arbitration … manifest[ed] clear and unmistakable agreement" (emphasis in original; quotation marks omitted)). It is not necessary for the Employment Agreement to state explicitly that questions of arbitrability are committed to the arbitrator, for "[n]o magical language is required to accomplish a waiver of rights in an arbitration agreement." Morgan, 225 N.J. at 309; Shaw Grp. Inc. v. Triplefine Int'l Corp., 322 F.3d 115, 121 (2d Cir. 2003).

Second, the Employment Agreement incorporates arbitral rules that expressly delegate to arbitrators the authority to decide arbitrability. Section 12.1 of the Employment Agreement provides that "[a]rbitration shall be conducted according to the Employment Arbitration Rules & Procedures of JAMS in effect at the time a claim is filed." Pa50, § 12.1. JAMS Rule 11(b), in turn, states:

> Jurisdictional and arbitrability disputes, including disputes over the formation, existence, validity, interpretation or

> scope of the agreement under which Arbitration is sought, … shall be submitted to and ruled on by the Arbitrator. Unless the relevant law requires otherwise, *the Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter*.

Pa118, Rule 11(b) (emphasis added).[7]

JAMS Rule 11(b)'s delegation of authority to the arbitrator "is about as 'clear and unmistakable' as language can get." Awuah v. Coverall N. Am., Inc., 554 F.3d 7, 11 (1st Cir. 2009) (considering materially identical American Arbitration Association (AAA) Rule 7(a)). Many courts have held that incorporation of such arbitral rules "provides 'clear and unmistakable' evidence that the parties agreed to arbitrate 'arbitrability.'" Blanton v. Domino's Pizza Franchising LLC, 962 F.3d 842, 846 (6th Cir. 2020). By the Sixth Circuit's count, in fact, eleven (perhaps even twelve) of the federal circuits have done so, including the Third Circuit. Id. (collecting cases).[8] Some of those cases concern

[7] The Employment Agreement incorporates the JAMS rules in effect "at the time a claim is filed." Pa50, § 12.1. The rules cited above took effect June 1, 2021, before Fisk filed its demand for arbitration on October 11, 2023, Pa136, but after Green filed her demand for arbitration on January 12, 2021, Pa26, ¶ 5. It is immaterial which version applies, however, because Rule 11(b) is identical in both the 2021 Rules and the prior version. Compare Pa114 with Pa118, Rule 11(b).

[8] See Awuah, 554 F.3d at 11–12; Contec Corp. v. Remote Sol., Co., 398 F.3d 205, 208 (2d Cir. 2005); Richardson v. Coverall N. Am., Inc., 811 F. App'x 100, 103 (3d Cir. 2020); Simply Wireless, Inc v. T-Mobile US, Inc., 877 F.3d 522, 528 (4th Cir. 2017), abrogated on other grounds by Henry Schein, Inc. v. Archer & White Sales, Inc., 586 U.S. 63 (2019); Petrofac, Inc. v. DynMcDermott Petroleum Operations Co., 687 F.3d 671, 675 (5th Cir. 2012); Fallo v. High-Tech Inst., 559 F.3d 874, 878 (8th Cir. 2009); Brennan v. Opus Bank, 796 F.3d 1125, 1130 (9th Cir. 2015); Terminix Int'l Co., LP v. Palmer Ranch Ltd. P'ship, 432 F.3d 1327, 1332 (11th Cir.

AAA's or other entities' rules, but several considered the JAMS rule at issue here (and, in any event, the AAA and JAMS rules are substantively identical). See Simply Wireless, 877 F.3d at 528 (considering JAMS rule); Belnap v. Iasis Healthcare, 844 F.3d 1272, 1281 (10th Cir. 2017) (same); Cooper v. WestEnd Capital Mgmt., L.L.C., 832 F.3d 534, 546 (5th Cir. 2016) (same). Those decisions rightly held incorporation of the JAMS rule to establish that the parties intended to delegate arbitrability.

Third, the Employment Agreement excludes from arbitration certain otherwise-arbitrable controversies or disputes, but does not exclude threshold questions of arbitrability. Specifically, Section 12.2 excludes from arbitration claims for workers' compensation or unemployment compensation benefits; claims to compel arbitration, enforce an award, or obtain equitable relief in support thereof; and claims based on a pension or benefit plan that contains its own arbitration provision. Pa50, § 12.2. "By expressly foreclosing certain proceedings from arbitration, the parties … strongly implied that every other 'controversy or dispute' remains subject to arbitral resolution"—including controversies or disputes over arbitrability. Sappington, 884 F.3d at 396.

Fourth, Green herself successfully argued before the trial court that the Employment Agreement requires arbitrability disputes to be decided by the arbitrator. She is therefore judicially estopped from arguing otherwise now. In her January 2021 motion to compel arbitration and stay this litigation, she told

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2005); Qualcomm Inc. v. Nokia Corp., 466 F.3d 1366, 1373 (Fed. Cir. 2006), abrogated on other grounds by Henry Schein, Inc., 586 U.S. 63; Chevron Corp. v. Ecuador, 795 F.3d 200, 207–08 (D.C. Cir. 2015).

the trial court that, "[i]n accordance with the Agreement and Rule 11[b] JAMS Employment Arbitration Rules and Procedures, questions of arbitrability must be decided by the arbitrator." Pa26, ¶ 7. Green noted specifically, as Fisk Alloy has above, that the parties' incorporation of "the JAMS Rules" in the agreement meant "the Court ha[d] *no jurisdiction* to rule on arbitrability." Pa29 (emphasis in original); Pa30 ("[T]he parties have agreed that arbitrability is an issue for the arbitrator."). Having prevailed on that argument when the trial court granted her motion to compel arbitration, see Pa33, Green is judicially estopped from taking a contrary position now, see Kimball Int'l, Inc. v. Northfield Metal Products, 334 N.J. Super. 596, 606 (App. Div. 2000) (judicial estoppel forbids party from "advocat[ing] a position contrary to a position it successfully asserted in the same or a prior proceeding").

Any one of these reasons suffices to clearly and unmistakably establish the parties' intent to delegate arbitrability; together, they are conclusive.

* * *

The Supreme Court has cautioned courts not to "confuse[] the question of who decides arbitrability with the separate question of who prevails on arbitrability." Henry Schein, Inc., 586 U.S. at 71; see also id. at 68 ("[A] court may not 'rule on the potential merits of the underlying' claim that is assigned by contract to an arbitrator, 'even if it appears to the court to be frivolous.'" (quoting AT&T Techs., Inc., 475 U.S. at 649–650)). To be sure, Fisk Alloy's challenges to the Appraisal are arbitrable, as are the disputes over the appropriate interest rate to be applied on Green's SARs payments and the calculation of the Gross-Up Amount for taxes, which are discussed infra. But,

for present purposes, all of that is beside the point. Because the trial court had no authority to determine arbitrability in the first instance, its purported confirmation of the Appraisal and entry of final judgment were *ultra vires*. This Court accordingly should vacate and remand with instructions to deny Green's motion to "confirm" the Appraisal and grant Fisk Alloy's motion to compel arbitration.

II. Fisk Alloy's Challenges Are a New Dispute Subject to Binding Arbitration

Because the trial court exceeded its authority by determining the threshold question of arbitrability, this Court should vacate the judgment and remand without considering the arbitrability of Fisk Alloy's substantive challenges. Henry Schein, Inc., 586 U.S. at 71. If the Court disagrees on that threshold question, however, it still should vacate and remand with instructions to grant Fisk Alloy's motion to compel arbitration because Fisk Alloy's challenges are arbitrable under the parties' broad arbitration agreement. The trial court's contrary conclusion was wrong in multiple respects and effectively placed the Appraisal beyond review in *any* forum, judicial or arbitral, under any standard of review, ever. Arbitration awards are only final to the extent that parties contractually agree them to be final. Here, the Employment Agreement establishes unambiguously that the parties not only did *not* agree for the Appraisal to be final, binding, and unreviewable, but rather that they contemplated and expressly provided for disputes over an appraisal.

A. Fisk Alloy's Challenges Constitute a "Controversy" or "Dispute" "Arising Under" or "Relating To" the Employment Agreement (2T at 35:17–36:11, 42:25–43:3; 3T at 13:22–24)

Arbitration is fundamentally contractual in nature, and here the parties agreed to arbitrate any and all disputes arising out of or relating to the Employment Agreement, which includes Fisk Alloy's challenges to the Appraisal itself and to Green's requested interest rate.

1. The FAA and New Jersey law require that arbitration agreements be enforced according to their terms. Morgan, 225 N.J. at 303 (quoting Rent-A-Ctr., 561 U.S. at 67). As the Supreme Court has explained, "a court may not 'rule on the potential merits of the underlying' claim that is assigned by contract to an arbitrator." Henry Schein, Inc., 586 U.S. at 68–69 (quoting AT&T Techs., Inc., 475 U.S. at 649–650 ("A court has no business weighing the merits of the grievance because the agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious." (quotation marks omitted)). An arbitration clause covering, as this one does, "any claim or controversy arising out of or relating to the agreement," is the "paradigm of a broad clause" that creates "a presumption that the claims are arbitrable." Collins & Aikman Products Co. v. Bldg. Sys., Inc., 58 F.3d 16, 20 (2d Cir. 1995) (quotation marks and brackets omitted); see also 1 Domke on Commercial Arbitration § 15:19.

2. Fisk Alloy's motion to compel arbitration identified a litany of arbitrable disputes, including challenges to the Appraisal, Green's requested interest rate, and claims arising from Green's attempt to bias the appraiser through her knowing submission of irrelevant material.

As for the Appraisal: Fisk Alloy alleged that the appraiser considered information not known or knowable as of January 31, 2021, in violation of applicable law and appraisal standards. See Pa136. That information included Fisk Alloy's audited financial statements for the year ending December 31, 2021, which did not exist on January 31, 2021; the company's quarterly budgets prepared after January 31, 2021; and correspondence and initial projections from March and May 2021 about a possible business combination in Germany. Pa142, ¶ 35.

Fisk Alloy raised other challenges, including that the appraiser:

- exceeded his authority under the Employment Agreement and his engagement letter by calculating the tax Gross-Up Amount, and that he made material errors worth millions of dollars in doing so;
- applied improper tax rates and methodologies, including failing to apply the tax credit that would be due Green for expenses she incurred in pursuing the arbitration and related work;
- used the wrong company as a purported comparator;
- assigned a higher per-share value than the per-share equity value of the common stock, as the Employment Agreement required; and
- failed to consider relevant evidence that would reasonably be relied upon by appraisers in the field.

Pa142, ¶ 35.

Fisk Alloy's demand for arbitration also raised disputes that were not challenges to the Appraisal itself, but to Green's efforts to obtain relief that was not granted or even addressed in the Final Award or the Appraisal:

- Green requested that the trial court award her a quarterly interest rate that exceeded the rate authorized under Section 5.2(c) of the agreement;

- Green proposed a Stock Pledge and Limited Guaranty Agreement that violated the Employment Agreement; and

- Green violated the Employment Agreement, the appraiser's engagement letter, and the implied covenant of good faith and fair dealing by knowingly submitting information to the appraiser that was neither known nor knowable on January 31, 2021, and therefore could not be considered under the relevant appraisal standard and applicable law, in an effort to bias the appraiser.

Pa144–Pa145, ¶¶ 39–50.

3. Fisk Alloy's challenges to the Appraisal, the interest rate, and to Green's conduct during the appraisal process fall within the Employment Agreement's broad arbitration provision.

The arbitration provision provides "that *any* controversy, claim or dispute arising out of or in *any* way relating to this Agreement, Green's employment by the Company, or the ending of such employment, including, without limitation, *any* claim arising under this Agreement, … *shall* be settled by final and binding arbitration." Pa50, § 12.1 (emphasis added). Such a broadly written provision creates a presumption of arbitrability. Collins & Aikman Products Co., 58 F.3d at 20; see also 1 Domke, supra, § 15:19. Fisk Alloy's challenges to the Appraisal, the interest rate, and the Gross-Up Amount plainly constitute a "controversy" or "dispute arising out of or in any way relating to" Section 5.2 of the Employment Agreement. Section 5.2(h) itself recognizes this possibility, providing that "[i]n the event there is a bona fide dispute as to the entitlement to a payment under this Section 5.2 or the amount thereof, the due date of such

payment shall be delayed for a reasonable time to resolve such dispute." Pa47, § 5.2(h).

Fisk Alloy accordingly had a contractual right to arbitrate these issues. Indeed, the trial court correctly predicted as early as March 2021 that objections to an eventual appraisal would need to be arbitrated. In granting Green's motion to compel arbitration, the court held that the arbitrator had "full jurisdiction to decide all issues." 1T at 20:17–22; 26:11–12. The court further opined that, "obviously, the arbitration, the appraiser, this decision is going to be questioned by one party or the other. There is no two ways about that. … [I]t will be up to the arbitrator to decide the viability of" such a challenge. 1T at 24:26–25:14. Despite Fisk Alloy having highlighted this prior ruling for the court, 1T at 8:18–19; 9:9–16, the court improperly usurped the arbitrator's role and seized jurisdiction over this entirely foreseen dispute. That was legal error.

B. The Trial Court's Contrary Conclusion Was Wrong (2T at 25:16–26:5, 35:5–36:11, 42:25–43:3; 3T at 74:10–13)

The trial court's various arguments in favor of "confirming" the Appraisal were incorrect.

1. The trial court's purported confirmation of the Appraisal was based on its view that the Appraisal was merely "the implementation of the arbitration award," and/or was itself "a final award" which would "not go back for another arbitration." 2T at 35:23–36:11. The trial court appeared to believe that its continuing jurisdiction to enforce the Final Award authorized it to reject Fisk Alloy's challenges to the Appraisal without arbitration, or indeed without any consideration at all. That was incorrect.

The arbitrator's Final Award directed the parties to "act promptly to appoint an Appraiser or Appraisers" to prepare the written appraisal required under Section 5.2 to value Green's SARs. Pa62. In other words, the award required the parties to engage in a *process*; it did not hold (or even suggest) that the *outcome* of that process was inviolate, final, and could not be challenged.

Indeed, the arbitrator several times expressly reserved ruling on any issues relating to how the Appraisal was to be conducted. The dispute before the arbitrator required him "to make findings regarding whether" Fisk Alloy violated "any [of Green's] express or implied rights," but "not, as the Arbitrator, to determine the value of [Green's] SARs, or to conduct the contractually required Appraisal or to dictate to the Appraiser … how to conduct the Appraisal." Pa60. That was so because the arbitrator's "authority [was] to adjudicate and remedy the claims of breach of duty and fraud, and not to conduct the actual valuation of the SARs." Pa58. The trial court's May 16, 2023 confirmation of the award accordingly directed that "[t]he parties shall follow the procedures outlined in Section [5.2(a)] of Green's Employment Agreement and the Arbitration Award for purposes of valuing Green's Stock Appreciation Rights." Pa35 (emphasis added).

The trial court's continuing "jurisdiction to enforce the terms of the Arbitration Award," id., necessarily was limited to matters resolved *in* the award. "Upon confirming an arbitration award, the trial court must enter a judgment that may be enforced as any other judgment in a civil action." 2 Domke, supra, § 42:1; N.J.S.A. 2A:23B-22, -25(a). Since the arbitrator ordered the parties to promptly engage in the appraisal process, there is no doubt

that the trial court had authority to, for example, hold a party in contempt for refusing to participate in the appraisal process in good faith. But "confirmation" of the Appraisal over Fisk Alloy's arbitrable challenges to the Appraisal is not a "term" of the arbitration award subject to the trial court's enforcement authority. Fisk Alloy's challenges are instead a new dispute, and "if a party's request for enforcement involves a new dispute that falls outside the scope of the award, enforcement must be denied." 2 Domke, supra, § 42:1; Giron v. Dodds, 35 A.3d 433, 438 (D.C. 2012).

2. The trial court's error is underlined by the well-recognized distinction between arbitration awards, which generally may be challenged on only a narrow range of grounds, and appraisals, which are subject to more searching judicial review. Limited review of arbitration awards is permissible in part because an arbitration is a quasi-judicial proceeding in which evidence is taken, witnesses are subpoenaed, oaths are sworn, and other hallmarks of due process are observed. See, e.g., N.J.S.A. 2A:23B-17. But an "[a]ppraisal is a proceeding without a presiding officer with authority to control proceedings and punish misconduct, without formal taking of evidence, without oaths, procedural safeguards, discipline or other court-like restraints." Ward v. Merrimack Mut. Fire Ins. Co., 332 N.J. Super. 515, 529 (App. Div. 2000) (quoting Binkewitz v. Allstate Ins. Co., 222 N.J. Super. 501, 511 (App. Div. 1988). That is why an appraisal may be challenged on the grounds that the appraiser made a "mistake of law" or failed to consider "all evidence an expert would consider relevant to an evaluation," Elberon Bathing Co. v. Ambassador Ins. Co., 77 N.J. 1, 13, 15 (1978), or for having "misapprehended the facts or issues presented," Leach v.

Princeton Surgiplex, LLC, A-6120-112T, 2013 WL 2436045, at *5 (App. Div. June 6, 2013).

This Court has specifically rejected attempts to constrain judicial review of appraisals to the standards for setting aside arbitration awards. No one could seriously argue, this Court explained, that an appraiser could "determine fair market value by spinning a wheel or flipping a coin," or "consider[ing] less than all relevant evidence," or that a party could not "question a mathematical error in the appraiser's calculations." Id. at *2. Yet the trial court here applied essentially that level of deference, concluding that "[i]f it's in the appraisal it's done," and thus refusing to "revisit things that the appraisal already decided." 2T at 42:25–43:2. That was legal error.

This Court's decision in Cap City Products Co. v. Louriero, 332 N.J. Super. 499 (App. Div. 2000), is not to the contrary. The Court there enforced a valuation as a final arbitration award, but it did so because the parties' contract required it. Specifically, the employment agreement at issue provided that the parties initially each obtain their own appraisals, and "[i]f the [initial] valuations are far apart, then we will mutually select a third party to value the stock and *to arbitrate a binding settlement*." Id. at 508–09 (emphasis added). In other words, the employment agreement in Cap City combined the roles of arbitrator and appraiser. The Employment Agreement in this case, however, does *not* conflate the roles of arbitrator and appraiser, nor does it state that the Appraisal would be final and binding. To the contrary, Section 5.2(h) anticipates that disputes may arise about the Appraisal and provides for a delay in payment until such

disputes are resolved. Pa47, § 5.2(h). That indicates that the parties here did not intend the Appraisal to be final, as the Cap City parties did.

3. Green contended below that Fisk Alloy should be judicially estopped from arguing that disputes over the Appraisal are subject to arbitration, and the trial court appeared to base its holding, at least in part, on this argument. See 2T at 25:16–26:5, 35:5–36:11. That contention is wrong.

The doctrine of judicial estoppel bars "a party [who] *successfully asserts* a position in a prior legal proceeding, … [from] assert[ing] a contrary position in subsequent litigation arising out of the same events." Adams v. Yang, 475 N.J. Super. 1, 8 (App. Div. 2023) (emphasis added). Judicial estoppel is intended "to protect the integrity of the court system," id., "rather than the litigants," Montrose Med. Grp. Participating Sav. Plan v. Bulger, 243 F.3d 773, 781 (3d Cir. 2001). That is why "'[t]o be estopped [a party must] have convinced the court to accept its position in the earlier litigation. A party is not bound to a position it unsuccessfully maintained.'" Adams, 475 N.J. Super. at 8–9 (quoting Kimball Int'l, Inc. v. Northfield Metal Prods., 334 N.J. Super. 596, 606–07 (App. Div. 2000)); New Hampshire v. Maine, 532 U.S. 742, 750–51 (2001) ("Absent success in a prior proceeding, a party's later inconsistent position introduces no risk of inconsistent court determinations, and thus poses little threat to judicial integrity." (citation and quotation marks omitted)). "[B]ecause of its draconian consequences," Adams, 475 N.J. Super. at 9, New Jersey courts recognize "judicial estoppel [a]s an extraordinary remedy, which should be invoked only when a party's inconsistent behavior will otherwise result in a miscarriage of justice," Kimball Int'l, Inc., 334 N.J. Super. at 608.

Green contended that Fisk Alloy should be judicially estopped from arguing that its challenges to the Appraisal are subject to arbitration. In January 2021, Fisk Alloy filed this lawsuit and sought preliminary injunctive relief compelling Green to participate in the contractual appraisal process and be bound by its outcome. Pa12, ¶¶ 43–51. Green responded by moving to compel arbitration and stay this litigation. Pa23. The trial court denied Fisk Alloy's motion and granted Green's, Pa33, and the parties proceeded first to arbitration and then through the appraisal process. When Fisk Alloy later, in September and October 2023, sought to arbitrate its challenges to the Appraisal, Green argued estoppel.

Green's estoppel contention fails at the threshold because Fisk Alloy lost its bid for a preliminary injunction and its opposition to arbitration. Judicial estoppel requires that a party have *prevailed* upon—that is, persuaded a court to have adopted—a position inconsistent with one that it now takes. Adams, 475 N.J. Super. at 8–9; Kimball Int'l, Inc., 334 N.J. Super. at 606. That is so because the doctrine's purpose is not to protect litigants but the courts. Montrose Med. Grp., 243 F.3d at 781; see also Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharms. Co., 290 F.3d 578, 585 n.4 (3d Cir. 2002) ("It would be inequitable … to find [an] appeal moot based on that estimation of irreparable harm that had previously been rejected."); Whiting v. Krassner, 391 F.3d 540, 543–44 (3d Cir. 2004) (rejecting argument that a party "having argued for a stay based on the likelihood that his claim could be held to be moot is the type of 'position' that should work an estoppel"). Because Fisk Alloy

failed to persuade the trial court to adopt its argument, judicial estoppel simply does not apply.

III. Even if the Court Does Not Send This Matter to Arbitration, Vacatur and Remand Are Still Necessary

If the Court concludes that the arbitration clause in the Employment Agreement neither delegates arbitrability determinations to the arbitrator nor covers Fisk Alloy's substantive challenges, vacatur and remand are nevertheless still necessary. First, the trial court erred in its award to Green of interest. The parties disputed the applicable interest rate under the Employment Agreement, and that dispute was neither resolved in the course of the arbitration nor considered in the Appraisal. The court's award therefore cannot be justified even under the auspices of merely "confirming" the Appraisal. Making matters worse, the court awarded Green her requested rate of 4.12% not because it believed that this was the correct rate under terms of the Employment Agreement, but to punish Fisk Alloy. 3T at 34:9–21. That was error because a court cannot rewrite the terms of a contract to achieve a result it considers more equitable. Second, the appraiser's calculation of the tax Gross-Up Amount exceeded his contractual authority under the Employment Agreement and the appraiser's engagement letter. This is a valid challenge even under the constrained review applicable to arbitration awards, yet the trial court refused to consider it at all. 2T at 42:25–43:2. This, too, was error. Third, the trial court's flat refusal to consider any of Fisk Alloy's challenges to the Appraisal was wrong under any standard of review. 2T at 42:25–43:2. Finally, the trial court awarded Green interest on the tax Gross-Up Amount, Pa79, a calculation error worth more than $500,000 that

the parties actually *agreed* needed to be corrected. Pa83; Pa85; Pa88. If nothing else, then, remand is necessary to correct that undisputed error.

A. The Trial Court Gravely Overstepped its Authority by "Confirming" Green's Request for an Interest Rate That Was Neither Arbitrated Nor Considered in the Appraisal (3T at 13:22–24, 34:9–21)

Even if one accepts the incorrect premise that the September 12, 2023 Appraisal was itself a final arbitration award that could be confirmed in a summary proceeding without adjudication of Fisk Alloy's objections, no one could reasonably dispute that such "confirmation" would have to be limited to matters considered *in* the Appraisal. Yet the trial court permitted Green to smuggle into the judgment an award of interest at a rate that was neither part of the arbitrator's Final Award nor considered as part of the Appraisal. The trial court's summary "confirmation" of Green's requested interest rate was a grave overstepping of authority.

As discussed above, the Employment Agreement applies to Green's SARs interest at "the applicable midterm federal rate as of the date of the Initial Payment," and defines "Initial Payment" to be made by a date no later than "75 days after the applicable Trigger Date." Pa46 §§ 5.2(c)(i), (ii). The midterm federal interest rate 75 days after the Trigger Date of December 31, 2020, was 0.62%. See Pa109. In her proposed Judgment Order accompanying her motion to "confirm" the Appraisal, however, Green awarded herself a quarterly interest rate of 4.13%. Pa73.

Neither the arbitrator's Final Award nor the Appraisal established her entitlement to that rate. The Final Award directs that, once the amount of

Green's SARs payments is determined, she be paid "interest at the rate specified in Section 5.2(c)(ii) of the Agreement on that amount, which interest shall accrue from what would have been the date of payment under Section 5.2(c) and (e) of the Agreement had this Arbitration proceeding not been brought until the date of the first payment." Pa66. While the arbitrator set forth the contractual basis for determining the interest rate, he did not determine what "the rate specified" actually was, because Green never put that rate in issue.

The trial court exceeded its authority by resolving this dispute. The appropriate interest rate to be awarded under Section 5.2(c) of the Employment Agreement is unquestionably a controversy or dispute arising out of or relating to the agreement. Pa50, § 12.1. Both that dispute and any antecedent one about arbitrability were thus exclusively committed to arbitration. Henry Schein, Inc., 586 U.S. at 68. Fisk Alloy alerted the court multiple times that its ruling on the interest-rate issue would be *ultra vires* and that Fisk Alloy had the right to arbitrate that dispute. 3T at 11:14–12:4, 13:12–15:3. Nevertheless, the court insisted that "we're not going to arbitration again, so you can put that one aside. That's done." 3T at 13:22–24. That was error, as discussed above. See pp. 24–33, infra.

In any event, the trial court was also wrong on the merits. As noted, interest is to be awarded at the applicable midterm federal interest rate as of the "Initial Payment." "Initial Payment" is a defined term in the Employment Agreement, and refers to a date no later than "75 days after the applicable Trigger Date." Pa46, §§ 5.2(c)(i), (ii). Everyone agrees that the Trigger Date was December 31, 2020, and thus under the plain language of Section 5.2, the

appropriate interest rate is the applicable midterm federal rate 75 days thereafter, March 15, 2021, which was 0.62%. The reason that Green had not received a payment on that date was her decision to file the arbitration, which triggered Fisk Alloy's right under Section 5.2(h) to delay payment until after all disputes were resolved. But that does not change the fact that "Initial Payment" was a defined term with a clear meaning.

The trial court, however, was concerned with whether it was "fair that the interest rate [be] sub one percent." 3T at 10:22–23. Although it recognized that Initial Payment was a defined term under the contract, the trial court purportedly "look[ed] at the totality of the circumstances in this case and what Fisk has done" and concluded that "to rule that Fisk is entitled to pay interest at a rate sub one percent would be such a fundamental miscarriage of justice that it would bear—it would underscore what has already been found, and that is that Fisk has breached the covenant of good faith and fair dealing and that would be another example of that." 3T at 34:9–21. The trial court accordingly awarded Green her requested interest rate of 4.12%, which was the midterm federal rate as of September 2023, as a punitive measure, rather than because the contract required it. Pa79.

Respectfully, the trial court gravely erred here. Fisk Alloy has a contractual right to arbitration of this dispute under Section 12.1 of the Employment Agreement, and so the court never should have reached it in the first place. But more alarming is the trial court's disregard for the plain language of the parties' contract for the apparent purpose of imposing on Fisk Alloy a punitive interest rate justified by the court's view of the merits of Green's

underlying claim and the court's overall sense of fairness. Such considerations do not provide a sound basis to disregard the parties' contract. See Dunkin' Donuts of Am., Inc. v. Middletown Donut Corp., 100 N.J. 166, 183–84 (1985) ("Equitable relief cannot be claimed because a contract is oppressive, improvident, or unprofitable, or because it produces hardship.").

B. The Arbitrator's Calculation of the Gross-Up Amount Exceeded His Contractual Authority (2T at 42–43; 3T at 66; 3T at 71–74)

Fisk Alloy also challenged the Appraisal on the grounds that the appraiser exceeded his contractual authority by calculating the tax Gross-Up Amount, in the course of which he made material errors worth millions of dollars.

The New Jersey Arbitration Act permits a court to vacate an arbitration award if, among other grounds, "an arbitrator exceeded the arbitrator's powers." N.J.S.A. 2A:23B-23(a)(4). "[A]n arbitrator exceeds his or her 'authority by disregarding the terms of the parties' agreement.'" Borough of E. Rutherford v. E. Rutherford PBA Local 275, 213 N.J. 190, 203 (2013) (quoting State, Office of Employee Relations v. Commc'ns Workers of Am., AFL-CIO, 154 N.J. 98, 112 (1998)).

The appraiser's contractual authority here was limited. In his engagement letter, the appraiser acknowledged his "understand[ing] that our conclusions may serve as a valuation basis in connection with the process set forth in Section 5.2(a)(ii) of the Employment Agreement." Pa70 (emphasis added). Under Section 5.2(a)(ii), in turn, the appraiser's only role was to prepare a *written appraisal* that determines the company's "fair market value," which is defined to mean "the price in a single transaction determined on a going-concern basis

that would be agreed upon by the most likely hypothetical buyer for a 100% interest in the equity capital of the Company." Pa44. The appraiser's determination of fair market value becomes the "Appraised Value," which is used to determine the "Current Market Price of the Common Stock." Id. The excess of the Current Market Price of the Common Stock over the "Strike Price" is referred to as the "Spread," and the Spread multiplied by the number of SARs granted to Green determines the "Appreciation Payment" payable to her. Pa44.

The Employment Agreement also provides, separately, for payment to Green of a "Gross-Up Amount." Under Section 5.2(b), the "Gross-Up Amount" ensures that, "after payment of all federal and state income and employment taxes," Green receives for her SARs payments "an after-tax amount equal to the amount she would have received" if her payments were taxed not as income but "at the rates applicable to long-term capital gains." Pa45.

The Appreciation Payment and the Gross-Up Amount are distinct. The Appreciation Payment depends on the value of the company, and more specifically, on the Spread between the Current Market Price and the Strike Price. The appraiser's role, therefore, was to value the company so that Green's Appreciation Payments could be calculated. The Gross-Up Amount, however, does not depend directly on the value of the company, but rather on Green's hypothetical tax liability. Its calculation thus falls outside the appraiser's bailiwick.

Fisk Alloy twice tried to raise this challenge before the trial court, and the court twice refused to consider it. At the March 19, 2024 hearing, the court held that the Gross-Up Amount was settled *because* it was in the Appraisal, and "[i]f

it's in the appraisal it's done. … I'm not going to revisit things that the appraisal already decided." 2T at 42:25–43:2. Then, at the December 3, 2024 hearing, Fisk Alloy attempted to explain that the Gross-Up Amount "should not have been in the appraisal." 3T at 66:23–25; *see also* 3T at 71:17–72:21. But, again, the court treated the Appraisal as *per se* inviolate. 3T at 74:10–13 ("I am not going to reexamine what the appraiser did. What he did, he did, and if there are mistakes, you have your recourse, okay?").

Even if the Appraisal could properly be treated as an arbitration award and confirmed in a summary proceeding, Fisk Alloy still had the right to challenge any aspects thereof that exceeded the appraiser's contractual authority. N.J.S.A. 2A:23B-23(a)(4); E. Rutherford PBA Local 275, 213 N.J. at 203. The trial court's rejection of Fisk Alloy's challenge to the Gross-Up Amount *because* the appraiser considered it was circular and erroneous.

C. The Trial Court's Refusal to Consider Any of Fisk Alloy's Other Challenges Was Error (2T at 42:25–43:2; 3T at 74:10–13)

Once the trial court decided that the Appraisal could be confirmed as an arbitration award, it refused to consider any issues "that the appraisal already decided." 2T at 42:25–43:2. As discussed at length above, however, the Appraisal contains numerous legal, factual, and computational errors, which are cognizable challenges under New Jersey law. Elberon Bathing Co., 77 N.J. at 13, 15; Leach, 2013 WL 2436045, at *5. Those issues should be arbitrated, as should the antecedent question of arbitrability. If this Court disagrees on those points, though, it still should vacate and remand with instructions that the trial court consider Fisk Alloy's challenges on the merits.

D. At the Very Least, Vacatur and Remand is Necessary to Correct the Trial Court's Undisputed Error in Awarding Green Interest on the Gross-Up Amount (Pa83, Pa85, Pa88) (Not Ruled on Below)

Finally, vacatur and remand is necessary to correct the trial court's error in awarding Green interest on the Gross-Up Amount—a correction that both parties sought before the trial court, and to which Fisk Alloy does not expect Green to object now.

The trial court entered judgment for Green in the amount of $15,083,148.91, plus interest on future payments. That judgment consisted of $9,842,000 as the Appreciation Payment on Green's SARs; a Gross-Up Amount of $3,067,000; and interest accrued through January 2, 2025, of $2,174,148.91. Pa80. The interest calculation treated the Gross-Up Amount as principal that accrued interest in the amount of $516,853.73.

That defies both the Employment Agreement and common sense. As to the agreement, Section 5.2(c)(ii) states that the "remaining unpaid *Appreciation Payment* … with interest" shall be paid in quarterly installments; it does not award interest on the Gross-Up Amount. Pa46, § 5.2(c)(ii) (emphasis added). As to common sense, the only purpose of the Gross-Up Amount is to allow Green to receive an amount, after income and employment taxes, that is equal to what she would have received had her SARs been actual stock taxed at the long-term capital-gains rate. Pa45, § 5.2(b). There is no reason to award Green interest on money whose only purpose is to go straight to the government.

Remarkably, the parties actually agreed about this, and brought it to the trial court's attention three times, to no avail. Green provided the court a corrected Order nunc pro tunc on December 18, 2024, which reduced the total

award to $14,566,295.18, including interest of $1,657,295.18. Pa83. Fisk Alloy agreed, subject to its appeal rights, to entry of the corrected order (reserving its right to challenge the judgment in all other respects) on December 20, 2024. Pa85. And Green again wrote to the Court on January 30, 2025. Pa88. The trial court, however, has not done so. If nothing else, then, this Court should vacate and remand for the trial court to correct this undisputed error.

Conclusion

For the reasons discussed above, this Court should vacate the trial court's final judgment and remand with instructions to grant Fisk Alloy's motion to compel arbitration and deny Green's motion to confirm the Appraisal.

Respectfully submitted,

Dated: March 17, 2025

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FISK HOLDINGS, INC., f/k/a FISK ALLOY, INC.,	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-001416-24T01
Plaintiff-Appellant,	Civil Action
v.	On Appeal from the Final Judgment of the Superior Court of New Jersey,
JANET M. GREEN,	Law Division, Passaic County Trial Court Docket No. PAS-L-000242-21
Defendant-Appellee.	Sat Below: Hon. Thomas J. LaConte

Submission Date: April 16, 2025

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PRELIMINARY STATEMENT

Appellant Fisk Alloy was found guilty of acting in bad faith in its attempts to cheat its former CFO, Respondent Janet Green, out of millions of dollars she was owed based on her employment contract. Appellant Fisk tried to get a fake appraisal of Respondent Green's stock before the arbitration of Ms. Green's claims, but failed in both the Court and before well-respected JAMS arbitrator, Michael Young. The arbitration took two years. Depositions were taken. Fisk dumped five million documents on Ms. Green in discovery. A hearing was held over 7 days. Arbitrator Young issued a ruling that Fisk had acted in bad faith in trying to cheat Ms. Green and ordered a prompt appraisal taking into account his findings of bad faith and ordering that specific financial transactions be considered (among other wrongdoing, the owner of Appellant Fisk withdrew $12.5 million dollars from the firm the day before the trigger date to evaluate Ms. Green's stock) and that certain financial documents manufactured to devalue Ms. Green's stock not be considered. Fisk sought to modify the Award to limit the information which could be provided to the Appraiser (the subject of the appeal) and lost. The Arbitrator ordered that Ms. Green be paid the money due promptly after the appraisal. The Award was confirmed by the court in a Consent Order which states: "The parties consent to this Court having jurisdiction to enforce the

terms of the Arbitration Award." Pa35-36. The only thing to enforce was the implementation of payment to Ms. Green after the appraisal ordered by the Arbitrator. The appraisal was final in accordance with the Award.

The parties agreed on an appraiser, the internationally-known Houlihan Lokey (HL). The parties negotiated and executed an agreement with Houlihan Lokey which states that the appraisal by the firm "shall be considered the Appraisal for the purpose of Section 5.2 of the Employment Agreement." Ms. Green's Employment Contract also requires that the valuation shall mean "Appraised Value" for purposes of paying Ms. Green. In accordance with the confirmed Arbitration Award, the Employment Contract, and the HL Contract, HL issued an appraisal finding Ms. Green was due $12.9 million.

Respondent moved to enforce and confirm the final aspect of the award in accordance with the Consent Order. Appellant, continuing a four-year pattern of refusing to pay Ms. Green what she deserved, filed a cross-motion claiming that its challenges to the appraisal should be subject to yet another arbitration, contrary to its strenuously argued position throughout the case that only a "licensed appraiser" can perform the valuation. On March 19, 2024, the Court ruled that the appraisal was simply the implementation of the Arbitration Award, noting that the parties consented to the jurisdiction of the Court. Fisk claims it is

entitled to yet another arbitration regarding the information which the Appraiser received. Fisk fails to tell this Court that it already arbitrated that issue, and lost.

Appellant also argues that Fisk should benefit from its bad faith, claiming that the interest rate at the time Fisk was supposed to pay Ms. Green four years ago (.62%), should be the interest rate applied to her long-overdue payments. The court below ruled that the proper interest rate under the Arbitration Award and the Employment Contract was the rate at the time of the actual first payment (4.12%). Continuing its relentless attempt to cheat Ms. Green, Fisk appealed, despite the law prohibiting appeals from arbitration awards and that appraisals are subject to that rule.

Appellant claims that this case is about the "arbitrability" of an arbitration that has already taken place and been confirmed. This appeal is prohibited by N.J.S.A. 2A:23A-18:

> Upon the granting of an order confirming ... an award, a judgment or decree shall be entered ... and be enforced as any other judgment or decree. **There shall be no further appeal or review of the judgment or decree.**

STANDARD OF REVIEW

This appeal should be dismissed. The arbitration has occurred. The Award was confirmed. N.J.S.A. 2A:23A-18 prohibits this appeal.[1]

PROCEDURAL HISTORY CORRECTION

Fisk does not give an accurate procedural history. It claims "Fisk Alloy initiated this action by Verified Complaint and Order to Show Cause on January 19, 2021 . . ." Pb3. In fact, on January 13, 2021, Ms. Green initiated an arbitration, in accordance with the dispute resolution procedure in her Employment Contract. Da1-4. Fisk sought to prevent arbitration of Ms. Green's claims that Fisk engaged in fraud and bad faith in trying to cheat her out of the full value of her stock before an appraisal. Pa1-17. The court compelled arbitration in accordance with the Contract. Pa33-34. The Arbitrator ruled in Ms. Green's favor. Da51-53. Fisk sought to modify the Award and lost. Da62-67.

STATEMENT OF FACTS

Respondent, Janet Green (" Ms. Green") was the CFO for Appellant Fisk Alloy ("Fisk"). Pa43. The parties entered into an Employment Agreement dated April 2, 2010 that promised Green stock worth 10% of the company on her tenth

[1] Appellee notified Appellant that an appeal would be frivolous. Da99.

anniversary. Pa44, §5.2. The trigger date for stock valuation was December 31, 2020. Pa45, § 5.2(a)(ii). During 2020, it became clear that Eric Fisk, the owner of the company, was scheming and conspiring with his lawyer and members of upper management to create a false financial picture of the company and to deplete the company of cash in order to cheat Ms. Green out of the true value of her stock. Pa26, ¶ 5.

Ms. Green filed a Demand for Arbitration on January 13, 2021, claiming that Fisk had acted in bad faith in attempting to cheat her out of the true value of her stock. Id. and Da1-4. Ms. Green agreed to Fisk's proposed arbitrator, the well-known and well-respected JAMS arbitrator Michael Young.

On January 19, 2021, Appellant Fisk filed an Order to Show Cause demanding that the appraisal of Respondent Green's stock take place *before* the arbitration of Green's claims of fraud and bad faith. Pa1-14. Fisk argued vociferously that the Appraisal was a condition precedent to the Arbitration. During the March 4, 2021 oral argument on Fisk's OTSC, Fisk's lawyer drove home the point that the Appraiser's final valuation was beyond the reach of any arbitrator:

> THE COURT: Even if the arbitrator looks at the appraisal, he or she can reject it because of the (indiscernible) policy, correct?

> MR. ROSENER: No, Your Honor. **The arbitrator can award damages for the actions that violate the agreement. And that's all. He can't change the appraisal**. He can't change --
>
> THE COURT: He's telling me that if the appraiser gets a figure that the arbitrator feels is excessively high or is too far, too low, right? They can't say that the methodology was incorrect or is a violation of the duty to act in good faith or anything like that?
>
> MR. ROSENER: **The arbitrator has no role in the appraisal.** He can award damages for breach of the agreement and breach of the duty of good faith to the extent it affects the appraisal. And in each of those
> --
> THE COURT: So, in essence, they can reject the appraisal? Now, you may call it supplemented, but if they are not accepting the number on the bottom line, are they not rejecting it?
>
> MR. ROSENER: **They don't have the right to substitute their judgment for the appraisal that's arrived at by the appraiser.** That's the – the arbitrator can look at damages that are caused by any actions. Whether this 12 and a half million dollar distribution was or wasn't permissible and whether it affected value is something that it can evaluate. **But the effect on the appraisal, the appraisal was final,** the damages caused by the acts of the company are subject to award if she can prove it.

1T 15:9-16:8.

Thus, Fisk took the exact opposite position it takes in this appeal; it now claims that an arbitrator can substitute their judgment for the appraiser's. The

Court rejected Fisk's argument that the appraisal had to occur first and compelled arbitration. Pa33-34.

After two years of litigation, four depositions, and Fisk dumping over five million documents on Ms. Green, a hearing was conducted over seven days. Da56, ¶ 6. On February 21, 2023, Arbitrator Young issued a "Final Award"[2] finding that Fisk had acted in bad faith and with ill will in attempting to cheat Ms. Green out of the true value of her stock by manipulating its financial projections and removing $12.5 million dollars in cash from the Company on the trigger date, holding:

> The following facts support my findings that Respondent violated the duty of good faith and fair dealing in allowing Mr. Fisk to withdraw – and in facilitating the withdrawal of – $12.5 million as a cash dividend just before the December 31 Trigger Date:
>
> 1. Claimant was led to believe throughout November and December 2020 that Mr. Fisk sought to withdraw cash in limited amounts and for discrete purposes as he had done at earlier points in time;
>
> 2. Simultaneously, Mr. Fisk was taking steps – including shutting down the company's line of credit – to effectuate the withdrawal of a sum much larger than any amount that had ever been previously taken out of the company;

---

[2] Fisk did not include the complete Final Award in its Appendix. Ms. Green has included it in her Appendix. Da12-54.

3. Even though Claimant was still Chief Financial Officer ("CFO") of the company, and would ordinarily be involved in any such cash withdrawal, Mr. Fisk took steps to hide his actions from her (and from anyone who might tell her); and

4. Mr. Fisk admitted during his deposition that he intentionally took these steps, and hid them from Claimant, so that the withdrawn cash could not be considered part of the asset base that would be valued as part of the valuation of Claimant's SARs.

Accordingly, I conclude that there is no question that Respondent, acting through Mr. Fisk, intended to deprive Claimant of the opportunity to have a significant asset – cash in the amount of $12.5 million – included as part of the valuation of the SARs. (Footnote omitted).

Da37-38.

I find that Respondent – with ill intent – refused to update the 2020 Five-Year Plan to reflect any of these developments. Respondent did not revise the Five-Year Plan to reflect significant increases in sales activity for the company in December 2020 or to reflect the increase in anticipated revenue for 2021 – even though it was willing, in early January 2021, to incorporate the anticipated increases in revenue into the 2021 budget. That it was willing soon after the beginning of 2021 to revise its 2021 budget but not the Five-Year Plan reflects ill intent and bad motive. Similarly, while Respondent updated its 2019 Five-Year Plan to reflect the grounding of the Boeing 737 Max, it did not update the 2020 plan to reflect its re-certification – which occurred even before the Trigger Date.

> Accordingly, I find that Respondent violated the duty of good faith and fair dealing by excluding Claimant from a meaningful role in the preparation of the Five-Year Plan. I also find that Respondent violated the duty of good faith by refusing to correct various assumptions in the Five-Year Plan when circumstances in December 2020, and at the very beginning of 2021, demonstrated that a more optimistic outlook was warranted. I find that Respondent acted intentionally in the preceding ways with the intent that the result would be a plan that undervalued the company, and therefore would skew the valuation of Claimant's SARs to her disadvantage. (Footnote omitted).

Da43-44.

In the Section entitled "Remedies," Arbitrator Young addressed the role of the Appraiser, adopting Fisk's position:

> Respondent [Fisk] argues that, even if I were to find against Respondent on the fraud or breach analysis, I cannot order the remedies sought by Claimant [Ms. Green], particularly as relates to point (g) above – the remedies outlined in Section VI and VII of the report of Claimant's financial expert – because **"the Arbitrator lacks jurisdiction under the Employment Agreement to tell the neutral appraiser what valuation methodology to employ or what information the neutral appraiser must consider in preparing an appraisal"**
>
> . . .
>
> I have made clear in prior rulings that, **under the relevant provisions of the [Employment] Agreement, there are limitations on the scope of my authority** as the Arbitrator.

> . . .
> **I am not, as the Arbitrator, to determine the value of Claimant's SARs, or to conduct the contractually required Appraisal or to dictate to the Appraiser or Appraisers how to conduct the Appraisal.**"

Da46-47.

This comported with a pre-hearing ruling in which the Arbitrator also accepted Fisk's position that an arbitrator could not interfere in an appraisal:

> There is no question that I have dismissed Claims 4 and 5 of Claimant's operative pleading. I now affirm that Claimant will not be allowed to offer evidence – including expert opinion – regarding how the appraisers should be selected or regarding what would be the proper valuation methodology to be followed by the appraisers. Nor will I rule on these issues.

Da24.

The remedies ordered by the Arbitrator were designed only to make sure accurate information was provided to the Appraiser:

> b) I require that this Final Award be provided by the Parties to whichever Appraiser or Appraisers are chosen by the Parties to value Claimant's SARs;
>
> c) I require that the Parties advise the Appraiser or Appraisers that she, he or they should (i) deem that there was, as of the Trigger Date, $12.5 million more in cash in the company than reflected in the balance sheet as of the Trigger Date, and (ii) consider this amount to be an asset of the company as of the Trigger Date;

d) I require that the Parties not give the Five-Year Plan to the Appraiser or Appraisers unless both Parties agree that it has been properly updated to **reflect all information known or knowable prior to January 31, 2021** that reflects on the financial status of the company and its financial prospects as of the Trigger Date;

e) **I require that neither Party be precluded from presenting to the Appraiser or Appraisers whatever evidence she or it believes to be relevant to the determination of the value of Claimant's SARs as of the Trigger Date.**

f) I require the Parties to act promptly to appoint an Appraiser or Appraisers, to require that the Appraisal to be conducted expeditiously, and **Respondent shall pay Claimant whatever is owed to her**, as per Section 5.2 (c) and (e) of the Agreement, and as per the sequence of payments set forth in Section 5.2 (c) and (e) of the Agreement, **with the first such payment to be made promptly after the result is rendered in the Appraisal process**, along with interest at the rate specified in Section 5.2 (c) (ii) of the Agreement on that amount, which interest shall accrue from what would have been the date of payment under Section 5.2 (c) and (e) of the Agreement had this Arbitration proceeding not been brought until the date of the first payment.

Da48-49.

Fisk objected to the Arbitrator's ruling in (e) above – which is the same issue it raises on this appeal. Da62-63. The Arbitrator rejected Fisk's complaint. Da67. Thus, an Arbitrator has already ruled on what information could be provided to the Appraiser, so Fisk's reliance on Henry Schein, Inc. v. Archer and

White Sales, Inc., 586 U.S. 63 (2019), is specious. Pb 18, 23-24, 36. Henry Schein simply provides that a party's agreement to have an arbitrator decide arbitrability will be enforced. Here, it was. The Arbitrator decided. Fisk lost. Schein does not allow a new arbitration after an Arbitrator has already ruled.

The Arbitration Award was confirmed by the court on March 17, 2023. Da70. Fisk prepared a Consent Order confirming the arbitration award which states that "the parties shall follow the procedures outlined in Section 5.3(a) of Green's Employment Agreement and Arbitration Award for purposes of valuing Greens's Stock Appreciation Rights. . . **The parties consent to this Court having jurisdiction to enforce the terms of the Arbitration Award**." Pa35-36. Thus, Fisk agreed that the Court had the power to enforce the award after the appraisal.

In compliance with the Employment Agreement, Arbitration Award, and the Consent Order, the parties used the process outlined to select their individual representatives who would select the appraiser. Da72-73, ¶ 9. The party-appointed representatives jointly selected three appraisers to interview, after soliciting interest and resumes from more than fifteen different appraisers. Id. They selected Jeffrey Tarbell of Houlihan Lokey ("HL"). Id. Houlihan Lokey is

an internationally known and well-respected company which conducts such analyses, and Mr. Tarbell has more than three decades of experience providing valuation and financial opinions to private and publicly traded companies. Id.

The Employment contract provides:

> If the Company and Green cannot in good faith agree upon an appraiser, then the Company, on the one hand, and Green, on the other hand, shall each select an appraiser, the two appraisers so selected shall select a third appraiser who shall be directed to prepare such Appraisal and the term **"Appraisal Value" *shall* mean the appraised value set forth in the Appraisal prepared in accordance with this definition**. (Emphasis added).

Pa45, § 5.2(a)(ii)

Similarly, upon the selection of Mr. Tarbell, counsel for both parties negotiated and executed a Retainer Agreement with him. The binding contract dictates that the appraisal by Houlihan Lokey "***shall* be considered the Appraisal for the purposes of Section 5.2 of the Employment Agreement.**" Sealed Da204.

All parties were included in all communications with the Appraiser and were provided access to all the information provided by the other party. Da73, ¶11.

Despite the Arbitrator's ruling in Section "e" above, and his upholding that Ruling, continuing its relentless effort to prohibit the Appraiser from having all relevant information, on July 18, 2023, Fisk's counsel wrote to Mr. Tarbell and complained, as they do in their present appeal, that:

> We reviewed Ms. Green's submissions and found that the materials she relies upon for her 5 year financial projections include number [sic] of facts, events and conditions that were neither known nor knowable as of January 31, 2021, and therefore violated the terms of you engagement letter. These items include [list of documents].
>
> We respectfully request that you not consider any portion of those projections that are based upon or refer to any information that was not known or knowable as of January 31, 2021. To the extent that you conclude that Ms. Green's forecast can be modified such that impermissible information can be excluded and not used in any appraisal, Fisk will have further comments to specific items included therein.

Da83-84.

In response to Fisk's email attempting to interfere with the Appraisal, counsel for Ms. Green replied:

> The agreement the parties signed with you specifically precluded the kind of interference in which Mr. Rosener is engaged. Specifically because he was involved in the attempt to cheat Ms. Green out of the full value of her stock, the agreement provides that each party should have "a single point

of contact" who "shall not be counsel to a party." (Page 4 of the Engagement Agreement). I have allowed scheduling communications - and, when Mr. Rosener improperly injected his arguments into the process, brought this prohibition to your attention. Please advise Mr. Rosener to cease communications about the substance of your evaluation.

I will reply substantively, just so the record is clear before both attorneys are kept out of the valuation process. We will not relitigate the arbitration that Ms. Green won and Fisk lost.

Every source used by Ms. Green provides information that was known **and/or knowable** before January 31, 2021 and Ms. Green is prepared to answer any questions you have during the interview.

Additionally, the Arbitrator ruled: "I require that neither Party be precluded from presenting to the Appraiser or Appraisers whatever evidence she or it believes to be relevant to the determination of the value of Claimant's SARs as of the Trigger Date." Of course you are free to question each party and decide for yourself what to consider.

Finally, one of the early documents provided by Fisk was an alleged 2020 audit report dated March 2022 (only one month before the 2021 audit was issued). This was part of the scheme to cheat Ms. Green. The 2020 audit has fabricated information and different numbers than the 12/31/20 information created internally before 1/31/21. It also utilized a valuation prepared in February 2022 using the 5 YR plan the arbitrator specifically ruled was inadmissible in the valuation.

> Please advise Mr. Rosener to stop interfering in this process. My client's single point of contact is Mr. Friedland. Fisk can designate a single point of contact who is not Mr. Rosener. Please enforce the agreements in the Engagement letter.

Da82-83.

On July 19, 2023, Mr. Tarbell settled the dispute, raised for a third time by Fisk on this Appeal, writing "[t]o be clear, Houlihan Lokey's responsibility in this matter is to prepare an appraisal of the company subject to the terms of our engagement agreement. Our appraisal will follow recognized appraisal practices and standards which prohibit the consideration of information that was neither known nor knowable at the valuation date. I make this clarification not to imply anything improper by either party, but simply to make clear that ex-post information will not be considered in our appraisal." Da82.

In fact, the Arbitrator specifically ruled that information known after the valuation date could be considered by the Appraiser because Fisk deliberately excluded knowable information in order to cheat Ms. Green:

> Respondent suggested that it would be inappropriate to include in a valuation exercise any information that became known after the valuation date, such as different projections that might seem justified by post-December 31, 2020 events. I reject this blanket assertion for the following reasons. First, the Five-Year Plan is not the

> valuation analysis *per se*; it is the basis of, or at least a part of, the valuation exercise. I find, based on the expert testimony at the Hearing, that there is nothing wrong with ensuring that these projections are as accurate as possible, even if it means accounting for information from January 2021. Second, much of the information referenced in the text that Claimant argues, and I agree, should have been incorporated in a revised Five-Year Plan was knowable before the Trigger date – even if not, as Respondent argues, knowable in October or November 2020. Finally, while some of the information was known in early January 2021, just after the Trigger Date, even Respondent's expert agreed at the Hearing that it would not be inappropriate to include such information, particularly if it is information that only became known after the Trigger Date, but that related to pre-Trigger Date events or financial results for 2020. (Emphasis added).

Da43-44.

On June 28, 2023, Fisk's counsel wrote to Mr. Tarbell "[a]s I am sure you know, appraisers routinely bring sales projection forward and we are confident that you can do the same here or that you can prepare a valuation using another valuation methodology that you deem appropriate." This admission completely contradicts Fisk's position in the present Appeal. Da78.

On July 27, 2023, both parties participated in a full-day meeting with Mr. Tarbell on site at Fisk. Da75, ¶ 21. Ms. Green was accompanied by Mr. Friedland, who had also been her expert at the arbitration. Id. Representing Fisk

at the meeting were Eric Fisk, the owner; Petra Panaget, VP Sales; Jim Mentekidis, VP Product Management; Angel Cendeno, CFO; and Kroll representatives whom Fisk had hired for the appraisal process: Zain Saeed, Senior Director, and Sarah Fisher, Vice President Expert Services. Id. Fisk had approximately five hours of speaking time and Green had approximately two hours of speaking time. Id. Both sides made presentations and responded to questions from Jeffrey Tarbell. Id. At the conclusion of the meeting, the parties were told they could provide any additional information they thought would be relevant that had not been previously provided. Id.

On August 1, 2023, Mr. Tarbell requested additional information from both parties. Id. at ¶ 22. After the supplemental information was received, Mr. Tarbell distributed the draft report to both parties for review and comment along with the following instructions:

> Attached please find our draft appraisal report for this matter. As discussed in my June 27 email, we invite the Parties' feedback on the report by 5 pm ET on Wednesday, September 6. We will then consider such feedback and issue our final report on Monday, September 11.

Id. at ¶ 23; Da80.

On September 12, 2023, Houlihan Lokey issued the Final Valuation Report which valued Ms. Green's SARs at $12.9 million dollars noting that the value was determined "using the procedure outlined in Section 5.2 of the Employment Agreement." Sealed Da145, 130.

Ms. Green moved to confirm the final aspect of the award in accordance with the Consent Order. Pa73-74. Fisk, continuing a four-year pattern of refusing to pay Ms. Green what she deserved, and abandoning its position that the Appraisal is not arbitrable, filed a cross-motion claiming that it had disputes regarding the appraisal and that it wanted to litigate in yet another arbitration. Da75-76. On March 19, 2024, the trial court ruled that the appraisal was simply the implementation of the Arbitration Award, noting that the parties consented to the jurisdiction of the Court when the only remaining issue was the appraisal. 2T 35:17-37:23.

Fisk further argued that it should benefit from its bad faith, claiming that the interest rate at the time Fisk was *supposed* to pay Ms. Green in 2021, four years ago, (.62%), should be the interest rate applied to her long-overdue payments. 3T 10:4-11:20. On December 3, 2024, the Court ruled that the proper interest rate under the Arbitration Award and the Employment Contract was the

rate at the time of the actual first payment to Ms. Green (4.12%). 3T 37:13-19. Fisk appealed.

LEGAL ARGUMENT

POINT I

APPELLANT DOES NOT EVEN ALLEGE A VALID REASON TO OVERTURN THE CONFIRMED ARBITRATION AWARD (Da12-54;Da70; Pa79)

Appellant argues that the trial court's confirmation of the Final Arbitration Award – which included the valuation by the appraiser – was improper because the court treated the appraisal[3] as "though the appraisal were *itself* a final and binding arbitration award. (emphasis in original)." Pb 1. In fact, under well-established law, the appraisal *itself* is a final and binding arbitration award. Cap City, infra. Additionally, Appellant is contractually bound to treat the appraisal as final and binding in accordance with the Employment Contract, the Arbitration Award, the contract with the Appraiser, a Consent Order it drafted and signed, and its own repeated arguments below that the appraisal is not

[3] While Fisk complains that Ms. Green "did not attach [the appraisal] as an exhibit in her motion to confirm the Final Award" (Pb 11), it knows full well that Ms. Green moved to file the Appraisal under seal because the contract with the Appraiser required filing under seal (which we have also requested in this Court) because the Appraisal contains HL's proprietary work product. Da87-89.

subject to arbitration. Even on appeal, Fisk admits that an arbitrator cannot be the appraiser:

> [T]he arbitrator correctly found and the contract unambiguously requires, the arbitrator's authority is to adjudicate and remedy the claims of breach of duty and fraud, and not to conduct the actual valuation of the SARs.

Pb 10.

A. Established Law Supports the Trial Court Ruling That the Appraisal is the Implementation of the Final Arbitration Award (2T 35:18-36:1)

Appellant does not even attempt to meet any of the statutory criteria for vacating the Arbitration Award. The only bases to obtain the remedy sought by Appellant here are laid out clearly in the Arbitration Act:

(1) the award was procured by corruption, fraud, or other undue means;

(2) the court finds evident partiality by an arbitrator; corruption by an arbitrator; or misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;

(3) an arbitrator refused to postpone the hearing up-on showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to section 15 of this act, so as to substantially prejudice the rights of a party to the arbitration proceeding;

(4) an arbitrator exceeded the arbitrator's powers;

(5) there was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection pursuant to

subsection c. of section 15 of this act not later than the beginning of the arbitration hearing; or

(6) the arbitration was conducted without proper notice of the initiation of an arbitration as required in section 9 of this act so as to substantially prejudice the rights of a party to the arbitration proceeding.

N.J.S.A. 2A:23b-23.

Appellant seeks to disguise its goal of overturning the Arbitration Award by arguing that the appraisal is a separate finding that is subject to yet another arbitration. Following established law, the court below held:

> [T]he arbitration envisioned by the agreement has already taken place, the threshold questions have been answered, those issues have been resolved prior to the appraiser getting his duty so that he would know what it is that he was doing and what the rules of the game were . . . **the appraisal is the implementation of the arbitration award.**

2T 35:18-36:1.

This ruling comports with the decision in Cap City Products Co., Inc. v. Louriero, 332 N.J. Super. 499 (App. Div. 2000) which Fisk relied upon until it changed its position. Cap City follows the Supreme Court ruling in Tretina Printing, Inc. v. Fitzpatrick and Assocs., Inc., 135 N.J. 349 (1994), holding that a valuation – like the one here – is "an arbitration award" which could only be set

aside if there was evidence of corruption or wrongdoing as laid out in the Arbitration Act. Cap City 332 N.J. Super. at 502-504. Appellant does not even allege such wrongdoing. Tretina was cited by the Supreme Court this month, confirming that "[j]udicial review of private sector arbitration awards is thus strictly limited." Rappaport v. Paternak, __ N.J. __, 2025 WL 970902 *3 (N.J. Supreme Court, Apr. 1, 2025).

In Cap City, supra, when a shareholder retired, he and the other shareholder agreed to "mutually select a third party to value the stock and arbitrate a binding settlement." Id. at 501. The retiring shareholder disagreed with the valuation and filed suit. The trial court "treated the matter as one seeking enforcement of an arbitration award." Id. at 503. The Appellate Division "agree[d] with that characterization." Id. The Appellate Court held that even a mistake could not result in overturning a valuation: "the closeness of the question represents a graphic illustration of the wisdom of the [New Jersey Supreme Court's] Tretina conclusion [that the goal is] to avoid litigation which must ensue if a question such as that presented here is to be resolved anew by the courts after it has been decided by an arbitrator [referring to the appraiser]." Id. at 505.

The Appellate Court specifically found that the characterization of the appraiser's function as distinct from an arbitrator's function was "unpersuasive," applying the Supreme Court's Tretina principle. Id. at 508. The court in Tretina rejected the very arguments made by Appellant here:

> Louriero argues that the Tretina rule does not apply here, first because Trugman was not performing an arbitration, but rather an appraisal . . . We find the asserted distinctions unpersuasive, and are satisfied that the Tretina principle applies regardless of the characterization used to describe Trugman's function.

Id. at 507-508.

Appellant cites Elberon Bathing Co. v. Ambassador Ins. Co., 77 N.J. 1 (1978), for the proposition that an appraisal may be challenged in court. Pb 29. Not only does Fisk fail to apprise this Court that Elberon was effectively overturned on this issue, it also cites to Ward v. Merrimack Mut. Fire Ins. Co., 332 N.J. Super. 515 (App. Div. 2000) and Leach v. Princeton Surgiplex, LLC, No. A-6120-11T1, 2013 WL 2436045, AT *4 (N.J. Super. Ct. App. Div. June 6, 2013), both of which rely on Elberon for the proposition that an appraisal is subject to a different standard than an arbitration, decisions which were modified by Cap City and Tretina. The Appellate Court in Cap City specifically held that, "[t]o the extent that statements in prior cases such as Elberon reach a different

conclusion because the independent party performing the decision-making function is termed something other than an arbitrator [e.g., an appraiser], those cases are deemed modified by the subsequent holding [by the Supreme Court] in Tretina." Cap City, 332 N.J. Super. at 508. This case presents the same issue decided in Cap City and that ruling applies here: "[W]hatever label may be applied to the agreement [between Fisk and Ms. Green], it is clear that the two agreed to be bound by the valuation . . ." Id.

B. The Arbitrator Already Ruled on the Issues Fisk Raises on Appeal (Da67)

Fisk seeks to overturn the Appraisal/Award based on claims that the Appraiser "considered" some of the information the Arbitrator allowed to be shared, claiming it was not "known or knowable." Pb25. In support of this claim, Fisk cites to its own post-Award Demand for [a second] Arbitration as if its own unsubstantiated claims are evidence.[4] Sealed Pa139-140.

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[4] In addition to citing its own unsupported post-Award Demand for [a second] Arbitration (sealed Pa131-147), Fisk frequently misstates the record in their brief, using citations which do not support its assertions, for example p. 15 citing Pa79 and Pa80; p. 16 citing Pa 83, 85 and 88; p. 20 citing Pa118; p. 20 fn7 citing Pa114 and 118; p. 27 citing 1T 24:26-25:14; p. 27 citing 1T 8:18-19 and 9:9-16; p. 33 citing Pa79; p. 34 citing Pa 83, 85 and 88; p. 34 citing Pa109; p. 36 citing Pa79; heading "D", p. 40 citing Pa83, 85 and 88; p. 40 citing Pa80; p. 41 citing Pa83; p. 41 citing Pa85.

In fact, the Appraisal specifically states the opposite:

> The effective date of our analysis and this Report is December 31, 2020 (the "Valuation Date") and this Report is written from the perspective of that date. However, the Parties have directed us to take into account certain information that was known or knowable as of January 31, 2021, consistent with the findings set forth in the Final Award (as defined herein).

Sealed Da129.

Fisk does not advise this Court that it actually sought a modification of the Award from the Arbitrator, claiming that the Arbitrator erred when he ruled that either party could "present to the Appraiser whatever evidence" they "believed to be relevant." Da62-63. Arbitrator Young ruled against Fisk and upheld his Award:

> First, it is not at all clear that I have any authority to correct a substantive error in a Final Award, even if I believe that such as substantive error exists. Rule 24(j) of the JAMS Employment Arbitration Rules & Procedures allows correction of "any computational, typographical or other similar error," but it is otherwise silent regarding the correction of other types of errors. Respondent asks for the "correction of an error" that is not computational, typographical" or "similar" to a computational or typographical error. Consequently, there is significant doubt that I have the authority under this Rule to change the substance of the Final Award, even if I believe that I should do so.

> Second, the relief awarded is appropriate and is within my authority. Unlike the relief initially requested by Claimant and subsequently requested in her post-Hearing submissions, I am not dictating what the Appraiser does with any submissions or communications from Claimant. The Appraiser may consider or ignore any such submissions. She/he/they may find the submissions or communications from Claimant credible or not credible, just as she/he/they may find the submissions from Respondent credible or not credible. Moreover, the relief is appropriate (as relief for Claims 2 and 3) as it is consistent with the finding in the Final Award that Respondent excluded Claimant from any meaningful role in the preparation of the Five-Year Plan (and thereby violated its duty of good faith), to grant relief that ensures that she is not excluded from the Appraisal Process.
>
> Finally, and relatedly, Respondent argued – and in particular its expert opined – that the relief sought by Claimant was unnecessary because the Appraiser would presumably allow Claimant to submit anything she wished in response to, or in addition to, whatever the Respondent would submit to him/her/them. **The relief that Respondent now requests post-Final Award is inconsistent with the preceding arguments and opinions.**

Da67.

Thus, while Fisk claims it should get yet another arbitration regarding what information was provided to the Appraiser, it has failed to tell this Court that the Arbitrator already ruled on that claim.

While claiming that the Appraiser considered material he should not have, Fisk contradicts the actual Appraisal itself, and lists documents without any evidence that they were "considered." Pb 12-13. Among the documents are two regarding plans for expansion of the business in Germany that Fisk began in 2020 but hid from Ms. Green, its CFO. Id. Fisk fails, again, to advise this Court that the Arbitrator ruled that the German expansion plans began before the trigger date in 2020, as noted in the Appraisal:

> In 2020 the Company began to explore the development of a manufacturing facility in Germany, sometimes referred to as the GMBH project. While the Parties disagree on whether this project was 'known or knowable' at the Valuation Date, we have relied on the findings of the Final Award, which state that the German expansion was being explored in the Fall of 2020.

Sealed Da136.

This complies with the Arbitrator's finding:

> Similarly, I find that Claimant was intentionally not told in Fall 2020 about the possibility being explored by the Respondent of expansion of its business into Germany. Even if Claimant was planning to leave the company at the end of 2020, it was unusual, and not justified, that she, as still the then-current CFO, was not told this information. The fact of possible expansion was not referenced at all in the Five-Year Plan. It is reasonable for me to infer that had Claimant known of this possible expansion, and had she been given the opportunity to

> engage fully regarding the Five-Year Plan as it was being developed, she would have argued for the inclusion of some reference in the plan to revenue from the German expansion – even if that amount was discounted in some manner for the possibility that the expansion would not get off the ground.

Da41, fn18.

The Arbitrator has already ruled on the issues raised in this appeal. The Appraiser also contradicts the arguments Fisk makes.

Similarly, the Appraiser did not "exceed his authority" when he calculated the "Gross Up Amount." Pb37. In an apparent Freudian slip, the law cited by Fisk to support its argument refers to the authority of arbitrators – although Fisk's main argument is that the Appraiser is not an arbitrator. Nevertheless, the contract with the Appraiser provides that the HL Appraisal "shall be considered the Appraisal for the purposes of Section 5.2 of the Employment Agreement." Sealed Da204.

Section 5.2 of the Employment Contract provides for the "Gross up Amount" repeatedly. Pa44-45. In fact, Fisk's post-arbitration brief also notes the contract provision regarding "Gross Up." Da11. Thus, HL did exactly what Fisk agreed it should do.

Finally, there is no evidence to support Fisk's allegation that "the Appraiser failed to exercise independent judgment" regarding how to treat the cash Eric Fisk took out of the company the day before the trigger date. Pb13. The "independent judgment" just went against the wrongdoer. The cite given by Fisk is to its own post-award Demand for [a second] Arbitration in which it makes completely unsubstantiated claims.

C. The Arbitration Award Granted Ms. Green Specific Performance – Including a Prompt Appraisal and Payment (Da33-40)

There can be no doubt that the Arbitration Award outlined the specific performance required to implement Arbitrator Young's ruling that Appellant had acted in bad faith in attempting to cheat Ms. Green out of the true value of her stock by falsifying financial documents and removing $12.5 million from the company the day before the trigger date. Da47-48. In accordance with the JAMS Employment Arbitration Rule 24 – to which Appellant agreed to be bound – "[t]he Arbitrator may grant any remedy or relief that is just and equitable and within the scope of the Parties' agreement, including, but not limited to, specific performance of a contract or any other equitable or legal remedy." Da85-86.

The remedy awarded by Arbitrator Young ordered the parties to "act promptly to appoint an Appraiser or Appraisers, to require that the Appraisal be conducted expeditiously, and Respondent shall pay Claimant whatever is owed to her, a per Section 5.2(c) and (e) of the Agreement, and as per the sequence of payments set forth in Section 5.2(c) and (e) of the Agreement, with the first such payment to be made promptly after the result is rendered in the Appraisal process." Da49, 53.

Thus, the Arbitrator elected to grant the remedy of specific performance of Section 5.2(a)(ii) of the Employment Agreement. The Award required Fisk to comply with the contract and *pay Ms. Green* in accordance with the Final Valuation Report. The Award clearly includes payment in accordance with the Appraisal.

In accordance with the ruling in Cap City, supra, the confirmation of the Arbitration Award includes acceptance of the appraisal. It is even clearer here, where the Arbitrator explicitly incorporated the Final Valuation Report into his Final Award and required specific performance. The Award would have been useless to Ms. Green if it did not.

D. Appellant Seeks Now to Disavow its Prior Agreements

1. Fisk Signed A Consent Order (Pa35)

Appellant argues that the court below had no jurisdiction to confirm the Final Arbitration Award, which included the appraisal. Pb 17. That is contrary to its own representations to the Court. Fisk prepared, signed and filed a Consent Order confirming the Arbitration Award, agreeing that the court had such power:

> "The parties shall follow the procedures outlined in Section 5.3(a) of Green's Employment Agreement and Arbitration Award for purposes of valuing Greens's Stock Appreciation Rights . . . **The parties consent to this Court having jurisdiction to enforce the terms of the Arbitration Award.**"

Pa36

In a transparent attempt to undo this consensual waiver, Fisk alleges that the Consent Order is "limited to matters resolved in the award" without being able to give an example. Pb 28. However, the Appraisal is the specific performance ordered by the Arbitration Award and it is impossible to extricate the two. Prompt payment to Ms. Green in accordance with the Appraisal was the only thing to enforce. Continuing its relentless attempt to cheat Ms. Green, Appellant falsely claims that the Appraisal and payment to Ms. Green were not

the only issues specifically left to the court's jurisdiction – and that it gets yet another arbitration by making up the claim that the appraiser included objectionable information in his analysis – despite the appraiser specifically confirming that he did not: "Our appraisal will follow recognized appraisal practices and standards which prohibit the consideration of information that was neither known nor knowable at the valuation date." Da82.

2. Fisk Signed a Contract with the Appraiser (Da203-213)

On May 5, 2023, Fisk entered into a binding contract with the Appraiser, Houlihan Lokey, agreeing that:

> The conclusions rendered by Houlihan Lokey will be based on methods and techniques that Houlihan Lokey considers appropriate under the circumstances, shall represent the value estimated by Houlihan Lokey based solely upon the information furnished by or on behalf of the Parties and other sources, and **shall be considered the Appraisal for the purposes of Section 5.2 of the employment Agreement**. (Emphasis supplied).

Sealed Da204.

Basic principles of contract interpretation dictate that Houlihan Lokey's Appraisal is the final Appraisal of Ms. Green's stock. The words, especially the word "shall," used in both the Employment Contract and the appraisal retainer

agreement, mean that the Appraisal is final and binding. Harvey v. Bd. of Chosen Freeholders of Essex Cnty., 30 N.J. 381, 391 (1959) ("[t]he word 'may' is ordinarily permissive or directory, and the words 'must' and 'shall' are generally mandatory").

3. The Employment Contract Provides That The Appraisal is Final (Pa42)

The underlying Employment Contract executed by Appellant also indicates Fisk's agreement that the "Appraised Value" of Ms. Green's stock "**shall mean** the appraised value set forth in the Appraisal prepared in accordance with this definition." Pa45 §5.2(a)(ii). The Appraisal itself notes that it was done "using the procedure outlined in Section 5.2(a)(ii) of the Employment Agreement." Sealed Da145.

E. Appellant is Estopped From Disavowing Its Repeated Arguments That The Appraisal is Not Subject to Arbitration (2T 25:3-26:6; 2T 35:5-16; 2T 28:11-21)

Because Fisk succeeded in preventing the Arbitrator from participating in the Appraisal process, it is now judicially estopped from claiming the Appraisal is subject to being challenged in arbitration. It is settled that:

> In order to protect the integrity of the court system, "[w]hen a party successfully asserts a position in a prior legal proceeding,

> that party cannot assert a contrary position in subsequent litigation arising out of the same events. Kress v. LaVilla, 335 N.J. Super. 400, 412, (App. Div. 2000), 168 N.J. 289 (2001). The doctrine has been summarized as follows: "'[t]o be estopped [a party must] have convinced the court to accept its position in the earlier litigation. A party is not bound to a position it unsuccessfully maintained.'" Kimball Int'l, Inc. v. Northfield Metal Prods., 334 N.J. Super. 596, 606-07 (App. Div. 2000) (quoting In re Cassidy, 892 F.2d 637, 641 (7th Cir. 1990)) (second alteration in original). Stated differently, "[t]he principle is that if you prevail in Suit #1 by representing that A is true, you are stuck with A in all later litigation growing out of the same events." Id. at 607 (quoting Eagle Found., Inc. v. Dole, 813 F.2d 798, 810 (7th Cir. 1987)).
>
> Adams v. Yang, 475 N.J. Super. 1, 8-9 (App. Div. 2023).

Fisk argues that it lost its attempt to have the appraisal before the arbitration, so it did not prevail in its argument that an arbitrator cannot interfere in the methodology of the appraisal. Pb32. The procedural ruling has nothing to do with the substantive ruling. The Arbitrator refused to take action requested by Ms. Green, agreeing with Fisk's arguments regarding the limits on the Arbitrator interfering with the Appraisal methodology. Da46. The remedies ordered by the Arbitrator were designed only to make sure accurate information was provided to the Appraiser. Da47-49. Particularly "e," which provides:

> **I require that neither Party be precluded from presenting to the Appraiser or Appraisers whatever evidence she or**

> **it believes to be relevant to the determination of the value of Claimant's SARs as of the Trigger Date.**

Da49.

Fisk already arbitrated its objection to "e." Da62-63. It lost. Da67.

Contrary to Fisk's argument, (Pb31-33), the Arbitrator did accept Fisk's arguments that only the Appraiser can do the valuation. **"the Arbitrator lacks jurisdiction under the Employment Agreement to tell the neutral appraiser what valuation methodology to employ or what information the neutral appraiser must consider in preparing an appraisal"** . . . I have made clear in prior rulings that, **under the relevant provisions of the [Employment] Agreement, there are limitations on the scope of my authority** as the Arbitrator. . . I am not, as the Arbitrator, to determine the value of Claimant's SARs, or to conduct the contractually required Appraisal or to dictate to the Appraiser or Appraisers how to conduct the Appraisal." Da46-47.

In arguing below, Appellant quoted Cap City, supra, which it now disavows, noting:

> **[t]he court found that the valuation was "an arbitration award or the product of a settlement" and, could only be set aside in the event of fraud, corruption, or similar wrongdoing on the part of the**

> **third-party chosen to value the stock.** Id. at 502, 504. In other words the court adopted the high deferential standard applied to arbitration awards and applied it to the appraisal mechanism chosen for valuing stocks. Id. at 508-09. The court noted that **"whatever label may be applied to the agreement between [the two shareholders], it is clear that the two agreed to be bound by the valuation performed by [the third-party hired to value the stock]."** Id. at 508.
>
> **Here, like Cap City, there is a procedure expressly agreed to by the parties for valuing the price of the stock. Like the court in Cap City, this court should find that the provision for valuing stock, Section 5.2, is valid and enforceable requiring both Ms. Green's adherence to the procedures and her being bound by the outcome.**

(Emphasis supplied). Da7-8.

In rejecting Fisk's attempt to arbitrate yet again over the appraisal, the court below noted Fisk's positions before the Appraisal was rendered:

> Mr. Stio then states, at Page 9: 'Your Honor, because the parties agreed that the valuation would be performed by an appraiser you cannot have someone who is not a licensed appraiser tell an appraiser how to do his or her job.' It goes on to say: 'Both sides already have hired appraisers, neutral appraisers, to appoint someone who's qualified to do this job.'
>
> Then on Page 12 Mr. Stio says: 'And we are trying to find out, in the first instance, what is this dispute about, and let's find out if, in fact, an appraiser is going to consider any of this alleged fraudulent information.'

> Mr. Rosener, at Page 14, says: 'Your Honor, there is only one. There is only one appraisal. The way the agreement works is the two appraisers, the appraisers that are appointed by each of the parties, sole – sole role is to pick a neutral appraiser who itself, independent of the other two, arrives at the appraised value.'
>
> Mr. Rosener says, at Page 15: 'The arbitrator has no role in the appraisal.' Also on Page 15 Mr. Rosener: 'They don't have the right to substitute their judgment for the appraisal that's arrived at by the appraiser."

2T 25:3-26:6

> Again, the colloquy of Mr. Rosener is cited: 'The arbitrator can award damages in the actions that violate the agreement, and that's all. He can't change the appraisal.' He goes on to say: 'The arbitrator has no role in the appraisal. He can award damages for breach of the agreement and breach of duty of good faith to the extent it affects the appraisal.' And then finally he says: 'They don't have the right to substitute their judgment for the appraisal that's arrived at by the appraiser.' And then finally he says: 'But the effect of the appraisal, the appraisal was final.'

2T 35:5-16.

The trial judge then quoted the Arbitration Award:

> I want to go over is the final award of the arbitrator. The arbitrator, first on Paragraph – and Page 2: 'The agreement requires that an actual val – val – valuation of the SARS be conducted by an independent appraiser.'

> Then on Page 3 he concludes: 'For the reasons discussed below I find that respondent, which is Fisk, violated its duty of good faith and fair dealing.' It goes on to say, in the same page: 'My authority is to adjudicate and remedy the claims of breach of duty and fraud, and not to conduct the actual valuation of the SARS.'

2T 28:11-21.

Now, Fisk disavows those arguments and the law it cited below. In a torturous new argument, Appellant argues that the case it relied on below is not applicable because "the employment agreement in Cap City combined the roles of arbitrator and appraiser" and the Employment Agreement in this case does not. Pb 30. That argument is completely contrary to the Cap City holding that the term used to describe the valuator is irrelevant. supra at 503.

Additionally, the Appellate Division has rejected Fisk's argument. In Cardoso v. Goldberg, No. A-4904-05T5, 2007 WL 4062187 (N.J. Super. Ct. App. Div. Nov. 19, 2007); the parties entered into a settlement agreement that included a procedure to appraise the plaintiff's ownership interest in a company. The parties' settlement agreement mirrors the procedure and language in the present Employment Agreement exactly, stating "Cardoso and Goldberg shall each select one (1) neutral MAI Certified Appraiser who, in turn shall select one (1) neutral MAI Certified Appraiser who shall appraise the property." Da104-

108; Id. at *2. The plaintiff brought an action, among other claims, to invalidate the appraisal "because it deviated from recognized appraisal standards, failed to rely on appropriate facts and data, and included an erroneous analysis of value." Id. at *3. The trial court rejected the plaintiff's claim and, citing to Cap City, determined that "absent a showing of fraud, corruption or similar wrongdoing which is not alleged by plaintiff, the appraisal provision in the Settlement Agreement must be enforced." Id. at *5. The plaintiff appealed, arguing, like Fisk does here, that Cap City "involved an arbitration." Id. The Appellate Division agreed with the trial court and ruled that even though the agreement did not combine the roles of arbitrator and appraiser, "the parties intended to be bound by an appraisal completed pursuant to procedures set forth in their settlement agreement." Id. at *6. Moreover, the court advised "[h]ad the parties intended to preserve the right to challenge the opinion of the single appraiser, such a provision could have been inserted in the agreement." Id. citing Mt. Hope Dev. Assoc. v. Mt. Hope Waterpower Project, L.P., 154 N.J. 141, 149 (1998) ("Had the parties to this action desired to preserve their right to appeal, they could have inserted a provision into the consent judgment reserving that right and delineating the scope and extent of any appeal. They did not do so.").

Fisk could have asked Arbitrator Young to retain jurisdiction in order to hear objections to the appraisal. Of course, Fisk would have had to contend with its agreement in the Employment Contract that the Appraisal "shall" be the final decision regarding valuation as well as its arguments directly to the contrary. Instead, Fisk signed a Consent Order confirming the Arbitration Award which included ordering payment to Ms. Green promptly after the appraisal and granting the Court jurisdiction to enforce the Award after the appraisal. Pa35-36. Fisk then signed a contract with the appraiser, HL, which provides that the HL valuation "shall be considered the appraisal for the purposes of Section 5.2 of the Employment Agreement." Sealed Da204.

Now, Fisk claims that the appraisal was not final and binding – contrary to the Employment Contract, the Arbitration Award, the HL Contract, its prior vigorously argued position that the appraisal cannot be subject to arbitration, and the clear law that the valuation is part of the arbitration and is not appealable. The court below was correct in confirming the Final Award, which included the appraisal and refusing to "revisit things that the appraisal already decided." 2T 43:1-2.

Since the Final Award was confirmed, Appellant's filing is frivolous because it violates the law:

> Upon the granting of an order confirming, modifying or correcting an award, a judgment or decree shall be entered by the court in conformity therewith and be enforced as any other judgment or decree. **There shall be no further appeal or review of the judgment or decree**.

N.J.S.A. 2A:23A-18.

POINT II

THE COURT BELOW APPLIED THE INTEREST RATE IN THE EMPLOYMENT CONTRACT (3T 13:12-14:22)

A. Appellant Seeks to Financially Benefit From Its Own Wrongdoing

Fisk uses a tortured and incorrect reading of the Employment Contract to claim that the court below applied the wrong interest rate to the Arbitration Award. Pb 34-37. It argues that, although its bad faith effort to cheat Ms. Green deprived her of the use and enjoyment (including income and interest) of millions of dollars for four years, Fisk should financially benefit from its wrongdoing by paying an interest rate far below the actual rate applicable to the four years it deprived Ms. Green of her money. Id. Fisk wants to profit from its wrongdoing. That result is contrary to centuries old law.

The Supreme Court in Neiman v. Hurff, 11 N.J. 55, 60 (1952) held that "[N]o one shall be allowed to profit by his own wrong." This doctrine is "so essential to the observance of morality and justice [that it] has been universally recognized in the laws of civilized communities for centuries and is as old as equity. The sentiment is ageless." Id. at 60-61. See also, Wasserman v. Schwartz, 364 N.J. Super. 399, 408 (Law Div. 2001). Here, Fisk has been found to have acted in bad fath and with "ill intent," (Da43) yet it argues that it should benefit from an interest rate below 1%, despite the fact that interest rates rose steadily from its initial efforts to cheat Ms. Green in 2020 until the confirmation of the Final Arbitration Award in December 2024.

Fisk's position violates well-established law. "[A] court of equity will deny its remedies to a suitor who has been guilty of bad faith, fraud or unconscionable acts in the transaction which forms the basis of the lawsuit. Goodwin Motor Corp. v. Mercedes-Benz of N. Am., Inc., 172 N.J. Super. 263, 271 (App. Div. 1980).

The court below analyzed the Employment Contract language, the Arbitration Award, and the "totality of the circumstances" in applying the correct

interest rate:[5]

> . . . looking at the totality of the circumstances in this case and what Fisk has done, this Court is satisfied that the applicable mid-term federal rate is the rate that should apply, which Ms. Smith indicates is 4.3 percent, and to rule that Fisk is entitled to pay interest at a rate sub one percent would be such a fundamental miscarriage of justice that it would bear – it would underscore what has already been found, and that is that Fisk has breached the covenant of good faith and fair dealing and that would be another example of that.
>
> So I am absolutely satisfied that 4.3 is the applicable interest rate.

3T 34:10-23.

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[5] Fisk attempts to muddy the facts and mislead this Court by noting, without explanation, that "Green's initially [sic] requested interest through October 20, 2023; the final judgment awarded interest through January 2, 2025." Pb12, fn 6. Ms. Green's motion to confirm was filed in September 2023. Pa37-38. The court accepted briefs and considered the arguments, and held oral argument in March 2024. See 2T; Da91-94. But, due to Fisk's continuing efforts to litigate and relitigate everything, oral argument was held again in December 2024. See 3T Ms. Green submitted updated interest calculations in December 2024, which were used by the court because Ms. Green had still not received any of the money she was due. Da95-98. In fact, the interest rate applied pursuant to the Employment Contract – the federal mid-term rate at the time of the initial payment – went down from March 2024 (4.23%) to December 2024 (4.12%) – which benefitted Fisk. Da92-94, 95-98.

B. The Court Applied the Interest Rate at the Time of the Actual Initial Payment, Pursuant to the Contract (3T 31:2-8)

The Employment Contract states at 5.2(c)(i) that '[a]n amount equal to one-third of the Appreciation Payment, plus the full Gross-Up Amount, shall be payable in cash within 75 days after the applicable Trigger Date. Pa45-46. Thus, if Eric Fisk had not engaged in a four-year bad faith attempt to cheat Ms. Green out of millions of dollars, Ms. Green would have received her first payment on March 15, 2021.

The Arbitration Award provides that 'Respondent shall pay Claimant whatever is owed to her... with the first such payment to be made *promptly* after the result is rendered in the Appraisal process, *along with interest* at the rate specified in Section 5.2(c)(ii) of the Agreement on the amount, with that *interest accruing from what would have been the date of payment under Section 5.2 (c) and (e) of the Agreement had this Arbitration proceeding not been brought until the date of the first payment."* Da49, 53.

The rate specified in the Employment Contract at 5.2(c)(ii) is "the applicable mid-term federal rate as of the date of the initial payment." Pa46. Fisk's tortured argument that "initial payment" doesn't actually mean initial payment was rejected by the court. The initial payment took place on December

31, 2024, almost four years late due to Fisk's bad faith. Fisk argues that the date the initial payment should have been made – but for its bad faith – March 2021, is the date applicable to the interest rate. Pb34-36. Enforcing the Employment Contract and the Arbitration Award, the court showed the fallacy of Fisk's position:

> THE COURT: What happened in March [2021]?
>
> MR. HEEP: Well that's when, as I understand it –
>
> THE COURT: Was any payment made?
>
> MR. HEEP: No, the payment wasn't made because the arbitration was triggered.

3T 31:2-8.

Fisk claims that the court below ignored the Contract language in order to "punish" it. Pb33. The court specifically rejected that claim at oral argument. When Fisk's counsel claimed the judge was making decisions based on "what's reasonable or fair," the court immediately corrected him saying: "But that's not what I'm going to do. You just turned what I said on its head. I am going to interpret the agreement." 3T 13:12-14:22.

Fisk argues, without shame, that the "reason that Green had not received a payment on that [March 2021] date was her decision to file the arbitration."

Pb36. Green was forced to file for arbitration because, acting with "ill intent" and in "bad faith," Fisk tried to cheat her.

C. The Court Enforced the Arbitration Award (Pa90-93)

The Arbitration Award itself is contrary to Fisk's argument that the applicable interest rate is the rate on the date the initial payment was **due to** be made to Janet Green, March 21, 2021 (0.62%). The clear language of the Arbitration Award specifies that "the first such payment [was] to be made promptly after the result is rendered in the Appraisal process," along with the interest rate set in the Agreement (federal mid-term rate) "on that amount." Da53. Clearly the Arbitrator refers to the initial payment as the first payment, with interest on that amount, at the rate specified. First, the payment due is established. Then the initial payment date is scheduled. Then the federal mid-term rate at the time of the initial payment is applied to that amount from the date on which the first payment should have been made. No other interpretation makes sense.

Fisk argues as if there is no comma between the "rate" and the date from which it accrues ("what would have been the date of payment"). Da53. The applicable midterm federal rate specified in the contract obviously applies as of

the date of the **actual** initial payment. The court accurately found that rate to be 4.12%. That rate **accrues** from what would have been the initial payment – but for Fisk's bad faith.

POINT III

THIS COURT SHOULD CORRECT THE COMPUTATION ERROR IN THE ORDER (Da95-98)

For more than a year – and after two extensive oral arguments – Fisk failed to challenge Ms. Green's computation of the payments due to her under the Arbitration Award. Da94. After the final Order was signed, Appellant raised, for the first time, the issue of interest being incorrectly applied to the tax gross-up amount. Ms. Green immediately agreed to correct the Order and submitted a corrected Order to the Court. Da100-103.

Rather than continuing to drag out these proceedings as suggested by Appellant, Ms. Green respectfully requests that this Court modify the Order in accordance with the agreed-upon corrected Order attached to the Motion Appellee has filed in this Court pursuant to R. 2:9-1(a).

CONCLUSION

Because this appeal is frivolous and violates N.J.S.A. 2A:23A-18, it should be dismissed and Appellee should be awarded attorneys' fees.

SMITH MULLIN, P.C.
Attorneys for Defendant-Appellee

BY: _____
NANCY ERIKA SMITH

Dated: April 16, 2025

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Docket No.: A-001416-24 T01

FISK HOLDINGS, INC., f/k/a FISK ALLOY, INC.,

Plaintiff-Appellant,

– v. –

JANET M. GREEN,

Defendant-Appellee

Civil Action

On Appeal from the Final Judgment of the Superior Court of New Jersey Law Division, Passaic County

Trial Court
Docket No. PAS-L-000242-21

Sat Below: Hon. Thomas J. LaConte, J.S.C.

Date: April 30, 2025

REPLY BRIEF OF PLAINTIFF-APPELLANT FISK HOLDINGS, INC.

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Preliminary Statement

Green is in a difficult position. When she sought to compel arbitration more than four years ago, she argued that the parties' Employment Agreement and the JAMS rules it incorporated provided that "questions of arbitrability must be decided by the arbitrator," Pa26, ¶ 7, and thus under well-established precedent the trial court had "*no jurisdiction* to rule on arbitrability," Pa29.[1] Green won that argument, Pa33, but now that Fisk Alloy seeks arbitration, the shoe is on the other foot; Green must defend the trial court's arrogation to itself of the authority to decide arbitrability. Surprisingly, Green ignores this threshold issue almost entirely, now tacitly conceding that the trial court erred, which resolves this case. Because the trial court lacked jurisdiction to decide arbitrability, its subsequent purported "confirmation" of the appraisal requires vacatur.

While the Court need go no further, it bears emphasizing the consequences of Green's position. The trial court refused to subject the appraisal to *any* scrutiny, whether under the standard for challenging appraisals set forth in Elberon Bathing Co. v. Ambassador Ins. Co., or the more limited (but still meaningful) review applicable to arbitration awards under the New Jersey Arbitration Act. This protection from any review under any standard is contrary to the Employment Agreement, New Jersey law, and basic notions of fairness.

[1] Pa = Plaintiff-Appellant's Appendix.

Argument

I. The Trial Court Lacked Authority to Decide the Threshold Question of Arbitrability

The trial court's usurpation of the arbitrator's authority to decide the threshold question of arbitrability was a foundational error requiring vacatur of the court's purported "confirmation" of the Appraisal and entry of final judgment. See Pb17–23.[2] Green's response brief largely ignores this dispositive issue and provides no sound defense of the trial court's decision.

1. Both the Federal Arbitration Act and the New Jersey Arbitration Act recognize that "arbitration is a matter of contract." Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 67 (2010); Kernahan v. Home Warranty Adm'r of Florida, Inc., 236 N.J. 301, 318 (2019). That means that parties can agree to arbitrate threshold or "'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." Rent-A-Ctr., 561 U.S. at 70. Such "delegation clause[s]," Morgan, 225 N.J. at 303, must be enforced so long as the contract "clearly and unmistakably" establishes the parties' intent to delegate to the arbitrator the authority to determine arbitrability, AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 649 (1986). Once a court determines that the parties entered into a valid agreement to arbitrate such threshold questions, the court "possesses no power to decide the arbitrability issue[,] … even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is

[2] Pb = Plaintiff-Appellant's Opening Brief.

wholly groundless." Henry Schein, Inc. v. Archer & White Sales, Inc., 586 U.S. 63, 68 (2019).

2. In its opening brief, Fisk Alloy offered four reasons why the trial court erred in deciding the threshold question of arbitrability. ***First***, the Employment Agreement between Fisk Alloy and Green states that "any controversy, claim or dispute arising out of or in any way relating to this Agreement, Green's employment by the Company, or the ending of such employment, including, without limitation, any claim arising under this Agreement," shall be "settled by final and binding arbitration." Pa50, § 12.1; Pb19. Such a broad clause encompasses the meta-"controversy or dispute" over whether a given controversy or dispute is arbitrable. See Wells Fargo Advisors, LLC v. Sappington, 884 F.3d 392, 396 (2d Cir. 2018). ***Second***, the Employment Agreement expressly incorporates JAMS Rule 11(b), which states that "the Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter." Pb19–20 (quoting Pa118, Rule 11(b)); Pb20 n.8 (collecting cases); Awuah v. Coverall N. Am., Inc., 554 F.3d 7, 11 (1st Cir. 2009); Blanton v. Domino's Pizza Franchising LLC, 962 F.3d 842, 846 (6th Cir. 2020). ***Third***, the Employment Agreement's exclusion from arbitration of certain *other* classes of disputes "strongly implie[s]" that disputes over arbitrability *are* covered. Sappington, 884 F.3d at 396; Pb21. ***Fourth***, Green successfully argued before the trial court that the Employment Agreement delegates disputes over arbitrability to the arbitrator; she is now judicially estopped from advancing a contrary position. Pb21–22.

3. Green does not meaningfully respond to Fisk Alloy's arguments. She does not dispute that the arbitration provision in the Employment Agreement is valid, nor does she dispute that its breadth covers threshold questions of arbitrability. She does not dispute the provision's incorporation of JAMS Rule 11(b) and that rule's grant of jurisdiction to the Arbitrator to determine his own jurisdiction. She does not argue that the Employment Agreement's arbitration provision excludes otherwise-arbitrable disputes over workers' compensation and the like, but does not exclude disputes over arbitrability, confirming that the provision extends to such threshold issues. And she does not explain why her argument is not estopped.

Green briefly attempts to distinguish Henry Schein, Inc. v. Archer & White Sales, Inc., 586 U.S. 63 (2019), but her argument merely takes issue with the arbitrability of Fisk Alloy's challenge to the Appraisal, and not with the trial court's authority to *decide* arbitrability as a threshold matter. In Green's view, Fisk Alloy's argument that the Appraisal should be set aside because the appraiser considered irrelevant information was already decided against Fisk Alloy by the arbitrator. Db10–11.[3] That is incorrect because the arbitrator did not decide the issue, and indeed *could* not have decided it. See infra, pp. 5–6. More fundamentally, Green "confuses the question of who decides arbitrability with the separate question of who prevails on arbitrability." Henry Schein, 586 U.S. at 71. The Supreme Court has made clear that "a court may not 'rule on the potential merits of the underlying' claim that is assigned by contract to an

[3] Db = Defendant-Appellee's Opposition Brief.

arbitrator, 'even if it appears to the court to be frivolous.'" Id. at 68 (quoting AT&T Techs., Inc. v. Comm'ns Workers, 475 U.S. 643, 649–650 (1986)). The question is who decides and not whether Green thinks she is correct.

II. Fisk Alloy's Challenges Are Arbitrable

Green argues that the trial court could summarily "confirm" the appraisal, without considering any challenges, under any standard, ever, because the appraisal was merely "'the implementation of the arbitration award.'" Db22 (quoting 2T 35:18–36:1). Her arguments are unpersuasive.

1. Green contends that Fisk Alloy's challenges are not arbitrable, claiming that the arbitrator already resolved them. Db25–30. But the only issue she meaningfully discusses is Fisk Alloy's challenge to the appraiser's consideration of irrelevant material. Green ignores that Fisk Alloy's motion to compel arbitration identified several arbitrable disputes pertaining to the Appraisal, including to its methodology and conclusions, challenges to Green's request for an interest rate exceeding that authorized by the Employment Agreement, and challenges to Green's efforts to bias the appraiser. Pb24–26.

Further, Fisk Alloy's challenge to the appraiser's consideration of irrelevant material was not resolved in the Final Award for the simple reason that the appraisal had not occurred yet. New Jersey law is clear that an appraisal may be challenged on the grounds that the appraiser made a "mistake of law," failed to consider "all evidence an expert would consider relevant to an evaluation," Elberon Bathing Co. v. Ambassador Ins. Co., 77 N.J. 1, 13, 15 (1978), or "misapprehended the facts or issues presented," Leach v. Princeton

Surgiplex, LLC, A-6120-112T, 2013 WL 2436045, at *5 (App. Div. June 6, 2013). Such a challenge could never be ripe until the appraisal takes place.

Fisk Alloy requested that the Arbitrator strike the paragraph of the Final Award allowing the parties to present to the appraiser "whatever evidence she or it believes to be relevant to the determination of the value of [Green's] SARs as of the trigger date." Da62.[4] Fisk Alloy made this request in part to avoid any suggestion that the appraiser might be required to consider everything that the parties submitted, and also because the parties' "unrestrained ability to produce (and continue to produce)" materials to the appraiser, and "the ability to request continued calls and conferences," threatened to unduly increase the "cost" of the appraisal process, which "must be borne by" Fisk Alloy under the Employment Agreement. Da62–63. The arbitrator denied Fisk Alloy's request because, he explained, his jurisdiction once the Final Award issued was limited to making "computational, typographical or other similar" corrections, and he concluded this change was a substantive one. Da67. To the extent the arbitrator addressed Fisk Alloy's concern, it was to make clear that the appraiser was still required to exercise independent judgment to "consider or ignore any such submissions." Id. In other words, the arbitrator did not prescribe, ex ante, what materials the appraiser should or should not consider. Thus, Fisk Alloy's present challenge to the methodologies and conclusions of the Appraisal, including that it relied irrelevant materials, was neither placed in issue nor decided by the arbitrator. See Elberon, 77 N.J. at 13, 15.

[4] Da = Defendant-Appellee's Appendix.

2. Green also relies heavily on this Court's decision in Cap City Products Co. v. Louriero, 332 N.J. Super. 499 (App. Div. 2000). But Green draws precisely the wrong conclusion from that case.

Cap City enforced a valuation as a final arbitration award because the parties' contract required that it do so. The contract said that the parties would "mutually select a third party to value the stock *and to arbitrate a binding settlement*." Id. (emphasis added). That language is the key difference between Cap City and this case: there, the parties' contract explicitly combined the roles of arbitrator and appraiser and agreed that the result of the valuation would be "binding." Id. Here, not only does the Employment Agreement not make the appraisal final or "binding;" it anticipates that arbitrable disputes over the appraisal will arise. Specifically, Section 5.2(h) provides that "[i]n the event there is a bona fide dispute as to the entitlement to a payment under this Section 5.2"—the section that addresses valuation of Green's SARs—"or the amount thereof, the due date of such payment shall be delayed for a reasonable time to resolve such dispute." Pa47, § 5.2(h); Pb30–31.

In Cap City, because the parties had agreed that a third party would "value the stock and [] arbitrate a binding settlement," 332 N.J. Super. at 502, the valuation was subject to the circumscribed judicial review afforded to arbitration awards under Tretina Printing, Inc. v. Fitzpatrick & Assoc., Inc., 135 N.J. 349 (1994). The Court rejected the argument that the valuation was not an arbitration but an appraisal, and thus was subject to judicial review under the standard set forth in Elberon Bathing Co. v. Ambassador Insurance Co., 77 N.J. 1, 17 (1978). See Cap City, 332 N.J. Super. at 508. The Court explained that, "regardless of

the characterization used to describe" the "independent party performing the decision-making function," or "whatever label may be applied to the [parties'] agreement," it was clear that they "agreed to be bound by the valuation." Id. And "[t]o the extent that statements in prior cases such as" Elberon "suggest[ed] a different principle," the Court concluded that such "cases must be deemed modified by the subsequent holding in Tretina." Id.

Green clings to this latter statement, which in her view held that an appraisal "*is* 'an arbitration award,'" as a matter of law, and rejected any "characterization of the appraiser's function as distinct from the arbitrator's function." Db22, 24 (emphasis in original). This gets Cap City exactly backwards. The lesson of Cap City is that, regardless of what one calls the third-party decisionmaker, if the parties' contract renders that decisionmaker's judgment final and binding, then it is to be enforced as an arbitration award. Cap City, 332 N.J. Super. at 508 ("whatever label may be applied … it is clear that the [parties] agreed to be bound by the valuation"). But Section 5.2 of the Employment Agreement here manifestly does *not* render the appraisal final and binding, and that makes all the difference. Although Green chastises Fisk Alloy for making this "torturous" distinction, Db39, it is one that Cap City itself drew again and again, 332 N.J. Super. at 501–02, 508–09.[5]

Green also criticizes Fisk Alloy for citing Ward v. Merrimack Mut. Fire Ins. Co., 332 N.J. Super. 515, 529 (App. Div. 2000), and Leach v. Princeton

[5] Green's reliance on Cardoso v. Goldberg, A-4904-05T5, 2007 WL 4062187, at *5–6 (App. Div. Nov. 19, 2007), is similarly misplaced, because there the contract clearly expressed the parties' intent to be bound by the appraisal, see Db39–40.

Surgiplex, LLC, A-6120-112T, 2013 WL 2436045, at *5 (App. Div. June 6, 2013). Green claims that both decisions "rely on Elberon for the proposition that an appraisal is subject to a different standard than an arbitration, decisions which were modified by Cap City and Tretina." Db24. Both decisions, however, post-date Cap City and Tretina. Ward was decided two days after Cap City and Leach was decided 13 years after Cap City. See also Salt Lake Tribune Publ'g Co., LLC v. Mgmt. Planning, Inc., 454 F.3d 1128, 1135 (10th Cir. 2006).

3. Green contends that, by agreeing to the consent order confirming the Final Award, Fisk Alloy waived any right to challenge the appraisal or, for that matter, to seek adjudication in any forum on any of the issues for which Fisk Alloy seeks arbitration. She is incorrect.

Initially, it is necessary to define certain terms. When Fisk Alloy refers to the "Final Award," it is referring to the Final Award that the arbitrator issued on February 21, 2023, Pa56, and which the trial court confirmed by consent order on May 16, 2023, Pa35. When Fisk Alloy refers to the "Appraisal," it is referring to the Appraisal delivered on September 12, 2023, which Green sought to "confirm" as though it were itself an arbitration award. Pa37. This clarification is necessary because Green portrays Fisk Alloy as arguing "that the court below had no jurisdiction to confirm the Final Arbitration Award, which included the appraisal," which she claims is "contrary to [Fisk Alloy's] own representations to the Court." Db11. That is incorrect: Fisk Alloy's argument is *not* that the trial court lacked jurisdiction to confirm the Final Award, but rather that the Final Award directed the parties to engage in the *process* of obtaining the appraisal,

but did not direct that the *outcome* of that process was final, inviolate, and beyond review on any ground, in any tribunal, ever.

As Fisk Alloy explained, Pb28–29, the consent order's statement that the court had continuing "jurisdiction to enforce the terms of the Arbitration Award," Pa35, necessarily was limited to issues resolved *in* the award, 2 Domke on Commercial Arbitration § 42:1 ("if a party's request for enforcement involves a new dispute that falls outside the scope of the award, enforcement must be denied"); see also N.J.S.A. 2A:23B-22, -25(a). Strangely, Green chides Fisk Alloy for "being [un]able to give an example" of such an issue, Db32, but Fisk Alloy did give one. The Final Award directed the parties to "act promptly to appoint an Appraiser." Pa62. If Fisk Alloy or Green refused, in bad faith, to participate in this process, the trial court could have "enforced" that "term" through contempt proceedings. Pb28–29. But confirmed awards may only be "enforced as any other judgment in a civil action," N.J.S.A. 2A:23B-25(a), and a judgment cannot be enforced on an issue it did not decide.

4. Green points to the parties' engagement letter with the appraiser and to the Employment Agreement in an effort to show that the Appraisal cannot be challenged, but neither document supports that claim.

The engagement letter provided that the appraiser's conclusions "shall be considered the Appraisal for the purposes of Section 5.2 of the Employment Agreement." Da204. In Green's view, "[b]asic principles of contract interpretation dictate" that this means the "Appraisal is the final Appraisal." Db33. But the Employment Agreement governs the Appraisal, not the engagement letter. And in any event, basic principles of contract interpretation forbid courts from

inserting words into a contract that are not there, and the engagement letter does not say that the Appraisal would be "final" and forever insulated from any review. Cf. E. Brunswick Sewerage Auth. v. E. Mill Associates, Inc., 365 N.J. Super. 120, 125 (App. Div. 2004) ("A court has no power to rewrite the contract of the parties by substituting a new or different provision from what is clearly expressed in the instrument."). That the appraiser's written report "shall be … the Appraisal for the purposes of Section 5.2" simply begs the question of whether Section 5.2 deems the Appraisal unreviewable. It does not. Unlike Section 12.1, which expressly states that arbitration "shall be … final and binding," Pa50, § 12.1, Section 5.2(h) contemplates that disputes could arise about "the entitlement to a payment under this Section 5.2 or the amount thereof," Pa47, § 5.2(h). And the parties' engagement letter with the appraiser does not purport to alter Section 5.2(h).

5. Green glancingly defends the appraiser's authority to calculate the Gross-Up Amount. Cf. Pb37–39. Green's precise argument is unclear, but it appears to rely on Fisk Alloy's "post-arbitration brief" having "note[d] the contract provision regarding 'Gross Up,'" which she contends means that the appraiser "did exactly what Fisk agreed it should do." Db29. But the one-page excerpt of Fisk Alloy's brief she cites does not remotely support her claim that Fisk Alloy agreed that the appraiser should calculate the Gross-Up Amount. See Da11. Rather, it merely recognized that the Employment Agreement entitled her to such a payment.

More fundamentally, though, the document Green cites, Da11, was not introduced before the trial court and is therefore not part of the record and "of

no consequence on the merits of this appeal." Middle Dep't Inspection Agency v. Home Ins. Co., 154 N.J. Super. 49, 56 (App. Div. 1977). As explained in the accompanying motion to strike, basic appellate procedure limits review to the "record developed before the trial court." Davis v. Devereux Foundation, 209 N.J. 269, 330 n.8 (2012); R. 2:5-4; R. 2:6-1(a); R. 2.6-3. Green's citation in her brief and inclusion in her "appendix on appeal … documents" that were not "offered into evidence … is a clear violation of R. 2:5-4." Bergen Cnty. v. Borough of Paramus, 79 N.J. 302, 309 n.2 (1979). Fisk Alloy's arbitration brief, Da10–11, and other non-record materials, see Da99, should be stricken, see generally Mot. to Strike.

III. The Trial Court's Interest-Rate Ruling Was *Ultra Vires* and Wrong on the Merits

As Fisk Alloy explained, the trial court gravely overstepped its authority when it awarded Green interest in excess of that authorized by the Employment Agreement. Pb34–37. Green does not address why the trial court instead of the arbitrator had authority to decide the arbitrability of the interest-rate issue, nor does she contest that this dispute constitutes an arbitrable "controversy" or "dispute" "arising under" or "relating to" the Employment Agreement.

Green instead attempts to defend the court's ruling on the merits. Db42–47. Green invokes equitable considerations, contending that awarding Green the contractual rate would permit Fisk Alloy to "benefit from its wrongdoing." Db42. But it is "settled precedent [] that in the absence of fraud, accident, or mistake, a court of equity cannot change or abrogate the terms of a contract. Equitable relief cannot be claimed because a contract is oppressive,

improvident, or unprofitable, or because it produces hardship." Dunkin' Donuts of Am., Inc. v. Middletown Donut Corp., 100 N.J. 166, 183–84 (1985). Green does not contend that the rate set forth in the contract was the product of fraud or mistake, and short of that, the trial court could not disregard the parties' contract in the name of the "totality of the circumstances." That is especially so given that the Employment Agreement was executed a decade before Green's termination, when neither party knew whether the applicable midterm federal rate would favor Green or Fisk Alloy.

IV. Other Issues Raised in Green's Brief Are Meritless

The remainder of Green's brief likewise lacks merit.

1. Green contends that Fisk Alloy's appeal is barred—indeed, is "frivolous"—because it "violates N.J.S.A. 2A:23A-18." Db39; see also Db3–4, 42. But the statute on which she relies, the Alternative Procedure for Dispute Resolution Act ("APDRA"), does not apply in this case.

APDRA was intended to "create a new procedure for dispute resolution which would be an alternative to the present civil justice system and arbitration system of settling disputes" and would "provide parties with rights that are not currently available under New Jersey's Arbitration Act." Mt. Hope Dev. Associates v. Mt. Hope Waterpower Project, L.P., 154 N.J. 141, 145 (1998) (quotation marks and citation omitted). Following confirmation of an APDRA award, "[t]here shall be no further appeal or review of the judgment or decree." N.J.S.A. 2A:23A-18(b).

Green's reliance on that provision fails because the parties did not invoke APDRA. "APDRA is a voluntary procedure for alternative dispute resolution that is only operative when parties to a contract agree to be governed by it." Mt. Hope, 154 N.J. at 145. "In order for the provisions of this act to be applicable, it shall be sufficient that the parties signify their intention to resolve their dispute by reference in the agreement to 'The New Jersey Alternative Procedure for Dispute Resolution Act.'" N.J.S.A. 2A:23A-2. The Employment Agreement here makes no reference to APDRA and instead incorporates the JAMS rules. Accordingly, APDRA's appellate bar does not apply here.

2. Finally, and reluctantly, Fisk Alloy must address Green's inflammatory rhetoric. Throughout her brief, Green repeatedly deploys provocative language and *ad hominem* attacks against Fisk Alloy and its counsel. For example, Green accuses Fisk Alloy of "frequently" misstating "the record" by "using citations which do not support its assertions," Db25 n.4, but does not explain what is inaccurate about any—not one—of the 20-plus supposed misrepresentations she cites. For another example, Green accuses Fisk Alloy's counsel of "scheming and conspiring" to "cheat" her, but cites only her own counsel's certification in support of her motion to compel arbitration, which does not mention counsel and is not evidence in any event. Db5 (citing Pa26, ¶ 5). Green elsewhere caricatures entirely benign statements as malign "attempts to muddy the facts and mislead this Court." Compare Db44 n.5, with Pb12 n.6 (clarifying discrepancy between accrued interest Green requested and that which was ultimately awarded). This appeal is not Fisk Alloy's lawful defense of its rights, Green says, but rather its "relentless attempt to cheat" her with "false[] claims," Db32,

and "tortured" arguments, Db39, 42, 45, made "without shame," Db46. None of this invective is meritorious; all of it is unnecessary. This appeal is not an effort to "cheat" Green; Fisk Alloy did not seek a stay pending appeal and is paying her on the schedule set forth in the judgment. But by summarily "confirming" the Appraisal, the trial court awarded Green a substantially greater sum than that to which she is entitled under the Employment Agreement. There is nothing improper about Fisk Alloy defending its rights before this Court.

Conclusion

For the reasons discussed above and in the opening brief, this Court should vacate the trial court's final judgment and remand with instructions to grant Fisk Alloy's motion to compel arbitration and deny Green's motion to confirm the Appraisal.

Dated: April 30, 2025

Respectfully submitted,

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