New Jersey Judiciary
Superior Court - Appellate Division

Notice of Appeal

TITLE IN FULL (AS CAPTIONED BELOW)	ATTORNEY / LAW FIRM / PRO SE LITIGANT
HOLTEC INTERNATIONAL **V.** **NEW JERSEY ECONOMIC DEVELOPMENT AUTHORITY**	NAME **BLAIR R ALBOM, Esq.** STREET ADDRESS **7 TIMES SQ** CITY **NEW YORK** / STATE **NY** / ZIP **10036-6516** / PHONE NUMBER **212-833-1100** EMAIL ADDRESS **balbom@fklaw.com** **jshaw@fklaw.com (*)**

ON APPEAL FROM

TRIAL COURT JUDGE	TRIAL COURT OR STATE AGENCY	TRIAL COURT OR AGENCY NUMBER
ROBERT T. LOUGY, JSC	**MERCER**	**MER-L-000696-20**

Notice is hereby given that **NEW JERSEY ECONOMIC DEVELOPMENT AUTHORITY** appeals to the Appellate Division from a ☐ Judgment or ■ Order entered on **12/30/2021** in the ■ Civil ☐ Criminal or ☐ Family Part of the Superior Court ☐ Tax Court or from a ☐ State Agency decision entered on _____

If not appealing the entire judgment, order or agency decision, specify what parts or paragraphs are being appealed.

For criminal, quasi-criminal and juvenile actions only:

Give a concise statement of the offense and the judgment including date entered and any sentence or disposition imposed:

This appeal is from a ☐ conviction ☐ post judgment motion ☐ post-conviction relief ☐ pre-trial detention
If post-conviction relief, is it the ☐ 1st ☐ 2nd ☐ other _____ (specify)

Is defendant incarcerated? ☐ Yes ☐ No

Was bail granted or the sentence or disposition stayed? ☐ Yes ☐ No

If in custody, name the place of confinement:

Defendant was represented below by:

☐ Public Defender ☐ self ☐ private counsel _____ (specify)

(*) truncated due to space limit. Please find full information in the additional pages of the form.

Notice of appeal and attached case information statement have been served where applicable on the following:

	Name	Date of Service
Trial Court Judge	**ROBERT T. LOUGY, JSC**	**01/20/2022**
Trial Court Division Manager	**MERCER**	**01/20/2022**
Tax Court Administrator		
State Agency		
Attorney General or Attorney for other Governmental body pursuant to *R.* 2:5-1(a), (e) or (h)		

Other parties in this action:

Name and Designation	Attorney Name, Address and Telephone No.	Date of Service
HOLTEC INTERNATIONAL	**MICHAEL P O'MULLAN, Esq.** **RIKER DANZIG SCHERER HYLAND ET AL, LLP** **HEADQUARTERS PLZ** **ONE SPEEDWELL AVE** **MORRISTOWN NJ 07962-1981** **973-538-0800** **momullan@riker.com,jschroeder@riker.com,sdechoyan@riker.com**	**01/20/2022**

Attached transcript request form has been served where applicable on the following:

	Name	Date of Service
Transcript Office	**APPELLATE TRANSCRIPT OFFICE**	**01/20/2022**
Clerk of the Tax Court		
State Agency		

Exempt from submitting the transcript request form due to the following:

☐

■ Transcript in possession of attorney or pro se litigant (four copies of the transcript must be submitted along with an electronic copy).

List the date(s) of the trial or hearing:

11/08/2021	**MOTION**	**ROBERT T. LOUGY, JSC**

☐ Motion for abbreviation of transcript filed with the court or agency below. Attach copy.

☐ Motion for free transcript filed with the court below. Attach copy.

I certify that the foregoing statements are true to the best of my knowledge, information and belief. I also certify that, unless exempt, the filing fee required by *N.J.S.A.* 22A:2 has been paid.

01/20/2022	s/ **BLAIR R ALBOM, Esq.**
Date	Signature of Attorney or Pro Se Litigant

(*) truncated due to space limit. Please find full information in the additional pages of the form.

BAR ID #	**375832021**	EMAIL ADDRESS	**balbom@fklaw.com,jshaw@fklaw.com**

New Jersey Judiciary
Superior Court - Appellate Division
Notice of Appeal

Additional appellants continued below

Additional respondents continued below

Additional parties continued below

Appellant's attorney email address continued below

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PARTY NAME: HOLTEC INTERNATIONAL ATTORNEY NAME: MICHAEL P O'MULLAN, Esq.
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Additional Party's attorney email address continued below

New Jersey Judiciary
Superior Court - Appellate Division

Civil Case Information Statement

Please type or clearly print all information.

Title in Full	Trial Court or Agency Docket Number
HOLTEC INTERNATIONAL **V.** **NEW JERSEY ECONOMIC DEVELOPMENT AUTHORITY**	**MER-L-000696-20**

● Attach additional sheets as necessary for any information below.

Appellant's Attorney Email Address: **balbom@fklaw.com**
jshaw@fklaw.com (*)

☐ Plaintiff ■ Defendant ☐ Other (Specify)

Name	Client
BLAIR R ALBOM, Esq.	**NEW JERSEY ECONOMIC DEVELOPMENT AUTHORITY**

Street Address	City	State	Zip	Telephone Number
7 TIMES SQ	**NEW YORK**	**NY**	**10036-6516**	**212-833-1100**

Respondent's Attorney Email Address: **momullan@riker.com**
jschroeder@riker.com (*)

■ Plaintiff ☐ Defendant ☐ Other (Specify)

Name	Client
MICHAEL P O'MULLAN, Esq.	**HOLTEC INTERNATIONAL**

Street Address	City	State	Zip	Telephone Number
HEADQUARTERS PLZ ONE SPEEDWELL AVE	**MORRISTOWN**	**NJ**	**07962-1981**	**973-538-0800**

Give Date and Summary of Judgment, Order, or Decision Being Appealed and Attach a Copy:
Order Granting Plaintiff's Application for Summary Judgment and Denying Defendant's Motion for Summary Judgment, dated December 30, 2021

Have all the issues as to all the parties in this action, before the trial court or agency, been disposed? (There may not be any claims against any party in the trial court or agency, either in this or a consolidated action, which have not been disposed. These claims may include counterclaims, cross-claims, third-party claims, and applications for counsel fees.) ■ Yes ☐ No

If outstanding claims remain open, has the order been properly certified as final pursuant to R. 4:42-2? ☐ Yes ■ No ☐ N/A

A) If the order has been properly certified, attach copies of the order and the complaint and any other relevant pleadings to the order being appealed. Attach a brief explanation as to why the order qualified for certification pursuant to R. 4:42-2.

B) If the order has not been certified or has been improperly certified, leave to appeal must be sought. (See R. 2:2-4; 2:5-6.) Please note that an improperly certified order is not binding on the Appellate Division.

If claims remain open and/or the order has not been properly certified, you may want to consider filing a motion for leave to appeal or submitting an explanation as to why you believe the matter is final and appealable as of right.

(*) truncated due to space limit. Please find full information in the additional pages of the form.

Were any claims dismissed without prejudice? ☐ Yes ■ No

If so, explain and indicate any agreement between the parties concerning future disposition of those claims.

Is the validity of a statute, regulation, executive order, franchise or constitutional provision of this State being questioned? (*R.* 2:5-1(g)) ☐ Yes ■ No

Give a Brief Statement of the Facts and Procedural History:

In 2014, Holtec applied and was approved for a ten-year, $260 million tax incentive award under the Grow New Jersey Assistance Program, a taxpayer-funded program administered by NJEDA that incentivizes the creation and retention of jobs in the State. However, in 2019, an investigation by the Governor's Task Force on the Economic Development Authority's Tax Incentive Programs (the "Task Force") uncovered significant instances in Holtec's application in which Holtec knowingly submitted false information to NJEDA. First, the investigation revealed that Holtec had falsely stated in its application that it had not been debarred by any government agency, when in fact it had been debarred in 2010 by the Tennessee Valley Authority ("TVA") for bribing an official of that agency. Second, the investigation also revealed that Holtec had falsely represented to NJEDA that Holtec had been offered a "robust proposal" from South Carolina that included free land in Charleston, when in fact there was no such promise of free land. The Task Force ultimately made a criminal referral of the matter to the Attorney General on July 9, 2020.

The Task Force's uncovering of Holtec's misstatements in its application prompted NJEDA to ask for additional information about the TVA debarment and the facts and circum stances of the underlying misconduct, as well as the supposed offer of free land in Charleston, before NJEDA could approve the issuance of the company's pending annual credit for the 2018 tax year. Holtec failed to provide a sufficient explanation for its misstatements, and instead initiated this action.

On July 27, 2020, Holtec filed a First Amended Complaint asserting claims against NJEDA for breach of contract, breach of the duty of good faith and fair dealing, and equitable estoppel, and seeking an order compelling NJEDA to approve the issuance of the 2018 credit.

On June 24, 2020, NJEDA filed a motion to dismiss the First Amended Complaint in its entirety. On August 4, 2020, the Hon. Mary Jacobsen granted in part and denied in part the motion to dismiss, dismissing Holtec's claim for equitable estoppel but allowing its remaining claims to proceed. NJEDA answered the First Amended Complaint on August 13, 2020.

After discovery was concluded, the parties cross-moved for summary judgment on August 20, 2021. NJEDA asserted that summary judgment should be granted in its favor because, as to the breach of contract claim, Holtec's misrepresentations about the TVA debarment excused NJEDA from continuing to approve the issuance of further tax credits to Holtec, and, as to the breach of good faith and fair dealing claim, NJEDA acted in good faith when it withheld the credit. Holtec argued that it was entitled to summary judgment on its claims, asserting that it had fully performed its obligations under the incentive agreement and that its answer to the debarment question and its statements regarding free land in Charleston, South Carolina were not material misrepresentations.

On December 30, 2021, the Court denied NJEDA's motion for summary judgment, and granted Holtec's motion for summary judgment on its breach of contract claim, finding that Holtec did not materially misrepresent its prior debarment or having received an offer of free land in Charleston, South Carolina. The Court denied Holtec's application for summary judgment on its claim for breach of the duty of good faith and fair dealing, finding that the record was devoid of any evidence that NJEDA acted in bad faith by withholding approval of the 2018 tax credit, including in light of the Task Force's referral of the matter to the Attorney General. The Court ordered NJEDA to issue to Holtec a Letter of Compliance approving the issuance of the $26 million annual amount for the 2018 tax year. It denied Holtec's request for direct damages, which, inter alia, sought interest on a $26 million payment Holtec allegedly made to cover its advance sale of the 2018 tax credit to a third-party purchaser.

To the extent possible, list the proposed issues to be raised on the appeal as they will be described in appropriate point headings pursuant to *R.* 2:5-2(a)(6). (Appellant or cross-appellant only.):

The proposed issues to be raised on appeal include, but are not limited to, the following:

I. The Trial Court Erred in Granting Summary Judgment for Holtec, and Denying Summary Judgment for NJEDA, in Determining:

(*) truncated due to space limit. Please find full information in the additional pages of the form.

A. That the Asserted Ambiguity in the Application's Debarment Question Excused Holtec's Answer
B. That Holtec Did Not Misrepresent That It Had an Offer of Free Land in Charleston, South Carolina
C. That Holtec's Misrepresentations About Its Purported Offer of Free Land in Charleston, South Carolina Were Not Material
D. That Recission in This Case Would Be an Inequitable Remedy
II. The Trial Court Erred in Determining That the Doctrine of Patent Ambiguity Does Not Apply to the Interpretation of the Application's Debarment Question

If you are appealing from a judgment entered by a trial judge sitting without a jury or from an order of the trial court, complete the following:

1. Did the trial judge issue oral findings or an opinion? If so, on what date? _____ ☐ Yes ■ No
2. Did the trial judge issue written findings or an opinion? If so, on what date? **12/30/2021** ■ Yes ☐ No
3. Will the trial judge be filing a statement or an opinion pursuant to *R.* 2:5-1(b)? ☐ Yes ☐ No ■ Unknown

Caution: Before you indicate that there was neither findings nor an opinion, you should inquire of the trial judge to determine whether findings or an opinion was placed on the record out of counsel's presence or whether the judge will be filing a statement or opinion pursuant to *R.* 2:5-1(b).

Date of Your Inquiry:

1. Is there any appeal now pending or about to be brought before this court which:
   (A) Arises from substantially the same case or controversy as this appeal? ☐ Yes ■ No
   (B) Involves an issue that is substantially the same, similar or related to an issue in this appeal? ☐ Yes ■ No

If the answer to the question above is Yes, state:

Case Title	Trial Court Docket#	Party Name

2. Was there any prior appeal involving this case or controversy? ☐ Yes ■ No

If the answer to question above is Yes, state:

Case Name and Type (direct, 1st PCR, other, etc.)	Appellate Division Docket Number

Civil appeals are screened for submission to the Civil Appeals Settlement Program (CASP) to determine their potential for settlement or, in the alternative, a simplification of the issues and any other matters that may aid in the disposition or handling of the appeal. Please consider these when responding to the following question. A negative response will not necessarily rule out the scheduling of a preargument conference.

State whether you think this case may benefit from a CASP conference. ☐ Yes ■ No
Explain your answer:
The parties have explored previously the possibility of a settlement conference without success, and mediation is unlikely to bear fruit at this time.

Whether or not an opinion is approved for publication in the official court report books, the Judiciary posts all Appellate Division opinions on the Internet.

I certify that confidential personal identifiers have been redacted from documents now submitted to the court, and will be redacted from all documents submitted in the future in accordance with Rule 1:38-7(b).

NEW JERSEY ECONOMIC DEVELOPMENT AUTHORITY	**BLAIR R ALBOM, Esq.**
Name of Appellant or Respondent	Name of Counsel of Record (or your name if not represented by counsel)
01/20/2022	s/ **BLAIR R ALBOM, Esq.**
Date	Signature of Counsel of Record (or your signature if not represented by counsel)

(*) truncated due to space limit. Please find full information in the additional pages of the form.

375832021 Bar #	**balbom@fklaw.com,jshaw@fklaw.com** Email Address

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New Jersey Judiciary
Superior Court - Appellate Division
CIVIL Case Information Statement

Additional appellants continued below

Additional respondents continued below

Additional parties continued below

Appellant's attorney email address continued below

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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CIVIL PART
MERCER COUNTY
DOCKET NO.: MER-L-696-20
APP. DIV.NO.:

HOLTEC INTERNATIONAL,	:	
Plaintiff,	:	
vs.	:	TRANSCRIPT OF MOTION
NEW JERSEY ECONOMIC DEVELOPMENT AUTHORITY,	:	
Defendant.	:	

Place: Civil Courthouse

(Heard via Teams)

Date: November 8, 2021

BEFORE:

THE HONORABLE ROBERT LOUGY, J.S.C.

TRANSCRIPT ORDERED BY:

BLAIR R. ALBOM, ESQ.
(Friedman Kaplan Seiler & Adelman)

APPEARANCES:

MICHAEL P. O'MULLAN, ESQ.
CHARLES MC KENNA, ESQ.
COREY LABRUTTO, ESQ.
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RECORDING OPERATOR: THELMA GUERRIER TOUZE

I N D E X

THE COURT: Good morning. We are on the record in the matter of Holtec, International versus New Jersey Economic Development Authority, Mercer County Docket Number L-696-20.

This is Judge Lougy presiding over a remote proceeding happening via the Teams Videoconferencing platform.

The silent participant in this proceeding is the phone number ending in 7845 which is a polycom which is broadcasting this live into a courtroom where it is being recorded by the Court Smart video recording system.

So, the audio proceeding of -- the audio recording of this proceeding remains the official court record.

The Court will drop a link whereby counsel may request the audio recording of this proceeding from the Court and it just comes as a WAV file in a matter of minutes.

May I please have appearances of counsel on behalf of plaintiff.

MR. O'MULLAN: Mike O'Mullan from Riker, Danzig, Scherer, Hyland, and Perretti for plaintiff, Holtec, International and with me today is Charles McKenna and Corey Labrutto also of Riker Danzig.

THE COURT: Good morning, Mr. O'Mullan. Good morning to all counsel who are here on behalf of plaintiff. Appearances of counsel on behalf of the defendant.

MR. CORNGOLD: Good morning, Your Honor; I'm Eric Corngold from Friedman, Kaplan, Seiler, and Adelman. We represent the New Jersey Economic Development Authority and with me are Ricardo Solano, Blair Albom and Nora Bojar.

THE COURT: Good morning, Mr. Corngold and good morning to all counsel appearing on behalf of the defendant.

We are numerous months into this remote proceeding but I'll still set forth some of the ground rules just so we can proceed most efficiently.

One, if all counsel and parties who are not speaking could mute their devices, that avoids any ambient noise or other disruptions. Two, if everyone could please identify themselves by name when they begin or resume speaking, it greatly assists my court clerk as well as any eventual transcriber in ensuring at the record is complete and accurate.

And this technology facilitates nicely not speaking over one another, but I don't see that to be an issue here. This matter comes before the Court on

the parties' respective motions for summary judgment.

The Court wants to thank all counsel for the quality and completeness of their written submissions which is evident on its papers; also less evident on the papers is the professionalism and cooperation that all counsel have worked together to bring this matter to this point.

There are many cases where -- that require judicial management on things like discovery, et cetera. Here the Court wants to thank all counsel for working out all of the -- some of the issues amongst themselves and bringing this case as it stands now.

Mr. Corngold or Mr. O'Mullan, have either of you discussed the preferred order for presentation on your parties' respective applications?

MR. CORNGOLD: We haven't Your Honor.

THE COURT: Mr. O'Mullan, sir?

MR. O'MULLAN: Mike O'Mullan for plaintiffs. We haven't had a chance to discuss it but if it's -- if the Court would be in agreement we -- the plaintiff is the critical person.

THE COURT: Since you are the plaintiff, Mr. O'Mullan and you're the captain of the litigation so to speak, so I will turn it over to you. What I guess and I'll leave -- you know, listen, all counsel here are

immersed in the facts as well as the law that both parties are relying upon.

In many ways, there is -- the parties have met on common battlefield on many of the claims. So, I leave it to your professional judgments, Mr. O'Mullan, how much you want to anticipate Mr. Corngold's positions based on the substantial briefing in this matter or whether we want to say neatly in terms of plaintiff's motion for summary judgment and then turn to the defendant's motion for summary judgment.

So, we can remain a little bit fluid while maintaining the discipline that the arguments and the law requires. So, with that lengthy preamble out of the way, Mr. O'MULLAN I turn it over to you, sir.

MR. O'MULLAN: Thank you, Your Honor.

Mike O'MULLAN for plaintiff, Holtec International. Thank you again for hearing us this morning, Your Honor.

This is a case about broken promises by the EDA. In 2014, the EDA induced Holtec to make the largest private investment in Camden's history. More than $260 million in exchange for the promise of tax credits over ten years.

There was no doubt that without that promise, the tax credits, Holtec would have built outside of New

Jersey. As promised, Holtec spent more than $260 million to build a manufacturing and technology campus and to deliver hundreds of high-paying jobs to the poorest community in New Jersey.

The EDA delivered Holtec's tax credits for 2017, but after a change in the administration, the EDA has flatly refused to deliver any more tax credits. I'm sorry, the EDA has flatly refused to deliver any more tax credits, that's $26 million a year for 2018, 2019, 2020, and counting.

Under the new administration, the EDA is depriving Holtec the benefit of its promised tax credits by asserting post comp rationalizations that don't hold up and ignoring Holtec's performance and the EDA's heighten equitable obligation as a government agency to honor its contract in terms where enforced.

The EDA's excuse has failed and we ask the Court to find that the EDA breached its contract and implied covenant of good faith and fair dealing.

Holtec has three main points. First, there is no dispute that Holtec delivered on its promise to make the capital investment and deliver the jobs, but the EDA has failed to deliver on its promises to determine the tax credits. That's undisputed.

Second, the EDA's 2014 application failed to

ask the clear question about Holtec's prior public and breach, 2010 EDA (indiscernible).

Instead, the EDA knew that the application was ambiguous but it waited two years until 2016 to amend the question. So, there's's no misrepresentation here and if it had asked the clear question, it wouldn't have mattered.

The EDA never disqualified anyone for debarment or misrepresentation in its application. And the EDA's own senior legislative officer who had reviewed 250 applications testified that no litigation short of debt had ever led an EDA to disqualify now.

Third, with respect to the South Carolina alternate site, in 2014 the EDA's underwriter's expressly declined to require any binding offer from another state because they didn't want to push Holtec to that other state.

That was a strategic choice they made. Instead, the EDA knew that Holtec's assertions about free land was an assumption and its cost benefit anaylsis based on discussions and reflected Holtec's best estimate of the land costs and nothing in the record shows that Holtec's assumption is not true.

In fact, Dr. Singh testified that South Carolina had offered freely and again, it wouldn't have

mattered because regardless of the ultimate cost of the land, the estimated cost to build and maintain in other states were more than $100 million cheaper than in New Jersey.

So admodum, Holtec did exactly what the incentive agreement required. It made its investment and it delivered its jobs and now the EDA shouldn't be heard to break its promise under the former administration and ignore technical obligations to turn square corners by reneging on the agreement after its reaped the benefit of Holtec's performance.

Instead, we ask the Court to grant summary judgment specifically enforcing the tax credit contract and ordering direct damages.

The first point, Your Honor, is that there is no dispute here that Holtec lived up to its promise and EDA did not. Well, we'll unpack that a little bit.

In 2014, the EDA sought to reduce Holtec to make that investment in Camden and it succeeded. It achieved that goal. Without the tax credits, Holtec would have billed outside of New Jersey and the EDA was even willing to offer more but the parties had ultimately agreed on $260 million.

As promised, Holtec spent more than $260 million to build a manufacturing and technology site in

New Jersey's poorest community. This isn't one of those tax credit deals where an applicant signs a lease for some office space somewhere in New Jersey.

Holtec built an manufacturing center in Camden where they actually make things. They built it on a site that was previously industrial waste, it's a permanent investment in Camden.

The EDA's witnesses testified about that site. They said Holtec transformed a dilapidated industrial dump into a world class manufacturing facility. They described the facility as amazing; something that Camden had never seen before as an impressive facility.

They fully accepted the manufacturing site under the incentive agreement as fully satisfying the capital investment. Holtec also fully satisfied the jobs requirement.

What does that mean? That 400 jobs in 2018 and its hundreds of construction jobs during the construction phase and that's undisputed. There is also no dispute that in time, the EDA touted Holtec as a success and nominated it for awards.

The EDA's former president Lazura, testified that he believed the EDA's job was to bring large developments in.

Mr. Lazura testified that projects like Holtec's were part of the reason for the Economic Oportunity Act of 2013 and under his tenure, Holtec was a successful, but the new administration doesn't share that view.

The EDA also knew and approved Holtec's sale of tax credits after the construction phase. From the beginning, the EDA knew that if the tax credits were going to have any value for Holtec they needed to modify it, we needed to sell them, because Holtec couldn't use them all on their own.

After Holtec made the investment and built the facility, the EDA approved Holtec's sale tax credits and the EDA now knows that every March 1st, Holtec is required to either deliver the promised tax credits to its counter party or pay $26 million every March 1st out of its pocket.

So, the EDA knows that there's an ongoing down the cappings to hold that. The EDA also continues to accept thousands of dollars in fees from Holtec each year, but it doesn't provide any tax credits.

The EDA did deliver the tax credits in 2017 but has stopped since the change in administration. That's a lot of money, Judge, especially when coupled with the $26 million out-of-pocket costs every March

1st.

But this is about more than money. With every passing day, Holtec is subjected to speculation and a cloud of uncertainty. Its business and reputation are called into question, it's been years and time is of the essence.

Then all the while the EDA reached the benefits of Holtec's bargain. As promised, there's an amazing technology facility and manufacturing campus in Camden and 400 jobs.

But for three years, the EDA has consistently ignored its obligations to fairness and contractual dealings and has failed to turn square corners.

The EDA's misconduct isn't just bad for Holtec, it's bad for New Jersey and it's bad for any applicant that considers doing business with New Jersey or the EDA.

We ask the Court to make them stop. So, the EDA has refused to honor its promises based on Holtec's -- on EDA's contention that in the 2014 application Holtec made misrepresentations.

That's not true and the EDA's affirmative defense has failed, I want to turn to those now.

First, the EDA's first excuse, the first offense that Holtec made a misrepresentation about the

brief public 2010 TVA debarment in its 2014 application. That's wrong.

But for the EDA to prevail, it has to show that Holtec made a material misrepresentation regarding debarment. Holtec can't -- EDA rather, can't make that showing.

First, the EDA's application was unclear and ambiguous. We'll talk about that in a minute. Second, the EDA knew that it was ambiguous but chose to do nothing and waited until 2016 to revise the question.

And the EDA as a government agency can't use its own quarterly drafted application form as a basis to withhold a quarter of a million dollars in tax credits.

If the words of the application failed to ask a fair question about debarment, there can be no misrepresentation. That's a legal issue for the Court.

In our papers we've outlined the law. First, that ambiguous application form should be construed against the drafter, that's the EDA. Second, that equitable principles will be applied against the public body where justice and fairness dictate that course; and third, that New Jersey's -- New Jersey Law affords a forfeiture and its rules of construction will be strictly construed to avoid such a result.

That brings us to the text of the application. As drafted by the EDA, the 2014 application didn't ask any clear question that call for disclosure of Holtec's brief prior 2010 TVA debarment.

In 2010, Holtec had been briefly debarred by the TVA for a matter of days, but in 2014 the debarment was over. When Holtec submitted the application, Holtec was not subject to debarment.

In fact, Holtec had been fully restored and was doing business with the TVA as they are today.

Your Honor, because this issue, the language of the application is important, I would like to ask permission to put that up on the screen.

THE COURT: Mr. Corngold, any objection, sir?

MR. CORNGOLD: No, Your Honor.

THE COURT: Thank you so much. So, Mr. O'Mullan, you're challenging my technical capabilities but give me one moment to make you a --

MR. O'MULLAN: Your Honor, sir --

THE COURT: I mean, you'll be able to share your screen. Okay, sir?

MR. O'MULLAN: Yes, Your Honor. I would ask if you could make Corey Labrutto the presenter.

THE COURT: That was going to be my next question as soon as -- who is your expert on that side.

So, Corey Labrutto, sir?

MR. LABRUTTO: Yes.

MR. O'MULLAN: Because we are certainly far more challenged, Your Honor, than you are.

THE COURT: Always happy to facilitate.

Okay. So, Mr. -- I'm sorry, Mr. or Mrs. Labrutto now has the capacity to share a screen.

MR. O'MULLAN: So, Your Honor, what we've placed on the screen on the left-hand side is a portion of the language from the 2014 application. It's set forth in Holtec's Exhibit 10 and this is the language of the 2014 application as Holtec saw it.

In the additional background information section at the back of the application, it contains these words and we've highlighted in yellow the important words we think, Your Honor, it asks applicants are required to answer the following background questions and it continues and what followed was a list of 11 subparts and item eight is the one that we're concerned with today because it simply says, "Debarment by any department, agency, or instrumentality of the State or Federal government."

So, that was what they worked -- that was what was presented to them and despite the fact that the introductory language talks about a background

question, this isn't even in a question in and of itself.

In fact, it doesn't provide anything about an applicable time period or ask any fair question. It did not ask, "Has applicant ever been subject to debarment?"

It did not ask whether the applicant had been subject to debarment in the past five years. It did not ask as others had asked Holtec, "At any time during the past five years has your company been debarred, suspended, or proposed for debarment?"

That question was asked of Holtec by a counter party in 2013 and Holtec answered that question yes. It freely disclosed the 2013 in response to that question, the 2010 debarment.

That question is set forth at Exhibit 20 -- Holtec's Exhibit 24. And five, Your Honor, Item 8 itself most clearly asks whether the applicant is currently subject to debarment.

We submit that the EDA knew that flaw and set about to fix it. And if you look at the right-hand side of the slide, that's a portion of a post 26 application that's found at Holtec Exhibit 26 and it contains some additional words that are highlighted in yellow that were added. Has applicant, any officers,

or directors of applicant, any affiliates, collectively the control group, the control group been found guilty, liable or responsible in a legal proceeding for any of the following violations or conduct," and it continues.

The EDA added that language in 2016. It asks that actual question in 2016. That was the question that was missing in 2014. That was the flaw in the application.

That was the ambiguity. In short, the EDA's application to Holtec in 2014 was unfair because it was missing the question. At best, it was acceptable to multiple interpretations and it could have been answered yes or no.

The EDA was aware that the question was ambiguous and we point to that in our brief; most specifically in Exhibit 25 is an example of a 2013 applicant who responded to the application by pointing out that items one through ten or not worded as questions; specifically, the point that we raised and they had to add their own additional words to respond.

So there can be no dispute that the EDA knew that the application was flawed and lack a clear question and they failed to take action until 2016.

And it's the 2016 application that asks a more clear question. Nor in this case, Your Honor, is

there a shred of evidence to support any theory that Holtec intentionally sought to hide the brief 2010 debarment.

It was a matter of public record. It was easily accessible from a simple internet search. It was impossible to hide and it would have been a good folly to try.

Holtec had previously answered yes when it was asked a clear question in Exhibit 25 that we looked at earlier and Holtec specifically authorized the Attorney General's Office in connection with the application to perform a background search and share it with the EDA.

Both Dr. Singh, the CEO of Holtec, and Mr. Abraczinkas who are the -- who was the vice president responsible for filing the application and testified that there was never an intent to deceive anyone.

And even the EDA's current president said the EDA should have caught it. He said in an email quote, "I think we have to own the miss on the debarment question, we clearly should have caught that." That's Exhibit 18.

Admodum, none of that matters because in 2014 the -- the question he asked wasn't clear so there is no misrepresentation.

Rather than discuss the flawed application, the EDA points to the flawed OIG report in an attempt to smear Holtec. But the OIG report is nothing more than untested allegations that Holtec denies.

Holtec asserts admodum that the application was ambiguous, that the OIG report is irrelevant, Holtec has also pointed out it in its papers that the OIG report itself is inadmissible hearsay, it's not admissible on summary judgment and it's not admissible for the truth of the matter asserted.

Holtec denies those allegations (indiscernible). But even if the EDA had asked a fair question it wouldn't have mattered. So, in addition to not being able to show the misrepresentation, the EDA also cannot demonstrate either that any misrepresentation was material or justifiably relied on.

In order to excuse that performance, they've got to show those things and they can't. First, the EDA concedes that it never disqualified anyone for debarment or misrepresentation in its application.

As I mentioned before, the senior legislative officer for the EDA who had reviewed 250 applications and wrote 25 memos to the board, testified that disqualification required a serious legal outlier and

that no litigation short of death had met that requirement in his experience.

That same officer also testified that some applicants answered no to legal background questions or failed to initiate disclosed matters that required disclosure and it was not unusual for the EDA to independently discovery legal information that was not disclosed.

But the EDA never asserted the failure to disclose as a basis to disqualify in a memorandum to the board. None of the EDA's legal memos to the board cited that and when you look at the track record that's established in the legal memos that the EDA submitted to the Board, it shows that regardless of how egregious the underlying conduct was, the applicant was always approved safe for one example -- an applicant was suspended in a matter involving multiple deaths.

So, I point Your Honor to some of the evidence that we pointed -- that we included in the record. For example, Exhibit 63 is an EDA memo in which the EDA did not seek to disqualify an applicant where it's appropriate parent and affiliate had pled guilty to criminal violations paying millions of dollars in bribes, various officials in Argentina, Venezuela and Bangladesh in connection with the UN Oil

for Food Program.

They had agreed to an SEC consent agreement -- consent order that we could be ineligible under the related UN procurement program and the World Bank Bid Program and they had paid $1.6 billion dollars in fines, penalties, and disgorgement, but their Grow application was approved.

Exhibit 65 is another applicant who the EDA did not seek to disqualify. That applicant pled guilty to felony conspiracies to fix prices crime and was subsequently debarred by the Air Force. But that applicant was approved.

So, even criminal guilty pleas plus a debarment didn't require disclosure -- didn't require disqualification.

Exhibit 66 and 67 are two -- are two related memos relating to a bank applicant who first pled guilty to felony price fixing and then a short time later in a subsequent memo was fined $355 million by the European Commission for collusion to fix a different derivative rate. That's a repeated antitrust violations by the same applicant and it didn't matter.

Exhibit 68 is a telling lengthy list of extensive violations by that same applicant. Those applicants included or those violations included

regulatory violations, investigations, and settlements, and they weren't even presented to the Board.

That applicant received the tax credits and the list goes on.

Finding even where owners of the applicants were actually convicted of pleading guilty to crimes, the EDA declined to disqualify them. That's Exhibit 82.

One applicant, the sole owner was twice convicted of unlawful gambling but not disqualified. Exhibit 83, another application whose owner was -- had personally pled guilty to federal tax evasion and filed a false return resulting in a prison term was not disqualified.

So, this track record would demonstrate beyond dispute that Holtec's brief public debarment was not a seriously live wire warranting disqualification.

In our papers we've added extensive cites to those same legal memoranda that point out the various mitigating factors the EDA applied in the disqualification analysis with respect to others and we just point Your Honor to that.

But admodum, EDA cannot credibility show that Holtec TVA debarment is material and would have rendered Holtec ineligible where other applicants were

found to have violated much more egregious -- on much more egregious facts.

Turning to the South Carolina issues with respect to South Carolina, Holtec did not misrepresent its discussions with South Carolina. Instead, the EDA knew that Holtec had discussions with South Carolina, but not a binding offer.

Nothing in the record shows that Holtec's assumptions about South Carolina land costs were not true. Accordingly, the EDA shouldn't be heard to second-guess their review after Holtec had spent $260 million in choosing Camden.

There is nothing in the record, Your Honor, showing that Holtec's discussions about free land from South Carolina weren't correct.

They go back to at least 2011 and include discussions about the building and manufacturing site in South Carolina. They involve the senior members of the Department of Commerce and the governor.

Dr. Singh testified, it's in the record, at Exhibit 29, they offered me free land, free all kinds of things, Governor Haley was hell bent on bringing Holtec to South Carolina, she made all kinds of promises.

He further testified I believe we had an

informal offer of land and a lot of other things. Holtec had discussed and provided quote unquote room and board by which they meant free land with South Carolina reps.

The EDA knew that Holtec estimates about free land was an expressed assumption and cost benefit analysis. It wasn't based on a binding agreement and Your Honor, the cost benefits analysis is key to understanding these disclosures.

With Your Honor's permission I would like to put up on the screen Exhibit 51. On this Exhibit 51 which is a copy of Holtec's June 25, 2014 Cost Benefits Analysis.

THE COURT: Mr. Corngold, any objection, sir?

MR. CORNGOLD: No objection, Your Honor.

THE COURT: Thank you so much, Mr. Corngold.

Mr. O'Mullan, do you have the -- the technical capacity remains unchanged.

MR. O'MULLAN: Thank you, Your Honor. Corey, if you could put up Exhibit 51.

So, Exhibit 51 is an example of the June 25, 2014 Cost Benefits Analysis that was submitted by Holtec to the EDA in connection with their applications.

The top portion of this that we're looking at

right now is a comparison of estimated costs to build the building in New Jersey versus South Carolina. This says Savannah River Charleston, South Carolina. Then it calculates the differences across.

So one time upfront cost at the top and then ongoing annual cost differences at the bottom, I want to focus on the bottom portion of this exhibit, if you would scroll down Cory.

The bottom portion here under the heading, "Assumptions," then list the various assumptions that are tied to the estimated costs that are above and number three is the one I want to point you to, Your Honor.

It first relates to land acquisitions costs in Camden and then at the end says, "We will not have to pay for land in our South Carolina alternative as shown in this analysis."

That was expressly identified as an assumption in the Cost Benefits Analysis as the basis for that estimated cost above.

So, understanding the context in which the estimated land cost was made comes back to this document.

The assumption of free land --

THE COURT: I'm sorry. I mean, number three,

there was no support requested. Did the EDA ask for any basis for the assumptions built into items nine, ten, or eleven with respect to building maintenance cost, electricity costs, or payroll costs?

MR. O'MULLAN: There was back and forth with the EDA over this -- the Cost Benefits Analysis over a series of months. This is a revised version that was submitted in June. There was an eearlir one submitted with the initial application.

And so there was back and forth over a series of these terms and I think what's clear from that is the EDA was aware of that with respect to the delay in cost, the particulars that these were all -- that these were all estimates of land costs and the costs of building facilities.

Nobody was under the impression that the -- that there was a contract to build in South Carolina for example. No one was under the assumption that they had a quote from, you know, the utility company about what the maintenance costs. These were estimates and i think that's an important point.

And in the assumption. And in the assumption section it reflects what those, you know, what was underlying those estimates.

You can take ethat down, Cory. And, Your

Honor, that assumption about free land is just that, it's their best estimate of what South Carolina would ahve provided. The EDA knew that these statements were based on discussions. They were -- they did not ask for a binding written offer.

They didn't ask for a binding written offer because they didn't want to make Holtec go back to South Carolina and cozy up to them to get a better offer from them.

That was a strategic choice and that's important. In 2014, the EDA knew that Holtec was making estimates about what developments might cost and there's law in our papers about estimates of future events as possibilities, you know, can't be the basis for a flawed plan.

So, at this -- there can be admodum no misrepresentation about those land costs. And in any event the South Carolina costs wouldn't have made any difference.

The EDA can't contest that building and operating in South Carolina were substantially cheaper than the alternative to New Jersey. That's true regardless of the ultimate cost of land.

Again, you know, the key here is the Cost Benefits Analysis, so I would ask Cory to pull that

back up again and I want to focus on the top part here.

What the Cost Benefits Analysis is presenting, as I said, it's estimated costs based assumptions.

The middle two columns that are highlighted show estimated costs of building in Camden versus estimated costs to building in either Charleston or Savannah River, South Carolina.

The columns on the left-hand side talk about one time upfront costs likely in acquisitions costs which we talked about and there it shows, you know, the estimated cost of the land in New Jersey was $8 million.

The estimated cost for land in South Carolina was zero based on the assumptions below and to the right and the cost difference it calculates an $8 million difference in price.

But if you look at the other things that are part of those one time upfront costs, building construction costs are highlighted as well.

In New Jersey, they were projected to be $161 million. In South Carolina, they were projected to be only $60 million, the difference in the right-hand column is $101 million.

And that's true with respect to the other

items that are there, these other one-time costs. Total at the bottom of that column, $109 and a half million. Estimated difference in cost to build in Camden versus South Carolina.

And as you scroll down further, the next portion of that is ongoing annual costs, what was it going to cost on an annual basis to run the facility and so it includes things like payroll costs and cost of utilities, highlighting just the annual payroll costs is selected as well.

In New Jersey, it's estimated that payroll was going to cost $22 and a half million, in South Carolina only $15.75 million dollars and so if you look at the right-hand columnn, the annual operating costs were estimated to be $7.1 million cheaper every year in South Carolina.

And then what's below that on the Cost Benefits Analysis is the estimated or the net present value of those differences pushed out over ten years, the ten-year grant term and the difference is $162.2 million over ten years.

Over 15 years, it's $179 million. And what that demonstrates is the de minimis nature of those land costs over the cost of this development.

Again, these are projections, but based on

those projections, South Carolina was going to be somewhere between 162 and $179 million cheaper. That's critical.

And both Mr. Lizura and the underwriter, Mr. McCullough, testified that land costs would not have changed EDA's analysis and this makes exactly clear why that is.

The EDA also admits that the amount of the cost difference, whether it's $162 million or $179 million, doesn't matter. It's not relevant under the material factor test.

And in this case, they're way over a $100 million in any event. That should be the end of the inquiry.

Finally, Your Honor, under the material factor test, for buildings in, you know, Camden, projects in Camden, an alternative wasn't even a requirement and so that's just another reason why these building cost differences wouldn't matter.

Admodum, the South Carolina estimated costs were substantially less expensive than New Jersey regardless of the cost of the land and both the Cost Benefits Analysis and the EDA's witnesses show that the land costs would not have changed their analysis.

Admodum, Your Honor said at the outset this

is a case about the EDA's broken promises. Admodum Holtec did exactly what the incentive agreement required. It made a $260 million capital investment in Camden. It delivered hundreds of jobs, now the EDA shouldn't be able to break its promise after that project is completed and after it's received the benefit of the bargain.

We respectfully as the Court to grant summary judgment and deny EDA's motion; specifically enforcing the delivery of tax credits and awarding direct damages. Thank you.

THE COURT: Thank you so much, Mr. O'Mullan and I appreciate that and I guess why don't I turn it over to Mr. Corngold and certainly give you an opportunity to come back and I'll likely have questions for you after giving Mr. Corngold an opportunity to be heard.

Thank you so much, Mr. O'Mullan.

MR. O'MULLAN: I appreciate it.

THE COURT: And just to have -- I will just restore Mr. or Ms. Labrutto to participate, and we'll certainly change that back in the event that there are any further demonstratives from Mr. O'Mullan. Thank you so much, sir.

Mr. Corngold, sir.

MR. CORNGOLD: Thank you, Your Honor. This is Eric Corngold for the New Jersey Economic Development Authority.

The -- we believe that after the extensive briefings that the Court has that the Court should grant summary judgment for the defendant; that there is just no additional fact finding that needs to be done; that there is really no genuine issue to any material fact.

Let me just start by talking about the first point that Mr. O'Mullan made that Holtec built its plant in Camden and so that should require the EDA to give this $260 million of tax credit.

The premise of that argument is that it's okay to lie to get the tax credit; that as long as they built the plant the way that they were able to get the tax credit, the lies that which we'll talk about they made to get the credits are irrelevant but that's just not what the law is.

This is a self-reporting regime that the evidence is clear that the EDA relies on the trustworthiness and the truthfulness of applicants.

In fact, when Dr. Singh signed the application, he signed a statement that said I understand that submitting false information or

submitting materially inaccurate information may be grounds for denial, revocation, or termination of the tax credit.

That's the regime that we're in. That's the expressed agreement that Holtec entered into with the EDA and so the facts that Holtec built this plant, we don't need to talk about whether the benefit to Camden or not.

The question is one, did Holtec make misrepresentations and we think the evidence is clear and undisputed that it did and two, were those misrepresentations material and we'll show that under the law they clearly -- they clearly were and that's what our briefings are to.

In the face of that, the law is clear that the contract then is properly voidable by the New Jersey Economic Development Authority and the Whale case that we cite from the New Jersey Supreme Court is really directly on point where the Court granted summary judgment and granted a rescission on summary judgment because the applicant there, a rabbi, has lied on that application. I'll talk more about the Whale case a little later.

So the contract is voidable by the EDA. Second the misrepresentations are -- constitute a

material breach by Holtec excusing the EDA from any further contractual performance and third, the misrepresentation constitutes what's defined in the incentive agreement as an event of default.

And the parties in the contract, in the incentive agreement, expressly contracted that an event of default entitled the New Jersey Economic Development Authority at its sole discretion, that's the term in the contract, to suspend or cancel the whole contract.

So, let's start first and talk about the debarment and the answer to the debarment question and whether that constitutes a misrepresentation.

There is no dispute that the Holtec answered no, said no to the debarment question. Holtec tried to argue that the answer wasn't really incorrect but and this is really central, before Holtec commenced this lawsuit, Holtec made an unambiguous admission that the no answer was and the quote is incorrect.

In the company's letter to the EDA on May 20th, 2019, Holtec stated expressly and without caveat that quote, "The answer was incorrect." That's really the -- in a way, that's the end of the argument.

Holtec didn't offer at that time or advance now post hac justifications that the answer was truthful or that the question was ambiguous or that the

company at the time had answered the question in 2014 didn't understand it.

Holtec said the answer was incorrect and importantly, that admission by the company was made by one of the attorneys who assisted the company in the preparation and submission of the 2014 application.

If anyone would have known that the company, it would have known if the company didn't understand the debarment question or thought it was giving a correct answer or that the question was ambiguous it would be that attorney.

But no, that attorney on behalf of the company and the company is responsible for that admission, the company answers, says the answer is incorrect.

It's worth noting by the way, to understand Holtec's intent to trick the EDA. That even in this letter in this May 2019 letter, where Holtec purports to be trying to correct what it inadvertence is going to say Holtec is still trying to mislead the EDA and underplay the conduct that led to the debarment.

In that letter, in a submission, Holtec says that the money, the bribe to the TVA employee, came from a -- what they call a subcontractor of Holtec and Holtec states several years following this incident the

subcontractor was acquired by Holtec trying to suggest that Holtec really had no connection to this payment other than being a subcontractor.

What Holtec doesn't say in this letter is that the subcontractor, U.S. Tool and Dye, was actually owned by Dr. Singh and several of his companies; that Dr. Singh owned a controlling interest in U.S. Tool and Dye and owned it by 1996. That's not in dispute. The evidence is clear and the EDA doesn't deny that.

The testimony from Mr. Bongrazio, Holtec's CFO at the time was that Dr. Singh used that structure to hide the fact that he owned U.S. Tool and Dye.

And Holtec's continuing to try to mislead and discount its misconduct whnich led to the department even in Holtec's complaint it continues this misleading statement.

Now, Holtec may argue well, it's true that the U.S. Tool and Dye was a subcontractor. But that's not enough. In Section 5 of the incentive agreement, the parties agree that misrepresentations included that Holtec could not omit, that quote, could not omit to state a material fact necessary to make the statement contained therein not misleading or incomplete and that's clearly what this is; by not saying that U.S. Tool and Dye was actually owned by Mr. Singh when it

came paid this bribe. That's a statement that would be necessary to make these claims not misleading or incomplete.

So, we've got this admission that the answer was incorrect and against that, Holtec offers nothing, Holtec offers no evidence that at the time it answered the debarment question in 2014, it was confused by the question or thought that it was unclear or ambiguous.

It's got some self-serving testimony from Dr. Singh and Mr. Oneid that today in the middle of this litigation they now think that the question was ambiguous, but their opinion about what they think today in the midst of this litigation are legally irrelevant.

There is simply no evidence that Holtec in 2014 when it answered the question thought it was answering correctly, thought the question was misleading.

And Mr. Oneid, Holtec's COO, can't even stick to the story in his deposition, for the whole deposition. In that deposition, he testified and this is a quote, "And to this day, I'm flabbergasted that it was answered that way. As soon as I was made aware of it, I wanted to make sure that it was answered correctly."

Holtec has an admission in 2019 that the question was incorrect. Mr. Oneid says that he was flabbergasted it was answered incorrectly and he wanted to make sure it was answered correctly.

Really, in all of the extensive discovery that was done, the only evidence that Holtec's actual thinking in 2014 about the department question came from testimony from Mr. Bongrazio, Holtec's then CFO who testified that before the application was submitted he actually reviewed some of the financial materials and he saw the answer to the debarment question. He saw that that answer was going to be no in 2014.

And this was his testimony. He said quote, "And I know about the TVA thing, you know, I said how could we be -- how could we be answering this question no? So, I called Marty Davos and he said he would talk to our attorney and I guess he never answered me how I should answer but I heard later that it was answered no, I guess, no. Whatever. And I was surprised by that."

That's the only testimony about what took place in 2014. The Court can infer what took place because the lawyer who helped on the application in 2019 said the answer was incorrect.

But that's all there is. Now, Holtec tries

to argue and puts this on the screen and God knows I don't have the capability of doing that so I'm not going to try, Holtec said that the question is ambiguous.

But when you look at the question, when you look at the context, that's just not the case. The questionnaire identifies the items of question, the questionnaire is clearly asking for historic information that's the context of all of the companies, the accompanying questions that Holtec did not put up on the board and you can use those questions to infer what was meant.

And the -- the question there includes a requirement that if an answer to any of the questions was affirmative, it asks for back up information about pending or concluded matters.

That's clearly talking about historical matters. The -- now Mr. O'Mullan says look, the question, the EDA thought the question was ambiguous and so amended its application and showed the amended application that Mr. O'Mullan said fixes the problem.

But Holtec has a problem with that because as is in the record, and we show in our briefs and in the accompanying material, in 2019, Holtec submitted an amended application for this -- amended this

application for this tax credit.

Dr. Singh again signed the same certificate and with this question, the new version of the question that Mr. O'Mullan says fixed the problem, Holtec answered again, no.

Now, Mr. O'Mullan and Holtec argue well, this would have been easily found and the EDA should have found this with a simple internet search.

But again, that's not what the case law is. It would be -- the Court in the Whale case makes that clear in footnote one it says, "One who engaged in fraud, however, may not urge that one's victim should have been more circumspect or astute."

The law in New Jersey doesn't put that on the EDA. Holtec lied and whether the EDA should have found that or not, could have found that or not, is really irrelevant. That's not what the case law is. That's not what the New Jersey Supreme Court accepts as case law.

So the Court looks like it's about to ask a question.

THE COURT: I mean, I think and I think it's not in the reply either, well, either in the reply or opposition and there were lots of papers so I don't want to attribute the sentence to the wrong paper by

each party, doesn't Holtec say that wasn't the point of how easy it was to be -- for this question to be found rather we would have misrepresented such an easily verifiable fact on purpose.

I thought that's kind of where they -- where Holtec pivoted on the EDA could have easily found it so therefore why would we -- and where we disclosed it in the past, why would we seek to conceal it here?

MR. CORNGOLD: Well, you know, I guess I could say a couple of things about that. First, you know, you know, my muscle memory is as a prosecutor and I would say that's the argument that you always here it takes from a defendant, oh, how could -- the fraud would have been so easily determinable, they couldn't have intended to commit the fraud.

That's just not what the standard is and that's not evidence about their intent and even more importantly going back to what I said earlier, the Holtec is still trying to underplay the conduct that led to its misconduct.

The statements about U.S. Tool and Dye are really just a clear example of what Holtec is trying to do. So, this idea that oh, Holtec wouldn't have lied because the EDA would have easily found it, there is no evidence by the way.

There is no internet search that was done. We don't know the speculation about how easily it would have been -- it would have been determined. One of their witnesses, one of their employees, Mr. Davos says he didn't even know about the debarment until 2019.

So, even if people at the company didn't know, I wonder how -- what the evidence is about how easily it was found. But that's just not the standard as we said.

So, we think the evidence is clear that there was -- that this was a mis -- that these were misstatements and intentional misstatements.

The question is whether the misrepresentation about the debarment were material. Holtec tries to argue and it uses the examples of these other companies that I'll talk about in a minute, that the EDA has to show that it would have rejected the tax credit if Holtec had answered correctly.

But that's not the standard in New Jersey. The standard isn't the retrospective look back. The New Jersey Supreme Court in the Longabardi (phonetic) case from 1990, makes that clear.

The Court says that a misrepresentation is material if a reasonable party quote, "Would have considered the misrepresented fact relevant to its

concern and important in determining its course of action." Was it relevant to the EDA's concerns? Does the statement of contract which the New Jersey has adopted says the same thing and I'll read the language though it's got so many double and triple negatives, it's hard to really follow but it says it's not even necessary that the recipient of the misrepresentation would not have acted as he did had he not relied on this assertion.

The New Jersey Supreme Court says it better. The question is --

THE COURT: Mr. Corngold, the next sentence says it is enough that the manifestation substantially contributed and we'll both avoid the gender language, to its decision to make the contract.

(Change in transcribers)

MR. CORNGOLD: Yes, that's -- that's right and that's what Longobardi -- that's what Longobardi wants to ask. What Longobardi wants to ask is, what's the relevant fact? Was it something that the EDA could properly be considered? We don't know and there's no testimony about what the EDA board would have done or not have done in light of had they known about the debarment. And importantly, and Mr. O'Mullan ignores this, had they known that the -- that Holtec lied about

the debarment and was continually trying to mislead about the debarment, you know, in a self-reporting regime. That's crucial. We're talking about a relationship that's going on for more than a decade where the EDA is relying on year by year Holtec's truthful submissions. The EDA needs the counterparty that's telling the truth and they weren't telling the truth.

So the Longobardi standard, the relevant standard, even if you want to impose that, you know, it's got to be really relevant, it's got to be very relevant, is clearly met here. That's the question, whether it's relevant. And under the EDA statute and its regulations, this debarment is of course relevant to the EDA's decision-making. Regulation 19:30-2.2 says that debarment by another entity could be the basis for a disqualification. And the reg also says disqualification could be warranted where there was, quote, "The commission of an offense indicating a lack of business integrity and violation of any law which may bear upon a lack of responsibility or moral integrity."

I'd ask the Court to keep that language in mind. It's hard to keep it in mind given everything we're saying, but it's literally in the brief there.

That's what Mr. Saldudi (phonetic), the EDA executive who was responsible for considering these issues, testified about, that the reg by its terms says that this debarment would be relevant, because look at what the TVA's conclusion was.

In the October 12th, 2020 Notice of Proposed Debarment the OIG for the TVA says, "The adequate evidence that you," and this was addressed to Dr. Singh, "that you and Holtec unethically and improperly influenced the former TVA employee and that during the OIG's investigation of that matter you, at a minimum, misrepresented facts to the OIG personnel." And now this is the phrase that's really important, "TVA believed that the OIG reports and the plea agreement," that's the plea agreement where the employee pleaded guilty and the U.S. Attorney's Office asserted in full caps (indiscernible), the OIG reports and the plea agreement indicate a lack of business integrity or business honesty that seriously and directly effects the present responsibility of -- it's exactly the same language that the regulation requires the EDA to consider. Of course that's relevant to the EDA's determination.

And Holtec wants to downplay the conduct that led to the debarment, but the -- and wants -- let me

just say for a minute -- let me talk for a minute about this hearsay question that Holtec says, "Well, you can't really look at the TVA's findings because they're hearsay." That's, of course, not what we're asking the Court to do with those findings. We're not offering the TVA findings for their truth. We're not asking the Court to decide if Dr. Singh directly caused this bribe to be paid, trying to obstruct the investigation, trying to tamper with a witness, because that's what the evidence amply proves.

We are asking the Court -- we're -- this is relevant because those facts are saying that the EDA properly can consider in making its determination, again, go to the EDA's regulation, 19:30-23. The EDA can disqualify a company, quote, "Based entirely on the record of facts obtained by the original debarring agency or upon a combination of said facts and additional facts."

So the EDA is not bound by these rules of hearsay. The EDA -- then there's -- there's the -- in the joint statement of facts the EDA and Holtec agree that had Holtec answered yeah, the EDA would've asked for additional information, would've asked for the facts about the underlying debarment. That's, of course, what they did in all of the examples that

Holtec cites for these other companies. So they would have gotten -- they would have asked -- and you said speculation. I say the Court doesn't need the speculation, but had they -- had they gotten all these materials, they could have relied on them. And, again, what they show is that these bribes were paid of more than $50,000. And that's to a company, by the way, called Krohm, K-R-O-H-M, that the -- that at least the evidence that the TVA determined was named by using Dr. Singh's name, Kris Singh, and Mr. Simon's name, John, K-R-O-H-M. It sort of beguiles the imagination. I think that's a coincidence, but the payment at a company that was created with that name was made through a company that Dr. Singh controlled.

And in the way Dr. Singh acted in the investigation also goes straight to business -- in October 20 -- on October 12th, 2006 the OIG interviews Dr. Singh. And on that same day Dr. Singh called U.S. Glue and Dye (phonetic) president who had left -- who had left, you know, not unhappily and close to being fired, he called Mr. Moscardini (phonetic). He offers him a job and he says, "People are going to be going to you and asking you about Mr. Simon." And when Moscardini says, "I don't remember Mr. Simon," Dr. Singh says, "Good, you won't be able to tell anyone

anything."

And that's not it. Two weeks later Dr. Singh leaves a message on Moscardini's phone machine that the OIG reports offering to make restitution to Moscardini. And in the deposition Dr. Singh admitted that he tried to hire Mr. Moscardini because -- a year after Moscardini left. And Mr. Moscardini left in 2005 and these events are 2006, so that certainly -- that certainly confirms that.

So the -- so, as I say, the EDA could properly rely on those materials in making a determination. That is why this is not a hearsay call. It's also not a hearsay call, by the way, for at least some of the materials. The -- New Jersey Rules of Evidence 803(c)(8) provides, "A statement contained in a writing or record made by a public official of an act done by an official or an act, condition, or event observed by the official, if it's within the scope of the official's duty either to perform the act reported or to observe the act, that that's admissible."

Now, Holtec properly says that there's case law that says that doesn't mean that the agency's conclusions are admissible to overcome the hearsay rule, but the report itself is clearly directly at the heart of the 803(c)(8), and so those reports are

admissible. Now, there may be hearsay within hearsay, but at least with respect to Dr. Singh's interview there is no hearsay within hearsay because Dr. Singh -- it's an admission by Dr. Singh. But, again, the Court doesn't need to get to that point. You know, but if we get to a trial of this we can deal with these other issues more, but clearly for the purposes of the summary judgment motion these -- the TVA's report is -- should be considered.

Now, it's ironic that Holtec doesn't look at the TVA's report, but make comparisons with all these other companies. And in our papers we show that those comparisons are irrelevant, that that's not the standard. Again, the standard is what is relevant and it clearly was relevant. But I think, you know, if the Court were to determine that it has to make the determination, the idea that this company was controlled by one man, Dr. Singh, who directed payment to be made improperly, who obstructed TVA's investigation, who tampered with a witness, and the company continues to this day to mislead about the underlying conduct, you know, I don't -- we think that that properly -- something that the EDA would properly have considered long and hard in determining whether to give this tax credit. And I come back to this and I

probably said it too many times, it's the lying itself that's relevant.

So let me talk just a little bit about South Carolina. And I say South Carolina, but it's important that what we're talking about isn't simply South Carolina, it's Charleston. And I think that in all of Mr. O'Mullan's argument, I think he used the word Charleston once and only reading the cost benefit analysis. And in its papers Holtec barely mentions Charleston. The question here isn't: Did South Carolina offer some free land at some point to Holtec? The question is: Did Holtec -- did South Carolina offer a free shipyard to Charleston? And the evidence is unequivocal and there's simply no evidence about Charleston.

Holtec is relying on discussions the company had with South Carolina, but a different project, about the Savannah River project. That was a project that was a U.S. Department of Energy project. Holtec lost that deal. And Dr. Singh testified that that -- it wasn't going to go back to this Savannah project unless the Department of Energy, quote, "came to the table," unquote.

So free land about Savannah is irrelevant to the affirmative representations that Holtec made again

and again that it had gotten promises of free land in Charleston. It -- it -- and you can't use one for the other. I mean, Charleston is over 100 miles away from -- from the Savannah River. It would be as if the New -- the New Jersey governor offered free land in Camden and Holtec said, "Yeah, but you can also get free land in Teaneck." That's the extent, by the way, of my knowledge of New Jersey geography.

That's not what's relevant. What's relevant here is was there an offer of free land in Charleston? I'd say, by the way, the testimony about offers of free land even in Savannah River is confusing, at best. Dr. Singh testified on Page 188, "I don't know if we had negotiated to the point where they would pay for the land." But it's clear that there was no discussion of free land, much less a free shipyard in Charleston. Dr. Singh said he didn't recall any discussion of free land in Charleston. Dr. Singh said he only talked to Governor Haley two or three times and they didn't discuss the economic issue, the economic merits of Charleston. And he said, "But I'm not really the guy. Onea (phonetic) is the person who was leading discussions about South Carolina." And Onea testified that he had no discussion relating to Charleston. The quote is, "I wasn't engaged." So there's simply no

evidence that there was any promise, offer, even discussion of free land in Charleston. And that's what -- and that's what's relevant.

Now, Holtec wants to argue that, well, it's made clear that these were really just estimates and uses the cost benefit analysis to say these are just estimates. I think two things about that. First, the document that they put on the street isn't the last document, by the way, that was submitted to the EDA. The EDA said, "Don't say Savannah or Charleston, tell us where you're going to locate, where you're ultimate fight is." And they said Charleston. So the last document just has Charleston from the TVA, I think just has Charleston on top.

But importantly, that's not the only place where Holtec is misrepresenting that it had free land, an offer of free land from Charleston, and we lay this out, you know, probably three times in our three briefs, the testimony. But it's clear, the -- there's the memo from Mr. Kenyon (phonetic) who says this road is important because the CEO had met with the governor of South Carolina in June to discuss a possible move to Charleston, South Carolina and South Carolina had offered to give them an entire shipyard in Charleston for free. That's the quote. There's no evidence to

that. In the application, it submits documents describing the robust proposal it had from South Carolina and, again, they discussed the promises that South Carolina made to give free land in Charleston, in Charleston. Again, there's nothing that Holtec offers to suggest that that's the case.

Now, Holtec spends some amount of time saying this really wouldn't have mattered, again, it was okay to lie. What matters is, it really wouldn't have -- it really wouldn't have mattered. But that's, again, not what the testimony is. First of all, it's the fact -- and, again, I'll say this for the last time. It's the fact of the lying itself and the self-reporting regime that makes it material. And that's what Mr. McCullough (phonetic) testified. He said -- he testified whatever the cost of land was in South Carolina, it would be significant for him to know the information provided about the (indiscernible). Go back to the standard in Longobardi, go back to the relevant standard, it's clearly something -- the lying, the truthfulness of this applicant is clearly something that's material.

You know, I could talk more about the case law, but I'm not sure if the Court needs that at this point. I mean, we sort of laid it out pretty extensively in the brief. I don't know if the Court

has other questions. That's really the way that our argument works. There were these misrepresentations, clear misrepresentations. It was important for the EDA that Holtec tell the truth, that Holtec didn't, and these misrepresentations were material.

THE COURT: Mr. Corngold, I guess the questions I had, and I know that both parties talked about the Jewish Center of Sussex County case quite a bit and that it's an important case, but I was just trying to figure out, you know, had Mr. Whale/Wolfish continued to work for the Jewish Center of Sussex County for ten years, you know, like here you have EDA -- I'm sorry, Holtec has performed, is continuing to perform, and so it's not a simple case as in the Sussex County case where they can just let this guy go. Here, there's an ongoing investment and a reliance interest that you just didn't have in an easy case on equitable fraud.

So I didn't want to -- you know, it seems -- and, you know, I know all cases can be distinguished on their facts, but that's not real legal analysis. But I just wanted to give you an opportunity to say how does -- and I believe you said during your oral argument that you thought that case directly applied here and that it mattered. It does seem different where there's

been an ongoing -- there has been a significant up-front investment continuing operation and a reliance.

MR. CORNGOLD: Well, I think -- I say a couple of things about that. First, in a way the Court is -- is, you know, -- the Court is getting to certainly an important point. It's like if -- if the -- the question isn't, you know, this rabbi was performing well for two years, for three years, for four years and no harm, no foul. That's essentially what Holtec wants to argue that, well, they built the thing that the -- that New Jersey wanted that the EDA wanted and so it was okay that it was premised on law. That's just not what the law is.

And importantly, you know, the Whale analysis is really only one of -- one of three ways that the -- that we think that we win. Is there really any question that this was an event of default? The agreement makes clear that misrepresentations are an event of default and the agreement that Holtec signed is an event of default. It's the EDA's impression completely about whether to continue or not.

So I do think that the Whale case -- I mean, yes, you know -- you know, it may feel like there's a rabbi exception here that, you know, we're talking about sort of a different kind of context, but, you

know, in the commercial setting it's almost exactly the same thing because the EDA needs its applicants to be truthful in the same way that a congregation needs its rabbi to be truthful. It's not like the EDA just built this plant and goes away. Every year Holtec has to submit material that the EDA has to rely on, it does some checking that it has to rely on. Every year that relationship is -- the trustworthiness and the truthfulness of that relationship is tested. And the EDA is contracting to get an honest counterpart. That's not what the EDA has done.

MR. O'MULLAN: Your Honor, if I could address the --

THE COURT: I'm sorry, I don't know who's speaking.

MR. O'MULLAN: I'm sorry, it's Mr. O'Mullan. If I could -- can I address some --

THE COURT: I'm going to come back to you, Mr. O'Mullan, I just want to make sure that Mr. Corngold is done, okay? So thank you, Mr. O'Mullan.

Mr. Corngold, anything -- and I did see that you muted yourself. So I don't want to have you -- sit you down from the virtual podium before you're ready, sir. But are you done, sir, at this point?

MR. CORNGOLD: I am, unless the Court has any

additional questions.

THE COURT: No, I appreciate it, Mr. Corngold. Thank you so much, sir.

Mr. O'Mullan, sir.

MR. O'MULLAN: Yeah, just on the Jewish Center v. Whale case. You know, Mr. Corngold joked about the rabbi exception, but I do think that the context in which that case arises is important, right? That was the spiritual director of a congregation. And look at the context in this case, because we talked about it in our initial argument. The EDA's track record for considering its applicants was very different, you know. $1.6 billion in SCA fines. Come on down, you know, come on down. You know, that's very different than the context in which the Jewish Center case arises. We agree with Your Honor's point that, you know, there has been a substantially different investment in this case. And at the end of the day, you know, every other applicant that the EDA considered to be remotely similar was given a welcome to New Jersey.

I want to go and address, you know, the basis behind all of this is, you know, he lied. There is no lie. That's why I spent my presentation initially on Mr. Corngold addresses the OIG report, TVA's OIG report

at length. And at the end of the day, Your Honor, that's just a sideshow to smear the -- to smear Holtec. On the one hand they acknowledge that it's not admissible for its truth. Then they go on to talk about, essentially, the truth of it all, right? Almost everything that Mr. Corngold said was assuming the truth of the underlying assumptions -- assertions in the OIG report. The OIG reports, you know, are untested allegations. The EDA acknowledges that it's subject -- that, frankly, it's subject to the hearsay exception, not admissible for its truth. Holtec did -- did and does deny those allegations. And, you know, at the end of the day the conduct that is at issue for Holtec was, you know, the notion that -- that if those allegations were true, the TVA debarred them for a matter of days.

They ultimately reached a settlement agreement in which they did not require Holtec to acknowledge wrongdoing and Holtec did not acknowledge wrongdoing. The TVA chose to settle with Holtec, never -- Holtec was never prosecuted by a prosecutor and the OIG report itself is based on the word of a convicted felon. As Mr. Corngold has acknowledged, it's hearsay, but yet it underlies almost everything that he said. And, you know, the TVA had gotten to the point where,

you know, after a brief debarment they entered into a multi-year contract with Holtec, $300 million over ten years, and they continue to do business today. And, yet, this is the issue that the EDA is bringing up after Holtec has completed this facility.

All of those other things that Mr. Corngold spent his time talking about, Mr. Moscardini's allegations, that's double hearsay. Those are essentially the allegations of one out-of-court declarant regurgitating what he says is another out-of-court declarant's statement. We don't have the opportunity to cross-examine. That's why that's inadmissible.

The U.S. Glue and Dye assertions that Mr. Corngold spends his time talking about, that's only relevant if you accept the underlying premise that Holtec lied and that's -- the assertion that Mr. Corngold is not making. There is no lie here.

I want to talk about some of the evidence that Mr. Corngold raised about other applicants because I think when you look at the testimony, it doesn't bear out. Mr. Corngold talked about the testimony of Mr. Vongrazio (phonetic), the former CFO of the company, who testified that he didn't recall being involved in the application in 2014 except with respect to what he

said was a page and a half of financial information. That page and a half of financial information certainly is not the additional background information. He said he didn't otherwise work on the application. Instead, he said that it came to his attention at a later point. He didn't know how the application had been answered -- the question that he referred to had been answered in the first instance, but he talked to Mr. Gordon (phonetic) about it and didn't know how it was answered.

Even if you credit the fact that Mr. Vongrazio looked at the application in 2014 and reached a -- his own determination about how it should be answered, that doesn't change the analysis. At the end of the day, Your Honor, the application is unclear because the application is unclear and the EDA refuses to fix it. So Mr. Vongrazio's testimony doesn't alter that.

The same is true with respect to Mr. Onea. I mean, this is -- again, I think we've addressed this in the papers, but Mr. Onea wasn't involved in the application at all. And so the idea that, you know, his -- his -- what he said about the application, you know, it's all said in the context of someone that wasn't involved in the application in the first place.

He did testify about being flabbergasted and that notion was Holtec, you know, it would have been impossible to conceal the debarment. The notion that Holtec could have somehow concealed that would have been impossible.

The May 20th, 2019 letter Mr. -- that Mr. Corngold spoke about, that letter followed a press inquiry in which the press brought it to the attention of Holtec that -- how the EDA is reading that application and in that context in which their lawyer's letter, you know, clarified that, that's how you read the question and that -- and that it should have been a different answer.

THE COURT: And, Mr. O'Mullan, the Court -- the Court is trying to find -- and the Court appreciates the, I think, 12 pages of table of authorities that the parties compiled for the Court's benefit. But the DOT case where the -- the contractor didn't know -- I mean, the common -- the EDA says Holtec did nothing to raise the fact that the question was ambiguous. I think Justice Clifford talks about, you know, not wanting to open up for all sorts of post hoc rationalizations and then allowing the attorneys to create ambiguities where none exist.

MR. O'MULLAN: Right.

THE COURT: But there is the DOT case where the contractor didn't know the ambiguity about the lane closures until they got -- were told they weren't allowed to do it. And then it wasn't D'Annunzio and I don't think it's Panghorn, and I couldn't -- and the case is slipping my -- I can't find it, but it does seem that it -- there's the notion that the person filling out the document doesn't know it's ambiguous and until it realizes that the other party has a different understanding.

MR. O'MULLAN: Right. And, you know, that makes -- that certainly makes sense in this context. I think the context in which that arose in EDA's papers was with reference to that (indiscernible) context, you know, which they cite was an exception. But, you know, what we say about that in our papers, Your Honor, is that, you know, the principle itself doesn't apply. But even if it did apply, the EDA knew that their application was ambiguous, they already knew that. Seams (phonetic) told them in 2013, they were aware of that. So, you know, I don't think -- I don't think that helps them.

Mr. Corngold spent a lot of time talking about the need for truthfulness and, you know, and being forthright. And let's talk about that for a

minute. I mean, you know, Holtec wholly delivered on its promises here. Holtec did what it said it would do. Doesn't that matter? Holtec made this investment and delivered these jobs, but the EDA reaps the benefit of those, you know, hasn't lived up to their promises.

And moreover, with respect to the debarment issue itself and the context in which that's reviewed, you know, the EDA's track record is crystal clear. When it was time to approve other applicants who had serious legal background questions, it was never a problem. You know, and I pointed to three or four examples of those things and there's more in the papers, but, you know, bribes (indiscernible) tax evasion not a problem.

And, you know, at the end of the day, the TVA debarment is not a legal outlier, it's just not. And, again, you know, the TVA itself has reached a full resolution of those issues years ago without requiring anything more from Holtec. They continue to be a business partner to this day and -- but -- and then even if you consider the OIG reports allegations, and, Your Honor, you shouldn't, for purposes of summary judgment and Holtec denied those allegations and they've never been litigated and no federal prosecutor has ever taken them up, but even if you consider it,

nothing about that conduct is a legal outlier, you know.

So by whatever standard you apply, you know, it doesn't change that analysis at the end of the day. It does put Holtec in the position of, you know, of being smeared by a counterparty. And what does that say about them?

THE COURT: Do you want to -- and I know you touched on your papers. Mr. Corngold said -- argued -- and, I mean, I don't want to -- the EDA argues that the initial question -- the initial answer to question 8 was just one of -- was just the first -- first rung on a ladder of continued misrepresentations by Holtec that continued through, you know, up to supplemental applications. And that does seem to be misrepresentations of a different kind.

MR. O'MULLAN: Well, again, Your Honor, we don't think there's any misrepresentations. And, you know, the fundamental point is, if the application says what we say it says, there is no misrepresentation in the first place. And then, you know, Mr. Corngold points it to what we -- how we describe in our -- in that May 20th, 2019 letter our relationship with U.S. Glue and Dye. And, first of all, those -- that description is factually correct. U.S. Glue and Dye

was a subcontractor of the company, you know, but at the end of the day all of that turns on the underlying allegations themselves.

You know, there is no, you know, ongoing misrepresentation. In their papers they take swipes about whether it was nine days -- nine days or 60 days. I mean, as if that somehow matters, but, you know, it's clear from the TVA record that although they were subject to a notice of proposed debarment that stretched 60 days, ultimately TVA resolved those by way of a settlement of the debarment, and that was ancient history.

I wanted to circle back on the South Carolina allegations. Again, you know, I think the important point here is, you know, pointing to specifics in the record that would show that there's been a representation here, if you don't think that there is one. The context in which the allegations -- or the land costs for South Carolina arose I think I've addressed and there's really no evidence in the record. The evidence that we point to about Mr. -- about Dr. Singh's testimony, again, was an informal offer of land and a lot of other things. And that's all they needed.

And, again, the materiality issue with respect to land costs, you know, on a grow program

application for Camden, you know, at the end of the day there is no dispute that if Holtec didn't receive tax credits this plant would not be in Camden, it would be somewhere else.

THE COURT: So then, Mr. O'Mullan, does the -- I mean, I think Mr. Corngold will respond and, as he argued, you know, in some ways it was the -- even if the alternative site was not relevant because it's Camden and Camden didn't have -- was under a different criteria under the Grow Act, the truthfulness of the representations regarding South Carolina was material and relevant even if the alternative site wasn't relevant to EDA's consideration of Holtec's application, right? That's his argument.

MR. O'MULLAN: Sure. And to that argument, the evidence that he points to, you know, he's ignoring Dr. Singh's testimony about being -- having informal offers of free land. And so, you know, the record itself is clear on this point and there is no misrepresentation in the first place. But the analysis of how the EDA views alternative costs makes it abundantly clear that no matter -- no matter how much that land ultimately would have cost, and really nobody knew, right, because we were projecting costs that hadn't taken place, nobody knew what those costs would

ultimately be. But the context in which those numbers arise, whether they were -- whether it was $10 million or zero dollars doesn't change the analysis.

MR. CORNGOLD: Your Honor, can I make two -- two quick points?

THE COURT: Mr. O'Mullan is muted, but I'm not sure that he's done. So I want to --

MR. CORNGOLD: I saw he's muted, but I thought that's what that meant.

THE COURT: You know, when we were all in the courtroom when someone left the podium, we all knew, and it's a little bit more awkward in these virtual settings.

Mr. O'Mullan, anything further before I give Mr. Corngold an opportunity for reply, sir?

MR. O'MULLAN: Yes, just very briefly. You know, with respect to the ambiguity of the application and Mr. Corngold points to the context of the other things that were in there, there's nothing about historical context that changes the -- the absence of a question with respect to debar -- to debarment as it was asked. Those other items talk about commission of actions and violations of this and that, but that just enhances the ambiguity of that.

Let me just check my notes to see if there's

anything more here. I'm happy to answer any additional questions that you might have, Your Honor.

THE COURT: No, sir. I appreciate that, Mr. O'Mullan. And thank you, sir. Okay, he's muted again. So we'll take that as -- we'll take that as him sitting down. And, Mr. O'Mullan, anything further, sir, or are all set.

MR. O'MULLAN: No, Your Honor, I just wanted to emphasize, you know, we've been at this for a number of years at this point and we're coming to the end. And, you know, time is of the essence. This is important for Holtec and we'd ask you to find in our favor.

THE COURT: Thank you so much, Mr. O'Mullan, and I do -- I do understand the plaintiff's assertions that ongoing and continuing are not just easily quantifiable in this instance, but perhaps less quantifiable in a larger industrial -- so thank you, Mr. O'Mullan.

Mr. Corngold, sir.

MR. CORNGOLD: I just have three -- three quick points. The first is, again, the word Charleston didn't -- you didn't hear that. The question isn't, did -- was Holtec offered, whether an informal or formal offer, free land in all of South Carolina? And,

again, the testimony about that is a little ambiguous. But if there's any testimony, it's about Savannah River. There is absolutely no testimony about Charleston. And Holtec wants to run away from that, but that's what they're stuck with because they made express representations about an offer of a free shipyard in Charleston, not estimates, but direct statements.

The second thing is, Mr. O'Mullan doesn't -- we just -- I just want to talk -- because the Whale case is so interesting and the law is so interesting, you know, we're talking about recision of when a party did misrepresentation. The court in Enright says recision is to prevent the misrepresentor from gaining the benefit of the transaction, and that's what we're talking about. In Whale the court says the equity is not for the loss suffered by the victim, but rather to the unfairness of allowing the perpetrator to retain a benefit unfairly conferred. This was a benefit unfairly conferred and that's why the Court should grant our Motion for Summary Judgment.

THE COURT: And I do think Whale is a fascinating case and it's -- it is -- you know, Mr. O'Mullan or yourself referred to the rabbi exception. And not to make light of it, but I do think this is

another reference where every time I read a Justice Clifford opinion I'm more and more -- I learn something from his opinions every time I read them. But there is -- it is material -- Mr. Whale or Mr. Wolfish's misrepresentations more -- the court did not assume that any misrepresentation was material, but the court said given this unique spiritual relationship -- you know, because of the unique moral and spiritual relationship between clergy and congregation, revelation surely would have adversely affected the defendant's employment opportunities.

So the Court didn't view it -- you know, Mr. Whale or Wolfish, apparently, did not dispute that it was material, but just what the standard was. And here, there is a question of whether revelation of Holtec's evaluation would have adversely affected EDA's consideration. And I know there's language in the Whale case that says almost that the harm to plaintiff was complete upon their inability to consider the truthfulness of his representations. So I think that kind of cuts both ways and I see both streams in Justice Clifford's decision, but, you know, I do think that he talks about it being material, he presumes it's material given the unique relationship, but what do I do with the SEPA (phonetic) and all the other

violations that the Court -- that the agency did not deem to be material? You know, that -- that's a fairly significant portion of plaintiff's materiality. Well, one portion of plaintiff's materiality argument.

MR. CORNGOLD: So what I would say about those -- about those comparisons, and we don't think the comparisons are the proper -- the proper question, but what that SEPA case didn't involve was a company lying and continuing to lie about the conduct. And what that SEPA case of a multi-national company didn't involve is a company that's run by one man, one man who directed the bribes and tampered with witnesses in an investigation. And, again, that's conclusions that the EDA under its regulations could have relied on.

And just going to Whale, you know, I believe that our case is similar to Whale in the -- because of this long-term relationship of relying on truth, but our case in one way is a stronger case than Whale because in Whale the congregation didn't have a provision that was agreed to that was part of the contract that said, hey, if you lie that's an event of default and it's our discretion what we can do about it.

MR. MCKENNA: It's based --

THE COURT: Mr. McKenna, you're not muted,

sir.
MR. CORNGOLD: So the -- so in a way -- so I guess in that -- in that way, the case is stronger. But, you know, the contract term is relevant and the case law is clear, and we cite the case law that says the parties can contract for a forfeiture, which is what they did. And when that happened, equity doesn't say you can't do the forfeiture. It's directly about this very issue. Maybe Holtec shouldn't have signed that, but they did and that's the contract. Those are my quick -- quick points.
THE COURT: Thank you so much, Mr. Corngold.
And thank you so much, Mr. O'Mullan.
And I'll just end where I began. The parties' papers were excellent. I know -- I had the opportunity to hear from two -- two attorneys, but litigation of this duration and briefing of this size takes team efforts on both of your sides. So my gratitude to both parties. Mr. O'Mullan had mentioned the question of timing. The Court certainly understands that the parties, both parties are waiting for an answer and we'll proceed accordingly.
I do intend certainly on a matter of importance to the parties, I do intend to give a written statement of reasons and conclusions. I think

certainly given the amount of work the parties have put into it that they do -- the questions of the -- a matter of this importance merits a written decision, but I don't -- they don't get easier as they get older, and certainly the parties have -- you know, I believe plaintiff filed its complaint in July of 2020. I want to reiterate thanks, that during my brief stewardship of this matter the parties have demonstrated an ability to work together through counsel and I'm -- again, the recording is available for free. You just submit the form and they'll send you the wave file. And we'll -- you know, when the decision -- when the opinion -- when the judgment and the opinion comes out, we'll put it up on eCourts. And I very much appreciate all counsel's participation in this proceeding and thanks very much. Okay, thanks everyone.
MR. O'MULLAN: Thank you, Your Honor.
(Proceedings concluded at 11:46:46 a.m.)

CERTIFICATION

I, Lauren A. Vollmin, the assigned transcriber, do hereby certify the foregoing transcript of proceedings, Digitally Recorded, Index Number 10:01:08 to 10:58:00 is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate compressed transcript of the proceedings as recorded.

November 9, 2021

Lauren A. Vollmin

Lauren A. Vollmin, AD/T #469
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FILED, Clerk of the Appellate Division, January 20, 2022, **A-001477-21**

PREPARED BY THE COURT

HOLTEC INTERNATIONAL, Plaintiff, v. NEW JERSEY ECONOMIC DEVELOPMENT AUTHORITY, Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION – MERCER COUNTY DOCKET NO. MER-L-696-20 CIVIL ACTION **ORDER GRANTING PLAINTIFF'S APPLICATION FOR SUMMARY JUDGMENT AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

THIS MATTER having come before the Court, the Hon. Robert Lougy, A.J.S.C., presiding, on the application of Plaintiff Holtec International, represented by Michael P. O'Mullan, Esq., appearing, for an order granting summary judgment; and Defendant New Jersey Economic Development Authority, represented by Eric Corngold, Esq., appearing, for an order granting summary judgment against Plaintiff; and the matter having been fully briefed; and the Court having considered the parties' pleadings and arguments; and for the reasons as stated below; and for good cause shown;

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IT IS on this 30th day of December 2021 **ORDERED** that:

1. The application of Plaintiff for an order entering judgment in favor of Plaintiff and against Defendant is **GRANTED**.

2. Defendant shall forthwith issue to Plaintiff Holtec International a Letter of Compliance for the full $ 26 million annual amount for the 2018 tax period within thirty days of this Order.

3. Defendant's application for an order granting summary judgment is **DENIED**.

4. This Order shall be deemed filed and served upon uploading onto eCourts.

/s/ Robert Lougy
ROBERT LOUGY, A.J.S.C.

X **OPPOSED**
UNOPPOSED

PER RULES 1:6-2(f) AND 1:7-4(a), THE COURT PROVIDES THE FOLLOWING FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Plaintiff, who made the largest private investment in the history of the State's poorest city to build a manufacturing facility where there were once only vacant buildings, seeks to enforce its agreement with Defendant that entitles Plaintiff to approximately $ 260 million in tax credits over a ten-year span. Defendant argues that misstatements and misrepresentations in Plaintiff's

application renders the contract void and relieves Defendant of any obligation to perform under the contract. Both parties move for summary judgment. Plaintiff has fully performed its obligations under the contract and the Court concludes that Defendant's defenses to performance do not prevail given the ambiguities the application that Defendant drafted. The Court thus grants Plaintiff's application for summary judgment and denies Defendant's.

Plaintiff Holtec International ("Holtec") seeks judgment against Defendant on all counts and requests the Court order Defendant to issue Plaintiff a Letter of Compliance for the full $ 26 million annual amount for the 2018 tax period. Defendant New Jersey Economic Development Authority ("NJEDA") likewise seeks summary judgment and asks the Court to dismiss Plaintiff's First Amended Complaint in its entirety. The parties agree that no material facts are in dispute.[1]

First, the parties. Plaintiff is "a diversified energy technology company, recognized as the foremost technology innovator in the field of carbon-free power generation, particularly commercial nuclear and solar energy," with operations in Florida, New Jersey, Pennsylvania, Ohio, and abroad. Per the parties' Incentive

[1] The Court thanks all counsel and both parties for the comprehensive joint statement of material facts, which this discussion incorporates liberally. More generally, the Court thanks counsel for their zealous advocacy and exemplary professionalism.

Agreement, Plaintiff spent more than $ 260 million – the largest private investment in the city's history – to build a technology campus on forty-seven acres in south Camden along the Delaware riverfront. Before Plaintiff built the facility, abandoned buildings and vacant lots occupied the site. The facility employs hundreds of people in high-paying jobs.[2]

Defendant New Jersey Economic Development Authority ("NJEDA") is an independent State authority that finances small and mid-sized businesses and administers tax incentive initiatives as authorized by statue. It provides financing to businesses to help safeguard and promote New Jersey's ability to retain and grow jobs. In performing this mission, NJEDA worked in partnership with the New Jersey Business Action Center, which was housed within the Department of State.

Grow New Jersey Assistance Program ("Grow Program") is one of the tax incentive initiatives that NJEDA administers. Throughout 2013 and 2014, NJEDA and the Business Action Center communicated with Holtec about a possible

[2] The parties stipulate to the following: "Camden historically has experienced challenges in attracting business development, in part due to its ranking among New Jersey's poorest and most economically disadvantaged communities. According to the New Jersey Municipal Revitalization Index, in 2007 Camden ranked 566 out of 566 municipalities in the State."

application under the Grow Program. Both agencies supported Plaintiff's intention to submit an application.

During the application process, NJEDA employees recommended that Holtec apply for certain tax credits under the Grow Program. Holtec identified Camden, New Jersey as its potential site for future development through the Grow Program. The application itself required Plaintiff to identify an alternative site outside of New Jersey for development. Holtec identified multiple locations in its initial application, including Charleston, South Carolina. NJEDA reviewed the application and requested Holtec narrow down its alternative locations in order to perform a cost benefit analysis.

In January 2014, Holtec submitted a cost benefit analysis that listed two alternative sites in South Carolina: the Savannah River Site and Charleston. The submission described the land acquisition cost as zero. The "Assumptions" section of the document stated: "Holtec is interested in pursuing land acquisition costs in this proposal as we will not have to pay for land in our South Carolina alternative as shown in this analysis." Another analysis submitted later that year also stated Plaintiff's assumption that it would not "have to pay for land in our South Carolina alternative as shown in this analysis."

Holtec informed NJEDA that estimates that were subject to change in the future underlay the assumptions. See Pl.'s Ex. 52. Defendant understood that. In a June 2014 email, NJEDA employee Tim Lizura confirmed: "We also understand the cost benefit analysis contain estimates and so long as the information is the most current, believed true, have a verifiable basis for presentation and is being relied on by the applicant to make the location decision these should be fine as well."

Defendant accepted the assumptions without follow-up or further inquiry. It did not request supporting documents to corroborate the offer of free land from South Carolina. Defendant's underwriter testified that the agency did not require applicants to submit a written offer from another state because NJEDA did not want to "push the companies to another state to start engaging in further dialogue with them, because that … may weaken New Jersey's position to be able to retain or attract business."

Based upon Holtec's submissions, NJEDA staff developed a Project Summary and presented it to the agency's board. The summary noted the tax incentive award "was a material factor because the location analysis submitted to the Authority shows that absent the incentives Camden is the more expensive option for the company." The summary recognized that the numbers used to create

the report were based on "estimates." NJEDA employee Kevin McCullough testified even "[if] the land costs were $10 million instead of zero," the cost benefit analysis would not be changed in a meaningful way. Pl.'s Ex. 92 at 196:13-16. McCullough further noted that "as long as the cost benefit analysis indicated that the alternate site was…significantly cheaper in New Jersey," any land costs would not constitute a meaningful change to the application. Id. at 195:24-196:6.

The Grow Program application contained a section titled "Additional Background Information." JSF at ¶ 31. The section consisted of statements that required a "yes" or "no" answer from the applicant. Critical to this matter, statement No. 8 said: "Debarment by any department, agency, or instrumentality of the State or Federal government." Ibid. While other applicants and potential applicants raised questions and concerns regarding this section, its grammar, and its punctuation, Holtec did not ask NJEDA to clarify the statement or to explain the parameters of the request.[3] Ibid. Holtec responded "no" to each statement in the section, including statement No. 8. JSF at ¶ 32.

[3] In 2016, after Holtec submitted its application, NJEDA changed the "Additional Background Information" section of the application and included the following prefatory question to each statement: "Has applicant, any officers or directors of Application, or any Affiliates (collectively, the "Controlled Group") been found guilty, liable or responsible in any Legal Proceeding for any of the following violations or conduct?" The revised application defines a legal proceeding as "any State, Federal or foreign civil, criminal or administrative proceeding in a court or

In fact, however, the Tennessee Valley Authority ("TVA") had, based on a report of the agency's Officer of Inspector General, previously debarred Holtec for ten days in December 2010. TVA issued its "Notice of Proposed Debarment" concerning Plaintiff on October 12, 2010. Plaintiff and TVA ultimately entered into an Administrative Agreement that debarred Plaintiff for ten days in December 2010. Per the Agreement, the Agency based the debarment "upon alleged actions and conduct taken by or on behalf of Holtec in connection with the facts underlying the plea agreement of former TVA employee Jack Symonds." No civil, criminal, or administrative proceeding or adjudication took place.

Per Holtec's agreement with TVA, Holtec's debarment began December 3, 2010, and ended December 12, 2010. See Def.'s Ex. 11. The agreement between Plaintiff and TVA explicitly noted that Plaintiff did not concede any violation of law or wrongdoing. Holtec's debarment by TVA was public information available on the internet.

On March 19, 2019, Holtec submitted an Incentive Modification Application to NJEDA. As part of the application, Holtec again answered a series of "Legal

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administrative tribunal in the United States, any territories thereof or foreign jurisdiction."

Questions." The application included the new prefatory question. Def.'s Ex. 19. The relevant section states:

> Businesses applying for a Modification are subject to the Authority's Disqualification/Debarment Regulations (the "Regulations"), which are set forth in N.J.A.C. 19:30-21, et. seq. Applicants are required to answer the following background questions pertaining to the commission of certain actions that can lead to disqualification from eligibility under the Regulations.
>
> All capitalized terms used in this Questionnaire, except those defined elsewhere herein, shall be defined at the bottom of this form.
>
> Has Applicant, any officers or directors of Applicant, or any Affiliates (collectively the "Controlled Group") been found guilty, liable or responsible in any Legal Proceeding for any of the following violations or conduct? (Any civil or criminal decisions or verdicts that have been vacated or expunged need not be reported).
>
> . . . .
>
> 8. Debarment by any department, agency, or instrumentality of the State or Federal government.
>
> [Def.'s Ex. 19.]

Holtec again responded "no." Ibid.

Plaintiff was not the only applicant to or recipient of GROW funds that had debarments or other histories subject to disclosure. The record establishes beyond dispute that NJEDA did not disqualify applicants that checked "yes" to statements in the "Additional Background Information" except in the most extreme circum-

stances involving the loss of life. NJEDA reviewed each application "based upon the individual facts and circumstances of that application." When an applicant responded in the affirmative, "NJEDA asked for additional information, evaluated such information, and decided whether to recommend disqualification to the NJEDA Board." At the time of Holtec's application, if an applicant responded "no" to each statement in the "Additional Background Information" section and NJEDA was not made aware of a discrepancy, it would not ask for further information or assess the application for disqualification.

When Holtec applied to the Grow Program, NJEDA did not disqualify other applicants or participants from receiving tax credits when their companies were convicted of various wrongdoings and crimes, including violations of the Foreign Corrupt Practices Act. See Pl.'s Ex. 63-65, 69, 71, 77, 78.

During his service as NJEDA Senior Legislative Officer, Marcus Saldutti assessed the "Additional Background Information" section of roughly 250 applications. JSF at ¶ 38. Saldutti's responsibilities included preparing a memorandum for the NJEDA Board that alerted it to potential concerns that might lead to the disqualification of an applicant. Saldutti prepared twenty-five memoranda related to disqualification matters, eleven of which concerned applications to the Grow Program. JSF at ¶ 39. All eleven Grow Program

applicants of concern responded "yes" to an Additional Background Information statement or disclosed a legal concern in the application. Ibid. Additionally, one of the eleven applicants "initially responded 'no' but was prompted to provide additional information by NJEDA's independent due diligence." Ibid. Mr. Saldutti affirmed that, of the memos he drafted for the Board, nothing "short of death … would constitute as an outlier for purpose of EDA disqualifications…." Pl.'s Ex. 31 at 147:15-21.

Other applicants to the Grow Program told NJEDA that the GROW application's "Additional Background Information" section was confusing. Pl.'s Ex. 14 at 33:8-20. The Grow Program application did not identify an applicable timeframe or disclosure guidelines for answering the "Additional Background Information" section. On occasion, NJEDA staff provided applicants with information on the type of matters they were interested in learning about and the applicable time periods for the background section. Pl.'s Ex. 14 at 37:16-38:12.

From January 20, 2014, to July 10, 2014, NJEDA reviewed Holtec's application to the Grow Program. JSF at ¶ 10. During the review, NJEDA requested supporting documents from Holtec and "sought advice from the New Jersey Division of Law regarding Holtec's application." Ibid. As part of Holtec's Grow Program application, Holtec's Chief Executive Officer ("CEO"), Dr.

Krishna Singh, signed two CEO certifications "entitled 'Grow NJ for Cities that are a Garden State Grow Zone that Qualifies under the Municipal Rehabilitation and Economic Recovery Act.'" JSF at ¶ 12. By signing, Dr. Singh acknowledged "under penalty of law that the representations contained" in the application were accurate. Def.'s Ex. 2 at ¶ 2; Def.'s Ex. 3 at ¶ 2. NJEDA created the form signed by Dr. Singh for companies interested in making capital investment in certain cities, including Camden. JSF at ¶ 13.

Unlike applicants seeking funds for projects in cities other than Camden, Holtec did not have to submit an "at risk" certification. JSF at ¶14. Holtec had no obligation to suggest or establish that jobs were at risk of leaving New Jersey and NJEDA did not approve Holtec's application on that basis. Ibid.

The Holtec application was also exempt from scrutiny under the "over $40 million review." If a Grow Program applicant sought a tax credit award over $40 million for a project in a location other than Camden, NJEDA conducted an additional review called the "over $40 million review." JSF at ¶15. This extra level of scrutiny did not apply to projects located in Camden because of an exception known as the "Camden Alternative." Ibid. Because Holtec's award was calculated under the "Camden Alternative," NJEDA was not required to conduct the additional due diligence review. Ibid. Rather, Holtec was obligated to submit

a cost benefit analysis with its application to "evaluate whether the material factor requirement for the application was satisfied." JSF at ¶ 16. Holtec considered the tax credits offered under the Grow Program "a material factor in the business decision to make a capital investment and locate in Camden." Pl.s' Ex. 9 at ¶ 1.

NJEDA staff relied on the documents submitted by Holtec and ultimately "recommended approval of Holtec's application to NJEDA's Board." JSF at ¶ 11. NJEDA's underwriter believed the Attorney General's office performed a background search on Holtec and cleared them. Def.'s RSUMF at ¶ 17. NJEDA's review process, in general, required staff to "follow-up on any representations made in … the application to generally try to best understand the business decision that the company is making." Pl.'s Ex. 4 at 60:4-21. NJEDA's procedures "evolved over time" and at some point, the process involved a Google search of applicants. Def.'s Ex. 41 at 157:19-158:21. NJEDA staff member Kevin McCullough reiterated "it was very important for us to be getting accurate information from the applications, because so much of that information is not easily verifiable. So we relied heavily on the truthfulness of the applications." Def.'s Ex. 35 at 219:17-22. NJEDA's current CEO, Timothy Sullivan, acknowledged in an email that NJEDA should have caught the debarment matter during the application process. Pl.'s Ex. 18.

Holtec and NJEDA entered into an Incentive Agreement under the Grow Program. On July 10, 2014, Defendant's Board approved Holtec's application for $260 million in tax credits. The Incentive Agreement, under Section 11, states that Holtec will submit an "Annual Compliance Report" and, upon NJEDA's approval, NJEDA will issue a Letter of Compliance dictating the amount of tax credits permitted for use for the relevant tax period.

Holtec built the Krishna P. Singh Technology Campus ("the Campus") in Camden, spending over $260 million. JSF at ¶ 19. On December 28, 2017, NJEDA "certified Holtec's construction project as complete." JSF at ¶ 20. The Campus "occupies approximately 47 acres in the southern end of Camden" and "was built on a site previously occupied by abandoned buildings." JSF at ¶ 21. Holtec "has satisfied its full-time job requirements" and paid the $75,000 non-refundable annual servicing fee for its 2017 and 2018 Annual Compliance Report Submissions. JSF at ¶¶ 26-27. Holtec paid the "non-refundable one-time issuance fee of .5% of the total tax credit award, capped at $500,000." JSF at ¶ 28. The Grow Program permits awardees to sell their tax credits, in whole or in part, to third-party purchasers. JSF at ¶ 29. With NJEDA's approval, Holtec did precisely that and transferred its tax credits to third-party purchasers. JSF at ¶ 30.

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The relevant sections of the 2017 Incentive Agreement state:

> Section 5: Certain Covenants of the Company
>
> (b) The Company covenants that the representations, statements and warranties of the Company set forth in the Company Application and the representations, statements and warranties set forth herein (1) are true, correct and complete in all material respects, (2) do not contain any untrue statement of a material fact, and (3) do not omit to state a material fact necessary to make the statements contained herein or therein not misleading or incomplete.
>
> Section 14: Events of Default
>
> The occurrence of any one or more of the following events (whether such event shall be voluntary or involuntary or come about or be effected by operation of law or pursuant to or in compliance with any judgment, decree or order of any court or any order, rule or regulation or any administrative or government; body) shall constitute an "Event of Default"….
>
> . . . .
>
> (b) Any representation or warranty made by the Company in its Application, the approval letter or in this Agreement is false, misleading, or inaccurate in any material respect.
>
> Section 15: Remedies
>
> (a) Subject in all cases to the provisions of Section 12 of this Agreement related to reduction, forfeiture and recapture, … the Authority may, so long as such Event of Default is continuing, do one or more of the following as the Authority in its sole discretion shall determine, without limiting any other right to remedy the Authority or the Division of Taxation may have on account of such Event of Default:

> 1. The Authority may require the surrender by the Company to the Authority of the Tax Credit Certificate for suspension or cancellation.
>
> [Def.'s Ex. 4 at 12, 24, 25.]

On January 15, 2018, Holtec submitted its first Annual Compliance Report for 2017. On April 11, 2018, NJEDA issued a Letter of Compliance for the 2017 tax year. JSF at ¶¶ 22-23. Holtec submitted its Annual Compliance Report for 2018 on January 15, 2019. JSF at ¶ 24. On May 20, 2019, Plaintiff sent a letter to NJEDA updating Holtec's answer to the "Debarment/Disqualification Questionnaire." Def.'s Ex. 23. The letter states:

> It has just come to Holtec's attention that at the time it filed its application a response to the Debarment/ Disqualification Questionnaire was incorrect. Holtec has completed and signed a new Debarment/Disqualification Questionnaire which corrects that inadvertent mistake. The completed questionnaire is attached to this letter along with an explanation of the answer to the question to which it responded "Yes."
>
> [Def.'s Ex. 23.]

Holtec has not received a Letter of Compliance from NJEDA for the 2018 tax year from NJEDA. JSF at ¶ 25.

Independent of the parties' agreement, the Task Force on the Economic Development Authority's Tax Incentive Programs ("Task Force"), an entity separate from NJEDA, conducted a review of NJEDA programs and compiled a

report.[4] The public report, issued on June 17, 2019, highlighted Holtec's nondisclosure of its TVA debarment and Defendant's failure to discover the same. Def.'s SMF at ¶¶ 60-61; Def.'s Ex. 20. Prior to a July 2020 criminal referral, NJEDA demanded additional information from Plaintiff about its previous debarment. Def.'s Ex. 24. Defendant's request stated, "the Authority shall review in consultation with its legal counsel and invite Company to the Authority's office for a meeting to discuss the information and explanation provided." Def.'s Ex. 24. Plaintiff provided the requested information and accepted the offer for a meeting

[4] On January 19, 2018, Governor Murphy signed Executive Order 3, which directed the State Comptroller to "conduct a complete performance audit of the Grow New Jersey Assistance Program and the Economic Redevelopment and Growth Grant Program, and predecessor programs, from 2010 onward." Among other things, Governor Murphy charged the Comptroller with reviewing the "decision-making process regarding the acceptance of applications, focusing on how the EDA exercised its discretion under the statutes." On January 9, 2019, the Comptroller issued its report. On January 24, 2019, Governor Murphy signed Executive Order 52, which created the Task Force. The Executive Order stated, among other whereas clauses, that the Comptroller's report "concluded that incentive awards were 'improperly awarded, overstated, and overpaid' and specifically noted five commercial projects where the EDA failed to comply with the applicable statute and regulations and improperly awarded $ 179 million in incentives." (That finding did not concern Grow NJ programs.) Governor Murphy charged the Task Force with "conduct[ing] an in-depth examination of the deficiencies in the design, implementation, and oversight of Grow NJ and ERG, including those identified in the State Comptroller's performance audit, to inform consideration regarding the planning, development and execution of any future iterations of these or similar tax incentive programs."

on August 8, 2019. Def.'s Ex. 25. The parties never had that meeting. The Task Force referred the matter to the Attorney General on July 9, 2020. Def.'s Ex. 21.

NJEDA continues to withhold from Holtec a Letter of Compliance for the 2018 tax credit year based on its "contentions that Holtec has made false, misleading, or inaccurate statements to NJEDA relating to: (1) Holtec's 2010 debarment by the TVA and the reasons for Holtec's failure to disclose the debarment to NJEDA, and (2) Holtec's alleged alternative sites in South Carolina." JSF at ¶ 41.

On March 23, 2020, Plaintiff filed its complaint in the Chancery Division. On April 3, 2020, the matter was transferred from Chancery to the Law Division. On July 27, 2020, Plaintiff filed its first amended complaint. On August 4, 2020, the court granted in part Defendant's application and dismissed Count 3 of the amended complaint, which sought relief under an equitable estoppel claim. The parties proceeded through discovery. On August 13, 2021, the Court entered a consent order scheduling the parties' respective summary judgment motions. The Court heard oral argument on November 8, 2021.

Plaintiff seeks summary judgment and an order compelling Defendant to issue it a Letter of Compliance for the full $26 million annual amount for the 2018 tax period. Plaintiff argues it fully performed under the contract and NJEDA's

obligation to perform is not excused. Plaintiff asserts Defendant is not entitled to void the Incentive Agreement because Plaintiff did not misrepresent its past debarment due to the ambiguous nature of the application. Holtec certifies, "the Company did not willfully withhold or conceal information in the Application." Pl.'s Ex. 17 Holtec. Interr. Ans. 6. Holtec's Vice President of Contracting, Nick Abriczinskas noted in his deposition that Holtec did not take deliberate efforts to hide its debarment from the public. Pl.'s Ex. 16 at 43:18-21, 44:3-6. Abriczinskas further stated, "the question did not specify whether the debarment needed to be active to be responsive, or whether prior to debarments were also responsive." Ibid.

Plaintiff argues that it did not misrepresent its past debarment because the application section in question was ambiguous and, even under the updated application language, its answer of "no" was correct because no Control Group members had been found guilty, liable, or responsible for anything in any legal proceeding. Pl.'s Counter SMF at ¶ 56. Plaintiff argues that it did not mispresent its dealings with South Carolina to Defendant and, further, Defendant is not entitled to void the Incentive Agreement because NJEDA did not rely on Plaintiff's alleged misrepresentations when it entered into the Incentive Agreement and the alleged misrepresentations were not material. It notes Dr. Singh, Holtec's CEO,

believed Holtec "had an informal offer of land and a lot of other things." Pl.'s Ex. 87 at 180:19-21. He testified, "[f]ree land would not even enter our consideration if that's all they offered." Ibid. He further stated, "I do not explicitly remember discussing just the land. We had broad ranging discussions on what may come from the State which will overshadow anything related to commercial value of the land." Pl.'s Ex. 29 at 189:17-20. Dr. Singh also noted that besides himself, South Carolina development discussions mainly occurred with Senior Vice President Pierre Oneid because "[h]e's the one who was carrying the ball in discussions with South Carolina." Id. at 190:10-22. Holtec's Senior Vice Pierre Oneid, when asked about the type of incentives South Carolina offered Holtec, testified:

> I can't recall an amount, but I recall that it meant that it would be we would have room and board, just like what we had in New Jersey, we were offered the whole land for one dollar for 99 years or something like that. So, it was along the same lines. It was going to be an economic incentive that was going to be a package, but I don't recall the details.
>
> [Pl.'s Ex. 89 at 143:7-21.]

Plaintiff also contends that even if the Court determines Plaintiff misrepresented itself, the misrepresentations do not constitute a material breach of the agreement because the information was not material to NJEDA's assessment of the application. Similarly, Plaintiff argues the alleged misrepresentations do not

trigger default under the incentive agreement because they were not material. Additionally, Plaintiff asserts it fully performed under the contract and NJEDA exploited ambiguities in its own application to deprive Plaintiff of its benefit and therefore breached its duty of good faith and fair dealing.

Defendant argues that it is entitled as a matter of law to void the Incentive Agreement because Plaintiff made material misrepresentations regarding its previous debarment and free land in South Carolina. It places considerable weight on the statement of Plaintiff's own employees, who expressed confusion and shock over the company's initial answer of "no" to No. 8. First, Frank Bongrazio, who was responsible for filling out the financial components of the initial application, noted "I heard later that it was answered no—I guess no—no crimes or no court action, whatever, and I was surprised by that, but that's—but I really didn't have anything to do with that." Def.'s Ex. 14 at 27:21-24. Second, when asked about Holtec's answer of "no" to No. 8 said, Senior Vice President Pierre Oneid responded in his deposition that "I'm flabbergasted that it was answered that way." Def. Ex. 15 at 79:16-17.

Defendant contends the misrepresentations represent a material breach of the agreement and constitute events of default per the incentive agreement. Defendant argues Holtec's misrepresentations warrant recission of the contract because they

hindered Defendant's opportunity to discover material information that reflects unfavorably on Plaintiff and prevented the agency from making a fully informed determination about future dealings. It argues that Plaintiff produces no evidence to support its claim that the question was unclear, and Plaintiff asked Defendant to clarify the alleged ambiguity. Finally, Defendant asserts it did not act with ill motive when it withheld Plaintiff's tax incentive letter.

In reply, Plaintiff argues it substantially performed under the contract, accurately responded to the debarment statement, and did not misrepresent its offer of free land in South Carolina. Plaintiff reiterates that, even if the Court finds that the debarment statement was not ambiguous and it overstated its negotiations with South Carolina, the information was not material to Defendant's decision.

Defendant, in reply, argues the evidence establishes that Plaintiff gave an intentionally false answer to the debarment question and misrepresented its offer in South Carolina. It contends both misrepresentations are material. Finally, Defendant contends the TVA report and information surrounding the nature of Plaintiff's debarment are highly relevant and should be considered by the Court over Plaintiff's objections that the information is hearsay and impermissible. Defendant argues that it is not seeking to introduce the information to prove the truth of the matter asserted but rather the report's conclusion coupled with

Plaintiff's misrepresentations excuse NJEDA's obligation to approve Plaintiff's tax credits.

Both parties move for summary judgment. The procedures and standards for summary judgment are well-established. Summary judgment shall be granted when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. R. 4:46-2(c). Furthermore, "[a]n issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." Ibid. Summary judgment is appropriate where the party opposing summary judgment points only to disputed issues of fact that are "of an insubstantial nature." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995). Where the evidence on a factual issue "is so one-sided that one party must prevail as a matter of law," the court "should not hesitate" to grant summary judgment. Id. at 540 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986)). A genuine issue of material fact must be a disputed issue of fact that is of a substantial nature, having substance and real existence. Brill, 142 N.J. at 523. Bare conclusions without factual support cannot defeat summary judgment; instead, evidence submitted in support of the motion must be admissible,

competent, non-hearsay evidence. Brae Asset Fund, L.P. v. Newman, 327 N.J. Super. 129, 134 (App. Div. 1999); Jeter v. Stevenson, 284 N.J. Super. 229, 233 (App. Div. 1995).

The moving party must sustain the burden of showing clearly that no genuine issue of material fact is present in the case and that the moving party is entitled to judgment as a matter of law. Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 73 (1954) (Brennan, J.). In determining whether a dispute is genuine, the court makes all legitimate inferences in favor of the non-moving party and denies the motion if there is the slightest doubt about the existence of a material issue of fact. Saldana v. DiMedio, 275 N.J. Super. 488 (App. Div. 1998). The court must "consider whether the competent evidential materials presented, when viewed in a light most favorable to the non-moving party in consideration of applicable evidentiary standards, are sufficient to permit a rational fact finder to resolve the allegedly disputed issue in favor of the non-moving party." Brill, 142 N.J. at 523. The Court must engage in an analytical process essentially the same as that necessary to rule on a motion for directed verdict, namely, "'whether evidence presents sufficient disagreement to require submission to a jury or whether it is so one-sided that a party must prevail as a matter of law.'" Id. at 533 (quoting Anderson, 477 U.S. at 251-52).

Assertions that are unsupported by evidence "[are] insufficient to create a genuine issue of material fact." Miller v. Bank of Am. Home Loan Servicing, LP, 439 N.J. Super. 540, 551 (App. Div. 2015) (alteration in original) (quoting Heyert v. Taddese, 431 N.J. Super 388, 414 (App. Div. 2013)). "Competent opposition requires 'competent evidential material' beyond mere 'speculation' and 'fanciful arguments.'" Hoffman v. Asseenontv.Com, Inc., 404 N.J. Super. 415, 426 (App. Div. 2009) (quoting Merchs. Express Money Order Co. v. Sun Nat'l Bank, 374 N.J. Super. 556, 563 (App. Div. 2005)). Furthermore, "the act of filing the cross-motion represents to the court the ripeness of the party's right to prevail as a matter of law." Spring Creek Holding Co. v. Shinnihon U.S.A. Co., 339 N.J. Super. 158, 178 (App. Div. 2008).

Both parties maintain, across the board, that no material facts are in dispute. The parties agree on many material facts of the case: (1) Holtec applied to the Grow Program; (2) Holtec answered "no" to No. 8; (3) Holtec told NJEDA it expected an offer of free land from South Carolina; (4) Holtec received the Grow Program award; (5) Holtec built the facility in Camden; (6) Holtec received a Letter of Compliance for its 2017 tax credits; (7) Holtec received tax credits for 2017; (8) Holtec submitted its 2018 tax credit application; and (9) NJEDA has yet

to issue a Letter of Compliance for the 2018 tax credits. Both parties signal to the Court this matter is ripe for judgment as a matter of law.

The alleged actions that led TVA to briefly debar Holtec are not at issue in this case. Both parties agree that TVA debarred Holtec.[5] The critical issue is whether Holtec's representations of free land in South Carolina and its answer of "no" to No.8 make the contract between Holtec and NJEDA voidable, constitute a material breach, or constitute an event of default. These are questions for the Court as "[t]he interpretation or construction of a contract is usually a legal question for the court, 'suitable for a decision on a motion for summary judgment.'" Driscoll Const. Co., Inc. v. State, Dep't of Transp., 371 N.J. Super. 304, 313-14 (App. Div. 2004) (citing Spaulding Composites Co., Inc. v. Liberty Mut. Ins. Co., 346 N.J. Super. 167, 173 (App. Div. 2001)). Furthermore, "[t]he

[5] The parties dispute the length of Defendant's debarment. This is not a dispute of material fact, however, as the parties choose to measure the debarment differently. Plaintiff relies upon its agreement with TVA that specified that Plaintiff was debarred for a certain number of days. Defendant emphasizes the period running from the initial notice of debarment until the end of Plaintiff's actual debarment. Plaintiff's agreement with the TVA specified the dates of Plaintiff's debarment; the Court adopts that period. The Court declines to adopt Defendant's characterization of Plaintiff's debarment, as it conflates the notice of debarment with the agency's ultimate determination to debar Plaintiff from December 3, 2010, to December 12, 2010. While TVA might have declined to contract with Plaintiff during the pendency of the Notice of Debarment, the TVA / Holtec agreement states plainly the dates of the debarment.

interpretation of the terms of a contract are decided by the court as a matter of law unless the meaning is both unclear and dependent on conflicting testimony." Bosshard v. Hackensack Univ. Med. Ctr., 345 N.J. Super. 78, 92 (App. Div. 2001).

The analysis begins with the parties' agreement. In contract disputes, the State "must 'turn square corners' rather than exploit litigation or bargaining advantages that might otherwise be available to private citizens." W.V. Pangborne & Co. v. N.J. Dep't of Transp., 116 N.J. 543, 561 (1989) (quoting F.M.C. Stores Co. v. Borough of Morris Plains, 100 N.J. 418, 426 (1985)). The government must act fairly and "adhere to strict standards in its contractual dealings," and act consistent with its "supervening obligation… to deal scrupulously with the public." Id. at 562.

A breach of contract claim requires the claimant to establish four factors: (i) all parties entered a contract with set terms; (ii) the non-breaching party did what was required of them per the contract; (iii) the breaching party did not do what they were required to do under the contract; and (iv) the breaching party caused a loss to the non-breaching party. See Globe Motor Co. v. Igdalev, 225 N.J. 469, 482 (2016). A claimant must prove each element by preponderance of the evidence. Ibid.

The Court finds the "Additional Background Section" of the Grow Program application ambiguous. In contract interpretation, "[t]he polestar of construction is the intention of the parties to the contract as revealed by the language used, taken as an entirety; and, in the quest for the intention, the situation of the parties, the attendant circumstances, and the objects they were thereby striving to attain are necessarily to be regarded." Atl. N. Airlines, Inc. v. Schwimmer, 12 N.J. 293, 301 (1953). The standard interpretation of a contract "is the meaning that would be ascribed to it by a reasonably intelligent person who was acquainted with all the operative usages and circumstances surrounding the making of the writing." Deerhurst Estates v. Meadow Homes, Inc., 64 N.J. Super. 134, 149 (App. Div. 1960). This standard is "abandoned where its application produces an ambiguous result" and a secondary standard is applied in which the party whose intention was ambiguous will be held to that meaning. Id. at 149-50; see also Bosshard v. Hackensack Univ. Med. Ctr., 345 N.J. Super. 78, 92-93 (App. Div. 2001). Additionally, an ambiguous question that elicits an answer that "'may state the truth or may state a falsehood according as the ambiguity is resolved'" is construed against the person eliciting the information. Urback v. Metro. Life. Ins. Co., 130 N.J.L. 210, 214 (E. & A. 1943) (quoting MacKinnon v. Fid. & Cas. Co., 72 N.J.L. 29, 32 (Sup. Ct. 1905)).

Whether a given provision is ambiguous is a question of law. Schor v. FMS Fin. Corp., 357 N.J. Super. 185, 191 (App. Div. 2002). "An ambiguity in a contract exists if the terms of a contract are susceptible to at least two reasonable alternative interpretations." Nester v. O'Donnell, 301 N.J. Super. 198, 210 (App. Div. 1997) (quoting Kaufman v. Provident Life and Cas. Ins. Co., 828 F. Supp. 275, 282 (D.N.J. 1992)). The Court gives "terms of the contract . . . their 'plain and ordinary meeting," ibid. (quoting Kaufmann, 828 F. Supp. at 283), and does not "torture the language of [a contract] to create ambiguity," ibid. (quoting Stiefel v. Bayly, Martin & Fay, Inc., 242 N.J. Super. 643, 651 (App. Div. 1990)).

The Supreme Court instructed in M.J. Paquet v. New Jersey Department of Transportation that a government contract that contains a clause susceptible to more than one reasonable interpretation "is to be strictly construed against the draftsman, the government entity." 171 N.J. 378, 398 (2002). There, the Court found that a specification of the parties' agreement was susceptible to at least two different reasonable interpretations and therefore, construed that section against DOT and allowed plaintiff to seek an equitable adjustment from the DOT. Id. at 398.

The Court construes the contested clause against NJEDA. NJEDA drafted the application. It did not specify its intent and it provided no instructions or

guidance to the applicants. The statement is subject to multiple interpretations. One potential interpretation is NJEDA intended for applicants to answer the question including all past and current debarments regardless of relevant legal proceedings. A second interpretation is NJEDA required an affirmative response only if the applicant was currently debarred. An additional interpretation is an affirmative response was only necessary if the applicant was previously found guilty, liable, or responsible in any legal proceeding. Indeed, the record shows NJEDA employees were aware of confusion among applicants regarding the context of No. 8., including what NJEDA considered to be the relevant time period for the question. See Pl.'s Ex. 14 37:16-38:4.

Additionally, deposition testimony suggests NJEDA was interested in only learning about incidents where "officers or directors of the applicant or any affiliates, collectively, the Control Group, been found guilty, liable, or responsible through a legal proceeding …." Pl.'s Ex. 14 at 50:24-51:13. Under that interpretation, a "no" answer from Plaintiff would be accurate and render this issue moot. It is not clear that, at the time No. 8 was drafted, Defendant even understood the type of information it hoped to learn. Accordingly, the Court declines to hold that ambiguity against Plaintiff.

Defendant's argument that the contract claim should be analyzed under the doctrine of patent ambiguity fails. The doctrine of patent ambiguity states "in construing a public contract a contractor has an obligation to alert the public entity to possible errors in a contract before bidding on it." Dugan Constr. Co., Inc. v. N.J. Tpk. Auth., 398 N.J. Super. 229, 241 (App. Div. 2008). To ensure equality for all prospective bidders, "contractors are urged" to examine all documents and "raise questions about the drawings, specifications and conditions of bidding and performing the work." Ibid. Patent ambiguity, in publicly bid contracts, is an "exception to the general rule that a contract, and any latent ambiguities in it, should be construed against the party that wrote it." Ibid. The doctrine shifts the onus from the government to the bidder "by requiring that ambiguities be raised before the contract is bid on, thus avoiding costly litigation after the fact." Ibid.

Public contracts are different than private contracts, and the doctrine of patent ambiguity is best understood considering the purposes of public contract law and the rules developed to effectuate it. Public contracts are granted "only after the broadest opportunity for public bidding is given in order to secure competition, and guard against favoritism, improvidence, extravagance and corruption." D'Annunzio Bros., Inc. v. N.J. Transit Corp., 245 N.J. Super. 527, 532 (App. Div.

1991). "An essential element of the bidding process is a common standard of competition." Ibid.

Although the agreement here is between a government instrumentality and a service provider, the Court does not find the doctrine of patent ambiguity applicable. Though the Grow Program application was public, Plaintiff and Defendant worked together to develop the application and the process occurred over an extended period and after significant relationship building. NJEDA did not create the Grow Program application in the hopes that all companies would apply. The Grow Program, implemented by NJEDA, worked with the Business Action Center to fulfill its mission and to cultivate business relationships. JSF at ¶ 3. Throughout 2013 and 2014, NJEDA and the Business Action Center communicated with Holtec about its application to the Grow Program and supported Holtec's "intention to submit an application." JSF at ¶¶ 4-5. The risks inherent in public bidding do not exist in the process used by NJEDA and the burden of construction does not shift.

Defendant created the application with a clause susceptible to more than one reasonable interpretation and that clause "is to be strictly construed against the draftsman, the government entity." M.J. Paquet,171 N.J. at 398. In response to the ambiguous statement, NJEDA received an answer that "may state the truth or may

state a falsehood…." Urback, 130 N.J.L. at 214. Defendant's claim that Plaintiff's answer of "no" to No. 8 is grounds for a recission of the contract fails.[6] The statement is ambiguous in nature; therefore, Defendant shoulders the burden of any incomplete information it received.[7] The Court finds that in construing the

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[6] In this instance, recission would additionally be a distinctly inequitable remedy. A contract that is procured by fraud is subject to rescission. See Merchs. Indem. Corp. v. Eggleston, 37 N.J. 114, 130-31 (1962). "Rescission is an equitable remedy," it is discretionary, First American Title Ins. Co. v. Lawson, 177 N.J. 125, 143-144 (2003), and, for it to be available, "[t]he court must be able to return the parties to the 'ground upon which they originally stood.'" Intertech Assocs., Inc. v. City of Paterson, 255 N.J. Super. 52, 59 (App. Div. 1992) (quoting Hilton Hotels Corp. v. Piper Co., 214 N.J. Super. 328, 336 (Ch. Div. 1986)); see also Am. Container Corp. v. Hanley Trucking Corp., 111 N.J. Super. 322, 334 (Ch. Div. 1970) ("The law is clear that a rescission contemplates a return to status quo ante.") (citing Medivox Prods., Inc. v. Hoffmann-LaRoche, Inc., 107 N.J. Super 47, 75-76 (Law Div. 1969)); cf. Doughten v. Camden Bldg. & Loan Ass'n, 41 N.J. Eq. 556, 561 (E. & A. 1886) (explaining that recission requires returning other party to status quo "so far as is practicable" and "as far as possible."). That is impossible in this situation. Plaintiff invested over $ 260 million dollars to build its Camden facility and continues to operate that facility and employ hundreds of people. Upon NJEDA's commitment to it, Plaintiff committed to Camden. (Defendant asserts that Plaintiff does not employ large numbers of Camden residents. Defendant does not assert that the application or the parties' agreement imposed any obligations upon Plaintiff in that respect. Accordingly, the Court does not find that assertion to be relevant as a matter of law or in equity.) In furtherance of its mission to promote development and create jobs in New Jersey, generally, and in Camden, specifically, Defendant continues to benefit from Plaintiff's ongoing performance. It is hardly equitable to allow Defendant to continue to reap the benefits of Plaintiff's performance while Defendant escapes from its own obligations.

[7] Defendant points out, accurately, that other applicants brought the ambiguity to Defendant's attention. Plaintiff did not. It argues that the record is devoid of any evidence that, at the time of the application, Plaintiff thought the application was

statement against Defendant, Plaintiff did not misrepresent its past debarment.[8] Accordingly, the Court finds that Plaintiff's answer to No. 8 does not constitute grounds to excuse Defendant from its contractual obligations to Plaintiff.

Next, the Court turns to Defendant's argument that it is entitled to not perform under the agreement because Plaintiff misrepresented its offer of free land

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ambiguous. But that does not render the contractual provision clear. One party may not be aware of an ambiguity until it realizes the other party has a different understanding of the provision. In Driscoll, for example, to the best of its ability, the plaintiff understood the bid specifications to allow for permanent lane closures. 371 N.J. Super. at 310-11 (explaining that Plaintiff reviewed bid specifications, compared it Defendant's contracts with other contractors, and interpreted specifications to permit use of permanent lane closures). The parties did not realize that they had different understandings of the specifications until Plaintiff submitted a plan based upon its own interpretations. Id. at 311. In other words, a party is not held to predict that the other party holds a different reasonable interpretation of a given contractual provision.

[8] The Court further notes that the notion that Plaintiff would intentionally misstate or seek to conceal its debarment seems implausible, at best. First, the TVA debarment is a matter of public record, easily ascertainable with minimal effort. Second, Holtec signed an authorization for a background check as part of its application process. The record is devoid of any evidence that any agency conducted a background check. The undisputed facts underlying this litigation demonstrate that Defendant and the BAC actively solicited and encouraged Plaintiff's application to the Grow Program in the years shortly after the TVA debarred Plaintiff. Encouraged by such these agencies, it would seem more likely that Plaintiff would disclose any possible adverse determinations that it thought responsive to the application, rather than attempt to conceal them. Third, Holtec had, close in time to its application to NJEDA, disclosed the TVA debarment to another entity in response to an application's question that clearly called for its disclosure. Other than the ambiguity of Defendant's application, nothing distinguishes Plaintiff's disclosure in one instance and failure to do so in the other.

in South Carolina during the initial application period. The record fails to support Defendant's assertion for several reasons. Plaintiff consistently and explicitly referred to land costs as assumptions. Defendant did not seek or request any additional documents regarding land costs. While Defendant had every opportunity during an extensive review process to make such inquiries, it did not. Finally, each deposition of Defendant's employees or former employees who were part of the application review process established that, given the magnitude of the project and the higher costs associated with construction in New Jersey, land costs were not a material factor in NJEDA's approval of Plaintiff's application.

By way of background, the Grow Program application process required Holtec to provide alternative development sites. On January 20, 2014, Holtec submitted a cost benefit analysis citing the Savannah River Site or Charleston, South Carolina as alternative sites and recorded the land acquisition cost as zero. See Pl.'s Ex. 50. Under the "Assumptions" section of the application, Holtec stated: "Holtec is interested in pursuing land acquisition costs in this proposal as we will not have to pay for land in our South Carolina alternative as shown in this analysis." Id. at ¶ 2. Plaintiff similarly stated in its June 25, 2020 cost benefit analysis, "we will not have to pay for land in our South Carolina alternative as

shown in this analysis." Pl.'s Ex. 51 at ¶ 3. Plaintiff informed NJEDA the cost benefit analysis numbers were estimates and nothing was guaranteed. See Pl.'s Ex. 52. In an email sent on June 16, 2014, an NJEDA employee, Tim Lizura, said: "We also understand the cost benefit analysis contain estimates and so long as the information is the most current, believed true, have a verifiable basis for presentation and is being relied on by the applicant to make the location decision these should be fine as well." Pl.'s Ex. 52. Plaintiff's Senior Vice President Pierre Oneid testified: "I recall that it meant … we would have room and board, just like what we had in New Jersey, we were offered the whole land for one dollar for 99 years or something like that" when asked about the incentives South Carolina offered Holtec. Pl.'s Ex. 89 at 143:7-21.

Dr. Singh, Holtec's CEO, testified in respect to South Carolina that he was "satisfied that they will go all out" and that then-Governor of South Carolina Nikki Haley "was committed to try to bring Holtec to South Carolina." Pl.'s Ex. 87 at 181:21-25. Plaintiff was in continuous talks with South Carolina about development opportunities. Pl.'s Ex. 38-40, 42.

Defendant did not require Plaintiff to submit a written offer from South Carolina and did not request one. NJEDA Underwriter Kevin McCullough noted it was "not usual" operating procedures for applicants to submit written confirmation

and "between the documents that were provided, and the conversations that we had with the applicant and their representatives, we were ultimately satisfied." Pl.'s Ex. 11 at 146:2-10. The record shows Defendant intentionally chose not to request written agreements from Grow Program applicants because it did not "want to push the companies to another state to start engaging in further dialogue with them…." Pl.'s Ex. 11 at 145:18-20. Plaintiff provided the necessary assumptions based on its understanding of conversations with officials in South Carolina. Defendant accepted those assumptions and did not request more information. The Court finds Plaintiff did not misrepresent its offer of free land in South Carolina because Defendant was aware and in fact preferred that the offer of "free land" remain an assumption rather than a firm agreement.

The Court finds Plaintiff did not misrepresent its previous debarment or offer of land in South Carolina to Defendant.[9] As such, Defendant fails to establish

[9] The parties' briefs and oral arguments concerning misrepresentation addressed many cases, most of which the Court has addressed herein. Defendant relies heavily on Jewish Center of Sussex County v. Whale, 86 N.J. 619 (1981). Whale is important in several respects. First, it sets forth the elements of legal fraud and the "lesser burden of proving equitable fraud." Id. at 624 ("A misrepresentation amounting to actual legal fraud consists of a material representation of a presently existing or past fact, made with knowledge of its falsity and with the intention that the other party rely thereon, resulting in reliance by that party to his detriment."); id. at 625 (explaining that equitable fraud does not require scienter element). Second, Defendant relies upon the matter for, among other thing, its instruction that "[a]ctual loss in the financial sense is not required before equity may act;

a breach of contract claim and is not entitled to void the Incentive Agreement under guiding law or Section Fifteen of the Incentive Agreement.[10]

Finally, the Court turns to Plaintiff's claim that Defendant breached its duty of good faith and fair dealing. In New Jersey, an implied covenant of good faith

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equity looks not to the loss suffered by the victim but rather to the unfairness of allowing the perpetrator to retain a benefit unjustly conferred." Id. at 626. "Thus, in awarding an equitable remedy like rescission, the claimant's actual damage is only one factor to be considered." Ibid. (citing W. Prosser, The Law of Torts 732 (4th ed. 1971)). And third, the Court approved the trial court's remedy of rescission because "defendant gained an unfair advantage by virtue of [his] misrepresentation" because of "the unique moral and spiritual relationship between clergy and congregation." Ibid.

In this matter, the Court has already explained that rescission is an inequitable remedy in this matter. See note 6. Additionally, given Plaintiff's ongoing performance of its obligation under the contract, neither party is in position so easily terminated as an employment relationship. To the contrary, Plaintiff indisputably relied substantially upon its agreement with Defendant to build a technology campus that continues to operate, generate tax revenues, and employ New Jersey residents. The Court does not elevate Plaintiff's actual damage among all other factors but, instead, places it in the context of Plaintiff's ongoing and continuing performance under the parties' agreement and Defendant's ongoing benefits derived therefrom. Thus, while the Court appreciates the teachings of Whale, its close examination renders unchanged this Court's conclusion that Defendant is not equitably entitled to avoid its obligations under the parties' agreement.

[10] As noted above, Defendant moved for summary judgment on the grounds that Plaintiff's conduct constituted events of default under the parties' agreement. Because the Court concludes that Plaintiff did not materially misrepresent its debarment history or the availability of land in South Carolina, the Court does not find that Plaintiff made any statement "false, misleading, or inaccurate in any material respect" and, thus, did not default under the agreement.

and fair dealing exists in all contracts, such that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract . . . ." Sons of Thunder, Inc. v. Borden, Inc., 148 N.J. 396, 420 (1997) (quoting Palisades Props., Inc. v. Brunetti, 44 N.J. 117, 130 (1965)); see Kalogeras v. 239 Broad Ave., LLC, 202 N.J. 349, 366 (2010) (covenant inherent in every contract). A party may obtain relief "if its reasonable expectations are destroyed when [the other party] acts with ill motives and without any legitimate purpose." Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Ctr. Assocs., 182 N.J. 210, 226 (2005) (citations omitted); see also Restatement (Second) of Contracts, § 205, comment a (1979) ("Good faith performance . . . emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party"). Thus, a breach of this implied covenant necessarily requires "[b]ad motive or intention" on the part of the breaching party. Wilson v. Amerada Hess Corp., 168 N.J. 236, 251 (2001). "The party claiming a breach of the covenant of good faith and fair dealing 'must provide evidence sufficient to support a conclusion that the party alleged to have acted in bad faith has engaged in some conduct that denied the benefit of the bargain originally intended by the parties.'" Brunswick Hills Racquet Club, 182 N.J. at 225 (quoting 23 Williston on Contracts, § 63:22 at 513-14 (Lord ed. 2002)

(footnotes omitted)). Through this covenant there exists "[a]n affirmative obligation to prevent parties from taking advantage of asymmetrical relationships in breach of an implied covenant of good faith and fair dealing…." W.V. Pangborne & Co. v. N.J. Dep't of Transp., 116 N.J. 543, 562 (1989). The government must act fairly and "with compunction and integrity." Id. at 562 (citations omitted).

The Task Force on the Economic Development Authority's Tax Incentive Programs conducted a review of the NJEDA program and issued a public report identifying both Holtec's failure to disclose its previous debarment and Defendant's failure to discover the debarment on June 17, 2019. See Def.'s SMF at ¶¶ 60-61; Def.'s Ex. 20. The Task Force referred the matter to the Attorney General on July 9, 2020. Def.'s Ex. 21. Prior to the criminal referral, NJEDA sought additional information from Plaintiff regarding its previous debarment. Def.'s Ex. 24. On August 8, 2019, Plaintiff provided the requested information and accepted the offer for a meeting. Def.'s Ex. 25.

Defendant did not act in bad faith when it withheld the tax incentive payments. Palisades Props., 44 N.J. at 130. The record is devoid of any evidence that Defendant acted in bad faith in taking its position. It referred the matter to the Attorney General and, after that, had no obligation to further

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discuss the matter with Plaintiff during the pendency of that referral. Defendant did not breach an express term of the contract and the record does not show an ill motive. Under the circumstances, and based upon this record, Plaintiff does not prevail on establishing that Defendant acted in bad faith. Accordingly, the Court denies Plaintiff's application for summary judgment based upon an alleged breach of Defendant's duty of good faith and fair dealing when it withheld the 2018 Letter of Compliance.

The Court acknowledges but does not address the parties' hearsay arguments regarding the TVA report and plea agreement of former TVA employee Jack Symonds. The Court's findings do not reach the substantive issues of materiality; therefore, the exhibits were not considered.

The Court finds Plaintiff is entitled to specific performance of the Incentive Agreement. Defendant fails to show Plaintiff misrepresented material information about its debarment and offer of free land in South Carolina. Plaintiff performed under the contract and Defendant received the benefit of the exchange. As such, Plaintiff is entitled to the agreed upon tax credits. Finally, the Court denies Plaintiff's request for direct damages. Plaintiff fails to show Defendant breached its duty of good faith and fair dealing.

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Before Appellate Division,
Superior Court of New Jersey
DOCKET NO.

CIVIL

HOLTEC INTERNATIONAL
V.
NEW JERSEY ECONOMIC DEVELOPMENT AUTHORITY

PROOF OF SERVICE

I hereby certify that an original of the following documents, **NOTICE OF APPEAL, PROOF OF SERVICE, MOTION TRANSCRIPT (Vol. 1), TRIAL COURT ORDER, CASE INFORMATION STATEMENT** were submitted and transmitted to the parties listed below in the following format:

ELECTRONICALLY TO:
ATTORNEY NAME: MICHAEL P O'MULLAN, Esq.
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TRIAL COURT JUDGE: ROBERT T. LOUGY, JSC
TRIAL COURT DIVISION MANAGER: JUDITH IRIZARRY

BY MAIL:

I certify that the forgoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Attorney for APPELLANT
NEW JERSEY ECONOMIC DEVELOPMENT AUTHORITY

Dated: **01/20/2022**

By: **S/ BLAIR R ALBOM, Esq.**

(*) truncated due to space limit. Please find full information in the additional pages of the form.