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HOLTEC INTERNATIONAL, Plaintiff, - against - NEW JERSEY ECONOMIC DEVELOPMENT AUTHORITY, Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION MERCER COUNTY DOCKET NO.: MER-L-696-20 *Civil Action*

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS THE COMPLAINT

On the Brief:
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Defendant New Jersey Economic Development Authority ("NJEDA") respectfully submits this memorandum of law in support of its motion to dismiss the Complaint filed by Plaintiff Holtec International ("Holtec" or "Plaintiff"). For the reasons that follow, Holtec has failed to plead valid claims with respect to each of the counts alleged in its Complaint. Accordingly, the Complaint should be dismissed in its entirety pursuant to N.J. Ct. R. 4:6-2(e).

PRELIMINARY STATEMENT

Through its Complaint, Holtec seeks to compel NJEDA to approve a tax credit for the 2018 tax year pursuant to an incentive agreement awarded to it under the Grow New Jersey Assistance Act, N.J. Stat. Ann. § 34:1B-242 *et seq* (the "Grow Act" or "Grow NJ"). NJEDA, however, has not denied Holtec the tax credit at issue.

Rather, as Holtec concedes in its Complaint, the approval of Holtec's 2018 tax credit is pending while NJEDA evaluates Holtec's continued eligibility for a Grow NJ award, because of the company's recent admission that it made false statements to NJEDA when the company applied for the award. Holtec's misrepresentations – which include its failure to disclose a prior government debarment by the Tennessee Valley Authority (the "TVA") for bribing an official of that agency –

first came to light during an investigation conducted by the Governor's Task Force on the Economic Development Authority's Tax Incentive Program, and [redacted]

Holtec alleges that NJEDA does not have the authority to conduct a review of the facts and circumstances surrounding the company's misrepresentations, and that by withholding the 2018 tax credit pending such review, NJEDA is in breach of its obligations under the incentive agreement between the parties, dated February 2, 2017 (together with amendments thereto, the "Incentive Agreement"). Yet under the clear and unambiguous terms of the parties' contract and the Grow program regulations, NJEDA has not only the authority to perform this review, but the obligation to do so.

In Count One, Holtec alleges a breach of Section 11 of the Incentive Agreement, which requires NJEDA to authorize the issuance of a tax credit for the relevant tax year "upon satisfactory review" of information submitted annually by Holtec attesting to the company's compliance with the Incentive Agreement and Grow program regulations. On the facts as pled, there has been no breach of this provision. NJEDA's review is still ongoing, and NJEDA is not required to authorize the issuance of a credit absent a determination by NJEDA that Holtec

is in compliance with the Incentive Agreement and Grow program regulations.

Holtec contends that NJEDA's continued review "is without basis in law or fact" (Compl. ¶ 114) because the company's report "was satisfactory" (Compl. ¶ 111). But this is belied by the facts as pled. Holtec admits that it represented in its application that it had not been debarred by "any department, agency, or instrumentality of the State or Federal government" (Compl. ¶¶ 67-68). And Holtec admits that this representation was false (Compl. ¶ 64). These admissions are fatal to Holtec's Complaint. The TVA debarment itself, and, more significantly, the misrepresentation about the debarment, may constitute an event of default under Section 14 of the Incentive Agreement that would entitle NJEDA, in its sole discretion, to withhold the 2018 tax credit, and any future tax credits, and seek rescission of credits previously issued.

Specifically, the Incentive Agreement – the contract that is the subject of Holtec's Complaint – expressly states that if "[a]ny representation or warranty made by the Company [*i.e.*, Holtec] in its Application is false, misleading, or inaccurate in any material respect," then it shall constitute an "Event of Default," authorizing NJEDA, in its sole discretion, to, among other things, "require the surrender by the Company to

[NJEDA] of the Tax Credit Certificate for suspension or cancellation." Incentive Agreement § 14(b); § (15)(a)(1). Furthermore, as an express condition of the tax credits it received under the Incentive Agreement, Holtec "covenant[ed] that the representations, statements and warranties of the Company set forth in the Company Application . . . (1) are true, correct and complete in all materials respects, [and] (2) do not contain any untrue statement of a material fact." Incentive Agreement § 5(b).

Holtec asks this Court to disregard these clear and unambiguous provisions of the Incentive Agreement. Instead, Holtec seeks to halt NJEDA's review and force NJEDA to approve the issuance of a tax credit to the company before NJEDA can determine whether the TVA debarment and Holtec's misrepresentation about the debarment constitute an Event of Default that warrants rescission of tax credits awarded to date, and [redacted]. This attempt to circumvent the clear terms of the contract between the parties should not be permitted.

Count Two of the Complaint alleges a breach of the implied covenant of good faith and fair dealing based on the same conduct. That count must be dismissed because it is

precluded by the New Jersey Contractual Liability Act ("NJCLA"), which bars the assertion of any claim based upon an implied warranty, such as Holtec's claim based on an implied covenant of good faith and fair dealing. Count Two should also be dismissed because Holtec has failed to allege facts sufficient to state a claim for breach of the implied warranty.

Count Three, which alleges a claim for promissory estoppel must be dismissed because it, too, is precluded by the NJCLA, which bars assertions based on contracts implied in law, such as promissory estoppel. It also should be dismissed because it is precluded by the clear and unambiguous terms of the parties' contract and because Holtec has otherwise failed to allege facts sufficient to state a claim.

SUMMARY OF ALLEGED FACTS

1. The Grow NJ Tax Incentive Program

NJEDA "serves as the State's principal agency for driving economic growth. . . . Through partnerships with a diverse range of stakeholders, the NJEDA creates and implements initiatives to enhance the economic vitality and quality of life in the State and strengthen New Jersey's long-term economic

competitiveness."[1] As part of its mandate, NJEDA administers, *inter alia*, the Grow NJ tax incentive program. Grow NJ promotes economic development in New Jersey by awarding tax credits to qualifying businesses that create or retain jobs in the State. As such, it is a "powerful job creation and retention incentive program that strengthens New Jersey's competitive edge against tax incentive programs in surrounding states."[2]

2. Holtec's Application for a Grow NJ Award

On January 20, 2014, Holtec submitted an application for a Grow NJ tax incentive award. (Compl. ¶ 41.) As part of the application, Holtec was required to fill out a Legal Questionnaire, which included a question asking whether Holtec had been subject to "[d]ebarment by any department, agency, or instrumentality of the State or Federal government." (Compl. ¶ 67.) Holtec responded "NO" to this question. (Compl. ¶ 68.)

To ensure the integrity of the Grow NJ program, applicants are required to submit certifications from no less than their chief executive or equivalent officer indicating that

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[1] https://www.njeda.com/about/mission [last accessed on June 2, 2020]

[2] https://www.njeda.com/financing_incentives/programs/grow_nj [last accessed on June 2, 2020]

he or she had reviewed "the information submitted to [NJEDA] and that the representations contained therein are accurate." N.J. Stat. Ann. § 34:1B-244; N.J. Admin. Code § 19:31-4.4(b)(13). Holtec's application was accompanied by such a certification, signed under penalty of perjury by Holtec's then-President and CEO Dr. Kris Singh, stating that the contents of the application were true and accurate:

> I, the undersigned, **certify under penalty of law that the representations contained herein are accurate**; that I am familiar with the information submitted in this document, including all attachments, **and have personally exercised an appropriate degree of due diligence to reasonably ensure that the information contained in this document, and all attachments are true, accurate, and complete**.

Solano Cert.[3] at Ex. 2 (emphasis added).

Dr. Singh further certified that he understood that the submission of false or materially inaccurate information could result in the denial of the company's application, or the revocation or termination of tax credits if Holtec's application ultimately was granted:

> I am aware that there are significant penalties for submitting false information, including the possibility of fine and

[3] References to "Solano Cert." are to the Certification of Ricardo Solano Jr. In Support of Defendant's Motion to Dismiss the Complaint, dated June 22, 2019, submitted herewith.

> imprisonment. I understand that, in addition to criminal penalties, I may be liable for civil administrative penalties **and that submitting false information or submitting materially inaccurate information may be grounds for denial, revocation or termination of any award of tax credits** for which I may be seeking approval or now hold.

Solano Cert. at Ex. 2 (emphasis added).

On July 10, 2014, NJEDA approved Holtec's application (Compl. ¶ 46), relying, among other things, upon the accuracy and truthfulness of the information provided by Holtec.

3. The Incentive Agreement

Following approval of an application, the Grow Act states that NJEDA "shall require an eligible business to enter into an incentive agreement prior to the issuance of tax credits." N.J. Stat. Ann. § 34:1B-245. On February 2, 2017, NJEDA and Holtec thus entered into the Incentive Agreement, which governs the terms and conditions of the award. (Compl. ¶ 49.) The importance of the accuracy and truthfulness of the statements made in Holtec's application is reflected in several of the Incentive Agreement's provisions.

In Section 5, Holtec expressly covenanted that "the representations, statements and warranties of the Company set forth in the Company Application . . . (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 . . . therein not misleading or incomplete." (Incentive Agreement § 5(b).)

Section 11 of the Incentive Agreement requires Holtec annually to certify its ongoing compliance with Section 5 and all of the other provisions of the Incentive Agreement. The annual report must contain a "certification acceptable to [NJEDA] by [Holtec] indicating whether or not [Holtec] is aware of any condition, event or act which would cause [Holtec] not to be in compliance with the approval, the 2013 Act, this Agreement or the Regulations promulgated thereunder." (Incentive Agreement § 11.) Section 11 entitles Holtec to receive a "letter of compliance" – which the company presents to the State's Tax Department in order to receive its tax credit – only "upon satisfactory review" by NJEDA of the compliance information submitted by Holtec. (*Id*.)

Section 14, which enumerates grounds for default of the Incentive Agreement, provides that an "Event of Default" occurs if "[a]ny representation or warranty made by the Company in its Application, the approval letter or in [the Incentive] Agreement is false, misleading, or inaccurate in any material respect." (Incentive Agreement § 14(b).) Pursuant to Section 15, the occurrence of an Event of Default entitles NJEDA in its sole discretion to suspend or cancel Holtec's tax credits (*Id*.

§ 15(a)(1)), and to seek repayment of some or all previously issued credits. (*Id*. § 15(a)(2).)[4]

4. Holtec's Misrepresentations Come to Light

Holtec submitted annual compliance reports for fiscal years 2017 and 2018, the latter of which was submitted on or about January 15, 2019. (Compl. ¶¶ 55-56.) In neither of its submissions did Holtec seek to amend the debarment question on its application, despite the fact it has since conceded that its answer to the debarment question was not accurate. (Compl. ¶¶ 64, 69-70.)

On January 24, 2019, a few days after Holtec's January 2019 submission, Governor Murphy established a Task Force on the Economic Development Authority's Tax Incentive Programs, N.J. Admin. Code § EX. ORD. No. 52 (2019) (the "Task Force"). While NJEDA's review of Holtec's 2018 annual certification was pending, the Task Force reviewed Holtec's application and award, and identified the fact that Holtec had been debarred by the TVA. Task Force First Published Report, dated June 17, 2019

[4] Consistent with Grow program regulations, the Incentive Agreement also contains a limitation of liability clause, which provides that NJEDA "is not liable in damages for the issuance or use of the Grant of Tax Credits". (Incentive Agreement § 8; *see also* N.J. Admin. Code § 19:31-18.10(c).)

(the "Report")[5] at 4. At a subsequent public hearing, the Task Force's counsel elaborated on what it had learned: "basically Holtec, according to the US attorney's office and the OIG, paid . . . $54,000 to a TVA employee for, for maintaining or continuing to have its contract." Solano Cert. Ex. 4 at 22. At the public hearing the Task Force's counsel also noted, "this information suggests that Mr. Singh may have played a role in or at least at a minimum may have been aware of the underlying activity, according to his statements to the OIG." *Id*. at 30.

Ahead of the Report's public release, but after learning that the issue already had been discovered and was about to be reported in the media,[6] Holtec sent a letter to NJEDA, dated May 20, 2019, that attempted to amend its application and change the NO answer to the debarment question to YES. (Compl. ¶ 70.) In a one-paragraph letter from the

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[5] Available at https://www.politico.com/states/f/?id=0000016b-67c1-df00-a9fb-6fe1d7840001 (accessed June 4, 2020).

[6] *See* A False Answer, a Big Political Connection and $260 Million in Tax Breaks, *available at* https://www.propublica.org/article/holtec-international-george-norcross-tax-breaks (accessed June 13, 2020) ("Five days after WNYC and ProPublica contacted Holtec seeking comment about its incorrect answer on the application, an attorney representing the firm sent a letter asking the EDA to correct Singh's answer in the 2014 application. Kevin Sheehan, an attorney with the Parker McCay law firm, which represented Holtec in its application for tax breaks, wrote to the agency that the mistake was 'inadvertent.'").

company's lawyer – and not someone with firsthand knowledge of the underlying facts – Holtec claimed that its original answer was an "inadvertent mistake"; it did not, however, provide any explanation for that "mistake" or how it came to occur. (*Id*.) This was the first time that Holtec informed NJEDA of the TVA debarment.

On or about June 26, 2019, NJEDA requested that Holtec submit a written explanation for its failure to disclose the TVA debarment. (Compl. ¶¶ 74-76.)[7] In response, Holtec in a letter dated August 8, 2019 simply referred NJEDA back to its May 20, 2019 letter. (Compl. ¶ 78.) As noted above, Holtec's May 20, 2019 letter did not explain why the company answered the debarment question in the way it did. Indeed, to date, Holtec has never explained why its CEO, despite having knowledge of, and perhaps involvement in, events leading to the TVA debarment, executed a certification that falsely stated that all of the information contained in Holtec's application – including the denial of any debarment – was truthful, accurate, and complete, and that he "personally exercised an appropriate degree of due

[7] NJEDA also requested information about Holtec's receipt of certain Ohio tax credits. During the course of its review of Holtec's annual certification, NJEDA also discovered that one of Holtec's affiliates had received tax credits under the Ohio Job Creation Tax Credit Program, but had lost those credits when the affiliate was unable to maintain the requisite jobs at that Ohio facility. (Compl. ¶ 76.)

diligence to reasonably ensure" himself of that fact. Solano Cert. at Ex 2.

Following this exchange of letters, the parties' legal representatives discussed the issue, including [redacted], but did not reach any agreement on how to proceed. (Compl. ¶¶ 84-88.) NJEDA expected Holtec to provide a substantive explanation addressing (1) why its CEO submitted a certification under penalty of perjury that contained a material misrepresentation, and (2) the events and circumstances leading to the TVA debarment as described at the Task Force's public hearing. Instead, Holtec elected to commence this litigation. NJEDA cannot make a decision about the status of Holtec's 2018 annual tax credit, or, indeed, Holtec's continued eligibility under Grow NJ, until Holtec either provides NJEDA the requested information or confirms that it will not provide anything more.

ARGUMENT

On a motion to dismiss a complaint under R. 4:6-2(e), the "court must dismiss the plaintiff's complaint if it has failed to articulate a legal basis entitling plaintiff to relief." *Sickles v. Cabot Corp.*, 379 *N.J. Super.* 100, 106 (App. Div. 2005). Although the Court must accept well-pleaded allegations as true and afford "every reasonable inference to the plaintiff," *Smith v. SBC Commc'ns Inc.*, 178 *N.J.* 265, 282

(2004), it should not give deference to conclusory or vague allegations. *Donato v. Moldow*, 374 *N.J. Super.* 475, 501 (App. Div. 2005); *see also Delbridge v. Office of Pub. Defender*, 238 *N.J. Super.* 288, 314 (Law Div. 1989) ("Complaints cannot survive a motion to dismiss where the claims are conclusory or vague and unsupported by particular overt acts."), *aff'd o.b. sub nom., A.D. v. Franco*, 297 *N.J. Super.* 1 (App. Div. 1993).

A motion to dismiss "should be granted if even a generous reading of the allegations [of the Complaint] does not reveal a legal basis for recovery." *Edwards v. Prudential Prop. & Cas. Co.*, 357 *N.J. Super.* 196, 202 (App. Div. 2003). Moreover, "[t]he motion may not be denied based on the possibility that discovery may establish the requisite claim; rather, the legal requisites for plaintiff[']s claim must be apparent from the complaint itself." *Id.*; *accord Teamsters Local 97 v. State*, 434 *N.J. Super.* 393, 413 (App. Div. 2014).

In considering a motion to dismiss, the Court may consider documents referred to in the Complaint without converting a motion to dismiss into a motion for summary judgment. *New Jersey Citizen Action, Inc. v County of Bergen*, 391 *N.J. Super.* 596, 605 (App. Div. 2007); *see also Teamsters Local,* 434 *N.J. Super.* at 412 ("In evaluating motions to dismiss, courts consider allegations in the complaint, exhibits attached to the complaint, matters of public record, and

documents that form the basis of a claim.") (internal quotation marks and citation omitted).

Here, as discussed in detail below, even a generous reading of Holtec's Complaint fails to allege facts sufficient to substantiate any of its claims. Moreover, Holtec's claims for breach of the implied covenant of good faith and fair dealing and for promissory estoppel are also barred by the New Jersey Contractual Liability Act.

I. THE CLAIM FOR BREACH OF CONTRACT (COUNT ONE) FAILS AS A MATTER OF LAW

"To establish a breach of contract claim, a plaintiff has the burden to show that the parties entered into a valid contract, that the defendant failed to perform his obligations under the contract and that the plaintiff sustained damages as a result." *Murphy v. Implicito*, 392 *N.J. Super.* 245, 265 (App. Div. 2007). As a matter of law, there cannot be a breach of contract unless the defendant has failed to perform an obligation it has under the contract. *See, e.g., EnviroFinance Grp., LLC v. Envtl. Barrier Co., LLC*, 440 *N.J. Super*. 325, 345 (App. Div. 2015) ("To prevail on a breach of contract claim, a party must prove . . . the opposing party's failure to perform a defined obligation under the contract).

Here, Holtec claims that NJEDA has breached the Incentive Agreement but fails to allege facts sufficient to

establish that NJEDA has failed to perform any of its obligations under the contract.

A. NJEDA Has Not Failed to Fulfill Its Obligation Under the Incentive Agreement

Section 11 of the Incentive Agreement obligates NJEDA to issue a letter of compliance authorizing the issuance of a tax credit only "[u]pon **satisfactory review** of all information submitted in the Annual Compliance Report." (Incentive Agreement § 11) (emphasis added). The relevant regulations similarly provide that "[a]nnually, upon **satisfactory review** of all information submitted, [NJEDA] will issue a letter of compliance." N.J. Admin. Code § 19:31-18.11(d) (emphasis added). According to the plain language of Section 11 and the regulations, if NJEDA has not completed this review and deemed the information submitted by Holtec satisfactory, NJEDA is under no obligation to issue a letter of compliance.

On the facts as pled, NJEDA has not completed the review to its satisfaction (*see* Compl. ¶¶ 12, 13, 56, 74-84, 88), and thus has not – as a matter of fact or law – breached the Incentive Agreement by not yet issuing a Certificate of Compliance. *See Namerow v. PediatriCare Assocs., LLC*, 461 *N.J. Super.* 133, 140 (Ch. Div. 2018) ("Under New Jersey law, where the terms of a contract are clear and unambiguous, there is no

room for interpretation or construction and the courts must enforce those terms as written.").

In responding to NJEDA's inquiry, Holtec failed satisfactorily to explain the misrepresentation in its application and subsequent annual certification. Instead, Holtec has merely asserted in a one-paragraph letter that its omission was an "inadvertent mistake." (Compl. ¶ 70.) NJEDA has sought, and still awaits, a full and detailed explanation from Holtec for its misrepresentation in the application and every annual certification submitted since then. Until NJEDA's review is complete, and unless at that time NJEDA denies Holtec its 2018 tax credit, no claim for breach of the Incentive Agreement can be sustained. *See, e.g.*, *Miller & Sons Bakery Co. v. Selikowitz*, 8 *N.J. Super.* 118, 122, (App. Div. 1950) ("Ordinarily no action for damages or for restitution can be maintained until the time for performance has come and there has been an actual failure to perform.").[8]

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[8] Given Holtec's lack of response to NJEDA's inquiries and the seriousness of the possible consequences of Holtec's misrepresentations, the time NJEDA has taken to conduct its review is entirely reasonable. *See, e.g.*, *Hosp. Ctr. at Orange v. Guhl*, 331 *N.J. Super.* 322, 336 (App. Div. 2000) (holding that in the absence of any federal mandate or state legislative directive that a state agency issue its decision within a specific time, courts should review whether the agency made its decision "within a reasonable period of time"). Moreover, Holtec has suffered no prejudice, as it can use the 2018 tax

B. The TVA Debarment, and Holtec's Misrepresentations about the Debarment, Could Disqualify Holtec From Receiving Its 2018, And Future, Tax Credits

Holtec contends that further review is not warranted, and that NJEDA cannot withhold the tax credit, because a "brief debarment by an agency that has since signed a ~$300 million contract with the company does not qualify" as a basis to reject the company's Grow award. (Compl. ¶ 72.) In essence, Holtec argues that NJEDA must perform under Section 11 of the Incentive Agreement because even if Holtec had answered the debarment question truthfully, it would not have affected the company's eligibility for an award.

Holtec is wrong that the TVA debarment could not have been a cause for disqualification under the Grow Act, particularly in light of the egregious circumstances leading to the debarment described by the Task Force. (*See* Solano Cert. Ex. 4 at 19-31.) NJEDA's regulations expressly contemplate as cause for disqualification debarment by a federal or state agency, N.J. Admin. Code § 19:30-2.2(a)(10), or "[a]ny other cause of such serious and compelling nature as may be determined by the Authority to warrant disqualification." N.J. Admin. Code § 19:30-2.2(a)(9).

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credit for up to three years past the closing of the tax period, should it ultimately receive the credit. *See* N.J. Stat. Ann. § 34:1B-247(c)(1).

But Holtec's argument misses the point. The relevant question in assessing Holtec's qualification for a Grow NJ award is not simply whether Holtec would have been disqualified from the Grow program had it disclosed the TVA debarment in its application, but also whether "any representation or warranty made by [Holtec] in its application, the approval letter, or in [the Incentive Agreement] is false, misleading, or inaccurate in any material respect." (Incentive Agreement § 14(b).)

If NJEDA determines that Holtec's debarment or the facts surrounding the debarment would disqualify Holtec, or that Holtec's misrepresentations constitute an Event of Default under Section 14(b) of the Incentive Agreement, it may (though it is not required to) withhold the 2018 tax credit certification, and/or pursue other remedies available to it under the Incentive Agreement. (Incentive Agreement § 15(a).) An Event of Default undoubtedly would be a material breach that would excuse performance by NJEDA of the provisions of Section 11 of the Incentive Agreement. *See Magnet Res., Inc. v. Summit MRI, Inc.*, 318 *N.J. Super.* 275, 285, (App. Div. 1998) ("It is black letter contract law that a material breach by either party to a bilateral contract excuses the other party from rendering any further contractual performance").

In any event, NJEDA has not completed its review under Section 11 of the Incentive Agreement, has not made a

determination about Holtec's debarment, has not declared an Event of Default under Section 14 of the Incentive Agreement, and has not suspended or canceled Holtec's 2018 tax credit or otherwise sought any of the remedies available to it under Section 15 of the agreement. Indeed, as stated, *supra*, NJEDA cannot make a final determination about the status of Holtec's 2018 annual tax credit, or Holtec's continued eligibility under Grow NJ, until Holtec either provides NJEDA the information NJEDA has requested or, in the alternative, confirms that it will not provide anything more. If, after completing its review, NJEDA declares an Event of Default and withholds the 2018 tax credit or otherwise seeks to enforce any of its Section 15 remedies, that will be the appropriate time for Holtec to assert any breach of contract claim.[9]

II. THE CLAIM FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING (COUNT TWO) IS PRECLUDED BY STATUTE AND FAILS AS A MATTER OF LAW

Count Two of Plaintiff's Complaint fails as a matter of law because it is precluded by the New Jersey Contractual Liability Act ("NJCLA"), which the Incentive Agreement

[9] And even in that case, such a claim could be upheld only if Holtec could show that NJEDA exercised the discretionary authority accorded it by the Incentive Agreement and the Grow Act arbitrarily or unreasonably.

incorporates by reference, and which Holtec invoked as a basis for this Court's jurisdiction (Compl. ¶ 15.) Specifically, Section 17(n) of the Incentive Agreement states:

> The rights and remedies of [Holtec] under this Agreement, including, but not limited to, any right with regard to the failure of [NJEDA] to observe or perform under this Agreement, shall be subject to the New Jersey Contractual Liability Act, N.J.S.A. 59:13-1 et seq., the provisions of which are hereby incorporated herein by reference.

(Incentive Agreement § 17(n).)

The NJCLA prohibits recovery "for claims based upon implied warranties or upon contracts implied in law," N.J. Stat. Ann. § 59:13-3, such as a breach of the implied warranty of good faith and fair dealing. For this reason alone, Count Two must be dismissed.

But even if the claim was not barred as a matter of law, Holtec still has failed properly to plead a breach of the implied warranty. The Supreme Court in *Wilson v. Amerada Hess Corp.*, 168 *N.J.* 236, 244 (2001), articulated the test for a violation of the implied covenant as follows: "a party exercising its right to use discretion . . . under a contract breaches the duty of good faith and fair dealing if that party exercises its discretionary authority arbitrarily, unreasonably, or capriciously, with the objective of preventing the other party from receiving its reasonably expected fruits under the

contract." *Id.* at 251. *See also*, *JPMorgan Chase Bank, N.A. v. Gaspar*, No. A-4652-12T4, 2014 WL 6991728, at *4 (N.J. Super. Ct. App. Div. Dec. 12, 2014) (citing *Wilson*, and holding that a bank did not violate the implied covenant by withholding consent to sale of condominium and allegedly causing defendant to default on mortgage where defendant had defaulted on the mortgage, and where terms of mortgage stated that the bank would not "**unreasonably** withhold its consent to a sale, transfer, or other conveyance of the Property" provided no default had occurred) (emphasis added); *Stankovits v. Schrager*, No. A-0128-06T2, 2007 WL 4410247, at *7 (N.J. Super. Ct. App. Div. Dec. 19, 2007) (defendant's motion to dismiss should have been granted on issue of implied covenant of good faith and fair dealing, noting that "[a]bsent sufficient proof of bad motive or intention, discretionary decisions that happen to result in an economic disadvantage to plaintiff are not actionable.").

In its complaint, Holtec has not alleged that NJEDA exercised its discretionary authority "arbitrarily, unreasonably, or capriciously," or with an objective of depriving Holtec of receiving the reasonably anticipated benefits of the Incentive Agreement. Nor do the facts as alleged, even if true, support such a claim. To the contrary, NJEDA has exercised its contractually permitted discretion

"reasonably and with proper motive." *Wilson*, 168 *N.J.* at 247. Rather than deny Holtec its 2018 credit or terminate the Incentive Agreement altogether, NJEDA informed Holtec of the company's apparent breach of the Incentive Agreement and requested further information so that NJEDA could make an informed assessment of the impact of Holtec's misrepresentations on the company's continued eligibility under the Grow program. Accordingly, no reading of the facts as alleged can support a claim for breach of the implied warranty, and for that reason, too, Count Two should be dismissed.

III. THE CLAIM FOR PROMISSORY ESTOPPEL (COUNT THREE) IS ALSO PRECLUDED BY STATUTE AND FAILS AS A MATTER OF LAW

Count Three of Plaintiff's Complaint fails for three independent reasons: (1) the promissory estoppel claim is predicated upon an alleged contract implied in law, and is therefore barred under the NJCLA; (2) the promissory estoppel claim is barred by the integration clause of the Incentive Agreement; and (3) the Complaint fails to plead a clear and definite promise by NJEDA to Holtec. Consequently, Holtec's claim for promissory estoppel fails as a matter of law and should be dismissed.

A. The Claim for Promissory Estoppel Is Barred by the New Jersey Contractual Liability Act as It Is Predicated Upon an Alleged Contract Implied in Law

Count Three of Plaintiff's Complaint fails as a matter of law because the NJCLA bars claims "based upon . . . contracts implied in law." N.J. Stat. Ann. § 59:13-3.

Promissory estoppel, which is the allegation in Count Three, "is another name for an implied-in-law contract claim." *XP Vehicles, Inc. v. United States*, 121 *Fed. Cl.* 770, 782 (2015) (barring promissory estoppel claim pursuant to the Tucker Act, which "does not allow suits against the government based on contracts implied in law") (internal quotations omitted). Although NJEDA is not aware of any case in New Jersey that addresses the issue, claims based on promissory estoppel regularly are barred under identical sovereign immunity waiver statutes in other jurisdictions. *See, e.g., Tp. of Saddle Brook v. United States*, 104 *Fed. Cl.* 101, 111 (2012) ("Promissory estoppel theory does not fall within the jurisdiction granted to the court by the Tucker Act, and . . . the government has not waived its sovereign immunity with regard to a promissory estoppel cause of action." (citation and internal quotations omitted)); *Ellis v. United States*, No. 19-1489C, 2020 WL 831855, at *3 (Fed. Cl. Feb. 19, 2020) ("Claims based on promissory estoppel rely upon the existence of a contract that is implied in law"); *Jablon v. United States*, 657 *F.2d* 1064, 1070 (9th Cir.

1981) (promissory estoppel claim barred because it "cannot be characterized merely as an 'express or implied-in-fact' contract"); *Durant v. United States*, 16 *Cl. Ct.* 447, 450 (1988) ("Because the Tucker Act is interpreted to allow causes of action founded only on express or implied-in-fact contracts, the doctrine of promissory estoppel is not within the parameters of the Claims Court's jurisdiction."); *SilverWing at Sandpoint, LLC v. Bonner Cty.*, 164 *Idaho* 786, 800 (2019) ("Promissory estoppel is another name for an implied-in-law contract claim." (internal quotations omitted)); *Tiberi v. Cigna Corp.*, 89 *F.3d* 1423, 1432 (10th Cir. 1996) (Promissory estoppel is "a contract implied in law where no contract exists in fact" and, therefore, "is applied in lieu of a formal contract." (internal quotations omitted)); *Martens v. Minnesota Min. & Mfg. Co.*, 616 *N.W.2d* 732, 746 (Minn. 2000) ("Promissory estoppel is an equitable doctrine that impl[ies] a contract in law where none exists in fact." (internal quotations omitted)); *XTL-NH, Inc. v. New Hampshire State Liquor Comm'n*, 170 *N.H.* 653, 659 (N.H. 2018) (reviewing opinions of several jurisdictions and holding that claims for promissory estoppel did not come within limited waiver of sovereign immunity for contract claims).

This Court therefore need not reach the merits or sufficiency of the pleading in Count Three, and should dismiss it as outside of its jurisdiction.

B. The Claim for Promissory Estoppel is Barred by the Integration Clause of Holtec's Incentive Agreement

Even if Count Three were not barred by the NJCLA, it would still fail as a matter of law because it is premised upon a supposed promise that is not an express term of Holtec's Incentive Agreement.

A promissory estoppel claim requires four elements: 1) a clear and definite promise, 2) made with the expectation that the promisee will rely upon it, 3) reasonable reliance upon the promise, 4) which results in definite and substantial detriment. *Malaker Corp. Stockholders Protective Comm. v. First Jersey Nat'l Bank*, 163 *N.J. Super.* 463, 479 (App. Div. 1978) (holding, inter alia, that an alleged oral promise by a bank to provide additional loans to a creditor was unenforceable under principles of promissory estoppel). Here, the integration clause of the Incentive Agreement prevents Holtec from being able to claim reasonable reliance upon any promise to modify or expand the meaning of the terms of that agreement.

The Incentive Agreement states that, "together with the Approval Letter[10], [the Incentive Agreement] constitutes the

[10] The Approval Letter, dated September 2, 2014, contains near-identical language to the Incentive Agreement with respect to NJEDA's obligations to review the annual certifications, and

entire agreement between the Parties and supersedes all prior agreements and understandings, if any, both written and oral, between the Parties with respect to the subject matter hereto." (Incentive Agreement § 17(b).) This clause necessarily precludes Holtec's promissory estoppel claim. *See MLCFC 2007-9 ACR Master SPE, LLC v. Echo Farms, RV Resort LLC*, No. A-1692-13T1, 2014 *WL* 5506807, at *7 (N.J. Super. Ct. App. Div. Nov. 3, 2014) ("A promissory estoppel claim is deficient [if] the contract included a clause stating that it represented the entire understanding between the parties.") (internal quotations omitted).

The terms of the Incentive Agreement are clear and unambiguous and require no extrinsic evidence for interpretation. *See Namerow v. PediatriCare Assocs., LLC*, 461 *N.J. Super.* 133, 140 (Ch. Div. 2018) ("Under New Jersey law, where the terms of a contract are clear and unambiguous, there is no room for interpretation or construction and the courts must enforce those terms as written."). Under these circumstances, the promissory estoppel claim must be dismissed.

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similarly is devoid of any promise of review by March 1 or any other specific time frame.

C. The Complaint Failed to Plead a Clear and Definite Promise, so the Claim for Promissory Estoppel Fails

Finally, the promissory estoppel claim should be dismissed – even if not barred for the reasons set forth above – simply because the Complaint fails to plead a clear and definite promise.

Holtec asserts that NJEDA promised that "if Holtec constructed its state-of-the-art facility in Camden, delivered the promised jobs, **and otherwise met its obligations under the Grow Program**, [NJEDA] would issue Holtec its annual Letter of Compliance." (Compl. ¶ 127) (emphasis added). First, no such clear and definite promise was made, nor has Holtec properly alleged one in its Complaint. The Incentive Agreement unambiguously states that NJEDA will issue annual letters of compliance upon its satisfactory review of Holtec's submissions—which, as stated *supra*, it has not yet completed. Second, any such promise, if it existed, is, by Holtec's own admission, predicated upon Holtec having "met its obligations under the Grow Program." *Id*. Those obligations included a certification by Holtec's CEO that everything in Holtec's application was truthful and accurate. Given that Holtec admittedly failed to disclose the TVA debarment in response to a question asking about debarments, the CEO certification submitted alongside Holtec's application was false. Holtec further failed to meet

its obligations under Grow NJ when it failed to disclose this falsehood in either of its two annual certifications.

Holtec's assertion that NJEDA "further made a clear and definite promise to Holtec concerning the timing in which [NJEDA] would process the company's Annual Compliance Report so that Holtec would have its tax credits in hand prior to March 1 each year" similarly fails. NJEDA made no such promise in either the Incentive Agreement or otherwise, and Holtec has not pleaded anywhere else in the Complaint, beyond simple conclusory assertions, that such a promise ever existed. Count Three of the Complaint should therefore also be dismissed because it fails to state an actionable claim.

CONCLUSION

For the foregoing reasons, this Court should dismiss the Complaint in its entirety.[11]

Dated: June 22, 2020

Respectfully submitted,

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[11] Even if the Court does not dismiss the Complaint in its entirety, the Court should strike Holtec's demand for damages. (Compl. Prayer for Relief ¶ b.) Section 8 of the Incentive Agreement expressly provides that NJEDA 'is not liable for damages for the issuance or use of the Grant of Tax Credits." (Incentive Agreement § 8.) Holtec's purported damages claim relating to its sale of the tax credits (Compl. ¶ 93) is specifically precluded by this clause.