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March 23, 2020

RECEIVED

***Via Mail***

Clerk of Court
Chancery Division, General Equity
Superior Court of New Jersey, Mercer County
PO Box 8068
Trenton, New Jersey 08650-0068

**Re: Holtec International v. New Jersey Economic Development Authority**

Dear Sir/Madam:

We represent Plaintiff Holtec International in this matter. Enclosed for filing please find the original and two copies of a Complaint and Case Information Statement. Please file the original of each document and return one copy stamped "filed" in the postage paid return envelope provided. Kindly charge any fees associated with this filing to our Superior Court of New Jersey account #0083800.

Very truly yours,

Michael P. O'Mullan

MOM/np
Enclosure

5121327v1

**Side 2**

# Civil Case Information Statement
# (CIS)

Use for initial pleadings (not motions) under *Rule* 4:5-1

**CASE TYPES** (Choose one and enter number of case type in appropriate space on the reverse side.)

## Track I - 150 days discovery

151 Name Change
175 Forfeiture
302 Tenancy
399 Real Property (other than Tenancy, Contract, Condemnation, Complex Commercial or Construction)
502 Book Account (debt collection matters only)
505 Other Insurance Claim (including declaratory judgment actions)
506 PIP Coverage
510 UM or UIM Claim (coverage issues only)
511 Action on Negotiable Instrument
512 Lemon Law
801 Summary Action
802 Open Public Records Act (summary action)
999 Other (briefly describe nature of action)

## Track II - 300 days discovery

305 Construction
509 Employment (other than Conscientious Employees Protection Act (CEPA) or Law Against Discrimination (LAD))
599 Contract/Commercial Transaction
603N Auto Negligence – Personal Injury (non-verbal threshold)
603Y Auto Negligence – Personal Injury (verbal threshold)
605 Personal Injury
610 Auto Negligence – Property Damage
621 UM or UIM Claim (includes bodily injury)
699 Tort – Other

## Track III - 450 days discovery

005 Civil Rights
301 Condemnation
602 Assault and Battery
604 Medical Malpractice
606 Product Liability
607 Professional Malpractice
608 Toxic Tort
609 Defamation
616 Whistleblower / Conscientious Employee Protection Act (CEPA) Cases
617 Inverse Condemnation
618 Law Against Discrimination (LAD) Cases

## Track IV - Active Case Management by Individual Judge / 450 days discovery

156 Environmental/Environmental Coverage Litigation
303 Mt. Laurel
508 Complex Commercial
513 Complex Construction
514 Insurance Fraud
620 False Claims Act
701 Actions in Lieu of Prerogative Writs

## Multicounty Litigation (Track IV)

271 Accutane/Isotretinoin
274 Risperdal/Seroquel/Zyprexa
281 Bristol-Myers Squibb Environmental
282 Fosamax
285 Stryker Trident Hip Implants
286 Levaquin
289 Reglan
291 Pelvic Mesh/Gynecare
292 Pelvic Mesh/Bard
293 DePuy ASR Hip Implant Litigation
295 AlloDerm Regenerative Tissue Matrix
296 Stryker Rejuvenate/ABG II Modular Hip Stem Components
297 Mirena Contraceptive Device
299 Olmesartan Medoxomil Medications/Benicar
300 Talc-Based Body Powders
601 Asbestos
623 Propecia
624 Stryker LFIT CoCr V40 Femoral Heads
625 Firefighter Hearing Loss Litigation
626 Abilify
627 Physiomesh Flexible Composite Mesh
628 Taxotere/Docetaxel
629 Zostavax
630 Proceed Mesh/Patch
631 Proton-Pump Inhibitors
632 HealthPlus Surgery Center
633 Prolene Hernia System Mesh

**If you believe this case requires a track other than that provided above, please indicate the reason on Side 1, in the space under "Case Characteristics.**

**Please check off each applicable category** ☐ **Putative Class Action** ☐ **Title 59** ☐ **Consumer Fraud**

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Attorneys for Plaintiff Holtec International

| | |
|---|---|
| HOLTEC INTERNATIONAL,<br><br>Plaintiff,<br><br>vs.<br><br>NEW JERSEY ECONOMIC DEVELOPMENT AUTHORITY,<br><br>Defendants. | SUPERIOR COURT OF NEW JERSEY<br><br>CHANCERY DIVISION, GENERAL EQUITY<br>MERCER COUNTY<br>DOCKET NO. MER-L-<br><br>CIVIL ACTION<br><br>**COMPLAINT** |

1. Plaintiff Holtec International ("Holtec") brings this action against defendant New Jersey Economic Development Authority ("EDA") for breach of contract and promissory estoppel, seeking specific performance and other relief.

2. Holtec is a diversified energy technology company, recognized as the foremost technology innovator in the field of carbon-free power generation, specifically commercial nuclear and solar energy. Holtec has operations in Florida, New Jersey, Ohio, Pennsylvania, and abroad.

3. The EDA is an independent authority formed by the State of New Jersey that, among other things, administers the Grow New Jersey Assistance Program (the "Grow Program"),

a program which was designed to incentivize companies through the issuance of tax credits to make capital investments and create or retain jobs in New Jersey rather than bring those opportunities to other states.

4. In the years leading up to 2014, Holtec, based upon growth expectations, was desirous of a new state-of-the-art research and manufacturing facility and was exploring whether to build the facility in a variety of locations, including New Jersey. The EDA and the New Jersey Department of State's Business Action Center ("BAC")[1] actively and aggressively courted Holtec and encouraged it to commit to build its new manufacturing and research facility—with its attendant high-paying jobs—in Camden, New Jersey.

5. Camden routinely ranks among New Jersey's poorest and most economically disadvantaged cities, and has historically experienced unique challenges attracting business development like that being contemplated by Holtec. Accordingly, in keeping with its legislative mandate, the EDA and the BAC aggressively sought to induce Holtec to commit to invest in Camden by building its multimillion-dollar, state-of-the-art facility there.

6. After extensive communications with the EDA and the BAC, in 2014 Holtec applied for and received an award of Grow Program tax incentives. Holtec would invest more than $300 million to construct the Krishna P. Singh Technology Campus in Camden and bring with it hundreds of high-paying jobs. Under the terms of an incentive agreement with the EDA, Holtec was to receive $260 million in tax credits over ten years following completion of the project and delivery of the promised jobs.

[1] The BAC is an arm of the state government of New Jersey that works with EDA and operates as a resource to assist businesses by, among other things, obtaining answers from government agencies, directing companies to appropriate officials or contacts, and facilitating meetings with regulatory agencies to attract and retain businesses in the State.

7. The Incentive Agreement between Holtec and the EDA was signed after six months of extensive vetting by the EDA, which concluded that Holtec was eligible for the award of tax credits.

8. Induced by the Incentive Agreement, Holtec spent more than $300 million to construct a state-of-the-art manufacturing and design facility in Camden, with associated office and support buildings. This provided an immediate infusion of construction-related revenue into Camden's economy—the single largest private investment in the history of the municipality—and has substantially contributed to Camden's revitalization efforts.

9. State officials publically praised Holtec at the time, stating, "your pledge to choose New Jersey to build the state-of-the-art 600,000 square foot manufacturing and design center is more than just an investment in your business, it is an investment in New Jersey and the renewal of manufacturing here in Camden."

10. Under the terms of the Incentive Agreement, the EDA is required to issue Holtec a Letter of Compliance each year for ten years if Holtec satisfies its contractual obligations. The annual Letter of Compliance enables Holtec to obtain the benefit of the annual portion of its tax credit under the Grow Program.

11. 2017 was the first tax year that Holtec was eligible to receive a tax credit under the Incentive Agreement. Holtec timely submitted its annual paperwork in January 2018, and the EDA thoroughly reviewed it, asking multiple follow-up questions to which Holtec responded. Fewer than three months later, the EDA issued Holtec its 2017 Letter of Compliance, which enabled Holtec to receive its 2017 tax credit.

12. In early 2019, Holtec timely submitted all of the required paperwork for its 2018 tax credit. More than a year has since gone by, and the EDA has not issued Holtec's required

Letter of Compliance, even though Holtec remains in full compliance with the Incentive Agreement. The apparent reason for this refusal is public criticism of the Grow Program and the EDA following the creation of the new administration's gubernatorial task force.

13. Over the past year, Holtec has tried repeatedly to engage with the EDA to see if a lawsuit could be avoided.

14. In disregard of its contractual obligations, the EDA has stalled and failed to approve Holtec's 2018 submission for its tax credits, which has caused Holtec tens of millions of dollars in damages. Holtec was thus left with no choice but to file this Complaint and seek an order requiring the EDA to comply with its duties under the Incentive Agreement.

**JURISDICTION AND VENUE**

15. This action is brought by Holtec pursuant to the New Jersey Contractual Liability Act, N.J.S.A. 59:13-1 to -10, and the common law.

16. The court has jurisdiction over Defendant EDA because the EDA is a New Jersey government entity.

17. Venue for this action properly lies in Mercer County, pursuant to Rule 4:3-2, because the causes of action arose in Mercer County where the EDA maintains its offices.

18. The matter is properly instituted in the Chancery Division pursuant to Rule 4:3-1 because the primary relief sought, specific performance, is equitable in nature.

**PARTIES**

19. Plaintiff Holtec is an S Corporation formed in the State of Delaware, with offices at 1 Holtec Boulevard, Camden, New Jersey (formerly known as 2500 Broadway, Camden, New Jersey).

20. Defendant EDA is an independent state agency created by the New Jersey Economic Development Authority Act, with offices at 36 West State Street, Trenton, New Jersey.

## FACTUAL ALLEGATIONS

21. Holtec is a diversified energy technology company, recognized as the foremost technology innovator in the field of carbon-free power generation, specifically commercial nuclear and solar energy. Among other things, Holtec designs, manufactures, and supplies equipment and systems for the nuclear-, solar-, geothermal-, and wind-power generation sectors of the energy industry. The company is globally recognized for its innovation and design of equipment and services to commercial power plants.

22. Since 2009, Holtec has been at the forefront of developing a new generation nuclear reactor, called the SMR-160. The SMR-160 is designed to be a safer, more environmentally friendly, and economical small modular reactor that has the flexibility to be used in remote locations, in areas with limited water supplies or land, and in unique industrial applications where traditional large reactors are not practical.

23. In or around 2013, Holtec had global operation centers in Marlton, New Jersey; Pittsburgh, Pennsylvania; Orrville, Ohio; Lakeland, Florida; Jupiter, Florida; San Diego, California; and abroad.

24. Holtec wanted to open a new state-of-the-art research and manufacturing facility where its engineers working on the SMR-160 project would be on the same campus as the company's manufacturing operations in order to take advantage of productive synergies between various skilled workers that would be perfecting this cutting-edge technology. This would facilitate communication between engineers and manufacturing operations and improve company production.

25. The SMR-160 project would also require significantly advanced and modernized manufacturing capabilities, which would necessitate a new facility with state-of-the-art equipment. That new facility would also enable Holtec to expand its current line of nuclear products, heat-exchange equipment, and other weldments for delivery to the company's worldwide customers.

26. Wherever Holtec decided to build its new facility, it would provide well-paid, technical jobs with career opportunities in the growing energy field, making it an attractive entity for states to court as an employer.

27. In considering where to construct this new facility, Holtec evaluated various options, including Camden, New Jersey.

28. The EDA's promise to award tax credits under the Grow Program was a material factor in Holtec's ultimate decision to choose Camden.

***The Grow New Jersey Assistance Program***

29. The Grow Program was originally signed into law on January 5, 2012. It was designed "to encourage economic development and job creation and to preserve jobs that currently exist in New Jersey but which are in danger of being relocated outside of the State." L. 2011, c. 149, § 3 (N.J.S.A. 34:1B-244).

30. As initially enacted, program applicants needed to demonstrate that "the capital investment resultant from the award of tax credits and the resultant retention and creation of eligible positions will yield a net positive benefit to the State," and that "the award of tax credits will be a material factor in the business's decision to create or retain the minimum number of full-time jobs for eligibility under the program." Ibid.

31. To assist the EDA in making eligibility determinations under the law, applicants needed to certify that (i) "existing full-time jobs are at risk of leaving the State or being

eliminated," (ii) "any projected creation or retention, as applicable, of new full-time jobs would not occur but for the provision of the tax credits under the program," and (iii) the representations in the Grow Program application were accurate.

32. On January 14, 2013, the New Jersey Legislature introduced a bill that would eventually be signed into law known as the Economic Opportunity Act of 2013, L. 2013, c. 161 ("2013 Act"). The 2013 Act was signed into law on September 18, 2013.

33. The 2013 Act amended the earlier version of the Grow Program statute in numerous respects, most notably as it related to companies that proposed to construct facilities in Camden.

34. Camden routinely ranks among New Jersey's poorest and most economically disadvantaged cities. According to the New Jersey Municipal Revitalization Index (which serves as the State's official measure of municipal distress by ranking New Jersey's municipalities according to eight separate indicators of social, economic, physical, and fiscal conditions in each locality), in 2007 Camden ranked 566 out of 566 municipalities in the state.

35. Moreover, Camden has historically experienced unique challenges to attracting business development, stemming from a diverse array of problems such as record-high crime to deficiencies in public education.

36. Camden was (and still is) an economically distressed municipality that the Legislature determined needed heightened incentives to encourage companies to locate there. Accordingly, in addition to increasing certain of the award amounts that companies willing to relocate to Camden could receive under the Grow Program, the 2013 Act changed the eligibility requirements for companies seeking to locate there.

37. If an applicant was proposing to make a capital investment and locate in Camden, there was no need for it to demonstrate that any jobs were "at risk" of leaving New Jersey or that

a retention of jobs would not occur "but for" the provision of tax credits. Instead, Camden applicants were simply required to "indicate that the provision of tax credits under the program is a **material factor** in the business decision to make a capital investment and locate in [Camden.]" N.J.S.A. 34:1B-244(d) (emphasis added).

38. The award of tax credits was unquestionably a material factor in Holtec's decision to invest in Camden, as the EDA itself determined during its review of Holtec's application for tax incentives.

***Holtec Decides to Apply for Tax Incentives***

39. In the months leading up to the enactment of the 2013 Act, the EDA and BAC were in regular communication with Holtec concerning possible tax incentives available to it should Holtec decide to construct its then-contemplated new facility in Camden. The EDA and BAC were actively courting Holtec to convince the company to move to Camden.

40. As part of these extensive conversations, the BAC encouraged Holtec to apply for tax credits in excess of $350 million. Holtec decided, however, to apply for credits totaling only $260 million because Holtec was unwilling to accept tax credits above the amount Holtec felt it needed to construct its advanced manufacturing campus in Camden.

41. On January 20, 2014, Holtec submitted an application for financial assistance under the Grow Program. The extensive application described Holtec's future plans for the company and the SMR-160, and how the company's decision to construct a facility in Camden would be beneficial to the State of New Jersey and Camden.

42. Because Holtec was proposing to make a substantial capital investment and locate in Camden, it was not legally required that Holtec demonstrate that any jobs were "at risk," or that any retention of jobs would not occur "but for" the provision of tax credits.

43. Holtec's application nevertheless described for the EDA various alternatives that Holtec had considered outside of New Jersey as part of its search for a new facility, and informed the EDA that the provision of tax credits was a material factor in Holtec's decision to move forward with the Camden project.

44. For over six months following the submission of the January 2014 application, Holtec and the EDA engaged in discussions concerning the proposal. Based on those extensive communications and a thorough vetting of Holtec's submissions, the EDA was satisfied that Holtec was eligible to receive an award of tax credits under the Grow Program.

45. The tax credits awarded to Holtec could be used by the company itself to reduce its own tax liability, or they could be sold to other entities. It was common for companies that were unable to utilize the full amount of the tax credits to sell such credits for an immediate benefit.

46. On July 10, 2014, the EDA approved Holtec's application under the Capital Investment Alternative of the 2013 Act. The EDA notified the company of this approval, and Holtec executed an approval letter dated September 2, 2014.

47. In reliance on the award of tax credits, Holtec thereafter undertook construction of the Krishna P. Singh Technology Campus in Camden, expending in excess of $300 million. The new campus occupies approximately 47 acres in the southern end of Camden along the Delaware waterfront, and has transformed a series of abandoned buildings and vacant lots into a thriving business center with state-of-the-art facilities for hundreds (and in the future, anticipated thousands) of employees.

48. Although Holtec spent in excess of $300 million, Holtec decided to have its independent auditor begin the certification cost report as soon as its capital spend crossed the $260 million required amount.

49. On or about August 10, 2016 and February 1, 2017, respectively, Holtec and the EDA executed an Incentive Agreement under the Grow Program ("Incentive Agreement"). The Incentive Agreement was later amended on December 28, 2017 and March 4, 2019, respectively.

50. The Incentive Agreement recites that the EDA, after fully vetting Holtec's application, determined that the company satisfied the eligibility criteria under the Grow Program statutes and that the EDA approved Holtec to receive tax credits of up to $260 million.

51. The Incentive Agreement required that Holtec submit to the EDA certain Tax Credit Certificate Documents, as defined in Section 10 to the Incentive Agreement, on or before July 10, 2018, demonstrating that Holtec had lived up to its obligations to complete the project. Holtec submitted those documents on or about September 15, 2017. The EDA reviewed that submission and issued a Grow New Jersey Assistance Act Tax Credit Certificate to Holtec on or about January 18, 2018, in the amount of $260 million.

52. Section 11 of the Incentive Agreement states,

> After receipt of the Tax Credit Certificate, [Holtec] shall submit to the [EDA], no later than 120 days after the end of each Tax Period during the Commitment Period, the Annual Compliance Report . . . Upon satisfactory review of all information submitted in the Annual Compliance Report, the [EDA] will issue a Letter of Compliance indicating the amount of the tax credits that may be used for the relevant Tax Period. No Tax Credit Certificate will be valid without the Letter of Compliance issued for the relevant Tax Period.

53. These contractual obligations are mirrored in the New Jersey Administrative Code, which states, "Annually, upon satisfactory review of all information submitted [in the Annual Compliance Report], the Authority will issue a letter of compliance." N.J.A.C. 19:31-18.11(d).

54. The Incentive Agreement and Administrative Code thus establish a clear mechanism for Holtec to receive its tax credits over the contract's term. Each year Holtec must submit compliance paperwork to the EDA, which must then review the paperwork and timely

determine if it is satisfactory. If so, the EDA must issue to Holtec a Letter of Compliance that entitles Holtec to receive its annual tax credit. The Incentive Agreement contemplates ten annual credits, worth up to $26 million each.

55. The Incentive Agreement worked as intended by the parties for the first year. After Holtec completed the project, Holtec submitted to the EDA its first Annual Compliance Report for 2017 on January 15, 2018. The EDA reviewed that information and submitted its first Letter of Compliance to Holtec on April 11, 2018, along with a Grow New Jersey Assistance Act Tax Credit Certificate signed April 5, 2018, in the amount of $26 million for the 2017 tax period representing the Incremental Tax Credit Amount.

56. Although Holtec has undoubtedly lived up to its obligations by completing the project, delivering the promised jobs, and following the same process for the next tax year, the EDA has failed to deliver its promised tax certificate. On January 15, 2019, Holtec submitted its second Annual Compliance Report for 2018. Fourteen months have since gone by, and the EDA has continued to change the required documentation and thus far refused and failed to issue the Letter of Compliance as required by Section 11 of the Incentive Agreement. The apparent reason for the EDA's failure stems from public criticism of the Grow Program generally.

***The EDA Fails to Honor the Incentive Agreement***

57. After Holtec entered into the Incentive Agreement and delivered on its promise to invest in Camden as set forth above, State government experienced a change of administration. On January 16, 2018, Governor Murphy assumed office as New Jersey's 56th Governor after campaigning for, among other things, reform of the EDA's tax incentive process. On January 19, 2018, Governor Murphy signed Executive Order No. 3, which instructed the New Jersey State

Comptroller to conduct an audit of certain aspects of New Jersey's tax-incentive programs, including the Grow Program.

58. On January 9, 2019, the Comptroller issued a report entitled "New Jersey Economic Development Authority: A Performance Audit of Selected State Tax Incentive Programs." This report offered certain criticisms of New Jersey's tax-incentive programs and how they were administered, but did not mention or address anything about Holtec or its tax-incentive award.

59. On January 24, 2019, Governor Murphy signed Executive Order No. 52, in which he created the Task Force on EDA's Task Incentives ("Task Force"). The Task Force was instructed to perform an examination of the design, implementation, and oversight of the Grow Program.

60. On June 17, 2019, the Task Force issued its First Published Report ("First Report"). The First Report was critical of the EDA, and made allegations against numerous companies (with a clear focus on companies that had invested in Camden) that had received Grow Program awards.

61. With respect to Holtec, the First Report stated, "A simple internet search revealed that one company, Holtec International, had been debarred by the Tennessee Valley Authority, even though Holtec said it had never been debarred in its Grow NJ Application." The First Report criticized the EDA for allegedly not discovering this issue during its extensive due diligence and vetting of Holtec's January 2014 application.

62. The matter referenced by the Task Force in the First Report concerns the Tennessee Valley Authority ("TVA"), a corporation owned by the federal government for whom Holtec has done hundreds of millions of dollars of work since 2001.

63. On October 12, 2010, the Office of Inspector General for the TVA sent to Holtec a Notice of Proposed Debarment. The notice stemmed from an incident in 2002—nearly 18 years

ago—involving a former employee of the TVA who filed a false statement on a financial disclosure form related to a payment to that employee's company from a then-subcontractor of Holtec. Holtec acquired that subcontractor several years after the 2002 payments.

64. The TVA had conducted a full investigation into these 2002 transactions by the subcontractor, and thereafter temporarily placed Holtec on the General Services Administration Excluded Party List on December 3, 2010. Nine days later, on December 12, 2010, the TVA lifted the debarment, and removed Holtec from the Excluded Party List.

65. In 2012, the TVA board unanimously voted to award Holtec a ten-year contract valued at approximately $300 million. During the public-contracting process at that time, the TVA Vice President of Supply Chain publicly told the TVA board: "I stand before this board to tell you that Holtec today is in good standing with the federal government, in good standing with TVA, and in good standing with the market. Holtec is a market leader in dry cask storage." Holtec continues to be a vendor of the TVA to this day.

66. The fact of Holtec's brief debarment by the TVA, and its subsequent contract with that agency, was a matter of public record discoverable by simple internet searches.

67. At the time of Holtec's EDA application in 2014, the company was not subject to debarment. In Holtec's January 20, 2014 application, there was a question that stated: "Debarment by any department, agency, or instrumentality of the State or Federal government." In response to that question, Holtec was to check either "YES" or "NO" on the online application form.

68. The question did not specify whether the debarment needed to be active to be responsive, or whether any past debarment would also be responsive. In other public-contracting forms, a debarment must be active to be responsive to those forms. The Grow Program application submitted by Holtec stated "NO" in response to the EDA's question on its form.

69. In the early part of 2019, the Task Force was holding public hearings, criticizing various entities that had received tax credits during the prior administration, and inviting public scrutiny of all aspects of the Grow Program. As part of that invited scrutiny, members of the media reported in May 2019 that Holtec had been subject to a brief debarment by the TVA, but had checked "NO" in response to the debarment question on its application.

70. Upon learning of the issue, on May 20, 2019, Holtec proactively reached out to the EDA to clarify the situation surrounding the brief TVA debarment. To the extent that the previous debarment was responsive to the question on the application, Holtec amended its answer and explained that the failure to identify the issue was inadvertent.

71. Nothing about the publicly available TVA incident, which related to events dating back to 2002, undercut the undeniable fact that Holtec had invested more than $300 million and created hundreds of high-paying jobs in Camden, just as the EDA had bargained for.

72. Moreover, N.J.A.C. 19:30-2.2 and 2.3 justify disqualification from EDA programs only under certain circumstances, and a brief debarment by an agency that has since signed a ~$300 million contract with the company does not qualify.

73. Further, an EDA staff member testified at an October 2019 hearing that, even where there were instances where companies checked "NO" to a disqualification question that technically should have been "YES," the EDA staffer has never recommended disqualifying that company from receiving a grant from the EDA. Indeed, as the Task Force itself noted, sometimes EDA staff would observe such an issue as part of its due diligence, but deem it too insignificant even to follow up with the applicant. The application would instead be processed for approval.

74. After the Task Force issued its First Report criticizing Holtec, on June 26, 2019, the EDA sent to Holtec a letter that attached relevant excerpts of the First Report. Even though

Holtec had already explained the TVA issue to the EDA in May, the EDA asked Holtec to "submit a written explanation for failing to inform the Authority" of that matter, and to explain the "impact" that the issue would have on Holtec's application.

75. In the same letter, the EDA enclosed a Pro Publica article dated June 26, 2019, which stated 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.

76. The EDA's June 26, 2019 letter stated that the EDA would review Holtec's written response and then would "invite the Company to the Authority's office for a meeting to discuss the information and explanation provided."

77. On August 8, 2019, Holtec responded to the EDA's correspondence. Holtec explained that the Ohio matter concerned a different company, Orrvilon, Inc. ("Orrvilon"), which does not have a physical presence in New Jersey and whose operations did not inform Holtec's application under the Grow Program. Holtec also pointed out that, per the plain language of the application, information about Orrvilon's tax credits in Ohio were not responsive to any question posed by the EDA.

78. With regard to the TVA debarment, Holtec reminded the EDA that this matter was already explained in the May 20, 2019 correspondence. Holtec also explained why, under the EDA's own regulations, the brief debarment would not have affected Holtec's eligibility to receive a Grow Program award.

79. Holtec concluded the August 2019 letter by accepting the EDA's invitation for an in-person meeting so that Holtec could address any remaining concerns that the EDA might have.

80. In the months that followed Holtec's August 2019 letter, the EDA took no action to set up the meeting that it itself had requested. Nor did it otherwise engage with Holtec to ask any legitimate follow-up questions concerning the matters addressed in Holtec's correspondence. The EDA instead chose to play a waiting game to ignore its contractual obligations.

81. Frustrated by the EDA's breach of the Incentive Agreement, but nevertheless hopeful that the EDA might eventually turn the "square corners" it is required to by law, on October 9, 2019 Holtec submitted to the EDA a Notice of Claim under the Contractual Liability Act, N.J.S.A. 59:13-1 to -10.

82. The Notice of Claim detailed the applicable history of interactions between the EDA and Holtec, reminded the EDA of its contractual obligations to review Holtec's Annual Compliance Report, and informed the EDA that its failure to issue the Letter of Compliance constituted a material breach of the Incentive Agreement. Holtec further informed the EDA that its actions were causing Holtec significant business disruption and damages in light of Holtec's own contractual obligations to transfer the 2018 tax credit to qualified purchasers.

83. The Notice of Claim reminded the EDA, again, that the EDA had requested a meeting with Holtec but had failed to schedule that meeting.

84. After the EDA received the Notice of Claim, the EDA advised Holtec through counsel that it wanted to conduct a further "review" of Holtec that would involve document demands, witness interviews, and the like. The EDA did not specify what issues it sought to "review," why those issues were relevant to the EDA's contractual obligations to issue the required Letter of Compliance, or what the legal basis was for the EDA conduct such an open-ended inquiry.

85. Holtec is aware of no legal authority for the EDA to conduct the sort of amorphous "review" that it proposed. Indeed, Holtec submits that there is no such legal authority and that the EDA proposed this framework as a delay tactic to avoid having to release Holtec's 2018 tax credits.

86. The EDA promised to share with Holtec a specific list of issues that the EDA believed were relevant and appropriate as part of this "review." The EDA never provided that list.

87. Near the end of 2019, Holtec reached out to the EDA to schedule the meeting that the EDA had itself originally requested in June 2019.

88. On January 6, 2020, the EDA's counsel replied that the meeting—i.e., the one that the EDA itself had requested and that Holtec had been trying for months to schedule—was "premature." The EDA repeated that it might want to perform some sort of amorphous "review," and proposed to discuss the matter further.

89. To date, Holtec still has not received any details about the proposed "review," the legal basis for the review, or how such issues could inform the EDA's obligations to issue the 2018 Letter of Compliance under the Incentive Agreement.

***The EDA's Breach Is Costing Holtec Tens of Millions of Dollars In Damages***

90. Pursuant to the statute that initiated the Grow Program, incentive recipients are entitled to securitize and transfer their tax-awards to other entities. This mechanism enables, for example, companies to obtain necessary financing to construct their Grow Program facilities in exchange for transferring future tax credits. It also permits companies to obtain the full benefit of their tax awards if their annual tax liability might be less than the yearly tax credit (such as in the case of nonprofits or startup companies).

91. Consistent with the Grow Program statute, Holtec entered into contracts of its own for the transfer of its yearly tax credits. Qualified purchasers lent to Holtec money that correlated

to the value of Holtec's Grow Program award. In exchange, Holtec agreed to reimburse the purchasers by transferring its annual tax credit each year.

92. The EDA was aware that Holtec entered into such contractual arrangements.

93. Because the EDA has not timely issued to Holtec the required Letter of Compliance for 2018, Holtec was unable to transfer those tax credits to the qualified purchasers in accordance with the timetables set forth in the applicable agreements. To avoid being in breach of its own contractual obligations, Holtec was thus forced to make cash payments of approximately $26 million to these purchasers. Unless the EDA is forced to comply or reverses its position, Holtec will be continue to be significantly harmed on an annual basis.

94. The EDA previously advised award recipients like Holtec that the EDA would work to process their annual filings expeditiously according to a certain timetable. Holtec relied on the EDA's representations when negotiating the terms of its own contracts with qualified purchasers.

95. The EDA understood that many purchasers of tax credits under the Grow Program are insurance companies, which have tax-filing deadlines of March 1 each year. For that reason, the EDA encouraged companies to submit their annual compliance reports no later than January 15 each year, which would normally allow the EDA sufficient time to complete its review and for the New Jersey Division of Taxation to prepare the annual tax credit certificate prior to March 1.

96. The EDA represented to companies that the "EDA will make every effort to assist all companies through this accelerated reporting period" so that companies would have their tax credits in hand prior to March 1 each year.

97. The EDA disregarded these promises, along with their contractual obligations, when it chose to delay and withhold the credits in breach of the Incentive Agreement.

98. The EDA also requires that each Company submit payment of the non-refundable annual servicing fee, which represents two percent (2%) of the annual tax credit amount. This fee is due at the time of Holtec's submission of its annual filings. Additionally, the EDA requires a non-refundable fee of $500,000 which is due prior to the receipt of the tax credit certificate and which was paid by Holtec.

99. Holtec has complied with the payment of all servicing fees to the EDA, but the EDA has nevertheless refused to conduct and complete the review of the 2018 Annual Compliance Report as mandated by the Incentive Agreement.

***Holtec Is Entitled to Specific Performance and Direct Damages***

100. The EDA, as a governmental entity, has a duty to "turn square corners" in its dealings with private parties and other governments. It is held to a high standard of integrity in the marketplace, and is not at liberty to engage in sharp tactics to disadvantage its business partners. Thus, in dealing with the public, a government agency must comport itself with compunction and integrity, and not conduct itself so as to achieve or preserve any kind of bargaining or litigation advantage.

101. While certain groups have criticized the Grow Program generally, and the EDA specifically, over the past year, such criticism does not relieve the EDA of its contractual obligations.

102. Holtec is proud of the investments it made in Camden, and its role in the revitalization of that city. Holtec is also proud of its (until recently) collaborative relationship with the EDA, in which the agency in years past acted as a true economic partner that encouraged business development using the grant programs created by the Legislature.

103. Holtec has satisfactorily performed each of its contractual obligations under the Incentive Agreement.

104. In reliance on the EDA's promise to provide $260 million tax credits, Holtec constructed its new facility, invested more than $300 million into Camden (far in excess of the obligated amount), and created hundreds of high-paying quality jobs in New Jersey's most distressed municipality.

105. Holtec timely submitted its 2018 Annual Compliance Report and promptly answered all legitimate questions from the EDA about the contents of that submission. Under the plain language of the Incentive Agreement, the EDA is required to issue Holtec the 2018 Letter of Compliance.

## <u>COUNT ONE</u>

## BREACH OF CONTRACT

106. Holtec incorporates each of the foregoing paragraphs as if fully set forth herein.

107. Holtec and the EDA entered into the Incentive Agreement, which is a valid and binding contract.

108. Section 11 of the Incentive Agreement states that, no later than 120 days after the end of each Tax Period during the Commitment Period, Holtec shall submit to the EDA its Annual Compliance Report.

109. Holtec completed its obligations regarding the Camden project and timely submitted its Annual Compliance Report for 2018 on January 15, 2019.

110. Section 11 of the Incentive Agreement requires the EDA to timely review the Annual Compliance Report and, if satisfactory, issue a Letter of Compliance indicating the amount of that tax credits that may be used for the relevant Tax Period.

111. Holtec submitted the required Annual Compliance Report for 2018, and that annual report was satisfactory, yet the EDA has refused timely to issue the Letter of Compliance for 2018.

112. The EDA's refusal to issue the Letter of Compliance for 2018 is a material breach of the Incentive Agreement.

113. The EDA's refusal to issue the Letter of Compliance for 2018 is not excused for any reason under the Incentive Agreement or otherwise by law.

114. The requests by the EDA to conduct an amorphous "review" prior to issuing the required Letter of Compliance is without basis in law or fact, and is instead an improper and unlawful delay tactic.

115. Holtec has been damaged by virtue of the EDA's breach of the Incentive Agreement and will continue to be damaged in future years if EDA continues to refuse to issue the mandated Letters of Compliance.

116. Under the circumstances and equities of this case, Holtec is entitled to specific performance of the Incentive Agreement and an order directing the EDA to issue the required Letter of Compliance for 2018.

117. Holtec is additionally entitled to direct damages flowing from the EDA's refusal to issue the Letter of Compliance. These damages include, but are not limited to, interest on the $26 million payment Holtec made to the qualified purchasers, any practical diminution of the 2018 tax credit's value given the EDA's delay, and any other such damages flowing from the EDA's actions.

## COUNT TWO

## BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

118. Holtec incorporates each of the foregoing paragraphs as if fully set forth herein.

119. Like all contracts governed by New Jersey law, the Incentive Agreement contains an implied covenant of good faith and fair dealing that requires, among other things, neither party to do anything that will have the effect of depriving the other party of the benefit of the bargain. Parties to a contract must adhere to community standards of decency, fairness, and reasonableness, and must refrain from exercising any contractual discretion in a manner that is arbitrary, unreasonable, or capricious.

120. The provision of tax credits under the Grow Program statute was a material factor in Holtec's decision to make an investment and locate in Camden.

121. Holtec has satisfactorily performed all of its obligations under the Incentive Agreement.

122. By indefinitely delaying the award of Holtec's 2018 Letter of Compliance, the EDA is breaching the implied covenant of good faith and fair dealing by, among other things, depriving Holtec of the benefit of the parties' bargain.

123. Holtec has been significantly damaged by virtue of the EDA's breach of the implied covenant of good faith and fair dealing, and will continue to be damaged in future years.

124. Under the circumstances and equities of this case, Holtec is entitled to specific performance of the Incentive Agreement and an order directing the EDA to issue the required Letter of Compliance for 2018.

125. Holtec is additionally entitled to direct damages flowing from the EDA's refusal to issue the Letter of Compliance. These damages include, but are not limited to, interest on the $26

million payment Holtec made to the qualified purchasers, any practical diminution of the 2018 tax credit's value given the EDA's delay, and any other such damages flowing from the EDA's actions.

## COUNT THREE

## PROMISSORY ESTOPPEL

126. Holtec incorporates each of the foregoing paragraphs as if fully set forth herein.

127. The EDA made a clear and definite promise to Holtec 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, the EDA would issue Holtec its annual Letter of Compliance.

128. The EDA further made a clear and definite promise to Holtec concerning the timing in which the EDA would process the company's Annual Compliance Report so that Holtec would have its tax credits in hand prior to March 1 each year.

129. The EDA made these promises with the expectation that Holtec would rely on them. The EDA wanted to convince Holtec to make a capital investment and locate in Camden, and as part of that process, knew that Holtec needed predictability regarding the timing of its annual tax credits so Holtec could securitize them accordingly.

130. Holtec relied on the EDA's promises by making over $300 million in investments into the Camden facility, delivering the promised jobs, and by structuring its own agreements with qualified purchasers on the assumption that Holtec would receive its annual tax credit by March 1 each year.

131. Holtec's reliance on the EDA's promises was reasonable and foreseeable, and Holtec had no reason to suspect that the EDA would disregard its promises as it is currently doing.

132. Based on its reliance, Holtec has been damaged in a definite and substantial way. Holtec invested hundreds of millions of dollars into the Camden facility in the expectation of receiving its lawfully issued tax credits. Holtec entered into its own contracts with qualified purchasers for the transfer of those annual tax credits. And Holtec was required to make payments of approximately $26 million to those purchasers because of the EDA's refusal to issue the required Letter of Compliance.

133. Under the circumstances and equities of this case, Holtec is entitled to an order directing the EDA to issue the required Letter of Compliance for 2018.

134. Holtec is additionally entitled to direct damages flowing from the EDA's refusal to issue the Letter of Compliance. These damages include, but are not limited to, interest on the $26 million payment Holtec made to the qualified purchasers, any practical diminution of the 2018 tax credit's value given the EDA's delay, and any other such damages flowing from the EDA's actions.

**PRAYER FOR RELIEF**

WHEREFORE, based on the preceding allegations, Holtec respectfully requests that the Court enter judgment against the EDA and award the following relief:

a. Ordering the EDA to issue the Letter of Compliance for the 2018 tax year;

b. Awarding Holtec direct damages incurred because of the EDA's actions; and

c. Granting such other relief as the interests of justice may require.

RIKER DANZIG SCHERER
HYLAND & PERRETTI LLP
Attorneys for Plaintiff Holtec International

By: ______________________
Michael P. O'Mullan

Dated: March 23, 2020

**RULE 4:5-1 CERTIFICATION**

I certify, to the best of my information and belief, that there are no related pending matters. I further certify that the matter in controversy in this action is not the subject of a pending arbitration proceeding in this State, nor is any other action or arbitration proceeding contemplated. I certify that there is no other party who should be joined in this action at this time.

RIKER DANZIG SCHERER
HYLAND & PERRETTI LLP
Attorneys for Plaintiff Holtec International

By: ______________________
Michael P. O'Mullan

Dated: March 23, 2020

**DESIGNATION OF TRIAL COUNSEL**

Pursuant to Rule 4:25-4, Michael O'Mullan is hereby designated as trial counsel for the Plaintiff in this action.

RIKER DANZIG SCHERER
HYLAND & PERRETTI LLP
Attorneys for Plaintiff Holtec International

By: ____________________
Michael P. O'Mullan

Dated: March 23, 2020

**CERTIFICATION PURSUANT TO R. 1:38-7(c)**

I hereby certify that confidential personal identifiers have been redacted from documents now submitted to the Court and will be redacted from all documents in the future in accordance with Rule 1:38-8(b).

RIKER DANZIG SCHERER
HYLAND & PERRETTI LLP
Attorneys for Plaintiff Holtec International

By: ____________________
Michael P. O'Mullan

Dated: March 23, 2020

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