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;

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.

The relevant sections of the 2017 Incentive Agreement state:

> Section 5: Certain Covenants of the Company
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> (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.
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> [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."
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> [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.
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> [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

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.