



NEW JERSEY ECONOMIC DEVELOPMENT AUTHORITY

To: Members of the Authority

From: Caren Franzini, Chief Executive Officer

Date: June 8, 2011

Re: Motions to Settle the Record – Hartz Mountain Industries v. NJEDA;  
Town of Secaucus v. NJEDA

The Members are asked to consider the attached Motions to Settle the Record brought by Hartz Mountain Industries and the Township of Secaucus, in connection with their appeals of the Authority's approval of a HUB grant to Panasonic for its proposed project in Newark, NJ. The Members are also provided with the Briefs of the Attorney General in Response to these Motions. Pursuant to the court rules, the Board is required to provide a final agency decision on these motions .

Certain of the materials are included with this e-mail. The Certifications and Appendices were voluminous and therefore are available by logging into the following site:

The following are attached to this e-mail

1. From Hartz:

- a. Notice of Motion to Settle the Record
- b. Letter –Brief in Support of Appellant’s Motion to Settle the Record

2. From Secaucus:

- a. Notice of Motion to Settle the Record
- b. Letter –Brief in Support of Appellant’s Motion to Settle the Record

3. From Attorney General’s Office

- a. Brief of the Attorney General on behalf of the NJEDA on the Motion to Supplement the Record responding to Hartz’s motion
- b. Letter- Brief of the Attorney General on behalf of the NJEDA on the Motion to Supplement the Record responding to Secaucus’ motion

4. From Panasonic:

- a. Letter -Brief on behalf of Panasonic on the Motion to Supplement the Record.

At the website you will find the above documents along with the Certifications and Appendices that support the briefs, in particular :

1. From Hartz

a. Certification of D. Mark Leonard in Support of Appellant Hartz Mountain Industries, Inc.'s Motion to the New Jersey Economic Development Authority to Settle the Record Pursuant to R. 2:5-5(a) and Exhibits

2. From Secaucus

a. Certification of Bernadette H. Condon, Esq. in Support of Motion to Settle the Record and Exhibits

3. From the Attorney General's Office

- a. Certification of Mark Lestuk
- b. Certification of Marcus Saldutti
- c. Certification of Timothy J. Lizura and Exhibits A and B
- d. Certification of Maureen Hassett and Exhibits
- e. Certification of Gabriel I. Chacon and Exhibit

Background

Hartz Mountain Industries, Inc has appealed the Authority's February 16, 2011 approval of the Panasonic Corp. of North America's request for Urban Transit Hub Program tax credits. Hartz has reviewed the Authority's April 20, 2011 Statement of the Items Comprising the Record on Appeal, contends that it is limited, and seeks to settle the record by the inclusion of various documents.

In addition, the Township of Secaucus has filed a Motion that mirrors that of Hartz.

Overview

There are two primary issues in the appeals of the Panasonic HUB grant approval: 1) whether the Authority properly approved Panasonic's application for tax credits under the Program and 2) whether the Authority properly interpreted the Urban Transit Tax Credit Act in setting forth a policy that considers "at risk" jobs to determine if a project meets the net benefit test required by the Act.

These larger issues are not before the Board at this time. The motions that the board is being asked to consider at Wednesday's board meeting relate to what documents should be included in the record before the Appellate Division when it makes its decision on the appeals as a whole.

Hartz and the Secaucus ("Appellants") seek to supplement the record by including 7 types of documents: documents the Appellants received from their various OPRA requests, including any materials that were redacted as a result of privilege (Requests 1-4), the files related to the approval of the Panasonic HUB grant (Request 5), any document related to the Authority's development of the policy to limit the net benefit test to the consideration of new and retained jobs (Request 6) and a news article from NJ Biz (Request 7). They argue that these documents are necessary so that the court can assess whether the net benefit calculation was done properly.

They also argue the record should include documents that demonstrate the evolution of the net benefit policy.

In its brief on behalf of the NJEDA, the Attorney General's Office states that, pursuant to Tim Lizura's certification, the entire factual file relating to the approval of the Panasonic HUB grant has been provided to Hartz and Secaucus. These documents include documents that could have been withheld under the deliberative process privilege. The only privilege that has been asserted with respect to these documents is the attorney/client privilege.

With respect to documents relating to the approval of the at risk/ retained jobs policy, the Attorney General's Office argues that the formulation of policy is a matter of statutory and regulatory interpretation and is an integral element of an agency's deliberative process in administering programs. It argues that providing documents and information related to this deliberative process is contrary to well established policy and is not necessary.

At Wednesday's meeting, the members will be asked to discuss these arguments and render a final agency decision concerning which items should be included in the record. If any member needs additional information, he should not hesitate to contact Maureen Hassett or me.

A handwritten signature in black ink, appearing to be 'M. Hassett', written over a horizontal line.

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Attorneys for Appellant Hartz Mountain Industries, Inc.

HARTZ MOUNTAIN INDUSTRIES,  
INC.,

Appellant,

v.

NEW JERSEY ECONOMIC  
DEVELOPMENT AUTHORITY,

Respondent.

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION

DOCKET NO. A-3647-10T3

On Appeal From:

Final Agency Action of New  
Jersey Economic Development  
Authority approving UTHC Appl.  
No. 203639

**NOTICE OF MOTION TO SETTLE THE  
RECORD PURSUANT TO R.2:5-5(a)**

TO: Members of the Board of Directors  
State of New Jersey  
Economic Development Authority  
36 West State Street  
Trenton, NJ 08625  
Attn: Caren S. Franzini, CEO

Kevin Jespersen, AAG  
Office of the Attorney General  
Division of Law and Public Safety  
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James M. Hirschhorn, Esq.  
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One Riverfront Plaza  
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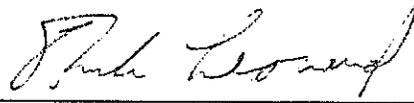
Leon J. Sokol, Esq.  
Sokol Behot & Fiorenzo  
433 Hackensack Avenue  
Hackensack, NJ 07601

**PLEASE TAKE NOTICE** that appellant, Hartz Mountain Industries, Inc., hereby moves before the New Jersey Economic Development Authority for an Order pursuant to R.2:5-5(a), to settle the record in the above-captioned Appeal.

**PLEASE TAKE FURTHER NOTICE** that in support of this motion, appellant shall rely upon the Certification of D. Mark Leonard and the Letter Brief submitted herewith.

HOROWITZ, RUBINO & PATTON

Attorneys for Appellant  
HARTZ MOUNTAIN INDUSTRIES, INC.

By:   
\_\_\_\_\_  
D. Mark Leonard

Dated: May 24, 2011

**CERTIFICATION OF SERVICE**

1. On May 24, 2011, I caused to have served via Hand Delivery an original and two (2) copies of the Notice of Motion to Settle the Record, Certification of D. Mark Leonard and Letter Brief in the above-captioned matter on:

Members of the Board of Directors

State of New Jersey  
Economic Development Authority  
36 West State Street  
Trenton, NJ 08625  
Attn: Caren S. Franzini, CEO

On May 24, 2011, I caused to have served via Hand Delivery one (1) copy of the Notice of Motion to Settle the Record, Certification of D. Mark Leonard and Letter Brief in the above-captioned matter on:

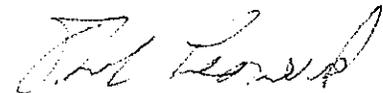
Kevin Jespersen, AAG  
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Newark, NJ 07102

Leon J. Sokol, Esq.  
Sokol Behot & Fiorenzo  
433 Hackensack Avenue  
Hackensack, NJ 07601

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



D. Mark Leonard

Dated: May 24, 2011

**HOROWITZ, RUBINO & PATTON**

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D. MARK LEONARD

May 24, 2011

**VIA HAND DELIVERY**

Members of the Board of Directors  
State of New Jersey  
Economic Development Authority  
36 West State Street  
Trenton, NJ 08625  
Attn: Caren S. Franzini, CEO

**RE: HARTZ MOUNTAIN MOUNTIAN INDUSTRIES, INC. V. NEW JERSEY  
ECONOMIC DEVELOPMENT AUTHORITY; ON APPEAL FROM NEW JERSEY  
ECONOMIC DEVELOPMENT AUTHORITY, UTHTC APPL. NO. 203639,  
APPELLATE DIVISON DOCKET NO. A-3647-10T3**

**(Letter-Brief in Support of Appellant's Motion to Settle the  
Record)**

Dear Members of the Board of Directors:

Please accept this letter in lieu of a more formal brief on behalf of appellant Hartz Mountain Industries, Inc. ("Hartz"), in support of Hartz's motion to settle the record on appeal pursuant to R. 2:5-5(a). Hartz has appealed from the New Jersey Economic Development Authority's ("EDA") February 16, 2011 approval of the Panasonic Corporation of North America's ("Panasonic") application for tax credits under the Urban Transit Hub Tax Credit ("UTHTC") program, as referenced above.

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**THE RELEVANT DOCUMENTS**

On April 20, 2011, the EDA filed with the Appellate Division its Statement of the Items Comprising the Record on Appeal (the "SICRA") in this matter. A true copy of the SICRA is attached to the May 20, 2011 Certification of D. Mark Leonard, as Exhibit A, filed herewith ("Leonard Cert."). Hartz hereby objects to the limited nature of the SICRA and seeks to settle the appellate record by including the following documents: (1) the various documents and other materials produced by the EDA on May 6, 2011 in connection with Hartz's March 7, 2011 Open Public Records Act ("OPRA") request (Document Nos. 1-154); (2) the various documents and other materials produced by the EDA on May 12, 2011 in connection with Hartz's March 7, 2011 OPRA request (Document Nos. 1-144); (3) the redacted information and withheld documents, as indicated in EDA counsel, Gabriel I. Chacon's May 12, 2011 letter accompanying the production of documents indicated in item (2), immediately above (Leonard Cert., Exhibit B); (4) the documents and other materials being withheld by EDA in response to Hartz's April 18, 2011 OPRA request (Leonard Cert., Exhibit C); (5) the documents and other materials in paper files or computer hard drives, systems or servers of those certain EDA personnel involved in the EDA's processing, consideration and approval of the subject Panasonic

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Application No. 203639 for tax credits under the UTHTC, including pre-application activities; (6) the documents and other materials in paper files or computer hard drives, systems or servers of those certain EDA personnel involved in the EDA's "at-risk-equals-new-jobs" policy informally adopted pursuant to a June 8, 2010 memorandum from Caren S. Franzini to Members of the EDA Board, including its "evolution" from EDA's earlier articulation of the policy in Ms. Franzini's November 10, 2009 memorandum to Members of the EDA Board; and (7) the April 20, 2011 NJBIZ article indicating that the EDA has been "working" on the Panasonic relocation since April 2010 (Leonard Cert., Exhibit D).

**PROCEDURAL HISTORY AND STATEMENT OF FACTS**<sup>1</sup>

As indicated above, on February 16, 2011, the Respondent New Jersey Economic Development Authority ("EDA") approved Panasonic Corporation of North America's ("Panasonic") application for \$102,408,062.00 in tax credits under the Urban Transit Hub Tax Credit Act program, as amended, N.J.S.A. 34:1B-207 through -209, from which approval Appellants Hartz Mountain Industries, Inc. ("Hartz") and the Town of Secaucus have appealed.

On January 12, March 7, and April 18, 2011, Hartz served OPRA requests on EDA. On January 28, 2011, Hartz filed parallel OPRA

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<sup>1</sup> Hartz has combined the Procedural History and the Statement of Facts for the EDA's convenience in the interests of brevity and clarity.

litigation before the Honorable Linda R. Feinberg, A.J.S.C. (Docket No. MER-L-253-11). The EDA and Panasonic by various adjournments and Panasonic's intervention, succeeded in postponing a March 4, 2011 return date of Hartz's Order to Show Cause, until May 13, 2011. On May 13, 2011, Judge Feinberg ordered the EDA to file a privilege log with respect to documents responsive to Hartz's OPRA requests that EDA has withheld or redacted. Judge Feinberg indicated that these documents would be subject to *in camera* review. The Court appeared surprised that the EDA had not conducted a paper search for documents responsive to the Hartz OPRA requests and ordered the parties to meet within 30 days to endeavor to resolve or narrow this dispute. Most importantly, Judge Feinberg acknowledged the difficulty in framing an OPRA request for unknown documents with specificity, but Judge Feinberg indicated that the Appellate Division should grant Hartz discovery to obtain disclosure of these unknown documents otherwise not obtainable under OPRA.

EDA promised full and fair disclosure to the public and to Hartz regarding the Panasonic application. This has not occurred. The EDA has failed to respond meaningfully to Hartz's OPRA requests by refusing to conduct paper searches or to check for responsive documents on the computers of the small circle of EDA personnel involved in the Panasonic application or in the informal "at-risk-

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equals-new-jobs" policy promulgation. Simultaneously, with the OPRA action still pending, the EDA issued a SICRA with only 16 items, ignoring entirely the hundreds of relevant pages of documents it recently produced or is withholding. EDA and Panasonic also unsuccessfully sought to accelerate this appeal in the Appellate Division before the OPRA issues are resolved by Judge Feinberg.

Hartz believes that Judge Feinberg will ultimately Order many of the withheld and redacted documents to be fully disclosed by EDA. As a matter of law and fundamental fairness, Hartz is entitled to the documents related to EDA's approval of the Panasonic UTHTC application and to EDA's agency "policy" giving rise to the approval; only then will the Appellate Division have an adequate record to determine these appeals.

As previously indicated by Timothy J. Lizura, EDA's Senior Vice President, at least three other prospective applications are potentially at issue in this appeal, and perhaps over \$1,000,000,000.00 of tax-payer money at stake (Leonard Cert., Exhibit C). A complete record is essential for purposes of this appeal. It is respectfully submitted that the EDA, by its Board of Directors, should grant this motion to settle the record and Order the EDA records custodian, Marcus Saldutti to turnover all the requested and necessary documents without further delay, and to

amend the SICRA accordingly.

LEGAL ARGUMENT

Rule 2:5-5(a) provides that "[a] party who questions whether the record fully and truly discloses what occurred in the [ ]agency below shall . . ., apply on motion to that [ ] agency to settle the record." Hartz brings this motion because the SICRA does not "fully and truly" disclose what occurred at the EDA in connection with the EDA's consideration and approval of the Panasonic UTHTC application and the EDA's adoption of its "at-risk-equals-new-jobs" policy in connection with the June 8, 2010 memorandum.

Rule 2:5-4(b) is entitled "Notice of Agency Record." The rule provides that "[w]ithin (30) thirty days of the service upon it of the notice of appeal the agency [ ]from which the appeal is taken shall file in the Appellate Court a statement of the items comprising the record. . . ." Rule 2:5-4(a) provides that "[t]he record on appeal shall consist of all papers **on file** in the [ ] agencies below . . . ." (Emphasis added). Here, EDA must concede that all such papers are not set forth in the SICRA, as the **EDA has thus far refused to produce its "file"** on Panasonic's application or regarding the EDA's formulation and adoption of its "at-risk-equals-new-jobs" policy.

A fundamental issue in this appeal is whether the Panasonic proposal creates a net economic benefit in excess of the cost of

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the tax credits by at least 110%. Based on only limited documents, just one EDA error noted by Hartz at the Board's February 8, 2011 Meeting—that the EDA miscalculated the net positive benefit since the proposed Newark lease had a 15-year term, not 20—Ms. Franzini recalculated the project's net positive benefit to be \$222.8 million in her February 16 memorandum to the Board. In Ms. Franzini's January memorandum, the EDA had calculated the net positive benefit to be \$348.6 million, a whopping **\$125.8 million error.**

In certain of the e-mails produced by the EDA on May 6, 2011 in connection with Hartz's March 7, 2011 Open Public Records Act ("OPRA") request (Doc. Nos. 1-154), EDA personnel raise issues regarding the use of certain variables that may have further skewed this calculation. See Excerpts from the EDA's May 6, 2011 document production attached to the Leonard Cert., as Exhibit E. For example, there is a question about signage costs and whether workstation furniture can be counted as a "hard" or "soft" cost (Doc. Nos. 87-92; Leonard Cert., Exhibit E). The EDA representative suggested that certain "large-scale" furniture systems might be considered hard costs. Picking up on this, Panasonic's representative indicated that they would reallocate such costs since the furniture systems were in lieu of sheet rock, and these expenses could be counted as a part of the cost of the

building structure. The signage cost was ultimately included by the EDA despite questions concerning its integration in the building structure. Also, certain e-mails between Ms. Franzini and Panasonic's tax consultant (one as late as 8:46 p.m.) on the date of the initial approval also suggest a familiarity seemingly unusual between a state agency and the representative of an applicant for tax credits (Doc. Nos. 78-80; Leonard Cert., Exhibit E). Indeed, on January 10, the day **before** this Board voted to approve Panasonic's UTHTC application, Panasonic's tax consultant was finalizing the press release trumpeting the approval with the EDA's press officer, Erin Gold (Doc. Nos. 81-83; Leonard Cert., Exhibit E). Clearly, the foregoing should be included in the appellate record.

Another fundamental issue in this appeal is whether the "at-risk-equals-new-jobs" policy was properly promulgated by a June 8, 2010 memorandum, circulated to the NJEDA Board, later supplemented with the July 8, 2010 Economic Impact Model (collectively the "policy paper"), proposing changes to the "HUB calculation of a project's net benefit." The "evolution" of the EDA's earlier articulation of the policy in Ms. Franzini's November 10, 2009 memorandum to Members of the EDA Board remains unexplained. Indeed, at precisely the same time, EDA was in the process of formally promulgating—with public notice and comment—new

regulations to implement the 2009 amendments to Act. The regulations were proposed on May 17, 2010 (see 42 N.J.R. 907(a)), adopted by NJEDA on July 23, 2010, and became effective on August 16, 2010. See 42 N.J.R. 1902. Nowhere in the newly adopted regulations is there any mention of "at risk" jobs, and more importantly, nowhere in the regulations is there any consideration given to treating so-called "at risk" jobs as "new" jobs. See N.J.A.C. 19:31-9.1 *et seq.*

In certain of the e-mails produced by the EDA on May 12, 2011, in response to Hartz's March 7, 2011 OPRA request (Doc. Nos. 1-154), EDA personnel were directly communicating with Panasonic's tax credit consultant in formulating and justifying this new ad hoc policy. See Excerpts from the EDA's May 12, 2011 document production attached to the Leonard Cert., as Exhibit F. Based on comments by the Lieutenant Governor, we now know that EDA has apparently been working on the Panasonic "deal" since April, at exactly the same time the informal at-risk-equals-new-jobs policy was being formulated (Leonard Cert., Exhibit D). For example, Timothy J. Lizura of EDA sent Panasonic's tax consultant a copy of the Final Draft of the Hub Rules on September 10, 2009 (Doc. No. 82; Leonard Cert., Exhibit F). These draft rules from 2009 did not change substantively with respect to the Net Economic Benefit test provisions as ultimately adopted. See N.J.A.C. 19:31-

9.5(a)(2)(iv); 19:31-9.7(c), as proposed (Doc. Nos. 97 and 99; Leonard Cert., Exhibit F), and as adopted. Yet, it is clear that Panasonic's tax consultant and a law partner of Panasonic's current counsel in this appeal, attempted to directly influence the EDA's adoption of the informal "at-risk-equals-new-jobs" policy despite the regulations then being adopted by the EDA (Doc. Nos. 123, and 129-132; Leonard Cert., Exhibit F). This process by-passed the public notice and comment requirements of formal rule-making, froze-out non-insiders from this informal policy-making process, and in effect, constituted a shadow government comprised of a handful of powerful and interested agents for the beneficiaries of these very same policy changes and tax credits (Doc Nos. 106-141; Leonard Cert., Exhibit F). Clearly, the foregoing should likewise be included in the appellate record.

The documents and information, listed in the "Relevant Documents" section above, as items 3 through 6, have not yet been released by the EDA, but relate directly to the Panasonic approval or the "at-risk-equals-new-jobs" policy. Without knowing precisely what documents exist it is impossible to articulate their precise relevance. However, Hartz refers the EDA to the public policy of OPRA as follows:

In enacting OPRA, the Legislature declared that it "shall be construed in favor of the public's right of access" to government records. N.J.S.A. 47:1A-1. The purpose of

the statute is ``to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process.''' Mason, 196 N.J. at 64 (quoting Asbury Park Press v. Ocean County Prosecutor's Office, 374 N.J. Super. 312, 329 (Law Div. 2004)). OPRA reflects this State's long-standing policy in favor of open access to public records, Serrano v. South Brunswick Township, 358 N.J. Super. 352, 363, 817 A.2d 1004 (App.Div.2003), and recognizes "that society as a whole suffers far more if governmental bodies are permitted to operate in secrecy." Asbury Park Press, 374 N.J. Super. at 329. [Wilson, 404 N.J. Super. at 581].

These policy considerations underscore the need for the Board to grant Hartz's motion to settle the record in this appeal. With as much as one billion dollars in tax-payer money at stake in this appeal, clearly, all these documents should be included in the SICRA.

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**CONCLUSION**

For the foregoing reasons, Hartz respectfully requests that the EDA grant Hartz's motion to settle the record and order the EDA records custodian to turnover to Hartz all the requested and necessary documents. All the documents indicated in the "Relevant Documents" section of this letter brief, above, should be included in an amended SICRA without further delay.

Respectfully submitted,

**HOROWITZ, RUBINO & PATTON**

By:

  
\_\_\_\_\_  
D. Mark Leonard

DML/ar

cc: (All via Hand Delivery)  
Anita B. Toldo, Appellate Division  
Kevin Jespersen, AAG  
Dennis J. Drasco, Esq.  
James M. Hirschhorn, Esq.  
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May 31, 2011

**By Hand**

New Jersey Economic Development Authority  
36 West State Street  
Trenton, New Jersey 08625

Re: Hartz Mountain Industries, Inc. v. New Jersey Economic  
Development Authority, UTHC App. No. 203639,  
Appellate Division Docket No. A-3647-10T3

Dear Directors:

Please accept this letter on behalf of Panasonic Corporation of North America ("Panasonic"), Applicant in UTHC App. No. 203639 and respondent in the above captioned appeal in response to the motion of Hartz Mountain Industries, Inc. ("Hartz") to settle or supplement the record in the appeal.

Panasonic joins in the opposition of the Attorney General representing the Authority to the Hartz motion. In addition, Panasonic urges that the Authority decide this motion as expeditiously as possible in order to preserve the ability of the Appellate Division to render a meaningful decision in this appeal.

As the Authority is aware, Panasonic is currently a tenant of a Hartz-owned facility in Secaucus, New Jersey. Panasonic's lease expires in March 2013, and, as Panasonic has previously informed the Authority, it will not renew the Lease because the Hartz property is not suitable for the needs of Panasonic's national headquarters. The Urban Transit HubTax Credit issued to Panasonic is in connection with the relocation of Panasonic's national headquarters from Secaucus to Newark, New Jersey. As the Authority is also aware, Panasonic's alternative to relocating its headquarters in Newark is to relocate at one of several out-of-state sites, thereby depriving New Jersey of the more than 800 jobs at Panasonic's headquarters.

On April 11, 2011, Panasonic and the Authority moved to accelerate the Appellate Division's consideration of the Appeal. In support of its motion, Panasonic submitted

New Jersey Economic Development Authority  
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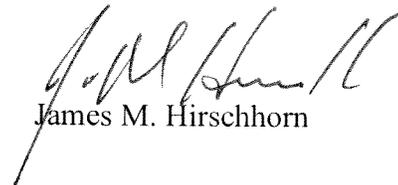
the Certification of Tomohiro Ohi, a copy of which is enclosed. The Ohi Certification informed the Appellate Division that relocation of its headquarters to Newark is not economically feasible without the Urban Transit Hub tax credit, that Panasonic requires a lead time of 18 months for the construction of the Newark facility, and that if Panasonic did not receive a final judicial decision approving the tax credit by September 30, 2011, it would be compelled to withdraw from the Newark project. Since that time, Hartz has believed that it can moot the appeal, and defeat the Authority's ruling issuing the tax credit, simply by protracting the case.

For that reason, Hartz opposed the motions to accelerate consideration. On May 24, 2011, the Appellate Division denied the motions, but it fixed a briefing schedule that will complete briefing of the appeal by August 18, 2011. That schedule permits oral argument and decision on an accelerated basis by September 30, 2011, and Panasonic intends to move the Appellate Division for that schedule at the appropriate point.

In order to further protract the appeal, and defeat any possibility of a timely decision, Hartz has now moved to settle or supplement the record. By the terms of R. 2:5-5(a), such a motion tolls the time for filing briefs. The Administration served its Statement of Items Comprising the Record on April 19, 2011. Under R. 2:6-11, Hartz's brief would have been due 45 days from that date unless and until the Appellate Division ordered a different briefing schedule. Hartz could have filed a motion to settle or supplement the record at any time after April 19. Instead, it waited more than 30 days, until the Appellate Division fixed a briefing schedule on May 24, and then filed its motion on the same day. Hartz has manifestly timed its motion so as to achieve the maximum delay in order to moot the appeal of the Authority decision.

The scheduling of the appeal lies ultimately in the control of the Appellate Division. Panasonic urges the Authority to do what it can to expedite consideration by promptly deciding Hartz's motion to settle or supplement the record.

Very truly yours,



James M. Hirschhorn

JMH

cc: Kevin Jespersen, AAG (By E-mail and regular mail)  
D. Mark Leonard, Esq. (By E-mail and regular mail)  
Dennis J. Drasco, Esq. (By E-mail and regular mail)  
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Panasonic Corporation of North America

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-3747-10T3

HARTZ MOUNTAIN INDUSTRIES, INC.

Appellant,

-v-

Civil Action

NEW JERSEY ECONOMIC  
DEVELOPMENT AUTHORITY and  
PANASONIC CORPORATION OF NORTH  
AMERICA

CERTIFICATION OF  
TOMOHIRO OHI

Respondents,

Tomohiro Ohi, of full age, certifies as follows:

1. I am Director of Procurement of Panasonic Corporation of North America ("Panasonic"), Respondent in this appeal. I make this certification in support of Panasonic's motion to expedite consideration of this appeal.

2. On December 7, 2010, Panasonic submitted to the New Jersey Economic Development Authority ("EDA") a verified Application for a tax credit under the Urban Transit Hub Tax Credit program established by N.J.S.A. 34:1B-207 et seq. (the "Panasonic Application"). A copy of the Panasonic Application, with certain proprietary commercial and financial information redacted, is attached to this certification as Exhibit A. On February 16,

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2011, the EDA granted Panasonic the tax credit in the amount of \$102,408,062. The grant of the tax credit is the subject of this appeal by Hartz Mountain Industries, Inc. ("Hartz")

3. The purpose of the tax credit is to provide an economic incentive for Panasonic to retain its national headquarters in New Jersey rather than relocating them elsewhere in the United States. At the present time, Panasonic's national headquarters is located in Secaucus, New Jersey, in a facility leased from Hartz. Panasonic's lease expires on March 31, 2013.

4. As stated in the Panasonic Application, the Secaucus location is not suitable for Panasonic's future needs because of its physical configuration, because the facility is energy inefficient, because it is not accessible to mass transportation, and because the location is not consistent with Panasonic's standing as a cutting-edge, green-friendly technology enterprise. Accordingly, Panasonic has rejected offers by Hartz to modify the Secaucus facility and will not renew its lease there under any circumstances.

5. Panasonic intends to locate its national headquarters, if possible, in a building to be constructed by a joint venture of Matrix Properties and SJP Partners at 2 Riverfront Plaza, Newark, New Jersey. Panasonic would lease approximately 280,000 square feet of the 340,000 square foot office building, to house approximately 800 employees, and will be the anchor tenant of the facility. However, this is the most expensive of several options available to Panasonic, and it is not economically feasible for Panasonic without the Urban Transit Hub tax credit.

6. If the Newark facility is not available, Panasonic is considering alternatives in New York City, Atlanta, Chicago and Southern California. Remaining in the Secaucus location is not an option. In order to provide the necessary lead time for construction of the Newark facility and for an orderly relocation, Panasonic must know no later than September 30, 2011.

18 months before the Secaucus lease expires, whether it will be relocating to Newark or whether it must select another option. Absence of a final decision affirming the tax credit before that date will place the approximately 800 jobs at Panasonic's headquarters at risk of departure from New Jersey.

7. Panasonic's commitment to the Newark location is contingent on the Urban Transit Hub tax credit. This appeal makes the availability of that tax credit uncertain. If the appeal is not finally resolved by September 30, 2011, Panasonic has the right to withdraw from any commitment to the Newark location. Panasonic will be compelled to exercise that right and to withdraw unless this Court renders a final decision on the validity of the tax credit by that date.

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

Dated: April 8, 2011

  
TOMOHIRO OHI



## INTRODUCTION

The Appellant Hartz Mountain Industries, Inc. ("Hartz") demands that the New Jersey Economic Development Authority (the "EDA") include in the record on appeal items that are both inappropriate and unnecessary. The EDA has provided Hartz with all the factual materials required for a fair and full adjudication of its appeal. There is no need to add to the record beyond the items provided.

This case concerns essentially two issues. The first issue is whether the EDA may consider "at risk" jobs in determining whether a particular project provides the "net positive benefit" to the State necessary to qualify for a tax credit under the provisions of the Urban Transit Hub Tax Credit Act, N.J.S.A. 34:1B-208, et seq. (the "Hub Act"). The second issue is whether the EDA properly granted Respondent Panasonic Corporation of North America ("Panasonic") a tax credit under the Hub Act.

The first issue, regarding consideration of at risk jobs, is purely a matter of statutory and regulatory interpretation and is not dependent on any factual record for resolution. Despite the absence of any relevant facts, Hartz seeks to probe the deliberative process by which the EDA devised its regulations that permit consideration of at risk jobs in the calculation of the net positive benefit. The contents of that deliberative process is irrelevant to an evaluation of the propriety of the regulations.

Such an exploration, moreover, violates fundamental and well-established principles that prohibit intrusion into the deliberative processes by which an administrative agency reaches policy decisions.

Regarding the EDA's grant of a Hub Act tax credit to Panasonic, a court must sustain the EDA's determination so long as substantial credible evidence supports that conclusion. The record required to evaluate the propriety of the EDA's decision is necessarily the relevant factual material that the EDA had available and considered in making its determination. The EDA has now provided all of that factual material to Hartz. There is, therefore, no need to add items to the record beyond the materials already provided.

#### PROCEDURAL HISTORY AND STATEMENT OF FACTS<sup>1</sup>

##### A. The Panasonic Application.

On December 7, 2010, Panasonic submitted to the EDA an application for a Hub Act tax credit. ¶6, Certification of Timothy J. Lizura ("Lizura Certification"), submitted with this Brief. On February 16, 2011, the EDA approved Panasonic's application for a tax credit under the provisions of the HUB Act.<sup>2</sup> Exhibit A at 44-

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<sup>1</sup>The procedural history and facts have been combined to avoid repetition and for the EDA's convenience.

<sup>2</sup>Panasonic's application was considered by the EDA at meetings prior to the February 16, 2011 meeting. Hartz's appeal however, challenges the EDA's approval on February 16, 2011.

45, Certification of Maureen Hassett ("Hassett Certification"), submitted with this Brief. The maximum amount of the approved credit was \$102,408,062. Id.

The subject of Panasonic's application was the proposed relocation of its headquarters from a leased facility in Secaucus, New Jersey, to a high rise commercial building to be constructed at 2 Riverfront Center in Newark, New Jersey. Exhibit A at 14-17, Hassett Certification. Panasonic plans to relocate approximately 800 full time employees from Secaucus to the Newark site and will occupy about 250,000 square feet of the 410,000 square feet at that location. Id.

The EDA, as part of the application process, determined that the State and Newark would receive additional tax revenues with a value of \$202.5 million as a result of Panasonic's relocation to Newark. Id. Thus, even with the tax credit of approximately \$102 million, the State and Newark would gain substantial tax revenues.

In calculating the net benefit, the EDA considered all of the approximately 800 Panasonic employees as "at risk" of being relocated outside the State. Panasonic presently leases space from the appellant Hartz in Secaucus, New Jersey. Panasonic's lease for the space will expire in March 2013, and Panasonic has determined that the current site is unsuitable. Panasonic's chief executive officer, as part of Panasonic's application to the EDA, certified that Panasonic had the capacity to accommodate its Secaucus

operations at other sites outside New Jersey. The site options include Atlanta, Chicago and California, where Panasonic has current operations and the ability to expand or acquire additional space. Panasonic also considered Brooklyn as a relocation site. Id.

Panasonic's proposed relocation to Newark depends on the tax credit. In order to proceed with the proposed relocation, Panasonic must know if the HUB tax credit is valid.

**B. The Panasonic Application Process.**

Consistent with the EDA's regular practices, Panasonic's application was subjected to an "underwriting" review to determine if Panasonic qualified for a Hub Act tax credit. ¶2, Certification of Mark Lestuk ("Lestuk Certification"), submitted with this Brief; ¶3, Lizura Certification. The principal purposes of the underwriting process are to determine if Panasonic satisfied the statutory and regulatory requirements for a Hub Act tax credit and, if Panasonic did qualify, to determine the appropriate amount of the tax credit. ¶2, Lestuk Certification; ¶3, Lizura Certification.

Panasonic's application was assigned to Mark Lestuk for underwriting review. Mr. Lestuk was a Real Estate Financial Analyst at the EDA. ¶6, Lizura Certification; ¶3, Lestuk Certification.

The EDA created a case file upon receipt of Panasonic's

application. The case file consisted of two components: an electronic file and a paper file. ¶¶4-6, Lestuk Certification; ¶7-8, Lizura Certification. The contents of both files, with privileged materials redacted, or removed, are provided as Exhibits to the Certification of Timonthy J. Lizura, submitted with this Brief.

In performing the underwriting analysis of Panasonic's application, Mr. Lestuk, the EDA underwriter, relied upon facts and information that he received from Panasonic or from representatives of Panasonic. All information upon which Mr. Lestuk relied and which he received from Panasonic or its representatives was transmitted in electronic form through emails. Any electronic document, other than emails, that Mr. Lestuck received from Panasonic or its representatives were saved by Mr. Lestuck in the electronic file for the Panasonic application. Mr. Lestuk preserved all of his emails on the EDA's email system. ¶¶4-6, Lestuk Certification. In response to a prior request from Hartz under the provisions of the Open Public Records Act, N.J.S.A. 46:1A-1, et seq., the EDA provided to Hartz the relevant emails between Mark Lestuk and Panasonic. ¶¶2-7, Certification of Marcus Saldutti ("Saldutti Certification"), submitted with this Brief.

Mr. Lestuck would on occasion have telephone conversations with representatives of Panasonic regarding the application. However, any information that he received from Panasonic that was

used in the underwriting analysis, although it may have been part of a telephone conversation, was memorialized either in an email or in an electronic document. ¶6, Lestuk Certification.

At the conclusion of the analysis, Mr. Lestuck prepared a memorandum that contained his assessment of Panasonic's application. After internal review at the EDA, Mr. Lestuck's underwriting memorandum was submitted to the EDA for its January 11, 2011 meeting. ¶7, Lestuk Certification. The EDA approved Panasonic's application for a Hub Act tax credit at the January 11, 2011 meeting. Exhibit B at 25-26, Hassett Certification.

On January 31, 2011, Hartz submitted a letter to the EDA that objected to the EDA's grant to Panasonic of a Hub Act tax credit. Exhibit B at 46-47, Hassett Certification. Allen J. Magrini, Hartz' Senior Vice President for Land Use and Development, appeared at a special meeting of the EDA on February 1, 2011. At that meeting, Mr. Magrini requested an opportunity to present concerns regarding the award of a Hub Act tax credit to Panasonic. Exhibit B at 28-29, Hassett Certification. On February 4, 2011, Hartz submitted to the EDA another letter requesting, among other things, that the EDA reconsider Panasonic's application for a Hub Act tax credit. Exhibit C at 49-50, Hassett Certification.

The EDA reconsidered, and again approved, Panasonic's application at the February 8, 2011 meeting. Exhibit B at 38, Hassett Certification. Mr. Lestuck's underwriting memorandum was

resubmitted to the EDA for the February 8, 2011 meeting. At the February 8, 2011 meeting, Hartz's Senior Vice President, Alan Magrini, gave a lengthy presentation opposing the grant of a tax credit to Panasonic. Exhibit B at 38-39, Hassett Certification.

On February 11, 2011, Hartz submitted to the EDA a detailed letter once again objecting to the grant of a tax credit to Panasonic. Exhibit C at 51-66, Hassett Certification. The EDA once again reconsidered the Panasonic Hub Act tax credit application at a special meeting held on February 16, 2011. Exhibit B at 44, Hassett Certification. An underwriting memorandum that Mr. Lestuck prepared regarding Panasonic's application was submitted to the EDA for the meeting. At the February 16, 2011 meeting, the EDA once again approved a Hub Act tax credit to Panasonic. Exhibit B at 44, Hassett Certification.

The memoranda regarding Panasonic's application that were submitted to the EDA and the minutes of the meetings at which the EDA considered Panasonic's application are all available to the public on the EDA's website at [www.njeda.com](http://www.njeda.com). Nonetheless, copies of the minutes and the memoranda are submitted as Exhibits to the Certification of Maureen Hassett that accompanies this Brief. Copies of the letters that Hartz submitted to the EDA are also submitted with Ms. Hassett's Certification.

**C. Hartz's Application to Settle the Record**

On March 31, 2011, Hartz filed a notice of appeal challenging

the EDA's award of a Hub Act tax credit to Panasonic. On May 24, 2011, Hartz filed a motion with the EDA to settle the record before the Appellate Division pursuant to R. 2:5-5(a). In the motion, Hartz seeks to add to the record items that are irrelevant and inappropriate to the issues on appeal.

#### ARGUMENT

#### POINT I

**HARTZ IS NOT ENTITLED TO PROBE THE EDA'S DELIBERATIVE PROCESS PRECEDING THE ADOPTION OF THE REGULATIONS THAT PERMIT THE EDA TO CONSIDER RETAINED JOBS IN DETERMINING THE NET POSITIVE BENEFIT.**

Hartz demands that the EDA add to the record on appeal practically every document that the EDA may have relating to EDA's regulation regarding the inclusion of at risk jobs in the net positive benefit test. See, e.g., Hartz Letter Brief at 3. Hartz further demands that the EDA include in the record a newspaper article because, according to Hartz, the article somehow illustrates that the EDA fashioned its regulation regarding at risk jobs to specifically benefit Panasonic. Hartz Letter Brief at 9. Items relating to the EDA's deliberative process preceding the adoption of its regulations regarding the use of at risk jobs in the net positive benefit test cannot properly be part of the record on appeal.

In determining whether supplementation of the record under R.

2:5-5(b) is appropriate, a court should consider: (1) whether at the time of the agency's action, the moving party knew of the information it now seeks to include in the record; and (2) whether the new material, if included, would likely affect the outcome. Liberty Surplus Ins. Co., Inc. v. Nowell Amoroso, P.A., 189 N.J. 436, 452-53 (2007); In re Gastman, 147 N.J. Super. 101, 114 (App. Div. 1997). Necessarily, in order to affect the outcome of the agency's decision, the supplementary materials must be relevant to the issues under consideration. The criteria established under the Liberty Surplus and Gastman decisions hence require that the supplementary materials be, at the least, relevant to the inquiry at hand.

Hartz first claims that the inclusion of at risk jobs in the net positive benefit test is without regulatory authorization. This argument is without merit. N.J.A.C. 19:31-9.7(c), part of the regulations regarding Hub Act tax credits, provides that in determining whether a company meets the net economic benefits test, the EDA may consider, among other things, "taxes paid directly or generated indirectly by new or **retained employees**." (Emphasis added). Hence, the regulations expressly authorize consideration of retained employees in determining the net positive benefit of a project seeking a Hub Act tax credit. See N.J.A.C. 19:31-9.7(c). The regulations thus subsume the use of at risk jobs for the net positive benefit test.

Hartz also claims that the regulation's inclusion of retained, or at risk, jobs in the net positive benefit test is contrary to the intent of the Hub Act and is hence *ultra vires*. The assessment of the validity of the EDA's regulations are essentially a matter of statutory construction, not factual determination. Administrative agencies are given wide discretion to select the proper means to accomplish the Legislature's goals. Kaprow v. Bd. of Educ. of Berkely Twp., 131 N.J. 572, 580-81 (1993). Administrative regulations are presumptively valid, and anyone challenging such a regulation bears the burden of proving its invalidity. Id. A court should afford substantial deference to agency regulations based on the recognition of the agency's presumed expertise. St. Peter's Univ. Hosp. v. Lacy, 185 N.J. 1, 12-13 (2005). In evaluating the propriety of a particular regulation, a court should determine whether the regulation is consistent with the legislative policy contained in the enabling statute. Dept. of Labor v. Titan Constr. Co., 102 N.J. 1, 10-11 (1985). In discerning the legislative policy, a court should examine the entire statute in light of its surroundings and objectives. Id. "The purpose of this inquiry is to ascertain whether the requisite authority may be said to be implicitly supplied, as '[t]hat which is implied is as much a part of the law as that which is expressed.'" N.J. Guild of Hearing Aid Dispensers v. Long, 75 N.J. 544, 562 (1978), quoting In re Gastman, 147 N.J.

Super. 101, 109 (App. Div. 1977). See, also, Titan Constr. Co., 102 N.J. at 10-11.

In assessing the propriety of the EDA's regulations, the Appellate Division must ascertain whether those regulations are consistent with the legislative intent and policy of the Hub Act. Hence, there is no supplemental factual materials that will either inform or assist the Appellate Division in evaluating the validity of the EDA's regulations regarding retained jobs.

Hartz claims that the EDA's motive in adopting the regulations was to specifically benefit Panasonic. The EDA vigorously disputes this accusation. Nonetheless, the measure of the regulations' validity is not the motive of the EDA, but whether the regulations are consistent with the legislative policy contained in the Hub Act. See, e.g., Titan Constr. Co., 102 N.J. at 10-11. That a regulation may benefit only one entity does not render the regulation invalid so long as the regulation otherwise rationally advances a legitimate legislative purpose. See, e.g., Paul Kimball Hosp. Inc. v. Brick Twp. Hosp., Inc., 86 N.J. 429, 448 (1981). The essential purpose of the Hub Act is to combat "a fiscal and economic crisis more severe than any experienced since the Great Depression." L. 2009, c. 90, §1. The goal of the legislation is to "reverse a deflationary cycle" and to avoid "further shrinkage of the New Jersey economy." Id. Providing a Hub Act tax credit so that a company that would otherwise leave the State remains in New

Jersey surely advances the Legislature's purposes. The inclusion of retained jobs in the net positive benefit test is consistent with the legislative policy of the Hub Act.

Thus, even if the EDA purposefully designed its regulations to accommodate Panasonic, because the regulations generally further the legislative policy of the Hub Act, the regulations remain valid, and available to others similarly situated to Panasonic. Therefore, supplementary materials that reveal the motives of the EDA in adopting the regulations serve no proper purpose.

Finally, probing the deliberative process by which the EDA developed the regulations is contrary to well-established policy. Generally, a litigant is not permitted to probe the mental processes of members of an administrative agency relating to the promulgation of a regulation. United States v. Morgan, 313 U.S. 409, 422 (1941); N.J. Turnpike Authority v. Sisselman, 106 N.J. Super. 358, 367 (App. Div.), certif. denied, 54 N.J. 565 (1969). The Supreme Court, in another context, has noted documents that are generated before the adoption of an agency's regulations and that expose the deliberative process of the agency's policy making are exempt from disclosure. Education Law Center v. N.J. Dept. of Education, 198 N.J. 274, 294-95 (2009). This policy is necessary to "ensure free and uninhibited communications within governmental agencies so that the best possible decisions can be reached." Id. at 286. The efficiency of government would be greatly hampered if,

with respect to legal and policy matters, all government agencies were forced to "operate in a fishbowl." Id. at 288, quoting Env'tl. Prot. Agency v. Mink, 410 U.S. 73, 87 (1973).

Hence, in this case, the inclusion in the record of materials that reveal the EDA's deliberative process is not only unnecessary, it is also contrary to a well-established policy against the disclosure of that process.

## POINT II

BECAUSE HARTZ HAS ALL OF THE RELEVANT ITEMS AVAILABLE TO THE EDA AT THE TIME THE AGENCY EVALUATED PANASONIC'S APPLICATION, FURTHER SUPPLEMENTS TO THE RECORD ARE UNNECESSARY.

An appellate court's review of an agency action is limited. In re Herrmann, 192 N.J. 19, 28 (2007); In re Zahl, 186 N.J. 341, 352 (2002); In re Polk, 90 N.J. 550, 578 (1982). The scope of review is whether the findings made could reasonably have been reached on sufficient credible evidence present in the record, considering the proofs as a whole. In re Taylor, 158 N.J. 644, 656 (1999). If substantial credible evidence supports an agency's conclusion, a court may not substitute its own judgment for that of the agency even though the court might have reached a different result. Greenwood v. State Police Training Ctr., 127 N.J. 500, 513 (1992). Necessarily, the record on appeal from an agency action is properly limited to the relevant factual materials the agency had available at the time it rendered its decision.

The EDA has provided to Hartz all of the relevant factual material that was before the EDA at the time it rendered its decision. Consistent with the EDA's standard practice, Panasonic's application for a Hub Act tax credit was subjected to an underwriting review. The purpose of the review is to determine whether Panasonic satisfied the statutory and regulatory requirements for a Hub Act tax credit and, if Panasonic did qualify, to determine the appropriate amount of the tax credit.

The person at the EDA who performed the underwriting analysis of Panasonic's application was Mark Lestuk, a Real Estate Financial Analyst. All of the information that Mr. Lestuk relied upon in performing his analysis were in the form of either electronic documents or emails. All of those materials were preserved in the EDA electronic file for the Panasonic application or in the EDA's email system. All of the materials were, also, provided to Hartz.

The underwriting process culminates in a memorandum from the underwriter to the EDA's Board. The memorandum summarizes the underwriting analysis. All of the memoranda that the Board considered regarding Panasonic's application are available to the public as part of the "Full Agenda" for the relevant meeting dates. All such agendas are located on the EDA's website, [www.njeda.com](http://www.njeda.com). All of these items are already part of the record on appeal. See Exhibit A, Certification of D. Mark Leonard, submitted with Hartz' application ("Leonard Certification").

Finally, Hartz several times submitted either oral or written objections to Panasonic's application for a Hub Act tax credit. All of the written objections and the descriptions of the oral objections, which are contained in the minutes of the relevant EDA meetings, are already included in the record on appeal. See Exhibit A, Leonard Certification.

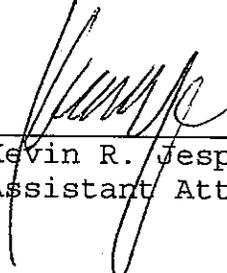
In sum, the EDA has provided, and Hartz now possesses, all of the factual materials upon which the EDA based its underwriting analysis of the Panasonic application; all of the underwriting memoranda that the EDA considered when deciding Panasonic's application; and all of the objections to the Panasonic application that Hartz presented to the EDA. The entirety of the relevant factual material is in Hartz's possession. All of these materials, except the Panasonic case file, is already part of the record. Once the EDA adds the non-privilege portions of the Panasonic case file to the record, the record will be complete. There is no need to further supplement the record.

**CONCLUSION**

For the foregoing reasons, the EDA should decline to supplement the record on appeal, other than to include those non-privileged materials that were part of the Panasonic case file. The Attorney general does not object to supplementing the record with the non-privileged portions of the Panasonic case file.

Respectfully submitted,

PAULA T. DOW  
Attorney General of New Jersey

By: 

\_\_\_\_\_  
Kevin R. Jespersen  
Assistant Attorney General

Dated: May 31, 2011

**LUM, DRASCO & POSITAN LLC**  
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Attorneys for Appellant, Town of Secaucus

TOWN OF SECAUCUS,

Appellant,

-vs-

NEW JERSEY ECONOMIC DEVELOPMENT  
AUTHORITY

Respondent(s).

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A- 003688-10

**On Appeal From:**

Final Agency Action of the New Jersey  
Economic Development Authority approving  
UTHTC Appl. No. 203639

Civil Action

**NOTICE OF MOTION TO SETTLE THE  
RECORD PURSUANT TO R. 2:2-5(a)**

TO: Members of the Board of Directors  
State of New Jersey  
Economic Development Authority  
36 West State Street  
Trenton, New Jersey 08625  
Attn.: Caren S. Franzini, CEO

Kevin Jespersen, AAG  
Office of the Attorney General  
Division of Law and Public Safety  
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D. Mark Leonard, Esq.  
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P.O. Box 2038  
Secaucus, New Jersey 07096

James M. Hirschhorn, Esq.  
Sills Cummis & Gross, PC  
One Riverfront Plaza  
Newark, New Jersey 07102

**PLEASE TAKE NOTICE** that Appellant, Town of Secaucus, hereby moves before the New Jersey Economic Development Authority for an Order pursuant to R. 2:5-5(a), to settle the record in the above-captioned Appeal.

**PLEASE TAKE FURTHER NOTICE** that in support of this motion, Appellant shall rely upon the Certification of Bernadette Condon and the Letter Brief submitted herewith.

**PLEASE TAKE FURTHER NOTICE** that Appellant, Town of Secaucus, respectfully requests oral argument on this application.

LUM, DRASCO & POSITAN LLC  
Attorneys for Appellant, Town of Secaucus

By:   
BERNADETTE CONDON

DATED: June 1, 2011

CERTIFICATION OF SERVICE

I hereby certify that the within Notice of Motion, Certification of Counsel and Letter Brief, were served via Federal Express for Overnight Delivery to all counsel of record on this 1<sup>st</sup> day of June, 2011 as follows:

Members of the Board of Directors  
State of New Jersey  
Economic Development Authority  
36 West State Street  
Trenton, New Jersey 08625  
Attn.: Caren S. Franzini, CEO

Kevin Jespersen, AAG  
Office of the Attorney General  
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BERNADETTE CONDON, ESQ.

**Dated: June 1, 2011**

# LUM, DRASCO & POSITAN LLC

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June 1, 2011

Members of the Board of Directors  
State of New Jersey  
Economic Development Authority  
36 West State Street  
Trenton, New Jersey 08625  
Attn: Caren S. Franzini, CEO

**Re: Town of Secaucus v. New Jersey Economic Development Authority  
Appellate Docket No.: A-3688-10T3  
On Appeal From: New Jersey Economic Development Authority,  
UTHTC Appl. No, 203639**

Dear Members of the Board of Directors:

This firm represents Appellant, Town of Secaucus ("Secaucus") in connection with the above-captioned action. Please accept this letter brief in lieu of a more formal submission in support of Secaucus' Motion, pursuant to Rule 2:5-5(a), to settle the record on appeal.

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## PRELIMINARY STATEMENT

Secaucus filed the within appeal of the New Jersey Economic Development Authority's ("NJEDA") grant of an Urban Transit Hub Tax Credit ("UTHTC") to Panasonic Corporation of North America ("Panasonic"), which gave Panasonic a tax credit in the amount of \$102,408.062.00 to facilitate its move out of Secaucus to a new location some ten (10) miles down the road in Newark. Similarly, Hartz Mountain Industries, Inc., ("Hartz Mountain") the owner of the facility in Secaucus that is currently leased by Panasonic, filed a Notice of Appeal of the NJEDA's decision to issue a tax credit to Panasonic.

Secaucus makes this Motion to Settle the Record based upon documents and materials that have been produced and/or improperly withheld by the NJEDA to Hartz Mountain and Secaucus in connection with certain requests pursuant to the Open Public Records Act, ("OPRA"), which documents are not included in the Statement of Items Comprising the Record ("SICRA") filed by the NJEDA, but which directly impact Secaucus' appeal. Specifically, Secaucus wishes to supplement the record with several pertinent items, including, but not limited to (1) various documents and other materials produced by the NJEDA on May 6, 2011; (2) various documents and other materials produced by the NJEDA on May 12, 2011; (3) the redacted information and withheld documents as indicated in Gabriel Chacon, Esq.'s May 12, 2011 letter; (4) documents withheld in response to Hartz Mountain's OPRA request dated April 18, 2011; (5) documents and other materials either in paper or electronic files and/or computer hard drives that relate to the NJEDA's consideration and approval of Panasonic's Application No. 203639 for the UTHTC; (6) documents and other materials either in paper or electronic files and/or computer hard drives, systems or servers of NJEDA personnel involved in the NJEDA's "at-risk-equals-new-jobs" policy informally adopted pursuant to a June

# LUM, DRASCO & POSITAN LLC

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8, 2010 memorandum from Carol S. Franzini to Members of the NJEDA Board, including its “evolution” from the NJEDA’s earlier articulation of the policy in Ms. Franzini’s November 10, 2009 memorandum to Members of the NJEDA Board; and (7) the April 20, 2011 NJBIZ article indicating that the NJEDA has been “working” on the Panasonic relocation since April 2010.

## **STATEMENT OF FACTS/PROCEDURAL HISTORY**

On April 20, 2011, the NJEDA filed its SICRA in the within Appeal. (See Exhibit “A” to Certification of Bernadette Condon, Esq. [‘Condon Cert’]) The NJEDA’s SICRA in the within Appeal is identical to that filed in the Appeal by Hartz Mountain, which Appeals have been consolidated by Order of the Appellate Division dated May 23, 2011. (Exhibit “B” to Condon Cert.) (compare Exhibit “A” of Condon Cert. to Exhibit “A” of Leonard Cert.) In that regard, Secaucus adopts and relies upon the Statement of Facts and Procedural History set forth in the Certification of D. Mark Leonard, Esq. (“Leonard Cert.”) as well as Hartz Mountain’s Letter Brief in Support of its Motion to Settle the Record dated May 24, 2011 and for the sake of brevity does not reiterate same herein.

Subsequent to its filing of the SICRA, on May 6, 2011 and May 12, 2011, the NJEDA produced almost three hundred (300) pages of e-mails and other documents and withheld and/or redacted numerous additional documents averring privilege. (See Exhibits “E” and “B” respectively to Leonard Cert.) Neither the documents that were produced nor the withheld and/or redacted documents were included in the NJEDA’s SICRA.

On May 13, 2011, the Court, in the matter known as Hartz Mountain Industries, Inc. v. New Jersey Economic Development Authority, Docket No. MER-L-253-11, which was brought by Hartz Mountain pursuant to OPRA seeking certain documents from the NJEDA (“OPRA case”), granted Secaucus leave to

# LUM, DRASCO & POSITAN LLC

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Intervene and join in Hartz Mountain's various OPRA requests for documents generated, received or relied upon by the NJEDA in connection with its grant of the tax credit to Panasonic.

Also on May 13, 2011, the Court directed the NJEDA to file a privilege log with respect to the documents responsive to the OPRA requests but which were withheld or redacted by the NJEDA. At that time, Judge Feinberg indicated that the withheld and/or redacted documents would be the subject of an *in camera* review either by the Court or a Special Master and directed the parties to meet within thirty (30) days to resolve any outstanding issues. The parties are presently working towards scheduling a mutually convenient time to meet. (See E-mail exchange between counsel dated May 25, 2011 annexed as Exhibit "D" to Condon Cert.) Additionally, the Court indicated that certain discovery which was not obtainable under OPRA could be the subject of discovery in the within Appellate Division proceeding. Thus, it is likely that after an *in camera* review of the withheld and redacted items and a meeting amongst the parties, the NJEDA will produce additional documents which must also be part of the record on appeal.

## LEGAL ARGUMENT

### **SECAUCUS' MOTION TO SETTLE THE RECORD SHOULD BE GRANTED IN ACCORDANCE WITH R. 2:5-5**

Rule 2:5-5 provides that a party may move to supplement the record at any time during the pendency of an appeal "if it appears that evidence unadduced in the proceedings below may be material to the issues on appeal..." The NJEDA in this case clearly considered numerous e-mails and other documents as is evidenced by its May 6, 2011 and May 12, 2011 productions.

# LUM, DRASCO & POSITAN LLC

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Rule 2:5-5 further provides that a party may move for an order correcting the record if there is a dispute about what “the record fully and truly discloses . . . .” Here, NJEDA cannot dispute that it produced several hundred pertinent documents only after filing its SICRA, which did not include those documents. Not only were the documents Secaucus now seeks to supplement the record with produced by the NJEDA in response to OPRA requests for documents generated, received or relied upon by the NJEDA in connection with its grant of the tax credit to Panasonic, these documents are material and vital to the Appellate Court’s determination in this case. Neither party will be prejudiced if this motion is granted because no briefs have been filed.

Additionally, Secaucus seeks documents with respect to the NJEDA’s “at-risk-equals-new-jobs” policy and the April 20, 2011 NJBIZ article indicating that the NJEDA has been “working” on the Panasonic relocation since April 2010. (Exhibit “D” to Leonard Cert.) In this case, Secaucus submits that the purpose of UTHHTCA is to encourage businesses looking to relocate to New Jersey from other states to move to a Transit HUB. It was not and is not the purpose/intention of the UTHHTCA to encourage and subsidize New Jersey businesses to move from one New Jersey municipality to another and the “net positive benefit” requirement was specifically enacted to prohibit such moves. (See Certification of Assemblyman Vincent Prieto annexed as Exhibit “C” to Condon Cert.) The NJEDA’s “at-risk-equals-new-jobs” policy was informally adopted pursuant to a June 8, 2010 memorandum from Carol S. Franzini to Members of the NJEDA Board, and evolved from the NJEDA’s earlier articulation of the policy in Ms. Franzini’s November 10, 2009 memorandum to Members of the NJEDA Board. Accordingly, it would be an injustice for the Appellate Division to consider this matter without a complete record.

# LUM, DRASCO & POSITAN LLC

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## CONCLUSION

For the foregoing reasons as well as those set forth in Hartz Mountain's Letter Brief in Support of its Motion to Settle the Record, dated May 24, 2011, Appellant, Town of Secaucus, respectfully requests that this Court grant its Motion to Settle the Record and, also, consider the documents listed herein as part of the within appeal.

Respectfully submitted,

LUM, DRASCO & POSITAN LLC

A handwritten signature in cursive script, reading "Bernadette Condon".

BERNADETTE H. CONDON  
A Member of the Firm

cc: Kevin Jespersen, AAG  
D. Mark Leonard, Esq.  
James M. Hirschhorn, Esq.



CHRIS CHRISTIE  
*Governor*

*State of New Jersey*  
OFFICE OF THE ATTORNEY GENERAL  
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25 MARKET STREET  
PO Box 112  
TRENTON, NJ 08625-0112

ROBERT M. HANNA  
*Director*

June 2, 2011

***Via Hand Delivery and Email***

Board of Directors  
New Jersey Economic Development Authority  
36 West State Street  
Trenton, NJ 08625

Attention: Ms. Caren S. Franzini, CEO

Re: ***Township of Secaucus v. New Jersey Economic Development Authority***  
Appellate Division Docket No. A-3688-10T3

Dear Ms. Franzini:

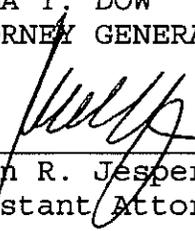
Please accept this letter as a response to the Township of Secaucus's Motion to Settle the Record Pursuant to R. 2:2-5. Secaucus seeks to add to the record on appeal seven particular documents or categories of documents. See Secaucus Letter Brief at pages 2-3. Hartz Mountain Industries, Inc. ("Hartz"), which is also an appellant in this case, on May 24, 2011, filed a similar motion to settle the record. Hartz also demanded that the record include seven particular documents or categories of documents. See Hartz Letter Brief at pages 2-3. The documents that Secaucus requests be added to the record are identical to the documents that Hartz asks be added. Accordingly, the Attorney General will rely upon the Brief and Certifications previously submitted in response



to Hartz's motion as the Attorney General's response to Secaucus's motion.

Very truly yours,

PAULA T. DOW  
ATTORNEY GENERAL OF NEW JERSEY

By:   
Kevin R. Jespersen  
Assistant Attorney General

KRJ/mh

cc: D. Mark Leonard, Esq. (via regular mail and email)  
Elizabeth Renaud, Deputy Attorney General (via email only)  
Bernadette H. Condon, Esq. (via regular mail and email)  
James M. Hirschhorn, Esq. (via regular mail and email)  
Leon J. Sokol, Esq. (via regular mail and email)



**COUNTY OF HUDSON**  
**COMPREHENSIVE ECONOMIC DEVELOPMENT STRATEGY COMMITTEE**  
**C/O HUDSON COUNTY DIVISION OF PLANNING**  
**MEADOWVIEW CAMPUS, BUILDING 1, FLOOR 2**  
**595 COUNTY AVENUE**  
**SECAUCUS, NEW JERSEY 07094**

**THOMAS A. DEGISE**  
COUNTY EXECUTIVE

Resolution: 2011-01-5.1

**JEFFREY H. KAPLOWITZ**  
CHAIRMAN

***Resolution of the Hudson County Comprehensive  
Economic Development Strategy Committee Opposing the Usage of New  
Jersey Urban Transit Hub Tax Credits for the Intrastate Relocation of  
Panasonic Corporation to Newark***

**Whereas**, a Comprehensive Economic Development Strategy (CEDS) is the result of the local planning process designed to guide the economic growth of an area. The purpose a CEDS is to establish a process that will help create jobs, foster more stable and diversified economies, and improve living conditions. An approved CEDS is a requirement to apply for assistance under the Economic Development Administration's (EDA) programs of public work, and economic adjustments; and,

**Whereas**, the Hudson County Comprehensive Economic Development Strategy Committee was duly constituted by appointments made by the Hudson County Executive in 2007, and consented to by the Hudson County Board of Chosen Freeholders. In line with its duties, the CEDS Committee adopts local economic plans and approves strategies for EDA programs; and,

**Whereas**, this Committee has prepared and endorsed a Comprehensive Economic Development Strategy for Hudson County that was approved by the United States Department of Commerce and the United States Economic Development Administration on August 31, 2010; and,

**Whereas**, the primary goals of the Hudson County CEDS include retaining and expanding existing businesses, strengthening the tax base of the County, and creating a diversified economy to maintain full employments and continue economic growth; and,

**Whereas**, the Panasonic Corporation of North America, located in Secaucus, New Jersey, employs approximately 850 people, is a primary tax generator for the Town and County, and provides economic stability to the area; and,

**Whereas**, the New Jersey Urban Transit Hub Tax Credit Act of 2008 provides tax credits as a financial incentive to relocate businesses employing at least 250 employees to locations within a ½ mile radius of a NJ Transit, PATH, PATCO, or light rail station. The Act designates nine transit communities as eligible within the program: Jersey City, Hoboken, Elizabeth, Paterson, Camden, Trenton, New Brunswick, and East Orange, and Trenton. The Tax Credit is equal to 100% of capital investment at the new location, distributed over a 10-year period. Stipulations for full entitlement to the tax credits

include the creation of 200 new full time employees, not previously existing in the State; and,

**Whereas**, the New Jersey Economic Development Authority has authorized a \$102 million dollar-plus incentive package, utilizing the Urban Transit Hub Tax Credit Program, to relocate Panasonic Corp. North America from its current location to Newark, New Jersey; and,

**Whereas**, the relocation of the Panasonic Corp. North America within New Jersey will result in the net creation of zero new jobs for the State, the loss of approximately 850 jobs to the town of Secaucus and the County of Hudson, a reduction in tax revenues for the municipality and County, and the loss of economic multipliers for local and regional businesses; and,

**Whereas**, the County of Hudson includes two municipalities eligible under the Urban Transit Hub Tax Credit Act which could have been considered by the NJ EDA for an incentive package, therefore the CEDS committee questions the process by which the NJ EDA selected Panasonic's proposed location; and,

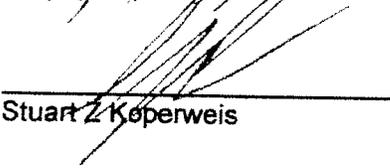
**Whereas**, the Town of Secaucus has objected to the move of the Panasonic Corporation, the resulting loss of 850 jobs, and the reduction in property tax revenue for the municipality, without Town input or consideration for alternative solutions to appeasing Panasonic Corporation; and,

**Now, therefore, be it resolved**, by the Hudson County Comprehensive Economic Development Strategy Committee that:

1. The Committee supports the Town of Secaucus in objecting to the New Jersey Economic Development Authority's utilization of the Urban Transit Hub Tax Credit Program as part of a package to incentivize the relocation of Panasonic Corporation North America to Newark, New Jersey.
2. The Committee supports the Town of Secaucus' request to pursue alternative incentives to maintain and upgrade Panasonic Corporation North America's current location.
3. This resolution shall be forwarded to the New Jersey Economic Development Administration board of trustees, Hudson County's State Legislative delegation, Hudson County Executive Thomas A. DeGise, the Hudson County Board of Chosen Freeholders, and the Mayor and governing body of the Town of Secaucus, as well as the Mayors and governing bodies of Hudson County's municipalities for their respective information and consideration.

Adopted by the Hudson County Comprehensive Economic Development Strategy Committee by unanimous vote on January 20, 2011.

  
\_\_\_\_\_, Chairman  
Jeffrey Kaplowitz

  
\_\_\_\_\_, Secretary  
Stuart Z. Koperweis