Court File No. CV-21-00658423-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JUST ENERGY GROUP INC., JUST ENERGY CORP., ONTARIO ENERGY COMMODITIES INC., UNIVERSAL ENERGY CORPORATION, JUST ENERGY FINANCE CANADA ULC, HUDSON ENERGY CANADA CORP., JUST MANAGEMENT CORP., JUST ENERGY FINANCE HOLDING INC., 11929747 CANADA INC., 12175592 CANADA INC., JE SERVICES HOLDCO I INC., JE SERVICES HOLDCO II INC., 8704104 CANADA INC., JUST ENERGY ADVANCED SOLUTIONS CORP., JUST ENERGY (U.S.) CORP., JUST ENERGY ILLINOIS CORP., JUST ENERGY INDIANA CORP., JUST ENERGY MASSACHUSETTS CORP., JUST ENERGY NEW YORK CORP., JUST ENERGY TEXAS I CORP., JUST ENERGY, LLC, JUST ENERGY PENNSYLVANIA CORP., JUST ENERGY MICHIGAN CORP., JUST ENERGY SOLUTIONS INC., HUDSON ENERGY SERVICES LLC, HUDSON ENERGY CORP., INTERACTIVE ENERGY GROUP LLC, HUDSON PARENT HOLDINGS LLC, DRAG MARKETING LLC, JUST ENERGY ADVANCED SOLUTIONS LLC, FULCRUM RETAIL ENERGY LLC, FULCRUM RETAIL HOLDINGS LLC, TARA ENERGY, LLC, JUST ENERGY MARKETING CORP., JUST ENERGY CONNECTICUT CORP., JUST ENERGY LIMITED, JUST SOLAR HOLDINGS CORP. AND JUST ENERGY (FINANCE) HUNGARY ZRT.

APPLICANTS

COMPENDIUM OF THE APPLICANTS AND THE DIP LENDERS

MOTION AND CROSS-MOTION FOR ADVICE AND DIRECTIONS
RETURNABLE FEBRUARY 9, 2022

February 7, 2022

CASSELS BROCK & BLACKWELL LLP
2100 Scotia Plaza
40 King Street West
Toronto, ON M5H 3C2

Alan Merskey LSO #: 413771
Tel: 416.860.2948
amerskey@cassels.com

John M. Picone LSO #: 58406N
Tel: 416.640.6041
jpicone@cassels.com

Christopher Selby LSO #: 65702T
Tel: 416.860.5223
cselby@cassels.com

Lawyers for the DIP Lenders

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ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

THE HONOURABLE MR.	)	WEDNESDAY**,** THE 15TH
	)	
JUSTICE KOEHNEN	)	DAY OF SEPTEMBER, 2021

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **JUST ENERGY GROUP INC.**, JUST ENERGY CORP., ONTARIO ENERGY COMMODITIES INC., UNIVERSAL ENERGY CORPORATION, JUST ENERGY FINANCE CANADA ULC, HUDSON ENERGY CANADA CORP., JUST MANAGEMENT CORP., JUST ENERGY FINANCE HOLDING INC., 11929747 CANADA INC., 12175592 CANADA INC., JE SERVICES HOLDCO I INC., JE SERVICES HOLDCO II INC., 8704104 CANADA INC., JUST ENERGY ADVANCED SOLUTIONS CORP., JUST ENERGY (U.S.) CORP., JUST ENERGY ILLINOIS CORP., JUST ENERGY INDIANA CORP., JUST ENERGY MASSACHUSETTS CORP., JUST ENERGY NEW YORK CORP., JUST ENERGY TEXAS I CORP., JUST ENERGY, LLC, JUST ENERGY PENNSYLVANIA CORP., JUST ENERGY MICHIGAN CORP., JUST ENERGY SOLUTIONS INC., HUDSON ENERGY SERVICES LLC, HUDSON ENERGY CORP., INTERACTIVE ENERGY GROUP LLC, HUDSON PARENT HOLDINGS LLC, DRAG MARKETING LLC, JUST ENERGY ADVANCED SOLUTIONS LLC, FULCRUM RETAIL ENERGY LLC, FULCRUM RETAIL HOLDINGS LLC, TARA ENERGY, LLC, JUST ENERGY MARKETING CORP., JUST ENERGY CONNECTICUT CORP., JUST ENERGY LIMITED, JUST SOLAR HOLDINGS CORP. AND JUST ENERGY (FINANCE) HUNGARY ZRT.
(each, an "**Applicant**", and collectively, the "**Applicants**")

CLAIMS PROCEDURE ORDER

THIS MOTION, made by the Applicants, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. c-36, as amended (the "**CCAA**") for an order, *inter alia*, establishing a claims procedure for the identification and quantification of certain claims against (i) the Applicants and the partnerships listed in Schedule "A" hereto (the "**JE Partnerships**", and collectively with the Applicants, the "**Just Energy Entities**") and (ii) the current and former

32. **THIS COURT ORDERS** that the Monitor shall make reasonable efforts to promptly deliver a copy of any D&O Proofs of Claim, Notices of Revision or Disallowance with respect to any D&O Claim, and Notices of Dispute of Revision or Disallowance with respect to any D&O Claim, to the applicable Directors and Officers named therein.

33. **THIS COURT ORDERS** that, subject to and in accordance with paragraph 31: (i) the Just Energy Entities, in consultation with the Monitor, shall accept, revise or reject each Claim set out in each Proof of Claim, and (ii) with respect to a D&O Claim set out in a D&O Proof of Claim, the Just Energy Entities, in consultation with the Monitor and the applicable Directors and Officers named in respect of such D&O Claim, shall accept, revise or reject such D&O Claim, provided that the Just Energy Entities shall not accept or revise any portion of a D&O Claim absent consent of the applicable Directors and Officers or further Order of the Court.

34. **THIS COURT ORDERS** that, subject to and in accordance with paragraph 31, if the Just Energy Entities, in consultation with the Monitor, agree with the amount and Characterization of the Claim as set out in any Proof of Claim or D&O Proof of Claim filed in accordance with paragraphs 26 or 29 herein and intend to accept the Claim in accordance with paragraph 33, the Monitor or the Claims Agent shall notify such Claimant of the acceptance of its Claim by the Just Energy Entities.

35. **THIS COURT ORDERS** that, subject to and in accordance with paragraph 31, if the Just Energy Entities, in consultation with the Monitor, disagree with the amount or Characterization of the Claim as set out in any Proof of Claim or D&O Proof of Claim filed in accordance with paragraphs 26 or 29 herein, the Just Energy Entities shall, in consultation with the Monitor and any applicable Directors or Officers, attempt to resolve such dispute and settle the purported Claim with the Claimant.

36. **THIS COURT ORDERS** that, subject to and in accordance with paragraph 31, if the Just Energy Entities and the Monitor intend to revise or reject a Claim that has been filed in accordance with paragraphs 26 or 29 herein, the Monitor shall notify the applicable Claimant that its Claim has been revised or rejected, and the reasons therefor, by sending a Notice of Revision or Disallowance.

37. **THIS COURT ORDERS** that any Claimant who intends to dispute a Notice of Revision or Disallowance sent pursuant to paragraph 36 above shall deliver a completed Notice of Dispute of Revision or Disallowance, along with the reasons for its dispute, to the Monitor by no later than thirty (30) days after the date on which the Claimant is deemed to receive the Notice of Revision or Disallowance, or such other date as may be agreed to by the Monitor, in consultation with the Just Energy Entities, in writing.

38. **THIS COURT ORDERS** that, where a Claimant who receives a Notice of Revision or Disallowance does not file a completed Notice of Dispute of Revision or Disallowance by the time set out in paragraph 37 above, then such Claimant's Claim shall be deemed to be as determined in the Notice of Revision or Disallowance and any and all of the Claimant's rights to dispute the Claim as determined in the Notice of Revision or Disallowance or to otherwise assert or pursue such Claim other than as determined in the Notice of Revision or Disallowance shall be forever extinguished and barred without further act or notification.

39. **THIS COURT ORDERS** that upon receipt of a Notice of Dispute of Revision or Disallowance in respect of a Claim, the Just Energy Entities, in consultation with the Monitor and any applicable Directors or Officers, shall attempt to resolve such dispute and settle the purported Claim with the Claimant, and in the event that a dispute raised in a Notice of Dispute of Revision or Disallowance is not settled within a time period or in a manner satisfactory to the Just Energy

Entities, in consultation with the Monitor and any applicable Directors or Officers, the Just Energy Entities shall, at their election, refer the dispute raised in the Notice of Dispute of Revision or Disallowance to a Claims Officer or the Court for adjudication, and the Monitor shall send written notice of such referral to the Claimant.

40. **THIS COURT ORDERS** that notwithstanding any other provisions of this Order, the Just Energy Entities, in consultation with the Monitor and any applicable Directors or Officers, may, at their election, refer any Claim to a Claims Officer or the Court for adjudication at any time, and the Monitor shall send written notice of such referral to the applicable parties.

41. **THIS COURT ORDERS** that the Just Energy Entities, in consultation with the Monitor, may consult with, and/or provide reporting to, any of the Consultation Parties in the review, adjudication and/or resolution of any Claims subject to this Claims Process (other than any Claims subject to the Intercreditor Agreement). Further, the Just Energy Entities shall give seven (7) days' prior written notice to the Consultation Parties of the details of any proposed settlement or allowance of any Claim subject to this Claims Process (other than any Claim subject to the Intercreditor Agreement) in an amount exceeding $5 million, and any Consultation Party may seek the direction of the Court regarding any such proposed resolution of the Claim.

CLAIMS OFFICER

42. **THIS COURT ORDERS** that Mr. Edward Sellers, and such other Persons as may be appointed by the Court from time to time on a motion by the Just Energy Entities or the Monitor, be and are hereby appointed as the Claims Officers for the Claims Process.

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(each, an "**Applicant",** and collectively, the "**Applicants")**

NOTICE OF MOTION AND CROSS-MOTION
(Motion for Advice and Direction)

Wittels McInturff Palikovic, Finkelstein Blankinship, Frei-Pearson, Garber LLP, and Shub Law Firm LLP (collectively, "**Class Counsel**"), in their capacity as counsel to the plaintiff classes (the "**Class Claimants**") in *Donin v. Just Energy Group Inc. et al*.[1] (the

[1] No. 17 Civ. 5787 (WFK) (SJB) (E.D.N.Y.).

"**Donin Action**") and *Trevor Jordet v. Just Energy Solutions, Inc.*[2] (the "**Jordet Action**", together with the Donin Action, the "**U.S. Litigation**"), will make a motion and cross-motion before the Honourable Justice McEwen of the Commercial List on February 9, 2022 at 10:00 a.m., or as soon after that time as the Motion can be heard via Zoom at Toronto, Ontario. If you intend to participate in the motion, you should send an email expressing your intention to Toronto.commerciallist@jus.gov.on.ca and teleconference details will be circulated to you in the ordinary course.

PROPOSED METHOD OF HEARING: The Motion is to be heard by videoconference.

THE MOTION IS FOR THE ADVICE AND DIRECTION OF THE COURT IN RESPECT OF THE CLASS CLAIMANTS' ROLE IN THESE PROCEEDINGS AND THE AVAILABILITY OF DUE PROCESS, INCLUDING:

1. an order, if necessary, validating the method of service, dispensing with further service, and abridging the time for filing of this motion, such that the motion is properly returnable on the date indicated above;

2. an order declaring that the Class Claimants are to be unaffected by this CCAA Proceeding;

3. in the alternative to the relief sought in paragraph 2, in the event the Class Claimants are to be affected by this CCAA Proceeding:

[2] No. 18 Civ. 953 (WMS) (W.D.N.Y.).

a. an order directing the implementation of a timely schedule and process leading to the final adjudication of the Class Claims, prior to any consideration by this Court of the Applicants' Plan or other event to exit this CCAA Proceeding (the "**Claims Adjudication Process**"), in substantially the following form:

   (1) three arbitrators from JAMS (US) with consumer class action experience shall be appointed to sit as Claims Officers in this CCAA Proceeding;

   (2) the Claims Adjudication Process shall employ the "Expedited Procedures" in the JAMS Comprehensive Arbitration Rules;

   (3) the Claims Adjudication Process shall employ a process for exchanging documents and conducting any necessary depositions, subject to the oversight of the Claims Officers; and

   (4) the Class Claims shall be finally adjudicated at a hearing lasting five to seven days in February 2022;

b. an order, substantially in the form attached hereto as **Schedule "A"**, directing the Applicants to provide the Class Claimants with access to any data room established by them in respect of these proceedings, and appointing a mediator/arbitrator (the "**Mediator/Arbitrator**") to resolve all matters pertaining to the

production of documents and access to information for restructuring purposes (as distinct from production for the purpose of the Claims Adjudication Process), together with such other procedural or substantive matters as the parties may agree of the Court may direct;

c. in the alternative to the relief sought in paragraph 3(b), above, an order:

(1) directing the specific production of the following documents and information within seven (7) days of the date of the order:

(A) a listing of creditors, the amount claimed by each creditor, whether security or other priority is claimed, and the status of the claim (i.e., allowed/contested/subject to ongoing review/etc.) and the aggregate number of creditors and claims;

(B) the DIP Term Sheet, each of its revisions, the latest current form, a conformed copy of the DIP term sheet with all revisions, any future updates, signature pages, DIP loan amount exhibits by DIP Loan participant, and definitive documents, and any other related non-privileged documents;

(C) copies of all of the Applicants' insurance policies that might respond to the Class Claims, the coverage

status, the total amount drawn against the policy to date, and a list of competing claims made against the policies;

(D) a list and the expected timing of key events in the CCAA Proceeding, including the release of the Applicants' proposed exit plan and how such exit plan is to be put before the Court and Creditors for approval;

(E) the restructuring, realization and/or sale or investment process related to any and all exit plans under consideration by the Applicants;

(F) any debt capacity analyses by the company and/or its investment bank;

(G) an updated business plan showing updates of actual results to projected results, an update showing the range of recoveries as per Texas House Bill 4492 (described below), the proceeds from the sale of ecobee Shares (defined below), and all other updates included in the business plan since it was published in May, 2021; and

(H) a statement of the enterprise value of the company with supporting documents showing methodology,

multiples, discount rates used, and comparables relied upon;

(2) directing the Applicants and their necessary advisors to meet with Class Counsel and their advisors within seven (7) days of the completion of production of the foregoing information, to review the information and answer questions; and

(3) scheduling a further case conference within 21 days of the date of the order to report on the status of its implementation and to schedule such further case conferences or hearings as may be necessary for the effective management and supervision of these proceedings;

4. the costs of this motion; and

5. such further and other relief as to this Honourable Court may seem just, including, without limitation, if and as necessary for the purpose of giving effect to the new information exchange regime contemplated at paragraphs 3(b) and (c) above, the variation of any prior orders made in these proceedings.

THE GROUNDS FOR THE MOTION ARE:

BACKGROUND

The U.S. Litigation

6. On October 3, 2017, Fira Donin and Inna Golovan filed a proposed class action lawsuit on behalf of themselves and all other U.S. customers alleging, among other things, that the Applicants named as defendants (the "**Just Energy Defendants**") breached their contractual obligations and implied covenant of duty of good faith and fair dealing (the Donin Action).

7. On April 6, 2018, Trevor Jordet filed class action claims on behalf of himself and all other U.S. customers in which he made similar allegations to the plaintiffs in the Donin Action (the Jordet Action).

8. The Donin Action and the Jordet Action are nationwide and encompass all states in which the Just Energy Defendants do business.

9. The Just Energy Defendants sought to have the Donin Action and the Jordet Action dismissed. They were unsuccessful because both courts ruled that the Plaintiffs' claims were plausible, and both actions remain pending in the United States.

THE CCAA Proceeding

10. On March 9, 2021, the Court issued an Initial Order granting CCAA protection to the Applicants.

11. On September 15, 2021, the Court issued a "**Claims Procedure Order**" which, among other things, established a "**Claims Bar Date**" of 5:00 p.m. on November 1, 2021 in respect of Pre-Filing Claims (as defined in the Claims Procedure Order).

12. On November 1, 2021, prior to the expiry of the Claims Bar Date, Class Counsel filed Proofs of Claim forms in respect of the Donin Action and the Jordet Action in the aggregate, unsecured amount of approximately $3.66 billion (reflecting a joint, composite damages claim encompassing both lawsuits).

13. In each case, Class Counsel provided Claim Documentation setting out the relevant background and merits of the U.S. Litigation.

14. Publicly filed financial statements dated September 30, 2021 indicate that Just Energy Group Inc. had approximately $12.6 million CAD in equity on its balance sheet.

15. By virtue of the size of the claims in the Donin Action and Jordet Action, and having regard to the Applicants' publicly filed financial statements, the Class Claimants have a significant stake in the CCAA Proceeding and ought to be treated as material stakeholders.

CLASS COUNSEL'S EFFORTS TO OBTAIN INFORMATION IN CONNECTION WITH THIS CCAA

Class Counsel's Initial Requests

16. Class Counsel has repeatedly requested that the Applicants and the Monitor provide them with access to information in connection with the CCAA Proceeding.

17. Class Counsel's requests are consistent with the type and character of information that is commonly requested and provided as between creditors and debtors in restructuring proceedings.

18. The information that Class Counsel has requested is necessary to properly evaluate and consider the ongoing CCAA Proceeding.

19. Notwithstanding repeated requests, the Applicants have largely resisted Class Counsel's requests. As a result, the flow of information has been deficient and contrary to a consensual CCAA restructuring.

20. On November 10, 2021, Steven Wittels, representing the Class Claimants, appeared on a motion before Justice Koehnen and objected to the Applicants' request for a second Key Employee Retention Plan ("**KERP**"), arguing that it was a waste of corporate assets. Mr. Wittels also alleged that the Applicants had not been forthcoming in providing Class Counsel with any information as to the Applicants' financial status.

21. On November 11, 2021, Class Counsel requested a meeting with counsel for the Monitor to discuss access to certain financial information of the Applicants.

22. On November 12, 2021, counsel for the Monitor suggested that Class Counsel direct their request to the Applicants.

23. On November 24, 2021, Class Counsel had a phone meeting with the Monitor in which Class Counsel and Tannor Capital, Class Counsel's financial advisor, requested information regarding, among other things:

    a. the proposed capital structure of the Applicants;

    b. creditor priorities and amounts;

    c. a copy of the DIP Facility, along with milestones and covenants;

    d. a potential claims adjudication process in connection with the claims of the Class Claimants; and

    e. the Plan Term Sheet.

24. At this time, with the exception of the DIP Term Sheet and its 15th amendment, Class Counsel has still not received the requested information from the Applicants.

Class Counsel, Paliare Roland, Tannor Capital and the Applicants enter into an NDA

25. On November 30, 2021, Just Energy Group Inc., Class Counsel, Tannor Capital and Paliare Roland Rosenberg Rothstein LLP ("**Paliare Roland**") entered into a Confidentiality, Non-Disclosure and Non-Use Agreement (the "**NDA**").

26. The NDA was the product of negotiation between the parties and was intended to facilitate the Applicants' disclosure of non-public information to Class Counsel.

27. Despite the execution of the NDA, the Applicants have continued to delay and resist Class Counsel's requests for information.

28. On November 30, 2021, in response to Class Counsel's request for a further phone meeting, counsel for the Applicants requested that Class Counsel first provide a list of questions it sought to have answered.

29. On December 2, 2021, Class Counsel provided the requested list to the Applicants.

30. On December 8, 2021, following nearly a week of delay by the Applicants, the parties had a virtual meeting. Only one hour before the meeting, the Applicants provided Class Counsel with the Applicants' May 2021 Business Plan (which was outdated), DIP Term Sheet (together with one

amendment), and written answers to Class Counsels' December 2, 2021 question list.

31. Most of the substantive information requests contained in Class Counsel's December 2, 2021 question list remain outstanding.

32. The Business Plan provided to Class Counsel is dated May 2021. Since that time,

    a. the Applicants have publicly filed subsequent financial statements;

    b. the Applicants have sold assets, including an 8% equity interest in ecobee Inc. (the "**ecobee Shares**"), which sale was authorized by the Court in its order dated November 10, 2021; and

    c. the State of Texas governor signed House Bill 4492, which provides recovery of costs by energy market participants, and pursuant to which the Applicants have filed for their recovery amounts. On December 9, 2021, the company issued a news release stating: "Just Energy Group Inc. ("Just Energy" or the " Company") (TSXV:JE; OTC:JENGQ), announced today an update of the expected recovery by Just Energy from the Electric Reliability Council of Texas, Inc. ("ERCOT") of certain costs incurred during the extreme weather event in Texas in February 2021 (the "Weather Event") as previously disclosed, which is expected to be approximately USD $147.5 million.

33. On December 13, 2021, Class Counsel sent counsel to the Applicants an email enclosing a further list of questions regarding the Applicants' Business Plan.

34. On December 15, 2021, the Applicants advised they were not in a position to "devote additional resources" to answering Class Counsel's questions and inquiries.

The Monitor's Involvement

35. On December 17, 2021, Class Counsel advised counsel for the Monitor of the difficulties it was encountering in obtaining information from the Applicants, and requested a meeting to discuss the company's financial condition, restructuring plans, and a suitable claims resolution process for the claims of the Class Claimants.

36. On December 22, 2021, Class Counsel and counsel to the Monitor had a virtual meeting to discuss Class Counsel's information requests.

37. On December 28, 2021, Paliare Roland emailed counsel for the Monitor to request the Monitor's assistance in scheduling a Case Conference with the presiding Judge in the first week of January 2022, for the purpose of setting a timetable for the bringing of this motion.

38. On December 31, 2021, counsel to the Applicants advised Paliare Roland that they had asked the Monitor to inquire for a date in the latter half of the second week of January 2022.

39. On January 4, 2022, Paliare Roland advised that it was not consenting to a further 7 - 10 day delay in obtaining a Case Conference date to schedule a date for a motion, and reiterated that it had not received a response from the Company regarding its substantive, timeline, process, transparency and information requests.

40. On January 4, 2022, Class Counsel again met with counsel to the Monitor to discuss the process proposed by Class Counsel for the adjudication of the claims of the Class Claimants.

41. For well over a month, Class Counsel has been ready, and has repeatedly requested, to become deeply involved as a key stakeholder in this CCAA Proceeding. Unfortunately, the Applicants appear to be unwilling to engage with Class Counsel in any substantive way.

42. To date, despite requests from Class Counsel to the Monitor and the Applicants, Class Counsel has not received substantive information regarding:

    a. the Plan Term Sheet, the size of the creditor pool or the quantum of claims in this CCAA Proceeding;

b. whether there are any professionals representing unsecured creditors and the Class Claims in the ongoing realization discussions, given that it now appears the Applicants have equity on the balance sheet (as discussed below);

c. the expected timing of key events in the CCAA Proceeding, including the release of the Applicants' and/or financiers' proposed exit plan and how such exit plan is to be put before the Court and Creditors for approval; and

d. how and when the Class Claimants' claims will be adjudicated and/or be treated within a vote.

43. The Applicants would ordinarily have established a data room through which stakeholders can access non-public information material to the restructuring effort.

44. If such a data room exists, then Class Counsel have not received access to it.

45. Class Counsel and its advisors need access to this type of information in order to meaningfully participate in any restructuring file, including this CCAA Proceeding.

46. Without this information, Class Counsel is hampered in its ability to consider and discuss the Applicant's intended course of conduct, and to develop and

propose alternatives that may be attractive to and preserve value for the general body of unsecured creditors.

CLASS COUNSEL'S PROPOSED CLAIMS ADJUDICATION PLAN

The Notice of Disallowance

47. On January 11, 2022, the Applicants served a Notice of Revision or Disallowance with respect to both the Donin/Golovan and Jordet Proofs of Claim (the "**Notice of Disallowance**").

48. The Notice of Disallowance largely repeats the failed legal arguments that the Applicants made in their unsuccessful attempts to have the Donin Action and the Jordet Action dismissed.

49. The Notice of Disallowance takes issue with the alleged size of the Class and quantum of the alleged claim, yet the Applicants continue to refuse to provide Class Counsel with the necessary data and information to more precisely determine these issues or to verify the Applicants' unsupported claims related to class size and damages.

50. The Notice of Disallowance rejects the alleged class size and quantum without any evidence and without even addressing the comprehensive expert report prepared by Serhan Ogur.

The Class Claimants are Unaffected Creditors

51. Class Counsel seeks a determination that the Class Claimants are unaffected creditors in this CCAA Proceeding, so that they may continue to pursue the U.S. Litigation in the U.S. courts.

52. In the absence of such a determination, Class Counsel seek the prompt and efficient adjudication of the U.S. Litigation within this CCAA Proceeding.

53. In response to the suggestion of Counsel to the Applicants, and in anticipation of the disallowance of the Proofs of Claim, on December 13, 2021, Class Counsel emailed the Applicants' counsel a proposed adjudication plan for the Class Actions.

54. The proposed adjudication plan was an attempt to reach a resolution for a mutually-agreeable process for the adjudication of the U.S. Litigation in a prompt and efficient manner within the CCAA Proceeding.

55. The proposal contemplated:

    a. the appointment of 3 arbitrators from JAMS (US) (with consumer class action experience) to sit as Claims Officers in this CCAA Proceeding;

    b. the use of the "Expedited Procedures" in the JAMS Comprehensive Arbitration Rules;

c. a process for exchanging documents, subject to the oversight of the Claims Officers; and

d. a hearing lasting 5-7 days in February 2022.

56. On December 15, 2021, the Applicants, through counsel, advised that "the Just Energy Entities anticipate further discussions with your group concerning a fair and reasonable method of adjudicating your clients' claims at the appropriate time".

57. To date, despite these overtures, the Applicants have not responded to Class Counsel's December 13, 2021, letter or proposed any alternative adjudication process for the Class Actions.

58. Given the size of the claims in the Class Actions, there is a need to establish an adjudication process leading to a resolution of these claims in advance of any motion to consider approving any Plan that the Applicants may put forward (or any other exit from this CCAA Proceeding).

THERE IS EQUITY IN THE JUST ENERGY ENTITIES

59. Just Energy's public financial reports, as filed with SEDAR and the US Securities Exchange Commission, are prepared in accordance with International Financial Reporting Standards ("**IFRS**"), as issued by the International Accounting Standards Board ("**IASB**").

60. The September 30, 2021 financial statements indicate that Just Energy Group Inc. had approximately $12.6 million CAD in equity on its balance sheet.

61. Just Energy's shares are listed for trading on the TSX Venture Exchange under the symbol (TSX: JE) and in the United States on the OTC Pink Exchange under the symbol (OTC: JENGQ).

62. As of January 10, 2021, Just Energy's equity market capitalization was approximately $55.8 million CAD.

63. Sections 11, 11.02 and 18.6 of the CCAA;

64. Rules 1.04, 1.05, 2.03, 3.02, 16, 37 and Rule 57.03 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 as amended and section 106 of the *Courts of Justice Act*, R.S.O 1990, c. C. 43 as amended; and

65. Such further and other grounds as the lawyers may advise.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the Motion:

1. The Affidavit of Robert Tannor sworn January 17, 2022; and

2. Such further and other evidence as the lawyers may advise and this Honourable Court may permit.

January 19, 2022

Paliare Roland Rosenberg Rothstein LLP
155 Wellington Street West
35th Floor
Toronto ON M5V 3H1
Tel: 416.646.4300

Ken Rosenberg (LSO# 21102H)
Tel: 416.646.4304
Email: ken.rosenberg@paliareolrand.com
Jeffrey Larry (LSO# 44608D)
Tel: 416.646.4330
Email: jeff.larry@paliareroland.com
Danielle Glatt (LSO# 65517N)
Tel: 416.646.7440
Email: danielle.glatt@paliareroland.com

Counsel to US counsel for Fira Donin and Inna Golovan, in their capacity as proposed class representatives in *Donin et al. v. Just Energy Group Inc. et al.*

Counsel to US Counsel for Trevor Jordet, in his capacity as proposed class representative in *Jordet v. Just Energy Solutions Inc.*

TO: THE SERVICE LIST

Court File No. CV-21-00658423-00CL

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **JUST ENERGY GROUP INC. ET AL.**

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
PROCEEDING COMMENCED AT TORONTO

NOTICE OF MOTION AND CROSS-MOTION

Paliare Roland Rosenberg Rothstein LLP
155 Wellington Street West, 35th Floor
Toronto ON M5V 3H1
Tel: 416.646.4300

Ken Rosenberg (LSO# 21102H)
Tel: 416.646.4304
Email: ken.rosenberg@paliareolrand.com
Jeffrey Larry (LSO# 44608D)
Tel: 416.646.4330
Email: jeff.larry@paliareroland.com
Danielle Glatt (LSO# 65517N)
Tel: 416.646.7440
Email: danielle.glatt@paliareroland.com

Counsel to US counsel for Fira Donin and Inna Golovan, in their capacity as proposed class representatives in *Donin et al. v. Just Energy Group Inc. et al.*

Counsel to US Counsel for Trevor Jordet, in his capacity as proposed class representative in *Jordet v. Just Energy Solutions Inc.*

SCHEDULE “A”

Court File No. CV-21-00658423-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE	)	WEDNESDAY, THE
	)	
JUSTICE MCEWEN	)	9th DAY OF FEBRUARY, 2022

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT,* R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JUST ENERGY GROUP INC., JUST ENERGY CORP., ONTARIO ENERGY COMMODITIES INC., UNIVERSAL ENERGY CORPORATION, JUST ENERGY FINANCE CANADA ULC, HUDSON ENERGY CANADA CORP., JUST MANAGEMENT CORP., JUST ENERGY FINANCE HOLDING INC., 11929747 CANADA INC., 12175592 CANADA INC., JE SERVICES HOLDCO I INC., JE SERVICES HOLDCO II INC., 8704104 CANADA INC., JUST ENERGY ADVANCED SOLUTIONS CORP., JUST ENERGY (U.S.) CORP., JUST ENERGY ILLINOIS CORP., JUST ENERGY INDIANA CORP., JUST ENERGY MASSACHUSETTS CORP., JUST ENERGY NEW YORK CORP., JUST ENERGY TEXAS I CORP., JUST ENERGY, LLC, JUST ENERGY PENNSYLVANIA CORP., JUST ENERGY MICHIGAN CORP., JUST ENERGY SOLUTIONS INC., HUDSON ENERGY SERVICES LLC, HUDSON ENERGY CORP., INTERACTIVE ENERGY GROUP LLC, HUDSON PARENT HOLDINGS LLC, DRAG MARKETING LLC, JUST ENERGY ADVANCED SOLUTIONS LLC, FULCRUM RETAIL ENERGY LLC, FULCRUM RETAIL HOLDINGS LLC, TARA ENERGY, LLC, JUST ENERGY MARKETING CORP., JUST ENERGY CONNECTICUT CORP., JUST ENERGY LIMITED, JUST SOLAR HOLDINGS CORP. AND JUST ENERGY (FINANCE) HUNGARY ZRT.

(each, an "**Applicant",** and collectively, the "**Applicants")**

ORDER

(Mediation/Arbitration Order)

THIS MOTION made by Wittels McInturff Palikovic, Finkelstein Blankinship, Frei-Pearson, Garber LLP, and Shub Law Firm LLP (collectively, "**Class Counsel**"), in its capacity as counsel to the plaintiff classes (the "**Class Claimants**") in *Donin v. Just Energy Group Inc. et al*.[1] (the "**Donin Action**") and *Trevor Jordet v. Just Energy Solutions, Inc.*[2] (the "**Jordet Action**", together with the Donin Action, the "**U.S. Litigation**") was heard this day via Zoom conference at Toronto, Ontario.

ON READING the motion record of the moving party and on hearing the submissions of counsel for the moving party and counsel for the Applicants, no one else appearing,

1. **THIS COURT ORDERS** that the timing and method of service and filing of this motion is hereby abridged and validated such that the motion is properly returnable today and hereby dispenses with further service thereof.

2. **THIS COURT ORDERS** that for the purposes of this Order, the following terms shall have the following meanings:

    a. "**CCAA Proceeding**" means the within proceedings in respect of the Applicants;

    b. "**Data Room**" means any data room established by the Applicants by which non-public information has been made available to certain stakeholders in this CCAA Proceeding;

    c. "**Monitor**" means FTI Consulting Canada Inc., in its capacity as the court-appointed monitor of the Applicants; and

    d. "**Persons**" means any individual, corporation, firm, limited or unlimited liability company, general or limited partnership, association (incorporated or unincorporated), trust, unincorporated organization, joint venture, trade

[1] Case No: 17 Civ. 5787 (WFK)(SJB), before the United States District Court Eastern District of New York.
[2] Case No: 2:18-cv-01496-MMB, before the United States District Court for the Eastern District of Pennsylvania.

union, government authority or any agency, regulatory body or officer thereof or any other entity, wherever situate or domiciled, and whether or not having legal status, and whether acting on their own or in a representative capacity.

3. **THIS COURT ORDERS** that any capitalized term used but not defined herein shall have the meaning given to such term in the Motion Record of the moving party dated January 19, 2022.

DATA ROOM ACCESS

4. **THIS COURT ORDERS** that the Applicants shall provide the Class Claimants with access to their Data Room.

APPOINTMENT OF MEDIATOR/ARBITRATOR

5. **THIS COURT ORDERS** that [*mediator/arbitrator to be determined by the Court after the moving party, the Applicants and the Monitor consult*] is hereby appointed as an officer of the Court and shall act as a neutral third party (the "**Mediator/Arbitrator**").

6. **THIS COURT ORDERS** that the Mediator/Arbitrator's mandate is to resolve all matters arising from the Class Claimants' requests for information in respect of any restructuring, realization and/or sale or investment process, and any and all exit plans of the Applicants in respect of these proceedings, together with such other procedural or substantive matters as the parties may agree or this Court may direct (the "**Mandate**").

7. **THIS COURT ORDERS** that in carrying out the Mandate, the Mediator/Arbitrator may, among other things:

    a. adopt processes and utilize resources which, in his/her discretion, he/she considers appropriate;

    b. consult with all Persons as the Mediator/Arbitrator considers appropriate; and

c. apply to this Court for advice and directions as, in his/her discretion, the Mediator/Arbitrator deems necessary.

8. **THIS COURT ORDERS** that the reasonable fees and disbursements of the Mediator/Arbitrator in relation to carrying out the Mandate shall be paid by the Applicants on a monthly basis, forthwith upon the rendering of accounts to the Applicants.

9. **THIS COURT ORDERS** that the Applicants are hereby authorized to pay to the Mediator/Arbitrator a retainer to be held by the Mediator/Arbitrator as security for payment of the Mediator/Arbitrator's fees and disbursements outstanding from time to time.

10. **THIS COURT ORDERS** that the Mediator/Arbitrator is authorized to take all steps and to do all acts necessary or desirable to carry out the terms of this Order, including dealing with any Court, regulatory body or other government ministry, department or agency, and to take all such steps as are necessary or incidental thereto.

11. **THIS COURT ORDERS** that, in addition to the rights and protections afforded as an officer of this Court, the Mediator/Arbitrator shall incur no liability or obligation as a result of his appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on his part. Nothing in this Order shall derogate from the protections afforded a person pursuant to Section 142 of the *Courts of Justice Act* (Ontario).

COMMUNICATION AND CONFIDENTIALITY PROTOCOL

12. **THIS COURT ORDERS** that the following communication and confidentiality protocol between the Court, the Mediator/Arbitrator and participants in the Mediation/Arbitration Process be and is hereby approved:

a. the Court and the Mediator/Arbitrator may communicate between one another directly to discuss, on an on-going basis, the conduct of the

Mediation/Arbitration Process and the manner in which it will be coordinated with the CCAA Proceedings;

b. the Court will not disclose to the Mediator/Arbitrator how the Court will decide any matter which may come before the Court for determination;

c. the Mediator/Arbitrator will not disclose to the Court the negotiating positions or confidential information of any of the parties in the Mediation/Arbitration Process;

d. without-prejudice statements, discussions, and offers of any of the parties arising in the course of the Mediation/Arbitration Process shall not be subject to disclosure through discovery or any other process, shall remain confidential, and shall not be referred to in Court and shall not be admissible into evidence for any purpose, including impeaching credibility or to establish the meaning and/or validity of any settlement or alleged settlement arising from the Mediation/Arbitration Process, provided, for the avoidance of doubt, that arbitral decisions and any related reasons of the Mediator/Arbitrator may be disclosed; and

e. any notes, records, statements made, discussions had and recollections of the Mediator/Arbitrator or any of his assistants in conducting the Mediation/Arbitration Process shall be confidential and without prejudice and protected from disclosure for all purposes, provided, for the avoidance of doubt, that arbitral decisions and any related reasons of the Mediator/Arbitrator may be disclosed;

GENERAL

13. **THIS COURT ORDERS** that the Monitor and the Applicants may apply to this Court from time to time for directions from this Court with respect to this Order, or for such further order or orders as any of them may consider necessary or desirable to amend, supplement or clarify the terms of this Order.

14. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, or abroad, to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

15. **THIS COURT ORDERS** that each of the Applicants and the Monitor be at liberty and are hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order.

_____

Court File No. CV-21-00658423-00CL

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ORDER

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Paliare Roland Rosenberg Rothstein LLP
155 Wellington Street West, 35th Floor
Toronto ON M5V 3H1
Tel: 416.646.4300

Ken Rosenberg (LSO# 21102H)
Tel: 416.646.4304
Email: ken.rosenberg@paliareolrand.com
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Tel: 416.646.4330
Email: jeff.larry@paliareroland.com
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(each, an "**Applicant",** and collectively, the "**Applicants")**

AFFIDAVIT OF ROBERT TANNOR
(Sworn January 17, 2022)

I, Robert Tannor, of the city of Santa Barbara, in the state of California, MAKE OATH AND SAY:

1. I am the general partner of Tannor Capital Advisors LLC ("Tannor Capital"), a boutique financial advisory firm specializing in restructuring. As a restructuring professional, I have actively participated in restructuring cases involving over 8 billion dollars of debt and over 400 credits from 2008 to 2021. Prior to founding Tannor Capital, I was a senior industry practice leader and director at Ernst & Young Corporate Finance LLC in New York ("EY"). While at EY, I worked as lead restructuring advisor, or as part of the team, in over 30 bankruptcy cases, both in and out of court. A copy of my CV is attached at **Exhibit "A"** to my affidavit.

2. Together with Tannor Capital, I have been retained as a financial advisor to Wittels McInturff Palikovic, Finkelstein Blankinship, Frei-Pearson, Garber LLP, and Shub Law Firm LLP (collectively, "Class Counsel") in connection with Class Counsel's representation of approximately eight million U.S. customers of the Applicants (the "Class Claimants") in *Donin v. Just Energy Group Inc. et al*.[1] (the "Donin Action") and *Trevor Jordet v. Just Energy Solutions, Inc.*[2] (the "Jordet Action", together with the Donin Action, the "U.S. Litigation" or the "Class Actions"), and in connection with Class Counsel's representation of the Class Claimants' interests as contingent unsecured creditors in this proceeding under the *Companies' Creditors Arrangement Act* (the "CCAA Proceeding"). As such, I have knowledge of the matters contained in this affidavit. Where I do not have direct knowledge of a matter, I have stated the source of my information and I believe it to be true.

[1] No. 17 Civ. 5787 (WFK) (SJB) (E.D.N.Y.).
[2] No. 18 Civ. 953 (WMS) (W.D.N.Y.).

A. BACKGROUND

(i) The U.S. Litigation

3. The following overview is based on my review of court documents in the U.S. Litigation and information I have received from Class Counsel, which I believe to be true. The merits of the U.S. Litigation are described in detail in the supporting materials (the "Claim Documentation") accompanying the Proofs of Claim forms filed by Class Counsel in this CCAA Proceeding.

4. On October 3, 2017, Fira Donin and Inna Golovan filed proposed class action lawsuits on behalf of themselves and all other U.S. customers alleging, among other things, that the Just Energy entities named as defendants breached:

(a) their contractual obligations to base their variable gas and electricity rates on "business and market conditions";

(b) their contractual obligation to charge a specified energy rate; and

(c) the implied covenant of duty of good faith and fair dealing.

The Complaint in the Donin Action is attached as **Exhibit "B"** to my affidavit.

5. The Just Energy Entities have sought to have the Donin Action dismissed. On September 24, 2021, Judge William F. Kuntz of the U.S. District Court for the Eastern District of New York denied the Just Energy Entities' motion to dismiss the Donin Action. A copy of Judge Kuntz's Decision and Order are attached as **Exhibit "C"** to my affidavit.

6. On April 6, 2018, Trevor Jordet filed class action claims on behalf of himself and all other U.S. customers in which he made similar allegations to the Donin and Golovan plaintiffs. The Complaint in the Jordet Action is attached as **Exhibit "D"** to my affidavit.

7. On December 7, 2020, Judge William M. Skrenty of the U.S. District Court for the Western District of New York denied the Just Energy Entities' motion to dismiss the Jordet Action. Judge Skrenty ruled, among other things, that "'business and market conditions' has some standard that [the Just Energy Entities] had to apply in setting [their] variable pricing but apparently failed to adhere to in [their] pricing." Judge Skrenty's Decision and Order are attached as **Exhibit "E"** to my affidavit.

8. I am advised by Class Counsel that the Donin Action and Jordet Action are nationwide and encompass all states in which the Applicants do business. The U.S. Litigation remains pending in the U.S. courts.

(ii) This CCAA Proceeding

9. From my participation in this CCAA Proceeding, and from my review of the materials available on the Monitor's website, I understand that:

(a) On March 9, 2021, this Court issued an Initial Order granting CCAA protection to the Applicants; and

(b) On September 15, 2021, this Court issued a "Claims Procedure Order" which, among other things, established a "Claims Bar Date" of 5:00 p.m. on November 1, 2021 in respect of Pre-Filing Claims (as defined in the Claims Procedure Order).

10. On November 1, 2021, prior to the expiry of the Claims Bar Date, Class Counsel filed Proofs of Claim forms in respect of the Donin Action and in respect of the Jordet Action in the aggregate, unsecured amount of approximately $3.66 billion (reflecting a joint, composite damages claim encompassing both lawsuits). In each case, counsel provided Claim Documentation setting out the relevant background and merits of the U.S. Litigation. The Donin/Golovan Proof of Claim, the Jordet Proof of Claim and the Claim Documentation (excluding Exhibits 2-5) are attached to my affidavit as **Exhibits "F"**, **"G"** and **"H"**, respectively.

11. By virtue of the size of the claims in the Donin Action and Jordet Action, the Class Claimants have a significant stake in the CCAA Proceeding and ought to be treated as material stakeholders.

B. CLASS COUNSEL'S EFFORTS TO OBTAIN INFORMATION IN CONNECTION WITH THIS CCAA PROCEEDING

(i) Class Counsel's Initial Requests

12. Class Counsel has repeatedly requested that the Applicants and the Monitor provide access to information in connection with this CCAA Proceeding. In my experience, Class Counsel's requests (as described below) are consistent with the type and character of information that is commonly requested and provided as between creditors and debtors in restructuring proceedings. Moreover, the requested information is necessary to properly evaluate and consider the ongoing CCAA Proceeding and to advise my clients accordingly.

13. Notwithstanding repeated requests, the Applicants have largely resisted Class Counsel's requests. As a result, the flow of information in this CCAA Proceeding has been deficient and contrary to a consensual CCAA restructuring.

14. On November 10, 2021, Steven Wittels, representing the Class Claimants, appeared on a motion before Justice Koehnen and objected to the Applicants' request for a second Key Employee Retention Plan ("KERP"), arguing that it was a waste of corporate assets. Mr. Wittels also alleged that the Applicants had not been forthcoming in providing Class Counsel with any information as to the Applicants' financial status.

15. On November 11, 2021, Class Counsel requested a meeting with counsel for the Monitor to discuss access to certain financial information of the Applicants.

16. On November 12, 2021, counsel for the Monitor advised that "[t]he Monitor does not have any financial information available to share with you with respect to the restructuring", and suggested that Class Counsel direct their request to the Applicants. A copy of counsel's email correspondence dated November 11-12, 2021 is attached at **Exhibit "I"** of my affidavit.

17. On November 24, 2021, Class Counsel had a phone meeting with the Monitor in which Class Counsel and I requested information regarding, among other things:

(a) the proposed capital structure of the Applicants;

(b) creditor priorities and amounts;

(c) a copy of the DIP Facility, along with milestones and covenants;

(d) a potential claims adjudication process in connection with the claims of the Class Claimants; and

(e) the Plan Term Sheet.

18. At this time, with the exception of the DIP Term Sheet and its 15th amendment, Class Counsel has still not received the requested information from the Applicants.

(ii) Class Counsel, Paliare Roland, Tannor Capital and the Applicants enter into an NDA

19. On November 30, 2021, Just Energy Group Inc., Class Counsel, Tannor Capital and Paliare Roland Rosenberg Rothstein LLP ("Paliare Roland") entered into a Confidentiality, Non-Disclosure and Non-Use Agreement (the "NDA"). The NDA was the product of negotiation between the parties and was intended to facilitate the Applicants' disclosure of non-public information to Class Counsel.

20. Despite the execution of the NDA, the Applicants have continued to delay and resist Class Counsel's requests for information.

21. On November 30, 2021, in response to Class Counsel's request for a further phone meeting, counsel for the Applicants requested that Class Counsel first provide a list of questions it sought to have answered. Accordingly, on December 2, 2021, Class Counsel provided such a list to the Applicants, a copy of which is attached at **Exhibit "J"** to my affidavit.

22. Following nearly a week of delay on the part of the Applicants, the parties had a further virtual meeting on December 8, 2021. Only one hour before the meeting, the Applicants provided Class Counsel with the Applicants' Business Plan, DIP Term Sheet (together with one amendment), and written answers to Class Counsels' December 2nd question list. A copy of the email correspondence regarding the scheduling of the December 8th meeting is attached as **Exhibit "K"** to my affidavit.

23. Many of the substantive information requests contained in Class Counsel's December 2nd question list remain outstanding. I have not attached a copy of the Applicants' written answers to Class Counsel's questions, out of concern that the Applicants may view them as privileged or confidential. Class Counsel would be pleased, however, for a copy of those written answers to be put before the Court.

24. Moreover, I note that the Business Plan provided to Class Counsel is dated May 2021. Since that time,

(a) the Applicants have publicly filed subsequent financial statements;

(b) the Applicants have sold assets, including an 8% equity interest in ecobee Inc. (the "ecobee Shares"), which sale was authorized by this Court in its order dated November 10, 2021; and

(c) the State of Texas governor signed House Bill 4492, which provides recovery of costs by energy market participants, and pursuant to which the Applicants have filed for their recovery amounts. On December 9, 2021, the company issued a news release stating: "Just Energy Group Inc. ("Just

> Energy" or the " Company") (TSXV:JE; OTC:JENGQ), announced today an update of the expected recovery by Just Energy from the Electric Reliability Council of Texas, Inc. ("ERCOT") of certain costs incurred during the extreme weather event in Texas in February 2021 (the "Weather Event") as previously disclosed, which is expected to be approximately USD $147.5 million. A copy of the news release is attached as **Exhibit "L"** to my affidavit.

25. On December 13, 2021, Class Counsel sent counsel to the Applicants an email enclosing a further list of questions regarding the Applicants' Business Plan. A copy of Class Counsel's further list of questions is attached as **Exhibit "M"** to my affidavit.

26. On December 15, 2021, in response to Class Counsel's further inquiries, the Applicants advised, through counsel, that "the Just Energy Entities […] are not in a position to devote additional resources at this time to answer an unreasonable number of questions and inquiries from your group". A copy of counsel's email correspondence dated December 13-15, 2021 is attached as **Exhibit "N"** to my affidavit.

(iii) The Involvement of the Monitor

27. On December 17, 2021, Class Counsel emailed counsel for the Monitor, explaining the difficulties it was encountering in obtaining information from the Applicants, and requesting a meeting to discuss the company's financial condition, restructuring plans, and a suitable claims resolution process for the claims of the Class Claimants. A copy of

counsel's email correspondence dated December 17, 2021 is attached as **Exhibit "O"** to my affidavit.

28. On December 22, 2021, Class Counsel and counsel to the Monitor had a virtual meeting to discuss Class Counsel's information requests.

29. On December 28, 2021, Paliare Roland emailed counsel for the Monitor to request the Monitor's assistance in scheduling a Case Conference with the presiding Judge in the first week of January 2022, for the purpose setting a timetable for the bringing of this motion.

30. On December 31, 2021, counsel to the Applicants advised Paliare Roland that they had asked the Monitor to inquire for a date in the latter half of the second week of January 2022.

31. On January 4, 2022, Paliare Roland advised that it was not consenting to a further 7 - 10 day delay in obtaining a Case Conference date to schedule a date for a motion, and reiterated that it had not received a response from the Company regarding its substantive, timeline, process, transparency and information requests. A copy of counsel's email correspondence dated December 28, 2021 – January 4, 2022 is attached as **Exhibit "P"** to my affidavit.

32. On January 4, 2022, Class Counsel again met with counsel to the Monitor to discuss the process proposed by Class Counsel for the adjudication of the claims of the Class Claimants.

33. In summary, for well over a month, Class Counsel has been ready, and has repeatedly requested, to become deeply involved as a key stakeholder in this CCAA Proceeding. Unfortunately, the Applicants appear to be unwilling to engage with Class Counsel in any substantive way.

34. To date, despite requests from Class Counsel to the Monitor and the Applicants, Class Counsel has not received substantive information regarding:

(a) the Plan Term Sheet, the size of the creditor pool or the quantum of claims in this CCAA Proceeding;

(b) whether there are any professionals representing unsecured creditors and the Class Claims in the ongoing realization discussions, given that it now appears the Applicants have equity on the balance sheet (as discussed below);

(c) the expected timing of key events in the CCAA Proceeding, including the release of the Applicants' and/or financiers' proposed exit plan and how such exit plan is to be put before the Court and Creditors for approval; and

(d) how and when the Class Claimants' claims will be adjudicated and/or be treated within a vote.

35. I would ordinarily expect Applicants in a case such as this to establish a data room through which stakeholders can access non-public information material to the restructuring effort. In light of the NDA signed by Class Counsel, I cannot comment on

the existence of a data room. However, if such a data room does exist, then Class Counsel have not received any access to it.

36. As noted above, Class Counsel and its advisors need access to this type of information in order to meaningfully participate in any restructuring file, including this CCAA Proceeding. The following are some examples of the information requested and its relevance to Class Counsel's position in, response to and the outcome of these proceedings:

(a) To understand recoveries, financial advisors and my firm usually provide a waterfall analysis of enterprise value across the capital structure including any and all claims. We have requested access to the claims records and have not received anything.

(b) To understand timing of the proceedings and details of the DIP loan, we have requested the complete DIP loan and amendments. We have received a DIP term sheet and Amendment 15 to the DIP loan. In my experience, 15 amendments in less than a year since the March 9, 2021 origination of the DIP loan is unusual, and we wish to see all of the amendments and updates to the DIP loan as they occur so that we can better understand what is occurring.

(c) A current business plan updated by events since the bankruptcy filing is usually provided to stakeholders. The enterprise value of the business is derived from the business plan prepared by management. We believe the

business plan received, dated May 2021, does not reflect the actual financial results since publishing the business plan. We have not been given any opportunity to make direct assessment and inquiry of the company and its financial advisors about details in the business plan.

(d) In any insolvency proceeding, the debtor and its financial advisor prepare an enterprise value assessment, which is the basis for recoveries across the pre-bankruptcy capital structure and proposed exit capital structure. We have been unable to obtain any information related to the proposed enterprise value (“EV”) including the methodology for the EV, multiples, adjustments to EV or exit capital structure, and the contemplated exit capital structure.

(e) In almost every restructuring, the Debtor and its advisors prepare an analysis of the debt capacity ranges for the company with input from debt capital providers through their investment bank. We have not received any debt capacity analysis provided by the company or its advisors which is a critical element in preparing a proposed capital structure for the company which is a critical element in understanding the range of potential recoveries to creditors and equity holders.

(f) We also requested access to the insurance policies of the Debtor that may be a source of recoveries to our constituency which was not provided. We request any and all claims made against such insurance policies.

(g) Lastly, in my experience, it is axiomatic that receiving a plan term sheet after it has been baked by the company and other stakeholders leads to distrust and dissatisfaction with the financial terms, recoveries, and process. Without access to company confidential information, any financial advisor is forced to rely on public information, such as Just Energy's public financials showing equity, and in my opinion, an out-of-date business plan.

37. Based on the Applicants' conduct described herein, I am concerned that the Applicants are not answering Class Counsel's questions as part of a strategy to "run out the clock" on the Class Claimants' ability to meaningfully participate in this CCAA Proceeding. Without this information, Class Counsel is hampered in its ability to consider and discuss the Applicant's intended course of conduct, and to develop and propose alternatives that may be attractive to and preserve value for the general body of unsecured creditors.

C. CLASS COUNSEL'S PROPOSED CLAIMS ADJUDICATION PLAN

38. On January 11, 2022, the Applicants served a Notice of Revision or Disallowance with respect to both the Donin/Golovan and Jordet Proofs of Claim (the "Notice of Disallowance"), copies of which are attached as **Exhibits "Q"** and **"R"** to my affidavit, respectively. I am advised by Class Counsel that the Notice of Disallowance largely repeats the legal arguments which were not persuasive to the U.S. courts on the motions to dismiss in the U.S. Litigation.

39. I also note that while the Notice of Disallowance takes issue with the alleged size of the Class and quantum of the alleged claim, the Applicants continue to refuse to provide Class Counsel with the necessary data and information to more precisely determine these issues. Instead, the Notice of Disallowance rejects the alleged class size and quantum without any evidence and without even addressing the comprehensive expert report prepared by Serhan Ogur, enclosed as Exhibit 1 to the Claim Documentation, and attached at Exhibit "H" to my affidavit. Mr. Ogur's report indicates that he is an experienced economist specializing in the U.S. energy industry, who performed a detailed analysis calculating, among other things, how much Just Energy overcharged its variable-rate customers from 2011 to 2020.

40. From my discussions with Class Counsel, I understand that Class Counsel now intends to seek a determination that the Class Claimants are unaffected creditors in this CCAA Proceeding, so that they may continue to pursue the U.S. Litigation in the U.S. courts. In the absence such determination, Class Counsel seek the prompt and efficient adjudication of the U.S. Litigation within this CCAA Proceeding.

41. In anticipation of the disallowance of the Proofs of Claim, on December 13, 2021, Class Counsel emailed counsel to the Applicants enclosing a proposed adjudication plan for the Class Actions, a copy of which is attached as **Exhibit "S"** to my affidavit. The proposed adjudication plan was an attempt to reach a resolution for a mutually-agreeable process for the adjudication of the U.S. Litigation in a prompt and efficient manner within the CCAA Proceeding. The proposal contemplated:

(a) the appointment of 3 arbitrators from JAMS (US) (with consumer class action experience) to sit as Claims Officers in this CCAA Proceeding;

(b) the use of the "Expedited Procedures" in the JAMS Comprehensive Arbitration Rules;

(c) a process for exchanging documents, subject to the oversight of the Claims Officers; and

(d) a hearing lasting 5-7 days in February 2022.

42. On December 15, 2021, the Applicants, through counsel, advised that "the Just Energy Entities anticipate further discussions with your group concerning a fair and reasonable method of adjudicating your clients' claims at the appropriate time". See **Exhibit "N"** to my affidavit.

43. To date, despite these overtures, the Applicants have not responded to Class Counsel's December 13, 2021 letter or proposed any alternative adjudication process for the Class Actions.

44. Given the size of the claims in the Class Actions, there is a need to establish an adjudication process leading to a resolution of these claims in advance of any motion to consider approving any Plan that the Applicants may put forward (or any other exit from this CCAA Proceeding).

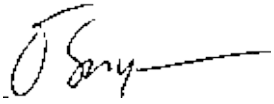
D. THERE IS EQUITY IN THE JUST ENERGY ENTITIES

45. Just Energy's public financial reports as filed with SEDAR and the US Securities Exchange Commission, are prepared in accordance with International Financial Reporting Standards ("IFRS"), as issued by the International Accounting Standards Board ("IASB"). The September 30, 2021 financial statements indicate that Just Energy Group Inc. had approximately $12.6 million CAD in equity on its balance sheet. A copy of the September 30, 2021 financial statements is attached as **Exhibit "T"** to my affidavit.

46. Just Energy's shares are listed for trading on the TSX Venture Exchange under the symbol (TSX: JE) and in the United States on the OTC Pink Exchange under the symbol (OTC: JENGQ). As of January 10, 2021, Just Energy's equity market capitalization was approximately $55.8 million.

47. I swear this affidavit in connection with Class Counsel's motion for advice and direction of the court and for no other or improper purpose.

SWORN remotely by Robert Tannor of the City of Santa Barbara, in the State of California, before me at the City of Toronto, in the Province of Ontario, on this 17th day of January, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



Commissioner for Taking Affidavits
(or as may be)

Robert Tannor

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

FIRA DONIN and INNA GOLOVAN, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

JUST ENERGY GROUP INC., JUST ENERGY NEW YORK CORP., and JOHN DOES 1 TO 100,

Defendants.

----------X

DECISION & ORDER
17-CV-5787 (WFK)(SJB)

WILLIAM F. KUNTZ, II, United States District Judge:

On April 27, 2018, Fira Donin and Inna Golovan ("Plaintiffs") filed an Amended Putative Class Complaint ("Amended Complaint") against Just Energy Group, Inc, Just Energy New York Corp., and Johns Does 1 to 100 ("Defendants") setting forth claims for violations of the New York General Business Law, unfair deceptive acts and practices, common law fraud, fraud by concealment, unjust enrichment, breach of contract, and breach of covenant of good faith and fair dealing. ECF No. 17. Defendants now move to dismiss the Amended Complaint in its entirety pursuant to Rules 12(b)(1), (2), and (6) of the Federal Rules of Civil Procedure. *See* ECF Nos. 27–30. For the reasons that follow, Defendants' motion to dismiss is GRANTED in part and DENIED in part.

BACKGROUND[1]

Fira Donin and Inna Golovan (together, "Plaintiffs") are residents of Brooklyn, New York who allege they were gas and electricity customers of Just Energy NY from June 2012 through August 2016 and August 2012 through April 2015, respectively. *See* Amended Complaint ("Compl.") ¶¶ 36, 40–41, 44, ECF No. 17. Just Energy Group and Just Energy New York ("JE" and "JENY," respectively, together, "Defendants"), are energy service companies ("ESCOs"), which provide a "free-market alternative" to local utility companies. *See* Def. Mem.

[1] These allegations are either drawn from the Amended Complaint or are properly incorporated into the Amended Complaint and are assumed to be true for the purposes of this motion.

in Support of Mot. to Dismiss ("Def. Mem.") at 2, ECF No 27-1. Just Energy NY "is the corporate entity that supplied Plaintiffs' energy." Compl. ¶ 64. Just Energy NY customers elect not to purchase energy from the local utility provider in their region, like Con Edison, and instead contract to purchase their energy supply from an ESCO. Def. Mem. at 2. Just Energy NY customers enter into a contract, by which Just Energy NY agrees to provide gas and/or electricity to the customer at agreed-upon terms. *Id*. The physical delivery of the gas or electricity to the customer's home, along with the reading of customer meters and determining usage amounts for billing purposes, remain the local utility's responsibility. *Id.* Plaintiffs allege "Defendants John Does 1 to 100 are the shell companies and affiliates similar to Just Energy New York Corp. through which Defendant Just Energy Group Inc. does business in New York and elsewhere. John Does 1 to 100 are also the Just Energy management and employees who perpetrated the unlawful acts described herein." Compl. ¶ 69.

Plaintiffs allege that Just Energy's "deceptive marketing and sales practices are unlawful in multiple ways including:

a. Using introductory teaser rates to misrepresent the cost of Defendants' energy;
b. Failing to adequately disclose that quoted rates are introductory teaser rates;
c. Failing to adequately disclose when Defendants' introductory teaser rates expire;
d. Actively misrepresenting the rates Defendants will charge when the teaser rates expire;
e. Failing to adequately disclose that Defendants' energy rates are consistently higher than the rates a customer's existing incumbent utility charges;
f. Failing to provide customers advance notice of the variable rate Defendants will charge; and

g. Failing to clearly and conspicuously identify in its contract and marketing materials the variable charges in Defendants' variable energy plans." Compl. ¶ 9; *see also* Compl. ¶¶ 3, 187, 194, 210, 231.

Specifically, Plaintiffs allege they were contacted by representatives associated with Just Energy in 2012, and shown "teaser rates" not reflective of Just Energy's actual rates. Compl. ¶¶ 37–38, 42–43. Plaintiff Donin alleges that after agreeing to switch her gas and electric accounts to Just Energy, she received emails from Just Energy that misrepresented Just Energy's rates. Compl. ¶ 39. Plaintiffs allege Just Energy lures consumers with a marketing campaign that touts low rates and fails to disclose that Just Energy's actual rates will not only be higher than those teaser rates, but will also be consistently and substantially higher than those charged by the utility. *Id.* ¶ 3.

Plaintiffs allege the "company also provides customers a set of documents, including a "welcome email" and "General Terms and Conditions," which together comprise the contract. Def. Mem. at 10. Plaintiffs allege that in this contract, Just Energy promises (1) to charge a specified energy rate, (2) not to increase customers' rates "more than 35% over the rate from the previous billing cycle," *see* Compl. ¶ 5, and (3) to base their variable rates on "business and market conditions," *id.* ¶ 6. Plaintiffs allege Defendants breach all three promises. *Id.* ¶¶ 4–6, 10, 31–35, 142–46, 255–56. Through these practices, Plaintiffs allege Defendants breached New York's General Business Law §§ 349, 349-D(3) and 349-D(7) (Counts I–III); engaged in unfair and deceptive acts and practices (Count IV); committed common law fraud (Count V) and fraud by concealment (Count VI); were unjustly enriched at the consumers' expense (Count VII); breached its contract (VIII); and violated the Covenant of Good Faith and Fair Dealing (Count

IX). For the reasons that follow, the Court GRANTS in part and DENIES in part Defendants' motion to dismiss.

LEGAL STANDARD

To survive a motion to dismiss pursuant to Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A sufficiently pleaded complaint provides "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* Indeed, a complaint that merely offers labels and conclusions, a formulaic recitation of the elements, or "'naked assertions' devoid of 'further factual enhancement,'" will not survive a motion to dismiss. *Id.* (quoting *Twombly,* 550 U.S. at 557). At the motion-to-dismiss stage, this Court accepts all factual allegations in the Amended Complaint as true and draws all reasonable inferences in favor of Plaintiff, the nonmovant. *Harris v. Mills*, 572 F.3d 66, 71 (2d Cir. 2009). But the Court need not credit "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Id.* at 72 (quoting *Iqbal*, 556 U.S. at 678) (alteration omitted). Rather, legal conclusions must be supported by factual allegations. *Iqbal*, 556 U.S. at 678.

DISCUSSION

Defendants move to dismiss the Complaint in its entirety on the basis that: (1) this Court has no personal jurisdiction over Just Energy, Inc. or the alleged John Does; (2) Plaintiff Donin has no standing; and (3) Plaintiffs otherwise fail to state a claim for which relief can be granted. For the reasons state below, this Court finds it has personal jurisdiction over Just Energy, Inc. and Plaintiff Donin has standing to proceed in this case. Furthermore, Plaintiffs' claims for

breach of contract and breach of the covenant of good faith and fair dealing survive Defendants' motion to dismiss. Plaintiffs' remaining claims are DISMISSED.

I. Personal Jurisdiction

Defendants argue this Court does not have personal jurisdiction over Just Energy, Inc. and John Does #1–100. This Court finds it has personal jurisdiction over Just Energy, Inc., but does not have personal jurisdiction over the John Does.

a. The Court has personal jurisdiction over Just Energy, Inc.

New York's long arm statute, N.Y. C.P.L.R. 302, permits jurisdiction over a non-domiciliary "who in person or through an agent: 1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or 2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act[.]" N.Y. C.P.L.R. 302(a)(1)-(2) (McKinney 2018). Courts have emphasized that, in the personal jurisdiction context, "[w]hile a plaintiff may plead facts alleged upon information and belief where the belief is based on factual information that makes the inference of culpability plausible, such allegations must be accompanied by a statement of the facts upon which the belief is founded." *Vista Food Exch., Inc. v. Champion Foodservice, L.L.C.*, 14-CV-804, 2014 WL 3857053, at *9 (S.D.N.Y. Aug. 5, 2014) (Sweet, J.) (internal quotations omitted). Pleadings based on "information and belief" are acceptable as long as they are allegations, not conclusions. *Geo Grp., Inc. v. Cmty. First Servs., Inc.*, 11-CV-1711, 2012 WL 1077846, at *5 (E.D.N.Y. Mar. 30, 2012) (Amon, J.) ("Second Circuit has expressly held that information and belief pleading is permissible for facts 'peculiarly within the possession and control' of the defendant.") (citing *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 121 (2d Cir. 2010))).

This Court has personal jurisdiction over Just Energy, Inc. pursuant to New York's long-arm statute. Plaintiffs have sufficiently alleged JE "transacts any business within the state or contracts anywhere to supply goods or services in the state" and that the instant case arises from that transaction. Pl's Opp. to Def. Mem. ("Pl. Opp.") at 4, ECF No. ECF. Plaintiffs allege that JE itself "states that it sells [energy] in New York," *see* Compl. ¶ 78, "receives payment from New York utilities for it," *see id*. ¶ 77, "issues news releases about New York," *id*. ¶ 65, "sign[ed] up [New York customers] through its advertisements, sales staff, independent sales contractors and website," *id*. ¶¶ 65, 67, 76, its employees "drafted the customer contract at issue," *id*. ¶ 66, and its executives presented an overview of Group's strategies at a conference in New York, *id*. ¶ 75. *See Amorphous v. Morais*, 17-CV-631, 2018 WL 1665233, at *5, 7 (S.D.N.Y. Mar. 15, 2018) (Buchwald, J.) (finding "defendants availed themselves of the privilege of doing business in the New York" when defendants filled orders to New York customers, participated in New York trade shows, and sent representatives to New York and that "not only N.Y. C.P.L.R. § 302(a)(1), but also due process's requirement of sufficient minimum contacts"). These facts directly contrast with Mr. Teixeira's declaration, *see* ECF No. 30-4, that JE "does not engage in any business in New York," *id*. ¶ 9.

Here, Plaintiffs allege specifically "that the subsidiary engaged in purposeful activities in this State, that those activities were for the benefit of and with the knowledge and consent of the defendant, and that the defendant exercised some control over the subsidiary in the matter that is the subject of the lawsuit." *Jensen v Cablevision Sys. Corp*., 17-CV-00100, 2017 WL 4325829, at *7 (E.D.N.Y. Sept. 27, 2017) (Spatt, J.). Drawing all reasonable inferences in favor of Plaintiffs, the Court is satisfied that Plaintiff has alleged facts showing personal jurisdiction over JE is proper.

Furthermore, this Court's exercise of personal jurisdiction over JE satisfies Constitutional Due Process. Defendants claim the exercise of personal jurisdiction over JE fails to comport with due process "in light of the Supreme Court's recent holding in *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County*, 137 S. Ct. 1773 (2017). Defs.' Mem. at 7–8. However, unlike *Bristol-Myers*, where nonresident plaintiffs suffered harm out of state and tried to join their claims with those of in-state plaintiffs, here, there is a direct "connection between the forum and the specific claims at issue." *Id*. at 1781. Defendant JE allegedly solicited and defrauded customers in *New York* and supplied their energy services to *New York* residents in *New York*. This constitutes sufficient contacts for purposes of due process. *Licci ex rel. Licci v. Lebanese Can. Bank, SAL*, 673 F.3d 50, 62 (2d Cir. 2012) (holding a single in-state act performed by a non-domiciliary is sufficient for long-arm jurisdiction under CPLR §302(a)); *Bradley v. Staubach*, 03-CV-4160, 2004 WL 830066, at *4 (S.D.N.Y. Apr. 13, 2004) (Scheindlin, J.) (holding "[c]ontacts sufficient to establish jurisdiction under C.P.L.R. § 302(a)(1) are sufficient to meet the minimum contacts requirements of the Due Process clause").

b. The Court does not have jurisdiction over John Does 1–100.

However, Plaintiffs have not sufficiently alleged facts to show this Court has jurisdiction over John Does 1 to 100. Plaintiffs describe John Does 1 to 100 as "shell companies and affiliates" through which Just Energy Inc. does business in and outside of New York, as well as "Just Energy management and employees who perpetrated the unlawful acts." Compl. ¶ 69. This vague and conclusory statement, without additional factual support, is insufficient to establish prima facie evidence of jurisdiction. *See, e.g.*, *Yao Wu v. BDK DSD*, 14-CV-5402, 2015 WL 5664256, at *3 (E.D.N.Y. Aug. 31, 2015) (Gold, Mag.) (dismissing complaint *sua sponte* for lack of personal jurisdiction over John Doe defendants where plaintiffs had averred no

factual allegations to support a finding of personal jurisdiction), *report and recommendation adopted*, 14-CV-5402, 2015 WL 5664534 (E.D.N.Y. Sept. 22, 2015) (Amon, J.). Accordingly, the Court hereby DISMISSES all claims against John Does 1–100 for lack of personal jurisdiction.

II. Plaintiff Donin has standing.

To demonstrate standing, the named plaintiff must have (1) suffered a direct personal injury, (2) fairly traceable to the defendant's allegedly unlawful conduct, (3) that is likely to be redressed by the requested relief. *See Crist v. Commn. on Presidential Debates,* 262 F.3d 193, 195 (2d Cir, 2001); *see also Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). Furthermore, "[t]here must be a direct, personal relationship between the party seeking relief, and the parties to the action for which that relief is sought." *Howard v. Koch*, 575 F. Supp. 1299, 1301 (E.D.N.Y. 1982) (Costantino, J.) (dismissing allegations of misconduct toward plaintiff's girlfriend for lack of standing); *see also Galtieri v. Kelly*, 441 F. Supp. 2d 447, 456 (E.D.N.Y.2006) (Bianco, J.) (holding the wife of a policeman lacked standing to challenge the police department's decision to comply with court order to garnish the policeman's benefits).

Defendants argue Plaintiff Fira Donin has no standing in this case because Defendants sent the emails in question to her husband Stanislav Donin, the accountholder with Just Energy, and because Plaintiff Donin is not a party to the contract at issue. Def. Mem. at 9. This Court disagrees. Plaintiff Donin was the recipient of the "welcome emails," which were sent to her by the Just Energy customer service representative who pitched to her in person. *See* Complaint ¶¶ 28, 39. The addressee of the emails is "fsdonin@juno.com." Pl. Mem. at 8. Furthermore, although Plaintiff Donin is not a signatory to the contract, she is a third-party beneficiary of the contract and can thus assert a claim of breach. *See Logan-Baldwin v. L.S.M. Gen. Contractors,*

Inc., 94 A.D.3d 1466, 1468 (2012) ("Where, as here, performance is rendered directly to the third party, it is presumed that the contract was for his or her benefit."); *see also Mirkin v. Viridian Energy, Inc.*, 15-CV-1057, 2016 WL 3661106, at *2 n.2 (D. Conn. July 5, 2016) (denying motion to dismiss breach of contract claim based on ESCO's alleged overcharges even though plaintiff "Mr. Mirkin is not a party to the agreement with Viridian"). Accordingly, Fira Donin has standing to assert her contractual claims against Defendants.

III. Fraud-Based Claims

Counts V and VI of Plaintiff's Complaint allege common law fraud and fraud by concealment. To state a claim for fraud in New York, a plaintiff must allege "(1) a misrepresentation or omission of material fact; (2) which the defendant knew to be false; (3) which the defendant made with the intention of inducing reliance; (4) upon which the plaintiff reasonably relied; and (5) which caused injury to the plaintiff." *Schwartzco Enterprises LLC v. TMH Mgmt., LLC*, 60 F. Supp. 3d 331, 344 (E.D.N.Y. 2014) (Spatt, J.) (citing *Wynn v. AC Rochester*, 273 F.3d 153, 156 (2d Cir. 2001)). To survive a motion to dismiss, a plaintiff must: "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *Id.* Plaintiff must also "allege facts that give rise to a strong inference of fraudulent intent." *Id.* (citing cases). "A cause of action to recover damages for fraud does not lie when . . . the only fraud charged relates to the breach of a contract[.]" *Individuals Sec., Ltd. v. Am. Int'l Grp.*, 34 A.D.3d 643, 644 (2d Dep't 2006) (holding there was "no evidence that the defendants violated any duty extraneous to the bond thereby giving rise to an actionable tort").

Plaintiffs' fraud claims fail because they have not "allege[d] a breach of duty which is collateral or extraneous to the contract between the parties." *Krantz v. Chateau Stores of Canada*

Ltd., 256 A.D.2d 186, 187 (1st Dep't 1998). The relationship between Plaintiffs and Defendants exists solely from their commercial contract. *See* Compl. Additionally, Plaintiffs have not sufficiently alleged a duty to disclose, as is also required for fraudulent concealment. *TVT Records v. Is. Def Jam Music Group*, 412 F.3d 82, 91 (2d Cir. 2005). Again, Plaintiffs plead no special relationship between the parties, outside of the contract that would produce a duty to disclose. *See* Compl. Thus, Plaintiffs' claims for fraud and fraudulent concealment are hereby DISMISSED.

IV. Plaintiff's GBL claims are untimely.

The New York General Business Law ("GBL") has a three-year limitations period for statutory causes of action. *See* N.Y. C.P.L.R. 214 (McKinney 2018); *Gaidon v. Guardian Life Ins. Co. of Am.*, 750 N.E.2d 1078, 1083 (2001) (applying "the three-year period of limitations for statutory causes of action under CPLR 214 (2)" to GBL § 349 claims). An action under the GBL "accrues 'when all of the factual circumstances necessary to establish a right of action have occurred, so that the plaintiff would be entitled to relief.'" *Globe Surgical Supply v. Allstate Ins. Co.*, 31 Misc. 3d 1227(A), 2011 WL 1884729, at *5 (Sup. Ct. Nassau Cnty. Apr. 18, 2011) (citation omitted). If an action is commenced outside the statute of limitations, "it is the plaintiff's burden to 'demonstrate that any delay was caused by fraud, misrepresentation or deception and that his reliance on the asserted misrepresentations was justifiable.'" *Davidson v. Perls*, 42 Misc. 3d 1205(A), 2013 WL 6797665, at *7–8 (Sup. Ct. N.Y. Cnty. Dec. 23, 2013) (collecting cases); *see also Marshall v. Hyundai Motor Am.*, 51 F. Supp. 3d 451, 463 (S.D.N.Y. 2014) (Karas, J.) ("[T]he party seeking to invoke the doctrine bears the burden of demonstrating that it was diligent in commencing the action within a reasonable time after the facts giving rise to the estoppel have ceased to be operational." (internal quotations omitted)).

Plaintiffs' claims accrued in 2012 at the latest, when they first received their energy bills showing the rates they were charged by Defendants. This date predates the filing of the Complaint by over three years. *See Heslin v. Metro. Life Ins. Co.*, 287 A.D.2d 113, 115–16 (3d Dep't 2001) (holding that the statute of limitations for a GBL § 349 action is "three years and accrues when the owner of a 'vanishing premium' life insurance policy s first called upon to pay an additional premium"). Furthermore, an "[a]ccrual of a § 349 claim 'is not dependent upon any date when discovery of the alleged deceptive practice is said to occur.'" And so, Plaintiff's claims cannot be tolled. *Statler v. Dell, Inc.*, 841 F. Supp. 2d 642, 648 (E.D.N.Y. 2012) (Wexler, J.). Plaintiffs' claims began accruing in 2012, either when they purportedly enrolled with Just Energy NY or when they first received their energy bills showing the rates they were charged by Just Energy NY. *See* Compl. ¶ 4. Under either accrual event, Plaintiffs would have had to file their Complaint long before October 2017 to state a timely claim under the controlling statute of limitations. *Pike v. New York Life Ins. Co.*, 72 A.D.3d 1043, 1048 (2d Dep't 2010) ("Although the plaintiffs allege that they were induced to purchase unsuitable policies, and that they were unaware that they would have to pay 'substantial' premiums, they do not point to any specific wrong that occurred each time they paid a premium, other than having to pay it. Thus, any wrong accrued at the time of purchase of the policies, not at the time of payment of each premium."). Accordingly, the Court hereby DISMISSES Plaintiff's GBL claims as untimely.

V. Plaintiffs' claims for unfair and deceptive practices outside of New York are dismissed.

To assert claims on behalf of out-of-state, nonparty class members with claims subject to different state laws, the named plaintiffs' claims must not be time barred. *Langan v. Johnson & Johnson Consumer Companies, Inc.*, 897 F.3d 88, 93 (2d Cir. 2018). Because the named

Plaintiffs' claims are time barred under the GBL, they cannot assert the out-of-state claims on behalf of the out-of-state class members. Furthermore, courts in this district have held that plaintiffs lack standing to "bring claims on behalf of a class under the laws of the states where the named plaintiffs have never lived or resided." *In re HSBC Bank, USA, N.A., Debit Card Overdraft Fee Litig.*, 1 F. Supp. 3d at 50 (holding that the plaintiffs lacked standing to "bring claims under state laws to which Plaintiff have not been subjected" and noting that, even if the plaintiff amended to add representatives from each state, "it would be difficult for the Court to adjudicate claims" under the various state laws); *see also Ellinghaus v. Educ. Testing Serv.*, 15-CV-3442, 2016 WL 8711439, at *9 (E.D.N.Y. Sept. 30, 2016) (Feuerstein, J.) (dismissing non-New York consumer protection claims on a motion to dismiss); *Simington v. Lease Fin. Grp., LLC*, 10-cv-6052, 2012 WL 651130, at *9 (S.D.N.Y. Feb. 28, 2012) (Forrest, J.) ("Where plaintiffs themselves do not state a claim under their respective state's consumer statutes, . . . they do not have standing to bring claims under other state statutes—even where they are named plaintiffs in a purported class action."). Here, the two named Plaintiffs reside not only in the same state, but in the same borough of the city of New York, and—consistent with the holdings of numerous courts in the Second Circuit—are not entitled to bring state law claims asserting violations of consumer protection statutes outside New York. Compl. ¶¶ 36, 41. As such, these claims are DISMISSED.

VI. Plaintiffs have sufficiently stated a breach of contract claim.

To state a claim for breach of contract, a plaintiff must show "(1) the existence of a contract between [plaintiff and defendant]; (2) performance of the plaintiff's obligations under the contract; (3) breach of the contract by that defendant; and (4) damages to the plaintiff caused by that defendant's breach." *Diesel Props S.r.l. v. Greystone Bus. Credit II LLC*, 631 F.3d 42, 52

(2d Cir. 2011). Plaintiffs claim Defendants breached the Agreements "by (a) charging rates higher than the rates set forth in the welcome emails Defendants sent to consumers (b) violating the contract's requirement that Defendants 'will not increase more than 35% over the rate from the previous billing cycle,' and (c) violating the contract's requirement that Defendants charge variable rates 'determined by business and market conditions.'" Compl. ¶ 35.

Defendants argue the Agreement expressly states that the rates charged are "variable," meaning they did not contract to charge Plaintiffs particular rates, and thus they did not breach the contract. However, Defendants ignore Plaintiff's allegations which specify that Defendants "made contractual promises to i) charge a specified energy rate (in Ms. Donin's case, 8¢ per kWh and 63¢ per therm), Compl. ¶ 4, ii) not to increase their rates "more than 35% over the rate from the previous billing cycle," *id.* ¶ 5, and iii) base their variable rates on "business and market conditions," *id.* ¶ 6, and that the Defendants breached these three promises.

First, Plaintiffs have put forth facts showing that Defendant charged them over a specific energy rate. Notwithstanding the contractual promise, Plaintiffs allege Just Energy consistently charged Plaintiff Donin more than 8¢ per kWh. *See* Compl. ¶ 4. Plaintiffs allege they have provided billing data during a four-year period showing there was only one month when Just Energy charged Ms. Donin less than the 8¢ per kWh contractual rate. *Id*. Similarly, Plaintiffs maintain the same allegations regarding her gas account. *Id*. Plaintiff Donin alleges that during the seventeen months of billing, Just Energy's rate was higher than 63¢ per therm. *Id*.

Second, Plaintiffs have put forth facts showing Defendants increased their rates more than 35% from previous billing cycles. Plaintiffs maintain that in August 2013 Defendants raised Plaintiff Donin's electricity price by more than 80% over the prior month's rate. *Id*. ¶ 5.

Similarly, in May 2016, Plaintiffs allege Just Energy increased Ms. Donin's May 2016 gas rate by more than 36% compared to the rate she paid in April 2016. *Id*.

Finally, Plaintiffs have put forward facts to substantiate their claim that Defendant's failed to base their variable rates on "business and market conditions." The Complaint sets forth a month-by-month comparison of what Con Ed would have charged during each of the months for which Plaintiffs' billing data is presently available, showing both the difference and the percent difference between a rate based on "business and market conditions" and the rate Defendants charged. Compl. ¶¶ 142–44. Based on these tables, Plaintiffs show "that Just Energy's variable rate was consistently significantly higher than Con Ed's rates and that the rate did not fluctuate with commodity prices." *Id*. ¶ 147. The Complaint also clearly shows that "Just Energy's variable rate often increased while wholesale costs declined," further substantiating its claim that Defendants' rates are untethered to "business and market conditions." *Id.* ¶¶ 153–56. This is sufficient to state a breach of contract claim for an ESCO's failure to charge contracted-for market-based rates, and thus a claim for breach of contract.

VII. Plaintiffs sufficiently allege a claim for breach of the covenant of good faith and fair dealing.

A "claim for breach of an implied covenant of good faith and fair dealing does not provide a cause of action separate from a breach of contract claim" when based on the same facts. *Atlantis Info. Tech., GmbH v. CA, Inc.*, 485 F. Supp. 2d 224, 230 (E.D.N.Y. 2007) (Spatt, J.); *Esposito v. Ocean Harbor Cas. Ins. Co.*, 13-CV-7073, 2013 WL 6835194, at *2 (E.D.N.Y. Dec. 19, 2013) (Feuerstein, J.). In New York, "all contracts contain an implied covenant of good faith and fair dealing, under which 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." *Claridge*

v. N. Am. Power & Gas, LLC, 15-CV-1261, 2015 WL 5155934, at *6 (S.D.N.Y. Sept. 2, 2015) (Castel, J.). "Where the contract contemplates the exercise of discretion, this pledge includes a promise not to act arbitrarily or irrationally in exercising that discretion." *Dalton v Educ. Testing Serv.*, 663 N.E.2d 289, 291 (N.Y. 1995). Whether a defendant exercised bad faith is an issue of fact for a jury to decide. *See First Niagara Bank N.A. v Mortg. Builder Software, Inc.*, 13-CV-592, 2016 WL 2962817, at *7 (W.D.N.Y. May 23, 2016) (Skretny, J.).

The Court finds some factual allegations overlap in Plaintiff's claims. However, because Just Energy contests the viability of the contract claim, the Court allows Plaintiffs to alternatively maintain the good faith and fair dealing claim, as is routinely allowed in federal court. *See, e.g.*, *Claridge*, 2015 WL 5155934, at *6 (allowing both claims to proceed and noting that "[g]iven the ambiguous language of the Agreement, the plaintiffs plausibly allege that [defendant ESCO] could have exercised its discretion in a manner contrary to customers' expectations"); *Hamlen v. Gateway Energy Services Corp.*, 16-CV-3526, 2017 WL 892399, at *5 (S.D.N.Y. Mar. 6, 2017) (Briccetti, J.); *Edwards v. N. Am. Power and Gas, LLC*, 120 F. Supp 3d. 132, 147 (D. Conn. 2015) ("[I]n pleading that [defendant's] prices were arbitrarily high and unreasonable, [plaintiff] . . .sufficiently alleged a claim of breach of the covenant of good faith and fair dealing."). Accordingly, Plaintiffs' "claim for breach of an implied covenant of good faith and fair dealing survives Defendants' motion to dismiss.

VIII. Plaintiff's unjust enrichment claim is dismissed.

Unjust enrichment "may not be plead in the alternative alongside a claim that the defendant breached an enforceable contract." *King's Choice Neckwear, Inc. v. Pitney Bowes, Inc.*, 09-CIV-3980, 2009 WL 5033960, at *7 (S.D.N.Y. Dec. 23, 2009) (Cote, J.), *aff'd*, 396 Fed. App'x 736 (2d Cir. 2010) (summary order); *see also Ainbinder v. Money Ctr. Fin. Grp., Inc.*, 10-

CV-5270, 2013 WL 1335997, at *8 (E.D.N.Y. Feb. 28, 2013) (Tomlinson, Mag.) (collecting cases), *report and recommendation adopted,* 10-CV-5270, 2013 WL 1335893 (E.D.N.Y. Mar. 25, 2013) (Feuerstein, J.). Unlike Plaintiffs' claim for breach of covenant of good faith and fair dealing, here all facts of Plaintiff's breach of contract claim overlap with their breach of unjust enrichment claims. There is no dispute as to the existence of a contract, and thus, a claim for unjust enrichment cannot survive. Accordingly, Plaintiff's unjust enrichment claim is DISMISSED.

CONCLUSION

In sum, the Defendants' motion to dismiss is GRANTED in part and DENIED in part. The Court finds it has personal jurisdiction over Defendant Just Energy, Plaintiff Donin has standing, and Plaintiffs have sufficiently alleged their breach of contract and breach of the covenant of good faith and fair dealing claims. All other claims are hereby DISMISSED. The Clerk of Court is respectfully directed to close the motion pending at ECF No. 27 and to remove John Does 1–100 from the caption.

SO ORDERED.

s/ WFK

HON. WILLIAM F. KUNTZ, II
UNITED STATES DISTRICT JUDGE

Dated: September 24, 2021
Brooklyn, New York

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

TREVOR JORDET,

Plaintiff,

v.

DECISION AND ORDER

18-CV-953S

JUST ENERGY SOLUTIONS, INC.,

Defendant.

I. Introduction

This case alleges that Defendant imposed improper pricing for natural gas upon Plaintiff and the proposed class of Defendant's customers (Docket No. 1, Compl.). Before this Court is Defendant's Motion to Dismiss (Docket No. 19)[1] the Complaint.

For the reasons stated herein, Defendant's Motion to Dismiss is granted in part, denied in part.

II. Background

This is a diversity jurisdiction class action under Pennsylvania common law and statute challenging terms of Defendant's utility supply contract (see Docket No. 1, Compl.). Plaintiff commenced the action in the United States District Court for the Eastern District of Pennsylvania, but it was later transferred to this District (Docket No. 23).

[1] In support of its motion to dismiss, Defendant submits its attorney's Declaration with exhibits (an example of Defendant's contract and Pennsylvania Public Utility Commission's Natural Gas Suppliers List) and Memorandum of Law, Docket No. 20. In opposition, Plaintiff submits his Memorandum of Law, Docket No. 26. Defendant filed a timely Reply Memorandum, Docket No. 32. Plaintiff moved to file a Sur-Reply, Docket No. 35, which this Court granted, Docket No. 38. He then filed the Sur-Reply, Docket No. 39.

Plaintiff then filed supplemental authorities, Docket Nos. 41 (Gonzales v. Agway Energy Servs., LLC, No. 18-235-MAD-ATB, 2018 WL 5118509 (N.D.N.Y. Oct. 22, 2018)), 42 (Mirkin v. XOOM Energy, LLC, 931 F.3d 173 (2d Cir. 2019)), presenting cases that denied motions to dismiss.

Plaintiff is a Pennsylvanian who was a customer of Defendant (incorporated in California with its principal place of business in Texas) from 2012 through February 2018 (Docket No. 1, Compl. ¶¶ 6, 5).

Pennsylvania deregulated natural gas in 1999 (id., Compl. ¶ 11; see Docket No. 20, Def. Memo. at 2). The purpose for deregulation was to allow energy supply companies ("ESCOs") to use their natural gas facilities, purchased gas from wholesalers and brokers or purchasing futures contracts at set prices, and other innovations to reduce natural gas costs and pass the savings to consumers (Docket No. 1, Compl. ¶ 12).

Customers only select an ESCO for supplying natural gas while continuing to use the utility for delivery and billing (id. ¶ 13). The only difference from utility-furnished natural gas is the price of energy supply (id.). ESCOs' supply rates, including Defendant's, are not approved by the Pennsylvania public service commission (id. ¶ 14).

A. Pleadings

Plaintiff charges that Defendant entices customers with a low teaser rates and "false promises that it will offer market-based variable rates," then shifts the accounts to variable pricing that are "untethered from changes in wholesale rates" (id. ¶ 15).

In or around 2012, Defendant solicited Plaintiff to change natural gas supplier to Defendant, "representing that [Defendant] would charge a rate lower than the local utility, PECO" (id. ¶ 16). Defendant's agreement contained a rescissionary period when Plaintiff could change his mind and terminate without penalty (id. ¶ 17). Defendant charged Plaintiff a fixed, discounted introductory rate for a number of months then converted the account to a variable price (id. ¶ 18). The agreement represented that the variable price "would be set 'according to business and market conditions, including but not limited to,

the wholesale cost of natural gas supply, transportation, distribution and storage'" (id. ¶ 19).

Plaintiff alleges that a reasonable consumer (like him) would conclude that business and market conditions were the vendor's wholesale costs and the amounts charged by competitors (id. ¶ 20). Instead, Defendant set the variable price higher than Plaintiff's utility (PECO) and Defendant's ESCO competitors (id. ¶¶ 21, 22). Plaintiff contends that Defendant's prices were not competitive market rates; for example, these prices did not fluctuate with changes in natural gas prices (id. ¶¶ 23, 24). Instead, Plaintiff believes that PECO's rates were indicators of the market since it includes supply costs, transportation, distribution, and storage costs (id. ¶ 25). Plaintiff, however, fails to acknowledge that PECO's rates are approved by the public service commission. Even with the advantage of purchasing natural gas from a highly competitive market, Defendant's prices were higher and were not commensurate with PECO's rates (id. ¶¶ 26-30). Plaintiff characterizes these prices as "wildly disparate" (id. ¶ 26). He concedes, however, that Defendant had discretion to set variable prices (id. ¶ 65).

As for market conditions, Plaintiff states that a reasonable customer recognizes the vendor should recoup a reasonable margin on sales of gas (id. ¶ 32), which Plaintiff contends should be the same as other ESCOs and the utility. Because other ESCOs' rates are lower than Defendant's, Plaintiff claims that the profit margin sought by Defendant is in bad faith (id.). Defendant's undisclosed costs in taxes, fees, and assessments Plaintiff deems to be insignificant and not a justification for the disparity in Defendant's pricing from its competitors or PECO (id. ¶ 33). Plaintiff, however, does not state the profit or profit margin of these ESCOs or of PECO.

Plaintiff alleges three causes of action. The First Cause of Action alleges violation of Pennsylvania Unfair Trade Practice and Consumer Protection Law ("UTPCPL") (id. ¶¶ 44-55), with this claim specifically addressed to a subclass of Pennsylvania residents (id.). The Second Cause of Action alleges breach of contract (including breach of the implied covenant of good faith and fair dealing, not distinct causes of action under Pennsylvania law) (id. ¶¶ 57-68). The Third Cause of Action alleges unjust enrichment, as alternative to the Second Cause of Action (id. ¶¶ 70-72).

Plaintiff alleges a class of Defendant's customers who also were charged variable rates for residential natural gas services from April 2012 to the present (id. ¶ 38; see also id. ¶ 39 (subclass of Pennsylvania customers so charged)). The Second and Third Causes of Action apply to the full class, while the First Cause of Action applies to the broader class and also the subclass of Pennsylvania customers.

B. Procedural History

Plaintiff filed this action in the United States District Court for the Eastern District of Pennsylvania on April 6, 2018 (Docket No. 1, Compl.).

With consent, Defendant moved to transfer venue to this District (Docket No. 17), see 28 U.S.C. § 1404(a). There, Defendant argued that the interest of justice supported transfer, in part because of a similar case that then was pending in this Court (Docket No. 18, Def. Memo. at 3, 4-7), see Nieves v. Just Energy New York, No. 17CV561. The district court for the Eastern District of Pennsylvania granted the transfer (Docket No. 23; see Docket No. 24 (transmitted docket)).

On the same day Defendant moved to transfer, Defendant moved to dismiss (Docket No. 19). The parties stipulated to set Plaintiff's response to the Motion to Dismiss

to twenty-one days from the adopting Order (Docket No. 22), or by September 4, 2018. Following transfer to this District and upon the parties' stipulation to extend Defendant's time to reply (Docket No. 28), this Court set the deadline for Defendant's reply for October 5, 2018 (Docket No. 29). After filing a timely Reply (Docket No. 32), Sur-Reply (Docket No. 39), and supplemental authorities from Plaintiff (Docket Nos. 41, 42), the motion to dismiss was deemed submitted without oral argument.

In its Motion to Dismiss, Defendant provides an example of an unexecuted contract (Docket No. 20, Def. Atty. Decl. Ex. 1). The definitional section there defined "Variable Price" as "the monthly rate that you will be charged per Ccf after expiration of the 12 month Intro Price. The Variable Price will not change more than once each billing cycle. Changes to the Variable Price will be determined by Just Energy according to business and market conditions." (Id.) In Section 5.1, Natural Gas Charges, the contract provides that

> "the Variable Price during the first billing cycle in which the Variable Price is in effect will be equal to the Intro Price. The Variable Price will not change more than once each monthly billing cycle. Changes to the Variable Price will be determined by Just Energy according to business and market conditions, including but not limited to, the wholesale cost of natural gas supply, transportation, distribution and storage, and will not increase more than 35% over the rate from the previous billing cycle."

(Id.; see also Docket No. 1, Compl. ¶ 19).

III. Discussion

A. Applicable Standards

1. Motion to Dismiss

Defendant has moved to dismiss the Complaint on the grounds that it states a claim for which relief cannot be granted (Docket No. 19). Under Rule 12(b)(6) of the

Federal Rules of Civil Procedure, the Court cannot dismiss a Complaint unless it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). As the Supreme Court held in Bell Atlantic Corp. v. Twombly, 550 U.S. 554, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), a Complaint must be dismissed pursuant to Rule 12(b)(6) if it does not plead "enough facts to state a claim to relief that is plausible on its face," id. at 570 (rejecting longstanding precedent of Conley, supra, 355 U.S. at 45-46); Hicks v. Association of Am. Med. Colleges, No. 07-00123, 2007 U.S. Dist. LEXIS 39163, at *4 (D.D.C. May 31, 2007). To survive a motion to dismiss, the factual allegations in the Complaint "must be enough to raise a right to relief above the speculative level," Twombly, supra, 550 U.S. at 555; Hicks, supra, 2007 U.S. Dist. LEXIS 39163, at *5. As reaffirmed by the Court in Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009),

> "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' [Twombly, supra, 550 U.S.] at 570 . . . . A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. Id., at 556 . . . . The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. Ibid. Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of "entitlement to relief."' Id., at 557 . . . (brackets omitted)."

Iqbal, supra, 556 U.S. at 678 (citations omitted).

A Rule 12(b)(6) motion is addressed to the face of the pleading. The pleading is deemed to include any document attached to it as an exhibit, Fed. R. Civ. P. 10(c), or any document incorporated in it by reference. Goldman v. Belden, 754 F.2d 1059 (2d Cir. 1985). This Court deems incorporated here the contract since it is integral to Plaintiff's

claim even if Plaintiff did not incorporate the actual document by reference, Chambers v. Time Warner, Inc., 282 F.3d 147, 152-53 (2d Cir. 2002); 5B Charles A. Wright and Arthur R. Miller, Federal Practice and Procedure § 1357, at 376, 377 (Civil 3d ed. 2004). Neither party, however, produced Plaintiff's actual contract with Defendant (or any potential class member's contract). The Complaint alleges key terms of that agreement (Docket No. 1, Compl. ¶ 19), while Defendant's moving papers contains a facsimile of its Natural Gas Customer Agreement for the Natural Gas Rate Flex Pro Program (Docket No. 20, Def. Atty. Decl. ¶ 1, Ex. 1). Both sides cite to an identical provision about variable prices. And, absent objection from Plaintiff, this Court will consider the Natural Gas Customer Agreement and its definition of "Variable Price" and its terms for natural gas charges (id., Secs. 1, 5.1).

In considering such a motion, the Court must accept as true all of the well pleaded facts alleged in the Complaint. Bloor v. Carro, Spanbock, Londin, Rodman & Fass, 754 F.2d 57 (2d Cir. 1985). However, conclusory allegations that merely state the general legal conclusions necessary to prevail on the merits and are unsupported by factual averments will not be accepted as true. New York State Teamsters Council Health and Hosp. Fund v. Centrus Pharmacy Solutions, 235 F. Supp. 2d 123 (N.D.N.Y. 2002).

2. Pennsylvania Unfair Trade Practices and Consumer Protection Law

Pennsylvania courts construe the Unfair Trade Practices and Consumer Protection Law, 73 Pa. Cons. Stat. §§ 201-3, et seq. (the "UTPCPL"), liberally to effectuate the goal of consumer protection, Bennett v. A.T. Masterpiece Homes at Broadsprings, LLC, 40 A.3d 145, 151 (Pa. Super. Ct. 2012), citing Commonwealth by Creamer v. Monumental

Properties, Inc., 459 Pa. 450, 459, 329 A.2d 812, 816 (1974) (see Docket No. 26, Pl. Memo. at 20).

The UTPCPL creates a cause of action for any person who purchases services primarily for personal, family, or household purposes and thereby suffers ascertainable loss of money as a result of employment by any person of a method, act, or practice declared unlawful by the Act, 73 Pa. Cons. Stat. § 201-9.2 (Docket No. 26, Pl. Memo. at 19). Plaintiff has to allege a deceptive act, an ascertainable loss of money or property, that resulted from the use or employment of a method, act, or practice declared unlawful by the UTPCPL, and that plaintiff justifiably relied on the deceptive conduct, Abraham v. Ocwen Loan Servicing, LLC, 321 F.R.D. 125, 154 n.11 (E.D. Pa. 2017) (Docket No. 20, Def. Memo. at 17); Landau v. Viridian Energy PA LLC, 223 F. Supp.3d 401, 418 (E.D. Pa. 2016) (Docket No. 26, Pl. Memo. at 20).

Unlawful methods of competition and unfair or deceptive acts or practices include false advertising, 73 Pa. Cons. Stat. § 201-2(4)(v) ("Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation or connection that he does not have"), (vii) ("Representing that goods or services are of a particular standard, quality or grade, or that goods are of a particular style or model, if they are of another"), (ix) ("Advertising goods or services with intent not to sell them as advertised") (Docket No. 20, Def. Memo. at 17; see Docket No. 26, Pl. Memo. at 19-20). To state a claim for false advertising as the unlawful method, a plaintiff has to allege that defendant's representations were false, that the representations actually deceived or tended to deceive, and the representation likely made the difference in the purchasing

decision, Price v. Foremost Indus. Ins., No. CV 17-00145, 2017 WL 6596726, at *9 (E.D. Pa. Dec. 22, 2017) (citing Seldon v. Home Loan Servs., Inc., 647 F. Supp.2d 451, 466 (E.D. Pa. 2009) (Docket No. 20, Def. Memo. at 18). The Third Circuit explains "Material representations must be contrasted with statements of subjective analysis or extrapolations, such as opinions, motives and intentions, or general statements of optimism, which constitutes no more than puffery," EP Medsystems, Inc. v. EchoCath, Inc., 235 F.3d 865, 872 (3d Cir. 2000). Puffery, however, is not actionable as false advertising under Pennsylvania law, Castrol, Inc. v. Pennzoil Co., 987 F.2d 939 (3d Cir. 1993); Commonwealth v. Golden Gate Nat'l Senior Care LLC, 158 A.3d 203, 215 (Pa. Commw. Ct. 2017), aff'd in part, rev'd in part, 648 Pa. 604, 194 A.3d 1010 (2018) (reversing dismissal of UTPCPL claims). Whether a statement is puffery is a question of fact to be resolved by a fact finder, Commonwealth v. Golden Gate Nat'l Senior Care LLC, 642 Pa. 604, 626-27, 194 A.3d 1010, 1024 (2018).

Unlawful methods also include a generic category of fraudulent and deceptive conduct. To plead this catchall provision for fraudulent or deceptive conduct, 73 Pa. Cons. Stat. § 201-2(4)(xxi) ("Engaging in any other fraudulent or deceptive conduct which creates likelihood of confusion or of misunderstanding"), plaintiff needs to allege a deceptive act, that is conduct likely to deceive a consumer acting reasonable under similar circumstances; justifiable reliance based on the misrepresentations or deceptive conduct; and ascertainable loss caused by justifiable reliance, Landau, supra, 223 F. Supp. 3d at 418 (Docket No. 26, Pl. Memo. at 20).

3. Pennsylvania Contract Law and Unjust Enrichment

Briefly, under Pennsylvania law, a breach of contract has these elements: the existence of a contract, including its essential terms; breach of a duty imposed by the contract; and resultant damages, Gillis v. Respond Power, LLC, No. 14-3856, 2018 WL 3247636, at *4 (E.D. Pa. July 16, 2018) (Docket No. 20, Def. Memo. at 8); Landau v. Viridian Energy PA LLC, 223 F.Supp.3d 401, 408 (E.D. Pa. 2016) (Docket No. 26, Pl. Memo. at 6) The only element at issue is allegation of breach of the agreement by Defendant.

An implied covenant of good faith and fair dealing is contained in all contracts under Pennsylvania law, and breach of that duty is subsumed in the breach of contract claim, Kantor v. Hiko Energy, LLC, 100 F. Supp. 3d 421, 430 (E.D. Pa. 2015) (quoting Burton v. Teleflex Inc., 707 F.3d 417, 432 (3d Cir. 2013)) (Docket No. 26, Pl. Memo. at 16); see Hatchigian v. State Farm Ins. Co., No. 13-2880, 2014 WL 176585, at *7 (E.D. Pa. Jan. 16, 2014) (breach of implied covenant and breach of contract is a single cause of action under Pennsylvania law), aff'd, 574 F. App'x 103 (3d Cir. 2014) (Docket No. 20, Def. Memo. at 8).

Under Pennsylvania law, unjust enrichment is inapplicable when the relationship is founded on a written agreement or express contract, Hershey Foods Corp. v. Ralph Chapek, Inc., 828 F.2d 989, 999 (3d Cir. 1987) (Docket No. 20, Def. Memo. at 24-25 (citing Pennsylvania state decisions)). "[T]o sustain a claim of unjust enrichment, the claimant must show that the party against whom recovery is sought either wrongfully secured or passively received a benefit that would be unconscionable for that party to retain without compensating the provider," Hershey Foods, supra, 828 F.2d at 999;

Torchia on behalf of Torchia v. Torchia, 346 Pa. Super. 229, 499 A.2d 581 (1985). Unjust enrichment cannot be alleged while alleging a breach of contract unless the validity of the contract itself is actually disputed, Grudkowski v Foremost Ins. Co., 556 F. App'x 165, 170 n.8 (3d Cir. 2014) (Docket No. 32, Def. Reply Memo. at 8).

B. Motion to Dismiss Contentions

Defendant argues that Plaintiff fails to allege plausible claims for breach of contract and his other contract claims (Docket No. 20, Def. Memo. at 8-16). Defendant invokes Pennsylvania's statute of limitations of four years to bar claims prior to April 6, 2014 (id. at 16-17), 42 Pa. Cons. St. Ann. § 5525(a). Defendant asserts Plaintiff also failed to plead violations of the UTPCPL, namely the asserted violations in advertising and the catchall provision for fraudulent and deceptive conduct (id. at 17-18, 18-21, 21-24). Defendant also contends that Pennsylvania's gist of the action doctrine prohibits a plaintiff from recasting a contract claim as a tort, as Plaintiff did here in alleging unfair trade practice violations (id. at 23-24; see Docket No. 32, Def. Reply Memo. at 7, citing Pollock v. National Football League, 171 A.3d 773, 77 n.2 (Pa. Super. Ct. 2017)). Defendant concludes that Plaintiff cannot invoke unjust enrichment while an express contract exists (Docket No. 20, Def. Memo. at 24-25; see also Docket No. 32, Def. Reply Memo. at 8).

Plaintiff contends that he plausibly alleged his three claims (Docket No. 26, Pl. Memo. at 5-25). The breach of contract here was the manner in which Defendant set variable pricing. Plaintiff responds that Defendant is "hang[ing] its hat on the implausible assertion that the phrase 'business and market conditions' could mean something other than wholesale costs, competitor pricing, or charges Just Energy incurs to supply natural gas (like transmission costs, which are minimal and steady)" (id. at 3). Plaintiff argues

that Pennsylvania law requires Defendant, as an ESCO, to disclose to Plaintiff the conditions of variability in its variable pricing, 52 Pa. Code § 62.75(c)(2)(i) (id. at 7). That provision requires the disclosure of the "conditions of variability (state on what basis prices will vary) including the [ESCO's] specific prescribed variable pricing methodology," id. Plaintiff counters that the gist of the action doctrine was not applicable, allowing his UTPCPL claim as distinct from his contract claim (id. at 23, citing Landau, supra, 223 F. Supp.3d at 408-19 (E.D. Pa. 2016)).

Plaintiff presents a table comparing Defendant's variable prices to the average Pennsylvania ESCO's billing rate from April 2016-February 2018, with Defendant's variable prices exceeding the competitor's average rates (from U.S. Energy Information Administration table) in a range between 7% (in March-April 2017) to 102% (in August-September 2017) (Docket No. 27, Pl. Atty. Decl. Ex. 7).

Defendant replies that Plaintiff concedes that Defendant did not promise to set rates based upon any single factor and that "business and market conditions" included a variety of nonexclusive factors (Docket No. 32, Def. Reply Memo. at 1), that Plaintiff alleged facts only for one factor in a multiple factor process (id. at 2-3). Plaintiff fails to plead in particularity (id. at 3 & n.2). Defendant points out that the Complaint failed to allege competitor ESCO rates (id. at 1, 4-5). Defendant denies that the difference between its rates and PECO's rates creates claims, thus Plaintiff failed to allege a benchmark for market prices (id. at 1-2).

Next, Defendant argues that Plaintiff has not established a violation of the catchall provision for the UTPCPL (id. at 6-7). Defendant asserts that Plaintiff's UTPCPL claim violates the gist of the action doctrine (id.; see Docket No. 20, Def. Memo. at 23-24).

Finally, Defendant distinguishes the motion to dismiss cases cited by Plaintiff (Docket No. 32, Def. Reply Memo. at 8-10 & nn.9-13).

The Sur-Reply argues that U.S. Energy Information Administration data includes pricing data from Pennsylvania for its ESCOs' rates (Docket No. 39). This, however, does not address the contention that the Complaint does not allege ESCO data was collected in Pennsylvania, Docket No. 32, Def. Reply at 1. As a motion to dismiss it rests solely on the four corners of pleadings where additional materials not integral to Plaintiff's claims were not incorporated by reference, cf. 5B Federal Practice and Procedure, supra, § 1357, at 376.

Plaintiff supplemented with two other cases in which motions to dismiss were denied in what he claims were similar circumstances (Docket Nos. 41, 42). In Gonzalez v. Agway Energy Services, LLC, No. 18-235-MAD-ATB, 2018 WL 5118509 (N.D.N.Y. Oct. 22, 2018) (Docket No. 41, Pl. Supp'al Auth. [Gonzalez]), the plaintiff alleged that Agway Energy misled by representing its variable rates for electricity were based on the cost of acquisition of electricity, transmission and distribution charges, market-related factors, plus applicable taxes, fees, charges, or other assessments, and Agway Energy's costs, expenses, and margins, at *1 (Docket No. 41, Pl. Supp'al Auth. at 1-2). In Mirkin v. XOOM Energy, LLC, 931 F.3d 173 (2d Cir. 2019) (Docket No. 42, Pl. Supp'al Auth. [Mirkin]), the Second Circuit reversed the grant of a motion to dismiss. Plaintiffs alleged that XOOM set its variable rate based on XOOM's "actual and estimated supply costs which may include but not be limited to prior period adjustments, inventory and balancing costs," id. at 175 (Docket No. 42, Pl. Supp'al Auth. at 1). They alleged XOOM breached the contract by charging a variable rate that did not reflect the factors in the contract (id. at 2).

After discussing the contract provision at issue here, this Court will consider (out of order) the common law causes of action of breach of contract and unjust enrichment and conclude with Plaintiff's First Cause of Action under the UTPCPL.

C. Variable Price Provision

Each of the three causes of action required Defendant to breach the standard of business and market conditions for imposing variable pricing. The key clause is Section 5.1, Natural Gas Charges of the Terms and Conditions of the contract, specifically declaring that

> "the Variable Price during the first billing cycle in which the Variable Price is in effect will be equal to the Intro Price. The Variable Price will not change more than once each monthly billing cycle. Changes to the Variable Price will be determined by Just Energy according to business and market conditions, including but not limited to, the wholesale cost of natural gas supply, transportation, distribution and storage, and will not increase more than 35% over the rate from the previous billing cycle."

(Docket No. 20, Def. Atty. Decl. Ex. 1). The contract stated in the definition section that changes in "Variable Price" would "be determined by Just Energy according to business and market conditions" (id.).

This case, like Nieves v. Just Energy New York, No. 17CV561, 2020 WL 6803056 (W.D.N.Y. Nov. 19, 2020) (Skretny, J.), and its variable rate provision, turns on the meaning of the phrase "business and market conditions." In Nieves, this Court relied upon the Second Circuit's decision in Richards v. Direct Energy Services, 915 F.3d 88 (2d Cir. 2019), and its definition of the terms "business and market conditions," recognizing that these terms (absent restriction or definition) was broad enough to cover the supplier's discretion in setting variable rates or prices, Nieves, supra, 2020 WL 6803056 at *5. This Court distinguished Jordet's contract from Nieves because it

provided some definition of what Defendant considered business and market conditions, id. at *6, from the inclusion of natural gas costs as a factor in rate setting.

D. Breach of Contract and Breach of Implied Covenant of Good Faith (Second Cause of Action)

As a breach of implied covenant of good faith, Plaintiff concedes that Defendant had unilateral discretion in setting the variable rate (Docket No. 1, Compl. ¶ 65). As one noted commentator found, "there can be no breach of the implied promise or covenant of good faith and fair dealing where the contract expressly permits the actions being challenged, and the defendant acts in accordance with the express terms of the contract," 23 Williston on Contracts § 63:22 (4th ed. 2018); see Richards v. Direct Energy Services, supra,, 915 F.3d at 99.

As a breach of contract, the terms refer to Defendant setting variable prices based upon business and market conditions, defined (in part) to include wholesale natural gas supply costs, transportation, distribution, and storage. Plaintiff reads this as the extent of what are business and market conditions. The cost of natural gas was a factor in business and market conditions (see id. ¶ 19; Docket No. 20, Def. Atty. Decl. Ex 1, Sec. 5.1), but not the exclusive factor. While Defendant has some discretion in setting variable rates, the contract gives some direction in that action.

Pennsylvania law, however, requires a natural gas supplier charging a variable rate to disclose the conditions for variation, 52 Pa. Code § 62.75(c)(2)(i). "Conditions of variability (state on what basis prices will vary) including the [natural gas supplier's] specific prescribed variable pricing methodology," id. This provision is part of natural gas supply regulation that mandates "all natural gas providers enable customers to make informed choices regarding the purchase of all natural gas services offered by providing

adequate and accurate customer information," provided in "an understandable format that enables customers to compare prices and services on a uniform basis," 52 Pa. Code § 62.71(a). Marketing materials advertising variable pricing has to "factor in all costs associated with the rate charged to the customer for supply service," 52 Pa. Code § 62.77(b)(2).

Plaintiff alleges a breach of contract where Defendant's only stated basis for variable pricing is its natural gas acquisition costs and does not specifically include the other, undisclosed factors Defendant used to set the variable prices.

As in Nieves, Jordet cites to cases in other courts that deny motions to dismiss on similar contract provisions (Docket No. 26, Pl. Memo. at 5 & n.2, 8; Docket No. 41, Pl. Supp'al Auth. [Gonzales]; Docket No. 42, Pl. Supp'al Auth. [Mirkin]). Again, these cases have limited precedential value because each is fact specific, resting upon different contract terms and governing law, see Claridge v. North Am. Power & Gas, LLC, No. 15-1261, 2015 WL 5155934, at *5 (S.D.N.Y. Sept. 2, 2015) (denying dismissal); Nieves, supra, 2020 WL 6803056, at *6 (see also Docket No. 32, Def. Reply Memo. at 8-10). Plaintiff cites (Docket No. 26, Pl. Memo. at 5 n.2) cases analogous to the "business and market conditions" provision for Defendant's variable prices where the provisions in these cases specified wholesale costs as part of the calculation, Landau, supra, 223 F. Supp.3d at 406; Steketee v. Viridian Energy, Inc., No. 15-585 (D. Conn. Apr. 14, 2016) (Docket No. 27, Pl. Atty. Decl., Ex. 1, Steketee Tr. at 2-3); Sanborn v. Viridian Energy, Inc., No. 14-1731 (D. Conn. Apr. 1, 2015) (id., Ex. 3, Sanborn Tr. at 3); Fritz v. North Am. Power & Gas, LLC, No. 14-634 (D. Conn. Jan. 29, 2015) (id., Ex. 4, Fritz Tr. at 2). In Landau, plaintiff Steven Landau alleged that associates from defendant represented that he would

enjoy lower rates than offered by utility PECO and that he would never have to worry about defendant suddenly increasing rates, Landau, supra, 223 F. Supp. 3d at 406. The variable rates may fluctuate based upon "wholesale market conditions applicable to the [defendant electric distribution company's] service territory," id. In Steketee, plaintiff amended the Complaint to allege that the variable rate was based on wholesale market conditions and added that a representative of defendant explained to plaintiff that defendant's variable rate would be based on wholesale market conditions (id., Ex. 1, Steketee Tr. at 2-3). In Fritz, defendant's variable market-based rate plan "may increase or decrease to reflect price changes in the wholesale power market" (Docket No. 27, Pl. Atty. Decl. Ex. 4, Fritz Tr. at 2).

In Sanborn, the court noted two statements at issue (id., Ex. 3, Sanborn Tr.). The first statement contained in the contract's terms and conditions provision stated that price may fluctuate from month-to-month "based on wholesale market conditions applicable" to defendant's service area. The second statement is a Massachusetts required disclosure statement that variable rates comes from a variety of factors including the wholesale market. (Id., Ex. 3, Sanborn Tr. at 3-4.)

Although noting that these cases do not present the actual contract texts, Defendant's contract here is like those supply agreements in these cited cases (see id., Ex. 3, Sanborn Tr. at 3-4). In all these contracts the variable rates were set by a combination of operating costs, the costs of purchasing fuel, and a "catch-all of other factors" (id., Sanborn Tr. at 3). As Defendant characterized Sanborn and similar cases, the courts found that the agreements there did not contain specific factors on which the variable rates would be set (Docket No. 32, Def. Reply Memo. at 10 & n.13). The factors

stated in each of these cases provided a basis for those plaintiffs to allege breaches when the defendants set rates at variance with those standards or consistent with objective supply costs. Plaintiff plausibly states a claim where "business and market conditions" has some standard that Defendant had to apply in setting its variable pricing but apparently failed to adhere to in its pricing. Plaintiff also plausibly alleges this breach as natural gas wholesale prices decreased while Defendant's pricing increased (Docket No. 26, Pl. Memo. at 8). Plaintiff also claims Defendant made representations of savings as compared with utility prices for natural gas (Docket No. 1, Compl. ¶ 16) as was alleged in other cases, Landau, supra, 223 F. Supp.3d at 406; Steketee, supra, (Docket No. 27, Pl. Atty. Decl. Ex. 1, Steketee Tr. at 3). In general, Plaintiff plausibly alleges a breach of contract claim.

E. Statutes of Limitations

Under Pennsylvania law, an action upon a contract "must be commenced within four years," 42 Pa. Cons. Stat. § 5525(a)(1). For an action for breach of contract, this limitations period begins to run from the time of breach, Baird v. Marley Co., 537 F. Supp. 156, 157 (E.D. Pa. 1982) (citing cases). With the filing of the Complaint here in April 6, 2018 (Docket No. 1, Compl.), breach of contract claims prior to April 6, 2014, are time barred. Plaintiff did not argue the timeliness of the April 2012 to April 6, 2014, breach of contract claims (either his or the purported class members).

Plaintiff alleged that he signed with Defendant as his natural gas supplier in 2012 (id. ¶ 21). Plaintiff cites PECO and Defendant's rates from April 2016 to February 2018 (id. ¶¶ 21-22). Plaintiff complains the rates charged by Defendant from that period were

higher than PECO's prices (id. ¶¶ 21-22, 24). Plaintiff also alleges a class of similar consumers of Defendant from April 2012 to the present (id. ¶¶ 38-39).

Under Defendant's contract, Defendant charged Plaintiff a fixed introductory rate for a number of months (id. ¶ 18). According to the model gas supply contract Defendant produced in its motion (Docket No. 20, Def. Atty. Decl. Ex. 1), that introductory rate lasted twelve months (id., Definition "Variable Price"). Thus, Plaintiff had claims from variable pricing (the alleged breach of contract) from 2013. Under § 5525, Plaintiff's claims prior to April 6, 2014, are time barred; similarly, the purported class's claims prior to that date also are barred. Defendant's Motion to Dismiss (Docket No. 19) these untimely claims is granted.

Therefore, Defendant's Motion to Dismiss the Second Cause of Action for breach of contract is granted in part, denied in part. The motion is granted for untimely breach of contract claims but denied as to the timely claims.

An action under the UTPCPL has a six-year statute of limitations, 42 Pa. Cons. Stat. Ann. § 5527(b); Morse v. Fisher Asset Mgmt., LLC, 206 A.3d 521, 526 (Pa. Super. Ct. 2019). Plaintiff's Third Cause of Action (and class claims) thus is timely. This Court below address the substance of Plaintiff's statutory claim.

F. Unjust Enrichment (Third Cause of Action)

Under Pennsylvania law, a plaintiff cannot allege an unjust enrichment where there is an existing contract, Hersey Foods, supra, 828 F.3d at 999; Umbelina v. Adams, 34 A.3d 151, 162 n.4 (Pa. Super. Ct. 2011) (Docket No. 20, Def. Memo. at 24-25 (citing cases); see also Docket No. 32, Def. Reply Memo. at 8 & n.8 (citing case)). Plaintiff counters that she is alleging this cause of action in the alternative under Federal

Rule 8(d)(2) (Docket No. 26, Pl. Memo. at 25). Defendant replies that, under Third Circuit precedent, where an express contract governs, a plaintiff may not plead unjust enrichment, even in the alternative, unless 'the validity of the contract itself is actually disputed'" (Docket No. 32, Def. Reply Memo. at 8, quoting Grudkowski v. Foremost Ins. Co., 556 F. App'x 165, 170 n.8 (3d Cir. 2014)). Plaintiff expressly alleged that he entered into a valid contract (id., citing Docket No. 1, Compl. ¶ 57).

Rule 8 allows for alternative pleading; the Second Circuit differs from the Third Circuit in this respect, cf. Kaufman v. Sirius XM Radio, Inc., 474 F. App'x 5, 9 (2d Cir. 2012); U.S. ex rel. Kester v. Novartis Pharm. Corp., No. 11 Civ. 8196 (CM), 2014 WL 4401275, at *12 (S.D.N.Y. Sept. 4, 2014). Under the Erie doctrine, this Court applies Pennsylvania substantive law but federal (here Second Circuit) procedures. The question thus is whether Plaintiff alleges an unjust enrichment claim separate from his contract claim.

Plaintiff's unjust enrichment claim, however, cannot be separated from the contract. Plaintiff alleges in the Third Cause of Action (after repeating and realleging prior allegations acknowledging an express contract, Docket No. 1, Compl. ¶¶ 69, 57)), that "by engaging in the conduct described above, Defendant has unjustly enriched itself and received a benefit beyond what was contemplated in the contract, at the expense of Plaintiff and the Class" (Docket No. 1, Compl. ¶ 70, emphasis supplied). His unjust enrichment claim measures from what Defendant should have been entitled to under the contract. Since he has (and purported class members had) an express contract with Defendant, Plaintiff cannot also allege an unjust enrichment claim. Plaintiff has not

alleged that Defendant had a legal duty independent of that contract in setting its variable rates.

Thus, Defendant's Motion to Dismiss (Docket No. 19) Plaintiff's Third Cause of Action is granted.

G. Pennsylvania Unfair Trade Practices and Consumer Protection Law (First Cause of Action)

Finally, this Court considers dismissal of the First Cause of Action under the Pennsylvania UTPCPL.

As for the element of alleging a deceptive act, Plaintiff alleges deception from the offer made during the initial rescission period, arguing that this offer was a solicitation in which Defendant represented that variable prices would be determined in accordance with business and market conditions (Docket No. 26, Pl. Memo. at 20-21; Docket No. 1, Compl. ¶ 19). He also asserts that the deception was the setting of variable prices untethered to wholesale prices or competitively to other ESCOs (Docket No. 26, Pl. Memo. at 21-22).

By alleging paying higher rates than were charged for natural gas by his former utility or other ESCOs, Plaintiff has alleged a loss of money (see Docket No. 1, ¶¶ 53, 50), either the difference he paid Defendant under the variable price from what Defendant ought to have charged had it applied business and market conditions or the difference from what he paid from his utility's rates (Docket No. 26, Pl. Memo. at 22-23). Plaintiff has not specified either the ESCOs' rates or what Defendant charged from 2013 (after the introductory rate expired) through March 2016 under variable pricing (cf. Docket No. 1, Compl. ¶¶ 21-22) to establish that defendant charged Plaintiff higher rates.

As for Plaintiff's justifiable reliance on Defendant's representation, he alleges deceptive conduct that, but for Defendant's representation about the variable pricing, he would not have contracted with Defendant (id. at 22; Docket No. 1, Compl. ¶¶ 47-53, 66).

As for use of or employment of an illegal method, act or practice, Plaintiff does not allege specific violations of the UTPCPL(see Docket No. 20, Def. Memo. at 17). Both sides now agree Plaintiff alleges wrongful methods of false advertising (Docket No. 20, Def. Memo. at 17; Docket No. 26, Pl. Memo. at 20-21) and fraudulent and deceitful conduct, falling under the Act's catchall provision, 42 Pa. Cons. Stat. § 201-2(4) (xxi) (Docket No. 20, Def. Memo. at 17; Docket No. 26, Pl. Memo. at 19-20, 21-22). He claims this deceptive activity refers to false advertising or solicitation and the catchall of prohibited fraudulent or deceptive conduct. Defendant refutes two theories of deception contending that there is no allegation of false advertising (Docket No. 20, Def. Memo. at 18-21) or fraudulent conduct to meet the catchall provision (id. at 21-23).

1. False Advertising

a. Oral Representation

Plaintiff states that Defendant made a representation that, if he joined Defendant, his natural gas rates would be less than PECO's rates (Docket No. 1, Compl. ¶ 16). After agreeing, Plaintiff argues that he was given a three-day rescission period before the contract went into effect, thus deeming this to be a solicitation regulated by the UTPCPL (Docket No. 26, Pl. Memo. at 20-21). Plaintiff believed that the offer of the proposed agreement represented that Defendant's variable prices would be competitive with other ESCOs, but the actual rates were not (id. at 21).

Defendant argues that Plaintiff fails to allege violation for false advertising (Docket No. 20, Def. Memo. at 17). Defendant claims that the Complaint does not allege a misrepresentation, deception or fraudulent conduct (id.) or make promises regarding the variable pricing (id. at 5-6). The Complaint, however, alleges that Defendant represented to Plaintiff that Defendant would charge lower rates than PECO, his natural gas utility (Docket No. 1, Compl. ¶ 16). Defendant counters that this allegation is parol evidence that is barred pursuant to Pennsylvania law (Docket No. 20, Def. Memo. at 6, 20, 22), see Scardino v. American Int'l Ins. Co., No. CIV.A.07-282, 2007 WL 3243753, at *7-8 (E.D. Pa. Nov. 2, 2007). Defendant denies any representation that under the agreement Defendant would beat utility prices or guarantee financial savings (id.; see Docket No. 20, Def. Atty. Decl., Ex. 1, model contract, at 1, Customer Disclosure Statement).

To allege false advertising as the unlawful method under the Act, Plaintiff has to allege that Defendant's representations were false. Defendant raises threshold objections that the oral representation is barred by Pennsylvania's parol evidence rule and that the agreement is not an advertisement. Courts in Pennsylvania have granted motions to dismiss because of the parol evidence rule, Bernardine v. Weiner, 198 F. Supp. 3d 439, 441, 443-44 (E.D. Pa. 2016). Pennsylvania law bars parol evidence and fraud in the inducement claim based on parol evidence, id. Here, Plaintiff alleges that Defendant represented that its rates would be less than PECO, inducing Plaintiff to sign up. This is parol evidence and fails to state a claim. Even if this oral representation remains, Plaintiff has not alleged that variable pricing after the introductory price expired.

Furthermore, the Eastern District of Pennsylvania held that representations by individual employees or agents of a defendant are not advertisements under the UTPCPL

and cannot constitute a violation of that act, Seldon, supra, 647 F. Supp. 2d at 466; see Thompson v. The Glenmede Trust Co., No. 04428, 2003 WL 1848011, at *1 (Pa. Ct. Com. Pl. Feb. 18, 2003). The court also noted that 73 Pa. Cons. Stat. § 201-2(4)(ix) false advertising requires allegation of intent, Seldon, supra, 647 F. Supp.2d at 466; Karlsson v. FDIC, 942 F. Supp. 1022, 1023 (E.D. Pa. 1996), aff'd, 107 F.3d 862 (3d Cir. 1997). Plaintiff here, however, has not alleged that Defendant intentionally engaged in false advertising; the Complaint merely alleges that Defendant intentionally concealed its pricing strategy while representing that it would base variable prices on business and market conditions (cf. Docket No. 1, Compl. ¶ 50).

Finally, Plaintiff's alleged representation is threadbare, merely alleging that Defendant's unnamed representative solicited Plaintiff representing lower rate than PECO (Docket No. 1, Compl. ¶ 16). This is similar to the allegations rejected by the United States District Court for the Western District of Pennsylvania in Corsale v. Sperian Energy Corp., 412 F. Supp. 3d 556, 563 (W.D. Pa. 2019). In Corsale, plaintiffs alleged that Sperian Energy Corp. advertised that it offered "competitive" rates; the Western District of Pennsylvania held this was threadbare and the vague claim of competitive rates was nonactionable puffery, id. Therefore, Defendant's motion to dismiss the First Cause of Action for claims under Complaint ¶ 16 is granted.

b. Cancellation Provision Making Contract an Advertisement

The second representation or solicitation alleged is the offered agreement during a recessionary period (see Docket No. 1, Compl. ¶ 17). Plaintiff argues that its terms was an advertisement until it came into effect when Plaintiff did not reject the agreement. According to the model Natural Gas Customer Agreement furnished by Defendant, the

customer could cancel that agreement up to three business days after receipt of the agreement without penalty (Docket No. 20, Def. Atty. Decl. Ex. 1, at 1). The agreement repeats in all capital letters "THE CUSTOMER MAY RESCIND THIS AGREEMENT AT ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY AFTER RECEIPT OF THIS AGREEMENT WITHOUT PENALTY" (id. (emphasis in original)).

Plaintiff argues that there was thus no contract for that three-day period because of his ability to rescind without penalty, concluding that the document he received was a solicitation or advertisement until those three days passed (Docket No. 26, Pl. Memo. at 21). Plaintiff cites for example In re Estate of Rosser, 821 A.2d 615, 623 (Pa. Super. Ct. 2003), where whether a contract had consideration or mutuality of obligation was necessary to determine if a decedent's conveyance could be voided by the survivors. To the contrary, Plaintiff and Defendant had mutuality of obligations even during the three-day rescissionary period. Plaintiff had to act to cancel the contract within those three days to terminate the agreement without penalty while Defendant still had to supply natural gas. Plaintiff has not cited other cases where the UTPCPL applied to the recessionary period of a contract by deeming that to be a solicitation or advertisement. He also has not cited authorities that render an agreement like the one in this case illusory merely because a party can opt out after a brief initial period. Pennsylvania law recognizes binding contracts that contain cancellation provisions, e.g., Samuel Williston, Williston on Contracts § 7:13 (2020), recognizing valid agreement with provision that one party may cancel provided the method to do so is limited. Reservation, for example, of right to cancel upon written notice or after a definite period after giving notice, "there is consideration for the promisor's promise, despite the fact that the promisor may in fact be

able to avoid its obligation," id.; see also Philadelphia Ball Club v. Lajoie, 202 Pa. 210, 51 A. 973 (1902). That an agreement contains this initial cancellation provision does not invalidate it as a contract and render it into a mere offer.

This Court has not found precedent under the UTPCPL that considered an agreement as an advertisement. This Court agrees with the Eastern District of Pennsylvania in Price, supra, 2018 WL 1993378, at *5 (see also Docket No. 20, Def. Memo. at 21), that "to the extent Plaintiffs rely on the sales agreement itself for their claim, that claim is duplicative of the breach of contract claim." The distinction Plaintiff argues from the lack of a recessionary period makes little difference; as discussed above, Plaintiff entered the contract with a recessionary period. A claim that this agreement is also advertising merely alleges a duplicative claim under common law and the UTPCPL.

Thus, Defendant's Motion to Dismiss (Docket No. 19) so much of the Complaint alleging the contract was advertising in violation of the UTPCPL is granted.

2. UTPCPL's Catchall for Fraudulent and Deceptive Practices and Federal Rule 9 Pleading Requirements

Defendant argues that Plaintiff has not alleged fraud and deception under the UTPCPL with specificity as required by Federal Rule of Civil Procedure 9(b) (Docket No. 20, Def. Memo. at 22-23). The parties dispute whether Plaintiff alleged fraud and thus under Rule 9(b) needed to plead fraud with particularity. Defendant argues that violation of the UTPCPL needs to be alleged with particularity (Docket No. 20, Def. Memo. at 18 n.4, citing, e.g., Dolan v. PHI Variable Ins. Co., No. 3:15-CV-01987, 2016 WL 6879622, at *5 (M.D. Pa. Nov. 22, 2016) (Rule 9(b) heightened specificity extends to all claims that sound in fraud, citations to District of New Jersey case omitted). The court in

Dolan held that Rule 9(b) applied to state fraud claims including alleged violations of the UTPCPL, id.

Plaintiff counters that under Landau, supra, 223 F. Supp. 3d at 418, pleading under the UTPCPL need not be particularized (Docket No. 26, Pl. Memo. at 20 n.8). The court in Landau considered the amendment to the catchall provision adding deceptive conduct and the court held that pleading deceptive conduct only required Rule 8(a) normal pleading and not the heightened fraud pleading of Rule 9(b), 223 F. Supp. 3d at 418.

An Erie doctrine issue arises whether Pennsylvania law (here, as construed by federal courts in that Commonwealth) applies or does this Court's (or the Second Circuit's) procedural caselaw applies on the particularity issue. Both sides here cite federal decisions from Pennsylvania. Under the Erie doctrine, while state law governs the substantive issues, procedural law in diversity cases is federal procedures, e.g., Loreley Financing (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC, 797 F.3d 160, 182 n.14 (2d Cir. 2015); NCC Sunday Inserts, Inc. v. World Color Press, Inc., 692 F. Supp. 327, 330 (S.D.N.Y. 1988) (applying Rule 9(b) to Connecticut Unfair Trade Practices Act claim, "while state law governs substantive issues of state law raised in federal court, it is federal law which governs procedural issues of state law raised in federal court, and Rule 9(b) is a procedural rule"). Where this Court or the Second Circuit has ruled on a procedure, this Court is bound to apply it. Absent that precedent, this Court reviews the decisions of other districts and may adopt its rationale.

As of 2016, the Second Circuit has not held that Rule 9(b) applies to similar state unfair trade practices laws, see L.S. v. Webloyalty.com, Inc., 673 F. App'x 100, 105 (2d Cir. 2016) (summary Order), where the court noted that Connecticut law did not require

a plaintiff to allege or prove fraud for violations of the Connecticut Unfair Trade Practices Act (or "CUTPA"), see Willow Springs Condo. Ass'n, Inc. v. Seventh BRT Dev. Corp., 245 Conn. 1, 43, 717 A.2d 77, 100 (1998). Acknowledging there that a CUTPA violation may overlap with common law claims, the Second Circuit and Connecticut courts recognize that "to the extent that they diverge, dismissal of a plaintiff's CUTPA claim is not warranted unless the facts as alleged do not independently support a CUTPA claim," L.S., supra, 673 F. App'x at 105. The Second Circuit then stated "we are doubtful, even assuming Rule 9(b) applies to certain CUTPA claims, Rule 9(b)'s particularity requirement would apply to a CUTPA claim premised" on the facts alleged, id., concluding that those alleged facts nevertheless would satisfy Rule 9(b) pleading requirements, id.

Magistrate Judge Hugh Scott of this District once found that an allegation under the New York General Business Law was not pled, Navitas LLC v. Health Matters Am., Inc., No. 16CV699, 2018 WL 1317348, at *19-20 (W.D.N.Y. Mar. 14, 2018) (Report & Rec), but did not require that pleading with particularity under Rule 9(b). There, co-defendant Bio Essentials asserted crossclaims for fraud and presumably for violation of New York General Business Law § 349 against defendant Health Matters America but not expressing alleging the claim under that statute, id. at *19, 3. Health Matters then moved to dismiss some of the crossclaims, including those alleging fraud and unfair business practices, id. at *4, 14-15. In two crossclaims, Bio Essentials alleged Health Matters false statements damaged Bio Essentials either as unfair trade practices or as fraudulent statements, id. at *14-15. Given Bio Essentials' relatively vague pleading, Health Matters argued that the fraud and unfair trade practice crossclaims violated Rule 9(b), id. at *15-16. Bio Essentials argued that only its fraud crossclaim required

pleading under Rule 9(b), id. at *17. Magistrate Judge Scott then applied Rule 9(b) to the fraud crossclaim while recommending dismissal of the unfair practices crossclaims for failure to allege the elements of General Business Law § 349 claims, id. at *17-19, quoting Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, 85 N.Y.2d 20,24-25, 623 N.Y.S.2d 529, 532 (1995).

Both L.S. and Navitas skirt applying Rule 9(b) particularity for state unfair trade practices actions, recognizing that they are distinct from common law fraud claims that would require particular pleading. Deceptive acts under the UTPCPL's catchall provision has been held not to be fraud and could be plead under Rule 8(a), Landau, supra, 223 F. Supp. 3d at 418. But the UTPCPL catchall refers to "engaging in fraudulent or deceptive conduct," 73 Penn. Cons. Stat. § 201-2(4)(xxi), which includes fraud. Therefore, so much of Plaintiff's catchall claim that alleges fraudulent conduct requires particular allegation under Rule 9(b), see 5A Charles A. Wright, Arthur R. Miller & A. Benjamin Spencer, Federal Practice and Procedure § 1297, at 63-64 (Civil 2018).

Even if Rule 9(b) is not required for allegations under the UTPCPL, Twombly and Iqbal require pleading details to allege a plausible claim, see Price v. Foremost Indus., Inc., Civil Action No.17-00145, 2018 WL 1993378, at *5 (E.D. Pa. Apr. 26, 2018) (plaintiffs' alleging UTPCPL violations stated misrepresentations that were "devoid of the details that Twombly and Iqbal require").

The allegations here, however, do not meet the plausibility standard of Twombly and Iqbal without regard to Rule 9(b) particularization, id. It is not clear what the deceptive act is here. The agreement ultimately gave Defendant discretion to set its variable pricing with one stated factor but allowing discretion to set it based upon "business and market

conditions". Plaintiff alleges his understanding of what "business and market conditions" is (or ought to have been) but he does not allege that Defendant represented that this understanding was what it meant.

Defendant's Motion to Dismiss (Docket No. 19) the First Cause of Action under the UTPCPL is granted.

H. How This Case Differs from Nieves v. Just Energy New York Corp.

Since Plaintiff's counsel in this case also represented Malta Nieves and the same defense counsel represent the Just Energy Defendants in both cases, a comparison of the result here and in Nieves is in order. Defendant moved to transfer this case to the Western District of New York because of the then-pending Nieves action was before this Court. Factually, the cases are distinguishable. First, the language of the variable terms differs between this case and Nieves. In Nieves, Just Energy New York ("Just Energy") set the variable electricity rate solely based on "business and market conditions" without that phrase being defined or giving specific examples of those conditions. This Court held that Just Energy had unfettered discretion in setting these rates without reference to wholesale electricity rates or competitors' charges, Nieves, supra, 2020 WL 6803056, at *4. Malta Nieves did not allege representations by Just Energy that she would pay less than the electrical utility; Nieves merely claimed that Just Energy represented that she would save money, id., at *2.

Second, Nieves arose in New York and argued breach of contract and other claims under New York law. Pennsylvania law expressly required natural gas suppliers to specify the basis for variable pricing while New York law does not. Third, the energy supplied differed, with Nieves involving electricity. There was no express breakdown of

the cost of electrical supply, transmission, or storage as was in Defendant's gas supply contract with Jordet in this case. Fourth, both cases involve different corporate Defendants that might be affiliates but each Defendant was incorporated and had principal place of business in different jurisdictions.

The crucial difference between Nieves and this case is the variable terms in the supply contracts. Defendant here listed some (but not all) elements toward establishing business and market conditions in variable pricing, whereas Just Energy in Nieves has more open concept of that phrase "business and market conditions."

IV. Conclusion

Plaintiff's understanding of what a reasonable customer might expect is not the terms of the contract he signed with Defendant. That agreement gave Defendant some discretion to set variable rates, but expressly included natural gas costs as factors for business or market conditions. As summarized in wholesale gas costs (as Plaintiff argues), this is an element of Defendant's pricing but not necessarily the entirety of the business and market conditions.

Deregulation of natural gas supply rates moved the marketplace from regulated monopoly (rates set by PECO, for example, as approved by the Pennsylvania regulators) to those set in the marketplace. Defendant, as an ESCO, did not have its rates set by a public agency or by its competitors (including utilities like PECO). But Pennsylvania law in establishing deregulation required natural gas suppliers to furnish information for the basis of their pricing to have informed consumers.

Defendant's Motion to Dismiss (Docket No. 19) is granted in part, denied in part. Defendant's Motion to Dismiss the First Cause of Action for violation of the Pennsylvania

Unfair Trade Practices and Consumer Protection Law is granted for both the advertising and fraudulent and deceptive conduct violations. Defendant's Motion to Dismiss (id.) the Second Cause of Action for breach of contract is denied. Its Motion to Dismiss (id.) the Third Cause of Action for unjust enrichment is granted. Defendant shall answer the surviving Second Cause of Action within fourteen (14) days after entry of this Decision and Order. This Court then will refer this case to a Magistrate Judge for conducting pretrial proceedings.

V. Orders

IT HEREBY IS ORDERED, that Defendant's Motion to Dismiss (Docket No. 19) is GRANTED in part, DENIED in part. Defendant shall answer the surviving Causes of Action within fourteen (14) days after entry of this Decision and Order. This Court will refer this case to a Magistrate Judge for pretrial proceedings.

SO ORDERED.

Dated: December 7, 2020
Buffalo, New York

s/William M. Skretny
WILLIAM M. SKRETNY
United States District Judge

CLAIM DOCUMENTATION

I. Relevant Background and Summary of Claim Documentation

Claimants Fira Donin, Inna Golovan, and Trevor Jordet have pending proposed class action lawsuits against the Just Energy Entities in two United States Federal District Courts. Claimants Donin's and Golovan's case is captioned *Donin et al. v. Just Energy Group Inc. et al.*, No. 17 Civ. 5787 (WFK) (SJB) (E.D.N.Y.) (hereafter "*Donin* Dkt.") and Claimant Jordet's case is captioned *Jordet v. Just Energy Solutions, Inc.*, No. 18 Civ. 953 (WMS) (W.D.N.Y.) (hereafter "*Jordet* Dkt"). Fira Donin, Inna Golovan, and Trevor Jordet, as well as the other individuals who have retained undersigned Class Counsel to sue the Just Energy Entities on a class-wide basis are referred to hereafter as the "Representative Plaintiffs."[1, 2]

Pursuant to the expert Affidavit of Dr. Serhan Ogur (the "Expert Report"), the Representative Plaintiffs hereby submit a general unsecured claim of **US$3,662,444,442**, which reflects the Just Energy Entities' liability to their U.S. customers for *inter alia* breaching the pricing terms of their residential and commercial contracts to supply electricity and gas. The Representative Plaintiffs' damages calculations are derived from the difference between the prices the Just Energy Entities were contractually bound to charge U.S. customers as compared to the prices ultimately charged. A true and correct copy of the Expert Report is attached hereto as **Exhibit 1**. In support of their calculations, the Representative Plaintiffs provide the following chart summarizing their class-wide damages calculations.

Class-Wide Damages Calculations	
U.S. Residential Electric Damages	$1,144,609,092
U.S. Residential Gas Damages	$717,711,010
U.S. Commercial Electric Damages	$449,392,725
U.S. Commercial Gas Damages	$68,624,767
Total:	**$2,380,337,594**

In addition to damages of US$2,380,337,594, the Representative Plaintiffs calculate that US$**1,282,106,848** is owed to them as pre-judgment interest, which amount has been added to their damages calculation to make up the remainder of their claim.[3]

[1] Those other individuals are: New York resident Todd Orsi; California residents Danielle Greer, Hannad Naveed, and Naveed Yamin; Michigan residents Nicholas Aldridge, Ariel Meserva, Jessica Smith Mixon, and Vernon Van Halm; and Texas residents Kadidja Fofana and Lisa Widner.

[2] Please note that while the Representative Plaintiffs are submitting proofs of claim for each of the two pending proposed class actions (*Donin* and *Jordet*), they are submitting identical claim documentation and amounts for each case.

[3] U.S. state law governs statutory pre-judgment interest. *Schipani v. McLeod*, 541 F.3d 158, 164 (2d Cir. 2008). The class actions challenge the Just Energy Entities' conduct in 11 jurisdictions— California,

Footnote continued on next page.

By way of brief background, on October 3, 2017, Fira Donin and Inna Golovan filed proposed class action lawsuits on behalf of themselves and all other U.S. customers alleging *inter alia* that the Just Energy Entities breached their contractual obligations to base their variable gas and electricity rates on "business and market conditions," breached their contractual obligation to charge a specified energy rate, and breached the implied covenant of duty of good faith and fair dealing. *See, e.g.*, *Donin* Complaint ¶¶ 26-35, attached hereto as **Exhibit 2**. On September 24, 2021, Judge William F. Kuntz of the U.S. District Court for the Eastern District of New York denied the Just Energy Entities' motion to dismiss all of the aforementioned class action claims on behalf of all U.S. customers, ruling *inter alia* that Plaintiffs Donin and Golovan had adequately alleged that the Just Energy Entities breached their contractual obligation to charge market-based rates, breached their contractual obligation to charge a specified energy rate, and breached the implied covenant of good faith and fair dealing. Decision & Order at 3, 12–15, *Donin* Dkt. No. 111 attached hereto as **Exhibit 3.**

Similarly, on April 6, 2018, Trevor Jordet filed class action claims on behalf of himself and all other U.S. customers alleging *inter alia* that the Just Energy Entities breached their contractual obligations to base their variable gas rates on "business and market conditions." *See, e.g.*, *Jordet* Complaint ¶¶ 19-37 attached hereto as **Exhibit 4**. On December 7, 2020, Judge William M. Skrenty of the U.S. District Court for the Western District of New York denied the Just Energy Entities' motion to dismiss the aforementioned class action breach of contract claim on behalf of all U.S. customers, holding that "'business and market conditions' has some standard that [the Just Energy Entities] had to apply in setting [their] variable pricing but apparently failed to adhere to in [their] pricing." *See* Decision & Order at 18, *Jordet* Dkt. No. 43, attached hereto as **Exhibit 5.**

As set forth on pp. 18-19 below, the Representative Plaintiffs' claims encompass the damages of **millions** of U.S. Just Energy customers. These claims are founded in well-established principals of contract, are buttressed by a legion of U.S. case law, regulation, and statue. The claims also represent paradigmatic class action claims that are readily certifiable (and have been certified on four separate occasions), are pleaded in tandem with increasing regulatory scrutiny (including outright bans) of the exact practices the Just Energy Entities employed throughout the U.S., and follow in the footsteps of at least **six** regulatory actions against the Just Energy Entities.

Delaware, Illinois, Massachusetts, Maryland, Michigan, New Jersey, New York, Ohio, Pennsylvania, and Texas. Each of these jurisdictions award pre-judgment interest as a matter of right. *See generally Allapattah Servs., Inc. v. Exxon Corp.*, 157 F. Supp. 2d 1291, 1311–12 (S.D. Fla. 2001), *aff'd*, 333 F.3d 1248 (11th Cir. 2003). The Representative Plaintiffs here have applied the forum state's (New York) pre-judgment interest rate (9% per annum) as well as the forum law on the date from which to calculate interest. New York courts usually pick the midpoint of the class period as the period from which to calculate pre-judgment interest, or any other reasonable date as "[t]he choice of the date from which to compute prejudgment interest is left to the discretion of the court." *Chuchuca v. Creative Customs Cabinets Inc.*, No. 13 Civ. 2506 (RLM), 2014 WL 6674583, at *16 (E.D.N.Y. Nov. 25, 2014)(collecting cases); *see also Marfia v. T.C. Ziraat Bankasi*, 147 F.3d 83, 91 (2d Cir. 1998) ("New York law leaves to the discretion of the court the choice of whether to calculate prejudgment interest based upon the date when damages were incurred or 'a single reasonable intermediate date,' which can be used to simplify the calculation.").

II. The Class Action Claims Are Strong and Supported by Ample Precedent

A. U.S. Courts Regularly Hold That ESCOs like Just Energy Are Liable When They Promise to Charge Market-Based Rates but Actually Charge Rates That Are Much Higher

As a result of deregulation in states across the United States, consumers and businesses can purchase natural gas and electricity through third-party suppliers while continuing to receive delivery of the energy from their existing public utilities. These third-party energy suppliers are known as energy service companies, or "ESCOs."

ESCOs like the Just Energy Entities play a middleman role: they purchase energy directly or indirectly from energy producers and then sell that energy to end-user consumers. However, ESCOs do not deliver energy to consumers. Rather, the companies that produce energy deliver it to consumers' utility companies, which in turn deliver it to the end-user. ESCOs merely buy gas and electricity and then sell that energy to end-users with a mark-up. Thus, ESCOs are essentially brokers and traders: they neither make nor deliver gas or electricity, but merely buy energy from a producer and re-sell it.

If a customer switches to an ESCO, the customer's existing utility continues to bill the customer for both the energy supply and delivery costs. The only difference to the customer is whether the customer's energy supply rate is set by the ESCO or the utility.

Numerous courts have held that consumers may recover against ESCOs like Just Energy who promise to base their rates on business and market conditions when plaintiffs show that the defendant ESCO's rate is higher than that of public utilities or where they show that rates do not otherwise change in a manner commensurate with market conditions. *See, e.g.*, *Burger v. Spark Energy Gas, LLC*, 507 F. Supp. 3d 982, 990 (N.D. Ill. 2020) ("Burger[] . . . alleg[es] that the Terms of Service provided that the variable rate 'may vary based on market conditions' and that [the ESCO] exercised its discretion contrary to consumers' reasonable expectations by setting a variable rate that did not fluctuate in connection with market conditions. Therefore . . . Burger can proceed on her contract claim concerning the variable rate based on a breach of the implied duty of good faith and fair dealing."); *Mirkin v. Viridian Energy, Inc.*, No. 15-1057, 2016 WL 3661106, at *8 (D. Conn. July 5, 2016) (holding that the plaintiffs plausibly alleged breach of contract where the contract provided that variable rates will be "based on wholesale market conditions" and variable rate failed to track wholesale market rates) (citing *Sanborn v. Viridian Energy, Inc.*, No. 14-1731, and *Steketee v. Viridian Energy, Inc.*, No. 15-585); *Melville v. Spark Energy, Inc.*, No. 15-8706 (RBK/JS), 2016 WL 6775635, at *3 (D.N.J. Nov. 15, 2016) ("Here, the [contract] states that the flex-rate plan uses a rate that 'may vary according to market conditions.' Plaintiffs argue that rates charged . . . were not market-based and, in support, list the rates charged by Spark in comparison to [the utility] during several months from 2013 to 2014. . . . [T]he Court finds that Plaintiffs have proffered sufficient evidence to state a claim for relief . . . Plaintiffs provided comparisons of rates offered by Spark to those of a competing energy provider. Such evidence supports the allegation that Spark's prices were untethered to those of the market at large."); *Oladapo v. Smart One Energy, LLC*, No. 14-7117, 2016 WL 344976, at

*4 (S.D.N.Y. Jan. 27, 2016) (holding that "the fact that Smart One's rates consistently rose over time, while those set by [the local utility] fluctuated, indicates that Smart One was not setting its rates in response to 'changing gas market conditions,' as it represented[.]"); *Landau v. Viridian Energy PA LLC*, 223 F. Supp. 3d 401, 408-09 (E.D. Pa. 2016) (holding that where a plaintiff introduces evidence demonstrating that "[an ESCO's] rates increased or stayed the same even when the average wholesale market price for the region decreased[,]" the plaintiff has sufficiently alleged a breach of contract claim); *Stanley v. Direct Energy Servs., LLC*, 466 F. Supp. 3d 415, 426 (S.D.N.Y. 2020) (holding that "there is a reasonable contract interpretation that 'Market' meant that Defendant's variable rate would be tethered to some degree to supply costs or to competitors' rates . . . upward variation from local utility rates may also demonstrate how Defendant's consumer rates are materially disconnected from their supply costs."); *Edwards v. N. Am. Power & Gas, LLC*, 120 F. Supp. 3d 132, 42-43 (D. Conn. 2015) (sustaining claim where contract promised "[t]he variable rate may increase or decrease to reflect the changes in the wholesale power market" and the plaintiff alleged that "the rates [the ESCO] charged were significantly higher than the wholesale market rate and did not always increase or decrease when the wholesale market rates did."); *Chen v. Hiko Energy, LLC*, No. 14-1771, 2014 WL 7389011, at *6 (S.D.N.Y. Dec. 29, 2014) (where contract provided that variable rate would be based on wholesale costs and other market-related conditions, plaintiffs plausibly alleged that the ESCO "breached . . . by charging them 'a rate that was not based on the factors upon which the parties agreed the rate would be based'" and noting the same disconnect between the ESCO's rates and utility rates alleged here).

In both pending class actions, the Representative Plaintiffs can prove that Just Energy's rates were substantially higher than utility rates and not commensurate with market conditions. *See* Compl. at 44-47, *Donin* Dkt. No. 17 (showing Just Energy's rate was typically between 30% and 50% higher than the utility rate); Compl. at 6-8, *Jordet* Dkt. No. 1 (showing Just Energy's rate was frequently more than double the utility rate and that its rate increased when wholesale costs declined).

B. Courts Regularly Certify Classes of Consumers Against ESCOs That Charge Rates Higher Than Allowed under the ESCOs' Customer Contracts

Four courts have addressed a contested motion to certify a class of customers of ESCOs like Just Energy who were overcharged under the terms of their written customer agreements, and each held that certification was appropriate. *See Bell v. Gateway Energy Services Corp.*, No. 31168/2018 (Rockland Cnty. Super. Ct. Jan. 8, 2021), NYSCEF Doc. No. 152; *BLT Steak LLC v. Liberty Power Corp, L.L.C.*, No. 151293/2013 (N.Y. Cnty., Super. Ct Aug. 14, 2020), NYSCEF Doc. No. 376 (a case in which the plaintiff was represented by FBFG, one of the law firms representing the Representative Plaintiffs); *Claridge v. N. Am. Power & Gas, LLC*, No. 15-1261, 2016 WL 7009062 (S.D.N.Y. Nov. 30, 2016) (a case in which the plaintiff was represented by FBFG); *Roberts v. Verde Energy, USA, Inc.*, No. X07HHDCV156060160S, 2017 WL 6601993 (Conn. Super. Ct. Dec. 6, 2017), *aff'd*, 2019 WL 1276501 (Conn. Super. Ct. Feb. 1, 2019).[4]

[4] Numerous other courts have followed suit in the settlement context. *See, e.g.*, *Edwards v. N. Am. Power & Gas, LLC*, 2018 WL 3715273, at *6–8 (D. Conn. Aug. 3, 2018) (granting final approval of settlement class, finding the requirements for class certification satisfied); *Silvis v. Ambit Energy L.P.*, 326 F.R.D. 419, 428–29 (E.D. Pa. 2018) (same); *Hamlen v. Gateway Energy Services Corp*., Case No. 16-3526, ECF

Footnote continued on next page.

Indeed, there are few cases better suited for class certification than the instant actions. The Representative Plaintiffs' claims, like those of each Class Member, arise out of uniform misrepresentations regarding the pricing methodology for Just Energy's variable rate made in its standard customer agreements. Additionally, not only are the misrepresentations concerning Just Energy's variable rate uniform, but the resultant injury to Class Members is also uniform because when Just Energy sets its variable rates each month, it uses standardized procedures within each utility region. Thus, the proposed Class is easily amenable to certification.

III. The Increasing Regulatory Denunciation of Just Energy's Pricing Practices Strongly Supports the Class Action Claims

Almost all of the states in the U.S. that deregulated their energy markets did so in the mid-to-late 1990s. This wave of deregulation was pushed by then-corporate superstar Enron. For example, in December 1996 when energy deregulation was being considered in Connecticut, Enron CEO Jeffrey Skilling, dubbed "[t]he most aggressive proponent" of deregulation, said:

> Every day we delay [deregulation], we're costing consumers a lot of money . . . . It can be done quickly. The key is to get the legislation done fast.[5]

Operating under this concocted sense of urgency, states in the U.S. that deregulated suffered serious consumer harm. For example, in 2001, forty-two states had started the deregulation process or were considering deregulation. Today, the number of full or partially deregulated U.S. states has dwindled to only seventeen and the District of Columbia. Even within those states, several have recognized deregulation's potential harm to everyday consumers and thus only allow large-scale consumers to purchase from ESCOs.

Responding to shocking energy prices, many key players that supported deregulation now regret the role they played. For example, reflecting on Maryland's deregulation experience, a Maryland Senator commented that "[d]eregulation has failed. We are not going to give up on re-regulation till it is done."[6]

A Connecticut leader who participated in that state's foray into energy deregulation was similarly regretful:

No. 141 (S.D.N.Y. Sept. 13, 2019) (same); *In re Hiko Energy LLC Litig.*, Case No. 14-1771, ECF No. 93 (S.D.N.Y. May 9, 2016) (same); *Wise v. Energy Plus Holdings, LLC*, Case No. 11-7345, Dkt. No. 75 (S.D.N.Y. Sept. 17, 2013) (same).

[5] Keating, Christopher, "Eight Years Later . . . 'Deregulation Failed,'" *Hartford Courant*, Jan. 21, 2007.

[6] Hill, David, "State Legislators Say Utility Deregulation Has Failed in its Goals," *The Washington Times*, May 4, 2011.

> Probably six out of the 187 legislators understood it at the time, because it is so incredibly complex . . . . If somebody says, no, we didn't screw up, then I don't know what world we are living in. We did.[7]

As a result of the widespread improper pricing practices by ESCOs like Just Energy, more than a decade ago states like New York began enacting remedial legislation meant to "establish[] important consumer safeguards in the marketing and offering of contracts for energy services to residential and small business customers."[8] As the drafters of this legislation noted, New York's ESCO Consumers Bill of Rights, codified as G.B.L. Section 349-d, in 2010 sought to end the exact type of conduct that harmed the Just Energy Entities' U.S. customers:

> Over the past decade, New York has promoted a competitive retail model for the provision of electricity and natural gas. Consumers have been encouraged to switch service providers from traditional utilities to energy services companies. Unfortunately, consumer protection appears to have taken a back seat in this process.
>
> * * *
>
> High-pressure and misleading sales tactics, onerous contracts with unfathomable fine print, short-term "teaser" rates followed by skyrocketing variable prices—many of the problems recently seen with subprime mortgages are being repeated in energy competition.[9]

State regulators have for years also denounced predatory pricing practices like those challenged in the class actions. For example, in 2014 the New York's Public Service Commission (the "NYPSC") declared that New York's retail energy markets were plagued with "marketing behavior that creates and too often relies on customer confusion."[10] The NYPSC further noted "it is extremely difficult for mass market retail energy customers to access pricing information relevant to their decision to commence, continue or terminate service through an ESCO."[11] The NYPSC concluded as follows:

> [A]s currently structured, the retail energy commodity markets for residential and small nonresidential customers cannot be considered

[7] Keating, *supra*.

[8] ESCO Consumers Bill of Rights, New York Sponsors Memorandum, 2009 A.B. 1558, at 1 (2009).

[9] *Id*. at 3–4.

[10] CASE 12-M-0476, Order Taking Actions to Improve the Residential and Small Nonresidential Retail Access Markets, at 4 (Feb. 25, 2014).

[11] *Id*. at 11.

> to be workably competitive. Although there are a large number of suppliers and buyers, and suppliers can readily enter and exit the market, the general absence of information on market conditions, particularly the price charged by competitors, is an impediment to effective competition . . . . [12]

The NYPSC's consumer complaint data confirms this. The number of deceptive marketing allegations against ESCOs far exceed the combined number of complaints submitted regarding all other utilities in New York, including the lightly regulated telecommunications industry.

Many NYPSC complaints concern variable rate pricing like that practiced by the Just Energy Entities. Under this pricing practice, during an initial teaser or fixed rate period, the customer's energy supply costs are more or less as advertised, but after the initial period expires, instead of switching the consumer back to the utility, the ESCO uses customer inaction to substantially increase the price without further notice or explanation as to how the new rate is determined.

The conduct of ESCOs like the Just Energy Entities has been devastating to consumers across the United States. For example, "[a]ccording to the data provided by [New York's] utilities, the approximately two million New York State residential utility customers who took commodity service from an ESCO collectively paid almost $1.2 billion more than they would have paid if they purchased commodity from their distribution utility during the 36-months ending December 31, 2016."[13] "Additionally, small commercial customers paid $136 million more than they would have paid if they instead simply remained with their default utilities for commodity supply for the same 36-month period."[14] Combining these two groups, New York consumers have been "'overcharged' by over $1.3 billion dollars over this time period."[15]

Based on the flood of consumer complaints, negative media reports, and data demonstrating massive overcharges, the NYPSC announced in December 2016 an evidentiary hearing to consider primarily whether ESCOs should be "completely prohibited from serving their current products" to New York residential consumers.[16] Then, on December 16, 2016, the NYPSC permanently prohibited ESCOs from serving low-income customers, because of "the persistent ESCO failure to address (or even apparently to acknowledge) the problem of overcharges to [low income] customers . . . ."[17]

[12] *Id*. at 10.

[13] CASE 12-M-0476, Department of Public Service Staff Unredacted Initial Brief, at 2 (Mar. 30, 2018).

[14] *Id.* at 3.

[15] *Id.*

[16] CASE 12-M-0476, Notice of Evidentiary and Collaborative Tracks and Deadline for Initial Testimony and Exhibits, at 3 (December 2, 2016).

[17] CASE 12-M-0476, Order Adopting a Prohibition On Service To Low-Income Customers By Energy Services Companies, at 3 (Dec. 16, 2016).

Following the first part of the evidentiary hearing announced in December 2016, on March 30, 2018, NYPSC staff announced the following conclusions about ESCOs:

> [A]s the current retail access mass markets are structured, customers simply cannot make fully informed and fact-based choices on price . . . since the terms and pricing of the ESCO product offerings are not transparent to customers. For variable rate products this is due, in large part, to the fact that ESCOs often offer "teaser rates" to start, and after expiration of the teaser rate, the rate is changed to what is called a "market rate" that is not transparent to the customer, and the contract signed by the customer does not provide information on how that "market rate" is calculated.[18]
>
> * * *
>
> ESCOs take advantage of the mass market customers' lack of knowledge and understanding of, among other issues, the electric and gas commodity markets, commodity pricing, and contract terms (which often extend to three full pages), and in particular, the ESCOs' use of teaser rates and "market based rate" mechanisms that customers are charged after the teaser rate expires. In fact, ESCOs appear to be unwilling to provide the necessary product pricing details as to how those "market based rates" are derived to mass market customers in a manner that is transparent so as to enable an open and competitive marketplace where customers can participate fairly and with the necessary knowledge to make rational and fully informed decisions on whether it is in their best interest to take commodity service from their default utility, or from a particular ESCO among competing but equally opaque choices.[19]

In response to these criticisms, the ESCOs claimed that their marketing and overhead costs explain the overcharges, but NYPSC staff found that these costs do "not justify the significant overcharges."[20] Likewise, when the ESCOs claimed that their provision to consumers of so-called value-added products such as light bulbs and thermostats contributed to their excessive rates, NYPSC staff found that "these sorts of value-added products is at best de minimis and does not explain away the significantly higher commodity costs charged by so many ESCOs."[21]

[18] CASE 12-M-0476, Department of Public Service Staff Unredacted Initial Brief, at 41–42 (Mar. 30, 2018).

[19] *Id.* at 86 (citations omitted).

[20] *Id.* at 37.

[21] *Id.* at 87.

Similarly, the NYPSC staff found that the "claim that at least a portion of the significant delta between ESCO and utility charges is explained by ESCOs offering renewable energy is disingenuous at best. ESCOs may be charging a premium for green energy, but they are not actually providing a significant amount of added renewable energy to customers in New York."[22]

Instead, NYPSC staff reached the following conclusion:

> The massive $1.3 billion in overcharges is the result of higher, and more often than not, significantly higher, commodity costs imposed by the ESCOs on unsuspecting residential and other mass market customers. These overcharges are simply due to (1) the lack of transparency and greed in the market, which prevents customers from making rational economic choices based on facts rather than the promises of the ESCO representative, and (2) obvious efforts by the ESCOs to prevent, or at least limit, the transparency of the market. These obvious efforts include the lack of a definition for "market rate" in their contracts, resulting in the fattening of ESCOs' retained earnings.[23]

Following these conclusions, in December 2019 the NYPSC **banned** the exact same variable rate pricing practices the Representative Plaintiffs challenge in the class actions. The NYPSC's press release announcing the ban on variable energy rates does not mince words, stressing that it was intended to "prevent[] bad actors among ESCOs from overcharging New York consumers" and that the regulations only went forward after "the state's highest court definitively halted ESCOs' attempts to use litigation to evade and/or delay consumer-protection regulation."[24] The regulations themselves likewise condemn ESCOs' conduct and declare that "avoiding accountability" has become a "business model" in the deregulated energy market:

> Based upon the number of customer complaints that continue to be made against ESCOs, and the likely need for increased enforcement activities, the large number of ESCO customers that pay significant premiums for products with little or no apparent added benefit, . . . it appears that a material level of misleading marketing practices continues to plague the retail access market.
>
> * * *

[22] *Id.* at 69.

[23] *Id*.

[24] Press Release, "PSC Enacts Significant Reforms to the Retail Energy Market," December 12, 2019, *available at*: http://www3.dps.ny.gov/pscweb/WebFileRoom.nsf/Web/51A7902329FEA7B7852584CE005CF88D/$File/pr19110.pdf?OpenElement.

> The persistence of complaints related to ESCO marketing practices is indicative of some ESCOs continuing to skirt rules and attempting to avoid accountability as part of their business model.[25]

The NYPSC's variable rate ban followed a two-year investigation of ESCO practices that culminated in a 10-day evidentiary hearing to examine evidence submitted by 19 parties and to hear the testimony and cross-examination of 22 witnesses and witness panels.[26]

The NYPSC prefaced the ban with the observation that variable energy rates—like those the Just Energy Entities charged the Representative Plaintiffs and the Class—are "[t]he most commonly offered ESCO product" and that this popular product is frequently provided at "a higher price than charged by the utilities."[27] The absurdity of consumers paying ESCOs more for the exact same energy offered by regulated utilities was not lost on the NYPSC:

> If market participants are unwilling, or unable, to provide material benefits to consumers beyond those provided by utilities in exchange for a regulated, just and reasonable rate, the market serves no proper purpose and should be ended.[28]

In fact, the NYPSC found it "troubling" that even after considering reams of evidence "neither ESCOs nor any other party have shown . . . that ESCO charges above utility rates were generally – or in any specific instances – justified."[29] This fact only highlighted the NYPSC's "long-held concern that many customers may only be taking ESCO service due to their misunderstanding of [ESCOs'] products and/or prices."[30]

Accordingly, and on this record, the NYPSC banned variable energy rates like those the Just Energy Entities charged to the Representative Plaintiffs and the Class.[31] In place of these floating variable rates, the NYPSC required ESCOs to guarantee that their variable rates would save customers money compared to what the utility would have charged.[32] Under the new regulations, if the ESCO charges the consumer more than the utility, the consumer is owed a

[25] December 12, 2019 Order at 88–90.

[26] *Id.* at 3–4.

[27] *Id.* at 11.

[28] *Id.* at 12.

[29] *Id.* at 30.

[30] *Id.* at 31.

[31] *Id.* at 39.

[32] *Id.*

refund for the difference.[33] In the Representative Plaintiffs' class actions, the difference between what the Just Energy Entities charged consumers for the exact same energy that Class Members' utilities would have charged is more than US$2 billion. The NYPSC's regulations took effect in April 2021. Around the same time, the Just Energy Entities ceased offering service in New York and attempted to reframe the state's ban on the Just Energy Entities' core business practice as "regulatory constraints . . . requiring certain variable rate customers to be dropped to the utility."[34]

IV. Just Energy's Damning Public Dossier Further Supports the Class Actions

The Just Energy Entities have amassed a damning public dossier that includes at least **six** regulatory enforcement actions, reams of investigative journalism exposing Just Energy's deceptive practices, and countless negative customer reviews.

For example, on December 31, 2014, Just Energy agreed to settle claims brought by the Massachusetts Attorney General that are strikingly similar to those of the Representative Plaintiffs', making various concessions related to its deceptive energy sales and billing practices in Massachusetts.[35]

The Massachusetts Attorney General alleged that Just Energy made misleading, false, and unlawful representations and omissions concerning its energy, including that:

> Just Energy represented to consumers that purchasing residential gas and/or electricity from Just Energy will save customers money;
>
> Just Energy failed to disclose complete and accurate pricing information; and
>
> Just Energy failed to disclose to consumers that its rates following any introductory period may be higher than the rates charged by consumers' traditional utilities.[36]

In response to the Massachusetts Attorney General's allegations, Just Energy agreed to refund a total of US$4,000,000 to Massachusetts customers along with implementing several key changes to its marketing and sales practices, as follows:

[33] *Id.*

[34] Ring, Paul, Energy Choice Matters, Aug. 16, 2021, http://www.energychoicematters.com/stories/20210816a.html

[35] Assurance of Discontinuance, *In the Matter of Just Energy Group, Inc., et al.*, Mass. Sup. Ct., Suffolk, (Dec. 31, 2014).

[36] *Id.* ¶¶ 19(a), 20(a)–(b).

> Just Energy must cease making representations, either directly or by implication, about savings that consumers may realize by switching to Just Energy, unless Just Energy contractually obligates itself to provide such savings to consumers.[37]
>
> Where Just Energy quotes introductory teaser rates in its marketing material or in any verbal representation, the rate quote must be accompanied by a statement informing consumers that the quoted rate is an introductory rate and state when the rate will expire.[38]

Just Energy was banned for three years from enrolling Massachusetts consumers into variable rate energy products unless it complied with the following requirements:

> Within 30 days of a customer enrolling in a variable energy rate product, Just Energy must provide the customer with written notice of the date on which the introductory rate will expire.
>
> Any new contracts for variable rate products shall either (i) include the calculation that will be used to set monthly rates under the contract such that the customer can calculate the cost of Just Energy's residential energy, or (ii) make the rates available 60 days in advance via phone and the internet.[39]

Additionally, for three years Just Energy was banned from charging Massachusetts consumers variable electricity rates in excess of 14.25¢ per kWh.[40, 41] The settlement further provided that:

> For current Just Energy variable rate customers, the company is required to clearly and conspicuously post its current variable rates and post subsequent variable rates with at least 45 days advance notice.[42] Just Energy is also required to mail notice to all existing Massachusetts variable rate customers alerting them to the fact that advance pricing information is now available via phone and on Just

[37] *Id*. ¶ 26(a).

[38] *Id*. ¶ 26(c).

[39] *Id*. ¶ 28(a)–(b), (d).

[40] *Id*. ¶ 30(a).

[41] Just Energy charged Representative Plaintiff Donin electricity rates higher than this very high rate for 17 months while she was a Just Energy customer. 14 of those 17 months were consecutive. For the 10 months of billing data Representative Plaintiff Golovan possesses, Just Energy charged her more than the 14.25¢ cap **every single month**.

[42] *Id*. ¶ 30(b).

> Energy's website, and that these customers can cancel their Just Energy contracts without paying termination fees.[43]
>
> Just Energy must at its own expense hire an independent monitor for three years to audit *inter alia* Just Energy's Massachusetts marketing materials, billing data, consumer communications, and direct marketing efforts.[44]
>
> Just Energy must distribute a copy of the Assurance of Discontinuance to current and future (for three years) principals, officers, directors, and supervisory personnel responsible for the Massachusetts market.[45] Just Energy must also secure and maintain these individuals' signed acknowledgement of receipt of the Assurance of Discontinuance.

The Massachusetts Attorney General's sweeping action was far from the first time the Just Energy Entities had been targeted by regulators.

For example, in June 2003, the *Toronto Star* reported that Just Energy (then operating under the name Ontario Energy Savings Corp.) was fined for violating the Ontario Energy Board's code of conduct by fraudulently enrolling customers.[46]

In 2008, the Illinois Attorney General sued U.S. Energy Savings Corp. (whose name was changed to Just Energy in 2012), alleging violations of Illinois' consumer fraud laws. The May 2009 Press Release announcing a US$1 million settlement noted that the Illinois Attorney General had "received a nearly unprecedented number of calls from consumers who were deceived by false assurances that they would receive significant savings by switching to this alternative gas supplier."[47] According to the Attorney General's complaint, among other deceptive conduct "consumers were led to believe that they would automatically save money by enrolling in the U.S. Energy Savings program."[48]

During this same period, the Citizens Utility Board (the "CUB") and AARP filed a formal complaint with the Illinois Commerce Commission (the "ICC") alleging, *inter alia*, that Just Energy told customers they would "save money" by signing up, that consumers would not see

[43] *Id*. ¶ 30(c).

[44] *Id*. ¶ 44, Attachment 2.

[45] *Id*. ¶ 46.

[46] Spears, John, "*Energy marketers fined over forgeries*," Toronto Star (June 21, 2003).

[47] Press Release, "Madigan Secures $1 Million in Consumer Restitution from Alternative Gas Supplier for Deceptive claims," May 14, 2009.

[48] *Id*.

any gas price increases if they signed up, and that Just Energy presented false and misleading information about its prices.[49] In April 2010, the ICC found that Just Energy's sales and marketing practices were deceptive, fined the company US$90,000, and ordered an independent audit of its practices.[50]

In July 2008, New York's Attorney General announced a US$200,000 settlement with Just Energy (then named U.S. Energy Savings) and noted that the Attorney General's "office received hundreds of consumer complaints that sales contractors promised immediate savings on utility bills, but the price of gas was actually more than the price charged by the local utility because the price was locked in for a multi-year period."[51]

In November 2016, Ohio's Public Utilities Commission (the "PUCO") fined Just Energy **for a second time** for misleading marketing practices. An article in the *Columbus Dispatch* notes that Just Energy is an "energy company with a track record of misleading marketing," that it was fined by the PUCO in 2010 for deceptive marketing, and that it "sells energy contracts that often cost more than customers would pay if they received the standard service price."[52] The article also mentions that some of the complaints that led to the PUCO's action "stemmed from contracts sold on behalf of Just Energy by another company, saveonenergy.com."[53]

There are also thousands of complaints about the Just Energy Entities on the internet. Over the last three years alone, Just Energy has had at least 282 complaints filed against it with the Better Business Bureau (the "BBB").[54] Even though Just Energy is listed on the BBB's website as having been in business for 24 years, the BBB clearly declares that "THIS BUSINESS IS NOT BBB ACCREDITED" and displays the following "Pattern of Complaint" warning to the consuming public:

> BBB files indicate that this business has a pattern of complaints concerning door to door sales representatives who are using misleading sales tactics, misrepresenting themselves as the consumer's current energy or gas company, and not being transparent about cancellations fees which may be charged by their

[49] Verified Original Complaint ¶19, Illinois Commerce Commission Docket 08-0175 (March 3, 2008).

[50] Press Release, "Illinois Commerce Commission Fines Just Energy for Deceptive Sales and Marketing Practices, Orders Audit," April 15, 2010.

[51] Press Release, "Attorney General Cuomo Stops WNY Natural Gas Provider From Deceiving Consumers by Misrepresenting Service Contracts," (July 4, 2008).

[52] Gearino, Dan, "Electricity marketer Just Energy fined over complaints,'" The Columbus Dispatch, (Nov. 4, 2016).

[53] *Id.*

[54] Business Profile: Just Energy Group, Inc., BBB.org, https://www.bbb.org/us/tx/houston/profile/electric-companies/just-energy-group-inc-0915-16000393.

> current provider for switching their services. Additionally, consumers allege Just Energy's representatives display poor customer service when the business is contacted to resolve billing and contract concerns.
>
> In November 2019, consumers also began filing customer reviews alleging sales representatives stationed at a local warehouse club were not being truthful about the rates for natural gas. We also received a customer review that stated the Just Energy employee was wearing a t-shirt with the warehouse club's logo.

Media reports about Just Energy equally condemn the Just Energy Entities. When the confidential results of the Illinois Commerce Commission's audit referenced above were made public, Chicago's CBS affiliate reported that between 2010 and 2011 Just Energy received over 29,729 customer complaints.[55] "There were so many complaints over so many years with so little company oversight on how they were handled that the audit said, '[a]n adequate compliance culture at the top levels of the organization is not evident.'"[56]

A 2014 exposé by Canada's Global News highlights that the "CUB, the Better Business Bureau (BBB), the Ontario Energy Board, among others, have been inundated with complaints from consumers about the sales methods employed by Just Energy. The most common grievance is Just Energy promises people savings that don't materialize."[57]

The exposé further reported that Just Energy's founder Rebecca MacDonald has "raked in an estimated $150 million from the company since she established it in the 1990s" and is facing accusations "over whether she's misled investors in her company."[58] Those accusations include that MacDonald faked her credentials and the conclusions by "two of Canada's top forensic accounting firms" that Just Energy used "an unregulated form of accounting to paint a much rosier picture of the company's financial situation," which in turn allowed Just Energy to show an "artificial profit."[59]

The Global News exposé also contains a 22-minute video entitled the "Just Energy Hustle." Below is an excerpt of a Global News journalist's videotaped interview with Just Energy's then-Co-CEO Deborah Merril. Despite having joined Just Energy in 2007, in the 2014 interview the

[55] Zekman, Pam, "Alternative Energy Supplier Has Long Record Of Fraud Complaints," *CBS2*, (Jan. 15, 2013).

[56] *Id*.

[57] Livesey, Bruce, "Canadian energy company stalked by controversy over its sales methods," *Global News*, (Nov. 6, 2014). *Available at:* https://globalnews.ca/news/1656865/canadian-energy-company-stalked-by-controversy-over-its-sales-methods/.

[58] *Id*.

[59] *Id*.

Co-CEO denies even knowing about the many criticisms leveled at Just Energy's marketing and sales practices:

> JOURNALIST: "Critics have accused your company of underhanded sales tactics, sleazy tactics to try to get people to sign their name to a contract."
>
> CO-CEO MERRIL: "I have not heard those accusations, so, nobody said that to me, no."
>
> JOURNALIST: "Really, this is news to you?"
>
> CO-CEO MERRIL: "No, nobody's said that to me. I think it's . . . ."
>
> JOURNALIST: "It's your company. I mean, you know . . . ."
>
> CO-CEO MERRIL: "I would disagree with that."
>
> JOURNALIST: "You would disagree that there's a view that your company is doing things at the door that it shouldn't be doing?"
>
> CO-CEO MERRIL: "No, I'm saying that mistakes happen and we take 'em very seriously."

"The Just Energy Hustle," Timestamp 18:35 to 19:18.[60]

More than a year prior to the Global News exposé, on July 31, 2013, New York-based investment management firm Spruce Point Capital Management released an investment analysis that labeled Just Energy as "a company that U.S. consumers and investors are quickly realizing has become toxic to their wallets through deceptive energy marketing practices, and harmful to their brokerage accounts."[61] The report signaled that Just Energy's "growth appears to be the result of deceptive sales tactics, now at risk of unravelling" which is "evidenced by a large body of consumer fraud complaints."[62] The report also highlights how Just Energy uses a teaser rate to deceive consumers:[63]

[60] Livesey, Bruce, "Canadian energy company stalked by controversy over its sales methods," *Global News*, (Nov. 6, 2014). *Available at:* https://globalnews.ca/news/1656865/canadian-energy-company-stalked-by-controversy-over-its-sales-methods/.

[61] Spruce Point Capital Management, "Just Energy: Another Dividend Cut Poses An Above Average Risk to Investors" at 2 (July 31, 2013), *available at:* http://www.sprucepointcap.com/just-energy/.

[62] *Id*. at 3.

[63] *Id*. at 4–5.

As noted in the table and analysis excerpted below, Just Energy (referred to in the report as "JE") "appears" to offer the lowest price fixed contract, but there's a 'catch:'

	ConEd Solutions	Constellation	Spark Energy	Greenlight Energy	US Gas & Electric	Just Energy	Constellation	Spark Energy	Greenlight Energy	Just Energy
Commodity	Electric	Electric	Electric	Electric	Electric	Electric	Gas	Gas	Gas	Gas
Term (months)	12	12	12	None	5	60	12	12	None	60
Initiation Fee	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00
Cancellation Fee	-	-	-	-	$50.00	$50.00	-	-	-	$50.00
Monthly Fee	-	-	-	-	-	-	-	4.95	-	
Unit Cost (c/KWh | c/therm)	**10.45c**	**10.99c**	**10.49c**	**10.00c**	**10.50c**	**7.15c**	**67.90c**	**77.50c**	**66.00c**	**62.00c**

Source: ConEdison website and company websites. End of April 2013

JE's gas RateFlex prices are fixed *only for three* months – despite the 5-year term – and after three months, the contract reverts to a *fluctuating* price based on "*business and market conditions*." The Electric RateFlex is fixed for 2 months. JE then gives its customers the option of locking in this new, variable and unknown price. The company tries to reassure consumers that the rate won't fluctuate that much by guaranteeing that the variable rate won't increase by more than *35% per month* (see: section 7). Just Energy also allows consumers to cancel their contract free within 30 days – before the misleadingly low introductory price expires – but charges a $50 "Exit Fee" if cancelled thereafter. Of course, most consumers don't bother to read the fine print, particularly if salesmen are pushing quick cash back incentives with Visa Gift Cards for registering and referring friends.

A May 8, 2019 article in the *Chicago Reporter* tells a similar story. The article showcased the experience of a 45-year-old carpenter who, over the course of 10 years, paid Just Energy more than US$20,000 more than he would have paid his local utility.[64] This Just Energy customer's experience was used to highlight the then-proposed Illinois Home Energy Affordability & Transparency Act ("HEAT"). On August 27, 2019, Illinois Governor J.B. Pritzker signed HEAT into law. Effective January 1, 2020, HEAT requires *inter alia* ESCOs like Just Energy operating in Illinois to include the utility's comparison price on all marketing materials, during telephone or door-to-door solicitations, and on every consumer's utility bill so consumers can make informed price comparisons.

In addition, on May 9, 2019, *CommonWealth* featured the Massachusetts Attorney General's findings that Massachusetts consumers who switched to ESCOs paid US$177 million more over a two-year period than they would have if they had stayed with the local utility.[65] The *CommonWealth* article references the fact that the Massachusetts Attorney General brought successful lawsuits against ESCOs "including Just Energy" which actions resulted "in almost $10 million in refunds to consumers and forc[ed] the defendant companies to cease their unfair practices." *Id.*

[64] *Available at:* https://www.chicagoreporter.com/illinois-bill-aims-to-curb-alternative-energy-scams-by-forcing-transparency/.

[65] Harak, Charlie et al., "DPU failing to protect Mass. Consumers," *CommonWealth*, May 9, 2019. *Available at:* https://commonwealthmagazine.org/opinion/dpu-failing-to-protect-mass-consumers/.

V. The Class Actions Encompass Approximately 8,000,000 U.S. Just Energy Customers

Using Just Energy's public 2015 Annual Report (which covers the year ended March 31, 2015), Class Counsel calculated the approximate number of Class Members during the relevant period of 2011 to present:

A. U.S. Residential Electric Class Members – 2,481,640 RCEs[66]

B. U.S. Residential Gas Class Members – 1,096,180 RCEs

C. U.S. Commercial Electric Class Members – 3,702,200 RCEs

D. U.S. Commercial Gas Class Members – 596,040 RCEs

Total U.S. Residential Class Members (Electric and Gas Combined) – 3,577,820 RCEs

Total U.S. Commercial Class Members (Electric and Gas Combined) – 4,298,240 RCEs

Total U.S. Class Members (All Combined) – **7,876,060 RCEs**

Regarding Class Counsel's methodology for calculating the U.S. class size, Just Energy's 2015 Annual Report discloses (a) the number of worldwide Just Energy gas RCEs by commodity and the number of worldwide Just Energy electric RCEs by commodity for the year ended April 1, 2014, and (b) the "additional" number of worldwide gas and worldwide electric RCEs by commodity added in the one-year period from April 1, 2014, to March 31, 2015. The 2015 Annual Report also identifies the percentage of Just Energy's customer base that takes service in the U.S. and distinguishes between commercial and residential RCEs.

Beginning with the April 1, 2014 current customer data, Class Counsel used the percentage of U.S. Just Energy customers to calculate the number of U.S. residential and commercial gas and electric customers as of April 1, 2014. Class Counsel then took the number of additional gas and electric customers added in the one-year period from April 1, 2014 to March 31, 2015 and multiplied it by the percentage of U.S. Just Energy customers to determine the number of U.S. gas and electric customers added at each service level during this one-year period. For example, Just Energy's 2015 Annual Report states that as of April 1, 2014 Just Energy had 1,198,000 RCEs and that 72% of Just Energy customer base takes service in the U.S. Class Counsel thus calculate that as of the April 1, 2015, the Just Energy Entities had approximately 862,560 U.S. residential electric customers (i.e. 1,198,00 RCEs x .72). The 2015 Annual Report also states that Just Energy added 489,000 residential RCEs in the one-year period from April 1, 2014, to March 31, 2015. Using the same percentage of U.S. based customers (72%), Class Counsel

[66] According to Just Energy's 2021 Annual Report, an "RCE" means residential customer equivalent, which is a unit of measurement equivalent to a customer using 2,815 m3 (or 106 GJs or 1,000 Therms or 1,025 CCFs) of natural gas on an annual basis or 10 MWh (or 10,000 kWh) of electricity on an annual basis, which represents the approximate amount of gas and electricity, respectively, used by a typical household in Ontario, Canada.

calculates that during this one-year period Just Energy added approximately 352,080 U.S. residential electric customers (i.e. 489,000 RCEs x .72).

During each of the reporting years from 2015 to 2021, Just Energy reported figures for the number of additional residential and commercial gas and electric RCEs as well as the percentage of Just Energy's U.S. customer base. Beginning with the 2014 total customer count and using only the "additional" U.S. residential and commercial RCEs added each year, Class Counsel calculated the approximate total class size. The following chart summarizes Class Counsel's class size calculations:

Year	U.S. Residential Electric Customers Added	U.S. Residential Gas Customers Added	U.S. Commercial Electric Customers Added	U.S. Commercial Gas Customers Added
2014[67]	862,560	537,840	1,627,920	146,880
2015	352,080	133,920	503,280	48,240
2016	271,440	105,120	395,280	61,920
2017	237,850	85,200	234,300	38,340
2018	260,000	115,700	274,950	110,500
2019	226,800	87,570	291,690	88,200
2020	142,120	25,160	259,760	59,840
2021	128,790	5,670	115,020	42,120
Total	2,481,640	1,096,180	3,702,200	596,040
Total Customers Across All Four Customer Categories:				**7,876,060**

Please note that due to missing data from the 2011 to 2014 period, these calculations are **underinclusive**. With discovery, the Representative Plaintiffs' expert will be able to provide the exact class size.

[67] 2014 figures represent current U.S. Just Energy customers as of April 1, 2014.

Dated: November 1, 2021
Armonk, New York

By: /s/ Steven L. Wittels

WITTELS MCINTURFF PALIKOVIC
Steven L. Wittels, Esq.
J. Burkett McInturff, Esq.
Steven D. Cohen, Esq.
18 Half Mile Road
Armonk, NY 10504
Tel: (914) 775-8862
Email: slw@wittelslaw.com
jbm@wittelslaw.com
sdc@wittelslaw.com

FINKELSTEIN, BLANKINSHIP, FREI-PEARSON & GARBER, LLP
Greg Blankinship
One North Broadway, Suite 900
White Plains, NY 10601
Tel: (914) 298-3290
Email: gblankinship@fbfglaw.com

SHUB LAW FIRM LLC
Jonathan Shub
Kevin Laukaitis
134 Kings Highway East, 2nd Floor
Haddonfield, NJ 08033
Tel: (856) 772-7200
Email: jshub@shublawyers.com
klaukaitis@shublawyers.com

Class Counsel for the Representative Plaintiffs and the Class

Exhibit 1

EXPERT REPORT OF DR. SERHAN OGUR

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I. Introduction and Qualifications

My name is Serhan Ogur, Ph.D., and I am a Senior Economist and Principal at Exeter Associates, Inc. ("Exeter"). Exeter is an economics consulting firm specializing in regulated energy industries (e.g., electricity and natural gas) and in competitive wholesale and retail electric power markets.

In this report, I have been asked by the Plaintiffs' counsel to offer my expert opinions on the following topics:

1. How energy service companies ("ESCOs"), such as Just Energy Group Inc., Just Energy Solutions Inc., and other affiliated Just Energy entities (collectively, "Just Energy") can procure electricity and natural gas for their customers;
2. Whether ESCOs like Just Energy bear more or less risk to service fixed- or variable-rate customers; and
3. How much Just Energy variable-rate customers were overcharged from 2011 to 2020.

I have worked on electric power market issues for 20 years, including both wholesale and retail market issues. Prior to joining Exeter, I was employed by the Illinois Commerce Commission ("ICC"); PJM Interconnection, LLC ("PJM"); and Fellon-McCord & Associates, LLC ("Fellon-McCord").

At the ICC, I worked at the Federal Energy Program ("FEP") under the Energy Division. The FEP's function is to advise ICC's commissioners on all energy-related matters that fall within the jurisdiction of the federal government (e.g., the Federal Energy Regulatory Commission ["FERC"], the Federal Trade Commission, the U.S. Department of Justice). The duties I performed at the FEP included reviewing federal and state rate cases, reviewing utility filings at the FERC regarding the formation of regional transmission organizations ("RTOs"), and serving as the ICC Staff's expert witness at ICC regulatory proceedings. While at the ICC, I testified in an electric utility merger case and in a case that established auction-based default service electric supply procurement and pricing mechanisms for the major investor-owned utilities ("IOUs") in Illinois.

At PJM, I was assigned to the Market Strategy and Performance Compliance departments. The duties I performed at PJM included periodic reporting to the board of managers, the senior

management, and PJM's stakeholder committees on the performance of all markets and services administered by PJM.

At Fellon-McCord, I worked as the lead analyst at the Power Control Center, which was the department responsible for performing all wholesale and retail electricity market operation and compliance tasks of large customers that were their own load-serving entities ("LSEs") (rather than taking retail supply service from the incumbent utility or from a mass-market competitive supplier). My role at Fellon-McCord required me to be familiar with all wholesale and retail tasks (e.g., scheduling, forecasting, settlements, billing, risk management) related to supplying electric power to wholesale and retail end-users.

As previously noted, my current role is as a Senior Economist and Principal at Exeter Associates. The majority of Exeter's client base consists of federal and state government agencies, including the U.S. Air Force, the U.S. Army, and the U.S. Department of Energy ("DOE") (as purchasers of electricity and natural gas from competitive retail suppliers in retail choice states and from the utility in bundled states); state offices of consumer advocate; state public utility commission ("PUC") staffs; and state offices of attorneys general. That work entails assisting federal government agencies (Air Force bases, Army installations, DOE national laboratories) with optimizing their utility services (electricity, natural gas, potable water, and wastewater) and minimizing their supply procurement costs, which requires in-depth knowledge of all facets of wholesale and retail electricity and natural gas markets. Exeter's work also entails supporting state governments and state agencies in energy-related formal proceedings (e.g., rate cases, default service implementation cases, utility merger and acquisition applications) before state PUCs and the FERC.

I have testified numerous times in front of the Pennsylvania PUC in default electric service design and implementation cases on behalf of the Pennsylvania Office of Consumer Advocate ("PA OCA"). I am a trusted advisor for the PA OCA in all matters related to electric utility regulation, wholesale and retail electricity markets, and electric power procurement and risk management.

I am the main consultant to the Defense Logistics Agency – Energy ("DLA Energy"), which in turn is one of the major power and natural gas procurement agencies for federal government sites (alongside the General Services Administration ["GSA"]), with competitive electricity acquisitions in some of the same markets, states, and utility service territories in which Just Energy is also active. I helped DLA Energy issue solicitations for competitive supply, evaluate

the price and service offers, and draft contract terms in various markets. The states in which I helped DLA Energy procure competitive supply include Illinois, Maryland, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, and Texas. I have extensive experience in the procurement of fixed-rate, variable-rate, and hybrid-type (arrangement with both fixed- and variable-rate elements) contracts.

I hold a doctorate degree in Economics from Northwestern University, where my studies focused on competition in deregulated wholesale electricity markets. My undergraduate degree is also in Economics from Bogazici University (Istanbul, Turkey). My resume, containing the state PUC dockets in which I have submitted written and oral testimony, is provided in Exhibit A.

II. Electricity and Natural Gas Markets

Historically, states have regulated the retail electricity and natural gas markets within their borders, including how utilities procure or supply electricity and natural gas, the retail prices charged for electricity and natural gas, and the distribution of electricity and natural gas to end-use customers.[1,2] The predominant electric utility model relied on fully vertically integrated local monopolies. These monopolies oversaw all aspects of electricity provision: generation, transmission and distribution, and the full suite of retail services.[3] Similarly, the regulated natural gas industry relied on the competitive procurement of natural gas in wholesale markets and the distribution of that gas to its retail customers.[4] States granted for-profit utilities licenses to operate these monopolies, subject to regulatory oversight. This arrangement is often referred to as the "state regulatory compact."

Under the state regulatory compact, state-regulated utilities agreed to provide safe and reliable public utility service. In return, the regulating body gave the utilities an exclusive franchise territory and allowed the utilities the opportunity to recover their reasonably and

[1] Regulation is typically provided by a public utility commission—a quasi-judicial, independent, administrative body also referred to as a public service commission ("PSC"), commerce commission, board of public utilities, public utilities regulatory authority, etc., depending on the state.

[2] For a comprehensive overview of the history of the regulation of the electricity and natural gas sectors in their various forms, see: Phillips, C. F. (1993). *The Regulation of Public Utilities: Theory and Practice*. Public Utilities Reports, Inc. Arlington, Virginia.

[3] For an overview of each aspect of electricity provision, see: U.S. Energy Information Administration (October 22, 2020). "Electricity explained: How electricity is delivered to consumers." Retrieved from: https://www.eia.gov/energyexplained/electricity/delivery-to-consumers.php.

[4] For an overview of each aspect of natural gas provision, see: U.S. Energy Information Administration (December 9, 2020). "Natural gas explained." Retrieved from: https://www.eia.gov/energyexplained/natural-gas/.

prudently incurred costs.[5] In addition to cost recovery, the regulator provided the utilities an opportunity—but not a guarantee—to earn a fair return on their invested capital.[6]

Starting in the late 1980s and early 1990s, many states began considering the potential benefits of restructuring electricity and natural gas markets.[7] In particular, states evaluated the potential to deregulate—meaning substitute the forces of market competition for administrative control—portions of electricity and natural gas service to reduce costs and improve efficiency. Developments towards the deregulation of electricity and natural gas markets followed similar efforts in the airline, trucking, and telecommunications industries.[8]

During the late 1990s and early 2000s, several states officially unbundled their electricity and natural gas markets; that is, these states separated the functions of providing electric and natural gas service into competitive and non-competitive components.[9] Some components, such as the distribution of electricity and natural gas, both of which require significant amounts of upfront capital, were thought to be "natural" monopolies and, therefore, these functions were generally left to the traditional local monopoly providers. These non-competitive services remained subject to cost-of-service regulation and the regulatory compact. Other portions of electric and natural gas service, such as electric generation and natural gas supply procurement, were opened to market competition, in this case from independent power producers in electricity markets and independent retail natural gas suppliers in natural gas markets. Providers of these services no longer received the same guarantee of cost recovery, meaning they absorbed greater risk. They also, however, gained the ability to compete in previously closed markets and earn a market return.

In some states, policymakers went further by also opening the provision of retail services to competition. This last reform is referred to as retail deregulation, retail restructuring, or retail

[5] See: Regulatory Assistance Project (2011). *Electricity Regulation in the U.S.: A Guide*. Retrieved from: https://www.raponline.org/wp-content/uploads/2016/05/rap-lazar-electricityregulationintheus-guide-2011-03.pdf.

[6] State and federal utility regulatory commissions must provide regulated public utilities with a reasonable opportunity to earn a fair rate of return ("ROR") on prudently incurred capital investments (net of depreciation, and as adjusted by the regulator). No such requirement applies to unregulated utility providers.

[7] See: Flores-Espino, F., T. Tian, I. Chernyakhoyvskiy, *et al*. (2016). *Competitive Electricity Market Regulation in the United States: A Primer*. National Renewable Energy Laboratory. Retrieved from: https://www.nrel.gov/docs/fy17osti/67106.pdf.

[8] For an overview of efforts toward restructuring these markets, see: Winston, C. (1993). "Economic Deregulation: Days of Reckoning for Microeconomists." Journal of Economic Literature, 31(3), 1263-1289.

[9] For a contemporaneous account of unbundling efforts, including descriptions of various electricity reforms, see: Warwick, W.M. (2002). *A Primer on Electric Utilities, Deregulation, and Restructuring of U.S. Electricity Markets*. Pacific Northwest National Laboratory. Retrieved from: https://www.pnnl.gov/main/publications/external/technical_reports/PNNL-13906.pdf.

choice.[10] As many as 20 states have pursued electricity retail deregulation to some degree, including New York, the state in which Plaintiffs Ms. Fira Donin and Ms. Inna Golovan reside.[11] Similarly, as many as 25 states have implemented natural gas deregulation to some degree, including New York and Pennsylvania, the states in which Plaintiffs Ms. Donin and Mr. Trevor Jordet, respectively, reside. In electricity or natural gas retail choice states, customers have the option to purchase supply (i.e., unbundled service) from ESCOs under market-based rates.[12] This means that customers can "shop" among competing ESCOs for energy supply instead of relying on service from the local monopoly provider.

In retail choice states, apart from electricity supply in Texas, retail electricity and natural gas customers that either cannot switch to, or choose not to adopt service from, a competitive supplier are allowed to continue receiving service from the regulated local monopoly utility (i.e., bundled service).[13] Supply for default service is procured by the utilities (which serve as the default service providers in their respective service territories) in the competitive market. This procurement task takes various forms including default service auctions and procuring directly from wholesale markets,[14] depending on the state and the customer class.[15] The utilities rely on market-provided electric generation supply or competitively procured natural gas supply to serve their default service customers. In the case of electric power utilities, they are generally precluded from owning electric generation resources to avoid potentially anti-competitive impacts on the wholesale and retail markets.[16] Default service is provided by the utilities to default service customers without any, or with very little, markup. As a result, the supply price (or rate) associated with the energy component of default service, also known

[10] See: National Renewable Energy Laboratory (2017). *An Introduction to Retail Electricity Choice in the United States*. Retrieved from: https://www.nrel.gov/docs/fy18osti/68993.pdf.

[11] See: American Coalition of Competitive Energy Suppliers (2021). "State-by-State Information." Retrieved from: https://competitiveenergy.org/consumer-tools/state-by-state-links/.

[12] ESCOs are also referred to as alternative retail electric suppliers, third-party suppliers, retail electric providers, and retail electricity suppliers, depending on the state.

[13] Service from the local utility is also referred to as "default service" or "standard offer service."

[14] Default service auctions, also known in the industry as basic generation service auctions, are a way for the utilities to assign the responsibility or cost of serving the generation supply portion of their default service customers' loads to unregulated wholesale suppliers through a transparent procurement mechanism (auctions or requests for proposals) overseen by the PUCs.

[15] For an overview of default service procurement for residential customers in states with retail deregulation, see: Littlechild, S. (2018). *The Regulation of Retail Competition in US Residential Electricity Markets*. Energy Policy Research Group, University of Cambridge. Retrieved from: https://www.eprg.group.cam.ac.uk/wp-content/uploads/2018/03/S.-Littlechild_28-Feb-2018.pdf.

[16] See: Hunt, S. (2002). *Making competition work in electricity*. John Wiley & Sons. Retrieved from: https://regulationbodyofknowledge.org/wp-content/uploads/2013/03/Hunt_Making_Competition_Work.pdf.

as the default service rate or the default price, reflects the costs of competitive, market-provided energy.[17]

The default service rate is also referred to as the "price to compare" ("PTC") in the energy industry. The PTC is the rate (or price) charged by the local utility to customers who are on default service for the portion of their electric and natural gas service that is open to competition. The default rate can change as frequently as monthly. Nevertheless, for residential customers in most states, the major components of default service rates change no more frequently than quarterly or semi-annually. It is typical that retail customers may leave or return to default service at any time without penalty from the default utility.

ESCOs procure electric power and natural gas on behalf of the customers they serve in a variety of ways. These include: (1) making short-term (day-ahead in the case of natural gas, and day-ahead or real-time in the case of electricity) purchases on wholesale markets established to facilitate the buying and selling of electricity and natural gas;[18] (2) purchasing electricity and natural gas in the wholesale market directly from power plants and from natural gas suppliers; (3) generating electricity from power plants owned or contracted for by the ESCO; (4) purchasing power and natural gas from wholesale brokers or marketers, including other ESCOs; and (5) any number of combinations of the above options.

In deregulated markets, the wholesale price of electricity and natural gas at any given time is determined by supply and demand conditions.[19] Supply factors include the price of fuels, the availability of generating and transmission and pipeline resources, and external conditions that could, for example, affect the availability of solar and wind generation (affecting electricity prices) or the production and transportation of natural gas. Demand is affected by weather conditions, time of day and day of week, and general economic conditions. In organized electricity and natural gas markets, the price is constantly changing, typically daily for natural gas and multiple times within each hour for electricity.

There are a variety of rate arrangements that ESCOs offer to shopping customers. Variable rates, which can change monthly, are the type of rate arrangement at issue in this case. Just

[17] See: Tsai, C-H & Y-L Tsai (2018). "Competitive Retail Electricity Market under Continuous Price Regulation." Energy Policy, Vol. 114, 274-287.

[18] In the case of electricity, these organized wholesale power markets are administered by RTOs or independent system operators (ISOs).

[19] For additional information regarding electricity markets, see: Federal Energy Regulatory Commission (2020). *Energy Primer: A Handbook for Energy Market Basics*. Retrieved from: https://www.ferc.gov/sites/default/files/2020-06/energy-primer-2020_Final.pdf.

Energy offered customers service at a fixed rate for an initial period, often several months.[20] These fixed rates tended to be low or competitive relative to the PTC.[21] Thereafter, customers were automatically switched to variable-rate service. In the retail energy (electricity or natural gas) markets, the nature of the pricing arrangement between the ESCO and the end-use customer affects the way in which the energy supply can be rationally procured by the ESCO in the wholesale market.

When an ESCO acquires a fixed-rate customer, it has a strong incentive to hedge the purchase price of its projected sales to that customer for the duration of the term of the fixed-price retail supply contract at the time the contract is executed. Hedging refers to an attempt to eliminate most of or all the price risk associated with serving a customer's future consumption by entering into various transactions prior to the delivery period. Hedging to support a fixed rate for a specific contract duration allows the ESCO to try to lock in a profit by acquiring the customer's estimated future energy needs at a predetermined cost that is lower than the fixed rate at which the customer has agreed to pay the ESCO. If the ESCO does not hedge to avoid cost fluctuations for energy to serve a fixed-price contract, it incurs the risk of paying more for the customer's energy supply than the fixed rate at which the customer agreed to pay the ESCO. ESCOs typically hedge almost all of their expected fixed-rate supply contract exposure. However, if customers' actual usage is higher than expected, the ESCO faces the risk that the electricity or natural gas purchased to fill the gap between expected and actual usage will be more expensive than the hedged price or the fixed rate. Similarly, if the ESCO ends up being over-hedged due to unexpectedly low consumption or contract cancellations, the ESCO may have to sell the excess energy supply at a lower price and, as a result, incur a loss.

ESCOs have the opposite incentive for variable-rate supply contracts that are based on business and market conditions; that is, their incentive is to <u>not</u> hedge any of the variable-rate commitments. Hedging in this circumstance <u>increases</u> the ESCO's risk since the agreement between the ESCO and the variable-rate customer is such that the ESCO can pass through the market costs that the ESCO incurs to serve the customer's load, plus a reasonable profit margin. Therefore, the ESCO is assured of a profit if the ESCO serves the variable-rate customer's energy consumption through wholesale market purchases without any hedging.

[20] Civil Action No. 17-5787 (E.D.N.Y.), First Amended Class Action Complaint and Jury Demand, pp. 1-2; Civil Action No. 18-953 (W.D.N.Y.), December 7, 2020, Decision and Order at 2.

[21] Id.

III. Goals and Expectations of Electricity and Natural Gas Industry Restructuring

Energy industry restructuring consists of a variety of reforms intended to improve economic outcomes for market participants, including customers.[22] The typical reform model includes unbundling competitive market components such as electric generation, initiating new or expanded wholesale markets, and introducing competitive procurement of supply.

Retail deregulation (rather than just wholesale deregulation) is a relevant part of overall energy industry restructuring because it establishes how the benefits of wholesale restructuring can potentially be realized by retail customers.[23] Competition in retail markets should, theoretically, result in the convergence of retail and wholesale prices. ESCOs, unlike the franchised monopolies that previously supplied electricity and natural gas, are not guaranteed a customer base or the opportunity to earn a reasonable return. Thus, to be able to compete in an open market in which participants have reasonable access to relevant information, ESCOs should pass through cost savings to their customers, offer novel products and services, and better align service offerings with customer preferences. Additionally, to manage the risk inherent with serving load, ESCOs have an incentive to develop innovative procurement methods and practices.

There are two major risk categories associated with serving fixed-rate customers: volume risk and market price risk.[24] Volume risk refers to the consumption risk associated with such factors as the weather, increases and decreases in the number of customers, and general business and economic conditions. Market price risk stems from the need to balance energy requirements with purchases in the wholesale market.

Mistakes in procurement, marketing, or pricing to end-use consumers—including failure to account for the impacts of market forces—can result in economic losses to an ESCO. Success in managing these factors, meanwhile, can (but is not guaranteed to) provide economic gains.

[22] See: Joskow, P.L. & Schmalensee, R. (1983). *Markets for Power: An Analysis of Electric Utility Deregulation* MIT Press; Peltzman, S. (1989); "The Economic Theory of Regulation after a Decade of Deregulation." Brookings Papers on Economic Activity: Microeconomics, 1-41; and Stigler, G. J., & Friedland, C. (1962). "What Can Regulators Regulate? The Case of Electricity." The Journal of Law & Economics, Vol. 5, 1.

[23] See: Littlechild, S. (2002). "Competition in Retail Electricity Supply." Journal des Economistes et des Etudes Humaines, 12(2). Also see: Hunt, S. (2002). *Making Competition Work in Electricity*. John Wiley & Sons.

[24] See: Bartelj, L., A. F. Gubina, D. Paravan & R. Golob (2010). "Risk management in the retail electricity market: the retailer's perspective." IEEE PES General Meeting, 1-6.

These gains should reflect success with competing in the retail market based on the relative merit of the ESCO's competitive offerings.

The availability of default service provides a backstop to the competitive retail market. It also establishes a benchmark against which one can evaluate ESCOs' rates and the extent to which they offer a competitive rate. In other words, the PTC allows a comparison of the prices offered by ESCOs to what is available from the local monopoly utility, whose rates reflect market conditions.

An ESCO providing energy under a fixed-price arrangement will typically procure almost all of the needed supply using hedging instruments in order to lock in a price for a defined period into the future for a specified quantity of electricity.[25] The same is true for natural gas. The period of such hedges can extend out from days to several years. There is typically additional cost associated with forward-looking purchases since the wholesale supplier is being asked to absorb the market price risk, for which some degree of compensation is required. As the procurement period gets further away (i.e., the fixed-price contract extends further out), the cost of hedged energy generally becomes more expensive, holding all else equal. It is also important to note that some additional electricity and natural gas will need to be purchased to exactly match demand. Consequently, regardless of the hedging strategy, the ESCO will need to incur some degree of risk in serving its fixed-price customers. The potential benefit of a fixed-rate arrangement to the end-use customer is that rates remain stable for the duration of the contract period; that is, the market price risk is borne by the suppliers (some by the wholesale supplier(s) and some by the retail supplier).

Selling energy under a variable-rate arrangement in which the customer agreement provides that the rate may vary according to business or market conditions, as was done by Just Energy, relieves the supplier of almost all the risks applicable to fixed-price rates. If demand increases (e.g., due to weather conditions) or market prices increase, the ESCO can pass on the increased costs to its customers consistent with the contract arrangements under which the ESCO's customers agreed to receive service. In essence, the variable-rate arrangement shifts the burden of risk away from the ESCO and on to the end-use customer. The theoretical benefit of a variable-rate arrangement to the end-use customer is that the customer can expect that, on average, prices will be lower than they would be under a fixed-rate

[25] See Dupuis, D., Gauthier, G., & Godin, F. (2016). "Short-term Hedging for an Electricity Retailer." The Energy Journal, 37(2), 31-59. Retrieved from http://www.jstor.org/stable/24696747.

arrangement due to the difference in the incidence of risk, that is, because the ESCO bears less risk for variable-rate customers. Alternatively stated, variable-rate customers should incur a lower risk premium than fixed-price customers, which should translate into lower average prices.

IV. Calculation of Just Energy Overcharges

I am informed by the Plaintiffs' counsel that, in both the *Jordet* case and the *Donin* case, Just Energy's motions to dismiss were denied by the court and discovery will commence. In the absence of data that the Plaintiffs' counsel expects to be provided by Just Energy, I used publicly available data, as described in each relevant section below, to estimate how much the class of affected Just Energy customers were overcharged from 2011 to 2020. The affected class consists of the residential and commercial electricity and natural gas supply customers of Just Energy (and its affiliates) in the United States who purchased supply from Just Energy under variable rates between 2011 and the present day.[26] The overcharge theory is based on the difference between the electricity and natural gas rates the affected class were charged versus what they would have been charged if Just Energy's rates were based on business and market conditions.

A. Summary of Just Energy Overcharges

In the relevant sections of this report, I describe the methods by which I estimated Just Energy overcharges to the affected class by commodity (electricity and natural gas) and customer class (residential and commercial). Table 1 shows my estimates of Just Energy overcharges for residential electricity customers, commercial electricity customers, residential natural gas customers, and commercial natural gas customers, as well as the total overcharges.

[26] Just Energy also supplies electric and natural gas customers outside the U.S. Sales to those customers, and any potential overcharges related to those sales, are not included in this analysis, which is limited to only U.S. customers.

Table 1. Just Energy Overcharges by Commodity and Customer Class, 2011-2020	
Commodity and Customer Class	**Overcharges**
Electricity – Residential	$1,144,609,092
Electricity – Commercial	$717,711,010
Natural Gas – Residential	$449,392,725
Natural Gas – Commercial	$68,624,767
Total	**$2,380,337,594**

I derived an estimate of Just Energy's overcharges to customers using two public sources of information: the Energy Information Administration's ("EIA's") Form 861, and Just Energy's annual reports. More specifically, I referenced the following information from each source:

- EIA Form 861: I downloaded the annual "Sales to Ultimate Customers" data from 2011-2020. The Sales to Ultimate Customers dataset, according to EIA's website, is "compiled from data collected on the Form EIA-861 and an estimate from Form EIA-861S for data by customer sector." It includes the following information: "retail revenue, sales, and customer counts by state, balancing authority, and class of service (including the transportation sector which was added in 2003) for each electric distribution utility or energy service provider."

- Just Energy Annual Reports: I downloaded the complete annual reports from Fiscal Years ("FYs") 2011-2021. In these reports, I referenced several measures of Just Energy's gross margin (i.e., net sales less the cost of goods sold) and load served. Load served is represented in terms of Residential Customer Equivalent ("RCE"). Just Energy subdivides gross margin and RCE by geographic region (e.g., U.S., Canada, United Kingdom), customer type (e.g., residential or commercial), and commodity type (e.g., natural gas or electricity). The availability of any particular cross-sectional data point (e.g., RCEs for U.S.-based residential gas customers), however, depends on the report year.

In addition to the above public sources, I also referenced utility billing data provided by the Plaintiffs' counsel (from the two complaints in *Jordet* and *Donin*). More specifically, I referenced the following four datasets:

- Mr. Jordet's natural gas supply bills: Provided data include the Just Energy natural gas supply rate for service between April 15, 2016 and February 15, 2018 (22 billing periods) and the PECO Energy Corporation ("PECO") default natural gas service rate for the same period. The provided information was converted from per-hundred-cubic-feet ("CCF") to per-therm using a conversion ratio of 1 therm = 1.037 CCF.

- Ms. Donin's natural gas supply bills: Provided data include the Just Energy natural gas supply rate for service between January 5, 2015 and July 5, 2016 (17 billing periods) and the National Grid USA Service Company, Inc. ("National Grid") default natural gas service rate for the same period. Both rates are represented as per-therm.

- Ms. Donin's electricity supply bills: Provided data include the Just Energy electricity supply rate for service between June 26, 2011 and July 28, 2016 (49 billing periods) and the Consolidated Edison, Inc. ("ConEd") default electricity service rate for the same period. Both rates are represented as per-kilowatt-hour ("kWh").

- Ms. Golovan's electricity supply bills: Provided data include the Just Energy electricity supply rate for service between July 10, 2014 and May 11, 2015 (10 billing periods) and the ConEd default electricity service rate for the same period. Both rates are represented as per-kWh.

For each of the four customer class/commodity pairings (i.e., residential electric, commercial electric, residential natural gas, commercial natural gas), I estimated overcharges using two key measures: Just Energy's excess margin and the quantity of affected Just Energy load. Excess margin represents the amount by which Just Energy is estimated to have charged variable-rate customers in excess of rates that reflect market conditions. The quantity of affected load represents the estimated aggregate class size (i.e., energy usage subject to Just Energy's excess margin). The product of the excess margin and quantity of affected load is equal to the total overcharges incurred by the affected class. The assumptions used to estimate both of these factors differ by customer type (i.e., residential versus commercial) and by utility type (i.e., natural gas versus electricity) due to the nature of provided and/or available data. The following subsections discuss the applicable assumptions for the estimates provided above in Table 1.

The price a variable-rate customer should have been charged in any given month or billing period can be calculated based on a number of benchmarks, including the PTC, or Just Energy's realized cost of serving that customer during that billing period (plus a reasonable profit margin). Once discovery is conducted (and monthly customer-level sales and price data, and cost of sales data, are provided by Just Energy), overcharges can be calculated more precisely for each member of the affected class as well as for the entire class.

I summarize the caveats to my analysis and estimates in the last subsection of this section.

B. Estimated Overcharges to Residential Electricity Customers

I estimated excess margins for all residential electricity customers using the average excess electricity margin applicable to Ms. Donin between June 2012 and July 2016. For each separate billing month within this time frame, I subtracted the default supply rate (i.e., the ConEd PTC rate) from Ms. Donin's Just Energy supply rate. The difference between the Just Energy and default service rate represents the excess margin. The magnitude and direction of the excess margin varies by month. To account for this variability, I used the average excess margin for the full period of provided data.[27] Ms. Donin's average excess electricity margin over these 49 billing periods was $0.0340/kWh.

I estimated the quantity of affected residential electricity load using annual reporting (provided by Just Energy) captured in EIA Form 861. More specifically, I summed the total quantity of reported residential load served by Just Energy and each of Just Energy's affiliates for each year between 2011 and 2020. Available information includes data for Just Energy, Just Energy New York Corp., Amigo Energy, Commerce Energy, Hudson Energy Services, and Tara Energy, LLC. These entities collectively serve or served customers in the following 11 states: California, Delaware, Illinois, Maryland, Massachusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania, and Texas. EIA Form 816 data include customers served under various retail rate products, including variable- and fixed-rate plans. I account for the inclusion of non-class volumes (i.e., fixed-rate contracts) in EIA Form 861 data by scaling the total volume by half (i.e., 50%). I selected 50% as a reasonable mid-point given the absence of further information about the nature of Just Energy's customer book and the share of customers served under rates included within the Plaintiffs' proposed class.

I estimated overcharges to residential electricity customers as follows:

Overcharges = Total EIA-Reported Sales x Class Volume Adjustment x Excess Margin
= 67,260,022,000 kWh x 0.5 x $0.0340/kWh
= $1,144,609,092[28]

[27] The electric billing for Ms. Donin is inclusive of the time frame during which Just Energy served another Plaintiff, Ms. Golovan. Further, Ms. Golovan also received Just Energy service in place of default supply from ConEd. I elected to exclude Ms. Golovan's electric billing data to avoid over-weighting the overlapped time period (i.e., July 2014 – May 2015). I note that including Ms. Golovan's excess margins in the excess residential electricity margin calculation would have increased the resulting excess residential electricity margin. Therefore, calculating the excess residential electricity margin based solely on Ms. Donin's billing data is a conservative assumption.

[28] The mismatch is due to independent rounding.

C. Estimated Overcharges to Commercial Electricity Customers

I estimated the excess margin for commercial electricity customers by using the excess electricity margin I calculated for residential customers (see Subsection B above) as the starting point. I adjusted the residential customer excess margin to reflect the average difference in Just Energy's gross margin for residential and commercial customers, as reported by Just Energy on an RCE basis. In general, gross margin for commercial customers is lower than gross margin for residential customers. I evaluated several data points in Just Energy's annual reports to identify the appropriate scaling ratio, and ultimately used 27.3%. This scaling factor equals the ratio of realized base gross margin per RCE for commercial electricity customers to the realized base gross margin per RCE for residential electricity customers, averaged over a two-year period (FY 2020 and FY 2021). Just Energy does not provide a similar measure of realized base gross margin per RCE (as distinguished by commodity and customer class) in its annual reports prior to 2020. However, other potential metrics yield similar average ratios despite being less precise.[29] Multiplying the excess residential electricity margin (i.e., $0.0340/kWh) by the 27.3% adjustment factor for commercial customers yields an estimated excess commercial electricity margin of $0.0093/kWh.

I estimated the quantity of affected electricity customer load using annual reporting (provided to EIA by Just Energy) captured in EIA Form 861. More specifically, I summed the total quantity of reported commercial load served by Just Energy and each of Just Energy's affiliates for each year from 2011 through 2020. The affiliates and the states are the same for commercial and residential customer segments, except for the inclusion of Tara Energy Resources for commercial customers. Similar to the assumption I employed in the residential electricity subsection, I scaled the total volume by half (i.e., 50%) to account for the inclusion of non-class volumes in EIA Form 861 data.

[29] The ratio of average gross margin per RCE (not accounting for commodity type) for commercial and residential customers ranges from 23% to 42% and averages 35% from FY 2013 through FY 2021. A calculated average base gross margin per RCE using reported electricity base gross margin and electricity end-of-fiscal year RCEs (i.e., a point-in-time total, rather than inclusive of all points in time during the period) adjusted for U.S.-only RCEs yields a ratio that ranges from 17% to 36% and averages 23% from FY 2011 through FY 2021.

I estimated overcharges to commercial electricity customers as follows:

Overcharges = Total EIA-Reported Sales x Class Volume Adjustment x Excess Margin
= 154,577,982,000 kWh x 0.5 x $0.0093/kWh
= $717,711,010[30]

D. Estimated Overcharges to Residential Natural Gas Customers

I estimated the excess margin for all residential natural gas customers using the average excess natural gas margin applicable to Plaintiffs Mr. Jordet and Ms. Donin from April 2016 to February 2018 and from January 2015 to July 2016, respectively. For each separate billing month within this time frame (for both customers), I subtracted the default supply rate (i.e., PECO or National Grid service rate) from the applicable Just Energy supply rate. To account for variability, I used the average excess margin for the full period of provided data. The average excess natural gas margin over these 22 billing periods for Mr. Jordet and 17 billing periods for Ms. Donin was $0.2478/therm.

I estimated the quantity of affected residential natural gas load using RCE data provided in Just Energy's annual reports. First, I identified the end-of-period RCE quantities by customer class and commodity type. These data points are available as far back as FY 2013. For FY 2011 and FY 2012, Just Energy's RCE reporting does not distinguish between residential and commercial customers. For these years, I apportioned the provided total RCEs between customer classes using the average ratio of residential to commercial RCEs from the FY 2013 through FY 2021 period. Second, I adjusted the provided RCE data to remove non-U.S. customers. This adjustment was made using a percentage share of RCEs attributable to U.S. customers. The best available data from Just Energy were used for each review period year when adjusting for U.S. versus non-U.S. location.[31] Third, I converted RCEs into therms using Just Energy's provided definition of 1 RCE = 1,000 therms per year for natural gas customers. Fourth, I shifted the data to a calendar year basis (versus fiscal year basis) using period weighting. The estimated RCE data in each Annual Report represent an end-of-period, point-in-time estimate as of the last day (March 31) of the applicable FY. I derived 25% of the weighted total for a calendar year from the FY report starting in the same year, and the

[30] The mismatch is due to independent rounding.

[31] From FY 2017 to FY 2021, this share is differentiated by customer type but not by commodity type. From FY 2013 to FY 2016, this share is only provided on a book-wide basis (i.e., not differentiated by customer type or by commodity type). From FY 2011 to FY 2012, this share is differentiated by commodity type but not by customer type.

remaining 75% portion for the FY report starting in the next year.[32] Fifth, I adjusted the RCE to better approximate actual load to account for distinctions between RCEs (an aggregate, imprecise measure) and customer usage. The scaling factor applied to this adjustment is calculated based on the observed relationship between residential electricity RCEs (converted into kWh using a similar process as Steps 1 through 4 outlined above) and EIA-reported annual residential usage. For residential customers, this scaling factor equals 86% (i.e., actual load is lower than RCE load) based on the average ratio between Just Energy RCEs and EIA Form 861 kWh load from 2011 through 2020 for residential customers. Finally, similar to the approach I followed as described in the previous subsections, I account for the inclusion of non-class volumes in Just Energy's RCE totals by scaling the total volume by half (i.e., 50%).

I estimated overcharges to residential natural gas customers as follows:

Overcharges = Total Sales x Class Volume Adjustment x Excess Margin
= 3,626,720,117 therms x 0.5 x $0.2478/therm
= $449,392,725[33]

E. Estimated Overcharges to Commercial Natural Gas Customers

I estimated the excess margin for commercial natural gas customers by using the excess natural gas margin I calculated for residential customers (see above) as the starting point. I adjusted the excess natural gas margin for residential customers to reflect the average difference in Just Energy's gross margin for residential and commercial customers. I evaluated several data points in Just Energy's annual reports to identify the appropriate scaling ratio, and ultimately used 25.1%. This ratio equals the ratio of the realized base gross margin per RCE for commercial gas customers to the realized base gross margin per RCE for residential gas customers, averaged over a two-year period (FY 2020 and FY 2021). As noted above, Just Energy does not provide a similar measure of realized base gross margin per RCE (as distinguished by commodity and customer class) in its annual reports prior to 2020. Multiplying the residential excess natural gas margin (i.e., $0.2478/therm) by the 25.1% adjustment factor for commercial customers yields a commercial excess natural gas margin of $0.0622/therm.

[32] For example, the calendar year 2020 RCE total is estimated based on 25% of the FY 2020 reported RCE (i.e., as of March 31, 2020) and 75% of the FY 2021 reported RCE (i.e., as of March 2021).

[33] The mismatch is due to independent rounding.

I estimated the quantity of affected commercial natural gas load using RCE data provided in Just Energy's annual reports. The steps to convert fiscal year RCEs into calendar year therms for commercial customers are similar to those applicable to residential customers, except I used the data reported by Just Energy for commercial customers. Like the adjustment I performed for residential natural gas customers, I adjusted the RCE to better approximate actual load to account for distinctions between RCEs and customer usage. For commercial customers, this scaling factor equals 108% (i.e., actual load is higher than RCE load) based on the average ratio between Just Energy RCEs and EIA Form 861 kWh load from 2011 through 2020 for commercial customers. I scaled the total volume by half (50%) to account for the inclusion of non-class volumes in Just Energy's RCE data.

I estimated overcharges to commercial natural gas customers as follows:

Overcharges = Total Sales x Class Volume Adjustment x Excess Margin
= 2,204,852,190 therms x 0.5 x $0.0622/therm
= $68,624,767[34]

F. Caveats

The overcharge estimates provided above are based on the best available information at this time. In several cases, I made assumptions regarding the volume of the affected class load and the applicable excess margin due to the absence of more detailed determinants. Plaintiffs' counsel informed me that the more detailed determinants applicable to these calculations will be available through discovery. Therefore, I reserve the right to modify my findings based upon new information. This includes updating the methodology described above to account for more precise or disaggregate determinants and measures of overcharges.

The major simplifying assumptions employed in my analysis and overcharge estimates include the following:

- The excess electricity margin for residential customers was derived using one customer's billing data. Due to this small sample size, my estimate for the residential excess electricity margin is subject to potentially significant modification with the availability of additional data. The average realized excess electricity margin for all of

[34] The mismatch is due to independent rounding.

Just Energy's residential variable-rate customers may be higher or lower than the estimate contained in this report.

- The excess electricity margin for commercial customers was derived using my estimate for the excess electricity margin for residential customers and an adjustment factor for the difference between Just Energy's unitized gross margin for commercial and residential customers. Therefore, my estimate for the commercial excess electricity margin is also subject to potentially significant modification with the availability of additional data. The average realized excess electricity margin for all of Just Energy's commercial variable-rate customers may be higher or lower than the estimate contained in this report.

- The excess natural gas margin for residential customers was derived using two customers' billing data. Due to this small sample size, my estimate for the residential excess natural gas margin is subject to potentially significant modification with the availability of additional data. The average realized excess natural gas margin for all of Just Energy's residential variable-rate customers may be higher or lower than the estimate contained in this report.

- The excess natural gas margin for commercial customers was derived using my estimate of the excess natural gas margin for residential customers and an adjustment factor for the difference between Just Energy's unitized gross margin for commercial and residential customers. Therefore, my estimate for the commercial excess natural gas margin is also subject to potentially significant modification. The average realized excess natural gas margin for all of Just Energy's commercial variable-rate customers may be higher or lower than the estimate contained in this report.

- I estimated Just Energy's (and its affiliates') total electricity sales to residential and commercial customers based on the data published annually by EIA. While I expect that the customer-level data that the Plaintiffs' counsel anticipates receiving from Just Energy as part of the discovery process will result in similar volumes, they may differ from the EIA-reported sales volume data for various reasons such as adjustments and reporting discrepancies.

- I estimated Just Energy's (and its affiliates') total natural gas sales to residential and commercial customers based on the RCE data reported by Just Energy in its annual reports and various conversion and adjustment factors to convert these RCE data into relevant units (kWh for electricity, therms for natural gas). While I expect that the customer-level data that the Plaintiffs' counsel anticipates receiving from Just Energy as part of the discovery process will result in similar volumes, they may differ from my estimates due to the assumptions I relied upon in this conversion process.

- I estimated the affected (variable-rate) volumes of loads for Just Energy's electricity and natural gas customers in the United States as a percentage of my estimates of Just Energy's total electricity and natural gas sales to residential and commercial customers. I assumed that Just Energy's sales to each customer class-commodity pairing made under variable-rate plans account for half of Just Energy's total sales for each such pairing. The true volume of Just Energy's sales customers made under variable-rate plans, which will be able to be calculated from information obtained through the discovery process, potentially can be significantly larger or significantly smaller than the estimates contained in this report.

V. Conclusion

I estimated Just Energy's overcharges to its residential and commercial electricity and natural gas customers using the small sample of customer billing data I received from the Plaintiffs' counsel and two categories of publicly available information: EIA Form 861 and Just Energy's annual reports. Based on the more precise customer-level data and Just Energy's cost-of-sales data that I anticipate receiving as part of the discovery process, I will be able to more accurately calculate Just Energy's overcharges to each class member, and thus for the entire affected class.

This concludes my expert report.

Dated: November 1, 2021

Serhan Ogur, Ph.D.

Exhibit A – Resume of Serhan Ogur, Ph.D.

SERHAN OGUR

Dr. Ogur is a Principal of Exeter Associates, Inc. with 20 years of experience in the energy industry specializing in organized wholesale (Regional Transmission Organization/Independent System Operator) and retail electricity markets. Dr. Ogur's diverse background comprises energy management and consulting; analysis, design, and reporting of RTO electricity markets and products; and state and federal regulation of electric utilities.

Dr. Ogur's coursework in graduate school focused on Microeconomic Theory, Game Theory, and Industrial Organization. His doctoral dissertation investigates imperfect competition in deregulated wholesale electricity markets and oligopolistic competition between private and public generators.

Education

B.A. (Economics) – Bogazici University, Istanbul, Turkey, 1996

Ph.D. (Economics) – Northwestern University, Evanston, IL, 2007

Previous Employment

2014-2015	Senior System Operator Fellon-McCord & Associates, LLC Louisville, KY
2005-2014	Senior Economist PJM Interconnection, LLC Audubon, PA
2001-2005	Economic Analyst Illinois Commerce Commission Springfield, IL

Professional Experience

Dr. Ogur's work at Exeter includes analysis of electricity supply contracts; utility rates and tariffs; energy markets and prices; power procurement; default electric service design; project evaluation; demand response opportunities; congestion hedging strategies; and price forecasting.

Prior to joining Exeter, Dr. Ogur's responsibilities at Fellon-McCord encompassed overseeing and performing the daily tasks of the "24/7" wholesale electricity desk, including all aspects of scheduling, managing, and monitoring direct market participant load and generation assets (mostly in ISO/RTO markets) as well as their settlements and custom reporting. He was also in charge of developing strategies and making recommendations, through analytical, financial, and

market research, for longer-term management of clients' load obligations and generation assets such as Auction Revenue Rights (ARR) nominations; participation in energy, ancillary services, and capacity markets; load forecasting; energy, basis, and capacity price forecasting; hedging; and peak load management. Dr. Ogur also served as the company's lead analyst in various special consulting projects.

In PJM Interconnection's Market Strategy and Market Analysis departments, Dr. Ogur was responsible for analyzing and reporting on all PJM-administered electricity market products, including day-ahead and real-time energy, operating reserve, regulation, synchronized reserve, virtual transactions, financial transmission rights, capacity, demand response, energy efficiency, and renewables. He was part of the team that developed the protocols and business rules for participation of energy efficiency in PJM markets as well as a lead reviewer for energy efficiency plans and post-installation measurement and verification (M&V) reports for PJM's capacity market auctions. He also has training and experience in PJM's stakeholder management process.

Dr. Ogur's responsibilities at the Illinois Commerce Commission (ICC) included monitoring all Illinois-related developments under federal jurisdiction, mostly Federal Energy Regulatory Commission (FERC) filings and rulings concerning major Illinois electric public utilities. In addition, Dr. Ogur reviewed all actions concerning Illinois public utilities at the FERC level (applications to join RTOs, market-based rate authority filings, merger applications, transmission rate cases, etc.), and developed positions and official comments for the consideration of the ICC to file in the related FERC dockets. Dr. Ogur also filed written testimony and served as staff witness (including standing cross-examination) in the ICC dockets establishing auction-based competitive wholesale energy procurement mechanisms for major Illinois electric public utilities.

<u>Expert Testimony</u>

Before the Pennsylvania Public Utility Commission, Docket Nos. A-2021-3025659 and A-2021-3025662, Pike County Light & Power Company and Leatherstocking Gas Company, LLC, 2020, on behalf of the Pennsylvania Office of Consumer Advocate. Testimony addressed public utility merger and acquisition issues.

Before the U.S. District Court for the District of New Jersey, Civil Action No. 3:17-cv-02680-MAS- LHG, 2021, on behalf of Janet Rolland, et al. Testified on systematic overcharges by a retail electric supplier in a class action suit with plaintiffs in eight states.

Before the Pennsylvania Public Utility Commission, Docket No. P-2020-3022988, Pike County Light & Power Company, 2020, on behalf of the Pennsylvania Office of Consumer Advocate. Testimony addressed default service issues.

Before the Pennsylvania Public Utility Commission, Docket No. P-2020-3019907, UGI Utilities, Inc. – Electric Division, 2020, on behalf of the Pennsylvania Office of Consumer Advocate. Testimony addressed default service issues.

Before the Pennsylvania Public Utility Commission, Docket No. P-2020-3019522, Duquesne Light Company, 2020, on behalf of the Pennsylvania Office of Consumer Advocate. Testimony addressed default service issues.

Before the Pennsylvania Public Utility Commission, Docket Nos. P-2020-3019383 and P-2020-3019384, Citizens' Electric Company of Lewisburg, PA and Wellsboro Electric Company, 2020, on behalf of the Pennsylvania Office of Consumer Advocate. Testimony addressed default service issues.

Before the Pennsylvania Public Utility Commission, Docket No. P-2016-2534980, PECO Energy Company, 2016, on behalf of the Pennsylvania Office of Consumer Advocate. Testimony addressed default service issues.

Before the Illinois Commerce Commission, Docket No. 05-0159, Commonwealth Edison Company, 2005, on behalf of the Staff of Illinois Commerce Commission. Testimony addressed default service design and competitive procurement issues.

Before the Illinois Commerce Commission, Docket Nos. 05-0160, 05-0161, and 05-0162 (Consolidated), Central Illinois Light Company d/b/a AmerenCILCO, 2005, on behalf of the Staff of Illinois Commerce Commission. Testimony addressed default service design and competitive procurement issues.

Before the Illinois Commerce Commission, Docket No. 02-0428, Central Illinois Light Company and Ameren Corporation, 2002, on behalf of the Staff of Illinois Commerce Commission. Testimony addressed competition issues in a utility merger case.

Tannor Capital Advisors LLC

Due Diligence List - Just Energy

Green is we have, Blank we need

			Date	Format
I.	**Case Catch up and Latest Info**			
A.	1	Can you please send the Plan term sheets?		
	2	What are the company projections for 2022, 2023, 2024? Can you provide details?		
	3	Osler agreed to furnish the DIP loan agreement and modifications on the last call. Can you provide?		
B.	1	Are the secured creditors really secured? Can you provide us an opinion on whether the agreements have been deemed to be secured agreements? Can you provide them to us?		
	2	Why haven't the deeply in the money hedges and forwards been closed out? Why are these instruments showing show much unrealized gains? Is there are match of forwards and hedges to the company's current demand (gas and electricity)? What is the current forecasted demand vs historical demand?		
	3	Can you walk through the last released financial statement with us, the one showing equity book value?		
	4	Can you walk us through how the company is thinking about its valuation as it emerges from CCAA proceedings?		
	5	What is the value proposition to customers that make the business plan viable on a go forward basis? And how is the business plan sustainable from a viability perspective?		
II.	**Financial Information**			
A.	Financial Statements			
	1.	Will you provide us the past 3 years Annual Audited - Income Statement, balance sheet, cash flow with notes?		
B.	Operations and Customers			
	1.	Can you provide information on historical customer count and usage versus projected customer count and usage?		
	2.	Can you provide information on historical COGS versus future company estimates of COGS?		
	3.	How do the hedges / future / trading instruments fit into the supply - demand profiles?		
	4.	Are the COGS different for variable and fixed revenue customers?		
C	Revenue Detail			

1. Please provide some information on how the company is thinking about its projected revenue breakdown by customer & product offering &Jurisdiction

E Operating Cash Budget

1. Can you please provide copies of budget to actual rolling 13 week, 26 week, X week cash flow reports from inception to current?

F Cash Balances

1. What is the company forecasting for its exit cash needs?
2. What are the current cash balances by bank?
3. What are the escrow account detail?
4. What is the amount of Cash Collateral held by ISOs and all third parties?

G Asset Sales - And closures

1 What are the estimates of final proceeds for all closures (negative numbers) and positive ones for closures and sales?

III. Legal and Restructuring initiatives

A Restructuring initiatives/contracts

1. What restructuring initiatives are being taken to add value to unsecured creditors and unsecured creditor recoveries?
2. Can you provide details on any changes to customer agreements which may have an affect on customer take rates or churn?

C. Insurance

1 Will you provide us details and copies of the D&O Insurance policy?
2 Will you provide us details and copies of all of the insurance policies?
3 Are customer claims covered by any other insurance coverage?

III. Taxes

A. 1 Can you provide us with details of Taxes payable, carry forwards, and refunds owed?

NOTICE OF REVISION OR DISALLOWANCE

For Persons who have asserted Claims against the Just Energy Entities[1]

TO: Fira Donin and Inna Golovan as Representative Plaintiffs (the "**Claimants**")

J. Burkett McIntuff (attorney for Representative Plaintiffs)
jbm@wittelslaw.com
Wittels McInturff Palikovic
18 Half Mile Rd
Armonk, NY
10504
United States

RE: Claim Reference Number: PC-11177-1

Capitalized terms used but not defined in this Notice of Revision or Disallowance shall have the meanings ascribed to them in the Order of the Ontario Superior Court of Justice (Commercial List) in the CCAA proceedings of the Just Energy Entities dated September 15, 2021 (the "**Claims Procedure Order**"). You can obtain a copy of the Claims Procedure Order on the Monitor's website at http://cfcanada.fticonsulting.com/justenergy/.

Pursuant to the Claims Procedure Order, the Monitor hereby gives you notice that the Just Energy Entities, in consultation with the Monitor, have reviewed your Proof of Claim and have revised or disallowed all or part of your purported Claim set out therein. Subject to further dispute by you in accordance with the Claims Procedure Order, your Claim will be treated as follows:

[1] The "**Just Energy Entities**" are Just Energy Group Inc., Just Energy Corp., Ontario Energy Commodities Inc., Universal Energy Corporation, Just Energy Finance Canada ULC, Hudson Energy Canada Corp., Just Management Corp., Just Energy Finance Holding Inc., 11929747 Canada Inc., 12175592 Canada Inc., JE Services Holdco I Inc., JE Services Holdco II Inc., 8704104 Canada Inc., Just Energy Advanced Solutions Corp., Just Energy (U.S.) Corp., Just Energy Illinois Corp., Just Energy Indiana Corp., Just Energy Massachusetts Corp., Just Energy New York Corp., Just Energy Texas I Corp., Just Energy, LLC, Just Energy Pennsylvania Corp., Just Energy Michigan Corp., Just Energy Solutions Inc., Hudson Energy Services LLC, Hudson Energy Corp., Interactive Energy Group LLC, Hudson Parent Holdings LLC, Drag Marketing LLC, Just Energy Advanced Solutions LLC, Fulcrum Retail Energy LLC, Fulcrum Retail Holdings LLC, Tara Energy, LLC, Just Energy Marketing Corp., Just Energy Connecticut Corp., Just Energy Limited, Just Solar Holdings Corp., Just Energy (Finance) Hungary Zrt., Just Energy Ontario L.P., Just Energy Manitoba L.P., Just Energy (B.C.) Limited Partnership, Just Energy Québec L.P., Just Energy Trading L.P., Just Energy Alberta L.P., Just Green L.P., Just Energy Prairies L.P., JEBPO Services LLP, and Just Energy Texas LP.

Type of Claim	Applicable Debtor(s)	Amount as submitted		Amount allowed by the Just Energy Entities	
		Original Currency		Amount allowed as secured:	Amount allowed as unsecured:
A. Pre-Filing Claim	Just Energy Entities	USD	$3,662,444,442.00	$0	$0
B. Restructuring Period Claim			$	$	$
C. Total Claim	Just Energy Entities	USD	$3,662,444,442.00	$0	$0

Reasons for Revision or Disallowance:

See attached Schedule A.

SERVICE OF DISPUTE NOTICES

If you intend to dispute this Notice of Revision or Disallowance, you must, by no later than 5:00 p.m. (Toronto time) on the day that is **thirty (30) days after this Notice of Revision or Disallowance is deemed to have been received by you** (in accordance with paragraph 50 of the Claims Procedure Order), deliver a Notice of Dispute of Revision or Disallowance to the Monitor (by prepaid ordinary mail, registered mail, courier, personal delivery, facsimile transmission or email) at the address listed below.

If you do not dispute this Notice of Revision or Disallowance in the prescribed manner and within the aforesaid time period, your Claim shall be deemed to be as set out herein.

If you agree with this Notice of Revision or Disallowance, there is no need to file anything further with the Monitor.

The address of the Monitor is set out below:

FTI Consulting Canada Inc., Just Energy Monitor
P.O. Box 104, TD South Tower
79 Wellington Street West
Toronto Dominion Centre, Suite 2010
Toronto, ON, M5K 1G8

Attention: Just Energy Claims Process
Email: claims.justenergy@fticonsulting.com
Fax: 416.649.8101

In accordance with the Claims Procedure Order, notices shall be deemed to be received by the Monitor upon actual receipt thereof by the Monitor during normal business hours on a Business Day, or if delivered outside of normal business hours, on the next Business Day.

The form of Notice of Dispute of Revision or Disallowance is enclosed and can also be accessed on the Monitor's website at http://cfcanada.fticonsulting.com/justenergy.

IF YOU FAIL TO FILE A NOTICE OF DISPUTE OF REVISION OR DISALLOWANCE WITHIN THE PRESCRIBED TIME PERIOD, THIS NOTICE OF REVISION OR DISALLOWANCE WILL BE BINDING UPON YOU.

DATED this 11th day of January, 2022.

FTI CONSULTING CANADA INC., solely in its capacity as Court-appointed Monitor of the Just Energy Entities, and not in its personal or corporate capacity

Per: 

Jim Robinson
Senior Managing Director

SCHEDULE A

The Claimants advance a claim against the "Just Energy Entities" in the amount of US$3,662,444,442.00 based on a proposed and uncertified class action filed in the US District Court in the Western District of New York (the "**New York Court**") on April 27, 2018, titled *Fira Donin and Inna Golovan v. Just Energy Group Inc. et al.*, Case No. 1:17-cv-05787-WFK-SJB (the "**Donin Action**").

The Just Energy Entities, in consultation with the Monitor, disallow the claim in its entirety.

Status of Litigation

The Donin Action was brought against Just Energy Group Inc. ("**JEGI**") and Just Energy New York Corp. ("**Just Energy NY**") on behalf of a putative class of "all Just Energy customers in the United States […] who were charged a variable rate for their energy at any time from [applicable statute of limitations period] to the date of judgment". The Claimants alleged, among other things, that the defendants engaged in fraudulent conduct, violated New York statutes by engaging in deceptive acts and practices, breached contractual provisions to consider "business and market conditions",[2] and breached the implied covenant of good faith when it charged rates that were more than the local utility rate for natural gas and electricity in New York.

Following a motion to dismiss, the New York Court dismissed all the Claimants' claims except for the breach of contract and implied covenant of good faith claims. The survival of a claim on a motion to dismiss is not an assessment of its merits but only a determination that, accepting as true all of the allegations in the complaint as required on that motion, the plaintiff has alleged a right to relief that is not entirely speculative.[3] The Court did not find that Just Energy NY had improperly exercised its contractually agreed discretion to set rates, or even that Just Energy NY did not consider the many different business and market conditions in setting its rates. These were all matters which could not be resolved solely on the pleadings.

The New York Court also found that it did not have jurisdiction over John Does 1-100, which the Claimants alleged were "shell companies and affiliates" through which JEGI did business in New York and elsewhere, as well as "Just Energy management and employees who perpetrated the

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[2] The Claimants also allege that the defendants breached the agreement by (i) charging rates higher than the rates set forth in the welcome email sent to consumers and (ii) increasing the variable rate by more than 35% over the rate from the previous billing cycle. With respect to the first allegation, the language of the agreement between the parties made it clear that Just Energy NY would charge the Claimants variable rates and that Just Energy NY did not contract to charge the Claimants particular rates. The second allegation applies to only one of the two proposed representative plaintiffs, and any damages would be limited to the overpayment due to the difference between the actual increase and a 35% increase for the particular months in question. These claims are not amenable to certification and are secondary to the Claimants' main argument that the defendants breached the contract's requirement to charge variable rates "determined by business and market conditions". The Claimants have made no effort to quantify any damages that might arise from these alleged breaches.

[3] *Donin et al v. Just Energy Group Inc. et al,* Decision and Order 17-CV-5787(WFK)(SJB) regarding Motion to Dismiss dated September 24, 2021, Dkt. 111, at 4.

unlawful acts." All claims against these defendants were dismissed, which effectively limits the Donin class, should it be certified, to New York customers.

On January 10, 2020, over the Claimants' objection, the New York Court ordered that factual discovery in this matter was closed and that all pending discovery requests and disputes before that Court were terminated. This ruling came after years of discovery, including the production of documents by the defendants in response to numerous requests by the Claimants. That discovery was also limited to the defendants' New York business, consistent with the limited scope of the claim that remains.

Improper Expansion of Claim

Four years after the commencement of the litigation, the Claimants now purport to advance a claim against all "Just Energy Entities" on behalf of the proposed class, notwithstanding the fact that the only named parties in the Donin Action are JEGI and Just Energy NY. Even if the underlying litigation had any merit (it does not), the Claimants cannot use these CCAA Proceedings to improperly expand the scope of their April 2018 claim to now add new defendants who were never included in the Donin Action. The Claimants' attempt to do so is particularly inappropriate given the New York Court's dismissal of all claims against JEGI's affiliates other than Just Energy NY.

Claim Is Meritless

The claim is contingent, uncertified, speculative, and remote. The Claimants will have to overcome substantial hurdles to be entitled to any recovery, including:

- dispositive motion practice (i.e. motion for summary judgment), which would involve the disclosure of expert reports and supporting evidence from fact witnesses, depositions, potential preliminary motions, written briefs, and oral argument. In particular, the defendants would seek to have the claim dismissed as against JEGI, as it is a holding company that does not contract to provide natural gas or electricity to any customers;

- a contested class certification process, which would include written briefing, presentation of supporting evidence from fact and expert witnesses, and oral argument;

- a trial on the issue of liability, including pretrial submissions and motion practice to resolve evidentiary issues, voir dire, direct testimony and cross-examination of fact and expert witnesses, and legal argument from counsel; and

- resolution of damages of the plaintiffs or certified class(es), which may require bifurcation from the trial on liability (especially if the Claimants continue to allege damages on behalf of a national class, which the defendants argue is impermissible).

A loss by the Claimants at any one of these phases would either entirely eliminate, or severely restrict, the Claimants' potential damages (and those of any other members of any certified class).

The claim is devoid of merit for numerous reasons, including the fact that the applicable contract puts customers (including the Claimants) on clear notice of the variable rates that Just Energy NY would set and to which customers (including the Claimant) will be subject. The language in the operative agreements provides that "This Agreement does not guarantee financial savings" and

that the Claimants were paying a variable rate that "may change every month."[4] In complaining that their local utility's rates ended up being lower for a portion of the Claimants' contract term, the Claimants simply ignore away the operative agreement. There was no obligation under the agreement for Just Energy NY's rates to match or track those charged by the local utility.

Critically, the Claimants' allegation that the defendants breached the parties' contract by failing to set rates "according to business and market conditions" is premised on the erroneous assumption that local public utilities are the main competitors of Just Energy NY, and as such the defendants overcharged when their rates were higher than that of the local utility.[5] In reality, local utility rates are not an appropriate barometer by which to measure the rates of energy service companies ("**ESCOs")** like Just Energy NY (let alone an appropriate proxy for the long list of business and market conditions Just Energy NY was permitted to consider in exercising its discretion to set its rates) for several reasons, including because:

- **Local utilities and ESCOs do not offer the same products and services.** For instance, ESCOs offer 100% green products, fixed-rate products, energy conservation bundled services and products, dedicated customer service, and affinity rebates or refunds that many consumers prefer. ESCO retail commodity prices are part of a bundle of product and service offerings ESCOs provide their customers, in which products and services interact with each other; comparing the prices charged for those products and services with local utility commodity prices results in erroneous, misleading and distorted conclusions.

- **Local utility commodity prices do not reflect wholesale energy prices.** Local utilities are permitted to defer charges (with the approval of the regulator) to smooth price volatility during periods with particularly high wholesale gas and electricity costs (e.g., 2014 polar vortex price spikes). Such utility regulated deferral activity renders the local utility rates a particularly inappropriate proxy for actual wholesale rates and the actual business and market conditions for the given period and makes an accurate comparison between default service prices and ESCO prices for a particular period impossible. ESCOs do not have the ability to shift the costs of energy service over time, nor can they take advantage of regulated rates that ensure full cost recovery to the provider.

- **Local utilities and ESCOs do not have the same business model.** Just Energy NY must compete with other ESCOs to sell energy commodities to consumers. In contrast, local utilities are "default" providers of energy commodities and provide delivery service (gas and electric distribution) regardless of whether the consumer purchases energy commodities from the utility or an ESCO. As a result, local utilities do not face the same costs, risks and market forces that ESCOs face.

- **Local utility commodity prices do not include reasonable profit margins.** Unlike ESCOs, local utility commodity prices are designed to be a pass-through of wholesale costs (sometimes from different periods of time) and not a profit-generating business activity. Moreover, utilities are incentivised to allocate all possible commodity and

[4] "Essential Agreement Information" which is provided in the "Customer Disclosure Statement," which is incorporated into the Claimant's agreement with the defendant.

[5] The allegation that the defendant breached the covenant of good faith by failing to act reasonably in exercising its discretion to set rates is based on the same erroneous assumption.

employee/technology costs to a customer's delivery bill, since that is where the utility has a monopoly and is permitted to receive a return on investment. As a result, no accurate comparison is possible between utility commodity prices and ESCO commodity prices.

- **General energy market conditions affect ESCOs and local utilities differently.** ESCOs incur costs well beyond the costs of energy procurement, which are reflected in their prices. In addition to the costs of the product or service bundled with the commodity cost, ESCO prices may also include consideration of competitors' prices, profit margins, and customer retention policies in addition to overhead costs and marketing efforts. ESCOs account for the costs and values associated with their enhanced products and services, including renewables, and need to structure their businesses to successfully offer fixed-rate guarantees to customers who purchase such products. ESCOs face the business conditions of a competitive market—not at all like the business conditions faced by a regulated utility.

The Claimants' expert has failed to even consider the variable rates charged by other ESCOs during the relevant period in calculating the alleged damages.

Not only is the Donin Action devoid of merit, it is not amenable to Rule 23 certification pursuant to the relevant US law, including because:

- Claimants will need to show that the language in the various contracts falling within the class definition are sufficiently similar to present common issues of law, and that those issues predominate over individual issues that different class members face.

- Claimants will need to establish that the proposed representative plaintiffs' claims are representative of the experience other customers may have had. The one-size-fits-all approach taken in the Claimants' damages model does not account for the different products and services offered by Just Energy NY to its customers and the different providers individual customers had prior to contracting to purchase energy services from Just Energy NY, and those differences may be considered at class certification.

- The differences between various contracts and products would be even more pronounced and problematic for purposes of a motion for class certification to the extent the Claimants continue to take the position that they will be seeking to include in the proposed class consumers who are not customers of Just Energy NY whose contracts for variable rate energy fit within Claimants' class definition. Although such an expansion is impermissible for the reasons described above, the proposed class's failure to satisfy the strict requirements of Rule 23 would be exponentially more pronounced where the proposed class includes customers who contracted with different entities, using different contracts, subject to different regulatory regimes, and for different product offerings.

- The Court will also need to find that the proposed representative plaintiffs or other subsets of the proposed class are not subject to unique defenses that would impair the fair and efficient resolution of the action. State specific regulations could present unique claims and

defenses to the extent the Claimants' alleged class extended to Just Energy customers outside of New York.

Expert Report

The Claimants have submitted a report, that purports to be an expert report, in support of their proof of claim, however the Claimants have missed the relevant deadlines set by the New York Court to submit expert reports in the underlying litigation. Given the New York Court's order that discovery is closed in the Donin Action, the Claimants should not be allowed, as part of this proceeding, to cure defects of their own making in the litigation that existed prior to the CCAA Proceedings, in order to attempt to obtain monies to which they are not otherwise entitled.

The quantum of damages set out in the Claimants' expert report is speculative and highly inflated, as it is, among other things, based on several flawed assumptions. For example:

- The report assumes the correct "comparable" to determine "business and market conditions" is that of the local utility, instead of considering the rates charged by other ESCOs. As noted above, this assumption is deeply flawed. This approach fails for a number of reasons, including by failing to account for any ESCO reasonable profit margin on commodity prices, as local utility commodity prices are not designed to generate any profit.

- The report incorrectly includes commercial customers, whose contracts were materially different from (and subject to different regulatory regimes than) those of residential customers. Moreover, very few of Just Energy Entities' commercial customers are contractual counterparties of the named defendants. Commercial customers currently account for approximately 50% of the Just Energy Entities' customers' electricity and gas usage.

- Calculation of damages for residential and commercial gas customers is derived from a calculation that includes the residential gas load served by all Just Energy Entities. However, only Just Energy NY and JEGI are named defendants in the Donin Action, and any damages must be limited to customers who were contractual counterparties with those defendants. This effectively limits the claim to New York customers since JEGI does not contract directly with customers.

- Calculation of damages for residential and commercial electricity customers is derived from a calculation that includes the residential electricity load served by "Just Energy", Just Energy New York Corp., Amigo Energy, Commerce Energy, Hudson Energy Services, and Tara Energy, LLC (and Tara Energy Resources for commercial customers). However:

    - Only Just Energy NY and JEGI are named defendants in the action, and any damages must be limited to customers who were contractual counterparties with those defendants;

    - Including entities like Amigo Energy and Tara Energy, LLC, which only operate in Texas, makes no sense, given that the comparison to local utility rates is the basis of the Claimants' claim for damages and customers in Texas cannot obtain power directly from a local utility (they must obtain power from a retailer). The Just

Energy Entities' Texas customers currently account for approximately 85% of non-commercial electricity usage, and approximately 52% of non-commercial electricity usage that is being charged out based on variable rates.

- The report assumes that 50% of residential and commercial electricity and natural gas usage of the Just Energy Entities' customer base is attributable to customers that are parties to variable rate contracts that would be included in the proposed class. This assumption is incorrect.

    - Currently, only approximately 34.9% of the Just Energy Entities' non-commercial customers' natural gas usage and approximately 6.9% of the Just Energy Entities' non-commercial customers' electricity usage is being charged out based on variable rates. Of that, only 2.1% and 0.04%, respectively, of natural gas and electricity usage is attributable to customers who are parties to variable rate contracts with the Just Energy Entities – the rest being customers who are parties to fixed-rate contracts with Just Energy Entities in certain jurisdictions that rolled over to variable rates when they did not renew their fixed rate contracts.[6] This latter subset of customers would not be properly included in the proposed class.

- The damages calculation includes time-barred claims. Pursuant to the 6-year limitation period applicable under New York law, all breach of contract claims with respect to alleged overcharges prior to October 3, 2011, are time-barred, consistent with other court decisions addressing this issue, including Judge Skretny's decision in the Jordet action.

- The expert report erroneously assumes the same rate of damages applies for the period between 2018 and 2020 as applied to the period before 2018. Given that the Just Energy Entities ceased to market variable-rate contracts to new customers by the end of 2017, the quantum of damages, if any, would have continued to decline materially following 2017 as no new variable rate customers were added to the customer pool.[7]

- The damages in the expert report are based on the calculated excess natural gas margin for residential customers, which was derived using two customers' billing data. The Claimants' expert himself acknowledges that the excess natural gas margin "is subject to potentially significant modification". This miniscule sample size means that the estimate of damages is effectively useless in accurately estimating any alleged damages. The same

[6] In certain jurisdictions, the Just Energy Entities are required by the relevant regulations to roll over fixed rate customers to variable rates where they do not affirmatively renew their fixed term contract.

[7] As noted above, customers who are parties to fixed rate contracts with the Just Energy Entities in certain jurisdictions that rolled over to variable rates when they did not renew their fixed rate contracts would not be properly included in the class.

issue also applies with respect to the calculation of the excess electricity margin, which was derived using only one customer's data.

- The report assumes, without any evidence, that the differences between the variable rates the Claimants were charged and the local utility rates in New York are the same as that in other states.

- The Claimants' expert acknowledges that he can only calculate overcharges "more precisely for each member of the affected class as well as for the entire class" once additional discovery is conducted, including Just Energy NY's provision of monthly customer level sales and price data and cost of sales data. However, the New York Court ruled that the Claimants are not entitled to additional discovery in the Donin Action.

The speculative nature of the Claimants' damages calculations is further exacerbated to the extent they continue to seek to include in the proposed class consumers who are not customers of Just Energy NY whose contracts for variable rate energy fit within the Claimants' class definition. Although such an expansion is impermissible for the reasons described above, the assumptions underlying the Claimants' proffered damages analysis are even more speculative where different utility rates and regulatory regimes apply in different jurisdictions, with different product offerings and rate structures. These variables are not accounted for at all in the Claimants' rudimentary damages analysis.

Inflated Claim of Prejudgment Interest

For all the reasons outlined above, the inclusion of US$1,282,196,848 in prejudgment interest is also contingent, speculative, remote, and excessive. The prejudgment interest amount calculation is also fundamentally flawed, as it applies New York's prejudgment interest rate of 9% to damages allegedly incurred in California, Delaware, Illinois, Massachusetts, Maryland, Michigan, New Jersey, Ohio, Pennsylvania, and Texas. Putting aside the fact that there is no basis for the underlying damages figure, the relevant prejudgment interest rates are significantly lower in most of these jurisdictions.

NOTICE OF REVISION OR DISALLOWANCE

For Persons who have asserted Claims against the Just Energy Entities[1]

TO: Trevor Jordet as Representative Plaintiff (the "**Claimant**")

Greg Blankinship (attorney for Representative Plaintiff)
gblankinship@fbfglaw.com
Finkelstein, Blankinship, Frei-Pearson & Garber, LLP
One North Broadway, Suite 900
White Plains, NY
10601
United States

RE: Claim Reference Number: PC-11175-1

Capitalized terms used but not defined in this Notice of Revision or Disallowance shall have the meanings ascribed to them in the Order of the Ontario Superior Court of Justice (Commercial List) in the CCAA proceedings of the Just Energy Entities dated September 15, 2021 (the "**Claims Procedure Order**"). You can obtain a copy of the Claims Procedure Order on the Monitor's website at http://cfcanada.fticonsulting.com/justenergy/.

Pursuant to the Claims Procedure Order, the Monitor hereby gives you notice that the Just Energy Entities, in consultation with the Monitor, have reviewed your Proof of Claim and have revised or disallowed all or part of your purported Claim set out therein. Subject to further dispute by you in accordance with the Claims Procedure Order, your Claim will be treated as follows:

[1] The "**Just Energy Entities**" are Just Energy Group Inc., Just Energy Corp., Ontario Energy Commodities Inc., Universal Energy Corporation, Just Energy Finance Canada ULC, Hudson Energy Canada Corp., Just Management Corp., Just Energy Finance Holding Inc., 11929747 Canada Inc., 12175592 Canada Inc., JE Services Holdco I Inc., JE Services Holdco II Inc., 8704104 Canada Inc., Just Energy Advanced Solutions Corp., Just Energy (U.S.) Corp., Just Energy Illinois Corp., Just Energy Indiana Corp., Just Energy Massachusetts Corp., Just Energy New York Corp., Just Energy Texas I Corp., Just Energy, LLC, Just Energy Pennsylvania Corp., Just Energy Michigan Corp., Just Energy Solutions Inc., Hudson Energy Services LLC, Hudson Energy Corp., Interactive Energy Group LLC, Hudson Parent Holdings LLC, Drag Marketing LLC, Just Energy Advanced Solutions LLC, Fulcrum Retail Energy LLC, Fulcrum Retail Holdings LLC, Tara Energy, LLC, Just Energy Marketing Corp., Just Energy Connecticut Corp., Just Energy Limited, Just Solar Holdings Corp., Just Energy (Finance) Hungary Zrt., Just Energy Ontario L.P., Just Energy Manitoba L.P., Just Energy (B.C.) Limited Partnership, Just Energy Québec L.P., Just Energy Trading L.P., Just Energy Alberta L.P., Just Green L.P., Just Energy Prairies L.P., JEBPO Services LLP, and Just Energy Texas LP.

Type of Claim	Applicable Debtor(s)	Amount as submitted		Amount allowed by the Just Energy Entities	
		Original Currency		Amount allowed as secured:	Amount allowed as unsecured:
A. Pre-Filing Claim	Just Energy Entities	USD	$3,662,444,442.00	$0	$0
B. Restructuring Period Claim			$	$	$
C. Total Claim	Just Energy Entities	USD	$3,662,444,442.00	$0	$0

Reasons for Revision or Disallowance:

See attached Schedule A.

SERVICE OF DISPUTE NOTICES

If you intend to dispute this Notice of Revision or Disallowance, you must, by no later than 5:00 p.m. (Toronto time) on the day that is **thirty (30) days after this Notice of Revision or Disallowance is deemed to have been received by you** (in accordance with paragraph 50 of the Claims Procedure Order), deliver a Notice of Dispute of Revision or Disallowance to the Monitor (by prepaid ordinary mail, registered mail, courier, personal delivery, facsimile transmission or email) at the address listed below.

If you do not dispute this Notice of Revision or Disallowance in the prescribed manner and within the aforesaid time period, your Claim shall be deemed to be as set out herein.

If you agree with this Notice of Revision or Disallowance, there is no need to file anything further with the Monitor.

The address of the Monitor is set out below:

FTI Consulting Canada Inc., Just Energy Monitor
P.O. Box 104, TD South Tower
79 Wellington Street West
Toronto Dominion Centre, Suite 2010
Toronto, ON, M5K 1G8

Attention: Just Energy Claims Process
Email: claims.justenergy@fticonsulting.com
Fax: 416.649.8101

In accordance with the Claims Procedure Order, notices shall be deemed to be received by the Monitor upon actual receipt thereof by the Monitor during normal business hours on a Business Day, or if delivered outside of normal business hours, on the next Business Day.

The form of Notice of Dispute of Revision or Disallowance is enclosed and can also be accessed on the Monitor's website at http://cfcanada.fticonsulting.com/justenergy.

IF YOU FAIL TO FILE A NOTICE OF DISPUTE OF REVISION OR DISALLOWANCE WITHIN THE PRESCRIBED TIME PERIOD, THIS NOTICE OF REVISION OR DISALLOWANCE WILL BE BINDING UPON YOU.

DATED this 11th day of January, 2022.

FTI CONSULTING CANADA INC., solely in its
capacity as Court-appointed Monitor of the Just Energy Entities,
and not in its personal or corporate capacity

Per: 

Jim Robinson
Senior Managing Director

SCHEDULE A

The Claimant advances a claim against the "Just Energy Entities" in the amount of US$3,662,444,442.00 based on a proposed and uncertified class action filed in the Eastern District of Pennsylvania on April 6, 2018, titled *Trevor Jordet v. Just Energy Solutions, Inc.*, Case No. 2:18-cv-01496-MMB (the "**Jordet Action**"). The Jordet Action was subsequently transferred to the US District Court in the Western District of New York (the "**New York Court**").

The Just Energy Entities, in consultation with the Monitor, disallow the claim in its entirety.

Status of Litigation

The Jordet Action was brought solely against Just Energy Solutions, Inc. ("**Just Energy Solutions**") on behalf of a putative class of all "Just Energy customers charged a variable rate for residential natural gas services by Just Energy from April 2012 to the present". The Claimant alleged, among other things, that the defendant violated Pennsylvania Unfair Trade Practices and Consumer Protection Law ("**PUTPCP**"), breached contractual provisions and an implied covenant of good faith requiring Just Energy Solutions to consider "business and market conditions" when it charged rates that were more than the local utility rate for natural gas, and was unjustly enriched as a result of the alleged misconduct. The Jordet Action does not purport to deal with any electricity customers of Just Energy Solutions.

Following a motion to dismiss brought by the defendant, the New York Court dismissed the PUTPCP and unjust enrichment claims, such that only the alleged breach of contract claim remains.[2] Moreover, the New York Court held that claims for breach of contract prior to April 6, 2014, are time-barred. The survival of a claim on a motion to dismiss is not an assessment of its merits but only a determination that, accepting as true all of the allegations in the complaint as required on that motion, the plaintiff has alleged a right to relief that is not entirely speculative. Indeed, the Court noted in its decision that it "cannot dismiss a Complaint unless it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'"[3] The lone remaining claim turns on whether Just Energy Solutions breached contractual commitments to use its discretion to set rates consistent with "business and market conditions" (defined to include a host of factors), and the Court found that whether Just Energy Solutions'

[2] As the New York Court noted in its decision on the motion to dismiss, a breach of the implied covenant of good faith is not a distinct cause of action from breach of contract under Pennsylvania law. *Jordet v. Just Energy Solutions Inc.,* Decision and Order 18-CV-953S regarding Motion to Dismiss dated December 7, 2020 ("**Motion to Dismiss Decision**"), Dkt. 43, at 4.

[3] Motion to Dismiss Decision, at 6.

pricing adhered to that discretionary standard could not readily be resolved solely on the pleadings.[4]

Improper Expansion of Claim

Almost four years after the commencement of the litigation, the Claimant now purports to advance a claim against all "Just Energy Entities" on behalf of both gas and electricity customers, notwithstanding the fact that the Jordet Action is limited to natural gas customers of Just Energy Solutions. Even if the underlying litigation had any merit (it does not), the Claimant cannot use these CCAA Proceedings to improperly expand the scope of his April 2018 claim to now add entirely new customer groups and new defendants who were not included in the Jordet Action.

Claim Is Meritless

The claim is contingent, uncertified, speculative, and remote, especially given that the Claimant's claim has not even proceeded to discovery. Even if discovery had taken place, the Claimant would still have to overcome substantial hurdles to be entitled to any recovery, including:

- dispositive motion practice (i.e. motion for summary judgment) following completion of discovery, which would involve the disclosure of expert reports and supporting evidence from fact witnesses, depositions, potential preliminary motions, written briefs, and oral argument;

- a contested class certification process, which would include written briefing, presentation of supporting evidence from fact and expert witnesses, and oral argument;

- a trial on the issue of liability, including pretrial submissions and motion practice to resolve evidentiary issues, voir dire, direct testimony and cross-examination of fact and expert witnesses, and legal argument from counsel; and

- resolution of damages of the plaintiff or certified class(es), which may require bifurcation from the trial on liability (especially if the Claimant continues to allege damages on behalf of a national class, which the defendant argues is impermissible).

A loss by the Claimant at any one of these phases would either entirely eliminate, or severely restrict, the Claimant's potential damages (and those of any other members of any certified class).

The claim is devoid of merit for numerous reasons, including the fact that the applicable contract contains multiple provisions that put customers (including the Claimant) on clear notice of the variable rates that Just Energy Solutions would set and to which customers (including the Claimant) will be subject:

- "**This Agreement does not guarantee financial savings.** However, at the end of your Term, if the Volume Weighted Average Utility Price is less than the Volume Weighted

[4] Motion to Dismiss Decision, at 17-18.

Average Just Energy Price, we will credit you $100 for each commodity included in this Agreement."[5] (emphasis added)

- "By signing for the ***Natural Gas and/or Electricity Rate Flex Pro Program***, I agree to an introductory fixed price, the Intro Price, for the first twelve billing cycles and thereafter be a Variable Price for the remainder of the Term. Changes to the Variable Price will be determined by business and market conditions." [6] (emphasis in original)

- "**Variable Price**: The monthly rate that you will be charged per Ccf[7] after the expiration of the 12 month Intro Price. The Variable Price will not change more than once each billing cycle. Changes to the Variable Price will be determined by Just Energy according to business and market conditions."[8] (emphasis in original)

- "After the Intro Price period expires, you will be charged a Variable Price per Ccf. The Variable Price during the first billing cycle in which the Variable Price is in the [*sic*] effect will be equal to the Intro Price. The Variable Price will not change more than once each monthly billing cycle. **Changes to the Variable Price will be determined by Just Energy according to business and market conditions, including but not limited to, the wholesale cost of natural gas supply, transportation, distribution and storage**…."[9] (emphasis added)

The parties' agreement thus expressly provides that it does not guarantee the financial savings about which the Claimant now complains. In complaining that his local utility's rates ended up being lower for a portion of the Claimant's contract term, the Claimant simply ignores away the operative agreement. There was no obligation under the agreement for Just Energy Solutions' rates to match or track those charged by the local utility.

Critically, the Claimant's allegation that the defendant breached the parties' contract by failing to set rates "according to business and market conditions" is premised on the erroneous assumption that local public utilities are the main competitors of Just Energy Solutions, and as such the defendant overcharged when its rates were higher than that of the local utility.[10] In reality, local utility rates are not an appropriate barometer by which to measure the rates of energy service companies (**"ESCOs")** like Just Energy Solutions (let alone an appropriate proxy for the long list

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5 "Essential Agreement Information" which is provided in the "Customer Disclosure Statement," which is incorporated into the Claimant's agreement with the defendant.

6 "Essential Agreement Information" which is provided in the "Customer Disclosure Statement," which is incorporated into the Claimant's agreement with the defendant.

7 Ccf is a unit of measurement of natural gas that is the volume of 100 cubic feet.

8 Paragraph 1 of "Natural Gas Disclosure Statement and Terms of Service" incorporated into the Claimant's agreement with the defendant.

9 Paragraph 5 of "Natural Gas Disclosure Statement and Terms of Service" incorporated into the Claimant's agreement with the defendant.

10 The allegation that the defendant breached the covenant of good faith by failing to act reasonably in exercising its discretion to set rates is based on the same erroneous assumption.

of business and market conditions Just Energy Solutions was permitted to consider in exercising its discretion to set its rates) for several reasons, including because:

- **Local utilities and ESCOs do not offer the same products and services.** For instance, ESCOs offer 100% green products, fixed-rate products, energy conservation bundled services and products, dedicated customer service, and affinity rebates or refunds that many consumers prefer. ESCO retail commodity prices are part of a bundle of product and service offerings ESCOs provide their customers, in which products and services interact with each other; comparing the prices charged for those products and services with local utility commodity prices results in erroneous, misleading and distorted conclusions.

- **Local utility commodity prices do not reflect wholesale energy prices.** Local utilities are permitted to defer charges (with the approval of the regulator) to smooth price volatility during periods with particularly high wholesale gas and electricity costs (e.g., 2014 polar vortex price spikes). Such utility regulated deferral activity renders the local utility rates a particularly inappropriate proxy for actual wholesale rate and the actual business and market conditions for the given period and makes an accurate comparison between default service prices and ESCO prices for a particular period impossible. ESCOs do not have the ability to shift the costs of energy service over time, nor can they take advantage of regulated rates that ensure full cost recovery to the provider.

- **Local utilities and ESCOs do not have the same business model.** Just Energy Solutions must compete with other ESCOs to sell energy commodities to consumers. In contrast, local utilities are "default" providers of energy commodities and provide delivery service (gas and electric distribution) regardless of whether the consumer purchases energy commodities from the utility or an ESCO. As a result, local utilities do not face the same costs, risks and market forces that ESCOs face.

- **Local utility commodity prices do not include reasonable profit margins.** Unlike ESCOs, local utility commodity prices are designed to be a pass-through of wholesale costs (sometimes from different periods of time) and not a profit-generating business activity. Moreover, utilities are incentivised to allocate all possible commodity and employee/technology costs to a customer's delivery bill, since that is where the utility has a monopoly and is permitted to receive a return on investment. As a result, no accurate comparison is possible between utility commodity prices and ESCO commodity prices.

- **General energy market conditions affect ESCOs and local utilities differently.** ESCOs incur costs well beyond the costs of energy procurement, which are reflected in their prices. In addition to the costs of the product or service bundled with the commodity cost, ESCO prices may also include consideration of competitors' prices, profit margins, and customer retention policies in addition to overhead costs and marketing efforts. ESCOs account for the costs and values associated with their enhanced products and services, including renewables, and need to structure their businesses to successfully offer fixed-rate guarantees to customers who purchase such products. ESCOs face the business conditions of a competitive market—not at all like the business conditions faced by a regulated utility.

The Claimant's expert has failed to even consider the variable rates charged by other ESCOs during the relevant period in calculating the alleged damages, despite the Claimant's

acknowledgment in the Complaint that "any reasonable consumer" would believe that Just Energy Solutions' variable rates would reflect the market prices *charged by other ESCOs*.[11]

Not only is the Jordet Action devoid of merit, it is not amenable to Rule 23 certification pursuant to the relevant US law, including because:

- Claimant will need to show that the language in the various contracts falling within the class definition are sufficiently similar to present common issues of law, and that those issues predominate over individual issues that different class members face.

- Claimant will need to establish that the proposed representative plaintiff's claims are representative of the experience other customers may have had. The one-size-fits-all approach taken in the Claimant's damages model does not account for the different products and services offered by Just Energy Solutions to its customers and the different providers individual customers had prior to contracting to purchase energy services from Just Energy Solutions, and those differences may be considered at class certification.

- The differences between various contracts and products would be even more pronounced and problematic for purposes of a motion for class certification to the extent the Claimant continues to take the position that they will be seeking to include in the proposed class consumers who are not natural gas customers of Just Energy Solutions whose variable rate contracts fit within the Claimant's class definition. Although such an expansion is impermissible for the reasons described above, the proposed class's failure to satisfy the strict requirements of Rule 23 would be exponentially more pronounced where the proposed class includes customers who contracted with different entities, using different contracts, subject to different regulatory regimes, and for different product offerings.

- The Court will also need to find that the proposed representative plaintiff or other subsets of the proposed class are not subject to unique defenses that would impair the fair and efficient resolution of the action. State specific regulations could present unique claims and defenses to the extent the Claimant's alleged class extended to Just Energy customers outside of Pennsylvania.

Expert Report

The Claimant has submitted a report, that purports to be an expert report, in support of his proof of claim. The quantum of damages set out in the report is speculative and highly inflated, as it is, among other things, based on several flawed assumptions. For example:

- The report includes electricity customers in its calculation of damages, but the proposed class in the Jordet Action is limited to only natural gas customers of Just Energy Solutions.

- The report assumes the correct "comparable" to determine "business and market conditions" is that of the local utility, instead of considering the rates charged by other ESCOs. As noted above, this assumption is deeply flawed. This approach fails for a number

[11] Jordet Complaint, para 20.

of reasons, including by failing to account for any ESCO reasonable profit margin on commodity prices, as local utility commodity prices are not designed to generate any profit.

- The report incorrectly includes commercial customers, whose contracts were materially different from (and subject to different regulatory regimes than) those of residential customers. Moreover, very few of Just Energy Entities' commercial customers are contractual counterparties of the named defendant. Commercial customers currently account for approximately 50% of the Just Energy Entities' customers' electricity and gas usage.

- Calculation of damages for residential and commercial gas customers is derived from a calculation that includes the residential gas load served by all Just Energy Entities. However, only Just Energy Solutions is a named defendant in the Jordet Action, and any damages must be limited to customers who were contractual counterparties with that defendant.

- The report assumes that 50% of residential and commercial natural gas usage of the Just Energy Entities' customer base is attributable to customers that are parties to variable rate contracts that would be included in the proposed class. This assumption is incorrect.

    - Currently, only approximately 34.9% of the Just Energy Entities' non-commercial customers' natural gas usage is being charged out based on variable rates. Of that, only 2.1% of natural gas usage is attributable to customers who are parties to variable rate contracts with the Just Energy Entities – the rest being customers who are parties to fixed-rate contracts with Just Energy Entities in certain jurisdictions that rolled over to variable rates when they did not renew their fixed rate contracts.[12] This latter subset of customers would not be properly included in the proposed class.

- The damages calculation includes time-barred claims. As Judge Skretny held in his decision dated December 7, 2020, regarding the motion to dismiss, all breach of contract claims with respect to alleged overcharges prior to April 6, 2014, are time-barred.

- The expert report erroneously assumes the same rate of damages applies for the period between 2018 and 2020 as applied to the period before 2018. Given that the Just Energy Entities ceased to market variable-rate contracts to new customers by the end of 2017, the quantum of damages, if any, would have continued to decline materially following 2017 as no new variable rate customers were added to the customer pool.[13]

- The damages in the expert report are based on the calculated excess natural gas margin for residential customers, which was derived using two customers' billing data. The Claimant's expert himself acknowledges that the excess natural gas margin "is subject to

[12] In certain jurisdictions, the Just Energy Entities are required by the relevant regulations to roll over fixed rate customers to variable rates where they do not affirmatively renew their fixed term contract.

[13] As noted above, customers who are parties to fixed rate contracts with the Just Energy Entities in certain jurisdictions that rolled over to variable rates when they did not renew their fixed rate contracts would not be properly included in the class.

potentially significant modification". This miniscule sample size means that the estimate of damages is effectively useless in accurately estimating any alleged damages.

- The report assumes, without any evidence, that the differences between the variable rates the Claimant was charged and the local utility rates in Pennsylvania are the same as that in other states.

The speculative nature of the Claimant's damages calculations is further exacerbated to the extent he continues to seek to include in the proposed class consumers who are not natural gas customers of Just Energy Solutions whose variable rate contracts fit within the Claimant's class definition. Although such an expansion is impermissible for the reasons described above, the assumptions underlying the Claimant's proffered damages analysis are even more speculative where different utility rates and regulatory regimes apply in different jurisdictions, with different product offerings and rate structures. These variables are not accounted for at all in the Claimant's rudimentary damages analysis.

Inflated Claim of Prejudgment Interest

For all the reasons outlined above, the inclusion of US$1,282,196,848 in prejudgment interest is also contingent, speculative, remote, and excessive. The prejudgment interest amount calculation is also fundamentally flawed, as it applies New York's prejudgment interest rate of 9% to damages allegedly incurred in California, Delaware, Illinois, Massachusetts, Maryland, Michigan, New Jersey, Ohio, Pennsylvania, and Texas. Putting aside the fact that there is no basis for the underlying damages figure, the relevant prejudgment interest rates are significantly lower in most of these jurisdictions.

WITTELS LAW
New York & New Jersey

Steven L. Wittels
Partner
slw@wittelslaw.com

18 Half Mile Road
Armonk, New York 10504
T: (914) 319-9945 F: (914) 273-2563

December 13, 2021

Via Email
Marc Wasserman
Jeremy Dacks
Michael De Lellis
Osler, Hoskin & Harcourt LLP
MWasserman@osler.com
JDacks@osler.com
mdelellis@osler.com

Robert I. Thornton
Rebecca Kennedy
TGF
RThornton@tgf.ca
Rkennedy@tgf.ca

Re: *Donin et al. v. Just Energy Group, Inc., et al.,* No. 17 Civ. 5787 (WFK) (SJB) (E.D.N.Y.)
Jordet v. Just Energy Solutions, Inc., No. 18 Civ. 953 (WMS) (W.D.N.Y.)

Dear Counsel for Just Energy (Osler):

This is to follow up on our meeting this past Wednesday (December 8) during which Class Counsel in the above-captioned New York federal cases proposed that the parties agree on a plan for adjudication of the Donin and Jordet Creditor-Plaintiffs' claims (hereafter collectively "Donin claims" or "Claimants") in the pending CCAA proceeding. This letter sets forth a framework for the proposed adjudication which we believe should be scheduled for hearing the first week of February 2022 before a tripartite panel (the "Claims Officers").

This proposed schedule contemplates receipt of the Claims Officers' decision before any vote on the Recapitalization Plan or subsequent entry by the Canadian Court of approval of such a Plan under the current Claims Procedure Order. If the Claims Officers have not rendered their decision within this time frame, then Class Counsel will move the Court for an appropriate adjournment of the pertinent CCAA deadlines. To the extent Just Energy believes defense counsel in the pending New York federal class actions need to be involved in the claims adjudication process, to avoid delay we are copying them on this communication.

We are also enclosing with this letter our Financial Advisor Tannor Capital's list of questions on the Just Energy Business Plan of May 2021, together with follow-up questions arising from last week's meeting. We ask that JE counsel as well as the Monitor and JE's advisors be prepared to discuss these questions during a Zoom conference later this week.

In order to meet the fast-track adjudication timetable, the parties will need to cooperate on various pre-hearing matters concerning the claims, which we describe below. Thus please provide your feedback on this proposed framework in writing no later than Wednesday this week (Dec. 15). Please also schedule a Zoom meeting for this Thursday or Friday (Dec. 16 or 17) with Osler, the Monitor, FTI, and the Company's US counsel (if warranted) to discuss finalizing the adjudication process, as well as Tannor Capital's questions.

Pre-Hearing Framework & Plan Leading to Hearing by the Claims Officers

We propose that the parties negotiate and agree on the following:

1. Claims Officers' Selection and Authority

The parties should agree on a tripartite panel from JAMS (U.S.) with both (i) prior arbitration experience, and (ii) experience with class action consumer fraud cases. Additionally, pre-hearing discovery and the hearing would be conducted in accordance with the expedited procedures of the JAMS Comprehensive Arbitration Rules and Procedures ("Rules") governing binding Arbitrations of claims. *See* https://www.jamsadr.com/rules-comprehensive-arbitration/ and "Expedited Procedures" -- Rule 16.1. Under this procedure, the Claims Officers will hear and resolve any disputes and motions concerning pre-trial disclosures and process in a manner that moves the cases forward expeditiously.

We propose that each side select one member of the tripartite panel from the JAMS pool of neutrals, with the third to be selected using the strike method set forth in Rule 15 of the JAMS Rules. *Id*.

2. Pre-Trial Disclosures

Given the limited disclosure that has occurred in the New York actions to date, what is needed now for proper adjudication of these claims is sufficient disclosure by the company of its pricing methodology and costs so all parties can access the appropriate measure of damages

In particular, both sides will need sufficient disclosure such as (i) the rates charged and usage data for Just Energy's customers in the various U.S. markets where the company supplies electricity and gas, (ii) JE's costing methodology, (iii) customer agreements utilized, and (iv) marketing materials. As discussed on our call last week, we are prepared to furnish a more detailed list of what is needed pre-hearing and intend to do so once this process is agreed to.

Depending upon the data and disclosures made, it is likely that circumscribed party depositions will be needed. Absent agreement, the Claims Officers will determine the scope of discovery and depositions in accordance with the JAMS Rules.

3. The Hearing

Under the Claims Officers' guidance the parties will work towards a speedy hearing date. We envision the hearing lasting approximately 5-7 days, and the parties presenting both live witness and expert testimony. We expect an expedited written ruling from the Claims Officers, which decision will be binding on all parties for purposes of the CCAA proceeding. This claims procedure will also allow for an appeal pursuant to the Claims Procedure Order.

****

We look forward to (i) your prompt response by this Wednesday (Dec. 15) as to this proposed claims adjudication procedure, and (ii) confirmation of a scheduled Zoom meeting for this Thursday or Friday (Dec. 16 or 17) with Osler, the Monitor, FTI, the company's advisors, as well as JE's U.S. counsel (if warranted), to discuss finalizing the adjudication process and responses to TCA's questions accompanying this letter.

Thank you.

Very Truly Yours,

/s/ Steven L. Wittels
Steven L. Wittels

cc:
Paul Bishop and Jim Robinson (FTI)
Jason Cyrulnik & Evelyn N. Fruchter
Cyrulnik Fattaruso LLP. (U.S. Litigation counsel for JE)

Court File No. CV-21-00658423-00CL

Just Energy Group Inc. et al.

FIFTH REPORT OF FTI CONSULTING CANADA INC., IN ITS CAPACITY AS COURT-APPOINTED MONITOR

February 4, 2022

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APPENDICES

Court File No. CV-21-00658423-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **JUST ENERGY GROUP INC.**, JUST ENERGY CORP., ONTARIO ENERGY COMMODITIES INC., UNIVERSAL ENERGY CORPORATION, JUST ENERGY FINANCE CANADA ULC, HUDSON ENERGY CANADA CORP., JUST MANAGEMENT CORP., 11929747 CANADA INC., 12175592 CANADA INC., JE SERVICES HOLDCO I INC., JE SERVICES HOLDCO II INC., 8704104 CANADA INC., JUST ENERGY ADVANCED SOLUTIONS CORP., JUST ENERGY (U.S.) CORP., JUST ENERGY ILLINOIS CORP., JUST ENERGY INDIANA CORP., JUST ENERGY MASSACHUSETTS CORP., JUST ENERGY NEW YORK CORP., JUST ENERGY TEXAS I CORP., JUST ENERGY, LLC, JUST ENERGY PENNSYLVANIA CORP., JUST ENERGY MICHIGAN CORP., JUST ENERGY SOLUTIONS INC., HUDSON ENERGY SERVICES LLC, HUDSON ENERGY CORP., INTERACTIVE ENERGY GROUP LLC, HUDSON PARENT HOLDINGS LLC, DRAG MARKETING LLC, JUST ENERGY ADVANCED SOLUTIONS LLC, FULCRUM RETAIL ENERGY LLC, FULCRUM RETAIL HOLDINGS LLC, TARA ENERGY, LLC, JUST ENERGY MARKETING CORP., JUST ENERGY CONNECTICUT CORP., JUST ENERGY LIMITED, JUST SOLAR HOLDINGS CORP. AND JUST ENERGY (FINANCE) HUNGARY ZRT.
(each, an "**Applicant**", and collectively, the "**Applicants**")

FIFTH REPORT OF THE MONITOR

INTRODUCTION

1. Pursuant to an Order (the "**Initial Order**") of the Ontario Superior Court of Justice (Commercial List) (the "**Court**") dated March 9, 2021 (the "**Filing Date**"), Just Energy Group Inc. ("**Just Energy**") and certain of its affiliates (collectively, the "**Applicants**") were granted protection under the *Companies' Creditors Arrangement Act,* R.S.C., c. C-36, as amended (the "**CCAA**" and in reference to the proceedings, the "**CCAA Proceedings**").

2. Pursuant to the Initial Order, among other things:

(a) a stay of proceedings (the "**Stay of Proceedings**") was granted until March 19, 2021 (the "**Stay Period**");

(b) the protections of the Initial Order, including the Stay of Proceedings, were extended to certain subsidiaries of Just Energy that are partnerships (collectively with the Applicants, the "**Just Energy Entities**");

(c) FTI Consulting Canada Inc. was appointed as Monitor of the Just Energy Entities (in such capacity, the "**Monitor**");

(d) a debtor-in-possession interim financing facility was approved in the maximum principal amount of US$125 million subject to the terms and conditions set forth in the financing term sheet (the "**DIP Term Sheet**") between the Just Energy Entities and Alter Domus (US) LLC, as administrative agent for the lenders (the "**DIP Lenders**") dated March 9, 2021; and

(e) certain charges were granted with priority over all encumbrances on the Just Energy Entities' property, including two third-ranking charges on a *pari passu* basis in favour of: (A) the DIP Lenders to secure all Obligations (as defined in the DIP Term Sheet) owing thereunder at the relevant time up to the maximum amount of the Obligations; and (B) each Commodity/ISO Supplier that executed a Qualified Support Agreement in an amount equal to the value of the Priority Commodity/ISO Obligations.

3. On March 9, 2021, Just Energy, in its capacity as foreign representative, commenced proceedings under Chapter 15 of the United States Bankruptcy Code (the "**Chapter 15 Proceedings**") for each of the Just Energy Entities with the United States Bankruptcy Court for the Southern District of Texas (the "**U.S. Court**"). The U.S. Court entered, among others, the *Order Granting Provisional Relief Pursuant to Section 1519 of the Bankruptcy Code.*

4. On March 19, 2021, at the comeback hearing in the CCAA Proceedings, the Court granted the Amended and Restated Initial Order (the "**First A&R Initial Order**"), that, among other things:

(a) extended the Stay Period to June 4, 2021;

(b) approved a key employee retention plan ("**KERP**") and an associated charge as security for payments under the KERP in respect of certain key employees of the Applicants deemed critical to the continued operation and stability of the Just Energy Entities;

(c) increased the amount of the Administration Charge, FA Charge and Directors' Charge;

(d) granted the Cash Management Charge in favour of the Cash Management Banks to secure Cash Management Obligations;

(e) confirmed that any obligations secured by a valid, enforceable and perfected security interest shall continue to be secured by the Property, including any Property acquired after the date of the applicable security agreement; and

(f) authorized the Just Energy Entities to provide cash collateral to third parties where so doing is necessary to operate the Business in the normal course, with the consent of the Monitor and subject to the terms of the Definitive Documents.

5. On April 2, 2021, the U.S. Court granted the *Order Granting Petition for (I) Recognition as Foreign Main Proceedings, (II) Recognition of Foreign Representative, and (III) Related Relief under Chapter 15 of the Bankruptcy Code* (the "**Final Recognition Order**"). The Final Recognition Order, among other things, gave full force and effect to the First A&R Initial Order in the United States, as may be further amended by the Court from time to time.

6. On May 26, 2021, the Court granted the Second Amended and Restated Initial Order (the "**Second A&R Initial Order**") that, among other things:

(a) amended the definition of "Qualified Commodity/ISO Supplier" in the Initial Order to include counterparties to a Commodity Agreement or ISO Agreement executed after the Filing Date;

(b) amended the definition of "Commodity Agreement" to include contracts entered into by a Just Energy Entity for protection against fluctuations in foreign currency exchanges rates; and

(c) amended the requirements set out at paragraph 30 of the Initial Order to permit Qualified Commodity/ISO Suppliers to terminate a Commodity Agreement or Qualified Support Agreement entered into after May 26, 2021, without obtaining Court authorization in certain limited circumstances.

7. A copy of the Second A&R Initial Order is attached hereto as **Appendix "A"**.

8. Also on May 26, 2021, the Court granted an Order that, among other things, (a) extended the Stay Period to September 30, 2021, and (b) authorized, but did not obligate, Just Energy (U.S.) Corp. to repatriate funds to the Just Energy Entities operating in Canada should it become necessary to do so to ensure sufficient working capital is held by such entities to fund their ongoing operations, which repatriation was permitted to be by way of repayment of certain intercompany indebtedness, including interest.

9. On September 15, 2021, the Court granted the Claims Procedure Order (the "**Claims Procedure Order**") that approved the claims process for the identification, quantification, and resolution of Claims (as defined in the Claims Procedure Order) as against the Just Energy Entities and their respective directors and officers (the "**Claims Procedure**"). Additionally, on September 15, 2021, the Court granted an Order that, among other things, extended the Stay Period to December 17, 2021.

10. On November 10, 2021, the Court granted an Order that, among other things, (i) authorized the Just Energy Entities to enter into the Fifteenth Amendment to the DIP Term Sheet (with amendments 1-14 having been amendments to certain milestone deadlines set out therein approved via email); (ii) approved the JE Finance Transaction (as defined therein); (iii) approved a second KERP; and (iv) extended the Stay Period to February 17, 2022.

11. Pursuant to an order dated November 10, 2021 (the "**ecobee Support Agreement Order**"), the Court authorized (i) Just Management Corp. ("**JMC**") to enter into a

support agreement with Generac to vote in favour of the ecobee Transaction (as such terms are defined below) (the "**Support Agreement**"), (ii) the completion of certain restructuring steps proposed to be taken by the Just Energy Entities to ensure that the sale of stock owned by JMC could be completed in a tax efficient manner, and (iii) the sale of the ecobee shares held by Just Energy as a result of the ecobee Transaction.

12. All references to monetary amounts in this Fifth Report of the Monitor (the "**Fifth Report**") are in Canadian dollars unless otherwise noted. Any capitalized terms not otherwise defined herein have the meanings attributed to them in the Second A&R Initial Order.

13. Further information regarding the CCAA Proceedings, including all materials publicly filed in connection with these proceedings, are available on the Monitor's website at http://cfcanada.fticonsulting.com/justenergy/ (the "**Monitor's Website**").

14. Further information regarding the Chapter 15 Proceedings, including the Final Recognition Order and all other materials publicly filed in connection with the Chapter 15 Proceedings, are available on the website of Omni Agent Solutions as the U.S. noticing agent of the Just Energy Entities at https://omniagentsolutions.com/justenergy.

PURPOSE

15. The purpose of this Fifth Report is to provide information to the Court with respect to the following:

    (a) the Monitor's activities since the Monitor's Fourth Report to the Court dated November 5, 2021, and the supplement thereto dated November 9, 2021 (together, the "**Fourth Report**");

    (b) certain energy-related legislative developments in the state of Texas, including an update on House Bill 4492, and their impact on the Just Energy Entities;

    (c) the Just Energy Entities' restructuring initiatives;

    (d) the Claims Procedure;

(e) an update on the ecobee Transaction (as defined below);

(f) the Monitor's views in respect of the motion for advice and direction (the "**Donin/Jordet Motion**") filed by Canadian counsel to U.S. counsel for Fira Donin and Inna Golovan in their capacity as proposed representative plaintiffs in *Donin et al. v. Just Energy Group Inc. et al.* (the "**Donin Action**") and Trevor Jordet, in his capacity as proposed representative plaintiff in *Jordet v. Just Energy Solutions Inc.* (the "**Jordet Action**" and together with the Donin Action, the "**Donin/Jordet Actions**"); and

(g) the Just Energy Entities' actual cash receipts and disbursements for the 13-week period ending January 29, 2022, and a comparison to the cash flow forecast attached as Appendix "A" to the Fourth Report, along with an updated cash flow forecast for the period ending March 12, 2022;

(h) the relief sought by the Applicants in their proposed Order (the "**Proposed Order**"), which includes extending the Stay Period to March 4, 2022; and

(i) the Monitor's views in respect of the foregoing, as applicable.

TERMS OF REFERENCE AND DISCLAIMER

16. In preparing this Fifth Report, the Monitor has relied upon audited and unaudited financial information of the Just Energy Entities, the Just Energy Entities' books and records, and discussions and correspondence with, among others, management of and advisors to the Just Energy Entities as well as other stakeholders and their advisors (collectively, the "**Information**").

17. Except as otherwise described in this Fifth Report:

(a) the Monitor has not audited, reviewed, or otherwise attempted to verify the accuracy or completeness of the Information in a manner that would comply with Generally Accepted Auditing Standards pursuant to the Chartered Professional Accountants of Canada Handbook; and

(b) the Monitor has not examined or reviewed the financial forecasts or projections referred to in this Fifth Report in a manner that would comply with the procedures described in the *Chartered Professional Accountants of Canada Handbook*.

18. Future-oriented financial information reported in or relied on in preparing this Fifth Report is based on assumptions regarding future events. Actual results will vary from these forecasts and such variations may be material.

19. The Monitor has prepared this Fifth Report to provide information to the Court in connection with the relief requested by the Applicants and in response to the Donin/Jordet Motion. The Fifth Report should not be relied on for any other purpose.

MONITOR'S ACTIVITIES SINCE THE FOURTH REPORT

20. In accordance with its duties as outlined in the Initial Order, the Claims Procedure Order and its prescribed rights and obligations under the CCAA, the activities of the Monitor since the Fourth Report have included the following:

(a) assisting the Just Energy Entities with communications to employees, creditors, vendors, and other stakeholders;

(b) participating in regular discussions with the Just Energy Entities, their respective legal counsel and other advisors regarding, among other things, the CCAA Proceedings, the Just Energy Entities' restructuring initiatives, the Claims Procedure, communications with stakeholders and business operations;

(c) in consultation with the Just Energy Entities, administering the Claims Procedure, reviewing and recording filed Claims, and issuing Notices of Revision or Disallowance (as each term is defined in the Claims Procedure Order) and where applicable, notifying creditors of accepted Claims;

(d) monitoring the cash receipts and disbursements of the Just Energy Entities;

(e) assisting the Just Energy Entities to update and extend their cash flow forecasts;

(f) working with and providing input to the Just Energy Entities and other stakeholders to assist with the development of a plan of compromise or arrangement and related draft documents;

(g) working with the Just Energy Entities, their advisors, and the Monitor's counsel, as applicable, to, among other things:

(i) provide stakeholders with financial and other information;

(ii) assist the Just Energy Entities in furthering their analysis and considerations with respect to possible exit strategies from the CCAA Proceedings and restructuring plan, including assisting with the preparation of related cash flow forecasts and presentations; and

(iii) ensure compliance with the requirements of regulators in applicable jurisdictions;

(h) attending meetings of the Board of Directors of Just Energy, and various committees thereof;

(i) responding to many creditor and other stakeholder inquiries regarding the Claims Procedure and the CCAA Proceedings generally;

(j) posting monthly reports on the value of the Priority Commodity/ISO Obligations to the Monitor's Website in accordance with the terms of the Second A&R Initial Order;

(k) maintaining the service list for the CCAA Proceedings with the assistance of counsel for the Monitor, a copy of which is posted on the Monitor's Website; and

(l) preparing this Fifth Report.

TEXAS LEGISLATIVE DEVELOPMENTS

21. As discussed in the Fourth Report, the Governor of Texas signed House Bill 4492 ("**HB 4492**") on June 16, 2021, which provides a mechanism for the partial recovery of costs incurred by certain Texas energy market participants, including certain of the Just Energy Entities, during the Texas weather event in February 2021.

22. HB 4492 addresses the securitization of (i) ancillary service charges above the system-wide offer cap of US$9,000/MWh during the weather event; (ii) reliability deployment price adders charged by the Electric Reliability Council of Texas, Inc. ("**ERCOT**") during the weather event; and (iii) non-payment of amounts owed to ERCOT due to defaults by competitive market participants, resulting in short payments to market participants, including Just Energy (collectively, the "**Costs**").

23. The Just Energy Entities had previously advised the Monitor that they anticipated recovering at least US$100 million of the Costs from ERCOT. The Just Energy Entities have continued to monitor and evaluate the potential benefits and impact of HB 4492 and, in a press release dated December 9, 2021, announced that their expected recovery from ERCOT of the Costs has increased to approximately US$147.5 million based on ERCOT's calculations filed with the Public Utility Commission of Texas, representing an increase of US$47.5 million over the previous estimate.

UPDATE ON RESTRUCTURING EFFORTS OF THE JUST ENERGY ENTITIES

24. The Just Energy Entities with the assistance of their counsel and the Financial Advisor, in consultation with the DIP Lenders (in their capacity as such, and in their capacity as assignee of the secured Claim asserted by BP Energy Company and its affiliates, and the sponsor in connection with the Recapitalization Plan (as defined below)), the Credit Facility Lenders, Shell, the lenders under the non-revolving term loan established pursuant to the Term Loan Agreement as part of the Applicants' 2020 balance sheet recapitalization transaction (the "**Term Loan Lenders**"), and their respective legal and financial advisors, have made significant progress in developing a recapitalization term sheet (the "**Recapitalization Term Sheet**") that provides for the recapitalization of the Just Energy Entities and their respective businesses via a plan of compromise or arrangement (the "**Recapitalization Plan**").

25. The Recapitalization Term Sheet and Recapitalization Plan are intended to facilitate emergence from the CCAA Proceedings, preserve the going concern value of the business, maintain customer relationships, and preserve employment and critical vendor and regulator relationships – all for the benefit of the Just Energy Entities' stakeholders.

26. To provide sufficient time to advance these restructuring efforts, and finalize the Recapitalization Term Sheet and Recapitalization Plan, the Just Energy Entities have negotiated extensions to certain milestone deadlines provided for in the DIP Term Sheet including the following:

(a) February 10, 2022 – deadline for delivery of the settled Recapitalization Term Sheet, which will form the basis of the Recapitalization Plan;

(b) February 17, 2022 – deadline for the Court to grant an order approving one or more meetings for a vote on the Recapitalization Plan and related materials (the "**Meeting Order**"), if applicable, and February 22, 2022, being the deadline to mail the meeting materials;

(c) March 15, 2022 – deadline for the U.S. Court to recognize the Meeting Order, if applicable;

(d) March 30, 2022 – deadline for the meeting(s) to vote on the Recapitalization Plan, if applicable;

(e) April 7, 2022 – deadline for the Court to grant an order approving and sanctioning the Recapitalization Plan, if applicable; and

(f) April 21, 2022 – deadline for U.S. Court to enter an order recognizing the order approving and sanctioning the Recapitalization Plan, if applicable.

27. The Just Energy Entities and the Monitor are hopeful that agreement on the Recapitalization Term Sheet and Recapitalization Plan can be reached in the near future. To this end, the Monitor understands that the Just Energy Entities intend to bring a motion before the Court returnable on March 3, 2022, to seek the authority to file the Recapitalization Plan and request that the Court grant the Meeting Order. The Monitor will comment on the Meeting Order and Recapitalization Plan in a future report to the Court. The Monitor notes that March 3, 2022 is after the milestone dates currently established for the Meeting Order. The Monitor understands that it is the intention of the Just Energy Entities to negotiate for an extension of the applicable milestone.

UPDATE ON CLAIMS PROCEDURE

Claims Procedure Overview

28. As noted in the Monitor's Third Report to the Court dated September 8, 2021 (a copy of which is available on the Monitor's Website), the Just Energy Entities, in consultation with the Monitor and the Claims Agent, developed the Claims Procedure to determine the nature, quantum, and validity of Claims against the Just Energy Entities and their Directors and Officers in a flexible, fair, comprehensive, and expeditious manner. Subject to certain exceptions, the deadline to file a Proof of Claim or a Notice of Dispute of Claim (in the case of Negative Notice Claimants) was November 1, 2021 (Toronto time) (the "**Claims Bar Date**"). For the purpose of this section, any capitalized terms not defined herein have the meanings ascribed thereto in the Claims Procedure Order.

29. The Claims Procedure Order incorporated a negative notice claims process for known and quantified Claims generally, while all other Claimants not included within the definition of "Negative Notice Claimant" were required to file a Proof of Claim. To the extent that a party received a Statement of Negative Notice Claim and failed to file a Notice of Dispute of Claim, the Negative Notice Claimant's Claim was deemed to be the amount set forth in the Statement of Negative Notice Claim.

30. Pursuant to noticing requirements and obligations of the Monitor contained within the Claims Procedure Order, the Monitor, with the assistance of the Claims Agent and the Just Energy Entities, has:

    (a) issued approximately 1,000 Negative Notice Claims Packages to 835 Negative Notice Claimants;

    (b) issued approximately 15,100 General Claims Packages to: (i) each person on the Service List (except Persons that are likely to assert only Excluded Claims); (ii) any Person who has requested a Proof of Claim and was not sent a Statement of Negative Notice Claim; (iii) any Person known to the Just Energy Entities or the Monitor as having a potential Claim that is not captured in any Statement of Negative Notice Claim; and (iv) any Person with a Claim arising out of the

restructuring, disclaimer, termination or breach on or after the Filing Date of any contract, lease or other agreement;

(c) issued approximately 3,700 notices advising of the existence of the Claims Procedure (which contained instructions for accessing a General Claims Package) to all active vendors of the Just Energy Entities listed in their books and records but not having any known Claims against the Just Energy Entities;

(d) caused the Notice to Claimants to be published on September 21, 2021, in the following printed publications: (i) the Global and Mail (National Edition); (ii) the Wall Street Journal; (iii) the Houston Chronicle; and (iv) the Dallas Morning News;

(e) posted all relevant documents with respect to the Claims Procedure on the Monitor's Website, including, but not limited to (i) the Notice to Claimants, (ii) the General Claims Package, (iii) a blank Notice of Dispute of Claim form, (iv) a blank Proof of Claim form, and (v) a blank D&O Proof of Claim form;

(f) received, reviewed, recorded and categorized all Notices of Dispute of Claim and Proofs of Claim that were received before, on, or after the Claims Bar Date;

(g) issued several Notices of Revision or Disallowance in respect of disallowed Claims prepared by the Applicants, in consultation with the Monitor;

(h) notified creditors of certain Claims accepted by the Just Energy Entities in consultation with the Monitor;

(i) engaged in numerous discussions and correspondence with various creditors that filed duplicative, erroneous, or marker claims to have such Claims withdrawn by the Claimant, where appropriate; and

(j) consulted with certain of the Consultation Parties in respect of certain Claims, as authorized pursuant to paragraph 41 of the Claims Procedure Order.

31. The Monitor has also engaged with numerous stakeholders in respect of questions that have arisen in respect of their Negative Notice Claims Package and the Claims Procedure generally.

32. The Just Energy Entities, with assistance from and in consultation with the Monitor, are in the process of completing a review of the Notices of Dispute of Claim and Proofs of Claim received, and are actively working to review, investigate, and/or resolve the various Claims as applicable.

Overview of Claims

33. Statements of Negative Notice Claim were issued to 835 Claimants, of which 15 subsequently submitted a Notice of Dispute of Claim. Additionally, there were 515 Claimants who submitted a Proof of Claim.

34. A summary of the Claims segregated by Statement of Negative Notice Claim, Notice of Dispute of Claim, Proof of Claim and category of claim, is presented in the table below. Please note that the amounts presented are inclusive of potential duplicate and/or erroneous claims and represent the total Claims recorded by the Monitor.

Category	Statement of Negative Notice		Notice of Dispute of Claim		Proof of Claim		Total Claims		
	Secured	Unsecured	Secured	Unsecured	Secured	Unsecured	Secured	Unsecured	TOTAL
(amounts stated in millions of CAD)									
Funded Debt	$ 331	$ 289	-	$ 13	-	-	$ 331	$ 302	**$ 633**
Commodity & Financial	472	2	2	-	377	2	852	3	**855**
Litigation	-	-	-	-	-	10,015	-	10,015	**10,015**
Tax & Unclaimed Property	-	5	-	-	0	90	0	95	**95**
Trade & Other	-	8	-	0	26	490	26	498	**524**
D&O	-	-	-	-	-	1,545	-	1,545	**1,545**
Total Claims Pool (Exl. Withdrawn & Rescinded Claims)	**804**	**304**	**2**	**14**	**403**	**12,140**	**1,209**	**12,458**	**13,667**
Withdrawn & Rescinded Claims	-	0	-	0	-	994	-	994	**994**
Total Claims Received	**$ 804**	**$ 304**	**$ 2**	**$ 14**	**$ 403**	**$ 13,134**	**$ 1,209**	**$ 13,452**	**$ 14,661**

35. The following provides an overview of the types of Claims contained within each category:

(a) Funded Debt: Funded Debt claims total approximately $633 million and include all aggregate claims that relate to the Credit Facility Lenders, the Term Loan Lenders, and the Claims of the Noteholders;

(b) Commodity & Financial: Commodity & Financial claims total approximately $855 million and include all aggregate Claims of Commodity Suppliers as well as Claims relating to financial hedges or the purchase of renewable energy certificates;

(c) Litigation: Litigation claims total approximately $10,015 million and include all aggregate Claims pertaining to on-going and settled litigation;

(d) Tax & Unclaimed Property: Tax & Unclaimed Property claims total approximately $95 million and include all aggregate Claims of various government bodies for taxes owing at the local, state/province, and/or federal level, and also includes all claims with respect to unclaimed property owed to various U.S. states. For the Just Energy Entities, unclaimed property typically represents cheques issued prior to each state's established dormancy period, which represents the date by which a payee must deposit a cheque – generally 2 or more years;

(e) Trade & Other: Trade & Other claims total approximately $524 million and include all aggregate Claims of trade vendors, IT vendors, former employees, commission vendors, landlords and other. In this category, it is estimated that there are approximately $435 million of Claims that are duplicative, which could reduce the total Claims to be resolved to approximately $89 million if such Claims are withdrawn or successfully resolved; and

(f) D&O Claims: D&O Claims include all Claims filed against the Directors and Officers of the Just Energy Entities. Approximately 302 D&O Proofs of Claim (including 193 "marker claims") were recorded totaling approximately $1,545 million. The Monitor understands that all of these D&O Claims are disputed by the Just Energy Entities. In fact, approximately $1,436 million of these claims have now been disallowed by the Just Energy Entities, in consultation with the Monitor, and pursuant to which the deadline to file a Notice of Dispute has lapsed, resulting in $109 million of D&O Claims remaining to be resolved.

36. As of January 31, 2022, secured claims initially recorded by the Monitor total approximately $1,209 million, which is comprised primarily of the Just Energy Entities secured funded debt obligations and other secured supplier obligations pursuant to the

Intercreditor Agreement. Based on the review of secured claims completed by the Just Energy Entities and the Monitor and subject to final resolution of all secured claims, if necessary, pursuant to the Claims Procedure Order, it is estimated that there are approximately $309 million of secured claims that are potentially duplicative or erroneous, which would reduce the total secured claims to be resolved to approximately $900 million if such Claims are withdrawn or successfully resolved.

37. As of January 31, 2022, unsecured claims initially recorded by the Monitor total approximately $13,452 million. Counsel for each of the Plaintiffs in the Donin Action and the Jordet Action filed a Proof of Claim each in the amount of US$3,662 million, or approximately $4,615 million (together, the "**Donin/Jordet Claims**"). Based on the review of unsecured claims completed by the Just Energy Entities and the Monitor and subject to final resolution of all unsecured claims, if necessary, pursuant to the Claims Procedure Order, it is estimated that there are approximately $6,362 million of unsecured claims recorded (including one of the contingent Donin/Jordet Claims in the amount mentioned above) that are duplicative or erroneous. Net of withdrawn and rescinded claims of $994 million and if the estimated duplicative or erroneous Claims of $6,362 million are withdrawn or successfully resolved, the total unsecured Claims to be resolved would be approximately $6,096 million.

38. The Just Energy Entities, with the assistance of the Monitor, are working to facilitate the voluntary withdrawal of duplicate and erroneous Claims submitted in an expeditious manner where possible. As of January 31, 2022, approximately $994 million of Claims have been withdrawn or rescinded. Of the $14,661 million total Claims received less withdrawn and rescinded Claims of $994 million, the total remaining Claims pool is $13,667.

39. In addition to the dollar value Claims listed in the above table and D&O "marker claims", there are an additional 275 Proofs of Claim which are recorded as "marker claims" for amounts yet to be determined. Of these "marker claims", 261 Proofs of Claim pertain to Claims filed by individuals who have sought to assert tort and/or similar Claims against the Just Energy Entities in relation to the Texas weather event. The

Monitor understands that all of these Claims are disputed by the Just Energy Entities. The remaining 14 "marker claims" generally pertain to Claims filed by certain governmental organizations and taxation bodies. The Just Energy Entities, in consultation with the Monitor, are working to determine and resolve these Claims.

40. The Monitor received 21 Claims totaling approximately $9 million after the applicable Claims Bar Date (the "**Late-Filed Claims**"). The Monitor and the Just Energy Entities are in the process of reviewing the Late-Filed Claims. To the extent any further late-filed claims are submitted, the Just Energy Entities, in consultation with the Monitor, will assess those claims in light of the circumstances existing at that time.

41. The Just Energy Entities, in consultation with the Monitor, continue to assess the nature, quantum and validity of the Claims with a view to either accepting or disputing each Claim based on its merits. The Monitor will provide an update regarding the status of the Claims in a future report.

UPDATE ON ECOBEE TRANSACTION

42. As discussed in the Fourth Report, it was announced on November 1, 2021 that ecobee Inc. ("**ecobee**"), a private company in which JMC owned approximately an 8% equity interest, had agreed to sell all of its issued and outstanding shares (the "**ecobee Transaction**") to 13462234 Canada Inc. ("**Generac**"), a wholly-owned subsidiary of Generac Power Systems, Inc., which is in turn a wholly-owned subsidiary of Generac Holdings Inc. ("**Generac Holdings**"). Generac Holdings stock trades on the New York Stock Exchange under the symbol GNRC. The sale was intended to be effected pursuant to a court approved arrangement under the *Canada Business Corporations Act*.

43. As consideration for the ecobee Transaction, Generac agreed to pay to the sellers of the ecobee shares US$200 million cash on closing, subject to customary adjustments, and US$450 million in Generac Holdings common stock. Additionally, upon achievement of certain performance targets between closing of the transaction and June 30, 2023, the sellers may receive a further amount up to an aggregate of US$120 million in shares of Generac Holdings common stock.

44. Subsequent to the issuance of the ecobee Support Agreement Order, the Just Energy Entities entered into the Support Agreement with Generac and voted in favour of the ecobee Transaction.

45. The ecobee Transaction closed on or around December 1, 2021. At closing, the Just Energy Entities received approximately $16 million in cash, which was net of certain adjustments totalling approximately $2 million, and approximately 80,281 common shares of Generac Holdings common stock. Commencing on December 7 through December 20, 2021, as authorized pursuant to the ecobee Support Agreement Order, the Just Energy Entities monetized the common shares of Generac Holdings common stock received for cash proceeds of $29 million, resulting in a combined total cash and share sale proceeds realized of $45 million.

DONIN/JORDET MOTION

Background

46. As mentioned above, the Donin/Jordet Motion was filed by the plaintiffs in the Donin Action and the Jordet Action (collectively, the "**Plaintiffs**"), who purport to represent a class of putative claimants. The Plaintiffs submitted two overlapping claims against the Just Energy Entities each in the amount of approximately US$3.66 billion, or US$7.32 billion combined, based on the proposed and uncertified class actions. The Monitor understands that the Plaintiffs are only claiming US$3.66 billion for the two overlapping claims, notwithstanding the fact that two duplicative claims were submitted, and that the Plaintiffs acknowledge that the damages calculation of US$3.66 billion is a joint and composite damages claim encompassing both the Donin Action and the Jordet Action.

47. The Donin Action claims damages on behalf of a putative class of "all Just Energy customers in the United States […] who were charged a variable rate for their energy at any time from [applicable statute of limitations period] to the date of judgment". The Jordet Action claims damages on behalf of a putative class of all "Just Energy customers charged a variable rate for residential natural gas services by Just Energy from April 2012 to present".

48. The Donin Action was filed against Just Energy and Just Energy New York Corp., and the Jordet Action was filed against Just Energy Solutions, Inc.

49. In both the Jordet Action and the Donin Action, the only claims that remain are allegations that the applicable Just Energy Entities' actions breached contractual provisions to consider "business and market conditions" and breached the implied covenant of good faith when it charged rates that were more than the local utility rate for natural gas and (in the case of the Donin Action only) electricity. All other causes of action asserted in the Donin/Jordet Actions were dismissed as part of summary dismissal orders issued by the New York Courts dated September 24, 2021 (in the Donin Action) and December 7, 2021 (in the Jordet Action).

50. In accordance with the Claims Procedure Order, counsel for each of the Plaintiffs in the Donin Action and the Jordet Action filed the Donin/Jordet Claims, which are appended as Exhibits F and G, respectively, to the Affidavit of Robert Tannor sworn January 17, 2022 (the "**Tannor Affidavit**") included in the Donin/Jordet Motion. Upon review of the Donin/Jordet Claims, and in consultation with the Monitor, the Just Energy Entities prepared Notices of Disallowance or Revision and disallowed the Donin/Jordet Claims in their entirety for the reasons set out in such notices, which are attached as Exhibits Q and R to the Tannor Affidavit. Further details regarding the basis for the disallowances are set out in the Affidavit of Michael Carter sworn February 2, 2022 (the "**Carter Affidavit**").

Discussions with the Monitor and Responses to Information Requests

51. The Monitor has had several meetings and discussions with U.S. and Canadian counsel representing the Plaintiffs in the Donin/Jordet Actions (collectively, "**Litigation Counsel**"), and a representative of Tannor Capital Management LLC ("**Tannor Capital**"), the Plaintiffs' financial advisor, to discuss the Donin/Jordet Claims. Further, counsel to the Just Energy Entities and the Monitor received a comprehensive list of information requests on December 13, 2021 from Litigation Counsel and Tannor Capital (the "**Information Requests**"). The Information Requests are attached as Exhibit M to the Tannor Affidavit.

52. Although omitted from the Tannor Affidavit, the Monitor, in consultation with the Just Energy Entities, did prepare and provide a comprehensive and detailed response to the Information Requests, despite most of the information being publicly available. The Monitor's responses to the Information Requests were promptly provided to Litigation Counsel and Mr. Tannor on December 23, 2021, a copy of which is attached as Confidential Appendix "G" to the Carter Affidavit.

Donin/Jordet Motion

53. In the Donin/Jordet Motion, the Plaintiffs are seeking an order, among other things, declaring that they are to be unaffected by the CCAA Proceedings. In the alternative, they are seeking, among other things, (a) an order directing the implementation of a litigation schedule and process leading to the final adjudication of the Donin/Jordet Claims prior to any consideration by the Court of any plan of compromise or arrangement put forth by the Just Energy Entities, and (b) an order directing the Just Energy Entities to provide the Plaintiffs with access to any data room and access to information, or in the alternative directing the production of specified documents and information listed.

54. The Monitor does not support the Plaintiffs' request to be treated as unaffected by the CCAA Proceedings. Given the quantum of the Donin/Jordet Claims, the Monitor is of the view that these Claims (and all other litigation claims) must be affected and dealt with as part of the CCAA Proceedings to allow the Just Energy Entities to emerge from these CCAA Proceedings as a successfully restructured business. The Monitor has also been informed by the DIP Lenders (who are also the Plan Sponsor) that under no circumstances will they support a CCAA Plan which leaves these uncertified contingent claims as unaffected. The Plaintiffs are contingent creditors and there is no basis for them to be treated differently than the other contingent creditors in these CCAA Proceedings.

Adjudication Process

55. The Monitor has attempted to facilitate discussions between parties to reach a settlement on a litigation schedule and process to resolve the Donin/Jordet Claims. The Monitor has continued these efforts after the date Litigation Counsel served their motion record. A consensus has not been reached as of the date of this Fifth Report.

56. With respect to the proposed litigation schedule set out in the Donin/Jordet Motion, the Monitor understands that there are several steps that would need to take place prior to the final determination or resolution of the Donin/Jordet Claims, including, without limitation, the following:

(a) discovery and production in respect of the Jordet Action;

(b) the exchange of any expert reports;

(c) a summary judgment motion or motions;

(d) a class certification hearing prior to a determination on the merits, as the putative class actions are currently uncertified;

(e) pre-trial steps, such as a pre-trial case conference;

(f) a trial on the merits; and

(g) the exercise of any potential appeal rights.

57. Given the complex nature and the early stages of the underlying litigation and size of the claims being alleged, the Monitor is of the view that the adjudication timeline proposed by the Plaintiffs is far too brief and not achievable from the outset. Rather, the Monitor is supportive of a more realistic adjudication schedule spanning approximately twelve months before a Claims Officer, as was proposed by the Just Energy Entities.

58. Further, the Monitor is of the view that it is unreasonable to delay the entire restructuring process of the Just Energy Entities to resolve one outstanding contingent litigation claim.

59. The Just Energy Entities' business is complex and requires diligent, focused management. The CCAA Proceedings have imposed considerable additional demands and responsibilities on management as they combine day to day responsibilities with the pursuit of a restructuring of the Just Energy Entities. In the Monitor's view, seeking adjudication of the Donin/Jordet Claims on the timeline proposed by the Plaintiffs would unduly impede the ability of management and key employees to focus their time and attention on achieving a successful restructuring for the benefit of all stakeholders.

60. Accordingly, the Monitor does not support the proposed adjudication process set forth in the Donin/Jordet Motion.

Information Requests and Recapitalization Plan Discussions

61. With respect to the documents and other information requested by the Plaintiffs, the Monitor intends to work with the Just Energy Entities and the Plaintiffs to facilitate and resolve such outstanding information and document requests as may be reasonable and appropriate in the circumstances.

62. The Plaintiffs have requested to be privy to the Recapitalization Plan discussions. The Monitor understands that only the Just Energy Entities' key stakeholders (which comprise the DIP Lenders, the Credit Facility Lenders, Shell and other key non-contingent creditors including the Term Loan Lenders) are privy to such discussions at this time. Further, the Plaintiffs are contingent uncertified creditors and the Monitor confirms that no contingent litigation creditor is privy to the discussions in respect of the Recapitalization Plan. Rather, the Plaintiffs will have the benefit of reviewing and considering any such Recapitalization Plan when it is put forth to all creditors for consideration. The Monitor notes that it is not a requirement that a debtor in a CCAA proceeding involve all of its creditors when developing a restructuring proposal and does not support the Plaintiffs' request for such involvement.

RECEIPTS AND DISBURSEMENTS FOR THE 13-WEEK PERIOD ENDED JANUARY 29, 2022

63. The Just Energy Entities' actual net cash flow for the 13-week period from October 31, 2021 to January 29, 2022, was approximately $33.9 million worse than the Cash Flow Forecast appended to the Fourth Report (the "**November Cash Flow Forecast**") as summarized below:

(CAD$ in millions)	Forecast	Actuals	Variance
RECEIPTS			
Sales Receipts	$614.2	$599.4	($14.7)
Miscellaneous Receipts	67.6	52.2	(15.3)
Total Receipts	$681.7	$651.7	($30.1)
DISBURSEMENTS			
Operating Disbursements			
Energy and Delivery Costs	($491.3)	($548.3)	($57.0)
ERCOT Resettlements	-	-	-
Payroll	(32.5)	(29.0)	3.5
Taxes	(31.8)	(22.6)	9.2
Commissions	(24.0)	(23.8)	0.3
Selling and Other Costs	(49.9)	(35.4)	14.5
Total Operating Disbursements	($629.5)	($659.1)	($29.6)
OPERATING CASH FLOWS	$52.2	($7.4)	($59.6)
Financing Disbursements			
Credit Facility - Borrowings / (Repayments)	$ -	$ -	$ -
Interest Expense & Fees	(12.8)	(11.0)	1.8
Restructuring Disbursements			
Professional Fees	(10.8)	(14.8)	(4.0)
NET CASH FLOWS	**$28.7**	**($33.2)**	**($61.8)**
CASH			
Beginning Balance	$137.1	$164.7	$27.6
Net Cash Inflows / (Outflows)	28.7	(33.2)	(61.8)
Other (FX)	-	0.4	0.4
ENDING CASH	**$165.8**	**$131.9**	**($33.9)**

64. Explanations for the main variances in actual receipts and disbursements as compared to the November Cash Flow Forecast are as follows:

(a) The unfavourable variance of approximately $14.7 million in Sales Receipts is primarily comprised of the following:

(i) An unfavourable variance of approximately $19.4 million in respect of U.S. residential customers, respectively, related to timing and also related to lower than anticipated energy demand and customer acquisitions;

(ii) A permanent favourable variance of approximately $10.8 million in respect of U.S. commercial customers, primarily driven by the impact of higher market prices on variable rate customer contracts, offset by higher Energy & Delivery Costs; and

(iii) A permanent unfavourable variance of approximately $6.1 million primarily due to lower than forecast Canadian residential and commercial customer billings;

(b) The unfavourable permanent variance of approximately $15.3 million of Miscellaneous Receipts is primarily due to lower than anticipated proceeds from the sale of stock received in the ecobee Transaction due to a decline in the stock price of Generac;

(c) The unfavourable variance of approximately $57 million in respect of Energy and Delivery Costs is primarily driven by the following:

(i) An unfavourable variance of approximately $40.3 million primarily due to higher than forecast commodity and collateral payments related to increased pricing during the period; and

(ii) A permanent unfavourable variance of approximately $16.7 million due to higher than forecasted transportation and delivery payments due in part to higher energy transmission volumes, temporarily increased transportation and delivery rates, and normal course fluctuations;

(d) The favourable variance of approximately $3.5 million in respect of Payroll is due to normal course fluctuations for various payroll tax remittances and sale incentive payments;

(e) The favourable variance of approximately $9.2 million in respect of Taxes is primarily due to the timing of estimated tax payments including an estimated sales tax reassessment payment owing by the Just Energy Entities of approximately $7.8 million that was forecast, but not paid, during the period. This payment will be removed from future forecasts since it is now expected to be resolved as part of the Claims Procedure;

(f) The permanent favourable variance of approximately $0.3 million for Commissions is primarily due to normal course fluctuations related to customer sign-ups and associated commissions;

(g) The favourable timing variance of approximately $14.5 million in respect of Selling and Other Costs is primarily due to lower than forecasted spending rates and to the Just Energy Entities' continued successful negotiation of payment terms and go-forward arrangements with its vendors;

(h) The favourable variance of $1.8 million in respect of Interest Expense & Fees is primarily due to lower than forecast interest and fees owed on the Just Energy Entities' credit facilities; and

(i) The unfavourable timing variance of $4.0 million in respect of Professional Fees is due to higher than forecast payments of professional fee invoices during the current 13-week period primarily resulting from increased services rendered by professionals with respect to the development and negotiation of the Restructuring Plan and adjudication of Claims pursuant to the Claims Procedure.

Reporting Pursuant to the DIP Term Sheet

65. The variances shown and described herein compare the November Cash Flow Forecast, as appended to the Fourth Report, with the actual performance of the Just Energy Entities over the 13-week period noted.

66. Pursuant to Section 18 of the DIP Term Sheet, the Just Energy Entities are required to deliver a variance report setting out the actual versus projected cash disbursements once every four weeks (the "**DIP Variance Reports**"). The permitted variances to which certain line items of the cash flow forecast are tested are outlined in section 24(30) of

Schedule I of the DIP Term Sheet. The Just Energy Entities provided the required variance reports for the four-week periods ended May 29, 2021; June 26, 2021; July 24, 2021; August 21, 2021; September 18, 2021; October 16, 2021; November 13, 2021; December 11, 2021; and January 8, 2022. All variances reported were within the permitted variances.

67. Also, in accordance with Section 18 of the DIP Term Sheet, the Just Energy Entities are required to deliver a new 13-week cash flow forecast, which shall replace the immediately preceding cash flow forecast in its entirety upon the DIP Lenders' approval thereof and is used as the basis for the next four-week variance report and permitted variance testing (the "**DIP Cash Flow Forecasts**"). The Just Energy Entities provided the required DIP Cash Flow Forecasts, which were approved by the DIP Lenders, for the 13-week periods beginning May 30, 2021; June 27, 2021; July 25, 2021; August 22, 2021; September 19, 2021; October 17, 2021; November 14, 2021; December 12, 2021; and January 9, 2022.

68. As the DIP Variance Reports utilize updated underlying cash flow forecasts vis-à-vis the November Cash Flow Forecast for the same period, the DIP Variance Reports differed from the variance analysis above that compares actual results to the November Cash Flow Forecast. For purposes of the Just Energy Entities reporting requirements pursuant to the DIP Term Sheet, the DIP Cash Flow Forecasts as approved by the DIP Lenders will continue to govern.

69. Since the Fourth Report, the Just Energy Entities have complied with their reporting obligations pursuant to the DIP Term Sheet, the Second A&R Initial Order, and other documents including certain support agreements. These reporting obligations during the period included the in-time delivery of the following:

(a) Delivery of a Priority Supplier Payables Certificate monthly;

(b) Delivery of an ERCOT Related Settlements update weekly;

(c) Delivery of a Cash Management Charge update monthly;

(d) Delivery of a Priority Commodity / ISO Charge update weekly and monthly;

(e) Delivery of a Gross Margin Calculation Certificate update quarterly;

(f) Delivery of Consolidated Financial Statements and related documents update quarterly;

(g) Delivery of a Marked to Market Calculation monthly; and

(h) Delivery of Electricity and Natural Gas Portfolio Reports, Hedging Exposure and Supply/Demand Projections quarterly.

CASH FLOW FORECAST FOR THE PERIOD ENDING MARCH 12, 2022

70. The Just Energy Entities, with the assistance of the Monitor, have updated and extended their weekly cash flow forecast for the 6-week period ending March 12, 2022 (the "**February Cash Flow Forecast**"), which encompasses the requested stay extension to March 4, 2022. The February Cash Flow Forecast is attached hereto as **Appendix "B"**, and is summarized below:

(CAD$ in millions)	6-Week Ending March 12, 2022
Forecast Week	**Total**
RECEIPTS	
Sales Receipts	$349.1
Miscellaneous Receipts	-
Total Receipts	$349.1
DISBURSEMENTS	
Operating Disbursements	
Energy and Delivery Costs	($257.3)
Payroll	(15.7)
Taxes	(11.2)
Commissions	(12.0)
Selling and Other Costs	(19.1)
Total Operating Disbursements	($315.3)
OPERATING CASH FLOWS	$33.8
Financing Disbursements	
Credit Facility - Borrowings / (Repayments)	$ -
Interest Expense & Fees	(1.9)
Restructuring Disbursements	
Professional Fees	(8.4)
NET CASH FLOWS	**$23.5**
CASH	
Beginning Balance	$131.9
Net Cash Inflows / (Outflows)	23.5
Other (FX)	-
ENDING CASH	**$155.4**

71. The February Cash Flow Forecast indicates that during the 6-week period ending March 12, 2022, the Just Energy Entities will have operating cash inflows of approximately $33.8 million with total receipts of approximately $349.1 million and total disbursements of approximately $315.3 million, before interest expense and fees of approximately $1.9 million and professional fees of approximately $8.4 million, such that net cash inflows are forecast to be approximately $23.5 million.

72. Generally, the underlying assumptions and methodology utilized in the November Cash Flow Forecast have remained the same for this February Cash Flow Forecast; however, the Monitor notes the following:

(a) The forecast period was extended from the week ending February 19, 2022 to the week ending March 12, 2022;

(b) The Just Energy Entities have updated and revised certain underlying data supporting the assumptions that contribute to the cash receipts and disbursements included in the February Cash Flow Forecast, which include:

(i) Customer cash receipt collection timing and bad debt estimates have been updated based on recent trends;

(ii) Customer cash receipt estimates have also been updated based on actualized revenue billed for recent periods combined with refined estimates for future customer billings;

(iii) Certain disbursements not incurred during the prior period have been carried forward as they are expected to be incurred in future weeks;

(iv) Vendor credit support and cash collateral requirements have been updated based on business requirements and on-going discussions between the Just Energy Entities and its vendors;

(v) The tax disbursements forecast has been updated based on the tax department's latest tax payment schedule and estimates; and

(vi) Professional fee estimates have been updated to reflect expected activity during the forecast period.

73. The February Cash Flow Forecast demonstrates that, subject to its underlying hypothetical and probable assumptions, the Just Energy Entities are forecast to have sufficient liquidity to continue funding their operations during the CCAA Proceedings to March 4, 2022.

STAY EXTENSION

74. The Stay Period will expire on February 17, 2022, and the Applicants are seeking a short extension to the Stay Period up to and including March 4, 2022.

75. The Monitor supports extending the Stay Period to March 4, 2022 for the following reasons:

(a) during the proposed extension of the Stay Period, the Just Energy Entities will have an opportunity to consider and hopefully finalize the Recapitalization Plan in an effort to achieve a going concern solution in consultation with the Financial Advisor, the Monitor and key stakeholders, including potentially seeking an order from the Court approving a creditors' meeting to vote on same;

(b) the Monitor is of the view that the proposed extension to the Stay Period is necessary to give the Just Energy Entities the flexibility and time required in order to develop and commence steps to implement a successful restructuring;

(c) as indicated by the February Cash Flow Forecast, the Just Energy Entities are forecast to have sufficient liquidity to continue operating in the ordinary course of business during the requested extension of the Stay Period;

(d) no creditor of the Just Energy Entities would be materially prejudiced by the extension of the Stay Period; and

(e) in the Monitor's view, the Just Energy Entities have acted in good faith and with due diligence in the CCAA Proceedings since the Filing Date.

APPROVAL OF THE ACTIVITIES OF THE MONITOR

76. The Proposed Order also seeks approval of the Fifth Report and the actions, conduct, and activities of the Monitor since the date of Fourth Report.

77. As outlined in the Monitor's previous reports to the Court (all of which are available on the Monitor's Website), the Monitor and its counsel have played, and continue to play, a significant role in the CCAA Proceedings. The Monitor respectfully submits that its actions, conduct, and activities in the CCAA Proceedings since the Fourth Report have been carried out in good faith and in accordance with the provisions of the orders issued therein and should therefore be approved.

CONCLUSION

78. The Monitor is of the view that the relief requested by the Applicants is necessary, reasonable and justified in the circumstances.

79. Accordingly, the Monitor respectfully supports the requested relief in the Proposed Order and recommends that such Order be granted.

80. Further, the Monitor respectfully does not support the relief requested in the Donin/Jordet Motion and recommends that such motion be dismissed.

The Monitor respectfully submits to the Court this Fifth Report dated this 4th day of February, 2022.

FTI Consulting Canada Inc.,
in its capacity as Court-appointed Monitor of
Just Energy Group Inc. *et al*,
and not in its personal or corporate capacity

Per: _____

Paul Bishop
Senior Managing Director

APPENDIX "A"

Second Amended and Restated Initial Order dated May 26, 2021

APPENDIX "A"

Court File No. CV-21-00658423-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.	)	WEDNESDAY, THE 26TH
	)	
JUSTICE KOEHNEN	)	DAY OF MAY, 2021

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **JUST ENERGY GROUP INC.**, JUST ENERGY CORP., ONTARIO ENERGY COMMODITIES INC., UNIVERSAL ENERGY CORPORATION, JUST ENERGY FINANCE CANADA ULC, HUDSON ENERGY CANADA CORP., JUST MANAGEMENT CORP., JUST ENERGY FINANCE HOLDING INC., 11929747 CANADA INC., 12175592 CANADA INC., JE SERVICES HOLDCO I INC., JE SERVICES HOLDCO II INC., 8704104 CANADA INC., JUST ENERGY ADVANCED SOLUTIONS CORP., JUST ENERGY (U.S.) CORP., JUST ENERGY ILLINOIS CORP., JUST ENERGY INDIANA CORP., JUST ENERGY MASSACHUSETTS CORP., JUST ENERGY NEW YORK CORP., JUST ENERGY TEXAS I CORP., JUST ENERGY, LLC, JUST ENERGY PENNSYLVANIA CORP., JUST ENERGY MICHIGAN CORP., JUST ENERGY SOLUTIONS INC., HUDSON ENERGY SERVICES LLC, HUDSON ENERGY CORP., INTERACTIVE ENERGY GROUP LLC, HUDSON PARENT HOLDINGS LLC, DRAG MARKETING LLC, JUST ENERGY ADVANCED SOLUTIONS LLC, FULCRUM RETAIL ENERGY LLC, FULCRUM RETAIL HOLDINGS LLC, TARA ENERGY, LLC, JUST ENERGY MARKETING CORP., JUST ENERGY CONNECTICUT CORP., JUST ENERGY LIMITED, JUST SOLAR HOLDINGS CORP. AND JUST ENERGY (FINANCE) HUNGARY ZRT.
(each, an "**Applicant**", and collectively, the "**Applicants**")

SECOND AMENDED AND RESTATED INITIAL ORDER

(amending the Initial Order dated March 9, 2021, as amended and restated on March 19, 2021)

THIS APPLICATION, made by the Applicants, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), was heard this day by judicial videoconference via Zoom in Toronto, Ontario due to the COVID-19 pandemic.

ON READING the affidavit of Michael Carter sworn March 9, 2021 and the Exhibits thereto (the "**First Carter Affidavit**"), the affidavit of Michael Carter sworn March 16, 2021 and the Exhibits thereto (the "**Second Carter Affidavit**"), the affidavit of Michael Carter sworn March 18, 2021 and the Exhibits thereto (the "**Third Carter Affidavit**"), the affidavit of Margaret Munnelly sworn March 16, 2021 and the Exhibits thereto (the "**Munnelly Affidavit**"), the affidavit of Michael Carter sworn May 19, 2021 and the Exhibits thereto, the pre-filing report of the proposed monitor, FTI Consulting Canada Inc. ("**FTI**"), dated March 9, 2021, the First Report of FTI in its capacity as the Court-appointed monitor of the Applicants (the "**Monitor**") dated March 18, 2021, the Second Report of the Monitor dated May 21, 2021, and on being advised that the secured creditors who are likely to be affected by the charges created herein were given notice, and on hearing the submissions of counsel for the Applicants and the partnerships listed in Schedule "A" hereto (the "**JE Partnerships**", and collectively with the Applicants, the "**Just Energy Entities**"), the Monitor, Alter Domus (US) LLC (the "**DIP Agent**"), as administrative agent for the lenders (the "**DIP Lenders**") under the DIP Term Sheet (as defined below), the DIP Lenders and such other counsel who were present, and on reading the consent of FTI to act as the Monitor,

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Application and the Application Record is hereby abridged and validated so that this Application is properly returnable today and hereby dispenses with further service thereof.

DEFINED TERMS

2. **THIS COURT ORDERS** that capitalized terms that are used in this Order shall have the meanings ascribed to them in Schedule "B" hereto or the First Carter Affidavit, as applicable, if they are not otherwise defined herein.

APPLICATION

3. **THIS COURT ORDERS AND DECLARES** that the Applicants are companies to which the CCAA applies. Although not Applicants, the JE Partnerships shall enjoy the benefits of the protections and authorizations provided by this Order.

PLAN OF ARRANGEMENT

4. **THIS COURT ORDERS** that the Applicants shall have the authority to file and may, subject to further order of this Court, file with this Court a plan of compromise or arrangement (hereinafter referred to as the "**Plan**")

POSSESSION OF PROPERTY AND OPERATIONS

5. **THIS COURT ORDERS** that the Just Energy Entities shall remain in possession and control of their respective current and future assets, licenses, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**"). Subject to further Order of this Court, the Just Energy Entities shall continue to carry on business in a manner consistent with the preservation of their business (the "**Business**") and Property. The Just Energy Entities shall each be authorized and empowered to continue to retain and employ the employees, contractors, staffing agencies, consultants, agents, experts, accountants, counsel and such other persons (collectively "**Assistants**") currently retained or employed by them, with liberty to retain such further Assistants as they deem reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.

6. **THIS COURT ORDERS** that:

(a) the Just Energy Entities shall be entitled to continue to utilize the central cash management system currently in place as described in the First Carter Affidavit or, with the consent of the Monitor, the DIP Agent and the DIP Lenders, replace it with another substantially similar central cash management system (the "**Cash Management System**") and that any present or future bank providing the Cash Management System (a "**Cash Management Bank**") shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the Just Energy Entities of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person (as hereinafter defined) other than the Just Energy Entities, pursuant to the terms of the documentation applicable to the Cash Management System, and shall be, in its capacity as provider of the Cash

Management System, an unaffected creditor under any Plan with regard to Cash Management Obligations. All present and future indebtedness, liabilities and obligations of any and every kind, nature or description whatsoever to a Cash Management Bank under, in connection with, relating to or with respect to any and all agreements and arrangements evidencing or in respect of treasury facilities and cash management products (including, without limitation, all pre-authorized debit banking services, electronic funds transfer services, overdraft balances, corporate credit cards, merchant services and pre-authorized debits) provided by a Cash Management Bank to any Just Energy Entity, and any unpaid balance thereof, are collectively referred to herein as the "**Cash Management Obligations**";

(b) during the Stay Period (as defined below), no Cash Management Bank shall, without leave of this Court: (i) exercise any sweep remedy under any applicable documentation (provided, for greater certainty, that the cash pooling and zero-balancing account services provided with respect to the JPMorgan accounts held by the U.S. Bank Account Holders may continue in the ordinary course); (ii) exercise or claim any right of set-off against any account included in the Cash Management System, other than set-off permitted pursuant to paragraph 8 against applicable Authorized Cash Collateral solely in respect of any Cash Management Obligations; or (iii) subject to paragraph 6(d)(ii), modify the Cash Management System;

(c) any of the Cash Management Banks may rely on the representations of the applicable Just Energy Entities with respect to whether any cheques or other payment order drawn or issued by the applicable Just Energy Entity prior to, on, or subsequent to the date of this Order should be honoured pursuant to this or any other order of this Court, and such Cash Management Bank shall not have any liability to any party for: (i) relying on such representations by the applicable Just Energy Entities as provided for herein; or (ii) honouring any cheque (whether made before, on or after the date hereof) in a good faith belief that the Court has authorized such cheque or item to be honoured;

(d) (i) those certain existing deposit agreements between the Just Energy Entities and the Cash Management Banks shall continue to govern the post-filing cash management relationship between the Just Energy Entities and the Cash Management Banks, and

that all of the provisions of such agreements shall remain in full force and effect; (ii)(A) changes to the Cash Management System in accordance with the Lender Support Agreement shall be permitted; and (B) the Just Energy Entities, with the consent of the Monitor, the DIP Agent, the majority of the DIP Lenders and the Cash Management Banks may, without further Order of this Court, implement changes to the Cash Management System and procedures in the ordinary course of business pursuant to the terms of those certain existing deposit agreements, including, without limitation, the opening and closing of bank accounts, where such changes are not otherwise implemented pursuant to paragraph 6(d)(ii)(A); (iii) all control agreements in existence prior to the date of this Order shall apply; and (iv) the Cash Management Banks are authorized to debit the Just Energy Entities' accounts in the ordinary course of business in accordance with the Cash Management System arrangements without the need for further order of this Court for all undisputed Cash Management Obligations owing to the Cash Management Banks;

(e) the Cash Management Banks shall be entitled to the benefit of and are hereby granted a charge (the "**Cash Management Charge**") on the Property to secure the Cash Management Obligations due and owing and that have not been paid in accordance with the applicable Cash Management Arrangements (as defined in the Lender Support Agreement). The Cash Management Charge shall have the priority set out in paragraphs 53-55 herein; and

(f) the Just Energy Entities are authorized but not directed to continue to operate under the merchant processing agreements with JPMorgan Chase Bank, N.A., Paymentech, LLC ("**Paymentech**") (collectively and as amended, restated, supplemented, or otherwise modified from time to time, the "**Merchant Processing Agreement**"). The Just Energy Entities are authorized to pay or reimburse Paymentech for fees, charges, refunds, chargebacks, reserves and other amounts due and owing from the Just Energy Entities to Paymentech (the "**Merchant Services Obligations**") whether such obligations are incurred prior to, on or after the date hereof, and Paymentech is authorized to receive or obtain payment for such Merchant Services Obligations, as provided under, and in the manner set forth in, the Merchant Processing Agreement, including, without limitation, by way of recoupment or set-off without further order of the Court.

7. **THIS COURT ORDERS** that, except as specifically permitted herein, the Just Energy Entities are hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by any of the Just Energy Entities to any of their respective creditors as of this date; (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of the Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the Business; provided, however, that the Just Energy Entities, until further order of this Court, are hereby permitted, subject to the terms of the Definitive Documents: (i) with the consent of the Monitor, to provide cash collateral ("**Authorized Cash Collateral**") to third parties (the "**Collateral Recipients**"), including to the Cash Management Banks in accordance with the Lender Support Agreement, with respect to obligations incurred before, on or after the date hereof, and to grant security interests in such Authorized Cash Collateral in favour of the Collateral Recipients, where so doing is necessary to operate the Business in the normal course during these proceedings; (ii) subject to the terms of the Lender Support Agreement, to reimburse the reasonable documented fees and disbursements of one Canadian legal counsel, one U.S. legal counsel, one local counsel in Texas and one financial advisor to the agent (the "**CA Agent**") and the lenders (the "**CA Lenders**") under the Credit Agreement, whether incurred before or after the date of this Order; (iii) subject to the terms of the Lender Support Agreement, to pay all non-default interest and fees to the CA Agent and the CA Lenders in accordance with its terms; and (iv) to repay advances under the Credit Agreement solely for the purpose of creating availability under the Revolving Facilities in order for the Just Energy Entities to request the issuance of Letters of Credit under the Revolving Facilities to continue to operate the Business in the ordinary course during these proceedings, subject to: (A) obtaining the consent of the Monitor with respect to the issuance of the Letters of Credit under the Revolving Facilities; and (B) receipt of written confirmation from the applicable CA Lender(s) under the Credit Agreement that such CA Lender(s) will issue a Letter of Credit of equal value within one (1) Business Day thereafter. Capitalized terms used but not otherwise defined in this paragraph shall have the meanings ascribed thereto in the Credit Agreement.

8. **THIS COURT ORDERS** that the holders of cash collateral provided by the Just Energy Entities prior to the date hereof or any Collateral Recipients of Authorized Cash Collateral (the foregoing, collectively, "**Cash Collateral**") shall be authorized to exercise any available rights of

set-off in respect of such Cash Collateral with respect to obligations secured thereby, whether incurred before, on or after the date hereof.

9. **THIS COURT ORDERS** that the Charges (as defined below) shall rank junior in priority to any liens, security interests and charges attached to Cash Collateral in favour of the holders thereof, and shall attach to the Cash Collateral only to the extent of any rights of any Just Energy Entity to the return of such Cash Collateral.

10. **THIS COURT ORDERS** that, subject to the terms of the Definitive Documents (as hereinafter defined), the Just Energy Entities shall be entitled but not required to pay the following amounts whether incurred prior to, on or after the date of this Order:

(a) all outstanding and future wages (including, without limitation, the Q3 bonus described in the Munnelly Affidavit), salaries, commissions, employee benefits, contributions in respect of retirement or other benefit arrangements, vacation pay and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;

(b) all outstanding and future amounts owing to or in respect of other workers providing services in connection with the Business and payable on or after the date of this Order, incurred in the ordinary course of business and consistent with existing arrangements;

(c) the fees and disbursements of any Assistants retained or employed by the Just Energy Entities in respect of these proceedings at their standard rates and charges, which, in the case of the Financial Advisor (as defined below) shall be the amounts payable in accordance with the Financial Advisor Agreement (as defined below);

(d) with the consent of the Monitor in consultation with the agent under the Credit Agreement (or its advisors), amounts owing for goods or services actually provided to any of the Just Energy Entities prior to the date of this Order by third parties, if, in the opinion of the Just Energy Entities, such third party is critical to the Business and ongoing operations of the Just Energy Entities;

(e) any taxes (including, without limitation, sales, use, withholding, unemployment, and excise) not covered by paragraph 12 of this Order, and whereby the nonpayment of

which by any Just Energy Entity could result in a responsible person associated with a Just Energy Entity being held personally liable for such nonpayment; and

(f) taxes related to revenue, State income or operations incurred or collected by a Just Energy Entity in the ordinary course of business.

11. **THIS COURT ORDERS** that, except as otherwise provided to the contrary herein and subject to the terms of the Definitive Documents, the Just Energy Entities shall be entitled but not required to pay all reasonable expenses incurred by the Just Energy Entities in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

(a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance (including directors and officers' insurance), maintenance and security services; and

(b) payment for goods or services actually supplied to the Just Energy Entities following the date of this Order.

12. **THIS COURT ORDERS** that the Just Energy Entities shall remit, in accordance with legal requirements, or pay:

(a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Quebec Pension Plan, and (iv) income taxes;

(b) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Just Energy Entities in connection with the sale of goods and services by the Just Energy Entities, but only where such Sales Taxes are accrued or collected after the date of this Order, or where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order; and

(c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the Just Energy Entities.

RESTRUCTURING

13. **THIS COURT ORDERS** that the Just Energy Entities shall, subject to such requirements as are imposed by the CCAA and subject to the terms of the Definitive Documents, have the right to:

(a) permanently or temporarily cease, downsize or shut down any of their Business or operations;

(b) terminate the employment of such of its employees or temporarily lay off such of its employees as it deems appropriate; and

(c) pursue all avenues of refinancing, restructuring, selling and reorganizing the Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing, restructuring, sale or reorganization,

all of the foregoing to permit the Just Energy Entities to proceed with an orderly restructuring of the Just Energy Entities and/or the Business (the "**Restructuring**").

LEASES

14. **THIS COURT ORDERS** that until a real property lease is disclaimed in accordance with the CCAA, the Just Energy Entities shall pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord under the lease) or as otherwise may be negotiated between the applicable Just Energy Entity and the landlord from time to time ("**Rent**"), for the period commencing from and including the date of this Order, twice-monthly in equal payments on the first and fifteenth day of each month, in advance (but not in arrears). On

the date of the first of such payments, any Rent relating to the period commencing from and including the date of this Order shall also be paid.

15. **THIS COURT ORDERS** that the Just Energy Entities shall provide each of the relevant landlords with notice of the relevant Just Energy Entity's intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the entitlement of a Just Energy Entity to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the relevant Just Energy Entity, or by further Order of this Court upon application by the Just Energy Entities on at least two (2) days notice to such landlord and any such secured creditors. If any Just Energy Entity disclaims the lease governing such leased premises in accordance with Section 32 of the CCAA, it shall not be required to pay Rent under such lease pending resolution of any such dispute (other than Rent payable for the notice period provided for in Section 32(5) of the CCAA), and the disclaimer of the lease shall be without prejudice to the Applicant's claim to the fixtures in dispute.

16. **THIS COURT ORDERS** that if a notice of disclaimer is delivered pursuant to Section 32 of the CCAA, then (i) during the notice period prior to the effective time of the disclaimer, the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the relevant Just Energy Entity and the Monitor 24 hours' prior written notice, and (ii) at the effective time of the disclaimer, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the relevant Just Energy Entity in respect of such lease or leased premises, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

NO PROCEEDINGS AGAINST THE JUST ENERGY ENTITIES, THE BUSINESS OR THE PROPERTY

17. **THIS COURT ORDERS** that until and including June 4, 2021 or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process before any court, tribunal, agency or other legal or, subject to paragraph 18, regulatory body (each, a "**Proceeding**") shall be commenced or continued against or in respect of any of the Just Energy Entities or the

Monitor or their respective employees and representatives acting in such capacities, or affecting the Business or the Property, except with the prior written consent of the Just Energy Entities and the Monitor, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Just Energy Entities or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

18. **THIS COURT ORDERS** that during the Stay Period, all rights and remedies of any individual, firm, corporation, organization, governmental unit, body or agency, foreign regulatory body or agency or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of the Just Energy Entities or the Monitor, or their respective employees and representatives acting in such capacities, or affecting the Business or the Property, are hereby stayed and suspended except with the written consent of the Just Energy Entities and the Monitor, or leave of this Court, provided that nothing in this Order shall: (i) empower the Just Energy Entities to carry on any business which the Just Energy Entities are not lawfully entitled to carry on, (ii) subject to paragraph 19, affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

19. **THIS COURT ORDERS** that notwithstanding Section 11.1 of the CCAA, all rights and remedies of provincial energy regulators and provincial regulators of consumer sales that have authority with respect to energy sales against or in respect of the Just Energy Entities or their respective employees and representatives acting in such capacities, or affecting the Business or the Property, are hereby stayed and suspended during the Stay Period except with the written consent of the Just Energy Entities and the Monitor, or leave of this Court on notice to the Service List.

NO INTERFERENCE WITH RIGHTS

20. **THIS COURT ORDERS** that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Just Energy Entities except with

the written consent of the Just Energy Entities and the Monitor, leave of this Court or as permitted under any Qualified Support Agreement or the Lender Support Agreement.

CONTINUATION OF SERVICES

21. **THIS COURT ORDERS** that during the Stay Period, except as permitted under any Qualified Support Agreement or the Lender Support Agreement, all Persons having oral or written agreements with any Just Energy Entity or statutory or regulatory mandates for the supply of goods and/or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Just Energy Entities or the Business, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Just Energy Entities, and that the Just Energy Entities shall be entitled to the continued use of their current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case, that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Just Energy Entities in accordance with normal payment practices of the Just Energy Entities or such other practices as may be agreed upon by the supplier or service provider and the applicable Just Energy Entity and the Monitor, or as may be ordered by this Court.

NON-DEROGATION OF RIGHTS

22. **THIS COURT ORDERS** that, subject to paragraph 30 but notwithstanding any other paragraphs of this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to any of the Just Energy Entities. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

KEY EMPLOYEE RETENTION PLAN

23. **THIS COURT ORDERS** that the Key Employee Retention Plan (the "**KERP**"), as described in the Second Carter Affidavit and attached as Confidential Appendix "Q" thereto, is

hereby approved and the Just Energy Entities are authorized to make payments contemplated thereunder in accordance with the terms and conditions of the KERP.

24. **THIS COURT ORDERS** that the key employees referred to in the KERP (the "**Key Employees**") shall be entitled to the benefit of and are hereby granted a charge on the Property (the "**KERP Charge**"), which charge shall not exceed the aggregate amount of C$2,012,100 for Canadian dollar payments and US$ 3,876,024 for U.S. dollar payments, to secure any payments to the Key Employees under the KERP. The KERP Charge shall have the priority set out in paragraphs 53-55 herein.

LENDER SUPPORT AGREEMENT

25. **THIS COURT ORDERS** that the Lender Support Agreement is hereby ratified and approved and that, upon the occurrence of a termination event under the Lender Support Agreement, the CA Lenders may exercise the rights and remedies available to them under the Lender Support Agreement in accordance with the terms thereof.

PRE-FILING SECURITY INTERESTS

26. **THIS COURT ORDERS** that any obligations secured by a valid, enforceable and perfected security interest upon or in respect of any of the Property pursuant to a security agreement which includes as collateral thereunder any Property acquired after the date of the applicable security agreement ("**After-Acquired Property**"), shall continue to be secured by the Property (including After Acquired Property that may be acquired by the applicable Just Energy Entities after the commencement of these proceedings) notwithstanding the commencement of these proceedings, subject to the priority set out in paragraphs 53-55 herein.

COMMODITY SUPPLIERS

27. **THIS COURT ORDERS** that each Qualified Commodity/ISO Supplier shall be entitled to the benefit of and is hereby granted a charge (together, the "**Priority Commodity/ISO Charge**") on the Property in an amount equal to the value of the Priority Commodity/ISO Obligations. The value of the Priority Commodity/ISO Obligations shall be determined in accordance with the terms of the existing agreements or arrangements between the applicable Just Energy Entity and the Qualified Commodity/ISO Supplier or, in the event of any dispute, by the

Court. The Priority Commodity/ISO Charge shall have the priority set out in paragraphs 53-55 herein.

28. **THIS COURT ORDERS** that the Commodity/ISO Supplier Support Agreements are hereby ratified, approved and deemed to be Qualified Support Agreements.

29. **THIS COURT ORDERS** that the Just Energy Entities are hereby authorized and empowered to execute and deliver up to eight (8) Qualified Support Agreements.

30. **THIS COURT ORDERS** that upon the occurrence of an event of default under a Qualified Support Agreement, the applicable Qualified Commodity/ISO Supplier may exercise the rights and remedies available to it under its Qualified Support Agreement, or upon five (5) days' notice to the Just Energy Entities, the Monitor and the Service List, may apply to this Court to seek the Court's authorization to exercise any and all of its other rights and remedies against the Just Energy Entities or the Property under or pursuant to its Commodity Agreement or ISO Agreement and the Priority Commodity/ISO Charge, including without limitation, for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Just Energy Entities and for the appointment of a trustee in bankruptcy of the Just Energy Entities provided that a Qualified Commodity/ISO Supplier may, unless otherwise ordered by the Court, terminate any Commodity Agreements and Qualified Support Agreements entered into after May 26, 2021 without obtaining the Court's authorization in the event that: (i) an Order is granted in these proceedings that authorizes the exercise of rights and remedies against the Just Energy Entities or the Property under or pursuant to the Definitive Documents and the DIP Lenders' Charge (as defined below); or (ii) these proceedings or the recognition proceedings under Chapter 15 of the United States Bankruptcy Code are dismissed or converted to a liquidation proceeding, including a receivership, bankruptcy, proceeding under Chapter 7 of the United States Bankruptcy Code or otherwise.

31. **THIS COURT ORDERS** that the Monitor shall provide a report on the value of the Priority Commodity/ISO Obligations as of the last day of each calendar month by posting such report on the Monitor's Website (as defined below) within three (3) Business Days of such calendar month end.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

32. **THIS COURT ORDERS** that during the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Just Energy Entities with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Just Energy Entities whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the Just Energy Entities, if one is filed, is sanctioned by this Court or is refused by the creditors of the Just Energy Entities or this Court.

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

33. **THIS COURT ORDERS** that each of the Just Energy Entities shall jointly and severally indemnify their respective directors and officers against obligations and liabilities that they may incur as directors or officers of the Just Energy Entities after the commencement of the within proceedings, except to the extent that, with respect to any officer or director, the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

34. **THIS COURT ORDERS** that the directors and officers of the Just Energy Entities shall be entitled to the benefit of and are hereby granted a charge (the "**Directors' Charge**") on the Property, which charge shall not exceed an aggregate amount of C$44,100,000, as security for the indemnity provided in paragraph 33 of this Order. The Directors' Charge shall have the priority set out in paragraphs 53-55 herein.

35. **THIS COURT ORDERS** that, notwithstanding any language in any applicable insurance policy to the contrary, (i) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge, and (ii) the Just Energy Entities' directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 33.

APPOINTMENT OF MONITOR

36. **THIS COURT ORDERS** that FTI is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs of the Just Energy Entities with the powers and obligations set out in the CCAA or set forth herein and that the Just Energy Entities and their shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Just Energy Entities pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

37. **THIS COURT ORDERS** that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

(a) monitor the Just Energy Entities' receipts and disbursements;

(b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;

(c) assist the Just Energy Entities, to the extent required by the Just Energy Entities, in their dissemination to the DIP Agent, the DIP Lenders and their counsel of financial and other information in accordance with the Definitive Documents;

(d) advise the Just Energy Entities in their preparation of the Just Energy Entities' cash flow statements and reporting required by the DIP Agent and DIP Lenders, which information shall be reviewed with the Monitor and delivered to the DIP Agent and DIP Lenders and their counsel in accordance with the Definitive Documents;

(e) advise the Just Energy Entities in their development of a Plan and any amendments to a Plan;

(f) assist the Just Energy Entities, to the extent required by the Just Energy Entities, with the holding and administering of creditors' or shareholders' meeting for voting on the Plan;

(g) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Just Energy Entities, wherever located and to the extent that is necessary to adequately assess the Just Energy Entities' business and financial affairs or to perform its duties arising under this Order;

(h) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order; and

(i) perform such other duties as are required by this Order or by this Court from time to time.

38. **THIS COURT ORDERS** that the Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof.

39. **THIS COURT ORDERS** that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the Ontario *Environmental Protection Act*, the *Ontario Water Resources Act*, or the Ontario *Occupational Health and Safety Act* and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

40. **THIS COURT ORDERS** that the Monitor shall provide any creditor of the Just Energy Entities and the DIP Agent and the DIP Lenders with information provided by the Just Energy Entities in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Just Energy Entities is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Applicant may agree.

41. **THIS COURT ORDERS** that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

42. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor (including both U.S. and Canadian counsel for all purposes of this Order), and counsel to the Just Energy Entities (including both U.S. and Canadian counsel for all purposes of this Order) shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, whether incurred prior to, on, or subsequent to the date of this Order, by the Just Energy Entities as part of the costs of these proceedings. The Just Energy Entities are hereby authorized and directed to pay the accounts of the Monitor, counsel to the Monitor, and the Just Energy Entities' counsel on a weekly basis.

43. **THIS COURT ORDERS** that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

ADMINISTRATION CHARGE

44. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor and counsel to the Just Energy Entities shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of C$3,000,000 as security for their professional fees and disbursements incurred at their standard

rates and charges, both before and after the making of this Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 53-55 herein.

DIP FINANCING

45. **THIS COURT ORDERS** that the Just Energy Entities are hereby authorized and empowered to obtain and borrow or guarantee, as applicable, pursuant a credit facility from the DIP Agent and the DIP Lenders in order to finance the Just Energy Entities' working capital requirements and other general corporate purposes, all in accordance with the Cash Flow Statements (as defined in the DIP Term Sheet) and Definitive Documents, provided that borrowings under such credit facility shall not exceed US$125,000,000 unless permitted by further Order of this Court.

46. **THIS COURT ORDERS** that such credit facility shall be on the terms and subject to the conditions set forth in the CCAA Interim Debtor-in-Possession Financing Term Sheet between the Just Energy Entities, the DIP Agent and the DIP Lenders dated as of March 9, 2021 and attached as Appendix "DD" to the First Carter Affidavit (as may be amended or amended and restated from time to time, the "**DIP Term Sheet**").

47. **THIS COURT ORDERS** that the Just Energy Entities are hereby authorized and empowered to execute and deliver such mortgages, charges, hypothecs and security documents, guarantees and other definitive documents (collectively with the DIP Term Sheet and the Cash Flow Statements, the "**Definitive Documents**"), as are contemplated by the DIP Term Sheet or as may be reasonably required by the DIP Agent and the DIP Lenders pursuant to the terms thereof, and the Just Energy Entities are hereby authorized and directed to pay and perform all of the indebtedness, interest, fees, liabilities and obligations to the DIP Agent and the DIP Lenders under and pursuant to the Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order. Notwithstanding any other provision in this Order, all payments and other expenditures to be made by any of the Just Energy Entities to any Person (except the Monitor and its counsel) shall be in accordance with the terms of the Definitive Documents, including in respect of payments in satisfaction of Priority Commodity/ISO Obligations.

48. **THIS COURT ORDERS** that the DIP Agent and the DIP Lenders shall be entitled to the benefit of and are hereby granted a charge (the "**DIP Lenders' Charge**") on the Property, which DIP Lenders' Charge shall not secure an obligation that exists before this Order is made. The DIP Lenders' Charge shall have the priority set out in paragraphs 53-55 hereof.

49. **THIS COURT ORDERS** that, notwithstanding any other provision of this Order:

(a) the DIP Agent on behalf of the DIP Lenders may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the DIP Lenders' Charge or any of the Definitive Documents;

(b) upon the occurrence of an event of default under any of the Definitive Documents or the DIP Lenders' Charge, the DIP Agent or the DIP Lenders, as applicable, may immediately cease making advances or providing any credit to the Just Energy Entities and shall be permitted to set off and/or consolidate any amounts owing by the DIP Agent or the DIP Lenders to the Just Energy Entities against the obligations of the Just Energy Entities to the DIP Agent and the DIP Lenders under the Definitive Documents or the DIP Lenders' Charge, make demand, accelerate payment and give other notices with respect to the obligations of the Just Energy Entities to the DIP Agent or the DIP Lenders under the Definitive Documents or the DIP Lenders' Charge, or to apply to this Court on five (5) days' notice to the Just Energy Entities, the Monitor and the Service List to seek the Court's authorization to exercise any and all of its other rights and remedies against the Just Energy Entities or the Property under or pursuant to the Definitive Documents and the DIP Lenders' Charge, including without limitation, for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Just Energy Entities and for the appointment of a trustee in bankruptcy of the Just Energy Entities; and

(c) the foregoing rights and remedies of the DIP Agent and the DIP Lenders shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Just Energy Entities or the Property.

50. **THIS COURT ORDERS AND DECLARES** that the DIP Agent, the DIP Lenders, the Qualified Commodity/ISO Suppliers and the Cash Management Banks shall be treated as

unaffected in any Plan filed by the Applicants or any of them under the CCAA, or any proposal filed by the Applicants or any of them under the *Bankruptcy and Insolvency Act* of Canada (the "**BIA**"), with respect to any advances made under the Definitive Documents, the Priority Commodity/ISO Obligations or the Cash Management Obligations, as applicable.

APPROVAL OF FINANCIAL ADVISOR AGREEMENT

51. **THIS COURT ORDERS** that the agreement dated February 20, 2021 engaging BMO Nesbitt Burns Inc. (the "**Financial Advisor**") as financial advisor to the Just Energy Entities and attached as Confidential Appendix "FF" to the First Carter Affidavit (the "**Financial Advisor Agreement**"), and the retention of the Financial Advisor under the terms thereof, is hereby ratified and approved and the Just Energy Entities are authorized and directed *nunc pro tunc* to make the payments contemplated thereunder in accordance with the terms and conditions of the Financial Advisor Agreement.

52. **THIS COURT ORDERS** that the Financial Advisor shall be entitled to the benefit of and is hereby granted a charge (the "**FA Charge**") on the Property, which charge shall not exceed an aggregate amount of C$8,600,000 as security for the fees and disbursements and other amounts payable under the Financial Advisor Agreement, both before and after the making of this Order in respect of these proceedings. The FA Charge shall have the priority set out in paragraphs 53-55 herein.

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

53. **THIS COURT ORDERS** that the priorities of the Administration Charge, the FA Charge, the Directors' Charge, the KERP Charge, the DIP Lenders' Charge, the Priority Commodity/ISO Charge and the Cash Management Charge, as among them, shall be as follows:

First – Administration Charge and FA Charge (to the maximum amount of C$3,000,000 and C$8,600,000, respectively), on a *pari passu* basis;

Second – Directors' Charge (to the maximum amount of C$44,100,000);

Third – KERP Charge (to the maximum amounts of C$2,012,100 and US$3,876,024);

Fourth – DIP Lenders' Charge (to the maximum amount of the Obligations (as defined in the DIP Term Sheet) owing thereunder at the relevant time) and the Priority Commodity/ISO Charge, on a *pari passu* basis; and

Fifth – Cash Management Charge.

54. **THIS COURT ORDERS** that the filing, registration or perfection of the Administration Charge, the FA Charge, the Directors' Charge, the KERP Charge, the DIP Lenders' Charge, the Priority Commodity/ISO Charge or the Cash Management Charge (collectively, the "**Charges**") shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

55. **THIS COURT ORDERS** that, subject to paragraph 9, each of the Charges shall constitute a charge on the Property and such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person (including those commodity suppliers listed in Schedule "A" hereto).

56. **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be approved by this Court on notice to parties in interest, the Just Energy Entities shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Charges unless the Just Energy Entities also obtain the prior written consent of the Monitor, the DIP Agent on behalf of the DIP Lenders and the beneficiaries of the Administration Charge, the FA Charge, the Directors' Charge, the KERP Charge, the Priority Commodity/ISO Charge and the Cash Management Charge, or further Order of this Court.

57. **THIS COURT ORDERS** that the Charges, the agreements and other documents governing or otherwise relating to the obligations secured by the Charges, and the Definitive Documents shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "**Chargees**") and/or the DIP Agent or the DIP Lenders thereunder shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made

pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan document, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds any of the Just Energy Entities and notwithstanding any provision to the contrary in any Agreement:

(a) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of the Definitive Documents shall create or be deemed to constitute a breach by any Just Energy Entity of any Agreement to which it is a party;

(b) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the Just Energy Entities entering into the DIP Term Sheet, the creation of the Charges or the execution, delivery or performance of any of the other Definitive Documents; and

(c) the payments made by the Just Energy Entities pursuant to this Order or the Definitive Documents, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

58. **THIS COURT ORDERS** that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the Just Energy Entities' interest in such real property leases.

SERVICE AND NOTICE

59. **THIS COURT ORDERS** that the Monitor shall (i) without delay, publish in The Globe and Mail (National Edition) and the Wall Street Journal a notice containing the information prescribed under the CCAA, (ii) within five days after the date of this Order, (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, or cause to be sent, in the prescribed manner or by electronic message to the e-mail addresses as last shown on the records of the Just Energy Entities, a notice to every known creditor who has a claim against the Just Energy Entities of more than $1,000, and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the

prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder, provided that the Monitor shall not make the claims, names and addresses of the individuals who are creditors publicly available.

60. **THIS COURT ORDERS** that the Monitor shall create, maintain and update as necessary a list of all Persons appearing in person or by counsel in this proceeding (the "**Service List**"). The Monitor shall post the Service List, as may be updated from time to time, on the Monitor's website as part of the public materials to be recorded thereon in relation to this proceeding. Notwithstanding the foregoing, the Monitor shall haven no liability in respect of the accuracy of or the timeliness of making any changes to the Service List.

61. **THIS COURT ORDERS** that the E-Service Protocol of the Commercial List (the "**Protocol**") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at http://www.ontariocourts.ca//scj/practice/practice-directions/toronto/eservice-commercial/) shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Protocol with the following URL - http://cfcanada.fticonsulting.com/justenergy (the "**Monitor's Website**").

62. **THIS COURT ORDERS** that the Just Energy Entities, the DIP Agent or the DIP Lenders and the Monitor and their respective counsel are at liberty to serve or distribute this Order, any other materials and orders as may be reasonably required in these proceedings, including any notices, or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal deliver, facsimile or other electronic transmission to the Just Energy Entities' creditors or other interested parties and their advisors and that any such service, distribution or notice shall be deemed to be received: (a) if sent by courier, on the next business day following the date of forwarding thereof, (b) if delivered by personal delivery or facsimile or other electronic transmission, on the day so delivered, and (c) if sent by ordinary mail, on the third business day after mailing. For greater certainty, any such distribution or service shall be deemed to be in

satisfaction of a legal or judicial obligation, and notice requirements within the meaning of clause 3(c) of the *Electronic Commerce Protection Regulations*, Reg. 81000-2-175 (SOR/DORS).

FOREIGN PROCEEDINGS

63. **THIS COURT ORDERS** that the Applicant, Just Energy Group Inc. ("**JEGI**") is hereby authorized and empowered, but not required, to act as the foreign representative (in such capacity, the "**Foreign Representative**") in respect of the within proceedings for the purpose of having these proceedings recognized and approved in a jurisdiction outside of Canada.

64. **THIS COURT ORDERS** that the Foreign Representative is hereby authorized to apply for foreign recognition and approval of these proceedings, as necessary, in any jurisdiction outside of Canada, including in the United States pursuant to chapter 15 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532.

GENERAL

65. **THIS COURT ORDERS** that any interested party may apply to this Court to amend or vary this Order on not less than seven (7) days' notice to any other party or parties likely to be affected by the Order sought or upon such other notice, if any, as this Court may order; provided, however, that the Chargees, the DIP Agent and the DIP Lenders shall be entitled to rely on this Order as issued and entered and on the Charges and priorities set out in paragraphs 53-55 hereof, including with respect to any fees, expenses and disbursements incurred and in respect of advances made under the Definitive Documents or pursuant to the Qualified Support Agreement, as applicable, until the date this Order may be amended, varied or stayed. For the avoidance of doubt (i) no payment in respect of any obligations secured by the Priority Commodity/ISO Charge or the Cash Management Charge or made to the CA Lenders pursuant to the Lender Support Agreement, and (ii) none of the Authorized Cash Collateral, shall be subject to the terms of any intercreditor agreement, including any "turnover" or "waterfall" provision(s) therein.

66. **THIS COURT ORDERS** that, notwithstanding paragraph 65 of this Order, the Just Energy Entities or the Monitor may from time to time apply to this Court to amend, vary or supplement this Order or for advice and directions in the discharge of their powers and duties under this Order or in the interpretation or application of this Order.

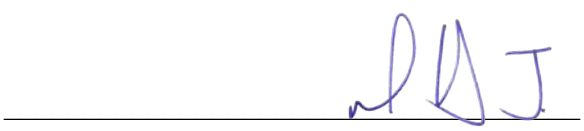
67. **THIS COURT ORDERS** that nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Just Energy Entities, the Business or the Property.

68. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body or agency having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Just Energy Entities, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies and agencies are hereby respectfully requested to make such orders and to provide such assistance to the Just Energy Entities and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to JEGI, in any foreign proceeding, or to assist the Just Energy Entities and the Monitor and their respective agents in carrying out the terms of this Order.

69. **THIS COURT ORDERS** that each of the Just Energy Entities and the Monitor be at liberty and are hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body or agency, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that JEGI is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

70. **THIS COURT ORDERS** that Confidential Appendices "FF" and "GG" to the First Carter Affidavit and Confidential Appendix "Q" to the Second Carter Affidavit shall be and are hereby sealed, kept confidential and shall not form part of the public record pending further Order of this Court.

71. **THIS COURT ORDERS** that this Order and all of its provisions are effective as of 12:01 a.m. Eastern Standard/Daylight Time on the date of this Order.



IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **JUST ENERGY GROUP INC. et al.** (each, an "**Applicant**", and collectively, the "**Applicants**")

Court File No. CV-21-00658423-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST
Proceedings commenced at Toronto

FIFTH REPORT OF THE MONITOR

Thornton Grout Finnigan LLP
TD West Tower, Toronto-Dominion Centre
100 Wellington Street West, Suite 3200
Toronto, ON M5K 1K7
Tel: (416) 304-1616 / Fax: (416) 304-1313

Robert I. Thornton (LSO# 24266B)
Email: rthornton@tgf.ca / Tel: (416) 304-0560

Rebecca L. Kennedy (LSO# 61146S)
Email: rkennedy@tgf.ca / Tel: (416) 304-0603

Rachel Nicholson (LSO# 68348V)
Email: rnicholson@tgf.ca / Tel: (416) 304-1153

Puya Fesharaki (LSO# 70588L)
Email: pfesharaki@tgf.ca / Tel: (416) 304-7979
Lawyers for the Court-appointed Monitor,
FTI Consulting Canada Inc.

Court File No. CV-21-00658423-00CL

Just Energy Group Inc. et al.

SECOND REPORT OF FTI CONSULTING CANADA INC., IN ITS CAPACITY AS COURT-APPOINTED MONITOR

May 21, 2021

DEVELOPMENT OF JUST ENERGY'S BUSINESS PLAN

35. In accordance with the requirements of the DIP Term Sheet, the Just Energy Entities have been preparing a detailed business plan, detailing, among other things, operational and financial projections, near and longer-term liquidity requirements, and anticipated business operations during and upon emergence from the CCAA Proceedings. It is anticipated that the business plan will facilitate the development of a restructuring process for emergence from the CCAA Proceedings in a manner that optimizes value for the benefit of all stakeholders.

36. The Monitor understands that the business plan has been approved by Just Energy's Board of Directors and was distributed to key stakeholders on May 18, 2021.

CORPORATE GOVERNANCE MATTERS

37. As described in the Carter Affidavit, Just Energy has appointed Mr. Anthony Horton (previously Chairman of the Board of Directors of Just Energy) as its Executive Chairman effective March 1, 2021. In this role, Mr. Horton will guide the Just Energy Entities' restructuring process, with the assistance of the Monitor and the Just Energy Entities' financial advisors.

38. Mr. Horton's compensation for such role is described in the Carter Affidavit and is comprised of a base fee of US$600,000, payable on a monthly basis in increments of US$50,000 over a twelve-month period. Mr. Horton will not receive regular board fees during this time. If the Just Energy Entities successfully restructure prior to the end of the twelve-month period, a lump sum payment equal to the remaining amount of the base fee (less applicable deductions and withholdings) will be paid to Mr. Horton. The Monitor participated in the meeting of the Board of Directors in which this new role and compensation structure was discussed and concurs with the appointment and related remuneration.

UPDATE ON DIP FACILITY

39. As described in the Supplementary Carter Affidavit, the Just Energy Entities have entered into the DIP Amendment since the date of the First Report. Pursuant to the DIP

Amendment, among other things: (i) reference to the Lender Support Agreement was added, (ii) the Just Energy Entities agreed to certain additional reporting requirements consistent with the Lender Support Agreement, and (iii) the scope of permitted priority liens was amended to authorize the Just Energy Entities to provide cash collateral to the Cash Management Banks in accordance with the Initial Order.

40. Since the date of the First Report, the Just Energy Entities have drawn down the remaining availability under the DIP Facility in the amount of US$25 million. Accordingly, the DIP Facility is now fully drawn.

41. Certain of the DIP Lenders requested the consent of the Just Energy DIP Borrowers to the grant of temporary silent participation rights in their respective interests under the DIP Facility. In accordance with the terms of the DIP Facility, the DIP Lenders are entitled to grant such participation rights with the consent of the DIP Borrowers provided they furnish certain necessary information under the DIP Facility, including to the Monitor. The Just Energy Entities provided their consent to the requested participation on May 20, 2021. The Monitor understands that the granting of the silent participation rights is expected to be temporary and does not change the terms of the DIP Facility.

RECEIPTS AND DISBURSEMENTS FOR THE NINE-WEEK PERIOD ENDED MAY 15, 2021

42. The Just Energy Entities' actual net cash flow for the 9-week period from March 15, 2021 to May 15, 2021, was approximately $65 million better than the Cash Flow Forecast as summarized below:

(CAD$ in millions)	Forecast	Actuals	Variance
RECEIPTS			
Sales Receipts	$422.4	$449.1	$26.7
Miscellaneous Receipts	8.0	6.0	(2.0)
Total Receipts	$430.5	$455.2	$24.7
DISBURSEMENTS			
Operating Disbursements			
Energy and Delivery Costs	($251.1)	($232.0)	$19.1
Payroll	(13.3)	(15.1)	(1.8)
Taxes	(29.2)	(18.7)	10.6
Commissions	(19.7)	(13.9)	5.9
Selling and Other Costs	(34.8)	(25.9)	8.9
Total Operating Disbursements	($348.1)	($305.5)	$42.7
OPERATING CASH FLOWS	$82.3	$149.7	$67.4
Financing Disbursements			
Credit Facility - Borrowings / (Repayments)	$31.5	$31.0	($0.5)
Interest Expense & Fees	(2.7)	(4.6)	(1.9)
Restructuring Disbursements			
Professional Fees	(11.7)	(11.6)	0.1
NET CASH FLOWS	**$99.5**	**$164.4**	**$65.0**
CASH			
Beginning Balance	$51.2	$77.7	$26.5
Net Cash Inflows / (Outflows)	99.5	164.4	65.0
Other (FX)	-	(8.0)	(8.0)
ENDING CASH	**$150.6**	**$234.1**	**$83.5**

43. Explanations for the main variances in actual receipts and disbursements as compared to the Cash Flow Forecast are as follows:

(a) The favourable variance of approximately $26.7 million in Sales Receipts is comprised of the following:

(i) A permanent favourable variance of approximately $16.3 million due to the receipt of payments from U.S. residential customers which had been assumed to be uncollectible in the Cash Flow Forecast;

(ii) A permanent favourable variance of approximately $4.6 million due to the receipt of payments from U.S. commercial customers related to higher billed revenue than was estimated in the Cash Flow Forecast; and

Court File No. CV-21-00658423-00CL

Just Energy Group Inc. et al.

THIRD REPORT OF FTI CONSULTING CANADA INC., IN ITS CAPACITY AS COURT-APPOINTED MONITOR

September 8, 2021

COMMODITY SUPPLIERS

Update on Discussions with Commodity Suppliers and Agreements Executed

28. As detailed in the Second Report, the Just Energy Entities are of the view that an expanded supply base would be beneficial to the longer-term viability of their business and have canvassed the market for potential suppliers with a goal of securing a diversified and competitive group of suppliers.

29. In addition to the ISDA Master Agreement with Mercuria Energy America, LLC previously entered into by the Just Energy Entities for the supply of electricity and natural gas, the Just Energy Entities have been successful in further diversifying their commodity supply arrangements and have entered into the following arrangements for the supply of electricity and natural gas in the United States – both of which require Just Energy U.S. to provide financial support under a letter of credit or to post cash collateral:

    (a) an ISDA Master Agreement dated April 15, 2019 as amended on July 19, 2021 with corresponding schedules and related agreements with J. Aron & Company LLC; and

    (b) an ISDA Master Agreement dated July 30, 2021 with corresponding schedules and related agreements with Hartree Partners, LP.

30. Going forward, the Just Energy Entities intend to continue actively managing their commodity supplier arrangements to enhance the longer-term viability of the business, and will continue to identify and engage in discussions with additional potential commodity suppliers as opportunities arise.

Dispute with Commodity Suppliers

31. After the Filing Date, Skyview Finance Company, LLC ("**Skyview**"), a counterparty that previously traded in renewable energy credits with Just Energy U.S., terminated its forward contracts with Just Energy U.S. and disputed certain amounts that the Applicants contend are owing to Just Energy U.S. The Just Energy Entities and Skyview have agreed on a process to resolve their dispute and the parties have completed preparation of their

materials in this process. The Monitor is being kept apprised of the developments in the dispute process and will provide a further update to the Court at a later date.

INTERCREDITOR DISPUTE

32. As described in the Monitor's earlier reports, certain of the Just Energy Entities are party to an intercreditor agreement (the "**Intercreditor Agreement**") between certain secured commodity and ISO service suppliers (each, a "**Secured Supplier**"), including BP and Shell, and the CA Agent on behalf of certain secured lenders. The Intercreditor Agreement, among other things, sets out the relative priority of the parties' security interests.

33. Prior to the commencement of these proceedings, Just Energy was advised by BP, a Secured Supplier and a party to the Intercreditor Agreement, that it disagreed with the characterization of certain amounts due to BP as Tier 2 and Tier 3 obligations and considered such amounts to be Tier 1 obligations. The Just Energy Entities have advised BP that they consider any dispute regarding the ranking of amounts due to BP under the Intercreditor Agreement to be an intercreditor dispute (the "**Intercreditor Dispute**") and that the Just Energy Entities do not intend to take a position on the Intercreditor Dispute.

34. The Monitor understands that the potential quantum of the amount under dispute is approximately US$200 million.

35. In order to avoid lengthy and costly litigation, the Monitor facilitated extensive discussions with, among others, BP, Shell, the CA Agent, the DIP Lenders, the Just Energy Entities and their respective financial and legal advisors (collectively, the "**Interested Parties**"), all of whom expressed an interest in the Intercreditor Dispute in order to understand the positions of such parties in respect of the Intercreditor Dispute and establish a process to resolve same.

36. The Monitor has not taken, and will not take, a position on the substance of the Intercreditor Dispute, and has assisted the Interested Parties in its capacity as an independent officer of the Court to develop the Resolution Process.

37. During the negotiation of the Resolution Process, the Monitor was advised that an entity or entities related to the DIP Lender had acquired the claim of BP against the Just Energy

Entities, which claim included the amount that was the subject of the Resolution Process. Following consultation with the Just Energy Entities, the DIP Lenders and the Monitor, the Interested Parties agreed to put the Resolution Process in abeyance while a potential restructuring solution is pursued.

38. Prior to putting the Resolution Process in abeyance, one point of dispute remained between the Interested Parties dealing with an issue regarding a potential post-award judicial review. In light of the abeyance, the Monitor is of the view that it is neither necessary to seek approval of the Resolution Process nor deal with the remaining point in dispute at this time. In the event that the discussions on the potential restructuring solution are no longer proving fruitful, or the resolution of the Intercreditor Dispute becomes otherwise required, the Monitor, in consultation with the Interested Parties now excluding BP, may bring the Resolution Process or a revised version of it before this Court for consideration.

UPDATE ON RESTRUCTURING EFFORTS OF THE JUST ENERGY ENTITIES

39. Pursuant to the DIP Term Sheet, the Just Energy Entities delivered their business plan on May 18, 2021 to the DIP Lenders and other stakeholders as required.

40. Since that time, the Just Energy Entities with the assistance of legal counsel and the Financial Advisor, and in consultation with the Monitor and the DIP Lenders, have continued their restructuring efforts with a focus on developing a restructuring plan that facilitates emergence from the CCAA Proceedings, preserves the going concern value of the business, maintains customer service and relationships, and preserves employment and critical vendor relationships – all for the benefit of the Just Energy Entities' stakeholders.

41. To provide sufficient time to further restructuring efforts, the Just Energy Entities have negotiated extensions to certain milestone deadlines provided for in the DIP Term Sheet including the following:

    (a) October 7, 2021 – deadline for delivery of a term sheet for a recapitalization transaction reasonably acceptable to the DIP Lenders (the "**Recapitalization Plan**");

Court File No. CV-21-00658423-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JUST ENERGY GROUP INC., JUST ENERGY CORP., ONTARIO ENERGY COMMODITIES INC., UNIVERSAL ENERGY CORPORATION, JUST ENERGY FINANCE CANADA ULC, HUDSON ENERGY CANADA CORP., JUST MANAGEMENT CORP., 11929747 CANADA INC., 12175592 CANADA INC., JE SERVICES HOLDCO I INC., JE SERVICES HOLDCO II INC., 8704104 CANADA INC., JUST ENERGY ADVANCED SOLUTIONS CORP., JUST ENERGY (U.S.) CORP., JUST ENERGY ILLINOIS CORP., JUST ENERGY INDIANA CORP., JUST ENERGY MASSACHUSETTS CORP., JUST ENERGY NEW YORK CORP., JUST ENERGY TEXAS I CORP., JUST ENERGY, LLC, JUST ENERGY PENNSYLVANIA CORP., JUST ENERGY MICHIGAN CORP., JUST ENERGY SOLUTIONS INC., HUDSON ENERGY SERVICES LLC, HUDSON ENERGY CORP., INTERACTIVE ENERGY GROUP LLC, HUDSON PARENT HOLDINGS LLC, DRAG MARKETING LLC, JUST ENERGY ADVANCED SOLUTIONS LLC, FULCRUM RETAIL ENERGY LLC, FULCRUM RETAIL HOLDINGS LLC, TARA ENERGY, LLC, JUST ENERGY MARKETING CORP., JUST ENERGY CONNECTICUT CORP., JUST ENERGY LIMITED, JUST SOLAR HOLDINGS CORP. AND JUST ENERGY (FINANCE) HUNGARY ZRT.

Applicants

AFFIDAVIT OF MICHAEL CARTER

I, Michael Carter, of the Town of Flower Mound, in the State of Texas, MAKE OATH AND SAY:

1. I have been Just Energy Group Inc.'s ("**JEGI**") Chief Financial Officer since September 2020. In that role, I am responsible for all financial-related aspects of the business of JEGI and its subsidiaries in the CCAA proceedings (collectively, the "**Just Energy Group**" or the "**Applicants**"), including the partnerships listed on Schedule "A" of the Initial Order (as defined below) to which the protections and authorizations of the Initial Order were extended (collectively with the Applicants, the "**Just Energy Entities**"). As such, I have personal knowledge of the

matters deposed to in this affidavit. Where I have relied on other sources for information, I have stated the source of my information and I believe such information to be true. In preparing this affidavit, I have also consulted with the Just Energy Group's senior management team and their financial and legal advisors, and in particular U.S. counsel who has carriage of the Putative Class Actions (as defined below) on behalf of the Just Energy Group.

2. I make this affidavit in support of the Applicants' motion for a short extension of the Stay Period (as defined below) to, and including, March 4, 2022, and in response to the Motion for Advice and Directions brought by Wittels McInturff Palikovic, Finkelstein Blankinship, Frei-Pearson, Garber LLP, and Shub Law Firm LLP (collectively, "**Plaintiffs' Counsel**"), in their capacity as counsel to the proposed representative plaintiffs in *Donin v. Just Energy Group Inc. et al.*[1] (the "**Donin Action**") and *Trevor Jordet v. Just Energy Solutions Inc.*[2] (the "**Jordet Action**", together with the Donin Action the "**Putative Class Actions**"), seeking (among other things):

(a) an order declaring that the plaintiff classes in the Putative Class Actions are to be unaffected by this CCAA Proceeding;

(b) in the alternative to the relief sought in paragraph 2(a), above, an order implementing a schedule and process (the "**Claims Adjudication Process**") for the final adjudication of the claims arising from the Putative Class Actions (the "**Putative Class Claims**") prior to any consideration by the Court of the

[1] No. 17 Civ.5787 (WFK) (SJB)(E.D.N.Y.).

[2] No. 18 Civ. 953 (WMS) (W.D.N.Y.).

Applicants' proposed plan of compromise or arrangement (the "**Plan**") or other event to exit this CCAA Proceeding;

(c) an order directing the Applicants to provide the plaintiffs with access to any data room established by the Applicants in respect of these proceedings, and appointing a mediator/arbitrator (the "**Mediator/Arbitrator**") to resolve all matters pertaining to the production of documents and access to information for restructuring purposes (as distinct from production for the purpose of the Claims Adjudication Process);

(d) in the alternative to the relief sought in paragraph 2(c), above, an order:

(i) directing the specific production of the following documents and information within seven (7) days of the date of the order:

(A) a listing of creditors, the amount claimed by each creditor, whether security or other priority is claimed, and the status of the claim (i.e., allowed/contested/subject to ongoing review/etc.) and the aggregate number of creditors and claims;

(B) the DIP Term Sheet, each of its revisions, the latest current form, a conformed copy of the DIP term sheet with all revisions, any future updates, signature pages, DIP loan amount exhibits by DIP Loan participant, and definitive documents, and any other related non-privileged documents;

(C) copies of all of the Applicants' insurance policies that might respond to the Putative Class Claims, the coverage status, the total amount drawn against the policy to date, and a list of competing claims made against the policies;

(D) a list and the expected timing of key events in the CCAA Proceeding, including the release of the Applicants' proposed exit plan and how such exit plan is to be put before the Court and Creditors for approval;

(E) the restructuring, realization and/or sale or investment process related to any and all exit plans under consideration by the Applicants;

(F) any debt capacity analyses by the company and/or its investment bank;

(G) an updated business plan showing updates of actual results to projected results, an update showing the range of recoveries as per Texas House Bill 4492, the proceeds from the sale of ecobee Shares, and all other updates included in the business plan since it was published in May 2021; and

(H) a statement of the enterprise value of the company with supporting documents showing methodology, multiples, discount rates used, and comparables relied upon;

(ii) directing the Applicants and their necessary advisors to meet with Plaintiffs' Counsel and their advisors within seven (7) days of the completion of production of the foregoing information, to review the information and answer questions; and

(iii) scheduling a further case conference within 21 days of the date of the order to report on the status of its implementation and to schedule such further case conferences or hearings as may be necessary for the effective management and supervision of these proceedings;

3. The Applicants are seeking to have the plaintiff's motion dismissed in its entirety. Among other things:

(a) The Applicants have already provided Plaintiffs' Counsel with confidential information pursuant to an NDA (defined below) in addition to the information available in JEGI's public company filings and the extensive documentation filed in the CCAA Proceedings. The Applicants and the Monitor have also answered questions posed by Plaintiffs' Counsel and attended numerous calls with them. The Applicants have diligently responded to reasonable information requests.

(b) The Applicants are addressing the plaintiffs' claims pursuant to the Claims Procedure Order and are prepared to engage with Plaintiffs' Counsel and the Monitor to appoint a Claims Officer to efficiently determine the claims. To that

end, the Applicants have proposed a fair and reasonable schedule for the adjudication of the claims, subject to the discretion of the Claims Officer; and

(c) The Applicants are currently negotiating a restructuring solution with their funded debt holders to preserve the Just Energy Entities' business as a going concern. Once that process is complete, the Applicants will seek court approval of any restructuring solution. All stakeholders will have an opportunity to make submissions to the Court with respect to the proposed restructuring at the appropriate time.

4. The Applicants and their advisors are spending an inordinate amount of time dealing with two contingent, uncertified, unsecured creditors whose claims have been disallowed in full. The Applicants require breathing space to focus on their restructuring discussions with the stakeholders that have funded the Just Energy Entities and should not be required to expend additional resources responding to extensive information requests at this time.

5. All references to monetary amounts in this affidavit are in Canadian dollars unless noted otherwise.

A. HISTORY OF THE CCAA PROCEEDINGS

6. On March 9, 2021 (the "**Filing Date**"), the Applicants obtained protection under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (the "**CCAA**") pursuant to an initial order (the "**Initial Order**") of the Ontario Superior Court of Justice (Commercial List) (the "**CCAA Court**"). The Applicants' filing for protection under the CCAA was precipitated by the

acute and unforeseen liquidity challenge caused by the unprecedented winter storm in Texas and the Texas regulators' response to same.

7. The Initial Order has twice been amended and restated. The CCAA Court granted an Amended and Restated Initial Order (the "**ARIO**") and a Second Amended and Restated Initial Order (the "**Second ARIO"**) on March 19, 2021, and May 26, 2021, respectively.

8. On April 2, 2021, the United States Bankruptcy Court for the Southern District of Texas granted a Final Recognition Order (the "**Final Recognition Order**") which, among other things, granted the ARIO, including any and all existing and future extensions, amendments, restatements, and/or supplements authorized by the CCAA Court, with full force and effect on a final basis with respect to the Just Energy Entities' property located within the United States.[3]

9. On September 15, 2021, the CCAA Court granted the Claims Procedure Order establishing a process (the "**Claims Process**") to determine the nature, quantum, and validity of Claims against the Just Energy Entities and their respective Directors and Officers. The Claims Procedure Order established a Claims Bar Date of November 1, 2021. A copy of the Claims Procedure Order is attached hereto as **Exhibit "A".** Since the Claims Bar Date, the Just Energy Entities have been working diligently with the Monitor to review, record, dispute and, where appropriate, finally determine the amount and characterization of Claims against the Just Energy Entities and their respective Directors and Officers.

10. On November 10, 2021, the CCAA Court granted an Order which, among other things, approved an amendment to the CCAA Interim Debtor-in-Possession Financing Term Sheet, dated

[3] The Final Recognition Order also provided that, "All parties who believe they have a claim against any of the Debtors are obligated to file such claims in, and only in, the Canadian Proceeding."

as of March 9, 2021 (the "**DIP Term Sheet**") to, among other things, extend the maturity date thereunder from December 31, 2021 to September 30, 2022, and extend the Stay Period (as defined in the Second ARIO) to February 17, 2022.

B. EXTENSION TO THE STAY PERIOD

11. Since the Stay Period was last extended on November 10, 2021, the Just Energy Entities, with the assistance of their legal and financial advisors, and in close consultation with the Monitor, have been working in earnest to advance their restructuring. Throughout the past number of months, the Just Energy Entities have continued their extensive engagement with their most significant stakeholders who are financially participating in the restructuring, including the lenders under the DIP Term Sheet (the "**DIP Lenders**") (who are also lenders under the non-revolving term loan established pursuant to the Term Loan Agreement as part of the 2020 balance sheet recapitalization transaction, the assignees of a significant secured supplier claim from BP, and the Plan sponsor under the company's Plan), the lenders under the ninth amended and restated credit agreement with Just Energy Ontario L.P. and Just Energy (U.S.) Corp., dated as of September 28, 2020 (the "**Credit Facility Lenders**"), and Shell[4] (a significant secured supplier), regarding a framework for the recapitalization of the Just Energy Entities and their respective businesses.

12. The Plan is intended to preserve the going concern value of the Just Energy Entities' businesses for the benefit of stakeholders (including the company's approximately 950,000 customers and significant trading partners), maintain the employment of the Just Energy Entities'

[4] Collectively, Shell Energy North America (Canada) Inc., Shell Energy North America (US), L.P., and Shell Trading Risk Management, LLC.

more than 1000 employees, and support the long-term viability of the business upon emergence from these CCAA and Chapter 15 proceedings.

13. The discussions regarding the Plan include renegotiation of the complex intercreditor arrangement which governs the secured debt portion of the Just Energy Entities' capital structure, defining the relative priorities of the various parties' security interests and specifying the priority of such interests in accordance with the waterfall defined therein.[5] The company has enjoyed the financial support of its most significant stakeholders to date, including multiple extensions of milestones by the DIP Lender to facilitate the Applicants' going-concern restructuring.

14. Given the nature of the business, the length of time the Applicants have been in the CCAA proceedings, the complexities and time consuming nature of the multiparty negotiations, and the volatility of the energy market, any significant delays in the conclusion of the restructuring could have damaging effects on the outcome for stakeholders and the support of the financial participants for the proposed restructuring. It is therefore imperative that the parties are able to conclude negotiations for the Plan and emerge from these CCAA proceedings as soon as possible. The parties' discussions are in advanced stages and are expected to conclude in the coming weeks.

15. In addition to operating a complicated business and negotiating a series of complex restructuring documents, management of the Just Energy Entities has been preparing since late last week for harsh winter weather that is forecast to significantly impact Texas later this week, which has required many hours of meetings and calls to review the Applicants' commodity supply

[5] A copy of the intercreditor agreement can be found at Exhibit "P" to my affidavit sworn March 9, 2021 which can be accessed at the following link: http://cfcanada.fticonsulting.com/justenergy/docs/Re%20Just%20Energy%20Inc%20et%20al%20-%20Application%20Record.pdf

positions, hedging strategies and liquidity positions. While the Applicants believe they are prepared to manage through this event, it is prudent that management's time and resources continue be focused on the business' operations. Similar adverse weather events are always a risk and may continue to require significant management attention.

16. The Just Energy Entities are seeking a short, two-week extension to the Stay Period from February 17, 2022 to and including March 4, 2022 to permit them to (i) conclude their discussions with key stakeholders that have financially supported this company during these CCAA proceedings regarding the terms of a proposed Plan, (ii) finalize the Plan, and (iii) file a further motion with this Honourable Court for, among other things, an Order accepting the Plan for filing and authorizing the Just Energy Entities to call, hold and conduct virtual meetings of creditors to consider and vote on resolutions to approve the Plan. The Just Energy Entities currently have March 3, 2022 scheduled for the hearing of such motion.

17. The Just Energy Entities have acted and continue to act in good faith and with due diligence in these CCAA proceedings. Since the Stay Period was last extended on November 10, 2021, the Just Energy Entities have, among other things:

(a) continued their extensive and ongoing engagement with the DIP Lenders, the Credit Facility Lenders and Shell regarding the terms of the Plan;

(b) continued reviewing and, in consultation with the Monitor, determining claims received within the Claims Process in accordance with the Claims Procedure Order including, but not limited to, (i) preparing and issuing Notices of Revision or Disallowance and notices of claim acceptance, where appropriate, (ii) engaging with certain claimants to discuss resolution and settlement of ongoing disputes

regarding their claims; and (iii) attending discussions with, and responding to inquiries from, multiple stakeholders and/or the Monitor regarding the Claims Process and Proofs of Claim/D&O Proofs of Claim received within the Claims Process;

(c) commenced litigation against the Electric Reliability Council of Texas ("**ERCOT**") and the Public Utility Commission of Texas (the "**PUCT**") in the US Court on November 12, 2021, seeking to recover payments that were made by various of the Just Energy Entities to ERCOT for certain invoices in February 2021 relating to the unprecedented winter storm in Texas in February 2021. A copy of Just Energy's Press Release announcing commencement of the litigation is attached hereto as **Exhibit "B"**;

(d) received and undertook a review of ERCOT's calculations of recoveries of certain costs to be securitized under House Bill 4492 which ERCOT filed with the PUCT on December 9, 2021 and according to which the Just Energy Entities expect to recover funds of approximately US$147.5 million. A copy of Just Energy's Press Release announcing release of ERCOT's calculations is attached hereto as **Exhibit "C"**;

(e) completed the windup and dissolution of Just Energy Finance Holding Inc. ("**JE Finance**"), and amended the style of cause in these CCAA proceedings to remove JE Finance as an Applicant, all in accordance with the Order of the CCAA Court, granted November 10, 2021. A copy of the Certificate of Dissolution is attached hereto as **Exhibit "D"**.

(f) continued to maintain regular communications with various regulators across Canada and the United States and satisfy all obligations to regulators that license one or more of the Just Energy Entities in the ordinary course. All licenses and registrations that the Just Energy Entities held as of the Filing Date remain valid and in full force and effect;

(g) continued to provide all required reporting to the DIP Lenders, Credit Facility Lenders and the Qualified Commodity/ISO Suppliers in accordance with the ARIO, the DIP Term Sheet, and all Qualified Support Agreements, as applicable, and negotiated changes to certain milestone dates under the DIP Term Sheet, as necessary, to facilitate restructuring discussions; and

(h) operated the business in the normal course with a view to maximizing the value of the Just Energy Entities for the benefit of all stakeholders.

18. I understand that the Monitor will file a report (the "**Monitor's Fifth Report**") that will include, among other things, a cash flow forecast demonstrating that, subject to the underlying assumptions contained therein, the Just Energy Entities will have sufficient funds to continue their operations and fund these CCAA proceedings until March 4, 2022. I further understand that the Monitor's Fifth Report will recommend that the Stay Period be extended.

C. BACKGROUND TO THE PUTATIVE CLASS ACTIONS

19. The information in this section is based on my review of court documents, the involvement of the senior management team in the litigation, and information received from Jason Cyrulnik of Cyrulnik Fattaruso LLP, US counsel for the defendants in the Putative Class Actions.

(a) Jordet Action

20. On April 6, 2018, Trevor Jordet filed the Jordet Action solely against Just Energy Solutions, Inc. ("**Just Energy Solutions**") on behalf of a putative class of all "Just Energy customers charged a variable rate for residential natural gas services by Just Energy from April 2012 to the present". The plaintiff alleged, among other things, that the defendant violated Pennsylvania Unfair Trade Practices and Consumer Protection Law ("**PUTPCP**"), breached contractual provisions and an implied covenant of good faith requiring Just Energy Solutions to consider "business and market conditions" when it charged rates that were more than the local utility rate for natural gas, and was unjustly enriched as a result of the alleged misconduct.

21. Importantly, the Jordet Action does not purport to deal with any electricity customers of Just Energy Solutions. A copy of the plaintiff's complaint in the Jordet Action is attached as Exhibit "D" to the affidavit of Robert Tannor sworn January 17, 2022 (the "**Tannor Affidavit**") filed in support of the plaintiffs' Motion for Advice and Directions.

22. The Tannor Affidavit at paragraphs 7 and 38 mischaracterizes the result of the motion to dismiss that was brought by the defendant. In fact, the defendant achieved significant success on this motion that restricted the causes of action that may be alleged in the proposed class action. The US District Court in the Western District of New York (the "**WDNY Court**") dismissed the PUTPCP and unjust enrichment claims, such that only the alleged breach of contract claim remains.[6] Moreover, the WDNY Court held that claims for breach of contract prior to April 6,

[6] As the WDNY Court noted in its decision on the motion to dismiss, a breach of the implied covenant of good faith is not a distinct cause of action from breach of contract under Pennsylvania law. *Jordet v. Just Energy Solutions Inc.,* Decision and Order 18-CV-953S regarding Motion to Dismiss dated December 7, 2020 ("**Jordet Motion to Dismiss Decision**"), Dkt. 43, at 4.

2014, are time-barred. A copy of the WDNY Court's decision on the motion to dismiss dated December 7, 2020 is attached as Exhibit "E" to the Tannor Affidavit.

23. The WDNY Court's decision was based solely on the pleadings being taken as true. Indeed, the WDNY Court noted in its decision that it "cannot dismiss a Complaint unless it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'"[7] The lone remaining claim therefore turns on whether Just Energy Solutions breached contractual commitments to use its discretion to set rates consistent with "business and market conditions" (defined to include a host of factors), and the WDNY Court found that whether Just Energy Solutions' pricing adhered to that discretionary standard could not readily be resolved solely on the pleadings.[8] In other words, there was no determination by the Court on the merits of the remaining breach of contract claims asserted by the plaintiff.

24. As a result, the WDNY Court's decision materially narrows the scope of the Jordet Action.

(b) Donin Action

25. On October 3, 2017, Fira Donin and Inna Golovan filed the Donin Action against JEGI, Just Energy New York Corp. ("**Just Energy NY**"), and John Does 1-100, which the plaintiffs alleged were "shell companies and affiliates" through which JEGI did business in New York and elsewhere, as well as "Just Energy management and employees who perpetrated the unlawful acts." The action was brought on behalf of a putative class of "all Just Energy customers in the

[7] Jordet Motion to Dismiss Decision, at 6.

[8] Jordet Motion to Dismiss Decision, at 17-18.

United States […] who were charged a variable rate for their energy at any time from [applicable statute of limitations period] to the date of judgment".

26. The plaintiffs alleged, among other things, that the defendants engaged in fraudulent conduct, violated New York statutes by engaging in deceptive acts and practices, breached contractual provisions to consider "business and market conditions", and breached the implied covenant of good faith when it charged rates that were more than the local utility rate for natural gas and electricity in New York. A copy of the plaintiffs' complaint in the Donin Action is attached as Exhibit "B" to the Tannor Affidavit.

27. Again, the defendants were largely successful on the motion to dismiss, which significantly narrowed the scope of claims in the Donin Action. The US District Court in the Eastern District of New York (the "**EDNY Court**") dismissed all the plaintiffs' claims except for the breach of contract and implied covenant of good faith claims. A copy of the EDNY Court's decision on the motion to dismiss dated September 24, 2021 is attached as Exhibit "C" to the Tannor Affidavit.

28. As noted by the EDNY Court, the plaintiff in a motion to dismiss must only "state a claim of relief that is plausible on its face", accepting for the purposes of the motion that the factual allegations contained in the complaint are true**.**[9] The EDNY Court did not make a judicial determination that Just Energy NY had improperly exercised its contractually agreed discretion to set rates, or even that Just Energy NY did not consider the many different business and market conditions in setting its rates. These were all matters which could not be resolved solely on the pleadings.

[9] *Donin et al v. Just Energy Group Inc. et al,* Decision and Order 17-CV-5787(WFK)(SJB) regarding Motion to Dismiss dated September 24, 2021, Dkt. 111, at 4.

29. The EDNY Court also found that it did not have jurisdiction over John Does 1-100. All claims against these defendants were dismissed. This decision effectively limits the Donin class, should it be certified, to New York customers, as JEGI is a holding company that does not contract with any customers and Just Energy NY only contracts with customers based in New York.

30. On January 10, 2020, over Plaintiffs' Counsel's objection, the EDNY Court ordered that factual discovery in this matter was closed and that all pending discovery requests and disputes before that Court were terminated. This ruling came after years of discovery, including the production of documents by the defendants in response to numerous requests by the plaintiffs. All discovery to date has been limited to the defendants' New York business, consistent with the limited scope of the remaining claim.

(c) Proofs of Claim

31. On November 1, 2021, Plaintiffs' Counsel filed two Proofs of Claim in respect of the Donin and Jordet Actions, each in the unsecured amount of approximately USD$3.66 billion.[10] Copies of the Donin Proof of Claim, the Jordet Proof of Claim and the Claim Documentation included in both Proofs of Claim (excluding Exhibits 2-5, which are copies of the pleadings and motions to dismiss for both Putative Class Actions) are attached to the Tannor Affidavit as Exhibits "F", "G" and "H", respectively.

[10] The damages calculation purports to be a joint, composite damages claim encompassing both lawsuits, notwithstanding the fundamental differences in terms of the defendants, scope of the claim and potential class members in the two actions.

(d) Notices of Disallowance

32. On January 11, 2022, the Monitor sent the proposed representative plaintiffs in the Putative Class Actions Notices of Disallowance in accordance with the Claims Procedure Order (the "**Notices of Disallowance**"). Copies of the Donin Notice of Disallowance and the Jordet Notice of Disallowance are appended to the Tannor Affidavit as Exhibits "Q" and "R", respectively.

33. The Notices of Disallowance disallowed the claims advanced in both Proofs of Claim in full as, among other things, contingent, uncertified, speculative, and remote.

34. The Notices of Disallowance specifically address the plaintiffs' attempts to expand the scope of their claims to add new defendants, new customer groups, and extended class periods. The Proofs of Claim purport to advance claims against all "Just Energy Entities" on behalf of both gas and electricity customers, notwithstanding the fact that:

(a) the Jordet Action only names Just Energy Solutions as defendant and is only brought on behalf of natural gas customers;

(b) the only named defendants in the Donin Action are JEGI and Just Energy NY and the EDNY Court dismissed all claims against JEGI's other affiliates; and

(c) the WDNY Court found claims prior to April 6, 2014 were time-barred in the Jordet Action.

35. The attempted expansion of the plaintiffs' claims is illustrated in the below chart:

	Donin Complaint/ Motion to Dismiss	Donin POC	Jordet Complaint/ Motion to Dismiss	Jordet POC
Defendants	JEGI, Just Energy NY EDNY Court dismissed claims against other JEGI affiliates.	All "Just Energy Entities"	Just Energy Solutions	All "Just Energy Entities"
Defendants' Customer Base[11]	New York	California Delaware Georgia Illinois Indiana Maryland Massachusetts, Michigan Nevada New Jersey New York Ohio Pennsylvania Texas	California Georgia Illinois Maryland Nevada Ohio Pennsylvania Virginia	California Delaware Georgia Illinois Indiana Maryland Massachusetts, Michigan Nevada New Jersey New York Ohio Pennsylvania Texas
Defendants' Customer Type	Largely Residential	Residential and Commercial	Largely Residential	Residential and Commercial
Product Type	Electricity and Natural Gas	Electricity and Natural Gas	Natural Gas Only	Electricity and Natural Gas
Class Period	Pleadings refer to "applicable Statute of Limitations Period"[12]	2011-2020	WDNY Court held claims prior to April 6, 2014 are time-barred.	2011-2020

[11] The customer base in the "Jordet Complaint/ Motion to Dismiss" column reflects the states where natural gas was marketed by Just Energy Solutions. Just Energy Solutions marketed natural gas in these various states for different lengths of time.

[12] I am informed by Mr. Cyrulnik and believe that a six-year statute of limitations period applies to New York contract claims, which would render claims accruing prior to October 3, 2011, time-barred.

36. It is notable that the plaintiffs have not attempted to add any additional defendants (or in the case of Jordet Action, to add electricity customers) to the Putative Class Actions in the approximately four years since they were commenced.

37. Additionally, the Notices of Disallowance state that:

(a) **Contractual Language:** The applicable contracts put customers (including the plaintiffs) on clear notice of the variable rates that the defendants would set and explicitly state that "This Agreement does not guarantee financial savings";

(b) **Comparison to Local Utilities is Flawed:** The plaintiffs' allegation that the defendants breached the parties' contracts by failing to set rates "according to business and market conditions" is premised on the erroneous assumption that local public utilities (not other energy service companies ("**ESCOs**")) are the defendants' main competitors, and as such the defendants overcharged when their rates were higher than that of the local utility. Local utility rates are not an appropriate barometer by which to measure the rates of ESCOs as: (i) local utilities and ESCOs offer different products and services and have different business models; and (ii) local utility commodity prices do not reflect wholesale energy prices and do not include reasonable profit margins; and

(c) **Damages Calculations are Inflated:** The calculation of the quantum of damages in the plaintiffs' purported expert report is speculative, highly inflated and based on a number of flawed assumptions. For instance, the report assumes that 50% of residential and commercial natural gas and electricity usage of the Just Energy Group's customer base is attributable to customers that are parties to variable rate

contracts that would be included in the proposed class. However, currently only 2.1% and 0.04%, respectively, of natural gas and electricity usage is attributable to customers who are parties to variable rate contracts with the Just Energy Entities.

38. The Tannor Affidavit (para. 50) improperly suggests that the Notices of Disallowance "rejected the alleged class size and quantum without any evidence and without even addressing the comprehensive expert report." To the contrary, the substantive flaws in the expert report are outlined in detail on pages 6-10 of both Notices of Disallowance.

39. The Notices of Disallowance also outlined a number of reasons as to why the Putative Class Actions are not amenable to certification pursuant to the relevant US law.

D. Communication with, and Information Provided to, Plaintiffs' Counsel

40. The Tannor Affidavit suggests that the Applicants and the Monitor have not been responsive to information requests over the last twelve weeks. This is simply not the case.

41. The Just Energy Group and the Monitor have engaged with Plaintiffs' Counsel since they first contacted the Monitor's legal counsel by email on November 11, 2021. This process included signing a Confidentiality, Non-Disclosure and Non-Use Agreement (the "**NDA**"), providing Plaintiffs' Counsel with confidential information and documents, answering numerous written questions, and arranging multiple meetings with Plaintiffs' Counsel and its financial advisor, Tannor Capital Advisors ("**Tannor Capital**") that have included, at various times, counsel for the Just Energy Group ("**Osler**"), the Monitor, counsel to the Monitor, and the financial advisor to the Just Energy Group.

42. The Tannor Affidavit (para. 14) notes that "Mr. Wittels also alleged [on November 10, 2021] that the Applicants had not been forthcoming in providing Class Counsel with any information as to the Applicants' financial status." However, this statement is misleading, as Plaintiffs' Counsel made no requests for any information until November 11, 2021 – eight months after the Applicants filed for CCAA protection on March 9, 2021. In fact, the first time that Osler had any interaction with Mr. Wittels was when Mr. Wittels appeared at the November 10, 2021 court hearing to oppose certain relief being sought, without previously advising the Monitor or Osler that he intended to do so.

43. The following is a chronology outlining the communications with, and information provided to, Plaintiffs' Counsel and the plaintiffs' Canadian counsel, Paliare Roland Rosenberg Rothstein LLP ("**Paliare Roland**"), over the last twelve weeks, based on my discussions with Osler:

Date	**Event**
November 10, 2021	Plaintiffs' Counsel appeared on a motion before Justice Koehnen and objected to the second Key Employee Retention Plan. Plaintiffs' Counsel did not reach out to the Just Energy Group or the Monitor in advance of this Court appearance to advise of his intended opposition.
November 11, 2021	Plaintiffs' Counsel emailed counsel for the Monitor for the first time to request a meeting to discuss being granted access to "certain financial information". On Friday, November 12, 2021, Counsel for the Monitor responded by email to Plaintiffs' Counsel indicating that their information request was best directed to the Just Energy Entities and copied Osler. The following Monday, November 15, 2021, Osler responded by email to Plaintiffs' Counsel and indicated they would be contacting them to discuss the requests.
November 19, 2021	Osler, Monitor's counsel, Plaintiffs' Counsel, Paliare Roland, and Tannor Capital attended a call to discuss Plaintiffs' Counsel's request for information.

November 22, 2021	Osler provided the draft NDA to Plaintiffs' Counsel.
November 24, 2021	Plaintiffs' Counsel and Paliare Roland attended a call with Osler, the Monitor and counsel to the Monitor to discuss comments received from Plaintiffs' Counsel and Paliare Roland on the draft NDA.
November 30, 2021	After various revisions from the parties, JEGI, Plaintiffs' Counsel, Tannor Capital and Paliare Roland entered into the NDA. The NDA explicitly states that it does not create any obligation to share documents with Plaintiffs' Counsel.
December 2, 2021	Plaintiffs' Counsel provided a list of questions to Osler (the "**December 2nd Questions**").
December 8, 2021	Osler provided comments on the December 2nd Questions as well as copies of the Business Plan, DIP Term Sheet, and two Amendments to the DIP Term Sheet. The DIP Term Sheet and two Amendments were previously disclosed in Court filings. A copy of the answers to the December Second Questions and the Business Plan are attached as confidential **Exhibits "E" and Exhibit "F"**, respectively, to this affidavit, as they contain confidential information and were provided pursuant to the terms of the NDA. Osler attended a call with Plaintiffs' Counsel, Tannor Capital, the Monitor, counsel to the Monitor, and the Just Energy Group's financial advisor to discuss the December 2nd Questions as well as the restructuring more generally.
December 13, 2021	Plaintiffs' Counsel emailed an additional list of questions (the "**December 13th Questions**") along with a proposed adjudication schedule to Osler.
December 15, 2021	Osler responded to Plaintiffs' Counsel, noting that: • The Just Energy Group and its advisors were working hard to develop a going concern restructuring solution for the Just Energy Entities and were not in a position to devote additional resources at that time to answer an unreasonable number of questions and inquiries from Plaintiffs' Counsel; • Sufficient information was already available to Plaintiffs' Counsel between JEGI's public company filings, the extensive documentation filed in the CCAA Proceedings, the information that had already been provided pursuant to the terms of the NDA, and the multiple discussions Plaintiffs' Counsel and their advisors had with representatives from Osler, the Monitor and its counsel and the Just Energy Group's financial advisor; and

	• The Just Energy Group would deal with the plaintiffs' claims in the framework of the Claims Procedure Order, the plaintiffs would have 30 days from the receipt of any Notice of Revision or Disallowance to file a Notice of Dispute, and the Just Energy Group anticipated further discussions with Plaintiffs' Counsel concerning a fair and reasonable method of adjudicating the Putative Class Claims at the appropriate time.
December 17, 2021	Plaintiffs' Counsel emailed the Monitor requesting a call regarding its information requests and its proposed adjudication timetable. Copies of the correspondence from December 13-17 is attached to the Tannor Affidavit as Exhibit "O".
December 22, 2021	I understand that the Monitor attended a call with Plaintiffs' Counsel to discuss their requests and to confirm that responses to the December 13th Questions would be forthcoming.
December 23, 2021	The Monitor responded to the December 13th Questions with the assistance of the Just Energy Entities. Among other things, the Monitor noted that in numerous instances, Plaintiffs' Counsel was asking discovery questions that were not relevant to developing an understanding of the restructuring process. A copy of the December 23rd response is attached as confidential **Exhibit "G"** to this affidavit, as this contains confidential information and was provided pursuant to the terms of the NDA.
December 28, 2021	Paliare Roland emailed the Monitor requesting assistance in setting a case conference with the presiding Judge for the first week of January in order to schedule a date for a motion.
December 30, 2021	The Monitor responded with a proposal to email the Court for a case conference in the first two weeks of January. The following day, Osler indicated that it requested that any case conference be heard in the second week of January.
January 4, 2022	Paliare Roland responded that it did not consent to seeking the case conference in the second week of January. I understand that counsel for the Monitor and the Monitor attended a call with Plaintiffs' Counsel to hear directly from them about the nature and background to their purported claims and also provide an anticipated delivery date for the Notices of Revision or Disallowance to be issued. The Monitor responded that same day, confirming that no plan would be presented by January 6, noting that all deadline dates under the DIP Term Sheet were extended by one week and suggesting a call to discuss the timetable for the plaintiffs' motion. A complete copy of the correspondence from December 28-January 4 is attached to this affidavit as **Exhibit "H"**.

January 5, 2022	Osler, the Monitor and its counsel, Plaintiffs' Counsel, Paliare Roland, and Tannor Capital attended another call and discussed, among other things, the timetable for the plaintiffs' motion and the anticipated delivery of Notices of Revision or Disallowance with respect to the Putative Class Actions in accordance with the Claims Procedure Order.

44. With respect to the above chronology, I note that the Tannor Affidavit omitted to reference the following calls and correspondence, which results in an incomplete record:

(a) The November 19, 2021 call amongst Osler, Monitor's counsel, Plaintiffs' Counsel, and Tannor Capital;

(b) The fact that the Applicants' financial advisor attended the December 8th call with Plaintiffs' Counsel, Tannor Capital, Osler, the Monitor, and counsel to the Monitor;

(c) The Monitor's response, with the assistance of the Applicants, to the December 13th Questions on December 23, 2021;

(d) The Monitor's response to Paliare Roland's email on January 4, 2022; and

(e) The January 5, 2022 call amongst Osler, the Monitor and its counsel, Plaintiffs' Counsel, Paliare Roland, and Tannor Capital.

45. The Tannor Affidavit (para. 45) notes that JEGI's September 30, 2021 financial statements indicate that it had approximately $12.6 million in equity on its balance sheet. The plaintiffs extrapolate from this fact that they have a "significant stake in the CCAA Proceedings" and are therefore entitled to extensive information from the Applicants. This assumption is based on a

fundamental misunderstanding of the September 30, 2021 financial statements, a complete copy of which is attached to this affidavit as **Exhibit "I"**.

46. JEGI's balance sheet is prepared in accordance with international financial reporting standards ("**IFRS** ") and does not necessarily represent the fair value of all the assets and liabilities of the Applicants. In particular, JEGI's balance sheet includes approximately $545 million of net derivative financial assets resulting from approximately $580 million of unrealized gains on its derivative instruments in the six months ended September 30, 2021. These derivative instruments are mostly fixed supply contracts which JEGI uses to hedge the future price of electricity and natural gas associated with its fixed price contracts with its customers.[13] These asset values are highly volatile, as they fluctuate depending on current market price for the commodity supply. This approximately $545 million net derivative financial asset was an approximately $40 million net financial derivative liability as at March 31, 2021. IFRS considers the commodity supply contracts to be financial derivatives and therefore these contracts are required to be marked-to-market resulting in unrealized gains (or losses) being recorded in Just Energy's financial statements even though these supply contracts are entered into to lock in the future gross margin of JEGI under its fixed price customer contracts. It is for these reasons that JEGI has historically and consistently excluded these unrealized gains/losses from its calculation of EBITDA, as noted at page 6 of Management's Discussion and Analysis for the three and six months ended September 30, 2021:

> Just Energy ensures that customer margins are protected by entering into fixed-price supply contracts. Under IFRS, the customer contracts are not marked to market; however, there is a requirement to mark to market the future supply

[13] Just Energy enters into derivative instruments in order to manage exposures to changes in commodity prices associated with its fixed price customer contracts. The derivative instruments that are used are designed to fix the price of supply for estimated customer commodity demand and thereby fix gross margins.

> contracts. This creates unrealized and realized gains (losses) depending upon current supply pricing. Management believes that the unrealized mark to market gains (losses) do not impact the long-term financial performance of Just Energy and has excluded them from the Base EBITDA calculation.

47. Given the fact that these unrealized gains/losses are not included in the Base EBITDA calculation, the net financial derivative assets/liabilities must also be excluded when considering the true value of the equity of the company. Absent these net financial derivative assets, JEGI's balance sheet equity would have been approximately negative $540 million as of September 30, 2021. Given the drop in commodity prices during the 3 months ended December 31, 2021, I anticipate that there will be substantial unrealized losses from JEGI's derivative instruments as at December 31, 2021 resulting in significantly lower net financial derivative assets, which will result in a substantial negative balance sheet equity value when JEGI files its financial statements as at December 31, 2021.

48. Additionally, the September 30, 2021 financial statements referred to in the Tannor Affidavit contain a Going Concern note:

> **Going Concern**
>
> Due to the Weather Event and associated CCAA filing, the Company's ability to continue as a going concern for the next 12 months is dependent on the Company emerging from CCAA protection, maintain liquidity, complying with DIP Facility covenants and extending the DIP Facility maturity. The material uncertainties arising from the CCAA filings cast substantial doubt upon the Company's ability to continue as a going concern and, accordingly the ultimate appropriateness of the use of accounting principles applicable to a going concern. These Interim Condensed Consolidated Financial Statements do not reflect the adjustments to carrying values of assets and liabilities and the reported expenses and Interim Condensed Consolidated Statements of Financial Position classifications that would be necessary if the going concern assumption was deemed inappropriate. These adjustments could be material. There can be no assurance that the Company will be successful in emerging from CCAA as a going concern.

49. Similar going concern notes were included in JEGI's audited financial statements for the year ended March 31, 2021 as well as the June 30, 2021 quarterly report. Full copies of these

financial statements are attached to this affidavit as **Exhibits "J" and "K"**, respectively. Additionally, various of JEGI's news releases have contained statements regarding the potential impact of the Texas storm on the company's ability to continue as a going concern since as early as February 22, 2021. A copy of the news release dated February 22, 2021 is attached to this affidavit as **Exhibit "L"**.

50. The information and documents relating to any proposed transaction must, out of necessity, be confidential to ensure a constructive dialogue with financial participants. It is not feasible to have other stakeholders "at the table" to second guess the Applicants or distract management from the task at hand. The Applicants, with the assistance of the Monitor, must exercise their business judgment to frame the negotiations and parties involved to achieve the desired outcome of a going concern transaction.

51. The Applicants and the Monitor have answered the reasonable and appropriate requests for information they have received to date. It is the Applicants' view that Plaintiffs' Counsel's remaining information requests are overbroad, relate to confidential information about the business and restructuring, and/or are more akin to discovery questions that are not relevant to developing an understanding of the restructuring process. The Applicants continue to be willing to, in consultation with the Monitor, engage with Plaintiffs' Counsel to address reasonable and appropriate requests for information.

E. Proposed Adjudication Schedule

52. Plaintiffs' Counsel sent a proposed schedule to Osler on December 13, 2021 (the "**December Proposed Schedule**"), attached as Exhibit S to the Tannor Affidavit. The December Proposed Schedule suggested:

(a) The appointment of a tripartite panel from JAMS (U.S.);

(b) The application of the expedited procedures of the JAMS Comprehensive Arbitration Rules and Procedures governing binding Arbitrations of claims to pre-hearing discovery and the hearing;

(c) "[S]ufficient disclosure" from the Just Energy Group;

(d) "Circumscribed" depositions; and

(e) A hearing lasting approximately 5-7 days to be scheduled for the first week of February 2022.

53. This proposal would have required the parties to start and complete documentary discovery, conduct depositions, prepare and exchange expert reports, and proceed to a hearing on the merits within a two-month period that included the December holiday break. The December Proposed Schedule was not a remotely achievable schedule, especially as the Applicants are in the midst of a critical time in their attempts to reorganize.

54. The December Proposed Schedule omits significant and substantive steps in the adjudication of any proposed class action. For instance, the schedule ignores the need to certify the proposed class actions in advance of any hearing on the merits. It is my understanding, including based on advice from U.S. counsel Mr. Cyrulnik, that, in the case of a class action, the court first needs to certify a class prior to any trial, including by making a determination as to whether the case satisfies the many requirements for proceeding as a class action and, if so, defining the precise scope of the permissible class based on consideration of the questions of law and fact that are common to the proposed class members. Without certifying the classes (the scope

of which are very much in contention given the plaintiffs' attempts to broaden the Putative Class Actions), it will be impossible to conduct a trial or give notice to potential class members to allow them to opt out if either of the Putative Class Actions is certified.

55. Plaintiffs' Counsel notes in their proposed schedule that they require disclosure of "information such as (i) the rates charged and usage data for Just Energy's customers in the various U.S. markets where the company supplies electricity and gas, (ii) JE's costing methodology, (iii) customer agreements utilized, and (iv) marketing materials" and that they are "prepared to furnish a more detailed list of what is needed pre-hearing." These statements conveniently gloss over the EDNY Court's ruling that discovery has been concluded in the Donin Action, as well as the fact that the named defendants in the Putative Class Actions only operated in certain jurisdictions. Similarly, Plaintiffs' Counsel ignores the fact that the time for submitting an expert report in the Donin Action has long passed.

56. The Notices of Disallowance delivered to the plaintiffs on January 11, 2022, both specified the significant steps that are required to be addressed in order to fairly and properly adjudicate the Putative Class Actions – most of which were missing from the plaintiffs' proposed adjudication schedule. In addition to the discovery that must be commenced and concluded in the Jordet Action, both actions require the completion of:

- dispositive motion practice (i.e., motion for summary judgment), which would involve the disclosure of any expert reports and supporting evidence from fact witnesses, depositions, potential preliminary motions, written briefs, and oral argument;
- a contested class certification process, which would include written briefing, presentation of supporting evidence from any fact and expert witnesses, and oral argument;

- a trial on the issue of liability, including pretrial submissions and motion practice to resolve evidentiary issues, voir dire, direct testimony and cross-examination of any fact and expert witnesses, and legal argument from counsel; and

- resolution of damages of the plaintiff or certified class(es), which may require bifurcation from the trial on liability (especially if the plaintiffs continue to allege damages on behalf of a national class, which the defendants argue is impermissible).

57. The plaintiffs' current proposed schedule, as set out in their notice of motion, is largely the same as the December Proposed Schedule. Notably, they are still seeking a hearing on the merits in February 2022 without accounting for the need to address discovery in the Jordet Action and motions for summary judgment and class certification in both Putative Class Actions.

58. On February 1, 2022, the Applicants provided the Applicants' proposed adjudication schedule to Plaintiffs' Counsel (the "**Applicants' Proposed Schedule**"). A copy of the communication to Plaintiffs' Counsel, including the Applicants' Proposed Schedule is attached to this affidavit as **Exhibit "M"**. The Applicants noted that they are willing to discuss the appointment of an arbitrator from Arbitration Place or similar forum as Claims Officer. I am advised by Osler that Arbitration Place has a roster that includes former Supreme Court of Canada and Ontario Court of Appeal judges. The Applicants' Proposed Schedule would be subject to the discretion of the Claims Officer.

59. The proposed expedited schedule for addressing both Putative Class Action Claims, along with the comparable schedule to adjudicate these Putative Class Actions in the ordinary course, is set out below:

Step	Applicants' Proposed Expedited Schedule	Potential Donin Schedule in the Ordinary Course	Potential Jordet Schedule in the Ordinary Course
Fact Discovery	After conducting a meet and confer among counsel, appropriately tailored document production by June 30, 2022 consistent with the status of the Donin and Jordet cases.	Completed/Deadline Passed	April 1, 2023
Expert Discovery	Opening Expert Disclosures: July 29, 2022 Rebuttal Expert Disclosures: August 19, 2022 Expert Depositions: August 29, 2022	Completed/Deadline Passed	Plaintiffs' Expert Disclosures: May 15, 2023 Defendants' Expert Disclosures: July 1, 2023 Expert Depositions: August 1, 2023
Dispositive Motions Hearing	November 10, 2022	September 3, 2022 (assuming pre-motion letters filed by March 3, 2022)	March 7, 2024 (assuming pre-motion letters filed September 7, 2023)
Class Certification Hearing	November 17, 2022	September 30, 2022 (assuming pre-motion letters filed March 31, 2022)	April 5, 2024 (assuming pre-motion letters October 5, 2023)
Joint Pretrial Order/Pretrial Conference	December 9, 2022	June 8, 2023	December 5, 2024
Trial	February 10, 2023	September 11, 2023	January 6, 2025

60. It is my understanding, including based on advice from Mr. Cyrulnik, that the schedules listed in the last two columns of the above chart may well be ambitious estimations of the "ordinary

course" schedules for hearing the Putative Class Actions, based on the assumptions set out in the relevant footnotes in the Applicants' Proposed Schedule.

61. As a reference point, the Applicants' compressed schedule provides for the hearing of the certification and summary judgment motions in November 2022, almost a year and a half before such motions would be heard in the Jordet Action in the ordinary course. If the plaintiffs are successful on both of these motions, a trial with respect to any certified common issues would commence by February 10, 2023 – approximately three years before any such trial would have been heard in the Jordet Action and seven months before any trial would have been heard in the Donin Action.

62. Management of the Applicants will be directly engaged in document production, attending depositions, and supervising and supporting litigation efforts in the Putative Class Actions at a time when they are focused on implementing a going concern restructuring for the business. The first step in the proposed schedule – document production – will be a burdensome step for management, as there has been no discovery in the Jordet Action to date. By way of illustration, document production in the Donin Action took nearly two years to complete. The preliminary list of disclosure requests sought by the plaintiffs is broad and confirms that the discovery process will not be a simple or quick exercise.

63. The Applicants' Proposed Schedule was advanced in an effort to strike a balance between available management resources to both successfully conclude a restructuring transaction and the need to finalize creditor claims in a timely fashion. The complexity of developing a plan for the Applicants was recognized by this Court in granting the Applicants' last request for a stay extension:

> The company has been moving in good faith towards a plan, but the business is of such a complexity that it has taken longer than initially anticipated. This is not surprising. The company is subject to a myriad of regulatory regimes across the United States and Canada. It has complex commercial arrangements with suppliers and a number of secured and unsecured lenders, the integrity of which in turn depends on Just Energy's compliance with regulatory requirements.

64. If anything, the time pressure imposed on management to negotiate a restructuring plan while operating the business has become even more intense and all consuming.

65. In the circumstances, the Applicants could not justify a more abridged timetable for adjudicating the Putative Class Actions. The restructuring negotiations of this billion-dollar company must continue to be the focus of management for the benefit of its stakeholders, including any potential class members. Management simply does not have the "bandwidth" to further accelerate the Applicants' Proposed Schedule, as this would undoubtedly be a distraction and strain on management resources during a critical phase of the restructuring. It is also imperative that any schedule allow for a full and fair consideration of the merits of the Putative Class Claims to ensure the integrity of the process and to avoid prejudice to unsecured creditors with competing claims.

SWORN BEFORE ME over video teleconference this 2nd day of February, 2022 pursuant to O. Reg 431/20, Administering Oath or Declaration Remotely. The affiant was located in the Town of Flower Mound, in the State of Texas while the Commissioner was located in the City Toronto, in the Province of Ontario.

Commissioner for Taking Affidavits
Karin Sachar (LSO No. 59944E)

Michael Carter

Del Rizzo, Francesca

From: Sachar, Karin
Sent: Tuesday, February 01, 2022 1:08 PM
To: Ken.Rosenberg@paliareroland.com; Jeff.Larry@paliareroland.com
Cc: Dacks, Jeremy; MacDonald, John; Wasserman, Marc; De Lellis, Michael; Paul Bishop; Robert Thornton
Subject: JE - Applicants' Proposed Adjudication Schedule
Attachments: Applicants' Proposed Adjudication Schedule (Feb 1, 2022).pdf

Dear Ken and Jeff,

Attached please find the Applicants' proposed adjudication schedule. We are happy to discuss.

Thanks,
Karin

OSLER

Karin Sachar
Partner
416.862.5949 | KSachar@osler.com
Osler, Hoskin & Harcourt LLP | osler.com

Schedule to Adjudicate the *Donin*/*Jordet* Claims

If Just Energy were to agree to an expedited process for adjudicating the Donin and Jordet claims together, with a trial in the next twelve months,[1] the parties would need to agree to adhere to a schedule similar to that listed in the Hypothetical Expedited Schedule column below. The parties would also have to agree to dates for the delivery of materials such as a summary judgment motion or a motion for class certification. The Just Energy Entities are willing to discuss the appointment of an arbitrator from Arbitration Place or similar forum as Claims Officer. Ambitious estimates of schedules for Donin and Jordet proceeding in the ordinary course in the New York courts absent such expedition are also listed below for comparison purposes, with relevant assumptions noted. Each schedule assumes that the expedited process commences on February 9, 2022. This timetable does not take into account any appeals of decisions of the Claims Officer. This schedule would be subject in all respects to the discretion of the Claims Officer.

Step	**Hypothetical Expedited Schedule**	**Potential Donin Schedule[2]**	**Potential Jordet Schedule[3]**
Fact Discovery	After conducting a meet and confer among counsel, appropriately tailored document production by June 30, 2022 consistent with the status of the Donin and Jordet cases.	Completed/Deadline Passed	April 1, 2023
Expert Discovery	Opening Expert Disclosures: July 29, 2022	Completed/Deadline Passed	Plaintiffs' Expert Disclosures: May 15, 2023

[1] This schedule assumes the case survives summary judgment and certification and provides potential dates for trial for illustrative purposes.

[2] This schedule is based on the Eastern District of New York's last scheduling entry in *Donin*, which set the deadline for pre-motion letters on summary judgment to be brought within a month. Due to the stay of proceedings, no activity has occurred in these cases since the Initial Order was granted on March 9, 2021. *See* Minute Entry, dated October 22, 2021 ("ORDER: The deadline to take the first step in dispositive motion practice shall be 11/22/2021. Should the parties not seek to file a dispositive motion, then the parties shall file a joint pretrial order by 1/20/2022. Otherwise, the Court will set a joint pretrial order deadline following resolution of any dispositive motion.").

[3] This schedule is based on the Western District of New York's last scheduling order in *Jordet*, which contemplates the completion of fact and expert discovery within 18 months, class certification briefing the next month, and summary judgment the following month. ECF No. 52.

	Rebuttal Expert Disclosures: August 19, 2022 Expert Depositions: August 29, 2022		Defendants' Expert Disclosures: July 1, 2023 Expert Depositions: August 1, 2023
Dispositive Motions Hearing	November 10, 2022	September 3, 2022 (assuming pre-motion letters filed by March 3, 2022)	March 7, 2024 (assuming pre-motion letters filed September 7, 2023)
Class Certification Hearing	November 17, 2022	September 30, 2022 (assuming pre-motion letters filed March 31, 2022)	April 5, 2024 (assuming pre-motion letters October 5, 2023)
Joint Pretrial Order/Pretrial Conference	December 9, 2022	June 8, 2023[4]	December 5, 2024[5]
Trial	February 10, 2023	September 11, 2023[6]	January 6, 2025

[4] We assume one year to resolve the summary judgment and class certification motions and an additional three months to file a joint pretrial order, which tracks the timeline set by Magistrate Bulsara in the most recent *Donin* scheduling order.

[5] We assume one year to resolve the summary judgment and class certification motions. The Court's existing Scheduling Order contemplates a Status Conference within a few days of the dispositive motion date if no motions are filed. We assume that the Court would grant the parties time to prepare any pretrial materials, which are due within 30 days of trial.

[6] We assume another three months to trial and do not assume bifurcation of liability from damages, which would add additional time.

Ken Rosenberg
T 416.646.4304 Asst 416.646.7404
F 416.646.4301
E ken.rosenberg@paliareroland.com
www.paliareroland.com

File 99380

February 4, 2022

VIA EMAIL **WITH PREJUDICE**

Marc Wasserman, Michael De Lellis
Jeremy Dacks, Shawn Irving

Osler Hoskin & Harcourt LLP
Box 50, 1 First Canadian Place
100 King Street West, Suite 6200
Toronto, ON M5X 1B8

Dear Counsel:

Re: Just Energy Group Inc.
Court File No. CV-21-00658423-00CL

We write further to the Applicants' proposal for a process for the adjudication of the *Donin* and *Jordet* claims together in the *CCAA* proceeding forwarded to us by you on February 1, 2022.

The Applicants' proposal is not accepted. The timelines proposed are not sufficiently expedited to ensure that the Class Claimants can meaningfully participate in the *CCAA* process.

The enclosed table sets forth a counter proposal in respect of the adjudication of the *Donin* and *Jordet* claims (the "**Claims**"), which has the Claims heard together pursuant to the JAMS US Expedited Procedures arbitration rules (the "**Expedited Adjudication Framework**") by a tripartite panel of two US arbitrators and one Canadian arbitrator (the "**Claims Officers**"). The Class Claimants propose that the Honourable Mr. Dennis O'Connor sit as the Canadian arbitrator.

The Expedited Adjudication Framework contemplates that the Claims Officers will have complete jurisdiction and discretion to determine the appropriate process within the JAMS US expedited rules and with consideration to an endorsement from the *CCAA* court that the deadline for the release of a decision on the merits shall be three days prior to the meeting of creditors (implying an outside date of March 27, 2022, as it appears as though the DIP lender is requesting a timeline that would have a vote on March 30, 2022). This deadline may be extended by the *CCAA* court on a motion for directions on notice to the parties and the service list. Any appeal would be to the *CCAA* court.

Class Counsel was prepared to send a proposal for a process that resulted in a decision of the merits in May, 2022, but it has modified its proposed timing according to the information in the Monitor's Fifth Report (which we received at approximately 3:20 pm this afternoon, before we had an opportunity to send the earlier version of our proposed Expedited Adjudication Framework). The report states that the DIP lender has demanded a timeline that would require a vote no later than March 30, 2022.

In order for the Court to accommodate the DIP lenders' request, the Class Claimants require a determination of their Claims pursuant to the Expedited Adjudication Framework on the earlier of three days before the meeting of creditors and March 27, 2022.

Neither the Monitor's Fifth Report nor the other materials filed on this motion disclose a commercial basis for the DIP lenders' timeline, but our clients have nevertheless modified their proposed schedule to consider the DIP lenders' position. If there is information that shows a commercial basis for the DIP lenders' timeline, our clients have not been provided with access to that information.

The Expedited Adjudication Framework establishes a time-sensitive process that addresses and protects the rights and interests of the parties and ensures that all questions about scope, jurisdiction, discovery or any other matter will be dealt with efficiently by the very panel that will hear the case. This process will provide a comprehensive resolution of the Class Claimants' claims in a flexible, expeditious and efficient manner.

The Expedited Adjudication Framework is conditional on the necessary parties supporting the plan confirming that the adoption of this timetable will result in the Claims being adjudicated in the first instance in time for the Class Claimants to participate in the *CCAA* exit plan and vote in accordance with the amount of their Claims determined at the end of the proposed adjudication.

We look forward to the Applicants' response to our proposal. We would like to work together to see if we can come to an agreement before the hearing on February 9, 2022.

Yours very truly,
PALIARE ROLAND ROSENBERG ROTHSTEIN LLP

Ken Rosenberg
KR:DG

c: Jeff Larry, Danielle Glatt – Paliare Roland LLP
Robert Thornton, Rebecca Kennedy, Puya Fesharaki – TGF LLP
Clients

Step	Description	Proposed Schedule
Claims Officers selection and authority	The parties will agree on a tripartite panel of arbitrators to act as the Claims Officers. The chair of the panel shall be the Honourable Mr. Dennis O'Connor (subject to availability). If the chair of the panel is not the Honourable Mr. Dennis O'Connor, the parties will agree to another Canadian arbitrator, with prior CCAA experience Each party will then select one arbitrator from the JAMS (U.S.) pool of neutrals with both: (i) prior arbitration experience; and (ii) experience with class action cases. Pre-hearing discovery and the hearing will be conducted in accordance with the expedited procedures of the JAMS Comprehensive Arbitration Rules and Procedures governing binding Arbitrations of claims. *See* https://www.jamsadr.com/rules-comprehensive-arbitration/ and "Expedited Procedures" -- Rule 16.1 (hereafter the "**Expedited Procedures**" attached hereto).	February 14, 2022
Procedure	Any determinations in respect of the scope of the Class Claimants' claims (for example, what states and customers they cover and what entities it includes) will be determined by the Claims Officers in accordance with the Expedited Procedures -- Rule 16.1 and the endorsement of the Court that the Class Claimants' claims be determined three days prior to the meeting of creditors. All issues related to discovery, including both productions and depositions, and the determination of when and how class certification will be briefed and argued, shall also be determined	

	by the Claims Officers in accordance with the Expedited Procedures and the endorsement of the Court that the Class Claimants' claims be determined three days prior to the meeting of creditors.	
Hearing	Hearing dates shall be determined by the Claims Officers in accordance with the Expedited Rules and the endorsement of the Court that this matter be determined three days prior to the meeting of creditors.	
Decision	The Court will endorse that the Claims Officers shall provide an expedited written ruling, which decision will be binding on all parties for purposes of the *CCAA* proceeding, three days prior to the meeting of creditors (implying an outside date of March 27, 2022, as it appears as though the DIP lender is requesting a timeline that would have a vote on March 30, 2022). This deadline may be extended by the CCAA court on a motion for directions on notice to the parties and the service list	Three days prior to the meeting of creditors (implying an outside date of March 27, 2022)
Appeals	Either party may file an appeal to the *CCAA* court within five (5) days of the written ruling.	Appeal to be filed within five (5) days of judgment.

JAMS Comprehensive Arbitration Rules & Procedures

Effective June 1, 2021

Local Solutions. Global Reach.®

JAMS Comprehensive Arbitration Rules & Procedures

Founded in 1979, JAMS is the largest private provider of alternative dispute resolution (ADR) services worldwide. Our neutrals resolve some of the world's largest, most complex and contentious disputes, utilizing JAMS Rules & Procedures as well as the rules of other domestic and international arbitral institutions.

JAMS mediators and arbitrators are full-time neutrals who come from the ranks of retired state and federal judges and prominent attorneys. These highly trained, experienced ADR professionals are dedicated to the highest ethical standards of conduct. Whether they are conducting in-person, remote or hybrid hearings, JAMS neutrals are adept at managing the resolution process.

Effective June 1, 2021, these updated Rules reflect the latest developments in arbitration. They make explicit the arbitrator's full authority to conduct hearings in person, virtually or in a combined form, and with participants in more than one geographic location. They also update electronic filing processes to coordinate with **JAMS Access**, our secure, online case management platform.

Summary of Revisions to the Comprehensive Rules

Scan this code with your smartphone for a complete list of all changes.

Additional Arbitration Resources

Arbitration Schedule of Fees and Costs

Scan for details on our professional and administrative fees.

Latest JAMS Rules Updates

Scan for links to our updated **Streamlined, Construction, Expedited Construction** and **Employment** rules.

Sample Contract Clauses

Scan for guidance on creating custom commercial contract clauses, including our **Diversity and Inclusion** option.

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RULE 1
Scope of Rules

(a) The JAMS Comprehensive Arbitration Rules and Procedures ("Rules") govern binding Arbitrations of disputes or claims that are administered by JAMS and in which the Parties agree to use these Rules or, in the absence of such agreement, any disputed claim or counterclaim that exceeds $250,000, not including interest or attorneys' fees, unless other Rules are prescribed.

(b) The Parties shall be deemed to have made these Rules a part of their Arbitration Agreement ("Agreement") whenever they have provided for Arbitration by JAMS under its Comprehensive Rules or for Arbitration by JAMS without specifying any particular JAMS Rules and the disputes or claims meet the criteria of the first paragraph of this Rule.

(c) The authority and duties of JAMS as prescribed in the Agreement of the Parties and in these Rules shall be carried out by the JAMS National Arbitration Committee ("NAC") or the office of JAMS General Counsel or their designees.

(d) JAMS may, in its discretion, assign the administration of an Arbitration to any of its Resolution Centers.

(e) The term "Party" as used in these Rules includes Parties to the Arbitration and their counsel or representatives.

(f) "Electronic filing" (e-filing) means the electronic transmission of documents to JAMS for the purpose of filing via the Internet. "Electronic service" (e-service) means the electronic transmission of documents to a Party, attorney or representative under these Rules.

RULE 2
Party Self-Determination and Emergency Relief Procedures

(a) The Parties may agree on any procedures not specified herein or in lieu of these Rules that are consistent with the applicable law and JAMS policies (including, without limitation, Rules 15(i), 30 and 31). The Parties shall promptly notify JAMS of any such Party-agreed procedures and shall confirm such procedures in writing. The Party-agreed procedures shall be enforceable as if contained in these Rules.

(b) When an Arbitration Agreement provides that the Arbitration will be non-administered or administered by an entity other than JAMS and/or conducted in accordance with rules other than JAMS Rules, the Parties may agree to modify that Agreement to provide that the Arbitration will be administered by JAMS and/or conducted in accordance with JAMS Rules.

(c) Emergency Relief Procedures. These Emergency Relief Procedures are available in Arbitrations filed and served after July 1, 2014, and where not otherwise prohibited by law. Parties may agree to opt out of these Procedures in their Arbitration Agreement or by subsequent written agreement.

(i) A Party in need of emergency relief prior to the appointment of an Arbitrator may notify JAMS and all other Parties in writing of the relief sought and the basis for an Award of such relief. This Notice shall include an explanation of why such relief is needed on an expedited basis. Such Notice shall be given by email or personal delivery. The Notice must include a statement certifying that all other Parties have been notified. If all other Parties have not been notified, the Notice shall include an explanation of the efforts made to notify such Parties.

(ii) JAMS shall promptly appoint an Emergency Arbitrator to rule on the emergency request. In most cases the appointment of an Emergency Arbitrator will be done within 24 hours of receipt of the request. The Emergency Arbitrator shall promptly disclose any circumstance likely, based on information disclosed in the application, to affect the Arbitrator's ability to be impartial or independent. Any challenge to the appointment of the Emergency Arbitrator shall be made within 24 hours of the disclosures by the Emergency Arbitrator. JAMS will promptly review and decide any such challenge. JAMS' decision shall be final.

(iii) Within two business days, or as soon as practicable thereafter, the Emergency Arbitrator shall establish a schedule for the consideration of the request for emergency relief. The schedule shall provide a reasonable opportunity for all Parties to be heard taking into account the nature of the relief sought. The Emergency Arbitrator has the authority to rule on his or her own jurisdiction and shall resolve any disputes with respect to the request for emergency relief.

(iv) The Emergency Arbitrator shall determine whether the Party seeking emergency relief has shown that immediate loss or damage will result in the absence of emergency relief and whether the requesting Party is entitled to such relief. The Emergency Arbitrator shall enter an order or Award granting or denying the relief, as the case may be, and stating the reasons therefor.

(v) Any request to modify the Emergency Arbitrator's order or Award must be based on changed circumstances and may be made to the Emergency Arbitrator until such time as an Arbitrator or Arbitrators are appointed in accordance with the Parties' Agreement and JAMS' usual procedures. Thereafter, any request related to the relief granted or denied by the Emergency Arbitrator shall be determined by the Arbitrator(s) appointed in accordance with the Parties' Agreement and JAMS' usual procedures.

(vi) In the Emergency Arbitrator's discretion, any interim Award of emergency relief may be conditioned on the provision of adequate security by the Party seeking such relief.

RULE 3
Amendment of Rules

JAMS may amend these Rules without notice. The Rules in effect on the date of the commencement of an Arbitration (as defined in Rule 5) shall apply to that Arbitration, unless the Parties have agreed upon another version of the Rules.

RULE 4
Conflict with Law

If any of these Rules, or modification of these Rules agreed to by the Parties, is determined to be in conflict with a provision of applicable law, the provision of law will govern over the Rule in conflict, and no other Rule will be affected.

RULE 5
Commencing an Arbitration

(a) The Arbitration is deemed commenced when JAMS issues a Commencement Letter based upon the existence of one of the following:

(i) A post-dispute Arbitration Agreement fully executed by all Parties specifying JAMS administration or use of any JAMS Rules; or

(ii) A pre-dispute written contractual provision requiring the Parties to arbitrate the dispute or claim and specifying JAMS administration or use of any JAMS Rules or that the Parties agree shall be administered by JAMS; or

(iii) A written confirmation of an oral agreement of all Parties to participate in an Arbitration administered by JAMS or conducted pursuant to any JAMS Rules; or

(iv) The Respondent's failure to timely object to JAMS administration, where the Parties' Arbitration Agreement does not specify JAMS administration or JAMS Rules; or

(v) A copy of a court order compelling Arbitration at JAMS.

(b) The issuance of the Commencement Letter confirms that requirements for commencement have been met, that JAMS has received all payments required under the applicable fee schedule and that the Claimant has provided JAMS with contact information for all Parties together with evidence that the Demand for Arbitration has been served on all Parties.

(c) If a Party that is obligated to arbitrate in accordance with subparagraph (a) of this Rule fails to agree to participate in the Arbitration process, JAMS shall confirm in writing that Party's failure to respond or participate, and, pursuant to Rule 22(j), the Arbitrator, once appointed, shall schedule, and provide appropriate notice of, a Hearing or other opportunity for the Party demanding the Arbitration to demonstrate its entitlement to relief.

(d) The date of commencement of the Arbitration is the date of the Commencement Letter but is not intended to be applicable to any legal requirement, such as the statute of limitations; any contractual limitations period; or any claims notice requirement. The term "commencement," as used in this Rule, is intended only to pertain to the operation of this and other Rules (such as Rules 3, 13(a), 17(a) and 31(a)).

RULE 6
Preliminary and Administrative Matters

(a) JAMS may convene, or the Parties may request, administrative conferences to discuss any procedural matter relating to the administration of the Arbitration.

(b) If no Arbitrator has yet been appointed, at the request of a Party and in the absence of Party agreement, JAMS may determine the location of the Hearing, subject to Arbitrator review. In determining the location of the Hearing, such factors as the subject matter of the dispute, the convenience of the

Parties and witnesses, and the relative resources of the Parties shall be considered.

(c) If, at any time, any Party has failed to pay fees or expenses in full, JAMS may order the suspension or termination of the proceedings. JAMS may so inform the Parties in order that one of them may advance the required payment. If one Party advances the payment owed by a non-paying Party, the Arbitration shall proceed, and the Arbitrator may allocate the non-paying Party's share of such costs, in accordance with Rules 24(f) and 31(c). An administrative suspension shall toll any other time limits contained in these Rules or the Parties' Agreement.

(d) JAMS does not maintain an official record of documents filed in the Arbitration. If the Parties wish to have any documents returned to them, they must advise JAMS in writing within thirty (30) calendar days of the conclusion of the Arbitration. If special arrangements are required regarding file maintenance or document retention, they must be agreed to in writing, and JAMS reserves the right to impose an additional fee for such special arrangements. Documents that are submitted for e-filing are retained for thirty (30) calendar days following the conclusion of the Arbitration.

(e) Unless the Parties' Agreement or applicable law provides otherwise, JAMS, if it determines that the Arbitrations so filed have common issues of fact or law, may consolidate Arbitrations in the following instances:

(i) If a Party files more than one Arbitration with JAMS, JAMS may consolidate two or more of the Arbitrations into a single Arbitration.

(ii) Where a Demand or Demands for Arbitration is or are submitted naming Parties already involved in another Arbitration or Arbitrations pending under these Rules, JAMS may decide that the new case or cases shall be consolidated into one or more of the pending proceedings and referred to one of the Arbitrators or panels of Arbitrators already appointed.

(iii) Where a Demand or Demands for Arbitration is or are submitted naming Parties that are not identical to the Parties in the existing Arbitration or Arbitrations, JAMS may decide that the new case or cases shall be consolidated into one or more of the pending proceedings and referred to one of the Arbitrators or panels of Arbitrators already appointed.

When rendering its decision, JAMS will take into account all circumstances, including the links between the cases and the progress already made in the existing Arbitrations.

Unless applicable law provides otherwise, where JAMS decides to consolidate a proceeding into a pending Arbitration, the Parties to the consolidated case or cases will be deemed to have waived their right to designate an Arbitrator as well as any contractual provision with respect to the site of the Arbitration.

(f) Where a third party seeks to participate in an Arbitration already pending under these Rules or where a Party to an Arbitration under these Rules seeks to compel a third party to participate in a pending Arbitration, the Arbitrator shall determine such request, taking into account all circumstances he or she deems relevant and applicable.

RULE 7
Number and Neutrality of Arbitrators; Appointment and Authority of Chairperson

(a) The Arbitration shall be conducted by one neutral Arbitrator, unless all Parties agree otherwise. In these Rules, the term "Arbitrator" shall mean, as the context requires, the Arbitrator or the panel of Arbitrators in a tripartite Arbitration.

(b) In cases involving more than one Arbitrator, the Parties shall agree on, or, in the absence of agreement, JAMS shall designate, the Chairperson of the Arbitration Panel. If the Parties and the Arbitrators agree, a single member of the Arbitration Panel may, acting alone, decide discovery and procedural matters, including the conduct of hearings to receive documents and testimony from third parties who have been subpoenaed, in advance of the Arbitration Hearing, to produce documents.

(c) Where the Parties have agreed that each Party is to name one Arbitrator, the Arbitrators so named shall be neutral and independent of the appointing Party, unless the Parties have agreed that they shall be non-neutral.

RULE 8
Service

(a) JAMS or the Arbitrator may at any time require electronic filing and service of documents in an Arbitration, including through the JAMS Electronic Filing System. If JAMS or the Arbitrator requires electronic filing and service, the Parties shall maintain and regularly monitor a valid, usable and live email address for the receipt of documents and notifications. Any document filed via the JAMS Electronic Filing System shall

be considered as filed when the transmission to the JAMS Electronic Filing System is complete. Any document e-filed by 11:59 p.m. (of the sender's time zone) shall be deemed filed on that date.

(b) Every document filed with the JAMS Electronic Filing System shall be deemed to have been signed by the Arbitrator, Case Manager, attorney or declarant who submits the document to the JAMS Electronic Filing System, and shall bear the typed name, address and telephone number of a signing attorney.

(c) Delivery of e-service documents through the JAMS Electronic Filing System shall be considered as valid and effective service and shall have the same legal effect as an original paper document. Recipients of e-service documents shall access their documents through the JAMS Electronic Filing System. E-service shall be deemed complete when the Party initiating e-service or JAMS completes the transmission of the electronic document(s) to the JAMS Electronic Filing System for e-filing and/or e-service.

(d) If an electronic filing and/or service via JAMS Electronic Filing System does not occur due to technical error in the transmission of the document, the Arbitrator or JAMS may, for good cause shown, permit the document to be filed and/or served *nunc pro tunc* to the date it was first attempted to be transmitted electronically. In such cases a Party shall, absent extraordinary circumstances, be entitled to an order extending the date for any response or the period within which any right, duty or other act must be performed.

(e) For documents that are not filed electronically, service by a Party under these Rules is effected by providing one signed copy of the document to each Party and two copies in the case of a sole Arbitrator and four copies in the case of a tripartite panel to JAMS. Service may be made by hand-delivery, overnight delivery service or U.S. mail. Service by any of these means is considered effective upon the date of deposit of the document.

(f) In computing any period of time prescribed or allowed by these Rules for a Party to do some act within a prescribed period after the service of a notice or other paper on the Party and the notice or paper is served on the Party only by U.S. mail, three (3) calendar days shall be added to the prescribed period. If the last day for the performance of any act that is required by these Rules to be performed within a specific time falls on a Saturday, Sunday or other legal holiday, the period is extended to and includes the next day that is not a holiday.

RULE 9
Notice of Claims

(a) Each Party shall afford all other Parties reasonable and timely notice of its claims, affirmative defenses or counterclaims. Any such notice shall include a short statement of its factual basis. No claim, remedy, counterclaim or affirmative defense will be considered by the Arbitrator in the absence of such prior notice to the other Parties, unless the Arbitrator determines that no Party has been unfairly prejudiced by such lack of formal notice or all Parties agree that such consideration is appropriate notwithstanding the lack of prior notice.

(b) Claimant's notice of claims is the Demand for Arbitration referenced in Rule 5. It shall include a statement of the remedies sought. The Demand for Arbitration may attach and incorporate a copy of a Complaint previously filed with a court. In the latter case, Claimant may accompany the Complaint with a copy of any Answer to that Complaint filed by any Respondent.

(c) Within fourteen (14) calendar days of service of the notice of claim, a Respondent may submit to JAMS and serve on other Parties a response and a statement of any affirmative defenses, including jurisdictional challenges, or counterclaims it may have. JAMS may grant reasonable extensions of time to file a response or counterclaim prior to the appointment of the Arbitrator.

(d) Within fourteen (14) calendar days of service of a counterclaim, a Claimant may submit to JAMS and serve on other Parties a response to such counterclaim and any affirmative defenses, including jurisdictional challenges, it may have.

(e) Any claim or counterclaim to which no response has been served will be deemed denied.

(f) Jurisdictional challenges under Rule 11 shall be deemed waived, unless asserted in a response to a Demand or counterclaim or promptly thereafter, when circumstances first suggest an issue of arbitrability.

RULE 10
Changes of Claims

After the filing of a claim and before the Arbitrator is appointed, any Party may make a new or different claim against a Party or any third party that is subject to Arbitration in the proceeding. Such claim shall be made in writing, filed with JAMS and served

on the other Parties. Any response to the new claim shall be made within fourteen (14) calendar days after service of such claim. After the Arbitrator is appointed, no new or different claim may be submitted, except with the Arbitrator's approval. A Party may request a hearing on this issue. Each Party has the right to respond to any new or amended claim in accordance with Rule 9(c) or (d).

RULE 11
Interpretation of Rules and Jurisdictional Challenges

(a) Once appointed, the Arbitrator shall resolve disputes about the interpretation and applicability of these Rules and conduct of the Arbitration Hearing. The resolution of the issue by the Arbitrator shall be final.

(b) Jurisdictional and arbitrability disputes, including disputes over the formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought, and who are proper Parties to the Arbitration, shall be submitted to and ruled on by the Arbitrator. The Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter.

(c) Disputes concerning the appointment of the Arbitrator shall be resolved by JAMS.

(d) The Arbitrator may, upon a showing of good cause or *sua sponte*, when necessary to facilitate the Arbitration, extend any deadlines established in these Rules, provided that the time for rendering the Award may be altered only in accordance with Rules 22(i) or 24.

RULE 12
Representation

(a) The Parties, whether natural persons or legal entities such as corporations, LLCs or partnerships, may be represented by counsel or any other person of the Party's choice. Each Party shall give prompt written notice to the Case Manager and the other Parties of the name, address, telephone number and email address of its representative. The representative of a Party may act on the Party's behalf in complying with these Rules.

(b) Changes in Representation. A Party shall give prompt written notice to the Case Manager and the other Parties of any change in its representation, including the name, address, telephone number and email address of the new representative. Such notice shall state that the written consent of the former representative, if any, and of the new representative, has been obtained and shall state the effective date of the new representation.

(c) The Arbitrator may withhold approval of any intended change or addition to a Party's legal representative(s) where such change or addition could compromise the ability of the Arbitrator to continue to serve, the composition of the Panel in the case of a tripartite Arbitration or the finality of any Award (on the grounds of possible conflict or other like impediment). In deciding whether to grant or withhold such approval, the Arbitrator shall have regard to the circumstances, including the general principle that a Party may be represented by a legal representative chosen by that Party, the stage that the Arbitration has reached, the potential prejudice resulting from the possible disqualification of the Arbitrator, the efficiency resulting from maintaining the composition of the Panel (as constituted throughout the Arbitration), the views of the other Party or Parties to the Arbitration and any likely wasted costs or loss of time resulting from such change or addition.

RULE 13
Withdrawal from Arbitration

(a) No Party may terminate or withdraw from an Arbitration after the issuance of the Commencement Letter (see Rule 5), except by written agreement of all Parties to the Arbitration.

(b) A Party that asserts a claim or counterclaim may unilaterally withdraw that claim or counterclaim without prejudice by serving written notice on the other Parties and the Arbitrator. However, the opposing Parties may, within seven (7) calendar days of service of such notice, request that the Arbitrator condition the withdrawal upon such terms as he or she may direct.

RULE 14
Ex Parte Communications

(a) No Party may have any *ex parte* communication with a neutral Arbitrator, except as provided in section (b) of this Rule. The Arbitrator(s) may authorize any Party to communicate directly with the Arbitrator(s) by email or other written means as long as copies are simultaneously forwarded to the JAMS Case Manager and the other Parties.

(b) A Party may have *ex parte* communication with its appointed neutral or non-neutral Arbitrator as necessary to secure the Arbitrator's services and to assure the absence of conflicts, as well as in connection with the selection of the Chairperson of the arbitral panel.

(c) The Parties may agree to permit more extensive *ex parte* communication between a Party and a non-neutral Arbitrator. More extensive communication with a non-neutral Arbitrator may also be permitted by applicable law and rules of ethics.

RULE 15
Arbitrator Selection, Disclosures and Replacement

(a) Unless the Arbitrator has been previously selected by agreement of the Parties, JAMS may attempt to facilitate agreement among the Parties regarding selection of the Arbitrator.

(b) If the Parties do not agree on an Arbitrator, JAMS shall send the Parties a list of at least five (5) Arbitrator candidates in the case of a sole Arbitrator and at least ten (10) Arbitrator candidates in the case of a tripartite panel. JAMS shall also provide each Party with a brief description of the background and experience of each Arbitrator candidate. JAMS may add names to or replace any or all names on the list of Arbitrator candidates for reasonable cause at any time before the Parties have submitted their choice pursuant to subparagraph (c) below.

(c) Within seven (7) calendar days of service upon the Parties of the list of names, each Party may strike two (2) names in the case of a sole Arbitrator and three (3) names in the case of a tripartite panel, and shall rank the remaining Arbitrator candidates in order of preference. The remaining Arbitrator candidate with the highest composite ranking shall be appointed the Arbitrator. JAMS may grant a reasonable extension of the time to strike and rank the Arbitrator candidates to any Party without the consent of the other Parties.

(d) If this process does not yield an Arbitrator or a complete panel, JAMS shall designate the sole Arbitrator or as many members of the tripartite panel as are necessary to complete the panel.

(e) If a Party fails to respond to a list of Arbitrator candidates within seven (7) calendar days after its service, or fails to respond according to the instructions provided by JAMS, JAMS shall deem that Party to have accepted all of the Arbitrator candidates.

(f) Entities or individuals whose interests are not adverse with respect to the issues in dispute shall be treated as a single Party for purposes of the Arbitrator selection process. JAMS shall determine whether the interests between entities or individuals are adverse for purposes of Arbitrator selection, considering such factors as whether they are represented by the same attorney and whether they are presenting joint or separate positions at the Arbitration.

(g) If, for any reason, the Arbitrator who is selected is unable to fulfill the Arbitrator's duties, a successor Arbitrator shall be chosen in accordance with this Rule. If a member of a panel of Arbitrators becomes unable to fulfill his or her duties after the beginning of a Hearing but before the issuance of an Award, a new Arbitrator will be chosen in accordance with this Rule, unless, in the case of a tripartite panel, the Parties agree to proceed with the remaining two Arbitrators. JAMS will make the final determination as to whether an Arbitrator is unable to fulfill his or her duties, and that decision shall be final.

(h) Any disclosures regarding the selected Arbitrator shall be made as required by law or within ten (10) calendar days from the date of appointment. Such disclosures may be provided in electronic format, provided that JAMS will produce a hard copy to any Party that requests it. The Parties and their representatives shall disclose to JAMS any circumstance likely to give rise to justifiable doubt as to the Arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the Arbitration or any past or present relationship with the Parties or their representatives. The obligation of the Arbitrator, the Parties and their representatives to make all required disclosures continues throughout the Arbitration process.

(i) At any time during the Arbitration process, a Party may challenge the continued service of an Arbitrator for cause. The challenge must be based upon information that was not available to the Parties at the time the Arbitrator was selected. A challenge for cause must be in writing and exchanged with opposing Parties, who may respond within seven (7) calendar days of service of the challenge. JAMS shall make the final determination as to such challenge. Such determination shall take into account the materiality of the facts and any prejudice to the Parties. That decision will be final.

(j) Where the Parties have agreed that a Party-appointed Arbitrator is to be non-neutral, that Party-appointed Arbitrator is not obliged to withdraw if requested to do so only by the Party that did not appoint that Arbitrator.

RULE 16
Preliminary Conference

At the request of any Party or at the direction of the Arbitrator, a Preliminary Conference shall be conducted with the Parties or their counsel or representatives. The Preliminary Conference may address any or all of the following subjects:

(a) The exchange of information in accordance with Rule 17 or otherwise;

(b) The schedule for discovery as permitted by the Rules, as agreed by the Parties or as required or authorized by applicable law;

(c) The pleadings of the Parties and any agreement to clarify or narrow the issues or structure the Arbitration Hearing;

(d) The scheduling of the Hearing and any pre-Hearing exchanges of information, exhibits, motions or briefs;

(e) The attendance of witnesses as contemplated by Rule 21;

(f) The scheduling of any dispositive motion pursuant to Rule 18;

(g) The premarking of exhibits, the preparation of joint exhibit lists and the resolution of the admissibility of exhibits;

(h) The form of the Award; and

(i) Such other matters as may be suggested by the Parties or the Arbitrator.

The Preliminary Conference may be conducted telephonically and may be resumed from time to time as warranted.

RULE 16.1
Application of Expedited Procedures

(a) If these Expedited Procedures are referenced in the Parties' Agreement to arbitrate or are later agreed to by all Parties, they shall be applied by the Arbitrator.

(b) The Claimant or Respondent may opt into the Expedited Procedures. The Claimant may do so by indicating the election in the Demand for Arbitration. The Respondent may opt into the Expedited Procedures by so indicating in writing to JAMS with a copy to the Claimant served within fourteen (14) days of receipt of the Demand for Arbitration. If a Party opts into the Expedited Procedures, the other side shall indicate within seven (7) calendar days of notice thereof whether it agrees to the Expedited Procedures.

(c) If one Party elects the Expedited Procedures and any other Party declines to agree to the Expedited Procedures, each Party shall have a client or client representative present at the first Preliminary Conference (which should, if feasible, be an in-person conference), unless excused by the Arbitrator for good cause.

RULE 16.2
Where Expedited Procedures Are Applicable

(a) The Arbitrator shall require compliance with Rule 17(a) prior to conducting the first Preliminary Conference. Each Party shall confirm in writing to the Arbitrator that it has so complied or shall indicate any limitations on full compliance and the reasons therefor.

(b) Document requests shall (1) be limited to documents that are directly relevant to the matters in dispute or to its outcome; (2) be reasonably restricted in terms of time frame, subject matter and persons or entities to which the requests pertain; and (3) not include broad phraseology such as "all documents directly or indirectly related to." The Requests shall not be encumbered with extensive "definitions" or "instructions." The Arbitrator may edit or limit the number of requests.

(c) E-discovery shall be limited as follows:

(i) There shall be production of electronic documents only from sources used in the ordinary course of business. Absent a showing of compelling need, no such documents are required to be produced from backup servers, tapes or other media.

(ii) Absent a showing of compelling need, the production of electronic documents shall normally be made on the basis of generally available technology in a searchable format that is usable by the requesting Party and convenient and economical for the producing Party. Absent a showing of compelling need, the Parties need not produce metadata, with the exception of header fields for email correspondence.

(iii) The description of custodians from whom electronic documents may be collected should be narrowly tailored to include only those individuals whose electronic documents may reasonably be expected to contain evidence that is material to the dispute.

(iv) Where the costs and burdens of e-discovery are disproportionate to the nature of the dispute or to the amount in controversy, or to the relevance of the materials requested, the Arbitrator may either deny such requests or order disclosure on the condition that the requesting Party advance the reasonable cost of production to the other side, subject to the allocation of costs in the final Award.

(v) The Arbitrator may vary these Rules after discussion with the Parties at the Preliminary Conference.

(d) Depositions of percipient witnesses shall be limited as follows:

(i) The limitation of one discovery deposition per side (Rule 17(b)) shall be applied by the Arbitrator, unless it is determined, based on all relevant circumstances, that more depositions are warranted. The Arbitrator shall consider the amount in controversy, the complexity of the factual issues, the number of Parties and the diversity of their interests, and whether any or all of the claims appear, on the basis of the pleadings, to have sufficient merit to justify the time and expense associated with the requested discovery.

(ii) The Arbitrator shall also consider the additional factors listed in the JAMS Recommended Arbitration Discovery Protocols for Domestic Commercial Cases.

(e) Expert depositions, if any, shall be limited as follows: Where written expert reports are produced to the other side in advance of the Hearing, expert depositions may be conducted only by agreement of the Parties or by order of the Arbitrator for good cause shown.

(f) Discovery disputes shall be resolved on an expedited basis.

(i) Where there is a panel of three Arbitrators, the Parties are encouraged to agree, by rule or otherwise, that the Chair or another member of the panel be authorized to resolve discovery issues, acting alone.

(ii) Lengthy briefs on discovery matters should be avoided. In most cases, the submission of brief letters will sufficiently inform the Arbitrator with regard to the issues to be decided.

(iii) The Parties should meet and confer in good faith prior to presenting any issues for the Arbitrator's decision.

(iv) If disputes exist with respect to some issues, that should not delay the Parties' discovery on remaining issues.

(g) The Arbitrator shall set a discovery cutoff not to exceed seventy-five (75) calendar days after the Preliminary Conference for percipient discovery and not to exceed one hundred five (105) calendar days for expert discovery (if any). These dates may be extended by the Arbitrator for good cause shown.

(h) Dispositive motions (Rule 18) shall not be permitted, except as set forth in the JAMS Recommended Arbitration Discovery Protocols for Domestic Commercial Cases or unless the Parties agree to that procedure.

(i) The Hearing shall commence within sixty (60) calendar days after the cutoff for percipient discovery. Consecutive Hearing days shall be established unless otherwise agreed by the Parties or ordered by the Arbitrator. These dates may be extended by the Arbitrator for good cause shown.

(j) The Arbitrator may alter any of these Procedures for good cause.

RULE 17
Exchange of Information

(a) The Parties shall cooperate in good faith in the voluntary and informal exchange of all non-privileged documents and other information (including electronically stored information ("ESI")) relevant to the dispute or claim immediately after commencement of the Arbitration. They shall complete an initial exchange of all relevant, non-privileged documents, including, without limitation, copies of all documents in their possession or control on which they rely in support of their positions, and names of individuals whom they may call as witnesses at the Arbitration Hearing, within twenty-one (21) calendar days after all pleadings or notice of claims have been received. The Arbitrator may modify these obligations at the Preliminary Conference.

(b) Each Party may take one deposition of an opposing Party or of one individual under the control of the opposing Party. The Parties shall attempt to agree on the time, location and duration of the deposition. If the Parties do not agree, these issues shall be determined by the Arbitrator. The necessity of additional depositions shall be determined by the

Arbitrator based upon the reasonable need for the requested information, the availability of other discovery options and the burdensomeness of the request on the opposing Parties and the witness.

(c) As they become aware of new documents or information, including experts who may be called upon to testify, all Parties continue to be obligated to provide relevant, non-privileged documents to supplement their identification of witnesses and experts and to honor any informal agreements or understandings between the Parties regarding documents or information to be exchanged. Documents that were not previously exchanged, or witnesses and experts that were not previously identified, may not be considered by the Arbitrator at the Hearing, unless agreed by the Parties or upon a showing of good cause.

(d) The Parties shall promptly notify JAMS when a dispute exists regarding discovery issues. A conference shall be arranged with the Arbitrator, either by telephone or in person, and the Arbitrator shall decide the dispute. With the written consent of all Parties, and in accordance with an agreed written procedure, the Arbitrator may appoint a special master to assist in resolving a discovery dispute.

(e) In a consumer or employment case, the Parties may take discovery of third parties with the approval of the Arbitrator.

RULE 18
Summary Disposition of a Claim or Issue

The Arbitrator may permit any Party to file a Motion for Summary Disposition of a particular claim or issue, either by agreement of all interested Parties or at the request of one Party, provided other interested Parties have reasonable notice to respond to the request. The Request may be granted only if the Arbitrator determines that the requesting Party has shown that the proposed motion is likely to succeed and dispose of or narrow the issues in the case.

RULE 19
Scheduling and Location of Hearing

(a) The Arbitrator, after consulting with the Parties that have appeared, shall determine the date, time and location of the Hearing. The Arbitrator and the Parties shall attempt to schedule consecutive Hearing days if more than one day is necessary.

(b) If a Party has failed to participate in the Arbitration process, and the Arbitrator reasonably believes that the Party will not participate in the Hearing, the Arbitrator may set the Hearing without consulting with that Party. The non-participating Party shall be served with a Notice of Hearing at least thirty (30) calendar days prior to the scheduled date, unless the law of the relevant jurisdiction allows for, or the Parties have agreed to, shorter notice.

(c) The Arbitrator, in order to hear a third-party witness, or for the convenience of the Parties or the witnesses, may conduct the Hearing at any location. Any JAMS Resolution Center may be designated a Hearing location for purposes of the issuance of a subpoena or subpoena *duces tecum* to a third-party witness.

RULE 20
Pre-Hearing Submissions

(a) Except as set forth in any scheduling order that may be adopted, at least fourteen (14) calendar days before the Arbitration Hearing, the Parties shall file with JAMS and serve and exchange (1) a list of the witnesses they intend to call, including any experts; (2) a short description of the anticipated testimony of each such witness and an estimate of the length of the witness' direct testimony; (3) any written expert reports that may be introduced at the Arbitration Hearing; and (4) a list of all exhibits intended to be used at the Hearing. The Parties should exchange with each other copies of any such exhibits to the extent that they have not been previously exchanged. The Parties should pre-mark exhibits and shall attempt to resolve any disputes regarding the admissibility of exhibits prior to the Hearing.

(b) The Arbitrator may require that each Party submit a concise written statement of position, including summaries of the facts and evidence a Party intends to present, discussion of the applicable law and the basis for the requested Award or denial of relief sought. The statements, which may be in the form of a letter, shall be filed with JAMS and served upon the other Parties at least seven (7) calendar days before the Hearing date. Rebuttal statements or other pre-Hearing written submissions may be permitted or required at the discretion of the Arbitrator.

RULE 21
Securing Witnesses and Documents for the Arbitration Hearing

At the written request of a Party, all other Parties shall produce for the Arbitration Hearing all specified witnesses in their employ or under their control without need of subpoena. The Arbitrator may issue subpoenas for the attendance of witnesses or the production of documents either prior to or at the Hearing pursuant to this Rule or Rule 19(c). The subpoena or subpoena *duces tecum* shall be issued in accordance with the applicable law. Pre-issued subpoenas may be used in jurisdictions that permit them. In the event a Party or a subpoenaed person objects to the production of a witness or other evidence, the Party or subpoenaed person may file an objection with the Arbitrator, who shall promptly rule on the objection, weighing both the burden on the producing Party and witness and the need of the proponent for the witness or other evidence.

RULE 22
The Arbitration Hearing

(a) The Arbitrator will ordinarily conduct the Arbitration Hearing in the manner set forth in these Rules. The Arbitrator may vary these procedures if it is determined to be reasonable and appropriate to do so.

(b) The Arbitrator shall determine the order of proof, which will generally be similar to that of a court trial.

(c) The Arbitrator shall require witnesses to testify under oath if requested by any Party, or otherwise at the discretion of the Arbitrator.

(d) Strict conformity to the rules of evidence is not required, except that the Arbitrator shall apply applicable law relating to privileges and work product. The Arbitrator shall consider evidence that he or she finds relevant and material to the dispute, giving the evidence such weight as is appropriate. The Arbitrator may be guided in that determination by principles contained in the Federal Rules of Evidence or any other applicable rules of evidence. The Arbitrator may limit testimony to exclude evidence that would be immaterial or unduly repetitive, provided that all Parties are afforded the opportunity to present material and relevant evidence.

(e) The Arbitrator shall receive and consider relevant deposition testimony recorded by transcript or videotape, provided that the other Parties have had the opportunity to attend and cross-examine. The Arbitrator may in his or her discretion consider witness affidavits or other recorded testimony even if the other Parties have not had the opportunity to cross-examine, but will give that evidence only such weight as he or she deems appropriate.

(f) The Parties will not offer as evidence, and the Arbitrator shall neither admit into the record nor consider, prior settlement offers by the Parties or statements or recommendations made by a mediator or other person in connection with efforts to resolve the dispute being arbitrated, except to the extent that applicable law permits the admission of such evidence.

(g) The Arbitrator has full authority to determine that the Hearing, or any portion thereof, be conducted in person or virtually by conference call, videoconference or using other communications technology with participants in one or more geographical places, or in a combined form. If some or all of the witnesses or other participants are located remotely, the Arbitrator may make such orders and set such procedures as the Arbitrator deems necessary or advisable.

(h) When the Arbitrator determines that all relevant and material evidence and arguments have been presented, and any interim or partial Awards have been issued, the Arbitrator shall declare the Hearing closed. The Arbitrator may defer the closing of the Hearing until a date determined by the Arbitrator in order to permit the Parties to submit post-Hearing briefs, which may be in the form of a letter, and/or to make closing arguments. If post-Hearing briefs are to be submitted or closing arguments are to be made, the Hearing shall be deemed closed upon receipt by the Arbitrator of such briefs or at the conclusion of such closing arguments, whichever is later.

(i) At any time before the Award is rendered, the Arbitrator may, *sua sponte* or on application of a Party for good cause shown, reopen the Hearing. If the Hearing is reopened, the time to render the Award shall be calculated from the date the reopened Hearing is declared closed by the Arbitrator.

(j) The Arbitrator may proceed with the Hearing in the absence of a Party that, after receiving notice of the Hearing pursuant to Rule 19, fails to attend. The Arbitrator may not render an Award solely on the basis of the default or absence of the Party, but shall require any Party seeking relief to submit such evidence as the Arbitrator may require for the rendering of an Award. If the Arbitrator reasonably believes that a Party will not attend the Hearing, the Arbitrator may schedule the Hearing as a telephonic Hearing and may receive the evidence

necessary to render an Award by affidavit. The notice of Hearing shall specify if it will be in person or telephonic.

(k) Any Party may arrange for a stenographic record to be made of the Hearing and shall inform the other Parties in advance of the Hearing. No other means of recording the proceedings shall be permitted absent agreement of the Parties or by direction of the Arbitrator.

(i) The requesting Party shall bear the cost of such stenographic record. If all other Parties agree to share the cost of the stenographic record, it shall be made available to the Arbitrator and may be used in the proceeding.

(ii) If there is no agreement to share the cost of the stenographic record, it may not be provided to the Arbitrator and may not be used in the proceeding, unless the Party arranging for the stenographic record agrees to provide access to the stenographic record either at no charge or on terms that are acceptable to the Parties and the reporting service.

(iii) If the Parties agree to the Optional Arbitration Appeal Procedure (Rule 34), they shall, if possible, ensure that a stenographic or other record is made of the Hearing and shall share the cost of that record.

(iv) The Parties may agree that the cost of the stenographic record shall or shall not be allocated by the Arbitrator in the Award.

RULE 23
Waiver of Hearing

The Parties may agree to waive the oral Hearing and submit the dispute to the Arbitrator for an Award based on written submissions and other evidence as the Parties may agree.

RULE 24
Awards

(a) The Arbitrator shall render a Final Award or a Partial Final Award within thirty (30) calendar days after the date of the close of the Hearing, as defined in Rule 22(h) or (i), or, if a Hearing has been waived, within thirty (30) calendar days after the receipt by the Arbitrator of all materials specified by the Parties, except (1) by the agreement of the Parties; (2) upon good cause for an extension of time to render the Award; or (3) as provided in Rule 22(i). The Arbitrator shall provide the Final Award or the Partial Final Award to JAMS for issuance in accordance with this Rule.

(b) Where a panel of Arbitrators has heard the dispute, the decision and Award of a majority of the panel shall constitute the Arbitration Award.

(c) In determining the merits of the dispute, the Arbitrator shall be guided by the rules of law agreed upon by the Parties. In the absence of such agreement, the Arbitrator shall be guided by the rules of law and equity that he or she deems to be most appropriate. The Arbitrator may grant any remedy or relief that is just and equitable and within the scope of the Parties' Agreement, including, but not limited to, specific performance of a contract or any other equitable or legal remedy.

(d) In addition to a Final Award or Partial Final Award, the Arbitrator may make other decisions, including interim or partial rulings, orders and Awards.

(e) Interim Measures. The Arbitrator may grant whatever interim measures are deemed necessary, including injunctive relief and measures for the protection or conservation of property and disposition of disposable goods. Such interim measures may take the form of an interim or Partial Final Award, and the Arbitrator may require security for the costs of such measures. Any recourse by a Party to a court for interim or provisional relief shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.

(f) The Award of the Arbitrator may allocate Arbitration fees and Arbitrator compensation and expenses, unless such an allocation is expressly prohibited by the Parties' Agreement. (Such a prohibition may not limit the power of the Arbitrator to allocate Arbitration fees and Arbitrator compensation and expenses pursuant to Rule 31(c).)

(g) The Award of the Arbitrator may allocate attorneys' fees and expenses and interest (at such rate and from such date as the Arbitrator may deem appropriate) if provided by the Parties' Agreement or allowed by applicable law. When the Arbitrator is authorized to award attorneys' fees and must determine the reasonable amount of such fees, he or she may consider whether the failure of a Party to cooperate reasonably in the discovery process and/or comply with the Arbitrator's discovery orders caused delay to the proceeding or additional costs to the other Parties.

(h) The Award shall consist of a written statement signed by the Arbitrator regarding the disposition of each claim and the relief, if any, as to each claim. Unless all Parties agree otherwise, the Award shall also contain a concise written statement of the reasons for the Award.

(i) After the Award has been rendered, and provided the Parties have complied with Rule 31, the Award shall be issued by serving copies on the Parties. Service may be made by U.S. mail. It need not be sent certified or registered.

(j) Within seven (7) calendar days after service of a Partial Final Award or Final Award by JAMS, any Party may serve upon the other Parties and file with JAMS a request that the Arbitrator correct any computational, typographical or other similar error in an Award (including the reallocation of fees pursuant to Rule 31(c) or on account of the effect of an offer to allow judgment), or the Arbitrator may *sua sponte* propose to correct such errors in an Award. A Party opposing such correction shall have seven (7) calendar days thereafter in which to file and serve any objection. The Arbitrator may make any necessary and appropriate corrections to the Award within twenty-one (21) calendar days of receiving a request or fourteen (14) calendar days after his or her proposal to do so. The Arbitrator may extend the time within which to make corrections upon good cause. The corrected Award shall be served upon the Parties in the same manner as the Award.

(k) The Award is considered final, for purposes of either the Optional Arbitration Appeal Procedure pursuant to Rule 34 or a judicial proceeding to enforce, modify or vacate the Award pursuant to Rule 25, fourteen (14) calendar days after service if no request for a correction is made, or as of the effective date of service of a corrected Award.

RULE 25
Enforcement of the Award

Proceedings to enforce, confirm, modify or vacate an Award will be controlled by and conducted in conformity with the Federal Arbitration Act, 9 U.S.C. Sec 1, *et seq.*, or applicable state law. The Parties to an Arbitration under these Rules shall be deemed to have consented that judgment upon the Award may be entered in any court having jurisdiction thereof.

RULE 26
Confidentiality and Privacy

(a) JAMS and the Arbitrator shall maintain the confidential nature of the Arbitration proceeding and the Award, including the Hearing, except as necessary in connection with a judicial challenge to or enforcement of an Award, or unless otherwise required by law or judicial decision.

(b) The Arbitrator may issue orders to protect the confidentiality of proprietary information, trade secrets or other sensitive information.

(c) Subject to the discretion of the Arbitrator or agreement of the Parties, any person having a direct interest in the Arbitration may attend the Arbitration Hearing. The Arbitrator may exclude any non-Party from any part of a Hearing.

RULE 27
Waiver

(a) If a Party becomes aware of a violation of or failure to comply with these Rules and fails promptly to object in writing, the objection will be deemed waived, unless the Arbitrator determines that waiver will cause substantial injustice or hardship.

(b) If any Party becomes aware of information that could be the basis of a challenge for cause to the continued service of the Arbitrator, such challenge must be made promptly, in writing, to the Arbitrator or JAMS. Failure to do so shall constitute a waiver of any objection to continued service by the Arbitrator.

RULE 28
Settlement and Consent Award

(a) The Parties may agree, at any stage of the Arbitration process, to submit the case to JAMS for mediation. The JAMS mediator assigned to the case may not be the Arbitrator or a member of the Appeal Panel, unless the Parties so agree, pursuant to Rule 28(b).

(b) The Parties may agree to seek the assistance of the Arbitrator in reaching settlement. By their written agreement to submit the matter to the Arbitrator for settlement assistance, the Parties will be deemed to have agreed that the assistance of the Arbitrator in such settlement efforts will not disqualify the Arbitrator from continuing to serve as Arbitrator if settlement is not reached; nor shall such assistance be argued to a reviewing court as the basis for vacating or modifying an Award.

(c) If, at any stage of the Arbitration process, all Parties agree upon a settlement of the issues in dispute and request the Arbitrator to embody the agreement in a Consent Award, the Arbitrator shall comply with such request, unless the Arbitrator believes the terms of the agreement are illegal or undermine the integrity of the Arbitration process. If the Arbitrator is concerned about the possible consequences of the proposed

Consent Award, he or she shall inform the Parties of that concern and may request additional specific information from the Parties regarding the proposed Consent Award. The Arbitrator may refuse to enter the proposed Consent Award and may withdraw from the case.

RULE 29
Sanctions

The Arbitrator may order appropriate sanctions for failure of a Party to comply with its obligations under any of these Rules or with an order of the Arbitrator. These sanctions may include, but are not limited to, assessment of Arbitration fees and Arbitrator compensation and expenses; assessment of any other costs occasioned by the actionable conduct, including reasonable attorneys' fees; exclusion of certain evidence; drawing adverse inferences; or, in extreme cases, determining an issue or issues submitted to Arbitration adversely to the Party that has failed to comply.

RULE 30
Disqualification of the Arbitrator as a Witness or Party and Exclusion of Liability

(a) The Parties may not call the Arbitrator, the Case Manager or any other JAMS employee or agent as a witness or as an expert in any pending or subsequent litigation or other proceeding involving the Parties and relating to the dispute that is the subject of the Arbitration. The Arbitrator, Case Manager and other JAMS employees and agents are also incompetent to testify as witnesses or experts in any such proceeding.

(b) The Parties shall defend and/or pay the cost (including any attorneys' fees) of defending the Arbitrator, Case Manager and/or JAMS from any subpoenas from outside parties arising from the Arbitration.

(c) The Parties agree that neither the Arbitrator, nor the Case Manager, nor JAMS is a necessary Party in any litigation or other proceeding relating to the Arbitration or the subject matter of the Arbitration, and neither the Arbitrator, nor the Case Manager, nor JAMS, including its employees or agents, shall be liable to any Party for any act or omission in connection with any Arbitration conducted under these Rules, including, but not limited to, any disqualification of or recusal by the Arbitrator.

RULE 31
Fees

(a) Each Party shall pay its *pro rata* share of JAMS fees and expenses as set forth in the JAMS fee schedule in effect at the time of the commencement of the Arbitration, unless the Parties agree on a different allocation of fees and expenses. JAMS' agreement to render services is jointly with the Party and the attorney or other representative of the Party in the Arbitration. The non-payment of fees may result in an administrative suspension of the case in accordance with Rule 6(c).

(b) JAMS requires that the Parties deposit the fees and expenses for the Arbitration from time to time during the course of the proceedings and prior to the Hearing. The Arbitrator may preclude a Party that has failed to deposit its *pro rata* or agreed-upon share of the fees and expenses from offering evidence of any affirmative claim at the Hearing.

(c) The Parties are jointly and severally liable for the payment of JAMS Arbitration fees and Arbitrator compensation and expenses. In the event that one Party has paid more than its share of such fees, compensation and expenses, the Arbitrator may award against any other Party any such fees, compensation and expenses that such Party owes with respect to the Arbitration.

(d) Entities or individuals whose interests are not adverse with respect to the issues in dispute shall be treated as a single Party for purposes of JAMS' assessment of fees. JAMS shall determine whether the interests between entities or individuals are adverse for purpose of fees, considering such factors as whether the entities or individuals are represented by the same attorney and whether the entities or individuals are presenting joint or separate positions at the Arbitration.

RULE 32
Bracketed (or High-Low) Arbitration Option

(a) At any time before the issuance of the Arbitration Award, the Parties may agree, in writing, on minimum and maximum amounts of damages that may be awarded on each claim or on all claims in the aggregate. The Parties shall promptly notify JAMS and provide to JAMS a copy of their written agreement setting forth the agreed-upon minimum and maximum amounts.

(b) JAMS shall not inform the Arbitrator of the agreement to proceed with this option or of the agreed-upon minimum and maximum levels without the consent of the Parties.

(c) The Arbitrator shall render the Award in accordance with Rule 24.

(d) In the event that the Award of the Arbitrator is between the agreed-upon minimum and maximum amounts, the Award shall become final as is. In the event that the Award is below the agreed-upon minimum amount, the final Award issued shall be corrected to reflect the agreed-upon minimum amount. In the event that the Award is above the agreed-upon maximum amount, the final Award issued shall be corrected to reflect the agreed-upon maximum amount.

RULE 33
Final Offer (or Baseball) Arbitration Option

(a) Upon agreement of the Parties to use the option set forth in this Rule, at least seven (7) calendar days before the Arbitration Hearing, the Parties shall exchange and provide to JAMS written proposals for the amount of money damages they would offer or demand, as applicable, and that they believe to be appropriate based on the standard set forth in Rule 24(c). JAMS shall promptly provide copies of the Parties' proposals to the Arbitrator, unless the Parties agree that they should not be provided to the Arbitrator. At any time prior to the close of the Arbitration Hearing, the Parties may exchange revised written proposals or demands, which shall supersede all prior proposals. The revised written proposals shall be provided to JAMS, which shall promptly provide them to the Arbitrator, unless the Parties agree otherwise.

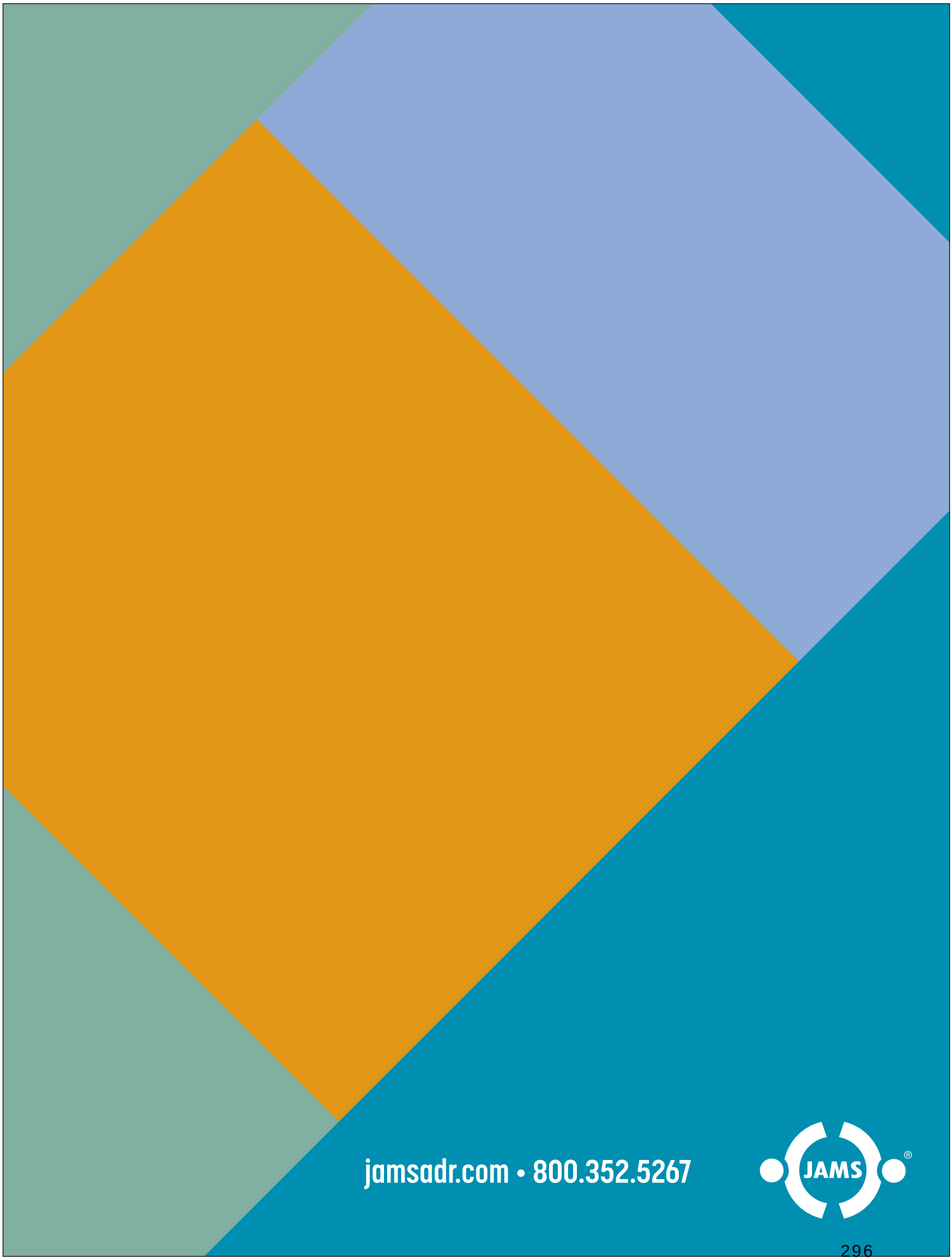
(b) If the Arbitrator has been informed of the written proposals, in rendering the Award, the Arbitrator shall choose between the Parties' last proposals, selecting the proposal that the Arbitrator finds most reasonable and appropriate in light of the standard set forth in Rule 24(c). This provision modifies Rule 24(h) in that no written statement of reasons shall accompany the Award.

(c) If the Arbitrator has not been informed of the written proposals, the Arbitrator shall render the Award as if pursuant to Rule 24, except that the Award shall thereafter be corrected to conform to the closest of the last proposals and the closest of the last proposals will become the Award.

(d) Other than as provided herein, the provisions of Rule 24 shall be applicable.

RULE 34
Optional Arbitration Appeal Procedure

The Parties may agree at any time to the JAMS Optional Arbitration Appeal Procedure. All Parties must agree in writing for such procedure to be effective. Once a Party has agreed to the Optional Arbitration Appeal Procedure, it cannot unilaterally withdraw from it, unless it withdraws, pursuant to Rule 13, from the Arbitration.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Court File No. CV-21-00658423-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JUST ENERGY GROUP INC., JUST ENERGY CORP., ONTARIO ENERGY COMMODITIES INC., UNIVERSAL ENERGY CORPORATION, JUST ENERGY FINANCE CANADA ULC, HUDSON ENERGY CANADA CORP., JUST MANAGEMENT CORP., 11929747 CANADA INC., 12175592 CANADA INC., JE SERVICES HOLDCO I INC., JE SERVICES HOLDCO II INC., 8704104 CANADA INC., JUST ENERGY ADVANCED SOLUTIONS CORP., JUST ENERGY (U.S.) CORP., JUST ENERGY ILLINOIS CORP., JUST ENERGY INDIANA CORP., JUST ENERGY MASSACHUSETTS CORP., JUST ENERGY NEW YORK CORP., JUST ENERGY TEXAS I CORP., JUST ENERGY, LLC, JUST ENERGY PENNSYLVANIA CORP., JUST ENERGY MICHIGAN CORP., JUST ENERGY SOLUTIONS INC., HUDSON ENERGY SERVICES LLC, HUDSON ENERGY CORP., INTERACTIVE ENERGY GROUP LLC, HUDSON PARENT HOLDINGS LLC, DRAG MARKETING LLC, JUST ENERGY ADVANCED SOLUTIONS LLC, FULCRUM RETAIL ENERGY LLC, FULCRUM RETAIL HOLDINGS LLC, TARA ENERGY, LLC, JUST ENERGY MARKETING CORP., JUST ENERGY CONNECTICUT CORP., JUST ENERGY LIMITED, JUST SOLAR HOLDINGS CORP. AND JUST ENERGY (FINANCE) HUNGARY ZRT.

Applicants

AIDE MEMOIRE OF THE APPLICANTS

Case Conference before the Honourable Mr. Justice McEwen
January 31, 2022

A. The Just Energy Group

1. Just Energy Group Inc. ("**Just Energy**") and its subsidiaries (including various partnerships which are not Applicants in these proceedings but which were extended the protections and authorizations of the Initial Order dated March 9, 2021, the "**Just Energy Entities**") are retail energy providers specializing in delivering electricity and natural gas to consumer and commercial customers as well as energy-efficient solutions and renewable energy

options. The Just Energy Entities serve over 950,000 consumer and commercial customers in the United States and Canada who rely on the Just Energy Entities for their energy needs.

2. As a provider of energy and natural gas in Canada and the United States, the Just Energy Entities operate in highly regulated markets. In most jurisdictions where they operate, the Just Energy Entities are subject to significant oversight from public utility commissions or independent electricity system operators. Certain of the Just Energy Entities have received gas and electricity licenses from regulators in British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, and various jurisdictions across the United States.

3. As at September 8, 2021, the Just Energy Entities employed 1,092 employees and had 29 independent contractors across Canada, the United States and India.

4. During the 2020 fiscal year (ending March 31, 2020) and the 2021 fiscal year (ending March 31, 2021), the Just Energy Entities had sales of more than C$3.15 billion and C$2.7 billion, respectively.

5. The Just Energy Entities' capital structure includes the following secured and unsecured debt (all as at September 30, 2021):

Items	**Approximate Amount (CAD)**
SECURED DEBT	
DIP Facility The US$125 million secured facility provided by the DIP Lenders under the DIP Term Sheet	$158.4 million
Secured Supplier Accounts Payable	$515.8 million
Credit Facility The pre-filing secured revolving credit facilities advanced by a syndicate of lenders to various of the Just Energy Entities under a ninth amended and restated credit agreement (as amended from time to time, the "**Credit Agreement**")	$167.6 million of funded debt $160.5 million of issued letters of credit
TOTAL SECURED DEBT	**$1.0 billion**

Items	Approximate Amount (CAD)
UNSECURED DEBT	
Term Loan The non-revolving term loan established pursuant to the Term Loan Agreement as part of the Recapitalization (the "**Term Loan**") under which various subsidiaries of the DIP Lender are lenders	$290.4 million
Subordinated Notes The unsecured subordinated notes issued by Just Energy in 2020 as part of its Recapitalization (as defined and discussed below)	$13.6 million
Trade Debt and other Unsecured Payables	$37.6 million
TOTAL UNSECURED DEBT	**$341.6 million**

6. The secured debt portion of the Just Energy Entities' capital structure is subject to, and governed by, a complex intercreditor arrangement which defines the relative priorities of the various parties' security interests and specifies the priority of such interests in accordance with the waterfall defined therein. This complex capital structure is one of the significant drivers of the company's current restructuring negotiations.

B. Current Status of the CCAA and Chapter 15 Proceedings

7. Since the granting of the Initial Order, a number of orders have been obtained by the Just Energy Entities to advance the CCAA and Chapter 15 proceedings, including the following:

(a) on March 19, 2021, the Court granted an Amended and Restated Initial Order ("**ARIO**") which, among other thing, extended the Stay Period to June 4, 2021;

(b) on April 2, 2021, the U.S. Court granted a Final Recognition Order which, among other things, recognized the ARIO, including any and all existing and future extensions, amendments, restatements, and/or supplements authorized by the

Court, full force and effect on a final basis with respect to the Just Energy Entities' property located within the United States;

(c) on May 26, 2021, the Court granted (i) the Second ARIO which revised certain definitions and incorporated certain limited termination rights for Qualified Commodity/ISO Suppliers, and (ii) an Order extending the Stay Period to September 30, 2021; relieving Just Energy of any obligation to call an annual meeting of shareholders; and authorizing certain intercompany transfers;

(d) on September 15, 2021, the Court granted (i) a Claims Procedure Order approving a process (the "**Claims Process**") for the identification, quantification and resolution of claims against the Just Energy Entities and their respective directors and officers and establishing a Claims Bar Date of November 1, 2021 (the "**Claims Procedure Order**"), and (ii) an Order extending the Stay Period to December 17, 2021 and other miscellaneous relief; and

(e) on November 10, 2021, the Court granted Orders (i) extending the Stay Period to February 17, 2021, (ii) approving a second KERP, and (iii) authorizing and empowering the Just Energy Entities to enter into an amendment to the DIP Term Sheet.

8. The Just Energy Entities have been working in earnest with the most significant participants in their capital structure, including the DIP Lenders (who are also Term Loan Lenders and the assignee of a significant secured supplier claim from BP), the Credit Facility Lenders and Shell (a significant secured supplier), to develop a going concern restructuring plan (the "**Restructuring Plan**") which, among other things, preserves the going concern value of the Just Energy Entities' businesses for the benefit of stakeholders (including the company's approximately 950,000 customers and significant trading partners), maintains the employment of the Just Energy Entities' more than 1000 employees, and supports the long-term viability of the

business upon emergence from these CCAA and Chapter 15 proceedings. These negotiations have been complex due to the nature of the company's business and financial arrangements.

9. As noted by the Court at the last stay extension motion:

> The company has been moving in good faith towards a plan, but the business is of such a complexity that it has taken longer than initially anticipated. This is not surprising. The company is subject to a myriad of regulatory regimes across the United States and Canada. It has complex commercial arrangements with suppliers and a number of secured and unsecured lenders, the integrity of which in turn depends on Just Energy's compliance with regulatory requirements.

10. The company's current intention is to seek a Meeting Order with respect to the Restructuring Plan on March 3, 2022.

11. In addition to developing the Restructuring Plan, the Just Energy Entities have been working with the Monitor to administer the claims process in accordance with the Claims Procedure Order. Currently, the total claims filed against the Just Energy Entities pursuant to the Claims Procedure Order are in excess of $12 billion, including approximately $1 billion in secured claims, including letters of credit. The Just Energy Entities expect that the final amount of accepted unsecured claims will be much lower than the face amount of the filed claims. The Just Energy Entities, in consultation with the Monitor, are in the process of attempting to resolve claims filed in the Claims Process including entering into discussions with certain Claimants to have their Claims withdrawn or settled and issuing Notices of Revision or Disallowance and notices of Claim acceptance to Claimants where appropriate. It is possible that certain claims will be referred for determination to either the CCAA Court or a Claims Officer in accordance with the Claims Procedure Order.

C. Motion for Advice and Directions brought by U.S. Counsel to the Proposed Representative Plaintiffs in 2 Uncertified U.S. Class Actions

12. The position of the Just Energy Entities is that the vast majority of the relief sought in Plaintiffs' Counsels' motion for advice and directions should not be heard on February 9, 2022,

when the company is in the process of negotiating a plan of arrangement with parties that have provided it with approximately $1 billion in financial capital.

13. The moving party is a group of three U.S. based law firms who represent 3 proposed representative plaintiffs in 2 uncertified U.S. Class Actions – the Donin Action and the Jordet Action. Proofs of Claim have been filed by U.S. Counsel on behalf of the proposed representative plaintiffs in the CCAA Claims Process, each in the amount of US$3,662,444,442.00. The Monitor delivered Notices of Revision or Disallowance denying those claims in full as part of the Claims Process. The time for the Claimants to dispute such disallowances has not yet passed.

Communications with and Information Provided to Plaintiffs' Counsel

14. The proposed representative plaintiffs' position regarding information and participation rights starts with a false premise – that a CCAA Debtor is required to provide a contingent, uncertified litigation creditor with confidential information concerning its business or restructuring. There is no statute or rule that requires a CCAA Debtor to do so. Similarly, there is nothing that requires a CCAA Debtor to negotiate a plan with any specific stakeholder or creditor, secured or otherwise, regardless of the amount of influence or leverage that stakeholder may claim to have.

15. The Tannor Affidavit in support of the Plaintiffs' Counsels' motion suggests that the Applicants and the Monitor have not been responsive to information requests over the last twelve weeks. That is simply incorrect.

16. Despite being under no legal obligation to do so, the Just Energy Entities and the Monitor have engaged with Plaintiffs' Counsel since they first contacted the Monitor's legal counsel by email on November 11, 2021. This process included signing a Confidentiality, Non-Disclosure and Non-Use Agreement ("**NDA**"), providing Plaintiffs' Counsel with confidential information and documents, answering numerous written questions, and arranging multiple meetings with

Plaintiffs' Counsel and its financial advisor that have included the Monitor, counsel to the Monitor and the financial advisor to the Just Energy Entities. There is nothing in the NDA that ***requires*** the company to provide any information to Plaintiffs' Counsel, yet the company has responded to those information requests it believes are reasonable and appropriate in the circumstances, considering the nature of the claims of the proposed representative plaintiffs.

17. Plaintiffs' Counsel, through their financial advisor, also state that the financial statements filed by Just Energy demonstrate that "there is equity in the Just Energy Entities". First, this Court accepted that the Just Energy Entities are insolvent when it made the Initial Order. Second, the Tannor Affidavit does not conduct any closer analysis of the financial statements, including adjusting the equity on the balance sheet for the impact of approximately $580 million of unrealized mark-to-market gains on supply contracts recorded in the six months ended September 30, 2021. Applicable accounting rules require these unrealized gains (or losses) to be recorded on the company's financial statements, even though the supply contracts are entered into specifically to lock in the gross margin on fixed price customer contracts for future periods. Consistent with industry practice, Just Energy has historically and consistently noted in its financial statements that these amounts do not impact the long term financial performance of Just Energy and are excluded from its base EBITDA calculation. Similarly, these amounts should be excluded when considering the balance sheet.

18. It is important to not lose sight of the fact that the Second ARIO charged the Applicants with the authority to develop and file a plan of compromise or arrangement with the assistance of the Monitor. The information and documents relating to any proposed transaction must, out of necessity, be confidential to ensure a constructive dialogue with financial participants with proven claims against the company. It is not feasible to have other stakeholders "at the table" to second

guess the Applicants or distract management from the task at hand - particularly contingent creditors who are contributing nothing to the restructuring and have nothing more than a nascent claim against certain of the Just Energy Entities that has yet to be certified or survive a summary judgment motion. The Applicants, in conjunction with the Monitor, must exercise their business judgment to frame the negotiations and parties involved to achieve the desired outcome of a going concern transaction. Should a plan of arrangement be proposed by the Just Energy Entities, all stakeholders will have the ability to participate in the public court process that will be implemented to consider such a plan.

Notices of Revision or Disallowance in respect of the Donin and Jordet Claims

19. The moving parties included copies of the Notices of Revision or Disallowance sent by the Monitor at Exhibits "Q" and "R" of the Tannor Affidavit. The disallowances disallowed the Claims advanced by the proposed representative plaintiffs in full as, among other things, contingent, uncertified, speculative, and remote.

20. The Notices of Revision or Disallowance also set out numerous procedural and substantive issues with the Proofs of Claim filed in the Claims Process, and by implication the adjudication plan put forward by U.S. counsel, including the following:

(a) The motion for advice and directions requests an adjudication schedule that would somehow see a trial for a proposed class action, that first requires (i) discovery in the case of the Jordet Claim; (ii) the exchange of expert reports; (iii) a judicial determination on summary judgement; and (iv) a judicial determination on certification, among other matters, be adjudicated to judgment in February, 2022. Unless and until a proposed class action is certified, it cannot proceed to trial.

(b) The proposed representative plaintiffs are attempting to impermissibly expand the scope of their claims to add new defendants, new customer groups and extended class periods. Their Proofs of Claim purport to advance claims against "All Just Energy Entities" on behalf of both gas and electricity customers, even though (i) the Jordet Claim only names Just Energy Solutions as defendant and is only brought on behalf of natural gas customers; (ii) the Donin Claim is only brought against Just Energy and Just Energy New York Corp and the US Court dismissed all claims against Just Energy's other affiliates; and (iii) the US Court found claims prior to April 6, 2014 were time-barred in the Jordet Action.

(c) Contrary to the plaintiffs' submissions, the defendants were largely successful on the motions to dismiss in both the Donin and Jordet Actions, which significantly narrowed the scope of their claims. For example, in the Motion to Dismiss in Donin dated September 24, 2021 (attached as Exhibit "C" to the Tannor Affidavit), the US Court dismissed all of the plaintiffs' claims, except for breach of contract and the implied covenant of good faith.

(d) Should the plaintiffs' claim survive summary judgement and certification, and liability is then established at trial, the plaintiffs' damages calculations are highly inflated and based on a number of flawed assumptions in a number of respects. To take only one example, the plaintiffs' purported expert report assumes that 50% of residential and commercial natural gas and electricity usage of the Just Energy Entities' customer base is attributable to customers that are parties to variable rate contracts. However, currently only 2.1% and 0.04%, respectively, of natural gas and electricity usage is attributable to customers who are parties to variable rate

contracts with the Just Energy Entities. Other issues with respect to the plaintiffs' purported expert report are outlined in detail on pages 6-10 of both Notices of Revision or Disallowance.

The Proposed Representative Plaintiffs Claims in the Context of the Just Energy Entities' Restructuring

21. The next step in the Applicants' going concerning restructuring efforts is to finalize a Restructuring Plan with its funded debtholders and seek a Meeting Order in connection with such plan. That Restructuring Plan will provide that all contingent litigation creditors are "Affected Creditors" under the Plan, including the proposed representative plaintiffs in the Jordet and Donin Claims. No financial sponsor or "new money" would permit the company to pursue a Restructuring Plan that does not affect litigation claims.

22. For the reasons set out above and in the Notices of Revision or Disallowance, and since the available resources of the company and senior management are entirely focused on the development of a going concern Restructuring Plan (in addition to running a significant and complex commercial enterprise), there is no scenario in which the Proofs of Claim filed in respect of contingent, uncertified class actions could be adjudicated to judgment on their merits before a Creditors' Meeting, and before the company's anticipated exit from these CCAA and Chapter 15 Proceedings as a going concern, without jeopardizing the entire restructuring which rests on the financial support of its funded debtholders.

23. Consistent with other Meeting Orders granted by this Court which provided that unliquidated, unresolved, contingent claims be valued for voting at $1.00, the Just Energy Entities do not intend to propose a plan of arrangement or Meeting Order that would provide the proposed representative plaintiffs in an uncertified class action with an effective veto or unwarranted leverage over its going concern restructuring. It cannot be the case that a contingent unsecured

creditor can hold the company, and all other creditors with ascertainable, proven claims, for ransom, and claim to have a veto over a CCAA plan of arrangement simply but putting a vastly inflated and unsupported number in a Proof of Claim form.

24. In summary, it would be an unnecessary and inappropriate use of the company's resources to litigate the motion for advice and directions in a vacuum of a Restructuring Plan that is currently being developed, and then litigate the Meeting Order. The CCAA has built in mechanisms for all stakeholders to participate in its restructuring initiatives, including in Court at the hearing for the Meeting Order and then the Sanction Order.

25. The Just Energy Entities respectfully request that this Honourable Court accept the guidance of the Monitor as its independent court officer by permitting the Just Energy Entities to continue to negotiate a Restructuring Plan with the funded debt participants and other significant secured creditors in its capital structure with proven claims, and restrict the February 9th court hearing to: (i) seeking a short extension of the stay of proceedings from February 17, 2022 to March 4, 2022 and, if necessary, (ii) a hearing or case conference on the appropriate procedure to litigate the claims of the proposed representative plaintiffs.

OHH

Osler, Hoskin & Harcourt LLP

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JUST ENERGY GROUP INC. *et al.*

Court File No. CV-21-00658423-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT
TORONTO

COMPENDIUM OF THE APPLICANTS AND THE DIP LENDERS MOTION AND CROSS-MOTION FOR ADVICE AND DIRECTIONS RETURNABLE FEBRUARY 9, 2022

CASSELS BROCK & BLACKWELL LLP
2100 Scotia Plaza
40 King Street West
Toronto, ON M5H 3C2

Alan Merskey LSO #: 413771
Tel: 416.860.2948
amerskey@cassels.com

John M. Picone LSO #: 58406N
Tel: 416.640.6041
jpicone@cassels.com

Christopher Selby LSO #: 65702T
Tel: 416.860.5223
cselby@cassels.com

Lawyers for the DIP Lenders