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 ("**Just Energy**") Chief Financial Officer since September 2020. In that role, I am responsible for all financial-related aspects of the business of Just Energy and its subsidiaries in these 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, including the business and financial affairs of the Just Energy Entities. 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.

2. This affidavit should be read in conjunction with my affidavit sworn on May 12, 2022 (the "**Meeting Order Affidavit**") in support of the Applicants' motion for the Authorization Order and Meetings Order (the "**Meeting Order Motion**") and is sworn in response to (i) a motion brought by Wittels McInturff Palikovic, Finkelstein Blankinship, Frei-Pearson, Garber LLP, and Shub Law Firm LLP (collectively, "**US Plaintiffs' Counsel**"), in their capacity as counsel to the proposed representative plaintiffs in *Donin v. Just Energy Group Inc. et al.*, Case No. 1:17-cv-05787-WFK-SJB (the "**Donin Action**") and *Trevor Jordet v. Just Energy Solutions Inc.*, Case No. 2:18-cv-01496-MMB (the "**Jordet Action**", together with the Donin Action the "**Putative US Class Actions**") and (ii) the responding motion record delivered by Haidar Omarali, in his capacity as representative plaintiff in *Haidar Omarali v. Just Energy Group et al*, Court File No. CV-15-52748300CP (the "**Omarali Motion Record**").

3. Capitalized terms used in this affidavit but not defined have the meaning given to them in the Meeting Order Affidavit.

Extension of Milestones and Waiver of DIP Budget Line Item Variance

4. As discussed in the Meeting Order Affidavit, the Support Agreement establishes various Milestones for the remainder of the CCAA and Chapter 15 proceedings, including that the

Authorization Order and the Meetings Order must be granted by May 26, 2022, and that the Solicitation Materials with respect to the Creditors' Meetings must be mailed by June 1, 2022. The milestones under the DIP Term Sheet were amended to align with the Milestones under the Support Agreement.

5. In light of the adjournment of the Applicants' motion for the Authorization Order and Meetings Order to June 7, 2022, the Just Energy Entities, the Plan Sponsor and the Supporting Secured CF Lenders agreed to extend the Milestones under the Support Agreement for the granting of the Authorization Order and the Meetings Order to June 7, 2022, and for the mailing of the Solicitation Materials with respect to the Creditors' Meetings to June 13, 2022. The DIP Lenders agreed to a corresponding extension of these milestone dates under the DIP Term Sheet. Both the Plan Sponsor/DIP Lenders and the Supporting Secured CF Lenders advised the Applicants that they consented to such extensions on the basis that none of the other Milestones were extended as it was critical that the timeline leading to emergence from these CCAA and Chapter 15 proceedings be preserved given market conditions and risk.

6. On May 26, 2022, the Applicants requested a waiver of the Energy and Delivery Costs line item variance for the DIP Budget dated May 5th, in order to permit the Applicants to post additional collateral with ERCOT. In response to Texas market fluctuations and above normal temperatures in Texas, among other things, ERCOT has significantly increased the Applicants' short-term collateral-posting requirements through the latter-half of May. Failure to post such collateral would risk the Applicants being shut out from participation in the day ahead energy markets, which participation is often critical to permit the Applicants to balance their customers' energy demands. On May 27, 2022, the DIP Lender approved the waiver and allowed the Applicants to amend the DIP Budget.

Adjudication of Putative US Class Actions Before Justice O'Connor

7. On March 3, 2022, the CCAA Court granted an Order on consent which, among other things, appointed the Honourable Justice Dennis O'Connor as Claims Officer for purposes of adjudicating the Claims submitted by Plaintiffs' Counsel in respect of the Putative US Class Actions in accordance with the Claims Procedure Order.

8. The following is a chronology of the proceedings before the Claims Officer in connection with the adjudication of the Putative US Class Actions:

Proceedings Before the Claims Officer	Date
A. Initial Case Conference	
Initial Case Conference held to consider, among other things, scheduling and procedural issues. A copy of the minutes of the Case Conference prepared by the Monitor is attached as Exhibit "A".	March 16, 2022
B. Plaintiffs' Request for the Appointment of Additional Claims Officers	
Plaintiffs' Counsel makes written submissions in support of appointing two additional Claims Officers in the adjudication of the Putative US Class Actions, a copy of which is attached as Exhibit "B".	March 23, 2022
Defendants' counsel makes written submissions in opposition to Plaintiffs' request for the appointment of additional Claims Officers, a copy of which is attached as Exhibit "C".	March 30, 2022
Plaintiffs' Counsel makes reply submissions, a copy of which is attached as Exhibit "D".	April 1, 2022
Hearing held to consider the parties' submissions and address scheduling issues. A copy of the minutes prepared by the Monitor is attached as Exhibit "E".	April 4, 2022
Decision rendered dismissing Plaintiffs' Counsel's request to appoint additional Claims Officers. A copy of the decision is attached as Exhibit "F".	April 5, 2022

Proceedings Before the Claims Officer	Date
Justice O'Connor held that: (i) it was premature to appoint additional Claims Officers before determining what disputes there are about the applicable US procedural and substantive law; (ii) the Claimants failed to establish that alternatives to appointing US adjudicators – including expert evidence regarding US law – would not be more effective and efficient; and (iii) he agreed with the concerns set out in Justice McEwen's ruling in the CCAA Proceedings dismissing a similar request by Plaintiffs' Counsel.	
C. Sequencing of Scope and Discovery	
Plaintiffs' Counsel makes written submissions in support of, among other things, resolving disputes regarding discovery requests before considering the scope of the remaining claims. A copy of these submissions is attached as Exhibit "G".	March 30, 2022
Defendants' counsel makes written submissions in support of deciding the scope of the Plaintiffs' remaining claims, prior to resolving disputes regarding discovery requests. A copy of these submissions is attached as Exhibit "H".	April 13, 2022
Plaintiffs' Counsel makes reply submissions, a copy of which is attached as Exhibit "I".	April 14, 2022
Hearing held to consider the parties' submissions and agree upon a schedule. A copy of the minutes prepared by the Monitor is attached as Exhibit "J".	April 14, 2022
D. Motion to Compel Discovery	
Plaintiffs' Counsel submits motion to compel the Just Energy Entities to produce certain documents. A copy of the submissions is attached as Exhibit "K".	April 29, 2022
Defendants' counsel makes written submissions in opposition to the motion to compel, a copy of which is attached as Exhibit "L".	May 10, 2022
Plaintiffs' Counsel makes reply submissions, a copy of which is attached as Exhibit "M".	May 17, 2022
Hearing held to consider the parties' submissions.	May 19, 2022
Plaintiffs' Counsel submits memorandum with respect to, among other things, the Claims Officer's procedural	May 20, 2022

Proceedings Before the Claims Officer	Date
authority. A copy of the memorandum is attached as Exhibit "N".	
Defendants' counsel submits letter in response to Plaintiffs' Counsel memorandum, a copy of which is attached as Exhibit "O".	May 20, 2022
Defendants' counsel submits letter outlining certain Canadian case law as requested by the Claims Officer. A copy of the letter is attached as Exhibit "P".	May 20, 2022
Plaintiffs' Counsel submits memorandum in response to Just Energy Entities' counsel letter, a copy of which is attached as Exhibit "Q".	May 20, 2022
Decision rendered, dismissing substantially all of the Plaintiffs' motion to compel. A copy of the decision is attached as Exhibit "R". Justice O'Connor held (among other things) that: (i) he had broad discretion with respect to the procedure in this claims process, with the objective being to "conduct a timely summary process that is fair and expeditious" including "by avoiding re-litigating issues that could cause delay, expense and potentially inconsistent results." (ii) discovery had already been closed by Judge Kuntz of the New York Court in the Donin case and that he should give effect to Judge Kuntz's order; (iii) the scope of the Donin Action was limited to New York State customers only, in light of Judge Kuntz's decision to dismiss the claims against John Does 1-100; (iv) the class period in the Jordet Action starts in 2014, given Judge Skretny's ruling in the New York Court that class claims prior to April 6, 2014 are time barred; (v) the class in Jordet is limited to residential customers because the Complaint explicitly limits the class to residential customers; and (vi) production of documents in the Jordet Action is limited to the states where Just Energy Solutions Inc. contracted with customers for the sale of natural gas.	May 24, 2022

Omarali Action

9. The Omarali Motion Record consists of the affidavit of Vlad Andrei Calina affirmed May 26, 2022 (the "**Calina Affidavit**"), delivered in response to the Meeting Order Motion. Mr. Omarali has not brought a cross-motion seeking any particularized relief.

10. To ensure the record with respect to the Omarali Action is substantially complete for the purposes of arguments that may be advanced at the Meeting Order Motion, attached hereto is the following:

(a) Exhibit "S": Just Energy's responding motion record filed in response to the representative plaintiff's motion for summary judgment heard in June 2019 (the "**Summary Judgment Motion**")[1];

(b) Exhibit "T": Just Energy's supplementary responding motion record filed in response to the Summary Judgment Motion[2]; and

(c) Exhibits "U": Just Energy's factum in respect of the Summary Judgment Motion.

11. The Summary Judgment Motion was dismissed in June 2019 by the Honourable Justice Belobaba on the basis that a full trial was necessary for all 13 common issues.

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[1] Just Energy's Responding Motion Record consists of the following affidavits: (i) Affidavit of Richard Teixera sworn January 11, 2019 (the "**Teixera Affidavit**"); (ii) Affidavit of Brian Marsellus sworn January 11, 2019 (the "**Marsellus Affidavit**"); and (iii) Affidavit of Daniel Gadoua sworn January 11, 2019 (the "**Gadoua Affidavit**"). For the purpose of this motion, I have not attached any of the exhibits to the Teixera Affidavit, Marsellus Affidavit or Gadoua Affidavit.

[2] Just Energy's Supplementary Responding Motion Record consists of two cross-examination transcipts, and the Affidavit of Jody Kelly sworn January 25, 2016. For the purpose of this motion, I have only attached the Kelly Affidavit at Exhibit "T".

12. The Calina Affidavit notes that the Omarali Action had been scheduled for a 20-day trial starting on November 15, 2021. That is correct. However, I am advised by Jonah Davids, Executive Vice President and General Counsel of Just Energy, and believe that, notwithstanding that trial dates had been scheduled, several important litigation steps had not been completed as at the time the Omarali Action was stayed as a result of the Initial Order. For example, I am advised by Mr. Davids and believe that the examination for discovery of the representative plaintiff had not been scheduled let alone completed, the examination for discovery of other potential class members had not been scheduled, undertakings had only been completed in respect of the Just Energy representative, and expert reports had not been exchanged. In addition, the parties had not attended a pre-trial hearing.

13. As part of the claims process in this proceeding, the representative plaintiff has submitted proof of claims forms against both the Just Energy Entities (the "**Omarali Claim**") and their directors (the "**D&O Claim**"). Just Energy's Notices of Revision or Disallowance, delivered in response to the representative plaintiff's proof of claims forms, are attached as Exhibits "K" and "L" to the Meeting Order Affidavit. The Notice of Revision or Disallowance delivered in response to the Omarali Claim summarizes the basis for the denial of the representative plaintiffs' claims, and states the following:

(a) *Class Members are Not Employees:* The Class Members are in both form and substance independent contractors and not employees. The Class Members had a significant degree of control in the performance of their work, including by setting their own days of work, hours of work, time off work, work location, and sales methods.

(b) *Class Members Fall within "Salesperson" Exemption:* In the alternative, even if the Class Members are "employees" pursuant to the ESA, they fall within the "salesperson" exemption in section (2)(h) of Ontario Regulation 285/01 and are therefore ineligible for minimum wage, overtime, public holiday pay and vacation pay.

(c) *Class Members are Not Route Salespersons:* The Class Members' sales function was integral, rather than ancillary to their function which was directed toward non-established customers and undertaken by the Class Members on their own scheduled in the location(s) of their choice.

(d) *Parts of Claim are Barred by Operation of the Limitations Act:* The Class Action was commenced on May 4, 2015. All claims for amounts to be paid prior to May 4, 2013 are precluded by the two-year limitation period prescribed in the *Limitations Act*, 2002.

14. The Notice of Revision or Disallowance delivered in response to the D&O Claim summarizes the basis for the denial of the representative plaintiffs' claims against the directors, and states the following:

(a) *D&O Claim is Entirely Contingent on Omarali Claim*: The D&O Claim is not independent, but rather entirely contingent on the success of the Omarali Claim.

(b) *D&O Claim is Untimely and Statute Barred:* The D&O Claim was filed over six years after the Omarali Action was filed and does not assert any "new knowledge" relating to the facts giving rise to the Omarali Claim that was not otherwise known

to the representative plaintiff at the time the Omarali Action was commenced. Further, the delay in advancing a claim against the directors has caused material prejudice to the Just Energy Entities and the directors.

(c) *D&O Claim Constitutes an Improper Attempt to Expand the Class Action:* The Omarali Action was certified as against only certain specified Just Energy Entities and only in relation to the specified common issues and the damages sought in the class action. The representative plaintiff cannot now, six years later, seek to add the directors as defendants to the Omarali Action and seek to recover a "wages" claim as opposed to a "damages" claim.

(d) *D&O Claim is an Abuse of Process and Brought in Bad Faith:* The D&O Claim is a tactical attempt to obtain more favourable treatment of a pre-filing claim to the detriment of other creditors and the estate,

(e) *Directors are Not Liable for the Amounts Claimed:* The amounts claimed in the Omarali Action are not for unpaid "wages" pursuant to the ESA or "debts for services performed" pursuant to the CBCA and OBCA for which directors can be per se personally liable in certain circumstances by virtue of holding office at the relevant time. Rather, the Omarali Action seeks damages resulting from alleged misclassification.

15. Further, even if the plaintiffs in the Omarali Action were successful in establishing liability in respect of any common issue, individualized hearings in respect of each individual class member would be required to establish the quantum, if any, of alleged damages. For example, individualized evidence regarding hours of work in each week would be required in respect of

claims for overtime and/or minimum wage claims and individualized evidence regarding specific work days would be required in respect of claims for public holiday pay.

SWORN BEFORE ME over video teleconference this 29th day of May, 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.

Tiffany Sun

Commissioner for Taking Affidavits
Tiffany Sun

Michael Carter

Miao Sun, a Commissioner, etc., Province of Ontario, while a Student-at-Law. Expires March 6, 2023.

THIS IS **EXHIBIT "A"** REFERRED TO IN THE AFFIDAVIT OF MICHAEL CARTER SWORN BEFORE ME over video teleconference this 29th day of May, 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.

Tiffany Sun

A Commissioner for taking Affidavits, etc.

Miao Sun, a Commissioner, etc., Province of Ontario, while a Student-at-Law. Expires March 6, 2023.

Minutes from the Dennis O'Connor Case Conference
March 16, 2022

IN ATTENDANCE:

Party	Firm	Individuals present
Just Energy Group Inc. et. al.	N/A	Jonah Davids
Canadian counsel to Just Energy Group Inc. et. al.	Osler, Hoskin & Harcourt LLP	Marc Wasserman, John MacDonald, Jeremy Dacks, Karin Sachar
U.S. Counsel to Just Energy Group Inc. et. al.	Cyrulnik Fattaruso LLP	Jason Cyrulnik, Evelyn Fruchter and Mary Kate George
Canadian Counsel to U.S. Counsel for proposed representative plaintiffs	Paliare Roland Rosenberg Rothstein LLP	Ken Rosenberg
U.S. Counsel for proposed representative plaintiffs Fira Donin and Inna Golovan (Donin matter) and representing interests of Jordet plaintiffs (Jordet matter)	Wittels McInturff Palikovic LLP	Steven Wittels Susan Russell
Canadian counsel to DIP Lender	Cassels Brock & Blackwell LLP	Alan Merskey
U.S. Counsel to DIP Lender	Akin Gump Strauss Hauer & Feld LLP	Laura Warrick
Monitor, FTI Consulting Canada Inc.	FTI Consulting Canada Inc.	Paul Bishop, Jim Robinson
Counsel to Monitor	Thornton Grout Finnigan LLP	Rebecca Kennedy, Rachel Nicholson

DISCUSSION:

Agenda

This case conference followed the agenda:

1. CCAA Status/February 9th Motion
2. Case Issues and Introduction
3. Plaintiffs' request for appointment of two additional U.S. based JAMS Claims Officers to be selected by the parties
4. Plaintiffs' request to adopt JAMS expedited Arbitration procedures
5. Scheduling Issues
6. Expected Role of the Monitor
7. DIP Lender's request for participation as observer

1. CCAA Status/February 9th Motion

Ms. Sachar provided an overview of Just Energy's operations and background leading to the filing of the CCAA proceedings. Ms. Sachar provided an overview of the Claims Procedure Order granted by Justice McEwen on September 15, 2021 and advised that the plaintiffs filed unsecured claims, totaling US$3.6 billion. Ms. Sachar advised that Just Energy's management is fully occupied with negotiating a going concern restructuring transaction for the benefit of its stakeholders, which has immense time pressure, along with the company's day to day operations and facilitating the claims process.

Ms. Sachar provided an overview of the Plaintiffs' motion for advice and directions before Justice McEwen, in which they requested various relief that was denied by Justice McEwen. Plaintiffs' counsel has filed a Notice of Leave to Appeal that decision to the Ontario Court of Appeal.

Mr. Rosenberg then introduced his clients' cases and advised that these are seminal claims in the claims process and that Justice McEwen made a fundamental error of law in not properly having regard to what "meaningful participation" is for a multi-billion dollar claim that includes over a million customers. Mr. Rosenberg also mentioned that, if needed, there is a process to have the claim estimated for voting purposes.

2. Case Issues and Introduction

Mr. Wittels provided additional background on the history of the Donin and Jordet cases and stated *inter alia* that the two New York federal courts denied Just Energy's separate motions to dismiss the cases and allowed Plaintiffs' central claims to proceed against the company in eleven U.S. states where Defendants did business for breach of contract in failing to charge customers rates based on business and market conditions, and at a specified rate, as well as for breaching their duty of good faith and fair dealing, and further described how Just Energy's conduct ensued from the deregulation of the US energy market. US Counsel for Jordet matter was not present, however, Mr. Wittels was authorized to represent the interests of plaintiffs in the Jordet matter.

Mr. Cyrulnik then advised that he wished to make a few corrections to the description of the case provided by Mr. Wittels and detailed that the US courts have dismissed various causes of action pled and defendants and that the only remaining causes of action relate to the alleged breach of contract. Further, the causes of action are limited in jurisdiction and the Jordet action is limited to natural gas customers.

3. Plaintiffs' request for appointment of two additional U.S. based JAMS Claims Officers to be selected by the parties

The Plaintiffs request the appointment of two additional U.S.-based Claims Officers to assist Justice O'Connor in the resolution of this dispute, one to be selected by Just Energy and one to be selected by the Plaintiffs. The Plaintiffs' position is that it would be helpful to have parties familiar with US practice and law to assist Justice O'Connor, given that US law is applicable.

Ms. Sachar advised that Just Energy objects to this request and does not agree that it is necessary. Mr. Cyrulnik stated that Justice O'Connor is well suited to determine the issues as it is a breach of contract case and that the parties would provide him with any US legal expertise needed to resolve

the claim. The appointment of additional arbitrators would lead to additional costs for the estate. Mr. Wittels noted that the additional costs to the estate would not be a material impact.

The issue of Justice O'Connor's jurisdiction to appoint additional Claims Officers was also raised at the case conference but the parties have subsequently confirmed that: (i) Just Energy will not be raising jurisdiction as a basis of its opposition to the appointment of additional Claims Officers; and (ii) if Justice O'Connor determines, after consideration of the parties' submissions, that he wishes to appoint additional Claims Officers but for any potential issues of his jurisdiction, then the parties will seek an Order on consent from Justice McEwen to give effect to such additional appointments.

4. Plaintiffs' request to adopt JAMS expedited Arbitration procedures

Mr. Rosenberg advised that the expedited process under JAMS is approximately 3-4 months, and could be expedited further. Mr. Cyrulnik advised that is only available on consent of the parties. Mr. Wittels also advised that, in other cases that have been brought against energy companies, those cases are often mediated, and the Claims Officer has the jurisdiction under the Claims Procedure Order to mediate any dispute at its election. Mr. Cyrulnik stated that the company was not opposed to mediating the dispute. Mr. Cyrulnik noted that the JAMS expedited procedures are not appropriate in a putative class action. Mr. Cyrulnik noted that in the Donin matter, discovery lasted more than a year and Plaintiffs' counsel sought additional time and discovery, which was denied. Mr. Wittels countered that discovery is not closed.

It was ultimately determined that this issue will be addressed, if necessary, in the future after the two issues (discussed below) are resolved.

5. Scope of Claims

Although not in the draft agenda, Mr. Cyrulnik brought up the scope of the claims as a potentially gating issue for the proceeding, since the scope of the claims could impact both the timetable of the claims resolution process and the scope of the discovery. Mr. Cyrulnik advised that the scope of the claims was significantly narrowed by the US courts, in both law and geography of the claims. Mr. Wittels disagreed with that position. Mr. Wittels is of the view that discovery should take place prior to the scope of the claims being determined. Mr. Cyrulnik is of the view that the scope of the claims to be pled should be determined prior to discovery and also advised that the discovery in the Donin case is now closed by court order. Mr. Wittels disagreed with that position and advised that discovery in the CCAA adjudication proceeding could be tailored to data discovery.

Mr. Cyrulnik also suggested that the summary judgment arguments could be heard prior to class certification given that, if the claims fail, then certification will not need to be addressed. Mr. Wittels also disagreed with this suggestion and stated that this is not how class cases proceed in the U.S.

6. Scheduling Issues

The two issues arising from the case conference, to be determined, are (i) whether Justice O'Connor should appoint two additional arbitrators (the parties will not be raising the jurisdiction

of the Claims Officer to do so in their submissions); and (ii) whether the scope of the claims should be determined prior to discovery, or after.

The parties agreed to the following schedule to resolve the above two issues:

Issue 1: Appointment of additional adjudicators

Date	**Step**
March 23, 2022	Plaintiffs' Counsel written submissions on appointment of additional adjudicators (maximum 3 pages)
March 30, 2022	Just Energy's counsel written response to submissions for appointment of additional adjudicators (maximum 3 pages)
April 1, 2022	Plaintiffs' counsel written reply, if any
April 4, 2022 (10:00 am)	Oral submissions before Justice O'Connor

Issue 2: Whether scope of claims to be determined prior to discovery

Date	**Step**
March 30, 2022	Plaintiffs' Counsel written submissions regarding discovery to take place prior to scope of claims determined (approximately 5 pages, maximum 10 pages)
April 13, 2022	Just Energy's counsel written response to submissions for discovery prior to scope determined (approximately 5 pages, maximum 10 pages)
April 19, 2022	Plaintiffs' counsel written reply, if any
April 25, 2022 (10:00 am)	Oral submissions before Justice O'Connor

Justice O'Connor noted that the parties could agree to forgo oral submissions if they were content to have him decide the issues on the papers.

7. Expected Role of the Monitor

Ms. Kennedy advised that the Monitor is here to support Justice O'Connor in his role and assist as needed, and will report to the Court.

8. DIP Lender's request for participation as observer

Mr. Merskey advised that the DIP Lender is looking to observe the proceeding and receive all information and notices. The DIP Lender is not looking to make submissions. However, if an issue arises in which they wish to make submissions (for example, related to estimation of the claim for voting purposes), then they will provide notice to the parties.

Justice O'Connor advised that he would make an order that the DIP Lender is entitled to attend as an observer and that advance notice will be given to the DIP Lender regarding any request to make an order estimating damages for voting purposes. On this issue, Ms. Kennedy advised that the Monitor may wish to take a position on any aspect of the dispute to the extent it relates to the CCAA proceedings (including for example, any position taken in respect of estimating the claim for voting purposes). Justice O'Connor advised that, if this issue arises, then he will address the participation of both the Monitor and the DIP Lender, as needed.

THIS IS **EXHIBIT "B"** REFERRED TO IN THE AFFIDAVIT OF MICHAEL CARTER SWORN BEFORE ME over video teleconference this 29th day of May, 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.

Tiffany Sun

A Commissioner for taking Affidavits, etc.

Miao Sun, a Commissioner, etc., Province of Ontario, while a Student-at-Law. Expires March 6, 2023.

Wittels McInturff Palikovic

March 23, 2022

Via Email
Hon. Dennis O'Connor
Claims Officer
Just Energy CCPA Proceeding
DOConnor@blg.com

Re: U.S. Class Counsel's Submission in Support of Appointing Two Additional JAMS U.S. Neutrals in the Adjudication of U.S. Class Action Claims

Dear Justice O'Connor:

A. Summary and Basis of this Request

Pursuant to your direction at the initial March 16, 2022 case conference, we write on behalf of U.S. Class Action Claimants Donin and Jordet[1] in the CCAA proceedings[2] to request that you promptly appoint two additional Claims Officers from the U.S.-based Judicial Arbitration and Mediation Services (JAMS) to assist in the adjudication of the damages claims suffered by millions of U.S. Just Energy customers who were overcharged an estimated USD $3.66 billion in eleven states. Now that Just Energy has petitioned Justice McEwan yet again to delay disclosure of its reorganization plan, we submit that appointment of these two additional Claims Officers will immeasurably assist Your Honor in fast tracking adjudication of these claims and ensure that both (i) the proposed Class Claimants' due process rights are protected, and (ii) Class Claimants gain constructive participation in the reorganization process, including the opportunity to have meaningful voting rights.

For the reasons set forth below, we submit that the appointment of two JAMS Claims Officers who are well-versed in JAMS U.S. Expedited Procedures, U.S. consumer class action jurisprudence, and U.S. energy supply contract law—one chosen by Plaintiffs and the other by Just Energy—will facilitate a more expeditious, efficient, and effective adjudication process for all interested parties rather than burdening Your Honor alone with the task of negotiating U.S. class action procedure and law, and resolving the parties' numerous sharp disputes on how the claims adjudication should proceed.

(continued overleaf)

[1] Claim Reference Nos. PC-11177-1 (Donin/Golovan) and PC-11175-1 (Jordet).

[2] *Donin, et al.*, *v. Just Energy Group Inc., et al.*, Case No. 17 Civ. 5787 (WFK) (SJB) (E.D.N.Y.) represented by Wittels McInturff Palikovic; and *Jordet v. Just Energy Solutions, Inc.*, Case No. 18 Civ. 953 (WMS) (W.D.N.Y.) represented by Finkelstein, Blankinship, Frei-Pearson & Garber, and the Shub Law Firm.

B. There is No Dispute that Justice O'Connor Has the Authority to Appoint Two Additional Claims Officers

Although during the March 16 conference Just Energy's counsel initially questioned Your Honor's jurisdiction to appoint additional Claims Officers under the Claims Procedure Order, that contention is now moot. As explicitly set forth in the Minutes of the conference circulated to you and all interested parties yesterday, March 22, by the Monitor's counsel, the parties subsequently confirmed that: (i) Just Energy will not be raising jurisdiction as a basis for its opposition to the appointment of additional Claims Officers; and (ii) were you to appoint two additional Claims Officers, the parties will then seek an Order on consent from Justice McEwen to give effect to such additional appointments.

C. Brief Overview of the Class Actions

As introduced at the March 16 conference, the U.S. *Donin* and *Jordet* Class Plaintiffs have each substantially defeated Just Energy's attempts in federal courts in the Eastern and Western Districts of New York to dismiss their claims; the company now faces breach of contract and the duty of good faith and fair dealing claims across eleven American states encompassing an estimated 2 million U.S. customers. In short, these millions of U.S. customers allege they have been grossly overcharged for electricity and natural gas as compared to what they would have paid had the company met its obligation to charge rates consistent with business and market conditions, and under the rate terms set forth in its consumer contracts.

Class Counsel has submitted detailed and compelling evidence in its Claims and Rebuttal to the company's denial of the Claims—including a preliminary expert report of its energy expert economist Serhan Ogur, PhD—which make a prima facie showing that Just Energy owes its current and former U.S. customers more than USD $3 billion in overcharge damages. The impediments to further progress of these two class actions have been the Covid-19 pandemic and the company's two Canadian bankruptcies. What is noteworthy and what was not discussed at the initial March 16 conference is that Just Energy has a long-standing and sullied track record of overcharging its U.S. customers. Regulators have deemed these overcharges illegal and have imposed fines in at least six states for the same type of overcharges alleged in our cases. In a broader context, this is just one of the many energy cases brought by Class Counsel's firms against companies like Just Energy which have exploited deregulation to price gouge customers, and which conduct regulators have now curtailed by banning variable energy rate practices in New York and other states.

D. Two Additional Claims Officers Experienced in U.S. Class Action Law Will Greatly Assist the Adjudication of the U.S. Claims

The Claims Procedure Order permits the Claims Officer to determine all procedural matters that may arise in respect to his determination of a disputed claim, including the manner in which evidence may be adduced.[3] As we propose, the tripartite panel of two U.S. arbitrators and Your

[3] *See* ¶ 44, Claims Procedure Order, entered September 15, 2021. As discussed at the case conference, U.S. Class Counsel also recommends the use of JAMS U.S. Expedited Procedures because these procedures establish a time-sensitive process that addresses and protects the rights and interests of the parties and

Honor as the Chair Person will enable a comprehensive resolution of the Class Claimants' claims in an informed, expeditious and more efficient manner than were you to be tasked with conducting the proceedings alone. Indeed, the following six reasons provide ample bases for your decision to add two more panelists.

First, two additional U.S. neutrals familiar with the procedural and substantive intricacies of U.S. class action law will enable a more informed analysis of opposing parties' positions. For example, these neutrals can readily advise on the U.S. Federal Rules of Civil Procedure authorizing class actions, notably Rule 23, which sets forth the prerequisites for class actions, certification requirements, and settlement approval that ensures a fair and adequate compromise of claims. They will be familiar with the U.S. court's fiduciary role in effectuating a fair resolution on behalf of class members and understand the scope of pre-class certification discovery proceedings in U.S. class actions. Additionally, they will be familiar with JAMS U.S. Expedited Procedures, which U.S. Class Counsel recommends be employed to achieve a prompt and fair adjudication of the proposed class claims.

Second, it is of significant value to the process to have adjudicators familiar with substantive state laws in the eleven U.S. states that Plaintiffs represent in the two class actions, including state contract jurisprudence and statutes of limitations and specific tolling provisions.

Third, the U.S. neutrals will be selected for their familiarity with the fraught U.S. energy deregulation landscape (Plaintiffs intend to select an arbitrator who has already mediated a number of similar energy overcharge actions); the proliferation of Energy Supply Companies (ESCOs), like Just Energy; the disastrous impact on electricity and gas consumers in almost all U.S. states; the burgeoning body of U.S. caselaw that has grown up around it; and the intense state regulatory activity that has attempted to curb the abuses. U.S. neutrals would be knowledgeable of how U.S. class action lawsuits play a critical role in protecting U.S. consumers and curbing unlawful practices of unscrupulous ESCOs.

Fourth, adding two neutrals with deep knowledge of U.S. law will undoubtedly assist in expediting the adjudication process by dispersing the workload that will be involved in meaningfully considering Plaintiffs' claims and Just Energy's defenses, as well as the data that will be gathered and presented. U.S. Class Counsel submits that the value of the efficiencies gained by allocating the associated tasks among three Claims Officers in a manner you believe most efficient will outweigh any concerns of additional costs that Just Energy might raise (which costs in any event pale in contrast to the past and ongoing legal costs of the Company's and Monitor's counsel).

Fifth, any award that is arrived at will more likely be accepted by class members as fair, adequate and measured, as it will be the product of thorough vetting by three exceedingly qualified Claims Officers, with a deep knowledge and expertise in the matters before them.

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ensures that all questions about scope, jurisdiction, discovery or any other matter will be dealt with efficiently by the panel that will hear the case.

Sixth, prior Canadian bankruptcies have benefited from the appointment of tripartite/multiple claims officers, including in cases where Just Energy's counsel Osler appeared on both sides: consider for example Nortel and Lac Megantic (Quebec railway disaster).

* * *

Given the benefits that will accrue to all interested parties, U.S. Class Counsel submits that the appointment of two JAMS neutrals would be in the best interest of both sides.

Respectfully submitted,

/s/ Steven L. Wittels
Steven L. Wittels

cc: All counsel of interest in this Claims Adjudication process

THIS IS **EXHIBIT "C"** REFERRED TO IN THE AFFIDAVIT OF MICHAEL CARTER SWORN BEFORE ME over video teleconference this 29th day of May, 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.

Tiffany Sun

A Commissioner for taking Affidavits, etc.

Miao Sun, a Commissioner, etc., Province of Ontario, while a Student-at-Law. Expires March 6, 2023.

CYRULNIK FATTARUSO LLP

55 BROADWAY, THIRD FLOOR, NEW YORK, NY 10006

March 30, 2022

Via Email
Hon. Dennis O'Connor
Claims Officer
DOConnor@blg.com

Re: Appointment of Additional Claims Officers in *Donin v. Just Energy Group Inc. et al.* and *Jordet v. Just Energy Solutions, Inc*.

Dear Justice O'Connor:

I write on behalf of Just Energy Group Inc., Just Energy New York Corp., and Just Energy Solutions, Inc. (collectively "Just Energy"), Defendants in Plaintiffs' proposed class actions. For the reasons set out below, Just Energy opposes Plaintiffs' request for the appointment of additional Claims Officers at this stage of the proceeding.

Overview[1]

Plaintiffs initiated their proposed class actions against Just Energy in 2017 (*Donin*) and 2018 (*Jordet*), respectively, alleging collectively 12 causes of action. Nine of those claims were dismissed as a matter of law at the first opportunity, under the lenient pleading standard governing motions to dismiss, drawing all inferences in Plaintiffs' favor. None of Plaintiffs' claims concerning fraud, deceptive practices, or consumer protection survived. Plaintiffs' unsupported statement that they "substantially defeated" Just Energy's motions to dismiss is thus incorrect. In *Jordet*, one claim survived the pleadings stage—breach of contract and the covenant of good faith and fair dealing (a single claim under Pennsylvania law). In the *Donin* matter, all but two claims were dismissed—breach of contract and, in the alternative permitted at the pleading stage, breach of the covenant of good faith (two claims under New York law). And the *Donin* court dismissed all claims, including breach of contract and breach of the covenant of good faith and fair dealing, against all Just Energy entities other than Just Energy New York Corp. and Just Energy Group Inc. (dismissing from the case in its entirety all "John Doe" defendants, including Just Energy entities that operate outside New York). No class has been

[1] Although this submission was to address Plaintiffs' request to appoint two additional claims officers, Just Energy briefly corrects several misstatements from the background assertions Plaintiffs included in their submission.

certified in either case—the class certification stage has not yet been reached—and the scope of those classes is disputed.[2]

Plaintiffs further mischaracterize the history of these cases by blaming the company's "two Canadian bankruptcies" and the Covid-19 pandemic as "impediments" to Plaintiffs' progress. But Just Energy has not filed two bankruptcies—the first proceeding was a balance sheet restructuring under the *Canada Business Corporations Act*, which did not affect or impair Plaintiffs' claims. And Plaintiffs' effort to blame the pandemic is unpersuasive—briefing for the motions to dismiss in both cases was completed before the start of the pandemic, fact discovery in the *Donin* matter was complete before the start of the pandemic, and discovery in the *Jordet* matter was stayed pending resolution of the fully briefed motion to dismiss.

Turning to Plaintiffs' application to appoint two additional claims officers, Just Energy submits that the proposal is unnecessary and inefficient, and should therefore be denied.

Argument

First, Plaintiffs' proposal to triple the number of claims officers is unnecessary at this stage of the proceeding. Plaintiffs propose adding two claims officers familiar with U.S. class action law, substantive state law, or JAMS procedure,[3] who they argue will "enable a more informed analysis of opposing parties' positions" and be "of significant value to the process." (Pl. Letter at 3). Defendants submit that Your Honor is more than capable of applying the relevant contract law in this case, and determining for himself when, if ever, it will be necessary (or even helpful) for the parties to present experts in U.S. law to assist in that process. Introducing experts at the appropriate time, and only to the extent necessary, would more efficiently address any future need relative to preemptively appointing two additional decisionmakers. Plaintiffs' assertion that the additional claims officers will assist in "expediting the adjudication process by dispersing the workload" is dubious: it is just as likely that the addition of two decisionmakers will slow the proceeding. Just Energy notes that a request for the appointment of a three person arbitration panel to adjudicate these claims was denied by Justice McEwen.

Second, particularly in light of the absence of any obvious benefit to be derived from tripling the number of claims officers, the additional cost of appointing two additional adjudicators is unwarranted.

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[2] As discussed at the initial conference, the *Donin* plaintiffs appear to continue to seek to pursue claims in its case on behalf of Just Energy customers who contracted with subsidiaries other than Just Energy New York – that is, contractual counterparties that were already dismissed (as "John Doe" defendants) in the Court's decision on the motion to dismiss. Decision & Order at 7-8, *Donin v. Just Energy Group Inc.*, 17-cv-05787 (Sept. 24, 2021 E.D.N.Y.).

[3] Plaintiffs' appeal to familiarity with JAMS Expedited Procedures is also inapposite. As Defendants have explained, and as will be briefed in due course in accordance with the direction of the Claims Officer, those procedures are not even applicable here (where the parties have not consented to that track), and further are impractical here, where discovery is likely to involve time-consuming data extracts from legacy systems and archived data.

Third, Plaintiffs' remaining arguments are irrelevant and unpersuasive. Plaintiffs' conclusory statement that the appointment of additional adjudicators will "ensure" that "the proposed Class Claimants' due process rights are protected" is rhetoric—there is no evidence whatsoever that Plaintiffs are not being afforded due process. Similarly, the assertion that any award arrived at "will more likely be accepted as fair, adequate and measured" if it comes from three Claims Officers is speculative and the implication that a single Claims Officer cannot provide a fair or adequate adjudication is absurd. And Plaintiffs' note that prior bankruptcies have "benefited" from the appointment of multiple claims officers is irrelevant and not probative—many prior bankruptcies have similarly benefited from having a single highly qualified Claims Officer like we have here.

* * *

On these bases, Defendants respectfully request that Plaintiffs' request for the appointment of two additional Claims Officer be denied.

Respectfully submitted,

/s/ Jason Cyrulnik
Jason Cyrulnik

cc: Counsel of Record

THIS IS **EXHIBIT "D"** REFERRED TO IN THE AFFIDAVIT OF MICHAEL CARTER SWORN BEFORE ME over video teleconference this 29th day of May, 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.

Tiffany Sun

A Commissioner for taking Affidavits, etc.

Miao Sun, a Commissioner, etc., Province of Ontario, while a Student-at-Law. Expires March 6, 2023.

Wittels McIntturff Palikovic

April 1, 2022

Via Email
Hon. Dennis O'Connor
Claims Officer
Just Energy CCAA Proceeding
DOConnor@blg.com

Re: U.S. Class Counsel's Reply Submission in Support of Appointing Two Additional JAMS U.S. Neutrals

Dear Justice O'Connor:

As U.S. Class Action counsel for Claimants Donin and Jordet, we submit this Reply in advance of Monday's 10:00 a.m. hearing (April 4) on our request that you appoint two additional U.S.-based JAMS Claims Officers to assist in adjudicating Claimant's 11-state overcharge class action affecting more than a million U.S. customers. (We apologize for not having been able to serve this Reply earlier in the day).

The Benefits of Two Additional Claims Officers Outweighs Any Opposition to Their Appointment. The Just Energy Defendants' opposition ignores most of the reasons in our March 23 letter application favoring appointment of the two U.S. Claims Officers who can provide welcome guidance on U.S. law and class action proceedings to complement Your Honor's own expertise in CCAA and Canadian law. In short, Just Energy claims (i) you alone should decide all of the factual and legal issues, and call in "experts in U.S. law to assist" as necessary, (ii) that the additional cost of two arbitrators is unwarranted, and (iii) that one Claims Officer alone can ensure Claimants' due process rights.

What Just Energy doesn't speak to, however, is that at every stage of this CCAA proceeding the company has blocked our efforts to obtain the data and discovery we need to get to the factual and legal issues, so that our experts can refine their $2+ billion damages analysis. Instead the defense strategy has been to object to every proposal we've made to adjudicate our claims, and thus avoid resolution before the plan is voted on.

The separate ongoing dispute now before you about whether you should order the discovery Claimants request, or rather as Defendants urge, delve into what they label "scope," underscores the problem of your deciding foreign U.S. law issues alone. We maintain that Defendants' manufactured dispute is contrary to the broad parameters of allowable discovery in the U.S. and contrary to accepted practice under Rule 23 of the Federal Rules of Civil Procedure which governs class action practice (*see* Class Counsel FBFG's March 30 letter). Which is why Claimants believe the decision-making process will benefit greatly from the addition of two experienced US arbitrators well versed in this area of U.S. practice and procedure.

Indeed, perhaps the most compelling reason for you to "determine" that the most efficient way to proceed -- as authorized by Claims Procedure Order, no. 44 -- is with a tripartite panel led by Your Honor, is found in Claimants' detailed rebuttals to the company's denial of our notices of claim. These rebuttals, which at the risk of overburdening you with paper we are including with this submission, highlight the many areas of U.S. procedural and substantive law that the Arbitrator(s) must address before rendering a decision on the claims. That is, unless Just Energy were to compromise and allow the claims to proceed in a streamlined fashion by voluntarily agreeing to produce the usage and regional data to enable our experts to calculate more precisely how much the company overcharged its U.S. customers in violation of its promise to charge rates consistent with business and market conditions. Barring such compromise, however, the Claims Officer(s) must address and decide disputed procedural and substantive issues prior to trial including the following:

- Whether the New York federal Judge's decisions allowing the contract claims to go forward means, as Claimants contend, that Claimants can obtain discovery for all electric and gas customers in eleven states;
- Whether class certification should be granted to Claimants, consistent with the precedent of all five U.S. courts that have addressed the Rule 23 certification question, or whether as Defendants argue, our case somehow merits a different result;
- Whether the Arbitrator(s) should agree, as has been held by every U.S. court that considered the issue, that U.S. incumbent utility rates are an absolutely appropriate barometer by which to measure the rates of energy service companies like Just Energy; and
- Whether the Arbitrator(s) should agree, again consistent with all courts and U.S. regulators that have looked at the question, that it is appropriate to use wholesale prices and the actual costs of the energy service company to decide that Just Energy's variable rate was inconsistent with and significantly higher than wholesale costs.

These and the other disputes detailed in our rebuttal support a process that involves three Claims Officers who can efficiently manage and address these U.S-centered issues.

Just Energy's Ongoing Delay in Disclosing a Plan Means That with An Expedited Adjudication Process of Approximately Three (3) Months, U.S. Class Claimants' Voting Rights Can Be Protected. Your Honor should appreciate that Judge McEwen denied our motion to appoint a tripartite panel on an expedited basis because he viewed it as premature given the company's representation that a plan announcement in March was imminent with a rapid vote to follow. This urgency has now disappeared, as Just Energy recently obtained Judge McEwen's endorsement of a stay extension until April 22. There is currently no indication as to when a plan will be disclosed. Thus, it is clear there is ample time to have a rapid but robust decision-making process administered under the JAMS expedited arbitration rules.

Further, we ask that you give short shrift to the Company's claim that adding two claims officers is somehow an inadvisable cost. Rather, the fact that Just Energy has sought to fit to retain a team of outside counsel from the U.S. to defend itself against these very strong class claims, together with its already large team of Canadian lawyers, reaffirms that this is precisely the type of case that warrants the participation of U.S. decision makers. To be sure, the incremental cost

of the additional arbitrators is minimal compared to the more than $40M that the company has already spent in the CCAA on outside advisors and legal representation.

In summary, we believe that the prompt appointment of two additional arbitrators – one selected by each side – will expedite this process and assure a speedy result in a 3-month time frame. With the help of the two other U.S. panelists, there will be no need to address arguments by the parties that outside experts are needed on matters of class action procedure or law, and there will be no dispute about the qualifications or admissibility of outside experts' testimony. Instead, the experts will be on the panel itself and make these decisions in conjunction with yourself as the ultimate arbiter. We submit that this procedure makes the most sense.

Thank you for your consideration.

Respectfully submitted,

/s/ Steven L. Wittels
Steven L. Wittels

cc: All counsel of interest in this Claims Adjudication process

THIS IS **EXHIBIT "E"** REFERRED TO IN THE AFFIDAVIT OF MICHAEL CARTER SWORN BEFORE ME over video teleconference this 29th day of May, 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.

Tiffany Sun

A Commissioner for taking Affidavits, etc.

Miao Sun, a Commissioner, etc., Province of Ontario, while a Student-at-Law. Expires March 6, 2023.

Minutes from April 4, 2022 Hearing before Justice O'Connor

IN ATTENDANCE:

Party	Firm	Individuals present
Canadian counsel to Just Energy Group Inc. et. al.	Osler, Hoskin & Harcourt LLP	John MacDonald, Jeremy Dacks, Karin Sachar
U.S. Counsel to Just Energy Group Inc. et. al.	Cyrulnik Fattaruso LLP	Jason Cyrulnik, Evelyn Fruchter and Mary Kate George
U.S. Counsel for proposed representative plaintiffs Fira Donin and Inna Golovan	Wittels McInturff Palikovic LLP	Steven Wittels
U.S. Counsel for proposed representative plaintiffs Fira Donin and Inna Golovan	Shub Law Firm LLC	Jonathan Shub
U.S. Counsel for proposed representative plaintiff Jordet	Finkelstein, Blankinship, Frei-Pearson & Garber LLP	Greg Blankinship Joshua Cottle
Canadian counsel to DIP Lender	Cassels Brock & Blackwell LLP	Alan Merskey
U.S. Counsel to DIP Lender	Akin Gump Strauss Hauer & Feld LLP	Laura Warrick
Monitor, FTI Consulting Canada Inc.	FTI Consulting Canada Inc.	Jim Robinson
Counsel to Monitor	Thornton Grout Finnigan LLP	Rebecca Kennedy, Rachel Nicholson

DISCUSSION:

Agenda

This case conference followed the agenda:

1. Submissions by the Parties
2. Scheduling Issues

1. Submissions

The Plaintiffs submitted their request for the appointment of two additional U.S.-based Claims Officers to assist Justice O'Connor in the resolution of their claims, one to be selected by Just Energy and one to be selected by the Plaintiffs. The Plaintiffs' proceeded with their submissions on this issue.

Just Energy responded with its submissions objecting to the Plaintiffs' request and reasons why the appointment of additional Claims Officers is not necessary.

The Plaintiffs then provided a brief reply in response to Just Energy's submissions.

Justice O'Connor reserved his decision and anticipates releasing a brief ruling in a couple of days.

2. Scheduling Issues

Regarding the issue as to whether the scope of claims should be determined prior to discovery, the parties agreed to amend the schedule to the following:

Date	**Step**	**Comment**
March 30, 2022	Plaintiffs' Counsel written submissions regarding discovery to take place prior to scope of claims determined (approximately 5 pages, maximum 10 pages)	Complete
April 13, 2022	Just Energy's counsel written response to submissions for discovery prior to scope determined (approximately 5 pages, maximum 10 pages)	No change to prior schedule
April 14, 2022 in the a.m.	Plaintiffs' counsel written reply, if any	Previously April 19, 2022
April 14, 2022 (10:00 am)	Oral submissions before Justice O'Connor (unless parties elect to have issue determined in writing)	Previously April 25, 2022

THIS IS **EXHIBIT "F"** REFERRED TO IN THE AFFIDAVIT OF MICHAEL CARTER SWORN BEFORE ME over video teleconference this 29th day of May, 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.

Tiffany Sun

A Commissioner for taking Affidavits, etc.

Miao Sun, a Commissioner, etc., Province of Ontario, while a Student-at-Law. Expires March 6, 2023.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED, and WITH RESPECT TO JUST ENERGY GROUP INC. et al.
and IN THE MATTER OF THE CLAIMS OF FIRA DONIN AND TREVOR JORDET

RULING

1. The US Class Action Claimants (Donin and Jordet) request that I appoint two additional claims officers from the US-based Judicial Arbitration and Mediation Services ("JAMS") to adjudicate these claims. They propose that each party appoint one of the additional adjudicators and that I would be Chair of the panel.

2. The Claimants argue that the appointment of two US adjudicators, who would be well-versed in US energy supply contract law and class actions claim procedures in the USA, could facilitate a more expeditious, efficient and effective adjudication.

3. The Claimants raise a number of arguments in support of their request. They submit that the additional adjudicators would be familiar with the procedural and substantive law that applies to the US class actions and that their expertise would enable me to make a more informed analysis of the opposing positions. They also argue that the additional adjudicators would be familiar with the US energy deregulation landscape and will have previously been involved with issues similar to those in the present claims.

4. In addition, the Claimants submit that the addition of the two adjudicators would assist in expediting the claims process and that the additional costs would be minimal in the context of this CCAA proceeding.

5. Just Energy opposes this request. However, it does not do so on the basis that I lack jurisdiction to grant it. Just Energy argues that if accede to the request, the parties will seek an order from Justice McEwen to give effect to any such order.

6. In my view, the request is premature. The parties appear to disagree on the scope, complexity and the applicable jurisdictions applicable to the claims asserted in the US class actions. As a result of motions to dismiss the class actions, Judges Kuntz ("Donin claim") and Skretny ("Jordet claim") dismissed some of the claims asserted. The parties disagree about the scope and complexity of the remaining claims. Just Energy argues that the remaining claims are relatively straightforward claims for breach of contract and that the issues remaining to be determined pursuant to US law will be discrete and manageable without the need of the additional adjudicators.

7. On the other hand, the Claimants argue that Just Energy takes an unduly narrow view of what will have to be addressed and that when adjudicating these claims, I would benefit from an understanding of the US Federal Rules of Civil Procedure authorizing class actions (notably Rule 23), the court's fiduciary role in effecting a fair resolution on behalf of class members and the US law relating to the scope of pre-class certification discovery

proceedings. They also submit it will be necessary to understand the substantive state law in eleven different US states.

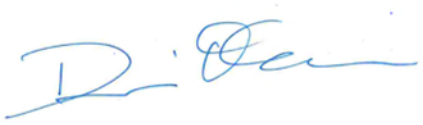
8. In my view, it would be premature to appoint two US adjudicators without first ascertaining what in fact the issues in these claims are and what disputes there are about the applicable US procedural and substantive law.

9. In addition, the Claimants have not satisfied me that alternatives to appointing US adjudicators would not be more effective and efficient. The most obvious alternative, it seems to me, is the use of expert evidence with respect to those areas of the US law about which the parties disagree. I will be in a better position to fashion a process to address US legal issues and to determine whether it will be best to appoint two US adjudicators when I have a better understanding of the US legal issues, if any, that are in dispute.

10. Finally I note that on February 22, 2022, Justice McEwen dismissed a similar request to the one now made by the Claimants. The Claimants have sought leave to appeal Justice McEwen's ruling. While Just Energy does not object to my jurisdiction to deal with the present request, I nonetheless agree with the concerns set out in Justice McEwen's ruling as the basis for his dismissal of the request at this stage of the CCAA process.

11. In the result, I dismiss the Claimants request to appoint additional adjudicators without prejudicing their right to renew the request at a later stage.

Dated at Toronto this 5th day of April 2022.



Dennis O'Connor

THIS IS **EXHIBIT "G"** REFERRED TO IN THE AFFIDAVIT OF MICHAEL CARTER SWORN BEFORE ME over video teleconference this 29th day of May, 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.

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March 30, 2022

Via Email

Hon. Dennis O'Connor
Claims Officer
Just Energy CCPA Proceeding
DOConnor@blg.com

Re: U.S. Class Counsel's Submission Regarding Scope And Information Needed For This Claim Adjudication

Dear Justice O'Connor:

As agreed during the March 16 case conference with Your Honor, Class Claimants respectfully write regarding the information we request that you direct Just Energy to provide prior to considering any scope of claims issue raised by Just Energy. We also write to address Just Energy's apparent position that this entire adjudication process should be phased by drastically limiting what information they are bound to produce, and instead focusing on the scope of the class, then summary judgment on the individual claims, then class certification, then Just Energy's summary judgment on Class Claimants' individual claims, and then a merits hearing.[1]

Just Energy's position is clearly a stratagem to delay resolving Class Claimants' claim for as long as possible. There is no reason that Just Energy should not promptly (i.e., within 30 days) produce the limited information Class Counsel seeks (as reflected in the attached letter to Just Energy, Exhibit 1). Once that is done, the parties and Your Honor can address at one time class certification and cross-summary judgments, to be promptly followed by a hearing on the merits resulting in the adjudication of Class Claimants' Claim. Just Energy has had a list of the type of information Class Counsel seeks since December, and there is no excuse for further delay.

Indeed, Class Claimants have been aggressively pushing for disclosures for months by Just Energy so that the parties and the factfinder can have a clear and accurate understanding of the number of aggrieved U.S. consumers and the scope of their damages. These are simple facts based on data which Just Energy could easily disclose to resolve most, if not all, of its concerns regarding the scope and size of the classes.

[1] During conferral, Just Energy's counsel contended that Your Honor agreed to decide the scope of the class issue before anything else. That is simply not true, as reflected in the minutes of the conference.

The contours of the proposed classes are straightforward. For *Jordet*, the class encompasses all Just Energy Solutions, Inc. customers who purchased natural gas on a variable rate during the following periods:

State	Relevant Time Period
California	April 2012 – Present
Illinois	April 2008 – Present
Maryland	April 2015 – Present
Michigan	April 2012 – Present
New Jersey	April 2012 – Present
New York	April 2012 – Present
Ohio	April 2012 – Present
Pennsylvania	April 2014 – Present

For *Donin*, the class encompasses all gas and electric customers of Just Energy Group Inc. or any of its subsidiaries, including but not limited to: Just Energy Group Inc., Just Energy Corp., 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 Pennsylvania Corp., Just Energy Michigan Corp., Just Energy Solutions Inc., Hudson Energy Services LLC, Hudson Energy Corp., Interactive Energy Group LLC, Just Energy Advanced Solutions LLC, Fulcrum Retail Energy LLC, Tara Energy, LLC, Just Energy Connecticut Corp. The class encompasses customers who purchased natural gas or electricity on a variable rate during the following periods:

State	Relevant Time Period
California	April 2012 – Present
Delaware	April 2015 – Present
Illinois	April 2008 – Present
Indiana	April 2008 – Present
Maryland	April 2015 – Present
Massachusetts	April 2012 – Present
Michigan	April 2012 – Present
New Jersey	April 2012 – Present
New York	April 2012 – Present
Ohio	April 2012 – Present
Pennsylvania	April 2014 – Present

As is done in every class action case involving retail gas and electric suppliers like Just Energy, the identification of the class and their usage is easily achieved by the defendant identifying all of the customers of the entities at issue and adding up their kWh or therms used while on a variable rate. Just Energy's contention that this is somehow a difficult task or that it should be delayed lacks support or merit.

A. Just Energy's Conduct Has Been Characterized By Delay And Obstruction

Just Energy's position that legal issues regarding the scope of the class must be decided before any information exchange occurs is the latest maneuver in its long campaign to delay and obstruct the rights of the Class Claimants to participate in the distribution of funds in this CCAA proceeding. Class Claimants have been seeking a speedy adjudication of their claims since they filed their proofs of claim on November 1, 2021. Class Counbel thereafter promptly initiated a conferral process in December 2021, seeking to participate in the negotiations regarding the restructuring plan as the largest unsecured creditor and seeking specific and limited information so that the claims could be adjudicated. To that end, on December 13, 2021 and again on January 28, 2022, Class Counsel provided Just Energy's counsel (and the Monitor) a general description of the type of information needed and invited their input.[2] Just Energy never responded to these requests. As a result, in preparation for the conferral process in which Your Honor ordered the parties to engage regarding information needed to address the scope issue, Class Counsel sent a more detailed list to Just Energy's counsel more than a week ago (on March 22).

But Just Energy refused to participate in any such discussion in good faith. To the contrary, during a conferral held today, Just Energy's U.S. counsel was unable and unwilling to confer in any meaningful fashion regarding what information is relevant to the scope issue. Instead this afternoon U.S. counsel in the two pending federal actions (Cyrulnik Fattaruso LLP) emailed Class Counsel that while they would "attempt to produce" by April 22 some limited number of contracts used for natural gas customers in six states in the *Jordet* matter. Just Energy is apparently refusing to produce any information in the *Donin* matter which encompasses both U.S. electricity and gas customers in 11 states. This despite the fact that Class Counsel have for months been requesting inter alia "(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, together with the company's [and] (ii) JE's costing methodology." Plaintiffs' experts need this data in order to refine their preliminary estimation that Just Energy overcharged its U.S. customers by more than $2.12 billion U.S. by virtue of the company's failure to charge customers in line with "business and market conditions" as set forth in its standard form contracts.

This transparent attempt to further delay the adjudication of the Class Claimants' claim should not be countenanced. Just Energy's views regarding the phasing of this adjudication process are nothing more than a furtherance of its attempts to delay adjudication of Class Claimants' claims as long as possible.

[2] Specifically, Plaintiffs requested: "(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."

B. The New York Courts Have Already Decided That All Discovery Should Be Conducted And Then Class Certification And Summary Judgment Motions Should Be Addressed.

Just Energy's view that legal issues regarding the scope of the class should be addressed before information is exchanged on the merits is not only contrary to U.S. law and procedure, it is precluded by the existing orders in the *Jordet* and *Donin* actions. In *Donin*, the court entered a scheduling order with two phases (attached here as Exhibit 2). First was pre-settlement discovery, where the parties exchanged limited information with an eye to an early mediation. The second phase was all fact and expert discovery, to be followed by dispositive motion practice (i.e., class certification and summary judgment). In *Jordet*, the court ordered that all fact and expert discovery occur at the same time, followed by plaintiff's motion for class certification (that order is attached here as Exhibit 3). Just Energy agreed in both instances that discovery and determination of the scope of the class should not be phased, but rather that all discovery should be conducted at the same time, and then the courts should decide class certification and summary judgment (if any) before proceeding to trial. That Just Energy has reversed course on this issue is indicative of its dilatory behavior.

C. Fact Exchanges Should Not Be Bifurcated As Between Class Scope And Merits.

The scheduling orders in *Donin* and *Jordet* are entirely consistent with U.S. procedure, where all fact and merits discovery is typically handled in one phase, to be followed by motions of class certification and summary judgments. There is no reason that Your Honor should deviate from that well settled procedure. *See, e.g., Bodner v. Paribas*, 202 F.R.D. 370, 374 (E.D.N.Y. 2000) (denying defendants motion to bifurcate because discovery on the merits was essential to determining whether class certification was appropriate and holding that "courts in this and other circuits have recognized that where discovery relating to class issues overlaps substantially with merits discovery, bifurcation will result in duplication of efforts and needless line-drawing disputes" (*citing* The Manual for Complex Litigation (Third) § 30.12 (1995)) ("Discovery relating to class issues may overlap substantially with merits discovery.")). Bifurcation of discovery is also typically rejected because it will likely lead to needless discovery disputes over whether particular discovery requests are relevant to class certification or the merits when, in actuality, the discovery requests are relevant to both. *See, e.g., Chen-Oster v. Goldman, Sachs & Co.*, 285 F.R.D. 294, 299-300 (S.D.N.Y. 2012) (recognizing that "class-related discovery . . . often overlaps substantially with the merits" and, therefore, "courts are reluctant to bifurcate class-related discovery from discovery on the merits").

Here, all of the limited information Class Claimants seek is germane to both class certification and the merits of the adjudication. For example, proving that all class members have the common issue that Just Energy set its rates in contravention of its uniform customer agreements implicates the contracts themselves and how Just Energy's rates compare to its costs and the rates its competitors (including the utility) charge other consumers. Likewise, class member usage data is relevant to showing that Just Energy does not follow its contract when setting variable rates and, the class damages, and that Plaintiff can prove liability and damages using common proof.

Just Energy has made no effort to articulate during any conferral process what information it considers to be merits and which related solely to the class, nor can it.

D. Just Energy's Scope Contentions Lack Factual And Legal Merit.

The basis of Just Energy's contention that this adjudication should be handled in numerous phases is predicated on the faulty assumption that it has meritorious arguments regarding the scope or certification of the class. Not so.

First, Just Energy has no basis to contend that the proposed class should not include all customers of Just Energy Solutions, Inc., Just Energy New York Corp., or Just Energy Group, Inc. and its subsidiaries.

The *Jordet* action pled a class of all Just Energy Solutions, Inc. customers who were charged a variable rate for residential natural gas services. *See* Class Action Complaint, No. 18-00953, ECF No. 1 (W.D.N.Y. Apr. 6, 2018). Currently, Just Energy Solutions, Inc. remains incorporated in California, Illinois, Maryland, Michigan, New Jersey, New York, Ohio, and Pennsylvania. As a result, the scope of the *Jordet* action encompasses all residential natural gas customers who received a variable rate supply from Just Energy Solutions, Inc. in these states.

The *Donin* action pled a class of all gas and electricity customers of Just Energy Group Inc. and Just Energy New York Corp. *See* First Amended Class Action Complaint, No. 17-5787, ECF No. 17 (E.D.N.Y. Apr. 27, 2018). As disclosed in the *Donin* action, Just Energy New York Corp. is a subsidiary of Just Energy Group Inc. *See* ECF No. 21 (May 30, 2018). There are numerous other subsidiaries of Just Energy Group Inc. throughout the United States. As a result, the scope of the *Jordet* action encompasses all residential natural gas and electricity customers who paid a variable rate for gas or electric from Just Energy Group Inc., any Just Energy entity that is a subsidiary of Just Energy Group Inc., and Just Energy New York Corp.

Just Energy wrongly contends that only Just Energy Solutions, Inc. customers can be included in the natural gas portion of the customer class because that is the only entity named in the *Jordet* Action. Even if true, this contention at best would marginally limit the portion of the class who purchased natural gas because Just Energy Solutions, Inc. is the Just Energy entity that sells all or most of the natural gas the Just Energy Entities sell in the U.S. Likewise, Just Energy is wrong to claim that the electricity portion of the customer class should be limited to customers of Just Energy New York and Just Energy Group, Inc. Notably, Just Energy Group, Inc. tried and failed to win its dismissal of the *Donin* Action.

That some consumers purchased from a Just Energy Group subsidiary is not a barrier to their inclusion in the class. "[C]ourts in this Circuit have held that, subject to further inquiry at the class certification stage, a named plaintiff has standing to bring class action claims . . . for products that he did not purchase, so long as those products . . . are 'sufficiently similar' to the products that the named plaintiff *did* purchase." *Mosely v. Vitalize Labs, LLC*, No. 13-2470, 2015 WL 5022635, at *7 (E.D.N.Y. Aug. 24, 2015) (emphasis in original). This is because a class action plaintiff may sue on behalf of other consumers if he or she (1) suffered injury, and (2) the injurious conduct implicates the same set of concerns as the conduct alleged to have

caused injury to other members of the proposed class. *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*, 693 F.3d 145, 162 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 1624 (2013); *see also In re Frito-Lay N. Am., Inc. All Natural Litig.*, No. 12-2413, 2013 WL 4647512, at *12 (E.D.N.Y. Aug. 29, 2013) (same) ("*NECA-IBEW* [] instructs that, because plaintiffs have satisfied the Article III standing inquiry, their ability to represent putative class members who purchased products plaintiffs have not themselves purchased is a question for a class certification motion."); *Wai Chu v. Samsung Elecs. Am., Inc.*, No. 18-11742, 2020 WL 1330662, at *4 (S.D.N.Y. Mar. 23, 2020) (*NECA-IBEW's* "same set of concerns" requirement satisfied for thirty-two devices, even though plaintiff only purchased three).

Just Energy may also contend that commercial customers should not be included, and it asserted previously without support that commercial contracts are different than residential contracts. Notably, neither the *Jordet* nor the *Donin* Actions is limited to residential customers, and the *Jordet* contract by its own terms applies to both "Home" and "Business" customers. The same is true for the Donin and Golovan contracts.

Second, Just Energy has no basis to contend that the classes are limited to New York and Pennsylvania.

The *Jordet* court's decision on Defendant's motion to dismiss did not restrict the geographical scope of the class, but limited the relevant time period to April 2014 to the present. *See* Decision and Order, No. 18-00953, ECF No. 43, at 18 (W.D.N.Y. Dec. 7, 2020). Given that the court did not restrict the *Jordet* action to New York, the claim for breach of contract remains for all natural gas customers who received a variable rate supply from Just Energy Solutions, Inc. Currently, Just Energy Solutions, Inc. remains incorporated in California, Illinois, Maryland, Michigan, New Jersey, New York, Ohio, and Pennsylvania.

The *Donin* court's decision on Defendant's motion to dismiss also did not restrict the geographical scope of the class. *See* Decision and Order, No. 17-5787, ECF No. 111 (E.D.N.Y. Sept. 24, 2021). The scope of the *Donin* claims extend to all Just Energy customers in the United States who were charged a variable rate for their electricity or natural gas. *See* Complaint, No. 17-05787, ECF No. 17, ¶ 172 (E.D.N.Y. Apr. 27, 2018).

Just Energy contends—without any support—that Claimant does not have standing to represent all of Just Energy natural gas customers on a variable rate across the U.S. Specifically, Just Energy asserted in its claim disallowance that "[s]tate specific regulations could present unique claims and defenses to the extent the Claimant's alleged class extended to Just Energy customers outside of Pennsylvania." However, Just Energy ignores the well-settled doctrine that class action plaintiffs have class standing to allege sufficiently similar injuries suffered by all potential class members. *See, e.g.*, *Stanley v. Direct Energy Servs., LLC*, 466 F. Supp. 3d 415, 438 (S.D.N.Y. 2020). As Judge Karas aptly explained in another case involving a retail electricity supplier like Just Energy, Just Energy's use of materially similar representations and pricing policies is sufficient to confer Claimant's standing on behalf of the Class:

> Plaintiff has alleged that Defendant sent "uniform notices" to their legacy customers from NYSEG Solutions and/or Energetix that promised competitive, market-based variable rates. (Am. Compl. ¶ 2.) And Plaintiff has further alleged that Defendant engages in a uniform policy of price gouging all of its customers. (*Id.* ¶¶ 2, 24, 68.) The Second Circuit has explicitly instructed that "non-identical injuries of *the same general character* can support standing" for a class action. *Langan*, 897 F.3d at 94 (emphasis added) (citation omitted) . . . Under analogous circumstances, the Second Circuit determined that standing existed for a plaintiff who sought to represent a variety of certificate holders in connection to certain mortgage investments, despite the fact that other certificate holders were "outside the specific tranche from which the named plaintiff purchased certificates" and were subject to "different payment priorities." *Langan*, 897 F.3d at 94 (referring to *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*, 693 F.3d 145 (2d Cir. 2012)). Similarly, here, it may be true that Energetix customers and NYSEG Solutions customers had different contracts before Defendant bought them. It may also be true that customers outside New York received slightly different terms or offers than those that Plaintiff received. But the fact that the "ultimate damages [for each member of the class may] . . . vary . . . is not sufficient to defeat class certification under Rule 23(a), let alone class standing." *NECA*, 693 F.3d at 164-65 (citation and quotation marks omitted).

Stanley, 466 F. Supp. 3d at 438-39.[3] This is by far the majority view. *See, e.g.*, "[W]hether a plaintiff can bring a class action under the state laws of multiple states is a question of predominance under Rule 23(b)(3), not a question of standing[.]" *Rolland v. Spark Energy, LLC*, No. 17-2680, 2019 WL 1903990, at *5 n.6 (D.N.J. Apr. 29, 2019) ("find[ing] Defendant's standing argument unpersuasive") (quoting *Langan v. Johnson & Johnson Consumer Cos.*, 897 F.3d 88, 96 (2d Cir. 2018)). *See also Mussat v. IQVIA, Inc.*, 953 F.3d 441, 448 (7th Cir. 2020) ("[A]bsentees [in a class action] are more like nonparties, and thus there is no need to locate each and every one of them and conduct a separate personal-jurisdiction analysis of their claims."); *In re Thalomid and Revlimid Antitrust Litig.*, No. 14-6997, 2015 WL 9589217, at *18-*19 (D.N.J. Oct. 29, 2015) (denying motion to dismiss multi-state class allegations on standing grounds); *Ramirez v. STI Prepaid LLC*, 644 F. Supp. 2d 496, 504-05 (D.N.J. Mar. 18, 2009) ("Defendants' argument appears to conflate the issue of whether the named Plaintiffs have standing to bring their individual claims with the secondary issue of whether they can meet the requirements to certify a class under Rule 23"); *In re Asacol Antitrust Litig.*, No. 18-1065, 2018 WL 4958856, at *4 (1st Cir. Oct. 15, 2018) ("Requiring that the claims of the class representative be in all respects identical to those of each class member in order to establish standing would 'confuse[ ] the requirements of Article III and Rule 23.'") (internal citations omitted).

[3] Just Energy's Notice of Disallowance admits that it uses uniform customer contracts with the same pricing provisions, arguing 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 Claimant) will be subject[.]"

Indeed, multistate breach of contract and breach of the covenant of good faith and fair dealing classes are routinely found to satisfy the predominance factor because such common law claims are generally uniform across the U.S. *See, e.g., In re U.S. Foodservice Inc. Pricing Litig*., 729 F.3d at 127 (no predominance issue for nationwide class asserting claims for breach of contract under the laws of multiple states); *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1122-23 (9th Cir. 2017) (affirming certification of nationwide breach of contract class); *Boyko v. Am. Intern. Group, Inc.*, No. 08-2214, 2012 WL 1495372, at *9 (D.N.J. Apr. 26, 2012), *separate portion vacated in part on reconsideration*, 2012 WL 2132390 (D.N.J. June 12, 2012) ("The Court agrees with Plaintiff that the legal elements of a breach of contract claim are substantially similar in all fifty states, such that certification of the AIG Class as to the breach of contract claim is proper."); *see also Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 233 n.8 (1995) ("contract law is not at its core 'diverse, nonuniform, and confusing'") (citation omitted); *Flanagan v. Allstate Ins. Co.*, 242 F.R.D. 421, 431 (N.D. Ill. 2007) (finding that numerous states' breach of contract laws are sufficiently similar for class certification purposes).

This reflects "the obvious truth that class actions necessarily involve plaintiffs litigating injuries that they themselves would not have standing to litigate," *Langan*, 897 F.3d at 95, and that "[n]amed plaintiffs in a putative consumer protection class action may assert claims under laws of states where they do not reside to preserve those claims in anticipation of eventually being joined by class members who do not reside in the states for which claims have been asserted." *Pisarri v. Town Sports Int'l, LLC*, No. 18-1737, 2019 WL 1245485, at *3 (S.D.N.Y. Mar. 4, 2019) (quotation and citation omitted). Indeed, the Second Circuit has expressly held that "any concern about whether it is proper for a class to include out-of-state, nonparty class members with claims subject to different state laws is a question of predominance under Rule 23(b)(3) not a question of adjudicatory competence under Article III." *Langan*, 897 F.3d at 93 (quotation marks omitted). Thus, where a plaintiff's own claims survive dismissal, *Langan* teaches that counts alleging violations of other jurisdictions' laws are to be addressed at class certification.

Third, Just Energy has no basis to contend that all customers of Just Energy, Inc., Just Energy New York, or Just Energy Group, Inc. and its subsidiaries who paid for gas or electric on a variable rate should not be treated as a class in this adjudicatory process. Indeed, no U.S. court has denied a motion for class certification in these types of cases. Each of the five courts that have addressed a contested motion to certify a class of customers overcharged under the terms of their customer agreements easily granted the motions. *Bell v. Gateway Energy Services Corp.*, No. 31168/2018 (Rockland Cnty. Super. Ct. Jan. 8, 2021), NYSCEF Doc. No. 152; *Claridge v. N. Am. Power & Gas, LLC*, No. 15-1261, 2016 WL 7009062 (S.D.N.Y. Nov. 30, 2016) (plaintiff was represented by the undersigned); *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); *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 (plaintiff was represented by the undersigned); *Martinez v. Agway Energy Services, LLC*, No. 18-00235, 2022 WL 306437 (N.D.N.Y. Feb. 2, 2022) (plaintiff represented by the undersigned).

Indeed, there are few cases better suited for class treatment. The classes' claims arise out of uniform misrepresentations regarding the pricing methodology for Just Energy's variable rate made in its standard customer contract. Just Energy provides its prospective customers with its standard contract prior to each contract's initiation. Additionally, not only are contractual commitments concerning Just Energy's variable rate uniform, but the resultant injury to the classes is also uniform because when Just Energy sets its variable rates, it uses the same rate for all customers within each utility region, regardless of which version of the contract governs its relationship with each variable rate customer. For these and the other reasons described below, the prerequisites to class certification will be easily met.

E. Just Energy Is Wrong That No Information Exchange Is Needed To Address The Scope Of The Class.

Just Energy's contention that Your Honor should address questions regarding the scope of the class before any information exchange occurs lacks merit. Determining who is in the alleged class is simple but grounded in factual determinations. Using documents and data produced by Just Energy, Plaintiff will identify for Your Honor all customers of Just Energy Solutions, Inc., Just Energy New York Corp., or Just Energy Group, Inc. whose customer agreements require that Just Energy set the variable rate based on business and market conditions (like the contracts in Jordet and Donin). As noted above, there is no merit to Just Energy's argument that the class is limited as a legal matter to New York or Pennsylvania or to two Just Energy entities.

Accordingly, and without agreeing that there should be any phasing, the scope of the class will relate to the following information:

1. All Just Energy, Inc., Just Energy New York, or Just Energy Group, Inc. (and its subsidiaries) customer agreements (also known as terms of service or terms and conditions) for residential natural gas and electric that contain a variable rate provision.

2. Examples of all correspondence from Just Energy, Inc., Just Energy New York, or Just Energy Group, Inc. (and its subsidiaries) to its residential customers during the Class Period, including but not limited to:

    a. Solicitation materials
    b. Welcome Letters/Introduction Packets
    c. Renewal notifications
    d. Any notifications regarding variable rates
    e. Any notifications regarding changes to customer contracts or terms of service

3. For each residential variable rate natural gas and electric customer, the following data for the Class Period:

    a. Customer account number
    b. Monthly usage (therms or kWh)
    c. Monthly variable rate

Of course, there is no reason to prioritize this production over other information sought by Class Claimants.

We thank Your Honor for his attention to this matter.

Respectfully,

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EXHIBIT 1

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March 22, 2022

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Re: ***Just Energy – Scope of Claims and Discovery***

Counsel,

Following the case conference with Justice O'Connor on March 16, 2022, Class Counsel sets forth below their position regarding the scope of the claims and discovery prior to our conferral this week.

1. Scope of the Claims

Plaintiffs Donin and Jordet each alleged multi-state classes and continue to have causes of actions implicating numerous states across the United States. Defendant's contention that the classes are limited in scope to New York is contradicted by rulings of the courts in each action on Defendant's respective motions to dismiss.

The *Jordet* action pled a class of all Just Energy Solutions, Inc. customers who were charged a variable rate for residential natural gas services. *See* Class Action Complaint, No. 18-00953, ECF No. 1 (W.D.N.Y. Apr. 6, 2018). The court's decision on Defendant's motion to dismiss did not restrict the geographical scope of the class, but limited the relevant time period to April 2014 to the present. *See* Decision and Order, No. 18-00953, ECF No. 43, at 18 (W.D.N.Y. Dec. 7, 2020). Given that the court did not restrict the *Jordet* action to New York, the claim for breach of contract remains for all residential natural gas customers who received a variable rate supply from Just Energy Solutions, Inc. Currently, Just Energy Solutions, Inc. remains incorporated in California, Illinois, Maryland, Michigan, New Jersey, New York, Ohio, and Pennsylvania. As a result, the scope of the *Jordet* action encompasses all residential natural gas customers who received a variable rate supply from Just Energy Solutions, Inc. in California, Illinois, Maryland, Michigan, New Jersey, New York, Ohio, and Pennsylvania. The period for which each states' residents can recover differs by state; the parties should be able to agree without difficulty on those dates.

The *Donin* action pled a class of all gas and electricity customers of Just Energy Group Inc. and Just Energy New York Corp. *See* First Amended Class Action Complaint, No. 17-5787, ECF No. 17 (E.D.N.Y. Apr. 27, 2018). The court's decision on Defendant's motion to dismiss also did not restrict the geographical scope of the class. *See* Decision and Order, No. 17-5787, ECF No. 111 (E.D.N.Y. Sept. 24, 2021). The scope of the *Donin* claims extend to all Just Energy customers in the United States who were charged a variable rate for their electricity or natural gas. *See* Complaint, No. 17-05787, ECF No. 17, ¶ 172 (E.D.N.Y. Apr. 27, 2018). The court in *Donin* did not restrict the geographical scope of claims for breach of contract and breach of the covenant of good faith and fair dealing. Indeed, in the *Donin* action was also submitted on behalf of other U.S. consumers in ten additional states including from California, Michigan, Texas, and New York, and consumers from a number of these states have retained Plaintiff's counsel and if need be can be added to the Complaint. As disclosed in the *Donin* action, Just Energy New York Corp. is a subsidiary of Just Energy Group Inc. *See* ECF No. 21 (May 30, 2018). There are numerous other subsidiaries of Just Energy Group Inc. throughout the United States. As a result, the scope of the *Jordet* action encompasses all residential natural gas and electricity customers who received a variable rate supply from any Just Energy Group Inc., any Just Energy entity that is a subsidiary of Just Energy Group Inc., and Just Energy New York Corp. The period for which each states' residents can recover differs by state; the parties should be able to agree without difficulty on those dates.

Any contention that the *Jordet* or *Donin* actions do not encompass out-of-state contract claims is contradicted by the Second Circuit. It is well-settled that class action plaintiffs have class standing to allege sufficiently similar injuries suffered by all potential class members. *Stanley v. Direct Energy Servs., LLC*, 466 F. Supp. 3d 415, 438 (S.D.N.Y. 2020) ("The Second Circuit has explicitly instructed that 'non-identical injuries of *the same general character* can support standing' for a class action.") (quoting *Langan v. Johnson & Johnson Consumer Cos., Inc.*, 897 F.3d 88, 94 (2d Cir. 2018))). Indeed, the Second Circuit has expressly held that "any concern about whether it is proper for a class to include out-of-state, nonparty class members with claims subject to different state laws is a question of predominance under Rule 23(b)(3) not a question of adjudicatory competence under Article III." *Langan*, 897 F.3d at 93 (quotation marks omitted). As you know, numerous courts have certified multi-state actions.

2. The Size of the *Jordet* and *Donin* Claims.

The contours of the proposed classes are straightforward. For *Jordet*, the class encompasses all Just Energy Solutions, Inc. customers who purchased natural gas on a variable rate during the following periods:

State	Relevant Time Period
California	April 2012 – Present
Illinois	April 2008 – Present
Maryland	April 2015 – Present
Michigan	April 2012 – Present
New Jersey	April 2012 – Present

New York	April 2012 – Present
Ohio	April 2012 – Present
Pennsylvania	April 2014 – Present

For Donin, the class encompasses all gas and electric customers of Just Energy Group Inc. or any of its subsidiaries, including but not limited to: Just Energy Group Inc., Just Energy Corp., 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 Pennsylvania Corp., Just Energy Michigan Corp., Just Energy Solutions Inc., Hudson Energy Services LLC, Hudson Energy Corp., Interactive Energy Group LLC, Just Energy Advanced Solutions LLC, Fulcrum Retail Energy LLC, Tara Energy, LLC, Just Energy Connecticut Corp. The class encompasses customers who purchased natural gas or electricity on a variable rate during the following periods:

State	Relevant Time Period
California	April 2012 – Present
Delaware	April 2015 – Present
Illinois	April 2008 – Present
Indiana	April 2008 – Present
Maryland	April 2015 – Present
Massachusetts	April 2012 – Present
Michigan	April 2012 – Present
New Jersey	April 2012 – Present
New York	April 2012 – Present
Ohio	April 2012 – Present
Pennsylvania	April 2014 – Present

As is done in every ESCO case, the identification of the class and their usage is achieved by the defendant identifying all of the customers of the entities at issue and adding up their kWh or therms used while on a variable rate. Just Energy will be compelled to do so in any adjudicatory setting; if it simply does so now, the parties will have a definitive understanding of the size and scope of the class. Accordingly, we ask that Just Energy provide a table listing all customers of the germane entities and the usage for each while on a variable rate during the Applicable Period.

Claimants have made clear that their damages estimations were based on the information to which they currently have access. These are simple facts based on data which Just Energy could easily disclose to resolve most, if not all, of its concerns regarding the scope and size of the classes.

3. Discovery In The *Jordet* and *Donin* Claims.

Discovery and expert discovery have not concluded in either action. The record is clear that discovery in *Donin* was stayed pending the dismissal ruling, which because of the pandemic was not issued until September 24, 2021, and that all further discovery was not foreclosed. *See e.g.*, ECF No. 60 at 12:8–13:2. Similarly, expert discovery in *Donin* has not begun. The *Donin* docket plainly shows expert discovery was stayed as of May 8, 2019 pending the dismissal ruling. May 8, 2019, Minute Order; *see also* ECF No. 51 at 14:14–17 (THE COURT: "[S]hould the case survive summary -- excuse me, motion to dismiss, we will discuss a timely schedule for conducting expert discovery. Until then, expert discovery is stayed.").

Discovery in *Jordet* has not yet materially commenced. *See* Case Management Order, No. 18-953, ECF No. 52 (W.D.N.Y. Feb. 23, 2021).

4. Facts Sought For Adjudication

As we have shared with the debtor on several occasions, we seek the following data and information as part of any adjudicatory process:

1. Does Just Energy or any creditors contend that not all Just Energy customer agreements (also knows as terms of service or terms and conditions) for residential natural gas and electric require contain a variable rate provision that provides that the variable rate must be determined based on "business and market condition"? If so, please produce all such contracts.

2. Examples of all correspondence from Just Energy to its residential customers during the Class Period, including but not limited to:

    a. Solicitation materials
    b. Welcome Letters/Introduction Packets
    c. Renewal notifications
    d. Any notifications regarding variable rates
    e. Any notifications regarding changes to customer contracts or terms of service

3. For each residential variable rate natural gas and electric customer, provide the following data for the Class Period:

    a. Customer account number
    b. Monthly usage (therms or kWh)
    c. Monthly variable rate

4. For each utility region in which Just Energy supplied natural gas or electricity to residential customers, provide the following data for each month in the Class Period:

    a. Utility default supply rate, i.e. Price to Compare
    b. Costs of goods sold for variable rate customers, i.e. all charges Just Energy pays for the electricity and natural gas it sells to its variable rate customers

c. Costs of goods sold for fixed rate customers, i.e. all charges Just Energy pays for the electricity and natural gas it sells to its fixed rate customers
d. Costs of goods sold Just Energy incurred to provide natural gas or electric supply for customers on introductory or initial rates
e. Any other charges or expenses Just Energy incurs in connection with the provision of natural gas or electricity supply to residential customers
f. Per therm and per kWh (or mWh) unit margins for variable rate customers, fixed rate customers, and customers on introductory or initial rates

5. For each utility region in which Just Energy supplied natural gas or electricity to residential customers, provide monthly pricing spreadsheets or other documents that reflect the factors, costs, or inputs Just Energy considers when setting monthly variable rates for residential natural gas or electricity.

6. Annual income statements or other accounting documents sufficient to show the gross and net revenues Just Energy obtained from selling residential natural gas or electricity.

7. All communications with regulatory agencies regarding Just Energy's variable rate.

8. Documents sufficient to identify officers and managers responsible for advertising/solicitations, rate setting, and wholesale gas and electric purchases/hedges – i.e. organization charts, phone trees, etc.

Class Counsel looks forward to conferring with you regarding these issues.

s/ D. Greg Blankinship
D. Greg Blankinship
FINKELSTEIN, BLANKINSHIP, FREI-PEARSON & GARBER, LLP
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White Plains, New York 10601
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gblankinship@fbfglaw.com

EXHIBIT 2

DISCOVERY PLAN WORKSHEET

Phase I (Pre-Settlement Discovery)	
Deadline for completion of Rule 26(a) initial disclosures and HIPAA-complaint records authorizations:	2-28-18
Completion date for Phase I Discovery as agreed upon by the parties: *(Reciprocal and agreed upon document production and other discovery necessary for a reasoned consideration of settlement. Presumptively 60 days after Initial Conference.)*	6-1-18
Date for initial settlement conference: *(Parties should propose a date approximately 10-15 days after the completion of Phase I Discovery, subject to the Court's availability)*	N/A
Phase II (Discovery and Motion Practice)	
Motion to join new parties or amend the pleadings: *(Presumptively 15 days post initial settlement conference)*	7-17-18
First requests for production of documents and for interrogatories due by: *(Presumptively 15 days post joining/amending)*	2-15-18
All fact discovery completed by: *(Presumptively 3.5 months post first requests for documents/interrogatories)*	2-28-19
Exchange of expert reports completed by: *(Presumptively 30 days post fact discovery)*	4-30-19
Expert depositions completed by: *(Presumptively 30 days post expert reports)*	6-28-19
COMPLETION OF ALL DISCOVERY BY: *(Presumptively 9 months after Initial Conference)*	7-30-19
Final date to take first step in dispositive motion practice: *(Parties are directed to consult the District Judge's Individual Rules regarding such motion practice. Presumptively 30 days post completion of all discovery)*	9-30-19
Do the parties wish to be referred to the EDNY's mediation program pursuant to Local Rule 83.8?	No

EXHIBIT 3

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

TREVOR JORDET,

Plaintiff, **18-CV-953S(Sr)**

v.

CASE MANAGEMENT ORDER

JUST ENERGY SOLUTIONS, INC.,

Defendant.

Pursuant to the Order of the **Hon. William M. Skretny** referring this case to the undersigned for pretrial procedures and the entry of a scheduling order as provided in Rule 16(b) of the Federal Rules of Civil Procedure and Rule 16 of the Local Rules of Civil Procedure for the Western District of New York, it is **ORDERED** that:

1. In accordance with Section 2.1A of the Plan for Alternative Dispute Resolution,[1] this case has been referred to mediation.

2. Motions to opt out of ADR shall be filed no later than **March 1, 2021.**

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[1] A copy of the ADR Plan, a list of ADR Neutrals, and related forms and documents can be found at http://www.nywd.uscourts.gov or obtained from the Clerk's Office.

3. Compliance with the mandatory requirements found in Rule 26(a)(1) of the Federal Rules of Civil Procedure will be accomplished no later than **February 26, 2021**.

4. The parties shall confer and select a Mediator, confirm the Mediator's availability, ensure that the Mediator does not have a conflict with any of the parties in the case, identify a date and time for the initial mediation session, and file a stipulation confirming their selection on the form provided by the Court no later than **May 21, 2021.**

5. All motions to join other parties and to amend the pleadings shall be filed no later than **May 1, 2021.**

6. The initial mediation session shall be held no later than **August 20, 2021.**

7. All fact depositions shall be completed no later than **April 15, 2022.**

8. Plaintiff shall identify any expert witnesses who may be used at trial and provide reports pursuant to Fed. R. Civ. P. 26(a)(2)(B) no later than **May 27, 2022.** Defendant shall identify any expert witnesses who may be used at trial and provide reports pursuant to Fed. R. Civ. P. 26(a)(2)(B) no later than **July 8, 2022.**

9. All expert depositions shall be completed no later than **August 19, 2022.**

10. All discovery in this case shall be completed no later than **August 19, 2022.**

11. Plaintiff's Motion for Class Certification shall be filed no later than **September 16, 2022.**

12. Dispositive motions shall be filed by all parties no later than **October 14, 2022.** *See generally* Local Rule 7.1(c); 56. Such motions shall be made returnable before Judge Skretny unless the referral order grants the Magistrate Judge authority to hear and report upon dispositive motions. The parties are directed to provide a courtesy copy of all motion papers to the Judge who will be hearing the motion.

13. In the event that no dispositive motions are filed, a Status Conference is set for **October 19, 2022 at 11:00 a.m.** before Judge Schroeder. The parties may participate by phone upon advance notice to chambers. The Court will initiate the call.

14. Mediation sessions may continue, in accordance with Section 5.11 of the ADR Plan, until **.** The continuation of mediation sessions shall not delay or defer other dates set forth in this Case Management Order.

15. No extensions of the above dates will be granted except upon written application showing good cause for the extension.

16. Sanctions: Counsel's attention is directed to Fed.R.Civ.P. 16(f) calling for sanctions in the event of failure to comply with any direction of this Court.

SO ORDERED.

DATED: Buffalo, New York
February 23, 2021

S/ H. Kenneth Schroeder, Jr.
H. KENNETH SCHROEDER, JR.
United States Magistrate Judge

THIS IS **EXHIBIT "H"** REFERRED TO IN THE AFFIDAVIT OF MICHAEL CARTER SWORN BEFORE ME over video teleconference this 29th day of May, 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.

Tiffany Sun

A Commissioner for taking Affidavits, etc.

Miao Sun, a Commissioner, etc., Province of Ontario, while a Student-at-Law. Expires March 6, 2023.

CYRULNIK FATTARUSO LLP

55 BROADWAY, THIRD FLOOR, NEW YORK, NY 10006

April 13, 2022

Via Email
Hon. Dennis O'Connor
Claims Officer
DOConnor@blg.com

Re: Briefing of Scope in *Donin v. Just Energy Group Inc. et al.* and *Jordet v. Just Energy Solutions Inc*.

Dear Justice O'Connor:

I write on behalf of Just Energy Group Inc., Just Energy New York Corp., and Just Energy Solutions Inc. (collectively "Just Energy"), Defendants in Plaintiffs' proposed class actions. For the reasons set out below, Just Energy respectfully submits that the most sensible way to proceed would be for the parties to first brief, and Your Honor first decide, the scope of Plaintiffs' remaining claims, so that the parties can then properly address disputes regarding discovery requests and responses. Plaintiffs' request that discovery be conducted, and discovery disputes be decided, prior to or absent a determination of scope would turn that sensible sequencing on its head.

The scope of Plaintiffs' surviving claims has already been addressed by two U.S. federal courts, and several consequences follow from those decisions. It is clear that Plaintiffs are refusing to accept those determinations—instead hoping to seize on the fact that the claims are now being adjudicated in a new forum to improperly seek to expand their claims beyond what was permitted by the federal courts. A decision addressing and confirming the scope at this initial stage is appropriate and necessary both so the parties can engage in an orderly, efficient proceeding (including with respect to minimizing discovery disputes), and to curtail costly re-litigation of claims already decided. As the Just Energy Entities are insolvent, dealing with scope prior to discovery will also enable these claims to be adjudicated in an efficient and cost-effective manner, taking into consideration the interests of the general body of creditors.

Attached hereto are copies of the *Jordet* complaint (**Exhibit A**), the *Jordet* dismissal decision (**Exhibit B**), the *Donin* complaint (**Exhibit C**), the *Donin* dismissal decision (**Exhibit D**), and the *Donin* order on discovery (**Exhibit E**).

Overview

At the March 16, 2022, conference, Just Energy proposed that, in light of the considerable gap between the parties' positions on the scope of the surviving claims (as reflected in Plaintiffs' Proofs of Claim and Just Energy's Notices of Disallowance), an initial determination by the Claims Officer on the scope of remaining claims would be in the interest of both parties, including to inform discovery. The Claims Officer requested briefing on "whether the scope of

the claims should be determined prior to discovery, or after" (Conference Minutes p. 4), and suggested that the parties meet and confer on the issue in advance of Plaintiffs' submission.[1]

On March 22, 2022, Plaintiffs sent a letter to Just Energy setting out, for the first time, eight specific discovery requests related to these actions.[2] Just Energy has been diligently assessing Plaintiffs' requests and the burden associated with collecting and producing the requested data and information, and agreed to meet and confer about why scope briefing should or should not proceed as the next step in the process.

During that call, and the parties' subsequent meet and confer, Just Energy explained repeatedly that it is working to collect and evaluate what documents it can produce without objection, but that the requests and Plaintiffs' positions reinforced the utility in having the Claims Officer decide the scope issues first: Plaintiffs continue to request discovery that Just Energy maintains is improper on its face or was already foreclosed by the federal courts. For example:

- In the *Donin* matter, Judge Kuntz and Judge Bulsara clearly ruled that fact discovery was closed, but Plaintiffs continue to seek information as if discovery is ongoing (or has not even begun).
- In the *Donin* matter, Plaintiffs seek burdensome information for customers outside of New York, despite the fact that the court dismissed "all claims" against the various Just Energy entities that contract with customers outside New York.
- In the *Jordet* matter, Plaintiffs seek information for customers outside of Pennsylvania (and even outside the states where Defendant Just Energy Solutions contracted).
- In the *Jordet* matter, Plaintiffs seek information concerning time periods that do not fall within the allowable period for claims set by the court.

If discovery were to proceed *prior* to resolving scope, Just Energy can, of course, lodge appropriate objections, and the parties will present each of those disputes to the Claims Officer. But Just Energy respectfully submits that it would be far more sensible and efficient to have the basic scope issues addressed at this juncture so that discovery requests are properly tailored in the first instance, meet-and-confers can be appropriately informed by the Claims Officer's guidance and decision, and disputes throughout the discovery process can be minimized.

---

[1] Plaintiffs incorrectly state that during the parties' conferral, "Just Energy's counsel contended that Your Honor agreed to decide the scope of the class issue before anything else." Pl. Letter at 1. Just Energy's counsel never took that position, and consistent with this briefing, noted that the parties would brief the sequencing issue if we were unable to come to agreement on that issue (or on the scope of Plaintiffs' surviving claims).

[2] Plaintiffs state that prior to serving these requests, they provided a "general description of the type of information needed." Pl. Letter at 3. Plaintiffs did not serve specific discovery requests until March 22, 2022, and Just Energy immediately conferred with Plaintiffs on those requests, notwithstanding the fact that a discovery schedule—including formal responses and objections—has not yet been set and despite the fact that the sequencing issue has not yet been resolved.

Argument

1. Plaintiffs' submission and discovery requests underscore the need for initial scope briefing.

As summarized below, the parties appear to have fundamental disagreements about the scope of the surviving claims. Plaintiffs argue that scope briefing is not necessary because they contend that such briefing would not be necessary in a traditional court proceeding. That argument is both wrong and misses the point, for two reasons. First, in a traditional court proceeding, Plaintiffs would not be permitted to revive claims the court had dismissed—and if they sought to do so, their efforts would be summarily rejected. Scope briefing is appropriate and necessary here because it appears that Plaintiffs are seeking to take advantage of the fact that the parties are no longer in front of the courts that already considered and circumscribed Plaintiffs' claims, and Plaintiffs are refusing to accept those decisions as the law of the case. Second, even in federal court, to the extent there was genuine disagreement about the scope of a claim, the court certainly could (and in most cases would) address that threshold issue through briefing and decision to control the volume of discovery disputes that would turn (even in part) on such predicate issues. The Claims Officer has the discretion under the Claims Procedure Order to determine the most expeditious manner to proceed and therefore clearly has the authority to first decide scope as a gating matter to the adjudication of the claims.

To illustrate the point, Just Energy sets out below some examples of the parties' disagreements, resolution of which will inform discovery, expert work, summary judgment, and class certification.

A. Jordet

Plaintiffs contend that for *Jordet*, "the class encompasses all Just Energy Solutions, Inc. customers who purchased natural gas on a variable rate" during specified periods for eight states, some going back to 2008. Pl. Letter at 2.

That definition is inconsistent with Judge Skretny's dismissal order and the *Jordet* complaint. For example, the court held that "Plaintiff's claims prior to April 6, 2014, are time barred; similarly, ***the purported class's claims prior to that date are also barred***." **Ex. B** at 19, *Jordet v. Just Energy Solutions, Inc.*, 18-cv-953 (W.D.N.Y. Dec. 7, 2020) (emphasis added). Plaintiff's claims on behalf of purported class members prior to April 6, 2014, are thus expressly "barred" – but Plaintiffs are apparently refusing to accept that ruling. Further, Plaintiff's list of eight states includes seven jurisdictions where Jordet did not purchase natural gas and several jurisdictions where the defendant in that matter, Just Energy Solutions Inc., does not even contract. That geographical scope is inappropriate.

Moreover, the complaint in that action concerned "residential" customers, not "commercial" or "all" customers. **Ex. A**, Jordet Compl. ¶¶ 38-39. Plaintiffs are inconsistent on this point—they argue, "neither the *Jordet* nor the *Donin* Actions is limited to residential customers" (Pl. Letter at 6), but also state, "The *Jordet* action pled a class of all Just Energy Solutions, Inc. customers who were charged a variable rate for ***residential*** natural gas services" (Pl. Letter at 5 (emphasis added)). Whether the *Jordet* matter includes commercial customers obviously bears directly on

discovery, expert work, summary judgment, and class certification, and a decision at this stage will efficiently enable the parties to narrow their discovery disputes and appropriately tailor dispositive motion practice.

B. Donin

Plaintiffs contend that for *Donin*, "the class encompasses all gas and electric customers of Just Energy Group Inc. ***or any of its subsidiaries*** . . . who purchased natural gas or electricity on a variable rate" during specified periods for 11 states. Pl. Letter at 2 (emphasis added). Plaintiffs identify seventeen subsidiaries or affiliates along with the two named Defendants.

But Judge Kuntz significantly narrowed these claims as well in his ruling on Defendants' motion to dismiss. Among other rulings, the court expressly dismissed "all claims" against the Just Energy Group Inc. subsidiaries, other than the named Defendant Just Energy New York Corp., that contract in and outside New York. **Ex. D** at 7-8, *Donin v. Just Energy Group Inc.*, 17-cv-05787 (E.D.N.Y. Sept. 24, 2021). Specifically, the *Donin* Plaintiffs had asserted claims against those other entities operating inside and outside of New York, labeling the requisite entities as "John Does" 1 to 100, "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." **Ex. C**, Donin Compl. ¶ 69. The court dismissed "all claims against John Does 1-100 for lack of personal jurisdiction." **Ex. D** at 8 ("Accordingly, the Court hereby DISMISSES all claims against John Does 1-100 for lack of personal jurisdiction"). Plaintiffs' refusal to accept dismissal of those claims is simply baseless, and the improper positions Plaintiffs are now advocating necessitate the Claims Officer's confirming the U.S. federal court's rulings in an initial decision on scope.

Moreover, as in *Jordet*, the complaint in *Donin* alleges that the action arises from Just Energy's conduct in supplying "***residential*** gas and electricity to consumers." **Ex. C**, Donin Compl. ¶ 1 (emphasis added). The named Plaintiffs are residential customers, and the complaint alleges that "Plaintiffs and the Class entered into a valid contract with Defendants for the provision of residential energy." **Ex. C**, Donin Compl. ¶ 249. The complaint does not purport to include commercial customers.

C. Donin Discovery

Even if Plaintiffs' claims in *Donin* had not been circumscribed as such, Plaintiffs' discovery requests are wholly improper because fact discovery in *Donin* has ended. As reflected in the excerpt below, at a January 2020 hearing Judge Kuntz was adamant in ruling that discovery was "closed," "eviscerated," "done," "kaput," and a "nullity." **Ex. E** at pp. 16-18, Jan. 8, 2020 Hearing Transcript.

> MR. WITTELS: I would like to address that one point about discovery. Discovery is ongoing, Judge. It's not closed as Defendants have represented,
>
> THE COURT: It's closed now. I just closed it. Okay? Anything else?
>
> [. . .]

MR. WITTELS: Judge, when you say -- we have ongoing discovery disputes that are before [Magistrate] Judge Bulsara, who as recently as December said that he found -- if I could just quote --

THE COURT: I am overruling judge Bulsara in that regard.

[. . .]

MR. WITTELS: Are you saying discovery is stayed; is that --

THE COURT: I am saying discovery is over. Done. *Kaput*. It's over. No more discovery.

[. . .]

MR. MCINTURFF: If I could, Your Honor, just another point of clarification. There are pending document production deadlines that the defendants --

THE COURT: They are all blown up.

MR. MCINTURFF: Okay.

THE COURT: Okay? Let me say it again. There is no more discovery to be had in this case. No depositions. No interrogatories, no requests for admissions, it is over. Discovery is complete as of this moment. Done. All outstanding discovery requests from this moment are eviscerated, a nullity. Do you understand?

MR. MCINTURFF: Yes, Your Honor.

THE COURT: Could I be any clearer?

MR. MCINTURFF: No.

[. . .]

The court's ruling was of course not something Plaintiffs' counsel wanted, and it was made over their objection. But that is law of the case, and Plaintiffs' refusal to accept those rulings should not be countenanced.

On September 24, 2021, the *Donin* court granted in large part Defendants' motion to dismiss, and four weeks later issued an order setting a deadline of November 22, 2021, for parties to take the first step in dispositive motion practice (given that discovery had ended), or, if neither party intended to submit dispositive motions, to file a joint pretrial order by January 20, 2022. In other words—the court ordered the parties to proceed to summary judgment and class certification briefing or otherwise to commence pretrial preparation.

Plaintiffs simply refuse to confront these orders, and inappropriately maintain efforts to treat the *Jordet* and *Donin* actions as if they are at the same procedural posture. Plaintiffs' approach further highlights the need for scope briefing —so that the parties can proceed with the requisite direction from Your Honor on where the respective cases are in the litigation process and what

claims survive in light of the decisions to date, rather than having to litigate these pervasive and level-setting issues in the context of each dispute that inevitably will be impacted by their resolution.

2. Initial scope briefing and resolution will inform discovery and serve the interests of fairness and efficiency.

Plaintiffs are wrong in advancing the unfounded claim that Just Energy's views regarding the phasing of this adjudication process are attempts to delay adjudication of Class Claimants' claims. That is simply rhetoric. Just Energy is anxious to get the small slice of what remains of Plaintiffs' claims dismissed. But doing so in an efficient way that does not unduly impede management's ability to fulfill their responsibilities in the CCAA process is the right way to proceed and in everyone's interest.

Plaintiffs incorrectly claim that Just Energy has taken the position that initial briefing on the scope would stay discovery until a decision on scope is rendered. As we have repeatedly explained to Plaintiffs, Just Energy is *already* actively engaged in diligently collecting documents and data that it believes could fall within the scope of Plaintiffs' claims, or that it can agree to produce subject to Just Energy's objections as to, among other things, the ultimate relevance of these documents. For the *Jordet* matter, Just Energy agreed to an initial production of contracts from the states in which Defendant Just Energy Solutions contracts, and communications with Plaintiff, to be substantially completed by April 22, without waiver of its right to contest the relevance of these materials. The relevant New York contracts and communications with the *Donin* Plaintiffs were already produced prior to the close of discovery in the *Donin* federal court litigation. Just Energy is assessing the remainder of Plaintiffs' requests, but believes that briefing to confirm the scope of Plaintiffs' surviving claims is necessary to allow discovery to be conducted efficiently—for example, facilitating the tailoring of requests and objections, and the collection of documents and data needed for claims that remain to be adjudicated, rather than having to raise the same disputes seriatim through motion practice before Your Honor.

Moreover, despite Plaintiffs' uninformed statements to the contrary, Just Energy's data collection is by no means a simple process. Discovery lasted more than a year in the *Donin* matter, and Plaintiffs still were not satisfied (though their requests for additional time and discovery were denied). Just Energy has started to collect data for the *Jordet* matter, which likely will involve time-consuming data extracts from some legacy systems and archived data. Decisions on scope will help facilitate Just Energy's effort to target the appropriate legacy systems and data that need to be accessed and collected, and minimize the expense and delay associated with extracting data for customers that are not at issue in the case. For example, Plaintiffs' position is that they are entitled to reopen discovery in *Donin* and demand documents related to all Just Energy subsidiaries that have sold variable rate natural gas or electricity in 11 states going back as far as 2008. By contrast, Just Energy's understanding of the posture of the *Donin* matter is that discovery was closed prior to the stay, and they are not permitted to demand any further discovery.

3. Plaintiffs' arguments are without merit.

Plaintiffs also misapprehend (or misstate) Just Energy's position with respect to the scope issues that need to be addressed. We briefly address those issues below, without responding to the substantive arguments included in Plaintiffs' briefs, which extend well beyond the issues the Claims Officer identified for purposes of this round of briefing, and which will be addressed in due course.

A. Plaintiffs respond to the strawman argument opposing bifurcation of class scope and merits

Plaintiffs oppose scope briefing on the grounds that "fact exchanges should not be bifurcated as between class scope and merits," arguing that U.S. courts typically permit discovery to proceed in a single phase related to both merits and class certification, and that Just Energy did not seek phased discovery in *Donin* and *Jordet*. Pl. Letter at 4. That is a strawman argument. Just Energy has not sought to bifurcate class and merits discovery. In *Donin*, discovery was completed in a single phase, and we envision a similar process with respect to *Jordet*. Just Energy's objections with respect to Plaintiffs' discovery requests (which are not at issue in this motion), relate to whether certain claims are included in the limited portions of the cases that remain following the courts' motion to dismiss decisions, not whether discovery is relevant to class certification as opposed to merits.

Plaintiffs' arguments about scope briefing and determination delaying any exchange of information (Pl. letter at 4) is misleading—information exchange has *already* been *completed* in *Donin*, and is in process for *Jordet*. And in both cases, Defendants believe that the scope of surviving claims has already been addressed (by the federal courts), but Plaintiffs have refused to accept those decisions and are using this adjudication process improperly to try and expand (or resuscitate) their claims.

B. New York and Pennsylvania Customer Limitations

Plaintiffs claim (at 6) that Just Energy contends that the Plaintiffs do not have "standing" to represent customers outside of their respective states (New York and Pennsylvania), and proceed to argue that Plaintiffs here do have standing to represent class members outside their respective states. Similarly, Plaintiffs contend (at 8) that Just Energy has "no basis" to assert that the claims do not include the three named defendants "and its subsidiaries."

First, whether Plaintiffs have standing to represent class members in other states is *not* at issue in this briefing, which is limited to whether the Claims Officer should address the scope of the remaining claims before proceeding to adjudicate discovery disputes. The parties will brief issues related to class certification, and whether Plaintiffs are appropriate class representatives, at the appropriate time.

Second, Plaintiffs fundamentally misapprehend Just Energy's position. Just Energy does not contest Plaintiffs' standing at this stage: Just Energy argues that the remaining claims as circumscribed by the courts in their motion to dismiss decisions and by the operative pleadings themselves, considered together with the identity of the defendant parties in these actions, are circumscribed. Specifically, the *Donin* claims were limited to claims against Just Energy Group

Inc. (a holding company that does not contract with *any* customers) and Just Energy New York Corp., and the *Jordet* claims were limited to claims against only Just Energy Solutions Inc. Whether or not the *Donin* Plaintiffs theoretically would have had *standing* to pursue claims on behalf of non-New York customers against other Just Energy entities who did in fact contract with such non-New York customers is academic: all such defendants were dismissed from the case by the district court. Left with no Just Energy entities that contract with customers outside of New York in the *Donin* case, Plaintiffs' standing to represent non-New York customers is irrelevant. In *Jordet*, Plaintiffs did not even name or attempt to include subsidiaries or affiliates of Just Energy Solutions Inc. as defendants. The operative pleading and motion to dismiss decision appear to limit the claims in that case to those asserted on behalf of Pennsylvania customers.

* * *

On these bases, Defendants respectfully request that the parties brief, and the Claims Officer proceed to resolve, the scope of Plaintiffs' surviving claims as the next stage in this process.

Respectfully submitted,

/s/ Jason Cyrulnik
Jason Cyrulnik

cc: Counsel of Record

THIS IS **EXHIBIT "I"** REFERRED TO IN THE AFFIDAVIT OF MICHAEL CARTER SWORN BEFORE ME over video teleconference this 29th day of May, 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.

Tiffany Sun

A Commissioner for taking Affidavits, etc.

Miao Sun, a Commissioner, etc., Province of Ontario, while a Student-at-Law. Expires March 6, 2023.

Wittels McInturff Palikovic

April 14, 2022

Via Email
Hon. Dennis O'Connor
Claims Officer
Just Energy CCPA Proceeding
DOConnor@blg.com

Re: U.S. Class Counsel's Reply Submission in Support of Discovery Needed to Adjudicate Claim and In Opposition to Just Energy's Attempt to Have Claims Officer First Address Co-Called Scope Issues

Dear Justice O'Connor:

We submit this reply in support of the Class Claimant's application that Your Honor order discovery to commence immediately without addressing Just Energy's so-called scope issues. In short, Just Energy's opposition to our application for discovery is simply part of its continued attempt to further delay adjudication of our claims so that the U.S. Class – the largest unsecured creditor with claims valued by our experienced energy economist at more than $2B – doesn't have a voting voice in the reorganization process.

In short, without citing any U.S. case law at all in its 8-page opposition, what Just Energy is trying to do is convince Your Honor to dismiss Plaintiffs' class claims out of the box BEFORE Plaintiffs have the opportunity to obtain the class discovery they are entitled to and need – despite our having defeated Defendants' motions to dismiss in two separate NY federal courts. That is what they mean by scope – re-brief what the Donin and Jordet courts have already decided.

Indeed, Defendant's contention that there should be briefing on the scope issue (beyond the 17 pages the parties have already collectively submitted on this issue) totally lacks merit. First, as Just Energy contends, the *Donin* and *Jordet* courts have already decided the scope of the Plaintiffs' claims. Your Honor need only read and apply those decisions. Further briefing is not needed. Second, Just Energy is wrong that no discovery is needed to determine which consumers fall within Plaintiff's remaining class. In particular, the identification of which Just Energy entities operate in which states and when, as well as the production of the uniform contracts of adhesion the Just Energy entities use, is necessary to identify which customers contracted with the Just Energy entities. Data associated with those customers (namely, the number of such consumers and their usage) is necessary to determine the size of the class and the scope of its damages.

There is binding, long-standing U.S. case law -- ignored entirely by Just Energy -- which supports our right to immediate discovery now to formulate the final definition(s) of our Class and to hone our preliminary damages estimates. For example, the U.S., Court of Appeals for the Second Circuit (the appellate court for NY federal cases) in a case called P*arker v. Time Warner*

Entertainment, 331 F.3d 13 (2d Cir. 2003) addressed precisely the type of backwards approach to a class action that Just Energy is seeking here, reversing a lower district court that decided the "scope" of a class action solely on the pleadings BEFORE any discovery was had. Recognizing there is scant time for you to consider further case law at this point, we're putting the long quote from *Parker* in a footnote below, but even a quick read of the quote and excerpts from the other cases cited should convince Your Honor that what we are experiencing here is just another delay tactic to frustrate our right to an adjudication on the merits.[1]

[1] "The difficulty we have with these conclusions [i.e denying class certification] is that they are based on assumptions of fact rather than on findings of fact. The District Court precluded any class discovery and even the filing of a motion for class certification. Thus, it remains unknown what class Parker would have sought to certify and the numbers of potential class members in that proposed class. Although the Amended Complaint alleges that the total number of Time Warner cable subscribers number about twelve million in twenty-three states, Parker has given no indication that he would actually seek to certify a class of *all* twelve million subscribers. Indeed, counsel for Parker stated in a hearing before Magistrate Judge Azrack that the number of potential class members could not be identified without discovery on the issue: '[T]here is simply no number because we've had no ***22** discovery as to the number of people who have actually been injured. We think it is a large number. We have no idea of whether it's thirteen million or one million or 1,000.' George Sampson, Transc. of Motion Hearing (Sept. 9, 2000). Absent at least limited discovery concerning the composition of the class, the District Court had no evidence regarding the size of the recovery that Time Warner might face if the class claims were successful. … Because the District Court decided Time Warner's motion without the factual support necessary to support its legal conclusions, the decision to deny Rule 23(b)(3) class certification is vacated and this matter is remanded for further proceedings." *Parker*, 331 F.3d at 21-22.

It is well-settled that Plaintiffs are entitled to receive broad class-wide discovery in order to meet the requirements for class certification under Rule 23, especially under *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). *See Burton v. D.C.*, 277 F.R.D. 224, 230 (D.D.C. 2011) ("The Supreme Court's ruling in [*Dukes*] confirms that pre-certification discovery should ordinarily be available where a plaintiff has alleged a potentially viable class claim because [*Dukes*] emphasizes that the district court's class certification determination must rest on a "rigorous analysis" to ensure '[a]ctual, not presumed, conformance' with Rule 23."); *see also Kilbourne v. Coca-Cola Co.*, No. 14 Civ. 984 MMA (BGS), 2015 WL 10943611, at *5 (S.D. Cal. Jan. 13, 2015) ("courts permit pre-certification discovery on issues like typicality, commonality, and numerosity if it would substantiate the class allegations") (citation omitted); *Keech v. Sanimax USA, LLC*, 2019 WL 79005, at *2 (D. Minn. Jan. 2, 2019) ("Fact discovery is necessary to determine whether the Rule 23 requirements can be satisfied"; denying the defendant's motion to strike class allegations because the Court needed to conduct a "rigorous analysis" and "probe behind the pleadings" for Rule 23 purposes). "To obtain pre-certification discovery concerning class issues, the plaintiff must show that such discovery would be relevant to his future motion for class certification." *Dupres v. Houselanger & Assocs., PLLC*, No. 19 Civ. 6691(RPK)(SJB), 2021 WL 2373737, at *2 (E.D.N.Y. June 9, 2021) (internal quotation omitted).

In the limited time remaining before our hearing this morning, here is a summary of the reasons why Your Honor should order Just Energy to immediately produce the discovery Class Plaintiffs need so as the Claims Officer you can adjudicate our timely filed claims:

1. **Just Energy's Statute of Limitations (SOL) Argument Is Plain Wrong.** Defendant contends that the time frame for the entire *Jordet* class can go no further than April 6, 2014 because Judge Skrtetny held that "Plaintiff's claims" prior to that time are barred. Debtor Letter at 3. That claim is misleading. True, that time frame applies to Mr. Jordet and other Pennsylvania consumers, but that holding is explicitly just about "Plaintiff's claims," not the temporal scope of other class members residing in states with different statutes of limitations. U.S. courts apply the limitations period of the states in which class members reside even when the limitations period for the named plaintiff is different, and there is no reason Your Honor cannot easily do the same. Nor has Just Energy explained why the fact that the claims of some class members in different states might extend a year or two beyond 2014 should affect the sequencing of any proceeding in this matter. Just Energy concedes that it will have to produce data for 8 years at a minimum; adding a year or two is a simple matter of data coding that adds little or no additional burden. Case law supports our position. See footnote 2.[2]

2. **Just Energy's contention that the *Jordet* action does not include commercial customers ignores that the *Jordet* class as plead, and not dismissed by Judge Skretny, includes "all" customers, not just residential customers.** Just Energy's sole argument here is that one line of Plaintiffs' nine-page letter used the phrase "residential natural gas services." That Plaintiffs did not also add the word commercial in this one sentence does not change the scope of the class as plead, as was clearly argued elsewhere. This type of "gotcha" argument is indicative of Just Energy's obstructionist approach to this claims process.

3. **The Donin Judges Did Not Preclude Class and Expert Discovery After a Ruling on the Motions to Dismiss.** Magistrate Judge Bulsara overseeing the case specifically ruled at a hearing on May 8, 2019 that "should the case survive summary – excuse me motion to dismiss, we will discuss a timely schedule for conducting expert discovery. Until then, expert discovery stayed." At page 14. He also added, at page 23, that "after the motion to dismiss is decided, OK, I'll hear from both sides as to whether or not there should be additional fact discovery." Judge Kuntz' remarks that Just Energy quotes and

[2] *See, e.g., Kaupelis v. Harbor Freight Tools USA, Inc.*, No. 19-1203 , 2020 WL 5901116, at *13, 2020 U.S. Dist. LEXIS 186249, at *38-39 (C.D. Cal. Sep. 23, 2020) (holding that multistate class could be certified; even though defendant claimed "differences between the statutes of limitations . . ." plaintiffs "demonstrated why each of these differences does not bar class certification" – e.g., plaintiffs defined the class "so that it does not impair the interest of any state as represented in their statutes of limitations."); *Garrard v. Rust-Oleum Corp.*, No. 20-00612, 2021 WL 5906063, at *7 (N.D. Ill. Dec. 14, 2021) (refusing to strike multistate class owing to differences in the statutes of limitations and holding that "The class definition can ultimately be revised to avoid statute of limitations issues . . . multistate consumer class actions 'are not categorically prohibited' despite variations in different states' laws . . .")

describes out of context only cut off the pending discovery that Plaintiffs were seeking at that time on their application to file a supplemental pleading before he decided the motion to dismiss. Certainly had the case not been stayed by bankruptcy, we would be back in front of the Donin court conducting expert discovery and requesting addition of fact discovery. Courts always have discretion to do justice. It would certainly be an abuse of discretion not to allow discovery in the Donin case now that Plaintiffs won the motion to dismiss. Indeed, Rule 23(d)(1)(B) states that it is up to the court in conducting a class action to issue orders that "protect class members and fairly conduct the action."

4. **Plaintiffs' proof of claims in this CCAA bankruptcy include claims for other Just Energy customers from other states, including Michigan, California, and Texas.** While Plaintiffs do not have contracts for all of these customers, the contracts they do have include the relevant "business and market conditions" language, which suggests the Just Energy contract at issue in *Jordet* and *Donin* is the same one at issue in the other states in which Just Energy does business. Thus your Honor she permit discovery beyond New York and Pennsylvania.

5. **Now that Just Energy is moving again to extend the April 21 stay, and delay disclosure of a reorganization plan, there is adequate time for JE to produce the discovery needed so that Your Honor can timely adjudicate the Class claims before a vote on the reorganization plan.** The Monitor's Eighth report on April 7 to Judge McEwen states: "*The Monitor understands that the Just Energy Entities will seek an extension to the Stay Period before the Court on April 21, 2022, prior to the expiration of the current Stay Period*."

6. **It is not true that Just Energy did not know what discovery the Class is seeking until March 22.** In our initial March 30 letter to Your Honor, we described that we have repeatedly told JE and its counsel *in writing* in December 2021 and January 2022 the data and document we needed for the adjudication process.

* * *

Thank you for your attention to this to this matter.

Respectfully submitted,

/s/ Steven L. Wittels
Steven L. Wittels

cc: All counsel of interest in this Claims Adjudication process

THIS IS **EXHIBIT "J"** REFERRED TO IN THE AFFIDAVIT OF MICHAEL CARTER SWORN BEFORE ME over video teleconference this 29th day of May, 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.

Tiffany Sun

A Commissioner for taking Affidavits, etc.

Miao Sun, a Commissioner, etc., Province of Ontario, while a Student-at-Law. Expires March 6, 2023.

Minutes from April 14, 2022 Hearing before Justice O'Connor

IN ATTENDANCE:

Party	Firm	Individuals present
Just Energy Group Inc. et. al.		Jonah Davids
Canadian counsel to Just Energy Group Inc. et. al.	Osler, Hoskin & Harcourt LLP	Jeremy Dacks, Karin Sachar
U.S. Counsel to Just Energy Group Inc. et. al.	Cyrulnik Fattaruso LLP	Jason Cyrulnik, Evelyn Fruchter and Mary Kate George
U.S. Counsel for proposed representative plaintiffs Fira Donin and Inna Golovan	Wittels McInturff Palikovic LLP	Steven Wittels
U.S. Counsel for proposed representative plaintiff Jordet	Finkelstein, Blankinship, Frei-Pearson & Garber LLP	Greg Blankinship Joshua Cottle
Canadian counsel to DIP Lender	Cassels Brock & Blackwell LLP	Alan Merskey
Monitor, FTI Consulting Canada Inc.	FTI Consulting Canada Inc.	Jim Robinson
Counsel to Monitor	Thornton Grout Finnigan LLP	Rebecca Kennedy, Rachel Nicholson

MINUTES:

The parties each made extensive oral submissions in relation to their written submissions regarding whether discovery is to take place prior to the determination of the scope of claims. His Honour requested counsel to provide dates relating to a scope hearing on the basis that the scope hearing would take place before the discoveries. At the conclusion of the oral submissions, the parties agreed to the following schedule:

Date	Step
April 22, 2022	Just Energy's Counsel to provide written list of documents that Just Energy is willing to produce from Plaintiff's discovery request letter dated March 22, 2022.
April 29, 2022	Plaintiff's counsel to provide motion to produce documents that Just Energy has indicated it is not willing to produce.
May 10, 2022	Just Energy's response to Plaintiff's motion to produce.
May 19, 2022 10:00 am – 4:00 pm	Oral submissions before Justice O'Connor with Court Reporter in attendance.

THIS IS **EXHIBIT "K"** REFERRED TO IN THE AFFIDAVIT OF MICHAEL CARTER SWORN BEFORE ME over video teleconference this 29th day of May, 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.

Tiffany Sun

A Commissioner for taking Affidavits, etc.

Miao Sun, a Commissioner, etc., Province of Ontario, while a Student-at-Law. Expires March 6, 2023.

Wittels McIntturff Palikovic

April 29, 2022

Via Email
Hon. Dennis O'Connor
Claims Officer
Just Energy CCAA Proceeding
DOConnor@blg.com

Re: U.S. Class Counsel's Motion to Compel Discovery for Claim Adjudication

Dear Justice O'Connor:

Pursuant to your directives at the April 14, 2022 hearing, Class Counsel in *Donin* and *Jordet* respectfully submit this motion to compel Just Energy to produce all documents responsive to Class Claimants' eight narrowed Discovery Requests contained in their March 22, 2022 letter to Just Energy's counsel, which is attached hereto as **Exhibit A**. As discussed during the April 14 hearing, this motion, and Just Energy's response, is also intended to resolve any and all scope issues Just Energy wishes to raise.

In particular, the production of the uniform contracts of adhesion the Just Energy entities used for variable rate gas and electricity sales in the U.S. during the relevant statute of limitations periods is necessary to define and identify the scope of the Class whose breach of contract claims will be adjudicated in this matter. Data associated with those customers (namely, Just Energy's charges, revenues, cost of goods sold, and margins) is also critical to determining the scope of class-wide liability and damages. As is done in every class action case involving retail gas and electric suppliers like Just Energy—including cases litigated and settled by the same plaintiff and defense counsel at bar—the identification of class membership, relevant contracts, and damages is easily obtained from the defendant in a matter of *days*. Just Energy's contention that this is somehow a difficult and inappropriate task, or an untimely request, is merely a strategy to avoid adjudicating the merits of Class Claimants' claims so that the U.S. Class—the largest unsecured creditor with claims valued by our experienced energy economist at more than $2 billion—is silenced in the reorganization process.

As set forth herein, discovery sought by our eight Discovery Requests is essential to an orderly and expedited ruling on class certification, and a trial to determine liability and damages. Class Claimants have been seeking this discovery since December 2021. Instead of promptly producing this discovery, however, Just Energy has thrown up a series of improper roadblocks that have unfortunately required this motion. The relevant facts and law clearly establish that Your Honor should order the prompt production (within two weeks) of the routine discovery Class Claimants have been seeking for more than four months.

I. Overview of the Proposed Classes and Claims for Adjudication

The contours of the proposed classes are straightforward. For *Jordet*, the class encompasses all Just Energy Solutions, Inc. customers who purchased natural gas on a variable rate during the following periods:

State	Relevant Time Period
California	April 2012 – Present
Georgia	April 2011 – Present
Illinois	April 2008 – Present
Maryland	April 2015 – Present
Michigan	April 2012 – Present
New Jersey	April 2012 – Present
New York	April 2012 – Present
Ohio	April 2012 – Present
Pennsylvania	April 2014 – Present

For *Donin*, the class encompasses all gas and electric customers of Just Energy Group Inc. or any of its subsidiaries, including but not limited to: Just Energy Group Inc., Just Energy Corp., 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 Pennsylvania Corp., Just Energy Michigan Corp., Just Energy Solutions Inc., Hudson Energy Services LLC, Hudson Energy Corp., Interactive Energy Group LLC, Just Energy Advanced Solutions LLC, Fulcrum Retail Energy LLC, Tara Energy, LLC, Just Energy Connecticut Corp. The *Donin* class encompasses customers who purchased natural gas or electricity on a variable rate during the following periods:

State	Relevant Time Period
California	April 2012 – Present
Delaware	April 2015 – Present
Illinois	April 2008 – Present
Indiana	April 2008 – Present
Maryland	April 2015 – Present
Massachusetts	April 2012 – Present
Michigan	April 2012 – Present
New Jersey	April 2012 – Present
New York	April 2012 – Present
Ohio	April 2012 – Present
Pennsylvania	April 2014 – Present

The merits claims in both cases—which were sustained by two federal judges (*Jordet* in December 2020 and *Donin* in September 2021) are likewise straightforward. *Jordet* seeks to enforce Just

Energy's contractual promise to set its variable gas rates in good faith based on "business and market conditions." *Donin* similarly seeks to enforce Just Energy's contractual promise to set rates based on "business and market conditions" as well as three other contract claims: (a) failure to charge the rates specified in welcome emails/letters sent to U.S. consumers, which rates were incorporated by reference into Just Energy's customer contract, (b) violating the contract's prohibition on increasing variable rates more than 35% over the prior billing cycle, and (c) violating the implied covenant of good faith and fair dealing.

II. *Jordet* Response to Just Energy's Grounds for Refusing to Produce the Requested Class-Wide Discovery

Trevor Jordet brought a proposed class action on behalf of Just Energy Solutions, Inc.'s U.S. customers. *See Jordet* Class Action Complaint (the "*Jordet* Complaint"), **Exhibit B**, at ¶¶ 16-20. On December 7, 2020, Judge William M. Skretny of the U.S. District Court for the Western District of New York denied Just Energy's motion to dismiss Mr. Jordet's breach of contract claim, ruling that "'business and market conditions' has some standard that [Just Energy] had to apply in setting its variable pricing but apparently failed to adhere to in [their] pricing." *Jordet v. Just Energy Sols., Inc.*, 505 F. Supp. 3d 214, 226-27 (W.D.N.Y. 2020), **Exhibit C**.

To prepare *Jordet* for class certification and a merits ruling, Class Claimants seek discovery that encompasses both the geographic (the U.S. market) and temporal scope of the *Jordet* class action breach of contract claims. To expedite these proceedings, Class Claimants have limited their discovery requests to a bare minimum of document categories. Just Energy continues to balk at even these narrowed demands. Yet upon examination, Just Energy's proposed approach to discovery—as outlined in Just Energy's Responses to Class Claimants' March 22, 2022 Document Requests, ("Just Energy's April 21, 2022 Letter"), **Exhibit D**, at 1-4—suffers from four fundamental flaws (in addition to the specific disputes on Class Claimants' eight discrete discovery requests outlined in Section IV below).

First, Just Energy oddly proposes to apply the statute of limitations for breach of contract actions in Pennsylvania (Mr. Jordet's home state) to the entire U.S. class, even though each of the eight applicable states have their own statute of limitations, several of which are longer than Pennsylvania's four-year period. Because each of the contracts produced by Just Energy thus far include a state-specific choice-of-law provision, a different statute of limitations applies for each state. *See Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 295-96 (1st Cir. 2000) (affirming the district court's certification of a multi-state class and finding that various states' statutes of limitations should be considered and were not a barrier to a class action).

It is true that Judge Skretny applied the Pennsylvania four-year statute of limitations in ruling on the motion to dismiss. However, a motion to dismiss, even in a class action, only addresses the named plaintiff's individual claim. The choice-of-law provisions in consumers' contracts dictate that each state's statute of limitations should apply. Just Energy is thus obligated to produce information and data consistent with the relevant limitations period—not via an artificially shortened limitations period based on Pennsylvania's four-year period.

Second, even though the *Jordet* class includes both residential *and* commercial variable rate customers, Just Energy refuses to produce information and data for commercial customers. The pleaded *Jordet* class was *not* modified by Judge Skretny, and it includes all U.S. variable rate gas customers, not just residential customers. Moreover, discovery thus far shows that the relevant language for commercial customers' purchases is similar, if not identical to the contract language for residential purchases. For example, in California, Georgia, New Jersey, Ohio, Pennsylvania and Maryland, Just Energy contracted to set variable rate prices for residential service based on "market conditions," "wholesale market gas conditions," or a combination of the two. *See* Just Energy Solutions, Inc. Contracts, ("Contracts"), **Exhibit E**, at JE_JORDET0000003; JE_JORDET0000026; JE_JORDET0000090. Tellingly, in New Jersey, Ohio, and Pennsylvania, Just Energy set variable rate prices for commercial service according to "market conditions" or "business and market conditions." *See* Contracts, at JE_JORDET0000016; JE_JORDET0000024; JE_JORDET0000092.

Many contracts produced by Just Energy also appear to be used for both residential *and* commercial customers. For instance, Just Energy's March 12, 2013 sample Ohio contract is labeled "General Terms and Conditions," includes definitions for commercial customers, and does not distinguish between residential or commercial customers. *See* Contracts at JE_JORDET 0000003, ¶ 1. This is not the only produced contract that does not distinguish between residential or commercial customers. *See* Contracts, at JE_JORDET0000016; JE_JORDET0000018; JE_JORDET0000024; JE_JORDET0000026; JE_JORDET0000040; JE_JORDET0000043; JE_JORDET0000052; JE_JORDET0000090; JE_JORDET0000092.

It is also irrelevant that Mr. Jordet was a residential customer. "[C]ourts in [the applicable U.S. Court of Appeals] have held that, subject to further inquiry at the class certification stage, a named plaintiff has standing to bring class action claims . . . for products that he did not purchase, so long as those products . . . are 'sufficiently similar' to the products that the named plaintiff *did* purchase." *Mosely v. Vitalize Labs, LLC*, No. 13-2470, 2015 WL 5022635, at *7 (E.D.N.Y. Aug. 24, 2015) (emphasis in original). This is because a class action plaintiff may sue on behalf of other consumers if he or she (1) suffered injury, and (2) the injurious conduct implicates the same set of concerns as the conduct alleged to have caused injury to other members of the proposed class. *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*, 693 F.3d 145, 162 (2d Cir. 2012), *cert. denied*, 568 U.S. 1228 (2013); *see also In re Frito-Lay N. Am., Inc. All Natural Litig.*, No. 12-2413, 2013 WL 4647512, at *12 (E.D.N.Y. Aug. 29, 2013) ("*NECA-IBEW* [] instructs that, because plaintiffs have satisfied the Article III standing inquiry, their ability to represent putative class members who purchased products plaintiffs have not themselves purchased is a question for a class certification motion."); *Wai Chu v. Samsung Elecs. Am., Inc.*, No. 18-11742, 2020 WL 1330662, at *4 (S.D.N.Y. Mar. 23, 2020) (*NECA-IBEW*'s "same set of concerns" requirement satisfied for thirty-two devices, even though plaintiff only purchased three).

Just Energy's effort to limit *Jordet* (again, prior to class certification) to residential claims relies on an overly restrictive view of the *Jordet* action and ignores the nationwide claims in *Donin* entirely. The *Jordet* action seeks to enforce Just Energy's promise to base its variable rates on business and market conditions. That obligation does not change based on whether the consumer is residential or commercial. As described above, Just Energy often does not distinguish between residential and commercial customers. To the extent Just Energy maintains—at the appropriate

later date—that commercial customers should be partially or fully excluded from a certified class, Class Claimants and Your Honor can assess that argument using discovery, not defense counsel's say so.

Third, the class action claims at issue in *Jordet* encompass at least nine states: California, Georgia, Illinois, Maryland, Michigan, New Jersey, New York, Ohio, and Pennsylvania. Yet Just Energy limited its production to six states (Pennsylvania, California, Georgia, Maryland, New Jersey, and Ohio) on the basis that these are the only residential markets that Just Energy provided natural gas service for during the four years prior to the filing of the *Jordet* action. This was improper because Just Energy Solutions Inc., or its predecessor Commerce Energy,[1] operated in more than the six states Just Energy identifies during the relevant time period. For example, Just Energy Solutions Inc. was also actively incorporated in Illinois, New York, and Michigan, prior to the filing of the *Jordet* action. Yet, Just Energy did not produce any contracts, nor has it agreed to produce any other discovery, for these states. Your Honor should order Just Energy to produce discovery for *all* states where it sold gas during the relevant statute of limitations period.

Fourth, Just Energy refuses to produce any information or data for the period after the *Jordet* case began. However, as stated in the *Jordet* Complaint, the class period extends to the *present* and so should Just Energy's production.

It is well-established that discovery in a class action is not limited in time to the date the lawsuit is filed. *See, e.g.*, *Hawkins v. Kroger Co.*, No. 15-02320, 2020 WL 1952832, at *10 (S.D. Cal. Apr. 23, 2020) (requiring defendant to produce evidence spanning the entire class period: "Because Plaintiff has alleged a class that continues to the present and has requested injunctive relief, and because Defendant has not provided any evidence establishing that it has stopped selling the relevant products, the Court finds that the discovery end date is the present."); *Fiori v. Dell, Inc.*, No. 09-1518, Dkt. No. 150, Order at 2 (N.D. Cal. Apr. 5, 2010) ("[U]ntil the court rules out a class period extending back to 2000, the class allegations of Plaintiffs' complaint govern the scope of discovery."); *Minter v. Wells Fargo Bank, N.A.*, 675 F. Supp. 2d 591 (D. Md. 2009) (ordering discovery of documents throughout the entire proposed class period); *Cent. Alarm Signal, Inc. v. Bus. Fin. Servs., Inc.*, No. 14-14166, 2016 WL 3595627, at *2 (E.D. Mich. July 5, 2016) (same).

III. *Donin* Response to Recurring Just Energy Grounds for Refusing to Produce the Requested Class-Wide Discovery

A. The Sustained *Donin* Class Claims are Nationwide in Scope and Class Discovery Should Not be Limited to New York

The *Donin* class includes all Just Energy customers in the United States who were charged a variable rate for their electricity or natural gas. *See First Am. Class Action* Compl., No. 17-05787, Dkt. No. 17, ¶ 172 (E.D.N.Y. Apr. 27, 2018), **Exhibit F**. The *Donin* court's September 24, 2021

[1] Mr. Jordet initially contracted with Commerce Energy for his natural gas service. According to a Just Energy press release, on April 1, 2017, Commerce Energy rebranded as Just Energy Solutions Inc. *See* Press Release, Just Energy, Commerce Energy Sheds Name to Begin Operating Under the Just Energy Brand (Apr. 3, 2017), https://justenergy.com/about-us/in-the-news/commerce-energy-rebrand/. Indeed, many of the contracts produced by Just Energy listed the contracting party as "Commerce Energy."

decision dismissed certain counts, but **did not** restrict the geographical scope of the sustained class action claims for breach of contract and good faith and fair dealing. *See* Decision and Order at 12–15, No. 17-5787 (E.D.N.Y. Sept. 24, 2021), Dkt. No. 111, **Exhibit G**. Specifically, the *Donin* court sustained three separate breach claims: (a) charging rates higher than those specified in welcome emails/letters sent to consumers, which were incorporated by reference into Just Energy's customer contract, (b) violating the contract's requirement that variable rates not increase more than 35% over the prior billing cycle, and (c) violating the contract's requirement to charge rates "determined by business and market conditions." *Id.* at 12–13. The September 2021 ruling also sustained the *Donin* implied covenant claim in part because "Just Energy contests the viability of the contract claim," and alternative pleading "is routinely allowed in federal court." *Id.* at 15.

In fact, while the *Donin* court's dismissal opinion explicitly addressed and dismissed class action state consumer protection claims "outside of New York" because it dismissed the Named Plaintiffs' individual consumer protection claims (*id.* at 11–12), the *Donin* court did not impose any geographical limitation whatsoever when it sustained the breach of contract and implied covenant claims. *See id.* at 13–15 (refusing to dismiss any aspect of these claims, including their nationwide scope as explicitly plead in Counts VIII and IX).

Well aware that the *Donin* plaintiffs' nationwide claims are entirely intact, Just Energy offers a magic trick that would prematurely limit class-wide discovery (and by default the scope of any certified class). Just Energy puts much weight on the fact that the *Donin* court dismissed "John Does 1-100" *at the pleading stage* because "Plaintiffs have not sufficiently alleged facts to show this Court has jurisdiction over John Does 1 to 100" and "without additional factual support" the *Donin* plaintiffs had failed "to establish prima facie evidence of jurisdiction" over these unnamed parties. *Id.* Just Energy tries to use this ruling *on the pleadings* regarding unnamed defendants to claim that the *Donin* court somehow intended that the dismissal of john does on jurisdictional pleading grounds would (silently) circumscribe the geographical scope of a yet-to-be certified class. There are multiple reasons why the *Donin* dismissal ruling does not bear the weight of Just Energy's claim.

First, as discussed above, the *Donin* dismissal opinion specifically addressed geographic limitations—but only in its dismissal of the *Donin* plaintiffs' multi-state consumer protection claims. *Id.* at 11–12. The opinion did not limit the reach of the nationwide breach claims.

Second, it would have been premature at the pleading stage (just like it is at this juncture of class-wide discovery to determine the Class' contours) for the *Donin* court to limit the scope of Plaintiffs' *live* claims. Questions as to the scope of any class are answered at the class certification stage once adequate discovery has been obtained—not on the pleadings or when the producing party seeks to withhold discovery because it believes a narrower class will be certified. *See, e.g.*, *Stanley v. Direct Energy Servs., LLC*, 466 F. Supp. 3d 415, 438 (S.D.N.Y. 2020). As the Southern District of New York aptly explained in another case involving a retail electricity supplier like Just Energy, Just Energy's use of materially similar contract terms and pricing policies is sufficient to confer Class Claimants' standing to represent consumers that reside in different states:

> Plaintiff has alleged that Defendant sent "uniform notices" to their legacy customers from NYSEG Solutions and/or Energetix that promised competitive,

> market-based variable rates. (Am. Compl. ¶ 2.) And Plaintiff has further alleged that Defendant engages in a uniform policy of price gouging all of its customers. (*Id.* ¶¶ 2, 24, 68.) The Second Circuit has explicitly instructed that "non-identical injuries of *the same general character* can support standing" for a class action. *Langan*, 897 F.3d at 94 (emphasis added) (citation omitted) . . . Under analogous circumstances, the Second Circuit determined that standing existed for a plaintiff who sought to represent a variety of certificate holders in connection to certain mortgage investments, despite the fact that other certificate holders were "outside the specific tranche from which the named plaintiff purchased certificates" and were subject to "different payment priorities." *Langan*, 897 F.3d at 94 (referring to *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*, 693 F.3d 145 (2d Cir. 2012)). Similarly, here, it may be true that Energetix customers and NYSEG Solutions customers had different contracts before Defendant bought them. It may also be true that customers outside New York received slightly different terms or offers than those that Plaintiff received. But the fact that the "ultimate damages [for each member of the class may] . . . vary . . . is not sufficient to defeat class certification under Rule 23(a), let alone class standing." *NECA*, 693 F.3d at 164-65 (citation and quotation marks omitted).

Stanley, 466 F. Supp. 3d at 438-39.[2] This is by far the majority view. *See, e.g.*, "[W]hether a plaintiff can bring a class action under the state laws of multiple states is a question of predominance under Rule 23(b)(3), not a question of standing[.]" *Rolland v. Spark Energy, LLC*, No. 17-2680, 2019 WL 1903990, at *5, n.6 (D.N.J. Apr. 29, 2019) ("find[ing] Defendant's standing argument unpersuasive") (quoting *Langan v. Johnson & Johnson Consumer Cos.*, 897 F.3d 88, 96 (2d Cir. 2018)); *see also Mussat v. IQVIA, Inc.*, 953 F.3d 441, 448 (7th Cir. 2020) ("[A]bsentees [in a class action] are more like nonparties, and thus there is no need to locate each and every one of them and conduct a separate personal-jurisdiction analysis of their claims."); *In re Thalomid and Revlimid Antitrust Litig.*, No. 14-6997, 2015 WL 9589217, at *18-19 (D.N.J. Oct. 29, 2015) (denying motion to dismiss multi-state class allegations on standing grounds); *Ramirez v. STI Prepaid LLC*, 644 F. Supp. 2d 496, 504-05 (D.N.J. Mar. 18, 2009) ("Defendants' argument appears to conflate the issue of whether the named Plaintiffs have standing to bring their individual claims with the secondary issue of whether they can meet the requirements to certify a class under Rule 23."); *In re Asacol Antitrust Litig.*, No. 18-1065, 2018 WL 4958856, at *4 (1st Cir. Oct. 15, 2018) ("Requiring that the claims of the class representative be in all respects identical to those of each class member in order to establish standing would 'confuse[ ] the requirements of Article III and Rule 23.'") (internal citations omitted).

Indeed, multistate breach of contract and breach of the covenant of good faith and fair dealing classes are routinely found to satisfy the class action predominance factor because such common law claims are generally uniform across the U.S. *See, e.g.*, *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 127 (2d Cir. 2013) (predominance satisfied and certifying nationwide class

[2] Just Energy's Notice of Disallowance admits that it uses uniform customer contracts with the same pricing provisions, arguing 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 Claimant) will be subject[.]"

asserting claims for breach of contract under the laws of multiple states); *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1122-23 (9th Cir. 2017) (affirming certification of nationwide breach of contract class); *Boyko v. Am. Intern. Group, Inc.*, No. 08-2214, 2012 WL 1495372, at *9 (D.N.J. Apr. 26, 2012), *separate portion vacated in part on reconsideration*, 2012 WL 2132390 (D.N.J. June 12, 2012) ("The Court agrees with Plaintiff that the legal elements of a breach of contract claim are substantially similar in all fifty states, such that certification of the AIG Class as to the breach of contract claim is proper."); *see also Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 233 n.8 (1995) ("contract law is not at its core 'diverse, nonuniform, and confusing'") (citation omitted); *Flanagan v. Allstate Ins. Co.*, 242 F.R.D. 421, 431 (N.D. Ill. 2007) (finding that numerous states' breach of contract laws are sufficiently similar for class certification purposes).

This reflects "the obvious truth that class actions necessarily involve plaintiffs litigating injuries that they themselves would not have standing to litigate." *Langan*, 897 F.3d at 95. Indeed, the Second Circuit has expressly held that "any concern about whether it is proper for a class to include out-of-state, nonparty class members with claims subject to different state laws is a question of predominance under Rule 23(b)(3) not a question of adjudicatory competence under Article III." *Langan*, 897 F.3d at 93 (quotation marks omitted). Thus, where a plaintiff's own claims survive dismissal, *Langan* teaches that counts alleging violations of other jurisdictions' laws are to be addressed at class certification.

Just Energy cannot contest this fact—as it has agreed to produce multi-state discovery in *Jordet* even though Mr. Jordet is a Pennsylvania resident. Just Energy's efforts to limit *Donin* to New York are simply a delay tactic.

Third, Just Energy's claim that the scope of the class is somehow fixed by a pleading elevates form far over substance. It is well settled that complaints may be conformed to the proof and amended up to the date of trial. That unnamed john does were dismissed because of jurisdictional pleading defects does not preclude Class Claimants from using actual facts to support—at any point prior to trial—the addition of other Just Energy Entities as named defendants or establishing privity exceptions to the Class's contract claims. Just Energy should produce the requested discovery and the parties and Your Honor should address Just Energy arguments to limit the Class's scope once the record is developed.

Fourth, as discussed below, future discovery in *Donin* was not foreclosed before the September 2021 ruling sustaining the *Donin* breach claims. Nonetheless, if Your Honor were to hesitate in deciding whether discovery was closed—notwithstanding that the district court judge had not yet ruled on Just Energy's pleading motion when he made what can be viewed as improvident remarks—then discovery should still be reopened as applicable precedent permits courts to reopen discovery where, as here, good cause exists.

B. Future Discovery in *Donin* was Not Foreclosed Before the *Donin* Claims were Sustained in September 2021

1. Just Energy's concedes that it must produce certain additional discovery responsive to the Class Claimant's Discovery Requests Nos. 4-6

Notwithstanding Just Energy's boiler plate objections to all eight Discovery Requests "on the basis that discovery is closed," Just Energy simultaneously acknowledges that it is willing to produce certain documents responsive to Requests 4-6 in this CCAA adjudication process. *See* Just Energy's April 21, 2022 letter discovery objections and response, **Exhibit D**:

> **Plaintiffs' Request No. 4**: For each utility region in which Just Energy supplied natural gas or electricity to residential customers, provide the following data for each month in the Class Period: [*see* **Exhibit A** for full data requests]
>
> - ***Donin*:** "Just Energy objects to this request on the basis that discovery is closed in this matter. [other objections omitted] …. Notwithstanding those objections, Just Energy can agree to produce documents memorializing Just Energy's gross margins (i.e., total sales revenue less COGS before deducting SG&A or other expenses) for the New York gas and electric markets for the six years prior to the filing of the Complaint."
>
> **Plaintiffs' Request 5**. For each utility region in which Just Energy supplied natural gas or electricity to residential customers, provide monthly pricing spreadsheets or other documents that reflect the factors, costs, or inputs Just Energy considers when setting monthly variable rates for residential natural gas or electricity.
>
> - ***Donin*:** Just Energy objects to this request on the basis that discovery is closed in this matter. Notwithstanding that objection, Just Energy can agree to produce models from the company's price-setting function that were used to analyze Just Energy New York's residential variable natural gas and electricity rates for the six years prior to the filing of the Complaint, which can be located pursuant to a reasonable and diligent search.
>
> **Plaintiffs' Request 6**. Annual income statements or other accounting documents sufficient to show the gross and net revenues Just Energy obtained from selling residential natural gas or electricity.
>
> - ***See* Response to Request No. 4.**

With its concession to produce discovery the *Donin* Class needs to prove its case, Just Energy concedes that discovery in *Donin* was not foreclosed prior to the ruling on the motion to dismiss. Just Energy does not deny (because it cannot) that for an informed adjudication to occur in this CCAA process, the company must produce documents sufficient for Your Honor and the Class to define the class and assess the liability and damages for the claims that were sustained by the *Donin* court in September 2021. The company's responses to Requests 4-6 show that Just Energy is willing to engage in a process that allows both parties to prepare separate damages models in advance of an adjudication. We discuss below why the data it has agreed to produce is overly limited and insufficient. However, it is now clear the company does not actually believe it would be proper to end discovery in a class action case before a motion to dismiss was decided.

2. The *Donin* Magistrate Was Tasked with Overseeing Discovery, and His Rulings Specifically Contemplate Discovery the *Donin* Plaintiffs Now Seek

It bears repeating that Magistrate Judge Bulsara, who was assigned at the outset of the case to oversee all discovery (*see* Scheduling Order dated October 30, 2017, attached hereto as **Exhibit H**), ruled on May 8, 2019 that expert discovery would commence once the Complaint survived Just Energy's motion to dismiss:

> With respect to experts, the plaintiffs did move before the close of the deadline to seek an extension of the expert discovery cut off. What I'm going to do is, should the case survive summary – excuse me, motion to dismiss, we will discuss a timely schedule for conducting expert discovery. Until then, expert discovery is stayed. (May 8, 2019 Tr. excerpts, at 14:14-17, attached as **Exhibit I**).

At this same hearing, Judge Bulsara also stated that further fact discovery hinged on the motion to dismiss:

> [A]fter the motion to dismiss is decided, OK, I'll hear from both sides as to whether or not there should be additional fact discovery … I'll let you make that motion after Judge Kuntz decides his motion to dismiss, and I won't think of it as a motion for reconsideration … But I will let you make that motion whenever it is – that that time comes. (*Id*., at 23:4-7,11-13, 16-17)

For context, Your Honor should know that after the *Donin* plaintiffs filed their Complaint in October 2017, Class Counsel repeatedly battled Just Energy on discovery issues, and were compelled to bring multiple discovery motions over, *inter alia*, the ESI protocol, ESI issues including sources, databases and search terms, redacted documents, privilege logs, and Defendant's withholding of documents. These disputes continued long after the Magistrate's rulings in May 2019 cited above.

As the discovery disputes continued, the parties awaited Judge Kuntz's decision on Defendants' dismissal motion, which was fully briefed and submitted in October 2018, but not decided until three years later in late September 2021. Prior to the ruling, the *Donin* plaintiffs filed an application to Judge Kuntz in November 2019 for a pre-motion conference on our proposed motion for leave to supplement their Class Action Complaint under the Federal Rules of Civil Procedure 15(d) to incorporate additional evidence into their pleading.

At the January 8, 2020 hearing on this application, Judge Kuntz (who had already had the fully-briefed dismissal motion for more than a year) *sua sponte* and without any request by Just Energy, vented what we believe constitutes no more than uncalled for dicta, a surprise reaction to our perfectly legitimate request to file a supplemental complaint. (Jan. 8, 2020 Transcript, **Exhibit J**).

As we know from their prior submissions to Your Honor, Just Energy is relying on these remarks to supersede Judge Bulsara's directives allowing expert and possibly further fact discovery once the motion to dismiss was denied. With all due respect to Judge Kuntz, his remarks were injudicious and without regard for the stage of the case–**where Just Energy has produced thus far only 318 documents**. Judge Kuntz was not involved in any of the discovery disputes and was plainly unfamiliar with Judge Bulsara's earlier directives regarding expert and fact discovery. In short, we believe the Judge's remarks can be construed to refer simply to the fact that discovery

was simply closed *at that point*—i.e. at the time when the motion to dismiss was pending—without interpreting his remarks to apply to what discovery would later be permitted once Judge Kuntz ruled on the motion to dismiss.

Accordingly, we ask that Your Honor reject Defendant's attempt to foreclose necessary discovery based on Judge Kuntz's remarks, and rule that in the interests of fairness and justice, future discovery was not foreclosed prior to a ruling on Just Energy's motion to dismiss. Such a ruling by the Claims Officer is certainly within your prerogative in this CCAA adjudication process.

Nonetheless, if Your Honor hesitates on the issue of whether discovery is closed, the next section of this motion to compel cites black letter law from the U.S. Federal courts which supports allowing the *Donin* plaintiffs' concurrent application here to reopen discovery if the moving party shows good cause under a six-part test, which we do in the next section of this motion.

3. Discovery May be Reopened Where, As Here, Good Cause Is Shown

The applicable legal standard in deciding whether to reopen discovery is "good cause, depending on the diligence of the moving party." *Moroughan v. County of Suffolk*, 320 F. Supp 3d 511, 515 (E.D.N.Y. 2018) (citing *Krawec v. Kiewit Constructors Inc.*, 2013 WL 1104414, at *8 (S.D.N.Y. Mar. 1, 2013)).

The Magistrate Judge in *Moroughan* (sitting in the same venue as our *Donin* case) describes the 6-part good cause test as follows:

> In analyzing a request to re-open discovery, courts apply the following six-part test: 1) whether trial is imminent, 2) whether the request is opposed, 3) whether the non-moving party would be prejudiced, 4) whether the moving party was diligent in obtaining discovery within the guidelines established by the court, 5) the foreseeability of the need for additional discovery in light of the time allowed for discovery by the district court, and 6) the likelihood that the discovery will lead to relevant evidence.

Id. Addressing these factors below, there is easily good cause to reopen both expert and fact discovery for this claim adjudication.

Factor 1: A Trial in the Claim Process

Given that Your Honor has not yet set a trial date in this CCCA adjudication process, the first factor weighs in favor of allowing additional discovery, as there is still adequate time for Just Energy to produce and Class Claimants to analyze the discovery sought.

When the Donin motion to dismiss was finally decided in September 2021, the case was stayed in bankruptcy with no imminent trial date. Thus, all the *Donin* plaintiffs could do was diligently file

their notices of claim in this CCAA proceeding (accomplished November 1, 2021), and press Just Energy for an adjudication in accord with the Claims Procedure Order.[3]

Factor 2: Whether the Motion is Opposed

Though we anticipate Just Energy will oppose reopening discovery, as recited above the company has already agreed to produce (albeit limited) discovery in this adjudication process. Additionally, it is within your sole discretion as the Claims Officer to determine the evidence that may be adduced and heard at trial. Thus, in the interest of a fair and impartial adjudication we ask that Your Honor reopen discovery and direct Just Energy to produce the limited requested discovery so you have before you the necessary evidence to render a fair and impartial decision on the merits. This second factor thus weighs in Class Claimants' favor.

Factor 3: Prejudice to the Nonmoving Party

Having conceded that it is willing to produce at least some further discovery in *Donin* and knowing that it was highly likely that Class Claimants would seek expert discovery and additional fact discovery if the *Donin* court denied their motion, Just Energy cannot seriously argue prejudice by now having to produce pertinent data and documents. Indeed, the company has known with certainty that nationwide gas discovery is owed in *Jordet* irrespective of the conflicting discovery rulings between Judges Bulsara and Kuntz. The lack of prejudice favors the *Donin* Class.

Factors 4 & 5: Diligence of the *Donin* Class and Foreseeability of Need

As described above, before discovery was stayed in the District Court, the *Donin* plaintiffs filed no less than 10 discovery-related motions (Dkt. Nos. 43, 45, 52, 62, 63, 75, 78, 82, 87, 91) and litigated strenuously to overcome Defendant's repeated discovery roadblocks, while simultaneously briefing and filing notices of supplemental authority on Defendant's motion to dismiss. The record shows that Claimant's Counsel displayed a high level of diligence.

Still, Just Energy may try to argue that Class Claimants lacked diligence in not initially moving to extend discovery by the February 28, 2019 deadline. To the contrary, Class Claimants did move successfully to extend the expert discovery deadline—thereby extending an already short discovery deadline for a class action in which the court had yet to rule on the motion to dismiss. Further, Class Claimants also moved to extend the fact discovery deadline, but the Magistrate deemed it untimely. In brief, a number of factors occasioned the slight untimeliness of the motion to extend (barely a month overdue), occasioned by the death of class counsel's father in February 2019 and simultaneous emergency family medical issues by the lead associate just before the February 28 discovery cutoff. Notwithstanding the cutoff, Judge Bulsara ruled that he would entertain a new motion *de novo* for additional discovery once the motion to dismiss was decided. That motion is now before Your Honor. In deciding whether Class Counsel has acted with

[3] Paragraph 44 of the CPO provides that "where a disputed Claim has been referred to a Claims Officer, the Claims Officer shall determine the validity and amount of such disputed claim." Further before making such any such determination, the Claims Officer is to "determine all procedural matters which may arise in respect of his or her determination of these matters, including any participation rights for any stakeholder and the manner in which any evidence may be adduced." *Id.*

diligence, we believe we have shown the alacrity and persistence emblematic of highly adequate Class Counsel both in the federal court, and again once the motion to dismiss was decided and we entered the CCAA process.

With respect to foreseeability of need, in a class action it would be putting the cart before the horse to forever close discovery before a motion to dismiss is decided. As held by the applicable Court of Appeals in *Parker v. Time Warner Entertainment*, 331 F.3d 13 (2d Cir. 2003), it is imperative that the trial court allow broad discovery on class issues so that Class Claimants can later formulate their class definition from an informed evaluation of the company's operations. In *Parker*, the Second Circuit reversed a district court that decided the "scope" of a class action solely on the pleadings *before* any discovery ensued:

> The District Court precluded any class discovery and even the filing of a motion for class certification. Thus, it remains unknown what class Parker would have sought to certify and the numbers of potential class members in that proposed class …. Absent at least limited discovery concerning the composition of the class, the District Court had no evidence regarding the size of the recovery that Time Warner might face if the class claims were successful …. Because the District Court decided Time Warner's motion without the factual support necessary to support its legal conclusions, the decision to deny Rule 23(b)(3) class certification is vacated and this matter is remanded for further proceedings.

Parker, 331 F.3d at 21-22.

Factor 6: The Likelihood of Relevant Evidence

Courts always have authority to do equity. It would be unfair and an abuse of discretion not to allow further discovery in the *Donin* case now that Class Claimants have won the motion to dismiss. Indeed, Rule 23(d)(1)(B) states that it is up to the court in conducting a class action to issue orders that "protect class members and fairly conduct the action." The discovery sought, as described below, is intended to enable Class Claimants to formulate their class definition and procced to an adjudication on the merits. Thus, this final factor favors the *Donin* Class.

****

At bottom, the bedrock principle of both the U.S. and Canadian civil justice systems is that claims should be resolved on their merits. In the class action context that means free and open discovery to determine the scope of the class—at class certification—followed by a merits ruling. Just Energy's efforts to block class-related discovery as a way to circumscribe the class from the outset violates these principles and should be rejected. For these and the reasons set forth below regarding each of Class Claimants' eight limited discovery requests, we respectfully ask that Just Energy be ordered to promptly produce all requested discovery.

IV. Just Energy's Refusal to Produce the Documents and Data Responsive to Class Claimants' Eight Limited Discovery Requests is Improper and Legally Deficient

A. Request for contracts of residential natural gas and electric customers.

This request seeks production of Just Energy's variable rate contracts for natural gas and electricity in all U.S. markets where Just Energy did business. Just Energy, and its relevant subsidiaries that contracted with U.S. consumers, are obligated to produce agreements for the variable rate products for all the company's natural gas and electrical markets in all relevant states.

First, because the *Donin* court sustained nationwide breach of contract and good faith and fair dealing claims brought by Just Energy gas and electricity customers across the United States, Just Energy must produce all variable rate agreements in effect during the applicable statute of limitations period. Second, Just Energy's attempt to restrict the geographical scope of *Jordet* by excluding New York, Illinois, and Michigan should be rejected as the company sells its products in all of these states. Third, Just Energy should not be allowed to limit its contract production to "residential" customers. There is no such limitation in either *Jordet* or *Donin* classes. Finally, for the reasons set forth above, the temporal scope of production is based on the statute of limitations period to the present. Other artificial limitations should be rejected.

> ***Argument Specific to Jordet:*** Just Energy improperly seeks to limit the geographic scope of its production to just six states (Pennsylvania, California, Georgia, Maryland, New Jersey, and Ohio). Just Energy also limited the temporal scope of its production in two ways (1) only going back four years prior to *Jordet's* filing even though the applicable statute of limitations for other states is longer, and (2) refusing to produce contracts in use after *Jordet* was filed, even though the class period extends to the present. Finally, Just Energy seeks to limit production to only "residential" contracts.
>
> Just Energy's position resulted in a highly limited April 22 production of contracts. For example, no residential contracts for Ohio or Pennsylvania were produced. There is only a single year of residential contracts for New Jersey (2017) and Georgia (2011), two years of Maryland residential contracts (2013, 2014) and only three years of California residential contracts (2013, 2016, 2017). Just Energy likewise did not produce any commercial contracts for California, Georgia, or Maryland and produced only two years of small commercial contracts for New Jersey (2014, 2017) and only one year for Pennsylvania (2014). Just Energy should be required to produce an exemplar of all of the operative commercial contracts for all states for the entire applicable periods.
>
> ***Argument Specific to Donin:*** Just Energy's claim that no further discovery should be permitted fails for the reasons discussed above. Just Energy also misleadingly claims that "relevant contracts have already been produced consistent with Just Energy's responses and objections." That *certain* "relevant" contracts for *New York only* have been produced does not excuse Just Energy from making a complete, nationwide contract production. Unless Just Energy is willing to stipulate that the contracts already produced in *Donin* are the same as all Just Energy variable rate gas and electric customers across the U.S., then

Just Energy must supplement its production—which to date comprises a scant 318 documents produced in the *Donin* case.

B. Request for correspondence from Just Energy to its residential customers, including but not limited to solicitation materials, welcome letters, renewal notifications, and notifications regarding variable rates or contract changes.

This request seeks production of exemplars of customer communications such as welcome letters (which under the Just Energy's contract in *Donin* is incorporated by reference) and other customer communications. For the reasons set forth above, Just Energy is obligated to produce examples of all requested communications between it and its customers for the variable rate products for all of the Company's natural gas and electrical markets in the United States.

Argument Specific to Jordet: Just Energy imposed the same temporal, geographic, and residential vs. commercial limitations as it did with its contract production.

Just Energy's positions resulted in a highly limited April 22 production. For example, Just Energy did not produce any correspondence for Pennsylvania. Just Energy produced introductory materials for Ohio (2013-2017), California (2013, 2016-2018), Maryland (2013-2014), New Jersey (2014, 2017), and Georgia (2011). Just Energy produced cancellation materials for Ohio (2013, 2016-2017), California (2012, 2017-2018), Maryland (2014), and New Jersey (2013, 2017).

Argument Specific to Donin: Just Energy's positions on this request are the same as its positions on Class Claimants' first request. Your Honor should reject Just Energy's positions for the same reasons.

C. Request for data for each residential variable rate natural gas and electric customer, including customer account number, monthly usage, and monthly variable rate.

This request seeks usage and rate charges for potential class members. For the reasons set forth above, Just Energy, and its relevant subsidiaries, are obligated to produce customer account numbers, monthly usage data and the monthly variable rate charged for all of the company's natural gas and electrical markets across the U.S. Thus, Class Claimants will not agree to the proposal Just Energy offered to limit the producing party to Just Energy Solutions.

Argument Specific to Jordet: Just Energy provided two options that *Jordet* could choose from, but Class Claimants will only address the second option. Just Energy agreed to produce data for residential natural gas customers in the six states who were billed for a variable rate in the four years prior to the filing of the *Jordet* Complaint. Just Energy stated it would require 6-8 weeks to produce this data. Yet these are the same inappropriate temporal, geographic, and residential vs. commercial limitations Just Energy seeks to impose throughout. Also, Just Energy's proposed timing is not appropriate. Obtaining the requested data can be accomplished in two weeks (especially since by the time Your Honor rules on this motion Just Energy will have had these demands for more than 2 months).

Argument Specific to Donin: Just Energy's positions on this request are the same as its positions on the *Donin* plaintiffs' first request. Your Honor should reject Just Energy's positions for the same reasons.

D. Request for data identifying the costs and expenses that Just Energy incurred in each utility region in providing natural gas and the utility default supply rate.

Data identifying the costs and expenses that Just Energy incurred in each utility region, and the corresponding utility default supply rate, goes directly to the question of whether Just Energy set its rates in good faith and based on business and market conditions. Class Claimants will prove that the margin Just Energy charged above its costs and expenses is unreasonably high such that the variable rate no longer reflects or is commensurate with business and market conditions. And because utility rates are reflective of business and market conditions (because they buy electricity and gas from the same wholesale markets Just Energy does), the fact that Just Energy charges rates substantially higher than utility rates further proves Class Claimants' breach of contract claim. Class Claimants will also prove that Just Energy does not set its variable rates in good faith, and one way they will do so is by showing that Just Energy tacks on a margin to the variable rate that is substantially higher than the margin it obtains from its customers on fixed or introductory rates, even though its costs are the same or even lower for servicing variable rate customers. It is because this information is so damning that Just Energy is both resisting their production and incredibly claiming that such data does not exist.

As for its costs of goods sold ("COGS"), Just Energy agrees to produce documents memorializing Just Energy's gross margins (i.e. total sales revenue less COGS before deducting SG&A or other expenses). Yet it is not clear whether Just Energy intends to provide a single figure for the gross margins (divorced from any information about revenues or costs, thus rendering it useless), or whether it intends on separately identifying the gross margin, total sales revenue, COGS, SG&A, and other expenses (as typically occurs with productions in other similar litigations). Documents memorializing only a single gross margin figure are insufficient to identify the costs and expenses incurred.

Just Energy's claim that its costs are "generally" documented "on a portfolio basis not broken down by types or groups of customers" lacks support or credibility. Any business as sophisticated as Just Energy tracks the cost and margins it obtains from its different products, here the fixed, introductory, and variable rates it charges its customers in each utility region in the nine states at issue. If the CEO (or the debtor in possession) wanted to know which products were profitable and which were not, that information would be readily available, and Just Energy should not be heard to contend that it cannot do the same here.

Just Energy also refuses to produce the utility default supply rate. However, there is little dispute that utility rates are relevant, including because they reflect the business and market conditions in the utility's geographic region. The local utility is also invariably the main competitor of Just Energy for retail energy customers, and therefore their rates are part of market conditions any reasonable consumer would consider. Indeed, Just Energy sets its fixed and introductory rates specifically to compete with utility rates, because that is where it finds its customers and that is the most obvious and important comparator for any reasonable consumer. Not surprisingly, numerous

courts hold that utility rates are relevant to whether an ESCO like Just Energy charges market rates. *See Mirkin v. XOOM Energy LLC*, 931 F.3d 173, 178 (2d Cir. 2019) (endorsing use of local utility as a comparator); *Stanley v. Direct Energy Servs., LLC*, 466 F. Supp. 3d 415, 426 (S.D.N.Y. 2020) (endorsing use of local utilities as comparators); *Chen v. Hiko Energy, LLC*, No. 14-1771, 2014 WL 7389011, at *5 (S.D.N.Y. Dec. 29, 2014) (using local utility as comparator).

The data sought in this request are relied upon in the normal course of Just Energy's business, they are produced in every case of this type, and they are essential for Class Claimants' experts to evaluate in connection with the formulation of a damage model. This data also informs Class Claimants' implied covenant claims as understanding Just Energy's access to data is critical in assessing whether it exercised in good faith any pricing discretion it may have had. Class Claimants note that Just Energy's U.S. counsel has routinely produced all of the requested data in other cases in which the undersigned counsel have been involved.

Argument Specific to Jordet: Just Energy imposed the same temporal, geographic, and residential vs. commercial limitations as it did with its customer contract production.

Argument Specific to Donin: Just Energy's positions on this request are the same as its positions on the *Donin* plaintiffs' first request. Your Honor should reject Just Energy's positions for the same reasons.

E. Request for data identifying monthly pricing spreadsheets or other documents that reflect costs, factors, or inputs considered in setting variable rates.

This request seeks Just Energy documents that reflect Just Energy's internal rate calculations. Just Energy agreed to produce unspecified "models from the company's price-setting function that were used to analyze" the company's variable rates. Just Energy's cryptic answer raises several questions. **When** were these "models" used to "analyze" Just Energy's variable rates? Were they used to **set** the rates or merely analyze them later? What is the company's "price setting function"?

Every third party energy supplier like Just Energy has a standard practice by which they set variable rates. Each month, a spreadsheet or other analytical tool is used to account for the various factors that actually go into the variable rate, such as COGS, overhead, margin, and profit goals. It is a standard practice to maintain copies of these documents for later use and research. These spreadsheets, which are easy to collect and produce, are a true reflection of whether Just Energy actually sets its variable rates based on business or market conditions or if it sets those rates based on other unspecified factors. As such, Just Energy should produce them.

Just Energy also imposed improper geographic, temporal, and residential vs. commercial limits on its promised production. For example, Just Energy is attempting to limit the nationwide *Donin* contract claim to just New York "residential" gas and electricity rates "for the six years prior to the filing of the Complaint." There are no such limitations on the *Donin* (or *Jordet*) class and the September 2021 *Donin* dismissal ruling placed no such limits on the *Donin* claims.

F. Request for annual income statements or other accounting documents showing gross and net revenues Just Energy obtained from selling natural gas or electricity.

Just Energy's response refers Class Claimants back to its response to item four, where it agreed to produce documents memorializing Just Energy's gross margins (i.e. total sales revenue less COGS before deducting SG&A or other expenses). Ironically, and tellingly, this response is substantially closer to the data Class Claimants requested in this sixth request. But, in agreeing to produce documents showing gross margins, Just Energy fails to agree to produce documents showing gross *revenues*.

Just Energy also imposed its stock temporal, geographic, and residential vs. commercial limitations on *Jordet* and again refuses to produce additional discovery for *Donin* based on its claim that discovery is not available after the *Donin* court issued its September 2021 dismissal ruling.

G. Request for all communications with regulatory agencies regarding Just Energy's variable rate.

Just Energy refuses to produce any documents responsive to this request, improperly claiming that the request is "irrelevant." Not so. It is well known that energy companies like Just Energy have come under heavy scrutiny from regulators in New York, Connecticut, Illinois, Massachusetts, Pennsylvania, and elsewhere for their marketing and sale of the exact variable rate products at issue here. Indeed, Just Energy itself has been the target of at least **six** regulatory enforcement actions, reams of investigative journalism, 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 Class Claimants and agreed to refund a total of US$4,000,000 to a subset of Massachusetts customers along with implementing several key changes to its marketing and sales practices.[4] This information is germane to the sustained *Donin* implied covenant of good faith and fair dealing claim and will shed light on Just Energy's rate setting practices.

H. Request for documents showing officers and managers involved in setting variable rate prices.

Just Energy refused to produce any documents, claiming that "there are more efficient means of obtaining that information (e.g., corporate testimony)" and that the company does not "systematically" create "divisional" phone lists or organizational charts. Class Claimants find it incredulous that Just Energy cannot produce documents that identify officers and managers that have responsibility in connection with the marketing and sale of the products and geographies at issue in this case. Just Energy's employees have a way to look up and identify one another by position—all but the smallest companies have such documents. Class Claimants only ask that Just Energy produce those documents during the relevant time period and geographies. These documents do not need to have been "systematically" created and should be produced regardless

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

of whether they were organized by "division" or (likely) a broader level. After production of these documents, Class Claimants will elicit testimony. This is the most efficient way forward.

* * *

Thank you for your attention to this to this matter.

Respectfully submitted,

/s/ Steven L. Wittels
Steven L. Wittels

cc: All counsel of interest in this Claims Adjudication process

THIS IS **EXHIBIT "L"** REFERRED TO IN THE AFFIDAVIT OF MICHAEL CARTER SWORN BEFORE ME over video teleconference this 29th day of May, 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.

Tiffany Sun

A Commissioner for taking Affidavits, etc.

Miao Sun, a Commissioner, etc., Province of Ontario, while a Student-at-Law. Expires March 6, 2023.

CYRULNIK FATTARUSO LLP

55 BROADWAY, THIRD FLOOR, NEW YORK, NY 10006

May 10, 2022

Via Email
Hon. Dennis O'Connor
Claims Officer
DOConnor@blg.com

Re: Defendants' Opposition to Plaintiffs' Motion to Compel in *Donin v. Just Energy Group Inc. et al.* and *Jordet v. Just Energy Solutions Inc*.

Dear Justice O'Connor:

I write on behalf of Just Energy Group Inc., Just Energy New York Corp., and Just Energy Solutions Inc. (collectively "Just Energy"), Defendants in Plaintiffs' proposed class actions. For the reasons set out below, Just Energy respectfully opposes Plaintiffs' April 29, 2022 Motion to Compel discovery ("MTC").

OVERVIEW

Plaintiffs seek to compel responses to vague discovery requests that are overly broad and inappropriate in light of the operative complaints and prior court decisions. The requests themselves improperly conflate the two actions and attempt to obtain materials that are foreclosed in either case. The primary issues for decision are:

1. Whether Plaintiff Jordet is entitled to discovery materials predating April 2014 (and if so, whether Plaintiff Jordet is entitled to discovery materials predating April 2012)

   The answer is no. The *Jordet* court already held that all claims prior to April 2014 are time barred, including class members' claims. Even if the court had not already made that determination, by its own terms Plaintiff Jordet's complaint was expressly limited to claims "from April 2012 to the present."

2. Whether Plaintiff Jordet is entitled to discovery related to non-residential customers

   The answer is no. Commercial customers were not included in Plaintiff's putative class definition, or anywhere in the operative complaint for that matter. Plaintiff has not sought (nor was he granted) leave to amend his complaint to assert additional claims on behalf of a different putative class.

3. Whether Plaintiff Jordet is entitled to discovery from states where Just Energy Solutions did not contract

   The answer is no. The only surviving claims are contract claims, and the only Defendant in the *Jordet* action is Just Energy Solutions Inc. ("Just Energy Solutions"). Just Energy Solutions (or its predecessor) contracted in six states. There is no basis for Plaintiff's

argument that he is entitled to discovery in a breach of contract action relating to states where Just Energy Solutions (or its predecessor) did not even contract.

4. Whether Plaintiff Jordet is entitled to discovery post-dating the complaint

   The answer is no. Plaintiff's contract with Just Energy terminated in 2018, and the complaint does not contain sufficient allegations to warrant discovery post-dating the complaint.

5. Whether the *Donin* Plaintiffs are entitled to additional fact discovery

   The answer is no. The federal court unequivocally closed discovery and confirmed it was not "stayed" pending the motion to dismiss. A magistrate judge does not have authority to overrule a district judge's order (as Plaintiffs suggest).

   Moreover, there is no "good cause" to reopen discovery. Plaintiffs have not identified what incremental evidence they seek that would warrant reopening discovery. Further, the federal court previously found there was no good cause to reopen discovery, particularly given Plaintiffs' lack of diligence.

6. Whether the *Donin* Plaintiffs are entitled to fact discovery outside of New York

   The answer is no. As noted above, fact discovery in the *Donin* matter was closed by the court. Even if the court had not closed discovery, moreover, the only surviving claims are breach of contract claims, and the remaining Defendants contracted with only New York customers. There are no surviving claims that relate to breach of contract outside New York.

7. Whether Plaintiffs' specific discovery requests should be compelled.

   Even if the issues above are decided in Plaintiffs' favor, the answer is no. Each request needs to be examined individually and with respect to each action. The requests attempt to conflate the actions—for example, calling for information related to electricity and natural gas, even though the *Jordet* action includes only natural gas customers. Moreover, the *Donin* Plaintiffs concede they filed at least ten discovery motions, many of which were denied by the federal court. Even if *Donin* discovery is reopened (and Plaintiffs have not established it should be), it should not be reopened without limitation.

   To the extent any additional discovery is permitted, the requests should be properly tailored and clarified.

In the spirit of compromise, Just Energy has agreed to produce a reasonable scope of materials for each action. Plaintiffs' attempts to re-litigate issues that have already been decided (or foreclosed by their own complaints) are costly, inefficient, and improper, particularly in the context of this CCAA claims adjudication process. Here, Plaintiffs seek to expand upon their rights in the underlying litigations, but the claims process allows only for the adjudication of a party's existing rights as of the time the Applicants filed for protection under the CCAA. Such an expansion is not only prejudicial to the Just Energy Entities, but also to other unsecured creditors

in this process and, therefore, cannot be permitted. Additionally, the Plaintiffs' overbroad discovery requests and improper expansion of their claims fails to acknowledge the enhanced cost-benefit and proportionality concerns that are inherent in a CCAA claims adjudication process. As such, Plaintiffs' motion to compel should be denied in its entirety.

ARGUMENT

I. Jordet

Plaintiff Jordet defines his purported "class" as "all Just Energy customers charged a variable rate for **residential natural gas services** by Just Energy **from April 2012 to the present**." Ex. 1, Jordet Compl. ¶ 38. Similarly, Jordet defines a "Pennsylvania Sub-Class" as "Just Energy's Pennsylvania customers charged a variable rate for **residential natural gas services** by Just Energy **from April 2012 to the present**." Ex. 1, Jordet Compl. ¶ 39.

Jordet now wants to bring claims on behalf of a group of non-residential customers as well, who are not part of the putative class or even mentioned in the complaint. Jordet also now seeks to bring claims dating back to 2008. These latest efforts to expand the claims that he asserted—which were then further *limited* at the motion to dismiss stage (as set forth below)—are plainly improper.

1. The 2014 cutoff date was already decided by the federal court, and Plaintiff's attempt to re-litigate that issue is improper.

Plaintiff Jordet is now seeking discovery dating back to 2008. That request flies in the face of the operative complaint itself, which limits the putative class to customers from "April 2012 to the present." Of course, the federal court's motion to dismiss ruling further limited the claims by dismissing all claims that accrued prior to April 2014.

As noted above, the *Jordet* complaint defines the putative "class" as "all Just Energy customers charged a variable rate for residential natural gas services by Just Energy from **April 2012 to the present**." Ex. 1, Jordet Compl. ¶ 38 (emphasis added). The complaint also defines a purported "Pennsylvania Sub-Class" that is similarly limited from "**April 2012 to the present**." Ex. 1, Jordet Compl. ¶ 39 (emphasis added). The complaint does not purport to bring any claims for conduct prior to 2012. There is no basis for Plaintiff's contention that claims prior to 2012 are somehow permissible.

The federal court then considered the claims on Defendants' motion to dismiss, and it further limited the permissible time period for which claims could be pursued. In granting in part Defendant's motion to dismiss, the federal court ruled that "Plaintiff's claims prior to April 6, 2014, are time barred; **similarly, the purported class's claims prior to that date are also barred**." Ex. 2, Jordet MTD Order at 19 (emphasis added). Plaintiff inscrutably contends that the motion to dismiss "only addresses the named plaintiff's individual claim." MTC at 3. But that is obviously wrong: the court clearly held that the April 6, 2014, cutoff applies to "the purported class's claims," not just Plaintiff's claims. Ex. 2, Jordet MTD Order at 19.

Further, even if the court had not so clearly held, Plaintiff waived his argument that claims prior to 2014, including for class members, are timely. Judge Sktreny noted that at the motion to

dismiss stage, 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)." Ex. 2, Jordet MTD Order at 18. Arguments not raised in response to a motion to dismiss are waived. *See, e.g.*, Defendants' Legal Authority ("DL") Ex. 1, *Kao v. Brit. Airways, PLC*, 2018 WL 501609, at *5 (S.D.N.Y. Jan. 19, 2018) ("Plaintiffs' failure to oppose Defendants' specific argument in a motion to dismiss is deemed waiver of that issue.").

Re-litigating this issue has already been costly and time consuming—it was briefed on Just Energy's motion to dismiss, and there is no basis for Plaintiff's attempt to ignore that ruling. Consistent with the court's holding, Just Energy has agreed to produce certain documents dating back to the earliest date for which the court permitted the breach of contract claims to proceed – April 2014. Compelling discovery prior to this date would be contrary to the court's ruling.[1]

2. The *Jordet* action does not include non-residential customers.

Without citation to the complaint or the record, Plaintiff argues that "the *Jordet* class includes both residential *and* commercial variable rate customers." MTC at 4. But again, one need look no further than Plaintiff's own class definition to reject that unsupported and unsupportable position. Specifically, Plaintiff defines the "class" as "all Just Energy customers charged a variable rate for ***residential*** natural gas services by Just Energy from April 2012 to the present," and defines a Pennsylvania sub-class of customers charged a variable rate "for ***residential*** natural gas services." Ex. 1, Jordet Compl. ¶¶ 38-39 (emphasis added). The complaint does not assert any claims on behalf of non-residential, commercial customers at all, and Plaintiff's improper attempt to re-write his complaint through a discovery motion is obviously improper.

Plaintiff argues that Just Energy appears to use certain contracts for both residential and commercial customers, and that it is "irrelevant" that Plaintiff himself is a residential customer. MTC at 4. But those arguments miss the point: the issue is what claims and putative class Plaintiff actually pled, and whether commercial customers, who are plainly not part of Plaintiff's class definition, should somehow be considered putative class members anyway. They cannot—there is no putative class pled in the complaint to which commercial customers belong. Even if the class is ultimately certified, it will not include commercial customers.

Plaintiff also contends that Just Energy's "effort to limit *Jordet*" to residential claims "ignores the nationwide claims in *Donin* entirely." MTC at 4. This argument fails for two reasons. First, the argument typifies Plaintiffs' improper effort to conflate *Donin* and *Jordet*. The claims (and scope of the putative class) in *Donin* have no bearing on the claims (or scope of class) pled in *Jordet*, or on the availability of discovery in the *Jordet* matter. Second, *Donin* is similarly limited to residential customers in any event. *See, e.g.*, Ex. 3, Donin Am. Compl. ¶ 1 ("This consumer class action arises from Just Energy's fraudulent, deceptive, unconscionable, bad faith, and unlawful conduct in 'supplying' ***residential*** gas and electricity to consumers" (emphasis added)).

[1] In addition to contravening the court's ruling, compelling discovery prior to 2012 would be contrary to Plaintiff's own claims as well. Plaintiff's position that discovery should date back to 2008 therefore should be summarily rejected.

3. The *Jordet* action includes only the states where Just Energy Solutions Inc. contracted during the relevant period.

Plaintiff now contends that the class action "encompasses at least nine states." MTC at 5.

First, Plaintiff fails to establish that claims on behalf of customers outside of Pennsylvania should be considered. Plaintiff's complaint itself is inconsistent, and the initial definition of "class" in the complaint is expressly limited to Pennsylvania consumers. *See* Ex. 1, Jordet Compl. ¶ 4 (defining "Class" or "Class Members" as "***Pennsylvania consumers*** who were charged a variable rate for natural gas by Just Energy from March 2012 to the present" (emphasis added)).

But even considering the broadest (conflicting) "class" definition in the complaint (Ex. 1, Jordet Compl. ¶ 38), the class can encompass only the states where the Defendant Just Energy Solutions contracted. And there are only six states where Just Energy Solutions (or its predecessor Commerce Energy) contracted for natural gas: Pennsylvania, California, Georgia, Maryland, New Jersey, and Ohio.

Plaintiff claims that in addition to these six states, Just Energy Solutions Inc. "was actively incorporated in Illinois, New York, and Michigan, prior to the filing of the *Jordet* action." MTC at 5. Its incorporation in other states is not the issue: Just Energy Solutions did not contract to provide natural gas services in Illinois, New York, or Michigan, and sold natural gas only in the six states for which Just Energy agreed to produce documents.

Notwithstanding the limitation of the claims to Pennsylvania, in the spirit of compromise, Just Energy agreed to produce certain documents pertaining to each of six states in which Just Energy Solutions contracted to provide natural gas (and to leave for a later date Your Honor's determination of whether claims for customers outside of Pennsylvania are permitted), but there is certainly no basis for Plaintiff's request for documents outside the states where Just Energy Solutions contracted.

4. Discovery should be limited to the date the lawsuit was filed.

While simultaneously seeking an expedited resolution of this matter, Plaintiff seeks discovery "to the present," more than four years beyond the date of the complaint and argues that "discovery in a class action is not limited to the date the lawsuit is filed." MTC at 5. But Jordet terminated his contract in 2018, and the complaint does not sufficiently allege conduct post-dating the complaint to warrant discovery beyond that date. Plaintiff attempts to justify the addition of more than *four years* of additional document discovery through his allegation that that the putative class is "to the present," but ignores that the operative pleading does not include any allegations of misconduct that postdate 2018. Such conclusory statements do not outweigh the burdens associated with their request. *See, e.g.*, DL Ex. 2, *U.S. ex rel. King v. Solvay S.A.*, 2013 WL 820498, at *4 (S.D. Tex. Mar. 5, 2013) ("A few generalized allegations that conduct continued 'to the present' in a 267–page complaint… does not justify the burden and expense associated with unfettered discovery 'to the present'"). By contrast, Just Energy's proposed timeframe is a "reasonable temporal scope of discovery" in the context of the conduct alleged.

DL Ex. 3, *United States ex rel. Bilotta v. Novartis Pharms. Corp.*, No. 11 CIV. 0071 (PGG), 2015 WL 13649823, at *3 (S.D.N.Y. July 29, 2015) (denying additional discovery because "rote allegations of 'ongoing' illegal activity, unaccompanied by allegations of specific instances of wrongdoing, are insufficient to justify discovery beyond the time period during which specific instances of wrongdoing have been alleged"); DL Ex. 4, *United States v. Medtronic, Inc.*, 2000 WL 1478476, at *3 (D. Kan. July 13, 2000) (rejecting discovery date range of 20 years as overly broad and unduly burdensome based on the factual allegations in the complaint which centered on the period of plaintiff's three years of employment by the defendant).

II. Donin

5. Additional fact discovery in the *Donin* matter is foreclosed.

Plaintiffs argue that "future discovery in *Donin* was not foreclosed before the September 2021 ruling sustaining the *Donin* breach claims." MTC at 8. But of course, fact discovery in *Donin* ***was*** closed, and long before the September 2021 ruling on the motion to dismiss or the commencement of the CCAA proceeding. As set out below and in Just Energy's April 13, 2022 letter, Judge Kuntz closed fact discovery at a January 2020 hearing – to be sure, he did so over Plaintiffs' objections and much to their chagrin. He addressed Plaintiffs' many objections at the hearing, and left no room to argue that it was somehow still open or that Magistrate Bulsara, who Judge Kuntz expressly overruled and who is subject to Judge Kuntz's authority, could reopen it.

a. Discovery is closed

i. Magistrate Bulsara's Orders Do Not Permit Reopening Discovery

Plaintiffs argue that the *Donin* magistrate judge's rulings "specifically contemplate discovery the *Donin* Plaintiffs now seek." MTC at 9-10. Plaintiffs argue that at a May 2019 hearing, the magistrate judge stated that the parties would discuss expert discovery if the case survived the motion to dismiss,[2] and that at that point, the parties could address whether there should be additional fact discovery.

Plaintiffs' argument that fact discovery was effectively stayed rather than closed is disingenuous, unpersuasive, and plainly wrong.

First, at the January 2020 hearing, Judge Kuntz rejected this very argument and confirmed discovery was not "stayed" pending the motion to dismiss, it was "closed."

> MR. WITTELS: Are you saying discovery is stayed; is that --
>
> THE COURT: I am saying discovery is over. Done. *Kaput*. It's over. No more discovery.

[2] Plaintiffs' suggestion that expert discovery remains open is not at issue on this motion to compel fact discovery, and is not ripe for determination.

Ex. 4, Jan. 8, 2020 Tr. at 17.

Second, Judge Kuntz expressly overruled Magistrate Bulsara and closed discovery—and Plaintiffs conceded they understood that decision.

> MR. WITTELS: Judge, when you say -- we have ongoing discovery disputes that are before [Magistrate] Judge Bulsara, who as recently as December said that he found -- if I could just quote --
>
> THE COURT: I am overruling judge Bulsara in that regard.
>
> [. . .]
>
> MR. WITTELS: When you say "overruling," I just would like to make a question of Your Honor, then. We have ongoing disputes that the judge has -- that Judge Bulsara has ruled on and that we still -- that are subject to recent orders that the judge ruled on. Your Honor has --
>
> THE COURT: Do you not understand the relationship between magistrate judges and district court judges?
>
> MR. WITTELS: Yes.
>
> THE COURT: It's kind of analogous to the relationship between district court judges and the court of appeals, or the court of appeals and the United States Supreme Court. Okay?
>
> MR. WITTELS: No, I do -- I do, Your Honor.
>
> THE COURT: Good.

Ex. 4, Jan. 8, 2020 Tr. at 17.

Plaintiff argues, "Just Energy is relying on these remarks to supersede Judge Bulsara's directives allowing expert and possibly further fact discovery once the motion to dismiss was denied. With all due respect to Judge Kuntz, his remarks were injudicious and without regard for the stage of the case." MTC at 10.

Those arguments are nonsense. As a matter of law, Judge Kuntz's order *does* "supersede" Magistrate Bulsara's statements, and Plaintiffs' argument that Magistrate Bulsara would somehow be permitted to re-open discovery in defiance of this order turns the law on its head. Judge Kuntz is a district judge, and he has final say over all rulings in the case.[3] As noted above,

[3] Ex. 4, Jan. 8, 2020 Tr. at 17 ("THE COURT: Do you not understand the relationship between magistrate judges and district court judges?"); *see generally* "What Is a Magistrate Judge,"

Judge Kuntz specifically addressed this with Plaintiffs' counsel at the January 8, 2020 hearing when he said "No more discovery," and confirmed they understood *he was overruling* the magistrate. Ex. 4, Jan. 8, 2020 Tr. at 17. And it goes without saying that parties cannot ignore a federal court's ruling just because they believe it is "injudicious," particularly where, as here, the court indicated its intentions for the appropriate next steps in the litigation. After the motion to dismiss was decided, the court issued an order setting a deadline of November 22, 2021, for parties to take the first step in dispositive motion practice (given that discovery had ended), and further made clear that, if neither party intended to submit dispositive motions, they should proceed with filing a joint pretrial order by January 20, 2022. Ex. 5, Donin Docket at Docket Entry Oct. 22, 2021. Such an order confirms that the court considered discovery to be closed.

ii. Just Energy Does Not Concede that Fact Discovery Is Open

Plaintiffs also argue that "Just Energy concedes that it must produce certain additional discovery responsive to the Class Claimant's Discovery Requests Nos. 4-6" (MTC at 8) and that, "With its concession to produce discovery the *Donin* class needs to prove its case, Just Energy concedes that discovery in *Donin* was not foreclosed prior to the ruling on the motion to dismiss." MTC at 9. These are egregious misstatements. Reserving all rights, objecting to Plaintiffs' discovery requests, and entirely in the spirit of compromise, Just Energy voluntarily agreed to produce certain additional documents in the *Donin* case. Plaintiff's desperate effort to capitalize on that good faith effort to avoid a dispute in the spirit of compromise should not be countenanced. Just Energy expressly and repeatedly made clear that it is not required to produce the documents or somehow obligated to reopen discovery in the face of the federal court's contrary ruling. *See generally* Ex. 6, Just Energy Letter, dated Apr. 21, 2022.

b. There is no good cause to reopen discovery.

In a last-ditch effort, Plaintiffs argue that even if discovery in *Donin* is closed (it is), discovery should be reopened because there is "good cause." MTC at 11. Plaintiffs ignore the fact that their previous request to reopen discovery was denied for lack of "good cause." *See* Ex. 5, Donin Docket at Docket Entry Apr. 11, 2019 ("[T]here is no good cause proffered to extend the fact discovery deadline; indeed, Plaintiffs make no mention of their failure to seek relief within the deadlines in this Court's Rule 16 order"). In response to Plaintiffs' 2019 request, Magistrate Bulsara declined to reopen fact discovery, but permitted the remaining production of limited categories of documents that Just Energy had already offered to produce (all of which were for New York customers only). Ex. 7, May 8, 2019 Tr. at 11, 22-23.

As was the case then, there is no good cause for reopening discovery now. "[A]n application to reopen discovery should be denied where the moving party 'has not persuaded th[e] Court that it was impossible to complete the discovery by the established deadline.'" DL Ex. 5, *Baburam v. Fed. Express Corp.*, 318 F.R.D. 5, 8 (E.D.N.Y. 2016); *see also* DL Ex. 6, *Burlington Coat Factory Warehouse Corp. v. Esprit De Corp.*, 769 F.2d 919, 927 (2d Cir.1985) (upholding denial

https://fmja.org/wp-content/uploads/2021/07/What-is-a-Magistrate-Judge-for-FJMA-webpage.pdf (explaining magistrate judges are appointed by District Court judges and have limited, delegated authority).

of further discovery where the party "had ample time in which to pursue the discovery that it now claims is essential"). Plaintiffs had more than ample time to complete discovery here, and received voluminous responsive discovery. But Plaintiffs seek to reopen discovery anyway, citing six factors courts consider in determining whether a party demonstrated good cause for such relief. Although the argument is barred by the federal court's prior rejection of this very application, we nevertheless briefly address the six factors – none of which weigh in Plaintiffs' favor – below.

i. Factor 1: Whether trial is imminent.

This factor weighs in Just Energy's favor. After the motion to dismiss was decided, the parties were directed to proceed to either dispositive briefing or pretrial preparation. Ex. 5, Donin Docket at Docket Entry Oct. 22, 2021. Trial was imminent. This factor weighs in favor of Just Energy.

The *Donin* Plaintiffs ignore the court's October 2021 order. They argue inconsistently that their claims need to be decided with alacrity in this proceeding, and that there is adequate time to reopen and revisit discovery that originally lasted more than a year and has been closed for more than two years. Reopening discovery at this late stage would be extraordinarily time consuming and would certainly not expedite the resolution of Plaintiffs' claims.

ii. Factor 2: Whether the motion is opposed.

This factor weighs in Just Energy's favor, as the request is opposed.

iii. Factor 3: Whether there is prejudice to the nonmoving party.

This factor also weighs in Just Energy's favor. Plaintiff is seeking discovery that was already produced, was denied by the federal court, or was foreclosed by the motion to dismiss decision. The burden associated with re-opening discovery, especially after Just Energy briefed (and won) numerous discovery disputes at the earlier stage, is costly and prejudicial – further exacerbated by the fact that the company is in the midst of a CCAA restructuring. Re-opening discovery would potentially not only conflict directly with the federal court's January 2020 order, but with the many other orders denying Plaintiffs' requests for additional discovery – a gambit they appear bent on continuing in this proceeding. *See, e.g.*, Ex. 7, May 8, 2019 Tr. at 11, 22-23 (declining to reopen discovery other than for limited categories of New York materials Just Energy previously agreed to produce); Ex. 8 at 3, Dec. 18, 2019 Order (denying discovery post-dating complaint). Those issues were already briefed and/or argued, and relitigating them is costly, burdensome, and unfair.

iv. Factor 4: Diligence of the Donin class.

Diligence is of the utmost importance in a court's consideration of a motion to reopen discovery. Federal courts have explained: "Whether good cause exists turns on the diligence of the moving party." DL Ex. 5, *Baburam v. Fed. Express Corp.*, 318 F.R.D. 5, 8 (E.D.N.Y. 2016).

This factor also weighs heavily in favor of Just Energy. First, the federal court already addressed this factor and found that there was a lack of "diligence" on Plaintiffs' part in their request to reopen discovery, and that finding is law of the case. Ex. 7, May 8, 2019 Tr. at 12 ("I'm denying

your request to extend fact discovery. . . . [While] I take into account exceptional family circumstances, we have a few things here that are going beyond that, which to me is an indication that there wasn't diligence and the rules are simply not being followed").

Second, Plaintiffs argue they established diligence because they filed "no less than 10 discovery-related motions," but decline to acknowledge that the majority of those motions were filed *after* fact discovery had closed, *after* the court had found a lack of diligence on Plaintiffs' part, and that many of those motions were denied. Plaintiffs' desire to relitigate these unfavorable decisions does not constitute good cause.[4] The fact that Plaintiffs filed numerous discovery motions after the discovery cutoff is no indication of diligence.

v. Factor 5: Foreseeability of Need

This factor weighs in Just Energy's favor as Plaintiffs have not identified what *additional* discovery is needed for resolution of their claims, setting aside materials sought from other Just Energy entities. They have received or will receive documents from each of the categories of documents requested: contracts, individual rate data, marketing materials and form communications with customers, information about Just Energy's costs, pricing models, regulatory communications, and organization charts. Despite that, Plaintiffs request substantial amounts of discovery that has already been produced, ignoring that relevant materials have already been disclosed.

vi. Factor 6: Likelihood of Relevant Evidence

This factor also weighs in favor of Just Energy. As noted above, Plaintiffs have not met their burden of establishing that any incremental evidence would be relevant to their surviving claims. Substantial amounts of relevant evidence in this case have already been produced, including voluminous rate data for New York variable rate customers (which Plaintiffs appear to have misplaced),[5] and variable rate contracts for residential electric and natural gas consumers. Plaintiffs' submission includes no discussion of what has already been produced, instead attempting to re-start discovery with new requests.[6]

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[4] As just one example, the federal court denied Plaintiffs' request for discovery post-dating the complaint, but Plaintiffs have attempted in this proceeding to again seek that inappropriate discovery. *See* Ex. 8, Dec. 18, 2019 Order at 3 (denying discovery post-dating complaint).

[5] At the last hearing, Plaintiffs erroneously claimed that Just Energy's rate data had not been produced and that only customer complaint data had been produced. To the contrary, the rate data was produced in July 2019. On Friday, May 6, 2022, Plaintiffs reached out to counsel for Just Energy acknowledging receipt of the July 2, 2019 production and requesting that it be reproduced. Just Energy transmitted those files to Plaintiffs for the second time on May 9, 2022.

[6] It appears that at least part of Plaintiffs' failure to address the prior production is a function of the fact that Plaintiffs lost the rate data that had previously been produced in this case. As noted

6. The *Donin* action is limited to New York because no Defendant contracted with customers outside of New York.

vii. The Donin action is limited to New York

Even if discovery were reopened, Plaintiffs are not entitled to discovery outside New York. The *Donin* action is limited to New York customers, and Plaintiffs have offered no authority in support of their position that non-New York customers should be included. The only claims that survived Just Energy's motion to dismiss are plaintiffs' claims for breach of contract and (in the alternative) breach of the implied covenant of good faith and fair dealing. Plaintiffs' surviving breach claims do not reach beyond New York because no defendant contracted with customers outside of New York. The court dismissed, for lack of personal jurisdiction, defendants "John Does 1 to 100," the purported Just Energy "shell companies and affiliates" through which Just Energy does business in states outside of New York. Donin MTD Order at 5, 7-8. The only remaining defendants are Just Energy New York Corp. ("Just Energy NY"), which contracts only with New York customers, and Just Energy Group Inc. ("Just Energy Inc."), a parent company that does not contract with any customers at all. And breach claims can be sustained against only a contracting defendant. *See, e.g.*, Ex. 9, Donin MTD Order at 12 (noting breach of contract requires "a contract between plaintiff and ***defendant***" and "breach of contract ***by that defendant***" (emphasis added)); *see also* DL Ex. 7, *Alaska Elec. Pension Fund v. Bank of Am. Corp.*, 306 F. Supp. 3d 610, 624 (S.D.N.Y. 2018) ("as a general matter, 'a party who is not a signatory to a contract cannot be held liable for breaches of that contract.'"). Further discovery cannot revive legal claims (or defendants) that were already dismissed. Thus, even if discovery is reopened (or had never closed), it would be limited to New York customers and claims.

Plaintiffs fail to grapple with this dispositive fact, and they have never explained, in any of their submissions, how non-New York contract claims are within the scope of the claims that survived the federal court's ruling. They are not.

viii. Plaintiffs' additional arguments are meritless.

First, Plaintiffs argue that the *Donin* motion to dismiss opinion does not specifically address the geographical scope of Plaintiffs' contract claims. MTC at 6. But the question is not whether the decision uses the term "geographical scope"; the court's ruling indisputably resolves the issue because it limited the claims to contract claims, and it dismissed all of the Just Energy entities that contract with customers outside of New York. Donin MTD Order at 5, 7-8. Plaintiffs have not explained how those claims can somehow be revived in the face of that ruling.

Second, Plaintiffs argue it would have been "premature" at the pleading stage "for the *Donin* court to limit the scope of Plaintiffs' *live* claims." MTC at 6. But that is exactly how a motion to dismiss works—the court dismisses any and all claims that do not meet even the minimum pleading standard. *See* Ex. 9, Donin MTD Order at 4 ("At the motion-to-dismiss stage, this Court

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above, in response to Plaintiffs' candid acknowledgment and request last week, Just Energy promptly arranged for those materials to be resent to Plaintiffs.

accepts all factual allegations in the Amended Complaint as true and draws all reasonable inferences in favor of Plaintiff, the nonmovant."). Here, the court dismissed "all claims" against entities other than Just Energy NY and Just Energy Group. Plaintiffs argue that multistate contract claims in other cases have been certified at the class certification stage—those are irrelevant. The Plaintiffs' claims here were dismissed at the first opportunity, long before the class certification stage.

Third, Plaintiffs argue that permitting the scope of a class to be "fixed by a pleading" somehow "elevates form far over substance" because "complaints may be conformed to the proof and amended up to the date of trial." MTC at 8. This is simply incorrect. First, there is no unfettered leave to amend a complaint until the date of trial. The federal court *denied* Plaintiffs' motion to amend or supplement its complaint in January 2020, more than two years ago. Ex. 4, Jan. 8, 2020 Tr. at 13-15 ("I am going to deny the motion to amend the complaint."). Second, it is not just Plaintiffs' pleading that circumscribes their claims, but the federal court's decision to dismiss the defendants that Plaintiffs prefer to pretend were not dismissed.

7. Specific Discovery Requests

a. Just Energy Is Producing Documents Relating to the Remaining Claims.

Just Energy has agreed to a reasonable scope of production given the claims that remain to be resolved and is working diligently to produce those documents in a timely fashion over the coming weeks. Plaintiffs muddy the waters by refusing to acknowledge that the *Jordet* and *Donin* matters are differently situated: Discovery had not even commenced in the underlying *Jordet* litigation, while it was completed and closed in *Donin*. As such, discovery in these two matters should be considered separately.[7]

For efficiency, Just Energy has outlined its specific positions and objections on a request-by-request basis below without repeating its more general objections on the issues of date range, geography, and customer category (residential v. commercial). The Claims Officer's resolution of those issues on an omnibus basis will further guide Just Energy's positions on discovery.[8]

Request 1: Contracts of variable, residential natural gas and electricity customers.

Plaintiffs' request for "Just Energy's variable rate contracts for natural gas and electricity in all U.S. markets where Just Energy did business" exceeds the scope of the remaining claims, and

[7] As noted above, it is Just Energy's view that no further discovery is necessary in the *Donin* matter, but Just Energy has – in the interests of compromise – agreed to produce documents responsive to Requests 4-6 since the production of those materials does not present a significant incremental burden.

[8] To the extent the Claims Officer expands the scope of the claims, Just Energy reserves the right to lodge additional objections to the extent that the requested discovery presents incremental burdens that make the presently agreed-upon scope of discovery impracticable due to timing or otherwise.

any suggestion that Just Energy is "obligated" to produce that scope of materials is without merit. Just Energy incorporates by reference its positions with respect to the threshold issues of date range, geography, and customer category. *See* Sections 1-6, above.

Jordet: Just Energy has agreed to produce Just Energy Solutions contracts for non-fixed, residential, variable rate products for the company's natural gas markets (Pennsylvania, California, Georgia, Maryland, New Jersey, Ohio) that were in use for the four years prior to the filing of the Complaint. That agreement is appropriately tailored to the surviving claims. Indeed, in agreeing to produce contracts for these six states, Just Energy agreed to provide contracts for all states in which Just Energy Solutions (the only Just Energy entity at issue) contracted to sell natural gas (*i.e.*, the company is not withholding contracts from Illinois, Michigan, or New York).[9] Electricity customers are not part of the *Jordet* action, and those contracts are not relevant here. Plaintiff has not identified categories of documents beyond what Just Energy agreed to produce that would be relevant to the remaining claims and should be compelled.

Donin: Consistent with Just Energy's responses and objections to discovery in that matter, the decision on the motion to dismiss, and the court's ruling that discovery is closed, Just Energy has not agreed to produce additional documents responsive to this request. Just Energy already produced contracts for residential, variable rate electric and natural gas products of Just Energy New York for the six years prior to the filing of the Complaint prior to the close of discovery. Plaintiffs have not identified categories of documents beyond what Just Energy produced that would be relevant to the remaining claims and should be compelled.

> **Request 2:** Correspondence from Just Energy to its residential customers, including but not limited to solicitation materials, welcome letters, renewal notifications, and notifications regarding variable rates or contract changes.

Plaintiffs' request for "Examples of all correspondence from Just Energy to its residential customers during the Class Period" is overbroad to the extent it seeks anything beyond exemplar correspondence for Just Energy Solutions customers with contracts for non-fixed, residential, variable rate natural gas products. Just Energy incorporates by reference its positions on the issues of date range, geography, and customer category. *See* Sections 1-6, above.

Jordet: Just Energy has agreed to produce exemplars of the specified categories of documents Plaintiffs requested for Just Energy Solutions residential customers (or prospective customers) for variable rate products for the company's natural gas markets (Pennsylvania, California, Georgia, Maryland, New Jersey, Ohio) that were in use for the four years prior to the filing of the Complaint. Just Energy also agreed to produce communications with Mr. Jordet that have been located through a reasonable and diligent search. As Just Energy's agreement to produce

[9] Plaintiffs also complain (at 14, 15) about Just Energy's "highly limited April 22 production" of contracts and exemplars of customer communications. Complaints about Just Energy's production are not at issue nor are they ripe for resolution. To the extent Plaintiffs have questions about Just Energy's production, including whether documents are missing from Just Energy's production, those issues are more properly part of a meet and confer between counsel. Perceived document deficiencies are also irrelevant to resolving the proper scope of discovery.

documents is consistent with the proper scope of the claims and Plaintiffs' request, any further production should be denied.[10] Plaintiff has not identified categories of documents beyond what Just Energy agreed to produce that would be relevant to the remaining claims and should be compelled. For example, correspondence related to fixed rate customers, electricity customers, and customers of entities other than Just Energy Solutions are not relevant here.

To the extent Plaintiffs seek additional unenumerated categories of documents through use of the phrase "including but not limited to," Just Energy objects to that request as overbroad. *See, e.g.*, DL Ex. 8, *Henry v. Morgan's Hotel Grp., Inc.*, No. 15-CV-1789 (ER)(JLC), 2016 WL 303114, at *2 (S.D.N.Y. Jan. 25, 2016) (holding that a document request using "including but not limited to" language was a "blanket request" that was "plainly overbroad and impermissible.").

Donin: Consistent with Just Energy's responses and objections to discovery in that matter, the decision on the motion to dismiss, and the court's ruling that discovery is closed, Just Energy has not agreed to produce documents responsive to this request. Just Energy produced correspondence with the Plaintiffs and marketing materials for in-scope products of Just Energy New York for the six years prior to the filing of the Complaint prior to the close of discovery. Plaintiffs have not identified categories of documents beyond what Just Energy produced that would be relevant to the remaining claims and should be compelled.

> **Request 3:** Data for each residential variable rate natural gas and electric customer, including customer account number, monthly usage, and monthly variable rate.

Given the limited scope of the claims, the burden associated with production, and the fact that rate data has already been produced in the *Donin* matter, there is no need to produce data for Just Energy entities other than Just Energy Solutions. Just Energy incorporates by reference its positions on the issues of date range, geography, and customer category. *See* Sections 1-6, above.

Plaintiffs boldly declare without support (at 15) "that the requested data can be accomplished in two weeks." This is not the case. As Just Energy has previously explained to Plaintiffs and the Claims Officer, the process of restoring, validating, and extracting data from the company's billing systems is a time-consuming and resource-intensive endeavor. The process involves three primary processes: data restoration, programming, and validation.

- Data Restoration: Just Energy's operations policies dictate that customer billing data should be archived into offline media after 36 months of inactivity in order to manage storage growth and minimize the amount of data kept in the systems for performance reasons. As such, extraction of the requested customer data first requires Just Energy to restore data from backup tapes. The restoration of that data requires Just Energy to identify the correct backup tapes, recall them from the offsite storage vendor, confirm the integrity of the backup, loading the data from the physical tape (which is a very slow

[10] Given Plaintiff's second reference to Just Energy's "highly limited April 22 production," Just Energy notes that it is engaged in a rolling production of documents responsive to this request, and that production is not yet complete.

process that can take several days per tape), and then validate the integrity and completeness of the loaded data.

- Programming: Because the systems are not designed to generate mass reports of the individual customer data requested, custom queries must be designed to extract data from the system. This is accomplished by writing multiple sets of SQL scripts to cover the different billing methods employed by the various markets and utilities within the scope of the requested data set. Writing these scripts cannot be outsourced as it requires knowledge an in-depth understanding of the systems as their underlying data structures, as well as the company's operations, to ensure the data set is complete and accurate. For the agreed-upon scope of production in *Jordet*, Just Energy has already deployed separate teams of IT and Operations professionals to extract the requested data from the two relevant billing systems.

- Validation: Once the billing systems have been queried and data extracted, that data – which is likely to be hundreds of thousands of line entries – needs to be checked to ensure that in-scope market, customer, and usage data appears complete.

Company personnel is hard at work to provide the requested data and has provided its best estimate of when the data can be produced. At this point, expanding the scope of the data to be produced will impose further delay, for which Just Energy can provide additional estimates if necessary.

Jordet: In response to Plaintiff's data request, Just Energy made the following offer in its April 21 letter:

> Just Energy can agree to produce **unarchived data responsive to this request for Just Energy Solutions residential natural gas customers in the PA, CA, GA, MD, NJ, and OH markets1 who were billed for a variable rate product during the four years prior to the filing of the Complaint**. This data set could be extracted within 3-4 weeks from receiving Plaintiff's election to proceed with this approach and would include data for current customers and any customers that have been billed for Just Energy's services within the last 36 months. Alternatively, Just Energy can agree to produce **the requested data for Just Energy Solutions residential natural gas customers in the PA, CA, GA, MD, NJ, and OH markets who were billed for a variable rate product during the four years prior to the filing of the Complaint**, but because this data production requires the restoration of archived data from backup tapes (which Just Energy has already been working on for several weeks), Just Energy anticipates that it will require 6–8 weeks to restore, pull, validate, and produce that data. Please let us know which approach you prefer.

(Emphasis added.)

Plaintiffs failed to make an election between the two proposed alternative extracts or respond at all to the proposal. Despite that fact and the fact that the scope of the claims remains unresolved, Just Energy has already commenced the process of restoring and extracting data requested by Plaintiffs for Just Energy Solutions residential natural gas customers in the Pennsylvania, California, Georgia, Maryland, New Jersey, Ohio markets who were billed for a variable rate product during the four years prior to the filing of the Complaint. Just Energy anticipates that data can be delivered on or about June 16, 2022.

Donin: Consistent with the parties' negotiations and the orders from Magistrate Bulsara, Just Energy produced in 2019 rate data consistent with Plaintiffs' current requests for Just Energy New York customers of variable rate gas and electric products for the six years prior to the filing of the Complaint. *See* Ex. 6, Apr. 21, 2022 Letter at 3. Given the court's decision on the motion to dismiss and ruling that discovery is closed, Just Energy has not agreed to produce additional data responsive to this request. Plaintiffs have not identified categories of data beyond what Just Energy produced that would be relevant to the remaining claims and should be compelled.

Requests 4 and 6:

- Request 4: Data identifying costs and expenses incurred in each utility region and utility default supply rate.

- Request 6: Annual income statements or other accounting documents sufficient to show the gross and net revenues Just Energy obtained from selling residential gas and electric.

Just Energy incorporates by reference its positions on the issues of date range, geography, and customer category. *See* Sections 1-6, above.

Plaintiffs claim that Just Energy has resisted the production of information responsive to their request for cost and expense data, when in fact Just Energy in fact has agreed to produce or has described the documents responsive to Request 4(b)-(f) that the company was able to identify and explained the limitations of that data. To address Plaintiffs' criticism outlined in their argument regarding Request 6 that "in agreeing to produce documents showing gross margins, Just Energy fails to agree to produce document showing gross revenues," Just Energy states that the gross margin documents Just Energy has agreed to produce include gross revenue, as do the company's publicly available financial statements.

Jordet: Plaintiff has agreed to produce documents memorializing Just Energy's gross margins (i.e., total sales revenue less COGS before deducting SG&A or other expenses) for the natural gas markets in PA, CA, GA, MD, NJ, and OH for the four years prior to the filing of the complaint. Plaintiff has not identified categories of documents beyond what Just Energy agreed to produce that would be relevant to the remaining claims and should be compelled. Just Energy has not agreed to produce utility default supply rate documentation both because utility rates are not a proper comparator for assessing "business and market conditions," and because the utility rates are also available to Plaintiff from public sources.

Donin: Just Energy agreed to produce documents memorializing Just Energy's gross margins (i.e., total sales revenue less COGS before deducting SG&A or other expenses) for the New

York gas and electric markets for the six years prior to the filing of the complaint. Plaintiffs have not identified categories of documents beyond what Just Energy produced that would be relevant to the remaining claims and should be compelled. Just Energy has not agreed to produce utility default supply rate documentation both because utility rates are not a proper comparator for assessing "business and market conditions," and because utility rates are also available to Plaintiffs from public sources.

> **Request 5:** Data identifying pricing spreadsheets or other documents that reflect costs, factors, or inputs considered in setting variable rates.

Just Energy incorporates by reference its positions on the issues of date range, geography, and customer category. *See* Sections 1-6, above.

Just Energy has agreed to produce responsive documents as set out below. Although Plaintiffs' questions about the documents are more properly answered through their review of the documents or questioning of a company witness, Just Energy represents that the models it has agreed to produce are tools used in the rate-setting process by Just Energy personnel with responsibility for setting the company's rates for natural gas and electricity.

Jordet: Just Energy has agreed to produce models from the company's price-setting function that were used to analyze Just Energy Solutions residential variable natural gas rates in the PA, CA, GA, MD, NJ, and OH markets for the four years prior to the filing of the Complaint, which can be located pursuant to a reasonable and diligent search. Plaintiff has not identified categories of documents beyond what Just Energy agreed to produce that would be relevant to the remaining claims and should be compelled.

Donin: Just Energy has agreed to produce models from the company's price-setting function that were used to analyze Just Energy New York's residential variable natural gas and electricity rates for the six years prior to the filing of the Complaint, which can be located pursuant to a reasonable and diligent search. Plaintiffs have not identified categories of documents beyond what Just Energy produced that would be relevant to the remaining claims and should be compelled.

> **Request 7:** Communications with regulatory agencies regarding Just Energy's variable rate.

Just Energy incorporates by reference its positions on the issues of date range, geography, and customer category. *See* Section 1-6, above.

Jordet and Donin: Plaintiffs' request for communications with regulators regarding Just Energy's variable rate should be rejected for two reasons. First, with the dismissal of all statutory and consumer protection claims in both cases, regulatory communications are not relevant to the resolution of the dispute. Second, the burden of such a search far outweighs any potential benefit. Just Energy agreed to search for and produce similar communications in the *Donin* action (prior to resolution of the motion to dismiss and dismissal of the consumer protection claims). To do that, counsel for Just Energy collected emails for relevant personnel and reviewed all emails with the New York regulator (as identified using the domain name of that agency), and identified only a handful of potentially responsive documents. Here, where Plaintiffs profess to seek an

expeditious resolution of this matter while asking Just Energy to review the company's communications with 10 state regulators going back at least seven and as many as 14 years in time. Such a review is not warranted.

> **Request 8:** Documents showing officers and managers involved in setting variable rate prices.

Just Energy incorporates by reference its positions on the issues of date range, geography, and customer category. *See* Sections 1-6, above.

Jordet: Plaintiff's incredulity does not change the fact that the company does not possess a repository of the documents sought by Request 8, and Just Energy cannot be compelled to produce documents outside its possession, custody, or control. Just Energy's employee look-up tool contains information for current employees only and reflects their current position within the company. Even if Just Energy were required to create something not in its possession, the burden associated with reconstructing historical lists of employees in the requested business functions for a period of ten years or more would be time-consuming and extremely burdensome. Additionally, this issue was already litigated in the *Donin* matter, where Just Energy searched for and produced what limited organization charts it identified. The charts identified were almost entirely corporate organization charts showing the corporate structure, not charts of personnel. Just Energy did not identify any organization charts for the company's rate-setting function. Plaintiff's suggestion that the company produce complete lists of its employees for the relevant ranges is entirely disproportionate to the needs of the case especially where, as here, Plaintiffs have not even indicated why the identities of "officers and managers involved in setting variable rate prices" are necessary to this proceeding (e.g., since plaintiffs have not requested nor has Just Energy agreed to custodial searches of emails related to rate-setting).

Donin: As outlined above, Just Energy has already searched for documents responsive to this request. In the course of the company's searches, it did not identify organization charts or other documents showing the officers and managers involved in setting variable rate prices. Given the Court's decision on the motion to dismiss and ruling that discovery is closed, Just Energy has not agreed to produce additional information responsive to this request.

Respectfully submitted,

/s/ Jason Cyrulnik
Jason Cyrulnik

cc: Counsel of Record

THIS IS **EXHIBIT "M"** REFERRED TO IN THE AFFIDAVIT OF MICHAEL CARTER SWORN BEFORE ME over video teleconference this 29th day of May, 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.

Tiffany Sun

A Commissioner for taking Affidavits, etc.

Miao Sun, a Commissioner, etc., Province of Ontario, while a Student-at-Law. Expires March 6, 2023.

Wittels McInturff Palikovic

May 17, 2022

Via Email
Hon. Dennis O'Connor
Claims Officer
Just Energy CCPA Proceeding
DOConnor@blg.com

Re: U.S. Class Counsel's Reply in Support of Motion to Compel Discovery for Claim Adjudication

Dear Justice O'Connor:

As permitted by Your Honor, Class Counsel in *Donin* and *Jordet* respectfully submit this reply letter-brief in support of their motion to compel Just Energy to produce all documents responsive to the eight narrowed Discovery Requests set forth in Ex. A to our initial April 29 letter motion.

I. Just Energy's Opposition to the Requested Discovery Is Without Merit

The question on this motion is how much new (*Jordet*) and additional (*Donin*) expert and fact discovery is needed for the Claims Officer to "determine the validity and amount of such disputed Claim." CCAA Claims Procedure Order Para. 44. To accomplish this, you are empowered to "determine all procedural matters which may arise in respect of [your] determination of these matters, . . . and the manner in which any evidence may be adduced." *Id*.

Just Energy seeks to improperly constrict discovery both temporally and geographically so as to block Class Counsel and the Claims Officer from defining the scope of the Class, refining Class Claimants' damages calculations, and evaluating the merits of their claims. If allowed, this will drastically hinder Class Claimants' presentation of evidence and impair your ability to fully and fairly determine the validity and amount of their claims—which claims have been sustained by two separate U.S. District Court Judges and come on the heels of at least six regulatory actions related to Just Energy's practices and more than a dozen successful similar consumer class actions against retail energy suppliers like Just Energy.

This reply addresses Just Energy's general opposition points and then each of the eight Discovery Requests in dispute.

Point 1: Just Energy Arbitrarily Seeks to Restrict the Discovery Period to April 2014 to April 2018. The Class Discovery Period Should Be Based on Relevant Facts and Law such as the Applicable Statute of Limitations and Just Energy's Contract Language and Conduct. Class Counsel's original submission (pp. 3, 5) demonstrated why Jordet is entitled to discovery prior to April 2014. Surprisingly, Just Energy also claims that the allegations in Jordet's complaint bar discovery after April 2018 (when the complaint was filed). Not so. The proposed preliminary class definitions in the complaint span "April 2012 to the present." *Jordet* Complaint, ¶¶ 38–39.

Now (not April 2018) is the "present," and as is consistent with U.S. class action practice, the proposed class is not arbitrarily closed at the pleading stage but is instead informed by discovery.[1] Indeed, even if Jordet had chosen a class period end date prior to taking discovery, it is well settled that *facts* and not arbitrary deadlines determine the scope of class discovery.[2, 3]

Likewise, Jordet's choice to start his preliminary class definition at April 2012 (when he became a customer) does not restrict class discovery. Indeed, a primary purpose of pre-certification discovery is to discern the temporal scope of the challenged conduct. Here, that conduct is Just Energy's practice of overcharging and price gouging its customers in violation of its contract.

Point 2. Just Energy Wrongly Claims that Jordet Waived (at the Pleading Stage) the Issue of the Class Period Extending Prior to April 2012. Indeed, the only authority Just Energy cites, *Kao v. Brit. Airways, PLC*, No. 17-0232, 2018 WL 501609 (S.D.N.Y. Jan. 19, 2018), clearly identifies why Just Energy is wrong. As Just Energy quoted, "Plaintiffs' failure to oppose *Defendants' specific argument* in a motion to dismiss is deemed waiver of that issue." *Id.* at *5 (emphasis added). Just Energy made no such argument regarding the scope of the class period or discovery prior to 2012. This issue is not being *re*-litigated. It was never addressed. Jordet is plainly entitled to discovery prior to 2012 because the challenged conduct predates 2012.

Point 3. The Discovery Sought in *Jordet* and *Donin* Is *Both* Expert and Fact Discovery. The energy rates charged to the potential class, the company's costs, margins, rate setting practices and contract language are critical to the experts' analysis. As discovery was stayed pending the dismissal motion in *Jordet*, certainly it is available now that the case is proceeding in the CCAA. Likewise, in *Donin* Magistrate Judge Bulsara ruled "expert discovery is hereby stayed," and having defeated the motion to dismiss the *Donin* Plaintiffs are now entitled to "a timely schedule for conducting expert discovery."[4] Just Energy tries to sidestep this order, suggesting in a footnote that expert discovery is "not an issue on this motion to compel fact discovery" (fn. 2). But this is wishful thinking. First, this motion to compel is not limited to just fact discovery. Second, with

[1] *See Pizana v. Sanmedica Int'l, LLC*, No. 18-00644, 2020 WL 6075846 (E.D. Cal. Oct. 15, 2020) (Class period of "May 9, 2014 to present" continues beyond the complaint's filing date); *Watson v. Prestige Delivery Sys., Inc.*, No. 16-1823, 2017 WL 635388 (W.D. Pa. Feb. 16, 2017) ("[T]o the present" extends beyond the complaint's filing).

[2] "[T]here is 'no general rule which would limit class action discovery solely to the class action period.'" *Kirsch v. Delta Dental*, No. 07-186, 2009 WL 10728281, at *2 (D.N.J. Apr. 30, 2009) (quoting *Grossman v. First Pa. Corp.*, No. 89-9234, 1992 WL 38402, at *2 (E.D. Pa. Feb. 24, 1992). "Furthermore, 'should later discovery reveal [the setting of the dates of the class period] to be in error, the court can redefine the class period.'" *Id.* (quoting *Finkel v. O'Brien*, 1986 WL 15569, at *9 (D.N.J. May 22, 1986) (cleaned up)); *see also In re Control Data Corp. Sec. Litig.*, No. 85-1341, 1988 WL 92085, at *3 (D. Minn. Feb. 22, 1988) ("Although PMM relies on the certified class period as the relevant time frame, there is no rule fixing discovery in class-action litigation to the class period.").

[3] Just Energy is wrong to claim that *U.S. ex rel. King v. Solvay S.A.*, No. 06-2662, 2013 WL 820498, at *4 (S.D. Tex. Mar. 5, 2013) shows that allegations of conduct "to the present" cap discovery to at the complaint's filing. In fact, in *King*, the court rejected discovery to the present because the only allegations seeking this time frame were buried and not used to allege a class period to the present. *Id.* at *3. Here, the *Jordet* class period was specifically alleged to extend to the present because Just Energy continued to represent that it set its variable rates according to business and market conditions.

[4] **Exhibit A** hereto, Minute Order, May 8, 2019; Ex. I to Class Claimant's April 29 letter motion, Tr. 14:14-17.

its attempted dodge, Just Energy tries to evade the fact that expert discovery was stayed, which Judge Kuntz never ruled on, as it was on a separate track from fact discovery.

Point 4. Just Energy Is Obligated to Produce Discovery of Commercial Customers as Pre-Certification Discovery Is Not Limited to the Named Plaintiff's Experience. Jordet was a residential customer with a contract requiring that his natural gas variable rate be set according to "business and market conditions." At the time of filing the complaint, Jordet had no basis to allege that Just Energy used similar or identical language for many of its commercial customers. However, as this action has proceeded, it is now clear that Just Energy employed similar or identical practices for residential *and* commercial customers, namely to unreasonably set its variable rates far from business and market conditions. Just Energy's attempt to overly restrict discovery is inconsistent with the liberal discovery rules.[5] Just Energy seeks to use this CCAA process to skirt its own obligations to produce relevant discovery that is reasonably calculated to address the issues of this case. Here, commercial and residential customers are subject to similar or identical contract terms. As a result, commercial contracts are subject to disclosure.

Point 5. Your Honor Should Not Restrict the Geographical Scope of Discovery to Exclude States Where Just Energy Solutions Inc. Was Incorporated During the Relevant Time Period. Just Energy asks to exclude Michigan, Illinois, and New York from discovery on the claim that Just Energy Solutions Inc. did not contract for natural gas in those states. Counsel's representation is an insufficient basis for Your Honor to restrict the geographical scope of discovery. The purpose of discovery is fact-finding. The geographical scope of Just Energy Solutions Inc.'s natural gas operations should be borne out by discovery, rather than by counsel's representations here.

Point 6. Even After Closing Fact Discovery in *Donin*, Magistrate Bulsara Made Clear He Would Likely Grant a Motion for "Additional Fact Discovery" After the Motion to Dismiss Was Decided, and "Won't Think of It as a Motion for Reconsideration." (Ex. I, Tr. 23:4-7, 11-13, 16-17). Yet now Just Energy makes the odd claim that the Magistrate assigned to oversee discovery could not reopen it because of Judge Kuntz's improvident remarks. Just Energy is wrong. Under the Local Civil Rules of the Eastern District of New York, magistrate judges are automatically "assigned to each case upon the commencement of the action" and are explicitly empowered to "issue or modify scheduling orders." Local Civil Rule 16.2, available https://img.nyed.uscourts.gov/files/local_rules/localrules.pdf. "Except in multi-district cases and antitrust cases, a Magistrate Judge so assigned is empowered to act with respect to all non-dispositive pretrial matters unless the assigned District Judge orders otherwise." Local Civil Rule 72.2. "Given the bloated dockets that district courts have now come to expect as ordinary, the role of the magistrate in today's federal judicial system is nothing less than indispensable," *Peretz v. United States*, 501 U.S. 923, 928 (1991), and Judge Kuntz never divested Magistrate Bulsara of his authority under Local Rules 16.2 and 72.2 to effectuate his instructions that Plaintiffs could apply to have discovery re-opened following a dismissal ruling.

[5] The relevance of information, documents, or data is to be "broadly construed 'to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.'" *Daval Steel Prods. v. M/V Fakredine*, 951 F.2d 1357, 1367 (2d Cir. 1991) (quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978)).

Point 7. Just Energy Wrongly Claims in *Donin* that on May 8, 2019 Judge Bulsara Only Allowed Discovery for "Limited Categories of New York Materials Just Energy Previously Agreed to Produce." In fact, Judge Bulsara made clear he was reserving any ruling on the issue of discovery outside of New York: "I do recall, although I . . . I don't believe I ruled on it, you know, discussion about the initial conference about, you know, discovery relating to New York part -- or discovery outside of New York." May 8, 2019 Tr. At 4:12–15. Judge Bulsara never issued the pending ruling, likely because Judge Kuntz cancelled all deadlines more than 18 months before he issued a ruling on Just Energy's motion to dismiss. Just Energy's citation to Judge Bulsara's December 18, 2019, ruling is likewise inapposite, as Judge Bulsara made clear in that ruling that "Defendants appear to be engaging in a pattern of obfuscation and non-responsiveness that serves little purpose, and which the Court finds troubling." Dec. 18, 2019 Order at 2.

Point 8. Just Energy Will Not Be Prejudiced by Allowing the *Donin* Plaintiffs Access to the Discovery Needed for a Merits Adjudication. To the contrary, Just Energy's claims of prejudice ring hollow, because as the original fact discovery deadline approached—and Plaintiffs' sought Just Energy's consent to extend the discovery deadline—Just Energy took the position that discovery should be ***stayed*** until the ruling on their motion to dismiss. For example, on February 13, 2019 (more than two weeks before the expiration of the initial February 28, 2019 discovery deadline) the *Donin* plaintiffs sought Just Energy's consent to extend fact discovery by six months. *See* the email chain attached hereto as **Exhibit B**. In response, defense counsel did not claim prejudice as they do now. Instead, counsel stated that "we believe that in light of the pending motion to dismiss . . . , there should be a stay of discovery pending resolution of the motion to dismiss." *Id.* Indeed, when Just Energy responded to Plaintiffs' initial request to extend the fact discovery deadline, counsel made clear that "Defendants did not (and do not) object to a stay of discovery" and instead asked the magistrate to consider "whether a stay of discovery . . . should be put in place until after Judge Kuntz resolves the pending motions to dismiss." **Exhibit C.**

Point 9. The Eastern District of New York Where *Donin* is Pending Is the Slowest Federal Court in the United States and with a Motion to Dismiss the Entire Complaint Pending, Neither Party Conducted Full Blown Discovery. For example, Just Energy Did Not Even Bother to Depose the *Donin* Plaintiffs. On May 13, 2022, an "Expert Analyis" article in Law360 called the time to trial in the EDNY "stunning" and noted that "at a stunning 55.9 months to civil trial—third year in a row to place last or second to last" the EDNY is the slowest federal court in the United States.[6] In *Donin*, the dismissal motion was fully briefed on October 25, 2018 but not decided until September 24, 2021—two years and eleven months later.

Point 10. Just Energy Claims the *Donin* Plaintiffs Have "Received Voluminous Responsive Discovery" (at 9) While Sidestepping Their Scant 318-Document Production in *Donin*.

Point 11. Just Energy Wrongly Asserts that Judge Kuntz "*denied* Plaintiffs' Motion to Amend or Supplement its Complaint in January 2020." (at 12). In fact, as Just Energy's Counsel Well Knows, Plaintiffs Never Moved to Amend, but Rather Filed a Pre-Motion Letter Seeking to "Supplement" their Complaint with New Facts That Further Supported Denying the Dismissal Motion (Exhibit D). With all due respect to Judge Kuntz, he erroneously

[6] Robert Tata, *The Fastest Federal Trial Courts*, Law360.com (May 13, 2022, 12:32 p.m.), https://www.law360.com/classaction/articles/1492342/the-fastest-federal-trial-courts-a-look-at-virginia-florida.

ruled he was denying a "motion to amend the complaint" that Plaintiffs never made (later memorialized in an erroneous minute order, **Exhibit E**. A motion to supplement under Rule 15(d) is completely different than a motion to amend under Rule 15(a)—and counsel knows that.

II. Specific Discovery Requests

Just Energy broadly claims that "Plaintiffs have not identified what *additional* discovery is needed for resolution of their claims, setting aside materials sought from other Just Energy entities." First, "setting aside" all other states is a sizeable caveat and a pre-certification limitation of the class that is inappropriate. Further, as set forth below, for each of Plaintiffs' eight discovery requests, there is still substantial discovery needed for a fair and efficient adjudication of this matter.

Request 1: All Gas & Electric Contracts for Residential and Commercial Customers

Jordet: As discussed in the previous section and in our opening letter motion, discovery is not restricted to the limited allegations in the complaint. Just Energy routinely used similar contractual language for residential and commercial natural gas customers. Given that Jordet's breach of contract claim relies on the language business and market conditions, all customers subject to similar language are plainly members of the class.

Donin: First, because the *Donin* court sustained nationwide breach of contract and good faith and fair dealing claims brought by Just Energy gas and electricity customers across the United States, Just Energy must produce all variable rate agreements in effect during the applicable statute of limitations period across the United States. Just Energy knows this, which is why in *Donin* it already produced contracts for other Just Energy entities that sold energy in New York (like Amigo Energy, JE_DONIN592 and U.S. Energy Savings, JE_DONIN786) as well as internal training documents for Commerce Energy (JE_DONIN926). Now that the nationwide breach of contract and implied covenant claims have been sustained, there is no basis for Just Energy to withhold contracts from the other 10 states where JE supplied energy.

Similarly, Just Energy's New York contract production in *Donin* is limited to contracts in circulation before *Donin* was filed in late-2017. Just Energy should produce all applicable contracts to date and the parties and Your Honor can determine at the appropriate class certification stage which purchasers should be included in the class.

Request 2: For Correspondence from Just Energy To its Residential Customers, Including Solicitation Materials, Welcome Letters, Renewal Notifications, and Notifications Regarding Variable Rates or Contract Changes

Jordet & Donin: The disputed issues (nationwide scope and production of documents that post-date the complaint) are the same as the above item.

Request 3: Request for Data for Each Residential Variable Rate Natural Gas and Electric Customer, Including Customer Account Number, Monthly Usage, and Variable Rate

Jordet & Donin: The disputed issues (nationwide scope and production of documents that post-date the complaint) are the same as the above item.

Request 4: Request for Data Identifying the Costs and Expenses Just Energy Incurred in Each Utility Region in Providing Energy and the Utility Default Supply Rate.

Jordet & Donin: See initial letter motion. In *Donin*, Just Energy's concedes that it must produce certain additional discovery responsive to the Class Claimant's Discovery Requests Nos. 4-6, yet its proposed production is facially deficient as set forth in our initial submission.

Request 5: Data Identifying Monthly Pricing Spreadsheets or Other Documents that Reflect Costs, Factors, or Inputs Considered in Setting Variable Rates.

Jordet & Donin: In *Donin*, Just Energy improperly limits this data to "Just Energy New York's residential" customers when the contract that *Donin* plaintiffs are suing under plainly states on its face that it is the "General Terms and Conditions (and Notice of Appointment of Agent) ***For Residential & Small Business Customers***." This contract in turn defines a "Small Business Customer" as "Customer that uses less than 5,000 therms, 5,000 Ccf or 50,000 kWh annually, as applicable." Just Energy has already produced several additional New York contracts with this same language and it should produce pricing data for commercial customers. Moreover, in *Donin* Just Energy produced contracts from other entities that served New York customers. Finally, Just Energy should not withhold data outside of New York and that post-dates the complaint.

Request 6: Request for Annual Income Statements or Other Accounting Documents Showing Gross and Net Revenues Just Energy Obtained from Selling Natural Gas or Electricity.

Jordet & Donin: See initial letter motion.

Request 7: Communications with Regulators Regarding Just Energy's Variable Rates.

Jordet & Donin: Just Energy has been the target of at least **six** regulatory enforcement actions, reams of investigative journalism, and countless negative customer reviews. Yet it claims that such communications are not relevant and that producing such materials would be unduly burdensome. Just Energy is wrong on both counts. First, communications with regulatory agencies can shed light on Just Energy's true pricing practices and is also relevant to the implied covenant claim sustained in *Donin*. Second, searching for communications from regulatory agencies regarding variable rates is straightforward.

Request 8: Documents Showing Personnel Involved in Setting Variable Rates.

Jordet & Donin: Just Energy proffers the wholly inconsistent position that it is on the one hand too large to compile a list of relevant personnel and too small to retrieve data regarding former employees. This is silly. Similarly, Just Energy wrongly claims that "plaintiffs have not requested nor has Just Energy agreed to custodial searches of emails related to rate-setting" but this was the exact process the *Donin* parties were beginning to undertake when Judge Kuntz stayed discovery.

Thank you for your attention to this to this matter.

Respectfully submitted,

/s/ Steven L. Wittels
Steven L. Wittels

cc: All counsel of interest in this Claims Adjudication process

THIS IS **EXHIBIT "N"** REFERRED TO IN THE AFFIDAVIT OF MICHAEL CARTER SWORN BEFORE ME over video teleconference this 29th day of May, 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.

Tiffany Sun

A Commissioner for taking Affidavits, etc.

Miao Sun, a Commissioner, etc., Province of Ontario, while a Student-at-Law. Expires March 6, 2023.

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MEMORANDUM

To	The Honourable Dennis O'Connor, Claims Officer c. Opposing Counsel; Clients
Date	May 20, 2022 **Our File No.** 99380
Re	In the matter of the CCAA proceedings of the Just Energy Group Inc. et al (Court File No. CV-21-00658423-00CL) (the "**CCAA Proceedings**"); Donin v. Just Energy Group Inc. et al. (the "**Donin Action**") and Trevor Jordet v. Just Energy Solutions, Inc. (the "**Jordet Action**", and together with the Donin Action, the "**Donin and Jordet Claims**")

You have asked us what Canadian law, particularly as it relates to proceedings brought pursuant to the *Companies Creditors' Arrangement Act* R.S.C. 1985, c. C-36, as amended (the "***CCAA***"), says about the scope of your procedural authority for the purpose of adjudicating the Donin and Jordet Claims, which are pending before courts in the United States of America (the "***Foreign Proceedings***")[1]. Specifically, if you find that a judicial official presiding over the Foreign Proceedings made a procedural ruling or order with respect to discovery, pleadings or similar procedural issues, are you bound to follow that order or ruling through to the conclusion of your adjudication, or do you have the authority to amend the order or ruling or issue supplemental rulings that you believe are proper for your adjudication of the claim in the CCAA proceeding?

A. Short Answer

While the Donin and Jordet Claims filed in these CCAA Proceedings are coextensive with the claims filed in the Foreign Proceedings, they are independent claims and you are charged with running your own, independent process for the purpose of valuing the Donin and Jordet Claims in a summary manner, in keeping with the objectives of the CCAA. As such, procedural decisions of foreign courts in the Foreign Proceedings are not binding upon you and may or may not have persuasive value or relevance depending on the circumstances of the particular decision.[2]

[1] The Foreign Proceedings were stayed by the terms of the Initial Order made in the CCAA Proceedings, and recognized and given effect throughout the United States by the U.S. Bankruptcy Court.

[2] For the avoidance of doubt, we note that procedural decisions are to be distinguished from determinations of substantive rights, which could be binding, as a matter of applicable substantive foreign law and/or by application of the principle of estoppel.

B. Discussion

It is well established that an Ontario court will apply its own procedural rules to a case involving a legally relevant foreign element pending before it, even though (or if) the merits of the controversy are governed by some foreign law; the court will not apply a foreign rule that is procedural.[3] This principle is affirmed in *Tolofson v. Jensen; Lucas (Litigation Guardian of) v. Gagnon*.[4]

The CCAA does not expressly address the manner in which claims are to be proven. It instead specifies that claims will be administered and adjudicated in a summary manner. The discretion of the court to establish that process is implied by sections 12 and 20 of the CCAA, and buttressed by the general discretion afforded to the court by s. 11. These sections are reproduced below (emphasis ours).

> **12 The court may fix deadlines for the purposes of voting and for the purposes of distributions under a compromise or arrangement**.
>
> **20 (1) For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor is to be determined as follows:**
>
> **(a) the amount of an unsecured claim is the amount**
>
> (i) in the case of a company in the course of being wound up under the Winding-up and Restructuring Act…,
>
> (ii) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act…, or
>
> (**iii) in the case of any other company, proof of which might be made under the Bankruptcy and Insolvency Act, but if the amount so provable is not admitted by the company, the amount is to be determined by the court on summary application by the company or by the creditor**;…
>
> 11 Despite anything in *the Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, **the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or**

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[3] J.-G. Castel, *Introduction to Conflict of Laws*, 4th ed (Markham: Butterworths, 2002) at 49.

[4] 1994 CanLII 44 (SCC), [1994] 3 SCR 1022.

> **without notice as it may see fit, make any order that it considers appropriate in the circumstances**.

In the present case, Justice McEwan made the Claims Procedure Order dated September 15, 2021, requiring the proof of claims against the Applicants (the "**Claims Procedure Order**"). The Claims Procedure Order called for the proof of claims and established a process for the determination of disputed claims, including your appointment and authority to determine the claim and a broad and unfettered discretion to address all related procedural matters. Critically, paragraph 44 of the Claims Procedure Order provides that:

> "Where a disputed Claim has been referred to a Claims Officer, the Claims Officer shall determine all procedural matters which may arise in respect of his or her determination of these matters, including any participation rights for any stakeholder and the manner in which any evidence may be adduced".

In keeping with the foregoing, the Donin and Jordet Claims were filed in the CCAA Proceedings on behalf of various customers of the Applicants, as described therein. Although the Donin and Jordet Claims may be co-extensive with the claims made in the Foreign Proceedings, those claims and the process imposed by Justice McEwan to adjudicate those claims are independent of the Foreign Proceedings.

This independence is best illustrated by the decision of Justice Newbould in Essar Steel *Essar Steel Algoma Inc. (Re)*[5] Algoma case, which built on the decision of Justice Pepall (as she then was) in *Canwest Global Communications Corp. (Re)*[6].

The *Canwest* case dealt with an application by a union for an order lifting the CCAA stay to allow the arbitration of certain grievances or, alternatively, a direction that the grievances were to be addressed in accordance with the grievance procedure contemplated by the union's collective agreement, rather than the CCAA claims process approved by the court. The court dismissed the union's motion, emphasizing the flexibility of the CCAA Claims Process relative to the grievance procedure, and the importance of such flexibility to attaining the CCAA's objectives.

In *Algoma*, the court put a process in place to deal with approximately 3,000 outstanding grievances over the course of a few months, despite the local union's objection, which argued that the court was bound by the process contemplated by its collective agreement. Many of the grievances referred to the claims officer in *Algoma* were already the subject of outstanding arbitral

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[5] 2016 ONSC 1802 (CanLII).
[6] 2011 ONSC 2215 (CanLII)

proceedings[7]. The company and the local union agreed to leave a small number of these to be resolved in the ordinary course through the arbitral process already underway, but the vast majority became subject to the claims officer's jurisdiction. As a basis for its order, the court referred to, among other things, the reasoning in *Canwest* regarding the flexibility in CCAA proceedings, and the importance of achieving a speedy resolution of the claims.

Although we are not aware that the court or the claims officers in either the *Canwest* or *Algoma* cases considered the specific question that you have asked, we submit that a finding that you are bound—for the duration of the adjudication process—by procedural decisions made in the Foreign Proceedings runs contrary to the reasoning in *Canwest* and *Algoma* and risks undermining the advantages of the CCAA claims process. If a claims officer is going to be free to fashion their own process for summarily valuing a claim, they cannot be inexorably bound by procedural orders made within the context of an altogether different proceeding, having different priorities and different checks and balances. Indeed, the adjudicators in the Foreign Proceedings enjoy significant latitude to alter, amend, or supersede procedural orders through the pendency of the matters before them and it would be incongruous to deny a CCAA claims officer the same leeway in a more flexible proceeding.

Turning to this case, all of the issues raised on our clients' motion to compel discovery are procedural issues to be determined by you having regard to the process that you elect to implement, to achieve a timely summary valuation of the Donin and Jordet Claims.

We disagree that any of the rulings or decisions in the Foreign Proceedings prevented our clients from further applying to the foreign courts for modification or amendment of discovery rulings, or pleadings. In any event, however, the rulings and orders made in the Foreign Proceedings, which are not dispositive rulings orders on the merits, or final orders, were procedural. No law prevents you from exercising your authority in this fresh proceeding, to facilitate a timely, summary administration and adjudication of the Donin and Jordet Claims, whether that involves discovery, amending pleadings or the claim filed in the CCAA proceedings, or otherwise.[8]

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[7] The decision does not go into detail regarding the status of the 300 girevances, but at paragraph 4 of the decision the court does refer to the fact that approximately 200 grievances were in the process of being arbitrated by Arbitrator Bloch.

[8] Certainly, to the extent that another judge has made determinations of substantive rights, then that determination would be binding, as a matter of applicable substantive foreign law and/or by application of the applicable rules of estoppel. However, there has been no summary judgment or merits findings on any of the U.S. Claimants' claims. The decisions on the motions to dismiss sustained broad claims as pled at that time, on the basis that the claims were sufficiently pled as to breach of contract and the breach of the duty of good faith and fair dealing.

MS:mj

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OSLER

May 20, 2022

Karin Sachar
Direct Line: 416.862.5949
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Our Matter No.: 1218715

SENT BY ELECTRONIC MAIL

The Honourable Justice Dennis O'Connor
Ontario Superior Court
361 University Ave.
Toronto, ON M5G 1T3

Your Honour:

In the Matter of a Plan of Compromise or Arrangement of
Just Energy Group Inc. et al - Court File No. CV-21-00658423-00CL
Jordet and Donin Adjudication

I write on behalf of Just Energy to briefly address the authorities submitted by Canadian Counsel on behalf of the *Jordet* and *Donin* Plaintiffs earlier today.

As noted during yesterday's argument, Plaintiffs continue to confuse two different issues. The parties were asked whether they could point the Claims Officer to any authority addressing the effect of previously adjudicated judicial rulings in a case that was subsequently transferred to a Claims Officer to adjudicate as part of a CCAA claims process. Plaintiffs' letter cites authorities that deal with a different question: the authority of the CCAA Court to *prospectively* provide for the adjudication within the CCAA claims process of matters that would otherwise have proceeded in a different forum (e.g. grievance arbitration).

None of the authorities cited by Plaintiffs counsel support revisiting decisions already reached by prior adjudicators - in this case, the U.S. Courts. Indeed, they do not purport to address the issue. Only the *Canwest* decision Just Energy cited in its letter addresses (and rejects) the question of relitigating issues previously decided, and as noted in Just Energy's letter, Justice Pepall found that the parties were indeed bound by certain issues that had already been determined by the arbitrator prior to the CCAA process.

If Your Honour has any further questions with respect to this submission, we would be pleased to address them.

Yours very truly,

Karin Sachar
KS:fdr

c: Counsel of Record

THIS IS **EXHIBIT "P"** REFERRED TO IN THE AFFIDAVIT OF MICHAEL CARTER SWORN BEFORE ME over video teleconference this 29th day of May, 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.

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May 20, 2022

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Our Matter No.: 1218715

SENT BY ELECTRONIC MAIL

The Honourable Justice Dennis O'Connor
Ontario Superior Court
361 University Ave.
Toronto, ON M5G 1T3

Your Honour:

In the Matter of a Plan of Compromise or Arrangement of
Just Energy Group Inc. et al - Court File No. CV-21-00658423-00CL
Jordet and Donin Adjudication

During the hearing yesterday, Your Honour requested that the parties provide any Canadian case law addressing how a Claims Officer adjudicating an existing litigation proceeding as part of a CCAA claims process should treat judicial decisions made in the course of the litigation prior to the CCAA filing.

We have found one case that may provide Your Honour with some guidance in this respect. In *Re Canwest Publishing Inc./Publications Canwest Inc.*, 2011 ONSC 4518 ("*Canwest*"), Justice Pepall (among other things) addressed the issue of whether a Claims Officer should be bound by a prior arbitral decision when adjudicating a dispute between certain plaintiffs and the Applicants.

In *Canwest*, the prior arbitral decision had determined that the plaintiffs were entitled to the payment of salary and benefits for a nine-month period of time (subject to certain overpayments that were made to the plaintiffs). The plaintiffs subsequently brought a motion to annul the arbitral decision (a process whereby the Court may set aside an arbitral award on very narrow grounds – not an appeal of the merits of the award). The motion to annul was stayed as a result of the CCAA Initial Order.

The purchaser of the Applicants' business sought (among other things) a declaration that the only issues that remained to be determined by a Claims Officer were the quantification of: (i) the salary and benefits owing for the nine-month period and (ii) the overpayments to the plaintiffs, which were to be set off against the amounts owing to the plaintiffs. In other words, the parties should not be entitled to relitigate before the Claims Officer what had already been decided by the arbitrator, including the time period over which the claimed amounts were owing.

In considering the best process for the adjudication of the claims, the Court noted that it must "be mindful of the objectives that underlie a CCAA proceeding" and seek to "ensure a process that reduces the risk of inconsistent results but which is fair and expeditious" [Para 22].

Justice Pepall held that (i) the plaintiffs were estopped from relitigating certain issues as a result of the arbitral award [Para 33] and (ii) the scope of matters before the Claims Officer should be limited by the prior determination of the arbitrator that the applicable damages period was nine months (subject to the consideration of whether the motion in annulment was meritorious based on the evidence presented) [Para 34].

We have not located any cases which cite this decision.

If Your Honour has any further questions with respect to this decision, we would be pleased to address them.

Yours very truly,

Karin Sachar
KS:fdr

c: Counsel of Record

THIS IS **EXHIBIT "Q"** REFERRED TO IN THE AFFIDAVIT OF MICHAEL CARTER SWORN BEFORE ME over video teleconference this 29th day of May, 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.

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MEMORANDUM

To	The Honourable Dennis O'Connor, Claims Officer c. Opposing Counsel; Clients
Date	May 20, 2022 **Our File No.** 99380
Re	In the matter of the CCAA proceedings of the Just Energy Group Inc. et al (Court File No. CV-21-00658423-00CL) (the "**CCAA Proceedings**"); Donin v. Just Energy Group Inc. et al. (the "**Donin Action**") and Trevor Jordet v. Just Energy Solutions, Inc. (the "**Jordet Action**", and together with the Donin Action, the "**Donin and Jordet Claims**")

We have considered the *Canwest* decision provided to you earlier today by Just Energy's counsel. It is concerned with the impact of a substantive decision adjudicating the merits of a claim, which, we agree, could give rise an estoppel, as noted in footnote 2 of our memo sent earlier today. Your question pertained to the impact of procedural rulings made in the Foreign Proceedings[1], which is altogether different insofar as procedural decisions (a) are necessarily specific to the proceeding; and, (b) cannot satisfy the requirement of finality necessary for the creation of an estoppel insofar as matters of procedure remain subject to the ongoing discretion of the tribunal.

There can be no dispute that the prior rulings and decisions of the New York federal judges in Jordet and Donin both on the Just Energy motions to dismiss under Fed.R.Civ.P 12(b)(6) and discovery disputes are simply procedural rulings and orders, and not substantive rulings on the merits. As such, they are not law of the case, *stare decisis*, or *res judicata* as Just Energy's counsel erroneously tried to argue at the hearing on Class Claimants' motion to compel yesterday. *See* eg., excerpts from the following U.S. cases from New York and other federal court districts, which are just some of the plethora of cases reiterating this bedrock principle under U.S. law:

- **"Defendants have moved for dismissal of the case for lack of subject matter jurisdiction in the instant case.[1] 1. The Court accordingly construes their Motion as one for dismissal under Rule 12(b)(1) and (h)(3) of the FRCP since the decision is procedural and not a ruling on the merits."** *Gestetner v. Congregation Merkaz*, No. 02 CIV. 116(DAB), 2004 WL 602786, at *1 (S.D.N.Y. Mar. 29, 2004)

[1] Capitalized terms not otherwise defined herein have the meaning given to them in our memo sent earlier today.

- "**Andrx correctly points out, however, that this court should not apply the Korean law of discovery, since law regarding document disclosure is procedural [citation omitted]. Courts use choice-of-law rules to determine whether to apply another forum's substantive law but always use their own procedural rules**." *Astra Aktiebolag v. Andrx Pharms., Inc.*, 208 F.R.D. 92, 102 (S.D.N.Y. 2002)

- "**Generally, discovery is procedural and controlled by the Federal Rules of Civil Procedure. Rule 26 governs a party's duties to disclose information, the timing of disclosure, the scope and content of discovery, and duties to supplement disclosures**. Fed. R. Civ. P. 26(a)-(b). Rule 37 sets the applicable sanctions for a party's failure to comply. Fed. R. Civ. P. 37(c). *Hipwell v. Air & Liquid Sys. Corp.*, No. 120CV00063JNPJCB, 2020 WL 6899492, at *2 (D. Utah Nov. 24, 2020)

Furthermore, we note that at paragraph 34 the *Canwest* decision provided by our friends, Justice Pepall concludes that:

> the Claims Officer should be limited by the determination of the nine month period of damages previously established by Arbitrator Sylvestre **but subject to consideration of whether the motion in annulment is meritorious based on the evidence presented**. **If it is meritorious, the Claims Officer would be at liberty to authorize the Retired Typographers to bring a motion before me seeking to lift the stay or to make any other order he felt was appropriate**" (emphasis ours).

If one were to apply that reasoning to the procedural decisions made to date in the Foreign Proceedings, it would be appear to be necessary to allow those proceedings to run their course so that the final impact of those decisions could ultimately be factored into your decision making or used to revisit it.

Importantly, Justice Pepall's decision in *Canwest* was made in the context of a claim that had been fully arbitrated subject only to a motion in annulment. We struggle to see how her approach would work in the context of the Foreign Proceedings which are still at their inception. Viewed in this context, Justice Pepell's decision might be taken as further support for the proposition that the adjudication of claims in CCAA proceedings should not be subject to hard and fast rules, and that you must have a general discretion to adapt your procedure to the particular circumstances of the case, having regard to the overarching objective of facilitating a fair and timely valuation of the claim on a summary basis.

MS:mj

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IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, C. C-36, AS AMENDED, AND WITH RESPECT TO JUST ENERGY GROUP INC. ET AL. AND IN THE MATTER OF THE CLAIMS OF FIRA DONIN AND TREVOR JORDET

RULING

1. This is my ruling on the Plaintiffs' motion to produce documents in the Donin and Jordet class actions. At the request of the parties I have abbreviated the ruling in order to have it released as quickly as possible. The parties are familiar with the background of the proceedings that underlie the motion and the issues and arguments of the other side.

2. The Plaintiffs in each action request eight categories of documents that are described in the letter of March 22, 2022.

3. There are six issues in dispute (two in Donin and four in Jordet) that need to be resolved in order to determine the scope of the requests.

Donin

4. The first issue is whether the Plaintiffs are entitled to additional documents by way of fact discovery. Just Energy has already produced many of the documents requested.

5. United States District Judge William F. Kuntz, II has been the supervising judge in the Donin class action. At a hearing in January 2020, Judge Kuntz directed that the discovery in the case was over. When asked if he meant "stayed" he said "I am saying discovery is over. Done. Kaput. It's over. No more discovery".

6. When asked whether he was overturning Magistrate Judge Bulsara (who was dealing with discovery issues in the case) he said "I am overruling Judge Bulsara in that regard".

7. I am satisfied that Judge Kuntz's direction was clear and that he meant what he said. The Plaintiffs did not seek to have the decision reviewed. Judge Kuntz had the authority to overrule Magistrate Judge Bulsara and that is what he did.

8. It is not appropriate for me, as a claims officer in this CCAA proceeding, to go behind Judge Kuntz's ruling and to question whether he reached it for a proper purpose and through an appropriate process. Judge Kuntz ruled and I proceed keeping that ruling in mind.

9. In response to a request from me, counsel provided me with authorities on whether rulings, such as the one referred to above, are binding on this claims process. I thank them for their timely responses.

10. I do not find it necessary to decide this legal issue. For the reasons that follow, I conclude I should attach weight to Judge Kuntz's ruling and I attach significant weight to it.

11. I have a broad discretion with respect to the procedure in this claims process. The objective should be to conduct a timely summary process that is fair and expeditious. This objective can be furthered by avoiding re-litigating issues that could cause delay, expense and potentially inconsistent results.

12. In this case there had been at least ten discovery motions by the time when Judge Kuntz ruled discoveries were closed. I see no reason to second guess Judge Kuntz. Whether issue estoppel or similar principles strictly apply to his ruling, attaching weight to it is consistent with those principles as well as the objectives of the CCAA claims process.

13. It is worth noting that after the motion to dismiss was decided in September 2021, the Court issued an order setting a deadline of November 22, 2021 for the first steps with respect to dispositive motions. This order was premised on the notion that discoveries were complete.

14. I conclude that I should give effect to Judge Kuntz's order that discoveries are complete. The motion requesting that the Defendants produce further documents in the Donin Action is dismissed.

15. The second issue in the Donin case is whether the action is limited to claims by customers in the State of New York. While it is not necessary to decide this issue, I think it useful to briefly set out my conclusion that even if discoveries were re-opened, the Plaintiffs would not be entitled to discovery outside of New York.

16. The only claims that remain after the dismissal ruling are for breach of contract and an implied duty of good faith and fair dealing. The Complaint had alleged that Just Energy entered into contracts outside of New York through 100 John Does.

17. Judge Kuntz dismissed the claim against the John Does because of a lack of personal jurisdiction. The remaining claims in the action can only succeed for customers that contracted with the remaining Defendants in the action. The Complaint does not allege that either of the remaining Defendants contracted with customers outside of New York

Jordet

18. The first issue is whether the class period begins in 2014. For purposes of this analysis, I proceed on the assumption that in addition to Pennsylvania, the Jordet claim includes contracts with customers in California, Georgia, Maryland, New Jersey and Ohio.

19. On December 7, 2020 United States District Judge William M. Skretny granted the Defendant's motion to dismiss several parts of the claim. He ruled that the Plaintiffs' claims prior to April 6, 2014 were time barred. He went on to say "Similarly, the purported class claims prior to that date are also barred" The purported class included customers in states other than Pennsylvania where the Defendant entered into contracts.

20. The limitation period in Pennsylvania was four years. The limitation periods in some of the other states were longer. The Plaintiffs argue that Judge Skretny did not intend to rule that the Pennsylvania limitation period applied to customers in states with longer limitation periods.

21. While the Plaintiffs' Complaint referred to a class period beginning on April 12, 2012, Judge Skretny pointed out that the Plaintiffs did not argue the timeliness of the April 12, 2012 to April 6, 2014 breach of contract claims. Obviously, he was alive to the issue of pre-April 2014 limitation periods.

22. Judge Skretny's order is clear. Class claims prior to April 16, 2014 are barred. The Plaintiffs do not argue that the judge did not have jurisdiction to make that order. For similar reasons to those discussed in paragraphs 8 to 11 above, I do not consider it

appropriate for me to delve into the process or the reasons that led to Judge Skretny's order. I decline to order production of documents for the period prior to April 6, 2014.

23. The second issue in Jordet is whether the class action includes non-residential customers. I conclude that it does not. In the Complaint, the Plaintiffs define the class as "Just Energy's customers charged a variable rate for residential natural gas services by Just Energy from April 2012 to the present." [Emphasis added.] It defines the Pennsylvania sub-class as "residential natural gas customers" [Emphasis added.] The Complaint does not assert claims for non-residential or commercial customers.

24. The Plaintiffs point out that Just Energy uses certain contracts for both residential and commercial customers and argue commercial customers should be included in the class. Be that as it may, the Complaint limits the class to residential customers and that is the class to which certification, if granted, would apply.

25. Moreover, I note that the Plaintiffs' requests for documents in the March 22, 2022 letter specifically limit the requests to documents relating to residential customers.

26. I conclude that I should not, in the context of this CCAA claims process, expand the class of claimants beyond that plead by the Plaintiffs in the Complaint or to documents not sought in the letter requesting production.

27. The third issue in Jordet is whether production should be limited to only those states where the Defendant, Just Energy Solutions, Inc. contracted with customers. I am satisfied that it should. Just Energy's counsel asserted that the Defendant did not contract with customers in Michigan, New York and Illinois. Plaintiffs' counsel questions whether that is the case.

28. I direct the Defendant to produce an affidavit of an officer with knowledge of the facts indicating whether or not the Defendant contracted with customers in the three states in issue during the relevant time period. If the affidavit indicates that the Defendant did not do so, I dismiss the request for documents relating to those three states.

29. The fourth issue in Jordet arises from the language in the Complaint claiming on behalf of Just Energy customers for the period from April 2012 "to the present".

30. The issue is whether the reference "to the present" refers to the date of the Complaint (April 6, 2018) or to the present time, that is the month of May 2022.

31. The parties referred me to a number of American authorities where a representative plaintiff in a class action has sought to include claims occurring after the commencement of the class action and up to the present time. The results in the cases vary and often turned on the circumstances in the particular case.

32. I direct the parties to meet and confer on or before May 30, 2022 to attempt to resolve this issue. If they are unable to do so, they may contact me.

33. I am inclined to allow this request if it is not unduly burdensome for the Defendant. It strikes me that the documents necessary to provide the Plaintiffs with information sufficient to determine the amount of the claims for the four year period from April 2018 to the present should be readily available. This type of information will be provided to the Plaintiffs for the previous four years and it does not seem unreasonable to extend the order for production to the present time.

34. During the motion, counsel for the Defendants in Jordet and Donin raised concerns about the amount of work required to satisfy all of the requests being made at the same time as they were dealing with the CCAA process. In addressing the request for documents for the period from 2018 to the present, counsel should bear in mind my rulings above that should alleviate many of their workload concerns.

The Specific Requests in the March 22, 2022 Letter

35. In Donin, the Defendants have produced documents relating only to customers in New York State and as mentioned above, the District Court has ruled discovery is complete. I am not ordering any further production for the Donin action.

36. In Jordet, the Defendant has agreed to produce documents with respect to the five additional states mentioned above on a without prejudice basis. The Defendant has also agreed to produce documents for categories one to six in the March 22, 2022 request, subject to the limits I have ruled upon above. The Defendant takes issue with the need for

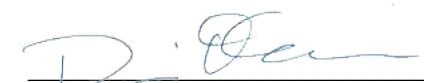
production of some of the documents in requests one to six and the availability of some of the others. It takes the position that the production of the documents it has agreed to produce will satisfy the reasons underlying requests one to six.

37. In my view the most efficient way to proceed with requests one to six is to have the Defendant complete the production of documents that it has agreed to and for the parties to meet and confer about what further production, if any, needs to be made. I will be available on short notice to settle any disputes.

38. Request seven relates to communications with regulators. This is a burdensome request. I am not persuaded that the relevance of these communications is sufficient to warrant production. The only remaining claim in the Jordet action relates to breach of contract. The fraud-related claims have all been dismissed. I decline to order production with respect to request seven.

39. Request eight relates to the names of personnel involved in fixing variable rates. Having heard counsel it seems to me that this issue can be nicely sorted out by a meet and confer.

DATED at Toronto this 24th day of May, 2022.



Dennis O'Connor

THIS IS **EXHIBIT "S"** REFERRED TO IN THE AFFIDAVIT OF MICHAEL CARTER SWORN BEFORE ME over video teleconference this 29th day of May, 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.

Tiffany Sun

A Commissioner for taking Affidavits, etc.

Miao Sun, a Commissioner, etc., Province of Ontario, while a Student-at-Law. Expires March 6, 2023.

Court File No. CV-15-527493-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

HAIDAR OMARALI

Plaintiff

- and -

JUST ENERGY GROUP INC., JUST ENERGY CORP.
and JUST ENERGY ONTARIO L.P.

Defendants

Proceeding under the *Class Proceedings Act, 1992*

RESPONDING MOTION RECORD OF THE DEFENDANTS
(Summary Judgment Motion)
Returnable June 11-13, 2019

January 11, 2019

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Court File No. CV-15-527493-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

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Plaintiff

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Returnable June 11-13, 2019

G.	Exhibit "G":	Executed Independent Contractor Agreements	268-356
H.	Exhibit "H":	Email chain between Fairview Office and Richard Teixeira dated November 13, 2014 re Fairview Recruiting Schedule	357-358
I.	Exhibit "I":	Just Energy and OEB Training Proctor Step by Step Guide	359-364
J.	Exhibit "J":	Document re The Five Modules	365-549
K.	Exhibit "K":	Commission Chart for Just Energy's residential Just Energy Conversion Program	550-551
L.	Exhibit "L":	Restated version of the OEB ER Code of Conduct from November 2010	552-594
M.	Exhibit "M":	Ontario Industry Training Module Participant Guide	595-620
N.	Exhibit "N":	Email from Nareg Sagatelian to Regional Fairview Calgary Office re DNS List dated June 9, 2015	621-622
O.	Exhibit "O":	Email to various individuals from Ravi Maharaj re Ontario Reminders dated September 19, 2014	623-639
P.	Exhibit "P":	2015 Just Energy Regional Distributor & Admin Permit Handbook	640-649
Q.	Exhibit "Q":	Email chain between regional coordinators re Next Weeks Same Day Locations dated January 10, 2015	650-652
R.	Exhibit "R":	List of Class Members that were badged in multiple offices	653-662
S.	Exhibit "S":	List of Independent Contractors that were badged and marketed in more than one province	663-665
T.	Exhibit "T":	List of Sales Agents and amounts of clothing they purchased	666-667
U.	Exhibit "U":	Example of Compliance Matrix used to track consumer compliance and compliance monitoring	668-671

V.	Exhibit "V":	Email chain to various individuals from Ravi Maharaj re Annual Ontario OEB Testing - 2016 dated May 25, 2016	672-674
W.	Exhibit "W":	Sample Just Energy Corporate & Consumer Relations "IC Strike Count"	675-683
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Y.	Exhibit "Y":	List of Ms. Schwantz's sales between November 2013 and December 2014	691-701
Z.	Exhibit "Z":	Ms. Schwantz's 2014 T4A	702-703
AA.	Exhibit "AA":	List of Sales Agents who never made a sale	704-782
BB.	Exhibit "BB":	List of Sales Agents who made over $100,000 in annual commissions	783-784
CC.	Exhibit "CC":	Email from Ravi Maharaj to Sales Support re Greg Giza dated May 27, 2014	785-788
DD.	Exhibit "DD":	List of Mr. Nemati, Mr. Barbieri and Ms. Borg's sales' statistics during the class period	789-799
EE.	Exhibit "EE":	List of Ms. Schwantz's team's sales statistics from November 2013 to February 28, 2015	800-810
FF.	Exhibit "FF":	Mr. Lavigne's team's sales' statistics between May 1, 2015 and October 31, 2015	811-814
GG.	Exhibit "GG":	Mr. Nemanti's team's sales' statistics between July 1, 2013 and October 31, 2014	815-818
HH.	Exhibit "HH":	Mr. Barbieri's team's sales' statistics between April 1, 2012 and September 30, 2012	819-822
II.	Exhibit "II":	Ms. Schwantz's team's sales' statistics	823-828
JJ.	Exhibit "JJ":	Document entitled "Trip Rules"	829-831
KK.	Exhibit "KK":	Email setting out Just Energy's "Double Points Week" dated February 17, 2015	832-833
LL.	Exhibit "LL":	Spreadsheet outlining how Just Energy's "New Agent Bonus" worked for JECP deals	834-838

TAB 1

Court File No. CV-15-527493-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

HAIDAR OMARALI

Plaintiff

- and -

JUST ENERGY GROUP INC., JUST ENERGY CORP. and JUST ENERGY ONTARIO L.P.

Defendants

Proceeding under the *Class Proceedings Act*, 1992

AFFIDAVIT OF RICHARD TEIXEIRA

I, Richard Teixeira, of the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY:

1. I am the Vice President of Consumer Sales with Just Energy Group Inc. ("**Just Energy**" or the "**Company**"). As such, I have knowledge of the matters contained in this affidavit, except where matters are stated as being based on information, in which case I believe the information to be true.

2. I make this affidavit in support of the defendants' response to the plaintiff's summary judgment motion.

3. I previously swore an affidavit with respect to the plaintiff's certification motion ("**My First Affidavit**"). A copy of My First Affidavit is attached as **Exhibit "A"**. I have reviewed the affidavits of Katlyn Schwantz ("**Ms. Schwantz**"), Jennifer Borg ("**Ms. Borg**") and

Jamie Acton ("**Ms. Acton**"), sworn August 29, 2018, the affidavits of Roland Lavigne ("**Mr. Lavigne**") and Bahram Nemati ("**Mr. Nemati**") sworn August 30, 2018, and the affidavit of Daniel Barbieri ("**Mr. Barbieri**") sworn September 2, 2018. Having done so, I can confirm that I strongly disagree with the majority of the assertions made by these affiants (the "**Affiants**").

4. In this affidavit I refer to "**Independent Contractors**" meaning those individuals who marketed and sold on behalf of Just Energy as door-to-door sales agents ("**Sales Agents**"), crew coordinators, regional distributors and those individuals who engaged in renewal and commercial sales.

Introduction

5. Currently, Just Energy no longer utilizes Independent Contractors to solicit contracts for natural gas and electricity.

6. As of January 1, 2017, certain legislative amendments pursuant to Ontario's *Energy Consumer Protection Act, 2009*, S.O. 2010, c 8, came into force. Those amendments provided, in part, that the sale or offer of sale of electricity or natural gas to a consumer in person at the consumer's home was prohibited. These amendments further stipulated that the remuneration provided by a supplier to a salesperson in respect of such sales or offers of sale of electricity or natural gas could not be based on a commission or value of volume of sales basis.

7. As a consequence of these legislative amendments, Just Energy ceased utilizing Independent Contractors to solicit contracts. Beginning in and around November 2016, Just Energy offered employment to approximately 40 of its Independent Contractors to become employees at Just Energy.

Just Energy's Team Model

8. The team model at Just Energy was created primarily for the purposes of educating and teaching Sales Agents how to sell Just Energy's products. Many of Just Energy's Sales Agents had never engaged in the sale of energy products prior to joining Just Energy and this model had proven to be successful for providing Sales Agents with the essential information and skills they needed to market energy products both successfully and in compliance with regulatory standards.

9. Once initial orientation was completed, Independent Contractors could elect to continue operating in a quasi-team like environment at the regional sales offices. While Independent Contractors had no obligation to market out of a regional office or with a team, Just Energy recommended marketing with a team and emphasized the many benefits of doing so. Among other things, the team model offered ongoing support to Independent Contractors by providing them with continuous education that was required to help them advance in the industry and by encouraging them to take on more advanced sales' roles at the Company. Independent Contractors were also provided with regular mentorship opportunities to assist them in developing their skills so that they could become crew coordinators, regional distributors and even national distributors.

10. Sales offices were designed and structured to provide ongoing support to each Independent Contractor and to allow for the constant learning that was needed by individuals to develop into successful salespersons of Just Energy products. In this regard, regional distributors, crew coordinators and assistant crew coordinators marketed together to support the Sales Agents and the Sales Agents' business objectives. Their success was Just Energy's top priority.

11. Experience has shown that a hierarchy of seasoned Sales Agents leading by example, which includes teaching sales and marketing skills, and reinforcing positive habits, such as professionalism and personal accountability, ultimately leads to a more motivated and productive salesforce, higher sales numbers and an increased likelihood of success for all.

12. The team model was also meant to help provide professional advancement opportunities to Independent Contractors. Our committed and hardworking Independent Contractors, be they regional distributors, crew coordinators or Sales Agents, were encouraged to enhance their relationship with Just Energy by taking on more advanced sales' roles. The model provided individuals with the opportunity to be mentored, and to develop their skills and become crew coordinators, regional distributors and even national distributors. Attached as **Exhibit "B"** is a Just Energy memo dated May 28, 2015 and entitled "Just Energy Nation Best Practices". The memo emphasizes the various ways that regional distributors can motive their Independent Contractors to boost morale and drive sales, including the recognition of Independent Contractor success by developing a point system to win money.

13. Just Energy provided professional advancements opportunities to Independent Contractors through the "Crew Coordinator Development Program" (the "**CCDP**"). This successful program incentivized and rewarded regional distributors and crew coordinators with bonuses for the promotion of independent contractors from their own salesforce to crew coordinator status. Attached as **Exhibit "C"** is copy of an email discussing our CCDP, which attaches a CCDP request form. We were ultimately working with individuals to help them grow, so that they could have their own offices one day. Their success was Just Energy's top priority.

14. While the team model was available to all Independent Contractors, it was primarily recommended for Sales Agents. Sales Agents were generally less experienced salespeople and guidance, support and motivation was necessary to help them succeed in their sales. Independent Contractors who were principally engaged in renewal and commercial sales did not generally adopt the team model.

15. Sales Agents were encouraged to take advantage of the support provided, however it was ultimately up to them whether they wished to utilize the support. It was not mandatory. Many of the Sales Agents did not adopt the team model of Just Energy and as a result often did not succeed in their sales. The driving factor behind successful Sales Agents at Just Energy was the motivation and support that came from team support. Door-to-door solicitation is a very difficult and draining type of sales' practice. There is frequent rejection and can require significant time and commitment in order for it to be lucrative. By having team members support you mentally and professionally, it made the sales effort much easier. The Sale Agents that succeeded were generally those that took advantage of the team environment.

Variety of Office Structures

16. Although the team model described above was typical, there was no requirement that a regional office be structured in this way by regional distributors. Regional distributors had the independence to create their own offices, with variations to the typical structure.

17. For example, the Fairview office, under the stewardship of Brian Marsellus ("**Mr. Marsellus**"),[1] initially began as one office, with one regional distributor and crew coordinator, but subsequently expanded and divided into several sub-offices, in order to give two crew

[1] Brian Marsellus was a national distributor with Just Energy from 2009-2016.

coordinators the opportunity to lead their own offices. Each sub-office had its own team, which was organized based on the same hierarchy as other Just Energy sales offices. Mr. Marsellus created this structure to create competition and generate more revenue, as well as to provide Independent Contractors with the incentive and platform to lead their own offices.

18. Similarly, our Cambridge renewal sales office and our Hespeler New Business office were also amalgamated into one office during the class period, with various teams marketing within the same location. The Toronto office which did primarily commercial sales, and the Viking office which primarily did residential sales, also amalgamated into one office during the class period.

19. It was beneficial for Independent Contractors to have multiple offices in the same physical location for the purposes of growth. By having different types of sales and offices within the same location, this meant different income stream opportunities, created healthy competition between regional distributors and crew coordinators, and ultimately the opportunity for greater overrides and profits[2]. This structure was regularly adopted and successfully utilized by Independent Contractors who were ambitious and committed to creating a lucrative sales business.

20. Independent Contractors also had the agency to engage in different kinds of sales within the same office location. For instance, Independent Contractors could engage in both commercial and residential sales, as well as door-to-door sales at the Fairview office, the Yorkland Commercial regional office and the Cambridge Renewals office.

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[2] An override is a kickback that a crew coordinator would receive on each sale.

21. There was also fluidity with respect to the scope of tasks and responsibilities between regional distributors and crew coordinators. Regional distributors and crew coordinators did not always have the same roles across regional sales offices. In the Oshawa office, for example, crew coordinators ran the day-to-day operations, while the regional distributor played more of a supporting role. I am informed by Ravi Maharaj, Regional Manager of Field Operations, that Tike Asajile, who was a crew coordinator at our Oshawa regional office, assumed the tasks and responsibilities that were characteristic of a regional distributor role. Tasks and responsibilities were not strictly defined, but were distributed among the offices based on skill sets.

Types of Sales

22. Independent Contractors were not confined to only one type of sales. They had the freedom to grow their business in the way that they wanted. In addition to door-to-door residential sales, Independent Contractors could also engage in commercial and/or renewal sales if they wished to do so. For example, Mr. Kian Nazarelly ("**Mr. Nazerally**") engaged in commercial sales from time to time which I am informed by Anastasia Reklitis of Fasken Martineau DuMoulin LLP was confirmed by Mr. Nazerally in the cross-examination of Mr. Nazerally's affidavit affirmed August 10, 2015. Attached as **Exhibit "D"** is a copy of the transcript from the cross examination which took place on March 18, 2016[3].

23. There were also Independent Contractors that engaged exclusively in renewal sales or commercial sales. These Independent Contractors had a different sales practice than door-to-door residential Sales Agents and did not typically market in a team or quasi-team

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[3] Page 29 of the transcript.

environment, as they did not require the same type and level of support and mentorship that Sales Agents required in the door-to-door sales context. This was because the Independent Contractors engaging in commercial and renewal sales were generally more experienced and had already established their skillset as salespeople in the industry. Further, it was not practical for Independent Contractors engaging in commercial and renewal sales to meet on a regular basis and travel to the field together. Independent Contractors engaging in commercial sales traveled to various locations throughout the day, visiting one business establishment, to make a single sale, in each location. It was unnecessary to have more than one Independent Contractor attend a business establishment to attempt to make an individual sale. As a result, Independent Contractors engaged in commercial sales usually did not travel together and consequently did not adopt a team-like model to their sales practices.

24. The typical day of an Independent Contractor engaged in commercial sales consisted of going directly to the field, and coming into the office once a week to pick up their pay cheque. There were weekly meetings, however most Independent Contractor did not attend or would call-in to the meeting. The purpose of the meeting was primarily to receive updates on any changes in products and pricing, etc.

25. The typical day of an Independent Contractor engaged in renewal sales was congruent with a Commercial Independent Contractor in that they would go straight to market the market and generally only came into an office once a week to pick up their commission cheque and to receive their customer "leads" (discussed more fully below).

Recruiting Independent Contractors

26. Up until around the summer of 2016, recruiting at Just Energy was managed by the centralized recruiting department in our Ottawa regional office. When our Ottawa office closed in and around 2016, centralized recruiting ceased and recruiting was thereafter completed on-site at each regional office. Individuals interested in Independent Contractor opportunities at Just Energy were therefore required to call into individual regional sales offices which would coordinate interviews at those regional offices.

27. Just Energy would use a variety of different methods to attract potential recruits, including word-of-mouth, visiting college and university campuses to hand-out flyers, and online adds, which were taken out on various websites, including Kijiji and Craigslist. Attached as **Exhibit "E"** is a copy of an email setting out various recruiting tactics used by Just Energy to recruit the next generation of Independent Contractors.

28. With respect to the content of advertisements, these were strictly controlled and had to be approved by Just Energy's centralized recruiting guidelines, so that there was no confusion or misrepresentation with respect to the independent contractor status of the sales agent position. As a result, these advertisements would, in addition to providing promotional information regarding the potential to achieve financial success, provide that the sales agent position was, among other things, 100 per cent commission based.

29. Each regional sales office had a recruiter, who was an employee of Just Energy. When an individual spoke to the recruiter, that individual was provided with information about the structure of the Independent Contractor role, including its 100% commission based compensation structure and the absence of any employment benefits of any kind.

30. In order to ensure that recruits were provided with an accurate representation of the opportunities at Just Energy, as well as their independent contractor status, Just Energy provided its recruiters with standardized recruitment materials. This ensured that a consistent and accurate message was conveyed to recruits about these matters.

31. In this regard, Just Energy provided its recruiters with the "Independent Contractor Orientation Guidebook", which, among other things, reinforced the Just Energy philosophy of motivation and empowerment, as well as the need to identify and accurately characterize the nature of the Independent Contractor role and the implications associated with that, such as the 100 per cent commission based compensation package. Attached as **Exhibit "F"** is a copy of the Independent Contractor Orientation Handbook.

The Interview Process

32. In response to our recruitment initiatives, recruits would began their interaction with Just Energy by calling-in to a sales office. During this phone call, it was made clear to recruits that they were being engaged by Just Energy as independent contractors, not employees. Recruits were informed that the position was, among other things, 100 per cent commission based and did not include a salary or employment benefits of any kind.

33. If the recruit and the Just Energy recruiter decided that they wished to continue with the interview process after the initial phone call, the recruit would be invited to attend an in-person interview at their respective sales office.

34. Interviews were generally completed in regional offices over a two to three day period, but individual sales offices and recruiters had significant leeway in this regard. Recruits

would attend their regional office and be interviewed by the recruiter, and, if times were busy, a crew coordinator or a regional distributor.

35. The recruiter or regional distributor would reiterate the philosophy of Just Energy, which was that the Company had a salesforce of Independent Contractors who operated on a 100% commission based compensation structure. Following the interview, the recruit would have been fully aware that there were no deductions from their commission payments for statutory reasons or otherwise, that any expenses were their own to claim for tax purposes, and that there were no obligations owed to them by Just Energy with respect to overtime, holiday pay, sick time, or the like.

36. During the recruiting process, regional distributors provided detailed explanations about the nature of the Independent Contractor relationship, including: the 100% commission based compensation structure, that Just Energy did not deduct taxes at source, and that Independent Contractors would have to remit their own taxes to the government.

37. I am informed by Jahan Saffari ("**Mr. Saffari**"),[4] a former regional distributor at the Viking office, and who is currently the regional director of our North California offices, that during the recruitment process he would expressly tell recruits that Just Energy would pay their commissions up front, but. Mr. Saffari would also explain to recruits that they should keep receipts for all of their expenses, including gas, meals, etc., such that at the end of the year, they could seek to claim these as business expenses. Mr. Saffari recalls all recruits understanding that

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[4] Mr. Saffari was a regional distributor in the Viking office from 2012-2014 and generally oversaw all recruitment and orientations at the Viking office. Mr. Saffari is currently the regional director of Just Energy's North California office.

they were providing services to Just Energy as Independent Contractors and that the position as 100% commission-based.

38. The administrator at the regional offices would review these and other terms of the ICA with the recruit and spend time discussing the independent contractor status of the position. Recruits would openly ask questions, and were given the opportunity to review the ICA privately in the office or at home before deciding whether to agree to its terms.

39. Importantly, recruits could not begin to market on behalf of Just Energy as sales agents or even proceed to orientation and training without first executing an ICA.

40. The Affiants have each executed their own ICA. Attached as **Exhibit "G"** to my affidavit are copies of the ICAs executed by the Affiants.

Orientation

41. Just Energy offered an orientation for new Independent Contractors who could choose to market as part of a team or on their own. As door-to-door sales could be physically and emotionally demanding, Just Energy endeavoured to teach and motivate each Independent Contractor to develop and enhance their skillset in order to become successful businesspeople. Seasoned sales people, including crew coordinators and regionals distributors, were invested in mentoring the less experienced Independent Contractors to help them build sales experience and gain valuable skills.

42. It was recommended that the entire orientation take place over two days; however, it was up to the regional distributors whether they wanted to complete it in one day or spread it across two days or even three days. We did not confirm the duration of complete

orientation sessions with the regional offices and left this to the discretion of regional distributors. Attached as "**Exhibit "H"** is an email chain between the Fairview Office and me, among others, which highlights that the Fairview Office had discretion with respect to its recruitment and orientation schedule for new recruits.

43. The duration of orientation was dependent on how many individuals were participating during a given week and the level of sales' experience individuals had. For example, orientation would take longer if there were individuals from all different backgrounds and levels of experience in comparison to a situation where the majority of the group were seasoned door-to-door solicitors.

44. Assuming orientation was spread out across three days, the first day typically began with classroom orientation sessions, while the second day and, perhaps, third day were dedicated to field shadowing. Attached as **Exhibit "I"** is a copy of the "Just Energy and OEB Training Proctor Step by Step Guide", which sets out a general template of the two to three day orientation process.

Classroom Orientation Sessions

Just Energy Orientation Modules

45. Classroom orientation generally centered on five modules (the "**Five Modules**"). The Five Modules set out, among other things, the Independent Contractor relationship at Just Energy, the legal and regulatory framework relevant to the position, Just Energy's product and services, as well as the tools and techniques by which an Independent Contractor could utilize in order to be successful at door-to-door energy sales. Attached as **Exhibit "J"** is a copy of The Five Modules.

46. The nature and implications of the independent contractor relationship appeared throughout the Five Modules. The first module, for instance, set out the role of the Sales Agent as an independent contractor by highlighting, among other things, the 100 per cent commission model and schedule flexibility.

47. The third module covered the three-level commission structure at Just Energy, namely, "initial commission", "reconciliation commission" and "residual commission", as well as the various incentives, including cash prizes, bonuses, scholarships, awards and trips, available to successful independent contractors.

48. In addition, an example of a commission chart for Just Energy's residential Just Energy Conversation Program (the "**JECP**") was presented to recruits during the orientation session, so that it would be clear to recruits how the commission based compensation regime at Just Energy operated. Attached as **Exhibit "K"** is a copy of said commission chart.

49. The fourth module included a presentation entitled "A Day in the Life of an Independent Contractor", which set out the recommended daily activities of the sales agent, including recommendations for attending the morning meetings, dressing professionally and proven tactics for developing a successful business plan.

50. Just Energy recommended that regional offices present all modules during orientation sessions, however different offices would spend different amounts of time on each module or might shorten certain modules, depending on the background of the recruits in a particular session.

Ontario Energy Board Modules

51. Selling energy in Ontario is a highly regulated process, which required Just Energy to ensure that its Independent Contractors followed certain rules and regulations when marketing energy to consumers. In this regard, Just Energy was required to implement a mandatory Ontario Energy Board (the "**OEB**") training component to its orientation program in accordance with, among other things, section 5 of the OEB "Electricity Retailer Code of Conduct" (the "**OEB ER Code of Conduct**"). Attached as **Exhibit "L"** is a restated version of the OEB ER Code of Conduct from November 2010. This OEB orientation was the only mandatory orientation Independent Contractors had to complete with Just Energy.

52. In 2011, the OEB initiated a process by which all Independent Contractors marketing energy programs, on behalf of eEnergy retailers such as Just Energy, were subject to eight modules (the "**Eight OEB Modules**") outlining key industry information as well as regulatory and compliance matters. Independent Contractors were therefore required to receive strict training regarding, for example, what must and must not be done at each door while marketing their products. Attached as **Exhibit "M"** is a copy of the "Ontario Industry Training Module Participant Guide (the "**OITMPG**")", which covers the Eight OEB Modules, which was provided to Independent Contractors during orientation sessions.

53. Those individuals leading orientation sessions at Just Energy, "office proctors", were provided materials by Just Energy to ensure that they adequately covered the OEB mandated information with new recruits. The Just Energy and OEB Training Proctor Step by Step Guide, noted above and attached as **Exhibit "I"**, provides a lesson plan template for office proctors teaching the Eight OEB Modules to new recruits.

Field Shadowing

54. Following the classroom session of Just Energy's Independent Contractor orientation process, regional offices offered field shadowing to its Independent Contractors. Field shadowing was highly recommended for individuals who did not have previous experience with door-to-door sales.

55. For example, seasoned sales professionals generally did not participate in field shadowing, while those who did participate in field shadowing, chose how long they wanted to do it for. Some Sales Agents did not engage in field shadowing for more than a few door-to-door sales. Others may have decided to engage in field shadowing for a couple of weeks.

56. Field shadowing would typically involve Sales Agents shadowing a crew coordinator while he or she interacted with customers, or a crew coordinator watching the Sales Agent interact with customers. In such cases, the crew coordinator would assist the Sales Agent and provide recommendations based on his or her observations.

57. Just Energy had many Sales Agents without sales experience, which meant that, for the vast majority of them, field shadowing was an essential tool for them to succeed.

58. Whether it be back at an office, or in the field, on-going shadowing and role playing opportunities were always available to Independent Contractors, and were certainly not exclusive to the on-boarding process. For example, if Sales Agents were not achieving their personal sales goals, they often requested that the regional distributor or crew coordinator shadow them in the field, in order to help them identify which skills they could improve on when marketing to customers. In turn, Sales Agents would practice with the regional distributor or

crew coordinator in order to improve their sales skill-set, which included better ways to communicate energy service and pricing issues to customers.

59. In short, field shadowing and role playing were important tools used to assist Independent Contractors improve the effectiveness of their sales approach with customers. Contrary to the Affiants' allegations and insinuations, field shadowing and role playing were never imposed on Sales Agents, especially on an on-going basis.

60. Without doubt, being a successful Sales Agent requires learning the right skills and a lot of practice. To this end, the above activities utilized by Just Energy were directed to enhance Sales Agents' abilities to successfully market energy, while complying with OEB legal and regulatory standards; they were not used to supervise or control Sales Agents. Unsurprisingly, the most successful Sales Agents were those individuals that took full advantage of these available, but optional, performance-developing tools.

Practice of an Independent Contractor

Morning Meetings

61. Contrary to the Affiants' assertions, there was no daily structure enforced by regional distributors, crew coordinators or otherwise at Just Energy. While there were recommended daily meetings and suggested hours of marketing, none of this was mandatory. If particular Independent Contractors followed a daily routine, this was because they chose to establish and maintain such a routine. To be clear, Sales Agents were at liberty to set their own schedules and engage in door-to-door sales at any time and at any location, so long as their sales efforts complied with the legal and regulatory OEB framework noted above.

62. Most of the regional offices that engaged in door-to-door new business sales had daily morning meetings. These morning meetings generally took place at either 10:00 or 11:00 AM, and were optional, but recommended, for all Independent Contractors.

63. The objective of the morning meeting was for those individuals heading out to the field that day, to congregate in a group-setting and discuss, among other things, sales strategy and goals, skills development, market and regulatory updates, as well as any changes in energy pricing and/or products offered by Just Energy. Morning meetings also provided the opportunity for Independent Contractors to discuss amongst themselves and finalize the location(s) in which they would be marketing that particular day.

64. Every Monday with Darren Pritchett, I would arrange a weekly conference call for all regional and national distributors. Crew Coordinators were also permitted to attend on these calls if they happened to be in the sales office and the Regional or National Distributor invited them to participate. The purpose of this call was for the Regional and National Distributors to update us on the sales goals and targets that had been discussed in everyone's respective offices. We did not impose any expectation or targets on the offices; rather, this was an opportunity for the Regional and National Distributors to share their sales objectives with us, while at the same time providing an opportunity for us to give them motivation or any guidance we felt they could benefit from in order to achieve their business goals.

65. In the commercial and renewal regional offices, there were generally no daily meetings; weekly meetings were held instead. The primary purpose of these weekly meetings was for Independent Contractors to pick up their commission cheques and to receive information

on any market, regulatory and product updates. These meetings were not mandatory and Independent Contractors could either attend in person or by phone.

Determining Marketing Location(s)

66. Independent Contractors were free to market where they wanted and accordingly decided for themselves where they would market on any given day. There was no regular "sales route" which Independent Contractors had to follow to pursue sales, and this was true whether they were marketing as part of a team or on their own.

67. One of the primary attractors of new Independent Contractors to Just Energy was that Just Energy placed no restrictions on where they could market their business, subject to certain external requirements and considerations, such as the availability of installation technicians, municipal regulations, utility charges and health and safety, respectively (discussed more fully below).

Door-to-Door New Business

68. For those Sales Agents marketing in a team environment, it was common for them to establish amongst themselves the marketing location(s) for the day at their respective regional offices' daily morning meetings.

69. Before the morning meeting, the regional distributors and/or crew coordinators would speak to Sales Agents and ask them about their marketing location preferences and general availability for the following day. The crew coordinator would often have their own preferred marketing locations for that day, based on, among other things, market intelligence gathered by Sales Agents in the field, which they would pass along to Sales Agents.

70. The marketing location(s) decided upon were conveyed by crew coordinators to the regional distributors at the daily morning meetings. The purpose of crew coordinators discussing the marketing location(s) with regional distributors was to confirm whether the proposed marketing location(s) were "appropriate" for marketing to customers. In this regard, regional distributors were privy to information that most crew coordinators, and the vast majority of Sales Agents were not, such as the existence of compliance issues, customer complaints and/or permit requirements in particular areas.

71. For example, it was not uncommon for customers to request that they not be solicited by Just Energy or any of its representatives. Therefore if on a given day a crew coordinator advised the regional distributor that a team was travelling to a marketing location with frequent non-solicitation requests, the regional distributor would likely advise the team to choose an alternative location, which was in the best interest of the Sales Agents for obvious reasons.

72. Just Energy implemented a process to facilitate these types of customer requests when they were made, which were referred to as "do-not-solicit lists". The do-not-solicit lists contained address information for consumers who directly advised Just Energy of their no solicitation request and the list was updated and sent to regional sales offices on a weekly basis. It was recommended that each Sales Agent review these lists prior to marketing; otherwise, contractors would risk annoying customers and be less likely of making a successful sale and be discouraged by the negative feedback from the consumer. Attached as **"Exhibit "N"** is an email from Mr. Marsellus to the Regional Fairview Calgary Office, reminding them to review and notify their Sales Agents of do-not-solicit lists. This email also attaches an example do-not-solicit list.

73. In addition, avoiding do-not-solicit list customers was an OEB requirement, so avoiding such customers not only ensured compliance with regulatory requirements, but also made the best use of a Sales Agent's time. Once iPads were implemented, Sales Agents could refer to the "red zones" on the iPad to identify which consumers to avoid approaching.

74. Sales Agents also needed to consider whether there were any municipal regulations in a particular location. Some municipalities, such as Brantford, Kitchener, London, Timmons, Ingersoll, Thunder Bay and Woodstock, would at times require that Just Energy or its Sales Agents obtain licences or permits to market in these locations; other municipalities would prevent Sales Agents form marketing in their jurisdictions entirely. In order to market in such municipalities, Just Energy would have to obtain a "corporate licence" or "corporate permit" to cover all the Sales Agents marketing on its behalf in one of these locations. Attached as **Exhibit "O"** is an email setting out some of the various municipalities that required licences and/or permits to market in their jurisdictions.

75. As an alternative, Sales Agents could obtain their own individual licences or permits if they wanted to market in a particular area that required such legal authorization. Just Energy would do what it could to assist Sales Agents to acquire licences or permits, however this required planning and pre-determining marketing locations. Attached as **Exhibit "P"** is a copy of the 2015 Just Energy Regional Distributor & Admin Permit Handbook", which sets out, among other things, how Just Energy and Sales Agents went about obtaining marketing licences and permits.

76. Just Energy's Extranet possessed the "Permit Requirement Database Tracker", which allowed Sales Agents to log-in and manage sales permits and requirements online (see

pages 5-7 of the 2015 Just Energy Regional Distributor & Admin Permit Handbook, attached as **Exhibit "P"**).

77. In addition to municipal regulations, marketing location(s) would be pre-determined for the purposes of planning whether Sales Agents would need an installation technician team to travel with them into the field. Most Sales Agents sold the JECP product which had an installation component to the provision of the energy service. This meant that the success of selling this particular product in many, if not most, cases depended on the ability of Sales Agents to offer customers same-day installation. A delay in installations could result in a customer cancelling their services and have a negative impact on the Independent Contractor through a loss of commission.

78. By pre-determining where Sales Agents were going, the regional offices and Just Energy could arrange for installation technicians to be available to support them in the field[5]. Accordingly, while Sales Agents could ultimately market wherever and whenever they wanted, marketing locations and hours were often determined by the availability of installation technicians.

79. In order to combat this installation technician supply issue, and given that the majority of the salesforce either had no driver's licences or no access to their own vehicle, the regional distributors and crew coordinators would try their best to support Sales Agents by arranging for vans and/or car pools to be available at the daily morning to transport them to areas where installation technicians were present to carry out same-day installations. Attached at

Exhibit "Q" is email chain between regional coordinators arranging for technicians to be available for same-day installations.

80. I am informed by Jahan Saffari that Sales Agents also generally discussed marketing locations with their crew coordinator and regional distributor prior to travelling to the field, in order to establish which customer sales' contracts the Sales Agents had to bring out to the field. Utility charges varied across territories, and Sales Agents were required to sign up a customer with the contract that reflected the appropriate utility charge for that customer's region.

81. Determining respective marketing locations was also recommended for health and safety reasons, i.e., the regional offices would prefer to know where Independent Contractors were marketing to ensure their safety.

Renewal and Commercial Sales

82. In the renewal sales' context, Independent Contractors were assigned customers to market, rather than locations to market in. The customers determined the location the Independent Contractors would be selling in.

83. Dan Gadoua ("**Mr. Gadoua**"), the regional distributor for the Cambridge office, would assign customers or "leads" through Just Energy's JEM app, for those Independent Contractors who used an iPad. iPads were available for purchase from Just Energy, to help increase the efficiency of the customer interaction. Prior to JEM and the implementation of iPads, Mr. Gadoua assigned leads manually.

84. Leads were either automatically assigned to Independent Contractors or Independent Contractors requested leads from the regional distributor. For example, Renewals

would often request to market in a specific location on a given day and Mr. Gadoua would determine whether there were any customers in that area that were up for renewal. If there were, Mr. Gadoua would assign those customers to the Independent Contractor.

85. Independent Contractors engaged in commercial new business did not have any marketing locations assigned to them. Independent Contractors chose where they wished to market and simply talked among themselves to ensure that they did not overlap with other Independent Contractors or visit areas that were recently marketed in.

Travelling to the Field

86. Independent Contractors had the independence to travel to the field whenever and however they so wanted.

87. While some Sales Agents would drive to the field on their own, the majority of them preferred to meet at the regional office and travel together, whether in the vans that were generally available at the regional offices, or in their own cars. Whether a Sales Agent accompanied the crew coordinator to this location(s) to market, or their own preferred location(s), was entirely the Sales Agents' own decision; however, Sales Agents generally decided to travel with the crew coordinator to take advantage of not only the benefits associated with marketing in groups, but also the marketing intelligence noted above.

88. Sales Agents chose to travel with the crew coordinator or with other Sales Agents in their vehicles because they often did not have transportation of their own. Many Sales Agents worked pay cheque to pay cheque and could not afford their own vehicles or otherwise pay for their transportation. Accordingly, many Sales Agents not only appreciated the van and/or

carpooling options that were available at the regional offices, but relied on these communal resources to run their businesses.

89. Sales Agents preferred travelling as a team because they wanted to be around each other for, among other things, safety, support, encouragement, motivation and even competition. Sales Agents often wanted to be around successful salespeople and who knew the areas that the team was marketing in, so that they too could partake in this success.

90. Further, Sales Agents were motivated to travel with a team because there were crew coordinators that would give bonuses to their Sales Agents. and would often underwrite other expenses.

Freedom to Market Where one Chooses

91. The Affiants suggest that crew coordinators drove all Sales Agents to a specific location to market door to door. This is misleading and suggests that Sales Agents were required to market in the same location as their crew coordinators. As mentioned above, many Sales Agents would travel with a crew coordinator to take advantage of among other things, the support and their vehicles. Sales Agents chose to travel with their crew coordinators for these reasons.

92. The Affiants assert that Sales Agents who marketed in areas not approved for the day would receive a warning from regional distributors and/or threats of termination. This is simply false. As noted throughout my affidavit, Just Energy itself did not place restrictions on where Sales Agents chose to conduct door-to-door sales, nor was there a mandatory reporting structure in place that required sales agents to report as to when and where they were carrying out their sales. To be clear, Sales Agents were not disciplined by Just Energy if they did not

report on their marketing location and/or obtain approval for a marketing location. Further, regional distributors could not terminate Independent Contractor Agreement.

93. Indeed, there were Sales Agents that never reported to their regional office and were never privy to discussions about determining marketing location(s) for any given day. These individuals therefore never had their marketing location(s) "approved" by anyone, and did not receive any warnings or threats of termination for marketing in locations that were not discussed among the teams at the regional offices.

94. An example of such a Sales Agent is Ms. Borg. I am informed by Mr. Saffari, who was the regional distributor at the Toronto office, that Ms. Borg never reported to the Toronto office and only attended the regional office when she needed to pick up supplies, including energy service contracts, brochures, and business cards. Ms. Borg rarely travelled with any sales team and opted to market in locations by herself.

95. Ms. Borg was also badged in the Ottawa office and was providing services to Just Energy in Ottawa, from in and around 2015-2016. I am informed by Joel Stewart that Ms. Borg never reported to the Ottawa regional office. She marketed remotely, and only attended the Ottawa office and travelled with other Sales Agents in the field when she needed installation technician support. In all other cases, Ms. Borg marketed remotely and never pre-arranged her marketing location with anyone.

96. Ms. Borg was also subsequently badged in the Kitchener office. I am informed by Dan Gadoua that, from early June to in and around July 2016, Ms. Borg never stepped foot into the Kitchener office and similarly never communicated her marketing location(s) to anyone for approval. Regional distributors were Borg were never aware of where Ms. Borg had decided to

market for the day, and she was accordingly rarely aware of where other Sales Agents were marketing. Nevertheless, this was permitted and acceptable behaviour to Just Energy.

97. If Sales Agents were marketing in a team environment, they did not necessarily have to market in the same location as the other Sales Agents on their team. It was also common that Sales Agents marketing in a team never marketed *as* a team, or in the same location as the other Sales Agents on their team.

98. Independent Contractors could pursue sales within the territory of their regional distributors or could also travel outside that region to areas not covered, or recently covered, by that region's Independent Contractors. Indeed, Independent Contractors were not restricted to marketing out of one regional office.

99. For example, Sales Agents often moved around offices in Ontario. Various independent contractors were selling for different physical offices and were therefore not always marketing with their team. Notably, out of the roughly 7,000 or so class members, about 200 of them were badged and operated as Sales Agents out of more than one regional office. For instance, Ms. Borg was badged at the Viking, Kitchener and Ottawa offices; Mr. Nemati was badged at both the Viking and Ottawa offices. Attached as **Exhibit "R"** is a list of class members that were badged in multiple offices.

100. Sales Agents could also market out of regional offices in other provinces. There were Sales Agents that were badged in an Ontario office who chose to market in a regional office in another province for a week at a time. For example, Dana Brown was badged in Ontario, Alberta and Manitoba regional offices at the same time and earned commissions from both Manitoba and Ontario in 2012 and earned commissions in all three provinces in 2013. Danielle

Larose was badged in both Ontario and Alberta offices and earned commissions in both provinces in 2013, 2013, 2014 and 2016. Nareg Sagatelian was badged in the Ontario and the Alberta regional office and earned commissions in both provinces in 2012, 2013, 2015 and 2016. Attached as **Exhibit "S"** is a list of Independent Contractors that were badged and marketed in offices in more than one province. In this regard, there was an open-door policy, in that, if individuals were badged in several offices, they had the agency to decide what office and location they wanted to market in on any given day, and were not required to report this to anyone.

The Ontario Energy Board

101. There were a number of legal regulations that Just Energy and its Independent Contractors were required to follow.

102. The OEB is responsible for setting the rules for the energy industry in Ontario. Accordingly, the OEB was responsible for much, if not most, of the requirements that Just Energy was, in turn, required to enforce upon its Independent Contractors. The majority of these rules and regulations, with respect to the marketing of energy services, were contained in the OEB ER Code of Conduct.

103. In order to educate Independent Contractors about the various OEB rules and regulations, Just Energy went to great efforts to provide materials for its Independent Contractors to learn this essential information for marketing energy services. The OITMPG, attached above as **Exhibit "M"**, was provided to recruits during their orientation and training sessions and sets out the various OEB rules and regulations.

Identification Badges, Business Cards and Clothing

104. Section 2 of Part B of the OEB ER Code of Conduct required that, in carrying out their door-to-door sales, independent contractors had to wear Just Energy identification badges and carry and distribute Just Energy business cards. This was for the purposes of identifying themselves to consumers, so that there was no misrepresentation regarding which entity the contractor was representing and the purpose of their visit. The OEB required contractors to display their badges at all times when they were in the field marketing (see section 2 of Part B of the OEB ER Code of Conduct attached as **Exhibit "L"**; and pages 8-9 of the OITMPG attached above as **Exhibit "M"**.

105. Independent Contractors were not required to wear any other specified apparel or branding, and were not prevented from wearing clothing that contained logos or branding of other companies. However, regional distributors and crew coordinators did encourage Sales Agents to dress in a professional manner, which included wearing plain and comfortable shoes and clean clothing. Experience had shown that dressing in a professional manner added credibility to sales pitches and ultimately increased the willingness of customers to purchase energy services (see page 4 of module four of the Five Modules attached above as **Exhibit "J"**.

106. To this end, regional distributors and crew coordinators encouraged Sales Agents to take full advantage of Just Energy branded clothing, which was available for purchase through each regional office at the same cost Just Energy had originally purchased the clothing from its vendors.

107. Time and again, wearing Just Energy clothing had been proven to enhance the marketing success of Independent Contractors. While Just Energy offered Independent

Contractors the opportunity to purchase Just Energy branded clothing, they were not required to purchase or, as noted above, wear it. (see page 4 of module four of the Five Modules attached above as **Exhibit "J"**.

108. The Affiants state that the regional distributor would ensure that the Sales Agents were all wearing their Just Energy uniform and badge prior to leaving the regional office. This statement suggests that Sales Agents marketing with the Affiants all purchased Just Energy clothing, which is not the case. For instance, there are no records of Mr. Lavigne and Ms. Schwantz ever buying Just Energy clothing during their time at Just Energy. Further, Just Energy's records indicate that only 53 people out of the 131 Sales Agents that made up the Affiants' sales' teams purchased Just Energy clothing. Attached as **Exhibit "T"** is a list of these Sales Agents and the amounts of clothing they purchased.

Just Energy Compliance Regime

109. In addition to setting the rules of the energy industry in Ontario, the OEB was also responsible for handling customer concerns as well as the licencing of utilities and energy suppliers. For such reasons, the OEB enforced a consumer complaint and compliance monitoring regime with respect to, among other things, what represents "false, misleading, or deceptive statements to customers", pursuant to O. Reg 389/10 of the *Energy Consumer Protection Act*, 2010, S.O. 2010, c. 8 (see section 7 of Part B of the OEB ER Code of Conduct attached as **Exhibit "L"**; and pages 8-12 of the OITMPG attached above as **Exhibit "M"**.

110. As a result of such rules and regulations, Just Energy was required to create a consumer compliance and compliance monitoring department to track Sales Agents who breached these standards established by the OEB and by regulatory bodies in other markets. To

ensure the efficiency in this regard, Just Energy created the "compliance matrix", which was an internal document that allowed us to receive, track and properly investigate customer complaints and set expectations to Independent Contractors regarding the consequences of negative marketing practices. Attached as **Exhibit "U"** is an example of a compliance matrix used to track consumer compliance and compliance monitoring, as required by the OEB.

111. The need for Just Energy to enforce OEB requirements on its Independent Contractors was increased by the fact that the OEB conducted annual testing of energy service retailers, which involved, among other things, Independent Contractors re-passing the OEB mandated test. Attached as **Exhibit "V"** is an email chain that shows Just Energy putting various regional sales offices on notice of an upcoming annual OEB testing.

112. In light of this situation, a significant amount of time was spent every day by Just Energy inquiring into customer complaints and investigating its sales agents. If the compliant was deemed valid, a warning to the sales agent was typically enough in the circumstances. In extreme cases, however, a fine could be implemented or even termination of the independent contractor relationship could result. Attached as **Exhibit "W"** is a sample Just Energy Corporate & Consumer Relations "IC Strike Count" from the different Fairview Offices based on a 12-month period ending on March 25, 2013, which tracks a range of regulatory requirements that certain Independent Contractors had breached while marketing energy services.

Customer Scripts

113. While Independent Contractors had the autonomy to choose how to market their contracts, the OEB required that salespeople marketing energy on behalf of energy retailers use an OEB-approved script, which contained certain content that could not be deviated from (see

section 4 of Part B of the OEB ER Code of Conduct attached as **Exhibit "L"**; and pages 18-19 of the OITMPG attached above as **Exhibit "M"**.

114. In addition, Just Energy also provided general sales scripts to its Independent Contractors which were nothing more than suggested guidelines for what Sales Agents should or should not say when marketing energy to customers.

115. Importantly, however, we ultimately had no control, or intended to have any control, over whether or not the Independent Contractors followed these scripts when marketing to customers. Attached as **Exhibit "X"** is an example JECP residential sales script used by Independent Contractors when marketing energy services.

Frequency of Sales

116. As noted above, Sales Agents were at liberty to engage in door-to-door sales at any time as long as it complied with local marketing ordinances for sales solicitation. While we advised Independent Contractors that the best time to market was between 11:00 AM to 9:00 PM, it was within their control to decide the times and the number of hours they wanted to sell per day.

117. Just Energy did not have any recordkeeping of hours. As we were a performance-based sales platform, our only records of the activities of the Independent Contractors were the customer contracts that were submitted for approval at the time of sale. It is plain that those Independent Contractors who made more sales presumably marketed more hours than those who made fewer sales or no sales at all.

118. It was the people that treated sales as a full-time endeavour that were most successful. Independent Contractors such as Ms. Schwantz, for example, were highly successful at door-to-door sales, because they marketed on a frequent basis. For instance, I have reviewed the records of Ms. Schwantz's sales statistics for June 2014, and determined that, at one time, Ms. Schwantz had sold contracts over a period of 27 consecutive days. This is one example of several where Ms. Schwantz sold contracts over a significant period of time. Attached as **Exhibit "Y"** is a list of Ms. Schwantz's sales between November 2013 and December 2014.

119. It was never recommended or encouraged to market for almost one month straight and there were certainly no push weeks that were 27 days long. It was Ms. Schwantz's personal choice to sell for such significant periods of time.

120. Ms. Schwantz was a highly motivated and successful Independent Contractor and freely chose to market the amount she did. I am informed by Joel Stewart, that Ms. Schwantz would set high achieving goals for herself as a crew coordinator, which included growing the numbers of her team and helping her achieve the goal she set for herself, which was to achieve $250,000 in annual commissions. I have reviewed Ms. Schwantz's T4A for 2014 and, during that year, she made CAD$200,227.03 in commissions. Attached as **Exhibit "Z"** is a copy of Ms. Schwantz's 2014 T4A.

121. Ms. Schwantz was an anomaly. Although we had successful Sales Agents, there were no Sales Agents as successful as her. Indeed, 5,498 of the class members in fact never made a sale while providing services to Just Energy. A list of these Sales Agents is attached as **Exhibit "AA"** to my affidavit. Generally speaking, if a Sales Agent was not making any sales after a few days, they chose not to continue marketing with Just Energy.

122. From 2012-2016, 2,416 class members made at least one sale while marketing services on behalf of Just Energy. The majority of the class members that made sales while marketing on behalf of Just Energy received less than $5,000 in annual commissions. Of the 7914 Independent Contractors that were engaged as Sales Agents, 28 made over $100,000 in annual commissions. A list of these Sales Agents is attached as **Exhibit "BB"** to my affidavit.

123. It was rare that an Independent Contractor chose to market as much as someone like Ms. Schwantz. Most Independent Contractors marketed 4-5 days per week, and only a few hours per day.

124. It was also acceptable and common practice for Independent Contractors to take extended time-off from selling with Just Energy. Indeed, many Sales Agents took time off, for days, weeks, months, and even years, only to return to making sales at Just Energy. In so doing, these Independent Contractors were not terminated for inactivity, nor were they turned away when they came back. Sales Agents could come and go as they pleased. Attached as **Exhibit "CC"** is an email that shows a former independent contractor returning to Just Energy after an extended absence of roughly seven years.

125. I am informed by Mr. Saffari that Mr. Nemati, Mr. Barbieri and Ms. Borg took significant time off from their sales. I have also reviewed sales' statistics from the class period which support this. For example, Mr. Nemati did not make any sales between December 30, 2013 and March 12, 2014. Mr. Barbieri made two sales between April 4, 2012 and June 10, 2012. Ms. Borg, made one sale between January 4, 2012 and September 18, 2012 and did not make any sales between December 2014 and June 5, 2015 and thereafter continued to sell on a sporadic basis until December 2 2015, and then later made a couple of sales in 2016. This

foregoing was perfectly acceptable, and these Independent Contractors were at no point terminated for ceasing selling. Attached as **Exhibit "DD"** is a list of Mr. Nemati, Mr. Barbieri and Ms. Borg's sales' statistics during the class period.

No Supervision

126. Contrary to the Affiants suggestions, crew coordinators and regional distributors did not control, supervise or oversee Sales Agents throughout their day while they were marketing in the field.

127. I have reviewed sales' data that demonstrates that the affiants were often selling more contracts than the other Sales Agents on their teams on the same days. Given this, it is unlikely that they were supervising and managing Sales Agents throughout the day. For example, Sales Agents on Ms. Schwantz's team did not market at the same frequency as her. I have reviewed the records of her teams' sales' statistics during the same period, and they did not make nearly as many sales as Ms. Schwantz. Remarkably, Ms. Schwantz accounted for approximately 34% of her entire team's production. Accordingly, and contrary to Ms. Schwantz's assertions in her affidavits, it is unlikely that she was supervising the Sales Agents on her team, if she was able to achieve these significant sales numbers. Attached as **Exhibit "EE"** is a list of Ms. Schwantz's team's sales statistics from November 2013 to February 28, 2015.

128. Similarly, Mr. Lavigne accounted for almost 50% of his team's sales between May 1, 2015 and October 31, 2015, Mr. Nemanti accounted for 33% of his team's sales between July 1, 2013 and October 31, 2014; and Mr. Barbieri accounted for 57% of his team's sales between April 1, 2012 and September 30, 2012. A copy of the Mr. Lavigne, Mr. Nemanti and

Mr. Barbieri's team's sales' statistics are attached as **Exhibit "FF"**, **Exhibit "GG"**, **Exhibit "HH"**, respectively.

129. Furthermore, I have reviewed the sales' data which indicates that during the class period, from 2012-2016, there were days when the Affiants were marketing in locations hundreds of kilometres away from where members of their sales teams were marketing on that same day. For instance, on December 16, 2013, Ms. Schwantz was marketing in North Bay, while another member from her team was marketing in Etobicoke, a distance of roughly 400 kilometres. Similarly, on January 2, 2014, Ms. Schwantz was marketing Brampton, while another member of her team was in North Bay, again a distance of roughly 400 kilometers. A copy of Ms. Schwantz's teams' sales' statistics are attached **Exhibit "II"**.

130. In the case of James Acton, on March 14, 2014 and March 22, 2014, he was marketing in South River and Mattawa, while other members of his sales team were marketing on those days in Ottawa. South River and Mattawa are roughly 400 and 300 kilometres away from Ottawa, respectively (see **Exhibit "II"** above).

131. With respect to Ronald Lavigne, he was marketing in London on June 6, 2015 and Niagara Falls on September 14, 2015, while members of his sales team were marketing in Sault Ste. Marie and Brantford on those days, respectively. London is over 600 kilometres from Sault Ste. Marie and Niagara Falls is approximately 100 kilometres from Brantford (see **Exhibit "II"** above).

132. In addition, on July 26, 2014, Mr. Nemati was marketing in Ottawa while a member of his sales team was marketing in Brampton, being a distance of over 400 kilometres away. Likewise, on August 11, 2012, Mr. Barbieri was marketing in Pickering, while a member

of his sales team was marketing in Hamilton. Pickering is roughly 100 kilometres from Hamilton (see **Exhibit "II"** above).

133. At no time did Just Energy or any of its Independent Contractors manage or supervise Sales Agents or other Independent Contractors. Where crew coordinators and/or regional distributors communicated with Sales Agents during a day in the field, this was for the purposes of offering support and assistance. For example, I am informed by Mr. Saffari that, as a regional distributor, he would regularly call the crew coordinators to see how Sales Agents were doing for the purposes of offering them support and assistance if they needed it. These were informal calls and were often made when crew coordinators where less experienced Sales Agents were out on the field.

134. For example, if Sales Agents were not achieving their sales goals, the regional distributor would provide advice to the crew coordinator to convey to the Sales Agents. This advice would relate to, among other things, methods for improving one's sales skills or recommending an alternative location for the Sales Agents to try to market their business. While the regional distributor and crew coordinator would strategize on how to improve the situation on the ground for Sales Agents, it was ultimately up to the sales team with respect to whether they wanted to follow the regional distributor's advice or not.

Push Weeks/Road Trips

135. Road trips and push weeks were organized by Just Energy in order to help Independent Contractors achieve their sales goals. Whether to do a push week or not was typically decided during my Monday conference call with regional distributors.

136. Push weeks, a common sales practice in many industries, were not a regular thing, as alleged by the Affiants, but were usually only planned when regional offices were still short of meeting their weekly sales goals.

137. Road trips were an office activity that was designed to facilitate sales and foster an environment of success. Road trips were often organized by crew coordinators, whereby the goal was to provide each Sales Agent with an opportunity to focus on and hone their craft as Sales Agents and go to territory that would be less saturated than traditional (close to home) locations. That said, it was up to each Independent Contractor to determine whether he or she would go on the road trip.

138. Independent Contractors paid for their own expenses while participating in push weeks or road trips. I am informed by Mr. Saffari that, around the end of 2013, Ms. Borg, Mr. Nemati and Mr. Barbieri were all marketing in the Viking office together and, when on road trips, paid their own expenses, including hotel and food.

139. Independent Contractors were not required to participate in push weeks and road trips. However, those who did participate chose to do so because they were committed to meeting their sales goals and were also motivated to win the various cash and promotional incentives offered by Just Energy.

140. In this regard, Just Energy was the industry leader in offering exciting, innovative and unique rewards to Independent Contractors. In addition to weekly commissions, Just Energy offered Independent Contractors a variety of incentives, rewarding Independent Contractors with significant sales with residual pay, cash bonuses and awards, including extravagant gifts and trips to exotic destinations. Attached as **Exhibit "JJ"** is a document entitled "Trip Rules" setting

out how Independent Contractors became eligible for trips, which in this case was to Puerto Vallarta, Mexico.

141. Categories of Rewards and Incentives included: the "Weekly Top 10" recognition, which were weekly notification of the top 10 sales agents; monthly rewards for top sellers; weekly bonuses, scholarships, awards for Independent Contractors that achieved 1, 3, 5 and 10 million in commissions; and awards for the regional sales offices that generated the most in sales. The rewards and incentives encouraged friendly competition and recognition, with the ultimate objective being to drive high-levels of performance and sales. For example, and attached as **Exhibit "KK"**, is an email setting out Just Energy's "Double Points Week" initiative, which provided the opportunity to regionals to earn double points if they hit their weekly office sales targets. In addition, and attached as **Exhibit "LL"**, is a spreadsheet outlining how Just Energy's "New Agent Bonus" worked for JECP deals.

142. Whether Sales Agents wanted to take advantage of these rewards and incentives was up to them. There were several Independent Contractors that were highly motivated by the rewards and incentives offered by Just Energy and pushed themselves to sell. Ms. Schwantz was such a person, and often and often qualified for and won many of them, including a trip to Ireland.

Other Business Ventures

143. The Affiants state that, as a result of the demands of marketing Just Energy products, Independent Contractors were unable to engage in any other business, while also marketing for Just Energy. This is false. Indeed, I am aware of several Independent Contractors

that pursued unrelated business ventures while marketing on behalf of Just Energy, some of whom I have already named in My First Affidavit.

144. Other Independent Contractors that pursued their own business included:

- Sam Masri - he sold LED retrofits and other products on the side;
- Brandon Reidel - he had an antique shop while providing marketing services to Just Energy;
- Matt Pancer - he had a video production company while providing marketing services to Just Energy;
- Eric Manirambona - he operated a restaurant while providing marketing services to Just Energy;
- Ben Van Dieren -he sold Solar product for another company while also providing marketing services to Just Energy;
- Richard Carvell - he worked in real estate while also marketing with Just Energy.

145. It was also not uncommon for Independent Contractors to incorporate and engage with Just Energy as corporations for, among other reasons, tax and other financial reasons. Attached is an email of an Independent Contractor inquiring with Just Energy as to the implications of engaging with Just Energy through his corporation. Attached as **Exhibit "MM"** is an email chain that provides an example of an incorporated Independent Contractor engaging with Just Energy to market energy services.

146. I am further aware of the following, among other Independent Contractors, that provided services to Just Energy through their own incorporation: Jody Kelly, Daniel Gadoua, Dan Camirand, Joel Stewart, Brian Marsellus, Glen Lancaster and Kevin Godin.

Compensation

147. The Affiants assert that they were only paid commission on contracts that were accepted and finalized with the customer by Just Energy and that they did not have control over which contracts were accepted and/or finalized by Just Energy. I believe the affiants are suggesting that Just Energy rejected contracts to which they are entitled commissions for.

148. Although Just Energy had the ability to not enroll a customer, they never did this. Every Independent Contractor had control over whether they could make a sale or not. If an Independent Contractor made a sale and enrolled the customer correctly, they received a commission for the sale.

149. We did not reject a customer just for the sake of it. Contracts were cancelled only under the following circumstances:

(a) if there was a failed or uncompleted verification call;

(b) if there was a missing or incorrect signing date;

(c) invalid billing and service address;

(d) incorrect customer/billing name;

(e) a phone number or authorized signature was missing;

(f) an Independent Contractor's name/number/signature was missing;

(g) if there was illegible hand-writing;

(h) if an acknowledgment form was not signed/submitted; and

(i) if the Independent Contractor used an expired or an incorrect type of agreement.

150. When any of the above occurred, head office would contact the customer and try to secure the correct information. If they were unable to, or if the form is missing a customer signature, the Agreement would be cancelled.

SWORN BEFORE ME at the City of ~~Toronto~~ Mississauga, in the Province of Ontario on January 10, 2019

Commissioner for Taking Affidavits
(or as may be)

Neal Hewitt

RICHARD TEIXEIRA

TAB 2

Court File No. CV-15-527493-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

HAIDAR OMARALI

Plaintiff

- and -

JUST ENERGY GROUP INC., JUST ENERGY CORP. and JUST ENERGY ONTARIO L.P.

Defendants

Proceeding under the *Class Proceedings Act*, 1992

AFFIDAVIT OF BRIAN MARSELLUS (SWORN JANUARY 11, 2019)

I, Brian Marsellus, of the Community of Courtice, in the Province of Ontario, MAKE OATH AND SAY:

1. I was previously a National Distributor with Just Energy Group Inc. ("**Just Energy**"), from 2009 to 2016, and, as such, have knowledge of the matters contained in this affidavit.

2. I make this affidavit in support of the defendants' response to the plaintiff's summary judgment motion.

3. It is my understanding that Just Energy no longer utilizes independent contractors ("**Independent Contractors**") to solicit contracts for natural gas and electricity. In this affidavit I refer to "Independent Contractors" meaning those individuals who marketed and sold on behalf

of Just Energy as door-to-door Sales Agents ("**Sales Agents**"), crew coordinators, regional distributors on behalf of Just Energy.

My Background in the Energy Retail Business

4. I have been working in commission driven sales models, like that used at Just Energy, since in and around the fall of 1983.

5. In 2001, I began working with Direct Energy, a competitive energy retailer in North America, as a regional distributor and remained in this role until I left to work as a regional distributor with Universal Energy Corporation ("**Universal Energy**") in 2005. I continued in this role with Universal Energy until it was acquired by Just Energy in 2009.

6. I was a national distributor for Just Energy out of its Fairview Office in North York, Ontario (the "**Fairview Office**") from 2009 to 2016.

The Just Energy Business Model

7. In its simplest terms, the Just Energy business model was based on "performance" driven commission payment program. The success of Just Energy as a company was tied to the success of its independent contractors, composed of regional distributors, crew coordinators assistant crew coordinators and Sales Agents.

8. To this end, Just Energy existed to provide a developmental door-to-door sales program, consisting of motivation, mentorship and resources, in order to assist its sales force of independent contractors achieve their sales and business objectives. Indeed, Just Energy regularly encouraged to its regional distributors and crew coordinators to recognize and celebrate

the achievements of Independent Contractors in order to inspire them to develop their sales careers.

9. At all times, we emphasized that independent contractors were not just doing a "job", they were building a career. In many ways, we saw our role at Just Energy as an "entrepreneurial school" for salespeople.

10. This performance based business model permeated every aspect of Just Energy, from the way it structured its offices and orientation and programs, to how it supported its sales force of independent contractors.

My role as National Distributor

11. As a national distributor at Just Energy, it was my responsibility to oversee the operations of certain sales offices in Ontario and around Canada.

12. From 2012-2016, I oversaw several regional distributors in Ontario, namely Mithra Saunders ("**Mr. Saunders**"), Daniel Orr ("**Mr. Orr**"), Gintras Slizauskas ("**Mr. Slizauskas**"), Danny Bromel ("**Mr. Bromel**") and Mara Walt ("Ms. **Walt**"). Ms. Saunders and Mr. Orr operated out of Fairview Office, while . Slizaukas operated out of the Yorkland Office in North York (the "**Fairview Office**"), and Mr. Bromel operated out of the Oshawa, respectively.

13. During this time, I was also responsible for overseeing the Fairview Calgary Office. Ms. Walt was the regional distributor there after moving from the Fairview Office in and around 2012-2013.

14. The regional distributors noted above, as well as those based out of the Calgary Office, reported directly to me daily about the day-to-day operations of their respective sales

offices. As the Just Energy business model was, in essence, a development program for salespeople, I wanted to see how the programs at these individual sales offices were performing with respect to, among other things, sales numbers, recruitment and compliance to regulatory requirements. Based on how things were going, I would provide whatever advice and guidance I could to assist them achieve their business objectives.

The Fairview Office

15. In comparison to other Just Energy sales offices, the Fairview Office was an outlier of my own making. Whereas most Just Energy sales offices consisted of a single office operated by a regional distributor who oversaw several crew coordinators and their teams of Sales Agents, I structured the Fairview Office around a number of sub-offices run by regional distributors.

16. Over the course of 2012-2016, two regional distributors – Ms. Saunders and Mr. Orr operated out of the Fairview Office. While Ms. Saunders and Mr. Orr primarily conducted residential energy sales, Mr. Slizauskas focused exclusively on commercial energy sales out of the Yorkland Office. There was also a "Fairview North Office" run by a regional distributor, Maria Panagakos, who engaged solely in commercial sales.

17. The different sub-offices at the Fairview Office operated as separate and autonomous entities within the Just Energy performance model. The sub-offices were responsible for, among other things, conducting their own recruitment and skills' development initiatives, daily meetings, as well as continuous motivational and performance-based learning programs (described more fully below). This structure resulted in each office or sub-office having its own style or approach to developing its sales force of independent contractors.

18. The hierarchical structure of the Fairview Office was the embodiment of the Just Energy performance based business model – that is, motivated and capable individuals could be promoted and eventually operate their own sub-office and build their own teams of Sales Agents. This hierarchical structure encouraged crew coordinators and Sales Agents to work hard, as well as created healthy competition between the regional distributors. This office environment served to drive sales as well as support and inspire salespeople to achieve their business objectives.

19. Importantly, as we were not offering increased salary as a carrot to successful salespeople, "promotion" became the key incentive for people to build their sales business under the Just Energy business model. At the Fairview Office, as in other Just Energy sales offices, successful salespeople could move their way up to regional distributor status through promotion and run their own performance driven universe.

20. Ms. Saunders, Mr. Orr, Mr. Slizauskas, Mr. Bromel and Ms. Walt are all examples of the success of this developmental program, in that, I used it successfully to develop and, ultimately, promote them from Sales Agents to regional distributors running their own offices and sub-offices.

Recruitment, the Interview Process and Orientation

Recruitment

21. The status of Sales Agents as independent contractors was instilled in Sales Agents from the outset of their relationship with Just Energy. Beginning with recruitment, Just Energy would use a variety of different methods to attract potential recruits, including word-of-mouth, visiting college and university campuses to hand-out flyers, and online adds, which were taken out on various websites, including Kijiji and Craigslist.

22. With respect to advertisements, these were strictly controlled and had to be approved by Just Energy's centralized recruiting guidelines.

23. Individual sales offices, including the sub-offices within the Fairview Office, were also encouraged to undertake their own recruiting initiatives that involved the same advertising platforms run by centralized recruiting at Just Energy.

24. Just Energy recruited from a diverse range of backgrounds, as well as different kinds of independent contractors. For instance, it was not uncommon for Sales Agents to choose to incorporate and engage with Just Energy as corporations to run their own sales businesses. In such cases, Just Energy would make payments (including HST) to the independent contractor's corporation.

The Interview Process

25. As with recruiting, the independent contractor relationship was communicated to recruits throughout the interview process. The Fairview Office had a designated recruiter for conducting interviews, Indra Persaud; however, if times were busy, or a recruiter was ill, Ms. Saunders, Mr. Orr or I would assist in conducting interviews of recruits.

26. Interviews were scripted and tightly controlled by Just Energy's centralized recruiting to ensure that recruiters appropriately dealt with the nature and implications of the independent contractor position, so that recruits were not confused or misled into thinking that they would have employee status. The interview scripts had been developed and refined over many years by Just Energy to ensure that all aspects of the independent contractor position were communicated to the recruit.

27. In this regard, we were sure to discuss the 100 per cent commission based nature of the position and the absence of employment benefits during the interview. We also spoke about the general autonomy provided by the position with respect to, among other things, marketing schedule flexibility and the freedom of Sales Agents to market in areas of their own choosing.

28. We also made sure to emphasize during the interview that, in becoming a sales agent, recruits were essentially establishing their own door-to-door sales business, in which Just Energy was limited to a support role aimed at providing them with the structure and resources necessary for achieving success.

Orientation

29. Orientation at the Fairview Office, like other Just Energy sales offices, typically followed a two to three day schedule in which recruits went through classroom sessions, followed by a day of classroom and field shadowing. However, the exact schedule of orientation sessions was left to the individual sales offices themselves. Attached as **"Exhibit "A"** is an email chain between the Fairview Office and me, among others, which highlights that the Fairview Office had discretion with respect to its recruitment and orientation schedule.

30. Orientation at sales offices was highly regulated by the Ontario Energy Board ("**OEB**"). For instance, in its Electricity Retailer Code of Conduct (the "**OEB ER CC**"), the OEB set out mandated content that energy retailers, such as Just Energy, had to cover during its orientation sessions with new salespeople. This content included legal and regulatory requirements applicable to, among other things, door-to-door sales of low volume energy consumers.

31. To this end, Just Energy provided the Ontario Industry Training Module Participant Guide (the "**OITMPG**")" to its salespeople during orientation sessions, which set out this OEB mandated information out over eight modules and included, among other things, the various rules, regulations and other applicable legislation to market energy to customer in Ontario (the "**Eight OEB Modules**").

32. The first day would usually run from 11:00 AM to around 3:30/4:00 PM; the second day would begin with a classroom session from 9:00 AM to roughly 10:30/11:00 AM, followed by field shadowing for the rest of the day.

33. On the first day, we would begin class by taking the new recruits through their independent contractor agreements ("**ICA**"). The ICA formed the basis of the contractual relationship between the independent contractor and Just Energy. The ICA clearly outlined that recruits were being engaged by Just Energy as independent contractors, not employees, by expressly providing that, among other things, the position was 100 per cent commission based and that independent contractors did not qualify for minimum wage workers compensation or other such employment benefits.

34. As we reviewed the ICA with them, recruits would openly ask questions about their independent contractor status, and were given the opportunity to review the ICA privately in the office or at home before deciding whether to agree to its terms. Recruits would be provided a copy of their executed ICA for their own records, if they so requested.

35. Importantly, recruits could not begin to market on behalf of Just Energy or even complete orientation without first executing an ICA.

36. After executing their ICA, new recruits would complete Just Energy's five module orientation program as well as write an OEB mandated test, which provided essential information about legal and regulatory matters that all Sales Agents had to be aware of when conducting door-to-door sales.

37. The nature of the independent contractor relationship was conveyed throughout the various modules. Module One, for instance, set out the role of the sales agent as an independent contractor by highlighting, among other things, the 100 per cent commission model and marketing schedule flexibility.

38. Module Three covered the three-level commission structure at Just Energy, namely, "initial commission", "reconciliation commission" and "residual commission", as well as the various incentives, including cash prizes, bonuses, scholarships, awards and trips, available to successful independent contractors.

39. Module Four included a presentation entitled "A Day in the Life of an Independent Contractor", which set out the recommended daily activities of the sales agent, including attending the morning meetings, dressing professionally and proven tactics for developing a successful business plan.

40. The second day would begin with a short two-hour classroom orientation session, followed by all-day field shadowing. In general terms, field shadowing involved a new recruit shadowing an experienced sales agent doing door-to-door solicitation for a of couple hours. Afterwards, the new recruit would do their own door-to-door sales while being followed by an experienced sales agent who would provide constructive criticism. Depending on their level of

confidence, it was not uncommon for new recruits to start marketing by themselves on their first day.

41. Behind the scenes, those teaching the classes for new Sales Agents were provided with the "Independent Contractor Orientation Guidebook", which contained guidelines and directions on how to conduct orientation seminars. This guidebook, among other things, reinforced the Just Energy philosophy of motivation, support and empowerment, as well as the need for those teaching the classes to identify and accurately characterize the nature of the Independent Contractor role and the implications associated with that, such as the 100 per cent commission based compensation package.

42. The classroom sessions for the entire Fairview Office (including the sub-offices) were conducted by Indra Persaud ("**Ms. Persaud**"); however, Mr. Saunders and Mr. Orr would sometimes help out if Ms. Persaud was ill or times were particularly busy in terms of recruitment.

43. While the orientation at Just Energy generally lasted only two days, field shadowing, motivational support and mentorship for independent contractors was an on-going process. As noted above, the success of Just Energy as a company was inherently tied to the strength and success of its door-to-door sales force and, for this reason, regional distributors and crew coordinators would dedicate a significant amount of time every day to these endeavours.

Day to Day Operations

44. Just Energy's support and mentorship based business model was reflected in the day-to-day operations of its door-to-door sales force.

Daily Morning Meetings

45. The Fairview Office, like other Just Energy sales offices, began each day with non-mandatory morning meetings, where regional distributors, crew coordinators, assistant crew coordinators and Sales Agents would provide product, regulatory and market updates, as well as engage in a variety of activities, including role-playing, motivational talks and discussions about sales strategy.

46. While marketing locations were discussed at the daily morning meetings, we did not "set" particular locations where sales teams were forced to market their business. Rather, the marketing locations discussed at the meetings were used only as recommendations as to where sales teams should market. This information was based on the market intelligence (discussed more fully below) gathered by sales teams in the field who were regularly and voluntarily relaying this information back to our offices. In this regard, sales teams looked to regional distributors and crew coordinators to provide them with the best market intelligence available to drive sales. We never required sales teams to market in any particular location, but we would provide suggestions as to where they should do so.

47. The daily morning meetings provided an excellent opportunity to deal with specific concerns or performance issues of salespeople individually or in a group setting. Our objective here was to provide as much support to increase performance as possible. Regional distributors, crew coordinators, assistant crew coordinators, veteran Sales Agents and I would regularly give up our time to assist those who requested assistance with the operation of their sales business.

48. In addition, I have always been a big believer in content-driven motivational materials that encourage people to be their best. As such, it was not uncommon at the Fairview Office's morning meetings for salespeople to be discussing books, such as *The Seven Habits of Highly Successful People* by Stephen Covey, or learning and reciting inspirational quotes by people like Deepak Chopra or Zig Ziglar.

49. As these daily morning meetings were only "recommended", attendance numbers fluctuated daily, some Sales Agents would skip these meetings and go straight into the field to start their door-to-door sales. However, such Sales Agents were certainly not the norm, as these daily meetings were proven to enhance sales marketing success, as well as create social cohesion between independent contractors.

50. People like to compete, be recognized and socialize and, for such reasons, regional distributors and crew coordinators would go to great lengths to make these daily meetings attractive, fun and magnetic. To this end, we would regularly have contests and/or play games, such as "top producer for the day", "spin-the-wheel", poker and monopoly, whereby Sales Agents could win, among other things, cash prizes, TVs and iPads..

51. The importance of bonuses, cash prizes, scholarships and trips as motivational tools, were important not only for Sales Agents, but for regional distributors and crew coordinators as well. For instance, our "Crew Coordinator Double Override Program" (the "**CCDP**") gave the top three crew coordinators in a given region in Canada the chance to receive double their current override.[1]

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[1] An override is a kickback that a crew coordinator would receive on each sale.

52. Also attached as **Exhibit "B"** is Just Energy's 2013 Scholarship Energy Program Overview, which is an example of the various scholarship opportunities we provided to student who marketed on behalf of Just Energy.

53. The contests and games that took place at the Fairview Office were not a Just Energy mandated program, but were employed and developed by myself and the sub-offices.. Although Just Energy set out standard corporate content and provided its recommendations for the conduct of these daily meetings, these meetings were nevertheless unique to the individuals offices and sub-offices that were running them.

Flexible Marketing Schedule

54. One of the greatest attractors of new independent contractors to Just Energy was the flexibility that the sales agent position offered with respect to one's marketing schedule.

55. Contrary to the allegations of the plaintiff's affiants, namely Daniel Barbieri, Jamie Action, Bahram Nemath, Katlyn Schwartz, Ronald Lavigne and Jennifer Borg, at paragraphs 16, 15, 15, 16, 15 and 15, of their affidavits,[2] respectively, there was no daily structure with respect to a salespersons marketing schedule that was enforced by a regional distributor, particularly at the Fairview Office and the other sales offices under my stewardship. Crew coordinators and Sales Agents were masters of their own schedules and were not subject to Just Energy imposed restrictions in this regard. Attached as **Exhibit "C"** is an email chain between Ms. Saunders of the Fairview Office and a prospective Sales Agent discussing certain

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[2] Daniel Barbieri's affidavit was sworn on September 2, 2018 (the "**Barbieri Affidavit**"); Jamie Acton's affidavit was sworn August 29, 2018 (the "**Acton Affidavit**"); Bahram Nemath's affidavit was sworn August 30, 2018 (the "**Nemath Affidavit**"); Katlyn Schwantz's affidavit was sworn on August 29, 2018 (the "**Schwantz Affidavit**"); Ronald Lavigne's affidavit was sworn September 2, 2018 (the "**Lavigne Affidavit**"); and Jennifer Borg's affidavit was sworn on August 29, 2018 (the "**Borg Affidavit**").

freedoms enjoyed by the Sales Agents position, including the ability to dictate one's own marketing schedule.

56. While Just Energy sales offices were typically in operation six days a week, some Sales Agents chose to market Mondays, Wednesdays and Fridays; others chose to market one, two or even seven days a week. Ultimately, the number of days a sales agent marketed was determined by his or her own personal drive to make money and grow his or her business.

57. Of course there were practical considerations that would impact when a crew coordinator or Sales Agent would market. For instance, in the case of residential sales, marketing times were largely determined by when customers were most likely to be home;[3] whereas in the case of commercial sales, marking times were determined by when businesses were open for business.[4]

58. In addition, and perhaps the most important determinant of an independent contractors marketing schedule was "transportation". As discussed more fully below, we would arrange for vans and car pools to be available after the daily morning meetings at the Fairview Office, typically around 11:00 AM, to transport sales teams into the field. However, depending on the number of Sales Agents on a particular day, I would have multiple vehicle departure times to cater to the individual schedules of Sales Agents.[5]

59. Similarly, the majority of Sales Agents preferred to market in groups, so they would look to us at the sales offices to assist in organizing groups of salespeople. This required setting particular meeting times at the office, or at another location, where the sales group could

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[3] Residential sales hours typically ran Mondays to Saturdays from 1:00 PM to 9:00 PM.

[4] Commercial sales hours operated during business hours, being Monday to Friday, 9:00 AM to 5:00 PM.

[5] The majority of sales team did not have driver's licences or access to their own vehicles.

congregate before heading out into the field. We did this to ensure health and safety issues were taken care, as well as effective sales development.

Freedom to Market where One Chooses

60. Contrary to the allegations set out in paragraphs 15, 16, and 19 of the Barbieri Affidavit,[6] Just Energy itself, as noted above, placed no restrictions on where crew coordinators and Sales Agents could market their businesses. We did not set market locations, "designated areas" or particular sales routes, in which they were required to market. Crew coordinators and Sales Agents possessed the autonomy to market wherever they so wished.

61. As noted above, we would discuss market locations at the daily morning meetings, but these locations were only recommendations and were based on reliable market intelligence gathered by sales teams marketing in the field. Regional distributors, crew coordinators and Sales Agents would discuss this market intelligence and decide together where they should go and market on a particular day. If a particular crew coordinator or Sales Agent wished to market in a different location, they were free to do so. Indeed, it was not uncommon for Independent Contractors to go into the field on their own to market on a schedule and location of their own choosing.

62. That being said, as in the case of an independent contractor's market schedule, there where legal and practical considerations that impacted where a sales agent or sales team would ultimately decide to market, such as municipal regulations..

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[6] The Acton Affidavit, the Nemath Affidavit, the Schwantz Affidavit, the Lavigne Affidavit and the Borg Affidavit all contain the same allegations.

63. In the case of municipal regulations, a number of municipalities, such as Woodstock, Thunder Bay and Ingersoll, required, at least at certain times, that Just Energy or Independent Contractors carry licences or permits to market on their territory. This requirement dissuaded many Sales Agents and sales teams from operating in such jurisdictions.

64.

65. In addition, Sales Agents attended the daily morning meetings in order to meet in order to travel together in to the field.

66.

No Reporting Structure

67. Independent Contractors were not require to report on their marketing location on any given day.

68. While the Fairview Office did have a "sign-in sheet", this was not used for taking attendance or pay purposes, but simply to know which Sales Agents were marketing on a particular day, so that we did not lose track of anyone for, among other things, transportation reasons. On some days, for instance, there could be as many as fifty Sales Agents at the Fairview Office requiring transportation into the field. In these circumstances, sign-in sheets allowed us to more effectively deal with such situations in order to make sure that no sales agent was overlooked or left behind.

Communications with Sales Agents in the Field

69. Regional distributors and particularly crew coordinators communicated with Sales Agents while out in the field by phone and email. These communications were not used to

control, manage or supervise Sales Agents, but to provide motivation, mentorship and support in order to boost morale and drive sales.

70. To this end, regional distributors and crew coordinators would provide on-the-fly field shadowing in the form of role-playing, motivational talks and sales strategies. These communications involved not only new Sales Agents, but veteran Sales Agents as well. In light of their experience, veteran Sales Agents knew better than anybody that there was always room for improvement in their sales pitch and performance.

71. Door-to-door sales is a very physically and emotionally demanding job, in which a very small percentage of new Sales Agents would ever make a sale. For such reasons, these communications played a vital role in the success of Sales Agents, whereby the crew coordinator became the person Sales Agents would approach to help improve their business or they were simply having a challenging day.

72. While Sales Agents ultimately had to go into the field and generate their own business, crew coordinators, who were typically in the field as well, were there to help train and organize their teams, so that Sales Agents obtained the structure, support and resources they needed to succeed.

73. In addition to motivation, mentorship and support, these communications provided many important practical benefits for driving sales. As noted above, using market intelligence gathered primarily through Sales Agents in the field, we would coordinate and assist groups of crew coordinators and Sales Agents by trying to place them in locations where there would be a higher probability of successful sales.

74. Considerations in this regard included the prior success rates of sales in a given area, the prevalence of "do not solicit" signs, restrictive municipal regulations, the availability of installation technicians and, in most cases, simply trying to avoid over-marketing in an area to prevent annoying customers.

75. The Fairview Office was particularly adept at utilizing this market intelligence through the use of a map of the different areas of the Greater Toronto Area in the office. We would use this map at the daily morning meetings and throughout the day to more effectively coordinate and assist Sales Agents in the field.

76. To be clear, in using this market intelligence, we would not tell Sales Agents to go to a particular location in a "mandatory" sense, but only make "recommendations" as to where they should try to market their business. Whether a sales agent listened to such recommendations or advice was entirely of his or her own choosing.

SWORN BEFORE ME at the City of Toronto, in the Province of Ontario on January 11, 2019

Commissioner for Taking Affidavits
(or as may be)

Harry Skinner

BRIAN MARSELLUS

TAB 3

Court File No. CV-15-527493-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

HAIDAR OMARALI

Plaintiff

- and -

JUST ENERGY GROUP INC., JUST ENERGY CORP. and JUST ENERGY ONTARIO L.P.

Defendants

Proceeding under the *Class Proceedings Act*, 1992

AFFIDAVIT OF DANIEL GADOUA (SWORN JANUARY 11, 2019)

I, Daniel Gadoua, of the City of Kitchener, in Ontario, MAKE OATH AND SAY:

1. I was an Independent Contractor at Just Energy beginning around 2004 to 2010; an employee at Just Energy between around 2010 to 2015; my employment with Just Energy ended around February 2015 and I became an Independent Contractor with Just Energy again from around February 2015 to 2018. As such, I have knowledge of the matters contained in this affidavit.

2. I make this affidavit in support of the defendants' response to the plaintiff's summary judgment motion.

3. I have reviewed the affidavits of Katlyn Schwantz, Jennifer Borg and Jamie Acton, sworn August 29, 2018, the affidavits of Roland Lavigne and Bahram Nemati sworn

August 30, 2018, and the affidavit of Daniel Barbieri sworn September 2, 2018. Having done so, I can confirm that I disagree with many of the assertions made by these affiants (the "**Affiants**").

4. In this affidavit I refer to "Independent Contractors" meaning those individuals who worked as door-to-door sales agents ("**Sales Agents**"), crew coordinators, regional distributors and those individuals who engaged in customer renewal sales ("**Renewals**") and commercial sales ("**Independent Contractors**").

5. Just Energy no longer utilizes Independent Contractors to market contracts for natural gas and electricity to residential customers doing door-to-door sales in Ontario.

Background

6. I began my sales' career at Just Energy. I began providing services to Just Energy as an Independent Contractor around May 2004 in Just Energy's Kitchener's office, and became an assistant crew coordinator in that office in September of that year. I marketed out of the Kitchener office until around March 2010.

7. In 2010, I became an employee of Just Energy. My title was Recontracting Manager. I worked primarily for Just Energy's Cambridge office, which focused exclusively on customer renewal sales. I assisted primarily with renewal sales in Just Energy's Cambridge and Alberta regional offices, and also helped out with door-to-door sales at Just Energy's Hespeler office, which primarily had door-to-door Sales Agents, and which shared an office location with the Cambridge regional office. I also assisted with offices in Ontario, Alberta, New York and Quebec.

8. I went back to providing services to Just Energy as an Independent Contractor around July 2015. Between July 2015 and 2018, I was at various times regional and senior regional distributor at the Cambridge office, a senior regional distributor for Just Energy's Edmonton South renewal office and was also a senior regional distributor for Just Energy's Manitoba and British Columbia regional offices and the Kitchener office. Around August 2015, I became a senior regional distributor for Just Energy's Kitchener office until around the end of 2016.

9. Around 2017 I engaged exclusively in renewal and commercial sales with Just Energy.

10. From 2015 to 2018, I was receiving my payments from Just Energy through my company, 2476299 Ontario Inc. In February 2018, my company signed a Master Services Agreement and Statements of Work to operate as a vendor for Just Energy.

Just Energy's Team Model for Sales Agents

11. The team model at Just Energy was created for the purposes of providing Sales Agents with information regarding Just Energy's products. Most of the Independent Contractors had never engaged in energy sales prior to joining Just Energy and this model had proven to be successful for providing orientation to Independent Contractors on the essential information they needed to market Just Energy's products both successfully and in compliance with regulatory standards.

12. Once initial orientation was completed, Independent Contractors could elect to continue operating in a quasi-team like environment at the regional sales offices. Many chose to do so because of the many benefits it had. Among other things, the team model offered ongoing

support to Independent Contractors by providing them with continuous education that was required to help them advance in the industry and remain compliant with the Ontario Energy Board's extensive regulation. Regional distributors and crew coordinators encouraged Independent Contractors through the use of promotion in the regional office, moving from Sales Agent status all the way up to regional distributor status..

13. By having access to seasoned salespeople, Independent Contractors had support to build their own skills as salespeople in the energy retail industry.

14. Although the team model described above was typical to Just Energy's sale force, there was no requirement that Independent Contractors and regional offices operate this way. Independent Contractors had the independence to create their own sales practices, with their own variations to the typical structure.

15. For example, Independent Contractors who engaged in renewal and commercial sales did not generally work in a team or quasi-team environment, as they did not require the same type and level of support and mentorship that Sales Agents required in the door-to-door sales context. Given that these Independent Contractors were marketing to customers that already had Just Energy products, the marketing process was much different and Independent Contractors faced far less rejection. As a result, Independent Contractors engaged in renewal and commercial sales did not seek out the ongoing interaction and motivation that door-to-door Sales Agents often looked for in the team dynamic.

16. Renewal and Commercial Independent Contractors were also much more autonomous than Sales Agents, as they tended to be much more experienced salespeople who did not require assistance with skills' development or marketing strategy.

Recruitment of Independent Contracts

17. It was made evident to recruits from the outset that a position with Just Energy was an Independent Contractor position.

18. Whereas Sales Agents were generally retained through advertisements, Renewals and Commercial Independent Contractors were often retained by word of mouth, or they were Independent Contractors already working for Just Energy, either Independent Contractors that wanted a change from door-to-door residential sales or they were active seasoned Sales Agents that wanted to expand their practice into renewal and/or commercial sales. For example, there were Sales Agents badged in regional sales offices that also engaged in renewal and/or commercial sales from time to time.

19. Those Independent Contractors that came in specifically for renewal or commercial sales never engaged in door-to-door sales with Just Energy.. For example, Andrew Martin and Ryan McKinnon were directly engaged to conduct renewal sales.

Orientation

20. If an individual elected to work toward becoming a badged Independent Contractor, he or she completed Just Energy's orientation program. Our orientation was designed to foster success and to ensure that each badged Independent Contractor operated within the province's regulatory framework as mandated by the Ontario Energy Board.

21. While Just Energy's Independent Contractors had to abide by the provincial regulatory requirements, each Independent Contractor was at liberty to use his or her own methods and he or she was not required to follow Just Energy's suggestions or advice.

22. Just Energy's orientation program for Sales Agents was a five module course that explained the Independent Contractor relationship at Just Energy, the legal and regulatory framework relevant to the position, Just Energy's product and service offerings, and the tools and techniques by which an Independent Contractor could be successful at sales. Just Energy's modules were geared towards the residential sales' context, as Independent Contractors engaging in door-to-door sales were individuals that generally had less sales' experience and required more guidance and support as they began their sales' career.

23. The modules were typically instructed by the regional distributors to groups of individuals who aspired to become badged Independent Contractors.

24. Just Energy did not have modules geared towards Independent Contractors principally undertaking renewal or commercial sales. Training for those Independent Contractors was generally done on an ad hoc basis, depending on how many of these Independent Contractors were starting with the Company at any particular time.

25. Just Energy's orientation also included an Ontario Energy Board mandated modules and an Ontario Energy Board mandated exam. This was dictated by the province beginning around 2007. This part of the orientation examined Independent Contractors on the legal and regulatory matters that all Independent Contractors had to be aware of when conducting door-to-door solicitation.

26. The Ontario Energy Board mandated exam was proctored by a Just Energy employee who did not have a financial interest in the success of the Independent Contractor candidates.

27. I often went to the Kitchener office to conduct the OEB mandated part of orientation. I was responsible for explaining the rules and regulations to individuals. The OEB training was generally around five (5) hours in length.

28. The second day of orientation generally began with a short two-hour classroom session, followed by all-day field shadowing for Independent Contractors that did not have previous experience with door-to-door sales. For example, if there were individuals who were seasoned sales professionals, they did not generally participate in field shadowing. Those who did participate in field shadowing, chose how long they wanted to do it for. The length of field training generally depended on the Independent Contractor's level of confidence. Some Independent Contractors did not engage in field shadowing for more than a few doors if they had previous equivalent experience. Others may have decided to engage in field shadowing for a couple of weeks.

29. While Just Energy's orientation lasted only two days, field shadowing, motivational support and mentorship for independent contractors was an on-going process. Field shadowing and role playing were skills' training activities that were always available to Independent Contractors, and was not exclusive to the onboarding process. Field shadowing was primarily utilized by Sales Agents, as succeeding in door-to-door sales required trial and error and significant practice.

30. If a Sales Agent was not achieving their sales' goals, they often requested that their regional distributor or crew coordinator shadowed them in the field, to help them identify which skills they could improve on in the customer interaction. The Independent Contractors would in turn practice with the regional or crew coordinator on how to improve their skills, for

example, how to better communicate pricing to a customer. Field shadowing and role playing were tools to assist Independent Contractors improve the effectiveness of their sales approach. Contrary to the affiants suggestions, this was never imposed on Independent Contractors.

31. The above activities were meant to enhance Sales Agents' abilities to successfully market Just Energy's products, while complying with regulatory standards. Our most successful Sales Agents were those individuals that took advantage of these tools.

Practice of an Independent Contractor

32. Contrary to the affiants assertions, there was no daily structure enforced by regional distributors or any individuals at Just Energy. There were meetings and hours of work that were recommended, however none of this was mandatory. If any Independent Contractors had the same routine every day, this was because the Independent Contractors chose to establish and maintain a routine. Sales Agents were at liberty to engage in door-to-door sales at any time and at any location, so long as their sales efforts complied with the regulatory framework.

33. While opportunities such as support meetings, road trips, mentoring and role playing were made available to the Independent Contractors, it was within the prerogative of each Independent Contractor to select those opportunities, if any, which they believed would positively impact their commissions earned.

Meetings

34. Most of the regional offices that engaged in door-to-door new business sales had a daily morning meeting. The morning meeting generally took place at around 10:00 a.m. or 11:00 a.m. These meetings were optional, but recommended for all Independent Contractors. The objective of the morning meeting was for Independent Contractors that were going out to the

field that day, to group-up and discuss, among other things, sales strategy and goals, skills development and any changes in pricing or products. Most Independent Contractors attended the morning meeting on the weeks that commission cheques were ready to be picked up and/or for the purposes of meeting other Independent Contractors to carpool with. Monday morning attendance was generally the highest, given that this was when commission cheques were available for pick up.

35. The primary purpose of the weekly meetings was to provide Independent Contractors with the opportunity to pick up their commission cheques, to provide them with product or pricing information as well as to obtain the sales contracts and paperwork (without which they could not market). The attendance rate at regional office meetings were higher in the door-to-door sales' context, given this was generally the meeting place for Sales Agents to travel to the field together. Whereas in the renewal and commercial sales' context, there was no equivalent incentive for Independent Contractors to regularly attending meetings, given that Independent Contractors engaged in renewal and commercial sales did not travel together to the field. I would generally hold a meeting on Mondays for commercial and renewal salespeople, but there were no daily meetings as there was with residential sales.

36. Independent Contractors engaging in renewal or commercial sales generally operated remotely in various locations at a time and did not require the consistent assistance and support from their regional offices. As a result, there were only weekly office meetings. Independent Contractors had the choice to attend these meetings, whether by telephone or in person. I generally ran the weekly meetings for Independent Contractors in the Cambridge office and did not keep track of who called in or attended in person. Independent Contractors were not required to attend and there was no tracking or recordkeeping of who attended the calls. We also

emphasized to Independent Contractors that they could set their own schedules and had the agency to decide when they wished to market and/or when and whether they wanted to participate in office activities.

37. As a regional distributor in the Cambridge office, I did not regularly communicate with Independent Contractors. These Independent Contractors did not require the same level of assistance and support throughout the day/week in comparison to door-to-door Sales Agents. There were daily conference calls, however these were not mandatory. The daily conference calls was a forum offered to Independent Contractors to use, in order to hold themselves accountable to their sales' goals. Those who regularly called in were ambitious Independent Contractors that set goals for themselves and kept motivated to achieve these goals by discussing them with others. They were also generally the Independent Contractors who were continuously looking to improve their marketing approaches and wanted the opportunity to talk to other salespeople who often provided helpful advice and sales' tips.

Marketing Location - Door-to-Door New Business

38. Contrary to the affiants' assertions, the regional distributor did not set the marketing location for the day. There was no "route" assigned to them. The Independent Contractors were free to market where they wanted and decided for themselves where to market on a given day. Before the morning meeting, the Crew Coordinator would speak to the Sales Agents and ask them for their marketing location preferences and availability for the following day. The Crew Coordinator would often have their own preference regarding where they themselves wanted to market that day, and would convey to the Sales Agent where they intended on going. The Sales Agents generally decided whether they wanted to travel with the Crew Coordinator to this marketing location, or whether they preferred to go market somewhere else.

39. The location(s) decided upon were then conveyed by the Crew Coordinator to the Regional Distributor at the morning meeting. The purpose of discussing the marketing location(s) with the regional distributor was to confirm whether the proposed marketing location(s) were appropriate to market in. The regional distributors were aware of whether there were any compliance issues, customer complaints and/or permit requirements in many of the areas Sales Agents generally marketed in.

40. It was also best practice for Independent Contractors operating in the team environment to pre-determine their respective marketing location(s) in order to avoid any teams from overlapping in a particular area. Generally crew coordinators from the various teams in a regional office would confirm with each other where they were marketing on a given day. We did not want to hurt one another's business.

Marketing Location - Renewal and Commercial Sales

41. In the Cambridge office, Independent Contractors would often tell me where they wanted to market or what their sales' goals were that week or month, and I would provide them with customer leads to meet their preferences. Customer leads were existing Just Energy customers, whose contracts were available for renewal.

42. These customer leads were in various locations and the amount of customer leads and corresponding locations assigned was at the discretion of the Independent Contractors. I tailored the customer leads to their availability and goals as best I could in the circumstances.

43. There were some Independent Contractors that would request to go on a road trip and market in a particular city. In these cases, Independent Contractors would ask me if there were any customer leads in a particular city and, if there were, would I provide them with

customer leads in that specific city. Sometimes, Independent Contractors would choose to travel together on these road trips to save the cost of accommodations and would decide among themselves how to split up the customer leads within that city.

44. No two Independent Contractors could have the same customer lead. Therefore, with the exception of Independent Contractors that were field shadowing, no Independent Contractors engaged in renewal and commercial sales would market together.

Just Energy Clothing, Badges and Business Cards

45. The affiants state that regional distributor would ensure that the Sales Agents were all wearing their Just Energy uniform and badge prior to leaving the regional office. This is inaccurate.

46. Uniforms were not mandatory for Sales Agents to wear while out in the field. Sales Agents were only required to wear a name badge and carry business cards because this was mandated by the province's regulatory scheme, which stipulated that door-to-door Sales agents identify themselves, so that there was no misrepresentation regarding which entity the contractor was representing and the purpose of their visit.

47. Independent Contractors were not required to wear anything else. Regional distributors and crew coordinators did however encourage Sales Agents to dress in a professional manner, which included encouraging Sales Agents to wear plain and comfortable shoes and clean clothing and discouraging Sales Agents from wearing clothing that contained other company logos or messaging, as it did not give Sales Agents a sense of professionalism. I often emphasized to Sales Agents that by dressing in a professional manner, this added credibility to their pitches, which increased customers' willingness to accept offers.

48. Regional distributors and crew coordinators also encouraged Sales Agents to take advantage of Just Energy branded clothing, which was available for purchase through each regional office at the cost Just Energy purchased the clothing from its vendors. Wearing Just Energy clothing had been proven to enhance the marketing success of Just Energy Contractors. While Just Energy offered Independent Contractors the opportunity to purchase Just Energy branded clothing, they were not required to purchase or wear them.[1]

Travelling to the Field

49. Sales Agents had the independence to travel to the field when and how they wanted to. Several Sales Agents would drive to the field on their own, however the majority of Sales Agents preferred to meet at the regional office and travel together, whether in the vans that were generally offered by the crew coordinators at the regional offices, or in their own cars. Many Sales Agents attended the morning meeting for the purposes of getting a ride with others to the field.

Sales Agents generally preferred travelling to the field as a team because they wanted to be around each other for support and motivation and it was efficient to just travel together. Door-to-door sales could be very difficult to do on your own. If you were out on the field alone, this frequently was lonely and discouraging. You were often rejected.

50. Most Sales Agents were inexperienced and new to door-to-door sales, therefore these individuals often opted for any opportunity to work alongside other Sales Agents.

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[1] Most Independent Contractors at the Cambridge Office had purchased some Just Energy clothing at some point, and Just Energy gave out some free clothing as well.

51. There was a boost to morale that flowed from working in groups and generally, Sales Agents did better in their individual sales if they were in the team dynamic. Sales Agents often wanted to be around others that were successful in their sales and who knew the areas that the team was marketing in. Others chose to travel in the van or with others in their vehicles because they did not have transportation of their own. This was a common occurrence. A lot of people did not have the means to get out to the field where others were going, therefore many of them appreciated the carpooling options that were available at the regional offices. Most Sales Agents did not own vehicles.

52. Some Independent Contractors also primarily marketed around their homes and not in a neighbourhood associated with a regional office. In 2015 for example, Jennifer Borg marketed in her neighbourhood in Ottawa, while badged in Kitchener, and did not report to any office.

53. Independent Contractors engaged in commercial and renewal sales did not travel with one another to their respective marketing locations. This was simply not practical. Independent Contractors engaging in commercial and renewal sales traveled to various locations throughout the day, visiting one business establishment or residential customer, to make a single sale, in each location. It was unnecessary to have more than one Independent Contractor present to make an individual sale.

54. Further, Independent Contractors engaged in renewal and commercial sales generally owned their own vehicles.

No Oversight

55. Just Energy did not have any recordkeeping of hours. Because we were a performance-based sales platform, our only records of the activities of the Independent Contractors were the customer contracts that were submitted for approval.

56. There were many Sales Agents that chose not to market, for days, weeks, months, and returned to making sales after that period of inactivity. Independent Contractors were not terminated for inactivity and were not turned away when they returned. Sales Agents could come and go as they pleased. It was common and acceptable for Independent Contractors to take time off from selling with Just Energy. For example, Roland Lavigne worked off and on at the Hespeler and the Kitchener offices and would often leave to go work for other companies as an Independent Contractor and would return to sell for Just Energy.

57. It often happened that Independent Contractors left Just Energy to work with the Company's competition, and then return. A new Independent Contractor Agreement was executed upon each return to the Company. By way of example, Jennifer Borg was engaged with Just Energy or a relate entity on two separate occasions. I am informed by Anastasia Reklitis of Fasken Martineau DuMoulin LLP that on each occasion, Ms. Borg executed an Independent Contractor agreement.

58. Other Independent Contractors pursued unrelated business ventures while also marketing for Just Energy. For example, Matt Pancer engaged in new door-to-door sales and infrequent renewal sales for the Kitchener and Cambridge regional offices and had a video production company on the side.

59. Sales Agents were at liberty to engage in door-to-door sales at any time. We advised Independent Contractors that the best time to work was between 1-9 pm, however it was within their control to decide within what times they wanted to sell and for how many hours they wanted to sell per day and on what day or days. In the commercial and renewal sales' context, we would advise that the best time to sell was between 10-5 pm for commercial sales, as this was standard hours of operations for businesses. With respect to residential renewal sales, we generally recommended between 1-9 pm, given that these were the times that it was most likely to connect with a customer.

60. Contrary to the affiants' suggestions, crew coordinators and regional distributors did not supervise and oversee Sales Agents throughout their day in the field. Crew sizes could range from 8-20 or more Sales Agents and crew coordinators themselves were occupied with making their own sales. It would have been very difficult for a crew coordinator to be successful in their own sales if they were also supervising the marketing and sales of the others members of their team.

61. Sales Agents were free to market where they wanted and for however long they wanted. As a crew coordinator in the Kitchener office, I would drop Sales Agents off for the day and I would reconvene with those remaining at the field when I finished my day, which was generally around 9 pm. I would often offer to drive Sales Agents to a bus stop or somewhere else convenient if they decided to end their day at the same time. I was generally not in contact with Sales Agents while they were marketing throughout the day, as I was focused on making my own sales.

62. I sometimes accompanied Sales Agents who were just beginning door-to-door sales and requested my feedback on their customer interactions. I did not actively coach them or hang over their shoulders, as I did not believe that this was beneficial for their development as salespeople. I believed in observing them and then subsequently providing advice and/or guidance where necessary.

Road Trips/Push Weeks

63. Push weeks were generally organized by Just Energy's corporate office or regional sales' offices and Independent Contractors would be informed of them through crew coordinators or regional distributors. Push weeks were not a regular occurrence and were typically planned when regional offices were short of meeting their weekly goals. Push weeks were not mandatory and were ultimately a decision by Independent Contractors to decide to work every day for approximately a week, as much as possible, until they achieved their goals.

64. Independent Contractors were often eager to participate in push weeks because of the various incentives Just Energy offered to Independent Contractors that met their goals during the week. For example, Independent Contractors who participated in push weeks would often have the opportunity to earn double the commission on their sales during that week. Just Energy also offered cash bonuses, trips to exotic destinations, steak dinner, and various other rewards to motivate individuals to reach their goals during that week. Participating Independent Contractors could choose whether they wanted to complete a push week or not. It was ultimately up to them how long they wanted to participate in a push week.

65. Push weeks existed in the commercial and renewal sales' context, however they took place less frequently than those in the residential sales' context. Regional distributors would

generally propose a push week in their respective offices, however not many Sales Agents participated in the commercial context because most businesses were closed on the weekend; whereas, most Sales Agents participated in renewal push weeks.

66. Push weeks and their related incentives did not function in the same way as they did in the residential sales' context. Commercial salespeople were generally seasoned salespeople committed to a career in sales, and did not generally require incentives or a "push" to meet their sales' goals.

67. Road trips were an office activity that was designed to facilitate sales and foster an environment of success, in addition to providing the opportunity to market in areas that tended not to be "over-marketed", which increased one's earning potential. Road trips were often organized by Crew Coordinators and the goal of the road trip was to provide each sales agent with an opportunity to focus on and hone their craft as sales agents. While road trips were designed to foster success, it was up to each Independent Contractor to determine whether he or she would attend the trip.

68. No one was disciplined or terminated because they did not participate in a road trip or push week. However, if someone did not want to participate we would try and motivate them to participate by promoting Just Energy's various incentives to them. We emphasized the different kinds of rewards that they could win if they met their goals. The rewards and incentives encouraged friendly competition and recognition, with the ultimate objective being to drive high levels of performance and sales.

69. Whether Sales Agents wanted to take advantage of the above opportunities was up to them. There were several Independent Contractors that were highly motivated by the

rewards and incentives offered by Just Energy and pushed themselves to sell. Others did not, and this was perfectly acceptable.

High Earning Potential

70. There was higher earning potential for Independent Contractors engaged in renewal and commercial sales. This was because the target market for these sales were established customers and relationships and these Independent Contractors therefore closed sales at a higher rate in comparison to Sales Agents in the door-to-door sales' context.

71. The average income for an Independent Contractor engaged in renewal sales was around CAD $100,000.00.

SWORN BEFORE ME at the City of Toronto, in the Province of Ontario on January 11, 2019

Commissioner for Taking Affidavits
(or as may be)

Evan Douglas Bowles Conover,
a Commissioner, etc., Province of Ontario,
while a Student-at-Law.
Expires September 11, 2021

DANIEL GADOUA

HAIDAR OMARALI

Plaintiff

-and-

JUST ENERGY GROUP INC. et al.

Defendants

Court File No. CV-15-527493-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at
Toronto

AFFIDAVIT OF DANIEL GADOUA
(SWORN JANUARY 11, 2019)

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Lawyers for the defendants

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THIS IS **EXHIBIT "T"** REFERRED TO IN THE AFFIDAVIT OF MICHAEL CARTER SWORN BEFORE ME over video teleconference this 29th day of May, 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.

Tiffany Sun

A Commissioner for taking Affidavits, etc.

Miao Sun, a Commissioner, etc., Province of Ontario, while a Student-at-Law. Expires March 6, 2023.

Court File No. CV-15-527493-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

HAIDAR OMARALI

Plaintiff

- and -

JUST ENERGY GROUP INC., JUST ENERGY CORP.
and JUST ENERGY ONTARIO L.P.

Defendants

Proceeding under the *Class Proceedings Act, 1992*

SUPPLEMENTARY RESPONDING MOTION RECORD OF THE DEFENDANTS (Summary Judgment Motion) Returnable June 11-13, 2019

March 4, 2019

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Court File No. CV-15-527493-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

HAIDAR OMARALI

Plaintiff

- and -

JUST ENERGY GROUP INC., JUST ENERGY CORP.
and JUST ENERGY ONTARIO L.P.

Defendants

Proceeding under the *Class Proceedings Act, 1992*

SUPPLEMENTARY RESPONDING MOTION RECORD OF THE DEFENDANTS (Summary Judgment Motion) Returnable June 11-13, 2019

TAB 2

Court File No. CV-15-527493-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

~~**KIA KORDESTANI**~~ **HAIDAR OMARALI**

Plaintiff

- and -

JUST ENERGY GROUP INC., JUST ENERGY CORP. and JUST ENERGY ONTARIO L.P.

Defendants

Proceeding under the *Class Proceeding Act, 1992*

AFFIDAVIT OF JODY KELLY
SWORN JANUARY 25, 2016

I, JODY KELLY, of the City of Ottawa, in the Province of Ontario, MAKE OATH AND SAY:

A. INTRODUCTION

1. I am the Director of Sales Performance with Just Energy Group Inc. ("**Just Energy**" or the "**Company**"). I have had a relationship with Just Energy since April of 2004. At that time I became an independent contractor sales agent, later transitioning into various team leader positions. I am currently an employee of the Company, in the capacity of Director of Sales Performance. As such, I have knowledge of the matters contained in this affidavit.

B. HISTORY WITH THE COMPANY

2. As set out above, I started as an independent contractor doing door-to-door sales with Just Energy in April of 2004. At that time, the regional office closest to me was the Ottawa office.

3. I was very successful as a sales agent. I had a high volume of sales of retail energy contracts and I was able to earn a significant income from the commissions associated with my sales.

4. As a result of my success with door-to-door sales, I moved quickly into team leader positions, still as an independent contractor, at the Ottawa office. Despite having only commenced in 2004, I quickly transitioned into being a Crew Coordinator and eventually some months later to an Assistant Regional Distributor. In these roles I was able to grow my income through override payments, which are payments made by Just Energy based on the sales of the badged independent contractors from each office.

5. By mid to late 2005, I became a Regional Distributor. I stayed in the role of Regional Distributor until 2011, at which time I joined RPM (described in further detail below). I remained a part of RPM until I joined the Company as an employee in or around December 2013.

C. REGIONAL PRODUCING MACHINES GROUP ("RPM")

6. In 2011, I decided that I wanted to continue to grow my income stream. In order to accomplish this objective, I worked with two other Just Energy Regional Distributors to handle our respective regional offices as a group under the umbrella of RPM.

7. In addition, I decided to open a second and separate sales office in Ottawa which sold furnaces and hot water tanks. This office was a National Home Services office, an affiliated Just Energy company. Sales agents were required to complete a specific training course and meet specific regulatory standards, in order to sell the hot water tanks and furnaces door-to-door.

8. The creation of RPM and my ability to open a National Home Services office demonstrate that independent contractors at Just Energy are unequivocally able to direct their own results. During my time as an independent contractor with Just Energy, I was able to use my skills to develop and engage in any activity, venture, or sales method that I deemed profitable.

D. INDEPENDENT CONTRACTORS

9. In my role as a regional distributor, I interviewed individuals who were interested in the Just Energy door-to-door sales opportunity. So as to ensure that individuals truly understood the independent contractor relationship and the challenges associated with door-to-door sales, I would strive to present the opportunity at Just Energy with the utmost transparency.

10. Despite my detailed and thorough explanation of the potential risks associated with door-to-door sales at Just Energy, I found that the majority of the interviewees were attracted by the value proposition in the 100% commission based compensation structure. As a result, the bulk of the interviewees were determined to continue onto the training portion of the "onboarding" process.

11. The interviews were conducted by me or the regional recruiter as a one-on-one session and it is was up to each interviewee to determine whether her or she, after having completed the interview, was keen on pursuing the opportunities available with Just Energy.

12. If an individual elected to work towards become a badged independent contractor, he or she would attend a training session. Just Energy's training program is a five module course offering that is structured around explaining the independent contractor relationship at Just Energy, the legal and regulatory framework of the energy business, Just Energy's product and service offerings, and the way in which an independent contractor can be successful at door-to-door sales.

13. Just Energy's training is designed to foster success and to ensure that each badged independent contractor operates within the province's regulatory framework. This is why, for example, each independent contractor receives training that addresses what must and must not be said at each door. While Just Energy's sales agents must abide by the provincial regulatory requirements, each independent contractor is at liberty to use his or her own methods and he or she is not required to follow Just Energy's suggestions or advice.

14. The training also includes an Ontario Energy Board mandated module and an Ontario Energy Board mandated examination. As director of RPM, I would ensure that my group of offices were conducting each training module as though there was an representative from the Ontario Energy Board in attendance, so as to ensure that the instructions were entirely consistent with the legislative and regulatory requirements.

15. The Ontario Energy Board mandated examination was always proctored by a Just Energy employee who did not have a financial interest in the success of badged independent contractor candidates.

16. It is during the Just Energy training that I would provide successful individuals with their independent contractor agreements and it was standard practice for me to provide each individual with a copy of his or her signed agreement.

E. FREEDOM AND AUTONOMY OF THE INDEPENDENT CONTRACTORS

17. The sales agents at the Ottawa office were are at liberty to engage in door-to-door sales at any time and at any location, so long as their sales fell within the regulatory framework. I never implemented a sales quota or minimum number of doors to be knocked on per day.

18. While each independent contractor could elect to operate in a quasi-team like environment at the office, the Ottawa office and its team leaders existed only to serve as conduits, to facilitate and foster success. Every activity was voluntary and the participation in any opportunity for growth was within the sole discretion of each and every independent contractor. The team structure is designed to provide ongoing support to each person and to allow for constant learning, as there are many activities and things that people can do so as to grow and develop as salespersons.

19. I also invested in sales agents that were part of my group, by advancing funds to assist individuals just starting their sales careers. For example, I would often provide cash advances to allow them to purchase supplies. These funds were from my own resources and were an investment by me as an independent contractor in the possibility of increasing my own income based on the sales those agents would ultimately make. Some such advances were repaid, others were not.

20. One example of an Ottawa office activity that was designed to facilitate sales and foster an environment of success was road trips. Road trips were often organized by Crew

Coordinators and the goal of the road trip was to provide each sales agent with an opportunity to focus on and hone their craft as sales agents. While road trips were designed to foster success, it was up to each independent contractor to determine whether he or she would attend the trip. As a result of their ability to choose, the Ottawa office was typically divided in half - with half of its sales agents being on the road and the other having elected to remain in town.

F. INDEPENDENT CONTRACTOR STATUS

21. Just Energy's performance-driven culture has proven profitable for me since my commencement with the Company in 2004. I have enjoyed being the master of my own destiny, and it is as a result of my status as an independent contractor that I was able to steadily grow my income.

22. While I was obligated to operate within the provincial regulatory requirements, being an independent contractor allowed me to work (i) where I wanted, (ii) when I wanted and (iii) to put in as much effort, or not, as I desired. I recognized, however, that the more I put into my door-to-door sales, the more profitable I would be. This meant, therefore, that I elected to have Just Energy's door-to-door sales as my only vocation and it was in so doing that I was able to earn a significant income. The amount of time that I dedicated to working as a sales agent with Just Energy was solely of my choosing. I chose to dedicate myself to being a sales agent for Just Energy on the basis of my desire to earn more money.

SWORNbefore me at the City of Ottawa, in the Province of Ontario this 25th day of January, 2016.

A Commissioner for taking affidavits.
TALA KHOURY, LSUC # 68135N
FASKEN MARTINEAU DUMOULIN LLP

Jody Kelly

THIS IS **EXHIBIT "U"** REFERRED TO IN THE AFFIDAVIT OF MICHAEL CARTER SWORN BEFORE ME over video teleconference this 29th day of May, 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.

Tiffany Sun

A Commissioner for taking Affidavits, etc.

Miao Sun, a Commissioner, etc., Province of Ontario, while a Student-at-Law. Expires March 6, 2023.

Court File No. CV-15-527493-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

HAIDAR OMARALI

Plaintiff

- and -

JUST ENERGY GROUP INC., JUST ENERGY CORP. and JUST ENERGY ONTARIO L.P.

Defendants

Proceeding under the *Class Proceedings Act*, 1992

RESPONDING FACTUM OF THE DEFENDANTS
(Summary Judgment Motion Returnable June 11-13th, 2019)

May 23, 2019

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Court File No. CV-15-527493-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

HAIDAR OMARALI

Plaintiff

- and -

JUST ENERGY GROUP INC., JUST ENERGY CORP. and JUST ENERGY ONTARIO L.P.

Defendants

Proceeding under the *Class Proceedings Act*, 1992

RESPONDING FACTUM OF THE DEFENDANTS
(Summary Judgment Motion Returnable June 11th-13th, 2019)

PART I – OVERVIEW

> [E]mployers should not be required to provide vacation pay or statutory benefits when they cannot control or monitor the hours employees work or how they do their job.[1]
>
> The prime example would be the door to door salesman whose employer is not aware of how many hours the employee works on a day by day basis.[2]

1. This action concerns approximately 8,000 individuals who were offered, and who took advantage of, the opportunity to earn significant commissions[3] through the sales of electricity and natural gas supply contracts offered by the defendants Just Energy Corp. and Just

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1 *Evangelista v. Number 7 Sales Limited*, 2008 ONCA 599 [“***Evangelista***”] at para. 36, per O’Connor A.C.J.O, Book of Authorities of the Defendants, Tab 1.

2 *Viceroy Construction Company Limited*, July 16, 1976, E.S.C. 368 at page 2, Book of Authorities of the Defendants, Tab 2.

3 In fact one of the plaintiff’s affiants (Katlyn Schwantz) made in excess of 200k as a sales agent: see Exhibit “Z” to Affidavit of Richard Teixeira, sworn January 10, 2019 (“**Teixeira Affidavit**”), Responding Motion Record of the Defendants (“**Responding MR**”), Tab 1Z, p. 703.

Energy Ontario L.P. (collectively, "**Just Energy**[4]"). Just Energy compensated these individuals on a 100 per cent commission basis because this model provided financial rewards commensurate with the effort, initiative and sales ability of each individual sales agent. Remunerating sales agents by paying them an hourly wage would have unfairly penalized those individuals who worked harder and who exhibited greater aptitude and skill.

2. It was not economically or organizationally viable for Just Energy to compensate its sales agents by paying them an hourly wage. First, if the sales agents were guaranteed an hourly wage regardless of their productivity, they would have had little incentive to assertively promote Just Energy's products. Compensation on a commission basis is an indispensable mechanism for aligning the sales agent's interests and objectives with those of Just Energy. Second, given the independent and self-directed nature of itinerant sales, Just Energy has no effective means to confirm the length of time that the sales agent actively engages in sales activity. Since the sales agents work in the field without supervision, the number of signed contracts that a sales agent generates is the only reliable metric for the calculation of the compensation to which he or she is entitled.

3. Indeed, the Ontario Legislature has long recognized the foregoing economic imperatives, and has expressly exempted commission sales representatives from many of the protections guaranteed for ordinary hourly wage "employees". The Legislature has specifically recognized that a time-based model is not workable for sales representatives who promote sales of the employer's goods or services remotely from the employer's place of business. For persons providing their services to an employer in such an independent and entrepreneurial manner, the Legislature has confirmed that performance-based (rather than time-based) compensation is more fair and appropriate.

4. It is clear that the class members fall within this "salesperson" exemption in para. 2(1)(h) of the *Exemptions, Special Rules and Establishment of Minimum Wage* regulation under the ESA,[5] and are therefore ineligible to claim the minimum wage, overtime and similar rights under the ESA. Furthermore, they do not fall within the "route salesperson" exception to the

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[4] While Just Energy Group Inc. is a defendant, it does not offer any contracts for sale. Just Energy Group Inc. is the parent holding company and did not contract with any of the class members.

[5] O Reg 285/01 [the "**Exemption Regulation**"].

salesperson exemption; that term has a well-established meaning in the field of human resources, and it is plainly inapplicable to the circumstances of the class members.

5. The Ontario Legislature has defined the statutory salesperson exemption in terms of four easily-applied factual criteria in order that courts and tribunals can avoid the complex multi-factor "control test" commonly applied to distinguish between "employees" and "independent contractors". In essence, the Legislature has declared that if the four criteria are satisfied such individuals are deemed to be independent contractors or, at a minimum, should receive the same treatment under the ESA as that accorded to independent contractors. Accordingly, the plaintiff's focus on the common law control test analysis is largely irrelevant; since the sales agents are expressly exempt from the provisions of the ESA that the plaintiff relies upon, their legal characterization absent such an exemption is of no moment.

6. Just Energy submits that the ESA salesperson characterization should also be applied for the purposes of the *Employment Insurance Act* and the *Canada Pension Plan* despite the fact that these statutes do not include an express salesperson exemption. In any event, an application of the common law control test produces the same result.

7. On the basis of the applicability of the salesperson exemption and/or the control test, the Class Members are not entitled to any of the remedies claimed by the plaintiff. Accordingly, summary judgment should be granted in favour of Just Energy on all of the common issues.

8. In the alternative, if this Honourable Court finds that the evidence does not allow it to reach the conclusion that *all* sales agents fall within the salesperson exemption, and that *none* are within the route salesperson exception, then it is Just Energy's submission that these questions can only be decided upon an examination of each class member's individual vocational experience with Just Energy. Once again, summary judgment is not available to the plaintiff because such individual questions raise genuine factual issues requiring a trial.

9. In the further alternative, even if this Court finds that one or more of the common issues can be resolved in the plaintiff's favour based upon the evidence adduced on this motion, Just Energy submits that the class must be restricted to the two-year period preceding the

commencement of this action on May 4, 2015. There are no discoverability issues raised by the facts of this case: the manner in which Just Energy compensated its sales agents could not have been more open and notorious. Consequently, every class member would have been aware of the facts constituting his or her claim the day they signed their Independent Contractor Agreement ("**ICA**", described more fully below). As a result, it is only those persons who served as sales agents after May 4, 2013, and only in respect of payments that should allegedly have been made after that date, that class members could possibly have any viable claim.

PART II - FACTS

10. To the extent Just Energy does not respond to facts raised by the plaintiff in their factum, this does not constitute an acceptance by Just Energy of the plaintiff's version of the facts.

Just Energy's Business

11. Since its inception over twenty years ago, Just Energy utilized independent sales people to solicit contracts for natural gas and electricity. As independent, full commission agents, their successes turned on the individual effort they chose to bring to the sales task. It was, in part, the individualized nature of door-to-door sales that influenced Just Energy's decision to engage all sales agents as independent salespeople.[6]

12. As of January 1, 2017, Just Energy no longer engages individuals for door-to-door energy solicitation as a result of certain legislative amendments pursuant to Ontario's *Energy Consumer Protection Act*, 2009, S.O. 2010, c 8, which came into force on that date. These amendments provide, in part, that the sale or offer of sale of electricity or natural gas to a consumer in person at the consumer's home is prohibited, and that such sales or offers of sale cannot be based on a commission or value of volume sales basis.[7]

13. Just Energy's team model was created primarily for the purposes of educating and teaching entry level door-to-door sales agents how to sell and succeed in the sales industry. Most entry level sales agents have never engaged in the sale of energy products prior to joining Just

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[6] Exhibit "A" to Teixeira Affidavit, paras. 19-21, Responding MR, Vol. 1, Tab 1A, pp. 48-49.

[7] Teixeira Affidavit, paras. 6-7, Responding MR, Vol. 1, Tab 1, p. 2.

Energy and this model had proven to be successful for providing sales agents with the essential information and tools succeed.[8]

14. The plaintiff's evidence, much of it discredited, tends to focus on the experience of entry-level sales agents and is therefore only representative of one category of sales agent at Just Energy during the class period.[9] Simply put, entry-level sales agents do not make up the entirety of the class. Indeed, the class is also composed to a significant extent by more experienced sales agents, such as crew coordinators and regional distributors, as well as sales agents that engaged in commercial and/or renewal sales, as opposed to only door-to-door residential sales.[10] Richard Teixeira, Brian Marsellus and Daniel Gadoua's affidavit evidence on the distinctions between sales agents during the class period was not challenged on cross-examination.[11]

The Independent Contractor Agreement and the Nature of the Sales Agent Position

15. It is undisputed that Just Energy did not pay sales agents an hourly wage, overtime or provide benefits such as vacation pay, medical, dental, vacation pay and/or sickness pay. The lack of these benefits were clearly set out in the ICA, which formed the basis of the contractual relationship between the sales agent and Just Energy. In fact, the driving factors behind many sales agents seeking out a sales position with Just Energy was the 100 per cent commission based compensation structure. The evidence shows that many, if not most of the plaintiff's affiants were well aware and understood prior to signing an ICA that the position was

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[8] Affidavit of Brian Marsellus, sworn January 11, 2019 ("**Marsellus Affidavit**"), paras. 7-10, Responding MR, Vol. 2, Tab 2, pp. 845-846; Teixeira Affidavit, paras. 8-11, Responding MR, Vol. 1, Tab 1, pp. 3-4.

[9] Affidavit of Katlyn Schwantz, sworn August 29, 2018, Plaintiff's Motion Record ("**Plaintiff's MR**"), Vol. 1, Tab B, p. 11; Affidavit of Jennifer Borg, sworn August 29, 2018, Plaintiff's MR, Vol. 1, Tab C, p. 54; Affidavit of Jamie Acton, sworn August 29, 2018, Plaintiff's MR, Vol. 1, Tab D, p. 61; Affidavit of Roland Lavigne, sworn August 30, 2018, Plaintiff's MR, Vol. 1, Tab E, p. 68; Affidavit of Bahram Nemati, sworn September 30, 2018, Plaintiff's MR, Vol. 1, Tab F, p. 75; Affidavit of Jamie Acton, sworn February 14, 2019, Plaintiff's Reply Motion Record ("**Plaintiff's Reply MR**"), Tab 1, p. 1; Affidavit of Katlyn Schwantz, sworn February 14, 2019, Plaintiff's Reply MR, Tab 2, p. 6.

[10] There is no evidence in the record with respect to how many class members were crew coordinators, regional distributors, door-to-door sales and/or renewal and commercial sales agents.

[11] Marsellus Affidavit, Responding MR, Vol. 2, Tab 2; Teixeira Affidavit, Responding MR, Vol. 1, Tab 1; Affidavit of Daniel Gadoua, sworn January 11, 2019 ("**Gadoua Affidavit**"), Vol. 2, Tab 3; Cross-Examination Transcript of Brian Marsellus, March 6, 2019 ("**Marsellus Cross**"), Plaintiff's Transcript Brief ("**Transcript Brief**"), Tab 1; Cross-Examination Transcript of Richard Teixeira, March 6, 2019 ("**Teixeira Cross**"), Transcript Brief, Tab 2; Cross-Examination Transcript of Daniel Gadoua, March 6, 2019 ("**Gadoua Cross**"), Transcript Brief, Tab 3.

100 per cent commission based; that there were no deductions from their commission statements; that any expenses were their own to claim for tax purposes; that there was no obligations owed to them by Just Energy with respect to overtime, holiday pay, sick time, or the like; and that they were not receiving benefits such as medical, dental, vacation pay, sickness pay[12]. Any alleged confusion or misunderstanding in this regard is simply not credible.

16. Jennifer Borg, for example, knowingly and willingly accepted to be bound by the terms of the ICA on multiple occasions, which is also true for other sales agents. Indeed, Ms. Borg signed multiple ICAs over the course of her tenure with Just Energy.[13]

Recruitment, Orientation and Training

17. The majority of sales agents who provided sales' services to Just Energy, came from different educational backgrounds, lacked formal work experience and had never held a prior door-to-door sales position.[14] The informational resources and skills-based training, beginning with recruitment and continuing throughout a sales agent's time with Just Energy, was intended to provide recruits with the necessary foundation to successfully achieve their business objectives.[15]

18. The five modules used by Just Energy during the orientation process contained a range of educational information, such as Just Energy's business model, the energy market in general, the 100 per cent commission compensation structure, bonuses and incentives, sales tactics and strategies, acceptable solicitation practices, as well as regulatory information that the

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[12] Teixeira Affidavit, paras. 35-37, Responding MR, Vol. 1, Tab 1, p. 54; Exhibit "D" to Teixeira Affidavit, Cross-Examination of Kian Nazerally, March 18, 2016, ("**Nazerally Cross**"), Q. 76-82, Responding MR, Vol. 1, Tab 1D, p. 225; Cross-Examination of Katlyn Schwantz, March 21, 2019 ("**Schwantz Cross**"), Q. 70-78, 85 and 456, Transcript Brief, Tab 4, pp. 173-174, 176, and 274, respectively; Cross-Examination of Bahram Nemati, March 22, 2019 ("**Nemati Cross**"), Q. 30 and 34-37, Transcript Brief, Tab 5, pp. 357-358; Cross-Examination of Roland Lavigne, March 22, 2019 ("**Lavigne Cross**"), Q. 407-408, Transcript Brief, Tab 6, p. 495.

[13] Gadoua Affidavit, para. 57, Responding MR, Vol. 2, Tab 3, p. 884 (Ms. Borg signed multiple ICAs over the course of her tenure with Just Energy); Exhibit "A" to Teixeira Affidavit, para 42, Responding MR, Vol. 1, Tab 1A, pp. 55-56 (similarly, Kia Kordestani executed an ICA on three separate occasions).

[14] Gadoua Affidavit, para. 11, Responding MR, Vol. 2, Tab 3, p. 872; Cross-Examination Transcript of Jamie Acton, March 28, 2019 ("**Acton Cross**"), Q. 133-135, Transcript Brief, Tab 7, p. 546; Exhibit "A" to Teixeira Affidavit, para. 21, Responding MR, Vol. 1, Tab 1A, p. 49.

[15] Teixeira Affidavit, paras. 54-59, Responding MR, Vol. 1, Tab 1, pp. 16-17; Marsellus Affidavit, para. 43, Responding MR, Vol. 2, Tab 2, p. 853.

Ontario Energy Board ("**OEB**") mandated that Just Energy provide its sales agents.[16] Similarly, the mandatory OEB test referred to in the plaintiff's factum was an OEB regulatory requirement, which all sales agents had to pass as part of the orientation process.[17]

19. It was not mandatory to complete the field shadowing or role playing elements of orientation training or do so on an on-going basis. Indeed, it was not uncommon for some sales agents, such as Jennifer Borg, to forgo sales training entirely in order to quickly get into the field to start selling energy. Whether or not a sales agent followed this approach was entirely at their own discretion.[18] Nevertheless, and despite such discretion, the evidence shows that sales agents still actively sought out field shadowing and role playing, among other training opportunities, due to the demonstrated ability of such training to improve a sales agent's confidence and skillset.[19]

Regulatory Requirements for Door-to-Door Solicitation in Ontario

20. During the class period, the extent of energy regulation in Ontario with respect to door-to-door solicitation cannot be overstated. Ontario Energy Board ("**OEB**") regulations were behind sales agents having to wear identification badges, the verification call to finalize energy contracts, the content in certain sales scripts used by sales agents, as well as how sales agents could interact with consumers in the course of selling energy.[20]

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16 Teixeira Affidavit, paras. 45-50, Responding MR, Vol. 1, Tab 1, pp. 13-14; Exhibit "J" to Teixeira Affidavit, Responding MR, Vol. 1, Tab 1J, pp. 365-549.

17 Teixeira Affidavit, paras. 51-53, Responding MR, Vol. 1, Tab 1, p. 15; Exhibit "L" to Teixeira Affidavit, Responding MR, Vol. 2, Tab 1L, pp. 553-594; Exhibit "A" to Teixeira Affidavit, para. 32, Responding MR, Vol. 1, Tab 1A, p. 53.

18 Teixeira Affidavit, paras. 93-96, Responding MR, Vol. 1, Tab 1, p. 26; Teixeira Affidavit, para. 59, Responding MR, Vol. 1, Tab 1, p. 17.

19 Acton Cross, Q. 134-136, Transcript Brief, Tab 7, p. 546; Nemati Cross, Q. 136-139, Transcript Brief, Tab 5, pp. 381-382.

20 Exhibit "A" to Teixeira Affidavit, paras. 31-33, Responding MR, Vol. 1, Tab 1A, p. 53; Teixeira Affidavit, paras. 101-104 and 109-113, Responding MR, Vol. 1, Tab 1, pp. 28-32; Exhibit "L" to Teixeira Affidavit, Responding MR, Vol. 2, Tab 1L, pp. 552-594; Exhibit "M" to Teixeira Affidavit, Responding MR, Vol. 2, Tab 1M, pp. 604-611.

21. The OEB also regulated the ability of sales agents to sell in any location or to consumers they wished by, among other things, the creation of "red-zones" based on do-not-solicit customer lists.[21]

22. Notwithstanding the above, perhaps the greatest impact the OEB had over Just Energy and sales agents in general was with respect to its compliance monitoring and enforcement regime, which regulated, among other things, sales agents' responsibilities and acceptable soliciting practices. Just Energy's compliance department, which was tasked with investigating customer complaints and sales agent compliance with acceptable solicitation practices, was the direct result of OEB regulation in this regard.[22]

23. Only in extreme cases of non-compliance with OEB standards were sales agents fined or ICAs terminated. If a complaint was ultimately deemed valid, the typical response by Just Energy was a warning to the sales agent.[23]

Just Energy had No Control over the Practice of an Independent Contractor

Sales practices varied considerably

24. The plaintiff's attempt to characterize a sales agent's sales practice at Just Energy as identical, is without merit.

25. Sales agents had the independence to create variations to Just Energy's typical team model.[24] For example, the Fairview office located in North York, Ontario (the "**Fairview Office**") was structured differently than other regional offices during the class period. The Fairview office initially began as one office, with one regional distributor and crew coordinators, however it subsequently expanded and divided into several sub-offices to provide sales agents with opportunities to lead their own sales' practices.[25]

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21 Teixeira Affidavit, para. 73, Responding MR, Vol. 1, Tab 1, p. 21.

22 Teixeira Affidavit, paras. 109-112, Responding MR, Vol. 1, Tab 1, pp. 30-31.

23 Teixeira Affidavit, para. 112, Responding MR, Vol. 1, Tab 1, p. 31.

24 Teixeira Affidavit, paras. 15-16, Responding MR, Vol. 1, Tab 1, p. 5; Gadoua Affidavit, para. 14, Responding MR, Vol. 2, Tab 3, p. 873.

25 Teixeira Affidavit, para. 17, Responding MR, Vol. 1, Tab 1, pp. 5-6; Marsellus Affidavit, paras. 15-178, Responding MR, Vol. 2, Tab 2, p. 847.

26. In addition, sales agents were not restricted to engaging exclusively in door-to-door residential sales and had the freedom to engage in door-to-door residential, renewal and/or commercial sales during the class period.[26] The Fairview office for example had sales agents engaging in door-to-door and commercial sales. Similarly, the Cambridge renewal sales office and the Hespeler residential sales offices amalgamated into one office during the class period, and there were sales agents in this office that engaged in renewal and door-to-door sales at this office location.[27]

27. Further, there were sales agents during the class period that engaged exclusively in renewal or commercial sales. Sales agents engaging in renewal and commercial sales had an entirely different sales practice than door-to-door residential sales agents.[28] Sales agents engaged in commercial and renewal sales did not typically operate in a team or quasi-team environment, nor did they use the resources that were available to and utilized by residential door-to-door sales agents.[29] Notably, on cross-examination, Kian Nazerally's evidence was that he would have likely not engaged in renewal sales because it was fun working with a team in the door-to-door residential sales context.[30]

Sales agents were masters of their own schedule

28. Contrary to the plaintiff's assertions, there was no daily structure enforced by regional distributors, crew coordinators or otherwise at Just Energy. Sales agents were at liberty to set their own schedules and engage in sales at any time.[31]

29. Although sales agents were assigned to and badged at particular regional offices, this was done primarily for the administration of commission and override payments.[32] The

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[26] Teixeira Affidavit, para. 22, Responding MR, Vol. 1, Tab 1, p. 7; Lavigne Cross, Q. 161-163, Transcript Brief, Tab 6, p. 454; Nazerally Cross, Q. 183-189, Responding MR, Volume 1, Tab 1D, pp. 228-229; Exhibit "11" to Michelle Alexander Affidavit ("**Alexander Affidavit**"), Cross-Examination Transcript of Mortuza Awal, March 31, 2016 ("**Awal Cross**"), Q. 139-142, Plaintiff's MR, Volume 1, Tab 11, pp. 710-711; Acton Cross, Q. 172, Transcript Brief, Tab 7, p. 43; Gadoua Affidavit, para. 18, Responding MR, Vol. 2, Tab 3, p. 874.

[27] Teixeira Affidavit, paras. 18 and 20, Responding MR, Vol. 1, Tab 1, p. 6.

[28] Gadoua Affidavit, paras. 19, 35-37, 41-44, 53-54, 59, 65-66 and 70-71, Responding MR, Vol. 2, Tab 3, pp. 874, 878-879, 880-881, 883, 885, 886-887 and 888, respectively.

[29] Teixeira Affidavit, paras. 23-24, 65 and 85, Responding MR, Vol. 1, Tab 1, pp. 7-8, 18-19 and 24, respectively; Gadoua Affidavit, paras. 15-16, Responding MR, Vol. 2, Tab 3, p. 873.

[30] Nazerally Cross, Q. 193-202, Responding MR, Vol. 1, Tab 1D, p. 229.

[31] Teixeira Affidavit, para. 61, Responding MR, Vol. 1, Tab 1, p. 17.

plaintiff's assertion that it was mandatory for sales agents at Just Energy to report daily to their regional offices is incorrect and is not credible. Indeed, the evidence shows that sales agents were not required to attend and/or report to the regional office that they were badged in[33]. For example, on cross-examination, Jennifer Borg admitted that there was no reason why her regional office, on any particular day, would know whether she was marketing and selling.[34] Jennifer Borg never reported to the Toronto or Ottawa regional offices and rarely travelled with a team, opting instead to market by herself. In addition, on cross-examination, Jennifer Borg further admitted that she did not attend the Kitchener regional office on a regular basis.[35]

30. Nonetheless, regional distributors and crew coordinators in the door-to-door sales offices went to great lengths to make daily meetings fun and magnetic in order to encourage sales agent to attend. Sales agents were encouraged to attend morning meetings as they were proven to enhance sales marketing success. Morning meetings created social cohesion between sales agents and provided sales agents with updates on product and regulatory information and training opportunities relating to their sales practices.[36] For example, when Tike Asajile -- a crew coordinator in the Oshawa office -- began his working relationship with Just Energy, he would not attend morning meetings, preferring instead to go straight into the field to sell energy. However, with time, Mr. Asajile came to appreciate the value of such meetings for his skills development and general motivation. Nevertheless, his decision to attend such meetings was entirely his choice.[37] Morning meetings were only recommended and attendance numbers fluctuated daily.[38]

31. In addition, the evidence shows that daily morning meetings did not exist in the commercial and renewal offices.[39] The attendance rate at regional office meetings were higher in

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32 Cross-Examination Transcript of Jennifer Borg, March 28, 2019 ("**Borg Cross**"), Q. 103-104, Transcript Brief, Tab 8, pp. 618-619.

33 Marsellus Cross, Q. 129 and 137, Transcript Brief, Tab 1, pp. 27-28 and p. 30, respectively.

34 Borg Cross, Q. 227, Transcript Brief, Tab 8, p. 650.

35 Borg Cross, Q. 193-194, Transcript Brief, Tab 8, pp. 644-645.

36 Marsellus Affidavit, paras. 45, 47 and 49, Responding MR, Vol. 2, Tab 2, pp. 854-855.

37 Exhibit "A" to Teixeira Affidavit, para. 44, Responding MR, Vol. 1, Tab 1A, pp. 56-57.

38 Marsellus Cross, Q. 137, Transcript Brief, Tab 1, p. 30; Exhibit "A" to Teixeira Affidavit, paras. 44-45, Responding MR, Vol. 1, Tab 1A, pp. 56-57.

39 Marsellus Cross, Transcript Brief, Tab 1, Q. 111, p. 23; Teixeira Affidavit, para. 65, Responding MR, Vol. 1, Tab 1, p. 18; Gadoua Affidavit, paras. 35-36, Responding MR, Vol. 2, Tab 3, p. 878.

the door-to-door sales' context, given this was generally the meeting place for sales agents that chose to travel to the field together.[40] Many sales agents did not have vehicles and therefore attended morning meetings to be able to car pool with other sales agents.[41] By contrast, sales agents did not travel to the field together in the renewal and commercial sales context. Sales agents engaging in renewal and commercial sales generally operated remotely and did not require regular support from their respective regional offices. There were only weekly meetings in the commercial and renewal offices and sales agents could choose to participate either in person or by phone.[42] The primary purposes for the weekly meetings in the commercial and renewal regional offices was for sales agents to pick up their commission cheques and receive market, regulatory and/or product updates.[43]

32. Just Energy did not engage in any formal record keeping regarding the number of hours a sales agent marketed or the particular location a sales agent was selling during the day, with the exception of recording the actual sale and execution of the energy contract itself.[44] On cross-examination, Jennifer Borg admitted that there was no day-to-day recordkeeping or the like.[45]

33. In addition, there was no set time as to how long a sales agent would spend daily or weekly in the field – the amount of time a sales agent would spend marketing and selling in this varied.[46] It was also not uncommon for sales agents to take significant time off from selling energy on behalf of Just Energy. For instance, the sales statistics for Bahram Nemati, Daniel Barbieri and Jennifer Borg demonstrate that they all took months off from selling energy, which

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40 Gadoua Affidavit, paras. 35-36, Responding MR, Vol. 2, Tab 3, p. 878.

41 Teixeira Cross, Q. 207, Transcript Brief, Tab 2, pp. 92-93.

42 Gadoua Affidavit, paras. 35-36, Responding MR, Vol. 2, Tab 3, p. 878.

43 Teixeira Affidavit, para. 65, Responding MR, Vol. 1, Tab 1, pp. 18-19; Gadoua Cross, Q. 75, Transcript Brief, Tab 3, pp. 146-147.

44 Teixeira Affidavit, para. 117, Responding MR, Vol. 1, Tab 1, p. 32; Marsellus Affidavit, paras. 67-68, Responding MR, Vol. 2, Tab 2, p. 859; Gadoua Affidavit, para. 36, Responding MR, Vol. 3, Tab 3, p. 878.

45 Borg Cross, Q. 227, Transcript Brief, Tab 8, p. 650.

46 Marsellus Affidavit, paras. 54-56, Responding MR, Vol. 2, Tab 2, pp. 856-857.

was an acceptable practice at Just Energy.[47] In addition, on cross-examination, Roland Lavigne admitted to taking three weeks off from providing services to Just Energy.[48]

34. There is no evidence showing that sales agents were required to work 6 days a week or 14 hours per day during the class period, unless they wished to do so based on their own volition and desire to make money. For example, the extreme number of hours worked by the plaintiff's affiant, Katlyn Schwantz, was directly tied to her effort to succeed and make money. At one point, Katlyn Schwantz worked for a period of 27 consecutive days in June 2014. However, this level of commitment was never recommended or encouraged by Just Energy. Katlyn Schwantz was certainly not the norm at Just Energy and most sales agents did not possess her motivation.[49]

35. With respect to "road trips" and "push weeks", these were designed by Just Energy to assist sales agents to reach their business goals; however, sales agents were not required to participate in or structure their schedules around these activities.[50] Those sales agents who did participate did so because they were committed to meeting their goals and were motivated by the prospect of various cash and promotional incentives.[51] Push weeks were not generally organized for sales agents engaging in commercial sales as they did not function in the same way as they did in the residential sales' context. Most commercial businesses were closed on the weekends and given commercial salespeople were generally seasoned salespeople committed to a career in sales, they typically did not require the "push" to meet their sales goals.[52] In addition, sales agents engaging in renewal sales did not generally participate in road

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47 Teixeira Affidavit, paras. 124-125, Responding MR, Vol. 1, Tab 1, p. 34; Exhibit "CC" to Teixeira Affidavit, Responding MR, Vol. 2, Tab 1CC; Exhibit "DD" to Teixeira Affidavit, Responding MR, Vol. 2, Tab 1DD.

48 Lavigne Cross, Q. 21-31 and Q. 49-54, Transcript Brief, Tab 6, pp. 431-433 and 436, respectively.

49 Teixeira Affidavit, paras. 118-121 and 123, Responding MR, Vol. 1, Tab 1, pp. 33-34; Exhibit "Y" to Teixeira Affidavit, Responding MR, Vol. 2, Tab 1Y, pp. 697-701; Schwantz Cross, Q. 285-286, Transcript Brief, Tab 4, pp. 227-228.

50 Nazerally Cross, Q. 305-309, Responding MR, Vol. 1, Tab 1D, pp. 233-234; Borg Cross, Q. 229-236, Transcript Brief, Tab 8, pp. 651-652; Teixeira Affidavit, para. 139, Responding MR, Vol. 1, Tab 1, p. 38; Exhibit "A" to Teixeira Affidavit, paras. 45-46, Responding MR, Vol. 1, Tab 1A, p. 57.

51 Teixeira Affidavit, para. 135, Responding MR, Vol. 1, Tab 1, p. 37; Borg Cross, Q. 221-223, Transcript Brief, Tab 8, p. 649.

52 Gadoua Affidavit, paras. 65-66, Responding MR, Vol. 2, Tab 3, pp. 886-887.

trips and push weeks, as renewal sales was a "lead based" business, with a finite amount of prospective sales at a given time[53].

Marketing location

36. The evidence shows that sales agents had the autonomy to choose where to market.[54] Although Just Energy did not restrict where and when a sales agent sold energy on any given day, sales agents who opted to work in teams often coordinated their schedules as well as the location of where they would sell on a particular day. As a team, sales agents would consider the market intelligence together and determine the location(s) that were likely to be conducive to sales.[55] For example, sales agents considered whether another team had recently marketed in a given location, to avoid overlapping with other sales agents;[56] whether there were permit or marketing licensing requirements in order to market in a given location;[57] the frequency of do-not-solicit requests in a given location, as avoiding do-not-solicit customers was an OEB requirement;[58] and whether installer support was available in a given location.[59] In order to facilitate installer support, and given that the majority of the salesforce either had no driver's licences or no access to their own vehicle, the regional distributors and crew coordinators would try their best to support sales agents by driving sales agents to the field.[60] Under no circumstances however were sales agents ever required to travel to the field with anyone from a regional office.[61] If sales agents did not get into a vehicle with a crew coordinator or any other sales agents, this did not preclude them from going out and selling.[62]

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53 Gadoua Cross, Q. 98, Transcript Brief, Tab 3, p. 152.

54 Teixeira Affidavit, paras. 86-87 and 93-100, Responding MR, Vol. 1, Tab 1, p. 19 and pp. 26-28.

55 Teixeira Affidavit, para. 88-90, Responding MR, Vol. 1, Tab 1, pp. 24-25; Marsellus Affidavit, paras. 45-46, Responding MR, Vol. 2, Tab. 2, p. 854.

56 Nemati Cross, Q. 211-214, Transcript Brief, Tab 5, pp. 404-405; Gadoua Cross, Q. 85-87, Transcript Brief, p. 149.

57 Teixeira Affidavit, paras. 74-75, Responding MR, Vol. 1, Tab 1, p. 21.

58 Teixeira Affidavit, paras. 72-73, Responding MR, Vol. 1, Tab 1, pp. 20-21.

59 Teixeira Affidavit, paras. 77-78, Responding MR, Vol. 1, Tab 1, p. 22.

60 Teixeira Affidavit, para. 79, Responding MR, Vol. 1, Tab 1, p. 22; Nemati Cross, Q. 162-163, Transcript Brief, Tab 5, pp. 389-390.

61 Teixeira Affidavit, para. 91, Responding MR, Vol. 1, Tab 1, p .25.

62 Lavigne Cross, Q. 203-206, Transcript Brief, Tab 6, p. 461.

37. While marketing locations were discussed at the regional offices, regional distributors and crew coordinators did not "set" particular locations where sales teams were forced to market. To the extent marketing locations were addressed by regional distributors and crew coordinators, these were recommendations. Many sales agents chose not to follow these recommendations and chose to market in an alternative location.[63]

38. In addition, sales agents were not restricted to marketing in the same location as other sales agents. For example, sales agents could pursue sales within the territory of their regional distributors or could also travel to regions outside of their regional office. Notably, 200 class members were badged in more than one regional office, including regional offices in multiple provinces.[64]

39. The plaintiff's assertions that those sales agents who marketed alone or in areas that were not pre-approved by Just Energy would receive a warning from regional distributors and/or threats of termination is unequivocally false. Regional distributors could not terminate ICAs[65]. This was clearly not Ms. Borg's experience and the plaintiff and the plaintiff's affiants have been unable to point to any case in which this did in fact occur. In fact, Jennifer Borg admitted that she had *quite a bit of independence* in terms of how she determined where to sell.[66]

Sales agents were not tracked

40. Contrary to the plaintiff's assertion, Just Energy did not use iPads to monitor and track the locations of sales agents in "real time". Just Energy used iPads as a way to improve the efficiency and success rate of its sales agents in the field. For example, regional distributors, such as Daniel Gadoua,[67] could and would assign customers or "leads" through Just Energy's JEM app to help increase the efficiency of customer interactions. Prior to the implementation of iPads and JEM, Mr. Gadoua could only manually assign such leads to sales agents.[68] Further, iPads

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63 Marsellus Affidavit, para. 46, Responding MR, Vol. 2, Tab 2, p. 854; Marsellus Cross, Q. 134-135, Transcript Brief, Tab 1, p. 29.

64 Teixeira Affidavit, paras. 99-100, Responding MR, Vol. 1, Tab 1, p. 27; Exhibit "R" to Teixeira Affidavit, Responding MR, Vol. 2, Tab 1R; Exhibit "S" to Teixeira Affidavit, Responding MR, Vol. 2, Tab 1S.

65 Teixeira Affidavit, paras. 92-93, Responding MR, Vol. 1, Tab 1, p. 26.

66 Borg Cross, Q. 228, Transcript Brief, 8, pp. 650-651.

67 Dan Gadoua was the regional distributor at the Cambridge office.

68 Teixeira Affidavit, para. 83, Responding MR, Vol. 1, Tab 1, p. 23.

assisted Just Energy and its sales agents to comply with OEB regulatory requirements by identifying and avoiding "do-not-solicit" customers. In so doing, sales agents could avoid these so-called "red zones" and thereby make better use of their time by knowing the areas they should focus on for selling energy.[69]

41. In any event, Just Energy's data records show that iPad sales for door-to-door solicitation began in December 2012, the use of iPads by sales agents throughout the class period remained low. Indeed, only approximately 708 of the close to 8,000 class members used an iPad to sign up customers in Ontario during the class period. Furthermore, the number of sales agents using iPads did not necessarily correlate to the number of iPads in use, as it was common for multiple sales agents to share the same iPad.[70]

Commissions for Completed Sales

42. Class members were engaged by Just Energy to sell Just Energy products.[71] Sales agents understood that if the regulatory verification procedure mandated by the OEB was satisfied, they were considered to have completed a sale at the door and would earn a commission.[72]

43. Sales agents understood that Just Energy could not change the terms of the sale during the verification process and that once the customer signed the document, that was the customer agreement. Sales agents further understood that if a sale was not verified, it was due to an issue with the completion of the regulatory verification procedure.[73] Just Energy did not reject a customer contract for which sales agents were entitled commissions for[74] and sales agents understood that Just Energy could not change the fundamental terms of contracts with the consumers.[75]

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69 Teixeira Affidavit, para. 73, Responding MR, Vol. 1, Tab 1, p. 21.

70 Exhibit "18" to Alexander Affidavit, Plaintiff's MR, Tab 18B, Q. 1823-1824, p. 1300.

71 Exhibit "G" to Teixeira Affidavit, Responding MR, Vol. 1, Tab G, p. 294, para. 5.

72 Lavigne Cross, Q. 287-288, Transcript Brief, Tab 6, pp. 474-475.

73 Schwantz Cross, Q. 371-374, Transcript Brief, Tab 4, pp. 250-251.

74 Teixeira Affidavit, paras. 148-149, Responding MR, Vol. 1, Tab 1, p. 41.

75 Schwantz Cross, Q. 371, Transcript Brief, Tab 4, pp. 249-250.

44. Contracts were only cancelled by Just Energy if the sales agent did not complete the sale with a customer in accordance with OEB requirements, including but not limited to: if there was a failed or uncomplete verification call; if there was a missing or incorrect signing date and/or customer/billing name; an invalid billing and service address; if a phone number or authorized signature was missing; if a sales agents' name/number/signature was missing; and/or if there was illegible hand writing.[76]

PART III – LAW AND ARGUMENT

The "Salesperson" Exemption Applies to the Class Members

45. As noted at the outset, the plaintiff, in his submissions, places significant emphasis on the common law control test for distinguishing between "employees" (who are presumptively entitled to the rights and protections granted by the ESA) and "independent contractors" (who are not entitled to those rights and protections). Just Energy submits that the plaintiff's focus on this issue is misguided: regardless of the results of such an analysis, the outcome in the present case is dictated by the provisions of the Exemption Regulation. The determinative provision is as follows:

> **2.** (1) Parts VII, VIII, IX, X and XI of the Act do not apply to a person employed,
>
> ...
>
> (h) as a salesperson, other than a route salesperson, who is entitled to receive all or any part of his or her remuneration as commissions in respect of offers to purchase or sales that,
>
> (i) relate to goods or services, and
>
> (ii) are normally made away from the employer's place of business.

46. In other words, regardless of whether a person may be characterized as being "employed", many of the statutory protections afforded by the legislation relating to the time or duration of work are not extended to persons who satisfy the following criteria: (1) remuneration

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[76] Teixeira Affidavit, para. 149, Responding MR, Vol. 1, Tab 1, p. 41; Schwantz Cross, Q. 374,-375 Transcript Brief, Tab 4, pp. 250-252.

takes the form of commissions (in whole or in part); (2) those commissions are calculated on sales (or offers to purchase); (3) the sales relate to goods or services; and (4) the sales are made away from the employer's place of business. The Ontario Court of Appeal has explained that this salesperson exemption is,[77]

> ... based on the notion that employees who are not subject to the usual controls of the employer in terms of reporting for duty, or, for that matter, actually performing work cannot expect a guarantee of statutory minimum wages.

47. The evidence is clear—and the plaintiff does not dispute—that the first, second and third statutory requirements for the application of the salesperson exemption are satisfied in the case of Just Energy's sales representatives: (1) the sales agents are paid by commission, (2) that commission is calculated and paid on sales, and (3) the subject matter of those sales is Just Energy's services.

48. The plaintiff does, however, take issue with the satisfaction of the fourth criterion, arguing that the sales are not "made" where the customer's business is solicited by the sales agent, but rather are made only when Just Energy completes a confirmation call and thereafter exercises its discretion to accept a customer contract[78]. On this basis, the plaintiff argues that the sales agents are not "selling" energy delivery services on the customer's doorstep, but are only "marketing" those services there.

49. This argument has been specifically considered and rejected by American courts which have held that, notwithstanding Just Energy's ability to decline a contract where there are concerns about the customer's creditworthiness, the sales agents are, as a matter of fact and law, engaged in "making sales". In the United States, the *Fair Labor Standards Act* prescribes minimum wage and overtime rights analogous to those in the ESA, but also includes an exemption for a person engaged as an "outside salesman".[79] Regulations under the FLSA clarify this term by providing that "making sales" must be the person's "primary duty" and that such a

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[77] *Evangelista*, *supra* note 1 at para. 36, Book of Authorities of the Defendants, Tab 1, quoting with approval *Isomeric Inc.*, [2000] O.E.S.A.D. No. 194 (O.L.R.B.) at para. 22, Book of Authorities of the Defendants, Tab 3.

[78] Although the ICA allowed Just Energy to conduct credit checks, Just Energy did not conduct credit checks in Ontario.

[79] 29 U.S.C. § 213(a)(1) ["**FLSA**"].

person must be "customarily and regularly engaged away from the employer's place or places of business in performing such primary duty".[80] The plaintiff in *Flood v. Just Energy Mktg. Corp.*[81]—like the plaintiff in the present case—argued that this requirement had not been satisfied; the Second Circuit Court of Appeals disagreed:

> Even viewing the facts in the light most favorable to Flood, they show that Flood was undoubtedly "making sales" within the scope of the outside salesman exemption. Flood spent most of every day going from door to door in an effort to persuade people to buy Just Energy's products. He was not just promoting these products or advertising them; he was trying to persuade specific customers to sign up then-and-there for an energy plan. Many customers did. Flood was paid only if he successfully persuaded a customer to sign a contract to buy from Just Energy.
>
> Nor was anyone else at Just Energy selling to Flood's customers or taking any kind of sales-oriented step toward completing the transaction. Although some of Flood's customer sign-ups did not ultimately receive Just Energy's product, this was only for technical and legal reasons involving a customer's later change of mind, failure of creditworthiness, or inability to change energy providers because of a "slam block" on the account. For those customers who received Just Energy products, they received them because Flood—and Flood alone—convinced them to buy Just Energy's products.[82]

50. In the result, the court in *Flood* found that the outside salesman exemption applied, and granted summary judgment in favour of Just Energy. The court reached the same conclusion in the earlier case of *Dailey v. Just Energy Mktg. Corp.*[83] In that case, the plaintiff brought a class action seeking overtime pay and minimum wage payments for Just Energy sales agents under provisions of the *California Labor Code*; that legislation also included an "outside salesperson" exemption analogous to that in the FLSA. Once again, the court rejected the "no sales" argument, and granted summary judgment in favour of the defendant:[84]

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[80] 29 C.F.R. § 541.500(a).

[81] 904 F.3d 219 (2d Cir. 2018), Book of Authorities of the Defendants, Tab 4.

[82] *Ibid* at page 229.

[83] 2015 U.S. Dist. LEXIS 97103 (N.D. Cal.) [***"Dailey"***], Book of Authorities of the Defendants, Tab 5.

[84] See also, *Evangelista v. Just Energy Mktg. Corp.*, 2018 U.S. Dist. LEXIS 222579 (C.D. Cal), Book of Authorities of the Defendants, Tab 6, where the court again dismissed such an action on the grounds that the salesperson exemption applied.

> Plaintiff contends that she never actually sold any services because the signed applications could be rescinded under certain circumstances—for example, if the customer cancelled the contract, if the customer failed a credit check, or if the customer was already enrolled with another supplier. The Court finds that Just Energy's retention of the right to cancel a contract based on the third-party verification call or a credit check—or any other reason—does not change the fact that Plaintiff's job duties involved the "selling" of or "obtain[ing] orders or contracts for" Just Energy's services. [...]
>
> Adopting Plaintiff's argument would exalt form over substance. "If an employee directs his efforts at persuading a particular customer to purchase a product and is compensated on the basis of his success in doing so then the employee is clearly engaged in sales activity and not mere general promotion of the product. ... This is particularly so when ... it has not been alleged that any other employee will affirmatively make further contact with the customer to consummate the sale."[85]

51. The plaintiff in the present case seeks to rely on the decision in *Wilkins v. Just Energy Grp. Inc.*, where similar claims were brought under the *Illinois Minimum Wage Law*, which once again included an "outside salesperson" exemption. As in *Flood* and *Dailey*, Just Energy brought a motion for summary judgment on the grounds that the exemption applied to the members of the proposed class, but unlike in those cases, the motion was dismissed. The different result is attributable to the fact that the evidence in *Wilkins* demonstrated that a significant percentage of the "sales" ostensibly completed by the sales agents were not approved by Just Energy and did not result in commission payments. Distinguishing the earlier decision in *DeWig v. Landshire, Inc.*,[86] which involved an individual who sold food products to convenience stores and schools, the court in *Wilkins* wrote:

> The *DeWig* opinion does not indicate that any of the transactions initiated by DeWig were cancelled.
>
> In contrast, the door-to-door workers in the instant case were not authorized to complete a transaction. Instead, the customer had to pass a credit check and the defendants had unlimited authority to reject Agreements. Although the defendants stress that most applicants passed the credit check (5.13% in 2013 and 8.33% in

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[85] *Dailey, supra* note 83 at pages 8-9, Book of Authorities of the Defendants, Tab 5.

[86] 666 N.E.2d 1204 (Ill. App. 1996), Book of Authorities of the Defendants, Tab 7.

> 2012), the record shows that of the 5,260 applications for gas service generated by the Westmont office in 2012, 2,084 Agreements were cancelled pre-flow (including the 8.33% that were cancelled due to credit issues) and 1,396 of Agreements were cancelled post-flow. The defendants do not explain why so many Agreements were canceled.
>
> The percentage of cancellations is not, as the defendants imply, de minimis. Moreover, post-flow cancellations are outside the control of the door-to-door workers. Given the number of cancellations, *DeWig* is inapposite. Fact questions exist about whether the door-to-door workers who obtained Agreements in fact "ma[de] sales or obtain[ed] orders or contracts for services" that were consummated. [citation omitted][87]

52. The court found that Just Energy was not entitled to summary judgment because the evidence adduced on the motion was insufficient to enable the court to understand "why so many Agreements were canceled". Given that fewer than 50% of customers successfully solicited by the class members ultimately entered into a contractual relationship with Just Energy, this called into question whether the sales agents were genuinely engaged in "making sales". In the result, the court held that the matter had to proceed to trial, with the court finding that the applicability of the outside salesperson exemption "cannot be resolved on this record".[88]

53. Of course, neither the decisions in *Flood* and *Dailey*, nor that in *Wilkins*, is binding upon this Court. Nevertheless, Just Energy submits that this court should adopt the analysis in *Flood* and *Dailey*, for the following reasons:

(a) *Flood* and *Dailey* were summary judgment decisions in which the courts *decided* the question of whether or not the outside salesperson exemption was applicable to Just Energy sales agents. *Wilkins* decided only that the record before the court was insufficient to support summary judgment;

(b) The decision in *Wilkins* turned on the unusually high number of contract cancellations. The court appeared to accept—without ultimately deciding the issue—that where a sales agent has a less than 50% chance of earning a

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[87] *Wilkins v. Just Energy Grp. Inc.*, 308 F.R.D. 170 (N.D. Ill.) at page 180, Book of Authorities of the Defendants, Tab 8.

[88] *Ibid* at page 182.

commission on any given transaction, there might be reasonable arguments that that person is not "making sales". Even if this reasoning were sound, there is no evidence of such an exceptionally low contract approval rate in the present case;

(c) In any event, the analysis in *Wilkins* is flawed as the rate of cancellation is irrelevant to the question of whether the sales agents are engaged in "making sales". As the decisions in *Flood* and *Dailey* illustrate, the relevant consideration is whether there is *anyone else* in the Just Energy organization that could be regarded as making the sales. In neither case was the rate of contract acceptance or cancellation discussed because, regardless of the rate of contracts that were sold, any contracts that were sold were sold by the sales agent *alone*;

(d) *Flood* was decided by a unanimous three-member panel of the Second Circuit Court of Appeals, and thus is of greater precedential value that the District Court decision in *Wilkins*; and

(e) *Flood* and *Dailey* are more recent authorities than *Wilkins*.[89]

54. For the foregoing reasons, the sales agents comprising the class in the present case satisfy all four statutory criteria for the application of the salesperson exemption in para. 2(1)(h) of the Exemption Regulation. Consequently, Parts VII, VIII, IX, X and XI of the ESA do not, *prima facie*, apply to the Class Members.

The "Route Salesperson" Exception Does Not Apply to the Class Members

55. The salesperson exemption is, however, subject to a "route salesperson" exception. While this term is not defined in the Exemption Regulation, it does have a well-established and commonly understood meaning in the field of human resources. This term, properly interpreted, has no application to Just Energy's sales agents.

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[89] Following the decision in *Flood*, Just Energy moved to have the court reconsider its decision in *Wilkins*: 2019 U.S. Dist. LEXIS 47486 (N.D. Ill.), Book of Authorities of the Defendants, Tab 9. The court denied the motion, finding that the different result was attributable to the different record, and the factual issues in *Wilkins* (that is, the low contract approval rate) which were absent in *Flood*.

56. A route salesperson—formerly, a "route salesman", and now more commonly designated as a "route sales representative"—is most often a worker who drives an employer-owned vehicle to deliver the employer's products to established customers along a specified route on a prescribed schedule.[90] The sales function is generally ancillary to the delivery function; while the individual is generally expected to encourage established customers to increase the volumes purchased or expand the range of products purchased, the principal responsibility of a route salesperson is to fill existing orders and maintain relationships with existing customers.

57. The case law confirms this understanding of the term "route salesperson". For example, in a 2011 Ontario Workplace Safety and Insurance Appeals Tribunal decision, the Tribunal recounted the duties and responsibilities of a worker employed as a route salesman for a linen supplier:[91]

> The worker testified that he became a "route salesman" with the employer in 1989. His responsibilities included loading the delivery truck in the morning with clean linens, laundry, mats, etc., and delivering these packages to his customers. At the customer's location, he would also have to pick up bags of soiled linens, mats, etc. He was responsible for collecting cash payments, or arranging the customer's charge account. He would return to the company depot at the end of the day and sort the products. He worked in three small cities in Ontario from 1989 to 2001. In January 2001, the company transferred him to routes in a larger city. He worked on a salaried basis, full-time, five days a week, approximately eight or more hours a day. He would begin around 7 am each day. He had other responsibilities including selling other products to his customers (such as toilet paper), and to sign-on new customers. Once a month or so, he would have to go in to the depot and count inventory. He recalled making approximately 40 stops a day during a regular route. The worker testified that having to work in the larger city as of January 2001 was more difficult, because of such factors as increased traffic and more difficulty parking. The worker explained that he was expected to complete his route within a certain time. The driver who returned the soiled linens to another

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[90] Tellingly, the position is also frequently referred to as a "route sales driver": see, for example, *International Union of Operating Engineers, Hoisting & Portable & Stationary, Local 870 v. Linde Canada Limited*, 2010 CanLII 1715 (Sask. L.R.B.) at para. 13, Book of Authorities of the Defendants, Tab 10.

[91] *Decision No. 1724/11*, 2011 O.N.W.S.I.A.T.D. 2860 at para. 39, Book of Authorities of the Defendants, Tab 11.

> location would be waiting at the depot at the end of the day to collect the soiled linens.

58. In *Canadian Union of Operating Engineers and General Workers (CUOE) v. Red Carpet Food Systems Inc.*,[92] the Ontario Labour Relations Board considered an application to certify a bargaining agent to represent persons employed by a company that operated and maintained vending machines. The proposed bargaining unit included the employer's "route sales representatives". The Board described those employees as follows:

> The duties of route sales representatives include filling and cleaning vending machines, merchandising, maintaining the machines at various locations, completing paperwork, and driving a truck to and from various locations. Approximately ninety percent (90%) of their workday is spent outside of the employer's premises. Their hours of work generally commence at times ranging from 4:00 a.m. to 6:00 a.m. and finishing from 12:00 p.m. to 2:00 or 3:00 p.m. They do not have a set lunch period. They wear vending staff uniforms during the course of their shift. Route sales representatives are generally paid a combination of salary and commission except during the initial training period when they are paid exclusively salary. They also receive an on-call premium when on-call on the weekends from time to time. Route sales representatives are required to have a valid driver's license. They receive training concerning how to fill, clean and repair vending machines and are instructed on how to merchandise vending machines and to complete the necessary paperwork.

59. And in *Chester v. Pepsi-Cola Canada Ltd.*,[93] the Saskatchewan Court of Queen's Bench considered the wrongful dismissal claim of a plaintiff who had been employed by the defendant as a route sales representative. That position was described in the following terms:

> Chester started work in February of 1983 as a route sales representative ("RSR") in the District of Prince Albert, Saskatchewan. His job was to deliver and maintain stock of the defendant's products at various retail locations in Prince Albert and district. Chester provided these services for nineteen years and eight months until his termination on October 30, 2002.

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92 2001 CanLII 5016 (O.L.R.B.) [***"Red Carpet"***] at para. 7, Book of Authorities of the Defendants, Tab 12.

93 2005 SKQB 110 at paras. 2-4, Book of Authorities of the Defendants, Tab 13. See also, *Matthews v. Hostess Foods Products Ltd.*, 2009 ABQB 14 at para. 2, Book of Authorities of the Defendants, Tab 14: "Jeffrey Sutton had been working as a route sales representative for Hostess Frito Lay since September, 1999. It was his job to provide Hostess Frito Lay products to stores within his assigned district."

Chester's employment responsibilities were described by Shaun Eaton ("Eaton"), Chester' supervisor, as follows:

- To create and manage the customer relationship;
- To manage the customer's inventory levels;
- To load product from warehouse on to delivery truck;
- Deliver product to stores on his route;
- Arrange charge accounts;
- Collect payment for product;
- Stock display shelves with product in individual stores.

Chester was paid a commission based on his route sales.

60. With this understanding of the term "route salesperson" it is readily apparent why the Legislature has seen fit to create an exception for such persons from the salesperson exemption. Such an employee (1) will often receive at least some part of his or her compensation in the form of commissions; (2) these commissions are paid on sales; (3) the sales are of the employer's goods; and (4) these sales activities (as well as the bulk of the employee's other functions) are performed away from the employer's place of business. In other words, such an employee satisfies the formal criteria for the salesperson exemption despite the fact that, in most respects, such an employee is subject to a degree of control comparable to that of any other hourly worker.

61. That is, the route salesperson position—unlike the ordinary traveling commission salesperson position—is one in respect of which the employer dictates the length of time that the employee must work, the employer dictates where, how and for whom that work is performed, and the employer is able to monitor and evaluate whether or not the work has been adequately performed within the time allotted. The position is essentially that of an hourly employee paid to deliver the employer's products to customers. While there may be a secondary "sales" component to such a position, to allow this ancillary function to dictate the employee's classification under the Exemption Regulation would be for the tail to wag the dog.

62. While the foregoing cases did not address the meaning of the term "route salesperson" in the specific context of the ESA and the Exemption Regulation, these same principles have been applied in this context in other cases. For example, in *Re Crestway Electronics Ltd.*,[94] an ESA adjudicator considered claims for termination pay and vacation pay asserted by a claimant who drove a company-supplied vehicle to attend weekly or bi-weekly at the business premises of specified customers primarily for the purpose of maintaining product stock levels at those locations. Because the claimant received part of his compensation in the form of commissions he clearly fell within the salesperson exemption. However, the adjudicator also found that the route salesperson exception applied, writing:

> I find as a fact that the job ... was one which by its very nature involved an extensive amount of delivery to pre-determined locations, and that by its very nature it required the Claimant to treat it as a "route sales" job. That it involved a considerable sales component does not change the fact that it was primarily directed to the service of a pre-determined group of stores, and that such service involved regular restocking visits to each of these stores. I find that the job left little opportunity for the solicitation of new customers (at least during regular working hours), and that it was such that it required any employee who wished to accomplish all the restocking visits to perform the job on a "route" basis.[95]

63. The Ontario Labour Relations Board more recently applied these same principles to reach a contrary conclusion in *VanGrootel v Advance Beauty Supply Limited.*[96] The applicant sold the defendant's beauty products throughout a defined sales territory. The defendant provided the applicant with a list of existing customers who the applicant was expected to visit on a regular basis. While the applicant sometimes delivered the defendant's products on such visits, most often she merely negotiated sales following which the products would be shipped directly from the defendant to the customer. In addition to maintaining such existing accounts, the applicant was also expected to grow the business with those customers and find and develop new customers within her territory. Because of the comparative significance of the latter

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[94] [1992] O.E.S.A.D. No. 132 ["***Re Crestway***"], Book of Authorities of the Defendants, Tab 15. See also, *DMG Canada Inc. v. Teague*, 2011 CanLII 63529 (O.L.R.B.) at para. 20, Book of Authorities of the Defendants, Tab 16.

[95] *Re Crestway*, *supra* note 94 at para. 28, Book of Authorities of the Defendants, Tab 15.

[96] 2016 CanLII 17209 (O.L.R.B.), Book of Authorities of the Defendants, Tab 17.

functions, and the manner in which the applicant performed them, the Board found that she was not a route salesperson:[97]

> I find that while Advance did provide Ms. VanGrootel with a client list, Advance did not require Ms. VanGrootel to visit these clients on a particular day or at a specific time. Advance provided Ms. VanGrootel with the client list so Ms. VanGrootel could identify which beauty and nail salons were existing clients of Advance. There was no evidence to suggest the client list included a direction from Advance to sell to these clients on a particular basis or schedule. Rather, Ms. VanGrootel was afforded the discretion to determine when and where she met with these clients.
>
> Ms. VanGrootel was also not required to follow a particular route while working as a [Distributor Sales Consultant]. When traveling throughout her sales territory, Ms. VanGrootel was not directed to meet with clients in a particular order or along a specific route. Ms. VanGrootel had the autonomy to decide which route she took when selling to clients in her sales territory.
>
> In light of the foregoing, I find that Ms. VanGrootel retained control over when and where she worked and the route she took when traveling throughout her sales territory. These findings are indicative of Ms. VanGrootel fitting within the definition of a salesperson as provided by the Act, not a route salesperson.

64. The foregoing cases demonstrate that there are two key indicia of a route salesperson position: (1) the delivery of the employer's products (whether goods already purchased by the customer, or goods that the customer accepts on consignment) constitutes a significant component of the worker's responsibilities; and (2) the worker's efforts are predominantly directed at servicing and supplying existing customers rather than developing new customers. Of course, in evaluating the importance of the worker's various responsibilities, both of these indicia will fall along a spectrum; it is, however, submitted that if a salesperson does not deliver *any* products, and the salesperson is not engaged in servicing *any* existing customers, that person *cannot possibly* be characterized as a "route salesperson".

65. Just Energy submits that Ontario Labour Board Decisions which have found workers to be route salespersons absent these indicia were wrongly decided and should not be

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[97] *Ibid* at paras. 31-33 and 36-37.

followed. This line of cases, although not extensive, began with the decision in *Orlov v. Amato*[98] where, it is submitted, the highly egregious facts led the Board into error. *Orlov* involved children aged between 11 and 13 who were enlisted to work for up to 12 hours per day selling boxed chocolates from door-to-door. The only compensation promised was a 50 cents per box commission, and after weeks of work the employer refused to pay even the commissions owing. It is not, therefore, surprising that the Board was sympathetic to the children and was inclined to grant their claim for minimum wage and vacation pay. However, the grounds upon which the Board reached this conclusion are not consistent with the legislation; the principal basis for the Board's conclusion was the following:[99]

> The sales in this case are conducted according to "routes" which are established and determined by the employer and not the employee. To this extent, the term "route" as an adjective to describe the nature of the sales work performed, corresponds to the plain language meaning of the word.

66. With respect, it cannot be the case that the route salesperson exception applies to every salesperson who follows a "route" in seeking to effect sales.[100] Indeed, it is impossible for a commission salesperson making sales away from the employer's place of business to move from one prospective customer to another without following a "route" in the broad sense. The Board's appeal to dictionary definitions is mistaken; while the term "route" can, in some contexts, be a synonym for "path" or "course", the relevant definition in the employment context is the following: "a specific itinerary, round, or number of stops regularly visited by a person in the performance of his or her work or duty"; examples given are "a newspaper route; a mail carrier's route".[101] The key is that such a route is followed "regularly" and is defined by the specific customers comprising the route. A salesman is not a route salesman simply because he or she moves from point A to point B to point C seeking to effect sales. A door-to-door salesperson who approaches every home along a residential street as a potential sale, and who does so along a different street each working day, is not following a "route" in the relevant sense.

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98 2003 CanLII 2984 (O.L.R.B.), Book of Authorities of the Defendants, Tab 18.

99 *Ibid* at para. 44.

100 Indeed, the decision in *VanGrootel* confirms this: it was clear that the applicant in that case followed certain "routes" to travel between customers.

101 https://www.dictionary.com/browse/route

67. The erroneous reasoning in *Orlov* was subsequently applied—and, indeed, its errors exacerbated—in *Hayat v. Clegg Campus Marketing*.[102] The worker in *Hayat* was engaged to solicit credit card applications from members of the public at kiosks that the employer had contracted to place in stores, malls and on university campuses. The employer dictated the particular kiosk location that the worker was to report to, and prescribed the number of hours that he was to work at that location. The worker's supervisor would call or visit approximately three time per day to monitor his work and "ensure that Mr. Hayat was at his station and performing the work". The worker was not permitted to solicit credit card applications at any place other than his assigned kiosk. The worker, seeking to enforce the rights of an hourly employee under the ESA, asserted two arguments. First, that each kiosk, having been rented by the employer for the purposes of its promotional business, constituted the employer's place of business, such that the "salesperson exemption" did not apply. Second, that the worker was a "route salesman". The Board found it unnecessary to deal with the first argument, as it found in the worker's favour on the second:[103]

> What ever [sic] else it may mean, the term "route salesperson" captures a salesperson who follows a specified route of customer locations over the course of a day where the employer exercises substantial control over the hours of work and the manner in which the work is performed. In this case, Clegg controlled Mr. Hayat's hours of work, the manner in which he performed the work and directed him to attend at one location on any given day. A salesperson who is directed by his or her employer to attend at one location is under even greater control than a salesperson who is directed to attend at several different locations during the course of the day. *In my view, one location can, therefore, constitute a "route"* within the meaning of section 2(1)(h) of Ont. Reg. 285/01. In the result Mr. Hayat is a "route salesperson" and exempted from the application of the section. [emphasis added]

68. With all due respect, this is a perverse interpretation of the term "route salesperson"; unlike *Orlov*, which merely applied the *wrong* dictionary definition of "route", *Hayat* goes further and applies the *antonym* of "route": a point is not a line; a single place cannot constitute a route even on the most expansive interpretation of that term. Admittedly, the worker in *Hayat* was not a person to whom the salesperson exemption was properly applicable;

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[102] 2006 CanLII 19392 (O.L.R.B.), Book of Authorities of the Defendants, Tab 19.

[103] *Ibid* at para. 11.

however, the correct analysis for reaching this conclusion was to accept the worker's first argument, and recognize that the kiosks to which he was assigned were, for the purposes of the legislation, the employer's place of business.

69. Two more recent decisions are effectively perpetuations of the errors in *Orlov* and *Hayat*, respectively. In *Schiller v. P & L Corporation Ltd.*,[104] the worker sold newspaper subscriptions from door-to-door. Because her supervisor drove the worker to the locations where she was to perform this work, and provided her with a list of current newspaper subscribers (who were, therefore, not to be solicited), the Board found that, as in *Orlov*, the worker followed a "route" and was therefore a "route salesperson".[105] Most recently, in *Kognitive Marketing Inc. v. Director of Employment Standards*,[106] the Board considered workers who were placed in the employer's clients' retail stores, to market the clients' credit cards to members of the public.[107] The Board applied the decision in *Hayat*, and held that, when a worker was stationed in a client's store, that store constituted a "route".[108]

70. In addition to applying tortured and erroneous interpretations of the term "route", and ignoring the well-settled meaning of the term "route salesperson", the foregoing cases were also informed by an evaluation of the degree of control exercised by the employer in each case. Even if this is an appropriate approach to the application of the "route salesperson" exception—and a number of Board decisions have suggested it is not, as the term "control" does not appear in the Exemption Regulation[109]—the cases are distinguishable from the present case. Specifically:

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104 2012 CanLII 12611 (O.L.R.B.), Book of Authorities of the Defendants, Tab 20.

105 *Ibid* at paras. 18-20.

106 2015 CanLII 61657 (O.L.R.B.) [***"Kognitive"***], Book of Authorities of the Defendants, Tab 21.

107 For example, the workers were placed in Canadian Tire stores, and were paid a commission for each Canadian Tire credit card account that they successfully solicited from customers passing through the store.

108 *Kognitive*, *supra* note 106 at para. 22, Book of Authorities of the Defendants, Tab 21.

109 See, for example, *Knox Insurance Brokers Ltd. (Re)*, [1996] O.E.S.A.D. No. 5 at paras. 148-49, Book of Authorities of the Defendants, Tab 22: "While the issue of control is implicit in Adjudicator Randall's second criterion, I am of the view that the degree of control is not the only test, as the language used in the regulation does not include any reference to control. ... I find that it would be inappropriate to substitute a test of control for the clear language in the regulation[.]" Indeed, it appears that the entire purpose behind enacting the exemption is to establish bright-line categories of workers who are exempt from the protections of the ESA, and obviate the type of microscopic measurements of "control" and independence that make the application of the employee v. independent contractor test so cumbersome.

(a) In both *Hayat* and *Kognitive*, the workers were required to work at fixed locations where they were subject to routine monitoring and supervision by their employers and, in the case of *Kognitive*, by the client of the employer for whom the services were being performed. These were not, therefore, true independent and self-directed commission salespersons whose employers "cannot control or monitor the hours employees work or how they do their job";[110]

(b) In *Orlov*, the children were necessarily under the direct supervision and control of their employer *because they were small children.*[111] In essence, the workers lacked the legal capacity to be independent and self-directed salespersons;

(c) Unlike the Just Energy sales agents in the present case, the worker in *Schiller* was strictly prohibited from soliciting at any addresses not specifically approved by the employer. There was a great deal of concern that existing newspaper subscribers would be annoyed if they were solicited, and would cancel their subscriptions as a result. Accordingly, every residential address to be solicited had to be confirmed by the employer as a non-subscriber in advance; this effectively made it impossible for the worker to solicit sales anywhere other than the neighbourhood stipulated by the employer. This constitutes a far greater degree of control than that exercised over the Class Members who were, at most, transported to a particular neighbourhood if they so chose.

71. For all of the foregoing reasons, Just Energy submits that this Court ought not to be guided by the decisions in *Orlov*, *Hayat*, *Schiller* and *Kognitive*. With respect, these decisions have distorted and misapplied the "route salesperson" exception to reach the Board's intended outcome, that the workers in each case were not exempt from the ESA's protections.[112] Needless to say, these Board decisions are not binding on this Court, and the errors in their reasoning are

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[110] *Evangelista*, *supra* note 1, Book of Authorities of the Defendants, Tab 1.

[111] It appears that the employer may not, in fact, have supervised the children and ensured their safety, but it is understandable that the Board was not inclined to reward the employer for this neglect.

[112] As noted, the Ontario Labour Relations Board has not only considered the meaning of "route salesperson" for the purpose of interpreting the Exemption Regulation under the ESA, but has also considered this term in the context of union certification: *Red Carpet*, *supra* note 92, Book of Authorities of the Defendants, Tab 12. Strikingly, the Board had no difficulty recognizing the ordinary, well-established meaning of the term in the certification context.

all the more reason for this Court to reaffirm the interpretation of "route salesperson" intended by the Legislature, and illustrated in cases like *Crestway Electronics* and *VanGrootel*.

72. In any event, for the reasons discussed, these cases are distinguishable. The degree of control exercised by Just Energy over the sales agents is considerably less than in any of *Orlov*, *Hayat*, *Schiller* or *Kognitive*.

Just Energy is Entitled to Summary Judgment

73. The foregoing demonstrates that the Class Members fall within the salesperson exemption in the Exemption Regulation, and do not fall within the route salesperson exception to that exemption. Accordingly, Parts VII, VIII, IX, X and XI of the ESA do not apply to the Class Members, and certified common issues 1, 4, 5, 6, 7, 8, 10, 11 and 12—which are effectively founded on these statutory rights—must be decided in Just Energy's favour.

74. It is well established that, where the evidence on a summary judgment motion demonstrates that there are no genuine issues requiring a trial, judgment may be granted in favour of either party. That is, although the plaintiff brings this motion alleging that the record before the Court is sufficient for the Court to determine the common issues in favour of the Class Members, it is equally open to the Court to decide those issues against the Class Members and in favour of Just Energy.[113]

Class Members Were Not Engaged in "Insurable" or "Pensionable" Employment

75. Just Energy recognizes that neither the *Employment Insurance Act*[114] nor the *Canada Pension Plan*,[115] nor the regulations under either statute, include any salesperson exemption analogous to that prescribed in the Exemption Regulation under the ESA. Nevertheless, it is submitted that the determination under the ESA should be applied under each of these federal statutes. Although the four-part salesperson exemption is simpler and more fact-based than the common law control test, they are ultimately directed at the same question:

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[113] *Whalen v. Hillier* (2001), 53 O.R. (3d) 550 (C.A.) at para. 13, Book of Authorities of the Defendants, Tab 23; *Klein v. Dick*, 2016 ONCA 8 at para. 5, Book of Authorities of the Defendants, Tab 24.

[114] S.C. 1996, c. 23 ["**EIA**"].

[115] R.S.C. 1985, c. C-8 ["**CPP**"].

whether the worker performs his or her work in a manner that makes time-based statutory provisions inappropriate and unworkable.[116] It is therefore submitted that if this Court determines that the Class Members are "salespersons" within the meaning of the Exemption Regulation, they must be deemed to be independent contractors for the purposes of the EIA and CPP, and therefore not engaged in "insurable employment" or "pensionable employment", respectively.

76. In the alternative, if this Court concludes that it must, for these federal statutes, repeat the analysis applying the common law control test, Just Energy submits that the result is the same. The control test has been applied in a number of cases decided under the EIA dealing with persons performing door-to-door sales services and the question of whether such persons are performing insurable work. The analysis in these cases is instructive because the decisions demonstrate that certain practical limitations or restrictions that may arise by virtue of the nature of such services should not be construed as "control" exerted by the party paying compensation for those services. For example:

(a) Where, as in most cases, the salesperson must periodically furnish information to the payor about completed contracts in order that the payor can confirm and calculate the salesperson's commission entitlement, this "reporting obligation" cannot be construed as a mechanism of control or supervision;[117]

(b) The salesperson is not subject to "control" in the relevant sense simply because the payor has the right to dictate the prices at which the subject products or services are to be sold;[118]

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[116] The Employment Insurance Act is clearly such a time-based scheme, as a person entitlement to benefits is calculated based on the number of hours worked: S.C. 1996, c. 23.

[117] *Lazowski v. Canada (Minister of Revenue)*, [2002] T.C.J. No. 517 (T.C.C.) [***"Lazowski"***] at para. 10, Book of Authorities of the Defendants, Tab 25; *Manhattan Multi-Marketing Inc. v. Canada (Minister of Revenue)*, [1991] T.C.J. No. 347 (T.C.C.) [***"Manhattan"***] at page 3, Book of Authorities of the Defendants, Tab 26; *Fatt v. Canada (Minister of Revenue)*, [2001] T.C.J. No. 239 (T.C.C.) [***"Fatt"***] at para. 8, Book of Authorities of the Defendants, Tab 27; *Clientel Canada Corp. v. Canada (Minister of National Revenue)*, [1999] T.C.J. No. 678 (T.C.C.) [***"Clientel"***] at para. 22, Book of Authorities of the Defendants, Tab 28; *Show Promotions and Personnel Inc. v. Canada (Minister of Revenue)*, [2003] T.C.J. No. 696 (T.C.C.) [***"Show"***] at para. 13, Book of Authorities of the Defendants, Tab 29; *Combined Insurance Company of America v. Canada (National Revenue)*, 2007 FCA 60 [***"Combined"***] at para. 66, leave to appeal denied 2007 CanLII 45658 (SCC), Book of Authorities of the Defendants, Tab 30.

[118] *Clientel*, *supra* note 117 at para. 21, Book of Authorities of the Defendants, Tab 28.

(c) The fact that the payor holds periodic meetings and encourages sales personnel to attend those meetings for motivation, or to provide information about the products and services being sold and about proven sales techniques, does not support a finding of "control".[119] Similarly, the fact that a salesperson believes that he or she "should" attend such meetings, and elects to do so, should not be construed as a contractual obligation to do so;[120]

(d) A sales contractor is not "compelled" to attend sales meetings (for the purposes of applying the control test) if the motivation for attending such meetings is to facilitate the selection of a more desirable sales territory or a more advantageous sales route, or to obtain sales leads developed by the payor;[121]

(e) Similarly, where the payor makes available a sales team structure to provide support and motivation to individual members of the team, the salesperson's choice to participate in that structure cannot be construed as an exercise of control over the salesperson;[122]

(f) The fact that the payor keeps records of routes or territories where sales activities have recently been conducted, and encourages the salesperson to work in other areas to avoid duplication and increase the chances of successful sales, does not constitute a relevant restriction on the salesperson's freedom to choose his or her sales territory;[123]

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[119] *Combined, supra* note 117 at paras. 57-59, Book of Authorities of the Defendants, Tab 30.

[120] *Ivanov v. Canada (Minister of Revenue)*, [2000] T.C.J. No. 236 (T.C.C.) [***"Ivanov"***] at para. 6, Book of Authorities of the Defendants, Tab 31; *740944 Alberta Ltd. v. Canada (Minister of Revenue)*, [1999] T.C.J. No. 652 (T.C.C.) [***"740944"***] at paras. 11-12, Book of Authorities of the Defendants, Tab 32; *Starsky Enterprises Inc. v. Canada (Minister of Revenue)*, [2008] T.C.J. No. 144 (T.C.C.) [***"Starsky"***] at paras. 9, 14, 17, Book of Authorities of the Defendants, Tab 33; *Haddad v. Canada (Minister of Revenue)*, [1996] T.C.J. No. 1436 (T.C.C.) [***"Haddad"***] at para. 20, aff'd [1998] F.C.J. No. 581 (C.A.), Book of Authorities of the Defendants, Tab 34.

[121] *Ivanov*, *supra* note 120 at para. 4, Book of Authorities of the Defendants, Tab 31; *Haddad*, *supra* note 120 at para. 21, Book of Authorities of the Defendants, Tab 34.

[122] *Clientel*, *supra* note 117 at para. 15, Book of Authorities of the Defendants, Tab 28.

[123] *740944*, *supra* note 120 at para. 13, Book of Authorities of the Defendants, Tab 32; *Starsky*, *supra* note 120 at paras. 13 and 17, Book of Authorities of the Defendants, Tab 33; *Clientel*, *supra* note 117 at para. 25, Book of Authorities of the Defendants, Tab 28; *Combined*, *supra* note 117 at paras. 68-69, Book of Authorities of the Defendants, Tab 30.

(g) More generally, where the payor promulgates guidelines respecting the sales practices that sales personnel are encouraged to follow, the choice to follow those guidelines cannot be construed as "control". For example, the salesperson is not subject to the payor's control simply because the payor provides a sample sales "pitch" which the salesperson is free to use or deviate from;[124]

(h) Certain restrictions on accepting other engagements or the manner in which sales are conducted for the payor are, as a practical matter, unavoidable and will not be construed as "control" over the salesperson's activities. For example, notwithstanding the salesperson's independence, the payor may reasonably prohibit the sale of competing products or services,[125] and can impose restraints on the sales practices to be used to ensure that the products and services sold are not disparaged and their goodwill is not impaired;[126]

(i) Similarly, if a restriction on the salesperson's conduct is imposed by applicable laws—such as the obligation to wear and exhibit photo identification—this cannot be construed as control by the payor simply because the payor institutes measures or takes steps to ensure the salesperson's compliance with those laws; and[127]

(j) The fact that the relationship may be terminated by the payor if the salesperson exhibits a demonstrated inability to generate sales does not constitute a material element of "control".[128]

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[124] *Show*, *supra* note 117 at para. 12, Book of Authorities of the Defendants, Tab 29; *Greenshield Windows and Doors Ltd. v. Canada (Minister of Revenue)*, [2015] T.C.J. No. 51 (T.C.C.) at paras. 23-24, Book of Authorities of the Defendants, Tab 35; *Combined*, *supra* note 117 at para. 65, Book of Authorities of the Defendants, Tab 30.

[125] *Ivanov*, *supra* note 120 at para. 14, Book of Authorities of the Defendants, Tab 31; *740944*, *supra* note 120 at para. 19, Book of Authorities of the Defendants, Tab 32; *Starsky*, *supra* note 120 at para. 8, Book of Authorities of the Defendants, Tab 33.

[126] *Starsky*, *supra* note 120 at para. 15, Book of Authorities of the Defendants, Tab 33; *Clientel*, *supra* note 117 at para. 33, Book of Authorities of the Defendants, Tab 28.

[127] *Lazowski*, *supra* note 117 at paras. 7 and 11, Book of Authorities of the Defendants, Tab 25; *Show*, *supra* note 117 at para. 7, Book of Authorities of the Defendants, Tab 29; *Combined*, *supra* note 117 at paras. 41 and 64, Book of Authorities of the Defendants, Tab 30.

[128] *740944*, *supra* note 120 at para. 18, Book of Authorities of the Defendants, Tab 32.

77. It is also significant that the analytical approach under the federal statutes gives much greater weight to the manner in which the parties have characterized their relationship in a written contract. Because section 5 of the ESA prohibits parties from contracting out of the statute's protections, and declares void any contractual provision purporting to do so,[129] written employment contracts necessarily carry little weight in a control test analysis under the provincial scheme. No such prohibition appears in the federal legislation; accordingly, a written contract characterizing a worker's status will be the "prime factor" in the analysis:[130]

> The general principle that commends itself to me arising out of this appeal and the recent jurisprudence noted is that under a given set of circumstances within which there are certain aspects of 'employee', some others of 'independent contractor', and even others that are somewhat ambiguous, that the intentions and objectives of the parties, if clearly and unequivocally stated and agreed upon, should be a prime factor in the determination of the Court.

78. In addition to the Tax Court of Canada cases cited above, which demonstrate that persons engaged in door-to-door sales will often be found to be independent contractors, that determination has been made with respect to Just Energy's sales agents, specifically. In a decision rendered in 2012, the Workplace Safety and Insurance Appeals Tribunal, after considering the testimony of several sales agents as well as their regional distributor and applying the common law control test as set out by the Supreme Court in *Sagaz*,[131] concluded that the sales agents were independent contractors. Accordingly, the applicant had not been injured in the course of "employment" and was not entitled to workers' compensation benefits.

79. Therefore, based both on the modest degree of control exercised by Just Energy over the sales agents, and the clear and unequivocal terms of the ICA, if it were appropriate to make a declaration as to the Class Members' status under the EIA and CPP, it would be necessary to conclude that the Class Members were independent contractors engaged in neither insurable nor pensionable employment.

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[129] *Employment Standards Act, 2000*, S.O. 2000, c. 41, ["**ESA**"], s. 5.

[130] *Starsky*, *supra* note 120 at para. 18, Book of Authorities of the Defendants, Tab 33, and *Show*, *supra* note 117 at para. 11, Book of Authorities of the Defendants, Tab 29, both quoting *Bradford v. M.N.R.* (1988), 88 DTC 1661 (T.C.C.), Book of Authorities of the Defendants, Tab 36.

[131] *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, Book of Authorities of the Defendants, Tab 37.

80. However, Just Energy submits that it is *not* appropriate for this Court to decide the common issues relating to the Class Members' status under the federal statutes both because the necessary parties are not before the Court, and because such a determination cannot support any of the remedies claimed by the plaintiff. The plaintiff ignores the fact that both federal statutes establish a tri-partite relationship between employer, employee and the Minister of National Revenue: contributions are paid by the employer to the Minister and, depending upon eligibility, benefits may subsequently be paid by the Minister to the employee. However, nothing in either statute provides for any payment by the employer to the employee; indeed, such a payment would be entirely inimical to the risk-spreading, insurance purposes of the EIA, and the mandatory retirement savings objectives of the CPP.

81. For the foregoing reason, the Minister is invariably a party to any litigation in which the court is called upon to decide whether an individual is engaged in insurable or pensionable employment. Such cases generally take the form of either a claim by an employee for EI benefits which the Minister has denied, or—more frequently—a claim by the Minister against an employer seeking premiums or contributions in respect of individuals who the employer maintains should be classified as independent contractors. Just Energy submits that no declaration as to the status of the Class Members should be made because the Minister is not a party to these proceedings; absent the Minister's participation, it would be inappropriate for this Court to make any determination that could affect either the Class Members', or Just Energy's, rights and obligations *vis-à-vis* the Minister.

82. In any event, no such declaration should be made because it can serve no practical purpose for the Class Members. The EIA is clear that if a worker is properly characterized as an employee, and is therefore engaged in insurable employment, the employer must pay the prescribed premium "to the Receiver General at the prescribed time and in the prescribe manner".[132] The CPP uses virtually identical language, mandating payment to the Receiver General.[133] It is axiomatic, therefore, that if these obligations were owed and were not discharged, the only party with standing to enforce them was the Minister. Furthermore, any such enforcement would result in a payment to the Receiver General and not the Class Members.

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[132] *Employment Insurance Act*, S.C. 1996, c. 23, subs. 82(1).

[133] *Canada Pension Plan*, R.S.C. 1985, c. C-8, subs. 21(1).

Not surprisingly, therefore, the plaintiff is not able to cite any jurisprudential support for the proposition that unpaid EI premiums and CPP contributions are payable to employees.

83. Nor is the plaintiff assisted in this regard by his claim for unjust enrichment. Even if the plaintiff is correct that the Class Members were employees, that EI premiums and CPP contributions should consequently have been paid, and that Just Energy was enriched through its failure to make such payments, the Class Members suffered no corresponding deprivation. On the contrary, the Class Members were themselves enriched because, had they been treated as employees, Just Energy would have been compelled to deduct from each sales agent's compensation the "employees' premium" under the EIA, and remit these sums to the Receiver General.

84. For the foregoing reasons, Just Energy submits that this Court should grant summary judgment declaring that certified common issues 2 and 3 (dealing with the Class Members' status as employees under the CPP and the EIA, respectively) ought not to be answered or, alternatively, should be answered in the negative.

Alternatively, Neither Party is Entitled to Summary Judgment

85. There are no genuine issues requiring a trial only if this Court concludes that, as a consequence of the proper interpretation and application of the Exemption Regulation, *all Class Members* are exempt from the ESA's protections. If, however, this Court concludes that some, but not all, Class Members are exempt—that is, all are *prima facie* exempt "salespersons", but only some are excepted "route salespersons"—then the evidence on this motion is not sufficient to enable this court to decide the common issues.

86. The evidence and the facts recounted above demonstrate that there was wide variety in the working experience of Just Energy's sales agents. This is a function of the fact that Just Energy made certain recommendations as to how sales agents could be most successful, but did not impose these as job requirements. If, however, this Court finds that the degree of control exercised by Just Energy over the sales agents was so extensive that, *in some instances*, the sales agents should be characterized as "route salespersons" for the purpose of the ESA, and "employees" for the purposes of federal legislation, then the evidence demonstrates that this

determination can only be made on a case-by-case basis. It is clear from the evidence that Just Energy did not exercise such control in *each and every case*.

87. If this is the Court's finding on this motion, then the certified common issues are not suitable for summary judgment. Rather, these issues must be resolved at a common issues trial at which the parties can adduce a more comprehensive record, in order that the court can provide more nuanced answers to the common issues.

88. Furthermore, summary judgment is not available in favour of the plaintiff on this record because there are significant credibility issues that cannot be resolved even through the use of the expanded fact-finding powers now included in Rule 20. While the conflict in the evidence does not undermine Just Energy's submission that all sales agents are properly classified as salespersons (but not route salespersons), it is fatal to the plaintiff's position that each and every sales agent was subject to an identical degree of control and supervision so as to support an "employee/route salesperson" characterization for the entirety of the class. The fact that Just Energy submits that summary judgment is appropriate on one view of the evidence, does not enable this Court to ignore this conflict if the evidence is necessary for the plaintiff to establish his assertion of class-wide systemic practice.[134]

Claims Predating May 4, 2013 are Statute-Barred

89. In the further alternative, if this Court concludes that one or more of the common issues may be decided in favour of the Class Members, thereby entitling the Class Members to certain remedies, Just Energy submits that those claims and those remedies must be limited to a period of time commencing on May 4, 2013. Because this action was commenced on May 4, 2015, all claims for amounts alleged to be payable before that date are precluded by the two-year limitation period prescribed in the *Limitations Act, 2002*.[135]

90. Under the *Limitations Act*, a proceeding must be commenced within two years of the date that the claimant suffers "injury, loss or damage".[136] The "injury, loss or damage" in the present case is the alleged failure of Just Energy to pay, *inter alia*, minimum wage pay as

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[134] *Gordashevskiy v. Aharon*, 2019 ONCA 297 at paras. 5-6, Book of Authorities of the Defendants, Tab 38.

[135] S.O. 2002, c. 24, Sch. B, ss. 4-5.

[136] *Ibid.*

mandated by the ESA. For each sales agent, that "injury" would have been sustained on the first date that he or she received a payment limited to commission income, and on every payment date thereafter. In the case of such recurring, periodic injuries—such as the non-payment of an obligation that accrues weekly or monthly—the claimant can recover only those amounts not paid in the two years preceding the commencement of the action.[137]

91. The running of the limitation period may, however, be suspended if the claimant (1) has not discovered the claim, *and* (2) could not, through the exercise of reasonable diligence, have discovered the claim. In the present case, it is not necessary to consider the second of these requirements, because it is abundantly clear on the evidence that *every* claim on behalf of *every* Class Member was discovered on the date of the alleged injury.

92. It is well-settled that the discovery of a "claim" means the discovery of *facts* that, if proven, will entitle the claimant to a remedy. The discovery of the claim is not postponed by the claimant's failure to appreciate the legal significance of those facts. As the court explained in *Nicholas v. McCarthy Tétrault*:[138]

> The circumstance that a potential claimant may not appreciate the legal significance of the facts does not postpone the commencement of the limitation period if he or she knows or ought to know the existence of the material facts, which is to say the constituent elements of his or her cause of action. Error or ignorance of the law or legal consequences of the facts does not postpone the running of the limitation period: *Coutanche v. Napoleon Delicatessen* (2004), 72 O.R. (3d) 122 (C.A.); *Calgar v. Moore*, [2005] O.J. No. 4606 (S.C.J.); *Milbury v. Nova Scotia (Attorney General)* (2007), 283 D.L.R. (4th) 449 (N.S.C.A.); *Hill v. South Alberta Land Registration District* (1993), 100 D.L.R. (4th) 331 (Alta. C.A.).

93. The court applied this principle in *Graham v. Imperial Parking Canada Corporation*,[139] where the plaintiff brought a class action on behalf of persons who had failed to make sufficient pre-payment when parking on the defendant's commercial parking lots and who

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[137] *Nygård International Partnership v. Hudson's Bay Company*, 2018 ONSC 5143 at para. 81, Book of Authorities of the Defendants, Tab 39.

[138] 2008 CanLII 54974 (Ont. S.C.), at para. 27, aff'd 2009 ONCA 692, leave to appeal refused, [2009] S.C.C.A. No. 476, Book of Authorities of the Defendants, Tab 40.

[139] 2010 ONSC 4982, Book of Authorities of the Defendants, Tab 41.

were charged so-called "violation fees" as a result. The plaintiff alleged, *inter alia*, that those fees contravened the *Consumer Protection Act, 2002*. The court granted the motion for certification, but limited the class to only those persons who had paid violation fees in the two years preceding the commencement of the action; the court explained:[140]

> A class member would have discovered all the facts that would support his or her a claim for relief as of the date that he or she received the demand that asserted that "[Impark's] right to claim [the violation fee] from owners of vehicles improperly parked on facilities managed by us has been confirmed by a Canadian Federal Court of Appeal decision."

94. The running and expiry of the limitation periods in *Graham* were not postponed by the fact that certain class members might have been unaware of their rights under the *Consumer Protection Act, 2002*, or might not have known that the Federal Court of Appeal decision referred to did not, properly construed, confirm the legality of the defendant's practices. *Graham* also demonstrates that limitation periods do not apply differently in class proceedings; specifically, class members cannot argue that individual claims are not financially viable, and therefore a legal proceeding is not an "appropriate means to seek a remedy"[141] until one of their number takes the initiative to launch a class action on behalf of all of them.[142]

95. In the present case, there can be no doubt that each Class Member was fully aware of all *facts* relating to each claim on the date that the payments now claimed were not made. It was patently evident that Just Energy did not pay any Class Member at a minimum wage rate or vacation pay on the dates that the plaintiff, in this action, alleges that those payments were due. This was obvious not only from the payments themselves, but was a fact trumpeted in the ICA that each Class Member executed. Even before these payments were allegedly due, Just Energy clearly warned the sales agents—in bold, underlined and capitalized type—that no such payments would be made. Arguably, these warnings in the ICA were an implicit invitation for anyone who took the view that they were entitled to something more than (or different from) commission payments to commence legal proceedings accordingly. No such action was taken

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[140] *Ibid* at paras. 160-161.

[141] *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B, s. 5(1)(a)(iv).

[142] See also, *George v. Newfoundland and Labrador*, 2013 NLTD(G) 170 at para. 65, Book of Authorities of the Defendants, Tab 42.

until May 4, 2015; consequently, any payments allegedly due but not paid prior to May 4, 2013 are now unrecoverable.

96. The plaintiff has adduced no evidence that *even one* Class Member who was allegedly entitled to payments before May 4, 2013—let alone *all* such Class Members—did not know, and could not reasonably have discovered, the relevant facts constituting his or her claim at the time of each alleged non-payment. Since the *Limitations Act* prescribes a presumption of immediate discovery, the plaintiff bears the onus of demonstrating any claim of discoverability.[143] The plaintiff seeks a class-wide declaration that all limitation periods were suspended on the grounds of discoverability,[144] yet has made no effort to discharge this onus.

97. Accordingly, certified common issue 15 must be resolved in favour of Just Energy and summary judgment granted accordingly.

Miscellaneous Issues

98. In addition to the foregoing principal issues raised in this action, the plaintiff raises a number of subsidiary issues that may quickly be dispensed with.

99. The plaintiff seeks a declaration that the provisions of the ESA constitute implied terms of the contract between Just Energy and each sales agent. There is no basis in law for such an order. The law is clear that the court will not imply contract terms that are inconsistent with or contrary to the contract's express terms.[145] Clearly, such an inconsistency would arise on these facts. While section 5 of the ESA may prohibit contracting *out* of the Act's protections,[146] nothing in the legislation inserts those protections *into* an employment contract. The Act simply allows individuals to claim certain statutory rights without regard to any contractual provision

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[143] *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B, s. 5(2): "A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved."

[144] Notice of Motion, para. 1(xiii).

[145] *Hydro Ottawa Limited v. International Brotherhood of Electrical Workers (Local 636)*, 2007 ONCA 292 at para. 65, Book of Authorities of the Defendants, Tab 43, quoting with approval: "It is a fundamental principle of law that an implied term cannot conflict with an express provision to the contrary." See also, *Benfield Corporate Risk Canada Limited v Beaufort International Insurance Inc.*, 2013 ABCA 200 at para. 115, Book of Authorities of the Defendants, Tab 44.

[146] ESA, *supra* note 129.

purporting to negate or limit those rights. For the reasons set out above, the Class Members have no such rights in the present case. Even if they did, they would not be *contractual* rights, such that certified common issues 5, 6, 7, 8, and 9 must all be answered in the negative and in Just Energy's favour.

100. The plaintiff also claims that Just Energy is liable in negligence. The elements of that cause of action are: (1) a duty of care owed by the defendant; (2) conduct on the part of the defendant that fell below the standard of reasonable care; (3) damage sustained by the plaintiff; and (4) proof that that damage was caused by the defendant's carelessness.[147]

101. The plaintiff's apparently boundless proposition that "employers owe a duty of care to employees" is not supported by the case law. Duties may be owed with respect to specific aspects of the employer-employee relationship: for example, the employer may owe a duty of care in supplying tools or working premises that are not unreasonably dangerous, and in making representations that an employee may rely upon, the employer may owe a duty of care to act reasonably in confirming the accuracy of the information imparted. However, as the decision of the Supreme Court in *Deloitte & Touche v. Livent Inc. (Receiver of)*[148] explains, a duty of care does not arise as a function of the relationship between the plaintiff and defendant, but arises solely from the defendant's undertaking to act reasonably in performing *specific acts* so as to protect the plaintiff against *particular losses.*[149] The plaintiff has not identified any such undertaking on Just Energy's part in the present case.

102. Insofar as it is the plaintiff's position that Just Energy undertook to act carefully in classifying sales agents as salespersons, route salespersons, independent contractors or employees, no evidence of such an undertaking has been adduced on this motion.

103. Nor has the plaintiff identified and proven any respect in which Just Energy failed to act with reasonable care;[150] there is no allegation that if Just Energy had acted more carefully

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147 *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at para. 3, Book of Authorities of the Defendants, Tab 45.

148 2017 SCC 63, Book of Authorities of the Defendants, Tab 46.

149 *Ibid* at paras. 30-31.

150 In most cases, the standard of care is proven through expert or lay evidence of the practices generally followed by others in the defendant's industry or profession; such evidence is generally necessary to answer the factual question of the standard of conduct that is "reasonable" in the circumstances: *Fougere v. Blunden Construction*

or prudently, certain losses would have been avoided. Simply put, this case has nothing to do with careless conduct giving rise to liability under the tort of negligence. The plaintiff is simply attempting to apply an ill-fitting legal label to claims that essentially sound—if at all—in contract or under statutory causes of action. Accordingly, certified common issues 10 and 11 should be answered in the negative, and in favour of Just Energy.

104. Lastly, the plaintiff seeks an order directing the certain damages be paid on the basis of the findings on this summary judgment motion, independent of any individual damage assessments to be made in the future. The plaintiff is not entitled to these damages awards:

(a) Among the amounts the plaintiff seeks are the unpaid EI and CPP contributions. For the reasons discussed above, even if the plaintiff's allegations are otherwise proven, the Class Members have no legal entitlement to these sums. If these amounts were payable, they were payable only to the Receiver General of Canada; there is no legal justification for the plaintiff's attempt to claim the Receiver General's rights as his own or as rights of the Class Members; and

(b) The plaintiff seeks a payment equal to one day's pay at the applicable minimum wage for each Class Member to reflect the one day of training that each sales agent participated in. This claim, however, ignores that while subs. 23(1) of the ESA imposes an obligation to pay minimum wage,[151] subs. 23(3) provides that "Compliance with this Part shall be determined on a pay period basis."[152] The ICA provided for a weekly pay period; accordingly, before it can be determined whether or not a sales agent is entitled to minimum wage payment, it is necessary to know the total commissions earned on the other working days in that same week. For example, if a sales agent started with Just Energy in 2016, when the minimum wage was $11.40 per hour, and the person attended an eight-hour training session followed by four eight-hour working days, he or she would be

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Ltd., 2014 NSSC 20 at para. 10, Book of Authorities of the Defendants, Tab 47; *Gilbert v Marynowski*, 2017 NSSC 227 at para. 51, Book of Authorities of the Defendants, Tab 48. The Plaintiff in the present case has adduced no evidence that Just Energy's practices deviated from those of others engaging the services of door-to-door sales personnel.

[151] ESA, *supra* note 129, s. 23(1).

[152] *Ibid*, s. 23(3).

entitled to at least $456 under the ESA; if that person earned $500 in commissions during those four working days, there would be no minimum wage entitlement despite the fact that $0 were earned on the day of training. Even if the person earned less than the minimum wage amount during the remainder of the week, he or she is only entitled to the difference between that amount and the amount of the commissions earned. This calculation can only be done on an individual basis.

PART IV - ORDER SOUGHT

105. Based on the above analysis, Just Energy submits that this Court must conclude:

(a) The Class Members all fall within the salesperson exemption under the ESA, and none fall within the route salesperson exception to that exemption; accordingly, the Class Members are exempt from the ESA and the statutory claims under that legislation must be dismissed;

(b) With respect to the claims founded upon the EIA and the CPP,

(i) These claims ought not to be decided in this action;

(ii) If the claims are decided, the Class Members were not engaged in insurable or pensionable employment either because they are deemed to be independent contractors by virtue of their salesperson characterization under the ESA, or must be found to be independent contractors on the application of the control test as applied by the Tax Court of Canada; or

(iii) If the EIA and CPP claims are decided, and it is found that the Class Members were engaged in insurable and/or pensionable employment, the plaintiff's claim must be dismissed because this finding does not entitle the Class Members to any remedy;

(c) The breach of contract claims on behalf of the Class Members must be dismissed because the contractual terms upon which the plaintiff relies do not appear in the ICA, and no such terms can be implied into the ICA as they would contradict the express terms of that contract;

(d) The plaintiff's negligence claim must be dismissed as Just Energy never undertook any obligation to exercise reasonable care to protect the Class Members from injury, and the plaintiff has not demonstrated that Just Energy failed to exercise reasonable care in discharging such obligations.

106. In the alternative to the foregoing, if this Court is not able to conclude that *no* Class Members fall within the route salesperson exception to the salesperson exemption—that is, that some Class Members are exempt from the ESA and some are not—then the issues raised on this motion are not suitable for summary judgment, and the matter must proceed to a common issues trial in order that the Court can provide more nuanced answers to the common issues.

107. In the further alternative, if any of the certified common issues in this action can be resolved in favour of the plaintiff on this motion, the class must be redefined to limit the Class Members' claims to only those amounts that Just Energy would have been obligated to pay after May 4, 2013.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of May, 2019 by

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SCHEDULE "A"
LIST OF AUTHORITIES

TAB	AUTHORITY
1.	*Evangelista v. Number 7 Sales Limited*, 2008 ONCA 599
2.	*Viceroy Construction Company Limited*, July 16, 1976, E.S.C. 368
3.	*Isomeric Inc.*, [2000] O.E.S.A.D. No. 194 (O.L.R.B.)
4.	*Flood v. Just Energy Mktg. Corp.*, 904 F.3d 219 (2d Cir. 2018)
5.	*Dailey v. Just Energy Mktg. Corp.*, 2015 U.S. Dist. LEXIS 97103 (N.D. Cal.)
6.	*Evangelista v. Just Energy Mktg. Corp.*, 2018 U.S. Dist. LEXIS 222579 (C.D. Cal)
7.	*DeWig v. Landshire, Inc.*, 666 N.E.2d 1204 (Ill. App. 1996)
8.	*Wilkins v. Just Energy Grp. Inc.*, 308 F.R.D. 170 (N.D. Ill.)
9.	*Wilkins v. Just Energy Grp., Inc.*, 2019 U.S. Dist. LEXIS 47486 (N.D. Ill.)
10.	*International Union of Operating Engineers, Hoisting & Portable & Stationary, Local 870 v. Linde Canada Limited*, 2010 CanLII 1715 (Sask. L.R.B.)
11.	*Decision No. 1724/11*, 2011 O.N.W.S.I.A.T.D. 2860
12.	*Canadian Union of Operating Engineers and General Workers (CUOE) v. Red Carpet Food Systems Inc.*, 2001 CanLII 5016 (O.L.R.B.)
13.	*Chester v. Pepsi-Cola Canada Ltd.*, 2005 SKQB 110
14.	*Matthews v. Hostess Foods Products Ltd.*, 2009 ABQB 14
15.	*Re Crestway Electronics Ltd.*, [1992] O.E.S.A.D. No. 132
16.	*DMG Canada Inc. v. Teague*, 2011 CanLII 63529 (O.L.R.B.)

17.	*VanGrootel v Advance Beauty Supply Limited*, 2016 CanLII 17209 (O.L.R.B.)
18.	*Orlov v. Amato*, 2003 CanLII 2984 (O.L.R.B.)
19.	*Hayat v. Clegg Campus Marketing*, 2006 CanLII 19392 (O.L.R.B.)
20.	*Schiller v. P & L Corporation Ltd.*, 2012 CanLII 12611 (O.L.R.B.)
21.	*Kognitive Marketing Inc. v. Director of Employment Standards*, 2015 CanLII 61657 (O.L.R.B.)
22.	*Knox Insurance Brokers Ltd. (Re)*, [1996] O.E.S.A.D. No. 5
23.	*Whalen v. Hillier (2001)*, 53 O.R. (3d) 550 (C.A.)
24.	*Klein v. Dick*, 2016 ONCA 8
25.	*Lazowski v. Canada (Minister of Revenue)*, [2002] T.C.J. No. 517 (T.C.C.)
26.	*Manhattan Multi-Marketing Inc. v. Canada (Minister of Revenue)*, [1991] T.C.J. No. 347 (T.C.C.)
27.	*Fatt v. Canada (Minister of Revenue)*, [2001] T.C.J. No. 239 (T.C.C.)
28.	*Clientel Canada Corp. v. Canada (Minister of National Revenue)*, [1999] T.C.J. No. 678 (T.C.C.)
29.	*Show Promotions and Personnel Inc. v. Canada (Minister of Revenue)*, [2003] T.C.J. No. 696 (T.C.C.)
30.	*Combined Insurance Company of America v. Canada (National Revenue)*, 2007 FCA 60, leave to appeal denied 2007 CanLII 45658 (SCC)
31.	*Ivanov v. Canada (Minister of Revenue)*, [2000] T.C.J. No. 236 (T.C.C.)
32.	*740944 Alberta Ltd. v. Canada (Minister of Revenue)*, [1999] T.C.J. No. 652 (T.C.C.)
33.	*Starsky Enterprises Inc. v. Canada (Minister of Revenue)*, [2008] T.C.J. No. 144 (T.C.C.)
34.	*Haddad v. Canada (Minister of Revenue)*, [1996] T.C.J. No. 1436 (T.C.C.), aff'd [1998] F.C.J. No. 581 (C.A.)
35.	*Greenshield Windows and Doors Ltd. v. Canada (Minister of Revenue)*, [2015] T.C.J. No. 51 (T.C.C.)

36.	*Bradford v. M.N.R. (1988)*, 88 DTC 1661 (T.C.C.)
37.	*671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59
38.	*Gordashevskiy v. Aharon*, 2019 ONCA 297
39.	*Nygård International Partnership v. Hudson's Bay Company*, 2018 ONSC 5143
40.	*Nicholas v. McCarthy Tétrault*, 2008 CanLII 54974 (Ont. S.C.), aff'd 2009 ONCA 692, leave to appeal refused, [2009] S.C.C.A. No. 476
41.	*Graham v. Imperial Parking Canada Corporation*, 2010 ONSC 4982
42.	*George v. Newfoundland and Labrador*, 2013 NLTD(G) 170
43.	*Hydro Ottawa Limited v. International Brotherhood of Electrical Workers (Local 636)*, 2007 ONCA 292
44.	*Benfield Corporate Risk Canada Limited v. Beaufort International Insurance Inc.*, 2013 ABCA 200
45.	*Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27
46.	*Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63
47.	*Fougere v. Blunden Construction Ltd.*, 2014 NSSC 20
48.	*Gilbert v. Marynowski*, 2017 NSSC 227

SCHEDULE "B"
TEXT OF STATUTES AND REGULATIONS

1. O. Reg. 285/01: WHEN WORK DEEMED TO BE PERFORMED, EXEMPTIONS AND SPECIAL RULES

Exemptions from Parts VII to XI of Act

2. (1) Parts VII, VII.1, VIII, IX, X and XI of the Act do not apply to a person employed,

[. . .]

(h) as a salesperson, other than a route salesperson, who is entitled to receive all or any part of his or her remuneration as commissions in respect of offers to purchase or sales that,

(i) relate to goods or services, and

(ii) are normally made away from the employer's place of business.

2. *Fair Labor Standards Act*, 29 U.S.C. Ch. 8

§213. Exemptions

(a) Minimum wage and maximum hour requirements

The provisions of sections 206 (except subsection (d) in the case of paragraph (1) of this subsection) and 207 of this title shall not apply with respect to—

(1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of subchapter II of chapter 5 of title 5, except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities); or

3. ***Part 541 -- Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Computer and Outside Sales Employees, Subpart F*, 29 C.F.R. Ch. V**

§541.500 General rule for outside sales employees.

(a) The term "employee employed in the capacity of outside salesman" in section 13(a)(1) of the Act shall mean any employee:

(1) Whose primary duty is:

(i) making sales within the meaning of section 3(k) of the Act, or

(ii) obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and

(2) Who is customarily and regularly engaged away from the employer's place or places of business in performing such primary duty.

4. ***Employment Insurance Act*, S.C. 1996, c. 23**

Deduction and payment of premiums

82 (1) Every employer paying remuneration to a person they employ in insurable employment shall

> **(a)** deduct the prescribed amount from the remuneration as or on account of the employee's premium payable by that insured person under section 67 for any period for which the remuneration is paid; and
>
> **(b)** remit the amount, together with the employer's premium payable by the employer under section 68 for that period, to the Receiver General at the prescribed time and in the prescribed manner.

5. ***Employment Standards Act, 2000*, S.O. 2000, c. 41**

No contracting out

5 (1) Subject to subsection (2), no employer or agent of an employer and no employee or agent of an employee shall contract out of or waive an employment standard and any such contracting out or waiver is void. 2000, c. 41, s. 5 (1).

Greater contractual or statutory right

(2) If one or more provisions in an employment contract or in another Act that directly relate to the same subject matter as an employment standard provide a greater benefit to an employee than the employment standard, the provision or provisions in the contract or Act apply and the employment standard does not apply. 2000, c. 41, s. 5 (2).

Minimum wage

23 (1) An employer shall pay employees at least the minimum wage. 2000, c. 41, s. 23 (1); 2014, c. 10, Sched. 2, s. 2 (1).

Determining compliance

(3) Compliance with this Part shall be determined on a pay period basis. 2000, c. 41, s. 23 (3).

6. ***Canada Pension Plan*, R.S.C. 1985, c. C-8**

Amount to be deducted and remitted by employer

21 (1) Every employer paying remuneration to an employee employed by the employer at any time in pensionable employment shall deduct from that remuneration as or on account of the employee's contributions for the year in which the remuneration in respect of the pensionable employment is paid to the employee any amount that is determined in accordance with prescribed rules and shall remit that amount, together with any amount that is prescribed with respect to the contributions required to be made by the employer under this Act, to the Receiver General at any time that is prescribed and, if at that prescribed time the employer is a prescribed person, the remittance shall be made to the account of the Receiver General at a financial institution (within the meaning that would be assigned by the definition *financial institution* in subsection 190(1) of the *Income Tax Act* if that definition were read without reference to its paragraphs (d) and (e)).

7. ***Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B**

Basic limitation period

4 Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered. 2002, c. 24, Sched. B, s. 4.

Discovery

5 (1) A claim is discovered on the earlier of,

(a) the day on which the person with the claim first knew,

(i) that the injury, loss or damage had occurred,

(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,

(iii) that the act or omission was that of the person against whom the claim is made, and

(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a). 2002, c. 24, Sched. B, s. 5 (1).

Presumption

(2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved. 2002, c. 24, Sched. B, s. 5 (2).

Demand obligations

(3) For the purposes of subclause (1) (a) (i), the day on which injury, loss or damage occurs in relation to a demand obligation is the first day on which there is a failure to perform the obligation, once a demand for the performance is made. 2008, c. 19, Sched. L, s. 1.

Same

(4) Subsection (3) applies in respect of every demand obligation created on or after January 1, 2004. 2008, c. 19, Sched. L, s.

HAIDAR OMARALI

Plaintiff

-and-

JUST ENERGY GROUP INC. et al.

Defendants

Court File No. CV-15-527493-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at
Toronto

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

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

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

Applicants

Ontario
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at: TORONTO

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