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

MOTION RECORD OF THE APPLICANTS
(Motion re Authorization to Pursue section 36.1 Claims in Adversary Proceeding)

April 14, 2022

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TO: SERVICE LIST

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ONTARIO
SUPERIOR COURT OF JUSTICE

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

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Applicants

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TAB 1

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

NOTICE OF MOTION

(Motion re Authorization to Pursue Section 36.1 Claims in Adversary Proceeding)

Just Energy Group, Inc. ("**Just Energy**"), in its capacity as the foreign representative (the "**Foreign Representative**") of the Applicants and the partnerships listed on Schedule "A" of the Initial Order (collectively, the "**Just Energy Entities**"), will make a motion before the Honourable Justice McEwen of the Ontario Superior Court of Justice (Commercial List) on April 21, 2022 at 10:00 a.m., or as soon after that time as the motion may be heard by judicial videoconference via Zoom at Toronto, Ontario. The videoconference details will be circulated by the Court.

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

THE MOTION IS FOR:

1. An Order substantially in the form included at Tab 3 of the Motion Record:

   (a) Authorizing the Foreign Representative and other Just Energy Entities, as the case may be, to pursue the Section 36.1 Claims (as defined below) in the Adversary Proceeding (as defined below), *nunc pro tunc*;

   (b) Authorizing and directing the Monitor to take whatever actions or steps it deems advisable to assist and supervise the Just Energy Entities with respect to the prosecution of the Section 36.1 Claims in the Adversary Proceeding;

   (c) In the alternative, authorizing the Monitor to jointly serve as foreign representative in the Chapter 15 Cases (as defined below) in order to allow the Monitor, the Foreign Representative and other Just Energy Entities, as the case may be, to jointly prosecute the Section 36.1 Claims in the Adversary Proceeding, *nunc pro tunc*; and

   (d) Such further and other relief as this Honourable Court may deem just;

2. Capitalized terms used but not defined in this Notice of Motion shall have the meanings given to them in the Affidavit of James C. Tecce affirmed April 14, 2022.

THE GROUNDS FOR THE MOTION ARE:

Background

3. On March 9, 2021, the Applicants obtained protection under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (the "**CCAA**") pursuant to an initial order (as amended, the "**Initial Order**") of the Ontario Superior Court of Justice (Commercial List) (the "**CCAA Court**").

The Initial Order extended the benefits of its protections and authorizations to the partnerships listed on Schedule "A";

4. FTI Consulting Canada Inc. ("**FTI**") was appointed by the CCAA Court in the Initial Order to act as monitor (in such capacity, the "**Monitor**");

5. The Applicants sought CCAA protection because of severe short-term liquidity challenges which resulted from a winter storm in Texas (the Just Energy Group's largest market) in February 2021 and the actions of the Texas Public Utility Commission (the "**PUCT**") and the Electric Reliability Council of Texas ("**ERCOT**");

6. On March 9, 2021, shortly after obtaining the Initial Order, Just Energy, in its capacity as Foreign Representative, filed a voluntary Chapter 15 petition under the U.S. Bankruptcy Code (the "**Bankruptcy Code**") for each of the Just Energy Entities (the "**Chapter 15 Cases**") in the United States Bankruptcy Court for the Southern District of Texas (the "**U.S. Bankruptcy Court**"). That same day, the U.S. Bankruptcy Court entered an Order granting the Just Energy Entities certain forms of provisional relief pursuant to section 1519 of the Bankruptcy Code;

7. The CCAA Court granted an Amended and Restated Initial Order (the "**ARIO**", hereinafter defined) on March 19, 2021, and a Second Amended and Restated Initial Order on May 26, 2021;

8. On April 2, 2021, the U.S. Bankruptcy Court granted a Recognition Order under Chapter 15 of the Bankruptcy Code which, among other things, (i) recognized that the Debtors (as defined therein, which includes the Plaintiffs), had their "center of main interests" in Canada; (ii) granted the ARIO full force and effect on a final basis with respect to the Just Energy Entities' property located within the United States; and (iii) granted recognition of the Foreign Representative as the

"foreign representative", as defined in section 101(24) of the Bankruptcy Code, with respect to the CCAA proceeding, including to all of the relief set forth in sections 1507, 1519, 1520, and 1521(a)(4) and (5) of the Bankruptcy Code, without limitation;

The Adversary Proceeding

9. On November 12, 2021, Just Energy, together with Just Energy Texas LP, Fulcrum Retail Energy LLC and Hudson Energy Services LLC (collectively, the "**Plaintiffs**") commenced an adversary proceeding against ERCOT and the PUCT (the "**Adversary Proceeding**") by filing a complaint (the "**Initial Complaint**") in the U.S. Bankruptcy Court;

10. The Adversary Proceeding stems directly from the actions taken by ERCOT and the PUCT during the winter storm and seeks, among other things, to avoid obligations incurred to, and claw back payments made to, ERCOT pursuant to section 36.1 of the CCAA (the "**Section 36.1 Claims**"), which incorporates by reference sections 38 and 95-101 of the *Bankruptcy and Insolvency Act*, R.S.C. 985, c. B-3 ("**BIA**");

11. More specifically, in February and March 2021, ERCOT delivered invoices (the "**Invoices**") that required payment of approximately USD$336 million relating to the week of February 13, 2021 through February 20, 2021 (the "**Invoiced Obligations**"). Under protest by Just Energy and with a full reservation of rights, the Invoices were paid by or on behalf of the Just Energy Entities;

12. The Plaintiffs challenge approximately USD$274 million paid in respect of the Invoices (the "**Transfers**") arguing, among other things, that (i) ERCOT artificially set a real-time market price at USD$9,000/MWh for approximately 88 consecutive hours during the winter storm event,

which was orders of magnitude greater than the value of the energy supplied and set in violation of Texas law, and (ii) alternatively, ERCOT failed to lower the price on February 17, 2021 after load-shed ceased;

13. The Initial Complaint contained five counts: (i) a portion of the USD$274 million in challenged Transfers, that is, USD$193 million, was paid post-petition and subject to avoidance as an unauthorized post-petition transfer pursuant to section 549 of the Bankruptcy Code because the U.S. Bankruptcy Court never "approved" the transfer in the manner contemplated under sections 549 and 363 of the Bankruptcy Code (Count 1); (ii) any claim ERCOT has relating to the Invoiced Amounts should be disallowed pursuant to sections 502(b) and 502(d) of the Bankruptcy Code (Count 2); (iii) the transferred amounts should be turned over to Just Energy pursuant to section 542 of the Bankruptcy Code (Count 3); (iv) Just Energy is entitled to set off the transferred amounts against obligations it owes ERCOT pursuant to sections 553 and/or 558 of the Bankruptcy Code (Count 4); and (v) the transferred amounts are subject to avoidance under the CCAA (Count 5 or the "**CCAA Count**").

14. In January 2022, both ERCOT and the PUCT moved to dismiss the Initial Complaint (the "**Initial Dismissal Motions**");

15. The Initial Dismissal Motions were argued before the Honourable Judge Marvin Isgur of the U.S. Bankruptcy Court on February 2, 2022;

16. At the conclusion of the hearing held on February 2, Judge Isgur (i) dismissed the PUCT as a defendant – without any opposition from ERCOT – finding the PUCT was not an indispensable party; (ii) dismissed Count 1 with prejudice, finding the U.S. Bankruptcy Court did, in fact, "approve" the post-petition transfers; (iii) dismissed Count 2 without prejudice, finding it

inapplicable without a pending proof of claim from ERCOT to which an objection could be lodged; (iv) dismissed Count 3 without prejudice as premature, but with leave to seek turnover if the turnover claim ripens; (v) declined to dismiss Count 4 and instead directed Just Energy to replead it; and (vi) requested more particularity on Count 5 being the CCAA Count, e.g., clarifying whether the claim is an "actual intent" claim, a preference, or a constructive fraudulent transfer claim;

17. The U.S. Bankruptcy Court directed the Plaintiffs to file an amended complaint by March 4, 2022.

18. The Plaintiffs filed an amended complaint on February 11, 2022 (the "**First Amended Complaint**");

19. The First Amended Complaint similarly challenges the Transfers and the Invoiced Obligations;

20. While the First Amended Complaint contains six counts (compared to the Initial Complaint's five counts), the First Amended Complaint breaks the CCAA Count into four separate "sub-Counts". As pled in the First Amended Complaint:

(a) Count 1: seeks an order declaring the Invoice Obligations are void in their full amount (approximately USD$336 million) on the basis that they are a preference, contrary to section 95 of the BIA (incorporated into the CCAA pursuant to section 36.1);

(b) Count 2: seeks an order declaring the pre-petition Transfers are void on the basis that they are a preference, contrary to section 95 of the BIA (incorporated into the

CCAA pursuant to section 36.1) and should be returned in an amount no less than approximately USD$81 million;

(c) Count 3: seeks an order declaring the pre-petition Transfers are void on the basis that they are a transfer at undervalue, contrary to section 96 of the BIA (incorporated into the CCAA pursuant to section 36.1) and should be returned in an amount no less than approximately USD$81 million; and

(d) Count 4: seeks an order directing ERCOT to return the Transfers made by Just Energy, pursuant to section 98(1) of the BIA (incorporated into the CCAA pursuant to section 36.1), either (i) in the amount of not less than approximately USD$274 million or, (ii) alternatively, in the amount of not less than approximately USD$220 million;

21. On March 14, 2022, the Adversary Proceeding was reassigned from the Honourable Judge Marvin Isgur to the Honourable Judge David R. Jones of the U.S. Bankruptcy Court;

22. On March 17, 2022, ERCOT filed a motion to dismiss (the "**Second Dismissal Motion**") the First Amended Complaint on the basis, among other things, that the Foreign Representative does not have standing to advance the Section 36.1 Claims;

23. On March 24, 2022, Just Energy filed an Objection to the Second Dismissal Motion arguing, among other things, that the proper parties were present and that all counts were properly pled;

24. Argument on the Second Dismissal Motion was commenced before the Honourable Judge David Jones of the U.S. Bankruptcy Court on April 4, 2022;

25. At the hearing of the Second Dismissal Motion, Judge Jones requested that the Foreign Representative seek direction from the CCAA Court with respect to the question of who is the proper party to advance the section 36.1 Claims;

26. On April 6, 2022, the U.S. Bankruptcy Court entered an Order stating that "[t]he Adversary Proceeding is abated and all deadlines in the Adversary Proceeding are stayed pending further Order of the Court so that the parties can seek direction from the Canadian Court with respect to the standing to prosecute the claims in the Adversary Proceeding";

The Foreign Representative Can Pursue the Section 36.1 Claims

27. Sections 95 and 96 of the BIA authorize "the trustee in bankruptcy", as an estate representative in a bankruptcy, to advance claims;

28. Section 98 of the BIA ensures that assets obtained in void transactions are returned to the estate;

29. Section 36.1 of the CCAA incorporates by reference sections 95, 96 and 98 of the BIA and provides that the Monitor, as the estate representative in a CCAA proceeding, can pursue such claims;

30. The Foreign Representative is a court-appointed fiduciary entrusted with the administration of the Just Energy Entities' assets;

31. Given its involvement in the events and Transfers at issue, the Foreign Representative is best positioned to pursue the Section 36.1 Claims in the U.S. Bankruptcy Court on behalf of the Debtors' estates and under the usual supervision of the Monitor;

32. There is no principled reason why a Foreign Representative cannot bring claims under section 36.1 of the CCAA on behalf of and for the benefit of the Debtors' estates;

33. The Monitor supports and approves of the Foreign Representative advancing the Adversary Proceeding, including the section 36.1 Claims;

34. Requiring the Monitor to advance the claims in the U.S. Bankruptcy Court to the exclusion of the Foreign Representative would allow form to triumph over substance; and

35. In the alternative, the Monitor should be authorized to jointly serve as foreign representative in the Chapter 15 Cases in order to allow the Monitor, the Foreign Representative and other Just Energy Entities, as the case may be, to jointly prosecute the Section 36.1 Claims in the Adversary Proceeding;

Other Grounds

36. The provisions of the CCAA and the BIA and the inherent and equitable jurisdiction of this Honourable Court;

37. Rules 1.04, 1.05, 2.01. 2.03, and 37 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended;

38. Changes to Commercial List operations in light of COVID-19 dated March 16, 2020; and

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

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

40. Affidavit of James C. Tecce affirmed April 14, 2021;

41. Ninth Report of the Monitor.

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

April 14, 2022

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TO: THE SERVICE 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. *et al.*

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT TORONTO

NOTICE OF MOTION
(Motion re Standing to Pursue Section 36.1 Claims in Adversary Proceeding)

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Lawyers to the Applicants

TAB 2

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 JAMES C. TECCE

I, James Tecce, of the City of New York, in the State of New York, MAKE OATH AND SAY:

1. I am an attorney at Quinn Emanuel Urquhart & Sullivan LLP, U.S. counsel to Just Energy Texas LP ("**JE Texas**"), Fulcrum Retail Energy LLC ("**Fulcrum**"), Hudson Energy Services LLC ("**Hudson**"), and Just Energy Group, Inc. ("**Just Energy**"), the plaintiffs in the Adversary Proceeding (defined below) (collectively, the "**Plaintiffs**").

2. I affirm this affidavit in support of a motion by Just Energy, in its capacity as the foreign representative (the "**Foreign Representative**") of the Applicants and the partnerships listed on Schedule "A" of the Initial Order (collectively, the "**Just Energy Entities**"), seeking an order (a) authorizing the Foreign Representative and other Just Energy Entities, as the case may be, to pursue the Section 36.1 Claims (as defined below) in the Adversary Proceeding (as defined below), including, *nunc pro tunc*; (b) authorizing and directing the Monitor to take whatever actions or steps it deems advisable to assist and supervise the Just Energy Entities with respect to the Adversary Proceeding; and (c) in the alternative, authorizing the Monitor to jointly serve as foreign representative in the Chapter 15 Cases (as defined below) in order to allow the Monitor, the Foreign Representative and other Just Energy Entities, as the case may be, to jointly prosecute the Section 36.1 Claims in the Adversary Proceeding, *nunc pro tunc*.

Background

3. On March 9, 2021, the Applicants obtained protection under the Companies' Creditors Arrangement Act, RSC 1985, c C-36 (the "**CCAA**") pursuant to an initial order (the "**Initial Order**") of the Ontario Superior Court of Justice (Commercial List) (the "**CCAA Court**"). The Initial Order extended the benefits of its protections and authorizations to the partnerships listed on Schedule "A" (together with the Applicants, the "**Just Energy Entities**").

4. The CCAA Court granted an Amended and Restated Initial Order on March 19, 2021, and a Second Amended and Restated Initial Order on May 26, 2021. A copy of the Second Amended and Restated Initial Order is attached as **Exhibit "A"** hereto.

5. On March 9, 2021, shortly after obtaining the Initial Order, Just Energy, in its capacity as Foreign Representative, filed a voluntary Chapter 15 petition under the U.S. Bankruptcy Code (the "**Bankruptcy Code**") for each of the Just Energy Entities (the "**Chapter 15 Cases**") in the United

States Bankruptcy Court for the Southern District of Texas (the "**U.S. Bankruptcy Court**"). That same day, the U.S. Bankruptcy Court entered an Order (the "**Provisional Relief Order**") granting the Just Energy Entities certain forms of provisional relief pursuant to section 1519 of the Bankruptcy Code. A copy of the Provisional Relief Order is attached (without exhibits) as **Exhibit "B"** hereto.

6. On April 2, 2021, the U.S. Bankruptcy Court granted an Order (the "**Recognition Order**") under Chapter 15 of the Bankruptcy Code which, among other things, (i) recognized that the Debtors (as defined therein) had their "center of main interests" in Canada; (ii) granted the ARIO full force and effect on a final basis with respect to the Just Energy Entities' property located within the United States; and (iii) granted recognition of the Foreign Representative as the "foreign representative", as defined in section 101(24) of the Bankruptcy Code, with respect to the CCAA proceeding, including to all of the relief set forth in sections 1507, 1519, 1520, and 1521(a)(4) and (5) of the Bankruptcy Code, without limitation. A copy of the Final Recognition Order is attached as **Exhibit "C"** hereto.

The Adversary Proceeding

7. On November 12, 2021, the Plaintiffs commenced an adversary proceeding in the U.S. Bankruptcy Court bearing adversary proceeding no. 21-4399 (MI) (the "**Adversary Proceeding**") against the Texas Public Utility Commission (the "**PUCT**") and the Electric Reliability Council of Texas ("**ERCOT**") by filing a complaint (the "**Initial Complaint**"). The Initial Complaint contained five counts. A copy of the Initial Complaint is attached as **Exhibit "D"** hereto.

8. The Adversary Proceeding stems directly from the actions taken by ERCOT and the PUCT during the winter storm and seeks, among other things, to avoid obligations incurred to, and claw back payments made to ERCOT pursuant to section 36.1 of the CCAA (the "**Section 36.1**

Claims"), which incorporates by reference sections 38 and 95-101 of the Bankruptcy and Insolvency Act, R.S.C. 985, c. B-3 ("**BIA**").

9. In January 2022, both ERCOT and the PUCT moved to dismiss the Initial Complaint (the "**Initial Dismissal Motions**").

10. The Initial Dismissal Motions were argued before the Honourable Judge Marvin Isgur of the U.S. Bankruptcy Court on February 2, 2022.

11. At the conclusion of the hearing, Judge Isgur made various rulings, including dismissing the PUCT as a defendant in the Adversary Proceeding and directing the Plaintiffs to file an amended complaint relating to certain of the counts raised in the Initial Complaint. A copy of the transcript of the February 2, 2022 hearing is attached as **Exhibit "E"** hereto.

12. On February 11, 2022, the Plaintiffs filed an amended complaint (the "**First Amended Complaint**"). A copy of the First Amended Complaint is attached as **Exhibit "F"** hereto.

13. The First Amended Complaint contains six counts (compared to five counts in the Initial Complaint), including four separate "sub-Counts" that relate to the CCAA. As pled in the First Amended Complaint:

(a) Count 1: seeks an order declaring that the Invoice Obligations (as defined therein) are void in their full amount (approximately USD$336 million) on the basis that they are a preference, contrary to section 95 of the BIA (incorporated into the CCAA pursuant to section 36.1);

(b) Count 2: seeks an order declaring the pre-petition Transfers (as defined therein) are void on the basis that they are a preference, contrary to section 95 of the BIA

(incorporated into the CCAA pursuant to section 36.1) and should be returned in an amount no less than approximately USD$81 million;

(c) Count 3: seeks an order declaring the pre-petition Transfers are void on the basis that they are a transfer at undervalue, contrary to section 96 of the BIA (incorporated into the CCAA pursuant to section 36.1) and should be returned in an amount no less than approximately USD$81 million; and

(d) Count 4: seeks an order directing ERCOT to return the Transfers made by Just Energy, pursuant to section 98(1) of the BIA (incorporated into the CCAA pursuant to section 36.1), either (i) in the amount of not less than approximately USD$274 million or, (ii) alternatively, in the amount of not less than approximately USD$220 million;

14. On March 14, 2022, the Adversary Proceeding was reassigned from the Honourable Judge Marvin Isgur to the Honourable Judge David R. Jones of the U.S. Bankruptcy Court.

15. On March 17, 2022, ERCOT filed a motion to dismiss (the "**Second Dismissal Motion**") the First Amended Complaint on the basis, among other things, that the Foreign Representative does not have standing to advance the Section 36.1 Claims. A copy of the Second Dismissal Motion is attached (without exhibits) as **Exhibit "G"** hereto.

16. On March 24, 2022, the Plaintiffs filed an Objection to the Second Dismissal Motion (the "**Objection**") arguing, among other things, that the proper parties were present and that all counts were properly pled. A copy of the Objection (without exhibits) is attached as **Exhibit "H"** hereto.

17. In support of the Objection, I submitted a declaration which attached a number of documents, including (i) the Declaration of Paul Bishop (the "**Monitor's Declaration**") and (ii)

the Declaration of Kevin P. McElcheran (the "**McElcheran Declaration**"). Copies of the Monitor's Declaration and the McElcheran Declaration are attached hereto as **Exhibits "I" and "J**", respectively.

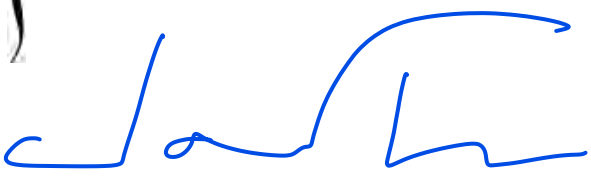
18. On March 31, 2022, ERCOT filed a Reply in support of the Second Dismissal Motion, a copy of which is attached as **Exhibit "K"** hereto.

19. Argument on the Second Dismissal Motion was commenced before Judge Jones on April 4, 2022. At the hearing, Judge Jones requested that the Foreign Representative seek direction from the CCAA Court with respect to the question of who is the proper party to advance the Section 36.1 Claims. A copy of the transcript of the April 4, 2022 hearing is attached as **Exhibit "L"** hereto.

20. On April 6, 2022, the U.S. Bankruptcy Court entered an Order (the "**April 6 Order**") stating that "[t]he Adversary Proceeding is abated and all deadlines in the Adversary Proceeding are stayed pending further Order of the Court so that the parties can seek direction from the Canadian Court with respect to the standing to prosecute the claims in the Adversary Proceeding". A copy of the April 6 Order is attached as **Exhibit "M"** hereto.

SWORN BEFORE ME over video teleconference this 14th day of April, 2022 pursuant to O. Reg 431/20, Administering Oath or Declaration Remotely. The affiant was located in the City of New York, in the State of New York while the Commissioner was located in the City Toronto, in the Province of Ontario.

Commissioner for Taking Affidavits



James Tecce

TAB A

This is Exhibit “A”

referred to in the Affidavit of **JAMES C. TECCE**

Sworn before me this 14th day of April, 2022

C. Mantara

A Commissioner for taking affidavits

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.	)	WEDNESDAY, THE 26TH
	)	
JUSTICE KOEHNEN	)	DAY OF MAY, 2021

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

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

SECOND AMENDED AND RESTATED INITIAL ORDER

(amending the Initial Order dated March 9, 2021, as amended and restated on March 19, 2021)

THIS APPLICATION, made by the Applicants, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), was heard this day by judicial videoconference via Zoom in Toronto, Ontario due to the COVID-19 pandemic.

ON READING the affidavit of Michael Carter sworn March 9, 2021 and the Exhibits thereto (the "**First Carter Affidavit**"), the affidavit of Michael Carter sworn March 16, 2021 and the Exhibits thereto (the "**Second Carter Affidavit**"), the affidavit of Michael Carter sworn March 18, 2021 and the Exhibits thereto (the "**Third Carter Affidavit**"), the affidavit of Margaret Munnelly sworn March 16, 2021 and the Exhibits thereto (the "**Munnelly Affidavit**"), the affidavit of Michael Carter sworn May 19, 2021 and the Exhibits thereto, the pre-filing report of the proposed monitor, FTI Consulting Canada Inc. ("**FTI**"), dated March 9, 2021, the First Report of FTI in its capacity as the Court-appointed monitor of the Applicants (the "**Monitor**") dated March 18, 2021, the Second Report of the Monitor dated May 21, 2021, and on being advised that the secured creditors who are likely to be affected by the charges created herein were given notice, and on hearing the submissions of counsel for the Applicants and the partnerships listed in Schedule "A" hereto (the "**JE Partnerships**", and collectively with the Applicants, the "**Just Energy Entities**"), the Monitor, Alter Domus (US) LLC (the "**DIP Agent**"), as administrative agent for the lenders (the "**DIP Lenders**") under the DIP Term Sheet (as defined below), the DIP Lenders and such other counsel who were present, and on reading the consent of FTI to act as the Monitor,

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Application and the Application Record is hereby abridged and validated so that this Application is properly returnable today and hereby dispenses with further service thereof.

DEFINED TERMS

2. **THIS COURT ORDERS** that capitalized terms that are used in this Order shall have the meanings ascribed to them in Schedule "B" hereto or the First Carter Affidavit, as applicable, if they are not otherwise defined herein.

APPLICATION

3. **THIS COURT ORDERS AND DECLARES** that the Applicants are companies to which the CCAA applies. Although not Applicants, the JE Partnerships shall enjoy the benefits of the protections and authorizations provided by this Order.

PLAN OF ARRANGEMENT

4. **THIS COURT ORDERS** that the Applicants shall have the authority to file and may, subject to further order of this Court, file with this Court a plan of compromise or arrangement (hereinafter referred to as the "**Plan**")

POSSESSION OF PROPERTY AND OPERATIONS

5. **THIS COURT ORDERS** that the Just Energy Entities shall remain in possession and control of their respective current and future assets, licenses, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**"). Subject to further Order of this Court, the Just Energy Entities shall continue to carry on business in a manner consistent with the preservation of their business (the "**Business**") and Property. The Just Energy Entities shall each be authorized and empowered to continue to retain and employ the employees, contractors, staffing agencies, consultants, agents, experts, accountants, counsel and such other persons (collectively "**Assistants**") currently retained or employed by them, with liberty to retain such further Assistants as they deem reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.

6. **THIS COURT ORDERS** that:

(a) the Just Energy Entities shall be entitled to continue to utilize the central cash management system currently in place as described in the First Carter Affidavit or, with the consent of the Monitor, the DIP Agent and the DIP Lenders, replace it with another substantially similar central cash management system (the "**Cash Management System**") and that any present or future bank providing the Cash Management System (a "**Cash Management Bank**") shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the Just Energy Entities of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person (as hereinafter defined) other than the Just Energy Entities, pursuant to the terms of the documentation applicable to the Cash Management System, and shall be, in its capacity as provider of the Cash

Management System, an unaffected creditor under any Plan with regard to Cash Management Obligations. All present and future indebtedness, liabilities and obligations of any and every kind, nature or description whatsoever to a Cash Management Bank under, in connection with, relating to or with respect to any and all agreements and arrangements evidencing or in respect of treasury facilities and cash management products (including, without limitation, all pre-authorized debit banking services, electronic funds transfer services, overdraft balances, corporate credit cards, merchant services and pre-authorized debits) provided by a Cash Management Bank to any Just Energy Entity, and any unpaid balance thereof, are collectively referred to herein as the "**Cash Management Obligations**";

(b) during the Stay Period (as defined below), no Cash Management Bank shall, without leave of this Court: (i) exercise any sweep remedy under any applicable documentation (provided, for greater certainty, that the cash pooling and zero-balancing account services provided with respect to the JPMorgan accounts held by the U.S. Bank Account Holders may continue in the ordinary course); (ii) exercise or claim any right of set-off against any account included in the Cash Management System, other than set-off permitted pursuant to paragraph 8 against applicable Authorized Cash Collateral solely in respect of any Cash Management Obligations; or (iii) subject to paragraph 6(d)(ii), modify the Cash Management System;

(c) any of the Cash Management Banks may rely on the representations of the applicable Just Energy Entities with respect to whether any cheques or other payment order drawn or issued by the applicable Just Energy Entity prior to, on, or subsequent to the date of this Order should be honoured pursuant to this or any other order of this Court, and such Cash Management Bank shall not have any liability to any party for: (i) relying on such representations by the applicable Just Energy Entities as provided for herein; or (ii) honouring any cheque (whether made before, on or after the date hereof) in a good faith belief that the Court has authorized such cheque or item to be honoured;

(d) (i) those certain existing deposit agreements between the Just Energy Entities and the Cash Management Banks shall continue to govern the post-filing cash management relationship between the Just Energy Entities and the Cash Management Banks, and

that all of the provisions of such agreements shall remain in full force and effect; (ii)(A) changes to the Cash Management System in accordance with the Lender Support Agreement shall be permitted; and (B) the Just Energy Entities, with the consent of the Monitor, the DIP Agent, the majority of the DIP Lenders and the Cash Management Banks may, without further Order of this Court, implement changes to the Cash Management System and procedures in the ordinary course of business pursuant to the terms of those certain existing deposit agreements, including, without limitation, the opening and closing of bank accounts, where such changes are not otherwise implemented pursuant to paragraph 6(d)(ii)(A); (iii) all control agreements in existence prior to the date of this Order shall apply; and (iv) the Cash Management Banks are authorized to debit the Just Energy Entities' accounts in the ordinary course of business in accordance with the Cash Management System arrangements without the need for further order of this Court for all undisputed Cash Management Obligations owing to the Cash Management Banks;

(e) the Cash Management Banks shall be entitled to the benefit of and are hereby granted a charge (the "**Cash Management Charge**") on the Property to secure the Cash Management Obligations due and owing and that have not been paid in accordance with the applicable Cash Management Arrangements (as defined in the Lender Support Agreement). The Cash Management Charge shall have the priority set out in paragraphs 53-55 herein; and

(f) the Just Energy Entities are authorized but not directed to continue to operate under the merchant processing agreements with JPMorgan Chase Bank, N.A., Paymentech, LLC ("**Paymentech**") (collectively and as amended, restated, supplemented, or otherwise modified from time to time, the "**Merchant Processing Agreement**"). The Just Energy Entities are authorized to pay or reimburse Paymentech for fees, charges, refunds, chargebacks, reserves and other amounts due and owing from the Just Energy Entities to Paymentech (the "**Merchant Services Obligations**") whether such obligations are incurred prior to, on or after the date hereof, and Paymentech is authorized to receive or obtain payment for such Merchant Services Obligations, as provided under, and in the manner set forth in, the Merchant Processing Agreement, including, without limitation, by way of recoupment or set-off without further order of the Court.

7. **THIS COURT ORDERS** that, except as specifically permitted herein, the Just Energy Entities are hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by any of the Just Energy Entities to any of their respective creditors as of this date; (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of the Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the Business; provided, however, that the Just Energy Entities, until further order of this Court, are hereby permitted, subject to the terms of the Definitive Documents: (i) with the consent of the Monitor, to provide cash collateral ("**Authorized Cash Collateral**") to third parties (the "**Collateral Recipients**"), including to the Cash Management Banks in accordance with the Lender Support Agreement, with respect to obligations incurred before, on or after the date hereof, and to grant security interests in such Authorized Cash Collateral in favour of the Collateral Recipients, where so doing is necessary to operate the Business in the normal course during these proceedings; (ii) subject to the terms of the Lender Support Agreement, to reimburse the reasonable documented fees and disbursements of one Canadian legal counsel, one U.S. legal counsel, one local counsel in Texas and one financial advisor to the agent (the "**CA Agent**") and the lenders (the "**CA Lenders**") under the Credit Agreement, whether incurred before or after the date of this Order; (iii) subject to the terms of the Lender Support Agreement, to pay all non-default interest and fees to the CA Agent and the CA Lenders in accordance with its terms; and (iv) to repay advances under the Credit Agreement solely for the purpose of creating availability under the Revolving Facilities in order for the Just Energy Entities to request the issuance of Letters of Credit under the Revolving Facilities to continue to operate the Business in the ordinary course during these proceedings, subject to: (A) obtaining the consent of the Monitor with respect to the issuance of the Letters of Credit under the Revolving Facilities; and (B) receipt of written confirmation from the applicable CA Lender(s) under the Credit Agreement that such CA Lender(s) will issue a Letter of Credit of equal value within one (1) Business Day thereafter. Capitalized terms used but not otherwise defined in this paragraph shall have the meanings ascribed thereto in the Credit Agreement.

8. **THIS COURT ORDERS** that the holders of cash collateral provided by the Just Energy Entities prior to the date hereof or any Collateral Recipients of Authorized Cash Collateral (the foregoing, collectively, "**Cash Collateral**") shall be authorized to exercise any available rights of

set-off in respect of such Cash Collateral with respect to obligations secured thereby, whether incurred before, on or after the date hereof.

9. **THIS COURT ORDERS** that the Charges (as defined below) shall rank junior in priority to any liens, security interests and charges attached to Cash Collateral in favour of the holders thereof, and shall attach to the Cash Collateral only to the extent of any rights of any Just Energy Entity to the return of such Cash Collateral.

10. **THIS COURT ORDERS** that, subject to the terms of the Definitive Documents (as hereinafter defined), the Just Energy Entities shall be entitled but not required to pay the following amounts whether incurred prior to, on or after the date of this Order:

(a) all outstanding and future wages (including, without limitation, the Q3 bonus described in the Munnelly Affidavit), salaries, commissions, employee benefits, contributions in respect of retirement or other benefit arrangements, vacation pay and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;

(b) all outstanding and future amounts owing to or in respect of other workers providing services in connection with the Business and payable on or after the date of this Order, incurred in the ordinary course of business and consistent with existing arrangements;

(c) the fees and disbursements of any Assistants retained or employed by the Just Energy Entities in respect of these proceedings at their standard rates and charges, which, in the case of the Financial Advisor (as defined below) shall be the amounts payable in accordance with the Financial Advisor Agreement (as defined below);

(d) with the consent of the Monitor in consultation with the agent under the Credit Agreement (or its advisors), amounts owing for goods or services actually provided to any of the Just Energy Entities prior to the date of this Order by third parties, if, in the opinion of the Just Energy Entities, such third party is critical to the Business and ongoing operations of the Just Energy Entities;

(e) any taxes (including, without limitation, sales, use, withholding, unemployment, and excise) not covered by paragraph 12 of this Order, and whereby the nonpayment of

which by any Just Energy Entity could result in a responsible person associated with a Just Energy Entity being held personally liable for such nonpayment; and

(f) taxes related to revenue, State income or operations incurred or collected by a Just Energy Entity in the ordinary course of business.

11. **THIS COURT ORDERS** that, except as otherwise provided to the contrary herein and subject to the terms of the Definitive Documents, the Just Energy Entities shall be entitled but not required to pay all reasonable expenses incurred by the Just Energy Entities in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

(a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance (including directors and officers' insurance), maintenance and security services; and

(b) payment for goods or services actually supplied to the Just Energy Entities following the date of this Order.

12. **THIS COURT ORDERS** that the Just Energy Entities shall remit, in accordance with legal requirements, or pay:

(a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Quebec Pension Plan, and (iv) income taxes;

(b) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Just Energy Entities in connection with the sale of goods and services by the Just Energy Entities, but only where such Sales Taxes are accrued or collected after the date of this Order, or where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order; and

(c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the Just Energy Entities.

RESTRUCTURING

13. **THIS COURT ORDERS** that the Just Energy Entities shall, subject to such requirements as are imposed by the CCAA and subject to the terms of the Definitive Documents, have the right to:

(a) permanently or temporarily cease, downsize or shut down any of their Business or operations;

(b) terminate the employment of such of its employees or temporarily lay off such of its employees as it deems appropriate; and

(c) pursue all avenues of refinancing, restructuring, selling and reorganizing the Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing, restructuring, sale or reorganization,

all of the foregoing to permit the Just Energy Entities to proceed with an orderly restructuring of the Just Energy Entities and/or the Business (the "**Restructuring**").

LEASES

14. **THIS COURT ORDERS** that until a real property lease is disclaimed in accordance with the CCAA, the Just Energy Entities shall pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord under the lease) or as otherwise may be negotiated between the applicable Just Energy Entity and the landlord from time to time ("**Rent**"), for the period commencing from and including the date of this Order, twice-monthly in equal payments on the first and fifteenth day of each month, in advance (but not in arrears). On

the date of the first of such payments, any Rent relating to the period commencing from and including the date of this Order shall also be paid.

15. **THIS COURT ORDERS** that the Just Energy Entities shall provide each of the relevant landlords with notice of the relevant Just Energy Entity's intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the entitlement of a Just Energy Entity to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the relevant Just Energy Entity, or by further Order of this Court upon application by the Just Energy Entities on at least two (2) days notice to such landlord and any such secured creditors. If any Just Energy Entity disclaims the lease governing such leased premises in accordance with Section 32 of the CCAA, it shall not be required to pay Rent under such lease pending resolution of any such dispute (other than Rent payable for the notice period provided for in Section 32(5) of the CCAA), and the disclaimer of the lease shall be without prejudice to the Applicant's claim to the fixtures in dispute.

16. **THIS COURT ORDERS** that if a notice of disclaimer is delivered pursuant to Section 32 of the CCAA, then (i) during the notice period prior to the effective time of the disclaimer, the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the relevant Just Energy Entity and the Monitor 24 hours' prior written notice, and (ii) at the effective time of the disclaimer, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the relevant Just Energy Entity in respect of such lease or leased premises, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

NO PROCEEDINGS AGAINST THE JUST ENERGY ENTITIES, THE BUSINESS OR THE PROPERTY

17. **THIS COURT ORDERS** that until and including June 4, 2021 or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process before any court, tribunal, agency or other legal or, subject to paragraph 18, regulatory body (each, a "**Proceeding**") shall be commenced or continued against or in respect of any of the Just Energy Entities or the

Monitor or their respective employees and representatives acting in such capacities, or affecting the Business or the Property, except with the prior written consent of the Just Energy Entities and the Monitor, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Just Energy Entities or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

18. **THIS COURT ORDERS** that during the Stay Period, all rights and remedies of any individual, firm, corporation, organization, governmental unit, body or agency, foreign regulatory body or agency or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of the Just Energy Entities or the Monitor, or their respective employees and representatives acting in such capacities, or affecting the Business or the Property, are hereby stayed and suspended except with the written consent of the Just Energy Entities and the Monitor, or leave of this Court, provided that nothing in this Order shall: (i) empower the Just Energy Entities to carry on any business which the Just Energy Entities are not lawfully entitled to carry on, (ii) subject to paragraph 19, affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

19. **THIS COURT ORDERS** that notwithstanding Section 11.1 of the CCAA, all rights and remedies of provincial energy regulators and provincial regulators of consumer sales that have authority with respect to energy sales against or in respect of the Just Energy Entities or their respective employees and representatives acting in such capacities, or affecting the Business or the Property, are hereby stayed and suspended during the Stay Period except with the written consent of the Just Energy Entities and the Monitor, or leave of this Court on notice to the Service List.

NO INTERFERENCE WITH RIGHTS

20. **THIS COURT ORDERS** that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Just Energy Entities except with

the written consent of the Just Energy Entities and the Monitor, leave of this Court or as permitted under any Qualified Support Agreement or the Lender Support Agreement.

CONTINUATION OF SERVICES

21. **THIS COURT ORDERS** that during the Stay Period, except as permitted under any Qualified Support Agreement or the Lender Support Agreement, all Persons having oral or written agreements with any Just Energy Entity or statutory or regulatory mandates for the supply of goods and/or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Just Energy Entities or the Business, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Just Energy Entities, and that the Just Energy Entities shall be entitled to the continued use of their current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case, that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Just Energy Entities in accordance with normal payment practices of the Just Energy Entities or such other practices as may be agreed upon by the supplier or service provider and the applicable Just Energy Entity and the Monitor, or as may be ordered by this Court.

NON-DEROGATION OF RIGHTS

22. **THIS COURT ORDERS** that, subject to paragraph 30 but notwithstanding any other paragraphs of this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to any of the Just Energy Entities. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

KEY EMPLOYEE RETENTION PLAN

23. **THIS COURT ORDERS** that the Key Employee Retention Plan (the "**KERP**"), as described in the Second Carter Affidavit and attached as Confidential Appendix "Q" thereto, is

hereby approved and the Just Energy Entities are authorized to make payments contemplated thereunder in accordance with the terms and conditions of the KERP.

24. **THIS COURT ORDERS** that the key employees referred to in the KERP (the "**Key Employees**") shall be entitled to the benefit of and are hereby granted a charge on the Property (the "**KERP Charge**"), which charge shall not exceed the aggregate amount of C$2,012,100 for Canadian dollar payments and US$ 3,876,024 for U.S. dollar payments, to secure any payments to the Key Employees under the KERP. The KERP Charge shall have the priority set out in paragraphs 53-55 herein.

LENDER SUPPORT AGREEMENT

25. **THIS COURT ORDERS** that the Lender Support Agreement is hereby ratified and approved and that, upon the occurrence of a termination event under the Lender Support Agreement, the CA Lenders may exercise the rights and remedies available to them under the Lender Support Agreement in accordance with the terms thereof.

PRE-FILING SECURITY INTERESTS

26. **THIS COURT ORDERS** that any obligations secured by a valid, enforceable and perfected security interest upon or in respect of any of the Property pursuant to a security agreement which includes as collateral thereunder any Property acquired after the date of the applicable security agreement ("**After-Acquired Property**"), shall continue to be secured by the Property (including After Acquired Property that may be acquired by the applicable Just Energy Entities after the commencement of these proceedings) notwithstanding the commencement of these proceedings, subject to the priority set out in paragraphs 53-55 herein.

COMMODITY SUPPLIERS

27. **THIS COURT ORDERS** that each Qualified Commodity/ISO Supplier shall be entitled to the benefit of and is hereby granted a charge (together, the "**Priority Commodity/ISO Charge**") on the Property in an amount equal to the value of the Priority Commodity/ISO Obligations. The value of the Priority Commodity/ISO Obligations shall be determined in accordance with the terms of the existing agreements or arrangements between the applicable Just Energy Entity and the Qualified Commodity/ISO Supplier or, in the event of any dispute, by the

Court. The Priority Commodity/ISO Charge shall have the priority set out in paragraphs 53-55 herein.

28. **THIS COURT ORDERS** that the Commodity/ISO Supplier Support Agreements are hereby ratified, approved and deemed to be Qualified Support Agreements.

29. **THIS COURT ORDERS** that the Just Energy Entities are hereby authorized and empowered to execute and deliver up to eight (8) Qualified Support Agreements.

30. **THIS COURT ORDERS** that upon the occurrence of an event of default under a Qualified Support Agreement, the applicable Qualified Commodity/ISO Supplier may exercise the rights and remedies available to it under its Qualified Support Agreement, or upon five (5) days' notice to the Just Energy Entities, the Monitor and the Service List, may apply to this Court to seek the Court's authorization to exercise any and all of its other rights and remedies against the Just Energy Entities or the Property under or pursuant to its Commodity Agreement or ISO Agreement and the Priority Commodity/ISO Charge, including without limitation, for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Just Energy Entities and for the appointment of a trustee in bankruptcy of the Just Energy Entities provided that a Qualified Commodity/ISO Supplier may, unless otherwise ordered by the Court, terminate any Commodity Agreements and Qualified Support Agreements entered into after May 26, 2021 without obtaining the Court's authorization in the event that: (i) an Order is granted in these proceedings that authorizes the exercise of rights and remedies against the Just Energy Entities or the Property under or pursuant to the Definitive Documents and the DIP Lenders' Charge (as defined below); or (ii) these proceedings or the recognition proceedings under Chapter 15 of the United States Bankruptcy Code are dismissed or converted to a liquidation proceeding, including a receivership, bankruptcy, proceeding under Chapter 7 of the United States Bankruptcy Code or otherwise.

31. **THIS COURT ORDERS** that the Monitor shall provide a report on the value of the Priority Commodity/ISO Obligations as of the last day of each calendar month by posting such report on the Monitor's Website (as defined below) within three (3) Business Days of such calendar month end.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

32. **THIS COURT ORDERS** that during the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Just Energy Entities with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Just Energy Entities whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the Just Energy Entities, if one is filed, is sanctioned by this Court or is refused by the creditors of the Just Energy Entities or this Court.

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

33. **THIS COURT ORDERS** that each of the Just Energy Entities shall jointly and severally indemnify their respective directors and officers against obligations and liabilities that they may incur as directors or officers of the Just Energy Entities after the commencement of the within proceedings, except to the extent that, with respect to any officer or director, the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

34. **THIS COURT ORDERS** that the directors and officers of the Just Energy Entities shall be entitled to the benefit of and are hereby granted a charge (the "**Directors' Charge**") on the Property, which charge shall not exceed an aggregate amount of C$44,100,000, as security for the indemnity provided in paragraph 33 of this Order. The Directors' Charge shall have the priority set out in paragraphs 53-55 herein.

35. **THIS COURT ORDERS** that, notwithstanding any language in any applicable insurance policy to the contrary, (i) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge, and (ii) the Just Energy Entities' directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 33.

APPOINTMENT OF MONITOR

36. **THIS COURT ORDERS** that FTI is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs of the Just Energy Entities with the powers and obligations set out in the CCAA or set forth herein and that the Just Energy Entities and their shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Just Energy Entities pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

37. **THIS COURT ORDERS** that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

(a) monitor the Just Energy Entities' receipts and disbursements;

(b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;

(c) assist the Just Energy Entities, to the extent required by the Just Energy Entities, in their dissemination to the DIP Agent, the DIP Lenders and their counsel of financial and other information in accordance with the Definitive Documents;

(d) advise the Just Energy Entities in their preparation of the Just Energy Entities' cash flow statements and reporting required by the DIP Agent and DIP Lenders, which information shall be reviewed with the Monitor and delivered to the DIP Agent and DIP Lenders and their counsel in accordance with the Definitive Documents;

(e) advise the Just Energy Entities in their development of a Plan and any amendments to a Plan;

(f) assist the Just Energy Entities, to the extent required by the Just Energy Entities, with the holding and administering of creditors' or shareholders' meeting for voting on the Plan;

(g) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Just Energy Entities, wherever located and to the extent that is necessary to adequately assess the Just Energy Entities' business and financial affairs or to perform its duties arising under this Order;

(h) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order; and

(i) perform such other duties as are required by this Order or by this Court from time to time.

38. **THIS COURT ORDERS** that the Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof.

39. **THIS COURT ORDERS** that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the Ontario *Environmental Protection Act*, the *Ontario Water Resources Act*, or the Ontario *Occupational Health and Safety Act* and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

40. **THIS COURT ORDERS** that the Monitor shall provide any creditor of the Just Energy Entities and the DIP Agent and the DIP Lenders with information provided by the Just Energy Entities in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Just Energy Entities is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Applicant may agree.

41. **THIS COURT ORDERS** that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

42. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor (including both U.S. and Canadian counsel for all purposes of this Order), and counsel to the Just Energy Entities (including both U.S. and Canadian counsel for all purposes of this Order) shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, whether incurred prior to, on, or subsequent to the date of this Order, by the Just Energy Entities as part of the costs of these proceedings. The Just Energy Entities are hereby authorized and directed to pay the accounts of the Monitor, counsel to the Monitor, and the Just Energy Entities' counsel on a weekly basis.

43. **THIS COURT ORDERS** that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

ADMINISTRATION CHARGE

44. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor and counsel to the Just Energy Entities shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of C$3,000,000 as security for their professional fees and disbursements incurred at their standard

rates and charges, both before and after the making of this Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 53-55 herein.

DIP FINANCING

45. **THIS COURT ORDERS** that the Just Energy Entities are hereby authorized and empowered to obtain and borrow or guarantee, as applicable, pursuant a credit facility from the DIP Agent and the DIP Lenders in order to finance the Just Energy Entities' working capital requirements and other general corporate purposes, all in accordance with the Cash Flow Statements (as defined in the DIP Term Sheet) and Definitive Documents, provided that borrowings under such credit facility shall not exceed US$125,000,000 unless permitted by further Order of this Court.

46. **THIS COURT ORDERS** that such credit facility shall be on the terms and subject to the conditions set forth in the CCAA Interim Debtor-in-Possession Financing Term Sheet between the Just Energy Entities, the DIP Agent and the DIP Lenders dated as of March 9, 2021 and attached as Appendix "DD" to the First Carter Affidavit (as may be amended or amended and restated from time to time, the "**DIP Term Sheet**").

47. **THIS COURT ORDERS** that the Just Energy Entities are hereby authorized and empowered to execute and deliver such mortgages, charges, hypothecs and security documents, guarantees and other definitive documents (collectively with the DIP Term Sheet and the Cash Flow Statements, the "**Definitive Documents**"), as are contemplated by the DIP Term Sheet or as may be reasonably required by the DIP Agent and the DIP Lenders pursuant to the terms thereof, and the Just Energy Entities are hereby authorized and directed to pay and perform all of the indebtedness, interest, fees, liabilities and obligations to the DIP Agent and the DIP Lenders under and pursuant to the Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order. Notwithstanding any other provision in this Order, all payments and other expenditures to be made by any of the Just Energy Entities to any Person (except the Monitor and its counsel) shall be in accordance with the terms of the Definitive Documents, including in respect of payments in satisfaction of Priority Commodity/ISO Obligations.

48. **THIS COURT ORDERS** that the DIP Agent and the DIP Lenders shall be entitled to the benefit of and are hereby granted a charge (the "**DIP Lenders' Charge**") on the Property, which DIP Lenders' Charge shall not secure an obligation that exists before this Order is made. The DIP Lenders' Charge shall have the priority set out in paragraphs 53-55 hereof.

49. **THIS COURT ORDERS** that, notwithstanding any other provision of this Order:

(a) the DIP Agent on behalf of the DIP Lenders may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the DIP Lenders' Charge or any of the Definitive Documents;

(b) upon the occurrence of an event of default under any of the Definitive Documents or the DIP Lenders' Charge, the DIP Agent or the DIP Lenders, as applicable, may immediately cease making advances or providing any credit to the Just Energy Entities and shall be permitted to set off and/or consolidate any amounts owing by the DIP Agent or the DIP Lenders to the Just Energy Entities against the obligations of the Just Energy Entities to the DIP Agent and the DIP Lenders under the Definitive Documents or the DIP Lenders' Charge, make demand, accelerate payment and give other notices with respect to the obligations of the Just Energy Entities to the DIP Agent or the DIP Lenders under the Definitive Documents or the DIP Lenders' Charge, or to apply to this Court on five (5) days' notice to the Just Energy Entities, the Monitor and the Service List to seek the Court's authorization to exercise any and all of its other rights and remedies against the Just Energy Entities or the Property under or pursuant to the Definitive Documents and the DIP Lenders' Charge, including without limitation, for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Just Energy Entities and for the appointment of a trustee in bankruptcy of the Just Energy Entities; and

(c) the foregoing rights and remedies of the DIP Agent and the DIP Lenders shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Just Energy Entities or the Property.

50. **THIS COURT ORDERS AND DECLARES** that the DIP Agent, the DIP Lenders, the Qualified Commodity/ISO Suppliers and the Cash Management Banks shall be treated as

unaffected in any Plan filed by the Applicants or any of them under the CCAA, or any proposal filed by the Applicants or any of them under the *Bankruptcy and Insolvency Act* of Canada (the "**BIA**"), with respect to any advances made under the Definitive Documents, the Priority Commodity/ISO Obligations or the Cash Management Obligations, as applicable.

APPROVAL OF FINANCIAL ADVISOR AGREEMENT

51. **THIS COURT ORDERS** that the agreement dated February 20, 2021 engaging BMO Nesbitt Burns Inc. (the "**Financial Advisor**") as financial advisor to the Just Energy Entities and attached as Confidential Appendix "FF" to the First Carter Affidavit (the "**Financial Advisor Agreement**"), and the retention of the Financial Advisor under the terms thereof, is hereby ratified and approved and the Just Energy Entities are authorized and directed *nunc pro tunc* to make the payments contemplated thereunder in accordance with the terms and conditions of the Financial Advisor Agreement.

52. **THIS COURT ORDERS** that the Financial Advisor shall be entitled to the benefit of and is hereby granted a charge (the "**FA Charge**") on the Property, which charge shall not exceed an aggregate amount of C$8,600,000 as security for the fees and disbursements and other amounts payable under the Financial Advisor Agreement, both before and after the making of this Order in respect of these proceedings. The FA Charge shall have the priority set out in paragraphs 53-55 herein.

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

53. **THIS COURT ORDERS** that the priorities of the Administration Charge, the FA Charge, the Directors' Charge, the KERP Charge, the DIP Lenders' Charge, the Priority Commodity/ISO Charge and the Cash Management Charge, as among them, shall be as follows:

First – Administration Charge and FA Charge (to the maximum amount of C$3,000,000 and C$8,600,000, respectively), on a *pari passu* basis;

Second – Directors' Charge (to the maximum amount of C$44,100,000);

Third – KERP Charge (to the maximum amounts of C$2,012,100 and US$3,876,024);

Fourth – DIP Lenders' Charge (to the maximum amount of the Obligations (as defined in the DIP Term Sheet) owing thereunder at the relevant time) and the Priority Commodity/ISO Charge, on a *pari passu* basis; and

Fifth – Cash Management Charge.

54. **THIS COURT ORDERS** that the filing, registration or perfection of the Administration Charge, the FA Charge, the Directors' Charge, the KERP Charge, the DIP Lenders' Charge, the Priority Commodity/ISO Charge or the Cash Management Charge (collectively, the "**Charges**") shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

55. **THIS COURT ORDERS** that, subject to paragraph 9, each of the Charges shall constitute a charge on the Property and such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person (including those commodity suppliers listed in Schedule "A" hereto).

56. **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be approved by this Court on notice to parties in interest, the Just Energy Entities shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Charges unless the Just Energy Entities also obtain the prior written consent of the Monitor, the DIP Agent on behalf of the DIP Lenders and the beneficiaries of the Administration Charge, the FA Charge, the Directors' Charge, the KERP Charge, the Priority Commodity/ISO Charge and the Cash Management Charge, or further Order of this Court.

57. **THIS COURT ORDERS** that the Charges, the agreements and other documents governing or otherwise relating to the obligations secured by the Charges, and the Definitive Documents shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "**Chargees**") and/or the DIP Agent or the DIP Lenders thereunder shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made

pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan document, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds any of the Just Energy Entities and notwithstanding any provision to the contrary in any Agreement:

(a) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of the Definitive Documents shall create or be deemed to constitute a breach by any Just Energy Entity of any Agreement to which it is a party;

(b) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the Just Energy Entities entering into the DIP Term Sheet, the creation of the Charges or the execution, delivery or performance of any of the other Definitive Documents; and

(c) the payments made by the Just Energy Entities pursuant to this Order or the Definitive Documents, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

58. **THIS COURT ORDERS** that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the Just Energy Entities' interest in such real property leases.

SERVICE AND NOTICE

59. **THIS COURT ORDERS** that the Monitor shall (i) without delay, publish in The Globe and Mail (National Edition) and the Wall Street Journal a notice containing the information prescribed under the CCAA, (ii) within five days after the date of this Order, (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, or cause to be sent, in the prescribed manner or by electronic message to the e-mail addresses as last shown on the records of the Just Energy Entities, a notice to every known creditor who has a claim against the Just Energy Entities of more than $1,000, and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the

prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder, provided that the Monitor shall not make the claims, names and addresses of the individuals who are creditors publicly available.

60. **THIS COURT ORDERS** that the Monitor shall create, maintain and update as necessary a list of all Persons appearing in person or by counsel in this proceeding (the "**Service List**"). The Monitor shall post the Service List, as may be updated from time to time, on the Monitor's website as part of the public materials to be recorded thereon in relation to this proceeding. Notwithstanding the foregoing, the Monitor shall haven no liability in respect of the accuracy of or the timeliness of making any changes to the Service List.

61. **THIS COURT ORDERS** that the E-Service Protocol of the Commercial List (the "**Protocol**") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at http://www.ontariocourts.ca//scj/practice/practice-directions/toronto/eservice-commercial/) shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Protocol with the following URL - http://cfcanada.fticonsulting.com/justenergy (the "**Monitor's Website**").

62. **THIS COURT ORDERS** that the Just Energy Entities, the DIP Agent or the DIP Lenders and the Monitor and their respective counsel are at liberty to serve or distribute this Order, any other materials and orders as may be reasonably required in these proceedings, including any notices, or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal deliver, facsimile or other electronic transmission to the Just Energy Entities' creditors or other interested parties and their advisors and that any such service, distribution or notice shall be deemed to be received: (a) if sent by courier, on the next business day following the date of forwarding thereof, (b) if delivered by personal delivery or facsimile or other electronic transmission, on the day so delivered, and (c) if sent by ordinary mail, on the third business day after mailing. For greater certainty, any such distribution or service shall be deemed to be in

satisfaction of a legal or judicial obligation, and notice requirements within the meaning of clause 3(c) of the *Electronic Commerce Protection Regulations*, Reg. 81000-2-175 (SOR/DORS).

FOREIGN PROCEEDINGS

63. **THIS COURT ORDERS** that the Applicant, Just Energy Group Inc. ("**JEGI**") is hereby authorized and empowered, but not required, to act as the foreign representative (in such capacity, the "**Foreign Representative**") in respect of the within proceedings for the purpose of having these proceedings recognized and approved in a jurisdiction outside of Canada.

64. **THIS COURT ORDERS** that the Foreign Representative is hereby authorized to apply for foreign recognition and approval of these proceedings, as necessary, in any jurisdiction outside of Canada, including in the United States pursuant to chapter 15 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532.

GENERAL

65. **THIS COURT ORDERS** that any interested party may apply to this Court to amend or vary this Order on not less than seven (7) days' notice to any other party or parties likely to be affected by the Order sought or upon such other notice, if any, as this Court may order; provided, however, that the Chargees, the DIP Agent and the DIP Lenders shall be entitled to rely on this Order as issued and entered and on the Charges and priorities set out in paragraphs 53-55 hereof, including with respect to any fees, expenses and disbursements incurred and in respect of advances made under the Definitive Documents or pursuant to the Qualified Support Agreement, as applicable, until the date this Order may be amended, varied or stayed. For the avoidance of doubt (i) no payment in respect of any obligations secured by the Priority Commodity/ISO Charge or the Cash Management Charge or made to the CA Lenders pursuant to the Lender Support Agreement, and (ii) none of the Authorized Cash Collateral, shall be subject to the terms of any intercreditor agreement, including any "turnover" or "waterfall" provision(s) therein.

66. **THIS COURT ORDERS** that, notwithstanding paragraph 65 of this Order, the Just Energy Entities or the Monitor may from time to time apply to this Court to amend, vary or supplement this Order or for advice and directions in the discharge of their powers and duties under this Order or in the interpretation or application of this Order.

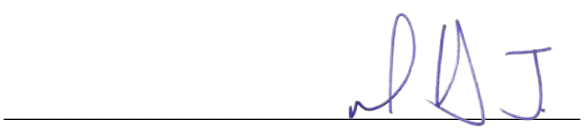
67. **THIS COURT ORDERS** that nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Just Energy Entities, the Business or the Property.

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

69. **THIS COURT ORDERS** that each of the Just Energy Entities and the Monitor be at liberty and are hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body or agency, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that JEGI is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

70. **THIS COURT ORDERS** that Confidential Appendices "FF" and "GG" to the First Carter Affidavit and Confidential Appendix "Q" to the Second Carter Affidavit shall be and are hereby sealed, kept confidential and shall not form part of the public record pending further Order of this Court.

71. **THIS COURT ORDERS** that this Order and all of its provisions are effective as of 12:01 a.m. Eastern Standard/Daylight Time on the date of this Order.



SCHEDULE "A"

JE Partnerships

Partnerships:

- JUST ENERGY ONTARIO L.P.
- JUST ENERGY MANITOBA L.P.
- JUST ENERGY (B.C.) LIMITED PARTNERSHIP
- JUST ENERGY QUÉBEC L.P.
- JUST ENERGY TRADING L.P.
- JUST ENERGY ALBERTA L.P.
- JUST GREEN L.P.
- JUST ENERGY PRAIRIES L.P.
- JEBPO SERVICES LLP
- JUST ENERGY TEXAS LP

Commodity Suppliers:

- EXELON GENERATION COMPANY, LLC
- BRUCE POWER L.P.
- SOCIÉTÉ GÉNÉRALE
- EDF TRADING NORTH AMERICA, LLC
- NEXTERA ENERGY POWER MARKETING, LLC
- MACQUARIE BANK LIMITED
- MACQUARIE ENERGY CANADA LTD.
- MACQUARIE ENERGY LLC
- MORGAN STANLEY CAPITAL GROUP

- BP CANADA ENERGY MARKETING CORP.
- BP ENERGY COMPANY
- BP CORPORATION NORTH AMERICA INC.
- BP CANADA ENERGY GROUP ULC
- SHELL ENERGY NORTH AMERICA (CANADA) INC.
- SHELL ENERGY NORTH AMERICA (US), L.P.

SCHEDULE "B"

DEFINITIONS

"**Commodity Agreement**" means a gas supply agreement, electricity supply agreement or other agreement with any Just Energy Entity for the physical or financial purchase, sale, trading or hedging of natural gas, electricity or environmental derivative products, or contracts entered into for protection against fluctuations in foreign currency exchange rates, which shall include any master power purchase and sale agreement, base contract for sale and purchase, ISDA master agreement or similar agreement.

"**ISO Agreement**" means an agreement pursuant to which a Just Energy Entity has reimbursement obligations to a counterparty for payments made by such counterparty on behalf of such Just Energy Entity to an independent system operator that coordinates, controls and monitors the operation of an electrical power system, and includes all agreements related thereto.

"**Lender Support Agreement**" means that certain Accommodation and Support Agreement dated as of March 18, 2021 and attached as Exhibit "A" to the Third Carter Affidavit, among the CA Agent, the CA Lenders and the Just Energy Entities, which agreement shall not be amended, restated or modified in any manner without the consent of the majority of the DIP Lenders and the Monitor.

"**Priority Commodity/ISO Obligation**" means amounts that are due and payable, at the applicable time, for: (i)(A) the physical supply of electricity or gas that has been delivered on or after March 9, 2021; (B) financial settlements on or after March 9, 2021; and (C) amounts owing under a confirmation or transaction that was executed on or after March 9, 2021 pursuant to a Commodity Agreement as a result of the termination thereof in accordance with the applicable Qualified Support Agreement; and (ii) for services actually delivered by a Qualified Commodity/ISO Supplier on or after March 9, 2021 pursuant to an ISO Agreement (but for greater certainty, excluding any amount owing for ISO services provided under an ISO Agreement on or before the date of this Order, whether or not yet due).

"**Qualified Commodity/ISO Supplier**" means any counterparty to a Commodity Agreement or ISO Agreement that has executed or executes a Qualified Support Agreement with a Just Energy Entity and refrained from exercising any available termination rights, under the Commodity

Agreement as a result of the commencement of the Proceedings absent an event of default under such Qualified Support Agreement.

"**Qualified Support Agreement**" means a support agreement between a Just Energy Entity and a counterparty to a Commodity Agreement, in form and substance satisfactory to the Just Energy Entities and the DIP Lenders, acting reasonably, which includes, among other things: (i) that such counterparty shall apply to the Court on five (5) days' notice to the Just Energy Entities, the Monitor and the Service List prior to exercising any termination rights under a Qualified Support Agreement, except as expressly provided for herein; (ii) the obligation to supply physical and financial power and natural gas and other related services pursuant to any confirmations or transactions executed pursuant to a Commodity Agreement; and (iii) an agreement to refrain from exercising termination rights as a result of the commencement of these proceedings absent an event of default under such support agreement.

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 (collectively, the "**Applicants**")

Ontario
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

SECOND AMENDED & RESTATED INITIAL ORDER

OSLER, HOSKIN & HARCOURT, LLP
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Toronto, ON M5X 1B8

Marc Wasserman (LSO# 44066M)
Michael De Lellis (LSO# 48038U)
Jeremy Dacks (LSO# 41851R)

Tel: (416) 362-2111
Fax: (416) 862-6666

Lawyers for the Applicants

TAB B

This is Exhibit “B”

referred to in the Affidavit of **JAMES C. TECCE**

Sworn before me this 14th day of April, 2022

C. Manfara

A Commissioner for taking affidavits

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re:	)	Chapter 15
JUST ENERGY GROUP INC., *et al*	)	Case No. 21-30823 (MI)
Debtors in a Foreign Proceeding,[1]	)	(Joint Administration Requested)
	)	**Re Docket No.**

ORDER GRANTING PROVISIONAL RELIEF
PURSUANT TO SECTION 1519 OF THE BANKRUPTCY CODE

Upon the motion (the "Motion")[2] filed by the foreign representative (the "Foreign Representative") of the above-captioned debtors (collectively, the "Debtors" or "Just Energy"), seeking provisional relief under the Bankruptcy Code to protect the Debtors and their property within the territorial jurisdiction of the United States pending recognition of the Debtors' voluntary arrangement proceedings commenced under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as amended, the "CCAA") in the Superior Court of Ontario (the "Canadian Proceedings" and such court, the "Canadian Court"); the Court having jurisdiction to consider the Motion and the relief requested therein pursuant to 28 U.S.C. and §1334; and the relief requested in the Motion being a core proceeding pursuant to 28 U.S.C. § 157(b); and that this Court may enter a final order consistent with Article III of the United States Constitution; venue being proper

[1] The identifying four digits of Debtor Just Energy Group Inc.'s local Canada tax identification number are 0469. Due to the large number of debtor entities in these chapter 15 cases, for which the Debtors have requested joint administration, a complete list of the debtor entities and the last four digits of their federal tax identification numbers are not provided herein. A complete list of such information may be obtained on the website of the Debtors' claims and noticing agent at www.omniagentsolutions.com/justenergy. The location of the Debtors' service address for purposes of these chapter 15 cases is: 100 King Street West, Suite 2360, Toronto, ON, M5X 1E1.

[2] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Motion or the CCAA Order (as defined herein), as applicable.

before the Court pursuant to 28 U.S.C. § 1410; adequate and sufficient notice of the filing of the Motion having been given by the Foreign Representative; it appearing that the relief requested in the Motion is necessary and beneficial to the Debtors; and no objections or other responses having been filed that have not been overruled, withdrawn, or otherwise resolved; and after due deliberation and sufficient cause appearing therefor, it is hereby **FOUND** that:

A. The findings and conclusions set forth herein constitute this Court's findings of fact and conclusions of law pursuant to rule 7052 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), made applicable to this proceeding pursuant to Bankruptcy Rule 9014. To the extent any of the following findings of fact constitute conclusions of law, they are adopted as such. To the extent any of the following conclusions of law constitute findings of fact, they are adopted as such.

B. There is a substantial likelihood that the Foreign Representative will successfully demonstrate that the Canadian Proceedings constitute "foreign main proceedings" as defined in section 1502(4) of the Bankruptcy Code.

C. As evidenced by the CCAA Order, the Canadian Court has determined that the commencement or continuation of any action or proceeding in Canada against the Debtors or their assets should be enjoined pursuant to applicable Canadian law to permit the expeditious and economical administration of the Canadian Proceedings, and such relief will either (a) not cause an undue hardship to any creditors or other parties-in-interest or (b) any hardship to such creditors or parties is outweighed by the benefits of the relief requested. This Court similarly determines that, consistent with the CCAA Order, the commencement or continuation of any action or proceeding in the United States against the Debtors or their assets should be enjoined pursuant to sections 105 and 1519(a) of the Bankruptcy Code to permit the expeditious and economical

administration of the Canadian Proceedings, and such relief will either (a) not cause an undue hardship to any creditors or other parties-in-interest or (b) any hardship to such creditors or parties is outweighed by the benefits of the relief requested.

D. Unless a preliminary injunction is issued, and unless the Debtors are immediately authorized to comply with the CCAA Order, and unless all creditors, persons, parties in interest, contract parties, lenders and governmental units and agencies located within the territorial United States (collectively, the "U.S. Chapter 15 Parties") are bound by the terms of the CCAA Order pending the upcoming recognition hearing to be held by this Court, there is a material risk that the U.S. Chapter 15 Parties may take certain actions against the Debtors, including exercising certain remedies under existing debt obligations, existing executory contracts, or unexpired leases or under applicable law. Such actions could (a) interfere with the jurisdictional mandate of this Court under chapter 15 of the Bankruptcy Code, (b) interfere with and cause harm to the Debtors' efforts to administer and implement the Canadian Proceedings, (c) interfere with the Debtors' operations, and (d) undermine the Debtors' efforts to achieve an equitable result for the benefit of all of the Debtors' stakeholders. Accordingly, there is a material risk that the Debtors may suffer immediate and irreparable injury (with no adequate remedy at law), and it is therefore necessary that the Court grant the relief set forth in this order (the "Order").

E. The Foreign Representative has demonstrated to the Canadian Court that the incurrence of indebtedness under the DIP Facility and the granting of liens and charge negotiated in connection with the DIP Facility is necessary to prevent irreparable harm to the Debtors because, without such financing, the Debtors will be unable to continue operations and fund their restructuring proceedings, which will significantly impair the value of their assets, and the Canadian Court has approved the DIP Facility as being appropriate and the amount that the Debtors

have been authorized to borrow is reasonably necessary for the continued operations of the Debtors in the ordinary course of business.

F. The Foreign Representative has demonstrated to the Canadian Court that the terms of the DIP Facility are fair and reasonable and were entered into in good faith by the Debtors and the DIP Lenders and that the DIP Lenders would not have extended financing without the provisions of this Order and the Court's recognition of the protections set forth in the CCAA Order relating to the DIP Facility.

G. The interest of the public (including the Debtors U.S. based customers) will best be served by this Court's entry of this Order.

H. The Foreign Representative and the Debtors are entitled to the full protections and rights available pursuant to section 1519(a)(1),(2), and (3) of the Bankruptcy Code because such relief is urgently needed to avoid transfer or infringement of and to protect the assets of the Debtors, particularly including the Debtors' retail electricity contracts and customers located in the territorial United States, and the interests of their creditors until this Court rules on the petition.

BASED ON THE FOREGOING FINDINGS OF FACT AND AFTER DUE DELIBERATION AND SUFFICIENT CAUSE APPEARING THEREFORE, IT IS HEREBY ORDERED THAT:

1. Pending entry of the Recognition Order and notwithstanding anything to the contrary contained in this Order, the Foreign Representative and the Debtors, as applicable, are authorized to comply with the terms, conditions, and provisions of the CCAA Order including, without limitation, the sections of the CCAA Order (a) authorizing the Debtors to obtain credit under the DIP Facility in the amount of up to USD $125 million and granting to the DIP Lenders the DIP Lenders' Charge to authorize the Debtors to enter into, perform and borrow under the DIP Facility, (b) staying the commencement or continuation of any actions against the Debtors and their assets, (c) imposing a stay with respect to claims or actions against the Debtors' directors and

officers or their assets in connection with the directors' or officers' positions at the Debtor, and (d) granting the Directors' Charge and Administration Charge. In addition, from entry of this Order until the conclusion of the hearing to consider recognition of the Canadian Proceedings, every U.S. Chapter 15 Party shall be bound by the CCAA Order, subject solely to further order of this Court or the Canadian Court upon prior written notice to the Debtors and the Foreign Representative.

2. Beginning on the date of this Order and continuing until the conclusion of the recognition hearing to be held by this Court (unless otherwise extended pursuant to section 1519(b) of the Bankruptcy Code):

a. the Foreign Representative is recognized as, and shall be the representative of, the Debtors with full authority to administer the Debtors' assets and affairs in the United States and may operate the Debtors' business and exercise the rights and powers of a trustee unless otherwise specified in the CCAA Order.

b. Section 362 of the Bankruptcy Code shall apply with respect to the Debtors and the Debtors' property that is within the territorial jurisdiction of the United States. For the avoidance of doubt and without limiting the generality of the foregoing, this Order shall impose a stay within the territorial jurisdiction of the United States of:

i. the commencement or continuation, including the issuance or employment of process of, any judicial, administrative or any other action or proceeding involving or against the Debtors or their assets or proceeds thereof, or to recover a claim or enforce any judicial, quasi-judicial, regulatory, administrative or other judgment, assessment, order, lien or arbitration award against the Debtors or their assets or proceeds thereof, or to transfer, assign, or exercise any control over the Debtors' assets located in the United States, particularly including the Debtors' retail electricity contracts and customers located in the territorial United States, except as authorized by the Debtors in writing and in their sole discretion;

ii. except as permitted in the CCAA Order, the creation, perfection, seizure, attachment, enforcement, or execution of liens or judgments against the Debtors' property in the United States or from transferring, encumbering, or otherwise disposing of or interfering with the Debtors' assets or agreements in the United States without the express written consent of the Foreign Representative, after

notice and hearing in conformance with this Court's procedures and rules;

iii. any act to collect, assess, or recover a claim against the Debtors that arose before the commencement of the Debtors' chapter 15 case; and

iv. the setoff of any debt owing to the Debtors that arose before the commencement of the Debtors' chapter 15 case against any claim of the Debtor.

In the event of any conflict between the scope of the stays and/or injunctions set forth in the CCAA Order and those contained in this Order, the language of the CCAA Order shall prevail, subject to further order of this Court.

c. section 365(e) of the Bankruptcy Code shall apply with respect to the Debtors' executory contracts and unexpired leases such that, notwithstanding any provision in any such contract or lease or under applicable law, no executory contract or unexpired lease with any of the Debtors may be terminated, cancelled, or modified (and any rights or obligations in such leases or contracts cannot be terminated or modified) solely because of a provision in any contract or lease of the kind described in sections 365(e)(1)(A), (B), or (C) of the Bankruptcy Code, and all contract and lease counterparties located within the United States shall be prohibited from taking any steps to terminate, modify, or cancel any contracts or leases with the Debtors arising from or relating in any way to any so-called "ipso facto" or similar clauses; *provided* that this Order does not impair or affect the rights of any person under sections 559 through 561 of the Bankruptcy Code, subject to the terms of the CCAA Order.

d. the Foreign Representative shall have the rights and protections to which the Foreign Representative is entitled under chapter 15 of the Bankruptcy Code, including, but not limited to, the protections limiting the jurisdiction of United States Courts over the Foreign Representative in accordance with section 1510 of the Bankruptcy Code and the granting of additional relief in accordance with sections 1519(a) and 1521 of the Bankruptcy Code.

e. until the conclusion of the recognition hearing to be held by this Court, no U.S. Chapter 15 Party may file an involuntary petition or similar relief against one or all of the Debtors under chapter 7 or chapter 11 of the Bankruptcy Code.

f. notwithstanding any provision in the Bankruptcy Rules to the contrary, (i) this Order shall be effective immediately and enforceable upon entry, (ii) the Foreign Representative and the DIP Lenders are not subject to any

stay in the implementation, enforcement, or realization of the relief granted in this Order, and (iii) the Foreign Representative is authorized and empowered, and may, in his discretion and without further delay, take any action and perform any act necessary to implement and effectuate the terms of this Order.

g. effective upon entry of this Order, section 525 of the Bankruptcy Code shall be in full force and effect in these chapter 15 cases and with respect to each of the Debtors, and this Court shall retain exclusive jurisdiction to hear any purported violations thereof, which requests may be brought by way of an expedited emergency motion.

h. any and all landlords or other parties with a lease of premises to the Debtors located within the United States are hereby prohibited from: taking any steps to cancel, terminate, or modify any lease for any reason, including non-payment of rent and/or due to any ipso facto clause described by section 365(e)(1) of the Bankruptcy Code; enforcing any "landlord lien", possessory lien or similar lien against any property of the Debtor; changing the locks or codes on any of the Debtors' premises; or commencing or continuing any eviction or similar proceedings.

3. Pending entry of the Recognition Order, the Foreign Representative and the Debtors are entitled to the benefits of, and may comply with, the terms and conditions of the DIP Financing, including but not limited to, the payment of associated fees and expenses as they come due without further notice or order of this Court. The CCAA Order provides, "that the DIP Agent and the DIP Lenders shall be entitled to the benefit of and are hereby granted a charge (the "**DIP Lenders' Charge**") on the Property,[3] which DIP Lenders' Charge shall not secure an obligation that exists before this Order is made" and "that the filing, registration or perfection of . . . the DIP Lenders' Charge . . . shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect." *See* CCAA Order, ¶¶ 38, 44. To the extent authorized

[3] "Property" means Just Energy's current and future assets, licenses, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof. *See* CCAA Order, ¶ 4.

under the CCAA Order, the Court recognizes, on a provisional basis, the DIP Lenders' Charge, as defined in the CCAA Order, granted in the CCAA Order which applies to all of the Debtors' assets located in the United States, subject to the priorities, terms, and conditions of the CCAA Order, to secure current and future amounts outstanding under the DIP Facility.

4. To the extent provided in the CCAA Order, and based on the finding therein and to promote cooperation between jurisdictions in cross-border insolvencies, the Debtors are hereby authorized to execute and deliver such term sheets, credit agreements, mortgages, charges, hypothecs and security documents, guarantees, and other definitive documents as are contemplated by the DIP Facility (collectively, the "DIP Documents") or as may be reasonably required by the DIP Lenders pursuant to the terms thereof, and the Debtors are hereby authorized to pay and perform all of its indebtedness, interest, fees, liabilities, and obligations to the DIP Lenders under and pursuant to the DIP Facility without any need for further approval from this Court.

5. This Order shall be sufficient and conclusive notice and evidence of the grant, validity, perfection, and priority of the liens granted to the DIP Lenders in the CCAA Order without the necessity of filing or recording this Order or any financing statement, mortgage, or other instrument or document which may otherwise be required under the law of any jurisdiction; *provided* that the Debtors are authorized to execute, and the administrative agent under the DIP Facility may file or record, any financing statements, mortgages, other instruments or any other DIP Document to further evidence the liens authorized, granted, and perfected hereby and by the CCAA Order.

6. The validity of the indebtedness, and the priority of the liens authorized by the CCAA Order and made enforceable in the United States by this Order shall not be affected by any reversal or modification of this Order, on appeal or the entry of an order denying recognition of

the Canadian Proceedings pursuant to the terms of the CCAA Order and sections 105, 1517, and 1519 of the Bankruptcy Code.

7. No action, inaction, or acquiescence by the DIP Lenders, including, without limitation, funding the Debtors' ongoing operations under this Order, shall be deemed to be or shall be considered as evidence of any alleged consent by the DIP Lenders to a charge against the collateral pursuant to sections 506(c), 552(b), or 105(a) of the Bankruptcy Code. The DIP Lenders shall not be subject in any way whatsoever to the equitable doctrine of "marshaling" or any similar doctrine with respect to the collateral.

8. Effective on a provisional basis upon entry of this Order, to the extent precluded by or provided for under the CCAA Order, no person or entity shall be entitled, directly or indirectly, whether by operation of sections 506(c), 552(b), or 105 of the Bankruptcy Code or otherwise, to direct the exercise of remedies or seek (whether by order of this Court or otherwise) to marshal or otherwise control the disposition of any collateral or property after a breach under the DIP Facility, the DIP Documents, the CCAA Order, or this Order.

9. In accordance with the CCAA Order, the Foreign Representative and the Debtors, as applicable, are authorized to pay or remit (a) any taxes (including, without limitation, sales, use, withholding, unemployment, and excise) the nonpayment of which by any Just Energy entity could result in a responsible person associated with a Just Energy entity being held personally liable for such nonpayment and (b) taxes related to income or operations incurred or collected by a Just Energy entity in the ordinary course of business.

10. Pursuant to Bankruptcy Rule 7065, the security provisions of Rule 65(c) of the Federal Rules of Civil Procedure are waived.

11. Notice of this Order will be provided to: (a) the Office of the United States Trustee; (b) the United States Attorney's Office for the Southern District of Texas; (c) administrative agent to the prepetition credit agreement and counsel thereto; (d) the Provisional Relief Parties; (e) all persons or bodies authorized to administer the Canadian Proceedings; and (f) any other parties of which the Foreign Representative becomes aware that are required to receive notice pursuant to Bankruptcy Rule 2002(q); and (g) such other entities as this Court may direct (collectively, the "Notice Parties"), which satisfies the requirements of Bankruptcy Rule 2002(q). In light of the nature of the relief requested, no other or further notice is required.

12. Service in accordance with this Order shall be deemed good and sufficient service and adequate notice for all purposes. The Foreign Representative, the Debtors, and their respective agents are authorized to serve or provide any notices required under the Local Rules.

13. The banks and financial institutions with which the Debtors maintain bank accounts or on which checks are drawn or electronic payment requests made in payment of prepetition or postpetition obligations are authorized and directed to continue to service and administer the Debtors' bank accounts without interruption and in the ordinary course and to receive, process, honor and pay any and all such checks, drafts, wires and automatic clearing house transfers issued, whether before or after the Petition Date and drawn on the Debtors' bank accounts by respective holders and makers thereof and at the direction of the Foreign Representative or the Debtor, as the case may be.

14. The Foreign Representative is authorized to take all actions necessary to effectuate the relief granted pursuant to this Order.

15. This Court shall communicate directly with, or request information or assistance directly from, the Canadian Court or the Foreign Representative, subject to the rights of a party in interest to notice and participation.

16. This Court shall retain jurisdiction with respect to the enforcement, amendment or modification of this Order, any requests for additional relief or any adversary proceeding or contested matter brought in and through the chapter 15 case, and any request by an entity for relief from the provisions of this Order, for cause shown, that is properly commenced and within the jurisdiction of this Court.

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Additionally, the Court finds that any payments made to ERCOT are made subject to all of the Debtors' rights to contest those payments, and all rights to receive a refund or credit as allowed by applicable law. Although the Court recognizes the authority to make payments to ERCOT as granted by the Canadian Order, this Court neither adds nor subtracts from any such authorization.

Finally, it is further ordered that the Court applies § 525 of the Bankruptcy Code to this recognition order. Pending entry of an order by this Court to the contrary, the United States Bankruptcy Court for the Southern District of Texas reserves exclusive subject matter jurisdiction for any relief sought under § 525. This provision is made to assure that this recognition order fully complies with US public policy. This paragraph is entered with full respect and comity to the difficult work being done by the Court's Canadian counterpart, and with this Court's thanks.

TAB C

This is Exhibit “C”

referred to in the Affidavit of **JAMES C. TECCE**

Sworn before me this 14th day of April, 2022

A Commissioner for taking affidavits

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re:	)	Chapter 15
JUST ENERGY GROUP INC., *et al.*,	)	Case No. 21-30823 (MI)
Debtors in a Foreign Proceeding,[1]	)	(Jointly Administered)

ORDER GRANTING PETITION FOR (I) RECOGNITION AS FOREIGN MAIN PROCEEDINGS, (II) RECOGNITION OF FOREIGN REPRESENTATIVE, AND (III) RELATED RELIEF UNDER CHAPTER 15 OF THE BANKRUPTCY CODE

Upon consideration of the *Verified Petition for (I) Recognition of Foreign Main Proceedings, (II) Recognition of Foreign Representative, and (III) Related Relief under Chapter 15 of the Bankruptcy Code* (together with the form petitions filed concurrently therewith, the "Verified Petition"),[2] filed by the Foreign Representative as the "foreign representative" of the above-captioned debtors (collectively, the "Debtors"), pursuant to sections 105(a), 1504, 1507, 1510, 1515, 1517, 1520, 1521, and 1522 of title 11 of the United States Code (the "Bankruptcy Code"), for entry of an order (i) granting recognition of the Canadian Proceeding as a "foreign main proceeding," pursuant to chapter 15 of the Bankruptcy Code; (ii) granting recognition of the Authorized Representative and Foreign Representatives as the

[1] The identifying four digits of Debtor Just Energy Group Inc.'s local Canada tax identification number are 0469. Due to the large number of debtor entities in these chapter 15 cases, for which the Debtors have requested joint administration, a complete list of the debtor entities and the last four digits of their federal tax identification numbers are not provided herein. A complete list of such information may be obtained on the website of the Debtors' claims and noticing agent at www.omniagentsolutions.com/justenergy. The location of the Debtors' service address for purposes of these chapter 15 cases is: 100 King Street West, Suite 2360, Toronto, ON, M5X 1E1.

[2] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Verified Petition.

"foreign representatives," as defined in section 101(24) of the Bankruptcy Code with respect to the Canadian Proceeding; (iii) recognizing, granting comity to, and giving full force and effect in the United States to the Canadian Proceeding and the CCAA Order as amended at the "Come-Back" hearing held on March 19, 2021, and as may be further amended by the Canadian Court from time to time (the "Final CCAA Order"); (iv) enjoining parties from taking any action that is otherwise inconsistent with the Final CCAA Order; and (v) granting such other relief as the Court deems just and proper, all as more fully set forth in the Verified Petitions; and this Court having held a hearing to consider the relief requested in the Verified Petitions (the "Hearing"); and upon the Initial Carter Declaration, the Supplemental Carter Declaration, and the Irving Declaration; and after due deliberation and sufficient cause appearing therefor, IT IS HEREBY FOUND AND DETERMINED THAT:

1. The findings and conclusions set forth herein constitute this Court's findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052. To the extent any of the following findings of fact constitute conclusions of law, they are adopted as such. To the extent any of the following conclusions of law constitute findings of fact, they are adopted as such.

2. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334.

3. This is a core proceeding pursuant to 28 U.S.C. § 157(b).

4. Venue is proper in this district pursuant to 28 U.S.C. § 1410.

5. The Debtors have their domicile, principal place of business, and/or property in the United States, and the Debtors are each eligible to be a debtor in a chapter 15 case pursuant to, as applicable, 11 U.S.C. §§ 109 and 1501.

6. This case was properly commenced pursuant to 11 U.S.C. §§ 1504, 1509, and 1515.

7. The Foreign Representative is a duly authorized "foreign representative" as such term is defined in 11 U.S.C. § 101(24) and the Authorized Representative is duly authorized to act on its behalf.

8. The Foreign Representative has satisfied the requirements of 11 U.S.C. § 1515 and Bankruptcy Rule 1007(a)(4).

9. The Canadian Proceeding is a "foreign proceeding" within the meaning of 11 U.S.C. § 101(23).

10. The Canadian Proceeding is pending before the Canadian Court in Canada, where the Debtors have their "center of main interests" as referred to in 11 U.S.C. § 1517(b)(1) and, as such, the Canadian Proceeding is entitled to recognition as a "foreign main proceeding" pursuant to 11 U.S.C. § 1502(4) and 1517(b)(1).

11. The Canadian Proceeding is entitled to recognition by this Court pursuant to 11 U.S.C. §§ 1515 and 1517(a).

12. The Debtors and Authorized Representative are entitled to all of the relief set forth in 11 U.S.C. §§ 1507, 1519, 1520, and 1521(a)(4) and (5), without limitation.

13. The relief granted hereby is necessary and appropriate to effectuate the objectives of chapter 15 of the Bankruptcy Code to protect the Debtors and the interests of their creditors and other parties in interest, and is consistent with the laws of the United States, international comity, public policy, and the policies of the Bankruptcy Code.

14. Absent the requested relief, the efforts of the Debtors, the Canadian Court, and the Authorized Representative in conducting the Canadian Proceeding and effectuating the restructuring under Canadian law may be frustrated, a result contrary to the purposes of chapter 15 of the Bankruptcy Code.

15. Each of the injunctions contained in this Order (i) is within the Court's jurisdiction, (ii) is essential to the success of the Canadian Proceeding, (iii) confers material benefits on, and is in the best interests of, the Debtors, their creditors, and their parties in interest, including, without limitation, other stakeholders, (iv) is critical and integral to the overall objectives of the recapitalization, and (v) meets the legal and factual requirements for issuing an injunction.

16. Good, sufficient, appropriate, and timely notice of the filing of, and the hearing on (to the extent necessary), the Verified Petition was given, which notice is adequate for all purposes, and no further notice need be given.

17. The relief granted hereby is necessary to effectuate the purposes and objectives of chapter 15 and to protect the Debtors and the interests of its creditors and other parties in interest (and the Debtors' assets located within the United States), is in the interest of the public and international comity, consistent with the public policy of the United States, and will not cause any hardship to any party in interest that is not outweighed by the benefits of the relief granted. Absent the requested relief, the efforts of the Debtors and the Foreign Representative in conducting the Canadian Proceeding may be frustrated by the actions of individual creditors, a result contrary to the purposes of chapter 15.

18. All creditors and other parties in interest, including the Debtors, are sufficiently protected by the grant of relief ordered hereby in accordance with section 1522(a) of the Bankruptcy Code.

For all of the foregoing reasons, and after due deliberation and sufficient cause appearing therefor, IT IS HEREBY ORDERED THAT:

19. The Canadian Proceeding is granted recognition as a foreign main proceeding as defined in 11 U.S.C. § 101(23) pursuant to 11 U.S.C. § 1517(a).

20. The Canadian Proceeding is a collective, court-supervised proceeding governed in accordance with applicable Canadian law, as it may be amended from time to time, and is granted recognition as a foreign main proceeding pursuant to 11 U.S.C. § 1517(b)(1) and is entitled to the protections of 11 U.S.C. § 1520(a), including, without limitation, the application of the protection afforded by the automatic stay under 11 U.S.C. § 362 to the Debtors and to the Debtors' property that is within the territorial jurisdiction of the United States.

21. The Final CCAA Order, including any and all existing and future extensions, amendments, restatements, and/or supplements authorized by the Canadian Court are hereby given full force and effect**, on a final basis, with respect to the Debtors and the Debtors' property that now or in the future is located within the territorial jurisdiction of the United States, including without limitation staying the commencement of continuation of any actions against the Debtors or its assets (except as otherwise expressly provided herein or therein), and the Final CCAA Order is binding upon (and enforceable against) and inure to the benefit of all creditors, lenders, parties to contracts or leases with any Debtor, governmental units, Persons (as defined in section 101 (41) of the Bankruptcy Code), parties in interest and regulatory bodies and agencies (collectively, the "U.S. Chapter 15 Parties"). All Chapter 15 Parties are hereby prohibited from interfering with the jurisdictional mandate of this Court under chapter 15 of the Bankruptcy Code, interfering with the Debtors' operations or assets or Debtors' efforts to administer and implement the Canadian Proceeding.

** Full force and effect is not given as to any changes, amendments or supplements that are manifestly contrary to the public policy of the United States. Parties in interest may raise a public policy issue by motion filed in this Court.

22. All objections, if any, to the Verified Petition or the relief requested therein that has not been withdrawn, waived, or settled by stipulation filed with the Court, and all reservations of rights included therein, are hereby overruled on the merits.

23. Upon entry of this Order, the Canadian Proceedings and all prior orders of the Canadian Court shall be and hereby are granted comity and given full force and effect in the United States and, pursuant to section 1520 of the Bankruptcy Code, among other things:

a. section 362 of the Bankruptcy Code shall apply with respect to the Debtors and the Debtors' property that is within the territorial jurisdiction of the U.S; *provided, however*, that the stay under section 362 is hereby modified to permit parties (including the Cash Management Banks, as defined in the Final CCAA Order) to exercise rights granted and permitted under the Final CCAA Order. For the avoidance of doubt and without limiting the generality of the foregoing, the Order shall impose a stay within the territorial jurisdiction of the U.S. of:

(i) except as permitted herein or in the Final CCAA Order, the commencement or continuation, including the issuance or employment of process of, any judicial, administrative or any other action or proceeding involving or against the Debtors or their assets or proceeds thereof, or to recover a claim or enforce any judicial, quasi-judicial, regulatory, administrative or other judgment, assessment, order, lien or arbitration award against the Debtors or their assets or proceeds thereof, or to transfer, assign, or exercise any control over the Debtors' assets located in the U.S., particularly including the Debtors' retail electricity contracts and customers located in the territorial U.S., except as authorized by the Debtors and the Canadian Court approved monitor (the "Monitor") in writing and in their sole discretion;

(ii) except as permitted herein or in the Final CCAA Order, the creation, perfection, seizure, attachment, enforcement, or execution of liens or judgments against the Debtors' property in the U.S. or from transferring, encumbering, or otherwise disposing of or interfering with the Debtors' assets or ag7reements in the U.S. without the express written consent of the Foreign Representative and the Canadian Court approved monitor, after notice and hearing in conformance with this Court's procedures and rules;

(iii) except as permitted herein or in the Final CCAA Order, any act to collect, assess, or recover a claim against the Debtors (or its assets)

that arose before the commencement of the Debtors' chapter 15 case; and

(iv) except as permitted herein or in the Final CCAA Order, the setoff of any debt owing to the Debtors that arose before the commencement of the Debtors' chapter 15 case against any claim of the Debtors.

b. the Debtors are authorized to comply with the terms of the Final CCAA Order without further order of this Court;

c. any obligations secured by a valid, enforceable, and perfected security interest upon or in respect of any of the Debtors' property pursuant to a security agreement which includes as collateral thereunder any property acquired after the date of the applicable security agreement ("After-Acquired Property"), shall continue to be secured by the applicable property (including After Acquired Property that may be acquired by the applicable Debtor(s) after the commencement of these proceedings) notwithstanding the commencement of these proceedings and notwithstanding anything set forth in section 552(a) of the Bankruptcy Code to the contrary, with the same priority, rights, and collateral as existed as of the Petition Date, but subject to the senior liens, charges, and priorities granted by the Final CCAA Order, including but not limited to the DIP Lenders' Charge and the other Charges (each as defined in the Final CCAA Order); *provided* that subject only to and effective upon entry of this Order and the Final CCAA Order, each prepetition secured creditor shall be entitled to all of the rights and benefits of section 552(b) of the Bankruptcy Code, and in no event shall the "equities of the case" exception of section 552(b) of the Bankruptcy Code apply to the secured claims of any prepetition secured creditor;

d. section 365(e) of the Bankruptcy Code shall apply with respect to the Debtors' executory contracts and unexpired leases such that, notwithstanding any provision in any such contract or lease or under applicable law, no executory contract or unexpired lease with any of the Debtors may be terminated, cancelled, or modified (and any rights or obligations in such leases or contracts cannot be terminated or modified) solely because of a provision in any contract or lease of the kind described in sections 365(e)(1)(A), (B), or (C) of the Bankruptcy Code, and all contract and lease counterparties located within the United States shall be prohibited from taking any steps to terminate, modify, or cancel any contracts or leases with the Debtors arising from or relating in any way to any so-called "ipso facto" or similar clauses; *provided* that this Order does not impair or affect the rights of any person under sections 559 through 561 of the Bankruptcy Code, subject to the terms of the Final CCAA Order;

e. the Foreign Representative shall have the rights and protections to which the Foreign Representative is entitled under chapter 15 of the Bankruptcy Code, including, but not limited to, the protections limiting the jurisdiction of United States Courts over the Foreign Representative in accordance with section 1510 of the Bankruptcy Code and the granting of additional relief in accordance with sections 1519(a) and 1521 of the Bankruptcy Code;

f. ~~without further order of this Court and at least 21 days prior written notice to the Debtors, no U.S. Chapter 15 Party may file an involuntary petition or similar relief against one or all of the Debtors under chapter 7 or chapter 11 of the Bankruptcy Code;~~

g. effective upon entry of this Order, section 525 of the Bankruptcy Code shall be in full force and effect in these chapter 15 cases and with respect to each of the Debtors, and this Court shall retain exclusive jurisdiction to hear any purported violations thereof, which requests may be brought by way of an expedited emergency motion; and

h. any and all landlords or other parties with a lease of premises to the Debtors located within the United States are hereby prohibited from: taking any steps to cancel, terminate, or modify any lease for any reason, including non-payment of rent and/or due to any ipso facto clause described by section 365(e)(1) of the Bankruptcy Code; enforcing any "landlord lien", possessory lien or similar lien against any property of the Debtor; changing the locks or codes on any of the Debtors' premises; or commencing or continuing any eviction or similar proceedings.

24. Michael Carter and Just Energy Group Inc. are the duly authorized representatives of the Foreign Representative within the meaning of 11 U.S.C. § 101(24), are authorized to act on their behalf in these Chapter 15 Cases, and are established as the duly-authorized representative of the Debtors in the United States.

25. The Foreign Representative and the Debtor shall be entitled to the full protections and rights enumerated under section 1521(a)(4) and (5) of the Bankruptcy Code and, accordingly, the Foreign Representative:

a. is entrusted with the administration or realization of all or part of the Debtor's assets located in the United States; and

b. has the right and power to examine witnesses, take evidence, or deliver information concerning the Debtor's assets, affairs, rights, obligations, or liabilities.

26. All persons and entities subject to the jurisdiction of the United States are permanently enjoined and restrained from taking any actions inconsistent with the Final CCAA Order or any documents incorporated by the Final CCCA Order, or interfering with the enforcement and implementation of the Final CCAA Order.

27. The Lender Support Agreement, attached hereto as **Exhibit A**, is hereby ratified and approved, and, upon the occurrence of a termination event under such Lender Support Agreement, the Agent and the Lenders (each as defined in the Lender Support Agreement) may exercise the rights and remedies available to them under the Lender Support Agreement in accordance with the terms thereof.

28. As permitted in the Final CCAA Order, the Debtors are authorized to provide cash collateral ("Authorized Cash Collateral") to third parties (the "Collateral Recipients"), including the Cash Management Banks (which, for the avoidance of doubt, include HSBC Bank USA, National Association ("HBUS"), JPMorgan Chase Bank, N.A., and Canadian Imperial Bank of Commerce, with respect to obligations incurred before, on or after the date hereof, and to grant security interests in such Authorized Cash Collateral in favor of the Collateral Recipients, where doing so is necessary to operate the Debtors' business in the normal course of these proceedings. As permitted in the Final CCAA Order, the holders of Cash Collateral (as defined in the Final CCAA Order) are authorized to exercise any available setoff rights in such Cash Collateral and the obligations secured thereby, whether incurred before, on or after the date hereof. For the avoidance of doubt, HBUS may exercise any available rights of setoff with respect to any prepetition credit card obligations against any Cash Collateral posted before, on or after the date hereof without any further order of this Court.

29. As permitted in the Final CCAA Order, the Debtors are authorized to (a) continue use of the prepetition credit card facility or obtain a new credit card facility with HBUS for employee and other business related expenses and (b) secure such credit card facility on a postpetition basis with Cash Collateral. Subject to the terms of the Final CCAA Order, the Charges (as defined in the Final CCAA Order) shall rank junior in priority to any lien, security interest, and charges attached to Cash Collateral in favor of the holders thereof, including the Cash Management Banks, and shall attach to the Cash Collateral only to the extent of any rights of any Just Energy Entity (as defined in the Final CCAA Order) to the return of such Cash Collateral.

30. Any payments made to ERCOT are made subject to all of the Debtors' rights to contest those payments, and all rights to receive a refund or credit as allowed by applicable law. Although the Court recognizes the authority to make payments to ERCOT as granted by the Final CCAA Order, this Court neither adds nor subtracts from any such authorization;

31. All parties who believe they have a claim against any of the Debtors are obligated to file such claims in, and only in, the Canadian Proceeding.

32. The Authorized Representative, the Foreign Representatives, and their respective agents are authorized to serve or provide any notices required under the Bankruptcy Rules or local rules or orders of this Court.

33. No action taken by the Foreign Representative, the Debtors, or their respective successors, agents, representatives, advisors, or counsel in preparing, disseminating, applying for, implementing, or otherwise acting in furtherance of or in connection with the Canadian Proceeding, this Order, these chapter 15 cases, or any adversary proceeding herein, or contested

matters in connection therewith, will be deemed to constitute a waiver of the rights or benefits afforded to such persons under 11 U.S.C. §§ 306 and 1510.

34. The Authorized Representative and Foreign Representatives are authorized to take all actions necessary to effectuate the relief granted by this Order.

35. This Order is without prejudice to the Authorized Representative or Foreign Representatives requesting any additional relief in the chapter 15 cases, including seeking recognition and enforcement by this Court of any further orders issued by the Canadian Court and/or of any reorganization, recapitalization, or other plan dealing with the rights of stakeholders that may be approved in the Canadian Proceeding.

36. This Court shall retain exclusive jurisdiction to hear and determine all matters arising from or related to the implementation, interpretation, or enforcement of this Order.

37. Notwithstanding any applicability of any Bankruptcy Rules, the terms and conditions of this Order shall be immediately effective and enforceable upon its entry and shall constitute a final order within the meaning of 28 U.S.C. § 158(a).

38. In the event of any inconsistency between this Order and the Final CCAA Order, the Final CCAA Order shall control.

39. In accordance with the Final CCAA Order, the Foreign Representative and the Debtors, as applicable, are authorized to pay or remit (a) any taxes (including, without limitation, sales, use, withholding, unemployment, and excise) the nonpayment of which by any Just Energy entity could result in a responsible person associated with a Just Energy entity being held personally liable for such nonpayment and (b) taxes related to income or operations incurred or collected by a Just Energy entity in the ordinary course of business.

Signed: April 02, 2021

Marvin Isgur
United States Bankruptcy Judge

Exhibit A

Lender Support Agreement

ACCOMMODATION AND SUPPORT AGREEMENT

THIS AGREEMENT made as of the 18th day of March, 2021

B E T W E E N:

JUST ENERGY ONTARIO L.P., an Ontario limited partnership as Canadian borrower (the "**Canadian Borrower**")

- and -

JUST ENERGY (U.S.) CORP., a Delaware corporation as US borrower (the "**US Borrower**" and together with the Canadian Borrower, the "**Borrowers**")

- and -

JUST ENERGY GROUP INC. ("**JustEnergy**") and **EACH OF THE OTHER OBLIGORS PARTY HERETO**

- and -

NATIONAL BANK OF CANADA, as administrative agent (the "**Agent**")

- and -

THE FINANCIAL INSTITUTIONS SIGNATORY HERETO, as lenders (the "**Lenders**").

WHEREAS the Borrowers, the Agent and the Lenders are parties to a ninth amended and restated credit agreement dated as of September 28, 2020 (as amended, restated, supplemented or otherwise modified prior to the date hereof, the "**Credit Agreement**");

AND WHEREAS JustEnergy, the Borrowers and the other Obligors applied and received on March 9, 2021 (the "**Filing Date**") an initial order (as amended, restated, supplemented or otherwise modified from time to time, the "**Initial Order**") from the Ontario Court of Justice (Commercial List) (the "**Canadian Court**") granting protection to JustEnergy, the Borrowers and the other Obligors under the Companies' Creditors Arrangement Act ("**CCAA**"; and the proceedings of the Obligors thereunder, the "**CCAA Proceedings**");

AND WHEREAS on the Filing Date, JustEnergy, the Borrowers and the other Obligors commenced ancillary insolvency proceedings under Chapter 15 of title 11 of the United States Code (the "**Chapter 15 Proceedings**") in the United States Bankruptcy Court for the Southern District of Texas (the "**US Court**" and together with the Canadian Court, the "**Courts**") and obtained a recognition order to, among other things, recognize the CCAA Proceedings and obtain a recognition order in respect of the Initial Order (the "**Recognition Order**" and together with the Initial Order, the "**Court Orders**");

AND WHEREAS JustEnergy and the Borrowers have requested that, notwithstanding the commencement of the CCAA Proceedings and the Chapter 15 Proceedings, which constitutes an Event of Default under the Credit Agreement and the occurrence of any other Event of Default that existed prior to the Filing Date (collectively, the "**Existing Defaults**"), the Lenders continue to make the Revolving Facilities available to the Borrowers by way of issuance of Letters of Credit only during the Accommodation Period (as defined below), in order that JustEnergy, the Borrowers and their Subsidiaries may continue to operate their respective Businesses during the pendency of the CCAA Proceedings and the Chapter 15 Proceedings;

AND WHEREAS the Lenders are agreeable to providing the consents and accommodations requested by JustEnergy and the Borrowers subject to and in accordance with the terms and protections contained in this Agreement.

NOW THEREFORE for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

Section 1 Interpretation

(a) Capitalized terms used herein (including the recitals) and not otherwise defined shall have the meanings ascribed thereto in the Credit Agreement.

(b) The headings in this Agreement are for reference only and shall not affect the meaning or interpretation of this Agreement. Unless the context otherwise requires, words importing the singular shall include the plural and vice versa and words importing any gender shall include all genders.

(c) In this Agreement:

(i) "**Accommodation Period**" means the period commencing on the Filing Date and ending on the earliest of: (A) the effective date of a Termination Notice (as defined below) pursuant to this Agreement; (B) the CCAA Implementation Date; (C) the expiry of the Stay; (D) the termination of the CCAA Proceedings and/or the Chapter 15 Proceedings; and (E) the Obligor Termination Date.

(ii) "**Bankruptcy Code**" means title 11 of the United States Code, 11 U.S.C. §§ 101–1532, as amended.

(iii) "**BP**" means, collectively, BP Energy Company and its applicable affiliates and subsidiaries.

(iv) "**Cash Management Arrangements**" means any and all agreements and arrangements evidencing or in respect of treasury facilities and cash management products (including, for greater certainty, all pre-authorized debit banking services, electronic funds transfer services, overdraft balances, corporate credit cards, merchant services and pre-authorized debits).

(v) "**Cash Management Bank**" has the meaning provided for in the Initial Order.

(vi) "**Cash Management Obligations**" has the meaning provided for in the Initial Order.

(vii) "**CCAA Implementation Date**" means the date on which the CCAA Plan is implemented or becomes effective or, in the alternative, a transaction for the sale of all or substantially all of the assets of JustEnergy is completed.

(viii) "**CCAA Plan**" means a plan of compromise and arrangement proposed or filed with the Canadian Court in the CCAA Proceedings, as approved by the Canadian Court.

(ix) "**CCAA Order**" means any Order of the Court made in connection with the *CCAA* Proceedings and "**CCAA Orders**" means more than one CCAA Order.

(x) "**Consultant**" means Alvarez & Marsal Canada Inc.

(xi) "**DIP Facility**" means the first lien super-priority debtor-in-possession delayed-draw term loan facility in an initial principal amount of US$125,000,000 established by the DIP Lenders in favour of the Borrowers pursuant to the DIP Term Sheet.

(xii) "**DIP Lenders**" means, collectively, the lenders under the DIP Facility and shall include the administrative and collateral agents thereunder.

(xiii) "**DIP Term Sheet**" means that that certain term CCAA interim debtor-in-possession financing term sheet dated as of March 9, 2021 and approved by the Canadian Court on the same date (as amended, restated, amended and restated, supplemented or otherwise modified from time to time), pursuant to which the DIP Lenders agreed to provide the DIP Facility.

(xiv) "**Drawdown Conditions**" means the following conditions precedent for any Drawdown of a Letter of Credit under a Revolving Facility:

(A) the Agent, the Canadian Issuing Lender and/or the US Issuing Lender, as applicable, will have received a Drawdown Notice by the deadline and within the notice period required under Section 2.10(2) of the Credit Agreement; *provided*, that no certifications regarding the representations and warranties in the Credit Agreement, any Pending Event of Default or existing Event of Default, or the fulfillment of the conditions precedent in Section 3.02 the Credit Agreement shall be required in such Drawdown Notice;

(B) upon giving effect to the Drawdown and to any repayment to occur in connection therewith, the sum of the principal amount of the face

amount of all Letters of Credit outstanding under the Revolving Facilities on the Drawdown Date shall not exceed the Letters of Credit Exposure Cap;

(C) if, after giving effect to the Drawdown and to any repayment to occur in connection therewith, the face amount of Letters of Credit outstanding under the Revolving Facilities on the Drawdown Date would exceed the Letters of Credit Exposure Cap as at the date of such Drawdown (the amount of such excess, the "**Excess Amount**") then the Borrowers will make a payment to the Agent as a repayment of the Advances, at least 1 Business Day before the requested Letter of Credit is scheduled to be issued, in an amount equal to the Excess Amount (the "**Cash Paydown Amount**");

(D) the conditions for any requests for issuance of Letters of Credit contained in the Credit Agreement are satisfied (other than any conditions requiring the absence of a Pending Event of Default or Event of Default or the accuracy of representations and warranties in the Credit Agreement); *provided*, that the condition to provide a Drawdown Notice pursuant to Section 2.10(2) of the Credit Agreement shall be deemed satisfied upon delivery of a Drawdown Notice as described in clause (A) above;

(E) each Letter of Credit requested to be issued, renewed or amended, as the case may be, shall be in form and substance reasonably satisfactory to the applicable Canadian Issuing Lender and the applicable US Issuing Lender, as applicable;

(F) a Letter of Credit requested to be issued shall not be used as collateral for obligations of the Obligors incurred or existing prior to the Filing Date, without the prior written consent of the Monitor in consultation with the Agent;

(G) the Accommodation Period shall not have been terminated or expired;

(H) the representations and warranties set forth in Schedule A continue to be true and correct in all material respects (provided that, any such representations and warranties that are already qualified by materiality shall be true and correct in all respects) and the Borrowers will certify the same in the related Drawdown Notice; and

(I) no Termination Event has occurred and is continuing on the Drawdown Date or would result from making the requested issuance, renewal or amendment of a Letter of Credit and the Borrowers will certify the same in the related Drawdown Notice.

(xv) "**ERCOT**" means Electric Reliability Council of Texas, Inc.

(xvi) "**Interested Creditors**" means, collectively, all creditors of the Obligors holding a pecuniary interest in either the CCAA Proceedings or the Chapter 15 Proceedings.

(xvii) "**ISO**" means an independent system operator that coordinates, controls and monitors the operation of the electric power system in a jurisdiction and includes, without limitation, ERCOT.

(xviii) "**Letters of Credit Exposure Cap**" means, at any time, the lesser of:

(A) the sum of:

(a) Cdn.$46,130,000, which equals the face amount of the Letters of Credit issued under the Revolving Facilities existing on the Filing Date, plus

(b) the aggregate of any Cash Paydown Amount paid by the Borrowers pursuant to Section 1(c)(xiv)(C) (excluding any Cash Paydown Amounts previously returned to the Borrowers as an Advance pursuant to Section 3(e)), less

(c) the aggregate amount of any Permanent Letter of Credit Reduction; and

(B) Cdn.$125,000,000.

(xix) "**Monitor**" means FTI Consulting Canada Inc., as the monitor of the CCAA Proceedings.

(xx) "**Obligor Termination Date**" means the date on which the Canadian Court authorizes the Obligors to terminate the Accommodation Period, in response to the Obligors' application to the Canadian Court to do so following delivery of the Obligor Termination Notice; *provided*, that the Obligors shall not commence such application to the Canadian Court unless any material default(s) described in the Obligor Termination Notice have not been cured by the Lenders within seven (7) days of the delivery of the Obligor Termination Notice to the Agent (provided that, for certainty, the Lenders shall have the right to cure any such material default at any time following such application and prior to any determination thereof by the Canadian Court); *provided*, *further*, that substantially simultaneously with the Obligors' application to the Court to terminate the Accommodation Period, the Obligors shall send a copy of such application to the Agent.

(xxi) "**Obligor Termination Notice**" means a written notice delivered to the Agent by the Obligors, with the consent of the Monitor, describing in reasonable detail the Lenders' material breach(es) of this Agreement.

(xxii) "**Permanent Letter of Credit Reduction**" means the amount of any Letter of Credit that was outstanding as of the Filing Date that is released or otherwise cancelled prior to its term as a result of the termination or satisfaction in full of the obligations of the applicable Obligor to the beneficiary of such Letter of Credit.

(xxiii) "**Shell**" means, collectively, Shell Energy North America (Canada) Inc. and its applicable affiliates and subsidiaries.

(xxiv) "**Shell Support Agreement**" means the support agreement between Shell and the applicable Obligors entered into as of the Filing Date, as may be amended or modified from time to time.

(xxv) "**Stay**" means the stay of proceedings provided for in the Initial Order (and recognized by the Recognition Order, together with any further stay of proceedings imposed by the Recognition Order), as may be extended pursuant to an order of the Canadian Court or US Court (as applicable).

(xxvi) "**Termination Event**" means the occurrence of any of the following:

(A) any Borrower shall default in the payment when due of any amount owing to the Agent or any of the Lenders under this Agreement and such non-payment continues for a period of three Business Days;

(B) the Encumbrances securing the Obligations for any reason shall cease to be valid and perfected Encumbrances on the collateral purported to be covered thereby or any action shall be taken by any of the Obligors to discontinue or assert the invalidity of any such Encumbrance securing the Obligations or the validity or enforceability of the Credit Documents or this Agreement;

(C) any representation or warranty made by any Obligor in this Agreement or any Drawdown Notice will prove to be incorrect in any material respect on and as of the date thereof and such representation or warrnaty is not thereafter made true and correct within 5 days of any Obligor becoming aware of its incorrectness;

(D) any Obligor shall fail to perform in any material respect any obligations under this Agreement; provided, that, in the case of the affirmative covenants contained in Schedule B, such failure shall be subject to a five (5) day grace period from the earlier of any Obligor becoming aware of such failure or the Agent delivers written notice of such failure to any Obligor;

(E) the termination of the Stay, the CCAA Proceedings or the Chapter 15 Proceedings or the provisions of the Initial Order for the benefit of the Agent and the Lenders relating to the Cash Management Arrangements, the security for the Cash Management Obligations

and this Agreement being stayed, varied, amended or reversed except with the consent of the Majority Lenders (or, in respect of the Cash Management Arrangments or security for the Cash Management Arrangements, the Cash Management Banks);

(F) the termination, expiration, cancellation or revocation of the Shell Support Agreement; or

(G) the DIP Lenders have terminated the DIP Facility and demanded repayment thereof.

(d) Unless the context of this Agreement otherwise requires, the Credit Agreement and this Agreement shall be read together and shall have effect as if the provisions of the Credit Agreement and this Agreement were contained in one agreement.

Section 2 Supplemental Covenants

(a) During the Accommodation Period, each Obligor hereby agrees to comply with the terms and covenants set forth in Schedule B hereto.

(b) In addition, until the earliest of (i) termination of the Accommodation Period, (ii) the Borrowers' emergence from the CCAA Proceedings and the Chapter 15 Proceedings (as decribed in the Initial Order), and (iii) solely upon written notice by the Borrowers to the Agent (a "**BP Waterfall Election Notice**") upon a final determination by a court of competent jurisdiction (and not subject to any stay, leave to appeal or appeal) that all or substantially all of BP's pre-Filing Date exposure has payment priority over the Lenders' Advances pursuant to Section 3.04 of the Intercreditor Agreement (the "**BP Termination Date**"; all disputes as to the relative payment priorities of BP's pre-Filing Date exposure and the Lenders' Advances after delivery of an "Enforcement Notice" are collectively referred to as the "**Waterfall Dispute**"), the Borrowers shall pay all interest and a fee equal to the Letter of Credit Fee Rate (both at the non-default rate set forth in Level I of the definition of Applicable Margin) and the fees described in Sections 5.02(9) and 5.03(8) of the Credit Agreement (at the non-default rate), in each case, due or becoming due in respect of all Advances (including all Letters of Credit) outstanding under the Credit Facilities, whether accrued before, on or after the Filing Date, in accordance with the terms of the Credit Agreement (collectively, the "**Interest Payment Obligations**"). For the avoidance of doubt, all Persons (including the parties hereto and the DIP Lenders) reserve all rights in respect of whether interest and other fees will accrue at the rate set forth in clause (b) of the definition of Applicable Margin during the CCAA Proceedings.

(c) Notwithstanding anything to the contrary in Section 2(b) above, if an Obligor Termination Notice has been delivered and the Lenders have not cured each material breach described therein within four (4) days of such delivery, the obligation under this Agreement for the payment of the Interest Payment Obligations shall cease immediately; *provided* that the payment in cash of the

Interest Payment Obligations under this Agreement shall automatically resume upon the Lenders curing each material breach described in the related Obligor Termination Notice if all such material breaches are cured prior to the Obligor Termination Date. Notwithstanding the foregoing, nothing in this Agreement shall in any way impair or affect any rights of the Agent or Lenders or obligations of the Obligors with respect to the interest, fees and other amounts payable or which may accrue under the Credit Documents.

Section 3 Agreements and Accommodations of the Lenders

The Borrowers hereby acknowledge and agree that, other than as provided herein, the right and ability of the Borrowers to request any further Drawdown under the Credit Facilities shall be hereby suspended and the Agent and the Lenders shall have no obligation to accept any further Drawdown Notice or make any further Advance under the Credit Facilities. Subject to the terms and conditions provided for herein:

(a) The Agent and the Lenders hereby agree that, during the Accommodation Period, the Borrowers shall be entitled to request, and the Lenders will continue to make, one or more Advances under the Revolving Facilities solely by way of issuance of Letters of Credit; provided that, the obligations of the Agent and the Lenders under this Section 3(a) shall be subject to and conditional upon the Drawdown Conditions being fulfilled or being waived by the Majority Lenders in their sole discretion; provided, further, that the Agent and Lenders shall, by written notice to the Borrowers, be entitled to terminate their obligations under this clause (a) at any time following the receipt by the Agent of a BP Waterfall Election Notice. Each such Letter of Credit so issued shall be subject to Section 5.02 of the Credit Agreement (excluding Section 5.02(11) of the Credit Agreement, which the parties hereby acknowledge will not be applicable).

(b) In addition, the Cash Management Banks that provided Cash Management Arrangements to the Obligors prior to the Filing Date will continue to provide Cash Management Arrangements to the Obligors consistent with past practice (subject to implementation of those changes that were in process immediately prior to the Filing Date), subject to the following:

(i) the Obligors will provide the following cash collateral, which shall rank in priority to all court-ordered charges (the "**Cash Management Collateral**"):

(A) Cdn.$2,000,000 in favour of Canadian Imperial Bank of Commerce and its Affiliates;

(B) Cdn.$100,000 in favour of JPMorgan Chase Bank, N.A. and its Affiliates; and

(C) (i) Cdn.$70,000 in favour of HSBC Bank Canada and its Affiliates; and (ii) US$300,000 in favour of HSBC Bank Canada and its Affiliates;

in order to secure the Cash Management Obligations owed to such Cash Management Banks;

(ii) the Obligors will obtain a court-ordered charge in favour of the Cash Management Banks pursuant to an amended and restated Initial Order and to secure the Cash Management Obligations due and owing and that have not been paid in accordance with the applicable Cash Management Arrangements, which charge shall be (A) junior to the DIP Lenders' Charge (as defined in the Initial Order) and any other charges which are *pari passu* with or rank senior to the DIP Lenders' Charge, and (B) senior to any other obligations which are not *pari passu* with or senior to the DIP Lenders' Charge pursuant to the Initial Order.

(iii) the terms of such Cash Management Arrangements may be changed in accordance with their terms, in the ordinary course of business in accordance with the Cash Management Bank's internal policies with the consent of the DIP Lenders and the Monitor.

(c) Upon the occurrence of a Termination Event and delivery by the Agent to the Borrowers of three full Business Days' prior written notice terminating the Accommodation Period (the "**Termination Notice**"), which notice may be delivered immediately upon the occurrence of a Termination Event (and shall be deemed effective immediately upon delivery by the Agent to the Borrowers by electronic mail or facsimile transmission and the expiration of such three full Business Day period), (i) the agreement of the Agent and the Lenders provided in Section 3(a) hereof shall terminate at 5:00 p.m. Toronto time on the third full Business Day after such Termination Notice was delivered, and (ii) the agreement of the Cash Management Banks provided in Section 3(b) shall terminate (A) immediately upon the occurrence of a Termination Event arising under clause (E) of the definition thereof; and (B) upon the occurrence of any other Termination Event, after delivery of a Termination Notice and the Cash Management Banks or the Agent obtaining an order of the Court, suspending or terminating the Cash Management Arrangements, or other relief, after application on proper notice to the Obligors and the service list in the CCAA Proceedings (such time and date of termination described in clauses (i) and (ii), each a "**Termination Time**"); *provided*, that the Borrowers shall have the right to cure any Termination Event which is identified in a Termination Notice at any time prior to the applicable Termination Time; *provided, further*, that no Termination Notice shall be required in the event of any Termination Event arising under clause (A) or (E) of the definition thereof. For the avoidance of doubt, if a Borrower cures all Termination Events identified in a Termination Notice before the applicable Termination Time, then such Termination Notice will be deemed automatically cancelled, revoked and of no further effect, and the agreement of the Agent and the Lenders provided in Section 3(a) or Section 3(b), as the case may be, shall not be terminated pursuant to such Termination Notice.

(d) The Obligors acknowledge that neither the Agent nor any Lender has made any assurances concerning (i) any possibility of an extension of the Accommodation Period or (ii) any additional consent or accommodations.

(e) In the event the Borrowers have made any repayment under Section 1(c)(xiv)(C)in order to accommodate the issuance of one or more Letters of Credit and any Letters of Credit are later reduced or released (in whole or in part) (other than a reduction or release on account of a Permanent Letter of Credit Reduction), then the Agent and Lenders hereby agree to promptly (and, in any event, within three (3) Business Days of such reduction or release) make an Advance to the Borrowers in an amount equal to the lesser of (A) the face amount of the Letters of Credit so reduced or released (other than any reduction or release on account of a Permanent Letter of Credit Reduction) and (B) the aggregate Cash Paydown Amounts received by the Agent and Lenders to date (excluding any Cash Paydown Amounts previously returned to the Borrowers as an Advance pursuant to this clause (e)) (it being agreed and understood that the conditions to making Advances contained in the Credit Agreement are waived for the limited purpose contained in this clause (e)). Any such Advance pursuant to this clause (e) shall be treated as an Advance for all purposes of the Credit Agreement.

(f) The Agent and each of the Lenders agree that during the Accommodation Period, they will not, directly or indirectly, sell, assign, lend, pledge, mortgage or dispose or otherwise transfer any of its relevant position in the obligations under the Credit Agreement or with respect to Letters of Credit (the "**Relevant Debt**") unless the Agent or the assigning Lender concurrently obtains an agreement in favour of the Obligors that provides that the assignee party agrees to be bound by the terms of this Agreement.

(g) The Agent and the Lenders agree that, after the delivery of an Obligor Termination Notice, if the Lenders have not cured any material breaches described in the Obligor Termination Notice within seven (7) days of delivery thereof, the Obligors shall be permitted to apply to the Canadian Court for termination of the Accommodation Period and declaration of the Obligor Termination Date. For greater certainty, the Lenders shall continue to have the right to cure any such material breaches at any time following the application by the Obligors and prior to any determination thereof by the Canadian Court.

Section 4 Representations and Warranties

In order to induce the Agent and the Lenders to enter into this Agreement, the Obligors hereby confirm that all the representations and warranties of the Obligors contained in Schedule A are true and correct in all material respects; provided that, any such representations and warranties that are already qualified by materiality shall be true and correct in all respects.

Section 5 Conditions Precedent

This Agreement (including the agreements, accommodations and consents contained herein) shall be subject to and conditional upon the following conditions precedent being fulfilled to the satisfaction of the Agent and the Lenders:

(a) execution and delivery of this Agreement by the Obligors, the Agent and the Lenders;

(b) the representations and warranties of the Obligors in this Agreement shall be true and correct in all material respects;

(c) the Lenders are satisfied with (i) the terms and conditions of the amended and restated Initial Order to be presented at the comeback motion for the Initial Order; and (ii) the US recognition order recognizing the amended and restated Initial Order;

(d) the Lenders are satisfied with a summary of the principal economic terms of the engagement letter between JustEnergy and BMO Nesbitt Burns Inc., as financial advisor to the Obligors, provided to the Lenders on a confidential basis;

(e) the Obligors will have paid, or arrangements satisfactory to the Agent shall have been made to ensure that the Obligors will pay, all reasonable out-of-pocket fees and expenses (including all reasonable legal fees and consultant's fees) incurred by on or behalf of the Agent in connection with this Agreement and the transactions and other documents contemplated by this Agreement on or prior to the Filing Date;

(f) the DIP Lenders shall have approved this Agreement and authorized the Obligors party hereto to enter into this Agreement and perform their obligations hereunder; and

(g) the Canadian Court shall have approved this Agreement and authorized the Obligors party hereto to enter into this Agreement and perform their obligations hereunder, pursuant to the amended and restated Initial Order.

provided that, all documents delivered pursuant to this Section 5 will be in full force and effect, and in form and substance satisfactory to the Agent, acting reasonably.

Section 6 Expenses

During the Accommodation Period, the Obligors shall pay all reasonable and documented fees and expenses of the Agent, the Lenders and the Collateral Agent, which fees and expenses shall be limited to the reasonable and documented time-based out-of-pocket legal and advisor fees (excluding any success fees) of McCarthy Tétrault LLP, Chapman and Cutler LLP, the Consultant and one Texas local counsel, in their capacities as advisors to the Agent, the Lenders and the Collateral Agent, whether incurred prior to, on or after the Filing Date, in connection with matters relating to the CCAA Proceedings and the Chapter 15 Proceedings, including the preparation, negotiation, completion, execution, delivery and review of this Agreement and all other documents

and instruments arising therefrom and/or executed in connection therewith, in each case, within ten (10) days (the "**review period**") of the Borrowers', DIP Lenders' and Monitor's receipt of detailed monthly invoices for such fees and expenses (which in the case of legal counsel may be redacted for privilege); *provided* that any of the Borrowers, the DIP Lenders or the Monitor may raise good faith disputes regarding any such invoice by written notice to the Agent before the end of the review period (which such dispute shall be finally adjudicated by the Canadian Court), but the Borrowers shall pay any undisputed portion of the invoice within two (2) Business Days of the end of the review period; *provided further*, that the Obligors shall not be required to pay any fees and expenses of legal counsel retained separately by the Agent or by any individual Lender or group of Lenders (all of the foregoing, the "**Expense Reimbursement Obligations**", except as provided in clause (ii) below). Notwithstanding the foregoing, (i) if an Obligor Termination Notice has been delivered and the Lenders have not cured each material breach described therein within four (4) days of such delivery, the payment of the Expense Reimbursement Obligations in cash shall cease immediately; *provided* that the payment in cash of the Expense Reimbursement Obligations shall automatically resume upon the Lenders curing each material breach described in the related Obligor Termination Notice if all such material breaches are cured prior to the Obligor Termination Date and (ii) the Expense Reimbursement Obligations shall not include fees and expenses related to any action(s) by any of the Agent, the Collateral Agent or any of the Lenders (or their respective counsels) in the CCAA Proceedings or the Chapter 15 Proceedings that (x) is adverse to the interests of the DIP Lenders under the terms of the DIP Term Sheet or under any order of the Canadian Court or US Court , or (y) the Monitor determines is (A) materially adverse to the interests of all Interested Creditors, taken as a whole, or (B) the Monitor determines is not filed in good faith to protect the interests of the Lenders.

Section 7 Continuance of Credit Agreement and Security

The Obligors acknowledge and confirm that, subject to any orders granted in the CCAA Proceedings or the Chapter 15 Proceedings, the Agent's claims, the Lenders' claims, the Collateral Agent's claims and the Obligors' obligations under the Credit Agreement and the other Credit Documents to which they are party shall be and continue in full force and effect.

Section 8 No Waiver

The Obligors acknowledge and agree that the Existing Defaults have not been waived and that this Agreement shall not constitute an amendment, waiver, consent or release with respect to any provision of the Credit Documents, a waiver of any breach of representation and warranty, breach of covenant, or any Pending Event of Default or Event of Default thereunder, or a waiver or release of the Agent's, the Collateral Agent's or any Lender's rights or remedies, all of which are expressly reserved.

Section 9 Release

The Obligors hereby unconditionally and irrevocably release the Agent, the Collateral Agent and the Lenders and their respective successors, assigns, officers, directors, employees, attorneys and agents from any liability for actions or omissions arising or occurring prior to the Filing Date, whether known or unknown, whether in connection with the Credit Documents or otherwise (it being agreed and understood that this release shall not extend to (i) any liabilities

arising under this Agreement or other actions or omissions on or after the Filing Date whether in connection with the Credit Documents or otherwise or (ii) any liabilities arising from the fraud, willful misconduct or gross negligence of any of the Agent, the Collateral Agent or any Lender).

Section 10 Credit Document

The Obligors acknowledge and agree that this Agreement shall constitute a Credit Document for purposes of the Credit Agreement.

Section 11 Counterparts and Electronic Signatures

This Agreement may be executed in any number of separate counterparts, each of which shall be deemed an original and all of said counterparts taken together shall be deemed to constitute one and the same instrument. Delivery of an executed counterpart of a signature page of this Agreement (whether by facsimile, email, PDF or other electronic means) shall be as effective as delivery of a manually executed counterpart of this Agreement. The words "execution," "signed," "signature," "delivery," and words of like import in or relating to this Agreement and any document to be signed in connection herewith or therewith shall be deemed to include electronic signatures, deliveries or the keeping of records in electronic form, each of which shall be of the same legal effect, validity or enforceability as a manually executed signature, physical delivery thereof or the use of a paper-based recordkeeping system, as the case may be.

Section 12 Governing Law

This Agreement shall be governed by the laws of the Province of Ontario and the federal laws of Canada applicable therein.

Section 13 Severability

If any term or provision of this Agreement or the application thereof to any party or circumstance shall be held to be invalid, illegal or unenforceable in any respect by a court of competent jurisdiction, the validity, legality and enforceability of the remaining terms and provisions of this Agreement shall not in any way be affected or impaired thereby, and the affected term or provision shall be modified to the minimum extent permitted by law so as most fully to achieve the intention of this Agreement.

Section 14 Other Miscellaneous

(a) This Agreement may be modified, amended or supplemented as to any matter only in writing (which may include e-mail) by all parties hereto.

(b) Any provision of this Agreement may be waived or amended if, and only if, such waiver or amendment is in writing (which may include e-mail) by the party against whom the waiver or amendment is to be effective (it being agreed and understood that, if such waiver or amendment is against the Lenders, only the consent of the Majority Lenders shall be necessary for any such waiver or amendment). No failure or delay by any party in exercising any right, power or privilege hereunder shall

operate as a waiver thereof nor shall any single or partial exercise thereof preclude any other or further exercise

(c) Any date, time or period referred to in this Agreement shall be of the essence except to the extent to which the parties hereto agree in writing to vary any date, time or period, in which event the varied date, time or period shall be of the essence.

(d) Each of the Lenders hereby agree that, to the extent the requisite DIP Lenders extend the period for delivery of any item required to be delivered under the DIP Facility, then the corresponding requirement to deliver such item hereunder shall be automatically so extended in an equivalent manner; *provided* that any applicable extension granted by the DIP Lenders of more than ten (10) Business Days shall only automatically extend the corresponding requirement to deliver such items hereunder for ten (10) Business Days without the Majority Lenders' prior written consent.

[Signature pages to follow]

IN WITNESS WHEREOF the parties hereto have executed this Agreement as of the day and year first above written.

BORROWERS:

JUST ENERGY ONTARIO L.P. by its general partner JUST ENERGY CORP.

By: _____
Name: Michael Carter
Title: Chief Financial Officer

By: _____
Name: Jonah Davids
Title: Executive Vice President, General Counsel and Corporate Secretary

JUST ENERGY (U.S.) CORP.

By: _____
Name: Michael Carter
Title: Chief Financial Officer

By: _____
Name: Jonah Davids
Title: Executive Vice President, General Counsel and Corporate Secretary

IN WITNESS WHEREOF the parties hereto have executed this Agreement as of the day and year first above written.

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JUST ENERGY (U.S.) CORP.

By: _____
Name: Michael Carter
Title: Chief Financial Officer

By: _____
Name: Jonah Davids
Title: Executive Vice President, General Counsel and Corporate Secretary

OTHER OBLIGORS:

JUST ENERGY GROUP INC.

JUST ENERGY CORP.

ONTARIO ENERGY COMMODITIES INC.

JUST ENERGY MANITOBA L.P., by its general partner, JUST ENERGY CORP.

JUST ENERGY (B.C.) LIMITED PARTNERSHIP, by its general partner, JUST ENERGY CORP.

JUST ENERGY QUÉBEC L.P., by its general partner, JUST ENERGY CORP.

JUST ENERGY TRADING L.P., by its general partner, JUST ENERGY CORP.

JUST ENERGY ALBERTA L.P., by its general partner, JUST ENERGY CORP.

UNIVERSAL ENERGY CORPORATION

JUST ENERGY FINANCE CANADA ULC

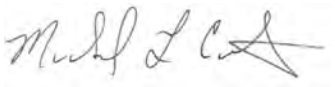
HUDSON ENERGY CANADA CORP.

JUST GREEN L.P., by its general partner, JUST ENERGY CORP.

JUST ENERGY PRAIRIES L.P., by its general partner, JUST ENERGY CORP.

JUST MANAGEMENT CORP.

JUST ENERGY ADVANCED SOLUTIONS CORP.

By: 

Name: Michael Carter

Title: Chief Financial Officer

JUST ENERGY ILLINOIS CORP.

JUST ENERGY INDIANA CORP.

JUST ENERGY NEW YORK CORP.

JUST ENERGY TEXAS I CORP.

JUST ENERGY, LLC, by its Sole Member and Sole Manager, JUST ENERGY TEXAS I CORP.

JUST ENERGY TEXAS LP, by its General Partner, JUST ENERGY, LLC, by its Sole Member and Sole Manager, JUST ENERGY TEXAS I CORP.

JUST ENERGY PENNSYLVANIA CORP.

JUST ENERGY SOLUTIONS INC.

JUST ENERGY MASSACHUSETTS CORP.

JUST ENERGY MICHIGAN CORP.

JUST ENERGY ADVANCED SOLUTIONS LLC

HUDSON ENERGY SERVICES LLC

HUDSON ENERGY CORP.

HUDSON PARENT HOLDINGS LLC

INTERACTIVE ENERGY GROUP LLC

DRAG MARKETING LLC

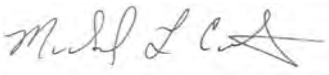
FULCRUM RETAIL ENERGY LLC

FULCRUM RETAIL HOLDINGS LLC

TARA ENERGY, LLC

JUST ENERGY MARKETING CORP.

JUST ENERGY CONNECTICUT CORP.

By: 

Name: Michael Carter

Title: Chief Financial Officer

JUST ENERGY LIMITED

JUST SOLAR HOLDINGS CORP.

JUST ENERGY FINANCE HOLDING INC.

11929747 CANADA INC.

12175592 CANADA INC.

JE SERVICES HOLDCO I INC.

JE SERVICES HOLDCO II INC.

8704104 CANADA INC.

By: _____

Name: Michael Carter
Title: Chief Financial Officer

JUST ENERGY (FINANCE) HUNGARY ZRT.

By: _____

Name: Amir Andani
Title: Director

JEBPO SERVICES LLP

By: _____

Name: Sudheendrah Vasudeva
Title: Designated Partner

By: _____

Name: Sam Mavalwalla
Title: Designated Partner

JUST ENERGY LIMITED

JUST SOLAR HOLDINGS CORP.

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Name: Amir Andani
Title: Director

JEBPO SERVICES LLP

By: _____

Name: Sudheendrah Vasudeva
Title: Designated Partner

By: _____

Name: Sam Mavalwalla
Title: Designated Partner

AGENT:

NATIONAL BANK OF CANADA, as Administrative Agent

By: _____
Name: Gavin Virgo
Title: Director

By: _____
Name: Jonathan Campbell
Title: Director

[*Lender signature pages on file with the Debtors.*]

Schedule A

Representations and Warranties

(See attached)

SCHEDULE A

Representations and Warranties

Each Borrower represents and warrants to the Agent and each Lender and acknowledges and confirms that the Agent and each Lender is relying upon such representations and warranties:

(1) Existence and Qualification Subject to any restrictions arising on account of any Obligor's protected status under the CCAA Proceedings (and only so long as such status exists), each Obligor (i) has been duly incorporated, formed, amalgamated, merged or continued, as the case may be, and is validly subsisting as a corporation, company, limited liability company, partnership or trust, under the laws of its jurisdiction of formation, amalgamation, merger or continuance, as the case may; and (ii) is duly qualified, in good standing and has all required Material Licences to carry on its business in each jurisdiction in which the nature of its business requires qualification to the extent necessary to carry on its business.

(2) Power and Authority Subject to the entry of, and the terms of, the *CCAA* Orders and to any restrictions arising solely on account of any Obligor's protected status under the *CCAA* Proceedings (and only so long as such status exists), each Obligor has the corporate, trust, company, limited liability company or partnership power and authority, as the case may be, (i) to enter into, and to exercise its rights and perform its obligations under, this Agreement (to the extent that it is a party thereto) and all other instruments and agreements delivered by it pursuant to this Agreement, and (ii) to own its Property and carry on its business as currently conducted and as currently proposed to be conducted by it.

(3) Execution, Delivery, Performance and Enforceability of Documents Subject to the entry of, and the terms of, the *CCAA* Orders and to any restrictions arising solely on account of any Obligor's protected status under the *CCAA* Proceedings (and only so long as such status exists), the execution, delivery and performance of this Agreement (to the extent that such Obligor is a party to this Agreement), and every other instrument or agreement delivered by an Obligor pursuant to this Agreement has been duly authorized by all corporate, trust, company or partnership actions required, and each of such documents has been duly executed and delivered. To the extent that any Obligor is a party hereto, upon entry of the *CCAA* Orders, this Agreement constitutes the legal, valid and binding obligations of such Obligor, enforceable against such Obligor in accordance with its terms (except, in any case, as such enforceability may be limited by applied bankruptcy, insolvency, reorganization or similar laws affecting creditors' rights generally and by principles of equity).

(4) Agreement Complies with Applicable Laws, Organizational Documents and Contractual Obligations Subject to the entry of the CCAA Orders, none of the execution or delivery of, the consummation of the transactions contemplated in, or compliance with the terms, conditions and provisions of this Agreement conflicts with or will conflict with, or results or will result in any breach of, or constitutes a default under or contravention of, (a) any Obligors' Organizational Document, (b) any Material Contract or Material Licence, (c) any Requirement of Law other than immaterial breaches or (d) results or will result in the creation or imposition of any Lien upon any of its Property that is not a Permitted Lien (as defined in the DIP Term Sheet).

(5) Consent Respecting Agreement Each Obligor has, obtained, made or taken all consents, approvals, authorizations, declarations, registrations, filings, notices and other actions whatsoever required with Governmental Authorities, third parties or otherwise to enable it to execute and deliver this Agreement (to the extent that such Obligor is a party hereto) and to consummate the transactions contemplated hereby, other than the approvals, clarifications or authorizations of the Governmental Authorities (including, without limitation, the Reserve Bank of India) required under the laws of India for the execution and delivery by JEBPO of any agreement (including without limitation this Agreement) to which it is a party, and the performance by JEBPO of its obligations thereunder.

(6) Judgments, Etc. At the date given, other than pursuant to the *CCAA* Proceedings, no Obligor is subject to any judgment, order, writ, injunction, decree or award, or to any restriction, rule or regulation (other than

customary or ordinary course restrictions, rules and regulations consistent or similar with those imposed on other Persons engaged in similar businesses) which has not been lifted or stayed.

(7) Absence of Litigation Other than the CCAA Proceedings, there are no actions, suits or proceedings pending or, to the best of its knowledge and belief, after due inquiry and all reasonable investigation, threatened against or involving any Obligor, (i) which would reasonably be expected to have a Material Adverse Effect or (ii) that involve this Agreement, in each case, which are not subject to the *CCAA* Stay (as defined in the DIP Term Sheet).

(8) Title to Assets Each Obligor has good title to its assets, and no Person has any agreement or right to acquire an interest in such assets other than in the ordinary course of its business. The Pledged Securities constitute all of the equity interests held by each Obligor in any other Obligor.

(9) Use of Real Property All real property material to the business of the Obligor owned or leased by each Obligor may be used by such Obligor pursuant to Applicable Law for the present use and operation of the material elements of the business conducted, or intended to be conducted, on such real property by such Obligor.

(10) Insurance Each Obligor maintains insurance which is in full force and effect that complies with all of the requirements of the Credit Agreement as of September 28, 2020.

(11) Labour Relations No Obligor is engaged in any material unfair labour practice or material employment discrimination practice, and there is no material unfair labour practice complaint or material complaint of employment discrimination pending against an Obligor, or to its knowledge threatened against an Obligor, before any Governmental Authority. To the best of its knowledge, no material grievance or arbitration arising out of or under any collective bargaining agreement is pending against an Obligor or, to the best of its knowledge, threatened against an Obligor, no strike, labour dispute, slowdown or stoppage is pending against an Obligor or, to the best of its knowledge, threatened against an Obligor and no union representation proceeding is pending with respect to any of an Obligor's employees.

(12) Compliance with Laws No Obligor is in material violation of any material Applicable Law or material Applicable Order, subject to the provisions of Section 21 of this Schedule A, in the case of Requirements of Environmental Law.

(13) Corporate Structure The corporate structure of the Borrowers and their subsidiaries is as set out in Schedule A(13) to this Agreement.

(14) Rights to Acquire Shares of Obligors No Person has an agreement or option or any other right or privilege (whether by law, pre-emptive or contractual) capable of becoming an agreement or option, including convertible securities, warrants or convertible obligations of any nature, for the purchase, subscription, allotment or issuance of any unissued shares in the capital of any Obligor (other than JustEnergy).

(15) Obligors Each Obligor either carries on their Business in Canada, the United States, India or Hungary, or carries on no business other than being a holding entity.

(16) Relevant Jurisdictions Schedule A(16) to this Agreement identifies, in respect of each Obligor, the Relevant Jurisdictions as of the Closing Date including each Obligor's jurisdiction of formation and organizational registration number (if any), its full address (including postal code or zip code), chief executive office, registered office and all places of business and, if the same is different, the address at which the books and records of such Obligor are located and the address from which the invoices and accounts of such Obligor are issued.

(17) Computer Software Each Obligor owns or has licensed for use or otherwise has the right to use all of the material software necessary to conduct its businesses. All Computer Equipment owned or used by an Obligor and necessary for the conduct of business has been properly maintained in all material respects or replaced and is in good working order for the purposes of on-going operation, subject to ordinary wear and tear for Computer

Equipment of comparable age and Computer Equipment which has been damaged but is in the course of being repaired.

(18) Intellectual Property Each Obligor has rights sufficient for it to use all the Intellectual Property reasonably necessary for the conduct of its business except to the extent failure to do so would not reasonably be expected to have a Material Adverse Effect; all patents, trade-marks or industrial designs which have been either registered or in respect of which a registration application has been filed by it are listed on Schedule A(18) to this Agreement. To its knowledge, no Obligor is infringing or misappropriating or is alleged to be infringing or misappropriating the intellectual property rights of any other Person where such infringement or misappropriation is reasonably expected to have a Material Adverse Effect.

(19) Financial Year End The financial year end of the Obligors is March 31.

(20) Financial Information All of the financial statements which have been furnished to the Lenders in connection with this Agreement are complete in all material respects and such financial statements fairly present the results of operations and financial position of the Borrowers and the Guarantors as of the dates referred to therein and have been prepared on a Modified Consolidated Basis, except that, in the case of quarterly financial statements, notes to the statements and audit adjustments required by GAAP are not included. All other financial information provided to the Lenders as of the date prepared (a) were based on reasonable assumptions and expectations and represent reasonable good faith estimates and (b) were believed to be achievable.

(21) Environmental (a) No Obligor is subject to any civil or criminal proceeding relating to Requirements of Environmental Laws and is not aware of any investigation or threatened proceeding or investigation, (b) each Obligor has all material permits, licenses, registrations and other authorizations required by the Requirements of Environmental Laws for the operation of its business and the properties which it owns, leases or otherwise occupies, (c) each Obligor currently operates its business and its properties (whether owned, leased or otherwise occupied) in compliance in all material respects with all applicable material Requirements of Environmental Laws, (d) no Hazardous Substances are stored or disposed of by any Obligor or otherwise used by an Obligor in violation of any applicable Requirements of Environmental Laws (including, without limitation, there has been no Release of Hazardous Substances by any Obligor at, on or under any property now or previously owned or leased by the Borrowers or any of their subsidiaries), (e) except as disclosed in the environmental reports identified on Schedule A(21) to this Agreement, to the knowledge of the Borrowers (i) all underground storage tanks now or previously located on any real property owned or leased by it have been operated, maintained and decommissioned or closed, as applicable, in compliance with applicable Requirements of Environmental Law; and (ii) no real property or groundwater in, on or under any property now or previously owned or leased by any Obligor is or has been during such Obligor's ownership or occupation of such property contaminated by any Hazardous Substance except for any contamination that would not reasonably be expected to give rise to material liability under Requirements of Environmental Laws nor, to the best of its knowledge, is any such property named in any list of hazardous waste or contaminated sites maintained under the Requirements of Environmental Law.

(22) CERCLA No portion of any Obligor's Property has been listed, designated or identified in the National Priorities List or the CERCLA Information System both as published by the United States Environmental Protection Agency, or any similar list of sites published by any federal, state or local authority proposed for requiring clean up or remedial or corrective action under any Requirements of Environmental Laws.

(23) Canadian Welfare and Pension Plans The Canadian Borrower has adopted all Canadian Welfare Plans and all Canadian Pension Plans in accordance with Applicable Laws and each such plan has been maintained and is in compliance in all material respects with its terms and such laws including, without limitation, all requirements relating to employee participation, funding, investment of funds, benefits and transactions with the Obligors and persons related to them. As of the commencement of the CCAA Proceedings (the **"CCAA Filing Date"**) and at no time preceding the CCAA Filing Date has any Obligor maintained, sponsored, administered, contributed to, or participated in a Specified Canadian Pension Plan. With respect to Canadian Pension Plans: (a) no steps have been taken to terminate any Canadian Pension Plan (wholly or in part) which could result in any Obligor being required to make an additional contribution in excess of $5,000,000 to the Canadian Pension Plan; (b) no contribution failure in excess of $5,000,000 has occurred with respect to any Canadian Pension Plan sufficient to give rise to a lien or charge

under any applicable pension benefits laws of any other jurisdiction; and (c) no condition exists and no event or transaction has occurred with respect to any Canadian Pension Plan which is reasonably likely to result in any Obligor incurring any liability, fine or penalty in excess of $5,000,000. No Obligor has a contingent liability in excess of $5,000,000 with respect to any post-retirement benefit under a Canadian Welfare Plan. With respect of each Canadian Pension Plan: (a) all contributions (including employee contributions made by authorized payroll deductions or other withholdings) required to be made to the appropriate funding agency in material compliance with all Applicable Laws and the terms of each Pension Plan have been made in accordance with all Applicable Laws and the terms of each Canadian Pension Plan; and (b) no event has occurred and no conditions exist with respect to any Canadian Pension Plan that has resulted or could reasonably be expected to result in any Canadian Pension Plan being the subject of a requirement to be wound up (wholly or in part) by any applicable regulatory authority, having its registration revoked or refused by any applicable regulatory authority or being required to pay any taxes or penalties under any applicable pension benefits or tax laws.

(24) ERISA Plans (a) Each ERISA Plan of any Obligor carrying on business in the United States has been maintained and is in compliance in all material respects with Applicable Laws including, without limitation, all requirements relating to employee participation, investment of funds, benefits and transactions with the Obligors and persons related to them, (b) with respect to such ERISA Plans: (i) no condition exists and no event or transaction has occurred with respect to any such ERISA Plan that is reasonably likely to result in any Obligor, to the best of its knowledge, incurring any liability, fine or penalty in excess of the US$ Equivalent Amount of Cdn.$5,000,000; and (ii) no Obligor carrying on business in the United States has a contingent liability with respect to any post-retirement benefit under a US Welfare Plan in excess of the US$ Equivalent Amount of Cdn.$5,000,000, (c) all contributions (including employee contributions made by authorized payroll deductions or other withholdings) required to be made have been made in accordance with all Applicable Laws and the terms of each ERISA Plan, (d) each of the ERISA Plans that is intended to be "qualified" within the meaning of Section 401(a) of the Code (i) has received a favourable determination letter from the IRS, (ii) is or will be the subject of an application for a favourable determination letter, and no circumstances exist that has resulted or could reasonably be expected to result in the revocation or denial of any such determination letter, or (iii) is entitled to rely on an appropriately updated prototype plan document that has received a national office determination letter and has not applied for a favourable determination letter of its own and (e) no Obligor carrying on business in the United States has any US Pension Plans and no multiemployer plans as defined in Section 4001(a)(3) of ERISA are maintained by any Obligor or to their knowledge have been maintained by any member of any Obligor's Controlled Group.

(25) Not an Investment Company No Obligor is an "investment company" or a company "controlled" by an "investment company" within the meaning of the United States Investment Company Act of 1940 or a "holding company", or a "subsidiary company" of a "holding company", or an "affiliate" of a holding company, or of a "subsidiary company" of a "holding company", within the meaning of the United States Public Utility Holding Company Act of 2005.

(26) No Margin Stock No Obligor is engaged in the business of extending credit for the purpose of purchasing or carrying margin stock. None of the proceeds of any Advance will be used to purchase or carry, or to reduce or retire or refinance any credit incurred to purchase or carry, any margin stock (within the meaning of Regulations U and X of the Board of Governors of the Federal Reserve System of the United States) or to extend credit to others for the purpose of purchasing or carrying any margin stock.

(27) Full Disclosure All information provided or to be provided by or on behalf of any Obligor to the Agent and the Lenders in connection with this Agreement (other than future-looking information or information of a general economic or industry nature) was or will be at the time prepared, to its knowledge, true and correct in all material respects and none of the documentation furnished to the Agent or any Lender by or on behalf of any Obligor, to its knowledge, omitted or will omit as of such time, a material fact necessary to make the statements contained therein not misleading in any material way, and all expressions of expectation, intention, belief and opinion contained therein were honestly made on reasonable grounds after due and careful inquiry by it at the time made (and, to its knowledge any other Person who furnished such material on behalf of them.

(28) Sanctions. It is not in violation of, in any material respect, any of the country or list based economic and trade sanctions administered and enforced by OFAC, or any Sanctions Laws. As of the date of this Agreement,

no Obligor (i) is a Sanctioned Person or (ii) is a Person designated under Executive Order No. 13224 on Terrorist Financing, effective September 24, 2001 or other Sanctions Laws. If a senior officer of any Obligor receives any written notice that any Obligor, any affiliate or any subsidiary of any Obligor is named on the then current OFAC SDN List or is otherwise a Sanctioned Person (such occurrence, a "**Sanctions Event**"), such Obligor shall promptly (i) give written notice to the Agent of such Sanctions Event, and (ii) comply in all material respects with all applicable laws with respect to such Sanctions Event (regardless of whether the Sanctioned Person is located within the jurisdiction of the United States of America or Canada), and each Obligor hereby authorizes and consents to the Lenders and the Agent (acting at the direction of the Majority Lenders) taking any and all steps the Lenders or the Agent (acting at the direction of the Majority Lenders) deem necessary, in their sole but reasonable discretion, to avoid violation of, in any material respect, all applicable laws with respect to any such Sanctions Event.

(29) Anti-Corruption Laws. No part of the proceeds of the Advances shall be used, directly or, to the Borrowers' knowledge, indirectly: (a) to offer or give anything of value to any official or employee of any foreign government department or agency or instrumentality or government-owned entity, to any foreign political party or party official or political candidate, or to anyone else acting in an official capacity, in order to obtain, retain or direct business, or obtain any improper advantage, in material violation of any Anti-Corruption Law.

(30) Anti-Terrorism Laws. To the extent applicable, each Obligor is in compliance, in all material respects, with (i) the U.S. Trading with the Enemy Act, as amended, and each of the foreign assets control regulations of the United States Treasury Department (31 C.F.R. Subtitle B, Chapter V, as amended) and any other enabling legislation or executive order relating thereto, (ii) the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (United States), as amended (the "**Patriot Act**"); and (iii) *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (Canada) (collectively with clauses (i) and (ii) above, the "**Anti-Terrorism Laws**"). The use of the proceeds of the Advances will not violate, in any material respect, the Trading with the Enemy Act, as amended, or any of the foreign assets control regulations of the United States Treasury Department (31 C.F.R. Subtitle B, Chapter V, as amended) or any enabling legislation or executive order relating thereto, in any material respect.

SCHEDULE A(13)

CORPORATE STRUCTURE

	Name of Obligor - Restricted Subsidiary*, Unrestricted Subsidiary**	Jurisdiction	Authorized Capital	Issued Capital	Owner of Securities
1.	Just Energy Group Inc.*	Canada	unlimited number of Common Shares 50,000,000 Preferred Shares	48,987,581 Common Shares	Publicly held
2.	Just Energy Corp.*	Province of Ontario	unlimited number of Common Shares, Class A Preference Shares and Class B Preference Shares	(a) 300 Common Shares	(a) Just Energy Group Inc.
3.	Just Energy Trading L.P. *	Province of Ontario	unlimited number of Class A Limited Partnership Units and unlimited number of Class B Limited Partnership Units	(a) 872,941 Class A Limited Partnership Units	(a) Just Energy Group Inc.
				(b) 9 Class A Limited Partnership Units	(b) Just Energy Corp.
				(c) 265,179 Class B Limited Partnership Units	(c) Just Energy Group Inc.
				(d) 3,444 Class B Limited Partnership Units	(d) Just Energy Corp.
				(e) 5,214 Class B Limited Partnership Units	(e) Universal Energy Corporation

	Name of Obligor - Restricted Subsidiary*, Unrestricted Subsidiary**	Jurisdiction	Authorized Capital	Issued Capital	Owner of Securities
4.	Just Energy (B.C.) Limited Partnership*	Province of British Columbia	unlimited number of Limited Partnership Units	(a) 1 Class A Limited Partnership Unit	(a) Just Energy Corp.
				(b) 2,499 Class A Limited Partnership Units	(b) Just Energy Trading L.P.
				(c) 394 Class B Units	(c) Just Energy Trading L.P.
5.	Just Energy Ontario L.P.*	Province of Ontario	unlimited number of Class A Units and unlimited number of Class B Preferred Units	(a) 82,478 Class A Units	(a) Just Energy Trading L.P.
				(b) 3,000 Class A Units	(b) Just Energy Corp.
				(c) 379,671 Class B Preferred Units	(c) Just Energy Trading L.P.
6.	Just Green L.P.*	Province of Alberta	unlimited number of Limited Partnership Units	(a) 1 Limited Partnership Unit	(a) Just Energy Corp.
				(b) 864,449 Limited Partnership Units	(b) Just Energy Trading L.P.
7.	Just Energy Québec L.P.*	Province of Quebec	unlimited number of Limited Partnership Units	(a) 1 Limited Partnership Unit	(a) Just Energy Corp.
				(b) 2,499 Limited Partnership Units	(b) Just Energy Trading L.P.

	Name of Obligor - Restricted Subsidiary*, Unrestricted Subsidiary**	Jurisdiction	Authorized Capital	Issued Capital	Owner of Securities
8.	Just Energy Manitoba L.P.*	Province of Manitoba	unlimited number of Class A Units and unlimited number of Class B Preferred Units	(a) 918 Class A Units (b) 82 Class A Limited Partnership Units (c) 760 Class B Preferred Units	(a) Just Energy Trading L.P. (b) Just Energy Corp. (c) Just Energy Trading L.P.
9.	Ontario Energy Commodities Inc.*	Province of Ontario	unlimited number of Common Shares	(a) 65,183,851 Common Shares (b) 200,781 Common Shares (c) 9,782,244 Common Shares (d) 1,200 Preferred Shares	(a) Just Energy Ontario L.P. (b) Universal Energy Corporation (c) Just Energy Group Inc. (d) Just Energy Group Inc.
10.	Hudson Energy Canada Corp.*	Canada	unlimited number of Common Shares	100 Common Shares	Just Energy Group Inc.
				14,000 common shares	Just Energy Alberta L.P.
				3,166,000 common shares	Just Energy Ontario L.P.
11.	Just Energy (U.S.) Corp.*	State of Delaware	5,000 Common Shares	(a) 2,897 Common Shares (b) 328 Common Shares (c) 53 Common Shares	(a) Ontario Energy Commodities Inc. (b) Just Energy Group Inc. (c) Just Energy Finance Canada ULC

	Name of Obligor - Restricted Subsidiary*, Unrestricted Subsidiary**	Jurisdiction	Authorized Capital	Issued Capital	Owner of Securities
12.	Just Energy Marketing Corp.*	State of Delaware	100 Common Shares	100 Common Shares	Just Energy (U.S.) Corp.
13.	Just Energy Illinois Corp.*	State of Delaware	5,000 Common Shares	2,600 Common Shares	Just Energy (U.S.) Corp.
14.	Just Energy Indiana Corp.*	State of Delaware	100 Common Shares	100 Common Shares	Just Energy (U.S.) Corp.
15.	Just Energy New York Corp.*	State of Delaware	5,000 Common Shares	900 Common Shares	Just Energy (U.S.) Corp.
16.	Just Energy Michigan Corp.*	State of Delaware	100 Common Shares	100 Common Shares	Just Energy (U.S.) Corp.
17.	Momentis U.S. Corp.**	State of Delaware	100 Common Shares	100 Common Shares	Just Energy (U.S.) Corp.
18.	Just Energy Texas I Corp.*	State of Delaware	1,000 Common Shares	1,000 Common Shares	Just Energy (U.S.) Corp.
19.	Just Energy Texas LP*	State of Texas	unlimited number of Class A1 Limited Partnership Units, unlimited number of Class A2 Limited Partnership Units and unlimited number of General Partnership Units	(a) 23,560 Class A1 Limited Partnership Units (b) 917 Class A2 Limited Partnership Units (c) 24.1 General Partnership Units	(a) Just Energy Texas I Corp. (b) Just Energy Texas I Corp. (c) Just Energy, LLC
20.	Just Energy, LLC*	State of Texas	10,000 Membership Units	(a) 2,356 Membership Units	(a) Just Energy Texas I Corp.

	Name of Obligor - Restricted Subsidiary*, Unrestricted Subsidiary**	Jurisdiction	Authorized Capital	Issued Capital	Owner of Securities
21.	Just Energy Massachusetts Corp.*	State of Delaware	1,000 Common Shares	1,000 Common Shares	Just Energy (U.S.) Corp.
22.	Just Energy Connecticut Corp.* [*pending dissolution*]	State of Delaware	1,000 Common Shares	1,000 Common Shares	Just Energy (U.S.) Corp.
23.	Just Energy Alberta L.P.*	Province of Alberta	unlimited number of Limited Partnership Units	(a) 1 Class A Limited Partnership Unit (b) 99 Class A Limited Partnership Units (c) 1 Class B Limited Partnership Unit (d) 131 Class A Limited Partnership Units	(a) Just Energy Corp. (b) Just Energy Trading L.P. (c) Just Green L.P. (d) Just Green L.P.
24.	Just Energy Pennsylvania Corp.*	State of Delaware	1,000 Common Shares	100 Common Shares	Just Energy (U.S.) Corp.
25.	Just Energy Finance Canada ULC*	Province of Nova Scotia	unlimited number of common shares	(a) 18,752 Common Shares	(a) Ontario Energy Commodities Inc.
26.	Just Energy Limited*	State of Delaware	100 Common Shares	100 Common Shares	Just Energy (U.S.) Corp.
27.	Just Energy Advanced Solutions LLC*	State of Delaware	unlimited Common Units	100 Common Units	Just Energy New York Corp.

	Name of Obligor - Restricted Subsidiary*, Unrestricted Subsidiary**	Jurisdiction	Authorized Capital	Issued Capital	Owner of Securities
28.	Just Management Corp.*	Canada	Unlimited number of Common Shares	100 Common Shares	Just Energy Group Inc.
				7,341,420 Class A preferred shares	Just Energy Ontario L.P.
				1,703,540 Class B preferred shares	Just Energy Ontario L.P.
29.	Just Holdings L.P.**	Province of Manitoba	unlimited number of Class A Limited Partnership Units and unlimited number of Class B Limited Partnership Units	(a) 1 Class A Limited Partnership Units	(a) Just Management Corp.
				(b) 1,000 Class A Limited Partnership Units	(b) Just Energy Group Inc.
30.	Just Ventures LLC**	State of Delaware	Unlimited number of Membership Interest Units	100 Membership Interest Units	Just Energy Marketing Corp.
31.	Just Ventures GP Corp.**	Canada	Unlimited number of common shares	100 common shares	Just Energy Corp.
32.	Just Ventures L.P.**	Province of Ontario	Unlimited number of Class A Limited Partnership Units	(a) 998 Class A Limited Partnership Units	(a) Just Energy Ontario L.P.
				(b) 2 Class A Limited Partnership Units	(b) Just Ventures GP Corp.

	Name of Obligor - Restricted Subsidiary*, Unrestricted Subsidiary**	Jurisdiction	Authorized Capital	Issued Capital	Owner of Securities
33.	Just Energy Prairies L.P.*	Province of Manitoba	unlimited number of Class A Limited Partnership Units and unlimited number of Class B Limited Partnership Units	(a) 1 Class A Limited Partnership Units (b) 999 Class A Limited Partnership Units	(a) Just Energy Corp. (b) Just Energy Trading L.P.
34.	Universal Energy Corporation*	Province of Ontario	Unlimited Common shares Unlimited Class A Shares Unlimited Class B Shares Unlimited Class C Shares	(a) 100,100 Common Shares (b) 25, 000,000 Class C Shares	(a) Just Energy Group Inc. (b) Just Energy Group Inc.
35.	American Home Energy Services Corp.**	State of Delaware	1,000 common voting shares	100 common voting shares	Just Energy (U.S.) Corp.
36.	8704104 Canada Inc. *	Canada	Unlimited Common Shares Unlimited Class A Special Shares	(a) 100 Common Shares (b) 9,500,000 Class A Special Shares	(a) Just Energy Group Inc. (b) Just Energy Group Inc.
37.	Just Energy Solutions Inc.* (formerly known as Commerce Energy, Inc.)	State of California	50,000,000 Common stock 10,000,000 Preferred Stock	30,553,540 Common Stock	Just Energy (U.S.) Corp.

	Name of Obligor - Restricted Subsidiary*, Unrestricted Subsidiary**	Jurisdiction	Authorized Capital	Issued Capital	Owner of Securities
			1,000,000 Series A Convertible Preferred Stock		
38.	Hudson Energy Corp.*	State of Delaware	1,500 Common Shares	1,001 Common Shares	Just Energy (U.S.) Corp.
39.	Hudson Parent Holdings LLC* [*pending dissolution*]	State of Delaware	Unlimited Preferred Units Unlimited Common Units	(a) 89,328 Preferred Units (b) 7,251,158 Common Units	(a) Hudson Energy Corp. (b) Hudson Energy Corp.
40.	Interactive Energy Group LLC* (formerly known as HE Holdings, LLC)	State of Delaware	Unlimited Common Units	100 Common Units	Hudson Parent Holdings LLC
41.	Drag Marketing LLC* [*pending dissolution*]	State of Delaware	Unlimited Common Units	1,000 Common Units	Hudson Parent Holdings LLC
42.	Hudson Energy Services LLC*	State of New Jersey	Unlimited Common Units	1,000 Class A Membership Interests	Interactive Energy Group LLC
43.	Hudson Energy Holdings UK Limited**	England and Wales	Unlimited number of ordinary shares	1,250,751 ordinary shares	Just Energy Group Inc.
44.	Just Energy (U.K.) Limited**	England and Wales	Unlimited number of ordinary shares	100 ordinary shares	Just Energy Group Inc.
45.	Fulcrum Retail Holdings LLC*	State of Texas	Unlimited Membership Units	10,000,000 units	Just Energy (U.S.) Corp.
46.	Fulcrum Retail Energy LLC*	State of Texas	Unlimited Membership Units	100 units	Fulcrum Retail Holdings LLC

	Name of Obligor - Restricted Subsidiary*, Unrestricted Subsidiary**	Jurisdiction	Authorized Capital	Issued Capital	Owner of Securities
47.	Tara Energy, LLC*	State of Texas	Unlimited Membership Units	100 units	Fulcrum Retail Holdings LLC
48.	Just Energy Foundation Canada **	Canada (Not for Profit)	N/A	N/A	N/A
49.	Just Energy Foundation USA, Inc. **	State of Georgia (Not for Profit)	N/A	N/A	N/A
50.	Just Solar Holdings Corp.*	State of Delaware	1,000 Common Stock	100 Common Stock	Just Energy (U.S.) Corp.
51.	Just Energy (Ireland) Limited**	Ireland	Unlimited Ordinary Shares	1 Ordinary Share	Hudson Energy Holdings UK Limited
52.	Just Energy Germany GmbH**	Germany	Unlimited Ordinary Shares	25,000 Ordinary Shares	Just Energy (U.K.) Limited
53.	JE Services Holdco I Inc.*	Canada	Unlimited number of Common Shares	100 Common Shares	8704104 Canada Inc.
54.	JE Services Holdco II Inc.*	Canada	Unlimited number of Common Shares	100 Common Shares	8704104 Canada Inc.
55.	JEBPO Services LLP*	India	N/A	(a) 99% (b) 1%	JE Services Holdco I Inc. JE Services Holdco II Inc.
56.	Just Energy Advanced Solutions Corp.*	Ontario	Unlimited number of Common Shares	100 Common Shares	Just Energy Corp.

	Name of Obligor - Restricted Subsidiary*, Unrestricted Subsidiary**	Jurisdiction	Authorized Capital	Issued Capital	Owner of Securities
57.	JEAS Holdings L.P.**	Province of Ontario	unlimited number of Class A Units and unlimited number of Class B Units	(a) 1 Class A Units (b) 99 Class A Units	(a) Just Energy Corp. (b) Just Energy Advanced Solutions Corp.
58.	Just Energy Finance Holding Inc.*	Province of Ontario	unlimited number of common shares	235,000,001 common shares	Just Energy Group Inc.
59.	Just Energy (Finance) Hungary Zrt.*	Hungary	N/A	1 ordinary share	Just Energy Finance Holding Inc.
60.	Filter Group Inc.**	Canada	unlimited number of Class A common shares, unlimited number of Class B common shares, unlimited number of common shares, unlimited number of Class A preferred shares, and unlimited number of Class B preferred shares	(a) 128,245 Class A common shares (b) 128,245 Class B common shares	8704104 Canada Inc.
61.	Filter Group USA Inc.**	Delaware	1,500 common shares	100 common shares	Filter Group Inc.

	Name of Obligor - Restricted Subsidiary*, Unrestricted Subsidiary**	Jurisdiction	Authorized Capital	Issued Capital	Owner of Securities
62.	11929747 Canada Inc.*	Canada	Unlimited number of common shares Unlimited number of Series A Preference Shares	(a) 100 common shares (b) 210,000,000 Series A Preference Shares	Just Energy Group Inc. Hudson Energy Canada Corp.
63.	12175592 Canada Inc.*	Canada	Unlimited number of common shares	10 common shares	Just Energy Group Inc.
64.	Just Energy Deutschland GmbH**	Germany	Unlimited number of common shares	(a) 23,750 common shares (b) 1,250 common shares	(a) Just Energy Germany GmbH (b) Dieter Helmut Scott
65.	Just Energy Services Limited**	Barbados	Unlimited number of common shares	100 common shares	Ontario Energy Commodities Inc.

SCHEDULE A(16)

RELEVANT JURISDICTIONS

Entity	Jurisdiction	Organizational Registration Number	Location of Tangible Property	Address from which invoices are issued	Chief Executive Office	Registered Office	Books and Records
Just Energy Group Inc.	Canada	750207-9	Ontario	80 Courtneypark Drive West, Mississauga, ON L5W 0B3	First Canadian Place, 100 King Street West Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1	First Canadian Place, 100 King Street West Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1	First Canadian Place, 100 King Street West Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1
Just Energy Ontario L.P.	Ontario	LP11837473	Ontario	80 Courtneypark Drive West, Mississauga, ON L5W 0B3	First Canadian Place, 100 King Street West Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1	First Canadian Place, 100 King Street West Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1	First Canadian Place, 100 King Street West Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1

Entity	**Jurisdiction**	**Organizational Registration Number**	**Location of Tangible Property**	**Address from which invoices are issued**	**Chief Executive Office**	**Registered Office**	**Books and Records**
Just Energy Corp.	Ontario	1733628	Ontario	80 Courtneypark Drive West, Mississauga, ON L5W 0B3	First Canadian Place, 100 King Street West Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1	First Canadian Place, 100 King Street West Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1	First Canadian Place, 100 King Street West Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1
Just Energy Trading L.P.	Ontario	140854530	None	80 Courtneypark Drive West, Mississauga, ON L5W 0B3	First Canadian Place, 100 King Street West Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1	First Canadian Place, 100 King Street West Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1	First Canadian Place, 100 King Street West Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1

Entity	Jurisdiction	Organizational Registration Number	Location of Tangible Property	Address from which invoices are issued	Chief Executive Office	Registered Office	Books and Records
Just Energy Quebec L.P.	Quebec	N/A	Québec	80 Courtneypark Drive West, Mississauga, ON L5W 0B3	First Canadian Place, 100 King Street West Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1	First Canadian Place, 100 King Street West Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1	First Canadian Place, 100 King Street West Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1
Just Energy (B.C.) Limited Partnership	British Columbia	N/A	British Columbia	80 Courtneypark Drive West, Mississauga, ON L5W 0B3	First Canadian Place, 100 King Street West Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1	First Canadian Place, 100 King Street West Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1	First Canadian Place, 100 King Street West Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1

Entity	**Jurisdiction**	**Organizational Registration Number**	**Location of Tangible Property**	**Address from which invoices are issued**	**Chief Executive Office**	**Registered Office**	**Books and Records**
Ontario Energy Commodities Inc.	Ontario	1512568	None	80 Courtneypark Drive West, Mississauga, ON L5W 0B3	First Canadian Place, 100 King Street West Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1	First Canadian Place, 100 King Street West Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1	First Canadian Place, 100 King Street West Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1
Just Energy (U.S.) Corp.	Delaware	3437441	Texas	80 Courtneypark Drive West, Mississauga, ON L5W 0B3	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056
Just Energy Manitoba L.P.	Manitoba	N/A	Manitoba	80 Courtneypark Drive West, Mississauga, ON L5W 0B3	First Canadian Place, 100 King Street West Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1	First Canadian Place, 100 King Street West Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1	First Canadian Place, 100 King Street West Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1

Entity	**Jurisdiction**	**Organizational Registration Number**	**Location of Tangible Property**	**Address from which invoices are issued**	**Chief Executive Office**	**Registered Office**	**Books and Records**
Just Energy Illinois Corp.	Delaware	3698192	Illinois	80 Courtneypark Drive West, Mississauga, ON L5W 0B3	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056
Just Energy Indiana Corp.	Delaware	3698189	Indiana	80 Courtneypark Drive West, Mississauga, ON L5W 0B3	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056
Just Energy New York Corp.	Delaware	3832304	New York	80 Courtneypark Drive West, Mississauga, ON L5W 0B3	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056
Just Energy Texas I Corp.	Delaware	4101099	Texas	80 Courtneypark Drive West, Mississauga, ON L5W 0B3	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056

Entity	**Jurisdiction**	**Organizational Registration Number**	**Location of Tangible Property**	**Address from which invoices are issued**	**Chief Executive Office**	**Registered Office**	**Books and Records**
Just Energy Texas LP	Texas	0800661333	Texas	80 Courtneypark Drive West, Mississauga, ON L5W 0B3	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056
Just Energy, LLC	Texas	0800074936	None	80 Courtneypark Drive West, Mississauga, ON L5W 0B3	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056
Just Energy Massachusetts Corp.	Delaware	4412363	Massachusetts	80 Courtneypark Drive West, Mississauga, ON L5W 0B3	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056
Just Energy Alberta L.P.	Alberta	N/A	Alberta	80 Courtneypark Drive West, Mississauga, ON L5W 0B3	First Canadian Place, 100 King Street West Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1	First Canadian Place, 100 King Street West Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1	First Canadian Place, 100 King Street West Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1

Entity	**Jurisdiction**	**Organizational Registration Number**	**Location of Tangible Property**	**Address from which invoices are issued**	**Chief Executive Office**	**Registered Office**	**Books and Records**
Just Energy Pennsylvania Corp.	Delaware	4659209	Pennsylvania	80 Courtneypark Drive West, Mississauga, ON L5W 0B3	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056
Just Energy Connecticut Corp.	Delaware	4492197	Connecticut	80 Courtneypark Drive West, Mississauga, ON L5W 0B3	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056
Just Energy Limited	Delaware	4675061	None	80 Courtneypark Drive West, Mississauga, ON L5W 0B3	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056
Just Energy Marketing Corp.	Delaware	3745362	Ontario	80 Courtneypark Drive West, Mississauga, ON L5W 0B3	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056

Entity	**Jurisdiction**	**Organizational Registration Number**	**Location of Tangible Property**	**Address from which invoices are issued**	**Chief Executive Office**	**Registered Office**	**Books and Records**
Universal Energy Corporation	Ontario	1640183	Ontario	80 Courtneypark Drive West, Mississauga, ON L5W 0B3	First Canadian Place, 100 King Street West Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1	First Canadian Place, 100 King Street West Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1	First Canadian Place, 100 King Street West Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1
Just Energy Solutions Inc. (formerly known as Commerce Energy, Inc.)	California	C1909805	California, Maryland, Michigan, New Jersey, Ohio, Pennsylvania New York and Nevada	80 Courtneypark Drive West, Mississauga, ON L5W 0B3	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056

Entity	Jurisdiction	Organizational Registration Number	Location of Tangible Property	Address from which invoices are issued	Chief Executive Office	Registered Office	Books and Records
Just Energy Finance Canada ULC	Nova Scotia	3241239	None	80 Courtneypark Drive West, Mississauga, ON L5W 0B3	First Canadian Place, 100 King Street West Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1	First Canadian Place, 100 King Street West Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1	First Canadian Place, 100 King Street West Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1
Just Energy Michigan Corp.	Delaware	3720535	Michigan	80 Courtneypark Drive West, Mississauga, ON L5W 0B3	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056
Hudson Energy Corp.	Delaware	4113503	None	80 Courtneypark Drive West, Mississauga, ON L5W 0B3	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056
Hudson Parent Holdings LLC	Delaware	4135199	None	80 Courtneypark Drive West, Mississauga, ON L5W 0B3	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056

Entity	Jurisdiction	Organizational Registration Number	Location of Tangible Property	Address from which invoices are issued	Chief Executive Office	Registered Office	Books and Records
Interactive Energy Group LLC (formerly known as HE Holdings, LLC)	Delaware	4667879	New York, Texas	80 Courtneypark Drive West, Mississauga, ON L5W 0B3	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056
Hudson Energy Services LLC	New Jersey	0400015448	New York, Texas	80 Courtneypark Drive West, Mississauga, ON L5W 0B3	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056
Drag Marketing LLC	Delaware	4136040	Florida	80 Courtneypark Drive West, Mississauga, ON L5W 0B3	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056
Hudson Energy Canada Corp.	Canada	756028-1	Ontario	80 Courtneypark Drive West, Mississauga, ON L5W 0B3	First Canadian Place, 100 King Street West Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1	First Canadian Place, 100 King Street West Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1	First Canadian Place, 100 King Street West Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1

Entity	**Jurisdiction**	**Organizational Registration Number**	**Location of Tangible Property**	**Address from which invoices are issued**	**Chief Executive Office**	**Registered Office**	**Books and Records**
Just Energy Advanced Solutions LLC	Delaware	4887030	None	80 Courtneypark Drive West, Mississauga, ON L5W 0B3	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056	5251 Westheimer Road, Ste. 1000 Houston, Texas 770564	5251 Westheimer Road, Ste. 1000 Houston, Texas 770564
Fulcrum Retail Holdings LLC	Texas	0801141765	Texas	80 Courtneypark Drive West, Mississauga, ON L5W 0B3	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056
Fulcrum Retail Energy LLC	Texas	0800173077	Texas	80 Courtneypark Drive West, Mississauga, ON L5W 0B3	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056
Tara Energy, LLC	Texas	0801157492	Texas	80 Courtneypark Drive West, Mississauga, ON L5W 0B3	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056

Entity	Jurisdiction	Organizational Registration Number	Location of Tangible Property	Address from which invoices are issued	Chief Executive Office	Registered Office	Books and Records
Just Green L.P.	Alberta	LP11326733	Alberta	80 Courtneypark Drive West, Mississauga, ON L5W 0B3	First Canadian Place, 100 King Street West Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1	First Canadian Place, 100 King Street West Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1	First Canadian Place, 100 King Street West Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1
Just Energy Prairies L.P.	Manitoba	6457364	Ontario	80 Courtneypark Drive West, Mississauga, ON L5W 0B3	First Canadian Place, 100 King Street West Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1	First Canadian Place, 100 King Street West Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1	First Canadian Place, 100 King Street West Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1

Entity	Jurisdiction	Organizational Registration Number	Location of Tangible Property	Address from which invoices are issued	Chief Executive Office	Registered Office	Books and Records
Just Management Corp.	Canada	798857-5	Ontario	80 Courtneypark Drive West, Mississauga, ON L5W 0B3	First Canadian Place, 100 King Street West Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1	First Canadian Place, 100 King Street West Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1	First Canadian Place, 100 King Street West Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1
Just Solar Holdings Corp.	Delaware	5666263	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056	80 Courtneypark Drive West, Mississauga, ON L5W 0B3	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056	5251 Westheimer Road, Ste. 1000 Houston, Texas 77056
Just Energy Advanced Solutions Corp.	Ontario	2518801	First Canadian Place, 100 King Street West Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1	80 Courtneypark Drive West, Mississauga, ON L5W 0B3	First Canadian Place, 100 King Street West Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1	First Canadian Place, 100 King Street West Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1	First Canadian Place, 100 King Street West Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1

Entity	**Jurisdiction**	**Organizational Registration Number**	**Location of Tangible Property**	**Address from which invoices are issued**	**Chief Executive Office**	**Registered Office**	**Books and Records**
Just Energy Finance Holding Inc.	Ontario	2639395	First Canadian Place, 100 King Street West, Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1	80 Courtneypark Drive West, Mississauga, ON L5W 0B3	First Canadian Place, 100 King Street West, Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1	First Canadian Place, 100 King Street West, Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1	First Canadian Place, 100 King Street West, Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1
Just Energy (Finance) Hungary Zrt.	Hungary	01-10-049893	H-1062 Budapest, Váci út 1-3. "A" tower, 6th floor	80 Courtneypark Drive West, Mississauga, ON L5W 0B3	H-1062 Budapest, Váci út 1-3. "A" tower, 6th floor	H-1062 Budapest, Váci út 1-3. "A" tower, 6th floor	H-1062 Budapest, Váci út 1-3. "A" tower, 6th floor First Canadian Place, 100 King Street West Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1

Entity	Jurisdiction	Organizational Registration Number	Location of Tangible Property	Address from which invoices are issued	Chief Executive Office	Registered Office	Books and Records
11929747 Canada Inc.	Canada	1192974-7	First Canadian Place, 100 King Street West, Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1	80 Courtneypark Drive West, Mississauga, ON L5W 0B3	First Canadian Place, 100 King Street West, Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1	First Canadian Place, 100 King Street West, Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1	First Canadian Place, 100 King Street West, Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1
12175592 Canada Inc.	Canada	1217559-2	First Canadian Place, 100 King Street West, Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1	80 Courtneypark Drive West, Mississauga, ON L5W 0B3	First Canadian Place, 100 King Street West, Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1	First Canadian Place, 100 King Street West, Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1	First Canadian Place, 100 King Street West, Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1

Entity	Jurisdiction	Organizational Registration Number	Location of Tangible Property	Address from which invoices are issued	Chief Executive Office	Registered Office	Books and Records
JE Services Holdco I Inc.	Canada	994141-0	First Canadian Place, 100 King Street West, Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1	80 Courtneypark Drive West, Mississauga, ON L5W 0B3	First Canadian Place, 100 King Street West, Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1	First Canadian Place, 100 King Street West, Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1	First Canadian Place, 100 King Street West, Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1
JE Services Holdco II Inc.	Canada	994143-6	First Canadian Place, 100 King Street West, Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1	80 Courtneypark Drive West, Mississauga, ON L5W 0B3	First Canadian Place, 100 King Street West, Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1	First Canadian Place, 100 King Street West, Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1	First Canadian Place, 100 King Street West, Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1

Entity	Jurisdiction	Organizational Registration Number	Location of Tangible Property	Address from which invoices are issued	Chief Executive Office	Registered Office	Books and Records
JEBPO Services LLP	India	AAI-4133	Ground Floor, Block 2B (Hibiscus) Tower 3 Embassy Tech Village (SEZ), Outer Ring Road Bengaluru Bangalore KA 560103 IN	80 Courtneypark Drive West, Mississauga, ON L5W 0B3	Ground Floor, Block 2B (Hibiscus) Tower 3 Embassy Tech Village (SEZ), Outer Ring Road Bengaluru Bangalore KA 560103 IN	Ground Floor, Block 2B (Hibiscus) Tower 3 Embassy Tech Village (SEZ), Outer Ring Road Bengaluru Bangalore KA 560103 IN	First Canadian Place, 100 King Street West, Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1
8704104 Canada Inc.	Canada	8704104	First Canadian Place, 100 King Street West, Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1	80 Courtneypark Drive West, Mississauga, ON L5W 0B3	First Canadian Place, 100 King Street West, Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1	First Canadian Place, 100 King Street West, Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1	First Canadian Place, 100 King Street West, Suite 2630, P.O. Box 355 Toronto, Ontario Canada M5X 1E1

SCHEDULE A(18)

INTELLECTUAL PROPERTY

Trademarks

TRADEMARK	ENTITY	COUNTRY	APPLICATION / REGISTRATION NUMBER
ONTARIO ENERGY SAVINGS CORP. & FLAG Design	Just Energy Group Inc.	Canada	TMA619698
THE ENERGY SAVINGS GROUP & Design	Just Energy Group Inc.	Canada	TMA688634
JUST ENERGY & DESIGN	Just Energy Group Inc.	Canada	TMA768038
JUST ENERGY	Just Energy Group Inc.	Canada	TMA775273
JUST ENERGY	Just Energy Group Inc.	Canada	TMA774244
JUST ENERGY GROUP	Just Energy Group Inc.	Canada	TMA821985
JUSTGREEN	Just Energy Group Inc.	Canada	TMA800468
JUSTCLEAN	Just Energy Group Inc.	Canada	TMA800467
JUSTREWARDS	Just Energy Group Inc.	Canada	TMA840225
COMMERCE ENERGY	Just Energy Group Inc.	Canada	TMA834723
GIVING YOU THE POWER TO SAVE	Universal Energy Corporation	Canada	TMA731578
UNIVERSAL ENERGY	Universal Energy Corporation	Canada	TMA673419
PRICE PROTECTION PLUS	Universal Energy Corporation	Canada	TMA709610
FIGHT BACK AGAINST HIGH ENERGY PRICES	Universal Energy Corporation	Canada	TMA709609
UNIVERSAL POWER	Universal Energy Corporation	Canada	TMA725654
HUDSON ENERGY	Hudson Energy Canada Corp.	Canada	TMA826363
PREDICT-A-BILL	Just Energy Group Inc.	Canada	TMA840682

TRADEMARK	ENTITY	COUNTRY	APPLICATION / REGISTRATION NUMBER
TARA ENERGY	Just Energy Group Inc.	Canada	TMA887538
ENERGY MADE EASY	Just Energy Group Inc.	Canada	TMA905281
CLIMATE SAVER	Just Energy Group Inc.	Canada	TMA840226
TERRAPASS DESIGN	Just Energy Advanced Solution LLC	Canada	TMA1041029
TERRAPASS	Just Energy Advanced Solution LLC	Canada	TMA755982
JUST ENERGY	Just Energy Group Inc.	USA	3848587
JUST ENERGY	Just Energy Group Inc.	USA	3666093
JUST ENERGY GROUP	Just Energy Group Inc.	USA	4187070
FLOWER DESIGN	Just Energy Group Inc.	USA	3861733
TARA ENERGY	Just Energy Group Inc.	USA	88787615
JUSTGREEN	Just Energy Group Inc.	USA	3905420
TERRAPASS DESIGN	Just Energy Advanced Solution LLC	USA	5323333
TERRAPASS	Just Energy Advanced Solution LLC	USA	5323332
HUDSON ENERGY	Hudson Energy Services LLC	USA	3950313
TARA ENERGY	Tara Energy, LLC	USA	3001649
SMART PREPAID ELECTRIC	Tara Energy, LLC	USA	4022479

Patents

PATENT	ENTITY	COUNTRY	APPLICATION NUMBER
Automatically refreshing tailored pricing for retail energy market	Hudson Energy Services LLC	USA	11/856005

PATENT	ENTITY	COUNTRY	APPLICATION NUMBER
Determining tailored pricing for retail energy market	Hudson Energy Services LLC	USA	11/856001
Tailored pricing for retail energy market	Hudson Energy Services LLC	PCT	PCT/US2008/074923
Water filtration apparatus with improved filter cartridge housing and distributor	Filter Group Inc.	Canada	2999315
Water filtration apparatus with top-loading filter cartridge housing	Filter Group Inc.	USA	15/911001

SCHEDULE A(21)

ENVIRONMENTAL REPORTS

Nil.

Schedule B

Supplemental Covenants

(See attached)

SCHEDULE B

Covenants

During the Accommodation Period and except as otherwise permitted by the prior written consent of the Lenders, each Borrower will and will cause each other Obligor to do the following:

(1) Timely Payment Make due and timely payment of the Obligations required to be paid by it under this Agreement.

(2) Conduct of Business, Maintenance of Existence, Compliance with Laws Subject to any necessary Order or authorization of the Court, (a) engage in business of the same general type as now conducted by it; (b) carry on and conduct its business and operations in a proper, efficient and businesslike manner, in accordance with good business practice; (c) except as otherwise permitted by the CCAA Proceedings, preserve, renew and keep in full force and effect its existence; (d) take all action necessary to maintain all material registrations, material licenses, material rights, material privileges and franchises necessary or desirable in the normal conduct of its business; and (e) comply in all material respects with all Requirements of Law, including without limitation, Requirements of Environmental Law.

(3) Insurance Maintain or cause to be maintained with reputable insurers, coverage against risk of loss or damage to its Property (including public liability and damage to property of third parties), business interruption insurance, fire and extended peril insurance and boiler and machinery insurance of such types as is customary for and would be maintained by a corporation with an established reputation engaged in the same or similar business in similar locations and provide to the Agent, on an annual basis, if requested, evidence of such coverage.

(4) Notice of Termination Event Promptly notify the Agent of any Termination Event hereunder that would apply to it or to any Obligor of which it becomes aware.

(5) Notice of Material Adverse Effect Promptly notify the Agent of any condition (financial or otherwise), event or change in its or any other Obligor's business, liabilities, operations, results of operations, assets or prospects which would reasonably be expected to have a Material Adverse Effect.

(6) Other Notices Promptly, upon having knowledge, give notice to the Agent of:

(a) any violation of any Applicable Law, which does or could reasonably be expected to have a Material Adverse Effect;

(b) any termination or expiration of or default under a Material Contract or Material Licence;

(c) any damage to or destruction of any property, real or personal, of any Obligor having a replacement cost in excess of $2,500,000;

(d) the receipt of insurance proceeds by any Obligor in excess of $2,500,000;

(e) any change in the regulatory framework relating to the energy market which is materially adverse to the Business or could reasonably be expected to be materially adverse to the Business with the passage of time;

(f) any Lien registered against any property or assets of any Obligor, other than a Permitted Lien (as defined in the DIP Term Sheet);

(g) any entering into of a Material Contract or Material Licence, together with a true copy thereof;

(h) any assignment of a Material Contract by the counterparty thereto; or

(i) the delivery by ERCOT (as defined in the Intercreditor Agreement) of any settlement proposals in connection with the "black swan" weather events that occurred in the State of Texas in February 2021, together with a true copy thereof.

(7) Computer Software Own or license for use or otherwise maintain the right to use all of the material software necessary to conduct its businesses and in all material respects, properly maintain and keep in good working order for the purposes of on-going operation, all Computer Equipment owned or used by an Obligor and necessary for the conduct of business, subject to ordinary wear and tear for Computer Equipment of comparable age and lost or damaged Computer Equipment replaced or repaired to the extent required to conduct its Business.

(8) Intellectual Property Maintain rights sufficient for it to use all the Intellectual Property reasonably necessary for the conduct of its business and not knowingly infringe or misappropriate in any material way the intellectual property rights of any other Person.

(9) Environmental Compliance Operate its business in compliance in all material respects with all applicable material Requirements of Environmental Laws and operate all Property owned, leased or otherwise occupied by it with a view to ensuring that no material obligation, including a clean-up or remedial obligation, will arise in respect of an Obligor under any Requirements of Environmental Law; provided however, that if any such obligation arises, the applicable Obligor will promptly satisfy or contest such obligation at its own cost and expense. It will promptly notify the Lender, to the extent not disclosed as of the date hereof, upon (i) learning of the existence of Hazardous Substance located on, above or below the surface of any land which it owns, leases, operates, occupies or controls (except those being stored, used or otherwise handled in substantial compliance with applicable Requirements of Environmental Law), or contained in the soil or water constituting such land and (ii) the occurrence of any lawfully reportable release, spill, leak, emission, discharge, leaching, dumping or disposal of Hazardous Substances that has occurred on or from such land which, in either case, is likely to result in liability under Requirements of Environmental Law.

(10) Maintenance of Property Subject to any necessary CCAA Order or authorization of the Canadian Court, keep all Property necessary in its business in good working order and condition, normal wear and tear excepted, save for lost or damaged Property replaced or repaired to the extent required to conduct its Business.

(11) ERISA Matters

(a) Maintain each ERISA Plan in compliance in all material respects with all applicable Requirements of Law;

(b) refrain from adopting, participating in or becoming obligated with respect to any US Pension Plan or multiemployer plan as defined in Section 4001(a)(3) of ERISA without the prior written consent of the Agent (at the direction of the Majority Lenders); and

(c) promptly notify the Agent on becoming aware of (i) the institution of any steps by any Person to terminate any US Pension Plan, (ii) the failure of any Obligor to make a required contribution to any US Pension Plan if such failure is sufficient to give rise to an Lien under Section 303(k) of ERISA, (iii) the taking of any action with respect to a US Pension Plan which is reasonably likely to result in the requirement that any Obligor furnish a bond or other security to the US Pension Benefit Guaranty Corporation under ERISA or such Pension Plan, or (iv) the occurrence of any event with respect to any ERISA Plan which is reasonably likely to result in any Obligor incurring any liability, fine or penalty in excess of $5,000,000, and following notice to the Agent thereof, provide copies of all documentation relating thereto if requested by the Agent or any Lender.

(12) Canadian Pension Plans

(a) maintain each Canadian Pension Plan in compliance in all material respects with all applicable Requirements of Law;

(b) refrain from adopting, participating in or becoming obligated with respect to any Specified Canadian Pension Plan; and

(c) promptly notify the Agent on becoming aware of (i) the institution of any steps by any Person to terminate any Canadian Pension Plan, (ii) the failure of any Obligor to make a required contribution to any Canadian Pension Plan if such failure is sufficient to give rise to a deemed trust or lien under applicable pension benefits standards laws, or (iii) the occurrence of any event with respect to any Canadian Pension Plan or Canadian Welfare Plan which is reasonably likely to result in any Obligor incurring any liability, fine or penalty in excess of $5,000,000, and following notice to the Agent thereof, provide copies of all documentation relating thereto if requested by the Agent or any Lender.

(13) Employee Benefit and Welfare Plans Maintain all employee benefit and Canadian Welfare Plans relating to the Business in compliance in all material respects with all Applicable Laws and ensure that all premiums and payments relating to employee benefits and pensions are paid as due.

(14) Additional Information Promptly provide the Agent, upon receipt thereof, with copies of all "management letters" or other material letters submitted by independent public accountants in connection with audited financial statements described in Section 18 of this Schedule B raising issues associated with the audit of the Obligors.

(15) ERCOT Related Settlements; Priority Commodity/ISO Charge On Thursday of each week, for the immediately preceding Friday, provide an estimate of (i) ERCOT related settlements in connection with the "black swan" weather events that occurred in the State of Texas in February 2021 and (ii) the amount of the Priority Commodity/ISO Charge.

(16) LDC Agreements Promptly provide to the Agent copies of any notices received from LDCs in connection with any collections, services, agreements or any Transportation Agreements, requests to increase the billing service amount under any Collection Services Agreements, offsets or material matters under any LDC Agreement, in each case which would reasonably be expected to have a Material Adverse Effect.

(17) Reporting Requirements Except as otherwise permitted by the prior written consent of the Agent (at the discretion of the Majority Lenders), the Obligors will:

(a) Annual Reports As soon as available and in any event within 120 days after the end of each Fiscal Year, cause to be prepared and delivered to the Agent the audited consolidated financial statements of JustEnergy, including, without limitation, a balance sheet, statement of equity, income statement and cash flow statement, certified by the chief financial officer of JustEnergy.

(b) Quarterly Reports

(i) As soon as available and in any event within 60 days of the end of each of its first three Fiscal Quarters of each Fiscal Year, cause to be prepared and delivered to the Agent as at the end of such Fiscal Quarter the unaudited interim consolidated financial statements of JustEnergy, including, in each case and without limitation, an income statement, balance sheet and cash flow statement certified by the chief financial officer of JustEnergy.

(ii) As soon as available and in any event within 60 days of the end of each Fiscal Quarter (including the fourth Fiscal Quarter), cause to be prepared and delivered to the Agent as at the end of such Fiscal Quarter the unaudited financial statements of the Borrowers prepared on a Modified Consolidated Basis, including, in each case and without limitation, an

income statement, balance sheet and cash flow statement, certified by the chief financial officer of JustEnergy.

(c) Compliance Certificate Concurrently with the delivery of the financial statements referred to in Sections 18(a) and (b) above, provide the Agent with a copy of the Compliance Certificate (as defined in the DIP Term Sheet) provided to the DIP Agent (as defined in the DIP Term Sheet).

(d) Business Plan Within 90 days of the Filing Date, deliver to the Agent a copy of the business plan delivered to the DIP Lenders in connection with the DIP Facility.

(e) Supply/Demand Projection Within 30 days of the end of each Fiscal Quarter, cause to be prepared and delivered to the Agent a supply vs. demand summary in respect of the Obligors' projected next 12 months and the next 36 months anticipated Available Supply and Supply Commitments for natural gas, electricity and JustGreen Products, separately.

(f) Hedging Exposure As soon as practicable and in any event within 30 days after the end of each Fiscal Quarter, provide to the Agent a report containing a summary of all outstanding hedging positions for all Hedges with Lender Hedge Providers (whether positive or negative) measured on a marked-to-market basis aggregated by product type (Commodity Hedge, Interest Rate Hedge, Currency Hedge or Equity Hedge) and in event that the Threshold Amount is exceeded, such reports will be provided by the Canadian Borrower to the Agent on a weekly basis.

(g) Marked to Market Calculation As soon as available, and in any event within 10 Business Days after the end of each month, deliver to the Agent the Canadian Borrower's good faith calculation of the marked-to-market exposure under its Supplier Contracts.

(h) Portfolio Report As soon as available and in any event within 30 days of the end of each Fiscal Quarter, cause to be prepared and delivered to the Agent a portfolio report (substantially in the form of the report attached to the Credit Agreement as Schedule 9.03(9)), which report shall include the Canadian Borrower's good faith calculation of the marked-to-market exposure for each of the following categories: Canadian gas, US gas, Canadian power and US power.

(i) Priority Supplier Payables As soon as available, and in any event within 10 Business Days after the end of each month, furnish to the Agent a Priority Supplier Payables Certificate setting out the Priority Supplier Payables as at the last day of the month just ended.

(j) Risk Management Policy Promptly notify the Agent of any material changes or modifications to the risk management and hedging policy of the Obligors from that in effect on the date hereof and promptly provide a copy of such change or modification.

(k) Gross Margin Calculation As soon as available, and in any event within 60 days after the end of each Fiscal Quarter, furnish to the Agent a certificate setting out the calculation of the Gross Margin as at the last day of the Fiscal Quarter just ended.

(l) DIP Facility Reporting Concurrently deliver to the Agent (for distribution to the Lenders) when delivered to the DIP Agent (or any DIP Lender) copies of all Cash Flow Statements and other reporting documents, reports and notices contractually required to be delivered to the DIP Agent pursuant to the DIP Facility (including any variance reports); *provided*, however, for the avoidance of doubt, that the Lenders will not have any right to approve or deny any of the Cash Flow Statements. The foregoing undertaking to deliver to the Agent reporting documents required to be delivered to the DIP Agent under the DIP Facility shall survive the termination of the DIP Facility so long as the Accommodation Period has not been terminated.

(m) Lender Calls Provide (through the Obligors' counsel and/or other advisors) the Agent and the Lenders with regular status updates on the CCAA Proceedings, the Chapter 15 Proceedings and potential restructuring transactions in the form of a conference call among JustEnergy, the Agent, the Lenders, Lenders' Counsel and the Consultant, on Wednesday of every other week (or such other day as reasonably agreed to by the Agent and Obligors), commencing on March 24, 2021; *provided*, that upon the reasonable written request of the Agent (which request shall be made at least twenty-four (24) hours before any such update call), representatives from the management team of the Obligors will join any such update call.

TAB D

This is Exhibit “D”

referred to in the Affidavit of **JAMES C. TECCE**

Sworn before me this 14th day of April, 2022

A Commissioner for taking affidavits

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re: JUST ENERGY GROUP INC., et al., Debtors in a Foreign Proceeding.[1]	Chapter 15 Case No. 21-30823 (MI)
JUST ENERGY TEXAS LP, FULCRUM RETAIL ENERGY LLC, HUDSON ENERGY SERVICES LLC, and JUST ENERGY GROUP, INC., Plaintiffs, v. ELECTRIC RELIABILITY COUNCIL OF TEXAS, INC. and the PUBLIC UTILITY COMMISSION OF TEXAS, INC., Defendants.	Adv. Pro. _____

COMPLAINT

Plaintiffs are Just Energy Texas LP, Fulcrum Retail Energy, LLC, Hudson Energy Services LLC ("**Hudson**"), and the foreign representative in the above-captioned chapter 15 cases (the "**Chapter 15 Cases**"), Just Energy Group, Inc. (collectively, "**Plaintiffs**" or "**Just Energy**," and, with their affiliated debtors in the Chapter 15 Cases, the "**Company**" or the "**Debtors**"). The Debtors are the subject of proceedings (the "**Canadian Proceedings**") under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as amended, the "**CCAA**") in the Ontario Superior Court of Justice, Commercial List (the "**Canadian Court**"). Plaintiffs bring this action by and through the foreign representative against Defendants Electric Reliability Council of Texas, Inc. ("**ERCOT**") and the Public Utility Commission of Texas (the "**PUCT**," and together with ERCOT, "**Defendants**"), and allege as follows:

[1] The identifying four digits of Just Energy Group Inc.'s local Canada tax identification number are 0469. A complete list of debtor entities in these chapter 15 cases may be obtained at www.omniagentsolutions.com/justenergy.

PRELIMINARY STATEMENT

1. In February 2021, Texas experienced a historically severe winter storm ("**Winter Storm Uri**") that incapacitated most of its power-generating facilities. As demand for electricity outpaced supply, ERCOT—the private entity that manages Texas's grid and wholesale electricity market—ordered deep cuts in electricity consumption in the form of forced outages. In industry parlance, ERCOT ordered "load" to be "shed" to reduce strain on the power grid. At the same time, ERCOT and its state regulator the PUCT also stunningly intervened in the market for wholesale electricity by setting prices ***orders of magnitude*** higher than what market forces ordinarily would produce.

2. On February 15 and February 16, with little discussion and without prior notice or any opportunity for public comment, the PUCT issued its key Orders Directing ERCOT To Take Action And Granting Exception To Commission Rules (the "**PUCT Orders**") directing ERCOT to "ensure that firm load that is being shed in [Energy Emergency Alert ("**EEA**") Level 3] is being accounted for in ERCOT's scarcity pricing signals." The PUCT did not tie the PUCT Orders to a fact-based analysis of the current market conditions or otherwise explain the reasoning behind its determination that energy prices should be set at the high-system-wide offer cap (the "**HCAP**"). Instead, it merely stated the economic truism that "[e]nergy prices should reflect scarcity of the supply" and opined without evidence that "[i]f customer load is being shed, scarcity is at its maximum, and the market price for the energy needed to serve that load should also be at its highest." In reality, scarcity was at its maximum because the storm had forced power generators offline—not because they were waiting for a higher market price.

3. Nonetheless, following the PUCT's directive, ERCOT manually adjusted one of the input values to the Real-Time On-Line Reliability Deployment Price Adder—part of ERCOT's scarcity pricing mechanism—to impose a Real Time Settlement Point Price on February 15 at the HCAP of $9,000 per megawatt hour ("**MWh**") for more than eighty consecutive hours. ERCOT also improperly calculated charges associated with various grid functions that support the

continuous flow of electricity, including for reserves. The cost of these "ancillary services" as they are known in the power industry reached the unprecedented price of $25,000/MWh during the storm.

4. The actions of the PUCT and ERCOT not only failed to solve the electricity shortage, but they also violated Texas law. Neither the PUCT nor ERCOT possesses the substantive authority to set prices in the wholesale electricity market in this manner; the PUCT did not follow the statutorily-prescribed rule-making procedures; and the PUCT's actions were not supported by evidence as required by law. The PUCT violated the Texas Administrative Procedure Act (the "**APA**") by setting prices without proper notice or making an evidentiary showing that the market's scarcity pricing signals were not working and that the inflated prices would accomplish their apparent intended purpose of stimulating power generation. The PUCT also violated the Public Utility Regulatory Act (the "**PURA**"), which mandates that pricing must be the function of competitive forces—not regulatory fiat.

5. Similarly, ERCOT's actions found no support under, and were inconsistent with its Standard Form Market Participant Agreement with each Plaintiff (collectively, the "**SFA**"), which incorporates by reference, and requires compliance with ERCOT's nodal protocols (the "**ERCOT Protocols**"). At the time of the storm, the ERCOT Protocols did not include firm load shed among the considerations relevant to determining whether scarcity pricing would be appropriate. Yet, the PUCT and ERCOT impermissibly set the HCAP at $9,000/MWh based on firm load shed; charged prices for ancillary services that exceeded the HCAP of $9,000/MWh; and failed to allow prices to fall below $9,000/MWh when firm load shed ended.

6. The economic consequences of the PUCT's and ERCOT's decisions were staggering. Over only seven days in February, due to the prices that ERCOT set, the state's wholesale market consummated $55 billion in transactions—a level of volume it ordinarily would

take the market four years to realize. The $9,000/MWh price was over four hundred times the average MWh price for 2020 of $22.00/MWh.[2]

7. What is more, ERCOT left that price in place for 32 hours after it had rescinded all load shed instructions early in the morning of February 18—even though during that period, the asserted justification for the price intervention no longer applied. After ordinary market forces were permitted to take over at 9:00 a.m. on February 19, the price per MWh dropped precipitously.

8. The PUCT's and ERCOT's decision making during the storm has been met with widespread criticism as economically unsound and legally invalid. On March 5, Potomac Economics, the PUCT's Independent Market Monitor ("**IMM**"), concluded that ERCOT's pricing intervention should have ended immediately at 12:00 a.m. on February 18 after load shed stopped and recommended that ERCOT correct real-time prices from that date and time until 9:00 a.m. on February 19. According to the IMM, the "mistake" of keeping the inflated prices in place resulted in billions of additional, improper costs to the ERCOT market. Then, on March 8, the Lieutenant Governor of Texas called on the PUCT and ERCOT to follow the IMM's recommendation, stating that correcting the "mistake will require an adjustment, but it is the right thing to do. It will ultimately benefit consumers and is one important step we can take now to begin to fix what went wrong with the storm." With respect to ancillary charges, Arthur D'Andrea, former Chair of the PUCT, remarked: "I haven't talked to anyone yet who thought [ancillary costs] could get above $9,000. That was surprising—I think, shocking—to a lot of us." The IMM also has indicated ERCOT did not properly calculate ancillary charges. The imprudence of the regulators' decisions is confirmed by the wave of lawsuits that have been filed and by laws passed by the Texas legislature designed to remedy the consequences of those decisions and to reform the way the PUCT and ERCOT function going forward.

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[2] U.S. Energy Information Administration, May 7, 2021 ("Average Texas electricity prices were higher in February 2021 due to severe weather storm") available at https://www.eia.gov/todayinenergy/detail.php?id=47876.

9. The regulatory missteps of the PUCT and ERCOT also severely harmed the Texas energy market's participants—few more so than Just Energy. Just six months earlier, Just Energy had completed a successful balance-sheet restructuring. In February and March 2021, ERCOT floored Just Energy with invoices that its recently de-levered balance sheet could not withstand. ERCOT's invoices demanded approximately $335 million for the week of February 13 through February 20. An implied threat accompanied ERCOT's invoices: if Just Energy failed to satisfy them, ERCOT and the PUCT would shutter Just Energy's business in Texas by exercising regulatory, contractual, and statutory remedies to transfer Just Energy's customers in Texas to a Provider Of Last Resort ("**POLR**") for no consideration.

10. In order to protect against a forced eviction from Texas's retail electricity market, the loss of meaningful assets to a competitor, and the devastating impact on its creditors, employees, sureties, public shareholders, and customers, Just Energy had no choice but to pay the invoices under protest. Those payments followed exhaustive efforts to mitigate the consequences of Defendants' actions, including submitting filings to ERCOT and the PUCT both individually and through the Texas Energy Association of Marketers; lobbying the Texas state legislature; commencing restructuring proceedings for the second time in six months, i.e., the Canadian Proceedings and Chapter 15 Cases; obtaining approval from both the Canadian Court and this Court to enter into a $125 million financing facility; and using the facility proceeds to pay ERCOT.[3]

11. Just Energy paid ERCOT with a full reservation of rights as recognized by this Court.[4] Regardless of whether ERCOT was paid the $335 million it invoiced for the week of

[3] With respect to Plaintiff Hudson, ERCOT invoiced its qualified service entity (or "**QSE**") BP Energy Company ("**BP**"). BP satisfied those invoices and seeks reimbursement from Hudson pursuant to the parties Independent Electricity System Operating Scheduling Agreement.

[4] See Order Granting Provisional Relief Pursuant To Section 1519 Of Bankruptcy Code [ECF No. 23] dated March 9, 2021 at p. 11 ("Additionally, the Court finds that any payments made to ERCOT are made subject to all of the Debtors' rights to contest those payments, and all rights to receive a refund or credit as allowed by applicable law.").

February 13 through February 20, ERCOT's "claim" has not been finalized, and certain of those transfers remain subject to challenge. Specifically, Plaintiffs challenge no less than $274 million (hereinafter, the "**Transfers**") out of the $335 million that ERCOT invoiced.

12. Just Energy is entitled to relief under the Bankruptcy Code because the Transfers are subject to (a) avoidance as unauthorized post-petition transfers (11 U.S.C. § 549); (b) turnover (11 U.S.C. § 542); (c) setoff (11 U.S.C. §§ 553 and/or 558); (d) disallowance (11 U.S.C. §§ 502(b), 502(d)); and (e) avoidance under Canadian law or any other applicable law. The Transfers should be recovered and distributed to Just Energy's creditors. The Bankruptcy Code provides remedies because this Court did not approve the Transfers, and they are subject to avoidance on that basis alone. Nor could this Court ever have approved the Transfers when the invoices are based on the PUCT Orders, which themselves are unlawful under the APA and the PURA, and otherwise are inconsistent with the ERCOT Protocols and the SFA. ***Alternatively***, even if the PUCT Orders are valid, Just Energy still has valid claims under the Bankruptcy Code because ERCOT could not have applied the $9,000/MWh price after 1:05 a.m. on February 18.

JURISDICTION AND VENUE

13. This proceeding involves the Debtors' assets located in the United States. Section 1521(a)(4) of the Bankruptcy Code provides that the Court may entrust the foreign representative with the "administration and realization of all or part of the debtors' assets within the territorial jurisdiction of the United States." Section 1507(a) of the Bankruptcy Code says in part that "the court, if recognition is granted, may provide additional assistance to a foreign representative under this title or other laws of the United States." Section 1521(a)(7) of the Bankruptcy Code provides that the foreign representative may be granted "any additional relief that may be available to a trustee, except for relief available under sections 522, 544, 545, 547, 548, 550, and 724(a)." 11 U.S.C. § 1521(a)(7). The proceeding also involves causes of action to recover property that was transferred after the commencement of the case. Pursuant to section 1520(a)(2) of the Bankruptcy

Code, "[u]pon recognition of a foreign proceeding that is a foreign main proceeding … section [549 applies] to a transfer of an interest of the debtor in property that is within the territorial jurisdiction of the United States ….".

14. The prosecution of this lawsuit also comports squarely with the objectives of chapter 15 as outlined in the Bankruptcy Code, including the "fair and efficient administration of cross-border insolvencies that protects the interests of all creditors, and other interested entities, including the debtor" and the "protection and maximization of the value of the debtor's assets." 11 U.S.C. §§ 1501(a)(3), (a)(4).

15. While Just Energy paid ERCOT, it did so under protest. Regardless of whether ERCOT filed a formal proof of claim, in sum and substance, Just Energy's payment under protest of amounts ERCOT invoiced and demanded leaves ERCOT with a contingent "claim" against Just Energy that has not been finalized and only will be liquidated after the Court determines the proper amounts in this proceeding.

16. Plaintiffs bring claims against the PUCT and ERCOT under sections 502(b), 502(d), 542(a), 549, 553 and/or 558 of the Bankruptcy Code as well as claims for avoidance under Canadian and any other applicable law. These causes of action are "core" pursuant to 28 U.S.C. § 157(b) and include, among other things, the "recognition of foreign proceedings and other matters under chapter 15 of title 11," 28 U.S.C. § 157(b)(2)(P) and "requests for other relief covered under the provisions of chapter 15."[5] They also are "core" because they involve "matters concerning the administration of the estate," 28 U.S.C. § 157(b)(2)(A); the "allowance or disallowance of claims," 28 U.S.C. § 157(b)(2)(B); "proceedings to determine, avoid, or recover fraudulent conveyances," 28 U.S.C. § 157(b)(2)(H); "orders to turn over property of the estate," 28 U.S.C. § 157(b)(2)(E); and "other proceedings affecting the liquidation of the assets of the

[5] In re British Am. Ins. Co. Ltd., 488 B.R. 205, 223 n.31 (Bankr. S.D. Fla. 2013).

estate or the adjustment of the debtor-creditor or equity security holder relationship," 28 U.S.C. § 157(b)(2)(O).

17. At minimum, this Court has "related to" jurisdiction over this entire proceeding. Considering that proceeds realized from this action may fund distributions to creditors in the Canadian Proceedings, its outcome will have far more than just a conceivable effect on the foreign estate.

18. Pursuant to Federal Bankruptcy Rule 7008, Plaintiffs consent to the entry of final orders or judgment by the Court.

19. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

PARTIES

20. Plaintiff Just Energy Texas LP is a Texas limited partnership with its headquarters in Harris County, Texas. Plaintiff Fulcrum Retail Energy LLC is a Texas company with its headquarters in Harris County, Texas. Plaintiff Hudson is a New Jersey company with its headquarters in Harris County, Texas. Plaintiff Just Energy Group, Inc. is a Canadian company with its headquarters in Toronto, Canada that has been appointed the Debtors' "foreign representative" as that term is defined under 101(24) of the Bankruptcy Code by both the Canadian Court and this Court.

21. Plaintiffs (along with the other Debtors) commenced the Chapter 15 Cases and the CCAA Proceedings in the Canadian Court on March 9, 2021. That same day, the Canadian Court appointed FTI Consulting Canada Inc. as Monitor. Under the CCAA, rights can be exercised for the benefit of creditors of the Debtors.

22. Defendant ERCOT is a membership-based § 501(c)(4) nonprofit corporation governed by its Board of Directors and subject to the oversight of the PUCT and the Texas Legislature. It is the independent system operator for all the transmission and generation facilities

in the ERCOT market, which is located entirely within Texas. It may be served with process at its principal place of business, 7620 Metro Center Drive, Austin, Texas 78744.

23. Defendant the PUCT is an agency of the State of Texas. The PUCT is a "State Commission" within the meaning provided in 47 U.S.C. §§ 153(41), 251 and 252. The PUCT may be served with citation by serving the PUCT General Counsel, at 1701 N. Congress Avenue, Austin, Texas 78711-3326.

FACTUAL ALLEGATIONS

I. BACKGROUND

A. THE COMPANY

24. The Company is a natural gas and electricity retailer currently operating in the United States and Canada. Its principal line of business consists of purchasing electricity and natural gas commodities from certain large energy suppliers and re-selling them to residential and commercial customers. The Company services more than 936,000 customers and provides employment to approximately 1,100 employees. Texas is the Company's single largest market, representing 47% of its revenues in fiscal year 2020.

25. Retailers like Just Energy fulfill a vital role in the ERCOT ecosystem. Retail electricity providers purchase wholesale power from power-generating companies, trading companies, and wholesalers and re-sell that power to customers. Retailers generally purchase most of their power in large, wholesale blocks—well in advance. They then compete with other retailers to sell that power to consumers at a low cost, typically under fixed-price contracts. Customers in locations within Texas where there is robust price competition benefit from the role played by retailers like the Company in the market.[6]

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[6] See Peter R. Hartley, Kenneth B. Medlock III & Olivera Jankovska, Electricity Reform And Retail Pricing In Texas, Center for Energy Studies (June 2017), https://www.bakerinstitute.org/media/files/files/55857030/ces-pub-txelectricity-060717_O6fiwZA.pdf.

26. In September 2020, Just Energy completed a balance sheet recapitalization (the "**Recapitalization**") in Canada. The Recapitalization was the culmination of a 15-month-long strategic review process and comprehensive plan to strengthen Just Energy's business. The Recapitalization improved the Company's overall capital structure by: (a) reducing its debt and obligations under preferred shares by approximately CAD $780 million; (b) raising over CAD $100 million of new equity; (c) reducing annual cash interest costs by approximately CAD $45 million; and (d) extending debt maturity dates.

27. The Recapitalization was executed through a plan of arrangement under section 192 of the Canada Business Corporations Act, which was approved by the Canadian Court on September 3, 2020. The Recapitalization also was recognized by this Court by the Honorable David R. Jones in the chapter 15 case styled In re Just Energy Group Inc., Case No. 20-34442 (DRJ) (Bankr. S.D. Tex.) on September 10, 2020. Upon the consummation of the Recapitalization, the Company had CAD $138 million of total available liquidity.

B. THE PUCT, ERCOT, AND THE TEXAS ELECTRICITY MARKET

28. The Texas Interconnection is one of the three main electricity grids in the United States that, for the most part, operates independently and with limited export and import capabilities. The PUCT and ERCOT are solely responsible for managing the Texas Interconnection and wholesale electricity transactions that occur within the grid.

29. ERCOT functions both as the technical operator for the Texas grid and a decision-making organization that creates rules for the wholesale electricity market. ERCOT is responsible for scheduling power for more than 26 million people on a grid that connects over 46,500 miles of transmission lines and more than 680 generation units, accounting for 84,500 megawatts of installed generation capacity.

30. Prices within the grid ordinarily are set by market forces. ERCOT manages the flow of electricity by continually ordering generators to ramp-up or ramp-down production to

constantly match the amount of power demanded by consumers and maintain overall grid stability and reliability. ERCOT also performs financial settlements for the competitive wholesale electricity market and enforces certain credit requirements.

31. ERCOT is subject to regulation by the PUCT, a state agency that regulates the state's electric, water, and telecommunication utilities, implements respective legislation, and offers customer assistance in resolving consumer complaints.

32. Each of the Plaintiffs (excluding the foreign representative) has a "Retail Electric Provider" certificate in Texas, is registered as a "Market Participant" in the ERCOT Market, and is party to a SFA with ERCOT. To participate in the ERCOT market, each Plaintiff must be a party to an SFA and comply with the ERCOT's Protocols.

33. If Plaintiffs are unable to pay ERCOT's invoices when due, ERCOT can suspend their market participation in as little as two days and transfer their customers to another energy provider, i.e., a POLR. Failure to pay timely an ERCOT invoice also would give the PUCT grounds to initiate a proceeding to amend, suspend, or revoke Plaintiffs' Retail Electric Provider certificates.

C. WINTER STORM URI

34. In February 2021, Winter Storm Uri brought extremely cold weather conditions to Texas. Customer demand for electricity surged on February 13 and 14, pushing Texas's power grid to a new winter peak demand record, topping 69,000 megawatts. This was more than 3,200 megawatts higher than the previous winter peak set in January 2018.

35. While demand soared, supply plummeted as power plants were forced offline by the storm's impact. As a result, demand threatened to exceed supply. In the early hours of February 15, ERCOT declared an EEA Level 1, urging consumers to conserve power. Within an hour, ERCOT elevated to an EEA Level 2, and only 13 minutes later, at 1:25 a.m., ERCOT

elevated to an EEA Level 3. With the grid stressed, ERCOT ordered forced outages to reduce strain.

D. THE PUCT AND ERCOT RESPOND BY ARTIFICIALLY INFLATING PRICING

36. The PUCT and ERCOT responded to the storm by intervening in the wholesale electricity market to impose draconian pricing on existing supply. The PUCT Orders were issued on February 15 and February 16 and resulted in electricity prices being raised to the regulatory maximum of $9,000/MWh, a spike of as much as 30,000% above average market prices for that time of year.[7]

37. By regulation, ERCOT power prices were ***capped*** during the relevant period at the HCAP of $9,000/MWh, but no regulation provides that the PUCT and ERCOT may ***set*** prices at this rate if ordinary market forces would produce a lower price. The amount is a cap—not a rate that can be set artificially.[8] The PUCT directed ERCOT to apply the system-wide offer cap of $9,000/MWh to ***set*** prices while firm load was being shed in an EEA3 load shed event.

38. Similarly, firm load shed was not a scarcity-pricing trigger at the time under ERCOT Protocol 6.5.3.7.1 that could be used to justify the decision to set the real-time market price at $9,000/MWh. Notwithstanding, the PUCT Orders capriciously concluded "[i]f customer load is being shed, scarcity is at its maximum, and the market price for the energy needed to serve that load should also be at its highest," prompting ERCOT to improperly set the price at the HCAP of $9,000/MWh.

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7 Russell Gold & Katherine Blunt, Texas Grapples with Crushing Power Bills After Freeze, Wall. St. J. (Feb. 23, 2021, 10:59 AM), https://www.wsj.com/articles/texas-grapples-with-crushing-power-bills-after-freeze-11614095953. Tim McGlaughlin, Texas Wholesale Electric Prices Spike More Than 10,000% Amid Outages, Reuters (Feb. 15, 2021, 9:17 AM), https://www.reuters.com/article/us-electricity-texas-prices/texas-wholesale-electric-prices-spike-more-than-10000-amid-outages-idUSKBN2AF19A.

8 16 T.A.C. §§ 25.505(g)(B)-(C).

39. Mandating the market pricing at these levels by order was unprecedented. For historical comparison, ERCOT real time prices averaged just $22.00 per MWh for February 2020.[9] If any for-profit entity had increased prices on the scale of what ERCOT did during a declared state of emergency, it would be widely recognized as price gouging under the law. In point of fact, the Texas Attorney General sued another retailer, Griddy, for price gouging because Griddy passed through the $9,000/MWh price to consumers.

40. The duration of the ERCOT-set price was equally unprecedented. In ERCOT's history, prices had never before remained at the cap for anything close to eighty hours. As depicted in the chart below, January 2018 was the first time in ERCOT history that prices ever even reached the $9,000/MWh cap—for a total of only ten minutes.[10] In 2019, prices hit the cap, but only for a little more than two hours.[11]

41. Historically, prices only ever hit the cap for a fraction of the more than eighty hours that the $9,000/MWh price was in place. As reflected in the chart below, in 2012, 2013, and 2014 (when the cap ranged from $3,000/MWh at the beginning of 2012 to $7,000/MWh at the end of 2014), prices were at the cap for less than two hours each year.[12]

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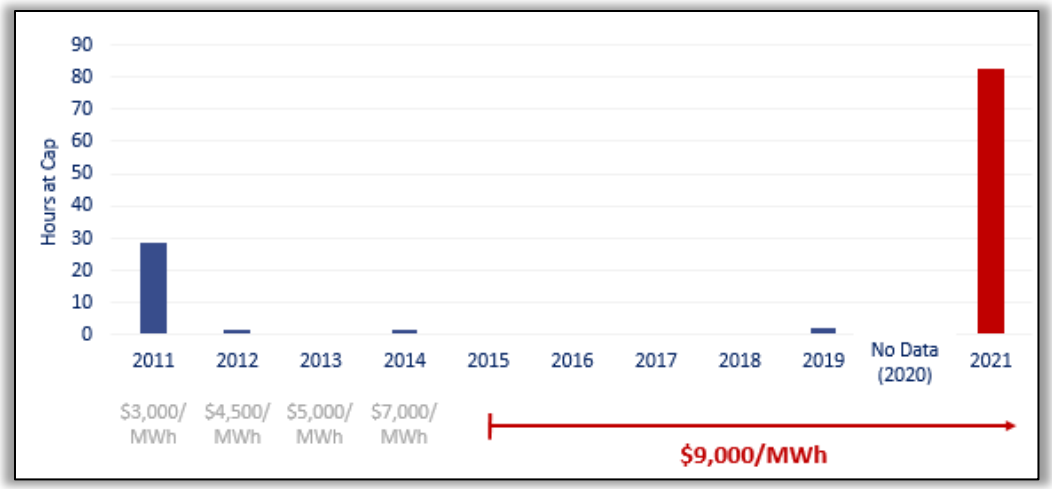
9 U.S. Energy Information Administration, May 7, 2021 ("Average Texas electricity prices were higher in February 2021 due to severe weather storm") ("Wholesale electricity prices in the Electric Reliability Council of Texas (ERCOT), Texas's primary grid operator, averaged $22 per megawatthour (MWh) in 2020") available at https://www.eia.gov/todayinenergy/detail.php?id=47876.

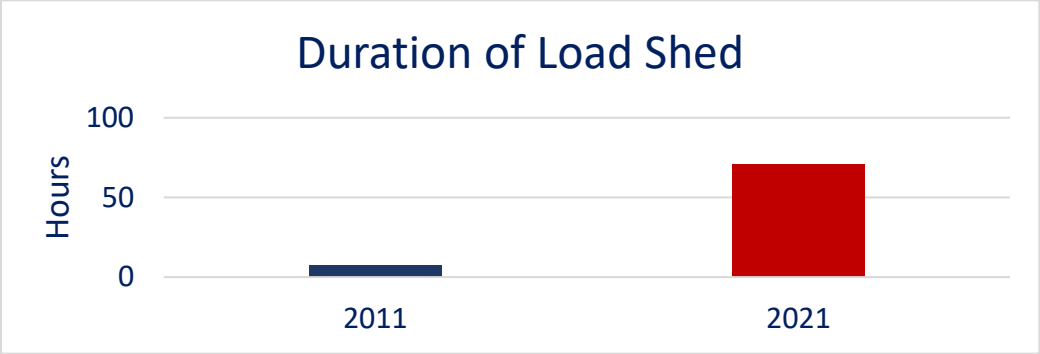
10 Potomac Economics, Ltd., 2018 State of the Market Report for the ERCOT Electricity Markets 23 (June 2019), https://www.potomaceconomics.com/wp-content/uploads/2019/06/2018-State-of-the-Market-Report.pdf.

11 Potomac Economics, Ltd., 2019 State of the Market Report for the ERCOT Electricity Markets 18 (May 2020), https://www.potomaceconomics.com/wp-content/uploads/2020/06/2019-State-of-the-Market-Report.pdf.

12 Potomac Economics, Ltd., 2014 State of the Market Report for the ERCOT Wholesale Electricity Markets 16 (July 2015), https://www.potomaceconomics.com/wp-content/uploads/2017/01/2014-ERCOT-State-of-the-Market-Report.pdf.



42. Although the February 2021 winter storm has prompted comparisons to another winter storm that hit Texas ten years ago, in February 2011, the events of 2021 were different. The chart above illustrates that eighty hours were spent at the cap in February 2021 versus 28.44 hours in 2011.[13] And, the cap was only $3,000/MWh at the time, a third of 2021. Critically, the 2011 prices were determined by the actual scarcity conditions in the market, rather than under orders issued by regulators, and as illustrated below, load shed lasted less than 8 hours—versus nearly 80 hours in 2021.



[13] ERCOT News Release November 20, 2021 ("Winter power plant assessment under way, CREZ development on track for 2013 completion) available at http://www.ercot.com/news/releases/show/26348.

E. FEBRUARY 18: LOAD SHEDDING STOPS, BUT $9,000/MWH PRICE CONTINUES

43. Temperatures warmed on February 17. With that development, ERCOT was able to stop shedding load just after midnight on February 18—a fact about which market participants were notified. No load shed directive under ERCOT Protocol 6.5.8.4.2(3) was in place after 1:05 a.m. on February 18. After lifting load shed instructions, the ERCOT grid had ample resources online, and there was no justification for continuing to impose an artificial price of $9,000/MWh through administrative adjustments to the Real Time-Reliability Deployment Price Adder.[14]

44. Despite a sufficient level of reserves, ERCOT failed to simultaneously return to the pricing mechanisms prescribed by the PUCT's Orders and the ERCOT Protocols. Instead, it left the $9,000/MWh scarcity price in place for an additional 32 hours.[15] When ERCOT finally allowed normal supply and demand forces to set the price of power on February 19, the trading price plummeted within one hour from $9,000/MWh to $27/MWh, later falling to less than $5/MWh.[16]

45. On February 21, the PUCT issued an "Order Directing ERCOT to Take Action and Granting Exception to ERCOT Protocols" (the "**February 21 Order**"). The February 21 Order, among other things, authorized ERCOT to "[d]eviate from protocol deadlines and timing related to settlements, collateral obligations, and invoice payments." That same day, ERCOT issued a

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[14] ERCOT Market Notice M-C021521-03 Legal (Feb. 17, 2021) ("Once ERCOT is no longer instructing firm Load shed, the adjustment will be set to 0, as it would be in the previous implementation."), http://www.ercot.com/services/comm/mkt_notices/archives/5224.

[15] Posting of ERCOT, to Legal Notifications (Feb. 16, 2021, 6:04 PM), http://www.ercot.com/services/comm/mkt_notices/archives/5221; Posting of ERCOT, to Legal Notifications; Operations (Feb. 19, 2021, 9:27 AM), http://www.ercot.com/services/comm/mkt_notices/archives/5228; Letter from Carrie Bivens, Vice President, ERCOT Indep. Mkt. Monitor Dir., Potomac Econs., Ltd. to Chairman Arthur C. D'Andrea & Commissioner Shelly Botkin, Pub. Util. Comm'n of Texas, at 1 (Mar. 4, 2021) [hereinafter IMM Letter], https://interchange.puc.texas.gov/Documents/51812_61_1114183.PDF.

[16] Mark Watson, ERCOT Prices Plunge, but 34 GW Remain Offline, 166,000 Are Still Without Power, S&P Glob. (Feb. 19, 2021, 10:46 PM), https://www.spglobal.com/platts/en/market-insights/latest-news/electric-power/021921-ercot-prices-plunge-but-34-gw-remain-offline-166000-are-still-without-power.

notice stating: "ERCOT is temporarily deviating from Protocol deadlines and timing related to settlements, collateral obligations, and invoice payments while prices are under review."[17] But, the next day, without explanation, ERCOT issued a second notice saying "ERCOT has ended its temporary deviation from protocol deadlines and timing related to settlements, collateral obligations, and invoice payments. Invoices and settlement will be executed in accordance with Protocol language."[18]

F. ERCOT Incorrectly Calculated Ancillary Charges

46. Just Energy has hedges in place to cover its ancillary services costs based on its normal share of electricity load in ERCOT. But during the weather event, Just Energy's load share disproportionately increased. The load share increase, combined with the much higher charges for ancillary services, resulted in significant additional costs. On operating days February 15 to 20, ancillary services prices consistently exceeded the HCAP, at times approaching $25,000/MWh. That hourly rate was a dramatic departure from ERCOT's historical prices for ancillary services.

47. These excessive prices for ancillary services violated both ERCOT's preexisting rules and the PUCT Orders. Nothing in the PUCT Orders suggests that the system-wide offer cap applies only to energy prices. As noted by the IMM's March 1 recommendation, given that ancillary services reserves are procured to reduce the probability of losing load, the value of such reserves should not exceed the value of lost load ("**VOLL**"), which was $9,000 for the February 15 to February 20 operating days due to the PUCT's Orders. Indeed, in its March 1 letter to the PUCT the IMM confirmed that the manner in which the ancillary service charges were calculated and assessed does not conform to past practice and noted that capping ancillary services prices at the system-wide offer cap would be more consistent with economic market design principles.[19]

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17 ERCOT Market Notice M-A022221-01 (Feb. 22, 2021).

18 ERCOT Notice M-A022221-02 (Feb. 23, 2021).

19 Comments From IMM, PUC Project No. 51812 (Mar. 1, 2021).

G. THE PUCT AND ERCOT ELEVATE SUPPLY SCARCITY INTO MARKET FAILURE

48. The $9,000/MWh price triggered an energy market failure that massively harmed market participants with little or no offsetting benefits for consumers or the reliability of the grid. The artificial price did not result in additional power production. Generators were still burdened by frozen equipment and other weather-related issues, making substantial generation impossible, irrespective of price.

49. On March 5, the IMM concluded, after investigation, that the $9,000/MWh price was improperly maintained for a full 32 hours after the load-shed events ended, resulting in billions in overcharges on February 18 and 19 alone. These overcharges exceed the total cost of power traded in real-time for the entire year in 2020.[20] The IMM recommended that the billions in overcharges for February 18 and 19 be reversed.[21] Lieutenant Governor Dan Patrick has publicly called for the PUCT to follow the IMM's recommendation and correct the unlawfully set prices.[22]

50. On June 2, 2021, Vistra Corp. filed with the PUCT in connection with Project No. 51812 a study it commissioned from London Economics International LLC ("**LEI**"). LEI examined what real time energy prices would have been in the absence of the PUCT Orders and ERCOT's execution of those Orders. LEI found that between 22:15 on February 15th and 9:00 on February 19th, energy prices would have averaged $2,404/MWh if not for the PUCT Orders—significantly lower than the $9,000/MWh HCAP price.

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[20] Naureen S. Malik, Texas Watchdog Says Grid Operator Made $16 Billion Error, Bloomberg (Mar. 4, 2021, 1:07 PM), https://www.bloomberg.com/news/articles/2021-03-04/texas-watchdog-says-power-grid-operator-made-16-billion-error.

[21] IMM March 4, 2021 Letter at 2 ("ERCOT recalled the last of the firm load shed instructions at 23:55 on February 17, 2021. Therefore, in order to comply with the Commission Order, the pricing intervention that raised prices to VOLL should have ended immediately at that time. However, ERCOT continued to hold prices at VOLL by inflating the Real-Time On-Line Reliability Deployment Price Adder for an additional 32 hours through the morning of February 19."). See also IMM Letter dated March 11, 2021 (following up on March 4 letter).

[22] Russell Gold, Texas Lt. Governor Calls for Reversal of $16 Billion Blackout Overcharges, Wall St. J. (Mar. 8, 2021, 7:07 PM), https://www.wsj.com/articles/texas-lt-governor-calls-for-reversal-of-16-billion-blackout-overcharges-11615240985?mod=searchresults_pos2&page =1.

51. The PUCT's and ERCOT's failed response also has spawned significant litigation. More than 150 individual lawsuits against ERCOT and other parties (as of June 10, 2021) were transferred to an MDL pretrial court.[23] At least one court has found ERCOT's "massive errors" caused debts for "failed market participants" and rejected ERCOT's claims of sovereign immunity.[24] There also have been several major bankruptcy filings in the wake of the storm, including the state's largest and oldest cooperative, Brazos River Electric, which filed for chapter 11 protection after receiving $1.9 billion of invoices—which it now is challenging in litigation against ERCOT[25]—as well as retailers Entrust Energy, Inc. (chapter 11), Griddy Energy (chapter 11), Liberty Power Holdings (chapter 11), and Brilliant Energy LLC (chapter 7).

H. LEGISLATIVE RESPONSE AND UPLIFT BALANCE FINANCING SETTLEMENT

52. Several significant pieces of legislation have been passed aimed at regulatory reform and redress that underscore the extent of the shortcomings in the PUCT's and ERCOT's response to the storm. On June 8, 2021, Texas Governor Greg Abbott signed Senate Bill 2 and Senate Bill 3 into law which provide for changes to the governance of the PUCT and ERCOT and "relat[e] to preparing for, preventing, and responding to weather emergencies and power outages."[26] Other bills have been signed into law to expand the membership of and change the

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[23] See Order of Multidistrict Litigation Panel, In re Winter Storm Uri Litig., No. 21-0313 (Tex. June 10, 2021), https://search.txcourts.gov/SearchMedia.aspx?MediaVersionID=e0e2a6dc-b8fa-4e74-8f56-4fefd281e972&coa=cossup&DT=DISPOSITION&MediaID=d3384293-5fb5-4d66-9803-bc4081572d8f.

[24] See CPS Energy v. Elec. Reliability Council of Texas, Cause No. 2021CI04574 (288th District Court) (Temporary Restraining Order dated April 28, 2021); decision dated May 26, 2021.

[25] See Brazos Elec. Power Cooperative, Inc., et al. v. Electric Reliability Council Of Texas, Inc., Adv. Proc. No. 21-03863 (DRJ) (Bankr. S.D. Tex.), ECF No. 173 (Debtors' First Amended Complaint Objecting To Electric Reliability Council Of Texas, Inc.'s Proof Of Claim And Other Relief).

[26] S. 2, 87th Leg., Reg. Sess. (Tex. 2021), https://capitol.texas.gov/tlodocs/87R/billtext/pdf/SB00002F.pdf#navpanes=0; S. 3, 87th Leg., Reg. Sess. (Tex. 2021), https://capitol.texas.gov/tlodocs/87R/billtext/pdf/SB00003F.pdf#navpanes=0; see, e.g., Tex. Util. Code § 39.1513; Tex. Gov't Code § 411.301.

eligibility requirements for the PUCT[27]; require an independent annual audit of ERCOT with published results[28]; allow for the use of electric energy storage facilities by transmission and distribution utilities[29]; provide securitization financing for gas utilities[30]; and provide additional means for facilities to restore power during widespread outages.[31] On June 16, 2021, Governor Abbot signed House Bill 4492 (the "**Securitization Bill**") which may provide for up to $2.1 billion of financing for certain uplift charges in excess of $9,000/MWh.[32] On June 18, 2021, Governor Abbott signed Senate Bill 1580 which "enable[s] electric cooperatives to use securitization financing to recover extraordinary costs and expenses incurred" due to Winter Storm Uri.[33]

53. Certain load service entities ("**LSEs**") recently reached a settlement with the PUCT and ERCOT relating to financing for the $2.1 billion designated by the Securitization Bill for uplift charges. On July 16, 2021, ERCOT filed an application with the PUCT for "approval of a Debt Obligation Order authorizing the financing of up to $2.1 billion for the Uplift Balance, plus reasonable costs."[34] On September 20, 2021, certain LSEs, including Just Energy, reached

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[27] S. 2154, 87th Leg., Reg. Sess. (Tex. 2021), https://capitol.texas.gov/tlodocs/87R/billtext/pdf/SB02154F.pdf#navpanes=0; see, e.g., Tex. Util. Code § 12.051(a) (changing composition of the PUCT from three commissioners to five).

[28] H.R. 2586, 87th Leg., Reg. Sess. (Tex. 2021), https://capitol.texas.gov/tlodocs/87R/billtext/pdf/HB02586F.pdf#navpanes=0.

[29] S. 415, 87th Leg., Reg. Sess. (Tex. 2021), https://capitol.texas.gov/tlodocs/87R/billtext/pdf/SB00415F.pdf#navpanes=0.

[30] H.R. 1520, 87th Leg., Reg. Sess. (Tex. 2021), https://capitol.texas.gov/tlodocs/87R/billtext/pdf/HB01520F.pdf#navpanes=0; see Tex. Gov't Code § 1232.1072.

[31] H.R. 2483, 87th Leg., Reg. Sess. (Tex. 2021), https://capitol.texas.gov/tlodocs/87R/billtext/pdf/HB02483F.pdf#navpanes=0.

[32] H.R. 4492, 87th Leg., Reg. Sess. (Tex. 2021), https://capitol.texas.gov/tlodocs/87R/billtext/pdf/HB04492F.pdf#navpanes=0; see also Tex. Util. Code § 39.651; Tex. Util. Code § 39.652(4).

[33] S. 1580, 87th Leg., Reg. Sess. (Tex. 2021), https://capitol.texas.gov/tlodocs/87R/billtext/pdf/SB01580F.pdf#navpanes=0; see also Tex. Util. Code § 41.151(a).

[34] Unopposed Partial Stipulation And Settlement Agreement dated September 20, 2021, Item 293 (the "**Settlement Stipulation**"), at 1 filed before PUCT in connection with Application Of ERCOT For A Debt Obligation Order To Finance Uplift Balances Under PURA Chapter 39, Subchapter N, For An Order Initiating A Parallel Docket, And For Good Cause Exception, Docket No. 52322 (the "**ERCOT Securitization Application**").

agreement with the PUCT and ERCOT on both an opt-out process for LSEs, e.g., certain municipalities, and on a methodology (attached as Schedule C to the Settlement Stipulation) to allocate financing proceeds on a load-ratio share basis among participating LSEs. On October 13, 2021, the PUCT adopted a final debt obligation order approving the ERCOT Securitization Application. ***Note***, to the extent Plaintiffs ultimately receive funds under the Securitization Bill from the $2.1 billion securitization facility that duplicate amounts requested in this lawsuit, they will take the necessary steps to avoid a double recovery, e.g., amending this complaint.

I. ERCOT INVOICES BURY JUST ENERGY

54. Just Energy's most valuable assets are its customers. Under Texas law, if a Retail Electricity Provider fails to make payments when due, ERCOT can revoke the provider's right to conduct activities in the ERCOT market and transfer their customers to a POLR (often at a higher rate for customers). See 16 Tex. Admin. Code § 25.43; ERCOT Market Guide § 7.11.1.a. Once that happens, the customers are lost.

55. On March 3, 2021, Just Energy filed a Petition for Emergency Relief with the PUCT (the "**Petition**").[35] In the Petition, Just Energy requested that the PUCT direct ERCOT to deviate from the deadlines and timing in its Protocols and Market Guides (as defined therein) related to settlements, collateral obligations, and invoice payments and to suspend the execution or issuance of invoices or settlements for intervals during the dates of February 13 through February 20, until issues raised by executive and legislative branches of Texas are resolved. Alternatively, Just Energy requested that the PUCT waive certain ERCOT Protocols to allow Just Energy to delay payment while exercising its rights under the ERCOT Protocols to dispute the invoiced payment amounts.

[35] Just Energy's petition is attached to the Recognition Order as Exhibit A.

56. For the period between February 13 and February 20, Just Energy has received invoices from ERCOT demanding payment of approximately $335 million. Just Energy disputes no less than $274 million of these invoiced amounts.

57. Lacking sufficient liquidity to satisfy the grossly overstated invoices, the Debtors commenced the Canadian Proceedings under the CCAA in the Canadian Court on March 9, 2021. That same day, the Canadian Court approved a $125 million financing facility and authorized the payment of the disputed invoices to ERCOT. The Debtors also filed the Chapter 15 Cases in this Court. ERCOT had actual notice of, and formally appeared in the Debtors' bankruptcy cases.[36]

58. The Court did not approve Just Energy's payment of the invoices. Instead, on March 9, the Court entered an order granting the Debtors' provisional relief that makes clear "any payments made to ERCOT are made subject to [Just Energy's] rights to contest those payments, and all rights to receive a refund or credit as allowed by applicable law." The order also states "[a]lthough the Court recognizes the authority to make payments to ERCOT as granted by the Canadian Order, this Court neither adds nor subtracts from any such authorization." The Court entered an order of recognition on April 2, 2021, incorporating the same reservations set forth above.

59. In total, the Transfers consist of payments made by Just Energy (and in the case of Hudson, BP) to ERCOT of no less than $274 million relating to both the imposition of a system-wide offer cap of $9,000/MWh and ancillary charges in response to invoices that Plaintiffs received relating to the week of February 13 through February 20.

II. LEGALITY OF THE PUCT'S AND ERCOT'S ACTIONS

60. The PUCT Orders are not consistent with, and find no support under the ERCOT Protocols or the SFA, which incorporates the ERCOT Protocols by reference. They also are

[36] See, e.g., Notice Of Appearance And Request For Service Of All Notices, Pleadings, Orders And Other Papers [ECF No. 30] dated March 9, 2021 at 1 (filed by the law firm of Munsch Hardt Kopf & Harr, P.C. "on behalf of [ERCOT], a creditor and party-in-interest").

unlawful under, inter alia, (a) Texas' APA, Tex. Gov't Code §§ 2001.024, 2001.029, 2001.033, 2001.035, 2001.038, 2001.171, 2001.174, and 2001.176 and (b) PURA, Tex. Util. Code §§ 15.001, 39.001(c), 39.001(d), 39.151(d).

A. ERCOT PROTOCOLS AND THE SFA

61. The ERCOT Protocols are incorporated by reference into the SFA. The $9,000/MWh price finds no support in the ERCOT Protocols or the SFA. Had the PUCT and ERCOT followed the ERCOT Protocols, a different and lower energy price would have been in effect.

62. ERCOT Protocols in effect at the time of Winter Strom Uri did not consider firm load shed a valid consideration with respect to scarcity pricing. ERCOT Protocol 6.5.7.3.1 (Determination Of Real-Time On-Line Reliability Deployment Price Adder) lists factors relevant to determining whether ERCOT's scarcity pricing mechanism is triggered and whether prices should be increased toward the HCAP of $9,000/MWh. The version of ERCOT Protocol 6.5.7.3.1 in effect during Winter Storm Uri did ***not*** list firm load shed as a consideration for invoking scarcity pricing. Notwithstanding ERCOT Protocol 6.5.3.7.1, the PUCT and ERCOT deemed firm load shed to be a scarcity-pricing trigger and increased the price to $9,000/MWh on that basis.

B. PUCT ORDERS ARE "RULES" UNDER TEXAS' APA

63. The APA defines "rule" to mean: "(A) a state agency statement of general applicability that: (i) implements, interprets, or prescribes law or policy; or (ii) describes the procedure or practice requirements of a state agency; (B) includes the amendment or repeal of a prior rule; and (C) does not include a statement regarding only the internal management or organization of a state agency and not affecting private rights or procedures." Tex. Gov't Code § 2001.003(6). The PUCT is a "state agency" for the purposes of the APA. See Tex. Gov't Code § 2001.003(7) (definition includes state commissions). The PUCT Orders purport to speak for the PUCT and utilize its authority. The PUCT Orders are more than a restatement of a formally

promulgated rule. They are a new directive to ERCOT, and they effectively amend the ERCOT scarcity pricing mechanism, promulgated at Tex. Admin. Code § 25.505(g) by forcing ERCOT to apply the system-wide offer ***cap*** of $9,000 per MWh to ***set*** prices in a load-shed situation. An agency's interpretation or application of existing promulgated rules themselves constitute "rules" under the APA when they have the effect of amending the existing rules or creating new rules.

C. PUCT ORDERS ARE GENERALLY APPLICABLE STATEMENTS

64. The PUCT Orders are generally applicable statements that implemented, interpreted, or prescribed law or policy, i.e., new scarcity pricing considerations for ERCOT. See Tex. Gov't Code § 2001.003(6)(A)(i). General applicability for the purposes of Tex. Gov't Code § 2001.003(6)(A) refers to "statements that affect the interest of the public at large such that they cannot be given the effect of law without public input."[37] The PUCT Orders affected the interests of the public in practice, e.g., electricity prices available to market participants and, by extension, many electricity consumers.

65. An agency statement "implements, interprets, or prescribes law or policy" when it reflects "[the agency's] construction and application" of existing regulations and "implements a broader policy judgment" by the agency.[38] The PUCT has authority to overrule ERCOT's determination of market clearing prices. See 16 Tex. Admin. Code § 25.501(a). The PUCT Orders are a specific construction and application of that authority to address scarcity issues surrounding Winter Storm Uri that implemented its broader policy judgment that "adjustments are needed to ERCOT prices to ensure they accurately reflect the scarcity conditions in the market."

D. PUCT ORDERS INCLUDE AMENDMENT OF PRIOR RULE

66. The PUCT Orders "amen[d] or repea[l] a prior rule." Tex. Gov't Code § 2001.003(6)(A). An agency's interpretation or application of existing promulgated rules

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37 El Paso Hosp. Dist. v. Tex. Health & Hum. Servs. Comm'n, 247 S.W.3d 709, 714 (Tex. 2008).

38 Teladoc, Inc. v. Med. Bd., 453 S.W.3d 606, 614 (Tex. App—Austin 2014).

themselves constitute "rules" under the APA when they have "the effect of amending the existing rules, or of creating new rules, and the other requirements of the APA's 'rule' definition are met." Here, the PUCT Orders are "more than a restatement of a formally promulgated rule." They are a distinct prescription to ERCOT and effectively amend the ERCOT scarcity pricing mechanism, promulgated at Tex. Admin. Code § 25.505(g), by forcing ERCOT to consider load shed in its scarcity pricing determination and set energy prices at $9,000/MWh.[39]

67. It is immaterial whether the PUCT issued the PUCT Orders in an emergency or intended to temporarily override ERCOT's scarcity pricing mechanism. There is no requirement that rules under the APA permanently amend or repeal a prior rule. On the contrary, the Court of Appeals has previously recognized ad hoc agency actions based on novel and exigent circumstances as "rules" for APA purposes.

E. PUCT Orders Affect Private Rights

68. The PUCT Orders do not include a statement regarding only the internal management or organization of the PUCT and instead directly affected private rights of ERCOT market participants and, by extension, electric consumers, e.g., rates at which electricity was available. Notably, the PUCT Orders were not issued as part of a contested matter before the PUCT. Nor were they an adjudication of the rights of particular parties. Rather, ERCOT market participants had a right to purchase electricity at rates determined under the scarcity pricing mechanism set out in the PUCT's rules at Tex. Admin. Code § 25.505(g). By substantially altering that mechanism, the PUCT impacted private rights.

F. $9,000/MWh Price Violated The APA

69. The APA requires that agency orders adopting rules contain "reasoned justification" for the agency's decision on each rulemaking issue. Tex. Gov't Code § 2001.033(1). That

[39] See Teladoc, 453 S.W.3d at 616; Tex. Dept. of Transp. v. Sunset Transp., Inc., 357 S.W.3d 691, 703 (Tex. App.—Austin 2011, no pet.).

justification must include "a summary of the factual basis of the rule as adopted which demonstrates a rational connection between the factual basis for the rule and the rule as adopted." Id. § 2001.033(1)(B). Lack of substantial compliance with the reasoned justification requirement renders a rule "voidable" under Tex. Gov't Code § 2001.035(a). If the Court in its discretion finds "good cause" to do so, it may "invalidate the rule or a portion of the rule, effective as of the date of the court's order." Id. § 20010.40.

70. The PUCT Orders are legally invalid because they interfere with or impair, or threaten to interfere with or impair, a legal right or privilege belonging to Plaintiffs. Tex. Gov't Code § 2001.038(a).

71. The PUCT violated the APA, including, without limitation, sections 2001.023, 2001.024, 2001.029, 2001.033, and 2001.035, and 16 Tex. Admin. Code § 25.362(c) by, among other things, failing to provide proper notice of its intent to adopt the PUCT Orders; disclose information required by the APA, e.g., an explanation of the order, rule, or proposed text; afford interested parties an opportunity to comment; articulate a reasoned justification or satisfactory evidentiary basis for its decision; or furnish information required in connection with emergency rulemaking.

72. The PUCT Orders violate the APA because they lack any reasoned justification. The one reason given by the PUCT was its belief that prices being at less than the HCAP was "inconsistent with fundamental market design" because "[i]f customer load is being shed, scarcity is at its maximum, and the market price to serve that load should also be at its highest." The PUCT provided no evidence to support its assertion that market's scarcity pricing signals were not working as intended, such as evidence that generators were not deploying because prices were too low, or that consumers were not curtailing use in response to the already objectively high prices of more than $1,200/MWh that were in effect on February 15, 2021 at the time of the PUCT Orders.

G. $9,000/MWH PRICE VIOLATED PURA

73. The PURA prohibits the PUCT from making rules "regulating competitive electric services, prices, or competitors or restricting or conditioning competition except as authorized by this title …," PURA § 39.001(c), and requires that the PUCT's rules "authorize or order competitive rather than regulatory methods … to the greatest extent feasible" and to be "practical and limited so as to impose the least impact on competition." PURA § 39.001(d).

74. The PUCT violated its substantive authority under the PURA and any substantive authority and procedural limitations of the Governor's Disaster Declaration in issuing the PUCT Orders. It acted both outside of its authority and contrary to legally-required procedures. The PUCT Orders violated the PURA, including sections 39.001(c) and 39.001(d), because they lacked any reasoned justification and displaced the forces of market competition.

75. The PUCT Orders also violated the PURA because they set prices by regulatory fiat instead of market forces and without regard to actual scarcity conditions in the market. The PUCT Orders directly contradict the PURA's mandate that prices should be a function of competition and not regulatory action. Once ERCOT set pricing at $9,000/MWh, Just Energy had no feasible option but to buy electricity at prices that were unlawful, unjustifiable, and unrelated to ordinary market forces. And, ERCOT's invoices include amounts for ancillary services that are either erroneously calculated or unreasonably applied in violation of ERCOT protocols.

H. ALTERNATIVELY, PUCT ORDERS EXPIRED ON FEBRUARY 18

76. Even if the PUCT Orders were a valid exercise of the PUCT's authority, they expired by their own terms as soon as firm load was no longer being shed. The imposition of the $9,000/MWh cap after 1:05 a.m. on February 18, 2021 was illegal because it did not properly implement the PUCT Orders.

77. The factual justification for the PUCT Orders was that: "***[i]f customer load is being shed***, scarcity is at its maximum, and the market price for the energy need to serve that load should

also be at its highest." There is no rational connection between that factual justification and a rule that would direct ERCOT to continue scarcity pricing ***in the absence of the load being shed***. And, indeed, the plain language of the PUCT Orders commanded ERCOT only to ensure "***that firm load that is being shed*** … is accounted for in ERCOT's scarcity pricing signals" (emphasis added).

78. Absent load shed, ERCOT had no authority to set the price at $9,000/MWh after 1:05 a.m. on February 18—even assuming the PUCT Orders were valid.

79. ERCOT continued imposing $9,000/MWh prices even after load shed ended. ERCOT ceased firm load shed at 11:55 p.m. on February 17, 2021, but refused to take any action to review or change the prices and instead continued imposing $9,000/MWh prices until 9 a.m. on Friday, February 19. From and after 1:05 a.m. on February 18, continued imposition of the $9,000/MWh price was improper.

III. DEFENDANTS ARE NOT PROTECTED BY SOVEREIGN IMMUNITY

80. ERCOT cannot sustain a sovereign-immunity defense because it is a private, membership-based corporation (certified and regulated by the PUCT) and not a governmental regulator. In point of fact, ERCOT argued in 2014 that it was not a "governmental unit" and that the statutory scheme governing its oversight does not suggest any legislative intention to make ERCOT part of the government.[40] ERCOT has since taken a contrary position in another case, but the issue has not yet been definitively resolved by the Texas Supreme Court.[41] Notably, on May 26, 2021, the 288th District Court in Bexar County refused to dismiss a lawsuit against ERCOT on sovereign immunity grounds.[42]

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40 See ERCOT Brief, HWY 3 MHP, LLC v. Elec. Reliability Council of Tex., Inc., No. 03-14-00303-CV at 24 (July 30, 2014).

41 Electric Reliability Council of Texas Inc. v. Panda Power Generation Infrastructure Fund LLC, No. 18-0781, 18-0792 (Tex. 2021).

42 See CPS Energy v. Elec. Reliability Council of Texas, Cause No. 2021CI04574Z (288th Judicial District).

81. Even if ERCOT and the PUCT are government entities, any sovereign immunity has been waived pursuant to the Constitution's Bankruptcy Clause. See, e.g., Central Virginia Community College v. Katz, 546 U.S. 356, 378 (2006) ("In ratifying the Bankruptcy Clause, the States acquiesced in a subordination of whatever sovereign immunity they might otherwise have asserted in proceedings necessary to effectuate the in rem jurisdiction of the bankruptcy courts"); 11 U.S.C. § 106(a) ("[S]overeign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following: (1) Sections … 502 … 525 … 542 … 549 … 553").

82. Separately, section 2001.038 of the APA is a grant of original jurisdiction, and "it waives sovereign immunity."[43]

CAUSES OF ACTION

COUNT 1
AGAINST ERCOT AND THE PUCT
(Avoidance of Unauthorized Post-Petition Transfers – 11 U.S.C. § 549)

83. Plaintiffs repeat and reallege the foregoing allegations as though they were fully set forth in this paragraph.

84. Under section 549 of the Bankruptcy Code, the Foreign Representative may avoid a transfer—"(1) that occurs after the commencement of the case; and (2) is not authorized under this title or by the court." 11 U.S.C. § 549(a).

85. Pursuant to Federal Rule of Bankruptcy Procedure 6001, "[a]ny entity asserting the validity of a transfer under § 549 of the Code shall have the burden of proof."

86. Section 1507(a) of the Bankruptcy Code says in part that "the court, if recognition is granted, may provide additional assistance to a foreign representative under this title or other laws of the United States." Pursuant to section 1520(a)(2) of the Bankruptcy Code, "[u]pon

[43] Tex. Logos, LP. v. Tex. Dep't of Transp., 241 S.W.3d 105, 123 (Tex. App.-Austin 2007, no pet.).

recognition of a foreign proceeding that is a foreign main proceeding … section [549 applies] to a transfer of an interest of the debtor in property that is within the territorial jurisdiction of the United States ….” Section 1521(a)(5) of the Bankruptcy Code entrusts the foreign representative with “the administration or realization of all or part of the debtor’s assets within the territorial jurisdiction of the United States.” Section 1521(a)(7) of the Bankruptcy Code authorizes the Court to grant “any additional relief that may be available to trustee, except for relief available under section 522, 544, 545, 547, 548, 550 and 724(a).” Authorizing the foreign representative to bring claims under section 549 of the Bankruptcy Code to recover the Transfers is appropriate when the lawsuit is consistent with the purposes of the chapter 15, including those identified in section 1501(a)(3) and (a)(4).

87. Just Energy (and in the case of Hudson, BP) made the Transfers in response to invoices that Plaintiffs received relating to the week of February 13 through February 20.

88. Approximately $193 million of the Transfers were made post-petition, after March 9, 2021, the date the Chapter 15 Cases were filed. They are subject to avoidance under section 549 of the Bankruptcy Code for several reasons, including the following—each of which provides an independent basis for recovery.

89. ***First***, the Court did not authorize the post-petition Transfers. Both the provisional and final recognition orders say “[a]ny payments made to ERCOT are made subject to all of the Debtors’ rights to contest those payments, and all rights to receive a refund or credit as allowed by applicable law. Although the Court recognizes the authority to make payments to ERCOT as granted by the Final CCAA Order, this Cout neither adds nor subtracts from any such authorization.”[44] Under the plain terms of section 549 of the Bankruptcy Code, transfers that are not “authorized under this title or by the Court” are subject to avoidance.

[44] Order Granting Petition For (I) Recognition As Foreign Main Proceedings, (II) Recognition Of Foreign Representative, And (III) Related Relief Under Chapter 15 Of Bankruptcy Code [ECF No. 82] ¶ 30. See also Order Granting Provisional Relief Pursuant To Section 1519 Of Bankruptcy Code

90. ***Second***, there could not have been a basis to authorize the post-petition Transfers when, among other things, the invoices were grossly inflated and otherwise related to the $9,000/MWh price and ancillary services charges that were not consistent with, and find no support in the ERCOT Protocols and the SFA.

91. ***Third***, there could not have been a basis to authorize the post-petition Transfers when, among other things, the invoices were grossly inflated and otherwise related to the $9,000/MWh price and ancillary services costs set in response to the PUCT Orders that were illegal under, inter alia, the APA and the PURA.

92. ***Alternatively***, if the PUCT Orders are considered legal and valid, a portion of the Transfers still could not have been authorized and should be avoided under section 549 of the Bankruptcy Code. Specifically, no less than approximately $220 million of the Transfers relate to the period after 1:05 a.m. on February 18, 2021, of which approximately $110 million was paid after the petition date. The PUCT Orders expired by their own terms at that time, and ERCOT improperly implemented them.

93. Based upon the foregoing, Plaintiffs are entitled to an order and judgment against ERCOT and the PUCT avoiding the post-petition Transfers.

COUNT 2
AGAINST ERCOT AND THE PUCT
(Disallowance of Claims – 11 U.S.C. §§ 502(b), 502(d))

94. Plaintiffs repeat and reallege the foregoing allegations as though they were fully set forth in this paragraph.

[ECF No. 23] (same); Tr., Hr'g Mar. 9, 2021 at 20:17-23 ("[COURT] I'm going to want to understand whether this becomes irrevocable. And if you're telling me that current contract or current regulations at ERCOT make it refundable, I'm going to want to see that. And then I would include in my order that one of the reasons for doing it is that it's, in fact, refundable."); 21:15-18 ("[COURT] I also have a duty, if I'm going to approve at first-day hearings such a large payment in such a disputed situation as you have described … that I not make that irrevocable"); 23:13-15 ("[COURT] So hopefully, there can either be an agreement or I can get satisfied that it is refundable."); at 25:14-16 ("[COURT] [P]aying such a large amount of money until I get some confidence that it isn't irrevocable is an issue").

95. Section 1507(a) of the Bankruptcy Code says in part that "the court, if recognition is granted, may provide additional assistance to a foreign representative under this title or other laws of the United States." Section 1521(a)(5) of the Bankruptcy Code entrusts the foreign representative with "the administration or realization of all or part of the debtor's assets within the territorial jurisdiction of the United States." Section 1521(a)(7) of the Bankruptcy Code authorizes the Court to grant "any additional relief that may be available to trustee, except for relief available under section 522, 544, 545, 547, 548, 550 and 724(a)." Authorizing the foreign representative to bring claims under section 502 of the Bankruptcy Code is appropriate when the lawsuit is consistent with the purposes of the chapter 15, including those identified in section 1501(a)(3) and (a)(4).

96. ERCOT has had knowledge of the Debtors' bankruptcy filings since March 9, 2021 and has appeared as a creditor in the Chapter 15 Cases. ERCOT sent the Debtors demands in writing for amounts allegedly due to ERCOT arising during the week of February 13, 2021 through February 20, 2021. These demands constitute informal "proofs of claim" that are subject to disallowance under section 502(b) of the Bankruptcy Code.

97. Moreover, to the extent any of the Transfers are avoided, either (a) in their full amount of not less than $274 million or, (b) ***alternatively***, in the amount of approximately $220 million relating to the period after 1:05 a.m. on February 18, 2021, any formal or informal claims asserted by ERCOT and the PUCT against Plaintiffs should be disallowed in whole or in part pursuant to section 502(d) of the Bankruptcy Code.

COUNT 3
AGAINST ERCOT AND THE PUCT
(Turnover—11 U.S.C. § 542(a))

98. Plaintiffs repeat and reallege the foregoing allegations as though they were fully set forth in this paragraph.

99. Section 542(a) of the Bankruptcy Code requires an entity in possession, custody, or control of property that may be used, leased, or sold under section 363 of the Bankruptcy Code to turn over such property to the trustee.

100. Section 1507(a) of the Bankruptcy Code says in part that "the court, if recognition is granted, may provide additional assistance to a foreign representative under this title or other laws of the United States." Section 1521(a)(5) of the Bankruptcy Code entrusts the foreign representative with "the administration or realization of all or part of the debtor's assets within the territorial jurisdiction of the United States." Section 1521(a)(7) of the Bankruptcy Code authorizes the Court to grant "any additional relief that may be available to trustee, except for relief available under section 522, 544, 545, 547, 548, 550 and 724(a)." Authorizing the foreign representative to bring claims under section 542(a) of the Bankruptcy Code is appropriate when the lawsuit is consistent with the purposes of the chapter 15, including those identified in section 1501(a)(3) and (a)(4).

101. The Transfers constitute property that the Debtors, and specifically the foreign representative, Plaintiff Just Energy Group, Inc., may use, sell, or lease under section 363 of the Bankruptcy Code.

102. Plaintiffs are entitled to the entry of an Order directing ERCOT and the PUCT to turn over the Transfers, either (a) in their full amount of not less than $274 million or, (b) ***alternatively***, in the amount of approximately $220 million relating to the period after 1:05 a.m. on February 18, 2021.

COUNT 4
AGAINST ERCOT AND THE PUCT
(Setoff—11 U.S.C. §§ 553 and/or 558)

103. Plaintiffs repeat and reallege the foregoing allegations as though they were fully set forth in this paragraph.

104. Section 558 of the Bankruptcy Code preserves "any defense available to the debtor as against any entity other than the estate." 11 U.S.C. § 558.

105. While section 553 of the Bankruptcy Code refers to the rights of setoff for creditors, see 11 U.S.C. § 553(a), the debtor's right to setoff is a defense that may be asserted under section 558 of the Bankruptcy Code.

106. Section 1507(a) of the Bankruptcy Code says in part that "the court, if recognition is granted, may provide additional assistance to a foreign representative under this title or other laws of the United States." Section 1521(a)(5) of the Bankruptcy Code entrusts the foreign representative with "the administration or realization of all or part of the debtor's assets within the territorial jurisdiction of the United States." Section 1521(a)(7) of the Bankruptcy Code authorizes the Court to grant "any additional relief that may be available to trustee, except for relief available under section 522, 544, 545, 547, 548, 550 and 724(a)." Authorizing the foreign representative to assert rights of setoff is appropriate and consistent with the purposes of the chapter 15, including those identified in section 1501(a)(3) and (a)(4).

107. Going forward, to the extent the Transfers are avoided or otherwise decreed unlawful, Just Energy is entitled to set off the amounts of the Transfers against future invoices from ERCOT or the PUCT, either (a) in their full amount of not less than $274 million or, (b) ***alternatively***, in the amount of approximately $220 million relating to the period after 1:05 a.m. on February 18, 2021.

COUNT 5
AGAINST ERCOT
(Canadian Companies Creditors Arrangement Act)

108. Plaintiffs repeat and reallege the foregoing allegations as though they were fully set forth in this paragraph.

109. On March 9, 2021, Plaintiffs filed for protection under the CCAA. Under the CCAA, rights can be exercised for the benefit of creditors of the Debtors.

110. Just Energy (and in the case of Hudson, BP) made certain of the Transfers pre-petition in response to invoices that Plaintiffs received relating to the week of February 14, 2021. The pre-petition Transfers, which total no less than approximately $81 million are recoverable under the CCAA or any other applicable law.

111. The pre-petition Transfers were made in the days leading up to Plaintiffs' insolvency filings (under protest) only to avoid losing Plaintiffs' customers and participant status in the ERCOT market. Moreover, Plaintiffs were financially vulnerable or insolvent on the dates that the pre-petition Transfers were made or became financially vulnerable or insolvent as a result of the pre-petition Transfers.

112. ***First***, the pre-petition Transfers should be avoided in their full amount ($81 million) because the invoices included charges for energy based on the artificial $9,000/MWh price set by ERCOT during Winter Storm Uri and ancillary services charges that were illegally and erroneously calculated under the APA and the PURA and find no support in the ERCOT Protocols or the SFA. Plaintiffs did not receive valuable or good consideration in exchange for the pre-petition Transfers, and they should be avoided and returned.

113. ***Alternatively***, if the PUCT Orders are considered legal and valid, a portion of the pre-petition Transfers still should be avoided and returned. Plaintiffs received less than reasonably equivalent value for the no less than approximately $110 million in pre-petition Transfers that relate to the period after 1:05 a.m. on February 18, because, among other things, the PUCT Orders expired by their own terms at that time, and ERCOT improperly implemented them.

114. Plaintiffs intended to delay creditor collection efforts when the pre-petition Transfers were made, preserving rights to challenge those Transfers at a later time. The pre-petition Transfers had the effect of delaying creditor collections because Plaintiffs received inadequate consideration from ERCOT and do not have sufficient assets to repay creditors in full.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully requests that this Court enter judgment in favor of Plaintiffs and against Defendants and:

A. Grant relief under sections 502(d), 542(a), 549, 553, 558, 1507(a), 1520(a), and 1521(a)(7) of the Bankruptcy Code;

B. Award recovery of all Transfers in an amount not less than $274 million;

C. Award such other and further relief, in law and equity, as this Court deems just and proper; and

D. Award damages to Plaintiffs in an amount to be proven at trial, including pre-judgment and post-judgment interest and attorneys' fees to the extent awardable.

Dated: November 12, 2021
New York, New York

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TAB E

This is Exhibit “E”

referred to in the Affidavit of **JAMES C. TECCE**

Sworn before me this 14th day of April, 2022

A Commissioner for taking affidavits

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

JUST ENERGY TEXAS, LP, ET AL	§ CASE NO. 21-04399-ADV
	§ HOUSTON, TEXAS
VERSUS	§ WEDNESDAY,
	§ FEBRUARY 2, 2022
ERCOT, INC.	§ 10:00 A.M. TO 11:47 A.M.

MOTIONS HEARING (HYBRID)

BEFORE THE HONORABLE MARVIN ISGUR
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES: SEE NEXT PAGE

(Recorded via CourtSpeak; no log notes.)

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(Please also see Electronic Appearances.)

HOUSTON, TEXAS; WEDNESDAY, FEBRUARY 2, 2022; 10:00 A.M.

THE COURT: Okay, we're here on a hybrid hearing in Just Energy, Adversary Proceeding 21-4399. I'm going to ask parties in Court to come forward if you intend to speak.

All appearances today should be made electronically whether you're in Court or not in Court. That is in accordance with our Complex Rules.

So if you haven't yet made an electronic appearance, please go to the website and do so by the end of the day.

In any event, I do want to have voice recognition of those who are intending to speak today. So we'll start with people in Court who are intending to speak. If you'll come forward to the microphone?

We'll then take any one on the line that intends to speak, but again all appearances need to be made electronically eventually.

Mr. Tecce?

MR. TECCE: Good morning, Judge Isgur. For the record, James Tecce on behalf of Just Energy. My client, Joanna Davis, the general counsel is on the line, as well as my colleague, Christine Chin.

And I'm joined by my partner John Bash in the courtroom. And I will make my electronic appearance by the end of the day. I'm sorry about that.

THE COURT: That's okay. Thank you, Mr. Tecce.

Mr. Alibhai?

MR. ALIBHAI: Good morning, Your Honor. Jamil Alibhai from Munsch Hardt on behalf of ERCOT.

THE COURT: Thank you.

Mr. Binford?

MR. BINFORD: Good morning, Your Honor. Jason Binford with the Texas Attorney General's office on behalf of the Public Utility Commission of Texas. Joining me in the courtroom today is my colleague, Autumn Highsmith. And joining us remotely is my colleague, Lala Milly.

THE COURT: Thank you.

Anyone on the phone -- I'm sorry, go ahead, please.

MR. FIBBE: Sorry, Your Honor. George Fibbe, Baker Botts on behalf of Calpine. Joining me in the courtroom is David Eastlake and also on -- joining by video from Sherman and Sterling in Ian Roberts.

THE COURT: All right, thank you, Mr. Fibbe.

If anyone on the phone wishes to speak during today's hearing, please go ahead and press five star one time on your phone.

(No audible response.)

THE COURT: If you change your mind, you can still appear. I'm just trying to get it lined up so the court reporter can do a good job.

(Pause in the proceeding.)

THE COURT: All right. Mr. Binford?

MR. BINFORD: Your Honor, we had some discussions at least on this side. I'm not sure if the discussions were extended to the other side yet about sort of the order to take things.

We were thinking of taking it in essentially a back and forth approach. Where we would discuss the counts to begin with. ERCOT, I believe, is going to go first and then I'll go second on that. And we will stop with the counts as they're pled and turn it over to the Just Energy side to respond to that.

And then we will go back to our side and talk about the other issues include sovereign immunity and preclusion --

THE COURT: What complaints are there against PUC that you think are a live right now?

MR. BINFORD: Your Honor, --

THE COURT: The actual counts against PUC. Not that you dispute, don't dispute. What's a live complaint against the PUC right now?

MR. BINFORD: Let me grab my slides and lets get into it.

(Pause in the proceeding.)

THE COURT: And I ask that because I'm not sure that we have any live disputes between the Plaintiff and the PUC.

And Mr. Alibhai prefers doing heavy lifting by

himself. So let's see where we are.

MR. BINFORD: May I approach, Your Honor?

THE COURT: Yes sir.

(Pause in the proceeding.)

THE COURT: Are these all identical?

MR. BINFORD: Yes, Your Honor. And if you could make Autumn Highsmith the presenter, she'll bring it up on the screen.

THE COURT: Sure.

(Pause in the proceeding.)

THE COURT: Ms. Highsmith, you're now the presenter.

(Pause in the proceeding.)

THE COURT: Let me just get this set up right.

(Pause in the proceeding.)

THE COURT: All right.

MR. BINFORD: There we go. All right. The Court asked what counts are alleged against the PUCT. And my first slide as counsel --

THE COURT: That you think remain in dispute. Because I think in some instances you said we haven't filed an informal proof of claim, right. So, --

MR. BINFORD: You're right.

THE COURT: -- I'm not going to sit here and litigate whether it's a valid, informal proof of claim. If you haven't filed one that's all I need to hear.

And I'll let Mr. Tecce tell me we'd litigate something that you say you didn't do. But it's going to be hard.

MR. BINFORD: We have not filed a proof of claim, whether formal or informal. And we don't intend to. We're not owed any money from this client or from this Debtor.

THE COURT: So what claims are made against you that you contest? Made against you, not somebody else.

MR. BINFORD: They have alleged that in some sort of alter ego fashion, is the best way I can describe it, that we are the ultimate beneficiaries of these transfers even though that nothing can be shown that we actually received a transfer.

And we believe that's fatal to all four counts. That they have alleged these counts against us. We're here seeking dismissal of those counts against us. And we have other basis related to whether this should be -- this entire dispute should be adjudicated in this Court.

And that's the rest of these slides. We may or may not get to today.

THE COURT: You may or may not be a party. Let me hear from Mr. Tecce how it is possible that you received a transfer here.

MR. TECCE: Good morning, Your Honor. For the record, Your Honor, I think I may be able to short circuit

this.

When we filed the suit, we named the PUC as a defendant. Okay, at the time -- and is still the case in the Brazos proceeding -- the position that was taken by ERCOT was that they were an indispensable party to the PUC. And that relief could not be afforded without them. Okay.

So we didn't want to be chasing that after the fact on a motion to dismiss, so we named them. Okay.

A judgment against ERCOT would suffice in this case. Okay. And the -- in this particular case a couple things have happened.

First, ERCOT argued that it had no choice in its motion, paragraphs 13 to 14 and paragraphs 15 to 16, they had no choice but to follow the PUCT orders. Okay. That they --

THE COURT: I don't want to cross into ERCOT. I want to understand what claims you need to pursue --

MR. TECCE: Okay. I'm almost finished. I'm almost finished. We don't allege that they received a transfer. Okay. And we don't think that they're an indispensable party. Okay. And we think that we can get relief against -- if we get relief against ERCOT that that will be absolute.

Okay. And so -- I mean, that's where it ends.

THE COURT: Okay. I agree. I mean, --

MR. TECCE: And then for the record, I'd just say this last point, Your Honor, which is that if they are an

indispensable party, okay, then immunity doesn't exist for them because they're ancillary to exercise in rem jurisdiction.

Okay, but we don't think they're an indispensable party. It's a catch 22, right. We don't think they're indispensable party, they didn't get transfers. But if the Court finds that or ERCOT says that --

THE COURT: I don't think it is possible to have an indispensable party against whom one seeks no relief.

MR. TECCE: Fair enough.

THE COURT: So it's -- you're seeking no -- the only relief that might be there against the PUC is this sort of implied beneficiary. And I think that under Iqal & Twombly that does not state a claim that deserves a trial.

I don't think that it carries far enough. PUC doesn't get any of the money, PUC regulates. And it is not a beneficiary of an intended beneficiary.

So I am finding that there are no actual live disputes between your client and the PUC. I am granting Mr. Binford's motion. The PUC is dismissed as a party.

And I thank you for coming today, Mr. Binford. You're welcome to observe.

MR. TECCE: May I make one parting comment on this, Your Honor, which is -- and ERCOT will have an opportunity at the podium, is that normally what's going to happen on a

lawsuit, obviously I think we have a better argument will prevail.

One final point at to why we named them. We would feel kind of stupid if we got to the end and ERCOT said I can't do anything without the PUC's consent. And obviously, I know that how any judgment is satisfied will be dealt with after the fact. But that was part of the -- I just want to make clear.

THE COURT: I don't think you heard me criticize what you did. I think we're in a pretty unusual area of the law. I don't have a problem that you were looking at what was going on in other case, trying to find a safe route of passage.

I didn't intend any of that to be a complaint against the PUC or against you. I just don't think they're here -- I don't think that they are a party when you don't seek relief against them.

MR. TECCE: Okay.

THE COURT: So I'm dismissing them as a party with no record.

MR. TECCE: Thank you, Your Honor.

THE COURT: Thank you. As I said, Mr. Alibhai, I'm confident you can handle everything on your own, so.

And if you -- I'll let you know, if you want to go count by count, I don't care if that's why you have Mr. Tecce

here. If you want to do everything, that's fine.

So if you want to take a minute to talk to Mr. Tecce about the best way to proceed or if you just want to -- how do you want to go?

MR. ALIBHAI: I was planning to address the five counts and then we'd stop there. Let Mr. Tecce respond on the five counts. And then to the extent necessary to address abstention. And then to the extent necessary to address immunity.

So break it up into those three parts, if that's okay.

THE COURT: Mr. Tecce, do you mind if he breaks it up that way?

MR. TECCE: That's -- I just want to -- my presentation is, I need to establish your jurisdiction. I'll do that first then I'll do the five counts and then stop and then we'll do abstention and immunity. Just so you know.

THE COURT: Yeah, I just want to be sure that this all gets organized, right. I think that's all going to work if -- why don't I just give you-all latitude in terms of presentation. It's all argument. Argue what you want and we'll, as usual go back and forth until we're done.

MR. ALIBHAI: May I approach, Your Honor?

THE COURT: Yes sir. Did you want somebody to broadcast that as well or just in writing?

MR. ALIBHAI: Yes, Caitlin Roberts.

(Pause in the proceeding.)

THE COURT: Ms. Roberts, you are now the presenter.

(Pause in the proceeding.)

MR. ALIBHAI: For the record, Your Honor, Jamil Alibhai from Munsch Hardt on behalf of ERCOT. I'm joined by Caitlin Roberts, Russ Parker from Munsch Hardt as well. Mr. Elliot Clark from Winstead is co-counsel as well.

And as you can see, Mr. Lippman and Mr. Cornwell are appearing virtually. And our client, the AGC, Brian Gleason is also on line.

Your Honor, with respect to the question you asked Mr. Binford, and I appreciate the Court's ruling, a central component of this action is that the PUCT orders are illegal. And that to me is a necessary part of some of these claims.

And to the extent that we're going to litigate whether the PUCT orders are illegal, I think that the PUCT has to address that issue. And the way that it's done in the cases that are pending is that the PUCT is the party whom other market participants have sued in Travis County and in the Third Court of Appeals seeking a declaration about the order.

And so that is the reason that we do believe that they're a necessary party. We should not have to litigate that agency's order at its validity without that agency being

allowed to speak to it and the Office of the Attorney General.

So that's our concern about this complaint and the issue you're raising about why is the PUCT here. I don't believe that these particular counts seek relief from them. But the complaint does. The complaint is going to need an adjudication.

THE COURT: So I read the complaint -- and it's not that your point at a level isn't correct. But they are seeking a determination that your compliance with the orders wasn't required because the orders were illegal.

But it is ERCOT's actions that they complain of. And I don't know what the outcome is going to be if you-all had conflicting responsibilities. But they are not asking me to declare that the PUC has to do anything, is barred from, not barred from enforcing its orders.

They're just asking me to say that you couldn't charge those rates because you were not obliged to or appropriate in following the PUC orders. Those are slightly different.

I understand the concern, but they don't seek that relief against the PUC. So PUC not being a party to it, is going to be free to go on about its affairs.

MR. ALIBHAI: So as we address the counts, we can talk about this issue further. But I think that that's part of the problem with the way these counts are pleaded in the

sense that although they assert claims, all of those claims rely upon a finding being made by this Court about the orders.

And I don't believe it's just how ERCOT followed them or implemented them. They called them flat out illegal. They say --

THE COURT: Yeah, but there are two parts to the complaint. One is that the initial order was illegal and the other is that at some point you-all should have done something different even under the order.

So there are two parts of it and they both do deal with the order, but they deal with your clients own conduct with respect to those orders, is the way that I read it. And maybe you read it differently.

MR. ALIBHAI: Well, I do read that two parts. But there is that one part that requires the orders to be illegal in order to seek relief with respect to a certain time period.

THE COURT: Right.

MR. ALIBHAI: And so with respect to the issue that's raised about the last 33 hours is what it's called. The 33 hours beginning on Wednesday night to Friday morning. It's more about how ERCOT implemented the order or complied with the order.

But the first part of it with respect to when we were in an emergency situation and there was a load shed being directed and all those things are findings that were made by

the PUCT in its order.

And we'll look at the order and discuss that. But to the extent that they want relief and they need that order to be held illegal or unenforceable under Texas law. And there's conflicting arguments that they make in their response and in their complaint about whether it's improper under the APA or under PURA and those -- and compliance with the SFA.

And so to the extent that they make those arguments today or try to justify any of this relief that they're seeking on these five counts, I think it does call into question the validity of the orders.

And the Texas Government Code speaks to that very issue. That if there's a question about the validity or the applicability of those orders, that the PUCT is the party -- is the one to be sued in those state court fora and address that issue. Not ERCOT.

THE COURT: What do I do about the provision of 1334 that says that in a Chapter 15 proceeding I can't abstain. So how do I -- how do you want me to deal with this state law where I've got Congress telling me it's a federal issue, you're prohibited from abstaining?

It's a federal issue because we're showing comity to a foreign nation, right? That's what they say in 1334.

MR. ALIBHAI: But we're also showing comity to the states.

THE COURT: Well no, I have a statute from Congress. Doesn't say show comity to the states. It says don't show comity to the states in a Chapter 15 proceeding. You're prohibited from doing that Isgur said Congress to me. Don't do it.

MR. ALIBHAI: And we don't have a Chapter 15 case that we address Berford (phonetic) under. But I do think that Berford, the United States Supreme Court --

THE COURT: What do you mean we don't have a Chapter 15 case?

MR. ALIBHAI: I'm saying the Berford cases we cite.

THE COURT: Oh yeah, but the Berford cases that you cite and that Fifth Circuit case that you cite --

MR. ALIBHAI: Wilson.

THE COURT: -- Wilson that quotes 1334 was before 1334 was amended to say you may not abstain in a Chapter 15 case.

And that's a perfectly reasonable decision by Congress. I mean it's a logical decision. This is not an irrational application of it. Our Canadian friends get their orders enforced if they're not -- whatever the language is about inappropriate under offending federal statutes -- and they do that exclusively through the sister Bankruptcy Courts in the United States. And so I can't abstain.

And so if you're telling me that PUC is a necessary

party and they can only be sued in the State Court and Congress says I can't abstain to State Court, it sort of leaves me in a bind.

Which means I have to rule on each case individually, right?

MR. ALIBHAI: Correct. I mean, you do. And I don't think that Berford was somehow overruled by any amendment to 1334.

THE COURT: Berford remains. It just doesn't apply in Chapter 15 cases.

MR. ALIBHAI: Our view is that it applies in all federal cases.

THE COURT: It's a judgment rule made before Congress about this statute and this statute Congress adopted says you can't abstain in Chapter 15s. How can Berford apply?

MR. ALIBHAI: Okay. Let me address the counts first.

THE COURT: Okay.

MR. ALIBHAI: We can come back to abstention later if we need to. I believe that the Court can dismiss this complaint for a variety of reasons.

So, let me address count one, which is the avoidance of the transfers. And the complaint alleges that the Canadian Court approved a financing facility and authorized the payment of the disputed invoices to ERCOT. It uses the word

"authorized" in their own complaint.

The Canadian Court order that was presented to the Court said the Just Energy entities are hereby authorized and empowered to borrow this money. And they did so.

It further said that they are authorized and empowered, in paragraph 37, to pay and form all the indebtedness and that order was presented to Your Honor. I was not at the hearing, but Mr. Lippman was virtually.

But I've read the transcript. The Court was concerned about whether there was a remedy -- my reading of the transcript -- not to put words in your mouth, but my reading of the transcript was the Court was concerned about whether it was irrevocable.

But there was no issue about whether it was being authorized or not. In fact, the Court asked the question do I need to authorize this payment to ERCOT. And the counsel for Just Energy said, we are asking you to authorize payment to ERCOT, yes.

And so with that discussion that happened on that day, with the order that had been entered in Canada, the Court did authorize the payment and the final recognition order which is at Docket 82. Says, "The Court recognizes the authority to make the payments to ERCOT as granted by the final CCAA order." The Court did not add nor subtract from any such authorization.

So in our view, with respect to the question of whether the payment was authorized we believe that it was authorized by the Canadian Court and it was then authorized by this Court at the request of counsel.

And so whether it's an issue of authority or whether it's an issue of they should not be allowed to come back to this Court and say something different now. We believe that the authorization issue dooms Count one and should be dismissed.

THE COURT: Largely you were preaching to the choir. I just want to clarify something with you to be sure we're on the same page. I don't know how Mr. Tecce is going to answer this because I think you're largely right.

I think what we said is it's authorized. That doesn't mean that you can't seek remedies post payment, whatever those appropriate remedies might be, but it makes no sense to say it's authorized and you can seek remedies post payment including that it's not authorized.

I don't think we ever intended to say that. But if, for example, -- and I know you heavily contest this and we'll get to this -- if they're entitled to an actual -- if I order they are entitled to a refund, that's consistent with the order that we issued, not inconsistent with it.

It would be inconsistent with it if saying you can get the money back because you want it back without any other

reason other than you don't think my order went far enough.

And I -- if that's what you're arguing for I don't know how he's going to defeat that.

MR. ALIBHAI: That's what I'm arguing for.

THE COURT: Okay.

MR. ALIBHAI: And Your Honor will recall that there was a discussion and Ms. Berrows from the Kirkland firm discussed what the methodology was to seek payment. And that she discussed how the protocols worked.

Which was -- and Your Honor took a break to allow the counsel to talk about that and they came back online and Ms. Berrows discussed that on the hearing transcript.

THE COURT: I actually don't remember that detail, but I'm just reading my order and I have a heard time reading it other than the way that I've just described and you've agreed with.

MR. ALIBHAI: Understood. Count two. Count two relates to a disallowance of claims. There's a couple of problems. One there's no claim that's been filed and then there's an allegation that there was an informal proof of claim.

And with respect to the *in re: Expo* case that we've cited there are five elements that they must meet. None of those things happened.

THE COURT: Did I understand it, you're disavowing

having filed an informal proof of claim, right?

MR. ALIBHAI: Correct.

THE COURT: Yeah, one of the essential elements of an informal proof of claim is that somebody intends to file one, whether its stated or not.

So if you are alleging an informal proof of claim, I don't have a dispute and I'm not going to rule that it was an invalid informal proof of claim. There is no dispute.

And again, I know Mr. Tecce may not like hearing all this bad news, but I don't understand why you're not just correct on this one.

MR. ALIBHAI: I'll move on. Count three seeks turnover relief. We believe that Your Honor has addressed this issue in case called *in re: ATP Oil and Gas Corp.* And explained, as many courts have, that Section 542 is used to recover possession. It's inapplicable when it's title dispute.

And I think the most important language -- putting aside the title dispute language that a number of cases talk about, but Your Honor in citing a DC circuit case said, "The Debtor cannot use the term or provisions to liquidate contract disputes."

And here there's a contract dispute. They're claiming that under the SFA, the standard form agreement, that they entered into that they are entitled to be charged a

different amount.

THE COURT: I have a pretty narrow question for you on this one. First of all I think my ATP ruling was correct. I have no reason not to stand by it. Haven't heard an argument not to stand by it.

I'm not sure that this is a 12(b)(6) as opposed to a Rule 56 matter. And I -- so again, you know, I agree but can I determine from the pleadings -- and maybe I can -- that's not an absolute right. Because if it's an absolute right, then turnover applies.

If it's a right that is not absolute, then I don't think turnover applies. And absolute I'm using colloquially, I think. So can I determine that from the pleadings?

MR. ALIBHAI: Yes, so if we go back one slide again back to the case to ATP. The language is either title dispute, contract disputes, or otherwise demand assets who's title is in dispute.

We believe that based on the pleadings, as currently pleaded, this complaint pleads itself out of court.

THE COURT: By -- their complaint?

MR. ALIBHAI: Correct. And I would point, for example, to paragraph 56 that Just Energy disputes no less than $274 million of these invoiced amounts. And they said that they authorized the payment of the disputed invoices.

Your Honor can also take judicial notice of the

first day hearing where they discussed the fact that they needed to pay this amount because they didn't want to be or have any issues with their customers or with the regulators regarding failure to pay. And that they did dispute it. That they were going to seek a remedy under the protocols with respect to those.

And so there's allegations in the complaint, there was proceedings before Your Honor that show this is a disputed title over this money. I would also say that with respect to the complaint alleges a breach of contract.

And in paragraph five, similarly ERCOT's actions found no support under and were inconsistent with its standard form market participant agreement with each Plaintiff, collectively the SFA.

So that pleading alone is sufficient to show that they've not state a plausible claim. Taking those allegations as true, they believe that there's a contract dispute between them and ERCOT and that there's a dispute as to whether we should have the money or not.

Now, of course, it's important and this is just the background on the issue, is that ERCOT is a revenue neutral entity. They've not even pleaded -- if we get past the dispute issue -- that this money is in ERCOT's hands.

They've also not pleaded with any specificity who made what payment and which payments they're seeking to --

THE COURT: So, I'm not sure that I -- up until now I'm following you. If you have an undisputed account receivable from Walmart, solvent company and Walmart won't pay the undisputed account receivable because you're in bankruptcy. I think I can order that payment.

And I don't need to trace money that Walmart got back to those invoices. It's an undisputed account payable. I think the turnover statute probably does apply.

So I don't know that I need to find a race within ERCOT itself as opposed to an undisputed right that would entitle turnover. That maybe that you then get a judgment that you can't collect and you've got to go enforce it.

But why would I need to find a race there to track down?

MR. ALIBHAI: Well, the reason I raise that issue is because with respect to turnover relief an example you gave is that if there's an undisputed --

THE COURT: Account payable.

MR. ALIBHAI: -- account payable --

THE COURT: Account receivable in the hands of the Debtor.

MR. ALIBHAI: -- accounts receivable. That's something that you would determine first. You know, let's say stipulated to it. We're not saying this is undisputed. In fact, we believe it is disputed.

THE COURT: No, I got that. But I'm trying to figure out why I need to find a race. You said there's no money in their hands. I just don't think that's one of the turnover standards. Because if it's an undisputed amount, then I don't think you -- you don't have to go litigate an undisputed amount to then get an order to pay it.

MR. ALIBHAI: Understood.

THE COURT: And so I make that distinction in your argument. I'm not sure it matters much here. But I don't think I need to trace the money. And if you think I do, I need to understand that because it might be some additional issue.

MR. ALIBHAI: So I think following ATP, looking at the complaint as pleaded, the reason that it's a 12(b)(6) issue is because taking those allegations as true, and applying the ATP case the standard -- that many courts apply, that this complaint fails to state a claim for relief on that issue.

THE COURT: So when I -- let me assume you're right for a moment and then hear what Mr. Tecce has to say.

Would I dismiss it or would I abate? Let's assume we get down the road and three years, we finish the trial in this and I say nope, ERCOT owes the money.

Can the turnover portion that's now undisputed in the sense of there's a judgment, can the turnover come back on

live to have a mechanism for a collection?

MR. ALIBHAI: So, with respect to whether there's like a post-judgment collection remedy.

THE COURT: No and I'm not thinking post-judgment collection remedy. I'm thinking motion for partial summary judgment, your side loses, and I say you owe $10 million.

It's not longer disputable because we have that there. Can they then win turnover so that what I need to do is -- do I need to dismiss the turnover or under your argument abate the turnover in case we ever get there?

This case has these unusual features of, you know, what would collection ultimately look like. And so I'm trying to sort out in my own mind if you should lose an argument like that, what should happen to this count.

MR. ALIBHAI: This count should still be dismissed and the reason is there is a contract between these parties that also incorporates the protocols. And the protocols provide for how payment would happen if this Court ordered a payment.

And that would be the proper mechanism is to go under the protocols. And so going back to the issue -- I'm going to address this a little bit later -- is that because ERCOT is revenue neutral, it's paid these monies out that are received to the people that were owed that money.

And I know you've been involved -- Your Honor's been

involved in other cases involving ERCOT and the PUCT and these issues.

THE COURT: Not like this one, so.

MR. ALIBHAI: Not like this one.

THE COURT: You're not going to bore me if you want to teach me something here. Go right ahead.

MR. ALIBHAI: No, and so that -- I wanted to just raise this sort of issue of how ERCOT works in the sense that there are people that generate the electricity and ERCOT buys it from them. It's the central party to those transactions.

THE COURT: It's the buyer and the seller of --

MR. ALIBHAI: It's the buyer and the seller, exactly. And so, those people who, you know, really owed Just Energy owed money to got -- they paid it to ERCOT and ERCOT in turn had to pay to people that it owed money to because it had purchased from them.

With respect to how ERCOT raises money in reference to having to pay someone back, this was discussed a little bit during that hearing before Your Honor. But there's an entire section of the protocols under Section 9 that discusses how that would happen.

And what would happen in this particular case, if that happened, is that ERCOT would have to go to the market and would have to issue a notice that it needed to raise these moneys, the $10 million number, and the taxpayers and the rate

payers of the State of Texas would be effected by that.

And would have to pay that back through the different people and there's a very complicated formula that based on load.

THE COURT: I do understand that --

MR. ALIBHAI: Yes.

THE COURT: -- as a position taken by your side. And I think I do understand that position. If it turns out that you owe back 10 million, that to me would seem to be a defense to turnover, not the failure of turnover to state a claim.

And I know we're dancing on the head of a pin maybe over ultimate eventualities but nevertheless, I'm trying to figure out whether abatement if more appropriate so you can then make that argument at the right time rather than today.

Because it's not -- neither one is really active today. It's almost like I should abate this and abate your argument and see if we ever get there, which seems unlikely to me, but possible.

MR. ALIBHAI: I understand the Court's concern. My concern is that if this fails to state a claim today, but is available sometime in the future, that it seeks hypothetical relief or it's not ripe. And for that reason it would be dismissed because it's not ripe.

And then if there is a time they would have the

opportunity to amend their pleadings and seek leave to do so if it was appropriate. But they would have to show at that time that it was appropriate.

THE COURT: So it seems to me that's a good route if we're not going to be stuck with some law of the case order. If I were to say today I'm dismissing it for failure to state a claim. If you're telling me you don't think that would preclude them from re-raising it as circumstances change, that creates an interesting avenue of remedy.

But I don't want to forget that sometimes if you dismiss a claim, you can't come back and revive it later because it's the case. And if you're telling me you don't think it would be under these scenarios, I need to hear that pretty clearly.

MR. ALIBHAI: So I believe that some of the claims that we've discussed already -- for example the unauthorized transfer issue -- that should be dismissed with prejudice. The Court should make a finding on that issue.

This claim, based upon what Your Honor said, about whether they may need to raise it in the future and whether it may be appropriate or not, can be dismissed without prejudice.

But it shouldn't be something that we would have to defend and would be something that they could conduct discovery on or --

THE COURT: Yeah, I'm thinking of either abating it

or -- you're right it may be dismiss without prejudice. And obviously we're talking out loud here. But I don't see it as a current live issue.

MR. ALIBHAI: Correct and for that reason it shouldn't stay in a live pleading.

THE COURT: Okay, thank you.

MR. ALIBHAI: Count 4. Count 4 seeks set off. And a couple of points here. We believe that set off generally isn't applicable in Chapter 15 cases because there's a lack of a federally created estate. 553 and 558 both reference the estate.

This Court is not going to have an estate. In fact, as I remember your order, I believe says that any claim has to be filed somewhere else. With respect to setoff that the way they've raised it, they're seeking to set off against some future --

THE COURT: You-all talk past each other a little bit on this one. And let me tell you how I think you-all are talking past each other so you can address this issue.

Their primary position on this is that set off exists independent of 553 or 558. That, in fact, if you read 553 it doesn't even talk about Debtors set off rights. And then they refer to case law that says that those set off rights have an independent common law origin almost.

And I don't know that you're addressing the non-553,

non-558 set off issue in this argument. And I would like to hear your answer about whether there can be an independent life to a set off right.

So here's the hypothetical, again. And in the end say, okay you owe 10 million back. You say under our protocols we don't have to pay it. Under state law you can't make us. And they say well we just want to set off the amount we're going to pay to them.

Tell me when in the code would preclude that remedy if you do the won't pay.

MR. ALIBHAI: First of all with respect to your question, I'm not sure that ERCOT would take the position that it's not going to pay.

THE COURT: I'm not sure that they would either, but they could.

MR. ALIBHAI: And again, I think that's part of the problem with this claim as well, just like the last one. That it presupposes a judgment exists.

And so with respect -- let's talk about set off generally in a non-bankruptcy context. A set off claim would usually be asserted by the defendant who says you're claiming that I owe you money, but in response there's money that you owe me and I get to off set whatever I owe you against that.

I'm not aware of set off being used as a cause of action by a plaintiff either in common law or Texas State law

that allows for that.

In fact, in Texas procedure, it's an affirmative defense that a defendant would raise to a claim that's being brought against it. They're trying to use it offensively and I think that what you said about 553 in terms of it, you know, not for a debtor. I think that's sort of how set off works. That it's not something that a debtor would raise or its not something that a plaintiff would raise. It's something a defendant would raise in response to a claim being brought against it for something.

If -- and I understood Your Honor at some of our past hearings say I'm not going to fashion how this judgment gets paid if there's ever a judgment. And so I believe that in this particular case, if we ever got to that point where there was a judgment, then we would have to address what is the remedy under the contract.

Because it is spelled out under the SFA and the protocols how such a judgment would get paid. But I believe that it would be inappropriate to use set off in that situation when the parties have already agreed how that would work.

And so we'd come back to Your Honor let's say there was a judgment and they said I want to do set off, we'd have to go through the contract provisions and the protocol provisions and see whether that's a remedy available.

Because if it's not a remedy that parties have agreed to, it should not be available.

THE COURT: I'm not sure how that's failure to state a claim, though.

MR. ALIBHAI: Well, they've asserted under 553 and 558 and we don't think it applies under 553 or 558. And they've not made any showing that this is an affirmative claim that's available to them today.

What their complaint says is at the end of that count -- and that's slide 20 in paragraph 107 -- going forward to the extent the transfers are avoided or otherwise decreed unlawful, then they want to seek set off.

And that is an unripe hypothetical claim. And if we're going to dismiss the claims that we've already talked about, this one depends on the transfers being avoided. And there is no live claim if Your Honor grants the motion to dismiss with respect to counts 1, 2 and 3.

THE COURT: Well, I understand the argument. But, you don't think that there could be under Rule 12 an argument that instead of waiting for the PUC procedures to occur, we're going to invoke our common law set off rights?

Which you're disputing they can do, so we have a dispute about that. It may not be a dispute that's ripe.

MR. ALIBHAI: It's neither ripe nor pleaded. And so the complaints deficient in the regard that it only pleads

under 553 and 558. If we turn to Count 4, it's titled -- Count 4, against ERCOT, the PUCT set off, 11 USC Sections 553 and 558.

The paragraphs in that count reference those code provisions. And so with respect to how its pleaded, if they want to try to replead a common law set off claim we can address that, you know, at another hearing.

But what they're basically saying is that they want to assert a breach of contract claim. But they don't want to do that for whatever reason and they have not done that.

So that's why I believe that as it is pleaded, as it sits today it's neither ripe nor properly available under those code sections. And if the Court believes that maybe there's a common law way to assert it, or they're able to find a way to do that, they can try to do that.

But they should be required to replead it to address what the correct mechanism is to seek set off and make sure that's its live and ripe dispute. Because this Court will not wade into hypothetical issues.

THE COURT: Okay.

MR. ALIBHAI: Count 5, Your Honor, is a very short count that seeks some amount of the money back based upon a claim under the CCAA. We move to dismiss because we do know what in the CCAA was applicable or being asserted.

In response, we received an argument that we're

using the BIA, which is incorporated in the CCAA. That's not in the pleading. It's improper as we cite in our case. I believe it's the *Wilhight* (phonetic) case from the Fifth Circuit, to try to fix pleading deficiencies a response. The complaint has to stand on it's own and this complaint states nothing about the BIA, but --

THE COURT: I read the two cases you cited and I just want to be sure that we're in agreement as to what they say. That none of those get in the way of me saying -- I don't think -- neither of the two cases you cite get in the way of the Court saying I don't think that's adequate. I'm going to give you an opportunity to replead and make it adequate.

Do you -- in other words, you can't become adequate because of what they put in their response.

MR. ALIBHAI: Correct.

THE COURT: But that could trigger a right to amend, right?

MR. ALIBHAI: It could and as I was looking at the response last night, it occurred to me that they've not sought a motion for leave to amend the complaint. They had that opportunity as a matter of right. They chose not to do it even though we've raised this issue, they knew there was this deficiency they could have done so.

So the 5th Circuit has addressed that issue and said

that a party who wishes to seek leave to amend must do so in a proper pleading, state what they will plead with respect to that. And what happens in this particular case, even the response, is they say, Oh, here's the elements, and we quoted from the response, Page -- Paragraph 67, but they don't make any effort to show that any of these elements could be pleaded or would be pleaded or how it would be dealt with.

THE COURT: I'm concerned about what you're telling me, and I want to hear more about it because normal practice here is at a 12(b)(6) hearing, you know, normal practice before me, and it may be incorrect in all practices. If there's a 5th Circuit cases that tells me that, I need to see it. But the normal practice is, and if I'm in a 12(b)(6) and if a problem can be cured by amendment, I normally would then allow an opportunity to amend. And I think the 5th Circuit normally reverse people that dismiss cases without that giving that opportunity.

That may be triggered and this is now a finer point by somebody orally saying, We'd like the chance to cure that by amendment. But if you're telling me they said it has to be in a written pleading seeking leave to amend, that's new to me and I need to understand that better.

MR. ALIBHAI: And the case that I'm looking at is the 5th Circuit *Willard v Humana Health*, which is 336 F.3d 375, and they say a full motion is not always required so long

as requesting party has set forth with particularity the grounds for the amendment and really sought "a bare request in an opposition to a motion to dismiss without any indication of particular grounds on which the amendment is sought does not constitute a motion within the contemplation of Rule 15(a)".

THE COURT: Okay.

MR. ALIBHAI: And --

THE COURT: That all makes sense to me.

MR. ALIBHAI: And there's also a case called *Law v Ocwen*, O-C-W-E-N, 587 F.app 790 which is a 2014 case that references the same concept.

So with respect to this count as it's pleaded, even through the response, it's not been fixed and so with respect to all five counts that are asserted against ERCOT they should be dismissed with prejudice with respect to the first two and without prejudice with respect to Counts 3, 4 and 5. And we can address whether they've met the requirement to try to re-plead those issues.

THE COURT: All right. Thank you, Mr. Alibhai.

Mr. Tecce, you are welcome to wear that mask, but I know you haven't been wearing it, you're not required to wear it.

MR. TECCE: I appreciate that, Your Honor. I'm only wearing it because I'm going to approach because I have some slides I'm going to hand out copies and then I'm going to take

it off. But thank you very much.

THE COURT: Thank you. Who's going to be showing the slides?

MR. TECCE: I believe it's Christine Chen.

THE COURT: All right. Thank you.

(Pause in the proceedings.)

MR. TECCE: Good afternoon, Your Honor. So --

THE COURT: Let me just get Ms. Chen up.

MR. TECCE: Sure. I'm sorry.

THE COURT: Ms. Chen, you're now the presenter.

MR. TECCE: Okay. Good. Are we sorted? I think were sorted. Okay. Your Honor, I want to get to the counts. You went to the 5th Circuit and permissive abstention in the *Firefighters* case. I just want you to know that when we get to that we have a lot to say about that.

I just think given the abstention doctrine, given what the statute says, given what *Firefighters* says, given what *Burford* says that it's basically discretionary, and in light of the fact that we have a Chapter 15 case, which makes this very unique, and there are two courts that are issue, the Canadian court and the US court, abstention is not appropriate to take cases away from two counts in a Chapter 15 case.

And so I don't want that to go -- we'll get to that when we get to that, but you raised that initially and I want to respond right away and let you know that we have a lot to

say about that at the appropriate time.

I will address the counts *seriatim*, Your Honor, but I just want to begin briefly because I do think, as with a plan, if we have to establish that you have jurisdiction over our claim, then it's relevant to look at the nature of the claims when we do get to abstention down the road. But we have a filed a five-count complaint. We're a Debtor in a Chapter 15 case, and we filed a five-count complaint, and each one of these counts is a core claim under the Bankruptcy Code.

And, Ms. Chen, if you can just go to Slide 2.

We gather the sections there that they fall under, we bring fraudulent conveyance claims, we bring turnover claims, we bring claims arising out of Chapter 15 cases, we give -- bring orders to turn over property. So we have stated core claims and the Court's jurisdiction is core under 157(b). And so there is authority to exercise jurisdiction over these claims.

Even though it's incident to deciding these claims, Your Honor, you will consult state law, Defendant's -- I think I take their argument to mean that if you consult state law that maybe they're not core anymore, that maybe you don't have jurisdiction, but that's a fairly reaching occurrence. We detail all the examples of where that happens in our papers.

On Slide 3 -- Ms. Chen, if you can flip it very quickly -- we list the case law there where you do look to

state law incident in deciding core claims. That doesn't make the claims any less core. Contract assumptions, assessing taxes and fines, determining property of the estate, determining whether property's been transferred, in all of these circumstances the Court looks to state law and the claims remained core. And they're no less core because of that. And we think that's important.

And so under the circumstances you're certainly capable of examining in connection with deciding bankruptcy claims whether transfers that were made in response to invoices that were based on what we submit is not founded in state law, would not comply with state law, you're certainly capable of making that examination and it doesn't make th claims any less core.

The last point I make, Your Honor, well, two more points, there is, to the extent that there's not a core jurisdiction, there certainly is related to jurisdiction.

If we could just go to Slide 5, Ms. Chen.

You certainly have related to jurisdiction here, Your Honor. The *British-American* case says that to the extent that there's any impact on the Chapter 15 cases and/or the foreign state, then there is related to jurisdiction. In that particular case, a Chapter 15 case, they allege breach of fiduciary duty against directors, the Court exercised related to jurisdiction over those claims and determined that you

could look at either the administration of the Chapter 15 case, or in the second bullet there, you can look at the estate administered at in the foreign proceeding.

And this particular lawsuit, Your Honor, certainly is going to have an impact on what happens in Canada, it goes to the company's liquidity, if these funds come back, they'll certainly facilitate the restructuring effort. And so you have core jurisdiction and related to jurisdiction.

And the last point I'll make about jurisdiction, Your Honor, is that there is no requirement that we exhaust administrative remedies before bringing suit. This is an argument that's made by ERCOT. And we have our authorities on this on Slide 6. To the extent that each of these claims has an independent jurisdictional basis, then there is no requirement that we exhaust administrative remedies.

The Code jurisdictional provisions control, and so we cite *The matter of Benjamin* case, the *BriteCo* where there was social security benefits and overpayment, the debtor wanted to challenge the overpayment as not compliance with the Social Security Administration's regulations, the Court said that would be something the Bankruptcy Court would exercise jurisdiction over and would not require administrative exhaustion.

BriteCo Funding, in a dispute with the Franchise Tax Board, does not require administrative exhaustion because

there are fraudulent transfer claims to recover payments made for directors' and officer' personal expenses on a fraudulent transfer basis. *Jones*, another case, a set off by a state agency of medical expenses against tax refunds, no requirement to exhaust administrative remedies because they had independent jurisdictional basis.

In the Defendant's cases, Your Honor, *Encore*, *Entergy* and *Penny* (phonetic), they are distinguishable, Your Honor, none of those involve bankruptcy courts or cases or core claims. The *Encore* case was a dispute over whether or not electricity was provided properly. *Entergy* was a merger case where there was a lawsuit involving the PUCT. The rate-setting cases were ongoing and then the deregulation came down to Texas. *Penny* is an Individual With Disabilities Act. Each of those cases examined administrative exhaustion in that context and not under the bankruptcy context. And so the first step for us, Your Honor, we submit you have jurisdiction to decide the five counts. Okay.

In terms of the counts themselves, very briefly, Your Honor, if we could go to Slide 7, there's a broad reservoir of power within Chapter 15, and we're going to get into this even when we get into the abstention cases. The Chapter 15 cases in the 5th Circuit recognize that there's a broad reservoir of power. None of the counts in our complain are prohibited under 1521(a)(7) of the Code. 549 which I'll

get to in a minute, that applies automatically upon recognition.

For the others, 1521 allows the Court to authorize any appropriate relief where necessary to effectuate the purposes of the chapter, and that includes in trusting all or part of the Debtor's assets within the United States to the foreign representative and then granting any additional relief that may be available to the Trustee except for relief under 522, 544, 547, et cetera.

And so under 1521, Your Honor, we think the appropriate relief would cover certainly turnover, that was in Section 304, the *Beachill* (phonetic) case from the 5th Circuit Court of Appeals says that if it was authorized under the -- over the prior section, it certainly would be covered within -- in Chapter 15. And then the other sections are not prohibited from 1521.

And to the extent that you don't get there on 1521, you still have 1507 which authorizes an even broader reservoir of power to include additional assistance which is broader, and the *Beachill* case looks at the difference between those standards and recognizes that.

And so (indiscernible), Your Honor, the PUCT raised this, which is that 550 is in the list of prohibited sections of 1521, and to the extent that you recover property under some of the avoidance sections that we've cited, the inclusion

of 550 would seem to suggest that we're not able to get the property back because it's prohibited under 1521.

And here, Your Honor, I'd ask you to turn to Slide 8. I don't think that that's the right reading of the statute. The only way to read 1521, which says that 550 doesn't apply harmoniously with 1520(a)(2), which says that 549 applies automatically, is to limit the reading of 550 to the other avoidance actions in 1521, specifically 544 and 545.

And if you look at the legislative history, actually, Your Honor, which is cited in the *Condor* case which we cited, they know -- and we highlight the language there -- that 1527 has the related avoiding powers, 1521(a)(7), but the avoiding power in 549 and the exceptions to that power are covered by 1520(a)(2). And so we think the history, legislative history supports the application of 550 only to the other avoidance sections in 1521(a)(7).

And that lastly, Your Honor, the treatises sort of looked at this. *Colliers* say that this is just sort of an issue that's come up, no court's really addressed it, but you could always used 105(a) to the extent necessary.

And so that takes us to Count 1, Your Honor, which is the 549 count. I understand -- I heard your remarks earlier, and let -- I'll just explain the theory here. There's -- it's more legal than it sounds, Your Honor, in terms of our challenge to the payment. Okay. In a sense that

if we start, Your Honor, by looking at -- let's go to Slide 9.

Okay, we think that if you look at Slide 9, look, this is the context in which the Court authorized the payment. And on the left is what ERCOT said in the green and that's what's in their brief, and on the right is what the Court said. And so leading up to the order, let's just look at this in terms of a time, all right, the Court -- you asked, Well, the Canadian port approved the DIP, so what should I do.

And -- what do I do, and counsel responded correct, counsel for the company, We're asking Your Honor to recognize that on a provisional basis under 1519, and you say, Yeah, but do I need to authorize the payment to ERCOT, and counsel says, We're asking you to authorize payment to ERCOT, yes, because if you approve, if you recognize the order for the limit purpose that we're asking you to, that recognition includes the Court's approval of making the payment to ERCOT.

Okay. And then after that a conversation ensues where you express concern about whether or not the payment's going to be revocable or not. Okay. And you indicate that you want to make sure that the payment can be revoked and you even specifically refer to the revocability of the flow of funds. Okay. That once the money comes out is it going to be revocable, is that flow of funds going to come back into the estate. Okay. And you get assurances to that effect.

And let's go the next slide, Slide 10. You enter

your order. Okay. And your order recognizes the authority to make the payment as granted by the Canadian order. Okay. And you clarify that it neither adds nor subtracts from that authority.

And so in this particular circumstance you didn't -- there's no release of the right to bring claims under the Bankruptcy Code if they exist. Okay. There's no requirement that we have to go back to State Court or to go through the administrative process. This is a reservation of rights to try and revoke the payment. Okay.

Now so the question is, is it authorization for 549 purposes, Your Honor. And that's why I say it's a legal argument, because what 549 requires, and this is the *Fairfield Sentry* case, is that there's a showing that not only is it authorized by the Court, but it's authorized under the title. All right. So look on 549 it says, it's not authorized under this title or by the Court. Right.

And what the *Fairfield Sentry* case says, and this is the argument, is that in that particular case the liquidator for the Fairfield funds entered into a sale contract with Farnum to sell the Fairfield's claims against the Madoff estate, okay, and claims trade. And so they signed a contract, the contract obligated them to get Court approval of the transaction, and before the did that the Madoff estate announced, We have another $5 billion coming in and, you know,

now the claim's worth $40 million more. Okay.

And so now Kreeze (phonetic), that's the name of the clerk, he tries to get out of the contract, and so he goes to th Bankruptcy Court but before he does Farnum gets to the foreign court and he gets an order from the foreign court that says, You've got to forward with the transaction. Okay. And so the lower court, the Bankruptcy Court says, I have to show comedy to that decision, I have to follow what that foreign court did. And you just have seller's remorse, so I don't have the authority to do anything here, and you are obligated to go forward. Okay.

And that goes up on appeal and what the 2nd Circuit says, and it takes instruction from the *Vitro* (phonetic) case heavily influenced by the *Vitro* case.

If we could turn to Slide 11, Ms. Chen.

It looks to the *Vitro* case, and what it says is, there's two fundamental points. The first one is, you don't have to necessarily show comedy all the time. There are certain breaks on comedy. Okay. And one of those breaks is in 1520(a)(2) which makes 363 applicable in a Chapter 15 case automatically.

And so you, lower court, you had an obligation, number one, to conduct a 363 analysis to make sure that there was a good business reason to grant the application, okay, and to secure for the benefit of the creditors the best possible

bid, you had an obligation to look to make sure that you satisfied 363.

And this transaction, Your Honor, involved the filing of two bankruptcy cases, the Chapter 15 case, the case in Canada involved getting debtor-in-possession financing. This was not an ordinary course of business transaction for this company. Okay. This was a 363(b) transaction and no 363(b) showing was made. So I'm not saying that you never said we don't authorize it, although I don't see that in the order. But as a legal matter there had to be that showing.

THE COURT: Both today and in your pleadings you argue, and let me assume you argue meritoriously just for a moment, that I made a mistake in approving it. You argue I shouldn't have approved it, you argue that it was error to approve it. No offense taken.

MR. TECCE: Okay.

THE COURT: But I nevertheless approved it and it became a final order. To now tell me I did it wrong doesn't make it unauthorized. It makes it erroneous.

MR. TECCE: No, I -- to be precise I'm not saying you did it wrong.

THE COURT: No, but I'm just --

MR. TECCE: No, no --

THE COURT: -- even if I did it wrong, I'm trying to go to your best argument, is I did it wrong. If I did it

wrong, I still authorized it.

MR. TECCE: But it's not -- I'm not saying you did it wrong, I'm saying you didn't authorize it as a legal matter because to authorize it for purposes of 549 you'd have to make a -- there had to be a 363 showing for it to be authorized as a legal matter.

THE COURT: 549(a)(2) includes something that is either authorized only under 303 or 542, or that is not authorized under this title or by the court. Chapter 15 is part of the title.

MR. TECCE: Right. And so what I --

THE COURT: And I authorized it.

MR. TECCE: But Chapter 15 also includes 1520(a)(2).

THE COURT: Uh-huh.

MR. TECCE: Okay. And so that's -- if we go to Slide 11, this is what the fee -- what -- this is what --

THE COURT: That's telling me I got it wrong.

MR. TECCE: There had to be a showing, Your Honor. I don't -- I'm not saying you do --

THE COURT: You're telling me -- you're telling me there wasn't a showing, you shouldn't have done it. I'm willing to just --

MR. TECCE: No, what I'm saying --

THE COURT: But I'm willing to just accept that for the purpose of what we're doing because it doesn't matter. I

authorized it.

MR. TECCE: If ERCOT wanted protection, okay, I mean I think the right question, if we're being frank here, Your Honor --

THE COURT: It's not an ERCOT motion, this was your motion.

MR. TECCE: Right. But if we're being -- the question -- you may say to me, Look, let's assume you've made out the elements on this claim. But now what, now what happens, what does this really get you. This is what I was -- to be perfectly candid, let's assume I can prove on 549. What does this get us? Okay. It gets an order that at the lest the post-petition portion was not authorized and would come back. But we still have to dispute what happens to it when it comes back. We still have to have an argument about --

THE COURT: I don't see how you possibly get here. I'm understanding your argument, but your argument all turns on whether this order was right, not on what it says. The order authorized.

MR. TECCE: Okay.

THE COURT: It authorized it because of Chapter 15, and it may have authorized it erroneously. You sought the order, don't forget that.

MR. TECCE: We did, Your Honor. We did seek the order.

THE COURT: Yeah, and it's really hard for you to then complain of an error in the order that you sought.

MR. TECCE: I mean we -- there -- I mean our point on seeking it was we're basically facing a liquidation if we didn't make the payment and --

THE COURT: I got it, but, you know, how often does financial distress not come into play in a bankruptcy case? It isn't going to get you out of --

MR. TECCE: Understood.

THE COURT: -- you did what you did. You know, you could have decided liquidation was better, you decided making the payment was better, you asked me to say okay, said okay, you make an argument maybe I shouldn't have granted you relief, but no way that I didn't authorize it. I authorized it.

MR. TECCE: All right. I understand. I understand. I just want to make one final point before I go to Count 2.

THE COURT: Yeah, go ahead. No, I'm not trying to cut you off, I'm just --

MR. TECCE: No, I mean I'm sorry to say -- so I mean our argument is that as a legal matter the -- even the Canadian court could not dispense with the requirements of 363, meaning -- meaning like --

THE COURT: So you and me and they all made a mistake. So what? I mean I don't mean to make light of the

mistake. I'm not even sure it's a mistake --

MR. TECCE: Okay. But also let's assume that --

THE COURT: But assuming it's a mistake it doesn't matter.

MR. TECCE: But if it wasn't -- then it wouldn't -- if there's -- if there's an agreement that there's a requirement to make the 363 showing, okay, that wasn't made.

THE COURT: Well, let me -- first of all, I'm not sure that I necessarily agree under this circumstance if there was. But I'll buy that for a moment, and I didn't do it. You've still got an order that authorized it.

MR. TECCE: We got an --

THE COURT: You want me to vacate that order?

MR. TECCE: No, we got an order that recognized the authority of the Canadian court, and if ERCOT wanted a greater level of protection, then there would have been a greater showing. And without it they don't get --

THE COURT: It was your motion, not ERCOT's.

MR. TECCE: All right. I'll move on at this point. Thank you.

THE COURT: Good. Go ahead.

MR. TECCE: Okay. The 502 count, Your Honor, that's Count 2, I think there's just more to this than -- I'll concede that it's not an informal Proof of Claim issue. I know what it says in the complaint. The have not made out an

informal Proof of Claim. I want to be very clear about the Record. They have not made out an informal Proof of Claim, they've never filed a Proof of Claim. So they -- and they don't dispute that. Okay.

THE COURT: And they don't dispute that.

MR. TECCE: Okay. The point of the 502 claim is that they do -- they have funds of the estate that -- and now we'll get into whether there's an estate or not, I won't speak to that -- but they have the property of this company and they have -- are of the position based on what's in the invoices that we owe them that money.

Okay. And we need to reconcile whether or not that is true or not. We don't believe we owe them the money that was reflected in the invoices. Now I understand we paid them, and so what we're asking in sum and substance in the 502, we don't agree, we object to their position on the invoices, we've reconciled this claim. I mean that's really all we're saying here.

That's what the 502 count is. If you don't -- if you -- we're asking the Court --

THE COURT: I actually don't understand what you're telling me.

MR. TECCE: Okay.

THE COURT: So why don't you --

MR. TECCE: Sure.

THE COURT: -- I mean it's not -- I would like to understand but I don't.

MR. TECCE: Okay. In a normal circumstance somebody would file a claim and you would object to the claim and you would argue the claim's not supported under state law. Okay.

THE COURT: Okay.

MR. TECCE: In this case we paid them, in this particular case there's not -- there's no -- there are in 15 cases, some Chapter 15 cases there are claims, administration procedures that are installed. There are none here. Right. So all we're all asking is to say even though they didn't file a Proof of Claim, even though there's no -- even though there's no claim administration procedures in place here, it would facilitate the administration of the Chapter 15 case if we reconciled whatever claim it is that they have against this company based on those invoices here.

THE COURT: I thought, and so maybe I've got my --

MR. TECCE: And the final point, Your Honor, is to the extent that any of it is avoided, if we avoided under 542, if we avoid avoidance statute, okay, then they may try and file a claim at that time, and in which case there would be at least some type of 502 disallowance, 502 disallowance until they returned property. But that's the only other point. But I'm sorry, I cut you off.

THE COURT: Yeah, look, I thought the undisputed

facts were a little bit different than what you just described. I thought they were that you paid the invoices, not that you made a deposit with ERCOT --

MR. TECCE: No, that's --

THE COURT: -- against payment of the invoices. So if you paid them, there isn't a claim. There may be a claim by you for a refund, there may be a claim by you for other rights, but I don't think they then have a claim. So that's why I'm not really following here.

MR. TECCE: We didn't make a deposit, we paid them the money and --

THE COURT: Yeah.

MR. TECCE: Understood. All right.

THE COURT: Okay.

MR. TECCE: All right. 542, which is the third count, Your Honor.

Slide 12, Ms. Chen, please.

Okay. First of all, the absence of an estate is not relevant to this particular claim. I would submit, Your Honor, that we've made this out -- we've made out this claim on the basis of what's alleged in the complaint. We gave them -- I understand that it's not a house or a hard piece of property, okay, but we did pay them, okay, on response to those invoices.

And to the extent that -- and that's property that

we could have used in 363 which is what the statute says, it says if they have property of the trustee that we can use, sell or lease under 363, we -- they have to deliver it to us. That's what it says. And that's -- and so the defenses by them are, number one, it's in dispute so we don't have to give it to them, I'll speak to that; number two, it's really a breach of contract claim. We're not alleging breach of contract.

On the first one, first of all -- oh, I don't know that they made this but 542, turnover, this clearly applies in a Chapter 15 even though not specifically enumerated, the case law on that we cite that on our slide here. So we have 542. It was a specifically-enumerated remedy under the old 304.

Secondly, it is disputed, but this is the *Contractor Tech* case and this is the *Mortgage Ameri* (phonetic) case. Even property that's disputed belongs to the Debtor, in this circuit at least. So there's a dispute over that money, but that doesn't mean it doesn't belong to us and it's not part of our estate. That's their argument.

But it is. If you look at that, it says the purpose of the avoidance provision -- and I'm reading from the *Contractor Tech* case, 343 BR 573, Because the purpose of the avoidance provision is to preserve the property includable within the bankruptcy estate, the property available to distribution to creditors, the property of the debtor is

subject to preferential transfer is at best understood as that property that could have been part of the estate had it not been transferred before the commencement of the proceedings.

So that money is part of our estate. That's -- that particularly your case I believe is a preference case, but if you -- the *Mortgage America* is actually a fraudulent transfer case. The fact that there's a dispute about it doesn't mean that it's not our property and something we could use under 363.

We also are not arguing that there's a breach of the contract. And this is subtle, but what we're -- first of all, we're not disclaiming the contract, we're not declaring them in breach --

THE COURT: Yeah, let me just be sure that --

MR. TECCE: Yeah.

THE COURT: -- I'm understanding. You're telling me that every time somebody files a routine preference suit that before I decide the preference outcome I have the authority to tell people to repay it and that the Debtor will hold their money?

MR. TECCE: No, I'm arguing that that's at least estate property.

THE COURT: Therefore it has to be turned over to the Debtor, who will hold it pending an outcome. So your client pays a $10 million preference to Bank of America --

MR. TECCE: Right.

THE COURT: -- you allege it's preference, Bank of America says it's not, you're telling me before I ever decide it that I have the authority to have Bank of America pay the 10 million to the Debtor --

MR. TECCE: No.

THE COURT: -- because it's turnover?

MR. TECCE: Once I make out the other elements of the claim, then you have the authority to do that.

THE COURT: But once you win, they have to return -- they have to turn the money over to you?

MR. TECCE: Correct. And that's why -- and that's why there's discussion of abating the claim. I understand that point. Okay. It's not dismissed without prejudice because there's no additional discovery, there's no point in dismissing the claim. Okay. There's no additional discovery, it's not going to --

THE COURT: But what's the -- what's the -- I actually don't know the difference between abating it and dismissing it without prejudice subject to facts that might arise. Those seem to be the same --

MR. TECCE: You're not going to be on the phone calls about discovery, about what the scope of it is and whether it's covered or not. I just -- it's -- there's nothing -- it's --

THE COURT: If it's abated, there won't be any discovery about it. Right? Seriously, well, I just don't understand the --

MR. TECCE: If it's --

THE COURT: -- the different affect on the parties along the cord between a dismissal without prejudice subject to revival or an abatement subject to a termination of the abatement, both to occur with the same ultimate set of facts. I know why --

MR. TECCE: And then --

THE COURT: -- he wants -- I don't know why he wants his, I don't know why you want yours. What does it matter?

MR. TECCE: In this particular case, Your Honor, given the fact that -- if you threw this count out right now, what we do in the lawsuit, we're going to take the same discovery, we're -- it's not going to change what we do.

THE COURT: Right.

MR. TECCE: So it may not -- it may not matter. But I -- to my mind if there is no substantive difference, obviously we'd prefer it might head off some arguments about, which I would think are unfounded, about whether, you know, witnesses could be asked questions. I don't know how the -- this is basically something happens, to your point, at the end. Like if we can establish that the invoices don't comply

and that we're entitled --

THE COURT: Right.

MR. TECCE: -- to some kind of refund, we just want the money to come back to us. Okay. And to your point, if you want to decide first whether or not there --

THE COURT: So it's a remedy, not a cause of action as far as you're concerned?

MR. TECCE: It's -- it's a cause of action in the sense that -- and it's not a breach of contract, that we believe we've overpaid under our contract --

THE COURT: Right.

MR. TECCE: -- and we want the money back. Okay. Not to disclaim our contract, not to argue that they're in breach. We've overpaid you on these invoices and we want it back. That's why it's not a breach of contract claim either.

THE COURT: Let me just ask because I mean Mr. Alibhai was taking, I don't think it was a hypothetical position but a real position that he really didn't have a problem if I dismissed it subject to revival, because he said just dismiss it without prejudice.

MR. TECCE: But --

THE COURT: Yeah.

MR. TECCE: -- upon revival upon what, upon what occurrence?

THE COURT: Yeah, I'll --

MR. TECCE: That's where the devil is in the details.

THE COURT: I don't think I understand this difference. Do you agree that it ought to be abated pending a determination as opposed to saying something live in the pleading?

MR. TECCE: I don't -- I don't -- I'll just -- I'll respond this way, Your Honor. If I were to convince you that it doesn't even need to be abated, it won't change the course of the suit one bit whether or not it's abated or it's not abated because we're going to do the same discovery, take the same questions. So to your point, yes, I would. If you abated it --

THE COURT: Yeah.

MR. TECCE: -- okay, then we -- there's not going to be any argument about how it gets reactivated or it just gets pushed, you want to push it off, maybe it's a Phase 4 thing, I don't know, we could figure it out. But it doesn't go away, it just gets kicked down the road.

THE COURT: So I'm going to sort of rule on Count 3 right now --

MR. TECCE: Okay.

THE COURT: -- which is I want each party to file a five-page brief on why they care between abatement subject determination on the occurrence of certain events, or

dismissal without prejudice subject to refiling on the occurrence of those same events. I seriously don't understand the difference in those two. And if you all could explain it in five pages, well, that's great; and if not, I'll just figure out what to do about it.

But we're not going to leave this here and live for discovery and stuff like that. I think everybody's in agreement on that. I'm not sure of the right solution. Give me five pages and tell me.

MR. TECCE: Okay.

THE COURT: Can I get that in two weeks?

MR. TECCE: Absolutely.

THE COURT: You okay with that, Mr. Alibhai?

MR. ALIBHAI: Yes, sir.

THE COURT: Okay. Thank you.

MR. TECCE: Okay.

THE COURT: So let's go to four.

MR. TECCE: Okay. Four. If we could go to Slide 13. Four, we start with 558, we don't start with 553. We start with 558. All right. And what 558 says is that the estate has the benefit of any defense available to the Debtor as against any entity other than the estate. And what does that mean? Well, on the slide there we have this *ABC-Naco* case which is, of all the cases we cite, gathers the authorities, that's why it's the one on the slide.

But what's important is that that -- 558 is basically not just set off, it's a recoupment, it's counterclaim, that's what 558 preserves. Okay. Among those, among those is set off, okay, but I'm just -- among those is set off which is in 553, but the Debtor's defenses are in 558. Okay.

And 553 and the ability to set off, whether it's under 553 or otherwise, is one of those defenses. Okay. And 553 ERCOT contends it doesn't apply. That's not right. We cite the *AWOL* (phonetic) case. That does apply in a Chapter 15 case and it's not limited to creditors, it includes debtors. And the discussion here is whether -- the challenge was whether or not there's actually mutuality here. Right? That we don't make out the elements under 553 because our claims are not mutual.

But there's no mutuality requirement in 558, and that's kind of -- *ABC* goes through the analysis of what the defenses in 558. It makes observations like on Page 835 --

THE COURT: Tell me when there's -- when there isn't a claim against your client --

MR. TECCE: I'm sorry?

THE COURT: -- when there is not claim asserted against your client how do you use a defense?

MR. TECCE: No, there -- it is -- it's a defense -- it would be a defense to payment. Okay. I understand it's

proactive, but there will be a claim against our client if we prevail. Now to your point you make --

THE COURT: There will be a claim against your client if you prevail?

MR. TECCE: Well, let me take this back.

THE COURT: Okay.

MR. TECCE: There will be claims against our client going forward for amounts that are owed to ERCOT. Okay. ERCOT will -- we have -- they're a creditor of our company on an ongoing basis. Okay. So the point of this set off count, which is that if we can prevail and show that the invoices were not valid, okay, then the Court would enter an order saying, Okay, let's assume that they were 350 --

THE COURT: But you don't mean the future invoices, you mean the invoices you've already paid.

MR. TECCE: Correct.

THE COURT: Okay.

MR. TECCE: Those are invalid. Okay. At that point we have a right on a going forward basis, meaning we have this revenue neutral entity that says they're not going to pay us the money back, or they may or may not, we don't know. Okay. So if we can prevail in showing that they're illegal on a going forward basis, one of the things you could do is order, once we fix whatever the amount is, that we have a set off right going forward, we have a credit against the company.

THE COURT: So this may sound a bit fanciful but I don't know why you're limiting this alleged right to set off to only if you win. Set off exits in the ether. You might be foolish to set something off before you win, but that's your own foolishness to exercise it.

You're simply telling me I think, Our common law set off rights are preserved to us, and if there's a future invoice that comes in, we can simply set off. Now ERCOT can then take whatever action they want against you if you set off --

MR. TECCE: That's the problem, Your Honor.

THE COURT: -- before you win, so you won't do it until you win, but your right is separate from -- the right you have is separate from whether you win a judgment. You could set off today --

MR. TECCE: I could, Your Honor, but I need --

THE COURT: -- you just --

MR. TECCE: -- I need --

THE COURT: -- will be in bad trouble if you do. But it doesn't mean that you don't have that legal right today. Because if it turns out that you win, you actually did have the legal right today. Right? I didn't take away your set off rights. You're telling me that they owe you this money back. You have a current right of set off, it's just until you win a judgment you're not going to exercise it. And

so why are we -- the declaration seems wrong to me that you're asking for. It makes it time limited, and it isn't. It exists today.

MR. TECCE: Well, that's a fair point, Your Honor, but we're in a position where if we don't pay them, they'll transition our customers to another provider and we'll be out of business in the state of Texas.

THE COURT: So you're going to pay them. So, no, you may sit on that right --

MR. TECCE: That's right.

THE COURT: -- until after you get a judgment --

MR. TECCE: That's right.

THE COURT: -- and then use it and they could still cut you off. Right?

MR. TECCE: If we have an order of the Court that determines the dollar amount that's owed, then, no, I don't think they can cut us off because --

THE COURT: I mean they can --

MR. TECCE: -- we haven't --

THE COURT: -- and then you can sue --

MR. TECCE: -- there's no non-payment at that point.

THE COURT: -- them for cutting you off. Right?

MR. TECCE: I'm sorry?

THE COURT: So they could and you could sue them for

cutting you off. Just as if they cut you off today, you could sue them for cutting you off, say, No, it's a valid set off right. Your set off right isn't dependent on a judgment --

MR. TECCE: But they --

THE COURT: -- it's dependent --

MR. TECCE: -- they've already --

THE COURT: -- on the existence.

MR. TECCE: -- they've already disputed that we have a valid set off right because they think their invoices are valid. So they're going to take the position that we've paid them and we're not entitled to say any refund, (indiscernible) of any kind, so we don't have a set off right.

THE COURT: That's why the set off is a present, not a future dispute. If you -- when you characterize this as a future dispute, you are asking me to determine your set off right doesn't arise until you have a judgment. I think that's inconsistent with the law. I think you have a set off right now, and that set off right you may only be willing to exercise it once you get a judgment --

MR. TECCE: Okay.

THE COURT: -- that's your choice.

MR. TECCE: I mean now I -- I take your point, Your Honor. I mean obviously in the --

THE COURT: But I don't want to issue a judgment that's inconsistent with where I think the law is.

MR. TECCE: But --

THE COURT: I think you have a present right of set off, we just don't know how much it is. It may be zero, but it's a present right.

MR. TECCE: But we do have 50 percent of it here which is that we have a present right against an invoice that comes in today. That's our point, Your Honor, which is that in --

THE COURT: You do have a present right against an invoice that comes in today, if it turns out that you're right in this lawsuit.

MR. TECCE: That's correct.

THE COURT: And you -- although it's a known unknown, you either have that right today or you don't.

MR. TECCE: That's fair, because th truth is if -- I don't mean to think out loud in front of you, but if you ruled six months from now, right, we would take the position if we hadn't paid them something that was there today, but we pay them, and if we don't pay them, we go out of business. It's a bit of a -- it's --

THE COURT: But that's all in your own choices, and I shouldn't be declaring that -- what choices you make are dependent on a misinterpretation by me of the law.

MR. TECCE: but --

THE COURT: I think you have a present right. We

just don't know --

MR. TECCE: But I actually --

THE COURT: -- whether you are owed anything.

MR. TECCE: -- you're not -- there's no -- 558 is not limited in time. Okay.

MR. BOWLING: I agree. And you asked me in your pleading to limit it to time.

MR. TECCE: Meaning that we can't pay them until we get -- we can't withhold payment until we get closure lest we face --

THE COURT: Lest --

MR. TECCE: -- the consequences.

THE COURT: -- well, lest you face the consequences is your problem, not my problem.

MR. TECCE: Understood.

THE COURT: I can only rule on what the law is, and I'm not understanding the distinction you're making.

MR. TECCE: To your point we do have a set off, we had a set off right when we paid them in March.

THE COURT: If --

MR. TECCE: If you are correct, that's --

THE COURT: -- if you are making the decisions here, that is right.

MR. TECCE: That's correct.

THE COURT: Yeah.

MR. TECCE: Right. So we did have the right but to be clear our position is that it's not limited, there's no mutuality requirement. I mean that's another point.

THE COURT: Yes, you have the right. But I don't know why you -- I don't think I can grant what you've asked me to grant, which is a future declaration about it. It's a present right, but it's disputed.

MR. TECCE: Okay. Understood, Your Honor. I mean I take your point. What we're telegraphing in the complaint is that we're not going to exercise the right obviously, but that we do have the right.

THE COURT: Today.

MR. TECCE: And you're -- to your point you're right, it's not have it in time until -- from and after a judgment.

THE COURT: Okay.

MR. TECCE: It's just to make the point that should we prevail.

THE COURT: And that right exists, and I made this point with Mr. Alibhai --

MR. TECCE: It existed in March, that's correct.

THE COURT: -- and it exists -- it existed before you filed bankruptcy once you made payments. It exists irrespective of the bankruptcy case. It's not a 553/558 issue. It exists. You don't need either of those to have it

exist, do you?

MR. TECCE: I mean if I want -- if I wanted an order of the Court telling me that I'm entitled to set off X against Y, then that would be the avenue I would come to court and argue we have a 558 right, 553 applies. We have now crystalized the amount of money that we are owed back or that, you know, and they're not going to pay us --

THE COURT: But in your pleadings you say you have a common law right that isn't taken away by the Bankruptcy Code.

MR. TECCE: Well, we have -- we have set off recoupment, we have those rights that are not -- the Debtor does under 558.

THE COURT: So why am I worried about 553 and 558?

MR. TECCE: Because I mean it is -- there -- it is a right of the -- it is a right of the Debtor, I mean the case law says that it's the right of the Debtor under 558 to exercise what is tantamount to a 553 set off.

THE COURT: Understood.

MR. TECCE: So, okay.

THE COURT: Okay.

MR. TECCE: All right. Anything more on that? All right. The last one is Count 5.

THE COURT: So I'm going to ask you what I asked him -- well, you didn't say very much in your complaint, are you asking for leave to amend so you can tell me in a

complaint the same thing you told me in your response?

MR. TECCE: If -- I guess to the -- I would like to make the argument that my complaint does satisfy the pleading requirements that were made. But to your --

THE COURT: You're going to lose that argument. So would you like to ask leave to amend?

MR. TECCE: Yes, I would like to ask for leave to amend.

THE COURT: Okay.

MR. TECCE: Is the -- I mean the -- just one minute, Your Honor, as to why I think the complaint satisfied -- we state the claim under the CCAA and to avoid counts. And the CCAA does include a preference -- it brings in the BAI which has a preference count and it brings in a fraudulent transfer count, and the case law to plead a preference count, the cases will -- if it's the same transaction, the cases will let you -- would let your count stand as a fraudulent transfer count as well. And so the -- it's a different legal theory, but we identify the transfer, we identify the invoice, the we identify the statute under which we want the money back, and we argue that it's subject to avoidance for -- because it was not -- it's not supported by state law. So --

THE COURT: So I don't know Canadian preference and fraudulent conveyance law, and a complaint that I need to rule on I would like to have not only the factual background but

also the elements of the claim and what relief you're entitled to under Canadian law because I don't know it.

MR. TECCE: Okay.

THE COURT: And I need the amendment so that I can be less than an idiot, or more than an idiot I should say, not less.

MR. TECCE: Now the preview -- so I will formally request permission to amend the complaint. The preview that you will find and we'll even cite the cases in the complaint is that the cases in the US interpret the two sections consistently with 547 and 548. Okay. But we'll, if given permission, we will amend the complaint to specifically articulate the sections that we move under and why we're entitled to that move.

THE COURT: Thank you.

MR. TECCE: Yeah, I mean that's my Slide 17 is why I think the complaint states it, but I think you've moved past it. So do you --

THE COURT: Well, let me see --

MR. TECCE: -- how do you want to proceed at this --

THE COURT: Well, let me see if Mr. Alibhai wants to respond on the five issues that we've talked about, otherwise I'll rule on the five issues, then we'll move to the rest of the argument.

Mr. Alibhai?

MR. ALIBHAI: I don't need anything further to say on Count 1, and I understood what the Court said on Count 3, but what I would point the Court to with respect to Counts 2, 3 and 4 in sort of a global way is that what you've heard today was a lot of hypothetical. If the -- one thing said on Count 2 was they may file a claim. On Count 3 and 4 they say if invoices are invalid.

What I don't believe will exist after the Court rules is a substantive claim that seeks relief based upon the invalidity of the invoices. Then all those claims, 2, 3, 4, all have the problem of not being ripe, and that's the issue we raised in our reply when they were talking about Count 2, and we cited the US Supreme Court case of *Texas v United States*, and it says, this is Page 8 of our reply, Footnote 31, "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated or indeed may not occur at all."

And I think that's also what I heard after hearing the response, the problems with 2, 3 and 4 to the extent that they're relying on this future event. This Court does not do that, it does not give hypothetical or relief about future events.

With respect to Count 5, and I'm happy to get copies to the Court of those cases, they have not pleaded the

claim and what I would say more specifically is to the extent that they're trying to raise something that's based in fraud, Rule 9 applies in addition to Count 8 -- in addition to Rule 8, and of course *Iqbal* and *Twombley* require the type of specificity I don't believe -- they decided for whatever reason, and he has slides about why they thought that they had done it, but I don't believe that the request made now is appropriate under the cases that I've cited to Your Honor to seek leave to amend.

Because one of the things you're supposed to do is file a motion and show the Court I will re-plead this claim this way and give the Court information on which it can decide whether you're stating a valid claim for relief. Because under Count 15 you have to show that, you can't just say I want leave to re-plead, I'm going to file something. That is not how it works. You have to show what it is you're going to file and why it would be a proper claim.

And so for those reasons we believe all five counts should be dismissed. We believe Counts 1 and 2 should be with prejudice, 3, 4 and 5 -- 3, 4 without prejudice based on what the Court said, Count 5 that's an issue that we believe that the Court can dismiss and not give leave to re-plead.

THE COURT: Thank you. All right. I've got jurisdiction over this under 28 USC Section 1334. This is a core matter under 28 USC Section 157.

I find that Count 1 asserted by the claimants does not state a claim for which relief can be granted for the reasons that we've gone through in some detail today. We authorized these payments, the payments are subject to a reversal of the flow of funds if it turns out that they should not have otherwise been paid. But they can't be recouped solely on the basis of 549. There may be another basis on which they will have to all come back, but it isn't the 549 basis which is Count 1. That one is dismissed, the dismissal is with prejudice against re-filing.

Count 2 goes to whether or not ERCOT has valid claims against the Debtor. There is no present dispute on which the Court can rule as to whether they have valid claims against the Debtor. That does not preclude the possibility that there could be a future time when ERCOT does assert a claim against the Debtor. Accordingly I'm dismissing this count without prejudice and not with prejudice. I'm dismissing it because there's no dispute between the parties as to any present claim that is asserted.

With respect to Count 3 I'm not taking that up now because I made it quite clear I don't know what the right answer as we've gone through is to abate subject to some specific revival provisions or to dismiss without prejudice subject to some specific reincorporation provisions. The parties are going to brief that. We'll do one or the other

and I don't know which one.

Count 4 is the set off right. I am ordering on my own motion that the set off provisions be re-pled. They seek relief that I believe to be inconsistent with the law only because it is contingent on a future event. There is a present dispute between the parties as to whether the Debtor has a present set off right. The Debtor says they do because the Debtor paid amounts that they shouldn't have paid and therefore they have a set off right.

It is irrelevant to the dispute that the Debtors might not presently be exercising that right. ERCOT alleges they don't have a present set off right. They say they do. But the remedy sought in here is only for a declaration that it would exist in the future. That misunderstands what a judgment does. A judgment reflects what has happened and the reasons for it retroactively in this case.

So if there is a judgment that these amounts should have been paid, that set off right exists presently and ERCOT disputes that it exists presently and therefore I do require it be re-pled. I don't find it is a contingent dispute based on future events. All of the events giving rise to the set off have already occurred. The legal consequences of those may be that the Debtor loses, but they've already occurred. There is no future contingency. The Debtor is waiting to act because of prophylactic protections that it wants which does

not diminish whether there is a present right.

As to Count 5 the claims under the Canadian Act I am going to require those to be re-pled. I disagree with the argument that the Debtor needs to literally file a copy of the pleading and seek leave to amend it. In the response the Debtor sets forth in sufficient detail what the natures of the -- what the nature of the claim is.

If -- I am unaware of any allegation that is presently being made that this was an actual fraudulent conveyance. Therefore Rule 9 I don't believe applies. Rule 9 does not apply to constructive fraudulent conveyances, only to actual ones. But it does need to be re-plead, I want to know what the law is. I'm not even ruling necessarily that the current petition might not be sufficient under some Rule 8 theory of notice pleading.

I want to know what I'm doing in the case, and so I am requiring the re-pleading. I think I have the right to have the pleading be in a position where I can better understand it. It may be that it's currently inadequate, but in any event I'm requiring the re-pleading of it.

Can I get that re-pleading to occur within the next 30 days?

MR. TECCE: Absolutely, Your Honor.

THE COURT: Okay. We'll set a deadline then of March 4 for the Debtor to file an amended complaint as to

those matters.

So you all wanted to move to your other arguments today? Go ahead, please.

MR. ALIBHAI: Your Honor, I'm happy to argue the other arguments, but as I understand your ruling the counts that would survive would be re-pleaded and at that point I think it would be appropriate to address whether those claims raise the same issues that we've raised here.

THE COURT: I think that's probably -- I hadn't thought of it that way but I think you make a good point.

MR. ALIBHAI: And so --

THE COURT: You want to wait and I'll give you the right to revive them after you review the amended complaint.

MR. ALIBHAI: Correct. That would be the operative complaint and it would appropriate for us to raise the issue in response to it.

THE COURT: Better idea than what it was. I think -- Mr. Tecce, I assume you're okay not subjecting yourself to potential loss today and wait to get your pleading re-pled?

MR. TECCE: Meaning on the abstention grounds?

THE COURT: I'm just saying, it's only relief he's seeking, the best you can do is you wait where you are right now and you're going to wait where you are right now if we put it off, so. And I've already said that I think that 13 -- what 1334 says is I don't have the authority to abstain.

MR. TECCE: That's fine. I -- yes.

THE COURT: Okay. That's fine. I'm going to find that the balance of today's issues are abated and may be revived by a motion filed by ERCOT once the new pleadings are reviewed. And if not, they'll just sit there in an abated state. Does that work? I think that's what you're asking me for.

MR. ALIBHAI: That's correct, Your Honor.

THE COURT: Okay. Good.

MR. ALIBHAI: One other issue that comes to mind is we have discovery that's been served to us and we did a stipulation on that. I'm not sure given that there's not a live complaint how you want us to proceed with the discovery issues. And your dismissal of the PUCT, I'm sure they want to address discovery as well, but I raise the issue of how we should proceed until we have this amended complaint.

THE COURT: Do we have a current discovery issue that we need to address, or do you want to -- or not? I mean I don't know what the status of this is so.

MR. ALIBHAI: No, I think we spoke last week if I remember correctly and we had a discovery conference with the Court and then you asked us to come back if we didn't reach a stipulation. We did on that limited issue, but my concern is that no further discovery occur while we're waiting for the amended complaint to see what grounds are going to be asserted

in order to raise the issue of whatever they're going to raise about the orders or the invoices.

THE COURT: Mr. Tecce?

MR. TECCE: So on this, Your Honor, I mean I think the question that is being asked is, is discovery going to continue. And to our mind we are most certainly going to file an amended complaint, we are most certainly going to argue the same theories about the orders and the invoices and the counts in the complaint might be different. But there's already an order in the case requiring discovery.

I was, in my notes, to ask about the PUCT. If they're dismissed, I presume that whatever order you've already entered is still applicable to them even though they're not a party to the suit anymore.

And our last point is our -- I don't have a problem with not arguing abstention today, provided that the position's not going to be from the Defendants that, well, the Court has, you know, decided it's going to jurisdiction, so that will get held in abeyance so --

THE COURT: No, I'm exercising jurisdiction unless I abstain, and I do not believe I have the authority to abstain, but I want them to be able to make their full argument about that.

MR. TECCE: Okay.

THE COURT: With respect to discovery I'm not

setting a minimum number of days you can wait to file your amended complaint. As soon as the amended complaint is filed, the parties should confer about what ought to be happening in discovery. You needn't wait for a Court order and let's get discovery going. If the parties then need a hearing, we'll give you a hearing. It is a good idea to know what the complaint says. So if you want to move that discovery up, then, you know, you can -- I suspect you can probably submit a complaint next week when it really comes down to it.

MR. TECCE: That's exactly -- yeah, we're going to file the amended complaint with due haste. We certainly don't need 30 days under any set of circumstances.

THE COURT: So once you file it, if we then need to have a discovery conference, I'm here.

MR. TECCE: Actually the -- and there still wouldn't be the briefing given your ruling on the abatement versus the -- even though we're going to re-plead the count and I -- we could re-plead the count, is that your -- we had that ruling on the five pages on the turnover --

THE COURT: Yeah, go ahead and put it in the complaint and the most I'll do is I'll just strike that by dismissal. But you can put it in there, and if I dismiss it, I won't make you plead it again. Or abate it, it'll just sit there.

MR. TECCE: Right. So there won't be a separate

filing on abatement from -- we'll just let the argument in the complaint on whether it should be abated or not. Is that what you're saying?

THE COURT: No, I want a five-page brief on whether I should abate or whether --

MR. TECCE: Okay.

THE COURT: -- I should dismiss without prejudice. But in your amended complaint include it on the assumption that there will be an abatement rather than a dismissal. But if there is a dismissal, you won't need to plead it again, I'll just --

MR. TECCE: Oh, I understand.

THE COURT: -- strike it out with an order.

MR. BINFORD: Your Honor?

THE COURT: Mr. Binford?

MR. BINFORD: Just very quickly, Your Honor. I know I'm a non-party now, but from the Brazos case I have lots of experience butting into actions I'm a non-party in. We signed a stipulation on discovery, we're working on it. We're not going to go back and say that the stuff that we've gathered we're not now going to produce. I will say as a non-party I'm trying to think how that changes things going forward.

The only thing that occurs to me is, and to be very candid, I might have asked for this anyway, there's a chance that we're not going to have a complete set by February 15,

which is the deadline. And so to the extent that that deadline is or not -- is or is not live at this point, it's not clear to me. But we are not stopping, that's clear, and we might not even need an extension. But I certainly foresee maybe needing some more time on a couple of these things that we're gathering.

THE COURT: I appreciate the heads up if you all need to have a dispute brought to the Court, bring it. I suspect if you got, you know, 90 percent of it done, you want another period of time, that you and Mr. Tecce will work that out without even needing to come back.

MR. BINFORD: Thank you, Your Honor.

THE COURT: Okay. Thank you all. We are in recess.

MR. TECCE: Thank you, Your Honor.

(Hearing adjourned 11:47 a.m.)

* * * * *

I certify that the foregoing is a correct transcript to the best of my ability due to the condition of the electronic sound recording of the ZOOM/video/telephonic proceedings in the above-entitled matter.

/S./ MARY D. HENRY

*CERTIFIED BY THE AMERICAN ASSOCIATION OF ELECTRONIC REPORTERS AND TRANSCRIBERS, CET**337*

JUDICIAL TRANSCRIBERS OF TEXAS, LLC

JTT TRANSCRIPT #65143 DATE FILED: FEBRUARY 7, 2022

TAB F

This is Exhibit “F”

referred to in the Affidavit of **JAMES C. TECCE**

Sworn before me this 14th day of April, 2022

C. Mansara

A Commissioner for taking affidavits

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re: JUST ENERGY GROUP INC., et al., Debtors in a Foreign Proceeding.[1]	Chapter 15 Case No. 21-30823 (MI)
JUST ENERGY TEXAS LP, FULCRUM RETAIL ENERGY LLC, HUDSON ENERGY SERVICES LLC, and JUST ENERGY GROUP, INC., Plaintiffs, v. ELECTRIC RELIABILITY COUNCIL OF TEXAS, INC., Defendant.	Adv. Pro. 21-4399 (MI)

FIRST AMENDED COMPLAINT

Plaintiffs are Just Energy Texas LP, Fulcrum Retail Energy, LLC, Hudson Energy Services LLC ("**Hudson**"), and the foreign representative (the "**Foreign Representative**") in the above-captioned chapter 15 cases (the "**Chapter 15 Cases**"), Just Energy Group, Inc. (collectively, "**Plaintiffs**" or "**Just Energy**," and, with their affiliated debtors in the Chapter 15 Cases, the "**Company**" or the "**Debtors**"). The Debtors are the subject of proceedings (the "**Canadian Proceedings**") under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as amended, the "**CCAA**") in the Ontario Superior Court of Justice, Commercial List (the "**Canadian Court**"). Plaintiffs bring this action by and through the Foreign Representative against Defendant Electric Reliability Council of Texas, Inc. ("**ERCOT**" or "**Defendant**"), and allege as follows:

[1] The identifying four digits of Just Energy Group Inc.'s local Canada tax identification number are 0469. A complete list of debtor entities in these chapter 15 cases may be obtained at www.omniagentsolutions.com/justenergy.

PRELIMINARY STATEMENT

1. In February 2021, Texas experienced a historically severe winter storm ("**Winter Storm Uri**") that incapacitated most of its power-generating facilities. As demand for electricity outpaced supply, ERCOT—the private entity that manages Texas's grid and wholesale electricity market—ordered deep cuts in electricity consumption in the form of forced outages. In industry parlance, ERCOT ordered "load" to be "shed" to reduce strain on the power grid. At the same time, ERCOT and its state regulator the PUCT also stunningly intervened in the market for wholesale electricity by setting prices ***orders of magnitude*** higher than what market forces ordinarily would produce.

2. On February 15 and February 16, with little discussion and without prior notice or any opportunity for public comment, the PUCT issued its key Orders Directing ERCOT To Take Action And Granting Exception To Commission Rules (the "**PUCT Orders**") directing ERCOT to "ensure that firm load that is being shed in [Energy Emergency Alert ("**EEA**") Level 3] is being accounted for in ERCOT's scarcity pricing signals." The PUCT did not tie the PUCT Orders to a fact-based analysis of the current market conditions or otherwise explain the reasoning behind its determination that energy prices should be set at the high-system-wide offer cap (the "**HCAP**"). Instead, it merely stated the economic truism that "[e]nergy prices should reflect scarcity of the supply" and opined without evidence that "[i]f customer load is being shed, scarcity is at its maximum, and the market price for the energy needed to serve that load should also be at its highest." In reality, scarcity was at its maximum because the storm had forced power generators offline—not because they were waiting for a higher market price.

3. Nonetheless, following the PUCT's directive, ERCOT manually adjusted one of the input values to the Real-Time On-Line Reliability Deployment Price Adder—part of ERCOT's scarcity pricing mechanism—to impose a Real Time Settlement Point Price on February 15 at the HCAP of $9,000 per megawatt hour ("**MWh**") for more than eighty consecutive hours. ERCOT also improperly calculated charges associated with various grid functions that support the

continuous flow of electricity, including for reserves. The cost of these "ancillary services" as they are known in the power industry reached the unprecedented price of $25,000/MWh during the storm.

4. The actions of the PUCT and ERCOT not only failed to solve the electricity shortage, but they also violated Texas law. Neither the PUCT nor ERCOT possesses the substantive authority to set prices in the wholesale electricity market in this manner; the PUCT did not follow the statutorily-prescribed rule-making procedures; and the PUCT's actions were not supported by evidence as required by law. The PUCT violated the Texas Administrative Procedure Act (the "**APA**") by setting prices without proper notice or making an evidentiary showing that the market's scarcity pricing signals were not working and that the inflated prices would accomplish their apparent intended purpose of stimulating power generation. The PUCT also violated the Public Utility Regulatory Act (the "**PURA**"), which mandates that pricing must be the function of competitive forces—not regulatory fiat.

5. Similarly, ERCOT's actions found no support under, and were inconsistent with its Standard Form Market Participant Agreement with each Plaintiff (collectively, the "**SFA**"), which incorporates by reference, and requires compliance with ERCOT's nodal protocols (the "**ERCOT Protocols**"). At the time of the storm, the ERCOT Protocols did not include firm load shed among the considerations relevant to determining whether scarcity pricing would be appropriate. Yet, the PUCT and ERCOT impermissibly set the HCAP at $9,000/MWh based on firm load shed; charged prices for ancillary services that exceeded the HCAP of $9,000/MWh; and failed to allow prices to fall below $9,000/MWh when firm load shed ended.

6. The economic consequences of the PUCT's and ERCOT's decisions were staggering. Over only seven days in February, due to the prices that ERCOT set, the state's wholesale market consummated $55 billion in transactions—a level of volume it ordinarily would

take the market four years to realize. The $9,000/MWh price was over four hundred times the average MWh price for 2020 of $22.00/MWh.[2]

7. What is more, ERCOT left that price in place for 32 hours after it had rescinded all load shed instructions early in the morning of February 18—even though during that period, the asserted justification for the price intervention no longer applied. After ordinary market forces were permitted to take over at 9:00 a.m. on February 19, the price per MWh dropped precipitously.

8. The PUCT's and ERCOT's decision making during the storm has been met with widespread criticism as economically unsound and legally invalid. On March 5, Potomac Economics, the PUCT's Independent Market Monitor ("**IMM**"), concluded that ERCOT's pricing intervention should have ended immediately at 12:00 a.m. on February 18 after load shed stopped and recommended that ERCOT correct real-time prices from that date and time until 9:00 a.m. on February 19. According to the IMM, the "mistake" of keeping the inflated prices in place resulted in billions of additional, improper costs to the ERCOT market. Then, on March 8, the Lieutenant Governor of Texas called on the PUCT and ERCOT to follow the IMM's recommendation, stating that correcting the "mistake will require an adjustment, but it is the right thing to do. It will ultimately benefit consumers and is one important step we can take now to begin to fix what went wrong with the storm." With respect to ancillary charges, Arthur D'Andrea, former Chair of the PUCT, remarked: "I haven't talked to anyone yet who thought [ancillary costs] could get above $9,000. That was surprising—I think, shocking—to a lot of us." The IMM also has indicated ERCOT did not properly calculate ancillary charges. The imprudence of the regulators' decisions is confirmed by the wave of lawsuits that have been filed and by laws passed by the Texas legislature designed to remedy the consequences of those decisions and to reform the way the PUCT and ERCOT function going forward.

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[2] U.S. Energy Information Administration, May 7, 2021 ("Average Texas electricity prices were higher in February 2021 due to severe weather storm") available at https://www.eia.gov/todayinenergy/detail.php?id=47876.

9. The regulatory missteps of the PUCT and ERCOT also severely harmed the Texas energy market's participants—few more so than Just Energy. Just six months earlier, Just Energy had completed a successful balance-sheet restructuring. In February and March 2021, ERCOT floored Just Energy with invoices relating to the Winter Storm Uri weather event (the "**Invoices**") that its recently de-levered balance sheet could not withstand. ERCOT's Invoices required payment of approximately $336 million relating to the week of February 13, 2021 through February 20, 2021 (the "**Invoice Obligations**"). An implied threat accompanied ERCOT's Invoices: if Just Energy failed to satisfy them, ERCOT and the PUCT would shutter Just Energy's business in Texas by exercising regulatory, contractual, and statutory remedies to transfer Just Energy's customers in Texas to a Provider Of Last Resort ("**POLR**") for no consideration.

10. In order to protect against a forced eviction from Texas's retail electricity market, the loss of meaningful assets to a competitor, and the devastating impact on its creditors, employees, sureties, public shareholders, and customers, Just Energy had no choice but to pay the Invoices under protest. Those payments followed exhaustive efforts to mitigate the consequences of Defendant's actions, including submitting filings to ERCOT and the PUCT both individually and through the Texas Energy Association of Marketers; lobbying the Texas state legislature; commencing restructuring proceedings for the second time in six months, i.e., the Canadian Proceedings and Chapter 15 Cases; obtaining approval from both the Canadian Court and this Court to enter into a $125 million financing facility; and using a significant portion of the facility proceeds to pay ERCOT.[3]

11. Just Energy paid ERCOT with a full reservation of rights as recognized by this Court that this lawsuit seeks to vindicate.[4] Plaintiffs challenge no less than approximately $274

[3] With respect to Plaintiff Hudson, ERCOT invoiced its qualified service entity (or "**QSE**") BP Energy Company ("**BP**"). BP satisfied those invoices and seeks reimbursement from Hudson pursuant to the parties Independent Electricity System Operating Scheduling Agreement.

[4] See Order Granting Provisional Relief Pursuant To Section 1519 Of Bankruptcy Code [ECF No. 23] dated March 9, 2021 at p. 11 ("Additionally, the Court finds that any payments made to

million paid in response to the Invoices (hereinafter, the "**Transfers**") because, among other things, the Invoices are based on the PUCT Orders, which themselves are unlawful under the APA and the PURA, and otherwise are inconsistent with the ERCOT Protocols and the SFA. ***Alternatively***, even if the PUCT Orders are valid, Just Energy still has valid claims because ERCOT had no basis to apply the $9,000/MWh price after 1:05 a.m. on February 18. Accordingly, Just Energy is entitled to (a) declaratory judgment that the Invoice Obligations and/or the Transfers paid in response to the Invoices are void as preferences and/or transfers at undervalue under section 36.1 of the CCAA and sections 95, 96, and 98 of the Bankruptcy and Insolvency Act (the "**BIA**"); (b) turnover under section 542(a) of the Bankruptcy Code of either the Transfers or the value of the Transfers; and (c) declaratory judgment that Plaintiffs currently are entitled to set off, counterclaim and recoup no less than the amount of the Transfers against any obligation owed to ERCOT.

JURISDICTION AND VENUE

12. This proceeding involves the Debtors' assets located in the United States. Section 1521(a)(4) of the Bankruptcy Code provides that the Court may entrust the Foreign Representative with the "administration and realization of all or part of the debtors' assets within the territorial jurisdiction of the United States." Section 1507(a) of the Bankruptcy Code says in part that "the court, if recognition is granted, may provide additional assistance to a Foreign Representative under this title or other laws of the United States." Section 1521(a)(7) of the Bankruptcy Code provides that the Foreign Representative may be granted "any additional relief that may be available to a trustee, except for relief available under sections 522, 544, 545, 547, 548, 550, and 724(a)." 11 U.S.C. § 1521(a)(7).

13. The prosecution of this lawsuit also comports squarely with the objectives of chapter 15 as outlined in the Bankruptcy Code, including the "fair and efficient administration of cross-border insolvencies that protects the interests of all creditors, and other interested entities,

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ERCOT are made subject to all of the Debtors' rights to contest those payments, and all rights to receive a refund or credit as allowed by applicable law.").

including the debtor" and the "protection and maximization of the value of the debtor's assets." 11 U.S.C. §§ 1501(a)(3), (a)(4).

14. Plaintiffs bring claims against ERCOT under section 542(a) of the Bankruptcy Code, 28 U.S.C. § 2201, Federal Rule of Bankruptcy Procedure 7001, section 36.1 of the CCAA, and sections 95, 96, and 98 of the BIA. These causes of action are "core" pursuant to 28 U.S.C. § 157(b) and include, among other things, the "recognition of foreign proceedings and other matters under chapter 15 of title 11," 28 U.S.C. § 157(b)(2)(P) and "requests for other relief covered under the provisions of chapter 15."[5] They also are "core" because they involve "matters concerning the administration of the estate," 28 U.S.C. § 157(b)(2)(A); "proceedings to determine, avoid, or recover preferences," 28 U.S.C. § 157(b)(2)(F); "proceedings to determine, avoid, or recover fraudulent conveyances," 28 U.S.C. § 157(b)(2)(H); "orders to turn over property of the estate," 28 U.S.C. § 157(b)(2)(E); and "other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or equity security holder relationship," 28 U.S.C. § 157(b)(2)(O).

15. At a minimum, this Court has "related to" jurisdiction over this entire proceeding given its potential impact on the Canadian Proceedings, the Chapter 15 Cases, and Just Energy's liquidity and ability to implement a going-concern restructuring. See In re British Am. Ins. Co. Ltd., 488 B.R. 205, 223-24 (Bankr. S.D. Fla. 2013) (observing a chapter 15 case necessarily requires a court "to substitute the chapter 15 case itself for the concept of the estate…. The court may also define the extent of related-to jurisdiction in the chapter 15 case by the potential effect of the action on the estate administered in the foreign proceeding"); SPV Osus Ltd. v. UBS AG, 882 F.3d 333, 339-40 (2d Cir. 2018) (claim is "related to" bankruptcy case "if the action's outcome might have any conceivable effect on the [foreign] estate."); In re Fairfield Sentry Ltd., 2018 WL 3756343, at *7 (Bankr. S.D.N.Y. Aug. 6, 2018) ("When the debtor is an entity involved in a foreign

[5] In re British Am. Ins. Co. Ltd., 488 B.R. 205, 223 n.31 (Bankr. S.D. Fla. 2013).

insolvency proceeding, the 'estate,' for purposes of determining whether 'related to' jurisdiction exists, is the foreign estate").

16. Pursuant to Federal Bankruptcy Rule 7008, Plaintiffs consent to the entry of final orders or judgment by the Court.

17. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

PARTIES

18. Plaintiff Just Energy Texas LP is a Texas limited partnership with its headquarters in Harris County, Texas. Plaintiff Fulcrum Retail Energy LLC is a Texas company with its headquarters in Harris County, Texas. Plaintiff Hudson is a New Jersey company with its headquarters in Harris County, Texas. Plaintiff Just Energy Group, Inc. is a Canadian company with its headquarters in Toronto, Canada that has been appointed the Debtors' "foreign representative" as that term is defined under 101(24) of the Bankruptcy Code by both the Canadian Court and this Court.

19. Defendant ERCOT is a membership-based § 501(c)(4) nonprofit corporation governed by its Board of Directors and subject to the oversight of the PUCT and the Texas Legislature. It is the independent system operator for all the transmission and generation facilities in the ERCOT market, which is located entirely within Texas. It may be served with process at its principal place of business, 7620 Metro Center Drive, Austin, Texas 78744.

20. Plaintiffs (along with the other Debtors) commenced the Chapter 15 Cases and the CCAA Proceedings in the Canadian Court on March 9, 2021. On the same date, the Canadian Court appointed FTI Consulting Canada Inc. as Monitor (the "**Monitor**"). The Monitor has been advised that the Foreign Representative is bringing claims against ERCOT relating to the Invoices and Transfers and has no objection.

FACTUAL ALLEGATIONS

I. BACKGROUND

A. THE COMPANY

21. The Company is a natural gas and electricity retailer currently operating in the United States and Canada. Its principal line of business consists of purchasing electricity and natural gas commodities from certain large energy suppliers and re-selling them to residential and commercial customers. The Company services more than 936,000 customers and provides employment to approximately 1,100 employees. Texas is the Company's single largest market, representing 47% of its revenues in fiscal year 2020.

22. Retailers like Just Energy fulfill a vital role in the ERCOT ecosystem. Retail electricity providers purchase wholesale power from power-generating companies, trading companies, and wholesalers and re-sell that power to customers. Retailers generally purchase most of their power in large, wholesale blocks—well in advance. They then compete with other retailers to sell that power to consumers at a low cost, typically under fixed-price contracts. Customers in locations within Texas where there is robust price competition benefit from the role played by retailers like the Company in the market.[6]

23. In September 2020, Just Energy completed a balance sheet recapitalization (the "**Recapitalization**") in Canada. The Recapitalization was the culmination of a 15-month-long strategic review process and comprehensive plan to strengthen Just Energy's business. The Recapitalization improved the Company's overall capital structure by: (a) reducing its debt and obligations under preferred shares by approximately CAD $780 million; (b) raising over CAD $100 million of new equity; (c) reducing annual cash interest costs by approximately CAD $45 million; and (d) extending debt maturity dates.

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[6] See Peter R. Hartley, Kenneth B. Medlock III & Olivera Jankovska, Electricity Reform And Retail Pricing In Texas, Center for Energy Studies (June 2017), https://www.bakerinstitute.org/media/files/files/55857030/ces-pub-txelectricity-060717_O6fiwZA.pdf.

24. The Recapitalization was executed through a plan of arrangement under section 192 of the Canada Business Corporations Act, which was approved by the Canadian Court on September 3, 2020. The Recapitalization also was recognized by this Court by the Honorable David R. Jones in the chapter 15 case styled In re Just Energy Group Inc., Case No. 20-34442 (DRJ) (Bankr. S.D. Tex.) on September 10, 2020. Upon the consummation of the Recapitalization, the Company had CAD $138 million of total available liquidity.

B. THE PUCT, ERCOT, AND THE TEXAS ELECTRICITY MARKET

25. The Texas Interconnection is one of the three main electricity grids in the United States that, for the most part, operates independently and with limited export and import capabilities. The PUCT and ERCOT are solely responsible for managing the Texas Interconnection and wholesale electricity transactions that occur within the grid.

26. ERCOT functions both as the technical operator for the Texas grid and a decision-making organization that creates rules for the wholesale electricity market. ERCOT is responsible for scheduling power for more than 26 million people on a grid that connects over 46,500 miles of transmission lines and more than 680 generation units, accounting for 84,500 megawatts of installed generation capacity.

27. Prices within the grid ordinarily are set by market forces. ERCOT manages the flow of electricity by continually ordering generators to ramp-up or ramp-down production to constantly match the amount of power demanded by consumers and maintain overall grid stability and reliability. ERCOT also performs financial settlements for the competitive wholesale electricity market and enforces certain credit requirements.

28. ERCOT is subject to regulation by the PUCT, a state agency that regulates the state's electric, water, and telecommunication utilities, implements respective legislation, and offers customer assistance in resolving consumer complaints.

29. Each of the Plaintiffs (excluding the Foreign Representative) has a "Retail Electric Provider" certificate in Texas, is registered as a "Market Participant" in the ERCOT Market, and is party to a SFA with ERCOT. To participate in the ERCOT market, each Plaintiff must be a party to an SFA and comply with the ERCOT's Protocols.

30. If Plaintiffs are unable to pay ERCOT's invoices when due, ERCOT can suspend their market participation in as little as two days and transfer their customers to another energy provider, i.e., a POLR. Failure to pay timely an ERCOT invoice also would give the PUCT grounds to initiate a proceeding to amend, suspend, or revoke Plaintiffs' Retail Electric Provider certificates.

C. WINTER STORM URI

31. In February 2021, Winter Storm Uri brought extremely cold weather conditions to Texas. Customer demand for electricity surged on February 13 and 14, pushing Texas's power grid to a new winter peak demand record, topping 69,000 megawatts. This was more than 3,200 megawatts higher than the previous winter peak set in January 2018.

32. While demand soared, supply plummeted as power plants were forced offline by the storm's impact. As a result, demand threatened to exceed supply. In the early hours of February 15, ERCOT declared an EEA Level 1, urging consumers to conserve power. Within an hour, ERCOT elevated to an EEA Level 2, and only 13 minutes later, at 1:25 a.m., ERCOT elevated to an EEA Level 3. With the grid stressed, ERCOT ordered forced outages to reduce strain.

D. THE PUCT AND ERCOT RESPOND BY ARTIFICIALLY INFLATING PRICING

33. The PUCT and ERCOT responded to the storm by intervening in the wholesale electricity market to impose draconian pricing on existing supply. The PUCT Orders were issued on February 15 and February 16 and resulted in electricity prices being raised to the regulatory

maximum of $9,000/MWh, a spike of as much as 30,000% above average market prices for that time of year.[7]

34. By regulation, ERCOT power prices were ***capped*** during the relevant period at the HCAP of $9,000/MWh, but no regulation provides that the PUCT and ERCOT may ***set*** prices at this rate if ordinary market forces would produce a lower price. The amount is a cap—not a rate that can be set artificially.[8] The PUCT directed ERCOT to apply the system-wide offer cap of $9,000/MWh to ***set*** prices while firm load was being shed in an EEA3 load shed event.

35. Similarly, firm load shed was not a scarcity-pricing trigger at the time under ERCOT Protocol 6.5.3.7.1 that could be used to justify the decision to set the real-time market price at $9,000/MWh. Notwithstanding, the PUCT Orders capriciously concluded "[i]f customer load is being shed, scarcity is at its maximum, and the market price for the energy needed to serve that load should also be at its highest," prompting ERCOT to improperly set the price at the HCAP of $9,000/MWh.

36. Mandating the market pricing at these levels by order was unprecedented. For historical comparison, ERCOT real time prices averaged just $22.00 per MWh for February 2020.[9] If any for-profit entity had increased prices on the scale of what ERCOT did during a declared state of emergency, it would be widely recognized as price gouging under the law. In point of fact,

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7 Russell Gold & Katherine Blunt, Texas Grapples with Crushing Power Bills After Freeze, Wall. St. J. (Feb. 23, 2021, 10:59 AM), https://www.wsj.com/articles/texas-grapples-with-crushing-power-bills-after-freeze-11614095953. Tim McGlaughlin, Texas Wholesale Electric Prices Spike More Than 10,000% Amid Outages, Reuters (Feb. 15, 2021, 9:17 AM), https://www.reuters.com/article/us-electricity-texas-prices/texas-wholesale-electric-prices-spike-more-than-10000-amid-outages-idUSKBN2AF19A.

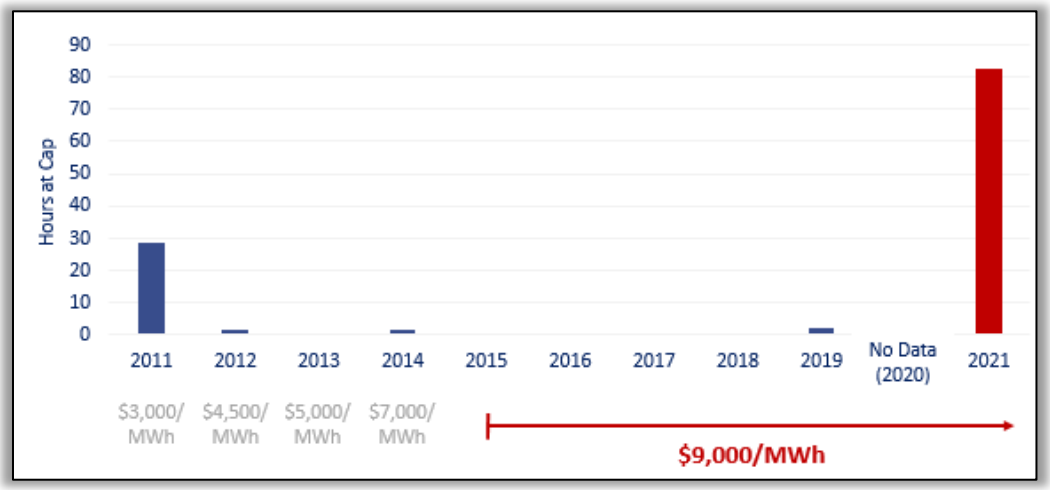
8 16 T.A.C. §§ 25.505(g)(B)-(C).

9 U.S. Energy Information Administration, May 7, 2021 ("Average Texas electricity prices were higher in February 2021 due to severe weather storm") ("Wholesale electricity prices in the Electric Reliability Council of Texas (ERCOT), Texas's primary grid operator, averaged $22 per megawatthour (MWh) in 2020") available at https://www.eia.gov/todayinenergy/detail.php?id=47876.

the Texas Attorney General sued another retailer, Griddy, for price gouging because Griddy passed through the $9,000/MWh price to consumers.

37. The duration of the ERCOT-set price was equally unprecedented. In ERCOT's history, prices had never before remained at the cap for anything close to eighty hours. As depicted in the chart below, January 2018 was the first time in ERCOT history that prices ever even reached the $9,000/MWh cap—for a total of only ten minutes.[10] In 2019, prices hit the cap, but only for a little more than two hours.[11]

38. Historically, prices only ever hit the cap for a fraction of the more than eighty hours that the $9,000/MWh price was in place. As reflected in the chart below, in 2012, 2013, and 2014 (when the cap ranged from $3,000/MWh at the beginning of 2012 to $7,000/MWh at the end of 2014), prices were at the cap for less than two hours each year.[12]

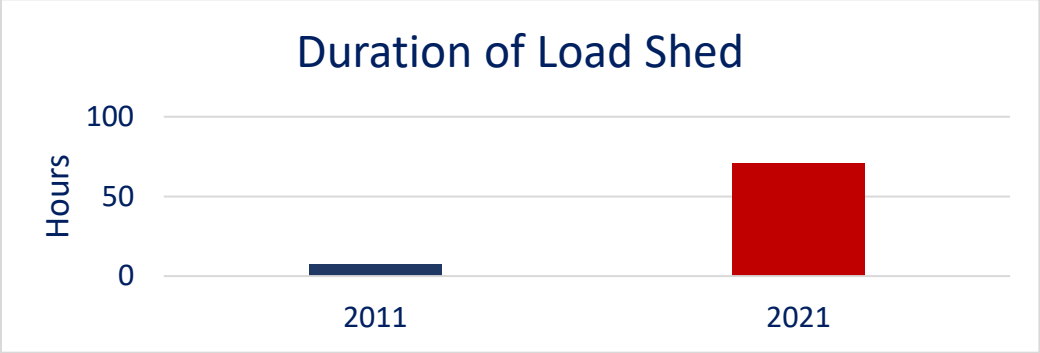


10 Potomac Economics, Ltd., 2018 State of the Market Report for the ERCOT Electricity Markets 23 (June 2019), https://www.potomaceconomics.com/wp-content/uploads/2019/06/2018-State-of-the-Market-Report.pdf.

11 Potomac Economics, Ltd., 2019 State of the Market Report for the ERCOT Electricity Markets 18 (May 2020), https://www.potomaceconomics.com/wp-content/uploads/2020/06/2019-State-of-the-Market-Report.pdf.

12 Potomac Economics, Ltd., 2014 State of the Market Report for the ERCOT Wholesale Electricity Markets 16 (July 2015), https://www.potomaceconomics.com/wp-content/uploads/2017/01/2014-ERCOT-State-of-the-Market-Report.pdf.

39. Although the February 2021 winter storm has prompted comparisons to another winter storm that hit Texas ten years ago, in February 2011, the events of 2021 were different. The chart above illustrates that eighty hours were spent at the cap in February 2021 versus 28.44 hours in 2011.[13] And, the cap was only $3,000/MWh at the time, a third of 2021. Critically, the 2011 prices were determined by the actual scarcity conditions in the market, rather than under orders issued by regulators, and as illustrated below, load shed lasted less than 8 hours—versus nearly 80 hours in 2021.



E. FEBRUARY 18: LOAD SHEDDING STOPS, BUT $9,000/MWH PRICE CONTINUES

40. Temperatures warmed on February 17. With that development, ERCOT was able to stop shedding load just after midnight on February 18—a fact about which market participants were notified. No load shed directive under ERCOT Protocol 6.5.8.4.2(3) was in place after 1:05 a.m. on February 18. After lifting load shed instructions, the ERCOT grid had ample resources online, and there was no justification for continuing to impose an artificial price of $9,000/MWh through administrative adjustments to the Real Time-Reliability Deployment Price Adder.[14]

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[13] ERCOT News Release November 20, 2021 ("Winter power plant assessment under way, CREZ development on track for 2013 completion) available at http://www.ercot.com/news/releases/show/26348.

[14] ERCOT Market Notice M-C021521-03 Legal (Feb. 17, 2021) ("Once ERCOT is no longer instructing firm Load shed, the adjustment will be set to 0, as it would be in the previous implementation."), http://www.ercot.com/services/comm/mkt_notices/archives/5224.

41. Despite a sufficient level of reserves, ERCOT failed to simultaneously return to the pricing mechanisms prescribed by the PUCT's Orders and the ERCOT Protocols. Instead, it left the $9,000/MWh scarcity price in place for an additional 32 hours.[15] When ERCOT finally allowed normal supply and demand forces to set the price of power on February 19, the trading price plummeted within one hour from $9,000/MWh to $27/MWh, later falling to less than $5/MWh.[16]

42. On February 21, the PUCT issued an "Order Directing ERCOT to Take Action and Granting Exception to ERCOT Protocols" (the "**February 21 Order**"). The February 21 Order, among other things, authorized ERCOT to "[d]eviate from protocol deadlines and timing related to settlements, collateral obligations, and invoice payments." That same day, ERCOT issued a notice stating: "ERCOT is temporarily deviating from Protocol deadlines and timing related to settlements, collateral obligations, and invoice payments while prices are under review."[17] But, the next day, without explanation, ERCOT issued a second notice saying "ERCOT has ended its temporary deviation from protocol deadlines and timing related to settlements, collateral obligations, and invoice payments. Invoices and settlement will be executed in accordance with Protocol language."[18]

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15 Posting of ERCOT, to Legal Notifications (Feb. 16, 2021, 6:04 PM), http://www.ercot.com/services/comm/mkt_notices/archives/5221; Posting of ERCOT, to Legal Notifications; Operations (Feb. 19, 2021, 9:27 AM), http://www.ercot.com/services/comm/mkt_notices/archives/5228; Letter from Carrie Bivens, Vice President, ERCOT Indep. Mkt. Monitor Dir., Potomac Econs., Ltd. to Chairman Arthur C. D'Andrea & Commissioner Shelly Botkin, Pub. Util. Comm'n of Texas, at 1 (Mar. 4, 2021) [hereinafter IMM Letter], https://interchange.puc.texas.gov/Documents/51812_61_1114183.PDF.

16 Mark Watson, ERCOT Prices Plunge, but 34 GW Remain Offline, 166,000 Are Still Without Power, S&P Glob. (Feb. 19, 2021, 10:46 PM), https://www.spglobal.com/platts/en/market-insights/latest-news/electric-power/021921-ercot-prices-plunge-but-34-gw-remain-offline-166000-are-still-without-power.

17 ERCOT Market Notice M-A022221-01 (Feb. 22, 2021).

18 ERCOT Notice M-A022221-02 (Feb. 23, 2021).

F. ERCOT Incorrectly Calculated Ancillary Charges

43. Just Energy has hedges in place to cover its ancillary services costs based on its normal share of electricity load in ERCOT. But during the weather event, Just Energy's load share disproportionately increased. The load share increase, combined with the much higher charges for ancillary services, resulted in significant additional costs. On operating days February 15 to 20, ancillary services prices consistently exceeded the HCAP, at times approaching $25,000/MWh. That hourly rate was a dramatic departure from ERCOT's historical prices for ancillary services.

44. These excessive prices for ancillary services violated both ERCOT's preexisting rules and the PUCT Orders. Nothing in the PUCT Orders suggests that the system-wide offer cap applies only to energy prices. As noted by the IMM's March 1 recommendation, given that ancillary services reserves are procured to reduce the probability of losing load, the value of such reserves should not exceed the value of lost load ("**VOLL**"), which was $9,000 for the February 15 to February 20 operating days due to the PUCT's Orders. Indeed, in its March 1 letter to the PUCT the IMM confirmed that the manner in which the ancillary service charges were calculated and assessed does not conform to past practice and noted that capping ancillary services prices at the system-wide offer cap would be more consistent with economic market design principles.[19]

G. The PUCT And ERCOT Elevate Supply Scarcity Into Market Failure

45. The $9,000/MWh price triggered an energy market failure that massively harmed market participants with little or no offsetting benefits for consumers or the reliability of the grid. The artificial price did not result in additional power production. Generators were still burdened by frozen equipment and other weather-related issues, making substantial generation impossible, irrespective of price.

46. On March 5, the IMM concluded, after investigation, that the $9,000/MWh price was improperly maintained for a full 32 hours after the load-shed events ended, resulting in billions

[19] Comments From IMM, PUC Project No. 51812 (Mar. 1, 2021).

in overcharges on February 18 and 19 alone. These overcharges exceed the total cost of power traded in real-time for the entire year in 2020.[20] The IMM recommended that the billions in overcharges for February 18 and 19 be reversed.[21] Lieutenant Governor Dan Patrick has publicly called for the PUCT to follow the IMM's recommendation and correct the unlawfully set prices.[22]

47. On June 2, 2021, Vistra Corp. filed with the PUCT in connection with Project No. 51812 a study it commissioned from London Economics International LLC ("**LEI**"). LEI examined what real time energy prices would have been in the absence of the PUCT Orders and ERCOT's execution of those Orders. LEI found that between 22:15 on February 15th and 9:00 on February 19th, energy prices would have averaged $2,404/MWh if not for the PUCT Orders—significantly lower than the $9,000/MWh HCAP price.

48. The PUCT's and ERCOT's failed response also has spawned significant litigation. More than 150 individual lawsuits against ERCOT and other parties (as of June 10, 2021) were transferred to an MDL pretrial court.[23] At least one court has found ERCOT's "massive errors" caused debts for "failed market participants" and rejected ERCOT's claims of sovereign

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[20] Naureen S. Malik, Texas Watchdog Says Grid Operator Made $16 Billion Error, Bloomberg (Mar. 4, 2021, 1:07 PM), https://www.bloomberg.com/news/articles/2021-03-04/texas-watchdog-says-power-grid-operator-made-16-billion-error.

[21] IMM March 4, 2021 Letter at 2 ("ERCOT recalled the last of the firm load shed instructions at 23:55 on February 17, 2021. Therefore, in order to comply with the Commission Order, the pricing intervention that raised prices to VOLL should have ended immediately at that time. However, ERCOT continued to hold prices at VOLL by inflating the Real-Time On-Line Reliability Deployment Price Adder for an additional 32 hours through the morning of February 19."). See also IMM Letter dated March 11, 2021 (following up on March 4 letter).

[22] Russell Gold, Texas Lt. Governor Calls for Reversal of $16 Billion Blackout Overcharges, Wall St. J. (Mar. 8, 2021, 7:07 PM), https://www.wsj.com/articles/texas-lt-governor-calls-for-reversal-of-16-billion-blackout-overcharges-11615240985?mod=searchresults_pos2&page =1.

[23] See Order of Multidistrict Litigation Panel, In re Winter Storm Uri Litig., No. 21-0313 (Tex. June 10, 2021), https://search.txcourts.gov/SearchMedia.aspx?MediaVersionID=e0e2a6dc-b8fa-4e74-8f56-4fefd281e972&coa=cossup&DT=DISPOSITION&MediaID=d3384293-5fb5-4d66-9803-bc4081572d8f.

immunity.[24] There also have been several major bankruptcy filings in the wake of the storm, including the state's largest and oldest cooperative, Brazos River Electric, which filed for chapter 11 protection after receiving $1.9 billion of invoices—which it now is challenging in litigation against ERCOT[25]—as well as retailers Entrust Energy, Inc. (chapter 11), Griddy Energy (chapter 11), Liberty Power Holdings (chapter 11), and Brilliant Energy LLC (chapter 7).

H. LEGISLATIVE RESPONSE AND UPLIFT BALANCE FINANCING SETTLEMENT

49. Several significant pieces of legislation have been passed aimed at regulatory reform and redress that underscore the extent of the shortcomings in the PUCT's and ERCOT's response to the storm. On June 8, 2021, Texas Governor Greg Abbott signed Senate Bill 2 and Senate Bill 3 into law which provide for changes to the governance of the PUCT and ERCOT and "relat[e] to preparing for, preventing, and responding to weather emergencies and power outages."[26] Other bills have been signed into law to expand the membership of and change the eligibility requirements for the PUCT[27]; require an independent annual audit of ERCOT with published results[28]; allow for the use of electric energy storage facilities by transmission and

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[24] See CPS Energy v. Elec. Reliability Council of Texas, Cause No. 2021CI04574 (288th District Court) (Temporary Restraining Order dated April 28, 2021); decision dated May 26, 2021.

[25] See Brazos Elec. Power Cooperative, Inc., et al. v. Electric Reliability Council Of Texas, Inc., Adv. Proc. No. 21-03863 (DRJ) (Bankr. S.D. Tex.), ECF No. 173 (Debtors' First Amended Complaint Objecting To Electric Reliability Council Of Texas, Inc.'s Proof Of Claim And Other Relief).

[26] S. 2, 87th Leg., Reg. Sess. (Tex. 2021), https://capitol.texas.gov/tlodocs/87R/billtext/pdf/SB00002F.pdf#navpanes=0; S. 3, 87th Leg., Reg. Sess. (Tex. 2021), https://capitol.texas.gov/tlodocs/87R/billtext/pdf/SB00003F.pdf#navpanes=0; see, e.g., Tex. Util. Code § 39.1513; Tex. Gov't Code § 411.301.

[27] S. 2154, 87th Leg., Reg. Sess. (Tex. 2021), https://capitol.texas.gov/tlodocs/87R/billtext/pdf/SB02154F.pdf#navpanes=0; see, e.g., Tex. Util. Code § 12.051(a) (changing composition of the PUCT from three commissioners to five).

[28] H.R. 2586, 87th Leg., Reg. Sess. (Tex. 2021), https://capitol.texas.gov/tlodocs/87R/billtext/pdf/HB02586F.pdf#navpanes=0.

distribution utilities[29]; provide securitization financing for gas utilities[30]; and provide additional means for facilities to restore power during widespread outages.[31] On June 16, 2021, Governor Abbot signed House Bill 4492 (the "**Securitization Bill**") which may provide for up to $2.1 billion of financing for certain uplift charges in excess of $9,000/MWh.[32] On June 18, 2021, Governor Abbott signed Senate Bill 1580 which "enable[s] electric cooperatives to use securitization financing to recover extraordinary costs and expenses incurred" due to Winter Storm Uri.[33]

50. Certain load service entities ("**LSEs**") recently reached a settlement with the PUCT and ERCOT relating to financing for the $2.1 billion designated by the Securitization Bill for uplift charges. On July 16, 2021, ERCOT filed an application with the PUCT for "approval of a Debt Obligation Order authorizing the financing of up to $2.1 billion for the Uplift Balance, plus reasonable costs."[34] On September 20, 2021, certain LSEs, including Just Energy, reached agreement with the PUCT and ERCOT on both an opt-out process for LSEs, e.g., certain municipalities, and on a methodology (attached as Schedule C to the Settlement Stipulation) to allocate financing proceeds on a load-ratio share basis among participating LSEs. On October 13, 2021, the PUCT adopted a final debt obligation order approving the ERCOT Securitization Application. ***Note***, to the extent Plaintiffs ultimately receive funds under the Securitization Bill

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29 S. 415, 87th Leg., Reg. Sess. (Tex. 2021), https://capitol.texas.gov/tlodocs/87R/billtext/pdf/SB00415F.pdf#navpanes=0.

30 H.R. 1520, 87th Leg., Reg. Sess. (Tex. 2021), https://capitol.texas.gov/tlodocs/87R/billtext/pdf/HB01520F.pdf#navpanes=0; see Tex. Gov't Code § 1232.1072.

31 H.R. 2483, 87th Leg., Reg. Sess. (Tex. 2021), https://capitol.texas.gov/tlodocs/87R/billtext/pdf/HB02483F.pdf#navpanes=0.

32 H.R. 4492, 87th Leg., Reg. Sess. (Tex. 2021), https://capitol.texas.gov/tlodocs/87R/billtext/pdf/HB04492F.pdf#navpanes=0; see also Tex. Util. Code § 39.651; Tex. Util. Code § 39.652(4).

33 S. 1580, 87th Leg., Reg. Sess. (Tex. 2021), https://capitol.texas.gov/tlodocs/87R/billtext/pdf/SB01580F.pdf#navpanes=0; see also Tex. Util. Code § 41.151(a).

34 Unopposed Partial Stipulation And Settlement Agreement dated September 20, 2021, Item 293 (the "**Settlement Stipulation**"), at 1 filed before PUCT in connection with Application Of ERCOT For A Debt Obligation Order To Finance Uplift Balances Under PURA Chapter 39, Subchapter N, For An Order Initiating A Parallel Docket, And For Good Cause Exception, Docket No. 52322 (the "**ERCOT Securitization Application**").

from the $2.1 billion securitization facility that duplicate amounts requested in this lawsuit, they will take the necessary steps to avoid a double recovery, e.g., amending this complaint.

I. ERCOT INVOICES BURY JUST ENERGY

51. Just Energy's most valuable assets are its customers. Under Texas law, if a Retail Electricity Provider fails to make payments when due, ERCOT can revoke the provider's right to conduct activities in the ERCOT market and transfer their customers to a POLR (often at a higher rate for customers). See 16 Tex. Admin. Code § 25.43; ERCOT Market Guide § 7.11.1.a. Once that happens, the customers are lost.

52. On March 3, 2021, Just Energy filed a Petition for Emergency Relief with the PUCT (the "**Petition**").[35] In the Petition, Just Energy requested that the PUCT direct ERCOT to deviate from the deadlines and timing in its Protocols and Market Guides (as defined therein) related to settlements, collateral obligations, and invoice payments and to suspend the execution or issuance of invoices or settlements for intervals during the dates of February 13 through February 20, until issues raised by executive and legislative branches of Texas are resolved. Alternatively, Just Energy requested that the PUCT waive certain ERCOT Protocols to allow Just Energy to delay payment while exercising its rights under the ERCOT Protocols to dispute the invoiced payment amounts.

53. For the period between February 13 and February 20, Just Energy has received Invoices from ERCOT demanding payment of approximately $336 million. Just Energy disputes no less than $274 million of the invoiced amounts.

54. Lacking sufficient liquidity to satisfy the grossly overstated Invoices, the Debtors commenced the Canadian Proceedings under the CCAA in the Canadian Court on March 9, 2021. That same day, the Canadian Court approved a $125 million financing facility and authorized the

[35] Just Energy's petition is attached to the Recognition Order as Exhibit A.

payment of the disputed Invoices to ERCOT. The Debtors also filed the Chapter 15 Cases in this Court. ERCOT had actual notice of, and formally appeared in the Debtors' bankruptcy cases.[36]

55. On March 9, the Court entered an order granting the Debtors' provisional relief that makes clear "any payments made to ERCOT are made subject to [Just Energy's] rights to contest those payments, and all rights to receive a refund or credit as allowed by applicable law." The order also states "[a]lthough the Court recognizes the authority to make payments to ERCOT as granted by the Canadian Order, this Court neither adds nor subtracts from any such authorization." The Court entered an order of recognition on April 2, 2021, incorporating the same reservations set forth above.

56. In total, the Transfers consist of payments made by Just Energy (and in the case of Hudson, BP) to ERCOT of no less than approximately $274 million relating to both the imposition of a system-wide offer cap of $9,000/MWh and ancillary charges in response to the Invoices Plaintiffs received relating to the week of February 13 through February 20.

II. LEGALITY OF THE PUCT'S AND ERCOT'S ACTIONS

57. The PUCT Orders are not consistent with, and find no support under the ERCOT Protocols or the SFA, which incorporates the ERCOT Protocols by reference. They also are unlawful under, inter alia, (a) Texas' APA, Tex. Gov't Code §§ 2001.024, 2001.029, 2001.033, 2001.035, 2001.038, 2001.171, 2001.174, and 2001.176 and (b) PURA, Tex. Util. Code §§ 15.001, 39.001(c), 39.001(d), 39.151(d).

A. ERCOT PROTOCOLS AND THE SFA

58. The ERCOT Protocols are incorporated by reference into the SFA. The $9,000/MWh price finds no support in the ERCOT Protocols or the SFA. Had the PUCT and

[36] See, e.g., Notice Of Appearance And Request For Service Of All Notices, Pleadings, Orders And Other Papers [ECF No. 30] dated March 9, 2021 at 1 (filed by the law firm of Munsch Hardt Kopf & Harr, P.C. "on behalf of [ERCOT], a creditor and party-in-interest").

ERCOT followed the ERCOT Protocols, a different and lower energy price would have been in effect.

59. ERCOT Protocols in effect at the time of Winter Strom Uri did not consider firm load shed a valid consideration with respect to scarcity pricing. ERCOT Protocol 6.5.7.3.1 (Determination Of Real-Time On-Line Reliability Deployment Price Adder) lists factors relevant to determining whether ERCOT's scarcity pricing mechanism is triggered and whether prices should be increased toward the HCAP of $9,000/MWh. The version of ERCOT Protocol 6.5.7.3.1 in effect during Winter Storm Uri did ***not*** list firm load shed as a consideration for invoking scarcity pricing. Notwithstanding ERCOT Protocol 6.5.3.7.1, the PUCT and ERCOT deemed firm load shed to be a scarcity-pricing trigger and increased the price to $9,000/MWh on that basis.

B. PUCT ORDERS ARE "RULES" UNDER TEXAS' APA

60. The APA defines "rule" to mean: "(A) a state agency statement of general applicability that: (i) implements, interprets, or prescribes law or policy; or (ii) describes the procedure or practice requirements of a state agency; (B) includes the amendment or repeal of a prior rule; and (C) does not include a statement regarding only the internal management or organization of a state agency and not affecting private rights or procedures." Tex. Gov't Code § 2001.003(6). The PUCT is a "state agency" for the purposes of the APA. See Tex. Gov't Code § 2001.003(7) (definition includes state commissions). The PUCT Orders purport to speak for the PUCT and utilize its authority. The PUCT Orders are more than a restatement of a formally promulgated rule. They are a new directive to ERCOT, and they effectively amend the ERCOT scarcity pricing mechanism, promulgated at Tex. Admin. Code § 25.505(g) by forcing ERCOT to apply the system-wide offer ***cap*** of $9,000 per MWh to ***set*** prices in a load-shed situation. An agency's interpretation or application of existing promulgated rules themselves constitute "rules" under the APA when they have the effect of amending the existing rules or creating new rules.

C. PUCT ORDERS ARE GENERALLY APPLICABLE STATEMENTS

61. The PUCT Orders are generally applicable statements that implemented, interpreted, or prescribed law or policy, i.e., new scarcity pricing considerations for ERCOT. See Tex. Gov't Code § 2001.003(6)(A)(i). General applicability for the purposes of Tex. Gov't Code § 2001.003(6)(A) refers to "statements that affect the interest of the public at large such that they cannot be given the effect of law without public input."[37] The PUCT Orders affected the interests of the public in practice, e.g., electricity prices available to market participants and, by extension, many electricity consumers.

62. An agency statement "implements, interprets, or prescribes law or policy" when it reflects "[the agency's] construction and application" of existing regulations and "implements a broader policy judgment" by the agency.[38] The PUCT has authority to overrule ERCOT's determination of market clearing prices. See 16 Tex. Admin. Code § 25.501(a). The PUCT Orders are a specific construction and application of that authority to address scarcity issues surrounding Winter Storm Uri that implemented its broader policy judgment that "adjustments are needed to ERCOT prices to ensure they accurately reflect the scarcity conditions in the market."

D. PUCT ORDERS INCLUDE AMENDMENT OF PRIOR RULE

63. The PUCT Orders "amen[d] or repea[l] a prior rule." Tex. Gov't Code § 2001.003(6)(A). An agency's interpretation or application of existing promulgated rules themselves constitute "rules" under the APA when they have "the effect of amending the existing rules, or of creating new rules, and the other requirements of the APA's 'rule' definition are met." Here, the PUCT Orders are "more than a restatement of a formally promulgated rule." They are a distinct prescription to ERCOT and effectively amend the ERCOT scarcity pricing

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37 El Paso Hosp. Dist. v. Tex. Health & Hum. Servs. Comm'n, 247 S.W.3d 709, 714 (Tex. 2008).

38 Teladoc, Inc. v. Med. Bd., 453 S.W.3d 606, 614 (Tex. App—Austin 2014).

mechanism, promulgated at Tex. Admin. Code § 25.505(g), by forcing ERCOT to consider load shed in its scarcity pricing determination and set energy prices at $9,000/MWh.[39]

64. It is immaterial whether the PUCT issued the PUCT Orders in an emergency or intended to temporarily override ERCOT's scarcity pricing mechanism. There is no requirement that rules under the APA permanently amend or repeal a prior rule. On the contrary, the Court of Appeals has previously recognized ad hoc agency actions based on novel and exigent circumstances as "rules" for APA purposes.

E. PUCT ORDERS AFFECT PRIVATE RIGHTS

65. The PUCT Orders do not include a statement regarding only the internal management or organization of the PUCT and instead directly affected private rights of ERCOT market participants and, by extension, electric consumers, e.g., rates at which electricity was available. Notably, the PUCT Orders were not issued as part of a contested matter before the PUCT. Nor were they an adjudication of the rights of particular parties. Rather, ERCOT market participants had a right to purchase electricity at rates determined under the scarcity pricing mechanism set out in the PUCT's rules at Tex. Admin. Code § 25.505(g). By substantially altering that mechanism, the PUCT impacted private rights.

F. $9,000/MWH PRICE VIOLATED THE APA

66. The APA requires that agency orders adopting rules contain "reasoned justification" for the agency's decision on each rulemaking issue. Tex. Gov't Code § 2001.033(1). That justification must include "a summary of the factual basis of the rule as adopted which demonstrates a rational connection between the factual basis for the rule and the rule as adopted." Id. § 2001.033(1)(B). Lack of substantial compliance with the reasoned justification requirement renders a rule "voidable" under Tex. Gov't Code § 2001.035(a). If the Court in its discretion finds

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[39] See Teladoc, 453 S.W.3d at 616; Tex. Dept. of Transp. v. Sunset Transp., Inc., 357 S.W.3d 691, 703 (Tex. App.—Austin 2011, no pet.).

"good cause" to do so, it may "invalidate the rule or a portion of the rule, effective as of the date of the court's order." Id. § 20010.40.

67. The PUCT Orders are legally invalid because they interfere with or impair, or threaten to interfere with or impair, a legal right or privilege belonging to Plaintiffs. Tex. Gov't Code § 2001.038(a).

68. The PUCT violated the APA, including, without limitation, sections 2001.023, 2001.024, 2001.029, 2001.033, and 2001.035, and 16 Tex. Admin. Code § 25.362(c) by, among other things, failing to provide proper notice of its intent to adopt the PUCT Orders; disclose information required by the APA, e.g., an explanation of the order, rule, or proposed text; afford interested parties an opportunity to comment; articulate a reasoned justification or satisfactory evidentiary basis for its decision; or furnish information required in connection with emergency rulemaking.

69. The PUCT Orders violate the APA because they lack any reasoned justification. The one reason given by the PUCT was its belief that prices being at less than the HCAP was "inconsistent with fundamental market design" because "[i]f customer load is being shed, scarcity is at its maximum, and the market price to serve that load should also be at its highest." The PUCT provided no evidence to support its assertion that market's scarcity pricing signals were not working as intended, such as evidence that generators were not deploying because prices were too low, or that consumers were not curtailing use in response to the already objectively high prices of more than $1,200/MWh that were in effect on February 15, 2021 at the time of the PUCT Orders.

G. $9,000/MWH PRICE VIOLATED PURA

70. The PURA prohibits the PUCT from making rules "regulating competitive electric services, prices, or competitors or restricting or conditioning competition except as authorized by this title …," PURA § 39.001(c), and requires that the PUCT's rules "authorize or order

competitive rather than regulatory methods … to the greatest extent feasible" and to be "practical and limited so as to impose the least impact on competition." PURA § 39.001(d).

71. The PUCT violated its substantive authority under the PURA and any substantive authority and procedural limitations of the Governor's Disaster Declaration in issuing the PUCT Orders. It acted both outside of its authority and contrary to legally-required procedures. The PUCT Orders violated the PURA, including sections 39.001(c) and 39.001(d), because they lacked any reasoned justification and displaced the forces of market competition.

72. The PUCT Orders also violated the PURA because they set prices by regulatory fiat instead of market forces and without regard to actual scarcity conditions in the market. The PUCT Orders directly contradict the PURA's mandate that prices should be a function of competition and not regulatory action. Once ERCOT set pricing at $9,000/MWh, Just Energy had no feasible option but to buy electricity at prices that were unlawful, unjustifiable, and unrelated to ordinary market forces. And, ERCOT's Invoices include amounts for ancillary services that are either erroneously calculated or unreasonably applied in violation of ERCOT protocols.

H. ALTERNATIVELY, PUCT ORDERS EXPIRED ON FEBRUARY 18

73. Even if the PUCT Orders were a valid exercise of the PUCT's authority, they expired by their own terms as soon as firm load was no longer being shed. The imposition of the $9,000/MWh cap after 1:05 a.m. on February 18, 2021 was illegal because it did not properly implement the PUCT Orders.

74. The factual justification for the PUCT Orders was that: "***[i]f customer load is being shed***, scarcity is at its maximum, and the market price for the energy need to serve that load should also be at its highest." There is no rational connection between that factual justification and a rule that would direct ERCOT to continue scarcity pricing ***in the absence of the load being shed***. And, indeed, the plain language of the PUCT Orders commanded ERCOT only to ensure "***that firm load that is being shed*** … is accounted for in ERCOT's scarcity pricing signals" (emphasis added).

75. Absent load shed, ERCOT had no authority to set the price at $9,000/MWh after 1:05 a.m. on February 18—even assuming the PUCT Orders were valid.

76. ERCOT continued imposing $9,000/MWh prices even after load shed ended. ERCOT ceased firm load shed at 11:55 p.m. on February 17, 2021, but refused to take any action to review or change the prices and instead continued imposing $9,000/MWh prices until 9 a.m. on Friday, February 19. From and after 1:05 a.m. on February 18, continued imposition of the $9,000/MWh price was improper.

III. ERCOT IS NOT PROTECTED BY SOVEREIGN IMMUNITY

77. ERCOT cannot sustain a sovereign-immunity defense because it is a private, membership-based corporation (certified and regulated by the PUCT) and not a governmental regulator. In point of fact, ERCOT argued in 2014 that it was not a "governmental unit" and that the statutory scheme governing its oversight does not suggest any legislative intention to make ERCOT part of the government.[40] ERCOT has since taken a contrary position in another case.[41]

78. ERCOT is not a "state actor" when, among other things, (a) ERCOT does not receive funding directly from the State; (b) the Texas Legislature designated ERCOT as an "independent organization," see Tex. Util. Code § 39.151(a)-(c); and (c) the PURA implicitly recognizes ERCOT is not an arm of the state because it imposes certain open meeting requirements on ERCOT that would be redundant of obligations imposed by the Texas Open Meetings Act, see Tex. Util. Code. § 39.1511 Tex. Gov't Code §§ 551.001- .146.

79. Even if ERCOT is a government entity, any sovereign immunity has been waived pursuant to the Constitution's Bankruptcy Clause. See, e.g., Central Virginia Community College v. Katz, 546 U.S. 356, 371-72, 378 (2006) ("Insofar as orders ancillary to the bankruptcy court's

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40 See ERCOT Brief, HWY 3 MHP, LLC v. Elec. Reliability Council of Tex., Inc., No. 03-14-00303-CV at 24 (July 30, 2014).

41 Electric Reliability Council of Texas Inc. v. Panda Power Generation Infrastructure Fund LLC, No. 18-0781, 18-0792 (Tex. 2021).

in rem jurisdiction, like orders directing turnover of preferential transfers, implicate State's sovereign immunity from suit, the States agreed in the plan of Convention not to assert that immunity …. In ratifying the Bankruptcy Clause, the States acquiesced in a subordination of whatever sovereign immunity they might otherwise have asserted in proceedings necessary to effectuate the in rem jurisdiction of the bankruptcy courts"); 11 U.S.C. § 106(c) ("Notwithstanding any assertion of sovereign immunity by a governmental unit, there shall be offset against a claim or interest of a governmental unit any claim against such governmental unit that is property of the estate").

80. ERCOT also has participated fully in the Chapter 15 Cases and, to that end, has submitted itself to the Court's jurisdiction. See ECF No. 30 (ERCOT Notice of Appearance); Dep't of Army v. Fed. Lab. Rels. Auth., 56 F.3d 273, 275 (D.C. Cir. 1995) ("[T]he sovereign immunity of a State is waived by appearance in a federal court ....") (citing Clark v. Barnard, 108 U.S. 436, 447 (1883)); Securities Inv. Protection Ass'n v. Madoff, 460 B.R. 106, 119 (Bankr. S.D.N.Y 2011) ("[T]here are also participatory factors indicating Defendants consent to personal jurisdiction in this adversary proceeding. In Deak & Co., Inc., 63 B.R. 422, 431 (Bankr.S.D.N.Y.1986), this Court found that the defendants effectively consented to personal jurisdiction by purposefully availing themselves of the protections afforded by United States bankruptcy law …. [and participating in] the bankruptcy case by filing a notice of appearance and attending court hearings through their New York counsel"); In re Paques, 277 B.R. 615, 636 (Bankr. E.D. Pa. 2000) (noting creditors' attorney entered appearance and Deak "suggest this entry of appearance may be sufficient to justify the assertion of personal jurisdiction").

CAUSES OF ACTION

COUNT 1
(28 U.S.C. §§ 2201: Declaration Of Preference Under CCAA (§ 36.1), BIA (§ 95)—Invoice Obligations)

81. Plaintiffs repeat and reallege the foregoing allegations as though they were fully set forth in this paragraph.

82. On March 9, 2021, Plaintiffs filed for protection under the CCAA. Just Energy incurred the Invoice Obligations prepetition. They relate to alleged amounts owing to ERCOT in connection with the Winter Storm Uri weather event during the week of February 13, 2021 through February 20, 2021.

83. The provisions involving the preferential and reviewable transactions under the BIA have been incorporated into the CCAA. Section 36.1(1) of the CCAA provides that "sections … 95 to 101 of the [BIA] apply, with any modifications that the circumstances require, in respect of a compromise or arrangement unless the compromise or arrangement provides otherwise."

84. The Foreign Representative can bring avoidance claims under Canadian law in the Chapter 15 Cases. See In re Condor Ins. Ltd., 601 F.3d 319, 329 (5th Cir. 2010) ("As Chapter 15 was intended to facilitate cooperation between U.S. courts and foreign bankruptcy proceedings, we read section 1521(a)(7) in that light and hold that a court has authority to permit relief under foreign avoidance law under that section.").

85. Section 95(1) of the BIA provides that "[a] transfer of property made, a provision of services made, a charge on property made, a payment made, ***an obligation incurred*** or a judicial proceeding taken or suffered by an insolvent person (a) in favour of a creditor who is dealing at arm's length with the insolvent person, or a person in trust for that creditor, with a view to giving that creditor a preference over another creditor ***is void*** as against … the trustee if it is made, ***incurred***, taken or suffered, as the case may be, during the period beginning on the day that is three

months before the date of the initial bankruptcy event and ending on the date of the bankruptcy ....” (emphasis added).

86. Under section 95(2) of the BIA, “[i]f the transfer, charge, payment, ***obligation*** or judicial proceeding referred to in paragraph (1)(a) has the effect of giving the creditor a preference, it is, in the absence of evidence to the contrary, presumed to have been made, ***incurred***, taken or suffered with a view to giving the creditor the preference — even if it was made, ***incurred***, taken or suffered, as the case may be, under pressure — and evidence of pressure is not admissible to support the transaction.” (emphasis added).

87. The Invoice Obligations were incurred in the days leading up to the filing of Plaintiffs’ Canadian Proceedings and Chapter 11 Cases with a view toward—and/or with the effect of—preferring ERCOT over Plaintiffs’ other creditors. Plaintiffs were insolvent on the dates that the Invoice Obligations were incurred, or became insolvent as a result of the Invoice Obligations.

88. There is a justiciable controversy because ERCOT disputes that the Invoice Obligations are void.

89. Accordingly, an Order declaring that the Invoice Obligations are void in their full amount (approximately $336 million) and that the Transfers made on account of those void obligations should be returned is warranted.

COUNT 2
(28 U.S.C. §§ 2201: Declaration Of Preference Under CCAA (§ 36.1), BIA (§ 95)—Prepetition Transfers)

90. Plaintiffs repeat and reallege the foregoing allegations as though they were fully set forth in this paragraph.

91. On March 9, 2021, Plaintiffs filed for protection under the CCAA. Just Energy (and in the case of Hudson, BP) made certain of the Transfers prepetition in response to the Invoices.

92. The provisions involving the preferential and reviewable transactions under the BIA have been incorporated into the CCAA. Section 36.1(1) of the CCAA provides that "sections … 95 to 101 of the [BIA] apply, with any modifications that the circumstances require, in respect of a compromise or arrangement unless the compromise or arrangement provides otherwise."

93. The Foreign Representative can bring avoidance claims under Canadian law in the Chapter 15 Cases. See In re Condor Ins. Ltd., 601 F.3d 319, 329 (5th Cir. 2010) ("As Chapter 15 was intended to facilitate cooperation between U.S. courts and foreign bankruptcy proceedings, we read section 1521(a)(7) in that light and hold that a court has authority to permit relief under foreign avoidance law under that section.").

94. Section 95(1) of the BIA provides that "***[a] transfer of property made***, a provision of services made, a charge on property made, ***a payment made***, an obligation incurred or a judicial proceeding taken or suffered by an insolvent person (a) in favour of a creditor who is dealing at arm's length with the insolvent person, or a person in trust for that creditor, with a view to giving that creditor a preference over another creditor ***is void*** as against … the trustee if it is ***made***, incurred, taken or suffered, as the case may be, during the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy …" (emphasis added).

95. Under section 95(2) of the BIA, "[i]f the ***transfer***, charge, payment, obligation or judicial proceeding referred to in paragraph (1)(a) has the effect of giving the creditor a preference, it is, in the absence of evidence to the contrary, presumed to have been ***made***, incurred, taken or suffered with a view to giving the creditor the preference — even if it was ***made***, incurred, taken or suffered, as the case may be, under pressure — and evidence of pressure is not admissible to support the transaction." (emphasis added).

96. The prepetition Transfers were made in the days leading up to Plaintiffs' Canadian Proceedings and Chapter 11 Cases with a view toward—and/or with the effect of—preferring ERCOT over Plaintiffs' other creditors. Plaintiffs were insolvent on the date that the prepetition Transfers were made, or became insolvent as a result of the pre-petition Transfers.

97. There is a justiciable controversy because ERCOT disputes that the pre-petition Transfers are void or should be returned.

98. Accordingly, an Order declaring the prepetition Transfers are void and should be returned in the amount of no less than approximately $81 million is warranted.

COUNT 3
(Declaration 28 U.S.C. § 2201: Transfer At Undervalue Under CCAA (§ 36.1), BIA (§ 96)—Prepetition Transfers)

99. Plaintiffs repeat and reallege the foregoing allegations as though they were fully set forth in this paragraph.

100. On March 9, 2021, Plaintiffs filed for protection under the CCAA. Just Energy (and in the case of Hudson, BP) made certain of the Transfers prepetition in response to the Invoices.

101. The provisions involving the preferential and reviewable transactions under the BIA have been incorporated into the CCAA. Section 36.1(1) of the CCAA provides that "sections … 95 to 101 of the [BIA] apply, with any modifications that the circumstances require, in respect of a compromise or arrangement unless the compromise or arrangement provides otherwise."

102. The Foreign Representative can bring avoidance claims under Canadian law in the Chapter 15 Cases. See In re Condor Ins. Ltd., 601 F.3d 319, 329 (5th Cir. 2010) ("As Chapter 15 was intended to facilitate cooperation between U.S. courts and foreign bankruptcy proceedings, we read section 1521(a)(7) in that light and hold that a court has authority to permit relief under foreign avoidance law under that section.").

103. Under section 96(1) of the BIA, "a court may declare that a ***transfer at undervalue*** is void as against ... the trustee — ***or order that a party to the transfer*** or any other person who is privy to the transfer, or all of those persons, pay to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor — if (a) the party was dealing at arm's length with the debtor and (i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and that ends on the date of the bankruptcy, (ii) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, and (iii) the debtor intended to defraud, defeat or delay a creditor." (emphasis added).

104. Section 2 of the BIA defines the term "transfer at undervalue" as "a disposition of property or provision of services for which no consideration is received by the debtor or for which the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor."

105. In the wake of the Winter Storm Uri weather event, Just Energy staved off eviction from the Texas market by ERCOT and liquidation by commencing the Canadian Proceedings, obtaining access to DIP financing, commencing the Chapter 15 Cases ancillary to those proceedings, and using a significant portion of the DIP-Financing to pay ERCOT's Invoices. It took those actions even though it disputed ERCOT's Invoices. Just Energy paid the Invoices under protest, preserving the ability to revoke the Transfers.

106. The prepetition Transfers were made in the days leading up to Plaintiffs' Canadian Proceedings and Chapter 11 Cases only to avoid losing Plaintiffs' customers and participant status in the ERCOT market. Plaintiffs were insolvent on the dates that the prepetition Transfers were made or became insolvent as a result of the prepetition Transfers.

107. Plaintiffs did not receive valuable or good consideration in exchange for the Transfers because the Invoices were grossly inflated and included charges for energy based on the

artificial $9,000/MWh price set by ERCOT during Winter Storm Uri and ancillary services charges that were illegally and erroneously calculated under the APA and the PURA and find no support in the ERCOT Protocols or the SFA.

108. The prepetition Transfers were made with the intent to prefer ERCOT over other creditors and to that end hindered and delayed the collection efforts of those other creditors. C.f., In re Tronox, 503 B.R. 239, 278 (Bankr. S.D.N.Y. 2014) ("The intent to defraud is something distinct from the mere intent to delay or hinder .... The [US] Supreme Court did not take issue with the contention … that [a] debtor believed he could satisfy all creditors if given more time, nor with the fact that his scheme was widely disclosed, nor with the fact that most of his creditors went along …. [It] concluded that the defendant's conveyance of assets to a corporation was made 'to divest the debtor of his title and put it in such a form and place that levies would be averted, and thus was avoidable as an actual fraudulent conveyance.'") (citing Shapiro v. Wilgus, 287 US 348 (1932)); In re Sentinel Mgmt. Grp., Inc., 728 F.3d 660, 667-69 (7th Cir. 2013) ("Sentinel's pledge of segregated funds as collateral for loans with the Bank of New York was driven by a desire to stay in business …. [and is sufficient legally] to constitute actual intent to hinder, delay, or defraud Sentinel's FCM clients …. When Sentinel pledged the funds that were supposed to remain segregated for its FCM clients, Sentinel's primary purpose may not have been to render the funds permanently unavailable to these clients …. But Sentinel certainly should have seen this result as a natural consequence of its actions. In our legal system, 'every person is presumed to intend the natural consequences of his act'"); In re Am. Props., Inc., 14 B.R. 637, 643 (Bankr. D. Kan. 1981) ("With a well-founded belief that extending repayment of the debt of Coleman Nebraska would help weather the storm, and with full knowledge that the transaction as proposed would be detrimental to the creditors of American, nevertheless James Coleman on behalf of the Coleman Companies intentionally entered into the transaction and transferred a mortgage from American to FNB. There was no element of malice towards the creditors of American because James Coleman

genuinely hoped the storm would pass. The transaction was not entered into in an attempt to harm American's creditors but the transaction was entered into intentionally to satisfy a Coleman Nebraska debt and with full knowledge harm would come to the creditors of American, hindering or delaying the ability of these creditors to receive satisfaction of debts owed to them by American."); Shapiro v. Wilgus, 287 U.S. 348, 354 (1932) ("Many an embarrassed debtor holds the genuine belief that if suits can be staved off for a season, he will weather the financial storm, and pay his debts in full … The belief, even though well founded, does not clothe him with a privilege to build up obstructions that will hold his creditors at bay").

109. There is a justiciable controversy because ERCOT disputes that the prepetition Transfers are void or should be returned.

110. Accordingly, an Order declaring that the prepetition Transfers are void and that they should be returned in the amount of no less than approximately $81 million is warranted.

COUNT 4
(Recovering Proceeds If Transferred—CCAA (§ 36.1), BIA (§ 98))

111. Plaintiffs repeat and reallege the foregoing allegations as though they were fully set forth in this paragraph.

112. The Foreign Representative can bring avoidance claims under Canadian law in the Chapter 15 Cases. See In re Condor Ins. Ltd., 601 F.3d 319, 329 (5th Cir. 2010) ("As Chapter 15 was intended to facilitate cooperation between U.S. courts and foreign bankruptcy proceedings, we read section 1521(a)(7) in that light and hold that a court has authority to permit relief under foreign avoidance law under that section.").

113. On March 9, 2021, Plaintiffs filed for protection under the CCAA. The provisions involving the preferential and reviewable transactions under the BIA have been incorporated into the CCAA. Section 36.1(1) of the CCAA provides that "sections … 95 to 101 of the [BIA] apply, with any modifications that the circumstances require, in respect of a compromise or arrangement unless the compromise or arrangement provides otherwise."

114. Section 98 (1) of the BIA provides that "[i]f a person has acquired property of a bankrupt under a transaction that is void or voidable and set aside … and has sold, disposed of, realized or collected the property or any part of it, the money or other proceeds, whether further disposed of or not, shall be deemed the property of the trustee."

115. Section 98(2) of the BIA provides that "[t]he trustee may recover the property or the value thereof or the money or proceeds therefrom from the person who acquired it from the bankrupt or from any other person to whom he may have resold, transferred or paid over the proceeds of the property as fully and effectually as the trustee could have recovered the property if it had not been so sold, disposed of, realized or collected."

116. Under the BIA, the Transfers should be recovered in their full amount because they relate to Invoice Obligations that are void as preferences under section 95 of the BIA.

117. Under the BIA, the prepetition Transfers should be recovered because they (a) are void as preferences under section 95 of the BIA; and (b) constitute void transfers at undervalue under section 96 of the BIA.

118. Plaintiffs are entitled to the entry of an Order directing ERCOT to return the Transfers, either (a) in the amount of not less than approximately $274 million or, (b) ***alternatively***, in the amount of not less than approximately $220 million relating to the period after 1:05 a.m. on February 18, 2021.

COUNT 5
(Turnover—11 U.S.C. § 542(a))

119. Plaintiffs repeat and reallege the foregoing allegations as though they were fully set forth in this paragraph.

120. Section 542(a) of the Bankruptcy Code requires an entity in possession, custody, or control of property that may be used, leased, or sold under section 363 of the Bankruptcy Code to turn over such property or its value to the trustee.

121. Section 1507(a) of the Bankruptcy Code says in part that "the court, if recognition is granted, may provide additional assistance to a Foreign Representative under this title or other laws of the United States." Section 1521(a)(5) of the Bankruptcy Code entrusts the Foreign Representative with "the administration or realization of all or part of the debtor's assets within the territorial jurisdiction of the United States." Section 1521(a)(7) of the Bankruptcy Code authorizes the Court to grant "any additional relief that may be available to trustee, except for relief available under section 522, 544, 545, 547, 548, 550 and 724(a)." Authorizing the Foreign Representative to bring claims under section 542(a) of the Bankruptcy Code is appropriate when the lawsuit is consistent with the purposes of the chapter 15, including those identified in section 1501(a)(3) and (a)(4).

122. Under the Bankruptcy Code, the Transfers should be turned over in their full amount or their value should be provided because they relate to Invoice Obligations that (a) are void as preferences under section 95 of the BIA and (b) relate to Invoices that were illegally and erroneously calculated under the APA and the PURA and find no support in the ERCOT Protocols or the SFA.

123. Under the Bankruptcy Code, the prepetition Transfers should be turned over because they (a) are void as preferences under section 95 of the BIA; (b) constitute void transfers at undervalue under section 96 of the BIA; (c) are recoverable under section 98 of the BIA; and (d) otherwise relate to Invoices that were illegally and erroneously calculated under the APA and the PURA and find no support in the ERCOT Protocols or the SFA

124. Under the Bankruptcy Code, the Transfers constitute property that the Debtors, and specifically the Foreign Representative, Plaintiff Just Energy Group, Inc., may use, sell, or lease under section 363 of the Bankruptcy Code.

125. Plaintiffs are entitled to the entry of an Order directing ERCOT to turn over the Transfers, either (a) in the amount of not less than approximately $274 million or, (b) ***alternatively***,

in the amount of not less than approximately $220 million relating to the period after 1:05 a.m. on February 18, 2021.

COUNT 6
(28 U.S.C. § 2201: Declaration Of Entitlement To Setoff, Recoupment, Counterclaim)

126. Plaintiffs repeat and reallege the foregoing allegations as though they were fully set forth in this paragraph.

127. The Transfers (a) relate to Invoice Obligations that (i) are subject to avoidance as preferences under section 95 of the BIA—making the Transfers recoverable in their full amount; or (ii) relate to Invoices that were illegally and erroneously calculated under the APA and the PURA and find no support in the ERCOT Protocols or the SFA.

128. The prepetition Transfers (a) are subject to avoidance as preferences under section 95 of the BIA; (b) constitute transfers for undervalue under section 96 of the BIA; or (c) otherwise relate to Invoices that were illegally and erroneously calculated under the APA and the PURA and find no support in the ERCOT Protocols or the SFA

129. Plaintiffs currently have rights of setoff, recoupment, or counterclaim against ERCOT in an amount not less than approximately $274 million. Since making the Transfers, Plaintiffs have continued to participate in the ERCOT market and to incur obligations to ERCOT.

130. There is a justiciable controversy because ERCOT disputes that the Invoices were legally unsupportable, that Plaintiffs are entitled to a return of the Transfers, or that Plaintiffs have any rights to setoff, recoupment, or counterclaim against ERCOT relating to the Transfers, the Invoices, or the Invoice Obligations.

131. Section 1507(a) of the Bankruptcy Code says in part that "the court, if recognition is granted, may provide additional assistance to a Foreign Representative under this title or other laws of the United States." Section 1521(a)(5) of the Bankruptcy Code entrusts the Foreign Representative with "the administration or realization of all or part of the debtor's assets within the territorial jurisdiction of the United States." Section 1521(a)(7) of the Bankruptcy Code

authorizes the Court to grant "any additional relief that may be available to trustee, except for relief available under section 522, 544, 545, 547, 548, 550 and 724(a)." Authorizing the Foreign Representative to assert rights of setoff, recoupment, and counterclaim is appropriate and consistent with the purposes of the chapter 15, including those identified in section 1501(a)(3) and (a)(4).

132. Accordingly, an Order declaring Plaintiffs are entitled to set off, recoup, or counterclaim ERCOT with respect to the amounts of the Transfers against any and all obligations Plaintiffs owe to ERCOT either (a) in the amount of not less than approximately $274 million or, (b) ***alternatively***, in the amount of not less than approximately $220 million relating to the period after 1:05 a.m. on February 18, 2021, is warranted.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment in favor of Plaintiffs and against Defendant and:

A. Grant relief under sections 542(a), 1507(a), and 1521(a)(7) of the Bankruptcy Code; 28 U.S.C. §§ 2201; section 36.1 of the CCAA; and sections 95, 96, and 98 of the BIA;

B. Declare the Invoice Obligations and prepetition Transfers void;

C. Award recovery of all Transfers in an amount not less than approximately $274 million; or alternatively, award recovery of Transfers relating to periods from and after 1:05 am. on February 18, 2021 in an amount not less than approximately $220 million;

D. Award such other and further relief, in law and equity, as this Court deems just and proper; and

E. Award damages to Plaintiffs in an amount to be proven at trial, including pre-judgment and post-judgment interest and attorneys' fees to the extent awardable.

Dated: February 11, 2022
New York, New York

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re: JUST ENERGY GROUP INC., et al., Debtors in a Foreign Proceeding.[1]	Chapter 15 Case No. 21-30823 (MI)
JUST ENERGY TEXAS LP, FULCRUM RETAIL ENERGY LLC, HUDSON ENERGY SERVICES LLC, and JUST ENERGY GROUP, INC., Plaintiffs, v. ELECTRIC RELIABILITY COUNCIL OF TEXAS, INC. ~~and the PUBLIC UTILITY COMMISSION OF TEXAS, INC.~~, ~~Defendants.~~Defendant.	Adv. Pro. ~~_____~~21-4399 (MI)

FIRST AMENDED COMPLAINT

Plaintiffs are Just Energy Texas LP, Fulcrum Retail Energy, LLC, Hudson Energy Services LLC ("**Hudson**"), and the foreign representative (the "**Foreign Representative**") in the above-captioned chapter 15 cases (the "**Chapter 15 Cases**"), Just Energy Group, Inc. (collectively, "**Plaintiffs**" or "**Just Energy**," and, with their affiliated debtors in the Chapter 15 Cases, the "**Company**" or the "**Debtors**"). The Debtors are the subject of proceedings (the "**Canadian Proceedings**") under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as amended, the "**CCAA**") in the Ontario Superior Court of Justice, Commercial List (the "**Canadian Court**"). Plaintiffs bring this action by and through the ~~foreign representative~~ Foreign Representative against ~~Defendants~~ Defendant Electric Reliability Council of Texas, Inc.

[1] The identifying four digits of Just Energy Group Inc.'s local Canada tax identification number are 0469. A complete list of debtor entities in these chapter 15 cases may be obtained at www.omniagentsolutions.com/justenergy.

("**ERCOT**") ~~and the Public Utility Commission of Texas (the "**PUCT**," and together with ERCOT, "**Defendants**~~ or "**Defendant**"), and allege as follows:

PRELIMINARY STATEMENT

1. In February 2021, Texas experienced a historically severe winter storm ("**Winter Storm Uri**") that incapacitated most of its power-generating facilities. As demand for electricity outpaced supply, ERCOT—the private entity that manages Texas's grid and wholesale electricity market—ordered deep cuts in electricity consumption in the form of forced outages. In industry parlance, ERCOT ordered "load" to be "shed" to reduce strain on the power grid. At the same time, ERCOT and its state regulator the PUCT also stunningly intervened in the market for wholesale electricity by setting prices ***orders of magnitude*** higher than what market forces ordinarily would produce.

2. On February 15 and February 16, with little discussion and without prior notice or any opportunity for public comment, the PUCT issued its key Orders Directing ERCOT To Take Action And Granting Exception To Commission Rules (the "**PUCT Orders**") directing ERCOT to "ensure that firm load that is being shed in [Energy Emergency Alert ("**EEA**") Level 3] is being accounted for in ERCOT's scarcity pricing signals." The PUCT did not tie the PUCT Orders to a fact-based analysis of the current market conditions or otherwise explain the reasoning behind its determination that energy prices should be set at the high-system-wide offer cap (the "**HCAP**"). Instead, it merely stated the economic truism that "[e]nergy prices should reflect scarcity of the supply" and opined without evidence that "[i]f customer load is being shed, scarcity is at its maximum, and the market price for the energy needed to serve that load should also be at its highest." In reality, scarcity was at its maximum because the storm had forced power generators offline—not because they were waiting for a higher market price.

3. Nonetheless, following the PUCT's directive, ERCOT manually adjusted one of the input values to the Real-Time On-Line Reliability Deployment Price Adder—part of ERCOT's

scarcity pricing mechanism—to impose a Real Time Settlement Point Price on February 15 at the HCAP of $9,000 per megawatt hour ("**MWh**") for more than eighty consecutive hours. ERCOT also improperly calculated charges associated with various grid functions that support the continuous flow of electricity, including for reserves. The cost of these "ancillary services" as they are known in the power industry reached the unprecedented price of $25,000/MWh during the storm.

4. The actions of the PUCT and ERCOT not only failed to solve the electricity shortage, but they also violated Texas law. Neither the PUCT nor ERCOT possesses the substantive authority to set prices in the wholesale electricity market in this manner; the PUCT did not follow the statutorily-prescribed rule-making procedures; and the PUCT's actions were not supported by evidence as required by law. The PUCT violated the Texas Administrative Procedure Act (the "**APA**") by setting prices without proper notice or making an evidentiary showing that the market's scarcity pricing signals were not working and that the inflated prices would accomplish their apparent intended purpose of stimulating power generation. The PUCT also violated the Public Utility Regulatory Act (the "**PURA**"), which mandates that pricing must be the function of competitive forces—not regulatory fiat.

5. Similarly, ERCOT's actions found no support under, and were inconsistent with its Standard Form Market Participant Agreement with each Plaintiff (collectively, the "**SFA**"), which incorporates by reference, and requires compliance with ERCOT's nodal protocols (the "**ERCOT Protocols**"). At the time of the storm, the ERCOT Protocols did not include firm load shed among the considerations relevant to determining whether scarcity pricing would be appropriate. Yet, the PUCT and ERCOT impermissibly set the HCAP at $9,000/MWh based on firm load shed; charged prices for ancillary services that exceeded the HCAP of $9,000/MWh; and failed to allow prices to fall below $9,000/MWh when firm load shed ended.

6. The economic consequences of the PUCT's and ERCOT's decisions were staggering. Over only seven days in February, due to the prices that ERCOT set, the state's wholesale market consummated $55 billion in transactions—a level of volume it ordinarily would take the market four years to realize. The $9,000/MWh price was over four hundred times the average MWh price for 2020 of $22.00/MWh.[2]

7. What is more, ERCOT left that price in place for 32 hours after it had rescinded all load shed instructions early in the morning of February 18—even though during that period, the asserted justification for the price intervention no longer applied. After ordinary market forces were permitted to take over at 9:00 a.m. on February 19, the price per MWh dropped precipitously.

8. The PUCT's and ERCOT's decision making during the storm has been met with widespread criticism as economically unsound and legally invalid. On March 5, Potomac Economics, the PUCT's Independent Market Monitor ("**IMM**"), concluded that ERCOT's pricing intervention should have ended immediately at 12:00 a.m. on February 18 after load shed stopped and recommended that ERCOT correct real-time prices from that date and time until 9:00 a.m. on February 19. According to the IMM, the "mistake" of keeping the inflated prices in place resulted in billions of additional, improper costs to the ERCOT market. Then, on March 8, the Lieutenant Governor of Texas called on the PUCT and ERCOT to follow the IMM's recommendation, stating that correcting the "mistake will require an adjustment, but it is the right thing to do. It will ultimately benefit consumers and is one important step we can take now to begin to fix what went wrong with the storm." With respect to ancillary charges, Arthur D'Andrea, former Chair of the PUCT, remarked: "I haven't talked to anyone yet who thought [ancillary costs] could get above $9,000. That was surprising—I think, shocking—to a lot of us." The IMM also has indicated ERCOT did not properly calculate ancillary charges. The imprudence of the regulators' decisions

[2] U.S. Energy Information Administration, May 7, 2021 ("Average Texas electricity prices were higher in February 2021 due to severe weather storm") available at https://www.eia.gov/todayinenergy/detail.php?id=47876.

is confirmed by the wave of lawsuits that have been filed and by laws passed by the Texas legislature designed to remedy the consequences of those decisions and to reform the way the PUCT and ERCOT function going forward.

9. The regulatory missteps of the PUCT and ERCOT also severely harmed the Texas energy market's participants—few more so than Just Energy. Just six months earlier, Just Energy had completed a successful balance-sheet restructuring. In February and March 2021, ERCOT floored Just Energy with invoices relating to the Winter Storm Uri weather event (the "**Invoices**") that its recently de-levered balance sheet could not withstand. ERCOT's ~~invoices demanded~~ Invoices required payment of approximately $~~335~~ 336 million ~~for~~ relating to the week of February 13~~,~~, 2021 through February 20, 2021 (the "**Invoice Obligations**"). An implied threat accompanied ERCOT's ~~invoices~~Invoices: if Just Energy failed to satisfy them, ERCOT and the PUCT would shutter Just Energy's business in Texas by exercising regulatory, contractual, and statutory remedies to transfer Just Energy's customers in Texas to a Provider Of Last Resort ("**POLR**") for no consideration.

10. In order to protect against a forced eviction from Texas's retail electricity market, the loss of meaningful assets to a competitor, and the devastating impact on its creditors, employees, sureties, public shareholders, and customers, Just Energy had no choice but to pay the ~~invoices~~ Invoices under protest. Those payments followed exhaustive efforts to mitigate the consequences of ~~Defendants'~~ Defendant's actions, including submitting filings to ERCOT and the PUCT both individually and through the Texas Energy Association of Marketers; lobbying the Texas state legislature; commencing restructuring proceedings for the second time in six months, i.e., the Canadian Proceedings and Chapter 15 Cases; obtaining approval from both the Canadian

Court and this Court to enter into a $125 million financing facility; and using a significant portion of the facility proceeds to pay ERCOT.[3]

~~11. Just Energy paid ERCOT with a full reservation of rights as recognized by this Court.[4] Regardless of whether ERCOT was paid the $335 million it invoiced for the week of February 13 through February 20, ERCOT's "claim" has not been finalized, and certain of those transfers remain subject to challenge. Specifically, Plaintiffs challenge no less than $274 million (hereinafter, the "**Transfers**") out of the $335 million that ERCOT invoiced.~~

11. ~~Just Energy is entitled to relief under the Bankruptcy Code because the Transfers are subject to (a) avoidance as unauthorized post-petition transfers (11 U.S.C. § 549); (b) turnover (11 U.S.C. § 542); (c) setoff (11 U.S.C. §§ 553 and/or 558); (d) disallowance (11 U.S.C. §§ 502(b), 502(d)); and (e) avoidance under Canadian law or any other applicable law. The Transfers should be recovered and distributed to Just Energy's creditors. The Bankruptcy Code provides remedies because this Court did not approve the Transfers~~Just Energy paid ERCOT with a full reservation of rights as recognized by this Court that this lawsuit seeks to vindicate.[4] Plaintiffs challenge no less than approximately $274 million paid in response to the Invoices (hereinafter, the "**Transfers**") because, ~~and they are subject to avoidance on that basis alone. Nor could this Court ever have approved the Transfers when the invoices~~ among other things, the Invoices are based on the PUCT Orders, which themselves are unlawful under the APA and the PURA, and otherwise are inconsistent with the ERCOT Protocols and the SFA. ***Alternatively***, even if the PUCT Orders are

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[3] With respect to Plaintiff Hudson, ERCOT invoiced its qualified service entity (or "**QSE**") BP Energy Company ("**BP**"). BP satisfied those invoices and seeks reimbursement from Hudson pursuant to the parties Independent Electricity System Operating Scheduling Agreement.

~~[4] See Order Granting Provisional Relief Pursuant To Section 1519 Of Bankruptcy Code [ECF No. 23] dated March 9, 2021 at p. 11 ("Additionally, the Court finds that any payments made to ERCOT are made subject to all of the Debtors' rights to contest those payments, and all rights to receive a refund or credit as allowed by applicable law.").~~

[4] See Order Granting Provisional Relief Pursuant To Section 1519 Of Bankruptcy Code [ECF No. 23] dated March 9, 2021 at p. 11 ("Additionally, the Court finds that any payments made to ERCOT are made subject to all of the Debtors' rights to contest those payments, and all rights to receive a refund or credit as allowed by applicable law.").

valid, Just Energy still has valid claims ~~under the Bankruptcy Code~~ because ERCOT ~~could not have applied~~ had no basis to apply the $9,000/MWh price after 1:05 a.m. on February 18. Accordingly, Just Energy is entitled to (a) declaratory judgment that the Invoice Obligations and/or the Transfers paid in response to the Invoices are void as preferences and/or transfers at undervalue under section 36.1 of the CCAA and sections 95, 96, and 98 of the Bankruptcy and Insolvency Act (the "**BIA**"); (b) turnover under section 542(a) of the Bankruptcy Code of either the Transfers or the value of the Transfers; and (c) declaratory judgment that Plaintiffs currently are entitled to set off, counterclaim and recoup no less than the amount of the Transfers against any obligation owed to ERCOT.

JURISDICTION AND VENUE

12. This proceeding involves the Debtors' assets located in the United States. Section 1521(a)(4) of the Bankruptcy Code provides that the Court may entrust the ~~foreign representative~~ Foreign Representative with the "administration and realization of all or part of the debtors' assets within the territorial jurisdiction of the United States." Section 1507(a) of the Bankruptcy Code says in part that "the court, if recognition is granted, may provide additional assistance to a ~~foreign representative~~ Foreign Representative under this title or other laws of the United States." Section 1521(a)(7) of the Bankruptcy Code provides that the ~~foreign representative~~ Foreign Representative may be granted "any additional relief that may be available to a trustee, except for relief available under sections 522, 544, 545, 547, 548, 550, and 724(a)." 11 U.S.C. § 1521(a)(7). ~~The proceeding also involves causes of action to recover property that was transferred after the commencement of the case. Pursuant to section 1520(a)(2) of the Bankruptcy Code, "[u]pon recognition of a foreign proceeding that is a foreign main proceeding … section [549 applies] to a transfer of an interest of the debtor in property that is within the territorial jurisdiction of the United States …."~~

13. The prosecution of this lawsuit also comports squarely with the objectives of chapter 15 as outlined in the Bankruptcy Code, including the "fair and efficient administration of cross-border insolvencies that protects the interests of all creditors, and other interested entities, including the debtor" and the "protection and maximization of the value of the debtor's assets." 11 U.S.C. §§ 1501(a)(3), (a)(4).

~~14. While Just Energy paid ERCOT, it did so under protest. Regardless of whether ERCOT filed a formal proof of claim, in sum and substance, Just Energy's payment under protest of amounts ERCOT invoiced and demanded leaves ERCOT with a contingent "claim" against Just Energy that has not been finalized and only will be liquidated after the Court determines the proper amounts in this proceeding.~~

~~15.~~14. Plaintiffs bring claims against ~~the PUCT and ERCOT under sections 502(b), 502(d), 542(a), 549, 553 and/or 558 of the Bankruptcy Code as well as claims for avoidance under Canadian and any other applicable law~~ERCOT under section 542(a) of the Bankruptcy Code, 28 U.S.C. § 2201, Federal Rule of Bankruptcy Procedure 7001, section 36.1 of the CCAA, and sections 95, 96, and 98 of the BIA. These causes of action are "core" pursuant to 28 U.S.C. § 157(b) and include, among other things, the "recognition of foreign proceedings and other matters under chapter 15 of title 11," 28 U.S.C. § 157(b)(2)(P) and "requests for other relief covered under the provisions of chapter 15."[5] They also are "core" because they involve "matters concerning the administration of the estate," 28 U.S.C. § 157(b)(2)(A); ~~the~~ ~~"allowance or disallowance of claims,"~~ proceedings to determine, avoid, or recover preferences," 28 U.S.C. § ~~157(b)(2)(B~~157(b)(2)(F); "proceedings to determine, avoid, or recover fraudulent conveyances," 28 U.S.C. § 157(b)(2)(H); "orders to turn over property of the estate," 28 U.S.C. § 157(b)(2)(E); and "other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or equity security holder relationship," 28 U.S.C. § 157(b)(2)(O).

[5] In re British Am. Ins. Co. Ltd., 488 B.R. 205, 223 n.31 (Bankr. S.D. Fla. 2013).

~~16. At minimum, this Court has "related to" jurisdiction over this entire proceeding. Considering that proceeds realized from this action may fund distributions to creditors in the Canadian Proceedings, its outcome will have far more than just a conceivable effect on the foreign estate.~~

15. At a minimum, this Court has "related to" jurisdiction over this entire proceeding given its potential impact on the Canadian Proceedings, the Chapter 15 Cases, and Just Energy's liquidity and ability to implement a going-concern restructuring. See In re British Am. Ins. Co. Ltd., 488 B.R. 205, 223-24 (Bankr. S.D. Fla. 2013) (observing a chapter 15 case necessarily requires a court "to substitute the chapter 15 case itself for the concept of the estate…. The court may also define the extent of related-to jurisdiction in the chapter 15 case by the potential effect of the action on the estate administered in the foreign proceeding"); SPV Osus Ltd. v. UBS AG, 882 F.3d 333, 339-40 (2d Cir. 2018) (claim is "related to" bankruptcy case "if the action's outcome might have any conceivable effect on the [foreign] estate."); In re Fairfield Sentry Ltd., 2018 WL 3756343, at *7 (Bankr. S.D.N.Y. Aug. 6, 2018) ("When the debtor is an entity involved in a foreign insolvency proceeding, the 'estate,' for purposes of determining whether 'related to' jurisdiction exists, is the foreign estate").

~~17.~~16. Pursuant to Federal Bankruptcy Rule 7008, Plaintiffs consent to the entry of final orders or judgment by the Court.

~~18.~~17. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

PARTIES

~~19.~~18. Plaintiff Just Energy Texas LP is a Texas limited partnership with its headquarters in Harris County, Texas. Plaintiff Fulcrum Retail Energy LLC is a Texas company with its headquarters in Harris County, Texas. Plaintiff Hudson is a New Jersey company with its headquarters in Harris County, Texas. Plaintiff Just Energy Group, Inc. is a Canadian company with its headquarters in Toronto, Canada that has been appointed the Debtors' "foreign

representative" as that term is defined under 101(24) of the Bankruptcy Code by both the Canadian Court and this Court.

~~20. Plaintiffs (along with the other Debtors) commenced the Chapter 15 Cases and the CCAA Proceedings in the Canadian Court on March 9, 2021. That same day, the Canadian Court appointed FTI Consulting Canada Inc. as Monitor. Under the CCAA, rights can be exercised for the benefit of creditors of the Debtors.~~

~~21.~~19. Defendant ERCOT is a membership-based § 501(c)(4) nonprofit corporation governed by its Board of Directors and subject to the oversight of the PUCT and the Texas Legislature. It is the independent system operator for all the transmission and generation facilities in the ERCOT market, which is located entirely within Texas. It may be served with process at its principal place of business, 7620 Metro Center Drive, Austin, Texas 78744.

~~22. Defendant the PUCT is an agency of the State of Texas. The PUCT is a "State Commission" within the meaning provided in 47 U.S.C. §§ 153(41), 251 and 252. The PUCT may be served with citation by serving the PUCT General Counsel, at 1701 N. Congress Avenue, Austin, Texas 78711-3326.~~

20. Plaintiffs (along with the other Debtors) commenced the Chapter 15 Cases and the CCAA Proceedings in the Canadian Court on March 9, 2021. On the same date, the Canadian Court appointed FTI Consulting Canada Inc. as Monitor (the "**Monitor**"). The Monitor has been advised that the Foreign Representative is bringing claims against ERCOT relating to the Invoices and Transfers and has no objection.

FACTUAL ALLEGATIONS

I. BACKGROUND

A. THE COMPANY

~~23.~~21. The Company is a natural gas and electricity retailer currently operating in the United States and Canada. Its principal line of business consists of purchasing electricity and

natural gas commodities from certain large energy suppliers and re-selling them to residential and commercial customers. The Company services more than 936,000 customers and provides employment to approximately 1,100 employees. Texas is the Company's single largest market, representing 47% of its revenues in fiscal year 2020.

~~24.~~22. Retailers like Just Energy fulfill a vital role in the ERCOT ecosystem. Retail electricity providers purchase wholesale power from power-generating companies, trading companies, and wholesalers and re-sell that power to customers. Retailers generally purchase most of their power in large, wholesale blocks—well in advance. They then compete with other retailers to sell that power to consumers at a low cost, typically under fixed-price contracts. Customers in locations within Texas where there is robust price competition benefit from the role played by retailers like the Company in the market.[6]

~~25.~~23. In September 2020, Just Energy completed a balance sheet recapitalization (the "**Recapitalization**") in Canada. The Recapitalization was the culmination of a 15-month-long strategic review process and comprehensive plan to strengthen Just Energy's business. The Recapitalization improved the Company's overall capital structure by: (a) reducing its debt and obligations under preferred shares by approximately CAD $780 million; (b) raising over CAD $100 million of new equity; (c) reducing annual cash interest costs by approximately CAD $45 million; and (d) extending debt maturity dates.

~~26.~~24. The Recapitalization was executed through a plan of arrangement under section 192 of the Canada Business Corporations Act, which was approved by the Canadian Court on September 3, 2020. The Recapitalization also was recognized by this Court by the Honorable David R. Jones in the chapter 15 case styled In re Just Energy Group Inc., Case No. 20-34442

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[6] See Peter R. Hartley, Kenneth B. Medlock III & Olivera Jankovska, Electricity Reform And Retail Pricing In Texas, Center for Energy Studies (June 2017), https://www.bakerinstitute.org/media/files/files/55857030/ces-pub-txelectricity-060717_O6fiwZA.pdf.

(DRJ) (Bankr. S.D. Tex.) on September 10, 2020. Upon the consummation of the Recapitalization, the Company had CAD $138 million of total available liquidity.

B. THE PUCT, ERCOT, AND THE TEXAS ELECTRICITY MARKET

~~27.~~25. The Texas Interconnection is one of the three main electricity grids in the United States that, for the most part, operates independently and with limited export and import capabilities. The PUCT and ERCOT are solely responsible for managing the Texas Interconnection and wholesale electricity transactions that occur within the grid.

~~28.~~26. ERCOT functions both as the technical operator for the Texas grid and a decision-making organization that creates rules for the wholesale electricity market. ERCOT is responsible for scheduling power for more than 26 million people on a grid that connects over 46,500 miles of transmission lines and more than 680 generation units, accounting for 84,500 megawatts of installed generation capacity.

~~29.~~27. Prices within the grid ordinarily are set by market forces. ERCOT manages the flow of electricity by continually ordering generators to ramp-up or ramp-down production to constantly match the amount of power demanded by consumers and maintain overall grid stability and reliability. ERCOT also performs financial settlements for the competitive wholesale electricity market and enforces certain credit requirements.

~~30.~~28. ERCOT is subject to regulation by the PUCT, a state agency that regulates the state's electric, water, and telecommunication utilities, implements respective legislation, and offers customer assistance in resolving consumer complaints.

~~31.~~29. Each of the Plaintiffs (excluding the ~~foreign representative~~Foreign Representative) has a "Retail Electric Provider" certificate in Texas, is registered as a "Market Participant" in the ERCOT Market, and is party to a SFA with ERCOT. To participate in the ERCOT market, each Plaintiff must be a party to an SFA and comply with the ERCOT's Protocols.

~~32.~~30. If Plaintiffs are unable to pay ERCOT's invoices when due, ERCOT can suspend their market participation in as little as two days and transfer their customers to another energy provider, i.e., a POLR. Failure to pay timely an ERCOT invoice also would give the PUCT grounds to initiate a proceeding to amend, suspend, or revoke Plaintiffs' Retail Electric Provider certificates.

C. WINTER STORM URI

~~33.~~31. In February 2021, Winter Storm Uri brought extremely cold weather conditions to Texas. Customer demand for electricity surged on February 13 and 14, pushing Texas's power grid to a new winter peak demand record, topping 69,000 megawatts. This was more than 3,200 megawatts higher than the previous winter peak set in January 2018.

~~34.~~32. While demand soared, supply plummeted as power plants were forced offline by the storm's impact. As a result, demand threatened to exceed supply. In the early hours of February 15, ERCOT declared an EEA Level 1, urging consumers to conserve power. Within an hour, ERCOT elevated to an EEA Level 2, and only 13 minutes later, at 1:25 a.m., ERCOT elevated to an EEA Level 3. With the grid stressed, ERCOT ordered forced outages to reduce strain.

D. THE PUCT AND ERCOT RESPOND BY ARTIFICIALLY INFLATING PRICING

~~35.~~33. The PUCT and ERCOT responded to the storm by intervening in the wholesale electricity market to impose draconian pricing on existing supply. The PUCT Orders were issued on February 15 and February 16 and resulted in electricity prices being raised to the regulatory maximum of $9,000/MWh, a spike of as much as 30,000% above average market prices for that time of year.[7]

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[7] Russell Gold & Katherine Blunt, Texas Grapples with Crushing Power Bills After Freeze, Wall. St. J. (Feb. 23, 2021, 10:59 AM), https://www.wsj.com/articles/texas-grapples-with-crushing-power-bills-after-freeze-11614095953. Tim McGlaughlin, Texas Wholesale Electric Prices Spike More Than 10,000% Amid Outages, Reuters (Feb. 15, 2021, 9:17 AM),

~~36.~~34. By regulation, ERCOT power prices were ***capped*** during the relevant period at the HCAP of $9,000/MWh, but no regulation provides that the PUCT and ERCOT may ***set*** prices at this rate if ordinary market forces would produce a lower price. The amount is a cap—not a rate that can be set artificially.[8] The PUCT directed ERCOT to apply the system-wide offer cap of $9,000/MWh to ***set*** prices while firm load was being shed in an EEA3 load shed event.

~~37.~~35. Similarly, firm load shed was not a scarcity-pricing trigger at the time under ERCOT Protocol 6.5.3.7.1 that could be used to justify the decision to set the real-time market price at $9,000/MWh. Notwithstanding, the PUCT Orders capriciously concluded "[i]f customer load is being shed, scarcity is at its maximum, and the market price for the energy needed to serve that load should also be at its highest," prompting ERCOT to improperly set the price at the HCAP of $9,000/MWh.

~~38.~~36. Mandating the market pricing at these levels by order was unprecedented. For historical comparison, ERCOT real time prices averaged just $22.00 per MWh for February 2020.[9] If any for-profit entity had increased prices on the scale of what ERCOT did during a declared state of emergency, it would be widely recognized as price gouging under the law. In point of fact, the Texas Attorney General sued another retailer, Griddy, for price gouging because Griddy passed through the $9,000/MWh price to consumers.

~~39.~~37. The duration of the ERCOT-set price was equally unprecedented. In ERCOT's history, prices had never before remained at the cap for anything close to eighty hours. As depicted in the chart below, January 2018 was the first time in ERCOT history that prices ever even reached

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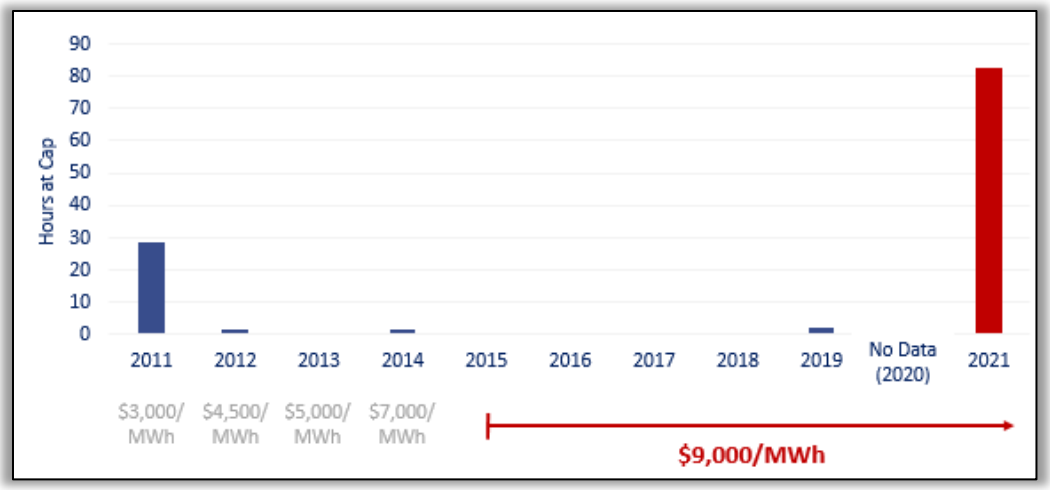
https://www.reuters.com/article/us-electricity-texas-prices/texas-wholesale-electric-prices-spike-more-than-10000-amid-outages-idUSKBN2AF19A.

[8] 16 T.A.C. §§ 25.505(g)(B)-(C).

[9] U.S. Energy Information Administration, May 7, 2021 ("Average Texas electricity prices were higher in February 2021 due to severe weather storm") ("Wholesale electricity prices in the Electric Reliability Council of Texas (ERCOT), Texas's primary grid operator, averaged $22 per megawatthour (MWh) in 2020") available at https://www.eia.gov/todayinenergy/detail.php?id=47876.

the $9,000/MWh cap—for a total of only ten minutes.[10] In 2019, prices hit the cap, but only for a little more than two hours.[11]

~~40.~~38. Historically, prices only ever hit the cap for a fraction of the more than eighty hours that the $9,000/MWh price was in place. As reflected in the chart below, in 2012, 2013, and 2014 (when the cap ranged from $3,000/MWh at the beginning of 2012 to $7,000/MWh at the end of 2014), prices were at the cap for less than two hours each year.[12]



~~41.~~39. Although the February 2021 winter storm has prompted comparisons to another winter storm that hit Texas ten years ago, in February 2011, the events of 2021 were different. The chart above illustrates that eighty hours were spent at the cap in February 2021 versus 28.44 hours in 2011.[13] And, the cap was only $3,000/MWh at the time, a third of 2021. Critically, the 2011

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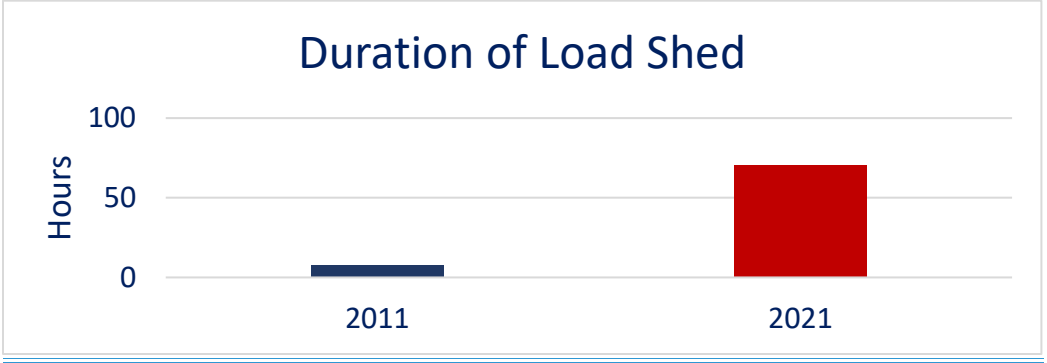
10 Potomac Economics, Ltd., 2018 State of the Market Report for the ERCOT Electricity Markets 23 (June 2019), https://www.potomaceconomics.com/wp-content/uploads/2019/06/2018-State-of-the-Market-Report.pdf.

11 Potomac Economics, Ltd., 2019 State of the Market Report for the ERCOT Electricity Markets 18 (May 2020), https://www.potomaceconomics.com/wp-content/uploads/2020/06/2019-State-of-the-Market-Report.pdf.

12 Potomac Economics, Ltd., 2014 State of the Market Report for the ERCOT Wholesale Electricity Markets 16 (July 2015), https://www.potomaceconomics.com/wp-content/uploads/2017/01/2014-ERCOT-State-of-the-Market-Report.pdf.

13 ERCOT News Release November 20, 2021 ("Winter power plant assessment under way, CREZ development on track for 2013 completion) available at http://www.ercot.com/news/releases/show/26348.

prices were determined by the actual scarcity conditions in the market, rather than under orders issued by regulators, and as illustrated below, load shed lasted less than 8 hours—versus nearly 80 hours in 2021.



E. FEBRUARY 18: LOAD SHEDDING STOPS, BUT $9,000/MWH PRICE CONTINUES

~~42.~~40. Temperatures warmed on February 17. With that development, ERCOT was able to stop shedding load just after midnight on February 18—a fact about which market participants were notified. No load shed directive under ERCOT Protocol 6.5.8.4.2(3) was in place after 1:05 a.m. on February 18. After lifting load shed instructions, the ERCOT grid had ample resources online, and there was no justification for continuing to impose an artificial price of $9,000/MWh through administrative adjustments to the Real Time-Reliability Deployment Price Adder.[14]

~~43.~~41. Despite a sufficient level of reserves, ERCOT failed to simultaneously return to the pricing mechanisms prescribed by the PUCT's Orders and the ERCOT Protocols. Instead, it left the $9,000/MWh scarcity price in place for an additional 32 hours.[15] When ERCOT finally

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[14] ERCOT Market Notice M-C021521-03 Legal (Feb. 17, 2021) ("Once ERCOT is no longer instructing firm Load shed, the adjustment will be set to 0, as it would be in the previous implementation."), http://www.ercot.com/services/comm/mkt_notices/archives/5224.

[15] Posting of ERCOT, to Legal Notifications (Feb. 16, 2021, 6:04 PM), http://www.ercot.com/services/comm/mkt_notices/archives/5221; Posting of ERCOT, to Legal Notifications; Operations (Feb. 19, 2021, 9:27 AM), http://www.ercot.com/services/comm/mkt_notices/archives/5228; Letter from Carrie Bivens, Vice President, ERCOT Indep. Mkt. Monitor Dir., Potomac Econs., Ltd. to Chairman Arthur C. D'Andrea & Commissioner Shelly Botkin, Pub.

allowed normal supply and demand forces to set the price of power on February 19, the trading price plummeted within one hour from $9,000/MWh to $27/MWh, later falling to less than $5/MWh.[16]

~~44.~~42. On February 21, the PUCT issued an "Order Directing ERCOT to Take Action and Granting Exception to ERCOT Protocols" (the "**February 21 Order**"). The February 21 Order, among other things, authorized ERCOT to "[d]eviate from protocol deadlines and timing related to settlements, collateral obligations, and invoice payments." That same day, ERCOT issued a notice stating: "ERCOT is temporarily deviating from Protocol deadlines and timing related to settlements, collateral obligations, and invoice payments while prices are under review."[17] But, the next day, without explanation, ERCOT issued a second notice saying "ERCOT has ended its temporary deviation from protocol deadlines and timing related to settlements, collateral obligations, and invoice payments. Invoices and settlement will be executed in accordance with Protocol language."[18]

F. ERCOT Incorrectly Calculated Ancillary Charges

~~45.~~43. Just Energy has hedges in place to cover its ancillary services costs based on its normal share of electricity load in ERCOT. But during the weather event, Just Energy's load share disproportionately increased. The load share increase, combined with the much higher charges for ancillary services, resulted in significant additional costs. On operating days February 15 to 20, ancillary services prices consistently exceeded the HCAP, at times approaching $25,000/MWh. That hourly rate was a dramatic departure from ERCOT's historical prices for ancillary services.

Util. Comm'n of Texas, at 1 (Mar. 4, 2021) [hereinafter IMM Letter], https://interchange.puc.texas.gov/Documents/51812_61_1114183.PDF.

16 Mark Watson, ERCOT Prices Plunge, but 34 GW Remain Offline, 166,000 Are Still Without Power, S&P Glob. (Feb. 19, 2021, 10:46 PM), https://www.spglobal.com/platts/en/market-insights/latest-news/electric-power/021921-ercot-prices-plunge-but-34-gw-remain-offline-166000-are-still-without-power.

17 ERCOT Market Notice M-A022221-01 (Feb. 22, 2021).

18 ERCOT Notice M-A022221-02 (Feb. 23, 2021).

~~46.~~44. These excessive prices for ancillary services violated both ERCOT's preexisting rules and the PUCT Orders. Nothing in the PUCT Orders suggests that the system-wide offer cap applies only to energy prices. As noted by the IMM's March 1 recommendation, given that ancillary services reserves are procured to reduce the probability of losing load, the value of such reserves should not exceed the value of lost load ("**VOLL**"), which was $9,000 for the February 15 to February 20 operating days due to the PUCT's Orders. Indeed, in its March 1 letter to the PUCT the IMM confirmed that the manner in which the ancillary service charges were calculated and assessed does not conform to past practice and noted that capping ancillary services prices at the system-wide offer cap would be more consistent with economic market design principles.[19]

G. THE PUCT AND ERCOT ELEVATE SUPPLY SCARCITY INTO MARKET FAILURE

~~47.~~45. The $9,000/MWh price triggered an energy market failure that massively harmed market participants with little or no offsetting benefits for consumers or the reliability of the grid. The artificial price did not result in additional power production. Generators were still burdened by frozen equipment and other weather-related issues, making substantial generation impossible, irrespective of price.

~~48.~~46. On March 5, the IMM concluded, after investigation, that the $9,000/MWh price was improperly maintained for a full 32 hours after the load-shed events ended, resulting in billions in overcharges on February 18 and 19 alone. These overcharges exceed the total cost of power traded in real-time for the entire year in 2020.[20] The IMM recommended that the billions in

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[19] Comments From IMM, PUC Project No. 51812 (Mar. 1, 2021).

[20] Naureen S. Malik, Texas Watchdog Says Grid Operator Made $16 Billion Error, Bloomberg (Mar. 4, 2021, 1:07 PM), https://www.bloomberg.com/news/articles/2021-03-04/texas-watchdog-says-power-grid-operator-made-16-billion-error.

overcharges for February 18 and 19 be reversed.[21] Lieutenant Governor Dan Patrick has publicly called for the PUCT to follow the IMM's recommendation and correct the unlawfully set prices.[22]

~~49.~~47. On June 2, 2021, Vistra Corp. filed with the PUCT in connection with Project No. 51812 a study it commissioned from London Economics International LLC ("**LEI**"). LEI examined what real time energy prices would have been in the absence of the PUCT Orders and ERCOT's execution of those Orders. LEI found that between 22:15 on February 15th and 9:00 on February 19th, energy prices would have averaged $2,404/MWh if not for the PUCT Orders—significantly lower than the $9,000/MWh HCAP price.

~~50.~~48. The PUCT's and ERCOT's failed response also has spawned significant litigation. More than 150 individual lawsuits against ERCOT and other parties (as of June 10, 2021) were transferred to an MDL pretrial court.[23] At least one court has found ERCOT's "massive errors" caused debts for "failed market participants" and rejected ERCOT's claims of sovereign immunity.[24] There also have been several major bankruptcy filings in the wake of the storm, including the state's largest and oldest cooperative, Brazos River Electric, which filed for chapter 11 protection after receiving $1.9 billion of invoices—which it now is challenging in litigation

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[21] IMM March 4, 2021 Letter at 2 ("ERCOT recalled the last of the firm load shed instructions at 23:55 on February 17, 2021. Therefore, in order to comply with the Commission Order, the pricing intervention that raised prices to VOLL should have ended immediately at that time. However, ERCOT continued to hold prices at VOLL by inflating the Real-Time On-Line Reliability Deployment Price Adder for an additional 32 hours through the morning of February 19."). See also IMM Letter dated March 11, 2021 (following up on March 4 letter).

[22] Russell Gold, Texas Lt. Governor Calls for Reversal of $16 Billion Blackout Overcharges, Wall St. J. (Mar. 8, 2021, 7:07 PM), https://www.wsj.com/articles/texas-lt-governor-calls-for-reversal-of-16-billion-blackout-overcharges-11615240985?mod=searchresults_pos2&page =1.

[23] See Order of Multidistrict Litigation Panel, In re Winter Storm Uri Litig., No. 21-0313 (Tex. June 10, 2021), https://search.txcourts.gov/SearchMedia.aspx?MediaVersionID=e0e2a6dc-b8fa-4e74-8f56-4fefd281e972&coa=cossup&DT=DISPOSITION&MediaID=d3384293-5fb5-4d66-9803-bc4081572d8f.

[24] See CPS Energy v. Elec. Reliability Council of Texas, Cause No. 2021CI04574 (288th District Court) (Temporary Restraining Order dated April 28, 2021); decision dated May 26, 2021.

against ERCOT[25]—as well as retailers Entrust Energy, Inc. (chapter 11), Griddy Energy (chapter 11), Liberty Power Holdings (chapter 11), and Brilliant Energy LLC (chapter 7).

H. LEGISLATIVE RESPONSE AND UPLIFT BALANCE FINANCING SETTLEMENT

~~51.~~49. Several significant pieces of legislation have been passed aimed at regulatory reform and redress that underscore the extent of the shortcomings in the PUCT's and ERCOT's response to the storm. On June 8, 2021, Texas Governor Greg Abbott signed Senate Bill 2 and Senate Bill 3 into law which provide for changes to the governance of the PUCT and ERCOT and "relat[e] to preparing for, preventing, and responding to weather emergencies and power outages."[26] Other bills have been signed into law to expand the membership of and change the eligibility requirements for the PUCT[27]; require an independent annual audit of ERCOT with published results[28]; allow for the use of electric energy storage facilities by transmission and distribution utilities[29]; provide securitization financing for gas utilities[30]; and provide additional means for facilities to restore power during widespread outages.[31] On June 16, 2021, Governor Abbot signed House Bill 4492 (the "**Securitization Bill**") which may provide for up to $2.1 billion

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25 See Brazos Elec. Power Cooperative, Inc., et al. v. Electric Reliability Council Of Texas, Inc., Adv. Proc. No. 21-03863 (DRJ) (Bankr. S.D. Tex.), ECF No. 173 (Debtors' First Amended Complaint Objecting To Electric Reliability Council Of Texas, Inc.'s Proof Of Claim And Other Relief).

26 S. 2, 87th Leg., Reg. Sess. (Tex. 2021), https://capitol.texas.gov/tlodocs/87R/billtext/pdf/SB00002F.pdf#navpanes=0; S. 3, 87th Leg., Reg. Sess. (Tex. 2021), https://capitol.texas.gov/tlodocs/87R/billtext/pdf/SB00003F.pdf#navpanes=0; see, e.g., Tex. Util. Code § 39.1513; Tex. Gov't Code § 411.301.

27 S. 2154, 87th Leg., Reg. Sess. (Tex. 2021), https://capitol.texas.gov/tlodocs/87R/billtext/pdf/SB02154F.pdf#navpanes=0; see, e.g., Tex. Util. Code § 12.051(a) (changing composition of the PUCT from three commissioners to five).

28 H.R. 2586, 87th Leg., Reg. Sess. (Tex. 2021), https://capitol.texas.gov/tlodocs/87R/billtext/pdf/HB02586F.pdf#navpanes=0.

29 S. 415, 87th Leg., Reg. Sess. (Tex. 2021), https://capitol.texas.gov/tlodocs/87R/billtext/pdf/SB00415F.pdf#navpanes=0.

30 H.R. 1520, 87th Leg., Reg. Sess. (Tex. 2021), https://capitol.texas.gov/tlodocs/87R/billtext/pdf/HB01520F.pdf#navpanes=0; see Tex. Gov't Code § 1232.1072.

31 H.R. 2483, 87th Leg., Reg. Sess. (Tex. 2021), https://capitol.texas.gov/tlodocs/87R/billtext/pdf/HB02483F.pdf#navpanes=0.

of financing for certain uplift charges in excess of $9,000/MWh.[32] On June 18, 2021, Governor Abbott signed Senate Bill 1580 which "enable[s] electric cooperatives to use securitization financing to recover extraordinary costs and expenses incurred" due to Winter Storm Uri.[33]

~~52.~~50. Certain load service entities ("**LSEs**") recently reached a settlement with the PUCT and ERCOT relating to financing for the $2.1 billion designated by the Securitization Bill for uplift charges. On July 16, 2021, ERCOT filed an application with the PUCT for "approval of a Debt Obligation Order authorizing the financing of up to $2.1 billion for the Uplift Balance, plus reasonable costs."[34] On September 20, 2021, certain LSEs, including Just Energy, reached agreement with the PUCT and ERCOT on both an opt-out process for LSEs, e.g., certain municipalities, and on a methodology (attached as Schedule C to the Settlement Stipulation) to allocate financing proceeds on a load-ratio share basis among participating LSEs. On October 13, 2021, the PUCT adopted a final debt obligation order approving the ERCOT Securitization Application. ***Note***, to the extent Plaintiffs ultimately receive funds under the Securitization Bill from the $2.1 billion securitization facility that duplicate amounts requested in this lawsuit, they will take the necessary steps to avoid a double recovery, e.g., amending this complaint.

I. ERCOT INVOICES BURY JUST ENERGY

~~53.~~51. Just Energy's most valuable assets are its customers. Under Texas law, if a Retail Electricity Provider fails to make payments when due, ERCOT can revoke the provider's right to conduct activities in the ERCOT market and transfer their customers to a POLR (often at a higher

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[32] H.R. 4492, 87th Leg., Reg. Sess. (Tex. 2021), https://capitol.texas.gov/tlodocs/87R/billtext/pdf/HB04492F.pdf#navpanes=0; see also Tex. Util. Code § 39.651; Tex. Util. Code § 39.652(4).

[33] S. 1580, 87th Leg., Reg. Sess. (Tex. 2021), https://capitol.texas.gov/tlodocs/87R/billtext/pdf/SB01580F.pdf#navpanes=0; see also Tex. Util. Code § 41.151(a).

[34] Unopposed Partial Stipulation And Settlement Agreement dated September 20, 2021, Item 293 (the "**Settlement Stipulation**"), at 1 filed before PUCT in connection with Application Of ERCOT For A Debt Obligation Order To Finance Uplift Balances Under PURA Chapter 39, Subchapter N, For An Order Initiating A Parallel Docket, And For Good Cause Exception, Docket No. 52322 (the "**ERCOT Securitization Application**").

rate for customers). See 16 Tex. Admin. Code § 25.43; ERCOT Market Guide § 7.11.1.a. Once that happens, the customers are lost.

~~54.~~52. On March 3, 2021, Just Energy filed a Petition for Emergency Relief with the PUCT (the "**Petition**").[35] In the Petition, Just Energy requested that the PUCT direct ERCOT to deviate from the deadlines and timing in its Protocols and Market Guides (as defined therein) related to settlements, collateral obligations, and invoice payments and to suspend the execution or issuance of invoices or settlements for intervals during the dates of February 13 through February 20, until issues raised by executive and legislative branches of Texas are resolved. Alternatively, Just Energy requested that the PUCT waive certain ERCOT Protocols to allow Just Energy to delay payment while exercising its rights under the ERCOT Protocols to dispute the invoiced payment amounts.

~~55.~~53. For the period between February 13 and February 20, Just Energy has received ~~invoices~~ Invoices from ERCOT demanding payment of approximately $~~335~~ 336 million. Just Energy disputes no less than $274 million of ~~these~~ the invoiced amounts.

~~56.~~54. Lacking sufficient liquidity to satisfy the grossly overstated ~~invoices~~Invoices, the Debtors commenced the Canadian Proceedings under the CCAA in the Canadian Court on March 9, 2021. That same day, the Canadian Court approved a $125 million financing facility and authorized the payment of the disputed ~~invoices~~ Invoices to ERCOT. The Debtors also filed the

[35] Just Energy's petition is attached to the Recognition Order as Exhibit A.

Chapter 15 Cases in this Court. ERCOT had actual notice of, and formally appeared in the Debtors' bankruptcy cases.[36]

~~57.~~55. ~~The Court did not approve Just Energy's payment of the invoices. Instead, on~~ On March 9, the Court entered an order granting the Debtors' provisional relief that makes clear "any payments made to ERCOT are made subject to [Just Energy's] rights to contest those payments, and all rights to receive a refund or credit as allowed by applicable law." The order also states "[a]lthough the Court recognizes the authority to make payments to ERCOT as granted by the Canadian Order, this Court neither adds nor subtracts from any such authorization." The Court entered an order of recognition on April 2, 2021, incorporating the same reservations set forth above.

~~58.~~56. In total, the Transfers consist of payments made by Just Energy (and in the case of Hudson, BP) to ERCOT of no less than approximately $274 million relating to both the imposition of a system-wide offer cap of $9,000/MWh and ancillary charges in response to ~~invoices that~~ the Invoices Plaintiffs received relating to the week of February 13 through February 20.

II. LEGALITY OF THE PUCT'S AND ERCOT'S ACTIONS

~~59.~~57. The PUCT Orders are not consistent with, and find no support under the ERCOT Protocols or the SFA, which incorporates the ERCOT Protocols by reference. They also are unlawful under, inter alia, (a) Texas' APA, Tex. Gov't Code §§ 2001.024, 2001.029, 2001.033, 2001.035, 2001.038, 2001.171, 2001.174, and 2001.176 and (b) PURA, Tex. Util. Code §§ 15.001, 39.001(c), 39.001(d), 39.151(d).

A. ERCOT PROTOCOLS AND THE SFA

~~60.~~58. The ERCOT Protocols are incorporated by reference into the SFA. The $9,000/MWh price finds no support in the ERCOT Protocols or the SFA. Had the PUCT and

[36] See, e.g., Notice Of Appearance And Request For Service Of All Notices, Pleadings, Orders And Other Papers [ECF No. 30] dated March 9, 2021 at 1 (filed by the law firm of Munsch Hardt Kopf & Harr, P.C. "on behalf of [ERCOT], a creditor and party-in-interest").

ERCOT followed the ERCOT Protocols, a different and lower energy price would have been in effect.

~~61.~~59. ERCOT Protocols in effect at the time of Winter Strom Uri did not consider firm load shed a valid consideration with respect to scarcity pricing. ERCOT Protocol 6.5.7.3.1 (Determination Of Real-Time On-Line Reliability Deployment Price Adder) lists factors relevant to determining whether ERCOT's scarcity pricing mechanism is triggered and whether prices should be increased toward the HCAP of $9,000/MWh. The version of ERCOT Protocol 6.5.7.3.1 in effect during Winter Storm Uri did ***not*** list firm load shed as a consideration for invoking scarcity pricing. Notwithstanding ERCOT Protocol 6.5.3.7.1, the PUCT and ERCOT deemed firm load shed to be a scarcity-pricing trigger and increased the price to $9,000/MWh on that basis.

B. PUCT ORDERS ARE "RULES" UNDER TEXAS' APA

~~62.~~60. The APA defines "rule" to mean: "(A) a state agency statement of general applicability that: (i) implements, interprets, or prescribes law or policy; or (ii) describes the procedure or practice requirements of a state agency; (B) includes the amendment or repeal of a prior rule; and (C) does not include a statement regarding only the internal management or organization of a state agency and not affecting private rights or procedures." Tex. Gov't Code § 2001.003(6). The PUCT is a "state agency" for the purposes of the APA. See Tex. Gov't Code § 2001.003(7) (definition includes state commissions). The PUCT Orders purport to speak for the PUCT and utilize its authority. The PUCT Orders are more than a restatement of a formally promulgated rule. They are a new directive to ERCOT, and they effectively amend the ERCOT scarcity pricing mechanism, promulgated at Tex. Admin. Code § 25.505(g) by forcing ERCOT to apply the system-wide offer ***cap*** of $9,000 per MWh to ***set*** prices in a load-shed situation. An agency's interpretation or application of existing promulgated rules themselves constitute "rules" under the APA when they have the effect of amending the existing rules or creating new rules.

C. PUCT ORDERS ARE GENERALLY APPLICABLE STATEMENTS

~~63.~~61. The PUCT Orders are generally applicable statements that implemented, interpreted, or prescribed law or policy, i.e., new scarcity pricing considerations for ERCOT. See Tex. Gov't Code § 2001.003(6)(A)(i). General applicability for the purposes of Tex. Gov't Code § 2001.003(6)(A) refers to "statements that affect the interest of the public at large such that they cannot be given the effect of law without public input."[37] The PUCT Orders affected the interests of the public in practice, e.g., electricity prices available to market participants and, by extension, many electricity consumers.

~~64.~~62. An agency statement "implements, interprets, or prescribes law or policy" when it reflects "[the agency's] construction and application" of existing regulations and "implements a broader policy judgment" by the agency.[38] The PUCT has authority to overrule ERCOT's determination of market clearing prices. See 16 Tex. Admin. Code § 25.501(a). The PUCT Orders are a specific construction and application of that authority to address scarcity issues surrounding Winter Storm Uri that implemented its broader policy judgment that "adjustments are needed to ERCOT prices to ensure they accurately reflect the scarcity conditions in the market."

D. PUCT ORDERS INCLUDE AMENDMENT OF PRIOR RULE

~~65.~~63. The PUCT Orders "amen[d] or repea[l] a prior rule." Tex. Gov't Code § 2001.003(6)(A). An agency's interpretation or application of existing promulgated rules themselves constitute "rules" under the APA when they have "the effect of amending the existing rules, or of creating new rules, and the other requirements of the APA's 'rule' definition are met." Here, the PUCT Orders are "more than a restatement of a formally promulgated rule." They are a distinct prescription to ERCOT and effectively amend the ERCOT scarcity pricing

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37 El Paso Hosp. Dist. v. Tex. Health & Hum. Servs. Comm'n, 247 S.W.3d 709, 714 (Tex. 2008).

38 Teladoc, Inc. v. Med. Bd., 453 S.W.3d 606, 614 (Tex. App—Austin 2014).

mechanism, promulgated at Tex. Admin. Code § 25.505(g), by forcing ERCOT to consider load shed in its scarcity pricing determination and set energy prices at $9,000/MWh.[39]

~~66.~~64. It is immaterial whether the PUCT issued the PUCT Orders in an emergency or intended to temporarily override ERCOT's scarcity pricing mechanism. There is no requirement that rules under the APA permanently amend or repeal a prior rule. On the contrary, the Court of Appeals has previously recognized ad hoc agency actions based on novel and exigent circumstances as "rules" for APA purposes.

E. PUCT ORDERS AFFECT PRIVATE RIGHTS

~~67.~~65. The PUCT Orders do not include a statement regarding only the internal management or organization of the PUCT and instead directly affected private rights of ERCOT market participants and, by extension, electric consumers, e.g., rates at which electricity was available. Notably, the PUCT Orders were not issued as part of a contested matter before the PUCT. Nor were they an adjudication of the rights of particular parties. Rather, ERCOT market participants had a right to purchase electricity at rates determined under the scarcity pricing mechanism set out in the PUCT's rules at Tex. Admin. Code § 25.505(g). By substantially altering that mechanism, the PUCT impacted private rights.

F. $9,000/MWH PRICE VIOLATED THE APA

~~68.~~66. The APA requires that agency orders adopting rules contain "reasoned justification" for the agency's decision on each rulemaking issue. Tex. Gov't Code § 2001.033(1). That justification must include "a summary of the factual basis of the rule as adopted which demonstrates a rational connection between the factual basis for the rule and the rule as adopted." Id. § 2001.033(1)(B). Lack of substantial compliance with the reasoned justification requirement renders a rule "voidable" under Tex. Gov't Code § 2001.035(a). If the Court in its discretion finds

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[39] See Teladoc, 453 S.W.3d at 616; Tex. Dept. of Transp. v. Sunset Transp., Inc., 357 S.W.3d 691, 703 (Tex. App.—Austin 2011, no pet.).

"good cause" to do so, it may "invalidate the rule or a portion of the rule, effective as of the date of the court's order." Id. § 20010.40.

~~69.~~67. The PUCT Orders are legally invalid because they interfere with or impair, or threaten to interfere with or impair, a legal right or privilege belonging to Plaintiffs. Tex. Gov't Code § 2001.038(a).

~~70.~~68. The PUCT violated the APA, including, without limitation, sections 2001.023, 2001.024, 2001.029, 2001.033, and 2001.035, and 16 Tex. Admin. Code § 25.362(c) by, among other things, failing to provide proper notice of its intent to adopt the PUCT Orders; disclose information required by the APA, e.g., an explanation of the order, rule, or proposed text; afford interested parties an opportunity to comment; articulate a reasoned justification or satisfactory evidentiary basis for its decision; or furnish information required in connection with emergency rulemaking.

~~71.~~69. The PUCT Orders violate the APA because they lack any reasoned justification. The one reason given by the PUCT was its belief that prices being at less than the HCAP was "inconsistent with fundamental market design" because "[i]f customer load is being shed, scarcity is at its maximum, and the market price to serve that load should also be at its highest." The PUCT provided no evidence to support its assertion that market's scarcity pricing signals were not working as intended, such as evidence that generators were not deploying because prices were too low, or that consumers were not curtailing use in response to the already objectively high prices of more than $1,200/MWh that were in effect on February 15, 2021 at the time of the PUCT Orders.

G. $9,000/MWH PRICE VIOLATED PURA

~~72.~~70. The PURA prohibits the PUCT from making rules "regulating competitive electric services, prices, or competitors or restricting or conditioning competition except as authorized by this title …," PURA § 39.001(c), and requires that the PUCT's rules "authorize or order

competitive rather than regulatory methods … to the greatest extent feasible" and to be "practical and limited so as to impose the least impact on competition." PURA § 39.001(d).

~~73.~~71. The PUCT violated its substantive authority under the PURA and any substantive authority and procedural limitations of the Governor's Disaster Declaration in issuing the PUCT Orders. It acted both outside of its authority and contrary to legally-required procedures. The PUCT Orders violated the PURA, including sections 39.001(c) and 39.001(d), because they lacked any reasoned justification and displaced the forces of market competition.

~~74.~~72. The PUCT Orders also violated the PURA because they set prices by regulatory fiat instead of market forces and without regard to actual scarcity conditions in the market. The PUCT Orders directly contradict the PURA's mandate that prices should be a function of competition and not regulatory action. Once ERCOT set pricing at $9,000/MWh, Just Energy had no feasible option but to buy electricity at prices that were unlawful, unjustifiable, and unrelated to ordinary market forces. And, ERCOT's ~~invoices~~ Invoices include amounts for ancillary services that are either erroneously calculated or unreasonably applied in violation of ERCOT protocols.

H. ALTERNATIVELY, PUCT ORDERS EXPIRED ON FEBRUARY 18

~~75.~~73. Even if the PUCT Orders were a valid exercise of the PUCT's authority, they expired by their own terms as soon as firm load was no longer being shed. The imposition of the $9,000/MWh cap after 1:05 a.m. on February 18, 2021 was illegal because it did not properly implement the PUCT Orders.

~~76.~~74. The factual justification for the PUCT Orders was that: "***[i]f customer load is being shed***, scarcity is at its maximum, and the market price for the energy need to serve that load should also be at its highest." There is no rational connection between that factual justification and a rule that would direct ERCOT to continue scarcity pricing ***in the absence of the load being shed***. And, indeed, the plain language of the PUCT Orders commanded ERCOT only to ensure "***that firm load that is being shed*** … is accounted for in ERCOT's scarcity pricing signals" (emphasis added).

~~77.~~75. Absent load shed, ERCOT had no authority to set the price at $9,000/MWh after 1:05 a.m. on February 18—even assuming the PUCT Orders were valid.

~~78.~~76. ERCOT continued imposing $9,000/MWh prices even after load shed ended. ERCOT ceased firm load shed at 11:55 p.m. on February 17, 2021, but refused to take any action to review or change the prices and instead continued imposing $9,000/MWh prices until 9 a.m. on Friday, February 19. From and after 1:05 a.m. on February 18, continued imposition of the $9,000/MWh price was improper.

III. ~~Defendants Are~~ ERCOT Is NOT PROTECTED BY SOVEREIGN IMMUNITY

~~79.~~77. ERCOT cannot sustain a sovereign-immunity defense because it is a private, membership-based corporation (certified and regulated by the PUCT) and not a governmental regulator. In point of fact, ERCOT argued in 2014 that it was not a "governmental unit" and that the statutory scheme governing its oversight does not suggest any legislative intention to make ERCOT part of the government.[40] ERCOT has since taken a contrary position in another case~~, but the issue has not yet been definitively resolved by the Texas Supreme Court.~~ [41]~~Notably, on May 26, 2021, the 288th District Court in Bexar County refused to dismiss a lawsuit against ERCOT on sovereign immunity grounds.~~[42]~~.~~[41]

78. ERCOT is not a "state actor" when, among other things, (a) ERCOT does not receive funding directly from the State; (b) the Texas Legislature designated ERCOT as an "independent organization," see Tex. Util. Code § 39.151(a)-(c); and (c) the PURA implicitly recognizes ERCOT is not an arm of the state because it imposes certain open meeting requirements

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40 See ERCOT Brief, HWY 3 MHP, LLC v. Elec. Reliability Council of Tex., Inc., No. 03-14-00303-CV at 24 (July 30, 2014).

~~41 Electric Reliability Council of Texas Inc. v. Panda Power Generation Infrastructure Fund LLC, No. 18-0781, 18-0792 (Tex. 2021).~~

~~42 See CPS Energy v. Elec. Reliability Council of Texas, Cause No. 2021CI04574Z (288th Judicial District).~~

41 Electric Reliability Council of Texas Inc. v. Panda Power Generation Infrastructure Fund LLC, No. 18-0781, 18-0792 (Tex. 2021).

on ERCOT that would be redundant of obligations imposed by the Texas Open Meetings Act, see Tex. Util. Code. § 39.1511 Tex. Gov't Code §§ 551.001- .146.

~~80.~~79. Even if ERCOT ~~and the PUCT are~~ is a government ~~entities~~entity, any sovereign immunity has been waived pursuant to the Constitution's Bankruptcy Clause. See, e.g., Central Virginia Community College v. Katz, 546 U.S. 356, 371-72, 378 (~~2006) (~~"2006) ("Insofar as orders ancillary to the bankruptcy court's in rem jurisdiction, like orders directing turnover of preferential transfers, implicate State's sovereign immunity from suit, the States agreed in the plan of Convention not to assert that immunity …. In ratifying the Bankruptcy Clause, the States acquiesced in a subordination of whatever sovereign immunity they might otherwise have asserted in proceedings necessary to effectuate the in rem jurisdiction of the bankruptcy courts"); 11 U.S.C. § ~~106(a) ("[S]overeign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following: (1) Sections … 502 … 525 … 542 … 549 … 553").~~106(c) ("Notwithstanding any assertion of sovereign immunity by a governmental unit, there shall be offset against a claim or interest of a governmental unit any claim against such governmental unit that is property of the estate").

80. ERCOT also has participated fully in the Chapter 15 Cases and, to that end, has submitted itself to the Court's jurisdiction. See ECF No. 30 (ERCOT Notice of Appearance); Dep't of Army v. Fed. Lab. Rels. Auth., 56 F.3d 273, 275 (D.C. Cir. 1995) ("[T]he sovereign immunity of a State is waived by appearance in a federal court ....") (citing Clark v. Barnard, 108 U.S. 436, 447 (1883)); Securities Inv. Protection Ass'n v. Madoff, 460 B.R. 106, 119 (Bankr. S.D.N.Y 2011) ("[T]here are also participatory factors indicating Defendants consent to personal jurisdiction in this adversary proceeding. In Deak & Co., Inc., 63 B.R. 422, 431 (Bankr.S.D.N.Y.1986), this Court found that the defendants effectively consented to personal jurisdiction by purposefully availing themselves of the protections afforded by United States bankruptcy law …. [and participating in] the bankruptcy case by filing a notice of appearance and

attending court hearings through their New York counsel"); In re Paques, 277 B.R. 615, 636 (Bankr. E.D. Pa. 2000) (noting creditors' attorney entered appearance and Deak "suggest this entry of appearance may be sufficient to justify the assertion of personal jurisdiction").

~~81. Separately, section 2001.038 of the APA is a grant of original jurisdiction, and "it waives sovereign immunity."[43]~~

CAUSES OF ACTION

COUNT 1

~~AGAINST ERCOT AND THE PUCT~~(28 U.S.C. §§ 2201: Declaration Of Preference Under CCAA (§ 36.1), BIA (§ 95)—Invoice Obligations) ~~(Avoidance of Unauthorized Post-Petition Transfers – 11 U.S.C. § 549)~~

~~82.~~81. Plaintiffs repeat and reallege the foregoing allegations as though they were fully set forth in this paragraph.

~~83. Under section 549 of the Bankruptcy Code, the Foreign Representative may avoid a transfer "(1) that occurs after the commencement of the case; and (2) is not authorized under this title or by the court." 11 U.S.C. § 549(a).~~

~~84. Pursuant to Federal Rule of Bankruptcy Procedure 6001, "[a]ny entity asserting the validity of a transfer under § 549 of the Code shall have the burden of proof."~~

82. On March 9, 2021, Plaintiffs filed for protection under the CCAA. Just Energy incurred the Invoice Obligations prepetition. They relate to alleged amounts owing to ERCOT in connection with the Winter Storm Uri weather event during the week of February 13, 2021 through February 20, 2021.

83. The provisions involving the preferential and reviewable transactions under the BIA have been incorporated into the CCAA. Section 36.1(1) of the CCAA provides that "sections … 95 to 101 of the [BIA] apply, with any modifications that the circumstances require,

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~~[43] Tex. Logos, LP. v. Tex. Dep't of Transp., 241 S.W.3d 105, 123 (Tex. App. Austin 2007, no pet.).~~

in respect of a compromise or arrangement unless the compromise or arrangement provides otherwise."

84. The Foreign Representative can bring avoidance claims under Canadian law in the Chapter 15 Cases. See In re Condor Ins. Ltd., 601 F.3d 319, 329 (5th Cir. 2010) ("As Chapter 15 was intended to facilitate cooperation between U.S. courts and foreign bankruptcy proceedings, we read section 1521(a)(7) in that light and hold that a court has authority to permit relief under foreign avoidance law under that section.").

85. Section 95(1) of the BIA provides that "[a] transfer of property made, a provision of services made, a charge on property made, a payment made, ***an obligation incurred*** or a judicial proceeding taken or suffered by an insolvent person (a) in favour of a creditor who is dealing at arm's length with the insolvent person, or a person in trust for that creditor, with a view to giving that creditor a preference over another creditor ***is void*** as against … the trustee if it is made, ***incurred***, taken or suffered, as the case may be, during the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy ...." (emphasis added).

86. Under section 95(2) of the BIA, "[i]f the transfer, charge, payment, ***obligation*** or judicial proceeding referred to in paragraph (1)(a) has the effect of giving the creditor a preference, it is, in the absence of evidence to the contrary, presumed to have been made, ***incurred***, taken or suffered with a view to giving the creditor the preference — even if it was made, ***incurred***, taken or suffered, as the case may be, under pressure — and evidence of pressure is not admissible to support the transaction." (emphasis added).

87. The Invoice Obligations were incurred in the days leading up to the filing of Plaintiffs' Canadian Proceedings and Chapter 11 Cases with a view toward—and/or with the effect of—preferring ERCOT over Plaintiffs' other creditors. Plaintiffs were insolvent on the dates that the Invoice Obligations were incurred, or became insolvent as a result of the Invoice Obligations.

88. There is a justiciable controversy because ERCOT disputes that the Invoice Obligations are void.

89. Accordingly, an Order declaring that the Invoice Obligations are void in their full amount (approximately $336 million) and that the Transfers made on account of those void obligations should be returned is warranted.

COUNT 2
(28 U.S.C. §§ 2201: Declaration Of Preference Under CCAA (§ 36.1), BIA (§ 95)—Prepetition Transfers)

90. Plaintiffs repeat and reallege the foregoing allegations as though they were fully set forth in this paragraph.

91. On March 9, 2021, Plaintiffs filed for protection under the CCAA. Just Energy (and in the case of Hudson, BP) made certain of the Transfers prepetition in response to the Invoices.

92. The provisions involving the preferential and reviewable transactions under the BIA have been incorporated into the CCAA. Section 36.1(1) of the CCAA provides that "sections … 95 to 101 of the [BIA] apply, with any modifications that the circumstances require, in respect of a compromise or arrangement unless the compromise or arrangement provides otherwise."

93. The Foreign Representative can bring avoidance claims under Canadian law in the Chapter 15 Cases. See In re Condor Ins. Ltd., 601 F.3d 319, 329 (5th Cir. 2010) ("As Chapter 15 was intended to facilitate cooperation between U.S. courts and foreign bankruptcy proceedings, we read section 1521(a)(7) in that light and hold that a court has authority to permit relief under foreign avoidance law under that section.").

94. Section 95(1) of the BIA provides that "***[a] transfer of property made***, a provision of services made, a charge on property made, ***a payment made***, an obligation incurred or a judicial proceeding taken or suffered by an insolvent person (a) in favour of a creditor who is dealing at

arm's length with the insolvent person, or a person in trust for that creditor, with a view to giving that creditor a preference over another creditor ***is void*** as against … the trustee if it is ***made***, incurred, taken or suffered, as the case may be, during the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy …" (emphasis added).

95. Under section 95(2) of the BIA, "[i]f the ***transfer***, charge, payment, obligation or judicial proceeding referred to in paragraph (1)(a) has the effect of giving the creditor a preference, it is, in the absence of evidence to the contrary, presumed to have been ***made***, incurred, taken or suffered with a view to giving the creditor the preference — even if it was ***made***, incurred, taken or suffered, as the case may be, under pressure — and evidence of pressure is not admissible to support the transaction." (emphasis added).

96. The prepetition Transfers were made in the days leading up to Plaintiffs' Canadian Proceedings and Chapter 11 Cases with a view toward—and/or with the effect of—preferring ERCOT over Plaintiffs' other creditors. Plaintiffs were insolvent on the date that the prepetition Transfers were made, or became insolvent as a result of the pre-petition Transfers.

97. There is a justiciable controversy because ERCOT disputes that the pre-petition Transfers are void or should be returned.

98. Accordingly, an Order declaring the prepetition Transfers are void and should be returned in the amount of no less than approximately $81 million is warranted.

COUNT 3
(Declaration 28 U.S.C. § 2201: Transfer At Undervalue Under CCAA (§ 36.1), BIA (§ 96)—Prepetition Transfers)

99. Plaintiffs repeat and reallege the foregoing allegations as though they were fully set forth in this paragraph.

100. On March 9, 2021, Plaintiffs filed for protection under the CCAA. Just Energy (and in the case of Hudson, BP) made certain of the Transfers prepetition in response to the Invoices.

101. The provisions involving the preferential and reviewable transactions under the BIA have been incorporated into the CCAA. Section 36.1(1) of the CCAA provides that "sections … 95 to 101 of the [BIA] apply, with any modifications that the circumstances require, in respect of a compromise or arrangement unless the compromise or arrangement provides otherwise."

102. The Foreign Representative can bring avoidance claims under Canadian law in the Chapter 15 Cases. See In re Condor Ins. Ltd., 601 F.3d 319, 329 (5th Cir. 2010) ("As Chapter 15 was intended to facilitate cooperation between U.S. courts and foreign bankruptcy proceedings, we read section 1521(a)(7) in that light and hold that a court has authority to permit relief under foreign avoidance law under that section.").

103. Under section 96(1) of the BIA, "a court may declare that a ***transfer at undervalue*** is void as against ... the trustee — ***or order that a party to the transfer*** or any other person who is privy to the transfer, or all of those persons, pay to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor — if (a) the party was dealing at arm's length with the debtor and (i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and that ends on the date of the bankruptcy, (ii) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, and (iii) the debtor intended to defraud, defeat or delay a creditor." (emphasis added).

104. Section 2 of the BIA defines the term "transfer at undervalue" as "a disposition of property or provision of services for which no consideration is received by the debtor or for which

the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor."

105. In the wake of the Winter Storm Uri weather event, Just Energy staved off eviction from the Texas market by ERCOT and liquidation by commencing the Canadian Proceedings, obtaining access to DIP financing, commencing the Chapter 15 Cases ancillary to those proceedings, and using a significant portion of the DIP-Financing to pay ERCOT's Invoices. It took those actions even though it disputed ERCOT's Invoices. Just Energy paid the Invoices under protest, preserving the ability to revoke the Transfers.

106. The prepetition Transfers were made in the days leading up to Plaintiffs' Canadian Proceedings and Chapter 11 Cases only to avoid losing Plaintiffs' customers and participant status in the ERCOT market. Plaintiffs were insolvent on the dates that the prepetition Transfers were made or became insolvent as a result of the prepetition Transfers.

107. Plaintiffs did not receive valuable or good consideration in exchange for the Transfers because the Invoices were grossly inflated and included charges for energy based on the artificial $9,000/MWh price set by ERCOT during Winter Storm Uri and ancillary services charges that were illegally and erroneously calculated under the APA and the PURA and find no support in the ERCOT Protocols or the SFA.

108. The prepetition Transfers were made with the intent to prefer ERCOT over other creditors and to that end hindered and delayed the collection efforts of those other creditors. C.f., In re Tronox, 503 B.R. 239, 278 (Bankr. S.D.N.Y. 2014) ("The intent to defraud is something distinct from the mere intent to delay or hinder .... The [US] Supreme Court did not take issue with the contention … that [a] debtor believed he could satisfy all creditors if given more time, nor with the fact that his scheme was widely disclosed, nor with the fact that most of his creditors went along …. [It] concluded that the defendant's conveyance of assets to a corporation was made 'to divest the debtor of his title and put it in such a form and place that levies would be averted, and

thus was avoidable as an actual fraudulent conveyance.'") (citing Shapiro v. Wilgus, 287 US 348 (1932)); In re Sentinel Mgmt. Grp., Inc., 728 F.3d 660, 667-69 (7th Cir. 2013) ("Sentinel's pledge of segregated funds as collateral for loans with the Bank of New York was driven by a desire to stay in business …. [and is sufficient legally] to constitute actual intent to hinder, delay, or defraud Sentinel's FCM clients …. When Sentinel pledged the funds that were supposed to remain segregated for its FCM clients, Sentinel's primary purpose may not have been to render the funds permanently unavailable to these clients …. But Sentinel certainly should have seen this result as a natural consequence of its actions. In our legal system, 'every person is presumed to intend the natural consequences of his act'"); In re Am. Props., Inc., 14 B.R. 637, 643 (Bankr. D. Kan. 1981) ("With a well-founded belief that extending repayment of the debt of Coleman Nebraska would help weather the storm, and with full knowledge that the transaction as proposed would be detrimental to the creditors of American, nevertheless James Coleman on behalf of the Coleman Companies intentionally entered into the transaction and transferred a mortgage from American to FNB. There was no element of malice towards the creditors of American because James Coleman genuinely hoped the storm would pass. The transaction was not entered into in an attempt to harm American's creditors but the transaction was entered into intentionally to satisfy a Coleman Nebraska debt and with full knowledge harm would come to the creditors of American, hindering or delaying the ability of these creditors to receive satisfaction of debts owed to them by American."); Shapiro v. Wilgus, 287 U.S. 348, 354 (1932) ("Many an embarrassed debtor holds the genuine belief that if suits can be staved off for a season, he will weather the financial storm, and pay his debts in full … The belief, even though well founded, does not clothe him with a privilege to build up obstructions that will hold his creditors at bay").

109. There is a justiciable controversy because ERCOT disputes that the prepetition Transfers are void or should be returned.

110. Accordingly, an Order declaring that the prepetition Transfers are void and that they should be returned in the amount of no less than approximately $81 million is warranted.

COUNT 4
(Recovering Proceeds If Transferred—CCAA (§ 36.1), BIA (§ 98))

111. Plaintiffs repeat and reallege the foregoing allegations as though they were fully set forth in this paragraph.

112. The Foreign Representative can bring avoidance claims under Canadian law in the Chapter 15 Cases. See In re Condor Ins. Ltd., 601 F.3d 319, 329 (5th Cir. 2010) ("As Chapter 15 was intended to facilitate cooperation between U.S. courts and foreign bankruptcy proceedings, we read section 1521(a)(7) in that light and hold that a court has authority to permit relief under foreign avoidance law under that section.").

113. On March 9, 2021, Plaintiffs filed for protection under the CCAA. The provisions involving the preferential and reviewable transactions under the BIA have been incorporated into the CCAA. Section 36.1(1) of the CCAA provides that "sections … 95 to 101 of the [BIA] apply, with any modifications that the circumstances require, in respect of a compromise or arrangement unless the compromise or arrangement provides otherwise."

114. Section 98 (1) of the BIA provides that "[i]f a person has acquired property of a bankrupt under a transaction that is void or voidable and set aside … and has sold, disposed of, realized or collected the property or any part of it, the money or other proceeds, whether further disposed of or not, shall be deemed the property of the trustee."

115. Section 98(2) of the BIA provides that "[t]he trustee may recover the property or the value thereof or the money or proceeds therefrom from the person who acquired it from the bankrupt or from any other person to whom he may have resold, transferred or paid over the proceeds of the property as fully and effectually as the trustee could have recovered the property if it had not been so sold, disposed of, realized or collected."

116. Under the BIA, the Transfers should be recovered in their full amount because they relate to Invoice Obligations that are void as preferences under section 95 of the BIA.

117. Under the BIA, the prepetition Transfers should be recovered because they (a) are void as preferences under section 95 of the BIA; and (b) constitute void transfers at undervalue under section 96 of the BIA.

118. Plaintiffs are entitled to the entry of an Order directing ERCOT to return the Transfers, either (a) in the amount of not less than approximately $274 million or, (b) ***alternatively***, in the amount of not less than approximately $220 million relating to the period after 1:05 a.m. on February 18, 2021.

COUNT 5
(Turnover—11 U.S.C. § 542(a))

119. Plaintiffs repeat and reallege the foregoing allegations as though they were fully set forth in this paragraph.

120. Section 542(a) of the Bankruptcy Code requires an entity in possession, custody, or control of property that may be used, leased, or sold under section 363 of the Bankruptcy Code to turn over such property or its value to the trustee.

~~85.~~121. Section 1507(a) of the Bankruptcy Code says in part that "the court, if recognition is granted, may provide additional assistance to a ~~foreign representative~~ Foreign Representative under this title or other laws of the United States~~." Pursuant to section 1520(a)(2) of the Bankruptcy Code, "[u]pon recognition of a foreign proceeding that is a foreign main proceeding … section [549 applies] to a transfer of an interest of the debtor in property that is within the territorial jurisdiction of the United States …~~." Section 1521(a)(5) of the Bankruptcy Code entrusts the ~~foreign representative~~ Foreign Representative with "the administration or realization of all or part of the debtor's assets within the territorial jurisdiction of the United States." Section 1521(a)(7) of the Bankruptcy Code authorizes the Court to grant "any additional relief that may be available to trustee, except for relief available under section 522, 544, 545, 547, 548, 550 and 724(a)."

Authorizing the ~~foreign representative~~ Foreign Representative to bring claims under section ~~549~~ 542(a) of the Bankruptcy Code ~~to recover the Transfers~~ is appropriate when the lawsuit is consistent with the purposes of the chapter 15, including those identified in section 1501(a)(3) and (a)(4).

~~86. Just Energy (and in the case of Hudson, BP) made the Transfers in response to invoices that Plaintiffs received relating to the week of February 13 through February 20.~~

~~87. Approximately $193 million of the Transfers were made post-petition, after March 9, 2021, the date the Chapter 15 Cases were filed. They are subject to avoidance under section 549 of the Bankruptcy Code for several reasons, including the following – each of which provides an independent basis for recovery.~~

~~88. ***First***, the Court did not authorize the post-petition Transfers. Both the provisional and final recognition orders say "[a]ny payments made to ERCOT are made subject to all of the Debtors' rights to contest those payments, and all rights to receive a refund or credit as allowed by applicable law. Although the Court recognizes the authority to make payments to ERCOT as granted by the Final CCAA Order, this Cout neither adds nor subtracts from any such authorization."[44] Under the plain terms of section 549 of the Bankruptcy Code, transfers that are not "authorized under this title or by the Court" are subject to avoidance.~~

~~89. ***Second***, there could not have been a basis to authorize the post-petition Transfers when, among other things, the invoices were grossly inflated and otherwise related to the $9,000/MWh price and~~

~~[44] Order Granting Petition For (I) Recognition As Foreign Main Proceedings, (II) Recognition Of Foreign Representative, And (III) Related Relief Under Chapter 15 Of Bankruptcy Code [ECF No. 82] ¶ 30. See also Order Granting Provisional Relief Pursuant To Section 1519 Of Bankruptcy Code [ECF No. 23] (same); Tr., Hr'g Mar. 9, 2021 at 20:17-23 ("[COURT] I'm going to want to understand whether this becomes irrevocable. And if you're telling me that current contract or current regulations at ERCOT make it refundable, I'm going to want to see that. And then I would include in my order that one of the reasons for doing it is that it's, in fact, refundable."); 21:15-18 ("[COURT] I also have a duty, if I'm going to approve at first-day hearings such a large payment in such a disputed situation as you have described … that I not make that irrevocable"); 23:13-15 ("[COURT] So hopefully, there can either be an agreement or I can get satisfied that it is refundable."); at 25:14-16 ("[COURT] [P]aying such a large amount of money until I get some confidence that it isn't irrevocable is an issue").~~

~~ancillary services charges that were not consistent with, and find no support in the ERCOT Protocols and the SFA.~~

~~90. ***Third***, there could not have been a basis to authorize the post-petition Transfers when, among other things, the invoices were grossly inflated and otherwise related to the $9,000/MWh price and ancillary services costs set in response to the PUCT Orders that were illegal under, inter alia, the APA and the PURA.~~

~~91. ***Alternatively***, if the PUCT Orders are considered legal and valid, a portion of the Transfers still could not have been authorized and should be avoided under section 549 of the Bankruptcy Code. Specifically, no less than approximately $220 million of the Transfers relate to the period after 1:05 a.m. on February 18, 2021, of which approximately $110 million was paid after the petition date. The PUCT Orders expired by their own terms at that time, and ERCOT improperly implemented them.~~

~~92. Based upon the foregoing, Plaintiffs are entitled to an order and judgment against ERCOT and the PUCT avoiding the post-petition Transfers.~~

~~COUNT 2~~
~~AGAINST ERCOT AND THE PUCT~~
~~(Disallowance of Claims – 11 U.S.C. §§ 502(b), 502(d))~~

122. Under the Bankruptcy Code, the Transfers should be turned over in their full amount or their value should be provided because they relate to Invoice Obligations that (a) are void as preferences under section 95 of the BIA and (b) relate to Invoices that were illegally and erroneously calculated under the APA and the PURA and find no support in the ERCOT Protocols or the SFA.

123. Under the Bankruptcy Code, the prepetition Transfers should be turned over because they (a) are void as preferences under section 95 of the BIA; (b) constitute void transfers at undervalue under section 96 of the BIA; (c) are recoverable under section 98 of the BIA; and

(d) otherwise relate to Invoices that were illegally and erroneously calculated under the APA and the PURA and find no support in the ERCOT Protocols or the SFA

124. Under the Bankruptcy Code, the Transfers constitute property that the Debtors, and specifically the Foreign Representative, Plaintiff Just Energy Group, Inc., may use, sell, or lease under section 363 of the Bankruptcy Code.

125. Plaintiffs are entitled to the entry of an Order directing ERCOT to turn over the Transfers, either (a) in the amount of not less than approximately $274 million or, (b) ***alternatively***, in the amount of not less than approximately $220 million relating to the period after 1:05 a.m. on February 18, 2021.

COUNT 6
(28 U.S.C. § 2201: Declaration Of Entitlement To Setoff, Recoupment, Counterclaim)

~~93.~~126. Plaintiffs repeat and reallege the foregoing allegations as though they were fully set forth in this paragraph.

127. The Transfers (a) relate to Invoice Obligations that (i) are subject to avoidance as preferences under section 95 of the BIA—making the Transfers recoverable in their full amount; or (ii) relate to Invoices that were illegally and erroneously calculated under the APA and the PURA and find no support in the ERCOT Protocols or the SFA.

128. The prepetition Transfers (a) are subject to avoidance as preferences under section 95 of the BIA; (b) constitute transfers for undervalue under section 96 of the BIA; or (c) otherwise relate to Invoices that were illegally and erroneously calculated under the APA and the PURA and find no support in the ERCOT Protocols or the SFA

129. Plaintiffs currently have rights of setoff, recoupment, or counterclaim against ERCOT in an amount not less than approximately $274 million. Since making the Transfers, Plaintiffs have continued to participate in the ERCOT market and to incur obligations to ERCOT.

130. There is a justiciable controversy because ERCOT disputes that the Invoices were legally unsupportable, that Plaintiffs are entitled to a return of the Transfers, or that Plaintiffs have

any rights to setoff, recoupment, or counterclaim against ERCOT relating to the Transfers, the Invoices, or the Invoice Obligations.

~~94.~~131. Section 1507(a) of the Bankruptcy Code says in part that "the court, if recognition is granted, may provide additional assistance to a ~~foreign representative~~ Foreign Representative under this title or other laws of the United States." Section 1521(a)(5) of the Bankruptcy Code entrusts the ~~foreign representative~~ Foreign Representative with "the administration or realization of all or part of the debtor's assets within the territorial jurisdiction of the United States." Section 1521(a)(7) of the Bankruptcy Code authorizes the Court to grant "any additional relief that may be available to trustee, except for relief available under section 522, 544, 545, 547, 548, 550 and 724(a)." Authorizing the ~~foreign representative to bring claims under section 502 of the Bankruptcy Code is appropriate when the lawsuit is consistent with the purposes of the chapter 15, including those identified in section 1501(a)(3) and (a)(4).~~ Foreign Representative to assert rights of setoff, recoupment, and counterclaim is appropriate and consistent with the purposes of the chapter 15, including those identified in section 1501(a)(3) and (a)(4).

~~95. ERCOT has had knowledge of the Debtors' bankruptcy filings since March 9, 2021 and has appeared as a creditor in the Chapter 15 Cases. ERCOT sent the Debtors demands in writing for amounts allegedly due to ERCOT arising during the week of February 13, 2021 through February 20, 2021. These demands constitute informal "proofs of claim" that are subject to disallowance under section 502(b) of the Bankruptcy Code.~~

~~96. Moreover, to the extent any of the Transfers are avoided, either (a) in their full amount of not less than $274 million or, (b) ***alternatively***, in the amount of approximately $220 million relating to the period after 1:05 a.m. on February 18, 2021, any formal or informal claims asserted by ERCOT and the PUCT against Plaintiffs should be disallowed in whole or in part pursuant to section 502(d) of the Bankruptcy Code.~~

COUNT 3
AGAINST ERCOT AND THE PUCT
(Turnover – 11 U.S.C. § 542(a))

97. Plaintiffs repeat and reallege the foregoing allegations as though they were fully set forth in this paragraph.

98. Section 542(a) of the Bankruptcy Code requires an entity in possession, custody, or control of property that may be used, leased, or sold under section 363 of the Bankruptcy Code to turn over such property to the trustee.

99. Section 1507(a) of the Bankruptcy Code says in part that "the court, if recognition is granted, may provide additional assistance to a foreign representative under this title or other laws of the United States." Section 1521(a)(5) of the Bankruptcy Code entrusts the foreign representative with "the administration or realization of all or part of the debtor's assets within the territorial jurisdiction of the United States." Section 1521(a)(7) of the Bankruptcy Code authorizes the Court to grant "any additional relief that may be available to trustee, except for relief available under section 522, 544, 545, 547, 548, 550 and 724(a)." Authorizing the foreign representative to bring claims under section 542(a) of the Bankruptcy Code is appropriate when the lawsuit is consistent with the purposes of the chapter 15, including those identified in section 1501(a)(3) and (a)(4).

100. The Transfers constitute property that the Debtors, and specifically the foreign representative, Plaintiff Just Energy Group, Inc., may use, sell, or lease under section 363 of the Bankruptcy Code.

101. Plaintiffs are entitled to the entry of an Order directing ERCOT and the PUCT to turn over the Transfers, either (a) in their full amount of not less than $274 million or, (b) ***alternatively***, in the amount of approximately $220 million relating to the period after 1:05 a.m. on February 18, 2021.

~~COUNT 4~~AGAINST ERCOT AND THE PUCT
~~(Setoff—11 U.S.C. §§ 553 and/or 558)~~

~~102. Plaintiffs repeat and reallege the foregoing allegations as though they were fully set forth in this paragraph.~~

~~103. Section 558 of the Bankruptcy Code preserves "any defense available to the debtor as against any entity other than the estate." 11 U.S.C. § 558.~~

~~104. While section 553 of the Bankruptcy Code refers to the rights of setoff for creditors, see 11 U.S.C. § 553(a), the debtor's right to setoff is a defense that may be asserted under section 558 of the Bankruptcy Code.~~

~~105. Section 1507(a) of the Bankruptcy Code says in part that "the court, if recognition is granted, may provide additional assistance to a foreign representative under this title or other laws of the United States." Section 1521(a)(5) of the Bankruptcy Code entrusts the foreign representative with "the administration or realization of all or part of the debtor's assets within the territorial jurisdiction of the United States." Section 1521(a)(7) of the Bankruptcy Code authorizes the Court to grant "any additional relief that may be available to trustee, except for relief available under section 522, 544, 545, 547, 548, 550 and 724(a)." Authorizing the foreign representative to assert rights of setoff is appropriate and consistent with the purposes of the chapter 15, including those identified in section 1501(a)(3) and (a)(4).~~

~~106.~~132. ~~Going forward~~Accordingly, ~~to the extent the Transfers are avoided or otherwise decreed unlawful, Just Energy is~~ an Order declaring Plaintiffs are entitled to set off~~,~~ , recoup, or counterclaim ERCOT with respect to the amounts of the Transfers against ~~future invoices from ERCOT or the PUCT,~~ any and all obligations Plaintiffs owe to ERCOT either (a) in ~~their full~~ the amount of not less than approximately $274 million or, (b) ***alternatively***, in the amount of not less than approximately $220 million relating to the period after 1:05 a.m. on February 18, 2021, is warranted.

COUNT 5
AGAINST ERCOT
(Canadian Companies Creditors Arrangement Act)

107. Plaintiffs repeat and reallege the foregoing allegations as though they were fully set forth in this paragraph.

108. On March 9, 2021, Plaintiffs filed for protection under the CCAA. Under the CCAA, rights can be exercised for the benefit of creditors of the Debtors.

109. Just Energy (and in the case of Hudson, BP) made certain of the Transfers pre-petition in response to invoices that Plaintiffs received relating to the week of February 14, 2021. The pre-petition Transfers, which total no less than approximately $81 million are recoverable under the CCAA or any other applicable law.

110. The pre-petition Transfers were made in the days leading up to Plaintiffs' insolvency filings (under protest) only to avoid losing Plaintiffs' customers and participant status in the ERCOT market. Moreover, Plaintiffs were financially vulnerable or insolvent on the dates that the pre-petition Transfers were made or became financially vulnerable or insolvent as a result of the pre-petition Transfers.

111. ***First***, the pre-petition Transfers should be avoided in their full amount ($81 million) because the invoices included charges for energy based on the artificial $9,000/MWh price set by ERCOT during Winter Storm Uri and ancillary services charges that were illegally and erroneously calculated under the APA and the PURA and find no support in the ERCOT Protocols or the SFA. Plaintiffs did not receive valuable or good consideration in exchange for the pre-petition Transfers, and they should be avoided and returned.

112. ***Alternatively***, if the PUCT Orders are considered legal and valid, a portion of the pre-petition Transfers still should be avoided and returned. Plaintiffs received less than reasonably equivalent value for the no less than approximately $110 million in pre-petition Transfers that

~~relate to the period after 1:05 a.m. on February 18, because, among other things, the PUCT Orders expired by their own terms at that time, and ERCOT improperly implemented them.~~

~~113. Plaintiffs intended to delay creditor collection efforts when the pre-petition Transfers were made, preserving rights to challenge those Transfers at a later time. The pre-petition Transfers had the effect of delaying creditor collections because Plaintiffs received inadequate consideration from ERCOT and do not have sufficient assets to repay creditors in full.~~

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully ~~requests~~ request that this Court enter judgment in favor of Plaintiffs and against ~~Defendants~~ Defendant and:

A. Grant relief under sections ~~502(d),~~ 542(a)~~, 549, 553, 558~~, 1507(a), ~~1520(a),~~ and 1521(a)(7) of the Bankruptcy Code; 28 U.S.C. §§ 2201; section 36.1 of the CCAA; and sections 95, 96, and 98 of the BIA;

B. Declare the Invoice Obligations and prepetition Transfers void;

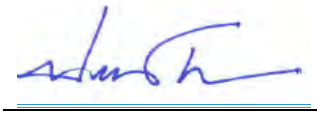
~~B.~~C. Award recovery of all Transfers in an amount not less than ~~$274~~ approximately $274 million; or alternatively, award recovery of Transfers relating to periods from and after 1:05 am. on February 18, 2021 in an amount not less than approximately $220 million;

~~C.~~D. Award such other and further relief, in law and equity, as this Court deems just and proper; and

~~D.~~E. Award damages to Plaintiffs in an amount to be proven at trial, including pre-judgment and post-judgment interest and attorneys' fees to the extent awardable.

Dated: ~~November 12~~February 11, ~~2021~~ 2022
New York, New York

QUINN EMANUEL URQUHART & SULLIVAN, LLP



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Lindsay M. Weber (admitted pro hac vice ~~to be filed~~)
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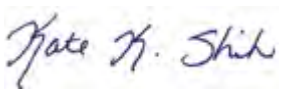
-and-



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Counsel to Plaintiffs

TAB G

This is Exhibit “G”

referred to in the Affidavit of **JAMES C. TECCE**

Sworn before me this 14th day of April, 2022

C. Manfara

A Commissioner for taking affidavits

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re: JUST ENERGY GROUP INC., *et al.*, Debtors in a Foreign Proceeding.[1]	Chapter 15 Case No. 21-30823 (DRJ)
JUST ENERGY TEXAS LP, FULCRUM RETAIL ENERGY LLC, HUDSON ENERGY SERVICES LLC, and JUST ENERGY GROUP, INC., Plaintiffs, v. ELECTRIC RELIABILITY COUNCIL OF TEXAS, INC., Defendant.	Adv. Proc. No. 21-04399

ELECTRIC RELIABILITY COUNCIL OF TEXAS, INC.'S
MOTION TO DISMISS FIRST AMENDED COMPLAINT AND FOR ABSTENTION

[1] The identifying four digits of Just Energy Group Inc.'s local Canada tax identification number are 0469. A complete list of debtor entities in these chapter 15 cases may be obtained at www.omniagentsolutions.com/justenergy.

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Pursuant to Federal Rule of Civil Procedure 12, as applied by Federal Rule of Bankruptcy Procedure 7012, Defendant Electric Reliability Council of Texas, Inc. ("ERCOT") moves to dismiss or abstain from hearing the *First Amended Complaint* [ECF 95] (the "Amended Complaint") filed by Plaintiffs Just Energy Texas LP ("JE Texas"), Fulcrum Retail Energy LLC ("Fulcrum"), Hudson Energy Services LLC ("Hudson"), and Just Energy Group, Inc. ("JEG" and together with JE Texas, Fulcrum, and Hudson, "Plaintiffs"). Alternatively, ERCOT requests a stay of this proceeding under the doctrine of primary jurisdiction.

I. PRELIMINARY STATEMENT

1. This repleaded action includes (1) an express challenge to the validity of an emergency state regulatory order; (2) claims seeking to claw back both prepetition and postpetition transfers for only one buyer of wholesale electricity; and (3) strained reliance on purely foreign law causes of action. Despite much common factual and legal background, these three features not only distinguish this action from the pending adversary proceeding of Brazos Electric Power Cooperative, Inc. ("Brazos") against ERCOT, but they also figure prominently in fatal legal defects.

2. Following dismissal of Counts 1 (avoidance of unauthorized post-petition transfers) and 2 (disallowance) of the original complaint with prejudice, and Count 3 (turnover) without prejudice, Plaintiffs were allowed to replead Counts 4 (setoff) and 5 (vaguely stated claims under Canadian insolvency law). As more fully described in this motion, Plaintiffs' claims should be dismissed for a host of reasons:

- ***Plaintiffs' claims bear too tenuous a connection with Canadian law to justify its application here.*** This Court should reject Plaintiffs' attempts to use Canadian law avoidance actions as a substitute for their failed and now-dismissed U.S. Bankruptcy Code

claims. The invoices involve U.S. transactions between Texas entities.[2] There is no basis in chapter 15 of the Bankruptcy Code or otherwise to subject ERCOT to Canadian law, nor would a Canadian court apply Canadian law under these facts.

- ***Only the Monitor has standing here under Canadian law; the Plaintiffs do not***. Plaintiffs' claims are grounded in § 36.1 of the Companies' Creditors Arrangement Act ("CCAA"),[3] which imports several causes of action from the Bankruptcy and Insolvency Act ("BIA").[4] But § 36.1's plain language makes clear that only an independent *monitor* appointed by the Canadian Court can bring such claims. Yet here the chapter 15 *debtors*—not the monitor—seek relief, which is fatal to Plaintiffs' claims.

- ***The filed rate doctrine precludes the relief Plaintiffs seek.*** The Fifth Circuit has held that ERCOT market prices, subject to PUCT oversight, qualify as "filed rates" and applied the filed rate doctrine to affirm the dismissal of various claims—including breach of contract claims against ERCOT arising out of extreme winter weather in Texas in 2003.[5] Here, in an effort to obtain more favorable treatment for themselves than other market participants, Plaintiffs challenge rates that were ordered by the PUCT itself, which is an even stronger basis to apply the filed rate doctrine than was at issue in *TCE*.

- ***Plaintiffs fail to sufficiently specify the obligations and payments***. Plaintiffs' Amended Complaint relies almost entirely on Canadian avoidance claims to attack transactions under Texas law/contracts with only Texas parties, and yet still fails to address critical pleading deficiencies. Most notably, they fail to identify and associate the allegedly avoidable invoices and payments with specific obligors/transferors.

- ***Plaintiffs fail to state a claim under Canadian law.*** Plaintiffs repleaded neither a cognizable fraudulent preference under § 95 of the BIA nor a transfer at undervalue under § 96. Applicable Canadian law differs materially from U.S. law. And without valid § 95 and § 96 claims, Plaintiffs' lone remaining claim fails as well because it is dependent upon and derivative of the avoidance claims.

- ***The Court should dismiss, abstain from deciding, or stay this Adversary Proceeding due to other jurisdictional issues.*** To decide many of Plaintiffs' non-core claims, this Court

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[2] Throughout this motion ERCOT refers to the Plaintiffs collectively solely because the Amended Complaint refers to them collectively. However, the Court should not interpret these references as a concession that each of the Plaintiffs even arguably has viable claims. In the ERCOT market, only a qualified scheduling entity ("QSE") may purchase electricity from ERCOT. That means only a QSE financially transacts with ERCOT. The only QSE among the Plaintiffs is JE Texas. Given that neither Fulcrum, Hudson, nor JEG is a QSE, none of them can state a claim upon which relief can be granted because none of them has the ability to financially transact with ERCOT.

[3] *Companies' Creditors Arrangement Act*, R.S.C. 1985 c. C-36, § 36.1.

[4] *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3. The relevant provisions of the CCAA and BIA are attached hereto as Exhibit A.

[5] *Tex. Comm. Energy v. TXU Energy, Inc.* ("*TCE*"), 413 F.3d 503, 508 (5th Cir. 2005).

would have to determine the validity and applicability of the PUCT's orders, the propriety of ERCOT's interpretation and implementation of those orders, and a variety of other issues within the purview of Texas's comprehensive regulatory scheme for electric utilities. To ensure consistency with the Texas courts and the PUCT, the Court should abstain or stay this adversary proceeding under the doctrine of primary jurisdiction. Moreover, mandatory abstention under 28 U.S.C. § 1334(c)(2) is applicable here because Plaintiffs' claims are in part based on Texas law, non-core, have no independent basis for federal jurisdiction apart from 28 U.S.C. § 1334(b), and relate to an action that has been commenced and can timely be adjudicated in appropriate State fora. Further, the Court should dismiss Plaintiffs' claims challenging the validity of the PUCT's emergency orders (Count 3 and Counts 4, 5, and 6 to the extent derivative of Count 3) because the PUCT is an indispensable party that Plaintiffs failed to properly join. Finally, the Court should dismiss based on ERCOT's sovereign immunity or abstain under *Burford v. Sun Oil Co.* and its progeny.

II. BACKGROUND

D. Factual and Legal Background

3. Texas's Public Utility Regulatory Act ("PURA") "establish[ed] a comprehensive and adequate regulatory system for electric utilities."[6] Because Texas has a uniquely intrastate electricity grid, the Legislature decided that an "essential organization" was necessary to operate the grid and regulate the competitive wholesale energy market that now serves it. The PUCT certified ERCOT to fill this role.[7]

4. ERCOT's rules, known as "protocols" (the "Protocols"), "provide the framework for the administration of the Texas electricity market."[8] ERCOT's Protocols also require market participants to execute a Standard Form Market Participant Agreement ("SFA"), the terms of which the Protocols define.[9]

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[6] TEX. UTIL. CODE § 31.001(a).

[7] *See id.* § 39.151(b).

[8] *BP Chems., Inc. v. AEP Tex. Cent. Co.*, 198 S.W.3d 449, 452 (Tex. App.—Corpus Christi 2006, no pet.).

[9] ERCOT Protocols § 22A; Am. Compl. [ECF 95] ¶ 5 (noting that Plaintiffs are subject to the SFA). A copy of JE Texas's SFA is attached as Exhibit B; a copy of Fulcrum's SFA is attached hereto as Exhibit C; and a copy of Hudson's SFA is attached hereto as Exhibit D. Though the SFAs

5. The PUCT rules require ERCOT to "determine the market clearing prices of energy and other ancillary services"—"[*e*]*xcept as otherwise directed by the* [*PUCT*]."[10] ERCOT does this by acting as a market clearinghouse: "the central counterparty for all transactions settled by ERCOT," and "the sole buyer to each seller, and the sole seller to each buyer, of all energy."[11]

6. JE Texas is the **only** Plaintiff that purchased energy from ERCOT because it is the only QSE.[12] The other Plaintiffs did not financially transact with ERCOT, and thus none of them were invoiced for electricity by ERCOT nor made any payments to ERCOT.

7. ERCOT invoiced JE Texas and non-party BP Energy Company ("BP") approximately $335 million for the energy they purchased between February 13 and February 20, 2021.[13] Although "Just Energy disputes no less than $274 million of these invoiced amounts[,]"[14] the Amended Complaint does not specify which obligations JE Texas incurred versus which ones BP incurred; nor does it specify at any level which obligations are actually in dispute. Before commencing the Canadian CCAA proceeding[15] and the Chapter 15 case, Plaintiffs

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are not attached to the Complaint, Plaintiffs rely upon them. *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498-99 (5th Cir. 2000).

[10] 16 TEX. ADMIN. CODE § 25.501(a) (emphasis added).

[11] ERCOT Protocols § 1.2(4).

[12] *See* Exhibits B, C, and D.

[13] BP serves as Hudson's QSE. A copy of the relevant QSE designation is attached hereto as Exhibit E. *See also* Am. Compl. ¶¶ 10 n.3, 53.

[14] Am. Compl. ¶¶ 10 n.3, 53.

[15] For the avoidance of doubt, JE Texas is not an "applicant"—the Canadian equivalent of a "Debtor"—in the Canadian CCAA proceeding, though it is an affiliate entitled to "enjoy the benefits of the protections and authorizations provided" by the Canadian Court's initial order. *See* CCAA Initial Order ¶ 3 (attached as Exhibit F).

paid ERCOT approximately $81 million for electricity during the Storm,[16] and they disputed all of their storm-related obligations to ERCOT with the PUCT and with ERCOT.[17]

E. Procedural Background

8. It is alleged that, on March 9, 2021, Plaintiffs and various other entities commenced Canadian insolvency proceedings.[18] The Canadian Court approved a $125 million financing facility "and *authorized the payment* of the disputed invoices".[19] The same day, Plaintiffs and others filed petitions in this Court under Chapter 15 seeking recognition of the foreign proceedings.[20] They also filed an emergency motion seeking this Court's approval of certain provisional relief, including approval of DIP financing to pay, *inter alia*, invoices from ERCOT related to Winter Storm Uri.[21] Indeed, throughout their initial filings, Plaintiffs stress to this Court their critical need to pay ERCOT.[22]

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[16] Am. Compl. ¶¶ 98, 110.

[17] *Id.* ¶ 52; Joint Discovery/Case Management Plan Under Rule 26(f) of the Federal Rules of Civil Procedure [ECF 19] at 7 n.10; Order Granting Provisional Relief Pursuant to Section 1519 of the Bankruptcy Code [Bankr. ECF 23] at 14–20.

[18] Am. Compl. ¶ 20.

[19] Original Compl. [ECF 1] ¶ 57 (emphasis added).

[20] Petition [Bankr. ECF 1]. Given that Canada is not the country where JE Texas, Hudson, and Fulcrum have the "center of [their] main interests," 11 U.S.C. § 1502(4), ERCOT reserves the right to challenge this Court's recognition of the Canadian proceedings as those entities' "foreign main proceeding" under 11 U.S.C. § 1517(d).

[21] Emergency Mot. for Provisional Relief Pursuant to Section 1519 of the Bankruptcy Code [Bankr. ECF 16] at 8.

[22] *See* Emergency Mot. for Provisional Relief Pursuant to Section 1519 of the Bankruptcy Code [Bankr. ECF 16] (Plaintiffs represented that failure to pay ERCOT's invoices "would be catastrophic for the Company and its creditors, lenders, employees, sureties, public shareholders, and customers" and that the DIP financing approved by the Canadian Court was necessary for the continuation of Plaintiffs' businesses and intended to allow Plaintiffs to make all payments to ERCOT and other critical parties); Declaration of Michael Carter in Support of Verified Petition for (i) Recognition as Foreign Main Proceedings, (ii) Recognition of Foreign Representative, and (iii) Related Relief Under Chapter 15 of the Bankruptcy Code [Bankr. ECF 3] ("Carter Declaration") (Plaintiffs' (and other related debtors) CFO explains that the DIP financing approved

9. At the first-day hearing on March 9, 2021, Plaintiffs' counsel explicitly asked this Court to authorize the payment to ERCOT:

> The Court: Well, the Canadian Court approved the DIP. What do I need to do?
>
> Mr. Schartz: Correct. We're asking Your Honor to recognize it on a provisional basis under 1519.
>
> The Court: Yeah. But do I need to authorize this payment to ERCOT?
>
> Mr. Schartz: *We are asking you to authorize payment to ERCOT, yes*. Because if you approve, if you recognize the Canadian order for the limited purpose that we're asking you to, that recognition includes the Canadian order's approval of making the payment to ERCOT.[23]

10. That same day, the Court entered an order that, among other things, recognized the Plaintiffs' authority to make the payments to ERCOT as approved by the Canadian Court.[24] Pursuant to this Court's order, ERCOT was then paid.

11. Over eight months later, on November 11, 2021, Plaintiffs filed their Original Complaint against ERCOT and the PUCT, collaterally attacking the orders of this Court and the Canadian Court, and directly attacking the orders issued by the PUCT during Winter Storm Uri and ERCOT's enforcement or implementation thereof.[25]

12. Plaintiffs initially (and, ultimately, unsuccessfully) framed their collateral attack under the Bankruptcy Code. In their Original Complaint, Plaintiffs asserted fives causes of action—four under U.S. bankruptcy law (Counts 1-4: post-petition avoidance under § 549; claims disallowance under § 502; turnover under § 542; and setoff under §§ 553/558) and one Canadian

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in the Canadian proceedings is "sufficient for Just Energy to continue making all payments to ERCOT and other critical parties as required to protect the overall value of Just Energy".).

[23] First-Day Hearing Tr. [Bankr. ECF 35] at 20 (emphasis added).

[24] Order Granting Provisional Relief Pursuant to Section 1519 of the Bankruptcy Code [Bankr. ECF 23] at 4.

[25] *See* Original Compl. [ECF 1].

cause of action with vague reference to the CCAA. The Court dismissed the PUCT as a party because Plaintiffs failed to state any viable cause of action against it.[26] On ERCOT's motion, the Court dismissed Count 1 (avoidance) with prejudice; dismissed Count 2 (disallowance) with prejudice; dismissed Count 3 (turnover) without prejudice; and required Counts 3 and 4 (setoff and the CCAA claim) to be repleaded.[27]

13. Plaintiffs then filed their Amended Complaint on February 11, 2022.[28] It brings six counts against ERCOT: (1) "Declaration Of Preference Under CCAA (§ 36.1), BIA (§ 95)—Invoice Obligations"; (2) "Declaration Of Preference Under CCAA (§ 36.1), BIA (§ 95)—Prepetition Transfers"; (3) "Transfer At Undervalue Under CCAA (§ 36.1), BIA (§ 96)—Prepetition Transfers"; (4) "Recovering Proceeds If Transferred—CCAA (§ 36.1), BIA (§ 98)"; (5) turnover under 11 U.S.C. § 542(a);[29] and (6) "Declaration Of Entitlement To Setoff, Recoupment, Counterclaim."[30]

14. Plaintiffs assert almost entirely new causes of action in the Amended Complaint, taking a sharp turn away from the U.S. Bankruptcy Code to the CCAA and BIA. At its core, the Amended Complaint and the newly manufactured causes of action remain nothing more than an effort to substitute Canadian causes of action where no U.S. law claims could provide Plaintiffs relief, and to re-assert their improper collateral attack on the PUCT orders and ERCOT's subsequent compliance therewith. Each of these claims fails as a matter of law, and at least one

[26] Order [ECF 87].

[27] Courtroom Minutes [ECF 84]; Order on Turnover Claim [ECF 105]. After considering supplemental briefing from the parties, and after Plaintiffs filed the Amended Complaint, the Court dismissed Plaintiffs' turnover claim instead of abating it.

[28] Am. Compl.

[29] Count 5 was dismissed on February 24, 2022—two weeks after it was filed. Order [Dkt. 105].

[30] *Id.*

claim (Count 3, transfer for undervalue, as well as Counts 4 – 6 to the extent derivative) improperly seeks to undermine the comprehensive regulatory scheme governing Texas's electricity market by directly challenging the validity of the PUCT's emergency orders.

III. RULE 12 LEGAL STANDARDS

A. Rule 12(b)(1) governs dismissal for lack of subject matter jurisdiction.

15. An action should be dismissed for lack of subject matter jurisdiction under Federal Rule 12(b)(1) where the action is barred by sovereign immunity.[31] Additionally, until a party has exhausted all administrative remedies, a trial court lacks subject matter jurisdiction and must dismiss any claim within a state agency's exclusive jurisdiction.[32] A court can find that subject matter jurisdiction is lacking based on: "(1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts."[33] "The burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction."[34]

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[31] *See Warnock v. Pecos County*, 88 F.3d 341, 343 (5th Cir. 1996); FED. R. CIV. P. 12(h)(3); *see also, e.g.*, *Doe v. U.S.*, 853 F.3d 792, 796 (5th Cir. 2017); *Voisin's Oyster House, Inc. v. Guidry*, 799 F.2d 183, 188-89 (5th Cir. 1986); *Baldwin v. Office of Injured Empl. Counsel*, 843 Fed. App'x. 656, 656 (5th Cir. 2021).

[32] *See In re Entergy Corp.*, 142 S.W.3d 316, 321–22 (Tex. 2004); *Oncor Elec. Delivery Co. LLC v. Giovanni Homes Corp.*, 438 S.W.3d 644, 657-60 (Tex. App.—Fort Worth 2014, no pet.).

[33] *Ramming v. U.S.*, 281 F.3d 158, 161 (5th Cir. 2001); *see Wolcott v. Sebelius*, 635 F.3d 757, 762 (5th Cir. 2011); *Lane v. Halliburton*, 529 F.3d 548, 557 (5th Cir. 2008).

[34] *Leal v. Azar*, Case No. 2:20-CV-185-Z, 2020 U.S. Dist. LEXIS 241947, at * 17 (N.D. Tex. Dec. 23, 2020) (citing *Ramming*, 281 F.3d at 161).

B. Rule 12(b)(6) governs dismissal for failure to state a claim.

16. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face."[35] A claim is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the conduct alleged."[36] "Only a complaint that states a plausible claim for relief survives a motion to dismiss."[37] While detailed factual allegations are not required, a complaint must contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."[38]

17. "Naked assertions devoid of further factual enhancement" that are "merely consistent with a defendant's liability" are not sufficient to survive a motion to dismiss.[39] Moreover, a plaintiff's conclusory allegations are "not entitled to the assumption of truth," and therefore a court may look past such conclusory allegations in order to examine the pleaded facts and determine their adequacy.[40] "[I]f a plaintiff chooses to plead particulars, and they show he has no claim, then he is out of luck—he has pleaded himself out of court."[41] "A plaintiff pleads himself

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[35] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, (2007)).

[36] *Id*.

[37] *Cirillo v. Valley Baptist Health Sys. (In re Cirillo)*, Nos. 09-10324, 13-01002, 2014 Bankr. LEXIS 1353, at *22 (Bankr. S.D. Tex. Apr. 3, 2014) (citing *Twombly*, 550 U.S. at 556).

[38] *Twombly*, 550 U.S. at 555.

[39] *Shipley Garcia Enters., LLC v. Harley-Davidson Motor Co. (In re Shipley Garcia Enters. LLC*), Nos. 11-20016, 13-02012, 2014 Bankr. LEXIS 1296, at *15 (Bankr. S.D. Tex. Mar. 28, 2014) (quoting *Twombly*, 550 U.S. at 557).

[40] *Id*. (quoting *Iqbal*, 556 U.S. at 678-79).

[41] *Complete Pharmacy Res., Ltd. v. Feltman*, No. H-04-3477, 2005 U.S. Dist. LEXIS 46982, at *8–9 (S.D. Tex. Aug. 12, 2005) (quoting *Jefferson v. Ambroz*, 90 F.3d 1291, 1296 (7th Cir. 1996)); *see also Fedele v. Marist Coll.*, No. 20 CV 3559 (VB), 2021 U.S. Dist. LEXIS 150094, at *6 (S.D.N.Y. Aug. 10, 2021) (quoting *Perry v. NYSARC, Inc.*, 424 F. App'x 23, 25 (2d Cir. 2011))

out of court when it would be necessary to contradict the complaint in order to prevail on the merits."[42]

18. In assessing a motion to dismiss, "courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice."[43] If a plaintiff mentions a document in its complaint and the document is central to its claim, it is considered part of the pleadings.[44] "Although the Fifth Circuit has not articulated a test for determining when a document is central to a plaintiff's claim, pertinent case law suggests that documents are central when they are necessary to establish an element of one of the plaintiff's claims."[45] A complaint fails if the allegations or the documents attached demonstrate that the plaintiff cannot recover.[46]

C. Rule 12(b)(7) governs dismissal for failure to join an indispensable party.

19. An indispensable party under Rule 12(b)(7) is one whose presence in the lawsuit is required for the fair and complete resolution of the dispute.[47] In resolving a Rule 12(b)(7) motion

("When ruling on a motion to dismiss, the Court need not accept as true 'factual assertions that are contradicted by the complaint itself . . . .'").

[42] *Kolupa v. Roselle Park Dist.*, 438 F.3d 713, 715 (7th Cir. 2006).

[43] *Lormand v. U.S. Unwired, Inc.*, 565 F.3d 228, 251 (5th Cir. 2009); *see Norris v. Hearst Tr.*, 500 F.3d 454, 461 n. 9 (5th Cir. 2007) (stating "it is clearly proper in deciding a 12(b)(6) motion, to take judicial notice of matters of public record").

[44] *In re Katrina Canal Breaches Lit.*, 495 F.3d 191, 205 (5th Cir. 2007); *Collins*, 224 F.3d at 498-99.

[45] *Doyle v. Nationstar Mortg., LLC,* No. H-20-3633, 2021 U.S. Dist. LEXIS 112681, at *5 (S.D. Tex. June 16, 2021) (quoting *Kaye v. Lone Star Fund v. (U.S.), L.P.*, 453 B.R. 645, 662 (N.D. Tex. 2011)).

[46] *Bennett v. Schmidt*, 153 F.3d 516, 519 (7th Cir. 1998); *GE Cap. Corp. v. Posey*, 415 F.3d 391, 398 n.8 (5th Cir. 2005).

[47] *HS Res., Inc. v. Wingate*, 327 F.3d 432, 438 (5th Cir. 2003).

to dismiss, the Court must first determine under Rule 19 whether a person should be joined to the lawsuit. Once the moving party has met its "initial burden of demonstrating that a missing party is necessary, after an initial appraisal of the facts indicates that a possibly necessary party is absent, the burden of disputing this initial appraisal falls on the party who opposes joinder."[48]

IV. ARGUMENTS AND AUTHORITIES

A. Counts 1 through 4 of the Amended Complaint Should be Dismissed for Lack of a Sufficient Connection to Canada for Canadian Law to Apply.

20. Canadian law does not apply to activities in Texas involving only Texas entities. The Supreme Court of Canada presumes a statute enacted by Parliament does not apply extraterritorially "in the absence of clear words or necessary implication to the contrary."[49] The CCAA does not contain such language or implication. In fact, the statute's definition of "debtor company" implicitly builds on the related definition of "company," which requires any foreign company to "hav[e] assets or do[] business *in Canada*."[50] Canadian courts also look to the related definitions of "insolvent person" and "debtor" under the BIA.[51] But those definitions only reach a party "who resides, carries on business or has property *in Canada*,"[52] or who "resided or carried on business *in Canada*."[53]

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[48] *Nat'l Cas. Co. v. Gonzalez*, 637 F. App'x 812, 814-15 (5th Cir. 2016) (quoting *Pulitzer-Polster v. Pulitzer*, 784 F.2d 1305, 1309 (5th Cir. 1986)).

[49] *Society of Composers, Authors & Music Publishers of Canada v. Canadian Assn. of Internet Providers ("SOCAN")*, 2004 SCC 45 ¶ 54.

[50] CCAA § 2(1) (emphasis added).

[51] *See, e.g.*, *UBG Buildiers Inc. (Re)*, 2016 ABQB 472 ¶ 110 (citing leading Canadian treatise).

[52] BIA § 2 (emphasis added).

[53] *Id.* (emphasis added).

21. The Amended Complaint shows there is no such connection to Canada here. JE Texas, Fulcrum, and Hudson are all U.S. entities, with their headquarters in Harris County.[54] ERCOT is also a U.S. entity based in Texas.[55] The gravamen of Plaintiffs' case relates to invoices based on orders from a Texas regulator during a winter storm throughout Texas.[56] Failure to pay the invoices would have affected these Texas entities' participation in the Texas electricity market,[57] and the payments allowed them to continue participating.[58] Plaintiffs never allege any of these Texas entities has assets or does business in Canada. Nor do they explain how JEG, the sole Canadian plaintiff, has any nexus to the business activities or resulting dispute between ERCOT and the Texas Plaintiffs.[59]

22. Canadian courts have recognized that foreign debtors might sometimes seek relief in Canada under the CCAA. But "[t]o prevent overreaching," the Supreme Court of Canada has "developed rules governing and restricting the exercise of jurisdiction over extraterritorial and transnational transactions."[60] Those rules require "[a] real and substantial connection to Canada," including, most importantly, that "a significant portion of the [relevant] activities . . . took place in

[54] Am. Compl. ¶ 18.

[55] *Id.* ¶ 19.

[56] *Id.* ¶¶ 9, 18.

[57] *Id.* ¶¶ 29–30.

[58] *Id.* ¶ 129.

[59] These facts also weigh against application of Canadian law under U.S. conflicts of laws principles. *See Janvey v. Brown*, 767 F.3d 430, 434 (5th Cir. 2014) ("It is well-settled that choice of law issues for supplemental state law claims, such as the fraudulent transfer claims at issue here, are governed by the forum state in which the federal court is sitting. Here, the forum state is Texas, and 'Texas courts follow the 'most significant relationship' test outlined in the Restatement (Second) of Conflict of laws[.]'").

[60] *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022 ¶ 41.

Canada."[61] This approach emanates from the observation that "[o]rdinarily people expect their activities to be governed by the law of the place where they happen to be."[62]

23. It does not matter that the Texas Plaintiffs' ultimate parent is a Canadian entity that commenced a foreign main proceeding under the CCAA. The Supreme Court of Canada has rejected the "universalist," single-proceeding model of bankruptcy adjudication. Rather, "Canada has adhered to a middle position . . . which recognizes that different jurisdictions may have a legitimate and concurrent interest in the conduct of an international bankruptcy, and that the interests asserted in Canadian courts may, but not necessarily must, be subordinated in a particular case to a foreign bankruptcy regime."[63]

24. Indeed, the Canadian Court here explicitly observed how Plaintiffs' companion Chapter 15 proceedings would "ensure that actions taken in relation to US entities and US property or by US regulators are overseen by the US courts."[64] And the Supreme Court of Canada has recognized that a foreign bankruptcy tribunal "applies its own substantive law."[65]

25. In their Amended Complaint, Plaintiffs cite *In re Condor* for the proposition that they may invoke foreign law.[66] But *In re Condor* "involved a situation where the foreign debtor allegedly fraudulently transferred $313 million in assets to an affiliate with United States

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[61] *SOCAN*, 2004 SCC 45 ¶¶ 58, 60 (quotation omitted).

[62] *Tolofson*, [1994] 3 S.C.R. 1022 ¶ 44.

[63] *Holt Cargo Systems Inc v. ABC Containerline NV (Trustee of)*, 2001 SCC 90 ¶ 80. The 2009 amendments to the BIA and the CCAA maintained the middle-ground approach to cross-border insolvencies through the adoption of most, but not all, of the UNICTRAL Model Law on Cross-Border Insolvency.

[64] Canadian Court Endorsement ("CCAA Op.") ¶ 40, a copy of which is attached hereto as Exhibit G.

[65] *Holt Cargo Systems*, 2001 SCC 90 ¶ 80.

[66] *See* Am. Compl. ¶ 84 (citing *Tacon v. Petroquest Res. Inc. (In re Condor Ins. Ltd.)*, 601 F.3d 319 (5th Cir. 2010)).

locations." [67] The Fifth Circuit also cautioned that "foreign representatives gain no powers not contemplated by the laws of [the foreign jurisdiction] through filing suit in the United States."[68]

26. JE Texas (and, to the extent relevant, other Plaintiffs) could have filed Chapter 11 proceedings in Texas, their home state. Instead, they are affiliates (but not applicants) to the CCAA proceeding and subsequent Chapter 15 debtors.[69] Canadian preference and transfer at undervalue law is not available to challenge the sale of electricity in Texas between parties based in Texas, contracting under Texas law, and operating in a Texas regulatory market.

27. Indeed, one doctrine central to relief under Chapter 15 is the principle of comity. Comity is a long-standing doctrine in international law, which the U.S. Supreme Court defined as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protections of its laws."[70] Comity is the "principle objective" in Chapter 15 ancillary proceedings; it is "the rule . . . not the exception."[71] Were this Court to find Plaintiffs have standing to assert the Canadian claims, in direct violation of contrary Canadian authority, it would pervert principles of international comity.

[67] *In re Fairfield Sentry Ltd.*, 458 B.R. 665, 681 (S.D.N.Y. 2011) (citation omitted). Here, by contrast, ERCOT engaged in business exclusively with entities organized and located in the United States.

[68] *In re Condor*, 601 F.3d. at 327.

[69] *See* CCAA Initial Order ¶ 3 (noting the Texas Plaintiffs are "not Applicants" in the CCAA proceeding).

[70] *Hilton v. Guyot*, 159 U.S. 113, 164 (1895).

[71] *In re Vitro S.A.B. de C.V.*, 701 F.3d 1031, 1064 (5th Cir. 2012).

Plaintiffs cannot use these Chapter 15 ancillary proceedings to distort and expand another sovereign's law.[72]

B. Counts 1 through 4 of the Amended Complaint should be dismissed because Plaintiffs lack standing as they are not the Monitor.

28. Even if Canadian law arguably applies, Plaintiffs lack standing to bring Counts 1 through 4 of the Amended Complaint because only a monitor may bring such claims under § 36.1 of the CCAA. "Standing is a component of subject matter jurisdiction."[73] Dismissal is therefore appropriate under Rule 12(b)(1).

29. Counts 1 through 4 invoke the BIA's preference, transfer at undervalue, and recovery provisions through § 36.1 of the CCAA. Under §§ 95 and 96 of the BIA, which are incorporated in the CCAA, "a trustee in bankruptcy has the right to challenge a payment or transaction as a preference or transfer undervalue. Section 36.1 of the CCAA extends this right to *a CCAA monitor*."[74] Section 36.1(2) of the CCAA directs that for purposes of claims under the BIA "a reference in sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act* . . . to 'trustee' is to be read as a reference to 'monitor'. . . ."

30. In Canada, as in the United States, "[t]he first and cardinal principle of statutory interpretation is that one must look to the plain words of the provision."[75] Thus, "the legislature's

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[72] *See In re Estrategias en Valores, S.A.*, 628 B.R. 722, 730-31 (Bankr. S.D. Fla. 2021) (finding that foreign representative did not have authority under Colombian law to assert conversion and unjust enrichment claims).

[73] *HSBC Bank USA, N.A. v. Crum*, 907 F.3d 199, 202 (5th Cir. 2018).

[74] *Cash Store Financial Services, Re*, 2014 ONSC 4326 ¶108 (emphasis added). Under § 11.7(1) of the CCCA, "[w]hen an order is made on the initial application in respect of a debtor company, the court shall at the same time appoint a person to monitor the business and financial affairs of the company." As the Supreme Court of Canada has explained, "[t]he monitor is an independent and impartial expert, acting as the eyes and the ears of the court throughout the proceedings." *9354-9186 Québec inc v. Callidus Capital Corp*, 2020 SCC 10 ¶ 52 (quotation omitted).

[75] *R. v. D.A.I.*, 2012 SCC 5 ¶ 26.

express choice to use [a] specific word . . . must be given effect."[76] Under this clear statutory language, Canadian courts have held that "it is the Monitor"—not the debtor—"who would have the right to make an application" under the BIA's preference and transfer at undervalue provisions.[77] But the monitor here is FTI Consulting Canada, Inc., which is *not* a plaintiff.[78] Plaintiffs thus have "no status to act" under any of the Canadian statutes they cite and therefore lack standing to assert avoidance actions under the CCAA in this Court.[79] For the same reasons applying Canadian law to the transactions in question would violate principals of comity, so too would granting standing to entities who lack it under Canadian law.

C. The filed rate doctrine precludes the relief Plaintiffs seek.

31. Plaintiffs have directly challenged the PUCT's emergency orders issued during Winter Storm Uri and seek the establishment of a rate for themselves that would differ materially from that charged to other market participants. In the Fifth Circuit, however, the filed rate doctrine bars a collateral attack on a rate approved by the PUCT, as well as obtaining a redetermination of the "appropriate amount" or "real value" for the energy sold in the ERCOT market at ERCOT rates.[80] "Simply stated, the [filed rate] doctrine holds that any 'filed rate'—that is, one approved

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[76] *1704604 Ontario Ltd v. Pointes Protection Association*, 2020 SCC 22 ¶ 45.

[77] *Verdellen v. Monaghan Mushrooms Ltd*., 2011 ONSC 5820 ¶ 46. For recent actions brought by a monitor, *see, e.g.*, *Ernst & Young Inc v. Aquino*, 2021 ONSC 527, *aff'd* 2022 ONCA 202; *Urbancorp Cumberland 2 GP Inc, Re*, 2017 ONSC 7156.

[78] CCAA Initial Order ¶ 26. Plaintiffs state that "[t]he Monitor has been advised that the Foreign Representative is bringing claims against ERCOT relating to the Invoices and Transfers and has no objection." Am. Compl. ¶ 20. But that is insufficient. The statute does not speak of the monitor's permission; it requires that the monitor actually bring the action.

[79] *Verdellen*, 2011 ONSC 5820 ¶ 46. Although each of Counts 1 to 4 appear to be brought by each plaintiff, Plaintiffs state that they "bring this action by and through the Foreign Representative." Am. Compl. at 1. Whether plaintiffs bring the action in their own name or through the Foreign Representative is immaterial for purposes of Canadian law, because none of them is the monitor.

[80] *TCE*, 413 F.3d at 508 (citation omitted).

by the governing regulatory agency—is per se reasonable and unassailable in judicial proceedings brought by ratepayers."[81] In applying the filed rate doctrine, courts throughout the country have dismissed all manner of claims, defenses, objections, and theories through which a litigant has attempted to second-guess or undermine a "filed rate."[82]

1. Filed rates are per se reasonable and unassailable in judicial proceedings.

32. Under the filed rate doctrine, filed rates are "per se reasonable and unassailable in judicial proceedings."[83] Stated another way, "the filed rate doctrine bars judicial recourse . . . based upon allegations that the entity's 'filed rate' is too high, unfair, or unlawful."[84] Judicial relief that requires use of a "hypothetical rate" or a "fair value" instead of the filed rate also violates the doctrine.[85] In fact, "[t]he doctrine prevents more than [just] judicial rate-setting; it precludes any judicial action which undermines agency rate-making authority."[86] One of the primary rationales of the filed rate doctrine is the "nondiscrimination principle," which avoids the risk that litigation over filed rates would become a means of obtaining preferential rates, as "victorious plaintiffs would wind up paying less than non-suing ratepayers."[87]

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[81] *Id.*

[82] *See, e.g., Winn v. Alamo Title Ins. Co.*, 2009 U.S. Dist. LEXIS 65889, at *3 (W.D. Tex. May 13, 2009) (collecting cases from courts across the country dismissing all manner of litigation and claims based on the filed rate doctrine). As the Court exercises its jurisdiction in this case, it should do so in a manner that gives effect to the filed rate. *In re Mirant Corp.*, 378 F.3d 511, 522 (5th Cir. 2004).

[83] *TCE*, 413 F.3d at 508 (quoting *Wegoland, Ltd. v. NYNEX Corp.*, 27 F.3d 17, 18 (2d Cir. 1994)).

[84] *TCE*, 413 F. 3d at 507; *see also In re Ultra Petro. Corp.*, --- F.4th ---, 2022 U.S. App. LEXIS 6522, at *13 (5th Cir. Mar. 14, 2022) ("'courts lack authority to impose a different rate than the one approved by [FERC].'" (quoting *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 578 (1981))).

[85] *Pub. Util. Dist. No. 1 v. IDACORP Inc.*, 379 F.3d 641, 651 (9th Cir. 2004).

[86] *Rothstein v. Balboa Ins. Co.*, 794 F.3d 256, 262 (2d Cir. 2015) (citation omitted).

[87] *Rothstein*, 794 F.3d at 262.

33. In *TCE*, the Fifth Circuit applied the filed rate doctrine to affirm dismissal of claims brought against ERCOT and a number of generators and market participants for allegedly conspiring to manipulate ERCOT rates "during severe winter weather" when "the price for electricity on the [ERCOT] market soared."[88] The TCE district court also applied the filed rate doctrine to dismiss a breach of contract claim against ERCOT based on "ERCOT's [alleged] failure to follow is own protocols."[89] Likewise, in *Utility Choice*, the Southern District of Texas dismissed a variety of causes of action relating to "alleged manipulation of the Texas energy market to create substantial price increases" because the claims "challenge[d] the [ERCOT] rates paid, and are thus barred by the filed rate doctrine."[90]

34. This doctrine bears directly on Plaintiffs' claims, insofar as they are premised on revisiting the appropriate rate charged by ERCOT and effectively seeking a preferential rate for Plaintiffs. Counts 3 through 6 of the Amended Complaint expressly challenge the validity of the PUCT's orders during the winter storm by referring to ERCOT's charges as "illegally and erroneously calculated under the APA and the PURA and find[ing] no support in the ERCOT Protocols or the SFA."[91] Moreover, all of Plaintiffs' claims would result in an effective preferential rate for themselves at the expense of other market participants.

2. The rates underlying the invoices are "filed rates" for purposes of the doctrine.

35. "While the filed-rate doctrine originated with federally approved rates, '[c]ourts have uniformly held . . . that the rationales underlying the filed rate doctrine apply equally strongly

[88] *TCE*, 413 F.3d at 506-07.

[89] *Id.*

[90] *Util. Choice, L.P. v. TXU Corp.*, 2005 U.S. Dist. LEXIS 38657, at *16 (S.D. Tex. Dec. 6, 2005).

[91] Am. Compl. ¶¶ 57 – 72, 107, 117 (referring to Count 3), 122, 127.

to regulation by state agencies.'"[92] And the filed rate doctrine applies whether a regulatory agency actively sets and approves rates or merely monitors market-based rates and maintains oversight authority.[93] The Fifth Circuit carefully considered the Texas electric regulatory structure and held in *TCE*, consistent with other Circuits examining other competitive electricity markets,[94] that the PUCT's oversight authority over ERCOT market rates brings its rates within the ambit of the filed rate doctrine.[95]

36. In this adversary proceeding, Plaintiffs' claims attack and seek the return of payment for energy sold in the ERCOT market, including at a rate ordered by the PUCT during the EEA3 period.[96] And under *TCE*, all the prices underlying ERCOT's charges—whether expressly set by the PUCT or set by the wholesale market—qualify as filed rates for purposes of the filed rate doctrine. The statutes and regulations relating to PUCT authority that the Fifth Circuit cited to in *TCE* for purposes of determining whether the rates are "filed" are still in force and apply equally to the ERCOT rates at issue here.[97] The Court should apply the filed rate doctrine to

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[92] *Alexander v. Global Tel Link Corp.*, 816 F. App'x 939, 943 (5th Cir. 2020) (quoting *TCE*, 413 F.3d at 509).

[93] *See Simon v. KeySpan Corp.*, 694 F.3d 196, 207 (2nd Cir. 2012) ("The rationale behind the filed rate doctrine applies with equal force to [a market based rate] auction system[.]"); *E. & J. Gallo Winery v. EnCana Corp.*, 503 F.3d 1027, 1041 (9th Cir. 2007) (applying filed rate doctrine to "market-based rates" overseen by FERC); *Util. Choice, L.P.*, 2005 U.S. Dist. LEXIS 38657, *6 n.6 (extending *TCE's* holding in respect of spot market rates to bilateral transactions).

[94] *TCE,* 413 F.3d at 509 (citing *Town of Norwood, Mass. v. New England Power Co.*, 202 F.3d 408, 419 (1st Cir. 2000) and *Pub. Util. Dist. No. 1 v. Dynegy Power Marketing, Inc.*, 384 F.3d 756, 760-61 (9th Cir. 2004)).

[95] *TCE*, 413 F.3d at 509-10; *see also Util. Choice*, 2005 U.S. Dist. LEXIS 38657, at *8 ("[T]he Fifth Circuit has held that the filed rate doctrine bars claims for damages stemming from rates approved by the PUCT in the Texas energy market.").

[96] *See* Am. Compl. ¶ 34.

[97] *See, e.g.*, TEX. UTIL. CODE §§ 35.004(f), 39.101(a)(1), 39.151; 16 TEX. ADMIN. CODE §§ 25.1(a), 25.501(a).

dismiss, at a minimum, Count 3 asserting transfer for undervalue (the only standalone cause of action that as pleaded seeks to have this Court determine the validity and applicability of the PUCT's orders), as well as Counts 4 through 6 to the extent they relate to those same determinations. [98]

D. Counts 1 through 4 of the Amended Complaint should be dismissed because Plaintiffs have failed to state a claim.

37. Even if Plaintiffs overcome the inapplicability of Canadian law and causes asserted, their lack of standing, and the filed rate doctrine's preclusive effects, they have failed to state a claim for each of their preference and transfer at undervalue counts.

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[98] On their face, Counts 1 and 2 do not implicate the validity or applicability of the PUCT emergency orders. As such, the dismissal of Counts 3 and 6 would substantially reduce the potential of this case to have precedential or other effects on litigation or regulatory proceedings challenging the PUCT's orders.

Moreover, Count 3 applies only to *prepetition* transfers, which plaintiffs allege are approximately $81 million of the $274 million in disputed payments. At the same time, Plaintiffs, either directly or through certain of their affiliates, are due to receive $147 million from Texas's post-storm securitization financing program. *See* Proceeding for Eligible Entities to File an Opt Out Pursuant to TEX. UTIL. CODE § 39.653(d) and for Load-Serving Entities to File Documentation of Exposure of Costs Pursuant to the Debt Obligation Order in Docket No. 52322, P.U.C.T. Project No. 52364, *Just Energy Group, Inc. REPs' Verification of Exposure Calculation* (Dec. 21, 2021) *available at:* http://interchange.puc.texas.gov/Documents/52364_581_1175879.PDF*;* and *see* Proceeding for Eligible Entities to File an Opt Out Pursuant to TEX. UTIL. CODE § 39.653(d) and for Load-Serving Entities to File Documentation of Exposure of Costs Pursuant to the Debt Obligation Order in Docket No. 52322, P.U.C.T. Project No. 52364, *ERCOT's Calculation of Load Ratio Share and Total Exposure for Load Serving Entities* (Dec. 7, 2021) *available at:* http://interchange.puc.texas.gov/Documents/52364_539_1172335.ZIP. Plaintiffs acknowledge in their Amended Complaint at ¶ 50 that the securitization statute's anti-double-recovery provision applies to this case. *See* TEX. UTIL. CODE § 39.651(d) ("A load-serving entity that receives proceeds from the financing under this subchapter shall return an amount of the proceeds equal to any amount of money received by the entity due to litigation seeking judicial review of pricing or uplift actions taken by the commission or the independent organization in connection with the period of emergency."). Accordingly, even if they recover the full $81 million in prepetition transfers they seek under Count 3, Plaintiffs would immediately be required to return $81 million in securitization funds. Aside from the fatal legal flaws, it does not make economic sense for Plaintiffs to assert Count 3. Finally, to net any recovery under Count 6 above what they would have to return in securitization funds, the Court would have to rule in favor of Plaintiffs in amount greater than $147 million.

1. Plaintiffs fail to identify the alleged obligations and transfers at issue.

38. Less than two years ago, Judge Robert Jones of the Northern District of Texas canvassed the case law regarding the detail with which a plaintiff must identify transfers subject to avoidance to survive a motion to dismiss.[99] While there is no overwhelming consensus with respect to preference claims, "[m]ost courts effectively require the specific-pleading standard of *Valley Media*, without expressly adopting it."[100] "The *Valley Media* standard requires that a plaintiff plead each transfer by date, amount, transferor, and transferee."[101] With respect to Plaintiffs' transfer at undervalue claim in Count 3—the functional equivalent of an actual fraudulent transfer claim—the Court has already acknowledged that Rule 9(b)'s heightened pleading standard applies.[102]

39. The Amended Complaint fails to identify the challenged obligations or payments with any level of specificity, regardless of whether a heightened pleading standard applies to these claims. The need for this information is particularly pressing given (a) that only JE Texas is a QSE,[103] meaning none of the other Plaintiffs financially transacts with ERCOT, and (b) Plaintiffs' admission that non-party BP (the QSE for Plaintiff Hudson) incurred some unidentified portion of the obligations and made some unspecified portion of the payments Plaintiffs seek to avoid.[104]

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[99] *Reagor Auto Mall Ltd. v. FirstCapital Bank of Tex., N.A. (In re Reagor-Dykes Motors, LP)*, 20-05002, 2020 Bankr. LEXIS 2254, *17 (Bankr. N.D. Tex. Aug. 24, 2020).

[100] *Id.*

[101] *Id.* at *14 (citing *Valley Media, Inc. v. Borders, Inc. (In re Valley Media, Inc.)*, 288 B.R. 189, 192 (Bankr. D. Del. 2003)).

[102] Feb. 2, 2022 Tr. (79:10-12) ("Rule 9 does not apply to constructive fraudulent conveyances, only to actual ones.").

[103] *See* Exhibits B, C, D, and E.

[104] Am. Compl. ¶¶ 10 n.3, 56, 91, 100. To the extent BP made any payments to ERCOT on behalf of Hudson (or other Just Energy entities) and now seeks reimbursement, such payments are not actionable under §§ 95 and 96 of the BIA.

Without identifying with sufficient specificity the date, amount, transferor, and transferee of each of the obligations and payments, the Amended Complaint fails to state any claim upon which relief can be granted.

2. Counts 1 and 2 should be dismissed because Plaintiffs have failed to state a claim for fraudulent preference under § 95 of the BIA.

40. To establish a fraudulent preference to an arm's length creditor under § 95,[105] a trustee (or monitor in the CCAA context) must first establish: (1) the impugned transfer or obligation was made or incurred within three months of bankruptcy (or CCAA filing date); (2) the debtor was insolvent on the date the transfer or obligation was made or incurred; and (3) as a result of the transfer or obligation, the creditor in fact received a preference over other creditors.[106] Establishing these "conditions precedent" raises a rebuttable presumption that the debtor intended to prefer one creditor over another.[107] But Plaintiffs have failed to plead either insolvency (at the relevant time) or preferential intent. As a result, Counts 1 and 2 should be dismissed.

a. Plaintiffs have not pleaded insolvency at the time of the challenged obligations and payments.

41. Only "a payment made [or] an obligation incurred . . . *by an insolvent person*" is avoidable under § 95. The debtor must *already* be insolvent because § 95 seeks to target "the insolvent debtor who in the face of imminent bankruptcy is moved to prefer or favor, before losing control over his assets, a particular creditor over others."[108] Moreover, under Canadian law, "[t]he

[105] Plaintiffs appear to plead that the parties were at arm's length. *See* Am. Compl. ¶¶ 85, 94.

[106] *St Anne Nackawic Pulp Co (Trustee of) v. Logistec Stevedoring (Atlantic) Inc.*, 2005 NBCA 55 ¶ 4.

[107] *See id.* at ¶ 5 ("Once the three conditions precedent have been met, a presumption arises that the payment was made with a view to giving that creditor a preference over the other creditors. However, it is a rebuttable presumption.").

[108] *Norris, Re*, 1996 ABCA 357 ¶ 16.

court will not presume insolvency. It must be proved and if it is not, then the application must be dismissed."[109]

42. Plaintiffs have not pleaded they were insolvent either when they incurred the obligations or when they made "certain of the" payments (i.e., those made prepetition).[110] Plaintiffs merely conclude they "were insolvent on the dates that the Invoice Obligations were incurred, or became insolvent as a result of the Invoice Obligations."[111] But "a formulaic recitation of the elements of a cause of action will not do."[112] And it is irrelevant that Plaintiffs allege they "became insolvent as a result" of the challenged obligations and payments. Canadian law requires insolvency *prior* to the challenged actions, which Plaintiffs do not allege here.

43. Plaintiffs' only allegation touching on insolvency states, "[l]acking sufficient liquidity to satisfy the grossly overstated Invoices, the Debtors commenced the Canadian Proceedings under the CCAA in the Canadian Court on March 9, 2021."[113] But there are no allegations suggesting any of the Plaintiffs were insolvent in February 2021 when they incurred the obligations. To the contrary, they pleaded that only five months earlier, Plaintiffs had completed a recapitalization that, among other things, right-sized their balance sheet, raised over CAD $100 million of new equity, and extended debt maturity dates, which resulted in the enterprise having total liquidity of CAD $138 million.[114] There is no indication that JE Texas was

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[109] *Van der Liek (Re)* (1970), 14 C.B.R. (NS) 229 ¶ 5 (Ont. S.C. (Bankr.)).

[110] Am. Compl. ¶ 91. Any payments made *after* the date of the CCAA filing would be outside the compass of § 95 as the provision is concerned only with payments made "during the period beginning on the day that is three months before the date of the initial bankruptcy event *and ending on the date of the bankruptcy*" (emphasis added).

[111] Am. Compl. ¶ 87; *see also id.* ¶ 96.

[112] *Twombly*, 550 U.S. at 555.

[113] Am. Compl. ¶ 54.

[114] *Id.* ¶ 24.

even insolvent as of the time of the CCAA filing: JE Texas is not an applicant in the CCAA proceedings, nor did the Canadian Court make a finding that it was insolvent.[115]

44. Because Plaintiffs only summarily state they were insolvent at the time the obligations were incurred while their successful recapitalization suggests otherwise, Counts 1 and 2 should be dismissed.

b. Plaintiffs' pleadings rebut any alleged intent to prefer ERCOT over other creditors.

45. Under § 95 of the BIA, if the monitor shows that a challenged action had a preferential effect when it was made, the court will presume the debtor intended to give the creditor a preference.[116] But that is not the end of the inquiry. Canadian courts have recognized two broad and sometimes overlapping categories of cases in which the presumption is rebutted: "transactions necessary to stay in business" and "ordinary course transactions"[117] (a term with a different meaning in Canada than in the United States, as explained herein).

46. Both categories seek to ferret out the debtor's "dominant intent."[118] "The state of mind of the debtor at the time of making the payment is ultimately the paramount consideration to be addressed by the court."[119] Under § 95, unlike the avoidance provisions in § 547 of the Bankruptcy Code, whether a creditor received a preference as *a factual matter* is ultimately not

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[115] The Canadian Court's finding of insolvency was limited to JEG. *See* CCAA Op. ¶¶ 48-51. There was no explicit finding of insolvency as to the other Applicants or any of the other Just Energy Entities (as those terms are defined therein).

[116] *See* BIA § 95(2) (presumption); *Van der Liek*, 14 C.B.R. (N.S.) 229 ¶ 7 ("[I]t must be shown that the effect of the conveyance, transfer, etc. was *at the date when it was made* to give preferential treatment to the creditor who received it." (emphasis in original)).

[117] *See, e.g.*, *Orion Industries Ltd (Trustee of) v. Neil's General Contracting Ltd.*, 2013 ABCA 330 ¶ 11.

[118] *Norris, Re*, 1996 ABCA 357 at ¶ 16.

[119] *Id.*

dispositive. Rather, because it is the debtor's "*accompanying intent* to favour one creditor over another" that "makes a preference in fact a fraudulent preference,"[120] a creditor may rebut any effects-based presumption of such intent. But Plaintiffs do not allege an intent to prefer ERCOT over another creditor when they incurred the challenged obligations and made the challenged payments.

47. First, "[T]here is ample authority for the proposition that if a transaction is carried in a *bona fide* expectation that it will enable the debtor to carry on its business, it is . . . a powerful circumstance rebutting the statutory presumption."[121] And this case is a textbook example of the necessary-to-stay-in-business exception. The Amended Complaint alleges that Plaintiffs made the payments "[i]n order to protect against a forced eviction from Texas's retail electricity market,"[122] and "to avoid losing Plaintiff's customers and participant status in the ERCOT market."[123] The Canadian Court ratified these assertions by confirming Plaintiffs' belief was reasonable.[124] As the Canadian Court observed: "If Just Energy does not pay the fees to ERCOT, the latter can simply transfer all of the Just Energy Group's customers in Texas to another service provider. That would be devastating to Just Energy's business."[125]

48. Second, and independently under settled Canadian law, a debtor's decision "to secure a continued supply of goods and services from [] trade creditors in order that it might

[120] *Id.* (emphasis added).

[121] *HXP Debenture Trust v. Guillaume*, 2014 SKQB 123 ¶ 59 (quotation and citation omitted).

[122] Am. Compl. ¶ 10.

[123] *Id.* ¶ 106.

[124] *See Principal Group Ltd. (Trustee of) v. Anderson* (1994), 29 C.B.R. (3d) 216 ¶ 62–63 (Q.B.) (debtor's belief must be reasonable).

[125] CCAA Op. ¶ 27.

continue in its business" is an action in the ordinary course.[126] As an initial matter, at least as to payments to ERCOT in the amount of $64.9 million and $96.3 million (cumulatively $161.2 million), Plaintiffs have conceded those payments were made in the ordinary course. In his first-day declaration, JEG's Chief Financial Officer testified: "On Friday, March 5, Just Energy made $64.9 million of payments to ERCOT *in the ordinary course*, and expects to make an additional $96.3 million of resettlement payments to ERCOT on Tuesday, March 9."[127] The Court granted Plaintiffs' relief based in part on this testimony.[128] Plaintiffs are thus estopped from arguing these payments were not made in the ordinary course.[129]

49. Further, Canadian courts recognize that "[t]he concept of what is in the ordinary course of business for a particular business is [] flexible and contextual."[130] *And that concept differs significantly from its American counterpart*. It simply "take[s] into account the type of business carried on between the debtor and creditor."[131] For example, a Canadian court recently concluded that a large movie theatre chain's extraordinary decision to shutter its screens during the COVID-19 pandemic was still an action in the ordinary course because the decision was "congruous, compatible and adhering to the same principles of thought and action" as the company

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[126] *Norris, Re* (1994), 161 A.R. 77 ¶ 7 (Q.B.), *rev'd on other grounds*, 1996 ABCA 357.

[127] Carter Declaration ¶ 14(b) (emphasis added).

[128] *See* Order Granting Petition for (I) Recognition as Foreign Main Proceedings, (II) Recognition of Foreign Representative, and (III) Related Relief under Chapter 15 of the Bankruptcy Code [Bankr. ECF 82] (the "Recognition Order") (introductory paragraph expressly mentioning Carter Declaration).

[129] *See, e.g.*, *Allen v. C&H Distribs., LLC*, 813 F.3d 566, 572 (5th Cir. 2015) ("Judicial estoppel is a common law doctrine that prevents a party from assuming inconsistent positions in litigation.") (quoting *Superior Crewboats Inc. v. Primary P & I Underwriters (In re Superior Crewboats, Inc.)*, 374 F.3d 330, 334 (5th Cir. 2004)).

[130] *Cineplex v. Cineworld*, 2021 ONSC 8016 ¶ 110.

[131] *Pacific Mobile Corp., Re*, [1985] 1 S.C.R. 290 ¶ 3.

had in the past, irrespective of the extraordinary conditions by which the ordinary business decisions were made.[132]

50. Judged based on these principles, the Amended Complaint establishes there was nothing out of the ordinary in Plaintiffs' purchase of electricity in the ERCOT marketplace. Plaintiffs stress the undisputedly historic circumstances of the storm, but as regular participants in the ERCOT market,[133] Plaintiffs' purchase of electricity in the ERCOT marketplace was ordinary and necessary to stay in business. Similar to a recent Canadian § 95 decision: Plaintiffs incurred obligations to ERCOT to obtain electricity to enable them to carry on their business; these obligations were therefore incurred by Plaintiffs to ERCOT in the ordinary course of their business.[134]

51. In sum, whether because of the necessary-to-stay-in-business exception, the ordinary-course exception, or both, Plaintiffs have failed to plead a cognizable fraudulent preference for either the challenged obligations or payments.

c. The Canadian Court's approval of the post-petition payments bars Plaintiffs' attempt to void the obligations those payments satisfied.

52. Plaintiffs attack the underlying invoices as fraudulent preferential "obligations" in an ineffectual attempt to void their voluntary, court-approved, post-petition payments.[135] At

[132] *Cineplex*, 2021 ONSC 8016 ¶ 123.

[133] Am. Compl. ¶ 29. Though not relevant to the Amended Complaint, ERCOT continues to assert that, even under Bankruptcy Code and prevailing law, payment of invoices consistent with, *inter alia*, the protocols were "in the ordinary course"; and nothing herein should be read as inconsistent with such position.

[134] *Zeifman Partners Inc. v. Baldassare*, 2020 ONSC 3023 ¶ 35 ("Discovery had to make payments to Boz to obtain supplies to enable it to carry on its business in the ordinary course. These payments were therefore made by Discovery to Boz in the ordinary course of its business.").

[135] On its face, § 95 of the BIA plainly applies only to pre-bankruptcy transfers and obligations. *See* BIA § 95(1)(A) (referring to transfers and obligations "during the period beginning on the day

Plaintiffs' request and great urging, the Canadian Court authorized these payments because, as represented by Plaintiffs, they were "necessary to 'keep the lights on.'"[136] The Canadian Court certainly did not approve these payments just so Plaintiffs could later challenge them as fraudulent in this Court. To be sure, all parties understood the underlying obligations were disputed. But as the Canadian Court noted, "Just Energy is in the process of challenging" the obligations and, critically, the resolution of that challenge "will be for another day *and another forum*"—that is, the process contemplated by ERCOT's protocols.[137]

53. Moreover, to establish a claim under BIA § 95, a court must conclude that a debtor intended to prefer one creditor over others. Plaintiffs' argument implies the Monitor sought and the Canadian Court approved payment of a fraudulent preference. To be clear, ERCOT is not suggesting the Canadian Court or the Monitor facilitated a fraudulent preference. And surely Plaintiffs are not either. Rather, as the Canadian Court found, the obligations incurred by Plaintiffs in February 2021 were "a result of the storm" and the resulting decision of "ERCOT's regulator . . . [to] increase[] the real-time settlement price of power from approximately US $1,200 per megawatt hour to US $9,000 per megawatt hour."[138] Thus, the Canadian Court's findings on the legitimacy of the post-petition payments preclude Plaintiffs' challenge to the underlying pre-filing obligations as fraudulent.

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that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy").

[136] CCAA Op. ¶ 63.

[137] *Id.* ¶¶ 38, 82.

[138] *Id.* ¶¶ 16, 18.

54. Additionally, under Canadian law, "[c]omeback relief . . . cannot prejudicially affect the position of parties who have relied *bona fide* on the previous order in question."[139] Against that backdrop, the Canadian Court would not entertain Plaintiffs' claims that, in substance, collaterally attack the very post-filing payments the Court approved in its initial order. To the contrary, the Canadian Court would recognize that "[to] make an order that would be contrary to the reasonable expectations of [ERCOT] based on the steps already taken and the orders already granted under the CCAA in this proceeding . . . would be unfair and it would not contribute to the fair application of the CCAA in this case or as a precedent for others."[140] For this Court to reach a contrary conclusion would greatly offend principles of international comity, which doctrine is central to all Chapter 15 proceedings. Indeed, Plaintiffs cannot now use Chapter 15 to undo the Canadian Court's authorization of the post-petition payments to ERCOT, especially when Plaintiffs requested such authority. Moreover, this Court already recognized the Canadian Court's authority to authorize such transfers.

3. Count 3 should be dismissed because Plaintiffs have failed to state a claim for transfer at undervalue under § 96 of the BIA.

55. To establish a claim under § 96 where the parties are at arm's length,[141] a monitor must establish: (1) the challenged transactions were "transfers at undervalue"; (2) the transactions occurred within one year before the CCAA filing; (3) the debtor was insolvent at the time of the transaction or rendered insolvent by it; and (4) the debtor intended to "defraud, defeat, or delay a

[139] *Muscletech Research & Development Inc., Re* (2006), 19 C.B.R. (5th) 54 ¶ 5 (Ont. Sup. Ct. (Com. List)).

[140] *Collins & Aikman Automotive Canada Inc., Re* (2007), 37 C.B.R. (5th) 282 ¶ 108 (Ont. Sup. Ct. (Com. List)).

[141] Plaintiffs appear to plead that the parties were at arm's length. *See* Am. Compl. ¶ 103.

creditor."[142] Here, alleging a "transfer at undervalue" violates the filed rate doctrine, as discussed above, and that alone merits dismissal of Count 3. Moreover, this claim more than any other treads heavily on Texas' comprehensive regulatory scheme for administering the ERCOT wholesale power market, which highlights additional jurisdictional and other legal defects of the Amended Complaint as discussed herein. Further, Plaintiffs failed to plead insolvency; and "the crucial question" under § 96 is whether the monitor has properly alleged "the fraudulent intent of the debtor."[143] Plaintiffs have not done so, and each of these deficiencies is an independent ground for dismissal. Count 3 should be dismissed.

a. Plaintiffs have not pleaded any intent to defraud, defeat, or delay a creditor.

56. The Amended Complaint does not allege Plaintiffs intended to defraud, defeat, or delay a creditor.[144] Instead, they allege they made the transfers with "the intent to *prefer* ERCOT over other creditors and to that end hindered and delayed the collection efforts of those other creditors."[145] Plaintiffs then perplexingly cite a string of inapplicable U.S. cases in an apparent attempt to shoehorn irrelevant American legal principles where they do not fit. Indeed, Plaintiffs cannot assert they made the payments with fraudulent intent. For purposes of a motion to dismiss, the Court cannot disregard the allegations in the Amended Complaint explaining why Plaintiffs

[142] *See Montor Business Corp (Trustee of) v. Goldfinger*, 2016 ONCA 406 ¶ 33. Although *Montor* speaks of the date of the bankruptcy, under § 36.1(2)(a) of the CCAA, references in the BIA should be read as the "day on which proceedings commence under [the CCAA]."

[143] *Urbancorp Toronto Management Inc (Re)*, 2019 ONCA 757 ¶ 64. Flummoxing, the Amended Complaint cites a series of American cases purporting to define fraudulent intent under U.S. law. *See* Am. Compl. ¶ 108. None of those cases sheds light on the standard under § 96 of the BIA. In any event, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Iqbal*, 556 U.S. at 678.

[144] *See* Am. Compl. ¶¶ 99-110.

[145] *Id.* ¶ 108 (emphasis added).

paid ERCOT: because it was necessary to remain in business.[146] The fact that Plaintiffs made the payments under protest[147] also demonstrates they did not intend to defraud, defeat, or delay any creditor. Where, as here, the factual allegations overwhelmingly controvert fraudulent intent, they are likewise insufficient to state a plausible claim. Therefore, this Court should dismiss Count 3.

b. Plaintiffs have not identified a present creditor against whom fraudulent intent was directed.

57. Not only must a party seeking to avoid a transfer at undervalue show the debtor had fraudulent intent, the party must also identify a *present* (as opposed to *future*) creditor toward whom that intent was directed.[148] Beyond Plaintiffs' failure to allege fraudulent intent generally, they also failed to identify which of their creditors they intended to defraud. To the contrary, in seeking the initial order from the Canadian Court, Plaintiffs sought and won approval for payments to a series of current creditors at the same time they made payments to ERCOT.[149] And "if any debts owing at the time of the impugned transactions were indeed paid, then this may evince a lack of intent to defraud then-existing creditors and effectively bar the Monitor . . . from attacking the transfers."[150] Thus, Plaintiffs' failure to plead which of their present creditors were the target of their alleged fraudulent intent provides another reason to dismiss Count 3.

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[146] *Id.* ¶¶ 10, 30, 51, 106.

[147] *Id.* ¶¶ 10, 105.

[148] Canadian courts have held that the statutory text of the BIA "specifically determines that a person who may become a creditor of the Bankrupt at some future date is not a 'creditor' as defined in the BIA." *Silbernagel (Re)* (2006), 81 O.R. (3d) 152 ¶ 7 (Sup. Ct.). As a result, "if the debtor intended to defeat, defraud or delay future creditors, then the transaction cannot be attacked under s. 96 of the BIA." *Ernst & Young*, 2021 ONSC 527 ¶ 201.

[149] CCAA Initial Order ¶ 7.

[150] *Ernst & Young*, 2021 ONSC 527 ¶ 203.

c. Plaintiff failed to adequately plead insolvency.

58. As discussed above, Plaintiffs' transfer for undervalue claim is the functional equivalent of an actual fraudulent transfer claim. Therefore, Rule 9(b)'s heightened pleading standard applies.[151] Plaintiffs have not adequately pleaded insolvency, nor have they adequately pleaded the prepetition transfers rendered them insolvent.

4. Counts 4 through 6 should be dismissed because they depend on success under Counts 1 through 3.

59. Count 4 seeks recovery under § 98 of the BIA of the invoices and payments avoided under §§ 95 and 96. Section 98 presumes a "void or voidable transaction,"[152] and is thus contingent upon the §§ 95 and 96 claims as pleaded.[153] Because Count 4 sinks or swims together with Counts 1 through 3, it too should be dismissed.[154] Similarly, Plaintiffs' claim for turnover under Count 5 (which the Court already dismissed) seeks to recover the invoices and payments avoided under §§ 95 and 96; and their claim for setoff under Count 6 effectively seeks the same relief. Because the Court should dismiss Counts 1 through 3, the Court should also dismiss derivative Counts 4 through 6.

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[151] *United Feature Syndicate, Inc. v. Miller Features Syndicate, Inc.*, 216 F. Supp. 2d 198, 220 n.8 (S.D.N.Y. 2002) ("While both parties treat this issue as a matter of the substantive law governing United Media's fraudulent conveyance claim, the degree of specificity with which United Media must plead this claim in its federal complaint is not a substantive question governed by New York or Canadian law, but rather a procedural question governed by the Federal Rules of Civil Procedure.").

[152] BIA § 98(1).

[153] Am. Compl. ¶ 116.

[154] *See In re Reagor-Dykes Motors, LP*, 2020 Bankr. LEXIS 2254 at *33-34 ("The fate of Reagor-Dykes' claims for recovery under §§ 550(a) and 502(d) of the Bankruptcy Code follow that of the preferential transfer and fraudulent transfer claims. Section 550, on which Count Three is based, allows for recovery of an avoided transfer; and if there is no viable avoidable transfer action, there is no recovery.").

5. Count 6 should be dismissed because the Amended Complaint fails to state a claim upon which relief can be granted.

60. Plaintiffs assert a common law right to setoff, even though only one of them incurred obligations and made payments to ERCOT. But "[p]arties can waive common law rights by agreement, and [Texas courts] respect their freedom of contract to do so."[155] The elements of waiver are "(1) an existing right, benefit, or advantage held by a party, (2) the party's actual knowledge of its existence, and (3) the party's actual intent to relinquish the right, or intentional conduct inconsistent with the right."[156] Moreover, the legislature can abrogate a principle of common law.[157] In order to make such a finding, "the express terms of the statute or its necessary implications [must] clearly indicate such an intent by the legislature."[158]

61. JE Texas, Fulcrum, and Hudson agreed in their SFAs they "shall comply with, and be bound by, all ERCOT Protocols."[159] They also contractually agreed to limit their remedies to three: "(i) immediate termination of this Agreement upon written notice to ERCOT; (ii) *Monetary recovery in accordance with the Settlement procedures set forth in the ERCOT Protocols*; and (iii) Specific performance."[160] By agreeing to limit their recovery rights in this manner, JE Texas, Fulcrum, and Hudson unequivocally waived the right to effectuate a common-law setoff. The remaining Plaintiffs have not pleaded any reason why those of them without a financial

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[155] *James Constr. Group, LLC v. Westlake Chem. Corp.*, 594 S.W.3d 722, 764 (Tex. App.—Houston [14th Dist.] 2019, pet. dism'd).

[156] *Id.*

[157] *See Bruce v. Jim Walters Homes*, 943 S.W.2d 121, 122-23 (Tex. App.—San Antonio 1997, not pet.).

[158] *Id.*

[159] SFA § 5.A. Fulcrum's and Hudson's SFAs also confirm they are not QSEs that financially transact with ERCOT in the first place.

[160] *Id.* § 8.B(2) (emphasis added).

relationship with ERCOT should be entitled to setoff anything (indeed, the absence of financial transactions between them and ERCOT means there is nothing for them to setoff).

E. The Court should grant a stay under the doctrine of primary jurisdiction.

62. If the Court declines to dismiss the Amended Complaint, it should stay these proceedings under the doctrine of primary jurisdiction. "Primary jurisdiction is a judicially created doctrine whereby a court of competent jurisdiction may dismiss or stay an action pending a resolution of some portion of the action by an administrative agency."[161] "Application of the doctrine is especially appropriate where[] 'uniformity of certain types of administrative decisions is desirable . . . .'"[162]

63. Plaintiffs have disputed the ERCOT invoices through the administrative process (starting with ERCOT's ADR process), and challenges to the validity of the PUCT's orders are pending in multiple Texas state courts. Yet Plaintiffs lodge those same challenges here in their attacks on the PUCT's orders and the invoices.[163] The state proceedings should resolve those key issues underlying Plaintiffs' claims here. If the invoices and orders are upheld at the conclusion of the state court and regulatory proceedings, then at least Count 3 and any remedies that are derivative of that purported cause of action (e.g., Counts 4, 5, and 6) will be foreclosed entirely.

64. Additionally, "uniformity of [these] types of administrative decisions is desirable."[164] A stay under the primary jurisdiction doctrine avoids "disparate interpretations" of

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[161] *Wagner & Brown v. ANR Pipeline Co.*, 837 F.2d 199, 201 (5th Cir. 1988).

[162] *Id.* (quoting *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 919 (5th Cir.1983)).

[163] *See, e.g.*, Am. Compl. ¶ 11 (alleging that the invoices are invalid because they are "based on the PUCT's orders, which themselves are unlawful under the APA and the PURA, and otherwise are inconsistent with the ERCOT Protocols and the SFA").

[164] *Wagner & Brown*, 837 F.2d at 201 (quoting *Avoyelles Sportsmen's League, Inc.*, 715 F.2d at 919).

the same body of controlling Texas law at issue here. Accordingly, the Court should stay these proceedings until the administrative proceedings and prescribed judicial avenues of review have been exhausted.[165]

F. The Amended Complaint (Counts 3 through 6) must be dismissed for failure to join an indispensable party.

65. In their Original Complaint, Plaintiffs sued the PUCT and effectively conceded the PUCT is an indispensable party.[166] However, even assuming for purposes of argument that the PUCT's sovereign immunity would not bar potential claims against it, Plaintiffs failed to plead any valid causes of action against the PUCT. Therefore, the Court dismissed all previously pleaded counts against the PUCT, which is no longer a party to this action.[167] In their Amended Complaint, Plaintiffs assert no causes of action against the PUCT and do not attempt to join it to this case. But Plaintiffs nevertheless persist in Counts 3 (and 4 through 6 to the extent derivative of the cause of action in Count 3) in expressly challenging the validity of the PUCT's orders during the winter storm by referring to ERCOT's charges as "illegally and erroneously calculated under the APA and the PURA and find[ing] no support in the ERCOT Protocols or the SFA."[168] The PUCT therefore is an indispensable party that Plaintiffs have not joined.

66. Requests to revise or correct prices charged by ERCOT which are not settled between the market participant and ERCOT must be appealed to the PUCT, and the PUCT has

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[165] *See Kibbie v. Killington/pico Ski Resort, Ltd*, 5:16-CV-247, 2017 WL 237618, at *3-*4 (D. Vt. Jan. 18, 2017) (primary jurisdiction applied and the district court case was stayed until the appeal of Vermont Department of Labor proceedings to the Vermont Superior Court had concluded because a simultaneous proceeding in the district court risked inconsistent rulings).

[166] Orig. Compl. [ECF 1].

[167] Order [ECF 87] ("For the reasons set forth in the February 2, 2022 hearing, the Public Utility Commission of Texas is dismissed as a party to this adversary proceeding.").

[168] Am. Compl. ¶¶ 57 – 72, 107, 117 (referring to Count 3), 122, 127.

exclusive jurisdiction over such disputes and may issue an order granting the relief it deems appropriate.[169] Thus, Plaintiffs' claims requesting that this Court hold the PUCT's pricing orders invalid are a direct challenge to the PUCT's authority under PURA. And PURA and the provisions of the APA that Plaintiffs rely on to attack the validity of the PUCT's orders mandate that the PUCT be a party to any proceeding attacking its orders.[170]

67. Federal Rule of Civil Procedure 19(a)(1)(B) provides that a person is necessary to be joined if either the absence of the person will impair that person's ability to protect its interest relating to the subject matter of the action or that person's absence will leave an existing party subject to a substantial risk of incurring "multiple, or otherwise inconsistent obligations." Both prongs are satisfied in this matter.

68. A party is necessary if the judgment would "effectively preclude [the nonparty] from enforcing its rights" and its rights would be "injuriously affected."[171] Stated another way, a party is necessary if "the party faces prejudice through a disposition in its absence."[172] Furthermore, the Fifth Circuit has held that "the establishment of a negative precedent can provide the requisite prejudice to the absentee."[173] Here, a ruling retroactively resetting the price ERCOT

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[169] 16 TEX. ADMIN. CODE § 22.251(b); TEX. UTIL. CODE § 32.001(a).

[170] TEX. UTIL. CODE § 15.002 ("The commission must be a defendant in a proceeding for judicial review"); TEX. GOV'T CODE §§ 2001.038(c) (in a declaratory judgment action to determine the validity of a rule "The state agency must be made a party to the action."); *see also* TEX. UTIL. CODE § 39.001(f) (requiring the PUCT be named as the appellee in a challenge to a competition rule).

[171] *See HS Res.*, 327 F.3d at 439 (citing *Hilton v. Atl. Refin. Co.*, 327 F.2d 217, 219 (5th Cir. 1964)). Furthermore, the proper vehicle to challenge an administrative rule under the Texas APA is a declaratory judgment. TEX. GOV'T CODE § 2001.038. The administrative agency must be a party to that action. *Id.*

[172] *Texas v. Ysleta del Sur Pueblo*, No. EP-17-CV-179-PRM, 2018 U.S. Dist. LEXIS 223055, at *17 (W.D. Tex. Aug. 27, 2018).

[173] *Pulitzer-Polster*, 784 F.2d at 1310.

charged to JE Texas, for example, would affect the PUCT's ability and authority to carry out the regulatory scheme established by PURA. Not only would it impair the PUCT's rights in this proceeding, but it potentially would also affect other pending actions regarding the validity and applicability of the PUCT's orders.[174]

69. The second prong is also satisfied because ERCOT will be exposed to multiple or inconsistent obligations related to the prices set during the storm and its statutorily-mandated task of carrying out the PUCT's requirements and exercising the authority which the PUCT delegates to ERCOT. ERCOT does not have discretion to disobey the PUCT's orders, and the PUCT can fine or even decertify ERCOT if it does.[175] A ruling by this Court that the PUCT's pricing orders were invalid would require ERCOT to act in contravention to the PUCT, which maintains that its orders were valid. But this Court's ruling cannot be controlling over the PUCT unless it is a party. As such, ERCOT would face conflicting obligations stemming from the Court's judgment and the PUCT's orders. The Court should dismiss Count 3 (including recovery under Counts 4, 5, and 6) under Rule 12(b)(7) for failure to join an indispensable party.

G. The Court must abstain from adjudicating Counts 3 through 6 under 28 U.S.C. § 1334(c)(2).

70. A bankruptcy court must abstain from deciding a proceeding if (1) the claim is non-core; (2) the claim has no independent basis for federal jurisdiction apart from § 1334(b); (3) an action has been commenced "in a State forum of appropriate jurisdiction"; and (4) the action "can be timely adjudicated" in that state forum.[176] All of these elements are satisfied.

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[174] The Court may take judicial notice of the fact that numerous, well-publicized cases related to the Storm and the PUCT's orders are pending in various fora.

[175] TEX. UTIL. CODE § 39.151(d).

[176] 28 U.S.C. § 1334(c)(2); *see In re TXNB Internal Case*, 483 F.3d 292, 300 (5th Cir. 2007).

1. Counts 3 through 6 are based largely on State law.

71. Though the Fifth Circuit did not list it as an element in *TXNB Internal Case*,[177] "[b]y its terms, § 1334(c)(2) mandatory abstention applies to proceedings that are based upon a State law claim or State law cause of action."[178] However, "[r]ead as a whole, § 1334(c)(2) makes clear that its abstention provision is not limited to proceedings that are based *solely* on state law claims."[179] "The fact that § 1334(c)(2) recites 'based upon *a* State law claim' indicates that Congress used 'based upon' in § 1334(c)(2) to mean 'based at least in part on.'"[180]

72. Counts 3 through 6 of the Amended Complaint expressly challenge the legality of the PUCT's orders during the winter storm by referring to ERCOT's charges as "illegally and erroneously calculated under the APA and the PURA and find[ing] no support in the ERCOT Protocols or the SFA."[181] Plaintiffs plainly assert that Texas law (which they try to assert in this Court through flawed Canadian causes of action as described above) governs these issues, so this proceeding is based at least in part on State law.

2. Plaintiffs' claims are constitutionally non-core.

73. First, all of Plaintiffs' claims are constitutionally non-core "*Stern*" claims.[182] The Amended Complaint points to numerous sub-parts of 28 U.S.C. § 157(b) for the proposition that

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[177] 483 F.3d 292.

[178] *Principal Growth Strategies, LLC v. AGH Parent, LLC*, 615 B.R. 529, 535 (D. Del. 2020) (citation omitted).

[179] *Id.* (emphasis added).

[180] *Id.* (emphasis original).

[181] Am. Compl. ¶¶ 57 – 72, 107, 117 (referring to Count 3), 122, 127.

[182] In the parlance of § 1334, Plaintiffs' claims are merely "related to" the Chapter 15 cases. They do not "arise under" the Bankruptcy Code, nor can they only "arise in" the context of the Chapter 15 cases. *See In re Wood*, 825 F.2d 90 (5th Cir. 1987); *cf. Stern v. Marshall*, 564 U.S. 462, 577 (2011) ("It does not make sense to describe a "core" bankruptcy proceeding as merely "related to" the bankruptcy case; oxymoron is not a typical feature of congressional drafting.").

its claims are core. But Congress cannot confer the Judicial Power of the United States on an Article I adjunct like the Bankruptcy Court.[183] That power is reserved exclusively to Article III courts.[184] When confronted with questions about the Bankruptcy Court's Constitutional authority, the Supreme Court has consistently expressed a narrow view.[185] "Congress may not 'withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.'"[186]

74. "When a suit is made of 'the stuff of the traditional actions at common law tried by the courts at Westminster in 1789,' and is brought within the bounds of federal jurisdiction, the responsibility for deciding that suit rests with Article III judges in Article III courts."[187] Fraudulent conveyance claims meet this description.[188] So do preference claims.[189] In the words of the Supreme Court, Plaintiffs' claims are "quintessentially suits at common law that more nearly resemble state law contract claims brought by a bankrupt corporation to augment the bankruptcy estate than they do creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res."[190] Indeed, ERCOT has neither filed a claim in Plaintiffs' Canadian proceedings nor in these Chapter 15 proceedings.

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[183] *E.g., Stern v. Marshall*, 564 U.S. 462 (2011).

[184] *Id.*

[185] *N. Pipeline Constr. Co v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989); *Stern,* 564 U.S. 462.

[186] *Stern*, 564 U.S. at 484 (quoting *Murray's Lessee v. Hoboken Land & Improv. Co.*, 59 U.S. 272, 284 (1856)).

[187] *Id.* (citation omitted, quoting *Northern Pipeline*, 458 U.S. at 90).

[188] *Id.* at 492 (discussing *Granfinanciera S.A. v. Nordberg*, 492 U.S. 33 (1989).

[189] *See id.* at 497-98 (discussing *Katchen v. Landy*, 382 U.S. 323 (1966), and *Langenkamp v. Culp*, 498 U.S. 42 (1990)).

[190] *Id.* at 492 (quoting *Granfinanciera*, 492 U.S. at 56).

75. Counts 3 through 6 of the Amended Complaint expressly challenge the legality of the PUCT's orders during the winter storm by referring to ERCOT's charges as "illegally and erroneously calculated under the APA and the PURA and find[ing] no support in the ERCOT Protocols or the SFA."[191] These claims are "based on state created rights" and "had there been no [Chapter 15 case], could have proceeded in state" fora, albeit pursuant to different state law causes of action rather than Canadian insolvency law.[192]

3. There is no basis for jurisdiction other than bankruptcy.

76. Second, there is no alternative basis for federal subject-matter jurisdiction over Plaintiffs' claims. JE Texas and Fulcrum are entities organized and headquartered in Texas.[193] Hudson also has its headquarters in Texas.[194] These entities are all citizens of Texas,[195] so there is not complete diversity with ERCOT. Nor does the Amended Complaint present a federal question. The only federal statute the Amended Complaint implicates is 28 U.S.C. § 2201, but the Declaratory Judgment Act does not provide an independent basis for federal-question jurisdiction where it does not already exist.[196] Plaintiffs' causes of action turn on either Canadian law or Texas law. Outside of § 1334(b), there is no plausible basis for federal jurisdiction over such claims.

4. Plaintiffs already sought relief from the PUCT and ERCOT.

77. Third, Plaintiffs commenced proceedings in state fora of appropriate jurisdiction prior to filing their petitions for recognition of a foreign proceeding. Plaintiffs filed their Chapter

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[191] Am. Compl. ¶¶ 57 – 72, 107, 117 (referring to Count 3), 122, 127.

[192] *Wood*, 825 F.2d at 97.

[193] Am. Compl. ¶ 18.

[194] *Id.*

[195] *See* 28 U.S.C. § 1332(c)(1).

[196] *Port Drum Co. v. Umphrey*, 852 F.2d 148, 151 (5th Cir. 1988).

15 petitions on March 9, 2021, and this Court granted final recognition on April 2, 2021. But Plaintiffs plead that, on March 3, 2021, they "filed a Petition for Emergency Relief with the PUCT."[197] In that filing, Plaintiffs argued ERCOT misapplied the PUCT's orders—exactly as they allege here.[198] They also argued ancillary services were "erroneously calculated" or "unreasonabl[y] appli[ed]."[199]

78. Moreover, Plaintiffs admit that they are "pursuing [their] administrative remedies" regarding the challenged invoices.[200] Plaintiffs "formally disputed ERCOT's invoices for the relevant period" and, after ERCOT denied those challenges, Plaintiffs "initiated alternative-dispute resolutions ('ADRs') for the disputed invoices."[201] The *CPS Energy* court recently held that market participants must exhaust these administrative remedies before seeking PUCT or judicial review of ERCOT's pricing actions.[202] By filing these administrative proceedings, including JE Texas's request for ADR, Plaintiffs commenced proceedings in appropriate Texas fora.

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[197] Am. Compl. ¶ 52.

[198] Order Granting Provisional Relief Pursuant to Section 1519 of the Bankruptcy Code [Bankr. ECF 23] ("Provisional Relief Order"), Exhibit A, p. 5 ("Just Energy disputes the application of the $9,000 MWh System Wide Offer Cap to any time period after the ERCOT grid ceased shedding load at 1:05 a.m. on February 18, 2021, as applying the System Wide Offer Cap after that time contravenes the language of the Commission's February 15 and February 16 orders.").

[199] *Id.*

[200] Joint Discovery/Case Management Plan Under Rule 26(f) of the Federal Rules of Civil Procedure [ECF 19] ("Discovery Plan") at 7 n.10.

[201] *Id.*; *accord* Provisional Relief Order [Bankr. ECF 23], Exhibit A, p. 5.

[202] 2021 WL 5879183, at *14; *see* 16 TEX. ADMIN. CODE § 22.251(c); ERCOT Protocols § 20.

5. Plaintiffs' claims can be timely adjudicated in the State forum.

79. Finally, Plaintiffs' invoice dispute and related underlying issues could be timely adjudicated in these and other State proceedings. As Plaintiffs acknowledge, the initial dispute process has already ended, and the ADR process has begun.[203]

80. Challenges to the validity of the PUCT's orders are also currently pending in Texas state courts. Like Intervenor Luminant and some other parties in state court proceedings, Plaintiffs alleged that the PUCT's orders were actually "competition rules," which PURA provides are subject to challenge directly in the Third Court of Appeals in Austin.[204] Plaintiffs' attack on the orders' validity is substantively identical to a challenge filed in that court prior to the filing of the Chapter 15 petitions.[205] That case has been fully briefed, and oral argument is scheduled for April 27, 2022. The relief the challengers seek in that case is invalidation of the PUCT's orders and remand to the PUCT to retroactively reprice the entire market for the days of the storm.[206] Such market-wide relief, if granted, presumably would inure to Plaintiffs' benefit, and if denied would constitute a determination by the courts and agencies designated by state law to administer the electric regulatory framework. Moreover, given the fact that Plaintiffs' adversary proceeding does not impede the progress and conclusion of a plan of reorganization, this Court should allow the state courts and administrative bodies to adjudicate these important issues in the first instance.

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[203] Discovery Plan [ECF 19] at 7 n.10; *accord* Provisional Relief Order [Bankr. ECF 23], Exhibit A, pp. 6-7.

[204] 16 TEX. ADMIN. CODE § 39.001(e); Orig. Compl. ¶¶ 63–75.

[205] *See Luminant Energy Co. v. PUCT*, No. 03-21-00098-CV (Tex. App.—Austin filed Mar. 2, 2021).

[206] *See, e.g., Br. of Appellant Luminant Energy Co.* at 26, 57, No. 03-21-00098-CV (Tex. App.—Austin filed June 2, 2021).

H. The Amended Complaint should be dismissed because ERCOT is immune from suit.[207]

1. ERCOT is entitled to Eleventh Amendment immunity.

81. Plaintiffs assert that ERCOT cannot be immune "because it is a private, membership-based corporation," "not a governmental regulator."[208] But they do not cite nor apply the Fifth Circuit's guiding test for Eleventh Amendment immunity, under which ERCOT's organizational status is not dispositive.

82. ERCOT has Eleventh Amendment immunity if it is an "arm of the state." To determine whether it is, this Court looks at six factors: (1) "[w]hether the state statutes and case law view the agency as an arm of the state"; (2) "[t]he source of the entity's funding"; (3) "[t]he entity's degree of local autonomy"; (4) "[w]hether the entity is concerned primarily with local as opposed to statewide[] problems"; (5) "[w]hether the entity has the authority to sue and be sued in its own name"; and (6) "[w]hether the entity has the right to hold and use property."[209] "These factors are examined as a whole, and no single factor is dispositive."[210] The second factor—regarding the entity's source of funding—is generally given particular importance.[211]

a. State statutes and case law

83. ERCOT's statutory scheme reflects its arm-of-the-state status. ERCOT exclusively performs statutory functions, exercises delegated sovereign rulemaking authority, has been designated a "state agency" for certain purposes, is subject to open-meetings laws and the Sunset

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[207] *Chapa v. DOJ*, 339 F.3d 388, 389 (5th Cir. 2003) ("Sovereign immunity implicates subject matter jurisdiction.").

[208] Am. Compl. ¶ 77.

[209] *Daniel v. Univ. of Tex. Sw. Med. Ctr.*, 960 F.3d 253, 256–57 (5th Cir. 2020).

[210] *Sw. Bell Tel. Co. v. City of El Paso*, 243 F.3d 936, 938 (5th Cir. 2001).

[211] *Id.*; *accord Daniel*, 960 F.3d at 257.

Act, and is governed by a state-selected board whose members are subject to conflict-of-interest and anti-lobbying statutes. [212] Moreover, two state officials—the PUCT's commissioner and the Public Utility Counsel—are *ex officio* members of ERCOT's governing board, and ERCOT representatives serve *ex officio* on numerous other state instrumentalities, alongside representatives of other state agencies.[213]

84. Plaintiffs focus on decisions holding that ERCOT is not a "governmental unit."[214] But ERCOT's "governmental unit" status "is not probative of" its Eleventh Amendment immunity.[215] And other courts have held ERCOT *is* a governmental unit.[216]

b. The source of ERCOT's funding

85. The State funds ERCOT using a statutorily created "system administration fee"—a regulatory fee collected from the entities subject to ERCOT's regulation.[217] Thus, the money

[212] *ERCOT v. CPS Energy*, 2021 Tex. App. LEXIS 9842, at *5 (Tex. App.—San Antonio Dec. 13, 2021, pet. filed); TEX. UTIL. CODE §§ 39.151(d), (g-1)(4), (g-5), (n); TEX. UTIL. CODE §§ 39.1511, 39.1512, 39.1513.

[213] TEX. UTIL. CODE §§ 39.151(g-1)(1)–(2); *see also* TEX. GOV'T CODE §§ 418.301–.310 (Texas Energy Reliability Council); TEX. UTIL. CODE §§ 38.201–.203 (Texas Electric Supply Chain Security and Mapping Committee), 39.917 (Texas Electric Grid Security Council); TEX. WATER CODE § 16.055 (Texas Drought Preparedness Council).

[214] Am. Compl. ¶ 77.

[215] *Williams v. Dall. Area Rapid Transit*, 242 F.3d 315, 319 (5th Cir. 2001).

[216] *CPS Energy*, 2021 Tex. App. LEXIS 9842, at *6, *14. ERCOT also acknowledges a divided panel of the Fifth Court of Appeals recently decided ERCOT is not entitled to sovereign immunity. *Panda Power Generation Infrastructure Fund, LLC v. ERCOT*, No. 05-18-00611-CV, 2022 Tex. App. LEXIS 1305 (Tex. App.—Dallas Feb. 23, 2022). On March 11, 2022, however, ERCOT filed a motion to consolidate briefing and order single-stage briefing of the petition and the merits with the Texas Supreme Court. *ERCOT v. Panda Power Generation Fund, LLC, et. al.*, Case No. 22-0196 https://search.txcourts.gov/SearchMedia.aspx?MediaVersionID=a38f8a97-cb28-49be-ae01-2bd298743452&coa=cossup&DT=MOTION&MediaID=dd1dd445-523d-4784-a72d-4c1fc9d1d4bd

[217] TEX. UTIL. CODE § 39.151(e).

ERCOT would hypothetically use to pay a damages award is state money.[218] The State also appropriates the fee. The Legislature delegated to the PUCT "complete authority to oversee" ERCOT's "finances [and] budget."[219] ERCOT must therefore submit its "entire proposed annual budget" to the PUCT, which "may approve, disapprove, or modify *any item* included."[220] This line-item budgetary authority, combined with the PUCT's authority over ERCOT's funding mechanism, means that ERCOT cannot raise or earmark money to pay a money judgment—or anything else—without the State's consent.[221]

c. ERCOT's degree of local control

86. This factor favors immunity because the State directly controls ERCOT via selection of ERCOT's governing board.[222] ERCOT is also "directly responsible and accountable to" the PUCT, which in turn has "complete authority" over ERCOT's "finances, budget, and operations," as well as plenary authority over ERCOT's rulemaking power and internal

[218] Regulatory fees are collected using the State's police power and—like the system administration fee—cannot raise more money "than reasonably necessary to cover the costs" of the regulatory regime it funds. *City of Fort Worth v. Gulf Refin. Co.*, 83 S.W.2d 610, 618 (Tex. 1935); *accord H. Rouw Co. v. Tex. Citrus Comm'n*, 247 S.W.2d 231, 234 (Tex. 1952); *see* TEX. UTIL. CODE § 39.151(e).

[219] TEX. UTIL. CODE § 39.151(d).

[220] *Id.* § 39.151(d-1) (emphasis added).

[221] Moreover, the Legislature *does* appropriate ERCOT's funds in some cases. It decreed that ERCOT's regulatory fee be used to fund the Independent Market Monitor and the Cybersecurity Monitor. TEX. UTIL. CODE §§ 39.1515(c), 39.1516(c). And the Legislature requires ERCOT to use its resources to support other state agencies, like the Texas Electric Supply Chain Security and Mapping Committee and the Texas Electric Grid Security Council. *Id.* §§ 38.202(d), 39.917(g).

[222] *See Daniel*, 960 F.3d at 258–59.

governance, including its bylaws.[223] The PUCT also has broad disciplinary powers over ERCOT, including the power to decertify ERCOT from its regulatory role.[224]

d. ERCOT's concern with statewide problems

87. ERCOT regulates the electric grid that covers the vast majority of Texas, including about 90% of the State's electric load.[225] ERCOT also oversees the wholesale energy market that serves this region.[226]

e. Whether ERCOT may hold and use property

88. This factor favors immunity because the State has ultimate control over ERCOT's property.[227] The Legislature and PUCT exercise free use of ERCOT's revenue and resources to operate a variety of legislative priorities and state agencies. Moreover, if ERCOT is decertified, the PUCT *must* simultaneously choose a successor and *must* "transfer [ERCOT's] assets to the successor organization."[228] This direct authority over ERCOT's property shows that Texas regards ERCOT's assets as the State's.

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[223] TEX. UTIL. CODE §§ 39.151(d), (g-1), (g-6); *see Daniel*, 960 F.3d at 258–59 (holding that even if university hospital was governed by physicians rather than state-selected board of regents, the level of "state oversight and financial regulation" nevertheless "support[ed the hospital] receiving arm-of-the-state recognition").

[224] TEX. UTIL. CODE § 39.151(d).

[225] *Id.* § 39.151(a)(2); ERCOT, *Fact Sheet* at 2 (Nov. 2021), https://www.ercot.com/files/docs/2021/11/23/ERCOT%20Fact%20Sheet.pdf; *see also* Am. Compl. ¶¶ 25–26.

[226] TEX. UTIL. CODE § 39.151(a)(4).

[227] *Daniel*, 960 F.3d at 260.

[228] TEX. UTIL. CODE § 39.151(d) (emphasis added); 16 TEX. ADMIN. CODE § 25.364(g) (emphasis added).

f. Whether ERCOT may sue and be sued

89. The Fifth Circuit has long considered this the least important factor because cases against putative arms of the state usually arise in "the context of determining whether a state has waived immunity."[229] This is true of ERCOT, which has argued that it is immune from—and thus not subject to—suit in several of the cases to which Plaintiffs might point. As the Fifth Circuit has intimated, this factor should be abandoned because it says little or nothing about whether an entity is an arm-of-the-state. But even if this factor applies, it should receive minimal weight.[230]

2. ERCOT's immunity has not been waived.

90. Plaintiffs assert that even if ERCOT is immune, its immunity has been waived by the Constitution's Bankruptcy Clause, 11 U.S.C. § 106(a), or the Texas Administrative Procedures Act.[231] Plaintiffs are incorrect.

a. The Bankruptcy Clause does not waive ERCOT's immunity.

91. In *Central Virginia Community College v. Katz*,[232] the Supreme Court held that the Constitution's Bankruptcy Clause[233] empowered Congress "to enact bankruptcy legislation" that included "the power to subordinate state sovereignty *albeit within a limited sphere*"—namely, when "necessary to effectuate *in rem* jurisdiction that is at the heart of traditional bankruptcy proceedings.[234] That waiver of immunity does not extend to Chapter 15 of the Bankruptcy Code.

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[229] *United States ex rel. King v. Univ. of Tex. Health Sci. Ctr.—Hous.*, 544 F. App'x 490, 498 n.3 (5th Cir. 2013) (per curiam); *Williams*, 242 F.3d at 319.

[230] *E.g.*, *Daniel*, 960 F.3d at 259–60 (holding entity to be arm of the state despite this factor weighing against it); *King*, 544 F. App'x at 498 (same).

[231] Am. Compl. ¶¶ 79-80.

[232] 546 U.S. 356 (2006).

[233] U.S. Const. art. I, § 8, cl. 4 ("The Congress shall have Power . . . To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States").

[234] *Katz*, 546 U.S. at 377–78 (emphasis added).

92. *First*, a Chapter 15 ancillary proceeding is not a "bankruptcy law" to which the Bankruptcy Clause applies. A Chapter 15 case has *none* of the "[c]ritical features of *every* bankruptcy proceeding."[235] The bankruptcy court does not exercise exclusive jurisdiction over "all of the debtor's property"; no estate is created.[236] The bankruptcy court is not responsible for the "equitable distribution" of the debtor's property; the foreign main proceeding is.[237] And, most fundamentally, Chapter 15 contains no provision discharging the debtor's liabilities; again, that relief is available, if at all, in the foreign main proceeding.[238] Chapter 15 is an international-comity statute meant to be "ancillary" and provide "assist[ance]" to a foreign insolvency proceeding in which these critical bankruptcy features might be present.[239] Because a Chapter 15 case lacks any of the critical features of "*every* bankruptcy," it is not a "Law[] on the subject of Bankruptcies" to which *Katz*'s waiver of immunity would apply.[240]

93. *Second*, even if Chapter 15 were a bankruptcy law, it would be outside the "limited sphere" in which *Katz* waives immunity.[241] *Katz* relied on a theory that states "would have understood" the Bankruptcy Clause to abrogate their immunity for claims "to avoid preferential

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[235] *Id.* at 363 (emphasis added).

[236] 11 U.S.C. § 103(a) (making Chapter 5 inapplicable in Chapter 15 cases).

[237] *See* Notice of Filing of (I) Claims Procedure and Stay Extension Motion, (II) Claims Procedure and Stay Extension Order, and (III) Endorsement in the CCAA Proceedings [Bankr. ECF 135] at 2.

[238] *Contra* 11 U.S.C. §§ 727, 1141 (d)(1)(A), 1192, 1328. Because there is no discharge in a Chapter 15 case, the waiver of Eleventh Amendment immunity addressed in *Tennessee Student Assistance Corp. v. Hood* is inapplicable here. 541 U.S. 440, 450 (2004) (holding that a discharge of debts under the Bankruptcy Code is effective against the states, regardless of their Eleventh Amendment immunity).

[239] *In re Condor,* 601 F.3d at 322; *see also In re British Am. Ins. Co.*, 488 B.R. at 222 ("In a Chapter 15 case, the United States court acts only in an ancillary role.").

[240] *Katz*, 546 U.S. at 363, 370.

[241] *Id.* at 377.

transfers and to recover the transferred property," as those had "been a core aspect of the administration of bankrupt estates since at least the 18th century."[242] But States cannot be assumed to have surrendered their sovereign immunity from proceedings in aid of foreign insolvency cases. Foreign assistance is an innovation of the 1978 Bankruptcy Act, which for the first time empowered federal bankruptcy courts to grant relief "ancillary to a foreign proceeding."[243] The States, in ratifying the Bankruptcy Clause, cannot have knowingly surrendered their immunity from such proceedings.

94. *Finally*, the ancillary proceedings in aid of a foreign insolvency case contemplated by Chapter 15 are not "necessary to effectuate the *in rem* jurisdiction of the bankruptcy courts."[244] The jurisdiction referenced by *Katz* is the jurisdiction over "[c]ritical features of every bankruptcy proceeding,"[245] especially the power to discharge the estate's debts.[246] Those features are absent in Chapter 15, which is meant primarily to give domestic effects to orders issued in foreign proceedings.[247]

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[242] *Id.* at 372.

[243] 11 U.S.C. § 304, *repealed by* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, § 802(d)(3), 119 Stat. 146, 216.

[244] *Katz*, 546 U.S. at 378.

[245] *Id.* at 362–64, 369–70.

[246] *Hood*, 541 U.S. at 447 ("The discharge of a debt by a bankruptcy court is similarly an *in rem* proceeding."); *see also Gardner v. New Jersey*, 329 U.S. 565, 574 (1947) ("The whole process of proof, allowance, and distribution is, shortly speaking, an adjudication of interests claimed in a *res*.").

[247] Congress appears to agree that Chapter 15 is substantively different than the remainder of the Bankruptcy Code as it relates to a State's immunity. As ERCOT shows below, the statutory waiver of immunity in § 106 does not apply to Chapter 15.

b. 11 U.S.C § 106 does not waive ERCOT's immunity.

95. Plaintiffs also rely on the putative waiver of immunity found in 11 U.S.C. § 106(a).[248] Under binding Circuit precedent, § 106(a) is unconstitutional.[249] But even if section 106 were constitutional, it would not waive ERCOT's immunity here.

96. Section 106(a) purports to abrogate the sovereign immunity of a governmental unit with respect to certain enumerated sections of the Bankruptcy Code "to the extent set forth in" that section.[250] That extent is limited to circumstances where a governmental unit has filed a proof of claim.[251]

97. Because § 501 does not apply,[252] ERCOT has not and cannot "file[]a proof of claim in th[is] case." ERCOT is immune from suit.

I. This Court should abstain from deciding Plaintiffs' state-law claims under *Burford v. Sun Oil Co* (Counts 3-6).

98. As discussed above, Counts 3 through 6 of the Amended Complaint expressly challenge the validity of the PUCT's orders during the winter storm by referring to ERCOT's charges as "illegally and erroneously calculated under the APA and the PURA and find[ing] no support in the ERCOT Protocols or the SFA."[253] These Counts therefore implicate *Burford* abstention.

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[248] Am. Compl. ¶ 79.

[249] *In re Fernandez*, 123 F.3d 241, 242 (5th Cir. 1997). Whether *Fernandez* was abrogated by the Supreme Court's decision in *Katz*—especially in a Chapter 15 case—is a question that should be decided by the Fifth Circuit, not this Court.

[250] 11 U.S.C. § 106(a).

[251] *Id.* § 106(b).

[252] *Id.* § 103(a).

[253] Am. Compl. ¶¶ 107, 117 (referring to Count 3), 122, 127.

99. Abstention is appropriate when a case presents "difficult questions of state law bearing on policy problems of substantial public import" that transcends the case or where the "federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."[254] *Burford* applies in all federal courts[255]—including, necessarily, bankruptcy courts.[256] The Fifth Circuit has recognized five factors that a court should weigh when considering *Burford* abstention: (a) "whether the cause of action arises under federal or state law"; (b) "whether the case requires inquiry into unsettled issues of state law, or into local facts"; (c) "the importance of the state interest involved"; (d) "the state's need for a coherent policy in that area"; and (e) "the presence of a special state forum for judicial review."[257] These factors all favor abstention.

100. First, Plaintiffs' claims arise under state law, which depends "on whether the plaintiff's claim may be 'in any way entangled in a skein of state law that must be untangled before the federal case can proceed.'"[258] The substance of much of Plaintiffs' pleading is an attack on the

[254] *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976); *see also Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

[255] *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 730 (1996).

[256] *E.g.*, *Wilson v. Valley Elec. Membership Corp.*, 8 F.3d 311 (5th Cir. 1993) (affirming abstention on *Burford* grounds); *In re N.Y.C. Off-Track Betting Corp.*, 434 B.R. 131, 154 (Bankr. S.D.N.Y. 2010) (abstaining on *Burford* grounds); *accord Koken v. Reliance Grp. Holdings, Inc. (In re Reliance Grp. Holdings, Inc.)*, 273 B.R. 374, 401 (Bankr. E.D. Pa 2002); *In re Internationale Resort & Beach Club*, 36 B.R. 189, 194 (Bankr. D.S.C. 1983).

[257] *Wilson,* 8 F.3d at 314.

[258] *Sierra Club v. City of San Antonio,* 112 F.3d 789, 795 (5th Cir. 1997) (quoting *Quackenbush*, 517 U.S. at 727).

PUCT's orders, and on ERCOT's compliance with the PUCT's orders, its Protocols, and the SFA, which are all under Texas law[259] and also under a "comprehensive" regulatory scheme.[260]

101. Second, the state-law questions the Amended Complaint presents are unsettled and uniquely difficult, requiring the Court to examine the interplay between the ERCOT Protocols, PUCT rules and PUCT's orders, and the APA and PURA. No court has previously adjudicated these questions, and Plaintiffs' exact challenges to the PUCT's orders are now pending in state court proceedings—which are the legislatively prescribed fora for such disputes.[261] Neither has any Texas court adjudicated a challenge to ERCOT's pricing decisions, let alone decisions made during an unprecedented emergency that were based on a binding PUCT order. Moreover, the question of remedies in this complex market would similarly require the Court to "delv[e] into highly local issues of fact" regarding market participant behavior and would implicate "precisely the sort of highly localized, specialized, judgmental, and perhaps partisan analysis" that requires abstention.[262]

102. Third, "utility regulation is one of the most important of the functions traditionally associated with the police power of the States," while "federal courts have little interest in hearing"

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[259] Moreover, as discussed in connection with mandatory abstention, all of Plaintiffs' counts under Canadian law and the Declaratory Judgment Act are non-core. Likewise, though it has already been dismissed, Plaintiffs' turnover claim is non-core to the extent it seeks to liquidate a contested claim. *See Highland Cap. Mgmt. v. Highland Cap. Fund Advisors, L.P.*, 2021 Bankr. LEXIS 1821, at *26 (Bankr. N.D. Tex. July 8, 2021) (holding that because turnover claim sought to "collect on a disputed indebtedness," it "is not a core claim").

[260] TEX. UTIL. CODE § 31.001(a).

[261] *See Exelon Generation Co. v. PUC*, No. D-1-GN-21-001772 (Tex. Dist. Ct., Travis Cnty. filed Apr. 19, 2021); *Luminant Energy Co. v. PUC*, No. 03-21-00098-CV (Tex. App.—Austin filed March 2, 2021).

[262] *Id.*

such matters.[263] The Texas Supreme Court has described PURA as a "pervasive regulatory scheme."[264] ERCOT is an "essential" part of this regulatory scheme that uses rulemaking authority delegated to it by the PUCT to regulate Texas's power grid and wholesale electricity market, as well as the participants in that market.[265]

103. Fourth, "*Burford* abstention is intended to avoid recurring and confusing federal intervention in an ongoing state scheme."[266] Other market participants' challenges to the PUCT's orders are already being heard in state trial and appellate courts.[267] The state courts "need[] neither [this Court's] harmonious nor disharmonious notes" on the questions before them.[268] But if this Court were to rule differently than those state courts, ERCOT and the PUCT would be in the impossible position of attempting to comply with contradictory rulings by state and federal courts. Moreover, Texas—unique among the continental United States—operates a wholly intrastate electricity grid and market, which are overseen by ERCOT and the PUCT. This "unified management" is necessary to balance the need to correct any error that affected Plaintiffs with a remedy that protects the overall stability of the market and grid.[269]

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[263] *Wilson,* 8 F.3d at 315 (citation omitted).

[264] *E.g., In re Entergy Corp*., 142 S.W.3d at 322.

[265] TEX. UTIL. CODE §§ 39.151(a), (d).

[266] *Wilson,* 8 F.3d at 315.

[267] *See Exelon Generation Co. v. PUC*, No. D-1-GN-21-001772 (Tex. Dist. Ct., Travis Cnty. filed Apr. 19, 2021); *Luminant Energy Co. v. PUC*, No. 03-21-00098-CV (Tex. App.—Austin filed March 2, 2021).

[268] *Wilson*, 8 F.3d at 316.

[269] *Sierra Club*, 112 F.3d at 794–95 (noting Texas's need for a coherent policy regarding water rights in the Edwards Aquifer by pointing to the "need for unified management and decision-making"); *see also Burford*, 319 U.S. at 319–20 (emphasizing the unique characteristics of oil and gas fields, which are not only usually intrastate but "must be regulated as a unit" because the actions of each operator in the field affect all other operators).

104. Fifth, any challenge to the PUCT's orders and ERCOT's implementation of them would be required to originate in either the state district court in Travis County or the Third Court of Appeals, or in ERCOT's and PUC's own administrative processes.[270] This Court should, accordingly, abstain from hearing Plaintiffs' attack on the PUCT's orders to avoid interfering with the courts the State selected to hear these important issues.

105. Finally, the Judicial Code does not prohibit abstention under *Burford* in a Chapter 15 case. In the context of statutory abstention, the Fifth Circuit has held that "a district court cannot permissively abstain from exercising jurisdiction in proceedings related to Chapter 15 cases."[271] But in that case the *only* basis for the district court's decision to abstain was 28 U.S.C. § 1334(c)(1), not *Burford* or any other prudential abstention doctrine.[272] This raises the question whether the prohibition against statutory abstention in Chapter 15 cases under § 1334(c)(1) also precludes abstention under pre-existing judicial abstention doctrines. "Little guidance exists, however, regarding the interplay between section 1334(c)(1) and traditional federal abstention doctrines."[273] Nevertheless, it would be unsound to suggest that *Burford*—which binds *all* federal courts[274]—does not apply under the unique circumstances present here.

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[270] *See* TEX. GOV'T CODE § 2001.176(b)(1); TEX. UTIL. CODE §§ 11.007(a), 15.001 (together, permitting judicial review of PUCT's orders in Travis County district court); *see also* TEX. UTIL. CODE § 39.001(e) (providing that a "competition rule" must be challenged directly in the Third Court of Appeals) and § 39.001(f) (requiring the PUCT be named as the appellee in a challenge to a competition rule).

[271] *Firefighters' Ret. Sys. v. Citco Grp. Ltd.*, 796 F.3d 520, 528 (5th Cir. 2015).

[272] *Id.* at 526 ("The district court provided two statutory bases for its decision to remand, §§ 1334(c)(1) and 1452(b).").

[273] *In re New York City Off-Track Betting Corp.*, 434 B.R. 131, 147 (Bankr. S.D.N.Y. 2010) (describing various approaches to reconciling § 1334(c)(1) with traditional abstention doctrines).

[274] *Quackenbush*, 517 U.S. at 730.

106. The Fifth Circuit's opinion in *Wilson v. Valley Electric Membership Corp.*, affirming *Burford* abstention in a case arising under bankruptcy jurisdiction, confirms that *Burford* abstention and § 1334(c)(1) abstention are distinct.[275] In *Wilson,* the district court abstained under *Burford*—not § 1334(c)(1)[276]—and the Fifth Circuit affirmed without separately analyzing whether abstention would be appropriate under the factors traditionally considered under § 1334(c)(1).[277] *Wilson* thus stands for the proposition that a court exercising bankruptcy jurisdiction is nevertheless bound by the Supreme Court's decision in *Burford*.

107. This Court should, therefore, abstain in favor of the pending proceedings presenting identical challenges to ERCOT's and the PUCT's actions during the storm.

V. STATEMENT REGARDING CONSENT

108. As discussed above in connection with mandatory abstention, Plaintiffs' claims are constitutionally non-core. For the avoidance of doubt, ERCOT does not consent to the Bankruptcy Court entering final orders or judgment. Precedent from the District Court suggests the Bankruptcy Court may not finally decide this Motion but must instead issue a report and recommendation to the District Court.[278]

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[275] 8 F.3d at 313; *In re Bellucci*, 119 B.R. 763, 773 (Bankr. S.D. Cal. 1990) (holding that "nonstatutory abstention and abstention-type doctrines were not eliminated from the picture by section 1334 abstention").

[276] The district court had previously refused to abstain under § 1334(c)(1). *Wilson v. Valley Elec. Membership Corp.*, 89-4846, 1991 U.S. Dist. LEXIS 13690, *2-3 (E.D. La. Sept. 24, 1991) (noting prior decision not to abstain).

[277] *See also Shipley Garcia Enters., LLC v. Cureton*, M-12-89, 2012 U.S. Dist. LEXIS 110153 (S.D. Tex. Aug. 7, 2012) (analyzing statutory and judicial abstention separately).

[278] *See In re ATP Oil & Gas Corp.*, 570 B.R. 764, 767 (S.D. Tex. 2017) (citing *Stern*, 564 U.S. at 467 for the proposition that "The district court must issue the final judgment on a motion to dismiss in an adversarial proceeding involving state-law claims by two non-debtor parties who have not consented to the Bankruptcy Court's entry of a final judgment.").

VI. CONCLUSION

ERCOT respectfully requests this Court issue a report and recommendation to the District Court recommending the following relief:

(1) dismiss with prejudice all Counts for failure to state a claim or for lack of subject matter jurisdiction;

(2) dismiss with prejudice Counts 3, 4, 5, and 6 under the filed rate doctrine insofar as they challenge the price of electricity charged by ERCOT;

(3) dismiss with prejudice Counts 3, 4, 5, and 6 for failure to join an indispensable party insofar as they challenge the validity or applicability of the PUCT's orders;

(4) dismiss all Counts on the ground that ERCOT is immune from suit;

(5) abstain from deciding Counts 3, 4, 5, and 6 insofar as they challenge the validity or applicability of the PUCT's orders;

(6) stay the Amended Complaint under the doctrine of primary jurisdiction; and

(7) provide ERCOT such other or further relief to which it is justly entitled.

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Dated: March 17, 2022

Respectfully submitted,

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TAB H

This is Exhibit “H”

referred to in the Affidavit of **JAMES C. TECCE**

Sworn before me this 14th day of April, 2022

C. Manfara

A Commissioner for taking affidavits

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re: JUST ENERGY GROUP INC., et al., Debtors in a Foreign Proceeding.[1]	Chapter 15 Case No. 21-30823 (MI)
JUST ENERGY TEXAS LP, FULCRUM RETAIL ENERGY LLC, HUDSON ENERGY SERVICES LLC, and JUST ENERGY GROUP, INC., Plaintiffs, v. ELECTRIC RELIABILITY COUNCIL OF TEXAS, INC. and the PUBLIC UTILITY COMMISSION OF TEXAS, INC., Defendants.	Adv. Pro. 21-04399 (DRJ)

OBJECTION OF JUST ENERGY TEXAS LP, FULCRUM RETAIL ENERGY LLC, HUDSON ENERGY SERVICES LLC, AND JUST ENERGY GROUP INC. TO ELECTRIC RELIABILITY COUNCIL OF TEXAS, INC'S MOTION TO DISMISS FIRST AMENDED COMPLAINT AND FOR ABSTENTION AND ERCOT INTERVENOR'S JOINDER THEREIN

[Relates to ECF No. 95 (First Am. Complaint), ECF No. 127 (ERCOT Mot.), and ECF No. 128 (ERCOT Def. Joinder)]

[1] The identifying four digits of Just Energy Group Inc.'s local Canada tax identification number are 0469. A complete list of debtor entities in these chapter 15 cases may be obtained at www.omniagentsolutions.com/justenergy.

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Just Energy Texas LP ("**JE Texas LP**"), Fulcrum Retail Energy, LLC ("**Fulcrum**"), Hudson Energy Services LLC ("**Hudson**", and the foreign representative in the above-captioned chapter 15 cases (the "**Chapter 15 Cases**"), Just Energy Group, Inc. (the "**Foreign Representative**" and collectively, "**Plaintiffs**" or "**Just Energy**," and, with their affiliated debtors in the Chapter 15 Cases, the "**Company**" or the "**Debtors**")[2] object (the "**Objection**") to ERCOT's Motion To Dismiss And For Abstention [ECF No. 127] (the "**ERCOT Mot.**") and the Joinder of NRG Energy, Inc. and Calpine Corporation (the "**ERCOT Intervenors**") [ECF No. 128] (the "**ERCOT Intervenors' Joinder**") and respectfully represent as follows.

I. PRELIMINARY STATEMENT

1. ERCOT drove Just Energy into bankruptcy through illegal billing for energy during Winter Storm Uri. Now, it is desperate to escape the very court that facilitated those payments by acting in an ancillary capacity to a Canadian foreign proceeding. It was ERCOT's Winter-Storm-Uri invoices that forced Just Energy to commence the Canadian Proceedings and Chapter 15 Cases, access debtor-in-possession financing, obtain permission from the Canadian Court to use a significant portion of the DIP facility to pay ERCOT, and get the Canadian Court's order recognized in the Chapter 15 Cases. Just Energy was responding to the implied threat that non-payment would lead ERCOT to transfer Just Energy's most valuable assets—its customers—to a Provider of Last Resort ("**POLR**") and drive Just Energy from the Texas market. Even though Just Energy disputes the invoices, it paid them under protest with a full reservation of rights recognized by both courts that this lawsuit seeks to vindicate.

[2] Capitalized terms not defined herein have their meanings in the First Amended Complaint [ECF No. 95] (the "**Complaint**" or "**First Am. Compl.**").

2. After ERCOT clamored for additional time to respond to the First Amended Complaint,[3] Just Energy expected novel challenges and instead finds a retread of the same tired arguments that appeared in ERCOT's First Motion.[4] Its renewed motion is thinly supported with relatively little legal authority and instead relies on distortions of the relief Just Energy seeks, misstatements of applicable law, and summary-judgment style arguments not relevant in the Rule-12 context to make its points. ERCOT's first motion failed to convince the Court that this lawsuit should be dismissed. Its sophomore effort falls even further short.

A. COURT HAS SUBJECT-MATTER JURISDICTION

3. The Complaint's six Counts are statutorily core.[5] Chapter 15 debtors and a foreign representative brought this suit before a federal court acting in an ancillary capacity to a CCAA case to recover illegally-transferred property totaling no less than $274 million[6] so it can be used to facilitate a Canadian restructuring. ERCOT takes offense to the fact that incident to deciding Just Energy's claims, the Court will interpret state law and particularly the APA and the PURA as they relate to the PUCT Orders. But, Congress makes clear: "[a] determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected

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[3] See ECF No. 99 (ERCOT's Emergency Motion To Continue Response Deadline Under Fed. R. Civ. P. 15(a)(3) (requesting five weeks to respond to First Amended Complaint)).

[4] ERCOT's Motion To Dismiss And For Abstention [ECF No. 30] (the "**ERCOT's First Motion**").

[5] **Count 1** (28 U.S.C. § 2201: Declaration Of Preference Under CCAA (§ 36.1), BIA (§ 95)—Invoice Obligations)); **Count 2** (28 U.S.C. § 2201: Declaration Of Preference Under CCAA (§ 36.1), BIA (§ 95)—Prepetition Transfers); **Count 3** (28 U.S.C. § 2201: Transfer At Undervalue Under CCAA (§ 36.1), BIA (§ 96)—Prepetition Transfers); **Count 4** (Recovering Proceedings If Transferred—CCAA (§ 36.1), BIA (§ 98)); **Count 5** (Turnover—11 U.S.C. § 542(a)); **Count 6**: (Declaration Of Entitlement To Setoff, Recoupment, Counterclaim), brought by the Foreign Representative through an adversary proceeding connected to the Chapter 15 Cases and are "core" matters pursuant to, inter alia, 28 U.S.C. **§ 157(b)(2)(P)**; **§ 157 (b)(2)(A)**; **§ 157(b)(2)(E)**; **§ 157(b)(2)(F)**; **§ 157(b)(2)(H)**; and **§ 157(b)(2)(O)**.

[6] The total amount of the Invoiced Obligations (defined below) is $336 million. The $274 million calculation assumes the PUCT Orders are not valid. If the PUCT Orders are proven valid, but Just Energy proves alternatively that ERCOT failed to comply with them and/or acted ultra vires by failing to take down the $9,000/MWh price on February 18, then the damage calculation changes. In that case, Just Energy alleges damages of $220 million. See Compl. ¶¶ 118, 125, 132.

by State law."[7] As the Fifth Circuit observes, "[b]ankruptcy courts routinely interpret state law in order to resolve disputes in bankruptcy cases."[8] Performing that function is particularly appropriate when the state-law issues do not predominate and are not complicated.

4. ERCOT also tries to suggest Stern v. Marshall, 564 U.S. 462 (2011), renders the claims non-core and limits jurisdiction. But, Stern is not a "jurisdiction" case. Instead, it deals with the narrower issue of whether the Court can enter final orders with respect to claims that are statutorily core, but are not Constitutionally core. Stern has no bearing on the Court's ability to exercise subject-matter jurisdiction over Just Energy's claims.

B. PROPER PARTIES ARE PRESENT

5. ERCOT's post hoc position that the PUCT is an indispensable party not only contradicts the law of the case that the PUCT is not such a party, but it is audacious considering ERCOT tacitly consented to that ruling when the Court dismissed the PUCT as a defendant. It also wrongly claims Just Energy "conceded the PUCT is an indispensable party" by naming the PUCT as a defendant.[9] Just Energy never took that position. It candidly (and repeatedly) told the Court it named the PUCT in response to ERCOT's argument in the Brazos Proceeding[10] that the PUCT is an indispensable party. The Court, the PUCT, and Just Energy debated extensively whether the PUCT should be a party at four separate hearings on January 6, January 11, January 15 and February 2. ERCOT attended each hearing, but said nothing until after the Court dismissed the PUCT on February 2. Nor did ERCOT oppose the PUCT Motion to Dismiss[11] on the grounds

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7 28 U.S.C. § 157(b)(3).

8 In re Luongo, 259 F.3d 323, 331 & n. 5 (5th Cir. 2001).

9 ERCOT Mot. p. 35, ¶ 65.

10 See, e.g., Brazos Elec. Power Cooperative, Inc. v. Electric Reliability Council of Texas, Inc. (In re Brazos Elec. Power Cooperative, Inc.), Adv. Proc. 21-03863 (DRJ) (Bankr. S.D. Tex.) ("**Brazos Proceeding**").

11 PUCT's Motion To Dismiss Complaint, Or, Alternatively, For Abstention And Memorandum In Support Thereof [ECF No. 28] (the "**PUCT Motion To Dismiss**").

that it is an indispensable party or otherwise. At this point, ERCOT has waived the argument. Regardless, the PUCT is not an indispensable party when, among other things. Just Energy does not seek any relief against the PUCT, and a judgment against ERCOT affords complete relief.

6. ERCOT also argues the Monitor is the only party with standing to bring the Canadian claims. While the Monitor may have the right to bring the Canadian claims, that does foreclose other representative parties from doing so. Sections 95 and 96 of the BIA authorize "the trustee in bankruptcy," as an estate representative in a bankruptcy, to bring claims. The CCAA authorizes the Monitor, as an estate representative in a CCAA case, to do so. Here, an estate fiduciary entrusted with the administration of the company's assets, i.e., the Foreign Representative, is bringing estate claims with the express support of the Monitor. That is exactly what section 1509(b) contemplates a foreign representative like Just Energy will do by giving it "the capacity to sue and be sued in a court in the United States" and ability to "apply directly to a court in the United States for appropriate relief in that court."[12] And, ERCOT does not identify any case holding a foreign representative acting on behalf of an estate cannot bring such claims or that the right belongs to the Monitor to the exclusion of another estate representative. This issue is sui generis. That may be because the court-appointed monitor typically acts as the foreign representative, which is not the case here; Just Energy Group, Inc. is the Foreign Representative. For greater certainty, the Monitor's Declaration submitted herewith signals support for the Foreign Representative to continue prosecuting this lawsuit; agrees if the Court considers it necessary to seek advice and directions from the Canadian Court to permit the Foreign Representative to proceed and/or to allow the Monitor to become more directly involved in prosecuting these claims;

[12] 11 U.S.C. § 1509(b)(1), (b)(2).

and requests that in the interest of efficiency, the proceeding simply continue as is.[13] In no event is this technical issue a basis to dismiss the lawsuit.

C. COUNTS ARE PROPERLY PLED

7. The six Counts in the First Amended Complaint have been pled with painstaking particularity. They satisfy any procedural or legal standard applicable at this stage.

- ***Canadian-Law Counts (One-Four)***. ERCOT appears rattled by the Canadian claims even though they have been a fixture in this proceeding since it was filed in November. As set forth below and in the McElchran Declaration, properly considered pursuant to Federal Rule 44.1,[14] the Complaint satisfies the relatively low legal hurdle of alleging the statutory elements of CCAA § 36.1(1) and BIA §§ 95, 96, and 98.

  - ***Choice Of Law***. ERCOT concludes cursorily that Canadian law does not apply given the various connections to Texas. The choice-of-law rules in this forum confirm Canadian law applies. That is not extraordinary considering this proceeding has been brought in connection with a Canadian restructuring. And, if there is a question of which law applies, it should be resolved after discovery. Courts believe the issue is fact-intensive and take that approach frequently.

  - ***Particularity Requirements***. The notice-pleading requirements of Federal Rule 8(a) govern nearly all aspects of the Complaint. ERCOT argues incredibly that the Complaint does not identify the challenged transfers, obligations, or bases for alleging insolvency.

    - The Complaint is clear that Just Energy disputes ERCOT invoices relating to the February 13 through February 20, 2021 period. ERCOT issued those invoices and accepted the $336 million Just Energy paid in response to them.

    - ERCOT claims it is confused because only the QSEs transact with ERCOT, and only JE Texas LP is a QSE. The detail of its argument reveals that ERCOT understands exactly which transfers, parties, and obligations are at issue.[15] JE Texas LP acts as Fulcrum's QSE. While BP Energy Company ("**BP**") acts as Hudson's QSE, that means Hudson acts through BP as intermediary with respect to

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[13] Declaration of James C. Tecce in Support of Plaintiffs Opposition (the "**Tecce Decl.**") filed concurrently herewith, Exhibit 1 (Declaration Of Paul Bishop (the "**Monitor Decl.**")).

[14] Tecce Decl. Exhibit 2 (Declaration Of Kevin P. McElchran (the "**McElchran Decl.**")). See Fed. R. Civ. P. 44.1 ("In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination may be treated as a ruling on a question of law."), made applicable to this proceeding pursuant to Bankruptcy Rule 9017.

[15] See ERCOT Mot. pp. 2, 4, 21, ¶¶ 1 & n. 2, 6, 7 & n. 12, n. 13, n. 15, 39 & n. 104 (detailing relationship among QSEs, each Plaintiff, and ERCOT).

ERCOT, but (a) BP is obligated to Hudson to procure energy and ancillary services on Hudson's behalf and (b) Hudson is liable to BP on a fully-secured basis for payments BP makes to ERCOT on its behalf. BP's claim against Hudson is a direct function of BP's payments to ERCOT made on Hudson's behalf. These factual issues are inappropriate for disposition at the motion-to-dismiss stage and are more properly examined with a developed record.

- ERCOT also is wrong in contending the heightened-pleading standard of Federal Rule 9(b) applies to the insolvency allegations. It does not. ERCOT's confusion on insolvency is itself perplexing considering ERCOT caused Just Energy's insolvency—forcing a CCAA filing after it buried Just Energy with Invoice Obligations totaling $336 million. ERCOT also forgets the issue of insolvency is scheduled for submission to the Court through summary judgment motions on April 9 under the Scheduling Order ¶ 2(c) [ECF No. 115], i.e., "whether the Canadian Court's determination of insolvency is binding in this adversary proceeding."

- The one assertion that arguably requires more particularity, i.e., the intent allegations relevant to the "transfer at undervalue" claim (Count 3), satisfies Federal Rule 9(b) to the extent it applies. The Complaint explains in paying ERCOT, Just Energy necessarily intended to "delay" or potentially "defeat" its other creditors' collection prospects because it resulted in an insolvency filing where their claims are impaired. That is actionable under Canadian law.

- ***Court Approval***. ERCOT's assertion that the Canadian Court's approval of Just Energy's paying ERCOT bars this lawsuit is wrong. Neither this Court nor the Canadian Court confined Just Energy to challenging the payments before the PUCT as ERCOT contends. Indeed, ERCOT consented to the entry of the Recognition Order and its broad reservation of rights.[16]

- ***Count 1 And Count 2 (Preferences)***. Just Energy properly alleges obligations incurred, and transfers made within 90 days of the CCAA filing are void preferences. They had the effect of preferring ERCOT over other creditors, paying it in full even though ERCOT is nothing more than a general pre-petition unsecured creditor with outsized leverage. The statute presumes a preference and precludes evidence of "pressure." ERCOT's "rendered insolvent" distinction does not defeat the claim, and the disposition of its "necessary to stay in business" and "ordinary course" defenses is premature, though they will be defeated. Indeed, its ordinary-course defense, which points to language in Just Energy's Chief Financial Officer's declaration filed in the Canadian Court to obtain approval to pay ERCOT, is too clever by half. The declaration simply states the obvious, i.e., that Just Energy pays ERCOT in the "ordinary course." But, Just Energy never conceded it pays ERCOT in the ordinary

[16] Tecce Decl. Exhibit 7 (Order Granting Provisional Relief Pursuant To Section 1519 Of Bankruptcy Code [ECF No. 23], March 9, 2021 ("**Recognition Order**") ("[T]he Court finds any payments made to ERCOT are made subject to all of the Debtors' rights to contest those payments, and all rights to receive a refund or credit as allowed by applicable law. Although the Court recognizes the authority to make payments to ERCOT as granted by the Canadian Order, this Court neither adds nor subtracts from any such authorization.")).

course $9,000/MWh for energy for 88 hours under compulsion of impermissible regulatory fiat—a point made clear by Just Energy paying under protest.

- ***Count 3 (Transfer At Undervalue)***. The Complaint makes out the elements of BIA section 96 in alleging the invoices were grossly outsized and paid with the "intent to delay" Just Energy's creditors. While ERCOT is "flummoxed" by the Complaint's citation to U.S. case law, that was done to respond to the Court's question of whether an "actual intent" claim has been alleged and, if so, what its basis was.[17] Just Energy pointed to U.S. law illustratively to explain the intent alleged is not "to defraud." But, Plaintiffs are not relying on U.S. law as Canadian law recognizes the claim. ERCOT also argues that Plaintiffs have not identified a present creditor against whom intent was directed, but that is an incorrect statement of the law. There is no such requirement.

- ***Count 4 (Recovery)***. Section 98 of the BIA authorizes the recovery of property transferred in violation of sections 95 and 96 of the BIA.

- ***Count 5: Turnover***. ERCOT is in possession Just Energy's property that should be turned over for use under section 363 of the Bankruptcy Code. In the First Amended Complaint, the turnover count is pled in tandem with the other declaratory requests for relief. Even if construed as a stand-alone claim, however, the turnover count survives regardless of whether it is "premature." Just Energy seeks a ruling that property was transferred illegally and should be returned in its full amount under section 542(a).

- ***Count 6: Setoff, Recoupment, Counterclaim***. ERCOT mischaracterizes this Count as derivative, but it stands on its own, claiming ***either*** ERCOT invoices and payments were illegal because they were based on the PUCT Orders that themselves are illegal ***or*** they violate Canadian law. Regardless, the Court already recognized Just Energy has properly pled a claim because it disputes the legality of the invoiced obligations and transfers. It also declined to sustain ERCOT's challenge that the SFA and Protocols waived Just Energy's setoff rights in the context of a Rule-12 motion.[18] In any event, Just Energy did not waive its rights to pursue remedies through this lawsuit, under the SFA or otherwise.

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[17] Tecce Decl. Exhibit 3 (Tr., Hr'g Feb. 2, 2022 at 79:8-20 ("I am unaware of any allegation that is presently being made that this was an actual fraudulent conveyance …. I want to know what I'm doing in the case, and so I am requiring repleading. I think I have a right to have the pleading be in a position where I can better understand it.")).

[18] See Tecce Decl. Exhibit 3 (Tr., Hr'g Feb. 2, 2022 at 33:17-34:4 ("[ERCOT COUNSEL:] Because it is spelled out under the SFA and the protocols how such a judgment would get paid. But I believe that it would in appropriate to set off in that situation when the parties have already agreed how that would work. And so we'd come back to Your Honor let's say there was a judgment and they said I want to do set off, we'd have to go through the contract provisions and the protocol provision and see whether that's a remedy available. Because it is a remedy that the parties have agreed to, it should not be available. THE COURT: I'm not sure how that's failure to state a claim, though")).

D. THERE IS NO BASIS TO ABSTAIN

8. ERCOT insists the Court must abstain from its virtually unflagging obligation[19] to exercise jurisdiction and instead abstain under the principles of Burford v. Sun Oil Co., 319 U.S. 315 (1943). ERCOT is wrong.

9. As a factual matter, ERCOT's abstention request is based on an exaggeration of the relief Just Energy requests. According to ERCOT, Just Energy wants to challenge "filed rates;" to invalidate Texas' regulatory scheme concerning electric utilities; and to compel a repricing of the Texas electricity market in a way that intervenes into the free market. Not correct. The Complaint takes issue with the legality of the PUCT Orders. They were bespoke; applied for less than one week in February 2021; and have no further force and effect. Just Energy does not ask the Court to interfere with, or pass on the wisdom of the PUCT's or ERCOT's regulation of electric utilities or any other comprehensive state policy. (Just Energy is not an "electric utility" and instead is a retail electricity provider). And, Just Energy does not challenge "filed rates" approved by a state agency as much as it argues that the rates required by the Protocols and lawful PUCT orders were different than those in the illegal PUCT Orders. In any event, ERCOT has cited no precedent in which the filed-rate doctrine was invoked to bar a party from arguing that an agency's order was entered unlawfully, as where the agency failed to adhere to procedural requirements. Rather, in the typical case the doctrine is invoked to prohibit a ratepayer from challenging a utility's lawfully filed rates on some other ground, e.g., that they are the product of an antitrust violation. Nor is Just Energy trying to "retroactively reprice the entire market for the days of the

[19] C.f., Black Sea Inv. Ltd. v. United Heritage Corp., 204 F.3d 647, 650 (5th Cir. 2000) (noting Colorado River abstention is an "extraordinarily narrow exception to the virtually unflagging obligation of the federal courts to exercise the jurisdiction given to them").

storm"[20]—a notion that was dispelled after it was discussed extensively with the Court. Just Energy made clear it was not asking the Court to tell ERCOT how to satisfy any judgment it might obtain, and the Court clarified it had no intention of entering any such judgment.[21] The reality is this lawsuit seeks much narrower relief than ERCOT represents, that is, to avoid illegal and inflated obligations incurred over a one-week period, to recover transfers made on behalf of those obligations, and to otherwise declare that Just Energy can exercise its setoff rights against ERCOT without suffering the POLR event.

10. As a legal matter, ERCOT's abstention request fails to grapple with the clear edict from Congress in 28 U.S.C. § 1334(c)(1) that permissive abstention has no application in a chapter 15 case. Congress eliminated the possibility that a federal court acting in an ancillary capacity to a foreign proceeding in the chapter 15 context would abstain from exercising subject-matter jurisdiction. Instead, all interaction between the foreign court and the United States must take place through a centralized court system. Stated differently, inserting "except with respect to a case under chapter 15" into section 1334(c) ensured foreign courts' orders will only be recognized and enforced, and ancillary relief will only be provided by companion bankruptcy courts in the federal system.

11. Moreover, Congress established a different framework for abstention in bankruptcy cases with section 1334(c) that subsumes all common-law forms of abstention, e.g., Burford,

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[20] ERCOT Mot. p. 42, ¶ 80.

[21] See Tecce Decl. Exhibit 4 (Tr., Hr'g Jan. 6, 2022 at pp. 85:10-88:2); Exhibit 5 (Tr., Hr'g Jan. 14 at pp. 8:18-22 ("[COURT:] I don't intend today or a month from now or in a final judgment in this case to tell—well first of all, if the judgment is in favor of ERCOT, this becomes irrelevant. If the judgment is against ERCOT, I have no intention of telling them what to do to pay that judgment"); at pp. 41:12-15 ("[JUST ENERGY COUNSEL:] [W]e [are] looking for a judgment here. We're not looking for you to direct the remedy. I think you've picked up on that"); at pp. 43:14-25 ("[ERCOT COUNSEL:] [W]e had a discussion when we were [here] on Tuesday about what Luminant's position was, but then in its reply … it brought up this issue again about how ERCOT can or should pass on any liability. And I heard your honor loud and clear that you don't intend to do that")).

Colorado River, etc. Case law,[22] the legislative history, and the statute's text referring to Burford considerations like "respect for State law" confirm this. ERCOT cannot remove its abstention request from the ambit of section 1334(c)(1)—and its chapter 15 limitations—by simply affixing the "Burford" label to it.

12. Assuming solely for the purposes of argument that permissive abstention applies notwithstanding the plain text of section 1334(c)(1), a balancing of the relevant factors tips decidedly against either section-1334(c)(1) or Burford abstention. Just Energy does not ask the Court to displace a Texas' regulatory regime for electricity or set policy, as ERCOT argues. Just Energy only raises a narrow, case-specific argument that two extraordinary orders of limited duration find no support under state law or the Protocols. And, the issues of state law are not uniquely difficult. The Court is more than capable of ascertaining whether the PUCT Orders were uninformed, arbitrary, and entered without the explanation or the prudence that the law requires.

13. ERCOT also cannot show that mandatory abstention under section 1334(c)(2) applies. At this point in the proceeding, ERCOT's application is untimely; Just Energy's claims are "core;" they are not "State law claims" as required by § 1334(c)(2); there is no pending state-court action—Just Energy's administrative challenges are irrelevant; and a state court cannot afford Just Energy relief in time to facilitate its Canadian restructuring efforts.

E. ERCOT Is Not Immune From Suit

14. Assuming for the sake of argument that ERCOT is a "state actor," in the bankruptcy context, a State does not enjoy immunity from claims based on in rem jurisdiction over a debtor's

[22] See Personette v. Kennedy (In re Midgard Corp.), 204 B.R. 764, 774 (B.A.P. 10th Cir. 1997); Cathedral of the Incarnation v. Garden City Co. (In re Cathedral of the Incarnation), 99 F.3d 66, 68-69 (2d Cir. 1996); Life Flight of Puerto Rico, 2009 WL 2885109, at *1 (Bankr. D.P.R. Aug. 18, 2009); In re Super Van, Inc., 161 B.R. 184, 189-191 (Bankr. W.D. Tex. 1993); Baumgart v. Fairchild Aircraft Corp., 981 F.2d 824, 833 (5th Cir. 1993); In re Pan Am Corp., 950 F.2d 839, 845-46 (2d Cir. 1991) (citing Legislative History); In re Wright, 231 B.R. 597, 600 (Bankr. W.D. Tex. 1999).

property.[23] A State's immunity is waived for proceedings ancillary to, or necessary to effectuate the bankruptcy court's in rem jurisdiction.[24] The claims here all either invoke the Court's in rem jurisdiction or are necessary to effectuate that jurisdiction. And, ERCOT waived whatever immunity defense it might have had by willingly submitting itself to the Court's jurisdiction and accepting funds for pre-petition charges from a company it knew was under the Court's supervision. It made a calculated decision to appear in the Chapter 15 Cases to get the Canadian Court's order authorizing payment recognized regardless of the jurisdictional consequences. Separately, ERCOT is not a state actor.[25] It is a member-based association.

15. Accordingly, the Court can exercise subject-matter jurisdiction; neither abstention nor sovereign immunity require that it decline to do so; and, the Complaint states claims upon which relief can be granted. The ERCOT Motion should be denied.

II. RELEVANT FACTUAL BACKGROUND

A. COMPANY AND MARKET

16. The Company purchases electricity and natural gas commodities from certain large energy suppliers and re-sells them to residential and commercial customers. It does not own generating assets. Texas is the Company's single largest market, representing 47% of its revenues in fiscal year 2020.[26]

17. Just Energy's most valuable assets are its customers. If Just Energy does not pay ERCOT's invoices when due, ERCOT can suspend its market participation in as little as two days

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[23] See Tennessee Student Assistance Corp. v. Hood, 541 U.S. 440 (2004).

[24] See Central Virginia Community College v. Katz, 546 U.S. 356 (2006).

[25] See Panda Power Generation Infrastructure Fund, LLC d/b/a Panda Power Funds, et al. v. Electric Reliability Council Of Texas, Inc., No. 05-18-00611-CV (Tex. Ct. App.—Fifth Dist. of Texas at Dallas) (Opinion) February 23, 2022 at 2 ("ERCOT is not entitled to sovereign immunity and the Legislature did not grant exclusive jurisdiction over Panda's claims to the PUC").

[26] Compl. ¶ 21.

and transfer its customers to another energy provider, i.e., a "Provider of Last Resort" or "POLR" (often at a higher rate for customers). Once that happens, customers are lost. ERCOT mandates that parties like Just Energy must pay an invoice in full even if it disputes the invoiced amounts. Failure to pay an ERCOT invoice timely also gives the PUCT grounds to initiate a proceeding to amend, suspend, or revoke Plaintiffs' Retail Electric Provider certificates.[27]

B. WINTER STORM URI

18. In February 2021, the historically severe Winter Storm Uri incapacitated most of Texas' power-generating facilities. When demand threatened to exceed supply, ERCOT ordered deep cuts in electricity consumption in the form of forced outages. In industry parlance, ERCOT ordered residential "load" to be "shed" to reduce strain on the power grid and prevent systemic failure.[28]

C. PUCT ORDERS—HCAP Of $9,000/MWh

19. On February 15 and February 16, with little discussion and without prior notice or any opportunity for public comment, the PUCT issued its key Orders Directing ERCOT To Take Action And Granting Exception To Commission Rules (the "**PUCT Orders**"). The PUCT Orders directed ERCOT to "ensure that firm load that is being shed in [Energy Emergency Alert ("**EEA**") Level 3] is being accounted for in ERCOT's scarcity pricing signals." Critically, the PUCT did not justify the PUCT Orders through a fact-based analysis of the current market conditions or otherwise explain the reasoning behind its determination that energy prices should be set at the HCAP. Instead, it merely stated the economic truism that "[e]nergy prices should reflect scarcity of the supply" and opined without evidence that "[i]f customer load is being shed, scarcity is at its

[27] Compl. ¶¶ 29, 30, 51. See ERCOT Protocol 9.6(2).

[28] Compl. ¶¶ 1, 31-33.

maximum, and the market price for the energy needed to serve that load should also be at its highest." In reality, scarcity was at its maximum because the storm had forced power generators offline—not because they were waiting for a higher market price.[29] The PUCT's Orders therefore misconceived the problem affecting the market and directed an unprecedented remedy that had no chance of correcting the actual problem (offline generators). It was unreasoned decision making.

20. It was also illegal. The PUCT has no authority to ***set*** prices. Yet it directed ERCOT to apply the system-wide offer cap of $9,000/MWh to ***set*** prices while firm load was being shed. By regulation, ERCOT power prices were ***capped*** during the relevant period at the HCAP of $9,000/MWh, but no regulation provides that the PUCT and ERCOT may actively ***set*** prices at this rate if ordinary market forces would produce a lower price. The amount is a cap—not a rate that can be set artificially.[30]

21. Following the PUCT's directive, ERCOT manually adjusted one of the input values to a price component called the Real-Time On-Line Reliability Deployment Price Adder—part of ERCOT's scarcity pricing mechanism—to impose a Real Time Settlement Point Price on February 15 at the HCAP of $9,000/MWh. ERCOT then left that price in place for eighty-eight consecutive hours.[31] For approximately 33 of those hours, the PUCT and ERCOT left the $9,000/MWh price in place ***after*** it had rescinded all residential load shed instructions early in the morning of February 18—and, therefore, the PUCT's asserted justification for the price intervention no longer applied. Potomac Economics, the PUCT's Independent Market Monitor, concluded that ERCOT's pricing intervention should have ended immediately on February 18 after load shed stopped, finding the "mistake" of keeping the inflated prices in place resulted in billions of additional, improper costs

[29] Compl. ¶¶ 1, 2, 33, 34, 35.

[30] Compl. ¶ 34.

[31] Compl. ¶ 3.

to the ERCOT market. When normal supply and demand forces were allowed to set the price of power on February 19, the trading price plummeted within one hour from $9,000/MWh to $27/MWh—a decline of 99.7%.[32]

22. Mandating the market pricing at these levels by order was unprecedented. For historical comparison, ERCOT real time prices averaged just $22/MWh for February 2020.[33] Equally unprecedented was the duration of the set price. Prices had never before remained at the cap for anything close to eighty-eight hours. January 2018 was the first time prices ever even reached the $9,000/MWh cap—for a total of only ten minutes. In 2019, prices hit the cap, but only for a little more than two hours, in total.[34]

D. ANCILLARY SERVICE CHARGES

23. ERCOT also improperly calculated charges associated with various grid functions that support the continuous flow of electricity, including for reserves. The cost of these "ancillary services" (as they are known in the power industry) reached the record price of $25,000/MWh during the storm. These excessive prices represented a dramatic departure from ERCOT's historical prices for ancillary services.[35]

E. CANADIAN PROCEEDINGS AND CHAPTER 15 CASES

24. In February and March 2021, ERCOT floored Just Energy with invoices demanding approximately $336 million for the week of February 13 through February 20.[36] Lacking sufficient liquidity to satisfy the invoices, the Debtors took immediate steps to raise a $125 million financing

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[32] Compl. ¶¶ 7, 41-42, 73-77.

[33] Compl. ¶ 38.

[34] Compl. ¶ 39.

[35] Compl. ¶¶ 3, 43, 44.

[36] Compl. ¶¶ 9, 53.

facility, which it secured over a matter of days, and commenced the Canadian Proceedings under the CCAA in the Canadian Court on March 9. That same day, the Canadian Court approved the financing facility and authorized the payment of the disputed invoices to ERCOT. Also on that day, the Debtors filed the Chapter 15 Cases in this Court seeking provisional recognition of the Canadian Court order. ERCOT representatives appeared at the first-day hearing in the Chapter 15 Cases on March 9.[37]

25. At the conclusion of the first-day hearing, the Court entered the Recognition Order granting Debtors' provisional relief that makes clear "any payments made to ERCOT are made subject to [Just Energy's] rights to contest those payments, and all rights to receive a refund or credit as allowed by applicable law." The Court entered a final order of recognition on April 2, 2021, incorporating the same reservations.[38]

F. INVOICE CALCULATION FINDS NO SUPPORT UNDER STATE LAW OR PROTOCOLS

26. Neither the PUCT nor ERCOT possesses the substantive authority to set prices in the wholesale market in the way they did; they did not follow the statutorily-prescribed rule-making procedures; their actions were not supported by evidence as required by law; and the PUCT inserted itself into an area where it has no authority. The PUCT Orders violated the Texas APA by setting prices without proper notice or making an evidentiary showing that the market's scarcity pricing signals were not working and that the inflated prices would accomplish their apparent intended purpose of stimulating power generation. The PUCT Orders also violated the PURA, which mandates that pricing must be the function of competitive forces—not regulatory fiat.[39]

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[37] Compl. ¶¶ 10, 54, 55. With respect to Plaintiff Hudson, ERCOT invoiced its QSE, BP. BP satisfied those invoices and seeks reimbursement from Hudson pursuant to the parties Independent Electricity System Operating Scheduling Agreement (the "**ISO Agreement**"). See Compl. ¶¶ 10, 56, 91, 100 & n. 3.

[38] Compl. ¶¶ 54, 55.

[39] Compl. ¶¶ 4, 11, 57, 66-69, 70-72, 107, 128.

27. Similarly, ERCOT's invoices find no support under, and are inconsistent with the ERCOT Protocols, incorporated by reference through the SFA. At the time of the storm, the ERCOT Protocols did not include firm load shed among the considerations relevant to determining whether scarcity pricing would be appropriate. Yet, the PUCT Orders impermissibly set the HCAP at $9,000/MWh based on firm load shed; charged prices for ancillary services that exceeded the HCAP of $9,000/MWh; and failed to allow prices to fall below $9,000/MWh when firm load shed ended.[40]

G. INITIAL COMPLAINT AND MOTIONS TO DISMISS

28. Just Energy filed its first complaint on November 12, 2021, naming both the PUCT and ERCOT as defendants. The complaint contained five counts alleging that: (1) a portion of the $274 million in challenged transfers, that is, $193 million, was paid post-petition and subject to avoidance as an unauthorized post-petition transfer (11 U.S.C. § 549) because the Court never "approved" the transfer in the manner contemplated under sections 549 and 363 of the Bankruptcy Code; (2) any claim ERCOT has relating to the Invoiced Amounts should be disallowed (11 U.S.C. §§ 502(b), 502(d)); (3) the transferred amounts should be turned over to Just Energy (11 U.S.C. § 542); (4) Just Energy is entitled to set off the transferred amounts against obligations it owes ERCOT (11 U.S.C. §§ 553 and/or 558); and (5) the transferred amounts are subject to avoidance under the CCAA.

29. Just Energy named the PUCT as a defendant in the initial Complaint. That is because ERCOT took the position in the Brazos Proceeding that the PUCT is a necessary and

[40] Compl. ¶¶ 5, 11, 58-59, 107, 128.

indispensable party to that litigation as ERCOT was simply following the PUCT Orders.[41] Just Energy expected ERCOT to make the same arguments in this proceeding.

30. Both ERCOT and the PUCT moved to dismiss the initial Complaint, arguing it failed to state claims as a matter of law; insisting the Court should abstain from deciding the claims under Burford; and asserting sovereign immunity. The Court granted their dismissal motions in part and denied them in part on the record at a hearing held on February 2. The Court (a) dismissed the PUCT as a defendant—without any opposition from ERCOT—finding the PUCT was not an indispensable party;[42] (b) dismissed the section 549 challenge to the post-petition transfers without prejudice, finding the Court did, in fact, "approve" the post-petition transfers;[43] (c) dismissed the section 502 claim without prejudice, finding it inapplicable without a pending proof of claim from ERCOT to which an objection could be lodged;[44] (d) declined to dismiss the setoff count and instead directed Just Energy to replead it, believing that as pled, the setoff count incorrectly limited Just Energy's rights to future setoff when Just Energy actually has had a vested setoff right since

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41 See Brazos Proceeding [ECF No. 259] (ERCOT's And Defendants Intervenors Calpine Corp., NRG Energy Inc., Nextera Energy Marketing LLC, Engie Energy Marketing NA, Inc., And Talen Energy Supply, LLC's Supplemental Motion For Leave To Appeal Order Denying ERCOT's Emergency Motion To Dismiss) ¶ 3 ("Brazos's adversary complaint seeks to disallow or reduce ERCOT's claim based on allegations that, in following the PUCT's binding orders, ERCOT violated ERCOT's rules"); ¶ 17 ("Questions Presented …. Does Brazos' failure to join the PUCT require dismissal of Brazos's claims that the price of energy during the storm was inconsistent with the PURA, ERCOT Protocol's, and/or the SFA; or that the PUCT's pricing orders are not applicable to amounts Brazos owes ERCOT pursuant to storm-related invoices?"); ¶ 27 ("The argument that the PUCT is an indispensable party to this adversary proceeding is exceedingly strong.").

42 See Tecce Decl. Exhibit 3 (Tr., Hr'g, Feb. 2, 2022) at 10:15-20 ("PUC doesn't get any of the money, PUC regulates. And it is not a beneficiary [or] an intended beneficiary. So I'm finding that there are no actual live disputes between your client and the PUC …. The PUC is dismissed as a party.").

43 See Tecce Decl. Exhibit 3 (Tr., Hr'g, Feb. 2, 2022) at 77:1-10 ("We authorized these payments, the payments are subject to a reversal of the flow of funds if it turns out they should not otherwise have been paid. But they cannot be recouped solely on the basis of 549. There may be another basis on which they will have to all come back, but it isn't the 549 basis which is Count 1.").

44 See Tecce Decl. Exhibit 3 (Tr., Hr'g, Feb. 2, 2022) at 77:11-18 ("There is no present dispute on which the Court can rule as to whether they have valid claims against the Debtor.").

the time of the disputed charges;[45] (e) dismissed the turnover count without prejudice as premature;[46] and (f) requested more particularity on the CCAA claim, e.g., clarifying whether the claim is an "actual intent" claim, a preference, or a constructive fraudulent transfer claim.[47] The Court directed Just Energy to file the amended complaint by March 4. Just Energy filed it on February 11.

31. The First Amended Complaint similarly challenges no less than $274 million of the amounts paid to ERCOT (hereinafter, the "**Transfers**") as well as the $336 million ERCOT invoiced (the "**Invoiced Obligations**").[48] The initial Complaint and First Amended Complaint rest on the same factual predicate and bring the same claims for avoidance under Canadian law, turnover, and setoff. The First Amended Complaint puts forth six counts: Count 1: Declaration Of Preference Under CCAA (§ 36.1), BIA (§ 95)—Invoice Obligations;[49] Count 2: Declaration Of Preference Under CCAA (§ 36.1), BIA (§ 95)—Prepetition Transfers;[50] Count 3: Transfer At Undervalue Under CCAA (§ 36.1), BIA (§ 96)—Prepetition Transfers;[51] Count 4: Recovering

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45 See Tecce Decl. Exhibit 3 (Tr., Hr'g, Feb. 2, 2022) at 78:2-79:1 ("I'm ordering on my own motion that the set off provisions be re-pled. They seek relief that I believe to be inconsistent with the law only because it is contingent on a future event. There is a present dispute between the parties as to whether the Debtor has a present set off right. The Debtor says they do because the Debtor paid amounts that they absolutely shouldn't have paid and therefore they have a set off right …. So if there is a judgment that these amounts should have been paid, that set off right exists presently and ERCOT disputes that it exists presently and therefore I do require that it be re-pled. I don't find it is a contingent dispute based on future events. All of the events giving rise to the set off have already occurred …. There is no future contingency. The Debtor is waiting to act because of prophylactic protections that it wants which does not diminish whether there is a present right.").

46 See ECF No. 105 ("[T]he turnover claim is dismissed without prejudice.").

47 See Tecce Decl. Exhibit 3 (Tr., Hr'g Feb. 2, 2022 pp. 79:2-20 ("As to Count 5 under the Canadian Act I am going to require those to be re-pled …. I am unaware of any allegation that this … was an actual fraudulent conveyance …. [I]t does need to be re-pled, I want to know what the law is. I'm not even ruling necessarily that the current petition might not be sufficient under some Rule 8 theory of notice pleading. I want to know what I'm doing in the case, and so I'm requiring the re-pleading …. [so I will] be in a position where I can better understand it.")).

48 Compl. ¶ 11.

49 Compl. ¶¶ 81-89.

50 Compl. ¶¶ 90-98.

51 Compl. ¶¶ 99-110.

Proceedings If Transferred—CCAA (§ 36.1), BIA (§ 98);[52] Count 5: Turnover—11 U.S.C. § 542(a);[53] and Count 6: Declaration Of Entitlement To Setoff, Recoupment, Counterclaim.[54] The First Amended Complaint requests narrower substantive relief because it omits the initial Complaint's counts for unauthorized post-petition transfer under section 549 of the Bankruptcy Code and disallowance under sections 502(c) and 502(d) of the Bankruptcy Code. While it contains six counts (compared to the Complaint's five), the First Amended Complaint breaks the CCAA Count into four separate "sub-Counts." The turnover and setoff counts carry over from the initial Complaint.

III. ARGUMENT

A. COURT HAS SUBJECT-MATTER JURISDICTION

32. All of Just Energy's claims independently qualify as "core" under 28 U.S.C. § 157(b) because they involve "other matters under chapter 15," 28 U.S.C. § 157(b)(2)(P); "matters concerning the administration of the estate," 28 U.S.C. § 157(b)(2)(A); "proceedings to determine, avoid, or recover fraudulent conveyances," 28 U.S.C. § 157(b)(2)(H); "orders to turn over property of the estate," 28 U.S.C. § 157(b)(2)(E); proceedings to determine, avoid, or recover preferences," 28 U.S.C. § 157(b)(2)(F); and "other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or equity security holder relationship," 28 U.S.C. § 157(b)(2)(O).

33. The claims fit squarely within the plain text of section 157(b)(2). The Canadian claims satisfy both §§ 157(b)(2)(H) and (b)(2)(F) as fraudulent conveyance and preference claims that seek to retrieve property located within the territorial jurisdiction of the United States. The

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[52] Compl. ¶¶ 111-118.

[53] Compl. ¶¶ 119-125.

[54] Compl. ¶¶ 126-132.

turnover count falls directly into § 157(b)(2)(E). And, all counts fall within §§ 157(b)(2)(A), (b)(2)(P), and (b)(2)(O).

1. SECTION 157(B)(2)(P)—CLAIMS "ARISE UNDER" CHAPTER 15

34. While each of the cited sections of 157(b)(2) apply with equal force and provide an independent jurisdictional basis, section 157(b)(2)(P), "other matters under chapter 15 of title 11" is particularly relevant. Congress intended for Chapter 15 Cases to be centralized in the federal system, and that intent appears in both § 157(b)(2) and the abstention exclusions in § 1334(c).

35. Section 157(b)(2)(P) includes requests for other relief that are covered under the provisions of chapter 15. In re British Am. Ins. Co. Ltd., 488 B.R. 205, 223 n.31 (Bankr. S.D. Fla. 2013) (stating "section 157(b)(2)(P) should be read to include within the ambit of core chapter 15 matters the recognition procedure and requests for relief covered by the various provisions of chapter 15"). The Fifth Circuit's expansive reading of 1334(c)(1)'s "except with respect to a case under chapter 15" to mean any proceeding "arising in or related to" a chapter 15 case[55] indicates it would read § 157(b)(2)(P) similarly.

36. Chapter 15 makes a broad reservoir of power available to Plaintiffs. Section 1521(a) authorizes the Court to grant "any appropriate relief" where necessary to "effectuate the purpose of this chapter and to protect the assets of the debtor or the interests of creditors." It "includes"—but is not limited to—"entrusting the administration of all or part of the debtors' assets within the territorial jurisdiction of the United States" and granting "any additional relief that may be available to a trustee, except for relief available under sections 522, 544, 545, 547, 548, 550, and 724(a)." 11 U.S.C. § 1521(a)(5), (a)(7). Similarly, section 1507(a) authorizes the

[55] See Firefighters' Ret. Sys. v. Citco Grp. Ltd., 796 F.3d 520, 527 (5th Cir. 2015).

Court to "provide additional assistance to a foreign representative under this title or other laws of the United States," subject only to the (inapplicable) limitations in section 1507(b).[56]

37. The Fifth Circuit interprets sections 1521 and 1507 liberally. See, e.g., Ad Hoc Group of Vitro Noteholders v. Vitro SAB de CV (In re Vitro SAB de CV), 701 F.3d 1031, 1044, 1054-55 (5th Cir. 2012) ("Chapter 15 provides for a broad range of relief …. [in] [s]ection 1520 …. § 1521(a) … [and] § 1507(a);" noting "[§] 1507 "was added … because Congress recognized that Chapter 15 may not anticipate all of the types of relief that a foreign representative may require and which would otherwise be available to such foreign representative;" "[u]nlike § 1521's 'any appropriate relief' language, § 1507 gives the courts the authority to provide 'additional assistance'"); In re Condor Ins. Ltd., 601 F.3d 319, 325 (5th Cir. 2010) (noting that the "structure and text of Chapter 15 suggests a broad reading of the powers granted to the district court in order to advance the goals of comity to foreign jurisdictions"); Firefighter's Ret. Sys. V. Citco Grp. Ltd., 796 F.3d 520, 526-527 (5th Cir. 2015) ("Chapter 15 was intended to provide effective mechanisms for dealing with cases of cross-border insolvency that would increase legal certainty, promote fairness and efficiency, protect and maximize value, and facilitate the rescue of financially troubled businesses.").[57]

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[56] See 11 U.S.C. § 1507(b) (court must assure "(1) just treatment of all holders of claims against or interests in the debtor's property; (2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding; (3) prevention of preferential or fraudulent dispositions of property of the debtor; (4) distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by this title; and (5) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.").

[57] See id. at 1056-1057 ("First, because § 1521 lists specific forms of relief, a court should initially consider whether the relief requested falls under one of these explicit provisions …. Second [if not] … a court should decide whether it can be considered 'appropriate relief' … [and] whether such relief has been expressly provided under § 304 …. Third, only if the requested relief goes beyond the relief previously available under § 304 or currently provided for under United States law, should a court consider § 1507"). Cf., Angul v. Kedzep, Ltd., 29 B.R. 417, 418 (S.D. Tex. 1983) ("Section 304 provides that a foreign representative may commence a case ancillary to a foreign proceeding and that the court may: (1) enjoin the commencement or continuation of any action involving the debtor or the debtor's property; (2) order property to be turned over; or (3) order other appropriate relief.").

38. Those provisions encompass the relief requested in the First Amended Complaint, that is, avoiding obligations and transfers under Canadian law; compelling turnover of property or its value located within the territorial jurisdiction of the United States; and declaring rights to setoff and counterlcaims which are preserved specifically in section 558. See In re Condor Ins. Ltd., 601 F.3d 319, 325 (5th Cir. 2010) (exercising subject-matter jurisdiction over avoidance action brought by foreign representative under foreign law irrespective of exclusion of § 544-claims from chapter 15 pursuant to section 1521(a)(7)); In re AJW Offshore, Ltd., 488 B.R. 551, 559 (Bankr. E.D.N.Y. 2013) ("[T]he Bankruptcy Code does not prohibit the court from authorizing the foreign representative to employ turnover powers available under §§ 542 [pursuant to 1521(a)]"); In re Tri-Cont'l Ex. Ltd., 349 B.R. 627, 639 (Bankr. E.D. Cal. 2006) ("[Foreign representative asking] that the funds to be released by agreement of the USDOJ from the in rem proceeding would be maintained in a deposit account within the jurisdiction of this court … merely asked to be entrusted to administer and realize assets under § 1521(a)(5)"). Cf., In re Fairfield Sentry, 458 B.R. 665, 67 (S.D.N.Y. 2011) (foreign avoidance claims did not fall within section 1521(a)(5) or 1521(a)(7) because they sought to recover property transferred outside the United States and not "assets within the territorial jurisdiction of the United States").

39. Similarly, construing chapter 15 to authorize the types of relief sought in the Complaint accords with the enumerated purposes set forth in section 1501. Those statutory purposes include the "fair and efficient administration of cross-border insolvencies that protects the interests of all creditors, and other interested entities, including the debtor" and the "protection and maximization of the value of the debtor's assets." 11 U.S.C. § 1501(a)(3), (a)(4). See 8 Collier On Bankruptcy ¶ 1501.02, 1501-5 (16th ed.) ("Courts routinely allude to the purposes of chapter 15 in the course of addressing specific issues that arise in chapter 15 cases") (quoting, inter alia,

Vitro, 701 F.3d at 1043, for proposition that Fifth Circuit relied on § 1501(a) before assessing "the qualification of the foreign representative")).

40. Thus, the claims are "core" under section 157(b)(2)(P) because they "arise under" foreign insolvency laws, "arise in" a chapter 15 case, and relate to requests for relief covered by chapter 15. In addition to falling within the relief contemplated by section 1521(a)(5), 1521(a)(7), and 1507(a), the claims concern payments made pursuant to an order of the Canadian Court that was recognized by this Court in Chapter 15 Cases in which ERCOT appeared and consented to the entry of that Recognition Order and its reservation of Just Energy's rights to pursue claims against ERCOT relating to the payments. ERCOT's single case, In re Wood, 825 F.2d 90 (5th Cir. 1987), decided nearly 20 years before Congress passed chapter 15 in 2005, does not dictate a different result.[58]

41. Similarly, In re Fairfield Sentry Ltd., 458 B.R. 665 (S.D.N.Y. 2011), cited by ERCOT,[59] does not impact the analysis. The District Court reversed the Bankruptcy Court's finding the claim in question was core, but that is because "[t]he foreign representatives seek recovery of foreign assets by challenging foreign transfers …. [so] there are no assets sought 'within the territorial jurisdiction of the United States.'" Id. at 677. Fairfield distinguished Condor because it "involved a situation where the foreign debtor allegedly fraudulently transferred $313

[58] ERCOT Mot. p. 38, ¶ 73 & n. 182. ERCOT cites Wood for the proposition that the claims do not "arise in" the context of a chapter 15 case—but Wood (which involved state law claims over disputed shares of stock) supports Plaintiffs. In Wood, the court explained "a proceeding is core under section 157 if it invokes a substantive right provided by title 11 or if it is a proceeding that, by its nature, could arise only in the context of a bankruptcy case." Wood, 825 F.2d at 97. Those are exactly the claims at issue here. None would exist but for the Debtors' bankruptcy filings under the CCAA. Cf., Am. Pegasus SPC v. Clear Skies Holding Co., LLC, 2015 WL 10891937, at *15 n.16 (N.D. Ga. Sept. 22, 2015) (observing "[this action] also appears to be a case arising under Title 11, due to the inclusion of the Cayman [avoidance] claim") (citing In re Tyler, 493 B.R. 905, 911 (Bankr. N.D. Ga. 2013) ("Proceedings 'arising under' title 11 involve 'matters invoking a substantive right created by the Bankruptcy Code.' For example, an action by a trustee to avoid a preferential transfer under 11 U.S.C. § 547 would invoke such a substantive right.")).

[59] ERCOT Mot. p. 14, ¶ 75 & n. 67.

million in assets to an affiliate with United States locations. Thus, the *assets* claimed were located within the territorial jurisdiction of the United States." Id. at 681. Here, the claims similarly involve the recovery of assets from a defendant located in the United States. Under Condor, the Bankruptcy Court has core jurisdiction over the claim under 28 U.S.C. §157(b)(2) for that reason.

2. PRESENCE OF STATE-LAW ISSUES HAS NO BEARING ON COURT'S AUTHORITY

42. ERCOT argues the Court's anticipated interpretation of state law applicable to the PUCT Orders renders the claims "non-core" and requires that they be decided in state court. But, bankruptcy courts routinely review and interpret state law when deciding core matters, e.g., contract assumption under section 365;[60] claim allowance under section 502;[61] taxes and fines;[62] section 541 property of the estate;[63] property subject to avoidance;[64] debt and lien avoidance;[65]

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[60] See In re Alta Mesa Resources, Inc., 613 B.R. 90, 99 (Bankr. S.D. Tex. 2019) (examining whether gathering agreements form real property covenants capable of being rejected under section 365; noting they "relate to real property located in Oklahoma" and "when a dispute focuses on real property, the Court ordinarily applies the law of the state where the real property is located").

[61] See, e.g., In re Ultra Petroleum Corp., 2017 WL 4863015, at *2 (Bankr. S.D. Tex. Oct. 26, 2017) (examining whether make-whole payments seek "unmatured interest" and are "fully enforceable under New York law"); In re Shree Mahalaxmi, Inc., 505 B.R. 794, 799-800 (Bankr. W.D. Tex. 2014) ("If appliable state law deems a claim for pre-petition interest unmatured or unearned on the petition date, § 502 disallows such claim."). See also Pepper v. Litton, 308 U.S. 295, 304 (1939) (noting "bankruptcy courts have exclusive jurisdiction over the liquidation and allowance of bankruptcy claims is a principle long recognized and not reasonably disputed.").

[62] See In re Luongo, 259 F.3d 323, 331 & n. 5 (5th Cir. 2001) ("Just as bankruptcy courts are often called upon to apply state law in resolving bankruptcy matters, so too may they apply tax law in appropriate circumstances …. [T]he bankruptcy court may avoid a preference … or a fraudulent transfer … even though these defenses are intertwined with state law").

[63] See In re First Protection, Inc., 440 B.R. 821, 828 (9th Cir. B.A.P. 2010) ("Although the question whether an interest claimed by the debtor is 'property of the estate' is a federal question to be decided by federal law, bankruptcy courts must look to state law to determine whether and to what extent the debtor has any legal or equitable interest in property as of the commencement of the case"); In re ATP Oil & Gas Corp., 553 B.R. 577, 582 (Bankr. S.D. Tex. 2016) (examining Louisiana law to determine whether property in constructive trust was excluded from estate under section 541).

[64] See In re Contractor Tech. Ltd., 343 B.R. 573, 577 (Bankr. S.D. Tex. 2006) ("In determining the exact meaning of 'parting with property' and 'interest in property' [for purposes of § 101(54) 'transfer' definition] Barnhill [v. Johnson, 503 S. Ct. 393, 398 (1945)] directs courts to state law").

[65] See In re Lovelace, 443 B.R. 494, 500 (Bankr. W.D. Tex. 2011) (examining state law to determine whether lender that extended home-equity loan held valid lien on homestead); In re Rice, 311 B.R. 450, 454 (Bankr. N.D. Tex. 2004) (examining validity of judgment debt under California law).

and whether interest is usurious.[66] Here, the mere fact that state law will be consulted does not a fortiori make the underlying claim non-core. See, e.g., 28 U.S.C. § 157(b)(3) (core/non-core determination "shall not be made solely on the basis that [a claim's] resolution may be affected by State law").

3. ALTERNATIVELY, COURT HAS "RELATED-TO" JURISDICTION

43. Even if the First Amended Complaint's claims are not core, the Court has "related-to jurisdiction"[67] given the potential impact the litigation may have on the Chapter 15 Cases and the Canadian Proceedings—and particularly Just Energy's liquidity. See In re British Am. Ins. Co. Ltd., 488 B.R. 205, 223-24 (Bankr. S.D. Fla. 2013) (exercising related-to jurisdiction over a chapter-15 debtor's complaint alleging breach of fiduciary duty against its former directors; observing a chapter 15 case necessarily requires a court "to substitute the chapter 15 case itself for the concept of the estate;" observing suit "may impact both the plaintiff and the administration of the chapter 15 case" and "court may also define the extent of related-to jurisdiction in the chapter 15 case by the potential effect of the action on the estate administered in the foreign proceeding"); SPV Osus Ltd. v. UBS AG, 882 F.3d 333, 339-40 (2d Cir. 2018) (claim is "related to" bankruptcy case "if the action's outcome might have any conceivable effect on the [foreign] estate."); In re Fairfield Sentry Ltd., 2018 WL 3756343, at *7 (Bankr. S.D.N.Y. Aug. 6, 2018) ("[T]he relevant estate for a foreign debtor is the foreign estate … all that is required for the exercise of 'related to' jurisdiction is the satisfaction of the 'conceivable effect' test, '[n]othing more.'").

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66 See In re Powerburst Corp., 154 B.R. 307, 312-313 (Bankr. E.D. Cal. 1993) (deciding whether interest rates were usurious under New York law).

67 See Bass v. Denney (In re Bass), 171 F.3d 1016, 1022 (5th Cir. 1999) ("A proceeding is 'related to' a bankruptcy if the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy"). Accord SPV Osus Ltd. v. UBS AG, 882 F.3d 333, 339-40 (2d Cir. 2018); Pacor, Inc. v. Higgins (In re Pacor), 743 F.2d 984, 994 (3d Cir. 1984).

4. STERN V. MARSHALL DOES NOT IMPACT JURISDICTION

44. ERCOT suggest wrongly that Stern v. Marshall limits the Court's jurisdiction to hear Just Energy's claims because it supposedly narrowed the jurisdictional grants in section 157(b)(2).[68] Stern dealt with the "narrow issue" before it, that is, whether bankruptcy courts can enter final orders with respect to claims that are statutorily core, but not Constitutionally core. It has no bearing on whether bankruptcy courts have subject-matter jurisdiction in the first instance. See Wellness Int'l Network, Ltd v. Sharif, 135 S.Ct. 1932, 1946-47 (2015) ("An expansive reading of Stern … would be inconsistent with the opinion's own description of its holding. The Court in Stern took pains to note that the question before it was a 'narrow' one, and that its answer did 'not change all that much' about the division of labor between district courts and bankruptcy courts."); In re Extended Stay, 466 B.R. 188, 202 & n. 73 (S.D.N.Y. 2011) (denying motion to withdraw reference; noting "[m]any of these claims are asserted against creditors who filed proofs of claim in the Debtors' bankruptcy …. [Stern] categorizes itself as a narrow decision …. [and] does not remove from the bankruptcy court its jurisdiction over matters directly related to the estate that can be finally decided in connection with restructuring debtor and creditor relations"); Liquidating Trustee v. Granite Fin. Solutions, Inc. (In re MPC Computers LLC), 465 B.R. 384, 388 (Bankr. D. Del. 2012) (observing Stern "in no way disturbed the bankruptcy court's jurisdiction to hear certain matters, which is a separate issue from the court's power to enter final judgment"). While ERCOT argues the Complaint's claims are "the stuff of traditional actions at common law," even if true, its only relevance is to explain ERCOT's disclaimer of consent to the entry of a final order in this proceeding.[69]

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[68] ERCOT Mot. pp. 38-39, ¶¶ 73-79

[69] ERCOT Mot. pp. 39, 55, ¶¶ 74, 108.

B. PUCT DOES NOT HAVE EXCLUSIVE JURISDICTION

45. ERCOT argues the PUCT has exclusive jurisdiction because Just Energy challenges "Texas's comprehensive regulatory scheme for electric utilities."[70] But, the lawsuit focuses on the wholesale and retail power markets. The PUCT does not have exclusive jurisdiction over Just Energy's claims because there is no pervasive regulatory scheme in place in Texas with respect to competitive suppliers in wholesale and retail power markets.

46. Texas deregulated the wholesale power market. It no longer is subject to comprehensive or pervasive regulation. See, e.g., In re Entergy, 142 S.W.3d 316, 322 (Tex. 2004) (agency has exclusive jurisdiction when "a pervasive regulatory scheme indicates that Congress intended for the regulatory process to be the exclusive means of remedying the problem to which regulation is addressed"); City of Corpus Christi v. Pub. Util. Comm'n of Texas, 51 S.W.3d 231, 236 (Tex. 2001) (Texas legislature amended PURA in 1999 to deregulate utility rates upon "finding that regulation was no longer warranted, except for regulation of transmission and distribution services and regulation of the recovery of stranded costs" and "concluding it was in the public interest to establish a fully competitive electric power industry in Texas").

47. While the PUCT has exclusive jurisdiction with respect to electric utilities, Just Energy is not an electric utility. It is a retail energy provider. See Tex. Util. Code § 32.001 ("COMMISSION JURISDICTION. (a) Except as provided by Section 32.002, the commission has exclusive jurisdiction over the rates, operations, and services of an electric utility"); § 32.002(6) ("'Electric utility' means a person … that owns or operates for compensation in this state equipment or facilities to produce, generate, transmit, distribute, sell, or furnish electricity …. The term does not include: …. (H) a retail electric provider").

[70] See, e.g., ERCOT Mot. pp. 2, 7-8, ¶¶ 2, 14.

48. And, to the extent the PUCT exercises "complete authority" with respect to ERCOT, it does so with respect to ERCOT's "finances, budget, and operations"—not the wholesale power market. See Tex. Util. Code § 39.151(d) ("The commission has complete authority to oversee and investigate the organization's finances, budget, and operations as necessary to ensure the organization's accountability and to ensure that the organization adequately performs the organization's functions and duties.").

49. Nor is Just Energy required to exhaust administrative remedies. Instead, the Court can decide whether the Invoiced Obligations or Transfers violated governing law without requiring Just Energy to first petition the PUCT because the Counts have an independent jurisdictional basis under sections 157(b) and 1334 of title 28. See, e.g., Matter of Benjamin, 932 F.3d 293 (5th Cir. 2019) (rejecting Social Security Administration's argument that a debtor asserting a claim in bankruptcy court alleging overpayment of benefits was required to exhaust the administrative appeal process; bankruptcy court had jurisdiction to decide a "claim for money [alleging] … the SSA failed to comply with its own regulations in recouping the overpayment."); In re Jones, 618 B.R. 757, 772-73 (Bankr. D.S.C. 2020) ("[P]laintiffs are not required to exhaust any administrative remedies before they seek remedies for the defendant's alleged violations of the Bankruptcy Code. … A state law restriction or impediment to a debtor seeking redress of [the Bankruptcy Code's] federally premised rights quickly runs afoul of the Supremacy Clause"); In re Tri-Union Dev. Corp., 2015 WL 5730745, at *12 (Bankr. S.D. Tex. Sept. 28, 2015) (observing jurisdiction "is not precluded by the doctrine of exhaustion of administrative remedies" when lawsuit examined whether forfeiture orders were valid in context of determining validity of debt) (citing In re Healthback LLC, 226 B.R. 464, 471 (Bankr. W.D. Okl. 1998) for proposition that jurisdiction will lie when "adjudication of the bankruptcy court over property of the estate is not directly concerned

with any administrative decision but rather to ensure that all creditors are treated equally within the scope of the Bankruptcy Code"); In re Bryco Funding, Inc., 2009 WL 3271309, at *2 (Bankr. N.D. Cal. Oct. 2, 2009) ("The trustee's failure to exhaust state-law administrative remedies does not divest this court of jurisdiction to adjudicate the fraudulent transfer claims against the [Franchise Tax Board] because the bankruptcy court has an independent basis for jurisdiction over the claims."). Tellingly, ERCOT cites no case holding a party had to exhaust administrative remedies before pursuing claims before a bankruptcy court exercising "core" or "related-to" jurisdiction.[71]

C. FILED-RATE DOCTRINE IS INAPPLICABLE

50. ERCOT tries to invoke the filed-rate doctrine, but identifies no precedent in which the filed-rate doctrine was invoked to bar a party from arguing that an agency's order was entered unlawfully.[72] Rather, in the typical case the doctrine is invoked to prohibit a ratepayer from challenging a utility's lawfully filed rates on some other ground. For example, TCE, which ERCOT relies upon, involved the appeal of antitrust claims against market participants. TCE did not concern claims against ERCOT. ERCOT also relies on Mirant and Ultra Petroleum, but those cases stand for another proposition, that is, that contracts subject to agency regulation can be rejected in chapter 11 because "the filed rate itself is separate from full payment of that rate." In

[71] See ERCOT Mot. pp. 8, ¶ 15 & n. 32; p. 53, ¶ 102 & n. 264 (citing Oncor Elec. Delivery Co. LLC v. Chaparral Energy, LLC, 546 S.W.3d 133, 139-40 (Tex. 2018) (breach of contract case "involve[d] …. [an electric utility's] "services," and PURA grants PUCT exclusive jurisdiction over those services); In re Entergy Corp., 142 S.W.3d 316, 323 (Tex. 2004) (PUCT has exclusive jurisdiction over disputes "regarding utility rates, operations, and services" such that administrative exhaustion doctrine applied to breach of merger agreement case).

[72] None of the cases ERCOT cites even named the regulatory agency as a defendant. See, e.g., Winn v. Alamo Title Ins. Co., 2009 WL 7099484 (W.D. Tex. May 13, 2009); Pub. Util. Dist. No. 1 of Grays Harbor Cty. Wash. v. IDACORP Inc., 379 F.3d 641 (9th Cir. 2004); Rothstein v. Balboa Ins. Co., 794 F.3d 256, 259 (2d Cir. 2015); Util. Choice, L.P. v. TXU Corp., 2005 WL 3307524, at *1 (S.D. Tex. Dec. 6, 2005).

re Ultra Petroleum Corp., 2022 WL 763836, at *8 (5th Cir. Mar. 14, 2022); In re Mirant Corp., 378 F.3d 511, 515–17 (5th Cir. 2004).

D. PUCT IS NOT AN INDISPENSABLE PARTY

51. ERCOT's after-the-fact argument that the PUCT is an indispensable party[73] ignores the law of the case that it is not such a party—a finding it never contested—and otherwise fails substantively. ERCOT is not correct that Just Energy conceded the PUCT is an indispensable party by naming it as a defendant.[74] Just Energy told the Court several times, starting with its opposition to the PUCT and ERCOT Motions to Dismiss, it only "named the PUCT as a Defendant after ERCOT took the position in the Brazos Proceeding that the PUCT is an indispensable party in that litigation."[75] That point was discussed among the Court, the PUCT, and Just Energy during four hearings, all of which ERCOT attended.

- On January 6, Just Energy told the Court several times in response to the question of "why we had the PUC," that it was named because "the position ERCOT has taken is that the PUCT is an indispensable party … in … the Brazos case." The Court told the PUCT "I might find that you are not an indispensable party because right now I still don't understand why you are, and you might win abstention and we might just proceed with ERCOT."[76]

- On January 11, the Court repeated its "skepticism I voiced at the last hearing as to whether PUCT should be a party …. I am doing my best to avoid having the PUCT as a party."[77]

- On January 14, after ruling on the intervention motions, the Court said "I'm going to reconsider this decision if PUC remains in the case. I have said from the beginning that … I don't think we need the PUC here."[78]

- On February 2, at the hearing to consider the PUCT and ERCOT Motions To Dismiss, the PUCT argued it should not a party when, among other things, it did not receive a transfer

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73 ERCOT Mot. pp. 35-37, ¶¶ 65-69.

74 ERCOT Mot. p. 35, ¶ 65.

75 Just Energy Omnibus Objection To ERCOT and PUCT Motions To Dismiss [ECF No. 70] at pp. 14-15, ¶¶ 27-28.

76 Tecce Decl. Exhibit 4 (Tr., Hr'g Jan. 6, 2022 pp. 13:8-16:9, 71:20-25).

77 Tecce Decl. Exhibit 6 (Tr., Hr'g Jan. 11, 2022 pp. 76:13-77:24).

78 Tecce Decl. Exhibit 5 (Tr., Hr'g Jan. 14, 2022 pp. 61:14-22).

> and did not file a claim. Just Energy reiterated to the Court that "[w]hen we filed suit, when we named the PUC as a defendant … the position that was taken by ERCOT was that they were an indispensable party …. So we didn't want to be chasing that after the fact on a motion to dismiss." The Court observed "I don't think it is possible to have an indispensable party against whom one seeks no relief …. I'm finding that there are no actual live disputes between your client and the PUC" and dismissed the PUCT from the lawsuit.[79]

52. ERCOT never disagreed with the Court or the PUCT that the PUCT was not an indispensable party during any of the four hearings when the issue was discussed before the Court's ruling. It did not object to the PUCT Motion To Dismiss. It never responded to Just Energy's point that Just Energy named the PUCT because of the position ERCOT is taking in Brazos. ERCOT said nothing, save a short statement in the reply in support of ERCOT's First Motion and a short statement on the record after the Court granted the PUCT Motion to the effect that ERCOT "believe[s] they are a necessary party" because Just Energy challenges the PUCT Orders, to which the Court responded "it's ERCOT's actions they complain of …. I understand your concern, but they don't seek that relief against the PUC."[80]

53. ERCOT cannot raise the argument at this point. The Court's finding is law of the case. See, e.g., Loumar, Inc. v. Smith, 698 F.2d 759, 762 (5th Cir. 1983) (law of the case is a "rule of practice, based on sound policy that when an issue is once litigated and decided, that should be the end of the matter"). And, ERCOT is precluded from challenging the decision because it never opposed the PUCT's dismissal as an indispensable party. See, e.g., United States v. Ware, 2022 WL 135818, at *1 & n. 1 (5th Cir. Jan. 13, 2022) ("arguments raised for the first time in a reply brief, even by pro se litigants, are waived"); Illan–Gat Engrs., Ltd. v. Antigua Int'l Bank, 659 F.2d

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[79] Tecce Decl. Exhibit 3 (Tr., Hr'g Feb. 2, 2022 pp. 8:19-10:22).

[80] Tecce Decl. Exhibit 3 (Tr., Hr'g Feb. 2, 2022 13:12-14:22); [ECF No. 80] ERCOT Reply In Supp. First Mot. Dismiss pp. 24-25 ¶¶ 47-49 ("If the PUCT is dismissed from this suit on any ground, the Court must dismiss the whole case because the PUCT is indispensable").

234, 242 (D.C.Cir. 1981) ("[A] court should in equity and good conscience, consider the timing of a [Rule 12(b)(7)] motion and the reasons for the delay"); Fed. R. Civ. P. 19, Notes On Advisory Committee Rules—1966 Amendment (delay in bringing motion is relevant "when the moving party is seeking dismissal in order to protect himself against a later suit by the absent person (subdivision (a)(2)(ii))[.]").

54. Regardless, the PUCT is not an indispensable party. The PUCT did not receive any transfer or send any invoice to Just Energy. Instead, ERCOT received the transfers and imposed the obligations being challenged. Should Just Energy obtain a judgment against ERCOT, that will afford it complete relief. And, there is no risk to ERCOT of conflicting obligations. Any judgment from this Court will be binding on ERCOT and give it a defense in any PUCT enforcement action. And, the interests of the PUCT and ERCOT are aligned. See Fed. Ins. Co. v. Singing River Health Sys., 850 F.3d 187, 201 (5th Cir. 2017) (party not indispensable when it had same interest as movant Medical Insureds—maximizing coverage—so "their interests are protected by the Medical Insureds' vigorous litigation in the coverage dispute"); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Flanders-Borden, 11 F.4th 12, 17 (1st Cir. 2021) ("[W]here the interests of an absent party are aligned closely enough with the interests of an existing party, and where the existing party pursues those interests in the course of the litigation, the absent party is not required under Rule 19.").

55. Just Energy never requested relief from the PUCT. It challenges the validity of the PUCT Orders, but the PUCT does not have to be a party for the Court to decide whether they comply with applicable law. ERCOT has cited no precedent holding—contrary to the Court's prior determination—that a state agency is an indispensable party in a suit that does not seek any relief against the agency merely because the parties' arguments require the court to pass upon the

lawfulness of the agency's regulations. By analogy, the Federal Rules of Civil Procedure recognize this and give the United States or the State the option to intervene. But, their presence is not mandatory. Cf., Fed. R. Civ. P. 5.1 ("A party that files a pleading, written motion, or other paper … drawing into question the constitutionality of a federal or state statute must promptly …. serve the notice and paper on the Attorney General of the United States if a federal statute is questioned—or on the state attorney general if a state statute is questioned …. [T]he attorney general ***may intervene*** within 60 days after the notice is filed") (emphasis added).

E. MONITOR IS NOT ONLY PARTY THAT CAN BRING CANADIAN LAW CLAIMS

56. The BIA gives "a trustee," as an estate representative in a bankruptcy proceeding, authority to bring claims under sections 95 and 96. Under section 36.1 of the CCAA, the same power is expressly conferred on the Monitor, as court officer acting for the benefit of the estate under the CCAA. ERCOT has not pointed to any authority[81] finding an estate fiduciary or representative other than the Monitor, like the Foreign Representative appointed by the Canadian Court, recognized by this Court, and entrusted to realize all or part of the Debtors' assets located in the United States, cannot bring estate claims under section 36.1 of the CCAA.[82] See Gray's Commentaries on Federal Corporate Laws, § CCAA-P4:COM18 (foreign representative "may avail itself of the following remedies: (a) a preferential payment action; (b) a transfer at undervalue…"); 11 U.S.C. § 1509(b)(1), (2) (foreign representative has standing "to sue and be sued" and can "apply directly to a court").

57. This is an issue of first impression. In two of the cases relied upon by ERCOT, the claim was asserted by the monitor, but the issue of standing was not raised or discussed by the

[81] ERCOT Mot. pp. 15-16, ¶¶ 26-30.

[82] See [ECF No. 82] p. 8, ¶ 25(a).

court.[83] And in the only two cases cited by ERCOT where standing was raised, the standing of a foreign representative or other estate fiduciary was not at issue. The cases involved non-representative parties, e.g., lenders in one case and an asset-purchaser who was not even a creditor in the other.[84] Here, a Court-appointed fiduciary is pursuing estate claims with the Monitor's support for the benefit of the entire estate.

58. The Monitor, who ERCOT properly describes as "an independent and impartial expert, acting as the eyes and ears of the court throughout the proceedings,"[85] supports Just Energy prosecuting the claims and asks the Court, for the sake of efficiency to permit the proceeding to continue with the current parties. See Tecce Decl. Exhibit 1 (Monitor Decl.) ¶¶ 8-10 ("The Monitor continues to support the Foreign Representative's pursuing claims against ERCOT. Among other things, the Foreign Representative is an estate fiduciary and is well-positioned to pursue claims in the Bankruptcy Court on behalf of the Debtors' estates. The Monitor will, if necessary, seek advice and directions from the Canadian Court for the Foreign Representative to proceed with this action and continue prosecuting the claims therein against ERCOT and/or for the Monitor to become directly involved in the prosecution of such claims. Efficiency dictates that the case should simply continue as is without the time and expense of involving the Canadian Court. The prompt disposition of the Adversary Proceeding is important to the Debtors.").

59. Importantly, a foreign representative and a monitor fulfill similar functions in respect of the estate. The CCCA defines the monitor to mean "the person appointed under section

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[83] ERCOT Mot. p. 16, ¶ 30 & n. 77 (citing Ernst & Young Inc v. Aquino, 2021 ONSC 527, aff'd 2022 ONCA 202 and Urbancorp Cumberland 2 GP Inc, Re, 2017 ONSC 7156).

[84] ERCOT Mot. pp. 15-16, ¶¶ 29-30 & n. 74, n. 77 (citing Re Cash Store Financial Services, 2014 ONSC 4326, aff'd 2014 ONCA 834 (attempt by DIP lenders to challenge preference and transfer at undervalue; without assignment by monitor to the DIP lenders, standing was lacking); Verdellen v Monaghan Mushrooms Ltd., 2011 ONSC 5820 (revieing standing under § 36.1 of purchaser of debtor's business who was not a creditor)).

[85] ERCOT Mot. pp. 15, ¶ 29 & n. 74.

11.7 to monitor the business and financial affairs of the company." CCAA § 2(1). It defines the foreign representative to mean "a person or body, including one appointed on an interim basis, who is authorized, in a foreign proceeding respect of a debtor company, to (a) monitor the debtor company's business and financial affairs for the purpose of reorganization; or (b) act as a representative in respect of the foreign proceeding. CCAA § 45(1). Both are court officers that owe duties to the estate.[86] There is therefore no reason why here the Foreign Representative and the Monitor should not equally have status to bring a challenge under § 36.1 of the CCAA for the benefit of the debtor's estate. The contrary conclusion would allow form to triumph over substance in a proceeding where the debtor—not the monitor—is acting as a foreign representative, but has the monitor's full support to prosecute the claims.

60. This Court and the Canadian Court can communicate on this point to the extent necessary. See 11 U.S.C. § 1525(b) ("The court is entitled to communicate directly with, or to request information or assistance directly from, a foreign court or foreign representative, subject to the rights of a party in interest to notice and participation.").

61. Even if there is a technical issue to "cure," dismissal is not warranted. The named Plaintiffs are the aggrieved parties that suffered significant harm as a result of ERCOT's illegal billing, risk a loss of their customers based on ERCOT's actions. JE Texas LP, Fulcrum, and Hudson have a "Retail Electric Provider" certificate, are registered as "Market Participants" in the ERCOT Market, and are parties to an SFA with ERCOT. If ERCOT's invoices are not paid, ERCOT can suspend market participation and transfer customers to a POLR. Also, the PUCT might initiate proceedings to amend, suspend, or revoke their Retail Electric Provider certificates.[87]

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[86] Tecce Decl. Exhibit 2 (McElcheran Decl. ¶ 35 (noting "Plaintiffs in this case, like the Monitor, are fiduciaries for the creditors of Plaintiffs")).

[87] First Am. Compl. p. 11, ¶ 29.

Because they have Constitutional standing, any prudential standing issues, i.e., whether the rights of third parties like the Monitor are being pursued, can be addressed without dismissal of the proceeding. See Elgin Sweeper Co. v. Melson Inc., 884 F. Supp. 641, 650-51 (N.D.N.Y. 1995) (noting "the BIA provides the mechanism for ... a creditor, under s. 38, to pursue a claim which the trustee elects not to pursue, in order to recover the amount of his debt, as long as he is prepared to fund the process;" denying request "to dismiss the complaint because the plaintiff [a creditor] has not obtained permission to proceed with this action from the Ontario court that adjudicated Compro's bankruptcy pursuant to § 38 of [the BIA];" noting "[n]either party has indicated what if any state policy would be implicated by extending comity to § 38 of the BIA;" agreeing to "extend comity to § 38 of the BIA and require the plaintiff to comply with its provisions. Since extending comity to Ontario law will not require this court to dismiss the complaint, the court will deny the defendant's motion to dismiss and allow the plaintiff 90 days … to obtain an order from the Ontario Court of Justice granting it leave to proceed with this action against the Royal Bank of Canada."); Advanced Tech. Incubator, Inc. v. Sharp Corp., 2009 WL 2460985, at *5 (E.D. Tex. Aug. 10, 2009) ("A plaintiff with constitutional standing may cure prudential standing defects after it files suit").

F. COUNT 1-COUNT 4: CANADIAN LAW CLAIMS

62. This lawsuit seeks to avoid obligations and recover payments based on illegal invoices. The company was grossly overcharged—$9,000/MWh for electricity that dropped to $27/MWh on February 19, 2021. That money should be recovered. Canadian courts interpret the BIA as "remedial legislation [that] should be given a liberal interpretation to facilitate its objectives." Tecce Del. Exhibit 8 (Third Eye Capital Corporation v. Resources Dianor Inc./Dianor Resources Inc., 2019 ONCA 508, 435 D.L.R. (4th) 416, at para. 43)). This liberal standard applies to the interpretation of both preferences and transfers at undervalue under Canadian law. See

Tecce Decl. Exhibit 9 (Ernst & Young Inc. v. Aquino, 2022 ONCA 202 (Ont. C.A.) ¶ 22); see also McElcheran Decl. ¶ 30.

1. CHOICE OF LAW ANALYSIS DICTATES CANADIAN LAW APPLIES

63. ERCOT does not attempt a choice-of-law analysis and instead argues in a footnote that Texas courts follow the "most significant relationship" test.[88] In conducting a choice of law analysis, the threshold question is "whether a federal or a forum (Texas) choice of law rule applies." Woods-Tucker Leasing Corp. of Ga. v. Hutcheson-Ingram Dev. Co., 642 F.2d 744, 748 (5th Cir. 1981). But here, the "[federal] independent judgment test 'is essentially synonymous with the most significant relationship approach'" applied in Texas. In re Mirant Corp., 675 F.3d 530, 536 (5th Cir. 2012). Under either court's choice-of-law rules, "the Court should apply the law of the forum with the 'most significant' contacts or relationship to th[e] dispute, thereby exercising an 'informed judgment in the balancing of all the interests of the states [or countries] in order to best accommodate the equities among the parties.'" In re SkyPort Glob. Commc'ns, Inc., 2013 WL 4046397, at *41 (Bankr. S.D. Tex. Aug. 7, 2013) (quoting Vanston Bondholders Protective Comm. v. Green, 329 U.S. 156, 162 (1946)); see also Koreag, Controle et Revision, S.A. v. Refco F/X Assocs. (In re Koreag, Controle et Revision, S.A.), 961 F.2d 341, 350 (2d Cir. 1992) ("The goal of this analysis is to evaluate the various contacts each jurisdiction has with the controversy, and determine which [country's] law and policies are implicated to the greatest extent.").

64. In the case of foreign jurisdictions, "[t]he analysis must [also] consider the international system as a whole in addition to the interests of the individual states, because the

[88] See ERCOT Mot. pp. 11-15, ¶¶ 20-27 & n. 59.

effective functioning of that system is to the advantage of all the affected jurisdictions." In re Maxwell Commc'n Corp. plc by Homan, 93 F.3d 1036, 1048 (2d Cir. 1996).

65. Canadian law applies. Plaintiffs are in insolvency proceedings in Canada.[89] Plaintiffs are tasked with administering the Debtors' assets in Canada; value received in the proceeding will be administered in the Canadian cases pursuant to Canadian insolvency law. See In re B.C.I. Finances Pty Ltd., 583 B.R. 288, 297 (Bankr. S.D.N.Y. 2018) (applying similar factors under New York's "greatest interest test" to find "Australian substantive law governs"); cf., Am. Pegasus SPC, 2015 WL 10891937, at *15 n.17 ("[T]he Cayman claim provides a substantive right for the [liquidators] for which there is no analog in Georgia state law, which makes sense in light of comprehensive federal schemes established to govern bankruptcy proceedings.… [Given] the stated goals of Chapter 15 and the holding of the Condor court, the Court declines to apply Georgia choice of law principles to the Cayman cause of action.").

66. ERCOT tries to argue Plaintiffs are "affiliates (but not 'Applicants') to the CCAA proceeding and subsequent chapter 15 debtors."[90] This is incorrect. Fulcrum, Hudson, and Just Energy are expressly named as Applicants in the caption of the Canadian Proceedings in the Initial Order. Although Just Energy Texas LP is named as an "affiliate," that is because a partnership is not authorized to apply for protections under the CCAA.[91] Nonetheless, where the operations of partnerships are integral and closely related to the operations of applicants, it is well-established that the Canadian courts have jurisdiction to extend CCAA protections to partnerships as well.

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[89] Similar to the United States, Canadian law provides statutory remedies to trustees in restructuring proceedings under the CCAA to recover estate property and enhance distributions to creditors. See Tecce Decl. Exhibit 2 (McElcheran Decl. ¶ 29)

[90] See ERCOT Mot. p. 14, ¶ 26 (citing ERCOT Exhibit G (Initial Order (Endorsement) ¶ 3)).

[91] See ERCOT Mot. Exhibit G (Initial Order (Endorsement)) p. 1 (caption), pp. 20-21, ¶¶ 114-117 ("Should Noncorporate Entities Be Captured By The Stay")).

See, e.g., Tecce Decl. Exhibit 10 (Re Lehndorff General Partner Ltd. (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List])), ¶ 21; id. Exhibit 11 (Re Target Canada Co., 2015 ONSC 303 ¶¶ 42-43).

67. ERCOT argues Texas law applies because fraudulent transfer claims are at issue.[92] But, avoidance actions focus on protecting the interests of creditors, not the interests of a transferee like ERCOT. See, e.g., Begier v. Internal Revenue Serv., 496 U.S. 53, 58 (1990) ("[T]he purpose of the avoidance provision is to preserve the property includable within the bankruptcy estate—the property available for distribution to creditors."); Tow v. Rafizadeh (In re Cyrus II P'ship), 413 B.R. 609, 619 (Bankr. S.D. Tex. 2008) ("Claims under and recoveries pursuant to [the Bankruptcy Code's avoidance provisions] seek to [prevent dispositions of property] by rewinding injuries caused to the bankruptcy estate and its creditors by fraudulent conveyances.").

68. Similarly, ERCOT argues In re Condor Ins. Ltd., 601 F.3d 319 (5th Cir. 2010) does not support the application of Canadian law.[93] Yet, like plaintiffs in Condor, the Foreign Representative here did not file suit in the U.S. to "gain powers not contemplated by the laws" of Canada." And criftically, the Fifth Circuit noted "Congress did not intend to restrict the powers of the U.S. court to apply the law of the country where the main proceeding pends." Id. at 327. ERCOT is also incorrect in arguing that Canadian avoidance law has no extraterritorial effect.[94] Cf., Perforaciones Martímas Mexicanas S.A de C.V. v. Grupo TMM S.A. de C.V, 2007 WL

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92 See ERCOT Mot. p. 12, ¶ 21 & n. 59.

93 See ERCOT Mot. pp. 13-14, ¶ 45.

94 See ERCOT Mot. p. 11, ¶ 20. Nor do ERCOT's authorities support its position. See ERCOT Mot. p. 12, ¶ 22 (citing Tolofson v. Jensen, [1994] 3 S.C.R. 1022 ¶ 41, which is not an insolvency case and has no application to interpretation of the BIA/CCAA; id. p. 13, ¶ 23 (citing Holt Cargo Systems Inc v. ABC Containerline NV (Trustee of), 2001 SCC 90 ¶ 80, which was decided before the 2009 amendment to the BIA's preference provision (§ 95) and adoption of the BIA's transfer at undervalue section (§96)); see also Tecce Decl. Exhibit 2 (McElcheran ¶¶ 34).

1428654, at *7 (S.D. Tex. 2007) (finding "[s]ince U.S. courts apply U.S. procedural law, the instant claim [did] not have to be heard in the same court in which the Mexican Limitation [was] pending").

69. While ERCOT argues the status of the ultimate parent, Just Energy Group, Inc., a Canadian company, is not relevant,[95] that is not accurate. The Canadian Court decreed the that the CCAA applies, and the case on which ERCOT relies predates relevant UNCITRAL amendments.[96]

70. Finally, ERCOT's choice-of-law argument is premature. Because they are fact-intensive, choice-of-law questions are decided on a complete record, after discovery. See, e.g., Gaetano Assocs Ltd. v. Artee Collections, Inc., 2006 WL 330322, at *4 (S.D.N.Y. Feb. 14, 2006) (deferring choice-of-law determination until "a more complete record can be presented to allow a reliable choice-of-law determination to be made"); Emp'rs Mut. Cas. Co. v. Key Pharm., Inc., 1992 WL 8712, at *11 (S.D.N.Y. Jan. 16, 1992) (denying motion to dismiss because court could not conclude applicable law at that stage); Banner Life Ins. Co. v. Bonney, 2011 WL 5027498, at *8 (E.D. Va. Oct. 21, 2011) ("Conducting a choice of law analysis is fact-intensive and context specific. Due to the complexity of this analysis when confronted with a choice of law issue at the motion to dismiss stage, courts ... have concluded that it is more appropriate to address the issue at a later stage in the proceedings."); cf., Ackerley Media Grp., Inc. v. Sharp Elecs. Corp., 170 F. Supp. 2d 445, 449 at n.1 (S.D.N.Y. 2001) ("The discovery process might very well uncover other facts which would then force the court to revisit the choice of law issue at the summary judgment or trial phase of this litigation.").

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[95] See ERCOT Mot. p. 13, ¶ 23.

[96] ERCOT cites the Holt case, but it is dated 2009 before UNCITRAL based provisions came into effect in Canada. See Tecce Declaration Exhibit 2 (McElcheran Decl. ¶ 34).

2. CANADIAN LAW CLAIMS HAVE BEEN PLED SUFFICIENTLY

71. ERCOT's argument that the Complaint does not put it on notice of the obligations and transfers Just Energy challenges is incredible. Federal Rule 8(a)(2) applies, requires only "a short and plain statement showing the pleader is entitled to relief," and has been satisfied. The 40-page First Amended Complaint makes obvious through 130 paragraphs that (a) the PUCT Orders put the $9,000/MWh price in effect between February 15 and February 19; (b) ERCOT invoiced Just Energy for $336 million relating to the week of February 13 through February 20, i.e., the "Invoiced Obligations"; and (c) Just Energy contends at least $274 million, i.e., the "Transfers," should be returned—or $220 million depending on the Court's findings with respect to the validity of the PUCT Orders.[97]

72. And, while ERCOT argues the insolvency allegations have not been pled with sufficient particularity, it neglects to mention that the issue of insolvency already is scheduled for submission through summary judgment motions on April 9. See Scheduling Order [ECF No. 115] ¶ 2(c). ERCOT acknowledges the Canadian Court made a finding of insolvency at the time of the CCAA filing.[98] Just Energy will demonstrate in its forthcoming summary judgment motion on April 9 why that finding is binding. In any event, the heightened pleading standards of Federal Rule 9(b) do not apply to insolvency allegations.

73. The standards applicable to pleading transfers, obligations, and solvency have been satisfied. See, e.g., Safety-Kleen Sys., Inc. V. Silogram Lubricants Corp., 2013 WL 6795963, at *7 (E.D.N.Y. Dec. 23, 2013) (gathering authorities finding Rule 8(a) applies to constructive-

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[97] See, e.g., First Am. Compl. ¶¶ 9, 11, 52, 53, 56, 82, 87, 89, 91, 96, 98, 100, 105, 106, 107, 108, 109, 110, 116, 117, 118, 122, 123, 124, 125, 127, 128, 129, 130, 132, WHEREFORE Clause ¶ C.

[98] See ERCOT Mot. pp. 23-24, ¶¶ 43-44 & n. 115; ERCOT Mot. Exhibit G (Initial Order (Endorsement)) pp. 10-11, ¶¶ 48-51 ("Does Just Energy Meet the Insolvency Requirements").

fraudulent transfer allegations and was satisfied when complaint lumped payments and insolvency allegations over four-year period); In re Our Alchemy, LLC, 2019 WL 4447545, at *10 (Bankr. D. Del. Sept. 16, 2019) (Rule 8(a) only requires that allegations "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests;" trustee satisfied pleading requirements where he "aggregated the transfers into a lump sum over a one year period"); In re Tronox, Inc., 429 B.R. 73, 98 (Bankr. S.D.N.Y. 2010) (insolvency allegations for constructive fraudulent transfer claim were "pled adequately in accordance with Rule 8(a)(2)"); In re Noram Resources, Inc., 2011 WL 5357895 at *5 (Bankr. S.D. Tex. Nov. 7, 2011) (applying Rule 8(a)(2) standard to Canadian law claims in reviewing Rule-12 motion); Fed. Nat'l Mortg. Ass'n v. Pinter, 2006 WL 2802092, at *9 (E.D.N.Y. Sept. 28, 2006) (allegations aggregating transfers made over 3-5 year period "are sufficient to satisfy the notice pleading standard of Rule 8"); Sullivan v. Kodsi, 373 F. Supp. 2d 302, 307-08 (S.D.N.Y. 2005) (denying motion to dismiss constructive fraudulent transfer claims challenging non-particularized transfers made over nearly three-year period); Court–Appointed Receiver for Lancer Mgmt. Group LLC v. 169838 Canada, Inc., 2008 WL 2262063, at *3 (S.D.Fla. May 30, 2008) (Rule 8(a) does not require the pleader to "allege the particular transfers which each of the [defendants] received," or capacity in which defendants received them). ERCOT's single case does not require a different result.[99]

74. ERCOT claims it is confused because only the QSEs transact with ERCOT, and only JE Texas LP is a QSE.[100] The detail of ERCOT's objection confirms Rule 8(a) has been satisfied. JE Texas LP is Fulcrum's QSE. And, BP is Hudson's QSE. While the issue is not

[99] See ERCOT Mot. pp. 21-22, ¶¶ 38, 39; p. 32 ¶ 58 (maintaining "Rule 9(b)'s heightened pleading standard applies" to insolvency allegations) (citing only Valley Media, Inc. v. Borders, Inc. (In re Valley Media, Inc.), 288 B.R. 189, 192 (Bankr. D. Del. 2003) ("Plaintiff's complaint only contains a rough estimate of the total amount of the preferential transfers. No other information is provided in the complaint.").

[100] See ERCOT Mot. pp. 2, 4, 21, ¶¶ 1 & n. 2, 6, 7 & n. 12, n. 13., n. 15, 39 & n. 104 (detailing relationship among QSEs, each Plaintiff, and ERCOT).

germane at the Rule-12 stage, it is worth noting that JE Texas LP, Fulcrum, and Hudson are all Market Participants party to SFAs with ERCOT. While Hudson interacts with ERCOT through BP as its intermediary, BP is obligated to Hudson under its ISO Services Agreement to procure power and ancillary services from ERCOT on Hudson's behalf; and, Hudson is liable to BP on a fully-secured basis for any payments BP makes to ERCOT on its behalf.

75. ERCOT also takes issue with JE Texas LP not being "the Canadian equivalent of a 'Debtor,'"[101] but that has nothing to do with whether ERCOT has sufficient notice of the challenged transfers and obligations involving JE Texas LP. Not that it is relevant, but the reason JE Texas LP is not a "Canadian Debtor" is because, as noted above, the CCAA does not apply to partnerships—it applies to corporations.[102]

76. Finally, ERCOT's "debtor-by-debtor" argument is at best premature. These types of disputes require discovery to be resolved properly. See, e.g., In re Adelphia Comm'n Corp, 365 B.R. 24, 70 & n. 194 (Bankr. S.D.N.Y. 2011) (denying motion to dismiss equitable subordination claim; noting "In Pepper, the Supreme Court ruled that 'the bankruptcy court has the power to sift the circumstances surrounding any claim to see that injustice or unfairness is not done in administration of the bankrupt estate,' and that a bankruptcy court's equitable power to subordinate may be 'invoked to the end that fraud will not prevail, that substance will not give way to form, that technical considerations will not prevent substantial justice from being done.' Some might regard distinctions between Debtors as a 'technical consideration[ ]' that should not prevent 'substantial justice from being done,' and others might regard such distinctions as much more than merely technical. That kind of determination … should be made in factual context. For the same

[101] See ERCOT Mot. pp. 4, ¶ 7 & n. 15.

[102] See ERCOT Mot. Exhibit G (Initial Order (Endorsement)) pp. 20-21, ¶¶ 114-117.

reason, the Court does not now address the Creditors' Committee's contention that section 510(c) of the Code does not mandate that the creditors benefiting from subordination be creditors of the same legal entity as the creditors to be subordinated."); cf., Tronox Inc. v. Kerr McGee Corp. (In re Tronox Inc.), 503 B.R. 239, 268 (Bankr. S.D.N.Y. 2013) (fraudulent conveyances should be "examined for their substance, not their form"); In re Keller, 185 B.R. 796, 799 (9th Cir. BAP 1995) ("nature of a debtor's interest in property, although largely a question of fact, is based on the interpretation of legal principles").

77. It is with good reason that courts do not engage in entity-specific examinations at the Rule-12 stage. There are legal theories relevant to the avoidance claims that bear directly on the relationships among the entities that only can be evaluated with a complete record. For example, the transactions among the Market Participant-plaintiffs, the QSEs, and ERCOT, may be susceptible to doctrines like "collapsing" or indirect-transfer theories. See, e.g., U.S. Bank Nat. Assn' v. Verizon Communications Inc., 2012 WL 3100778, at *9 (N.D. Tex. July 31, 2012) (noting "a series of cases decided in the context of leverage buyouts, and other complicated transactions, in which courts 'collapsed' steps of the transaction to ensure that the goals off the fraudulent transfer statute were met") (citing Orr v. Kinderhill Corp., 991 F.2d 31, 35 (2d Cir. 1993), HBE Leasing Corp. v. Frank, 48 F.3d 623, 635 (2d Cir. 1995)); DZ Bank AG Deutsche Zentral-Genossenschaft Bank v. Meyer, 869 F.3d 839, 843, (9th Cir. 2017) (debtor that caused his wholly-owned subsidiary to transfer its assets made an actual fraudulent transfer even though the debtor himself never transferred his assets and there was no allegation of alter ego). While ERCOT would like a decision on these issues, it should await discovery.

3. CANADIAN COURT APPROVAL DID NOT FORECLOSE CLAIMS

78. ERCOT argues the Canadian Court's authorizing Just Energy to pay the Invoices precludes any of the Canadian law claims.[103] Even though this is a factual question inappropriate for Rule-12 disposition, it is worth noting ERCOT is wrong. The Canadian Court's Order was clear that ERCOT's actions were the subject of "considerable controversy" and "severe criticism," and Just Energy was "challenging" the "unprecedented fees that ERCOT and PUCT imposed."[104] And, ERCOT's attempt to argue the only rights Just Energy reserved were to challenge the payments through the PUCT administrative procedures take the reference to "another forum" out of context. The Court made the statement when noting that criticism had been leveled against the regulators, not in the context of Just Energy's disputes.[105] It also belies the Canadian Court's findings (and the express language in the Recognition Order) noting Just Energy was paying under protest—terms to which ERCOT consented after appearing at the March 9, 2021 first-day hearing.[106] ERCOT's "come-back clause"[107] cases are irrelevant because they concern parties

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[103] See ERCOT Mot. pp. 27-29, ¶¶ 52-54.

[104] See ERCOT Mot. Exhibit G (Initial Order (Endorsement), March 9, 2022) ¶ 18 ("ERCOT and PUCT have issued additional invoice of US $55 billion to wholesale energy purchasers as a result of the storm. Just Energy's share of that is approximately $250 million"); ¶ 20 ("There is considerable controversy surrounding those fees. PUCT and ERCOT have been subject to severe criticism for their actions. The chair of PUCT and several of ERCOT's board members have resigned. The board of ERCOT terminated the employment of its CEO"); ¶ 35 ("Just Energy is being forced to pay unprecedented fees that ERCOT and PUCT imposed, (ii) ***which fees Just Energy is challenging***, (iii) which fees are highly controversial, (iv) and which fees were imposed in circumstances where ERCOT's and PUCT's overall management of the crisis has led to the departure of their CEOs and the resignation of several of their board members"); ¶ 81 ("Just Energy's liquidity crisis arises because of controversial steps taken by PUCT and ERCOT which steps Just Energy is in the process of challenging").

[105] See ERCOT Mot. Exhibit G (Initial Order (Endorsement), March 9, 2022) ¶ 38 ("I underscore that in making these comments I am not intending to criticize the Texas regulators. Whether there is anything to be criticized in their conduct or whether their imposition of dramatically higher fees is appropriate will be for another day and another forum.").

[106] See Tecce Decl. Exhibit 7 (Recognition Order); Exhibit 16 (Tr., Hr'g, Mar. 9, 2021).

[107] See ERCOT Mot. p. 29 ¶ 54 (citing Muscletech Research & Development Inc., Re (2006), 19 C.B.R. (5th) 54 ¶ 5 (Ont. Sup. Ct. (Com. List), Collins & Aikman Automotive Canada Inc., Re (2007), 37 C.B.R. (5th) 282 ¶ 108 (Ont. Sup. Ct. (Com. List)).

seeking amendments to CCAA orders entered without sufficient notice. That is not what is at issue here. See Tecce Decl. Exhibit 2 (McElcheran Decl. ¶ 35).

4. COUNT 1: PREFERENCES (OBLIGATIONS)

79. Under section 95 of the Bankruptcy and Insolvency Act ("BIA"), as incorporated into the CCAA,[108] a transfer is subject to claw-back if the debtor: (i) was insolvent; (ii) transferred property … [or] made a payment; (iii) in favor of a creditor; and (iv) within three months before the date [of the bankruptcy filing]. BIA § 95. Under section 36.1(2)(a) of the CCAA, the "date of bankruptcy" is read as the date of the filing under the CCAA.[109]

80. ERCOT's argument that the Complaint does not allege an intent to prefer ERCOT over other creditors falls flat. The Complaint alleges ERCOT imposed obligations on, and received payments from Just Energy; those obligations and payments resulted in ERCOT—a general unsecured, pre-petition creditor with nothing but the power to put the company under duress—receiving payment in full; honoring ERCOT's obligations forced Just Energy to file for protection under the CCAA and impaired the claims of Just Energy's other unsecured creditors.[110]

81. While ERCOT argues its defenses of "necessary for business" and "ordinary course"[111] defeat the claim, those defenses are not properly submitted through a Rule-12 motion,

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[108] The CCAA incorporates by reference sections 95 and 96 of the BIA. See CCAA § 36.1(1) ("[S]ections 38 and 95 to 101 of the [BIA] apply, with any modifications that the circumstances require, in respect of a compromise or arrangement unless the compromise or arrangement provides otherwise." (available at Government of Canada, Justice Laws Website, https://laws-lois.justice.gc.ca/eng/acts/c-36/page-6.html#h-93349 (last visited Jan. 23, 2022)).

[109] The term "date of the initial bankruptcy event" includes "proceedings under the [CCAA]." BIA § 2. Additionally, the CCAA provides that the "date of bankruptcy" is to be read as the date on which proceedings are commenced under the CCAA. CCAA § 36.1. See also Tecce Decl. Exhibit 2 (McElcheran Decl. ¶ 39).

[110] See Tecce Decl. Exhibit 2 (McElcheran Decl. ¶ 41 (citing Houlden, Morawetz & Sarra at F201 ("[a] preference occurs when an insolvent debtor pays one or more creditors at the expense of other creditors.")).

[111] See ERCOT Mot. pp. 24-27, ¶¶ 45-51. The Cineplex case cited by ERCOT is inapplicable. ERCOT Mot. p. 26 ¶ 49. That case dealt with a complex commercial agreement that specifically defined what "ordinary course of business" meant for the parties. It is of no help in understanding the statutory wording of section 95. See Tecce Decl. Exhibit 2 (McElcheran Decl. ¶ 54).

particularly when the statute contains a presumption of the existence of a preference and prohibits taking evidence of "pressure" into account. See BIA § 95(2) ("Preference presumed. If the transfer … [or] obligation … has the effect of giving the creditor a preference, it is, in the absence of evidence to the contrary, presumed to have been made [or] incurred … with a view to giving the creditor the preference—even if it was made [or] incurred … under pressure—and evidence of pressure is not admissible to support the transaction." Just Energy notes separately that it never conceded that it pays ERCOT $9,000/MWh for energy in the "ordinary course of business"—for 88 consecutive hours by PUCT edict.

82. ERCOT argues the Invoiced Obligations cannot be avoided because the statute does not refer to being "rendered insolvent" and instead requires insolvency at the time of the preference, that reading is not supportable under the circumstances given the relationship between the Invoiced Obligations and Just Energy's insolvency.[112] The case of Re King Petroleum Ltd., adopted this approach in a similar context and concluded that insolvency can be proven by showing that the preferential payment itself caused the insolvency. It looked at the other indicia of insolvency, e.g., inability to pay debts as they became due. Tecce Decl. Exhibit 12 (Re King Petroleum Ltd., 1978 CarswellOnt. 197 (SC) ¶ 9 ("[T]he company was an 'insolvent person' within the meaning of [the BIA] because by the very payment-out of the money in question it placed itself in a position that it was unable to meet its obligations as they would generally become due.")); BIA § 2 ("insolvent person" is someone "(a) who is for any reason unable to meet his obligations as they generally become due, (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or (c) the aggregate of whose property is not, at

[112] See ERCOT Mot. pp. 23-24, ¶¶ 41-44.

a fair valuation, sufficient … to enable payment of all his obligations, due and accruing due")). See McElchran Decl. ¶¶ 48-50.

83. Even if the language of statute is given its plain meaning,[113] it is only necessary to satisfy ***one*** of the three branches of the BIA test for insolvency. And, while insolvency will not be presumed as a result of subsequent events, such as the filing under the CCAA, such events may be relevant evidence of insolvency. See, e.g., Tecce Decl. Exhibit 13 (Re 55432 BC Ltd., 2004 BCSC 1619 ¶ 9 ("Another relevant factor is the fact that within a few weeks … the Company had admitted its insolvency.")). Similarly, insolvency can be inferred from evidence at the time of bankruptcy (or CCAA filing) that the bankrupt/debtor must have been insolvent on the date of the preference. See, e.g., Tecce Decl. Exhibit 14 (Re Blenkarn Planer Ltd, 1958 CarswellBC 6 ¶ 6 ("[W]hile the court must be satisfied by more than a mere statement that the trustee believes the debtor is insolvent, or was insolvent at a certain time, I do not view the duty cast upon the trustee as one of requiring proof of a condition of insolvency beyond all reasonable doubt.")).

84. Finally, the standard of proof is not "proof beyond a reasonable doubt," but instead, is a civil standard, e.g., a balance of probabilities. Circumstantial evidence, direct evidence, or a combination of the two will suffice. See Tecce Decl. Exhibit 15 (Re Carnese Hardware, 2002 CarswellOnt 5862 ¶ 11 ("The Trustee must prove insolvency but it may be established by circumstantial or direct evidence or a combination of the two.") (citing Re Eland Distributors Ltd., [1998] BCJ No. 1761 (BCSC) at p. 3)).

[113] See Tecce Decl. Exhibit 17 (Urbancorp Toronto Management Inc. (Re), 2019 ONCA 757, 74 C.B.R. (6th) 23, at para. 40); see also McElcheran Decl. ¶ 45.

5. COUNT 2: PREFERENCES (TRANSFERS)

85. ERCOT does not raise any separate challenges to Count 2 apart from those raised with respect to Count 1.[114] ERCOT's challenges fail for the same reasons.

6. COUNT 3: TRANSFERS AT UNDERVALUE

86. Under section 96 of the BIA as incorporated into the CCAA, a conveyance "made with intent to defeat, hinder, delay or defraud creditors or others … [is] void as against such persons and their assigns." BIA § 96.

87. ERCOT argues incorrectly that an "intent to prefer" is not enough.[115] But, Canadian law supports the theory espoused here. See Tecce Decl. Exhibit 9 (Ernst & Young Inc. v. Aquino, 2022 ONCA 202, at para 47 (to allege a claim under section 96 of the BIA, the trustee "only ha[s] to demonstrate that one of the motives or intentions was to defraud, defeat, or delay a creditor.") (emphasis in original) (citing Juhasz Estate v. Cordiero, 2015 ONSC 1781, 24 C.B.R. (6th) 69, at para. 54)). ERCOT also argues a present creditor has to be identified.[116] That is not the law in Canadian any longer. See Tecce Decl. Exhibit 9 Ernst & Young Inc. v. Aquino, 2022 ONCA 202, at para 21 (interpreting the phrase "defraud, defeat or delay a creditor" as "denoting any such creditor, not a target creditor or one necessarily known"; finding "[i]t is reasonable to infer that any large enterprise in financial difficulty will have many such creditors").

88. Just Energy has stated a claim with respect to Count 3. McElchran explains a Canadian court reviewing Count 3 would go beyond the amounts transferred pre-petition and would also consider the elements of the preference claim, i.e., the Invoice Obligations, and collapse the Invoiced Obligations with all the challenged Transfers to find the entire $274 million is

[114] See ERCOT Mot. pp. 22-29, ¶¶ 40-54.

[115] See ERCOT Mot. pp. 30-31 ¶ 56.

[116] See ERCOT Mot. p. 30 ¶ 57.

susceptible to challenge as a transfer at undervalue. See Tecce Decl. Exhibit 2 (McElchran Decl. ¶ 61).

89. While ERCOT will likely contend McElchran's theory falls outside the confines of Count 3. Not so. Pleading transfer and preference claims is not as rigid as ERCOT suggests. To the extent elements of a preference claim support a claim for fraudulent transfer, the distinction is treated as a different legal theory—not a claim that needs to pled independently. See Grede v. MBF Clearing Corp., 2018 WL 306668, at *5 (N.D. Ill. Jan. 5, 2018) (assessing whether fraudulent transfer claim brought after statute of limitations expired "related back" to complaint; noting "vast weight of authority, both in this circuit and beyond …. [that has] permitted plaintiffs who originally alleged that a pre-bankruptcy transfer was preferential to later re-categorize that same transfer as a fraudulent conveyance" and observing ability of plaintiff to "to add fraudulent conveyance claims concerning different transfers than those sought to be avoided as preferential in the original complaint where the two sets of payments were plausibly alleged to "be part of a single pattern of conduct."); In re Life Fund 5.1 LLC, 2010 WL 2650024, at *2 n.2 (Bankr. N.D. Ill. June 30, 2010) (noting complaint may "allege both actual and constructive fraud in the same count … [and] multiple constructive fraud theories").

90. Finally, ERCOT argues Count 3 also should be dismissed in light of the House Bill 4492 signed into law on June 16, 2021 by Governor Abbot (the "**Securitization Bill**") which may provide for up to $2.1 billion of financing for certain uplift charges in excess of $9,000/MWh.[117] The Securitization Bill cannot make Just Energy whole with respect to the entirety of the relief requested in the Complaint—and is not a basis to dismiss Count 3. Nonetheless, the Complaint

[117] See ERCOT Mot. p. 20, ¶ 36 & n. 98. See H.R. 4492, 87th Leg., Reg. Sess. (Tex. 2021), https://capitol.texas.gov/tlodocs/87R/billtext/ pdf/HB04492F.pdf#navpanes=0; see also Tex. Util. Code § 39.651; Tex. Util. Code § 39.652(4).

makes very clear that "to the extent Plaintiffs ultimately receive funds under the Securitization Bill from the $2.1 billion securitization facility that duplicate amounts requested in this lawsuit, they will take the necessary steps to avoid a double recovery in accordance with the Securitization Bill, e.g., amending this complaint."[118]

7. COUNT 4: TRANSFERS ARE RECOVERABLE

91. Section 98 of the BIA authorizes recovery of property after the its transfer has been declared "void." Given the Invoiced Obligations and Transfers are void, section 98 provides a mechanism to recover the related property. See McElchran Decl. ¶¶ 68-70.

G. COUNT 5: TURNOVER CLAIM

92. ERCOT argues summarily that Count 5 should be dismissed because none of the Canadian claims stand, and it seeks the same relief as Count 6 (setoff).[119] It is true Just Energy seeks various forms of declaratory relief, e.g., a declaration that under Canadian law the Invoiced Obligations and Transfers are void—not just voidable,[120] and has stated a turnover claim for that reason. See Am. Nat'l Bank of Austin v. MortgageAmerica Corp. (In re MortgageAmerica Corp.), 714 F.2d 1266 (5th Cir. 1983) (fraudulent transfer is "void in the very limited sense that creditors may otherwise treat the transferred property as though the transfer had never taken place"); BIA § 95 (transfer or obligation giving creditor preference "***is void*** as against … the trustee") (emphasis added); BIA § 96 ("[a] court may declare that a transfer at undervalue ***is void***") (emphasis

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[118] See Compl. ¶¶ 49-50.

[119] See ERCOT Mot. p. 32, ¶ 59.

[120] See First. Am. Compl. ¶ 122 ("[T]he Transfers should be turned over in their full amount or their value should be provided because they relate to Invoice Obligations that (a) are void as preferences under section 95 of the BIA and (b) relate to Invoices that were illegally and erroneously calculated under the APA and the PURA and find no support in the ERCOT Protocols or the SFA"); ¶ 123 ("[T]he prepetition Transfers should be turned over because they (a) are void as preferences under section 95 of the BIA; (b) constitute void transfers at undervalue under section 96 of the BIA; (c) are recoverable under section 98 of the BIA; and (d) otherwise relate to Invoices that were illegally and erroneously calculated under the APA and the PURA and find no support in the ERCOT Protocols or the SFA.")).

added);[121] In re Abell, 549 B.R. 631, 654–55 (Bankr. D. Md. 2016) (denying motion to dismiss turnover claims that were not brought "as standalone claims, but instead as ancillary claims to the declaratory judgment claims …. [considering they] can be determined after the court resolves the declaratory judgment claims"); In re Reuter, 499 B.R. 655, 669 (Bankr. W.D. Mo. 2013) ("[A] turnover action may not be appropriate if the right is disputed, [but] that principle is not applicable here because the turnover claim is ancillary relief to the declaratory judgment claim").

93. But, the Complaint states a claim for turnover as a stand-alone count as well, regardless of the disposition of Counts 1-4. In the initial Complaint, the turnover count was a stand-alone claim without its own declaratory relief. In the First Amended Complaint, the turnover count is ancillary to the declaratory-relief counts—but it also stands on its own even if those claims are dismissed. Considered in isolation, Count 3 still asserts that to the extent Just Energy proves the PUCT Orders are invalid—or alternatively ERCOT should have taken the price down on February 18 after load shed ceased—then ERCOT is in "possession, custody, or control" of estate property of substantial value—no less than $274 million—that Just Energy can use in accordance with section 363 and that should be turned over.[122] See, e.g., 11 U.S.C. 1520(a)(2) ("section[] 363 … appl[ies] to transfer of an interest of the debtor in property that is within the territorial jurisdiction of the United States to the same extent that the sections would apply to property of the estate"); In re Irish Bank Resol. Corp. Ltd. (in Special Liquidation), 559 B.R. 627, 644 (Bankr. D. Del. 2016) ("[B]y referring to § 363, a section which authorizes the trustee to 'use, sell, or lease ... property of the estate,' the drafters of § 542(a) made it clear that the turnover obligation applies to

[121] Cf., In re Roussos, 541 B.R. 721, 737–38 (Bankr. C.D. Cal. 2015) ("Assuming that the allegations set forth in the Complaint are true, as the Court must in the context of a motion to dismiss, the Properties remain property of the estate"); In re Newton, 1996 WL 33401177, at *3 (Bankr. S.D. Ga. Dec. 19, 1996) ("Thus, its actions [in violation of the automatic stay] were void and pursuant to 11 U.S.C. Section 542(a), Defendant was required to the return the vehicle upon Debtor's demand.").

[122] Compl. ¶¶ 119-125.

property of the estate (the equivalent term of art used in Chapter 15 is the property of the debtor 'within the territorial jurisdiction of the United States'"); In re DBSI, Inc., 468 B.R. 663, 669 (Bankr. D. Del. 2011) (elements are "(1) the property is in the possession, custody or control of another entity; (2) the property can be used in accordance with the provisions of section 363; and (3) the property has more than inconsequential value to the debtor's estate").

94. To the extent the Court considers the turnover count "premature" as a stand-alone claim, Just Energy submits it should simply be abated. But, if the Court is inclined to dismiss, any such dismissal should be with express leave to replead consistent with the Court's earlier Order. See ECF No. 105 (Order on Turnover Claim) (dismissing turnover count without prejudice; "Just Energy Texas, L.P. is granted leave to replead its complaint to seek § 542 turnover if the turnover claim ripens"). But see In re Ortega T., 562 B.R. 538, 539, 542-543 (Bankr. S.D. Fla. 2016) (denying motion to dismiss allegedly "premature" turnover claim; observing "turnover can be sought in the same complaint that seeks to establish that the property subject of turnover is property of the estate"); In re Process America, Inc., 588 B.R. 82, 102 (Bankr. C.D. Cal. 2018) (denying motion to dismiss turnover claim that was "not appropriate until certain factual issues have been determined" when "the Court would like to see this issue resolved soon"); In re Thadikamalla, 481 B.R. 232, 241 (Bankr. N.D. Ga. 2012) (denying trustee's motion for summary judgment "as to the turnover claim"; acknowledging "the trustee can [still] seek judgment as to such claims by separate motion or at trial"); In re Maxim Truck Co., Inc., 415 B.R. 346, 357 (Bankr. S.D. Ind. 2009) (declining to dismiss turnover claim even though "remedy under § 542 for turnover … ripens upon a determination by the Court that the property in dispute is, in fact, property of the estate"). Cf., In re Am. Home Mortg. Hold., Inc., 388 B.R. 69, 94-95 (Bankr. D. Del. 2008) (focusing on debt being in dispute and not whether unripe turnover claim was ancillary to others).

H. COUNT 6: SETOFF CLAIM

95. The First Amended Complaint seeks declaratory relief that Just Energy is entitled to setoff, recoup, and "counterclaim" the amount of the Transfers against any obligations its owes or owed to ERCOT.[123] It states a valid claim because the Transfers are susceptible to avoidance and relate either to illegal PUCT Orders or Invoiced Obligations that themselves can be avoided.

96. The Court found a setoff claim had been pled adequately. It asked Just Energy to broaden its scope beyond seeking a "future" right and instead to clarify the right vested at the time of the disputed invoices and payments.[124] To that end, the setoff claim is not "derivative" of the others as ERCOT argues.

97. And, the Court's earlier finding that a setoff claim has been stated comports with the Bankruptcy Code and common law. Cf., 11 U.S.C. § 558 ("The estate shall have the benefit of any defense available to the debtor as against any entity other than the estate"); In re Rancher's Legacy Meat Co., 630 B.R. 308, 318 (Bankr. D. Minn. 2021) ("Section 558, which grants the bankruptcy estate the benefit of any defense available to the debtor against other entities, has also been routinely and consistently interpreted to grant a debtor the right to assert setoff as an affirmative defense or counterclaim in the context of its bankruptcy case.").

98. "[U]nder modern American practice, 'setoff' and 'recoupment' are simply names given to permissive and compulsory counterclaims, respectively, and debtors in bankruptcy are

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[123] See First Am. Compl. ¶ 127 ("The Transfers (a) relate to Invoice Obligations that (i) are subject to avoidance as preferences under section 95 of the BIA—making the Transfers recoverable in their full amount; or (ii) relate to Invoices that were illegally and erroneously calculated under the APA and the PURA and find no support in the ERCOT Protocols or the SFA."); ¶ 128 ("The prepetition Transfers (a) are subject to avoidance as preferences under section 95 of the BIA; (b) constitute transfers for undervalue under section 96 of the BIA; or (c) otherwise relate to Invoices that were illegally and erroneously calculated under the APA and the PURA and find no support in the ERCOT Protocols or the SFA."); ¶ 129 ("Plaintiffs currently have rights of setoff, recoupment, or counterclaim against ERCOT in an amount not less than approximately $274 million. Since making the Transfers, Plaintiffs have continued to participate in the ERCOT market and to incur obligations to ERCOT.").

[124] See Tecce Decl. Ex. Exhibit 3 (Tr., Hr'g, Feb. 2, 2022) at p. 78:2-79:1.

subject to no special substantive requirements in asserting counterclaims." In re ABC-NACO, Inc., 294 B.R. 832, 834-35, 838 (Bankr. N.D Ill. 2003) ("[S]etoff and recoupment are largely archaic terms, referring to old forms of pleading now treated simply as counterclaims."). The obligations need not be mutual for setoff to apply. Just Energy's setoff rights came into being when it paid the Invoiced amounts under protest. Those amounts can be set off against its obligations to ERCOT, regardless of when they were, or are incurred.[125]

99. While ERCOT seeks to dismiss Count 6 by arguing the SFA and Protocols waived Just Energy's setoff rights,[126] the Court already found the argument inappropriate at the Rule-12 stage.[127] In addition to being premature, the contention is unpersuasive because Just Energy did not waive its rights to setoff.

100. ***First,*** the provisions of the SFA to which ERCOT points do not apply to this lawsuit. They address material breaches under the SFA—as do the cases cited by ERCOT.[128] Just Energy is not brining a breach-of-contract claim. Instead, it alleges the PUCT Orders are illegal;

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[125] See In re ABC-NACO, Inc., 294 B.R. at 834-35 ("Recoupment exists in bankruptcy as a judge-made exception to the mutuality requirement, allowing a creditor to offset a post-petition obligation to the debtor with a claim that arose prepetition, as long as both involved the same transaction."). Cf., In re PSA, Inc., 277 B.R. 51, 53 (Bankr. D. Del. 2002) ("§ 558 preserves any right of setoff the debtors may have under state law, including the right to setoff debtor's prepetition claims against administrative expense claims."); Second Pa. Real Estate Corp. v. Papercraft Corp. (In re Papercraft Corp.), 127 B.R. 346, 350 (Bankr. W.D. Pa. 1991) ("[B]ecause § 558 preserves to the Debtor the defenses it would have had prepetition, the court must examine the transaction as though the bankruptcy had not been filed [thereby] eliminat[ing] the prepetition/postpetition distinction …."); In re 1701 Com., LLC, 2014 WL 4657314, at *13 (Bankr. N.D. Tex. Sept. 17, 2014) ("Section 558 "provides the trustee with every defensive weapon available to the debtor …. including …. the ability to set off against administrative expenses amounts owed to the debtor").

[126] See ERCOT Mot. p. 33, ¶¶ 60-61.

[127] See Tecce Decl. Exhibit 3 (Tr., Hr'g Feb. 2, 2022 at pp. 33:17-34:4).

[128] See, e.g., ERCOT Mot. Exhibit C (Fulcrum SFA) p. 7 § 8.B(2) ("Participant's Remedies for Default" in "the event of Default by ERCOT")). ERCOT Mot. p. 33 ¶¶ 60-61 & n. 155, n. 157 (citing James Construction Group, LLC v. Westlake Chem. Corp., 594 S.W.3d 722, 764 (Tex. Civ. App.—Houston 2019) (breach of contract lawsuit concerning waiver of consequential damages provision in construction contract as covenant not to sue); Bruce v. Jim Walters Homes, 943 S.W.2d 121, 122-123 (Tex. Civ. App.—San Antonio 1997) (Texas Residential Construction Liability Act did not abrogate/preempt common law fraud claims arising out of a construction contract and defective construction)).

that the SFA is relevant because it incorporates the Protocols; and the PUCT Orders find no support in the Protocols, e.g., load shed was not a scarcity-pricing trigger at the time. Actually, ERCOT made a similar argument in the Brazos Proceeding[129]

101. ***Second***, the SFA reserves Just Energy's rights to contest the PUCT Orders. Rights to contest orders from "Governmental Authorities" like the PUCT are protected specifically in § L of the SFA.[130]

102. ***Third,*** for a setoff right to be waived, the waiver must be express. There is no express waiver of a setoff right in the SFA—in § 8.B.(2)(a) or otherwise. See CSFB1998-C2 TX Facilities, LLC v. Rector, 2016 WL 631923, at *5 (N.D. Tex. Feb. 16, 2016) ("[T]o be effective, waiver [of a setoff right] must be 'clear and specific.'").

103. ***Fourth***, to the extent ERCOT maintains the SFA provision (§ 8.B.(2)(a)) is an "exclusive remedies" provision, it does not satisfy the specificity requirements under Texas law to limit Just Energy's remedies. It says "remedies shall be limited." But, Texas law requires either the contract say "***sole*** remedy" or "***exclusive*** remedy" specifically—in some combination—which is lacking in this section. And that appears intentional, because "sole remedy" appears in § 8.B.(2)(b)—on which ERCOT does not rely, i.e., "in the event of a material breach by ERCOT of any of its representations, warranties or covenants, Participant's ***sole remedy shall be*** …" (emphasis added). See, e.g., Vandergriff Chevrolet Co., Inc. v. Forum Bank, 613 S.W.2d 68, 70 (Tex. Civ. App.—Fort Worth 1981) ("The mere fact that the contract provides a party with a particular remedy does not, of course, necessarily mean that such remedy is exclusive. A

[129] See, e.g., Brazos Proceeding [ECF No. 280] (ERCOT Sum. J. Mot.) pp. 10-16, ¶¶ 23-37.

[130] See ERCOT Mot. Exhibit C (Fulcrum SFA) p. 12 § L ("Conflicts") ("Nothing in this agreement may be construed as a waiver of any right to question or contest any federal, state and local law, ordinance, rule, regulation, order of any Governmental Authority"); ERCOT Protocols 2-36 ("Governmental Authority" means "Any federal, state, local, or municipal body having jurisdiction over a Market Participant or ERCOT.") available at https://www.ercot.com/files/docs/2021/08/18/March_15__2021_Nodal_Protocols.pdf.

construction which renders the specified remedy exclusive should not be made unless the intent of the parties that it be exclusive is clearly indicated or declared"); Crow-Billingsley Stover Creek Ltd. v. SLC McKinney Partners, L.P., 2011 WL 3278520, at *2 (Tex. Civ. App.—Dallas Aug. 2, 2011) (contract said specifically "shall be entitled as its sole and exclusive remedy"); Gala Homes, Inc. v. Fritz, 393 S.W.2d 409, 411 (Tex. Civ. App.—Waco 1965) (language insufficient to bind contract party to accept liquidated damages).

104. These are just a few reasons why the setoff right has not been waived. It will be argued more fully at the appropriate time.

I. PERMISSIVE ABSTENTION DOES NOT APPLY IN CHAPTER 15 CASES

105. Congress expressly excluded permissive abstention from chapter 15 cases. By its plain terms, section 1334(c)(1) of title 28 says, in relevant part, that "***except with respect to a case under chapter 15*** … [the Court may abstain] in the interest of justice, or in the interest of comity with the State courts or respect for State law" from hearing a proceeding based on "related to" jurisdiction. 28 U.S.C. § 1334(c)(1) (emphasis added).

106. The Fifth Circuit interprets the chapter 15 carveout from section 1334(c)(1) to cover not just the chapter 15 case itself, but also cases that ***arise in*** or are ***related to*** the chapter 15 case. See Firefighters' Ret. Sys. v. Citco Grp. Ltd., 796 F.3d 520, 527 (5th Cir. 2015) (reading phrase to "except with respect to a case under chapter 15"—to "mean that both the Chapter 15 case itself and cases 'arising in or related to' Chapter 15 cases are excluded"); 8 Collier On Bankruptcy ¶ 1501.03[5], 1501-14 (16th ed.) (reading Firefighters to "bar[] abstention from any proceeding in an chapter 15 case").

107. The Fifth Circuit has explained that comity considerations relevant in the chapter-15 context support carving chapter 15 out of section-1334(c) abstention. As Firefighters recognized, Congress determined that only one court system—the federal system, not the state

system—is relevant when a U.S. court is acting in an ancillary capacity to a foreign proceeding. Section 1334(c)(1) centralizes the interaction of the Canadian Court supervising Just Energy's restructuring with the United States—be it recognizing orders or other procuring other ancillary relief—in a single court system, that is, the federal system and its bankruptcy courts. See Firefighters, 796 F.3d at 525-26 ("Chapter 15 … [aims to] increase legal certainty …. Central to chapter 15 is comity and the facilitation of cooperation between multiple nations. To effectuate these goals, the statutory provisions concentrate control of those questions in one court. The 2005 amendment to § 1334(c)(1), which limits a court's ability to permissively abstain from Chapter 15 cases, is consistent with Chapter 15's emphasis on concentrating the resolution of cases involving foreign bankruptcies in one court system.").

108. The legislative history to section 1509, which authorizes a foreign representative to access courts in the United States, confirms the Fifth Circuit's reading. See H. Rep. No. 109–31, Pt. 1, 109th Cong., 1st Sess. 100–111 (2005), 2005 U.S.C.C.A.N. 88, 173, 2005 WL 832198, at *110 ("[C]hapter 15 is intended to be the exclusive door to ancillary assistance to foreign proceedings. The goal is to concentrate control of these questions in one court. That goal is important in a federal system like that of the United States, with many different courts, state and federal, that may have pending actions involving the debtor or the debtor's property").

109. More generally, courts have held repeatedly that Congress legislated an abstention standard for bankruptcy cases in section 1334 that subsumes all common-law abstention doctrines, e.g., Burford and Colorado River. See, e.g., Personette v. Kennedy (In re Midgard Corp.), 204 B.R. 764, 774 (B.A.P. 10th Cir. 1997) ("Unlike general federal court practice where abstention is founded exclusively on common law, courts presiding over bankruptcy cases are required to apply the abstention standards set forth in section 1334(c)."); Cathedral of the Incarnation v. Garden City

Co. (In re Cathedral of the Incarnation), 99 F.3d 66, 68-69 (2d Cir. 1996) ("A judicially created rule of abstention must yield to a statutory duty to rule under Congress's grant of jurisdiction."); Baumgart v. Fairchild Aircraft Corp., 981 F.2d 824, 833 (5th Cir. 1993) ("[§ 1334] summarizes and incorporates federal non-bankruptcy court abstention doctrines") (citing In re Pan Am Corp., 950 F.2d 839, 845-46 (2d Cir. 1991)); Pan Am, 950 F.2d at 845-46 ("[§ 1334] was intended to codify judicial abstention doctrines;" citing legislative history for proposition that 1334 "codifies the present case law relating to the power of abstention in particular proceedings by the bankruptcy court"); Life Flight of Puerto Rico, 2009 WL 2885109, at *1 (court considered "motion for abstention [as] pursuant to 28 U.S.C.A. § 1334(c), and [would] not discuss [Burford] as [it is] inapplicable in the face of this statute"); In re Wright, 231 B.R. 597, 600 (Bankr. W.D. Tex. 1999) ("[§ 1334] imports the judicially-created doctrine of federal court abstention, specifically applying the doctrine to abstention matters"). These doctrines, therefore, only can apply through section 1334(c)(1), not of their own force. Critically, section 1334(c)(1) excludes chapter 15 cases.

110. In addition, traditional Burford abstention is a poor fit for a bankruptcy case in which the restructuring and estate administration are supervening federal interests that often will predominate over whatever state-law concerns abstention seeks to address. As the Western District observed in SuperVan, "Burford abstention is not at issue in the bankruptcy context because we do not here have the mere resort to a federal court in order to attack or evade a state regulatory scheme; rather, we have the incidental ability to employ the federal forum to do what otherwise would have to be done in the state's administrative scheme in service to the larger policies underlying the administration of the bankruptcy case." In re Super Van, Inc., 161 B.R. 184, 189-191 (Bankr. W.D. Tex. 1993). Similarly, this proceeding is, first and foremost, ancillary

to the Chapter 15 Cases and Canadian Proceedings. Just Energy did not file the suit to attack a regulatory regime.

111. ERCOT's position that Burford applies independently of section 1334(c)[131] would mean simply labeling an abstention request as a "Burford" or "Colorado River" request would render section 1334(c) inapplicable. Congress intended something different, that is, to include Burford and similar doctrines within section 1334(c)(1). The statute's incorporation of factors relevant under those doctrines, e.g., "comity with State courts" and "respect for State law," fortifies that view. That is what Burford addresses. See New Orleans Public Service, Inc. v. New Orleans, 491 U.S. 350, 361 (1987) (Burford abstention is relevant when "there are difficult questions of state law bearing on policy problems of substantial public import and federal review would "be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern").

J. EVEN IF PERMISSIVE ABSTENTION IS RELEVANT, IT IS INAPPROPRIATE

112. The standards for permissive abstention, under section 1334(c)(1) or Burford, cannot be met here. This proceeding examines two unique orders that were in effect for eighty-eight hours and have long-since expired. Nor is there is a pervasive regulatory scheme at issue because Texas deregulated the wholesale and retail energy markets. Assessing the legality of two orders of limited duration entered in a deregulated, market-based system is not tantamount to interfering with a state's independence in carrying out a significant and comprehensive policy.

113. Importantly, the issues of state law are not complex. The Court can capably determine whether the PUCT Orders complied with the APA and the PURA, including whether they were entered arbitrarily, on an uniformed basis, and without the prudence and procedural

[131] See ERCOT Mot. p. 54, ¶ 105.

safeguards the law requires. See Kirschner v. Grant Thornton LLP (In re Refco Sec. Litig.), 628 F. Supp. 2d 432, 446 (S.D.N.Y. 2008) ("[T]he state law claims are straightforward common-law claims that do not involve arcane or idiosyncratic provisions of state law that would warrant abstention based on comity concerns"). And, whatever conclusions the Court reaches are confined to this proceeding and will not bind state courts considering similar issues. See Hardy v. Johns-Manville Sales Corp., 681 F.2d 334, 337 (5th Cir. 1982) ("Texas strictly adheres to the doctrine of mutuality, i.e., neither party can use a prior judgment to estop another unless both parties were bound by the prior judgment.").

114. Here, Just Energy argues more narrowly that the payments are illegal and subject to avoidance. See, e.g., In re Luongo, 259 F.3d 323, 331-32 (5th Cir. 2001) (abstention inappropriate "where bankruptcy issues predominate and the Code's objectives will potentially be impaired" if court declines to exercise jurisdiction); In re Consol. Med. Transp., Inc., 300 B.R. 435, 445 (Bankr. N.D. Ill. 2003) ("This dispute is purely between two private parties to determine the responsibility between them for a future liability. Any effect on the administrative decisions is indirect and ancillary. Thus, this opinion is not a 'judicial review' of any administrative decision within the meaning of the statute"). Even the PUCT observed during the Brazos Proceeding, claims sounding in fraudulent transfer do not infringe on state sovereignty.[132]

115. With respect to Burford specifically, the case dealt with facts not present in this proceeding. In Burford, (a) there was a real risk of interference with a state government's independence in carrying out a significant state policy, see Burford, 319 U.S. 1098, 1099-1107 ("[I]t is in the public interest that federal courts of equity should exercise their discretionary power

[132] See Brazos Proceeding, Tr., Hearing, Oct. 18, 2021 56:7-10 ("[PUCT COUNSEL:] Fraudulent transfer issues and classification issues under the Bankruptcy Code … aren't the earth-shaking things that the State of Texas thinks challenges PURA like an attack on the February orders.").

with proper regard for the rightful independence of state governments in carrying out their domestic policy"); (b) the state's policy was comprehensive and had wide-ranging goals; and (c) the court found the state could act more expeditiously. See Burford v. Sun Oil, 319 U.S. 1098, 1099-1107 (1943) (examining "general regulatory scheme devised for the conservation of oil and gas" that was designed "[t]o prevent past, present and imminent evils in the production of natural gas;" "equitable discretion should be exercised to give the Texas courts the first opportunity;" "judicial review of the Commission's decisions in the state courts is expeditious and adequate").

116. What is more, Burford was uniquely concerned with the offensive use of federal equitable power to intervene in state-court actions. Here, the Canadian Proceedings and Chapter 15 Cases were not filed to interfere with a pending state-court action. See New Orleans, 491 U.S. at 362 ("[F]ederal adjudication of this sort of pre-emption claim would not disrupt the State's attempt to ensure uniformity in the treatment of an essentially local problem."); In re Super Van, Inc., 161 B.R. 184, 189 (Bankr. W.D. Tex. 1993) ("[W]e have here a debtor-in-possession employing one of the many statutory rights conferred as part and parcel of the bankruptcy process … The remedy is … expressly made available by Congress to bankruptcy estates to serve the larger function of centralizing the administration of the bankruptcy … in one forum. If this remedy 'interferes' with the state statutory scheme, it does so quite *intentionally*, i.e., it represents a studied decision on the party of *Congress* to *expressly* interfere with the state's' administrative tax adjudication schemes'); id. ("There is no 'interference' such as in Buford—unless one wants to argue that the sole purpose of filing the bankruptcy itself was to interfere with the state administrative process").

117. Indeed, the Supreme Court has since observed Buford does not apply automatically when a state regulatory regime is at issue. See New Orleans, 491 U.S. at 362 ("While Burford is

concerned with protecting complex state administrative process from undue federal interference, it does not require abstention whenever there exists such a process, or even in all cases where there is a 'potential for conflict' with state regulatory law or policy").

118. The First Circuit's factually-analogous Public Serv. Co. of New Hampshire case, which follows the New Orleans decision, provides instruction. New Hampshire's largest electric utility sued the New Hampshire Public Utility Commission to enjoin its plan for a "specific and detailed structure for utility deregulation and ratemaking" that would change the utility-rate regime from agency-set, cost-based rates to market-driven rates. Pub. Serv. Co. of New Hampshire v. Patch, 167 F.3d 15, 23-24 (1st Cir. 1998). Observing "Burford abstention is not required merely because the federal action may impair or even entirely enjoin the operation of the state scheme," the First Circuit concluded abstention was inappropriate because the court would not have to "look beyond four corners of the Final Plan to confirm it is intended to shift from cost-based regulation to market-driven rates for electricity." Id. (citing, inter alia, New Orleans, 491 U.S. at 361-64; Zablocki v. Redhail, 434 U.S. 374, 379 n. 5 (1978)). Cf., In re Patriot Nat'l, Inc., 623 B.R. 696, 714 (D. Del. 2020) (Burford abstention was inappropriate; "while the outcome of a claim by the Receiver may affect the amount of assets in the ... liquidation proceeding ... it will not directly impact the state's regulation of insurers or the state's ability to establish rules for the orderly rehabilitation or liquidation of insolvent insurers").

119. Finally, ERCOT's reliance on Wilson v. Valley Elec. Membership Corp., 8 F.3d 311, 315 (5th Cir. 1993) is misplaced. Wilson was decided more than 20 years before Congress enacted chapter 15 and amended section 1334(c)(1) to eliminate permissive intervention from chapter 15 cases. While ERCOT contends Wilson supports its argument that Burford abstention is independent of section 1334(c)(1), the decision does not contain any analysis to suggest it

intended to address this precise issue. Nor could it have been considered in a way that is relevant here given Wilson was not a chapter 15 case.

120. Separately, In Wilson, a pending, state-law proceeding predominated over the bankruptcy case. After plaintiffs brought the complaint in state court, the suit was removed to federal court by one of the defendants who was in bankruptcy.[133] But, the Fifth Circuit specifically observed the bankruptcy case was remote to the litigation: "[defendant-appellants do] not even argue that this suit will interfere with the reorganization that catapulted it into the federal system. Nor does the Bankruptcy Code represent a supervening federal interest."[134] And, the issue was not considered a "one-time affair arising from a single landmark Louisiana decision"—but instead one that would have a broader impact on Louisiana's regulatory scheme, noting "the history of rural cooperatives in the state reveals a long-running seesaw battle between non-regulation and regulation. The Cajun Electric decision is merely the latest salvo, Federal intervention this late in the day would be inappropriate." Id. Here, the proceeding focuses on the PUCT Orders and is such a "one-time affair" that would have led the Fifth Circuit to reach a different result in Wilson.

K. MANDATORY ABSTENTION IS NOT APPLICABLE

121. ERCOT argues for the first time that it can make a case for mandatory abstention under section 1334(c)(2). It cannot.

122. ***First,*** the motion is not timely. The case has been pending for nearly six months, and this is ERCOT's second motion to dismiss. It could have raised the argument in the First Motion but failed to do so. ERCOT's argument would have been the same then as it is now, i.e., the claims are non-core because they involve the assessment of the legality of the PUCT Orders

[133] See Wilson v. Valley Elec. Membership Corp., 1992 WL 233769, at *1 (E.D. La. Aug. 24, 1992).

[134] Wilson, 8 F.3d at 315.

under state law. The First Amended Complaint did not reset the clock—like the First Amended Complaint, the initial Complaint pled counts for setoff, turnover, avoidance under Canadian law. ERCOT could have raised its mandatory abstention argument in First Motion brough under Rule 12(b)(6). It did not, requiring ERCOT to satisfy one of the two exceptions enumerated in Rule 12(h)(2) and (3) to avoid waiver of the abstention argument. It cannot satisfy either one.[135]

123. ***Second***, the claims are statutorily "core" under 28 U.S.C. § 157(b)(2)(P)—especially—as well as §§ 157(b)(2)(A), 157(b)(2)(H), 157(b)(2)(E), 157(b)(2)(F), and 28 U.S.C. § 157(b)(2)(O)—alternatively, which makes mandatory abstention inapplicable. The relevance of section 1334(c)(2)'s mandatory abstention is particularly limited in the chapter 15 context by § 157(b)(2)(P). There is no need for a lead-in phrase in § 1334(c)(2) to exclude chapter 15 cases like that found in § 1334(c)(1) because § 157(b)(2)(P) covers every proceeding "arising under" a chapter 15 case, including all requests for relief covered by the provisions of chapter 15. That includes the present claims, which fall within sections 1507 and 1521. And, that result is consistent with pervasive Congressional intent that foreign courts only interact with a centralized court system in the United States through chapter 15.

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[135] See FIMBANK PLC v. Discover Inv. Corp., 2020 WL 3519159, at *5 (S.D. Tex. May 21, 2020), report and recommendation adopted, 2020 WL 3504179 (S.D. Tex. June 29, 2020) ("When a party makes a motion under Rule 12, it must not make another motion under the same rule raising a defense or objection that was available at the time of their first motion;" arguments relating to lack of personal jurisdiction and insufficient service were waived because not raised in first motion); Fed. R. Civ. P. 12(g)(2) ("Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule ***must not make*** another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.") (emphasis added); Fed. R. Civ. P. 12(h)(2) (party can raise "[f]ailure to state a claim upon which relief can be granted ... or to state a legal defense to a claim .... (A) in any pleading allowed or ordered under Rule 7(a); (B) by a motion under Rule 12(c); or (C) at trial."); Gonzalez v. Trevino, 2021 WL 7184963, at *3 (S.D. Tex. Nov. 12, 2021) ("The Court recognizes that, since the defense of failure to state a claim is never waived and will eventually require adjudication, many courts have allowed such a defense to be asserted in a successive motion to dismiss."). But, arguing for "mandatory abstention" is not arguing "failure to state a claim" or a challenge to "subject matter jurisdiction." See, e.g., Matter of PFO Glob., Inc., 26 F.4th 245, 254 (5th Cir. 2022) ("A motion explicitly challenging a bankruptcy court's jurisdiction does not implicitly constitute a motion for abstention"); Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 712 (1996) ("The District Court's [Burford] abstention-based remand order . . . is not based on lack of subject matter jurisdiction.").

124. ***Third***, section 1334(c)(2) requires "a proceeding based upon a State law claim or State law cause of action." The claims in this proceeding are not State law claims or causes of action. They arise under Canadian law or the Bankruptcy Code (§ 542). And, setoff is not a purely "State law" claim; it is a common-law doctrine preserved specifically in section 558 for assertion in the bankruptcy context. See, e.g., 8 Collier On Bankruptcy ¶ 3.05[1], 3-74 (16th ed.) ("[S]ection 1332(c)(2) … is applicable only to proceedings based upon state law claims or cause of action"). And, the single case ERCOT relies on is distinguishable.[136]

125. ***Fourth,*** there is no pending state-court proceeding to which the Court can defer. ERCOT tries to argue the administrative proceedings with the PUCT are tantamount to a pending state court proceeding for 1334(c)(2) purposes.[137] But it cites no supporting authority for that proposition. It is not the law. See, e.g., Houston Regional Sports Network, 514 B.R. at 214 (state court action must be "commenced prior to the bankruptcy proceedings …. Because the state-court action was filed post-petition, mandatory abstention is not warranted"); In re Denton County Elec. Coop., 281 B.R. 876, 881 (Bankr. N.D. Tex. 2002) ("Because there is currently no pending state court action, it is clear that mandatory abstention … does not apply"); Matter of Rustic Mfg., Inc., 55 B.R. 25, 28 (Bankr. W.D. Wis. 1985) ("no action seeking to enjoin Marine from suing Rustic's guarantors has been commenced in state court."); Matter of Horace, 54 B.R. 671, 673 (Bankr. D.N.J. 1985) (claim should be capable of "be[ing] timely adjudicated in a state court").

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[136] See ERCOT Mot. p. 38, ¶ 71 & n. 178 (citing Principal Growth Strategies v. AGH Parent LLC, 615 B.R. 529 (Bankr. D. Del. 2020)). In Principal Growth, the foreign representative brought the claims in state court—not in its own chapter 15 court—and the posture of the decision is granting the foreign representative's motion to remand after removal. And the majority of the claims were based on state law, i.e., "[t]he SHIP Defendants fairly characterize this proceeding as 'based on foreign law.' After all, Counts IV, V, and VI of the Complaint plead claims based on Cayman Islands law. But for the same reason this proceeding can be characterized as 'based on foreign law,' it is also fairly characterized as 'based on state law' (or 'based on a state law claim'), since Counts I, II, III, VII, and VIII of the Complaint plead claims based on Delaware law." Id. at 535.

[137] ERCOT Mot. pp 40-41, ¶¶ 77-78.

126. ***Fifth,*** ERCOT could not show timely adjudication in state court is possible given the time constraints Just Energy is operating under given its need to complete its restructuring under the CCAA as soon as it can do so. See, e.g., In re AOG Entertainment, Inc., 569 B.R. 563, 579 (Bankr. S.D.N.Y. 2017) ("[A]n action might be 'timely adjudicated' in state court, despite some substantial delay, where the delay has little or no effect on the bankruptcy estate which creates the federal interest. Conversely, even a relatively brief delay might make state court adjudication untimely where the state action substantially effects the bankruptcy estate"); WRT Creditors Liquidation Trust v. C.I.B.C. Oppenheimer Corp., 75 F. Supp. 2d 596, 605-06 (S.D. Tex. 1999) ("A naked assertion that the matter can be timely adjudicated in the state court without more is insufficient to satisfy the requirement.").

127. A state court cannot afford timely relief. The Luminant appeal from the PUCT decision to the Texas Court of Appeals in Austin was filed on March 2, 2021, and oral argument is set for April 27, 2022—more than one year later. See Luminant v. Public Utility Corporation of Texas, 03-21-00098-CV (Tex. App.—Austin 2021).

128. Separately, reports from the Texas Office of Court Administration's Court Activity Reporting and Directory System show that the district courts in Harris and Travis Counties do not clear cases as quickly as Houston Bankruptcy Court. While Harris and Travis County district courts cleared 82.5% and 72.4% of their cases in 2020 and 85.7% and 82.6% of their cases in 2021, respectively, only 22% and 19% of cases were disposed of within 6-12 months in 2021, respectively. And their backlog indexes—which correlate the ratio of pending cases against disposed cases in a given year—were 1.3 and 3.4 for 2020 and 1.3 and 3.6 for 2021, respectively.[138]

[138] Attached to Tecce Decl. as Exhibit 18 are the District Court Performance Measures and Age of Cases Disposed for 2020 and 2021. These reports can be generated at https://card.txcourts.gov/ReportSelection.aspx.

129. The Houston Bankruptcy Court had a clearance rate of 116.4% in 2020 and 152.9% in 2021 for "Bankruptcy cases" (which includes Chapter 15 cases).[139] While the "adversary proceeding" clearance rates are much lower, Just Energy submits they are not the most relevant predictor under the circumstances. Here, Just Energy has tried to move this proceeding apace given its importance to the Canadian restructuring. For that reason, the "Bankruptcy cases" numbers are more germane. By analogy, the Brazos Proceeding is technically an "adversary proceeding," but it moved forward with incredible speed given the importance to the underlying chapter 11 cases. The time from complaint to trial in Brazos was approximately seven months.[140]

L. ERCOT IS NOT IMMUNE FROM SUIT

130. ERCOT cannot invoke sovereign immunity. This proceeding involves the exercise of the Court's in rem jurisdiction over Just Energy's property. And, separately, the requested relief is "ancillary to" and "effectuates" that in rem jurisdiction. Under the circumstances, "States"—if ERCOT can be called that—have waived their sovereign immunity.

131. At least two Supreme Court decisions compel this conclusion. In Tennessee Student Assistance Corp. v. Hood, 541 U.S. 440 (2004), the Supreme Court found a bankruptcy court's exercise of in rem jurisdiction to discharge a student-loan debt did not implicate state sovereignty or qualify as "a suit against a State for purposes of the Eleventh Amendment." 541 U.S. at 448 (noting "[a] bankruptcy court's in rem jurisdiction permits it to determine all claims that anyone, whether named in the action or not, has to the property or thing in question. The

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[139] Attached to Tecce Decl. Exhibit 19 are Table F. U.S. Bankruptcy Courts—Bankruptcy Cases Commenced, Terminated, and Pending During the 12-Month Periods Ending December 31, 2020 and 2021 and Table F-8. U.S. Bankruptcy Courts—Adversary Proceedings Commenced, Terminated, and Pending Under the Bankruptcy Code During the 12-Month Periods Ending December 31, 2020 and 2021 (available at https://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables). Note that Table F and Table F-8 do not directly provide a clearance rate, but it can be calculated by dividing the number of cases terminated over the number of cases filed in a given year.

[140] See Tecce Decl. Exhibit 20 (Brazos Proceeding Scheduling Order [ECF No. 13])).

proceeding is one against the world."). In Central Virginia Community College v. Katz, 546 U.S. 356 (2006), the Supreme Court observed that by ratifying the Bankruptcy Clause at the Constitutional Convention, states waived their sovereign immunity "in proceedings necessary to effectuate the in rem jurisdiction of the bankruptcy court." 546 U.S. at 378. Those proceedings include actions "to avoid preferential transfers and to recover the transferred property," regardless of whether such actions "are themselves properly characterized as in rem." Id. at 372-73 (explaining "[i]nsofar as orders ancillary to the bankruptcy courts' in rem jurisdiction, like orders directing turnover of preferential transfers, implicate States' sovereign immunity from suit, the States agreed in the plan of the [Constitutional] Convention not to assert that immunity."); see also id. at 369-70 (noting bankruptcy court's exercise of in rem jurisdiction "does not, in the usual case, interfere with state sovereignty even when States' interests are affected").

132. Under Hood and Katz, the relevant question when a State asserts sovereign immunity in a bankruptcy court is whether the proceeding either involves the exercise of in rem jurisdiction over the debtor's property, or is "ancillary to" or otherwise "effectuates" the bankruptcy court's in rem jurisdiction, such as proceedings involving claims "to avoid preferential transfers and to recover the transferred property." Katz, 546 U.S. at 372. Under that standard, sovereign immunity may not be invoked in this proceeding.

133. The Court exercises in rem jurisdiction over the debtor's property within the territorial jurisdiction of the United States in this proceeding. ERCOT is not immune from a lawsuit like this one seeking to avoid obligations and transfers, compel turnover, and declare setoff. See Katz, 546 U.S. at 371-72 (reserving question whether actions "to avoid preferential transfers or to recover the transferred property" are "properly characterized as in rem" and holding that they are at minimum ancillary); In re ATP Oil & Gas Corp., 553 B.R. 577, 581 (Bankr. S.D. Tex. 2016)

("Preferential transfer actions both stem from the bankruptcy itself and are decided primarily pursuant to in rem jurisdiction"); In re Univ. of Wisconsin Oshkosh Found., Inc., 586 B.R. 458, 465 (Bankr. E.D. Wis. 2018) ("A turnover action is a proceeding to collect property of the estate … that qualifies as the type of in rem proceeding contemplated by … Katz because it involves the bankruptcy court's jurisdiction over property of the estate and the collection of that property for distribution among creditors."); In re Auto. Pros., Inc., 370 B.R. 161, 182-83 (Bankr. N.D. Ill. 2007) ("Under [Katz], the states have unquestionably waived their sovereign immunity with respect to any issue relating to turnover of property of the estate."); In re Kids World of Am., Inc., 349 B.R. 152, 166 (Bankr. W.D. Ky. 2006) (same); In re Ravenwood Healthcare, Inc., No. 02 5 9516 JS, 2006 WL 4481985, at *1 (Bankr. D. Md. Oct. 12, 2006) (rejecting Maryland's sovereign immunity argument because suit was "premised upon a traditional bankruptcy cause of action, to wit, the turnover and recovery of property of the debtor's bankruptcy estate"); Vt. Dept. of Taxes v. Quality Stores, Inc. (In re Quality Stores, Inc.), 354 B.R. 840 (W.D. Mich. 2006) (Vermont not immune from § 542 turnover action).

134. That conclusion is particularly justifiable because Just Energy does not seek affirmative monetary damages. It simply wants its property (or its value) returned. See Hood, 124 S. Ct. at 1912 ("[T]he bankruptcy court's jurisdiction is premised on the res, not on the persona; that States were granted the presumptive benefit of nondischargeability does not alter the court's underlying authority. A debtor does not seek monetary damages or affirmative relief from a State by seeking a discharge of a debt."); In re Apex Long Term Acute Care—Katy L.P., 465 B.R. 452, 464 (Bankr. S.D. Tex. 2011) ("Preference actions therefore may be resolved through the exercise of a bankruptcy court's in rem jurisdiction over the bankruptcy estate, and preferences may be recovered through orders ancillary to the court's in rem jurisdiction …. Because the recovery of

preferences does not offset, but rather increases, a defendant's claim against the estate, there is no fundamental reason why a preference action in which the estate seeks to recover an amount greater than the defendant's claim against the estate should be treated differently.").

135. ERCOT's argument that Hood and Katz do not apply in a chapter 15 case rests on the false premise that the Court does not exercise jurisdiction over "all" of the debtor's property and does not distribute property or discharge liabilities.[141] That is neither a supportable limitation to the reading of Katz and Hood nor correct, e.g., section 1521(b) contemplates a foreign representative might be entrusted with "the distribution of all or part of the debtor's assets located in the United States." The Order appointing the Foreign Representative specifically made this finding as well.[142] The Court unquestionably exercises in rem jurisdiction over the debtor's property within the territorial jurisdiction of the United States, and that exercise of authority is ancillary to a foreign court's distribution of assets.

136. Nor does Hood contain any language indicating its holding is limited to cases where liabilities are discharged, as ERCOT contends. In a post-Katz discharge case, the Fifth Circuit decision did not read Hood or Katz to be so limited. See, e.g., In re Soileau, 488 F.3d 302, 307 (5th Cir. 2007) (examining whether bail-bond debt to state is dischargeable; "[w]hatever uncertainty there may be as to the outer limits of the holdings of Katz and Hood, at the very least they together establish beyond cavil that an in rem bankruptcy proceeding brought merely to obtain the discharge a debt or debts by determining the rights of various creditors in a debtor's estate … in no way infringes the sovereignty of a state as a creditor."). Also unpersuasive is ERCOT's contention that States retain immunity in a chapter 15 case because similar cases did not exist at

[141] ERCOT Mot. pp. 48-49, ¶¶ 92-93.

[142] See [ECF No. 82] p. 8 ¶ 25a ("[T]he Foreign Representative ... is entrusted with the administration or realization of all or part of the Debtor's assets located in the United States.").

the time of the Founding. No case has found the States' waiver of immunity extends only to the precise bankruptcy procedures in place at the Founding.

137. Separately, section 106 of the Bankruptcy Code abrogates sovereign immunity with respect to certain sections of the Bankruptcy Code, including section 542, and the exercise of setoff rights. ERCOT argues In re Fernandez, 123 F.3d 241, 242 (5th Cir. 1997), declared section 106(a) unconstitutional. Critically, Fernandez pre-dates Katz, to which ERCOT observes "[w]hether Fernadez was abrogated by the Supreme Court's decision in Katz—especially in a chapter 15 case—is a question that should be decided by the Fifth Circuit, not this Court."[143] And in Soileau, the Fifth Circuit stated Hood did not reach "the broader question of whether 11 U.S.C. § 106(a) is a valid abrogation of sovereign immunity" but notably said nothing about Fernandez. 488 F.3d at 306.

138. Regardless, the argument that section 106 does not apply because ERCOT did not file a proof of claim is not compelling considering that it laid claim to Just Energy's assets in the same way a creditor who filed a proof of claim intends. And, section 106(c), relating to setoff, contains no proof-of-claim requirement for the immunity waiver with respect to Just Energy's setoff claim. See 11 U.S.C. § 106(c) ("Notwithstanding any assertion of sovereign immunity by a governmental unit, there shall be offset against a claim or interest of a governmental unit against such governmental unit that is property of the estate"); In re Orion Refining Corp., 2004 WL 3244578, at *3-4 (Bankr. M.D. La. May 28, 2004) ("[E]ven if LDR's filing of its proof of claim in the Orion case did not waive sovereign immunity for all purposes under § 106(b), LDR has waived sovereign immunity pursuant to § 106(c) for the purposes of establishing Orion's potential setoff;" observing "[u]nder § 106(c), the debts or credits to be offset need not have arisen from

[143] ERCOT Mot. p. 50, ¶¶ 95-96 & n. 249.

the same transaction or occurrence as the governmental unit's claim"); In re Microage Corp., 288 B.R. 842, 852-53 (Bankr. D. Az. 2003) (finding "subsection (c) is [not] simply a procedural guarantee that a debtor may receive a setoff against a State, as determined by some other court or tribunal …. [I]t affirmatively effectuates a waiver of State sovereign immunity to the extent of the setoff amount, thereby granting this Court authority to litigate the validity and amount of any such setoff against the State itself").

139. Alternatively, ERCOT waived whatever immunity defense it had by voluntarily appearing and seeking relief in the Chapter 15 Cases. It entered a notice of appearance;[144] appeared at the first-day hearing in furtherance of this Court's recognizing the Canadian Court order authorizing payment; accepted payment from a chapter-15 debtor under the Bankruptcy Court's supervision; and accepted the Recognition Order which had an express provision reserving Just Energy's rights to challenge the payments without limiting that challenge to administrative proceedings.

140. These contacts are sufficient to constitute waiver. See State Office of Risk Mgmt. v. Tex. Dep't of Public Safety, 733 F.3d 550, 553-554 (5th Cir. 2013) (immunity waiver presents federal question; "both the Supreme Court and this court have recognized the 'voluntary invocation principle' [that finds waiver of immunity from suit] …. through invocation of federal court jurisdiction by an attorney authorized to represent the state in the pertinent litigation;" noting principle …. For over a century, this principle has been applied to cases like the present one, in which a state intervenes in a case asserting a claim to a fund …. [and thereby] voluntarily invoked the jurisdiction of the federal courts … [and] waived its sovereign immunity from suit"). Cf.,

[144] See Tecce Decl. Exhibit 21 (ECF No. 30 (Notice Of Appearance And Request For Service Of All Notices, Pleadings, Orders And Other Papers, dated March 9, 2021 (filed by law firm of Munsch Hardt Kopf & Harr, P.C. "on behalf of [ERCOT], as a creditor and party-in-interest")).

SIPA v. Madoff, 460 B.R. 106, 119 (Bankr. S.D.N.Y 2011) ("[T]here are also participatory factors indicating Defendants consent to personal jurisdiction in this adversary proceeding. In Deak & Co., Inc., 63 B.R. 422, 431 (Bankr. S.D.N.Y. 1986), this Court found that the defendants effectively consented to personal jurisdiction by purposefully availing themselves of the protections afforded by United States bankruptcy law. In Deak, as here, defendants participated in the bankruptcy case by filing a notice of appearance and attending court hearings through their New York counsel"); In re Paques, 277 B.R. 615, 636 (Bankr. E.D. Pa. 2000) (noting creditors' attorney entered appearance and Deak "suggest this entry of appearance may be sufficient to justify the assertion of personal jurisdiction"); In re Deak & Co. Inc., 63 B.R. 422, 431 (Bankr. S.D.N.Y. 1986) ("An appearance is ordinarily an overt act by which a party comes into court and submits himself to its jurisdiction .... It is an affirmative act requiring knowledge of the suit and an intention to appear …. By filing his appearance, he has rendered himself available as a party in interest to the subsequent issue determination of his asserted interest in the FOCO shares owned by Deak.").

M. ERCOT IS NOT A STATE ACTOR

141. In any case, even if a State could invoke sovereign immunity against Just Energy's claims, ERCOT would not be immune because ERCOT is not an arm of the state of Texas. It is a private, membership-based § 501(c)(4) nonprofit corporation. And, ERCOT's incorporation ***preceded*** its designation as the PUCT's independent system operator charged with ensuring the reliability and adequacy of the electric grid.

142. In determining sovereign immunity, "a factor that subsumes all others is the treatment of the entity in state courts." Jacintoport Corp. v. Greater Baton Rouge Port Comm'n, 762 F.2d 435, 438 (5th Cir. 1985) (internal quotation marks and citation omitted). The Fifth District Court of Appeals in Dallas sitting en banc just confirmed in a Winter-Storm-Uri lawsuit that "ERCOT is not entitled to sovereign immunity and the Legislature did not grant exclusive

jurisdiction over Panda's claims to the PUC." Panda Power Generation Infrastructure Fund, LLC v. Elec. Reliability Council of Texas, Inc., No. 05-18-00611-CV, 2022 WL 537708, at *1 (Tex. App.—Dallas Feb. 23, 2022).

143. ERCOT's reliance on Elec. Reliability Council of Texas, Inc. v. CPS Energy, in which the Fourth District Court of Appeals in San Antonio concluded that ERCOT is a "governmental unit" for the narrow purpose of allowing its interlocutory appeal of the denial of its plea to the jurisdiction, does not dictate a different result. Elec. Reliability Council of Texas, Inc. v. CPS Energy, 2021 WL 5879183, at *6 (Tex. App.—San Antonio Dec. 13, 2021, pet. filed). That limited holding does not square with Panda, is not binding on this Court, has been appealed, and concedes "[t]he Texas Supreme Court has not yet determined whether ERCOT is a governmental unit under this definition" and that "two [ ] sister courts have held ERCOT does not meet this definition and therefore does not qualify as a governmental unit." Id. at *3. In fact, the Texas Supreme Court has never held that ERCOT is a "governmental unit" for the purposes of interlocutory appeals let alone an arm of the state that enjoys sovereign immunity.

144. Under the basic standard articulated by the Fifth Circuit, ERCOT is not an arm of the state of Texas. "When confronted with a governmental entity asserting Eleventh Amendment immunity as an arm of the state," courts apply the Clark factors to decide whether the entity should enjoy immunity: (1) whether the state statutes and case law view the entity as an arm of the state; (2) the source of the entity's funding; (3) the entity's degree of local autonomy; (4) whether the entity is concerned primarily with local as opposed to statewide problems; (5) whether the entity has the authority to sue and be sued in its own name; and (6) whether the entity has the right to hold and use property. Williams v. Dallas Area Rapid Transit, 242 F.3d 315, 318-19 (5th Cir. 2001) (citing Clark v. Tarrant County, Tex., 798 F.2d 736 (5th Cir. 1986)). While no single factor

is dispositive, the second factor—the source of the entity's funding—is the most important. Id. at 319.

145. Most importantly, ERCOT does not receive any funding from the State. Panda, 2022 WL 537708, at *10-11; see also HWY 3 MHP, LLC v. Elec. Reliability Council of Texas, 462 S.W.3d 204, 210 (Tex. App.—Austin 2015, no pet.) ("ERCOT is not statutorily entitled to any services or benefits that a typical governmental unit might receive."). Instead, among other fees, ERCOT sets and charges "wholesale buyers and sellers a system administration fee" to cover its expenses akin to private electric utilities. Tex. Util. Code § 39.151(e); see also 16 Tex. Admin. Code § 25.363(b) (ERCOT's "accounts shall show all revenues resulting from the various fees charged by ERCOT"). ERCOT can also obtain private debt financing with the PUCT's approval. Tex. Util. Code § 39.151(d-2). A judgment against ERCOT would be satisfied out of the fees it collects and not out of the State's treasury. Thus, the most important Clark factor weighs against ERCOT's assertion of sovereign immunity. See Williams, 242 F.3d at 320-21 (holding that Dallas Area Rapid Transit was not an arm of the state because it "receives no appropriated funds from the state of Texas" and "a judgment against it would [not] be satisfied out of the state treasury").

146. Texas statutes do not view ERCOT as an arm of the state. The Texas Legislature's designation of ERCOT as an "independent organization" rather than as a state agency is powerful evidence that it did not intend ERCOT to be an arm of the state. See Tex. Util. Code § 39.151(a)-(c). The PURA implicitly recognizes that ERCOT is not an arm of the state because it specifically imposes certain open meeting requirements on ERCOT that would be redundant of obligations imposed by the Texas Open Meetings Act. See Tex. Util. Code § 39.1511; Tex. Gov't Code §§ 551.001- .146. And, Panda just observed that "ERCOT is a purely private entity that is not created

or chartered by the government, maintains some autonomy, is operated and overseen by its CEO and board of directors, and does not receive any tax revenue." Panda, 2022 WL 537708, at *8.

147. ERCOT has local autonomy as well. See Pendergrass v. Greater New Orleans Expressway Comm'n, 144 F.3d 342, 442 (5th Cir. 1998) ("Local autonomy is…a measure of the closeness of the connections between the entity and the State" and requires analysis of the entity's "independent management authority." (citation omitted)). While the PUCT may ***decertify*** ERCOT, it cannot ***dissolve*** ERCOT because ERCOT was neither created nor chartered by the State. Cf., Armstrong v. Cumberland Acad., 549 F. Supp. 3d 543, 547 (E.D. Tex. 2021) (finding that an open-enrollment charter school was an arm of the state because, among other things, the state education commissioner can revoke its charter "for any of several reasons, including financial mismanagement"). And, while ERCOT "may be confined by the PUC's influence, neither the PUC nor the Legislature controls ERCOT's day-to-day operations" because ERCOT, like any other private organization, is "primarily operated" by its CEO and board. Panda, 2022 WL 537708, at *9; see also HWY 3 MHP, 462 S.W.3d at 210-11 (noting that even though the PUCT has "oversight over ERCOT's budget, this type of regulatory control is not dissimilar from the financial oversight that the legislature has exerted over utilities that are not considered governmental units"). The PUCT chairperson is a member of ERCOT's board but is merely an ex officio nonvoting member. Tex. Util. Code § 39.151(g-1). And, while the PURA imposes some requirements on ERCOT, the statute "does not dictate how ERCOT performs [its] functions; the method of performance is wholly within ERCOT's discretion." Panda, 2022 WL 537708, at *9.

148. Furthermore, the ERCOT electric grid does not service ***all*** of Texas. ERCOT's grid services 213 of 254 Texas counties, not including El Paso, the upper Panhandle, and parts of east

Texas.[145] Thus, the fourth Clark factor weighs against ERCOT's assertion of sovereign immunity as well. See Williams, 242 F.3d at 321-22 (holding that Dallas Area Rapid Transit was not an arm of the state because it "plainly acts for the benefit of the residents of Dallas, Fort Worth, and the surrounding communities, as distinguished from that of the state as a whole").

149. Finally, the PUCT's agency rules confirm that ERCOT has the authority to sue and be sued in its own name. See 16 Tex. Admin. Code § 25.200(d) ("ERCOT shall not be liable for its ordinary negligence but may be liable for its gross negligence or intentional misconduct" when exercising its power to "cause the interruption of transmission service for the purpose of maintaining ERCOT system stability and safety."); id. § 25.361(c) ("ERCOT shall not be liable in damages for any act or event that is beyond its control and which could not be reasonably anticipated and prevented through the use of reasonable measures[.]"); id. § 25.362(j) (noting the actions that the PUCT can take for ERCOT's noncompliance with the PURA or a PUCT order which do not "preclude any form of civil relief that may be available under federal or state law"). If ERCOT were an arm of the state, these liability provisions would be superfluous. See Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 668-69 (2007) (invoking the canon against surplusage in interpretation of an agency rule).

III. CONCLUSION

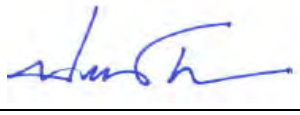
For the foregoing reasons, Just Energy respectfully request that the Court sustain the Objection, deny the ERCOT Motion, and grant such further and different relief as the Court deems appropriate.

[145] ERCOT, https://www.ercot.com/news/mediakit/maps (last visited Mar. 16, 2022).

Dated: March 24, 2022

Respectfully submitted,

QUINN EMANUEL URQUHART & SULLIVAN, LLP

/s/ 

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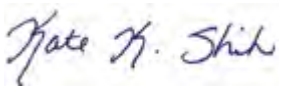
/s/ 

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Counsel to Just Energy

TAB I

This is Exhibit “I”

referred to in the Affidavit of **JAMES C. TECCE**

Sworn before me this 14th day of April, 2022

C. Mantara

A Commissioner for taking affidavits

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re: JUST ENERGY GROUP INC., et al., Debtors in a Foreign Proceeding.[1]	Chapter 15 Case No. 21-30823 (MI)
JUST ENERGY TEXAS LP, FULCRUM RETAIL ENERGY LLC, HUDSON ENERGY SERVICES LLC, and JUST ENERGY GROUP, INC., Plaintiffs, v. ELECTRIC RELIABILITY COUNCIL OF TEXAS, INC., Defendants.	Adv. Pro. 21-04399 (DRJ)

DECLARATION OF PAUL BISHOP

I, PAUL BISHOP, declare under penalty of perjury as follows:

1. I am Senior Managing Director of FTI Consulting Canada Inc. ("**FTI**").

2. I submit this declaration in support of the Opposition to ERCOT's Motion to Dismiss First Amended Complaint and for Abstention [ECF No. 127] (the "**Opposition**") filed by Just Energy Texas LP, Fulcrum Retail Energy, LLC, Hudson Energy Services LLC, and Just Energy Group, Inc. (collectively, "**Plaintiffs**").[2] The facts stated in this declaration are true of my own personal knowledge, unless otherwise indicated. If called to testify I am competent to do so.

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1 The identifying four digits of Just Energy Group Inc.'s local Canada tax identification number are 0469. A complete list of debtor entities in these chapter 15 cases may be obtained at www.omniagentsolutions.com/justenergy.

2 Capitalized terms not defined herein shall have the meanings assigned to them in the First Amended Complaint [Docket No. 95].

3. On March 9, 2021, the Ontario Superior Court of Justice (the "**Canadian Court**") issued an order appointing FTI as monitor ("**Monitor**") in the restructuring proceedings of Just Energy Group, Inc. ("**Just Energy**") and its affiliates (collectively, the "**Debtors**") under the Companies' Creditors Arrangement Act (the "**CCAA**") in Canada (the "**Canadian Proceedings**"). See Exhibit A (Initial Order ¶ 26). That same day, the Canadian Court granted Just Energy authorization to act as foreign representative (the "**Foreign Representative**") with respect to having the Canadian Proceedings recognized and approved in jurisdictions outside of Canada, including in the United States pursuant to chapter 15. Id. ¶¶ 53–54.

4. I have acted as a court-appointed monitor in numerous CCAA cases over the years. In my experience, the Monitor and the Foreign Representative are often the same person or entity. In this instance Just Energy Group Inc. is acting as the Foreign Representative.

5. In accordance with the Canadian Court's order, the Debtors filed for chapter 15 relief before the United States Bankruptcy Court for the Southern District of Texas (the "**Bankruptcy Court**") on March 9, 2021. That same day, the Bankruptcy Court entered an Order Granting Provisional Relief Pursuant to Section 1519 of the Bankruptcy Code to Just Energy as Foreign Representative under chapter 15 of the Bankruptcy Code. See [Docket No. 23].

6. On April 2, 2021, the Bankruptcy Court entered an Order Granting Petition for (i) Recognition as Foreign Main Proceedings, (ii) Recognition of Foreign Representative, and (iii) Related Relief Under Chapter 15 of the Bankruptcy Code, which, among other things, entrusted realization of all or part of the Debtor's assets located in the United States to the Foreign Representative. See [Docket No. 82 p. 8 ¶ 25a ("[T]he Foreign Representative ... is entrusted with the administration or realization of all or part of the Debtor's assets located in the United States.")].

7. The Foreign Representative told the Monitor before it filed the above-captioned adversary proceeding (the "**Adversary Proceeding**") that Plaintiffs were going to commence an action against the PUCT and ERCOT. The Monitor was aware the Adversary Proceeding would be filed before it happened on November 12, 2021 and indicated to the Foreign Representative at that time that it had no objection to the claims being brought in the Bankruptcy Court.

8. The Monitor is following the Adversary Proceeding and has provided updates on its progress in reports filed with the Canadian Court. The Monitor continues to support the Foreign Representative's pursuing claims against ERCOT. Among other things, the Foreign Representative is an estate fiduciary and is well-positioned to pursue claims in the Bankruptcy Court on behalf of the Debtors' estates.

9. The Monitor will, if necessary, seek advice and directions from the Canadian Court for the Foreign Representative to proceed with this action and continue prosecuting the claims therein against ERCOT and/or for the Monitor to become directly involved in the prosecution of such claims.

10. Efficiency dictates that the case should simply continue as is without the time and expense of involving the Canadian Court. The prompt disposition of the Adversary Proceeding is important to the Debtors.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: Johns Island, South Carolina
March 24, 2022

Paul Bishop

TAB J

This is Exhibit “J”

referred to in the Affidavit of **JAMES C. TECCE**

Sworn before me this 14th day of April, 2022

C. Mariana

A Commissioner for taking affidavits

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS—HOUSTON DIVISION

In re: JUST ENERGY GROUP INC., et al., Debtors in a Foreign Proceeding.	Chapter 15 Case No. 21-30823 (MI)
JUST ENERGY TEXAS LP, FULCRUM RETAIL ENERGY LLC, HUDSON ENERGY SERVICES LLC, and JUST ENERGY GROUP, INC., Plaintiffs, v. ELECTRIC RELIABILITY COUNCIL OF TEXAS, INC. Defendant.	Adv. Pro. 21-04399 (DRJ)

DECLARATION OF KEVIN P. McELCHERAN

I. INTRODUCTION

1. My name is Kevin Peter McElcheran. I am a lawyer in Ontario Canada. I received my BA from the University of Toronto in 1976 and my law degree from Queen's University in Kingston, Ontario in 1980. I was called to the bar in the Province of Ontario in 1982 following completion of the bar admission course. My office is located at Suite 420, 120 Adelaide St. W., Toronto Ontario.

2. I have been asked by counsel to Just Energy Group, Inc., the duly authorized foreign representative in the above-captioned chapter 15 cases (the "**Chapter 15 Cases**"), which are the subject of insolvency proceedings conducted under the Companies' Creditors Arrangement Act (the "**CCAA**") in Canada to provide expert testimony concerning certain Canadian law matters related to the First Amended Complaint filed on February 11, 2022 (the "**Amended Complaint**") by Just Energy Texas LP, Fulcrum Retail Energy, LLC, Hudson Energy Services LLC, and Just Energy Group, Inc. (collectively, "**Just Energy**" or "**Plaintiffs**" and, with their affiliated debtors in the Chapter 15 Cases, the "**Debtors**") against the Electric Reliability Council of Texas Inc. ("**ERCOT**" or "**Defendant**") before the United States Bankruptcy Court for the Southern District of Texas, Houston Division (the "**Bankruptcy Court**"), Adversary Proceeding No. 21-04399.[1]

[1] Capitalized terms not defined herein shall have the meanings assigned to them in the Amended Complaint.

3. In addition to the Amended Complaint, I have reviewed various filings in the CCAA proceedings and the Chapter 15 Cases. I identify the materials I reviewed in connection with my preparation of this declaration in Appendix I.

4. The facts on which this declaration is based are those described by Plaintiffs in the Amended Complaint, all of which I assume to be true.

II. QUALIFICATIONS

5. In 1982, I began my practice at Harries Houser, a firm that specialized in bankruptcy and insolvency law. In 1985, I joined Blake Cassels & Graydon LLP ("**Blakes**") as an associate working exclusively on bankruptcy and insolvency cases. I became a partner in 1989 and continued my practice exclusively engaged in commercial insolvency cases until 2007 when I joined McCarthy Tetrault LLP ("**McCarthys**"). I practiced at McCarthys until 2014.

6. Blakes and McCarthys are two of Canada's largest and most successful commercial law firms, two of the so called "Seven Sisters" of Canadian firms. Both have national practices. In my 24 years at Blakes, I was a founding member of its Restructuring and Insolvency Group and its co-chair. While at Blakes, I played a key role in many of Canada's largest domestic and cross-border restructuring, receivership, liquidation and bankruptcy cases, including acting as counsel for Enron Canada and the trustees of the Calpine trust. At McCarthys, I acted for the five largest Canadian banks in respect of a $32 billion asset backed commercial paper restructuring. I also acted as debtor counsel for Arctic Glacier Income Trust and its subsidiaries in it successful CCAA/Chapter 15 restructuring.

7. A partial list of my significant engagements is attached as Appendix 2.

8. In 2014, I opened my own office as Kevin P. McElcheran Commercial Dispute Resolution where I serve as a legal advisor, mediator and as a turnaround manager of businesses facing financial or operational obstacles to their continued success.

9. Throughout my legal career, I have been active as a writer and educator in my field of expertise, commercial bankruptcy and insolvency law. Beginning in 1983, I was an instructor and seminar leader in the bar admission course required by the Law Society of Ontario to qualify as a lawyer in Ontario. In 1990, I was appointed as head of the Insolvency law section of the course (then a subsection of Business Law). In that role, I was responsible for redesigning the course and the materials used to ensure that all new Ontario lawyers had a sufficient knowledge of insolvency law to qualify for practice.

10. I am the author of the text *Commercial Insolvency in Canada* (4th edition) published by LexisNexis in 2019. I have also written and published many papers on insolvency topics.

11. Since 2015, I have been an adjunct professor at Queen's University in Kingston Ontario teaching Commercial Bankruptcy and Insolvency law at Queen's Law School. In that role, I set the curriculum for the program based on my text, teach the course, and evaluate the students' work.

12. When I was practicing with Blakes and McCarthys, I was recognized as a leading practitioner in industry ranking services. In Chambers, I was Band 1 and in Lexpert, I was recognized in the "most frequently recommended" category for both Insolvency Litigation and Commercial Restructuring. I continued to be ranked in Lexpert in the "repeatedly recommended" category. In 2015, I was awarded the Murray Klein Award by the Ontario Bar Association for excellence in insolvency law.

13. I have been an active member of insolvency organizations, including the American Bankruptcy Institute, INSOL International. I continue my membership in the Insolvency Institute of Canada.

III. SUMMARY OF FACTS RELIED UPON[2]

14. Just Energy is an energy retailer operating in Texas. Its customers are users of electrical energy connected to the independent electrical grid that is unique to Texas. Just Energy purchases power and is invoiced by ERCOT in accordance with Texas law that is intended to create a wholesale market for power in Texas.

15. In the Amended Complaint, Plaintiffs have alleged, and I have assumed, that ERCOT overcharged Just Energy for energy supplied during the period February 13 to 20, 2021, as the value of energy was conspicuously less than the price artificially set by ERCOT.

16. Plaintiffs, along with their affiliated Debtors, commenced proceedings under the CCAA on March 9, 2021 before the Ontario Superior Court (the "**Canadian Court**") by the granting of an Initial Order (as amended and restated, the "**Initial Order**"). It is a requirement of commencing proceedings under the CCAA that the Debtors are insolvent on that date. Plaintiffs allege separately they were insolvent at the time they made the pre-petition Transfers and/or incurred the Invoice Obligations (or were rendered insolvent thereby).

17. The Debtors also commenced the Chapter 15 Cases before the Bankruptcy Court on March 9, 2021. The Bankruptcy Court entered an initial, provisional order recognizing the CCAA proceedings on March 9, 2021and its final order on April 2, 2021.

18. Under applicable Texas law and the ERCOT Protocols, unless ERCOT's invoices were paid when due, ERCOT could have revoked Plaintiffs' right to continue its business and transferred Plaintiffs' customers to a "Provider of Last Resort" without compensating Plaintiffs.

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[2] Facts relied upon are taken from the Amended Complaint.

19. To avoid the destruction of Plaintiffs' business by the loss of its customers, Just Energy applied to the Canadian Court for an order permitting it to borrow $125 million, a portion of which was used to fund the payment of ERCOT's invoices. As a result of Just Energy's incurrence of obligations and payment of ERCOT's invoices, other creditors of Plaintiffs have been delayed in receiving payment on their claims and will receive less than full payment such that a portion of their claims will be "defeated".

20. Accordingly, among other counts, Plaintiffs have alleged that the obligations reflected in the Invoices and/or the payments made on account of the Invoice were preferences as defined in section 95 of the Bankruptcy and Insolvency Act (the "**BIA**") and/or transfers at undervalue as described in section 96 of the BIA such that, under the CCAA, the transfers reflected in the Invoices and/or the payments made are void or that Plaintiffs are entitled to judgment for the difference in value between the value of the energy supplied by ERCOT and the price that it charged.

21. I understand the First Amended Complaint alleges that with respect to Plaintiffs Hudson Energy Services LLC and Fulcrum Retail Energy, that the parties dealing directly with ERCOT are qualified service entities (or "**QSEs**"), which include Plaintiff Just Energy Texas LP and an entity unaffiliated with Plaintiffs, BP Energy Company ("BP"). I also understand ERCOT challenges the First Amended Complaint because BP is the QSE for Hudson and the party that faces ERCOT. I do not address the implications of this issue in the declaration, which addresses obligations and transfers involving Plaintiffs.

IV. SUMMARY OF CLAIMS

22. For the reasons set forth below and based on my review of allegations contained in the Amended Complaint, it is my opinion that Plaintiffs have adequately alleged claims against ERCOT under Canadian law.

23. **Count One**. Count One of the Amended Complaint states a claim under section 95 of the BIA with respect to the Invoice Obligations (as defined in the Amended Complaint) and entitles Plaintiffs to an Order declaring that the Invoice Obligations are void in their full amount (approximately $336 million) and that the Transfers (as defined in the Amended Complaint) made on account of those void obligations should be returned because it alleges:

    a. the provisions involving the preferential and reviewable transfers under the BIA have been incorporated into the CCAA and that section 95(1) of the BIA provides that "[a] transfer of property made, a provision of services made, a charge on property made, a payment made, an obligation incurred or a judicial proceeding taken or suffered by an insolvent person (a) in favour of a creditor who is dealing at arm's length with the insolvent person … with a view to giving that creditor a preference over another creditor is void as against … the trustee if it is made, incurred, taken or suffered, as the case may be, during the three month period preceding the commencement of the CCAA proceeding on March 9, 2021 (the "**Preference Period**");

b. under section 95(2) of the BIA, "[i]f the transfer, charge, payment, obligation or judicial proceeding referred to in paragraph (1)(a) has the effect of giving the creditor a preference, it is, in the absence of evidence to the contrary, presumed to have been made, incurred, taken or suffered with a view to giving the creditor the preference — even if it was made, incurred, taken or suffered, as the case may be, under pressure — and evidence of pressure is not admissible to support the transaction";

c. the Invoice Obligations were incurred within the pre-petition Preference Period and had the effect of preferring ERCOT over Plaintiffs' other creditors; and

d. Plaintiffs were insolvent on the dates that the Invoice Obligations were incurred, or became insolvent as a result of the Invoice Obligations.

24. **Count Two.** Count Two of the Amended Complaint states a claim under section 95 of the BIA with respect to pre-petition Transfers, and Plaintiffs are entitled to an Order declaring the prepetition Transfers are void and should be returned in the amount of no less than approximately $81 million, because it alleges:

a. during the pre-petition Preference Period, Plaintiffs made certain of the Transfers in response to the Invoices;

b. section 95(1) of the BIA provides that "[a] transfer of property made… a payment made…by an insolvent person (a) in favour of a creditor …with a view to giving that creditor a preference over another creditor is void as against … the trustee if it is made, incurred, taken or suffered, as the case may be, during" pre-petition Preference Period is void;

c. under section 95(2) of the BIA, "[i]f the transfer, charge, payment, obligation or judicial proceeding referred to in paragraph (1)(a) has the effect of giving the creditor a preference, it is, in the absence of evidence to the contrary, presumed to have been made, incurred, taken or suffered with a view to giving the creditor the preference — even if it was made, incurred, taken or suffered, as the case may be, under pressure — and evidence of pressure is not admissible to support the transaction";

d. the pre-petition Transfers were made in the days leading up to Plaintiffs' Canadian Proceedings and Chapter 11 Cases with a view toward—and/or with the effect of—preferring ERCOT over Plaintiffs' other creditors; and

e. Plaintiffs were insolvent on the date that the prepetition Transfers as a result of the Invoice Obligations.

25. **Count Three**. Count Three of the Amended Complaint states a claim under section 96 of the BIA. Plaintiffs plead the Count with respect to pre-petition Transfers, and allege

they are entitled to an Order declaring the prepetition Transfers are void and should be returned in the amount of no less than approximately $81 million. They also allege:

a. Plaintiffs made certain of the Transfers pre-petition in response to the Invoices – that is Plaintiffs purchased electricity in transfers reflected in the Invoices;

b. among the provisions of the BIA that are incorporated into the CCAA are the provisions of section 96(1) of the BIA that, "a court may declare that a transfer at undervalue is void as against ... the trustee — or order that a party to the transfer or any other person who is privy to the transfer, or all of those persons, pay to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor — if (a) the party was dealing at arm's length with the debtor and (i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and that ends on the date of the bankruptcy, (ii) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, and (iii) the debtor intended to defraud, defeat or delay a creditor";

c. section 2 of the BIA defines the term "transfer at undervalue" as "a disposition of property or provision of services for which no consideration is received by the debtor or for which the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor";

d. the value of the electricity transferred to the Plaintiffs and invoiced by ERCOT in the Invoices was conspicuously less than price set by ERCOT and which ERCOT extracted from the Plaintiffs, causing the insolvency of the Plaintiffs and delaying and defeating the payment of other creditor claims against the Plaintiffs; and

e. Plaintiffs knew that the effect of transfers, including the payments made on account of the Invoices, would delay or potentially defeat the Plaintiffs' creditors.

26. As pled by Plaintiffs, Count 3 focuses on the amounts transferred pre-petition. In my view, the claim is understated in amount as a Canadian court would consider the incurring of the Invoice Obligations, completed by the payments on account of such obligations, as transfers at undervalue. Under this analysis, Plaintiffs would be entitled to judgment in the amount of the difference in value of the power supplied compared to the price artificially set by ERCOT and the PUCT (the Invoice Obligations) and paid by Plaintiffs, whether paid before or after the Initial Order.

27. **Count Four**. Count Four of the Amended Complaint states a claim under section 98 of the BIA with respect to remedies available to Plaintiffs, and Plaintiffs are entitled to the entry of an Order directing ERCOT to return the Transfers, either (a) in the amount of not less than approximately $274 million or, (b) alternatively, in the amount of not

less than approximately $220 million relating to the period after 1:05 a.m. on February 18, 2021, because it alleges:

a. pursuant to section 98(1) of the BIA which, with any modifications that the circumstances require, applies in the CCAA proceeding commenced on March 7, 2021, "[i]f a person has acquired property of a bankrupt under a transaction that is void or voidable and set aside … and has sold, disposed of, realized or collected the property or any part of it, the money or other proceeds, whether further disposed of or not, shall be deemed the property of the trustee" and "[t]he trustee may recover the property or the value thereof or the money or proceeds therefrom from the person who acquired it from the bankrupt (in this case ERCOT)";

b. if the Invoice Obligations are set aside as preferences or as transfers at undervalue, the Transfers should be recovered in their full amount because they relate to Invoice Obligations that are void; and

c. further, if the pre-petition Transfers are set aside as a preference, all amounts paid prior to the CCAA filing in respect to the Invoice Obligations are void as preferences under section 95 of the BIA; and (b) are void under section 96 of the BIA.

V. ANALYSIS

28. It is a fundamental principle of Canadian insolvency law that, subject to the terms of a CCAA plan, the unsecured creditors of the debtor share pro rata in distributions of the value of the debtor's estate realized or made available through the insolvency process. This fundamental principle is reflected both in statute and common law.

29. In aid of this principle, the BIA provides remedies to recover property of the debtor that may be realized through the insolvency process to enhance distributions to creditors. The provisions of sections 95 and 96 of the BIA permit proceedings to declare transactions by a debtor prior to the "initial bankruptcy event" to be void and therefore reverse such transactions. Section 98 ensures that assets obtained in void transactions are returned to the estate. Section 96 provides an alternative remedy of obtaining a money judgement for the benefit of the estate.

30. Canadian courts interpret the BIA as "remedial legislation [that] should be given a liberal interpretation to facilitate its objectives".[3] This liberal construction has been held to specifically apply to the interpretation of preferences and transfers at undervalue.[4]

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[3] *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508, 435 D.L.R. (4th) 416, at para. 43.

[4] *Ernst & Young Inc. v. Aquino*, 2022 ONCA 202 (Ont. C.A.) at para. 22

31. Sections 95 and 96 are new sections of the BIA that were included in the substantial amendments of the BIA and CCAA that came into force on September 18, 2009. The same amendments adopted the UNCITRAL Model Law. The amendments created the concept of "transfer at undervalue" and altered the statutory concept of "preference". Accordingly, court authorities applying the former *Bankruptcy Act* or BIA before it was amended in 2009 are of little assistance in interpreting section 96 and, in certain circumstances, must be re-evaluated in light of the changes of wording and onus reflected in section 95. Further, the adoption of the UNCITRAL Model Law replaced the system of common law comity that applied prior to 2009.

32. Section 36.1 of the CCAA incorporates by reference section 95 (preferences), section 96 (transfers at undervalue), and section 98 (recovery) in the BIA unless otherwise provided for in a CCAA plan.

33. I have reviewed the Motion to Dismiss[5] and, as reflected in this declaration and its analysis, I disagree with the submissions about Canadian law made in the motion. There are a number of Canadian authorities cited in the Motion to Dismiss that are entirely without relevance to this matter and do not support the propositions asserted in the motion.

34. At least two cases are cited for the proposition that Canadian law should not apply to this proceeding, *Tolofson* and *Holt*. However, neither case supports ERCOT's position and both are taken out of context.

    a. The *Tolofson* case, cited for the proposition that "to prevent overreaching, the Supreme Court of Canada has developed rules governing and restricting the exercise of jurisdiction over extraterritorial and transnational transactions,"[6] is not an insolvency case at all. It has nothing to do with the application of the BIA/CCAA. In *Tolofson*, the issue was what substantive law should apply in determining tort liability for a traffic accident, should it be the law of the forum of the proceeding, or should the law of another jurisdiction apply? In this case, the Plaintiffs applied for an opportunity to restructure under the CCAA in Canada. As a result of the findings of the Canadian Court in the granting of the Initial Order, the CCAA is the bankruptcy law that applies to the Debtors, including Plaintiffs – all of the CCAA including s. 36.1. Further, in these Chapter 15 Cases, that determination has been recognized.

    b. The *Holt* case is cited for the proposition that "it does not matter that the Texas Plaintiffs' ultimate parent is a Canadian entity that commenced a foreign main proceeding under the CCAA .... [Canadian law recognizes] that different jurisdictions may have a legitimate and concurrent interest in the conduct of an international bankruptcy ... that the interests asserted in Canadian courts may, but not necessarily must, be subordinated in a particular case to a foreign

[5] Electric Reliability Council Of Texas, Inc.'s Motion To Dismiss First Amended Complaint And For Abstention (the "**Motion To Dismiss**").
[6] Mot. To Dismiss p. 12, ¶ 22 & n. 60.

bankruptcy regime .... [and the] foreign bankruptcy tribunal applies its own substantive law."[7] Firstly, Plaintiffs are CCAA debtor companies, along with their parent. Plaintiffs are subject to the CCAA just like their parent is. Secondly, *Holt* is a pre-2009 case. It would have been decided differently if the Belgian bankruptcy had been recognized under the UNCITRAL based provisions that came into effect in Canada in 2009. Under those amendments, as I expect would be the case under Chapter 15, a foreign representative is entitled to recognition of an insolvency proceeding either as a foreign main or a foreign non-main proceeding.

35. The Motion To Dismiss makes two other arguments that I do not consider dispositive.

a. ***First***, ERCOT argues the Amended Complaint should be dismissed because Plaintiffs lack standing because they include the Foreign Representative but not the Monitor.[8] The BIA gives the "trustee in bankruptcy ... the right" to bring claims under sections 95 and 96. The CCAA substitutes the "monitor" for the "trustee" under section 36.1(2). In my experience, usually the monitor is the foreign representative that commences Chapter 15 cases in respect to CCAA proceedings. I note that Plaintiffs in this case, like the Monitor, are fiduciaries for the creditors of Plaintiffs and that the Monitor supports these proceedings brought by Plaintiffs on behalf of their creditors; and

b. ***Second,*** ERCOT claims the Canadian Court's approval of the payments to ERCOT and its findings preclude the claims.[9] This submission ignores the pleading in the Amended Complaint that Just Energy paid under protest. An order of the Canadian Court that permitted the payment under protest and with a reservation of rights should be sufficient to preserve the claims. The two cases cited by ERCOT simply stand for the proposition that CCAA court orders have effect according to their terms. In *Muscletech,* the court reflects on the right of affected parties to apply to the court for amendments of orders that may have been made without sufficient notice under a "come back clause" included in such orders (It is a practice of Canadian Courts to include "come back clauses" in CCAA orders made on short or incomplete notice). The *Collins*, decision is a detailed analysis of requests by affected parties for changes in CCAA orders on the hearing of a motion under such a "come back clause" in an initial order. Neither case is of relevance here as no change of an order of the Canadian Court is sought.

A. Section 95 - Preference

36. I have analyzed the Counts One and Two in the Amended Complaint and my opinion is that Plaintiffs have adequately stated claims for relief under section 95 of the BIA, which governs preferences in favour of creditors.

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[7] Mot. To Dismiss p. 13, ¶¶ 23-25 & n. 63, 65.
[8] Mot. To Dismiss pp. 15-16, ¶¶ 28-30.
[9] Mot. To Dismiss pp. 27-29, ¶¶ 52-54.

37. The Amended Complaint alleges that Plaintiffs and ERCOT dealt with each other at arms-length. Accordingly, section 95(1)(a) of the BIA applies.

38. In relevant part, that section states:

> **95 (1)** A transfer of property made, a provision of services made, a charge on property made, a payment made, an obligation incurred or a judicial proceeding taken or suffered by an insolvent person
>
> > **(a)** in favour of a creditor who is dealing at arm's length with the insolvent person … with a view to giving that creditor a preference over another creditor is void as against … the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy[.]

39. The term "date of the initial bankruptcy event" includes "proceedings under the [CCAA]." BIA § 2. Additionally, the CCAA provides that the "date of bankruptcy" is to be read as the date on which proceedings are commenced under the CCAA. CCAA § 36.1. Accordingly, in this case the pre-petition Preference Period applies to the three-month period preceding March 9, 2021, the date of the Initial Order.

40. Section 95(2) of the BIA sets the standard of proof that the estate must meet in seeking the avoidance of a preference:

> **(2)** If the transfer, charge, payment, obligation or judicial proceeding referred to in paragraph (1)(a) has the effect of giving the creditor a preference, it is, in the absence of evidence to the contrary, presumed to have been made, incurred, taken or suffered with a view to giving the creditor the preference — even if it was made, incurred, taken or suffered, as the case may be, under pressure — and evidence of pressure is not admissible to support the transaction.

41. As stated in *Houlden, Morawetz & Sarra* at F201, "[a] preference occurs when an insolvent debtor pays one or more creditors at the expense of other creditors". At its essence, a preference offends the pari passu rule that is fundamental to Canadian insolvency law. Under that rule, the value of the estate of an insolvent or bankrupt debtor that is available to unsecured creditors should be shared pro rata among such creditors (subject to the terms of any CCAA plan in which the creditors vote for a different distribution in the required majorities). Section 95 gives effect to this principle by means of a look back period of three months prior to the date of the filing, which I have called the pre-petition Preference Period in this declaration.

42. In analyzing Counts One and Two, I have assumed that ERCOT was a creditor of Plaintiffs as alleged in the Amended Complaint.

43. I have also assumed, based on the Amended Complaint, that the creation of the Invoice Obligations rendered Plaintiffs insolvent such that they were unable to meet their obligations as they generally came due. I have further assumed that Plaintiffs were insolvent when the pre-petition Transfers were made.

44. As summarized above, Count One seeks to avoid the Invoice Obligations for the period beginning on February 13 and ending on February 20, 2021 under section 95 of the BIA. In analyzing Count One, I have focused on the question of whether the creation of the Invoice Obligations was an "obligation… incurred, taken or suffered", "with a view to giving [ERCOT] a preference over another creditor".

45. Under the plain text of the statute, the term "obligations" includes the Invoice Obligations. Canadian Courts interpret statutes to give words their ordinary and common meaning.[10]

46. In the Motion to Dismiss,[11] Defendant asserts a chicken-and-egg objection suggesting that it is insufficient that the creation of the Invoice Obligation inflated ERCOT's claim, causing the insolvency of Plaintiffs. In my view, when the preference is effected by the creation of the preferential obligation, the ballooning of the debtor's liabilities with the effect of preferring one creditor over other creditors and causing them a loss of their creditor claims, the insolvency requirement has been met.

47. Under the BIA, a company is insolvent if one of the following three statutory elements is satisfied:

a. The debtor is "for any reason" unable to meet its obligations as they generally come due;

b. The debtor has ceased paying its current obligations in the ordinary course of business as they generally become due, or

c. The aggregate of the debtor's property is not, at fair valuation, sufficient, or if disposed of at a fairly conducted sale under legal process, would not be sufficiently to enable payment of all its obligations, due and accruing due.[12]

48. The Amended Complaint, which I have assumed to be true, clearly states that the creation of the Invoice Obligations by the artificial inflation of amounts due ERCOT for the supply of electricity caused Plaintiffs' insolvency. The Invoice Obligations increased the claims that ERCOT could assert such that Plaintiffs did not have sufficient resources available to satisfy its other unsecured creditor claims. Using the terminology used by Plaintiffs in one of the headings in the Amended Complaint, "ERCOT INVOICES BURY JUST ENERGY". That section then describes the

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[10] See, e.g., *Urbancorp Toronto Management Inc. (Re)*, 2019 ONCA 757, 74 C.B.R. (6th) 23, at para. 40.
[11] Mot. To Dismiss pp. 22-24, ¶¶ 41-44 & n. 108 (citing *Norris, Re*, 1996 ABCA 357 ¶ 16).
[12] See BIA §2 (definition of "insolvent person"); § 36.1(2)(c) ("reference in sections 38 and 95 to 101 of the [BIA] … to 'bankrupt', 'insolvent person' or 'debtor' is to be read as a reference to 'debtor company').

insolvency the Invoices caused and the necessity of the Debtors to commence insolvency proceedings in Canada.

49. By inflating the price charged for electricity in the Invoice Obligations, the total of the unsecured claims against Plaintiffs grew by the amount of ERCOT's claims (without a corresponding increase in the value of Plaintiffs' assets) and also increased ERCOT's pro rata share of the value of Plaintiffs' estate. The inflated price increased the "denominator" of total claims and also increased ERCOT's claims in the "numerator" of the pro rata calculation of distributions to creditors of Plaintiffs' estate in the insolvency proceedings that ensued.

50. I am supported in this analysis by a recent Supreme Court of Canada decision that confirms the common law principle called the "anti-deprivation rule". In its recent *Chandos* decision, the Supreme Court of Canada declared void a provision of an agreement between a supplier and a debtor that imposed a fee on the debtor if it became bankrupt or insolvent.[13] The court held that the clause offended the pari passu rule because the claim of the supplier as a creditor in the insolvency case would be increased (its share of the numerator) thereby depriving other creditors of a fair recovery. In my view, the inflation of ERCOT's claim by the imposition of the Invoice Obligations similarly offends the pari passu rule and the *Chandos* case is a useful guide to the interpretation of the phrase "obligation incurred" in section 95(1) of the BIA.

51. These same principles apply to Count Two of the Amended Complaint, which seeks to avoid payments made by Plaintiffs to ERCOT on account of the Invoice Obligations in the pre-petition Preference Period under section 95 of the BIA. In analyzing Count Two, I have focused on the question of whether the payments by Plaintiffs to ERCOT during the pre-petition Preference Period were made "with a view to giving [ERCOT] a preference over another creditor".

52. The payments made by Plaintiffs on account of the Invoices resulted in cash payments to ERCOT at a time when Plaintiffs were unable to pay their creditors generally as they came due. Such payments had the effect of giving ERCOT a preference as, due to the insolvency of Plaintiffs, its other unsecured creditors will not receive payment of their claims in full.

53. In my view, the Motion to Dismiss has alleged defenses to Count 1 and Count 2 without satisfying the evidentiary burden on Defendant to adduce evidence rebutting the presumption of preferences in the BIA.[14] Canadian courts do permit defendants to preference claims to defend provided that they can demonstrate the debtor's dominant intention was not to prefer. However, the Court must also respect the prohibition on taking into account evidence of "pressure". As a consequence, a full hearing at trial would be necessary to evaluate the evidence in context. The statement of the Chief Financial Officer using the term "in the ordinary course" is not a dispositive admission

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[13] See Chandos Construction Ltd. *v.* Deloitte Restructuring Inc., 2020 SCC 25.

[14] Mot. To Dismiss pp. 23-27, ¶¶ 45-51 (citing *Norris Re*, 1994 A.R. 77 ¶ 7 (Q.B.), *rev'd on other grounds*, 1996 ABCA 357.

as it likely did not take into account the main allegation in the proceeding that the setting of the price for energy was at a price that was conspicuously higher than the actual value of that energy, and was not in the ordinary course of the businesses of either Plaintiffs or Defendant.

54. Finally, the *Cineplex* case, which is cited by Defendant for the proposition that "the concept of what is in the ordinary course of business for a particular business is flexible and contextual"[15] is inapplicable. That case dealt with a complex provision of a commercial agreement that specifically defined what "ordinary course of business" meant in the context of a pre-closing covenant. There the court expressly held that a contractual clause that included what the phrase "ordinary course of business" should be construed in the light of the agreement of the parties as a whole. The *Cineplex* case is of no help in understanding the statutory wording of section 95 should Defendant submit evidence in an attempt to rebut the presumption of intent that arises from the facts of this case as pleaded.

B. Section 96 - Transfers at Undervalue

55. Based on my review of allegations in the Amended Complaint, in my opinion, Count Three states claims for transfers at undervalue pursuant to section 96 of the BIA.

56. A transfer at undervalue is defined in section 2 of the BIA as:

> a disposition of property or provision of services for which no consideration is received by the debtor or for which the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor.

57. Section 96 of the BIA is "a remedy to reverse an improvident transfer that strips value from the debtor's estate, where its conditions are met."[16]

58. Because the Amended Complaint alleges that ERCOT and Plaintiffs dealt with each other at arms-length, the statutory test for review of the creation of the Invoice Obligations and Transfers reflected in the Invoices is set out in section 96(1)(a) as follows:

> (i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and that ends on the date of the bankruptcy,
>
> (ii) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, and
>
> (iii) the debtor intended to defraud, defeat or delay a creditor.

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[15] Mot. To Dismiss p. 26, ¶ 49 & n. 130.
[16] *Urbancorp Toronto Management Inc. (Re)*, 2019 ONCA 757, 74 C.B.R. (6th) 23, at para. 48.

59. The Amended Complaint satisfies each element. Specifically, the Amended Complaint alleges that the sudden and unprecedented increase of the price of electricity delivered through ERCOT during the period between February 13 and 20 caused Plaintiff's insolvency and that the price did not reflect the market value of electricity but was artificially inflated such that the value of the electricity provided to Plaintiffs was conspicuously lower in value than the price it was required to pay.

60. The Amended Complaint also alleges that Plaintiffs made payments on account of the Invoices for that period after their delivery and before the CCAA filing to avoid the exercise of ERCOT's statutory remedies and that after the CCAA filing, using the proceeds of interim financing loans made in the CCAA proceedings, Plaintiffs paid ERCOT the balance owing under the Invoices.

61. While Plaintiffs have pled Count 3 to focus on the pre-petition Transfers, in my view, a Canadian court would view the claim more broadly. The "transfer at undervalue" as defined in the BIA is the exchange of energy for an obligation to pay and payment of a price that was conspicuously greater than the value of that energy as reflected in the Invoice Obligations that are the subject of Count 1. If as alleged in the Amended Complaint, the value of the electricity provided by ERCOT (the consideration provided by ERCOT in the "transfer") was conspicuously less that the price it charged and was paid (the consideration provided by Plaintiffs), the remedies provided under section 96 of the BIA are available provided that the other elements of section 96(1)(a) are also established.

62. In respect of the first two elements, the Invoice Obligations occurred within the look back period of 1 year from March 9, 2021 ("the initial bankruptcy event") and the Amended Complaint expressly states that the transfers caused Plaintiffs' insolvency. As I noted above, under Canadian law, a debtor must be insolvent to initiate proceedings under the CCAA.

63. The remaining issue, then is the question of whether the debtor intended to defraud, defeat or delay a creditor. Under this test, the trustee "only ha[s] to demonstrate that one of the motives or intentions was to defraud, defeat, or delay a creditor."[17]

64. In this respect, the effect of the sales of electricity by ERCOT to Plaintiffs and the requirement of payment to avoid the loss of Plaintiffs' customers had the effect of delaying the payment of other creditor claims. In fact, the claims of Plaintiffs' unsecured creditors have been stayed by the CCAA proceedings for a year. Further, unless the creditors' claims are paid in full in any plan of arrangement filed by Plaintiffs, unsecured creditor claims will be defeated at least in part.

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[17] *Ernst & Young Inc. v. Aquino*, 2022 ONCA 202, at para 47 (emphasis in original) (citing *Juhasz Estate v. Cordiero*, 2015 ONSC 1781, 24 C.B.R. (6th) 69, at para. 54).

65. Plaintiffs were aware that the completion of the transfers by payment would prejudice the position of unsecured creditors, delaying and potentially defeating their claims at least in part.

66. In my view it is sufficient to satisfy the "intention" requirement of section 96(1)(a) of the BIA to prove that the debtor knew that the consequences of its action would be to "defraud, defeat or delay" (my emphasis), even when it would have preferred not to have caused that harm. In this case, Plaintiffs chose to make the payments rather than risk the loss of its customers. That was a conscious and intentional choice with the known consequence that it would delay and/or defeat its unsecured creditors.

67. Finally, ERCOT asserts the section 96 claim cannot stand because Plaintiffs did not identify a present creditor.[18] It is not a requirement that Plaintiff identify a particular creditor that was defrauded, delayed or defeated by a transfer at under value. Rather, it is sufficient to allege that creditors were defrauded, delayed or defeated as is alleged here and demonstrated by the ensuing insolvency proceedings in which all creditor claims are stayed and, most likely, will not receive full payment. The correctness of this analysis is demonstrated in the recent decision of the Court of Appeal for Ontario, *Ernst & Young Inc. v. Aquino*, 2022 ONCA 202. In *Aquino*, at para 21, the court interpreted the phrase "defraud, defeat or delay a creditor" as "denoting any such creditor, not a target creditor or one necessarily known". As a result, "[i]t is reasonable to infer that any large enterprise in financial difficulty will have many such creditors" under Canadian law. *Id.* Therefore "because the [bankrupt] companies had outstanding debts at the time of the transfers, including a substantial loan from its primary lender", the lower court had properly found "'there was a creditor or creditors toward whom [the debtors] intent to defraud, defeat or delay could be directed.'" *Id.*, at para 45.

C. Section 98 - Remedies

68. In my opinion Plaintiffs have alleged facts sufficient to state a claim in Count Four under section 98 of the BIA.

69. Section 98 provides that "[i]f a person has acquired property of a bankrupt under a transaction that is void or voidable…, and has sold, disposed of, realized or collected the property … the money or other proceeds … shall be deemed property of the Trustee. That section further provides that the Trustee "may recover the property or the value of the property, or proceeds, from the person who acquired it from the bankrupt…."

70. I note that alternatively, with respect to a transfer at undervalue, the court may order that the difference between the "value of consideration received by the debtor and the valuation of the consideration given by the debtor" be returned to Plaintiffs. BIA § 96(2).

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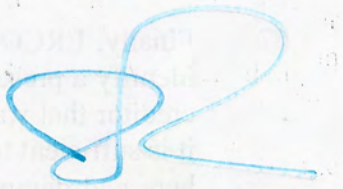
[18] Mot. To Dismiss p. 30, ¶ 57.

71. Therefore, to the extent the Invoice Obligations or Transfers are rendered void or voidable as preferences and/or transfers at undervalue, payments made to ERCOT on account thereof would fall subject to the remedies available in section 98 of the BIA.

I certify, under penalty of perjury under the laws of the United States of America, that the foregoing is true and correct.

Dated: March 24, 2022
Toronto, ON



KEVIN P. MCELCHERAN

Appendix 1

To the Declaration of Kevin P McElcheran

1) The Amended Complaint
2) The Declaration of Michael Carter dated March 9, 2021
3) The Affidavit of Michael Carter sworn on March 9, 2021
4) The Motion to Dismiss
5) Kevin P McElcheran, *Commercial Insolvency in Canada*, 4th edition, LexisNexis, pp 109-122
6) Houlden, Morawetz & Sarra, *Bankruptcy Law of Canada* 2021, Carswell
7) The *Bankruptcy & Insolvency Act*, Canada
8) The *Company's Creditors Arrangement Act*, Canada
9) *Tolofson v.Jensen*, [1994] 3 S.C.R. 1022
10) *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, 2001 SCC 90
11) *Cineplex v. Cineworld,* 2021 ONSC 8016
12) *Zeifman Partners Inc. v. Baldassare,* 2020 ONSC 3023
13) *Ernst & Young Inc. v. Aquino*, 2022 ONCA 202 (Ont. C.A.)
14) *Chandos Construction Ltd. v. Deloitte Restructuring Inc.,* 2020 SCC 25

Appendix 2
To the Declaration of Kevin P. McElcheran

Mining
- Curragh Inc. – Counsel of the Interim Receiver
- Royal Oak Mines – Counsel for Interim Receiver and Monitor
- Minven Gold – Counsel for the debtor

Aviation
- Air Canada – Counsel for Aerogold
- City Express – Counsel for aircraft lessor
- Air Atlantic – counsel for lending syndicate and owner of the restructured airline

Forest Products
- Abitibi – counsel for lending syndicate
- Grant Forest Products – counsel for lending syndicate

Wholesale Distribution
- Arctic Glacier Inc. – counsel for the debtor
- Red Carpet Distribution – counsel for secured creditor

Retail
- Eatons – counsel for mortgagee of the Hamilton Eaton's Centre
- Peoples Jewelers – counsel for equipment lessor
- Bargain Harolds – counsel for K-Mart

Media
- Canwest Global – counsel for Goldman Sachs

Marketing
- Mosaic – Counsel for the secured lender

Energy
- Enron Canada – Counsel for the company and
- Calpine Power – Counsel for the trustees of the Income Trust

Real Estate Development
- Bramalea – counsel for secured creditor
- Campeau Corporation – counsel for the debtor
- O&Y – counsel for CIBC
- Mater's Management – Counsel for the Receiver

Telcom
- Wind Mobile – counsel for the independent members of the board of directors
- Nortel – Canadian counsel for Avaya in purchase of the Enterprise Solutions Business
- GT Telcom – Counsel for the lending syndicate

- 360 Networks – Counsel for the lending syndicate and owners of the restructured company

Manufacturing

- Meridian Technologies – counsel for buyers of the business in restructuring
- W.C. Wood Corporation – counsel for the debtor

Financial Services

- Standard Trust Company – counsel for the liquidator
- Asset Back Commercial Paper – counsel for the 5 largest Canadian banks
- Growthworks Canadian Fund Inc. – counsel for the Fund.

TAB K

This is Exhibit “K”

referred to in the Affidavit of **JAMES C. TECCE**

Sworn before me this 14th day of April, 2022

C. Mansara

A Commissioner for taking affidavits

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re: JUST ENERGY GROUP INC., *et al.*, Debtors in a Foreign Proceeding.[1]	Chapter 15 Case No. 21-30823 (MI)
JUST ENERGY TEXAS LP, FULCRUM RETAIL ENERGY LLC, HUDSON ENERGY SERVICES LLC, and JUST ENERGY GROUP, INC., Plaintiffs, v. ELECTRIC RELIABILITY COUNCIL OF TEXAS, INC., Defendant.	Adv. Proc. No. 21-04399 (DRJ)

ELECTRIC RELIABILITY COUNCIL OF TEXAS, INC.'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS FIRST AMENDED COMPLAINT AND FOR ABSTENTION

[Relates to ECF No. 127 (ERCOT Mot.)]

[1] The identifying four digits of Just Energy Group Inc.'s local Canada tax identification number are 0469. A complete list of debtor entities in these chapter 15 cases may be obtained at www.omniagentsolutions.com/justenergy.

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Other Authorities

Defendant Electric Reliability Council of Texas, Inc. ("ERCOT") files this *Reply in Support of Its Motion to Dismiss the First Amended Complaint and for Abstention*.

I. PRELIMINARY STATEMENT

1. Plaintiffs[2] fail to overcome the grounds for dismissal and abstention that ERCOT set forth in its Motion to Dismiss. In particular:

(1) Plaintiffs fail to articulate any basis why Canadian law should govern transactions between U.S. entities engaging in business in Texas, under Texas law, and specifically within the regulated Texas energy market.

(2) Across the board, Plaintiffs are asking this Court to make new Canadian law. Plaintiffs fail to identify *any* case in which a Canadian court allowed a debtor to bring §§ 95 and 96 claims, allowed a collateral attack that used §§ 95 and 96 to unwind transactions approved in a CCAA initial order, or endorsed the novel theories Plaintiffs now advance on the insolvency and intent requirements of §§ 95 and 96. This Court should not create Canadian law in the ways that Plaintiffs urge because that is not the role of a U.S. court applying foreign law.

(3) Courts routinely apply the filed rate doctrine to regulatory orders, and the Fifth Circuit has made clear this doctrine applies under title 11.

(4) Plaintiffs refuse to identify the transfers and obligations they seek to avoid, thus falling short of their burden to specify the obligations/obligors and payment(s) applicable to each count.

(5) The PUCT is an indispensable party under Texas and federal law.

(6) ERCOT never claimed the Court lacks subject matter jurisdiction, except in connection with standing and immunity. But that has no bearing on constitutionality and the core vs. non-core issue.

(7) This proceeding does not implicate the Court's *in rem* jurisdiction, so ERCOT has immunity.

(8) Contrary to Plaintiff's *Burford* rebuttal, this case does not involve "predominating federal issues." Plaintiffs' claims all arise under Canadian and Texas law.

[2] Terms not defined herein have the meaning attributed to them in *Electric Reliability Council of Texas, Inc.'s Motion to Dismiss First Amended Complaint and for Abstention* [ECF 127] (the "Motion to Dismiss" or "MTD").

2. The Court should also disregard the declarations of Paul Bishop and Kevin McElcheran. Extraneous evidence is inadmissible in connection with a facial attack on standing or a Rule 12(b)(6) motion, and this Court does not require an advocacy-laden opinion to read and apply Canadian law.

II. ARGUMENTS AND AUTHORITIES

A. Plaintiffs have not articulated why Canadian law should govern transactions that took place in the United States exclusively between U.S. entities in the regulated Texas wholesale electricity market.

3. A choice-of-law analysis points away from Canada.[3] ERCOT does not dispute the "most significant relationship test" governs the choice-of-law inquiry in the U.S. But that test does not favor application of Canadian law. Courts consider the following factors: "(1) the place where the injury occurred; (2) the place where the conduct causing the injury occurred; (3) the domicile, residence, nationality, place of incorporation, and place of business of the parties; and (4) the place where the relationship between the parties is centered."[4] None of these factors points anywhere but Texas,[5] and the circumstance Plaintiffs cite for warranting application of Canadian law—that the insolvency proceedings are pending in Canada—is irrelevant to this test.[6]

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[3] "Choice-of-law decisions can be resolved at the motion to dismiss stage when factual development is not necessary to resolve the inquiry." *Energy Coal S.P.A. v. Citgo Petroleum Corp.*, 836 F.3d 457, 459 (5th Cir. 2016). The pleaded facts resolve the issue.

[4] *ASARCO LLC v. Ams. Mining Corp.*, 382 B.R. 49, 62 (S.D. Tex. 2007).

[5] *See* MTD ¶ 21. Additionally, Just Energy Texas, Fulcrum, and Hudson have agreed that Texas law applies to their disputes with ERCOT. SFA § 11(A) (MTD Exhibits B, C, and D).

[6] Obj. ¶ 65 [ECF 132]. In any event, a Canadian court would defer to U.S. law, too. *See Tolofson v. Jennsen*, [1994] 3 S.C.R. 1022 (Supreme Court of Canada rejecting the argument that the CCAA's "reach extends *in rem* to property outside Canada").

4. Plaintiffs' case law is also unavailing.[7] In *B.C.I. Finances Pty Ltd.*, the debtors were Australian companies,[8] and the tortious conduct occurred in Australia.[9] Moreover, in *Am. Pegasus SPC*, the court permitted a Cayman claim to proceed "*without* [conducting] a formal choice of law analysis."[10]

B. Plaintiffs cannot satisfy their burden to prove standing.[11]

5. The language of CCAA § 36.1 is clear: only the "monitor" may bring claims under BIA §§ 95 and 96.[12] Plaintiffs do not dispute that Canadian courts have reached this conclusion.[13] Instead, Plaintiffs try to reframe the issue as one of "first impression," asking this Court effectively to make new Canadian law.

6. Further, transactions executed by, or in respect of, Plaintiff Just Energy Texas LP fall strictly outside of the ambit of CCAA § 36.1. In importing the BIA's reviewable transaction regime, CCAA § 36.1(2)(c) expressly provides for replacement of the terms "bankrupt," "insolvent

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[7] *Id.* (citing *In re B.C.I. Finances Pty Ltd.*, 583 B.R. 288, 297 (Bankr. S.D.N.Y. 2018); *Am. Pegasus SPC v. Clear Skies Holding Co.*, 1:13-cv-03035-ELR, 2015 U.S. Dist. LEXIS 189547, at *48 n.17 (N.D. Ga. Sept. 22, 2015)).

[8] *B.C.I. Finances Pty*, 583 B.R. at 290.

[9] *Id.* at 297.

[10] *Am. Pegasus SPC*, 2015 U.S. Dist. LEXIS 189547, at *47 (emphasis added).

[11] The party asserting standing has the burden to prove it. *E.g.*, *Feder v. Elec. Data Sys. Corp.*, 248 Fed. App'x. 579, 581 (5th Cir. 2007). "The court at the pleading stage bases its decision on the allegations of the complaint, and the complaint must 'clearly … allege facts demonstrating' each element of standing." *McNeal v. La. Dep't of Pub. Safety & Corr.*, 20-312-JWD-EWD, 2021 U.S. Dist. LEXIS 20045, *17 (M.D. La. Feb. 2, 2021) (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016)).

[12] *See* MTD ¶¶ 28–30. ERCOT recognizes that § 38 of the BIA contains an exception to the "monitor"-only rule by which a *creditor* may seek judicial approval to advance a § 95 or § 96 claim where a monitor refuses to do so, but Plaintiffs do not rely on that exception here.

[13] *See, e.g.*, *Verdellen v. Monaghan Mushrooms Ltd.*, 2011 ONSC 5820 ¶ 46. *See also* Obj. ¶ 57.

person," and "debtor" in the BIA's language with the term "debtor company."[14] Therefore, transactions may be challenged under CCAA § 36.1 only to the extent that they involve a "debtor company" as a counterparty.

7. The definition of the term "debtor company" under the CCAA necessarily requires an entity to be a "company," another term defined in the CCAA.[15] Just Energy Texas LP does *not* meet the definition of a "company" because that definition does not include limited partnerships.[16] The Monitor came to the same conclusion, stating in its Pre-Filing Report that none of the JE Partnerships (a term that includes Just Energy Texas LP) is a "company" within the meaning of the CCAA.[17]

8. This defect is not remedied by the Canadian court's declaration in its Amended and Restated Initial Order that "[a]lthough not Applicants, the JE Partnerships shall enjoy the benefits of the protections and authorizations provided by this Order."[18] Canadian courts typically grant such language only where the operations of the applicant debtor company and the limited partnership are so intertwined that it becomes necessary to extend a stay or similar benefit in order to prevent impairment to the restructuring.[19] It is one thing for a court to extend the benefits of a stay or moratorium (i.e., a proverbial shield) to a non-debtor to facilitate the restructuring of a debtor-affiliate; it is another thing entirely to grant a non-debtor affiliate standing to pursue causes of action (i.e., a proverbial sword) belonging to an insolvency estate.

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[14] CCAA § 36.1(2)(c).

[15] *Id.* § 2(1).

[16] *Id.*

[17] Pre-Filing Report of the Monitor dated Mar. 9, 2021, ¶¶ 16 and 68 [link].

[18] Amended and Restated Initial Order, ¶ 3.

[19] *See, e.g.*, *Priszm Income Fund, Re*, 2011 ONSC 2061, ¶ 26.

1. The Court should not purport to extend Canadian law beyond existing Canadian precedent.

9. "This Court's role under [Federal Rule of Civil Procedure] 44.1 is to determine foreign law *as currently applied by [Canadian] courts*."[20] In *Nortel Networks*, the bankruptcy court found "the absence of direct precedent establishing [the proposition advanced] *most significant*."[21] The court was "not prepared to extend foreign law" by "usurp[ing] the function of the legislative authorities of the foreign sovereign nations."[22] The same result should obtain here. "[I]t is the [m]onitor"—not the debtor—"who would have the right to make an application" under the preference and transfer provisions.[23]

10. To the extent the Court considers his declaration, even Mr. McElcheran does not endorse the theory that a Canadian court would ignore the plain text of § 36.1. He concedes "[i]n [his] experience, usually *the monitor* is the foreign representative that commences Chapter 15 cases in respect to CCAA proceedings."[24] And the Monitor says the same thing.[25] Plaintiffs chose a chapter 15 debtor as their foreign representative. When a party "is seeking to test the outer limits of [foreign] law … [s]uch an exercise is much better attempted in front of a tribunal deeply ensconced in the relevant law."[26]

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[20] *In re Nortel Networks, Inc.*, 469 B.R. 478, 499 (Bankr. D. Del. 2012) (emphasis added); *accord In re Kingate Mgmt. Ltd. Litig.*, No. 09-CV-5386 (DAB), 2016 U.S. Dist. LEXIS 129882, at *172 (S.D.N.Y. Sept. 21, 2016).

[21] *Nortel Networks*, 469 B.R. at 504 (emphasis added).

[22] *Id.*

[23] MTD ¶¶ 28–30; *Verdellen v. Monaghan Mushrooms Ltd.*, 2011 ONSC 5820 ¶ 46.

[24] McElcheran Decl. ¶ 35(a) (emphasis added).

[25] Bishop Decl. ¶ 4 ("In my experience, the Monitor and the Foreign Representative are often the same person or entity.").

[26] *Glenn v. BP p.l.c. (In re BP p.l.c. Sec. Litig.)*, 27 F. Supp. 3d 755, 766 (S.D. Tex. 2014); *see also Gilstrap v. Radianz Ltd.*, 443 F. Supp. 2d 474, 491 (S.D.N.Y. 2006) (noting federal courts are

11. Dissatisfied with § 36.1's plain text, Plaintiffs seek to affix a "debilitating graft upon the statute" by adding words that do not exist.[27] Canadian courts would "consider the specific words used in this section" to understand who can bring a claim.[28] And like American courts, Canadian courts would draw meaning from the omission from the statute of any party but the monitor in ascertaining Parliament's intent.[29] Such omission evidences a legislative choice Canadian courts would respect.[30] So too should this Court.

2. A foreign representative is not equivalent to a monitor.

12. In addition to Plaintiffs' statutory interpretation failure, their policy arguments likewise falter. A foreign representative, by default, is not equivalent to a monitor.

13. *First*, "[u]nder section 1509 the foreign representative may bring claims for which the foreign representative *has actual standing*."[31] The foreign representative's standing to seek

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"hesitant" to apply foreign law "when doing so would necessarily involve expanding, extending, or departing from well-settled and long established principles of foreign law").

[27] *F.T.C. v. Anheuser-Busch, Inc.*, 363 U.S. 536, 546 (1960).

[28] *Urbancorp Toronto Management Inc (Re)*, 2019 ONCA 757 ¶ 40. Plaintiffs cite *Gray's Commentaries on Federal Corporate Laws* for the proposition that a foreign representative has a cause of action under § 36.1. *See* Obj. ¶ 56. But that text—which is not recognized as an insolvency treatise in Canada—cites § 36.1 and §§ 95 and 96 as authority, without further explanation. *See Gray's Commentaries on Federal Corporate Laws*, § CCAA-P4:COM18. By contrast, the leading Canadian insolvency treatise (which Plaintiffs ignore) does not say that a foreign representative can bring a claim under § 36.1. *See* Hon. Lloyd W. Houlden, Hon. Geoffrey B. Morawetz & Janis P. Sarra, *Bankruptcy and Insolvency Law of Canada* § 23:87 (4th ed. 2009 & Supp. 2022).

[29] *See* Ruth Sullivan, *Construction of Statutes* §§ 8.89–8.91 (6th ed. 2014).

[30] *See, e.g.*, *Tétreault-Gadoury v. Canada (Employ. & Imm. Comm'n)*, [1991] 2 S.C.R. 22 ¶ 16 (concluding that where a statute expressly granted "umpires" the power to interpret law, the statute's failure to expressly confer such power on a "board of referees" showed legislative intent).

[31] *Laspro Consultores LTDA v. Alinia Corp. (In re Massa Falida Do Banco Cruzeiro Do Sul S.A.)*, 567 B.R. 212, 222 (Bankr. S.D. Fla. 2017) (emphasis added).

relief in this Court under the BIA and CCAA rests not on its capacity as foreign representative, but on the rights and powers it already possesses under Canadian law.[32]

14. *Second*, under Canadian law, Plaintiffs ignore the vital distinctions between foreign representatives and monitors. A monitor must be a "licensed insolvency trustee" and is subject to oversight by Canadian regulators[33] through regular audits and inspections.[34] A monitor must act honestly and in good faith.[35] It must also act impartially.[36] And the monitor must be free of any conflicts of interest.[37] By contrast, a foreign representative under Canadian law need only be a "person or body … authorized, in a foreign proceeding [in] respect of a debtor company,"[38] and nothing in the CCAA or Canadian case law imposes a fiduciary duty on foreign representatives.[39]

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[32] *See Massa Falida Do Banco Cruzeiro Do Sul S.A.*, 567 B.R. at 222 ("Thus, the ability of the Plaintiff to seek relief under the New York statutes upon which the Amended Complaint relies, rests not on the Plaintiff's capacity as a recognized foreign representative, but rather on the Plaintiff's capacity as the Brazilian bankruptcy judicial administrator, and its rights and powers given to it under Brazilian law, including its 'duty to collect the assets and documents of the debtor.'").

[33] The Office of the Superintendent of Bankruptcy (OSB) carries out regulatory, administrative, and supervisory duties at arm's length from the Government of Canada and licenses, regulating and overseeing the conduct of trustees and monitors.

[34] BIA §§ 5(3), 13; CCAA § 11.7.

[35] CCAA § 25.

[36] Can. Reg. 368 §§ 36, 39; CAIRP Rules of Professional Conduct and Interpretation (Aug. 2018), Rule 4, <tinyrl.com/CAIRPRules>.

[37] BIA § 13.3; CCAA § 11.7(2).

[38] CCAA § 45.

[39] Plaintiffs' witness simply declares the existence of such a fiduciary duty but cites no authority. *See* McElcheran Decl. ¶ 35(a). Plaintiffs also describe the foreign representative as an "estate fiduciary" many times. *See* Obj. ¶¶ 6, 56–58. The term "estate fiduciary" is unknown in CCAA law, and ERCOT has not found a case in which either a foreign representative or monitor is described as an "estate fiduciary."

15. *Third*, Plaintiffs cite no authority to support their insistence that JEG is a foreign estate fiduciary, let alone that it has the same fiduciary duties as the Monitor.[40] A foreign representative is not equivalent to a monitor and does not have the same statutory powers as a monitor. Counts 1 through 4 must be dismissed.[41]

C. C. The filed rate doctrine precludes the relief Plaintiffs seek.

16. The filed rate doctrine forecloses all *collateral* attacks that a "'filed rate' is too high, unfair or unlawful" that parties may lodge through other claims in other proceedings,[42] such as breach of contract, fraud, negligent misrepresentation, and antitrust violations.[43] Filed rates are only subject to *direct* challenge through appropriate review mechanisms. Plaintiffs seek a ruling that the PUCT's orders were illegal, directly implicating the filed rate doctrine.[44] Plaintiffs seek precisely what the filed rate doctrine prohibits—to "recover[] damages measured by comparing the filed rate and the rate that might have been approved absent the conduct in issue."[45]

17. Plaintiffs retort that ERCOT failed to identify precedent in which the filed rate doctrine barred a party from arguing an agency's order was entered unlawfully.[46] But the D.C.

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[40] *Id.*

[41] U.S. standing doctrine likewise precludes anyone but the monitor from bringing suit; Plaintiffs do not belong to the class of persons Parliament authorized to sue. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 (2014).

[42] *Tex. Commer. Energy v. TXU Energy, Inc. ("TCE")*, 413 F.3d 503, 507 (5th Cir. 2005).

[43] *Id.*

[44] Am. Compl. ¶¶ 60–72.

[45] *Id.* (quoting *H.J., Inc. v. N.W. Bell Tel. Co.*, 954 F.2d 485, 488 (8th Cir. 1992)).

[46] Obj. ¶ 50.

Circuit has consistently allowed FERC to use the filed rate doctrine's corollary, the rule against retroactive ratemaking, to defend FERC orders.[47]

18. Collectively, the Fifth Circuit's decisions in *TCE*, *Ultra Petroleum*, and *Mirant*[48] make clear that this Court must give effect to the filed rate doctrine as it exercises its jurisdiction in applying the Bankruptcy Code.

D. D. Plaintiffs failed to adequately address material pleading deficiencies.

1. Plaintiffs fail to identify the alleged obligations and transfers at issue.

19. Plaintiffs still fail to identify the transfers and obligations they attack with any level of particularity. Plaintiffs refer generally to "Invoices" from March and February 2021 and "Invoice Obligations" requiring "payment of approximately $336 million relating to the week of February 13, 2021 through February 20, 2021…."[49] Then they "challenge no less than approximately $274 million paid in response to the Invoices …."[50] But they do not identify, for example, which of the Plaintiffs incurred which of the Invoice Obligations and when; nor which of the Invoice Obligations and subsequent payments are implicated by each cause of action. This violates Rules 8 and 9.[51]

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[47] *SFPP, L.P. v. FERC*, 967 F.3d 788, 794, 799, 802 (D.C. Cir. 2020) (a party "petitioned for review of [FERC's] orders," and FERC defended the order on the basis of the rule against retroactive ratemaking). The D.C. Circuit applied the same rationale to deny a challenge to a different refund that FERC defended using the rule against retroactive ratemaking in a case 25 years earlier. *Oxy USA v. FERC*, 64 F.3d 679, 700 (D.C. Cir. 1995).

[48] *See TCE*, 413 F.3d at 507; *Official Comm. of Unsecured Creditors of Mirant Corp. v. Potomac Elec. Power Co. (In re Mirant Corp.)*, 378 F.3d 511, 522 (5th Cir. 2004); *In re Ultra Petro. Corp.*, --- F.4th ---, 2022 U.S. App. LEXIS 6522, at *13 (5th Cir. Mar. 14, 2022).

[49] Am. Compl. ¶ 9.

[50] *Id.* ¶ 11.

[51] *See Reagor Auto Mall, Ltd. v. FirstCapital Bank of Tex., N.A. (In re Reagor-Dykes Motors, LP)*, 2020 Bankr. LEXIS 2254, at *13–25 (Bankr. N.D. Tex. Aug. 24, 2020).

20. Plaintiffs attempt to skirt these deficiencies by arguing ERCOT raises the so-called "debtor-by-debtor" issue prematurely, suggesting "[t]hese types of disputes require discovery to be resolved properly."[52] But this argument fails to address the pleading deficiency ERCOT has pointed out. Plaintiffs further contend that legal theories such as "collapsing" or "indirect transfer" help their pleadings.[53] But Plaintiffs have not pleaded those theories.[54] Even if they did, Plaintiffs have neither identified which transactions the Court should collapse, nor pleaded any basis for applying these theories.[55]

2. Plaintiffs have failed to state a claim for fraudulent preference under § 95 of the BIA.

a. Plaintiffs have not pleaded insolvency at the time of the challenged obligations and payments.

21. Canadian courts agree § 95 requires proof "the debtor was an insolvent person *at the date* of the alleged preference."[56] Plaintiffs' cases do not say otherwise.[57]

22. The Court should reject Plaintiffs' attempt to read in "rendered insolvent" language into § 95. Under CCAA § 36.1(2)(c), "debtor company" replaces "insolvent person" under

[52] Obj. ¶¶ 76–77.

[53] *Id.* ¶ 77.

[54] *See generally* Am. Compl.

[55] *See Mangan v. TL Mgmt., LLC (In re Walnut Hill, Inc.)*, No. 18-02028 (JJT), 2018 Bankr. LEXIS 3591, at *5 (Bankr. D. Conn. Nov. 14, 2018) ("There is nothing in the Complaint that leads this Court to accept that the alleged collapsible transaction … was anything more than the Defendants using legal means of leverage to obtain the assets.").

[56] *Van der Liek, Re* (1970), 14 C.B.R. (N.S.) 229 (Ont. S.C. (Bankr.)) ¶ 4 (emphasis added).

[57] *See 555432 BC Ltd, Re*, 2004 BCSC 1619 ¶ 33 (concluding the debtor "was insolvent *at the time the payment was made* in escrow") (emphasis added); *Blenkarn Planer Ltd., Re* (1958), 37 C.B.R. 147 (B.C.S.C.) ¶ 2 (requiring proof "that the debtor was insolvent at *the time the transaction was entered into*") (emphasis added).

BIA § 95. "Debtor company" means "any company that … *is* bankrupt or insolvent."[58] Conversely, § 96 requires that the company "was insolvent at the time of the transfer *or was rendered insolvent by it*."[59] According to the Supreme Court of Canada, "when different terms are used in a single piece of legislation, they must be understood to have different meanings."[60] Plaintiffs' approach would render § 96's reference to being "rendered insolvent" surplusage.[61]

23. Plaintiffs' own complaint establishes solvency of CAD $138 million at the relevant time.[62] Plaintiffs have not pleaded, and cannot plead, a valid claim under § 95.

b. Plaintiffs' pleadings rebut any alleged intent to prefer ERCOT.

24. Plaintiffs could not have incurred obligations or made payments to ERCOT with the "dominant intent" to prefer ERCOT over other creditors because the Amended Complaint establishes Canada's distinctive "necessary-to-stay-in-business" and "ordinary course" exceptions.[63] *Plaintiffs' own declarant* says that the payments were made "[t]o avoid the

[58] CCAA § 2(1) (emphasis added).

[59] BIA § 96(1)(a)(ii) (emphasis added).

[60] *Agraira v. Canada (Minister of Pub. Safety and Emergency Preparedness)*, 2013 SCC 36 ¶ 81; *cf. Badgerow v. Walters*, 596 U.S. ___, No. 20-1443 (Mar. 31, 2022) (slip op. at 8) ("We have no warrant to redline the FAA, importing Section 4's consequential language into [neighboring] provisions containing nothing like it.").

[61] *R. v. Proulx*, 2000 SCC 5 ¶ 28. Plaintiffs' reliance on a single, 40-year-old decision in *King Petroleum Ltd., Re* (1978), 29 C.B.R. (N.S.) 76 (Ont. S.C. (Bankr.)), for its contrary approach is misplaced. *King Petroleum* interpreted the meaning of "insolvent person" under the BIA, not the meaning of "debtor company" under the CCAA, as required by § 36.1 when applied to § 95. The case is also distinguishable on the facts because the driving factor in *King Petroleum* was "the money [that] had been paid out" (i.e., payments), not obligations that exceeded the company's assets. *See id.* ¶ 10. By contrast, given Just Energy's liquidity position as pleaded in the Amended Complaint, there is no claim that the pre-filing payments alone could have triggered insolvency.

[62] Am. Compl. ¶ 114.

[63] MTD ¶¶ 45–51.

destruction of Plaintiffs' business by the loss of its customers,"[64] which is a classic example of circumstances that will rebut an intent to engage in a fraudulent preference.[65]

25. Rather than respond to ERCOT's arguments, Plaintiffs assert these matters are not properly resolved under Rule 12.[66] But "[a] plaintiff pleads himself out of court when it would be necessary to contradict the complaint in order to prevail on the merits."[67] These issues are ripe for adjudication.

3. Plaintiffs have failed to state a claim for transfer at undervalue under § 96 of the BIA.

a. Plaintiffs have not pleaded any intent to defraud, defeat, or delay a creditor.

26. Plaintiffs misread Canadian law by insisting the pre-filing payments to ERCOT establish intent under § 96 because they "had *the effect* of delaying the payment of other creditor claims."[68] As the leading Canadian insolvency treatise explains, it is only where "the transfer was made to a *non-arm's-length creditor* within one year [that] no intention test is required; rather, it is an effects-based test."[69] But Plaintiffs plead that ERCOT operated *at arm's length* from Just

[64] McElcheran Decl. ¶ 19.

[65] *See* MTD ¶¶ 47–48.

[66] Mr. McElcheran speculates that Just Energy CFO's declaration that the payments to ERCOT were made in the ordinary course "likely did not take into account" certain factors. McElcheran Decl. ¶ 53. It is improper for Mr. McElcheran to attempt to clarify the sworn testimony of a fact witness.

[67] *Kolupa v. Roselle Park Dist.*, 438 F.3d 713, 715 (7th Cir. 2006).

[68] McElcheran Decl. ¶ 64.

[69] Houlden, Morawetz & Sarra, *supra* § 5:486 (emphasis added). The distinction between arm's length and non-arm's length parties follows from the plain text of § 96. *Compare* BIA § 96(1)(a), *with* § 96(1)(b).

Energy.[70] Thus, the "crucial question remains whether [Just Energy] has proved the fraudulent intent of the debtor."[71]

27. The Amended Complaint repeatedly pleads the pre-filing payments were made because it was necessary to remain in business.[72] Mr. McElcheran tries to sidestep this reality by positing that "[i]n [his] view it is sufficient to satisfy the 'intention' requirement … to prove that the debtor knew that the consequences of its action would be to 'defraud, defeat or delay,' *even when it would have preferred not to have caused that harm*."[73] But Mr. McElcheran cites no authority for his novel approach to fraudulent intent. And if this Court does not strike the McElcheran Declaration, it should give no weight to his "*prediction* of the [Canadian] courts' *willingness* to more broadly interpret the law."[74]

[70] *See* Am. Compl. ¶ 103. Thus, Plaintiffs' reliance on *Ernst & Young Incorporated v. Aquino* is misplaced as much as they wish to rely on the effects-based test. *Aquino* was a non-arm's length case. *See* 2022 ONCA 202 ¶¶ 26, 28.

[71] *Urbancorp Toronto Management Inc (Re)*, 2019 ONCA 757 ¶ 64.

[72] Am. Compl. ¶¶ 10, 30, 51, 106.

[73] McElcheran Decl. ¶ 66 (emphasis altered).

[74] *Licci v. Am. Express Bank Ltd.*, 704 F. Supp. 2d 403, 410 (S.D.N.Y. 2010) (emphasis in original) (declining to rely on Israeli law expert's prediction) *rev'd on other grounds sub nom.*, *Licci v. Lebanese Can. Bank,* 732 F.3d 161 (2d Cir. 2013). Mr. McElcheran advocates that because § 96 was adopted in 2009, the pre-2009 case law cited by ERCOT is "of little assistance in interpreting section 96[.]" McElcheran Decl. ¶ 31. But provisions like § 96 existed in the BIA since at least 1967 under the banner of "reviewable transactions." As one leading Canadian bankruptcy expert explained: "The wording and structure of the new provisions are similar to the reviewable transaction provisions in some respects, and so some of the case law under the older provisions remains relevant when interpreting the new provisions." Roderick J. Wood, *Bankruptcy and Insolvency Law* 226 (2d ed. 2015); *see also Ernst & Young Incorporated v. Aquino*, 2022 ONCA 202 ¶ 23.

b. Plaintiffs cannot merge the payments with the obligations to expand pre-filing transfers at undervalue under Count 3.

28. Plaintiffs contend a Canadian court would "collapse the Invoiced Obligations with all the challenged Transfers" such that "elements of a preference claim support a claim for fraudulent transfer[.]"[75] But no such mechanism exists under Canadian law.[76] Plaintiffs try to credit Mr. McElcheran with this argument, but his declaration cites no Canadian case endorsing this unprecedented approach.[77]

4. Plaintiffs still fail to state a claim for setoff.

29. Plaintiffs' setoff claim can only survive if at least one of their other substantive claims does. Because all of Plaintiffs' substantive claims fail, so does the setoff claim. Plaintiffs fail to acknowledge this and incorrectly suggest they can maintain a setoff claim in the abstract.

E. The doctrine of primary jurisdiction applies because the PUCT has exclusive jurisdiction over the $9,000 rate Plaintiffs challenge.

30. Plaintiffs attack ERCOT's primary jurisdiction arguments by raising several red herrings and other unsupportable arguments.

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[75] Obj. ¶¶ 88–89.

[76] Plaintiffs' brief cites only American cases on this issue. *Id.* ¶ 89. Indeed, the only Canadian case ERCOT has identified in which a party contended that a post-petition transfer was subject to a § 96 claim rejected that argument. *Montaldi, Re*, 2011 BCSC 565 ¶ 33 ("In my view, s. 96 does encompass claims with respect to the provision of services. However, the trustee is not challenging the redemption of [bankrupt] Mr. Montaldi's share, which did occur during the period established by the section. Rather, the trustee is challenging the *compensation for services provided after the date of the bankruptcy. Those payments appear to me to fall outside the time frame established by the section and accordingly, s. 96 is not applicable*." (emphasis added)).

[77] *See* McElcheran Decl. ¶ 61.

31. It does not matter whether any of Plaintiffs is an "electric utility."[78] The PUCT exercises authority over the wholesale power market.[79] Moreover, contrary to Plaintiffs' suggestion,[80] plenty of cases require a party to exhaust administrative remedies before pursuing claims in a bankruptcy court.[81]

F. The PUCT is an indispensable party under federal and state law.

32. The Court dismissed the PUCT because Plaintiffs failed to plead any viable cause of action against the PUCT in the Original Complaint, and thus there was no live dispute between the PUCT and Plaintiffs.[82] Plaintiffs still do not seek any monetary recovery or injunctive relief directly from the PUCT, but their repleaded and expanded claims under Canadian law purport to seek invalidation of PUCT emergency orders under the guise of Canadian insolvency, turnover, and setoff claims necessarily incorporating state law-based challenges.

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[78] Obj. ¶ 47.

[79] TEX. UTIL. CODE §§ 39.151(a),(d).

[80] Obj. ¶ 49.

[81] *E.g., Newhouse v. Aetna Life Ins. Co. (In re Heritage S.W. Med. Grp., P.A.)*, 309 B.R. 916, 922 (Bankr. N.D. Tex. 2004) (administratively closing adversary pending exhaustion of administrative remedy); *Leazer v. Extraction Oil & Gas, Inc. (In re Extraction Oil & Gas, Inc.)*, No. 20-50963 (CSS), 2021 Bankr. LEXIS 2562, at *13 (Bankr. D. Del. Sept. 20, 2021) (dismissing complaint for failure to exhaust administrative remedies); *S. Dynamics Therapy, Inc. v. Trailblazer Health Enters., LLC (In re S. Dynamics Therapy, Inc.)*, No. 02-5017-RLJ-11, 2002 Bankr. LEXIS 1954, at *7 (Bankr. N.D. Tex. Dec. 12, 2002) (dismissing adversary for failure to exhaust administrative remedies).

[82] Feb. 2, 2022 Hr'g Tr. at 10. Plaintiffs claim ERCOT is precluded from challenging this interlocutory ruling because it "is law of the case," and because ERCOT "said nothing" after the Court dismissed the PUCT. Obj. ¶ 53. The ruling is not law of the case. *See Ill. C. G. R. Co. v. Int'l Paper Co.*, 889 F.2d 536, 540 (5th Cir. 1989) ("Under the 'law of the case' doctrine, an issue of law or fact decided *on appeal* may not be reexamined either by the district court on remand or by the appellate court on subsequent appeal." (emphasis added)). And ERCOT has continued to preserve its position that the PUCT is indispensable. Reply [ECF. 80] at 24 ("If the PUCT is dismissed from this suit on any ground, the Court must dismiss the whole case because the PUCT is indispensable."); Feb. 2, 2022 Hr'g. Tr. at 13 (following Court's dismissal of the PUCT, counsel for ERCOT arguing the PUCT is a necessary party).

33. Indeed, the APA provides a mechanism to challenge the validity of a rule, including an emergency rule.[83] But "[t]he state agency *must be made a party to the action*."[84] Plaintiffs allege the PUCT Orders are rules.[85] They allege the scarcity pricing ordered by the PUCT violated the APA.[86] They even cite § 2001.038.[87] Thus, Plaintiffs *must* name the PUCT as a party if they want to challenge under the APA.[88]

G. Plaintiffs fail to overcome the case for mandatory abstention.

34. Plaintiffs dedicate eight pages of their Objection to arguing the Court has subject matter jurisdiction. But ERCOT never suggested otherwise, except in connection with standing and immunity.[89] Plaintiffs' argument also suffers from numerous other defects.

35. First, the rules contain no deadline to file a motion to abstain,[90] and Plaintiffs acknowledge a motion to abstain is not the same as a motion to dismiss.[91] Their attempt to shoehorn Rule 12 waiver makes little sense, particularly in light of the claims asserted in the Amended Complaint.

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[83] TEX. GOV'T CODE § 2001.038(a) (emphasis added).

[84] *Id.* § 2001.038(c) (emphasis added).

[85] Am. Compl. ¶¶ 60 and accompanying heading ("PUCT Orders are 'Rules' Under Texas' APA"), 60–65, 67.

[86] *Id.* ¶¶ 66–69.

[87] *Id.* ¶ 67.

[88] At the same time, naming the PUCT as a party would raise separate issues of sovereign immunity that would have to be overcome in order to proceed.

[89] MTD ¶¶ 28, 81–89 & n.207. In that vein, ERCOT agrees with Plaintiffs that *Stern v. Marshall* has nothing to do with subject matter jurisdiction. *Stern* addresses a bankruptcy court's constitutional authority to decide such matters, regardless of their "core" label.

[90] *See* FED. R. BANKR. P. 5011.

[91] Obj. ¶ 122 n.135.

36. Additionally, it does not matter that § 157 arguably designates Plaintiffs' claims as core. The Supreme Court disregards such designations when they violate the Constitution.[92] ERCOT has not filed a claim, and Plaintiffs are suing ERCOT for over $200 million. Only the district court may enter final orders according to *Stern*.[93] Nor does this case confer "arising in" jurisdiction. The statute refers to proceedings "arising in … *cases under Title 11*,"[94] not in an insolvency proceeding in another country.

37. Finally, Plaintiffs' contentions that there are no state law claims or pending state court proceedings fall flat. This proceeding is based in part on State law, and that is all the statute requires.[95] And an administrative proceeding can constitute an "action … in a State forum of appropriate jurisdiction" under § 1334(c)(2).[96] The Court must abstain.

H. ERCOT is immune from suit because this is not an *in rem* proceeding.

38. Plaintiffs' immunity arguments assume this lawsuit involves the Court's *in rem* jurisdiction.[97] The Court has exclusive jurisdiction "of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate."[98] But this suit does not involve the Court's *in rem* jurisdiction for three reasons:

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[92] *E.g.*, *Stern v. Marshall*, 564 U.S. 462, 482 (2011).

[93] "When a suit is made of 'the stuff of the traditional actions at common law tried by the courts at Westminster in 1789,' and is brought within the bounds of federal jurisdiction, the responsibility for deciding that suit rests with Article III judges in Article III courts." *Id.* at 484 (citation omitted, quoting *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 90 (1982)).

[94] 28 U.S.C. § 1334(b) (emphasis added).

[95] *Principal Growth Strategies, LLC v. AGH Parent, LLC*, 615 B.R. 529, 535 (D. Del. 2020).

[96] *See Arid Waterproofing v. Dep't. of Gen. Servs. (In re Arid Waterproofing)*, 175 B.R. 172, 179 (Bankr. E.D. Pa. 1994) (state administrative proceeding satisfied this element of mandatory abstention).

[97] Obj. ¶ 130.

[98] 28 U.S.C. § 1334(e)(1).

(1) The Canadian claims did not exist before commencement of the case because they have no existence outside of a Canadian insolvency proceeding.

(2) There is no estate in a Chapter 15 case,[99] so the claims are not "property of the estate."

(3) The Court's exclusive *in rem* jurisdiction in § 1334(e)(1) does not include liquidating claims that belong to the estate.[100] Such an interpretation would read § 1334(b) out of the statute.

I. This Court should abstain under *Burford v. Sun Oil Co.*

39. Plaintiffs attempt to downplay the significance of *Burford* and *Wilson* through an unpersuasive First Circuit case. In *Public Serv. Co. of New Hampshire*, the focal issue was whether to permit a preliminary injunction against the utility commission. The court explained that *Burford* does not bar federal court injunctions "where there are predominating federal issues that do not require resolution of doubtful questions of local law and policy."[101] But this case does not involve "predominating federal issues." Plaintiffs' claims all arise under Canadian and Texas law.

J. ERCOT objects to the Bishop and McElcheran declarations.

40. Plaintiffs submit two declarations to support their Objection. The Court should disregard both. Paul Bishop, the Monitor, declares he is aware of and supports the foreign representative bringing this suit.[102] Kevin McElcheran, a purported Canadian law expert,

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[99] *In re Condor Ins. Ltd.*, 601 F.3d 319, 327 (5th Cir. 2010) (explaining that "in a Chapter 15 ancillary proceeding," "the court is not required to create a separate bankruptcy estate"); *In re British Am. Ins. Co.*, 488 B.R. 205, 222–23 (Bankr. S.D. Fla. 2013) ("In light of the United States court's ancillary role under chapter 15, there is no estate created here in a chapter 15 case." (emphasis added)); 8 Collier on Bankruptcy ¶ 1502.01 (16th ed. 2021) ("Commencement of a chapter 15 case does not create an estate.").

[100] *Cano v. GMAC Mortg. Corp. (In re Cano)*, 410 B.R. 506, 553 (Bankr. S.D. Tex. 2009) (rejecting the idea that "§ 1334(e)(1) [incorporates] the § 541 definition of 'property of the estate'").

[101] *Pub. Serv. Co. of N.H. v. Patch*, 167 F.3d 15, 24 (1st Cir. 1998).

[102] Obj. Ex. 1 [ECF 132-2] at 3 (the "Bishop Declaration").

summarizes Plaintiffs' Canadian claims, offers analysis as to the Amended Complaint's sufficiency, and opines why the Court should deny ERCOT's Motion to Dismiss.[103]

41. The Court should ignore the Bishop Declaration. When evaluating a facial attack on subject matter jurisdiction i.e., standing, the Court should not look to evidence beyond the complaint.[104] Rather, the Court is bound by the Amended Complaint and items central to its claims.[105] The Court should thus disregard the Bishop Declaration because it seeks to introduce evidence on standing to rebut a facial attack.[106]

42. The Court should disregard the McElcheran Declaration for the same reason. But the McElcheran Declaration also contains improper legal conclusions and is overall unnecessary. Under Federal Rule of Civil Procedure 44.1, courts may consider expert testimony in determining foreign law.[107] But this rule has limits. First, it is inappropriate to consider evidence not attached or central to the complaint when ruling on a Rule 12(b)(6) motion to dismiss.[108] Second, to the extent the McElcheran Declaration briefs the issues raised in, and advocates against, ERCOT's

[103] *See generally* Obj. Ex. 2 [ECF 132-3] (the "McElcheran Declaration").

[104] *See Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. 1981) ("Simply stated, if the defense merely files a Rule 12(b)(1) motion, the trial court is required merely to look at the sufficiency of the allegations in the complaint because they are presumed to be true.").

[105] *Id.*; *VeroBlue Farms USA, Inc. v. Wulf*, 465 F. Supp. 3d 633, 650 (N.D. Tex. 2020).

[106] *Raburn v. Wiener*, 2017 U.S. Dist. LEXIS 234515, *12–13 (M.D. La. Nov. 16, 2017) (striking affidavit filed in support of an opposition to a motion to dismiss).

[107] ERCOT does not concede that Mr. McElcheran is an expert in Canadian law.

[108] *Lormand v. U.S. Unwired, Inc.*, 565 F.3d 228, 251 (5th Cir. 2009).

motion,[109] it is improper legal opinion testimony.[110] Third, to the extent it summarizes Canadian law, the McElcheran Declaration is unnecessary. The Court is capable of conducting its own analysis of the legal principles presented in the parties' briefing and, if necessary, its own research.[111] Expert testimony is "no longer 'an invariable necessity in establishing foreign law, and indeed, federal judges may reject even the uncontradicted conclusions of an expert witness and reach their own decisions on the basis of independent examination of foreign legal authorities.'"[112] This is especially true where the foreign law at issue is either in English or readily available in English.[113] In fact, the Court's independent research is *preferred* over an expert's declaration because retained experts necessarily "add[] an adversary's spin, which the court must

[109] *E.g.*, McElcheran Decl. ¶ 22 ("[I]t is my opinion that Plaintiffs have adequately alleged claims against ERCOT under Canadian law."); *id.* ¶ 35 (noting that ERCOT makes arguments that "I do not consider dispositive"); *id.* ¶ 36 ("I have analyzed Counts One and Two in the Amended Complaint and my opinion is that Plaintiffs have adequately stated claims for relief under section 95 of the BIA[.]"); *id.* ¶ 48 (weighing the sufficiency of the allegations for a preference claim); *id.* ¶ 55 ("Based on my review of allegations in the Amended Complaint, in my opinion, Count Three states claims for transfers at undervalue pursuant to section 96 of the BIA."); *id.* ¶¶ 59–67 (weighing the sufficiency of the allegations for transfer at undervalue); *id.* ¶ 68 ("In my opinion Plaintiffs have alleged facts sufficient to state a claim in Count Four under Section 98 of the BIA.").

[110] *Clark v. Am.'s Favorite Chicken Co.*, 110 F.3d 295, 297 (5th Cir. 1997) (affidavits or declarations containing legal conclusions are not proper). Moreover, the McElcheran Declaration's weighing of the allegations and opinions as to whether they state a claim should be ignored because he is not an expert in United States pleading requirements.

[111] FED. R. CIV. P. 44.1, advisory committee's note.

[112] *Trans Chem. Ltd. v. China Nat'l Mach. Imp. & Exp. Corp.*, 978 F. Supp. 266, 275 (S.D. Tex. 1997) (quoting *Curtis v. Beatrice Foods Co.*, 481 F. Supp. 1275, 1285 (S.D.N.Y.), *aff'd*, 633 F.2d 203 (2d Cir.1980)); *see also Tow v. Rafizadeh (In re Cyrus II P'ship)*, 392 B.R. 248, 251–52 (Bankr. S.D. Tex. 2008).

[113] *See Bodum USA, Inc. v. La Cafetiere, Inc.*, 621 F.3d 624, 628–29 (7th Cir. 2010) (preferring court's research over expert testimony in French law).

then discount."[114] "Published sources such as treatises do not have the slant that characterizes" the McElcheran Declaration.[115] The Court should disregard the McElcheran and Bishop Declarations.

III. CONCLUSION

43. ERCOT respectfully requests this Court grant its Motion to Dismiss and for Abstention.

[114] *Id.*

[115] *Id.*

Dated: March 31, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 31, 2022, I caused a copy of the foregoing document to be served via CM/ECF on all counsel of record.

By: */s/ Jamil N. Alibhai*
Jamil N. Alibhai

TAB L

This is Exhibit “L”

referred to in the Affidavit of **JAMES C. TECCE**

Sworn before me this 14th day of April, 2022

C. Mansara

A Commissioner for taking affidavits

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

JUST ENERGY TEXAS, LP, ET AL	§ CASE NO. 21-04399-ADV
	§ HOUSTON, TEXAS
VERSUS	§ MONDAY,
	§ APRIL 4, 2022
ERCOT, INC., ET AL	§ 2:45 p.M. TO 3:55 P.M.

STATUS CONFERENCE (VIA ZOOM)

BEFORE THE HONORABLE DAVID R. JONES
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES: SEE NEXT PAGE

(RECORDED VIA COURTSPEAK)

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HOUSTON, TEXAS; MONDAY, APRIL 4, 2022; 2:45 P.M.

THE COURT: Good afternoon, everyone. This is Judge Jones. The time is 2:45 Central. Today is April the 4th, 2022. This is the docket for Houston, Texas.

On the 2:45 docket, we have Adversary No. 21-4399, Just Energy Texas, et al v. ERCOT.

Folks, I do apologize. I will have a link up by the next hearing, so you can make your electronic appearance. I just didn't get it done. So we'll have to remember how to do it the old fashioned way. Just make sure you're close to a microphone.

Mr. Alibhai, good afternoon. Let me just start with you. If you'd just -- those folks on your team that wish to make an appearance.

MR. ALIBHAI: Good afternoon, Your Honor. Jamil Alibhai, Ross Parker, and John Cornwell on behalf of ERCOT. And I'm joined by Chad Seely.

THE COURT: All right. Thank you. Good afternoon.

Anyone else on the same side wish to make an appearance?

MR. FIBBE: Yes, Your Honor. George Fibbe of Baker Botts on behalf of Calpine. My colleague David Eastlake is here with me, and our colleagues from Shearman & Sterling, I believe Mr. McDowell and Mr. Roberts are on the --

THE COURT: Are on the line?

MR. FIBBE: -- phone line.

THE COURT: All right. Terrific. Thank you both. Good afternoon.

Anyone else on that side of the room?

(No verbal response)

THE COURT: All right. Counsel, there you are.

MR. TECCE: Sure. Good afternoon, Judge Jones. My name is James Tecce, it's spelled T-E-C-C-E, I'm an attorney at Quinn Emanuel. I'm joined by Jonah Davids, he's the General Counsel of Just Energy. And I'm also joined by my colleagues, Lindsay Weber and Ms. Barbara Howell.

THE COURT: Good afternoon to all of you.

MR. TECCE: Thank you.

THE COURT: All right. Anyone else? Good afternoon.

MR. HAITZ: Good afternoon, Your Honor. Eric Haitz with Gibson, Dunn & Crutcher on behalf of Plaintiff-Intervenor Luminant Energy Company, LLC.

THE COURT: All right. Thank you.

Anyone else in the courtroom?

(No verbal response)

THE COURT: All right. Anyone on GoToMeeting? Let me just go top to bottom. Mr. Bishop, did you wish to make an appearance?

(No verbal response)

THE COURT: So, Mr. Bishop, when -- I think you've got me muted, perhaps.

MR. BISHOP: Sorry, Judge. Sorry, Judge Jones. I'm with FTI Consulting Canada, we have been monitoring the CCAA proceedings in Canada.

THE COURT: Yes, sir. Thank you.

Mr. Higgins, good afternoon to you. Did you wish to make an appearance?

MR. HIGGINS: I do, Your Honor. John Higgins on behalf of FTI Consulting. We're U.S. counsel for Mr. Bishop and FTI.

THE COURT: All right. Thank you.

Mr. Davids, since you made it on the video, I won't steal your thunder if you want to make an appearance.

MR. DAVIDS: Oh, Your Honor, I don't believe I'll be making an appearance, but I'm here.

THE COURT: I was --

MR. DAVIDS: (Indiscernible).

THE COURT: I was just having a little fun with you.

(Laughter)

THE COURT: Mr. McElcheran, good afternoon, sir. Did you wish to make an appearance?

MR. MCELCHERAN: I'm only here as a -- potentially as a witness.

THE COURT: Okay. Thank you, sir. But you can hear

us okay?

MR. MCELCHERAN: I can.

THE COURT: All right. Thank you.

Is there anyone who is just on the telephone that wanted to make an appearance?

(No verbal response)

THE COURT: All right. Then, Mr. Alibhai, I have read almost everything on both dockets in an effort to get up-to-speed. Is there anything else that I need to be aware of or anything that you need to bring up before we get started?

MR. ALIBHAI: I don't believe so, Your Honor.

THE COURT: All right. Thank you.

Are you going to have some technical assistance?

MR. ALIBHAI: I am.

THE COURT: And who should I transfer control to?

MR. ALIBHAI: Jordan Curry.

(Pause in proceedings)

THE COURT: All right. That should be there.

And you like just -- you like no pictures on the screen, right?

MR. ALIBHAI: Yes, Your Honor. Thank you.

THE COURT: Okay. Got it. I will get that off. There we go.

MR. ALIBHAI: Thank you. May I take this off?

THE COURT: Please.

MR. ALIBHAI: Thank you.

THE COURT: Thanks.

(Participants confer)

MR. ALIBHAI: May I pro -- may I proceed, Your Honor?

THE COURT: Please.

MR. ALIBHAI: For the record, Your Honor, Jamil Alibhai from Munsch Hardt on behalf of ERCOT.

A couple of housekeeping things before --

UNIDENTIFIED: (Indiscernible).

THE COURT: Folks, I am going to -- I didn't -- I was hoping not to have to do this. Just because of the background noise, I am going to mute everyone who is on GoToMeeting. I will activate the hand-raising feature. If you wish to be heard, just hit five-star on your phone.

AUTOMATED VOICE: Conference muted.

THE COURT: And my apologies, Mr. Alibhai, for the interruption.

MR. ALIBHAI: Not at all.

Your Honor, a few housekeeping matters before I get started.

THE COURT: Okay.

MR. ALIBHAI: I wanted to let the Court know that, in the Brazos mediation, we found out last night that there's

a 4:30 conference with all of the parties.

THE COURT: Is that all hundred-and-however-many people there are?

MR. ALIBHAI: I don't know how many people are invited --

THE COURT: Wow.

MR. ALIBHAI: -- but all market participants, all co-op members. I think that's the first time we've done that.

THE COURT: Oh, wow. All right.

MR. ALIBHAI: It's mostly by Zoom. But because Mr. Seely was planning to be here for this hearing -- so I just wanted to let Your Honor know that, in the event that we get to 4:15 or 4:20 and we're not done --

THE COURT: He needs to go.

MR. ALIBHAI: -- which I hope to be, Mr. Seely and Mr. Parker, at least --

THE COURT: So everyone who needs to go, please go. We don't want to -- we don't want to invoke Judge Isgur's ire.

MR. ALIBHAI: Yes. And I'm hoping to be there, but you scheduled first, so I'm here.

THE COURT: So just so -- he told me that he would start when I got finished, so we see -- we now see what the truth is.

(Laughter)

THE COURT: He was just telling you --

MR. ALIBHAI: Well, I --

THE COURT: -- I would be done by 4:30. Okay.

MR. ALIBHAI: Well, that's fine with me.

THE COURT: All right.

(Laughter)

MR. ALIBHAI: With respect to today's argument, I'm going to handle the bulk of it. There are a couple of arguments that Mr. Fibbe will address, and if we get to those, we'll get to them. I'm -- again, I think there's some threshold issues that we're going to address today that will move this along.

THE COURT: Okay.

MR. ALIBHAI: The third issue I wanted to raise for Your Honor is you'll notice that there are two witnesses that are on the line. They have submitted declarations. To the extent that they do testify, Mr. Parker is going to cross-examine them. We have objected to those declarations, we believe they're improper under American law to have a declaration submitted in response to a facial attack to a standing argument and as improper with respect to a 12(b)(6) argument.

THE COURT: Sure.

MR. ALIBHAI: And so Mr. Tecce wanted to address that first because I think he wanted to see whether they need to stay on or not.

I'd like to address the merits of the motion because I think, in context, Your Honor will see that, not only is it improper that they testify by declaration, it's just as improper that they try to testify live or by Zoom.

THE COURT: Right. Well, you know that I have a great dislike for declarations because all I do is learn what the lawyers thing, I don't learn what the witnesses think.

MR. ALIBHAI: I'm aware.

THE COURT: But let me also ask you. On the standing question -- because I was trying to work my way through this and nobody really mentioned it. But it seems to me that, just looking at this, is that, rightly or wrongly, Judge Isgur cured that in the main case with the language that he added or was contained in the final recognition order at Docket 82, specifically Paragraph 12.

And at some point -- just looking at your face, I'm assuming that you don't know what Paragraph 12 says.

MR. ALIBHAI: I don't -- I've read it, but I don't remember --

THE COURT: Yeah.

MR. ALIBHAI: -- the paragraph.

THE COURT: Sure. At some point, I want you to address that because I don't understand why that just doesn't solve the problem.

MR. ALIBHAI: On standing.

THE COURT: Uh-huh.

MR. ALIBHAI: Okay. We will pull that up. I know we have it. But we'll pull it up --

THE COURT: Sure.

MR. ALIBHAI: -- and --

THE COURT: Well, I'll -- if you don't have it, I'll print it out for you. Just let me know.

MR. ALIBHAI: Sure.

All right. So let me address the biggest threshold issue --

THE COURT: Okay.

MR. ALIBHAI: -- which is that this entire adversary proceeding with respect to the claims that are substantive in nature all arise under Canadian law, and I think that that's a problem with respect to -- even in a Chapter 15 proceeding, even in an adversary proceeding, there are times it is proper. It is not our position -- and sometimes it is characterized as our position -- that the idea is that the Fifth Circuit has allowed or even reversed District Courts that have dismissed cases because they were refusing to apply foreign law. And it's not our position that you don't ever do that.

But our position is, in this particular case, there are multiple reasons why this court, nor any United States Court, and even a Canadian Court, we're going to show, would not apply Canadian law to these transactions.

THE COURT: Okay.

MR. ALIBHAI: And so we've gone through some of the statutes and definitions. This is Slide 3, which defines a "Debtor company." It uses the word "company." The word "company" is defined. And it talks about something that's incorporated in Canadian law or any incorporated company having assets or doing business in Canada.

And so, when we start talking about these entities -- and there are four plaintiffs, Your Honor: The Just Energy Texas limited partnership, which is not a company under Canadian law; Fulcrum Realty [sic] Energy, LLC; Hudson Energy Services, LLC; and then Just Energy Group, Inc. Just Energy Group in a different bucket for now, but with respect to the other three entities -- and I call them the "Texas Plaintiffs" because either they are incorporated or formed under Texas law or have their principal place of business -- one of the entities is a New Jersey entity, but principal place of business here. And so they don't fit these definitions with respect to a "Debtor" or a "company."

And if we go to Slide 4, this is the BIA Section 2, more definitions, where it has these definitions of a "Debtor," as well. You have to have resided or carried on business in Canada. And the insolvent person, as well, resides, carries on -- or business or has property in Canada. They're not citizens of Canada, they are Texas entities in one

form or another.

And so, when we get to the idea of they want to assert a claim under Canadian law, what Canada would say is does it have some link, what's the connection to Canada.

THE COURT: Right.

MR. ALIBHAI: And the case that we cite -- and there are multiple cases -- but from the Supreme Court, is the SOCAN case, where it says:

"A significant portion of the activities constituting that offense took place in Canada."

And what they use is the phrase "real and substantial link."

And that's contradictory to the entire idea of a Chapter 15. The whole purpose of the Chapter 15 is to take care of and deal with assets in the United States. They plead that. They say:

"This proceeding involves a Debtor's assets located in the United States"

That's Paragraph 12 in their complaint.

And so they have not pointed -- and I'm looking at the complaint. There are no facts pleaded in the complaint that would show that a significant portion of the activities constituting that offense took place in Canada or that there's any real and substantial link.

The only thing that I saw -- and I'm happy to hear

what they have to say about this -- is that Just Energy Group, Inc. is a Canadian entity and it's the parent entity of some of these entities. But that has nothing to do with these transactions that they're trying to claim either a preference or a fraudulent transfer or that there was monies that were transferred that shouldn't have been transferred under U.S. law or under -- on U.S. soil.

And with respect to that, we believe that the failure to show a real and substantial link then creates a failure to be able to apply Canadian law; and, as a result, those claims are not properly before it.

THE COURT: So let me ask you -- as I tried to work my way through the complaint -- and the complaint is made more difficult because there's the defined term "Just Energy," which refers to everybody --

MR. ALIBHAI: That's correct.

THE COURT: -- and then Just Energy does everything, and so it -- you really have to work hard at understanding who did what. Not impossible to figure out, but certainly harder than it needed to be.

Is there agreement between the two of you as to who actually made the payment? I know who got the DIP. I mean, I got --

MR. ALIBHAI: Right. And --

THE COURT: I got that.

MR. ALIBHAI: And I hesitate because, from the complaint, I can't tell. And of course, you know, I have access to the client and I've asked.

THE COURT: Sure.

MR. ALIBHAI: And it's not clear which invoices or which transfers were made by which entity even to us. And you note, you're right, and that's one of the issues I'm going to address, if we get to it, with respect to the idea that, in paragraph -- or the introductory paragraph, "plaintiffs" or, quote, "Just Energy" means all of the entities.

THE COURT: Right.

MR. ALIBHAI: And then the other issue I have with that, when we get to transfers and payment, to answer your question, is in Footnote 3, on Page 5. It says, with respect to Plaintiff Hudson, ERCOT invoiced its QSE BP Energy --

THE COURT: Yeah, I read that.

MR. ALIBHAI: -- and BP satisfied these invoices.

THE COURT: Right.

MR. ALIBHAI: So it's a different entity that made payments there, too.

And so -- and we raise this issue, right? That we have a problem with the idea of not knowing which transfer made by which entity on which date because there's issues of insolvency, there's issues of pre-petition/post-petition. There's issues of invoices versus transfers. And because of

all those moving parts, it is important for us to know, as we try to defend and as we try to show, that some of these don't even fall within the realm of the claims that they're now raising. And it may -- and it's going to vary entity by entity, potentially.

THE COURT: So are you telling me -- and again, I -- you know, all I've got to look to is what's on file, is -- so, when the DIP was approved and funded and a draw was made, what was that initial draw? It was like $126 million or something or --

MR. ALIBHAI: I think a hundred and a twenty-five is what I remember.

THE COURT: A hundred and twenty-five, okay, it's whatever it was.

Are you telling me that there are -- there's been a piecemeal payment of invoices, so they come at different times, or was it a lump sum saying this is for Invoices 1, 2, 3, 4, and 5?

MR. ALIBHAI: I think we got multiple payments.

THE COURT: You have multiple payments. Is that because of some limitation in the fed system or some -- you don't know.

MR. ALIBHAI: Not that I'm aware of.

THE COURT: Okay.

MR. ALIBHAI: I think there were just different

payments for different invoices by different providers, different market participants because they both had different obligations --

THE COURT: Interesting.

MR. ALIBHAI: -- and then --

THE COURT: Okay.

MR. ALIBHAI: And I'm not sure -- and I think there was also some timing issues.

THE COURT: Let me -- and I'm sorry for interrupting.

Mr. Tecce, let me ask you. Do you agree with this? Do you know? Because it would seem to me -- you know, I'm a follow the money guy.

MR. TECCE: Uh-huh.

THE COURT: And it would seem to me that -- I mean, I read the complaint, and it reads sort of as if it's all one big payment. But was it? Do you know?

MR. TECCE: I don't --

THE COURT: Was it --

MR. TECCE: I don't know if it was one big -- I don't -- I'm almost clear that it was not one big payment. Okay?

THE COURT: Okay.

MR. TECCE: And it was several payments.

But I can answer your question, Your Honor, and I'll

-- I don't want to interrupt the presentation.

THE COURT: No, no, no. It's -- I did that for you.

MR. TECCE: So, with respect to the plaintiffs, the -- there are the QSEs, right?

THE COURT: Uh-huh.

MR. TECCE: That interact with ERCOT.

THE COURT: Right.

MR. TECCE: And this is the argument that's raised by ERCOT.

THE COURT: Uh-huh.

MR. TECCE: So the two QSEs are BP Petroleum, which is a Delaware company --

THE COURT: Right.

MR. TECCE: -- and Just Energy, LP. Okay?

THE COURT: Uh-huh.

MR. TECCE: So I believe that those are the companies that made the payments, to the extent that payments were made. Okay? But the --

THE COURT: Well, you say that. But I got that it's on whose behalf the payment --

MR. TECCE: That --

THE COURT: -- was made.

MR. TECCE: That's what I was going to say, Your Honor.

THE COURT: And so --

MR. TECCE: And --

THE COURT: But it seems to me that it becomes important to -- just as I've lived my life in the avoidance world.

MR. TECCE: Right.

THE COURT: Is it becomes really critically important. Was that payment made directly on behalf of an entity? Was money transferred to Party A, and then Party A forwarded it on? You know, you've got the conduit theory where --

MR. TECCE: Right.

THE COURT: -- there is no control over it, it just -- it's just funneled through, and so you can effectively ignore them.

I mean, it seems to me that, if we're really going to go down the avoidance route, just we've got to know, you know, where the money came from. And it seems to me that it's a fair request, as I'm parsing through the complaint.

MR. TECCE: Uh-huh.

THE COURT: It seems to me to be a fair request to be able to say, you know, on this date, you know, $87 million was paid here --

MR. TECCE: Right.

THE COURT: -- on these invoices, and $13 million was paid there on behalf or by this entity because I do -- and

I think the point that Mr. Alibhai is making is that there may be applicable defenses, if you will, to specific payments.

And again, that all gets back to, well, if there's a conduit, can you totally ignore it, and it all goes back to the parent; or, if it wasn't, does money really, you know, flow down throughout the corporate structure, with full discretion to pay whatever it is you wanted to pay. I mean, and I don't know any of that.

But that -- to me, that would seem to be, in any sort of avoidance action, whether it be U.S. law or Canadian law --

MR. TECCE: Right.

THE COURT: -- that that would be a critical part of pleading.

MR. TECCE: Okay. So just to respond to that, Your Honor --

THE COURT: Sure.

MR. TECCE: -- I think there are two issues:

The first one is: Have we done what we need to do to satisfy the Rules of Civil Procedure to avoid our complaint being dismissed?

THE COURT: Uh-huh.

MR. TECCE: And the second one is -- and I would put in that are they on sufficient notice to defend. Okay?

THE COURT: Uh-huh.

MR. TECCE: And then the second one is: To defend, meaning, yes, at some point, they would -- we would provide them with information to specifically show that Just Energy, LP is the company that made the payment, BP is the company that made the payment. The theory is that BP is contractually obligated to Hudson Energy to make the payment on Hudson Energy's behalf. BP has a claim back to Hudson Energy for that amount.

THE COURT: Right.

MR. TECCE: But our argument is going to be many of the theories that I'm sure Your Honor is familiar with in the U.S., and when I get to the time, I'm going to argue that we'll be able to make them out under Canada -- Canadian law.

So I'm sympathetic to the fact -- to answer your question -- that they need to defend. The question is: Do -- is our case going to be dismissed at this point on this issue or is this something that we -- because, from a Rule 80 perspective, we have identified that there is a seven-day window of time.

THE COURT: Uh-huh.

MR. TECCE: We have identified a dollar amount that was transferred. We have identified the amount that -- as far as we could tell today, that we dispute. We have the seven days in question. And so we have identified, I think, from a legal matter, what we need to, to state out a claim at this

point.

THE COURT: Sure. So let me -- so, one, as I sit here right now -- and I got it that all I've done is read and I've heard five minutes worth of argument. I'm going to disagree with you on that point.

But I also take very seriously the Fifth Circuit instruction, guidance that the goal is not to have cases disappear on technicalities, but to put everybody on notice. And I got that you've been through this once with Judge Isgur. Judge Isgur, at least -- and again, I have the benefit of having known him for 32 years, and you don't, so I read him better than probably most. He wasn't focused on this issue.

And so, to the extent that you are unable to convince me, I will tell you that, if I did dismiss those claims, it would be with an opportunity to re-plead with more specificity because, again, I want to make substance, not on gotchas. And I got this is a bit unusual.

MR. TECCE: Right.

THE COURT: But I do think that it's a fair request, and this is -- I try to be as transparent as I --

MR. TECCE: Understood --

THE COURT: -- possibly --

MR. TECCE: -- Your Honor. So --

THE COURT: -- can be.

MR. TECCE: If I could just explain why we -- the

plaintiffs in the complaint are Just Energy, LP -- that is the QSE. Okay?

THE COURT: Uh-huh.

MR. TECCE: And then the other three, they're all market participants. Okay? So they all have standard form agreements with ERCOT.

THE COURT: Okay.

MR. TECCE: Okay? They are parties that would be injured by the conduct in question. So I would submit that we named the proper parties, that they have standing, that they might be injured.

THE COURT: Sure.

MR. TECCE: And --

THE COURT: I also think, again -- and you know, I'm going to hear what gets said -- I think this all got covered in the recognition order.

MR. TECCE: Okay. I'm -- I was looking for Paragraph 12, and I'm happy to --

THE COURT: It's one --

MR. TECCE: -- (indiscernible).

THE COURT: It's one sentence.

MR. TECCE: In the March 9th order, Your Honor? Is that it?

THE COURT: It is in Docket Number 82, that's the final order, where it gave the Debtors and the representative

all of the authority, without limitation, under 1521(a)(5).

(Participants confer.)

THE COURT: I'm going to give you time to think about that.

I'm just going to tell you where I was bothered by standing when I first sat down and read all of this --

MR. TECCE: Right.

THE COURT: -- I am not anymore.

MR. TECCE: Okay. That's -- I like that. But I ...

(Participants confer.)

MR. TECCE: Two points my colleague has drawn to my attention, if I could just come back to your original --

THE COURT: Sure.

MR. TECCE: -- point, Your Honor, which is that the statute in question does say "on behalf or by." And so, to your point, when -- if we have to file an amended complaint, there are ways that we will distinguish, if that's something that we have to do. You know, transfer made "on behalf or by," that's what the statute requires.

And all of our entities are Chapter 15 Debtors and they all have standing to bring relief under 1507, 1519, 1520, 1521. So we believe that we've properly named them.

But to your knowledge, if you want a complaint that says X transfer was made on X date by X, that's --

THE COURT: So two different issues.

MR. TECCE: Okay.

THE COURT: So one is a standing issue, which, again, when I sat down and I started reading -- because, again, I -- you know, my experience in 15, I hadn't seen a situation like this before. It was always the monitor who --

MR. TECCE: There you go --

THE COURT: -- was the only --

MR. TECCE: Sure.

THE COURT: -- person I ever saw because they were one and the same, and I got that.

But then, when I read the order -- because that's the provision that is, you know -- I mean, it's certainly encompassed by the Code. It's one -- and you know, Isgur has a way of being just very direct. And yeah, that's one sentence. My view is it resolves the issue on standing.

The second point about identifying the transfers, that has an entirely different application. I -- because I think -- and I think you want me to be able to look at it on a payment-by-payment basis.

I certainly think that Mr. Alibhai is entitled to understand exactly dollar by dollar, and also because there may be issues. Again, I don't know if there is the equivalent of 547(c) defenses under the Canadian act. I don't know what else he's got up his sleeve. He's got a pretty tricky sleeve and he amazes me with his resourcefulness all the time.

I also don't -- you know, I also think that you have to be able to look at this and, as you're looking at the required elements, break it down. You certainly can't argue a conduit theory if you don't know who the conduits are.

MR. TECCE: Okay.

THE COURT: So -- and again, I -- I'm going to hear what everyone else has to say about all of that. But if -- you know, if we end -- if we end up where I am right now, is that, you know, you're going to -- you're going to have an opportunity to take advantage of, you know, giving me more specificity, breaking it out by transaction by transaction, you know, or not. I mean, obviously, that choice would be yours.

MR. TECCE: Okay.

THE COURT: Okay?

MR. TECCE: And would you like me to respond right now to the monitor point or --

THE COURT: No, no. I just wanted to -- I wanted to see where we were going with this one particular issue.

MR. TECCE: Okay.

THE COURT: And I interrupted Mr. Alibhai --

MR. TECCE: Okay. Let's --

THE COURT: -- and I didn't mean -- and I didn't intend on doing that for this long, but thank you.

Mr. Alibhai.

MR. ALIBHAI: With respect to what the Court was asking about, in terms of this issue of the transfers.

THE COURT: Uh-huh.

MR. ALIBHAI: I think that that also goes along with this idea of how can Canadian law apply because what I heard was that two entities that are United States entities, made payments to a Texas entity on behalf of market participants in a regulated Texas market who have signed contracts that say Texas law applies to their transactions.

THE COURT: And I heard he didn't know --

MR. ALIBHAI: I thought --

THE COURT: -- because I think --

MR. ALIBHAI: -- the two were the -- two people who made the point --

THE COURT: Well, see, I don't know that. I mean, it certainly hasn't be pled. And again, I don't know if it was a payment made on behalf of or a payment that was made by. And I do think that you could end up in potentially different places based upon the facts.

MR. ALIBHAI: And so the facts, as they exist today --

THE COURT: Uh-huh.

MR. ALIBHAI: -- don't show what the Supreme Court of Canada requires --

THE COURT: Okay.

MR. ALIBHAI: -- which is a significant portion of the activities constituting that offense took place in Canada. All the bad acts that they complain about in this complaint relate to actions by ERCOT or the PUCT that occurred in Texas, in February. They allege that we have violated the SFA. The SFA has a choice of law provision that says you don't even do a conflict or choice of law analysis.

THE COURT: Right. But isn't the offense the payment of the money?

MR. ALIBHAI: No. I believe the offense is the concept that we sent invoices because they're saying the invoices were inflated.

THE COURT: Well, if you sent invoices -- no, I got that that gives rise to the valuation issues, and that's all right. But isn't the offense the payment of money? Because if they sent -- if you sent an invoice and they didn't pay it, then they would -- they couldn't possibly have a preference claim, right?

MR. ALIBHAI: So, under -- and we'll get to this when we talk about 95 and 96.

THE COURT: Uh-huh.

MR. ALIBHAI: I believe that the way that I read their complaint is that, with respect to Section 95, they are challenging the invoices as obligations that were incurred. They're not challenging payment because payment didn't happen

until later, and so they didn't have a pre-petition payment that they're trying to bring a claim under.

There are some, but -- and I notice -- like if you look at just the counts as they end, they end with different amounts.

THE COURT: Right.

MR. ALIBHAI: And that's because sometimes they're challenging the invoice only, and sometimes they're challenging the transfer. So the offense and the invoicing all occurred here, happened well before any bankruptcy was filed. And so there was no -- the cause of action that's being asserted with respect to those things doesn't even require the payment. And when the payment did occur, it occurred here at ERCOT's headquarters in this state.

So I'm looking at the end of the complaint, Docket Number 95.

THE COURT: Hold on, let me get -- let me catch up with you.

(Pause in proceedings)

THE COURT: So on Page 39?

MR. ALIBHAI: Page 30.

THE COURT: Oh, Page 30.

MR. ALIBHAI: 30, yes, Paragraph 89.

THE COURT: Okay. Hold on. That's -- I was at the end. Okay. I'm with you.

MR. ALIBHAI: So, there, it says:

"-- an order declaring that the Invoice Obligations are void in their full amount (approximately $336 million) and that the transfers made on account of those void obligations should be returned is warranted."

And then, in Paragraph 98 -- that's Count 2, still brought under Section 95, which relates to pre-petition transfers -- they say:

"-- declaring that the prepetition transfers are void and should be returned in the amount of no less than approximately $81 million" --

So there's a difference.

THE COURT: There is.

MR. ALIBHAI: One one relies on transfers more so than the other, which relies on the obligation, because they're relying on the fact that the statute says that -- and explicit in Paragraph 86, Your Honor, where they quote from it, that "if the transfer, charge, payment, obligation" ... and the "incurred" language that they cite, as well.

So I do believe that, even with respect to this invoice issue, nothing is going to change on those set of facts.

Now the transfers, I understand what you're saying, but at the end of the day, the transfers are made in Texas, they're made pursuant to an SFA. It's a standard agreement.

There are multiple paragraphs, and we'll talk about them later on, as well, that go into these issues about the idea that the actions of ERCOT violate the SFA, specifically, and the protocols, which are incorporated. There are paragraphs that say that. So they're relying on the SFA for purposes of their claim, which has this provision about Texas law.

And then, to finish up because, as I said, we're not taking the position and have not taken the position that foreign law can't apply in a Chapter 15 adversary proceeding. We show, under the case law, and multiple Fifth Circuit cases, that it really depends on what the relationship and the connection is, just as we said what Canada would show and do.

I think it's important to look at the Holt Cargo case, as well, which we cite, that says different jurisdictions may have a different interest, and it may be subordinated in a particular case to a foreign bankruptcy regime.

And so -- and Your Honor, I am not a Chapter 15 expert. You've done this for a long time. I'm sure that you've had cases where sometimes United States law applies, and sometimes foreign law applies, and it depends.

THE COURT: Right.

MR. ALIBHAI: And it depends. And the question is: What in this complaint says that Texas electricity rates charged by a Texas entity that has been set up by the Texas

Legislature, and you have Texas market participants, should have Canada law apply? By their logic, if they had chosen somehow to file in the Bahamas or in England, then they would say Bahamas and England law apply, and that's not the test. And so, for that reason, because they can't show this link, because they can't show that there's a connection to Canada, they can't rely on Canadian law.

Now we've talked about Canadian law. But what's more important to this Court is applying U.S. law. And whether you look at the SFA, Section 11(a), or you look at just our test of the most significant relationship test, there is nothing in this test that shows that Texas law would not apply, let alone that Canadian law would apply.

The place where the injury occurred, these are Texas entities. The place where -- for the market participants, that is.

The place where the conduct causing the injury occurred, all of these things happened in Texas during Winter Storm Uri.

The residence of these parties, each of them has a Texas connection, including ERCOT.

And fourth, the relationship is obviously centered in Travis County, Texas, as it says in Section 11(a) of the SFA.

And so, for all those reasons, Your Honor, we think

that that threshold issue of a lack of connection and a lack of showing factually that they can cite and use and rely on Canadian law -- which they didn't do the first time. They chose, in the first complaint, to have a very ambiguous count that made reference to the CCAA. I did not know what it was. In their response, they raised some issues. Judge Isgur said you need to plead it.

It turned into four counts, under the BIA. And so, once we saw that and we looked into it and consulted with Canadian counsel and learned Canadian law about how this works and studied even U.S. law about the venue and forum and choice of law provisions that are important, realized they're not able to do this. And the only reason they're trying to do it is because their U.S. claims did not survive the first motion to dismiss.

Nonetheless, even if, somehow, they could argue that Canadian law applies, we have raised this issue. And I do want to talk to some of my colleagues about the -- I saw the paragraph Your Honor referred to, but I do want to talk to them about them.

But nonetheless, it is undisputed in this case that the statute that they are bringing a claim under, the Canadian statute, says that -- it uses the word "Trustee" in Section 95 and Section 96. The then definitions with respect to the CCAA in Section 36.1 say anything in Section 38 and 95 to 101,

"Trustee" should be "monitor."

In a case in which it wasn't an issue about who it should be, the Court said it's the monitor who it would like to have make an application.

And then we also cited the Cash Stone [sic] case. And I think this is going to be important to the issue that Your Honor is raising about the paragraph that Judge Isgur cited. In the Cash Stone case, the Court said:

"In the absence of some form of assignment" --

The entity that was suing, who was not the monitor, is:

"-- not in a position to challenge the transactions as preferences" --

And so it's either the monitor; or, if a creditor has asked the monitor to bring the lawsuit and they've refused to do so, can go through some process -- I believe it's in Section 38 -- to seek an order from the Canadian Court.

So that has not happened, it is not even posited that it would happen or should be done. None of them are the monitor. And for that reason, even if Judge Isgur signed an order -- and he did sign an order -- but even Judge Isgur's order saying you have certain rights under Section 1507 and 21, that doesn't change Canadian law.

And so that's the problem they have, is that, by -- if there was something that they could have done under some

section of the U.S. law because of that, that would be different. But to use that paragraph to then say somehow that gives you rights under Canadian law that Canada has never endorsed -- like we looked at a lot of cases about this issue, and it's a rare situation that it happens. It's usually a creditor, and the have failed to show that the monitor has not brought the suit, and then they have go to and get the order.

And what the Courts do in those situations in Canada is they dismiss it or they stay it and they give them 90 days to try to go get that order --

THE COURT: Uh-huh.

MR. ALIBHAI: -- and say, here, you can try to fix this issue. But I don't see how Judge Isgur's order would statutorily change a Canadian law requirement --

THE COURT: So --

MR. ALIBHAI: -- because it is a requirement.

THE COURT: So who's the beneficiary of that cause of action?

MR. ALIBHAI: The creditors.

THE COURT: And is that changing?

MR. ALIBHAI: By?

THE COURT: Whether it's the monitor, whether it's someone entrusted with that asset under 1521, the ultimate beneficiary is exactly the same, isn't it?

MR. ALIBHAI: It can be.

THE COURT: Well --

MR. ALIBHAI: But I --

THE COURT: -- isn't it? I mean, if a Trustee were bringing it, it's creditor; if the monitor is bringing it, it's creditors; if it's someone that the cause of action is entrusted to, any recovery goes to creditors.

MR. ALIBHAI: And I'm not -- I'm just speaking generally --

THE COURT: Sure.

MR. ALIBHAI: -- without getting into Canadian law. These entities, in some respects, are Debtors; other ones are affiliates. If you -- and there's no estate in Canadian law, it's different, right? Because they have a Debtor-in-possession --

THE COURT: That's why we all said "creditors," as opposed to "estate."

MR. ALIBHAI: Exactly.

And so I think Canada's rationale behind this was let's have someone who's independent, let's have someone who has certain oversight and obligations under Canadian law, who's a monitor.

And I don't think -- first of all, Just Energy Group, Inc. I have not heard made any payments. And so that might be a Debtor, but it's not made any payments, so it's going to be very interesting to see how it has standing to

bring any claims.

THE COURT: So let me -- this is a genuine question. So what you want is you want an order from the Canadian Court that specifically says who has authority to bring these claims, whatever they may be.

MR. ALIBHAI: I don't think it's whoever. I assume it would be the monitor. I mean, I think that's the way the statute works, unless --

THE COURT: Well, I think -- I mean, the Canadian Court has whatever authority the Canadian Court has.

MR. ALIBHAI: Certainly.

THE COURT: And if it says Santa Claus can bring these claims, then I assume -- assuming that you had pursued your appellate rights, if the Court said Santa Claus can bring these claims, then Santa Claus would be an acceptable plaintiff to you at that point.

MR. ALIBHAI: I think that Your Honor would probably give deference to the Canadian Court as to what it said --

THE COURT: Right.

MR. ALIBHAI: -- and we'd be where we are.

THE COURT: Right. Okay.

MR. ALIBHAI: So -- but I think that -- and as I said, what I have learned is that, with respect to a monitor, that they would -- that they act differently, and so it's that reason that this exists.

Now it is a technical point, I understand that. And I understand that -- the point that Your Honor is making about, well, what if we just give all these people this power, and they use it for the purposes of the creditors.

THE COURT: A little different. I mean, the point is I come to this bound by everything that was entered before I got here.

MR. ALIBHAI: Sure.

THE COURT: And so I've got an order by Isgur that says what it says. And it just seems to be that that's -- that that fits. You're making the argument that he didn't have the authority to do that for a claim that arises under Canadian law. And I -- have I got that about right?

MR. ALIBHAI: I don't think it's authority -- the phrase Your Honor used.

THE COURT: Oh, okay.

MR. ALIBHAI: I think it's more --

THE COURT: I just --

MR. ALIBHAI: I think it's more his order doesn't change the statutory requirement for a statutory Canadian claim.

THE COURT: Okay. But I chose poorly then because that's exactly what I intended to say.

MR. ALIBHAI: Okay. No, I wanted to make sure we weren't talking past each other.

THE COURT: Sure.

MR. ALIBHAI: But I don't see how, if Canada says only A or B can bring a claim, a U.S. Court can't somehow say, hey, for purposes of Chapter 15 proceedings, hey, C can bring claims under Canadian law now. We're not going to change Canadian statutes.

THE COURT: Right.

MR. ALIBHAI: We look at the Acts of Parliament, we construe them the same was we do in the United States. We apply the words literally. Where they're used differently, they're used differently on purpose.

And you know, we found a U.S. case, In Re Nortel Networks, that we cited, where the Court had three different affiliates from three different countries; one was English, one was Irish, one was French. And they're all trying to bring these claims. And the Court said my job is to go through the law and figure out what it says under each of these countries. And there's page after page where they apply fraudulent transfer law under English law and Irish law and French Courts.

And it came to the end, where they said you don't have this type of claim against a *de facto* or shadow director under those countries' law, and so, no, you can't bring this claim, whoever you are that has the right to bring the claim because it said the Court will not extend foreign law, and so,

you know, nor should we, and we don't.

But nonetheless, I think the most important thing that all of this shows is Canadian law is just not appropriate here. And when we get into the more specific arguments we make about each of the counts, the Court will see why, as to these particular transactions and obligations, that it doesn't apply at all in this particular case.

But I think this threshold issue is important because it goes to standing, which, obviously, is one of the most important issues in any case. But the idea that when they could not bring the U.S. claims that they brought, they can just switch to a foreign law and say we'll fall under that, and even if we don't meet it directly, it's okay because the monitor knows about it. I don't think that that's what's appropriate on a statutory claim, I think you have to meet every line of it.

THE COURT: Right. And so does the logic go that, if the Canadian claims fall away, then everything else falls away, as well?

MR. ALIBHAI: So that's Counts 1 through 4.

THE COURT: Uh-huh.

MR. ALIBHAI: Count 5 has already been dismissed. We'll talk about that because I'm not quite sure what the disconnect was between the parties. I'll walk Your Honor through what happened at the previous hearing. I'm sure you

read the transcript.

THE COURT: Uh-huh.

MR. ALIBHAI: To me, it's clear, and I'll walk you through on Count 5. It's already been dismissed, pending there being some right to bring it back at a future time.

Count 6 is setoff. There's nothing to set off if there's no claim.

THE COURT: Right.

MR. ALIBHAI: So, yes, I -- to answer your question more directly: Yes, that's correct, and I was telling you why.

And so I'm happy to go into each of the counts and discuss them, or this is a good place if Your Honor wants to stop and discuss this issue out first about the application of Canadian law and standing --

THE COURT: I actually --

MR. ALIBHAI: -- and then --

THE COURT: I think that makes sense.

Mr. Tecce, let me ask you -- and Mr. Alibhai, don't go far.

MR. ALIBHAI: I won't.

THE COURT: So -- and this is a -- this is just a -- this is a risk tolerance question.

MR. TECCE: Sure.

THE COURT: So, obviously, the easiest thing to do

is to simply go back to the Canadian Court and get an order that says, you know, that whoever can bring these claims, or you can substitute the monitor in and, you know, you can do it -- you know, you can use an" on behalf of," blah, blah, blah, blah, blah --

MR. TECCE: Uh-huh.

THE COURT: -- and you know, "to the extent."

I was -- I never quite figured out why you needed some of the entities that you had.

MR. TECCE: Uh-huh.

THE COURT: But you know, again, it's your lawsuit, not mine.

And again, I think Judge Isgur's order says what it says. But you also know that I won't be the last person to look at this.

MR. TECCE: Understood.

THE COURT: And I will just tell you my experience has been -- Chapter 15 doesn't bother me. I've been around it now for, you know, all of my career, both as a practitioner and while I've been on the bench. I recognize that there is a change when the foreign main -- and especially Canada because that's been predominantly what I've seen, just with all of the oil and gas, is I sit in a different position.

But I will tell you the District Courts do not grasp that concept. I will tell you I had a conversation in a -- it

wasn't even my case, it was -- actually, it was one of Isgur's case. And the District Judge asked me a question, and I said, well, you have to understand we're not doing what we would do, we are simply enforcing what a court in another country decided was appropriate, subject to the limitations that we don't violate -- you know, we don't contravene U.S. policy. And that was a really, really tough concept for that particular DJ to grasp.

And I only give you that -- it was just a conversation that I had that was somewhat -- you know, it was -- I was surprised by it. And of course, when you really think about it, if you never see one of these, you probably would react exactly the same way.

So what I'm -- that was a long-winded way of saying that, you know, what I don't want to have happen is I've got a monitor who has -- is sitting tacitly by, and apparently -- because I haven't seen a pleading filed -- says, yeah, this is okay with me. But what if it turns out that Mr. Alibhai is right? And then you're back to, well, the monitor can now bring these claims. And then you're going to hear the arguments, you know, nuh-uh, that's -- you know, he sat by and watched this get done, he's now completely barred from pursuing anything, I mean, is the argument I would make.

MR. TECCE: Right.

THE COURT: And so the question is: In order to

make better use of everyone's time -- this can't be a hard call --

MR. TECCE: Right.

THE COURT: -- for the Canadian Court. Would we be better off simply stopping today? And I'll make the request on the record that I asked the Canadian Court, on an expedited basis, to consider who is the proper party to bring these claims. And hopefully, he would see or she would see a copy of the complaint and --

MR. TECCE: Well --

THE COURT: -- get me an order.

MR. TECCE: So let me respond --

THE COURT: Sure.

MR. TECCE: Are you finished, Your Honor? Okay. So a couple of points, Your Honor.

The short answer to your question is: If the Court -- this Court wants direction from the Canadian Court, we are prepared to go and obtain that. Okay?

THE COURT: Well, it's a little different because it's not going to be -- I get reversed all the time. And that's -- I -- you know, and I'm just okay.

MR. TECCE: What I'm saying is --

UNIDENTIFIED: That's not true.

THE COURT: Yeah, I know, but it sounded good. It sounded good, anyway.

(Laughter)

MR. TECCE: A couple of points.

THE COURT: Yeah.

MR. TECCE: What I was saying is this: If that's the kind of clarity that -- our position on this is that the monitor and the foreign representative, I think as you noted previously, are typically the same person.

THE COURT: Right.

MR. TECCE: Okay? In this case, the monitor and the foreign representative are not the same person. The foreign representative bought the claims.

THE COURT: Uh-huh.

MR. TECCE: Okay? And with the support of the monitor. Okay?

And where we left this in our papers was: If that's -- the monitor is prepared to go to the Canadian Court and get clarity. What I'm concerned about is that I wouldn't want it to be limited to let's let the Canadian Court tell us who is going to bring in the claims. We can deal with this issue of the monitor brings the claims or the foreign representative brings the claims because there are two points I'd like to respond to, if I could.

THE COURT: Sure.

MR. TECCE: Okay? The first one is that why Canadian law applies, and I'd like to answer that. But I'd

also like to answer this part about the monitor is the only party that can bring the claim. And if I can respond to that now because the smell of gunpowder is still in the air ...

THE COURT: No, of course you can. And let me tell you this: I don't believe that the monitor is the only person that can.

MR. TECCE: Right.

THE COURT: But the issue that you've got it is Mr. Alibhai does, and he can make an argument -- I'm -- I would suggest simply by confusion because the monitor and the rep are always the same person, the statute says what it says.

MR. TECCE: Right.

THE COURT: I mean, I don't apply Canadian law every day. I could be wrong.

MR. TECCE: Right.

THE COURT: And it would just seem to me, if we're all going to go through this exercise and it's a relatively easy issue to resolve -- and I wasn't suggesting how you make the request.

MR. TECCE: Right.

THE COURT: I leave that to you.

MR. TECCE: Sure. So --

THE COURT: But it just seemed to me that --

MR. TECCE: There -- two points I want to make on this.

THE COURT: Sure.

MR. TECCE: The first one is that, as a substantive matter, if we go back to court --

THE COURT: Uh-huh.

MR. TECCE: -- and we do that, this case continues because this is not a basis to dismiss for subject matter jurisdiction. And I want to make this very important point. Okay?

THE COURT: Uh-huh.

MR. TECCE: The idea of dotting your I's and crossing your T's with this technical argument. Okay? This has been presented in a court -- actually, I don't want to interrupt Mr. Alibhai, but I'd like to respond to you in realtime.

THE COURT: No, go ahead.

MR. TECCE: Can I do that, please?

THE COURT: Yeah.

MR. TECCE: Okay. So can we pull our slides up, please?

THE COURT: Let me --

MR. TECCE: Okay. And I'm going to be very quick, Your Honor, because I don't want to interrupt Mr. Alibhai --

THE COURT: And --

MR. TECCE: -- but I do want to respond.

THE COURT: And who's got the computer that I need

to give control to it?

MS. WEBER: It's Lindsay Weber.

MR. TECCE: Lindsay Weber. Thanks.

THE COURT: Lindsay Weber.

MR. TECCE: So the two points I'm going to address, Your Honor, if it's okay with you --

THE COURT: Sure.

MR. TECCE: -- is I'd like to --

THE COURT: Well, let --

MR. TECCE: I'll address the monitor point and then --

THE COURT: Let --

MR. TECCE: -- and then I'd like to address why Canadian law applies.

THE COURT: Sure. Let her catch up with you.

MR. TECCE: Yeah, sure.

THE COURT: I just gave her control.

MR. TECCE: Okay.

THE COURT: Okay. Ms. Weber, now you just need to share your screen.

(Participants confer.)

THE COURT: Let me ask this while she's doing that.

MR. TECCE: Yeah.

THE COURT: It was always my experience -- and of course, my experience ended about 11 years ago -- was that

getting an emergency hearing in front of the Canadian Solvency Courts was really quick.

MR. TECCE: It -- Your Honor, I -- we're not resisting the idea, and I think we even suggested that we would do it in our papers, in the monitor's declaration, which we're -- I thought we were going to argue about. But you know, the monitor says that he's willing to cooperate with us. So I wanted -- if that's something that -- a level of comfort that people want, we're not opposed to it.

But I would like just two minutes to explain why we got to where we are.

THE COURT: Sure.

MR. TECCE: And then we'll -- because it's very important, Your Honor, because what was said was that, well, if the Canadian claims go away, then the whole case goes away. Well, no, fixing this problem, going to the Canadian -- to the extent that it's a problem, I'm not going to stipulate -- going to the Canadian Court is not a basis to dismiss the suit. It's not a question of subject matter jurisdiction, and I'm going to explain why, if I could.

THE COURT: Okay.

MR. TECCE: Okay?

THE COURT: Sure.

MR. TECCE: All right. So, Your Honor, I begin, first of all, with the context in which the cases were filed,

right? So we have a Canadian proceeding, a Canadian proceeding that was commenced. Okay? And a Chapter 15 commenced in the United States. All right? And it was commenced when we received the invoices from ERCOT because we needed to pay them. Okay? And so we ultimately commenced a Chapter 15 case in the United States. We commenced Canadian proceedings. We obtained access to a Debtor-in-possession financing loan and we paid a large portion of the $125 million to ERCOT. Okay? So now we have a Canadian proceeding in Canada, and we have Chapter 15 cases here. All right?

So if we could start at Slide 12. I'll start with the monitor point first, and then I'll explain why Canadian law applies, Your Honor.

Okay. So the statute says -- Slide 12.

(Participants confer.)

MR. TECCE: It's loading. I'm sorry, Your Honor. It loads.

So the statute is at 95 and 96, and they say the "Trustee." They don't say the “Monitor,” they say the Trustee brings the claims under BIA.

THE COURT: Uh-huh.

MR. TECCE: Okay? All right?

For what it's worth, a partnership can also bring claims under the BIA. We'll talk about that if we really get to this distinction of Canadian Companies Creditors Act only

applies to companies, it doesn't apply to partnerships, we have partnerships. We'll get to that.

But the Trustee is the party that brings the 95 and the 96 claim. Okay?

And then, if we can go to Slide 13, you see that, under 36.1 -- this is the section that everybody is focused on -- the bank -- the Trustee is to be read with reference to the monitor.

THE COURT: Right.

MR. TECCE: Okay?

THE COURT: Uh-huh.

MR. TECCE: And -- but the statute also provides at Section 38 is that other parties can bring claims under the BIA. Okay? It says that, when the creditor requests -- so it's not unlike the United States. When the creditor requests and the company -- or the Trustee, rather, refuses to bring the claim, another party can get the claim by assignment. Okay?

THE COURT: Same here, we just call that a "Louisiana world letter."

MR. TECCE: Right.

So the monitor is not the only party that can bring the claim, as envisioned by the statute.

And so, Your Honor, here, we have the foreign representative -- can we go to Slide 14? The foreign

representative is bringing the statute. All right? And I do submit, Your Honor, that they do fulfill similar functions. Okay? The Court appointed Just Energy Group, Inc. as the foreign representative, which is authorized and empowered to act in a representative capacity. The monitor monitors the business and financial affairs of the company. The foreign representative monitors the Debtor and the companies business and financial affairs.

And so these parties, this is why the monitor and the foreign representative are often the same. They have similar roles and they're both estate representatives. Okay? And not surprisingly, the monitor supports our bringing the claims.

There is no case that says an estate representative cannot bring these claims. Okay? And the case that ERCOT relies on is the Verdellen case. So can we go to Slide 15? This is the case that ERCOT says the language of 36.1 is clear. This is Paragraph 5 of their reply:

"Only the monitor may bring claims under the BIA. Plaintiffs do not dispute that Canadian Courts have reached this conclusion."

And this is the case that's cited for that proposition.

In this particular case, a purchaser of assets bought the assets out of this company, and a counterparty or a

party emerged and said I have a patent, and I'm the patent holder, and the purchaser said, no, you're not, I bought the patent. Okay? And had an argument about who bought the patent. And it was decided that the party that bought the assets bought them as good faith purchasers. Okay? So this is not a case about whether or not the monitor is the only party.

What happened is, in the course of that litigation, the purchaser of the assets said, by the way, you got a preference, you claiming to have the patent, you got a preference. And the Court said this in Paragraph 46, it says the monitor -- it says the Trustee brings these applications, the monitor can bring them, but since you're not a creditor, asset purchaser -- not unlike the U.S. -- you can't bring the claim. Okay? So this is not a case that stands for the proposition that the monitor is the only party that can bring the claim.

And the important point I want to make, Your Honor, this is the very important point. If we could go back to Slide 14. We cite this Elgin Sweeper case from New York. And the Royal Bank of Scotland was the defendant of fraudulent transfer actions. They receive certain liens, you know, typical fraudulent transfer action against a secured creditor.

And one of the claims was under Section 38, right? Of the Ontario Act. And the Royal Bank of Canada said they

don't have an order of the Court that says that they have standing to pursue the claim, this particular creditor. And rather than dismiss the case -- this is very important -- the District Court said a U.S. Court's decision not to proceed with an action involving a foreign bankruptcy Debtor is generally based on principles of international comity and not subject matter jurisdiction. And it said I'm not going to dismiss your case, I'll give you 90 days to go back to Canada and fix -- you know, address this problem.

THE COURT: Uh-huh.

MR. TECCE: And that's very important, Your Honor.

So, like I said, we're not opposed to this. These are the reasons why we brought the claims the way we don't. But I don't -- I submit to you that I would not -- the case does not get dismissed or stopped for this reason.

THE COURT: So let's come back to where I started. And I'm begging you to listen to me.

MR. TECCE: Okay.

THE COURT: Okay? So you've said your piece.

So here's what's going to happen if you go down -- I'm a decision tree guy. You know, I went to business school in the '80s. They taught us -- you know, that's -- I am a cost/benefit guy all the way down the line.

MR. TECCE: Right.

THE COURT: That's why my two marriages didn't work

out so well. But that's how I was trained, it's just how I think.

And as I go down that decision tree is let's assume that I go -- I think that Isgur's order just suffices, and Alibhai, you're overruled. He's going to stand up and he's going to say, Judge, I want to file an interlocutory appeal on the standing issue --

MR. TECCE: Right.

THE COURT: -- because this is critical to the entire portion of the case. And I'm going to go, yeah, he's probably right.

So then you're going to go up through District Courts, perhaps to the Circuit, maybe directly to the Circuit, depending upon which DJ you draw, on this issue, and then we're going to get an answer. That's got one set of risks. You may get -- you know, you may get a good answer, you may get a bad answer, but it's going to take an awful lot of time, or if you see the issue -- and I agree with you. I would just stop it today --

MR. TECCE: Right.

THE COURT: -- and let you go get some instruction, and then we reconvene once we have that. And then you've got an order that you can rely on, and it says whatever it says. I will just tell you, I'm comfortable either way.

MR. TECCE: Okay. No, I am -- I'm hearing what

you're saying.

THE COURT: Okay.

MR. TECCE: So can I respond --

THE COURT: Sure.

MR. TECCE: -- just directly --

THE COURT: Please.

MR. TECCE: -- in candor. Okay?

THE COURT: That would be great.

MR. TECCE: Okay. So I'm hearing your -- what -- I'm getting the vibe here. Okay? I just need to prosecute this case and I need to keep pushing it forward.

THE COURT: I got it. So --

MR. TECCE: And --

THE COURT: -- let me first --

MR. TECCE: Yeah.

THE COURT: I am not -- I'm not a vibe guy. Everyone in the room who knows me will tell you that, when I have a feeling, it's not a vibe, it will permeate the room. This is me actually trying to just give you -- I'm really trying to genuinely tell you I don't care.

But it would seem to me that you would want to minimize risk where you could.

MR. TECCE: Sure.

THE COURT: And you also want to shorten time.

MR. TECCE: Right.

THE COURT: And again, I'm going back 11 years now, last time I was involved in a Chapter 15 as a lawyer, is you will get an answer from the Canadian Court, in my mind, in a lot shorter a period of time, than you will get going through a District and a Circuit Court or if you get a DJ who's willing to send it directly on. I actually wonder whether -- I guess -- I don't know, I shouldn't try to think for a DJ. It's going to -- it's going to be a lot shorter --

MR. TECCE: Sure.

THE COURT: -- if you just go back and get that question clarified.

MR. TECCE: So, Your Honor, we'll do that. I want to be very clear we'll --

THE COURT: So --

MR. TECCE: -- do that. Okay.

THE COURT: So let me ask. Mr. Alibhai, it seems to me that having the answer to this question saves everybody a lot of time and money. And as you know, I mean, from -- you know, from the Brazos case, I worry about what the citizens of the State of Texas are paying for us to sort through all of these issues.

And it just seems to me having the answer to that question, one way or the other, number one, would be most efficient in this case; and number two, quite frankly, might help you elsewhere in others. You know, I don't know what all

you've got pending. But I'm going to venture a guess this is probably not the only one that you're involved in these days.

So my suggestion is: Does it make sense to simply -- you're not waiving a thing -- but to simply abate it right here? And I want to talk about a schedule, which I would want to -- you know, I'd want a status conference, just to know where we are and get every back.

And if we have an order and it says, you know, John Smith can pursue the claims, then you can take issue with the Canadian order all you want, but I'm probably going to honor it unless you show me that it contravenes U.S. policy, and I can't imagine how that would go. But you -- that argument is available to you, if you have it. And if it turns out that it says only the monitor can bring these claims, well, then the monitor has a decision to make, and you know, he will do that, you know, based upon the advice that he gets from his counsel. Does that make sense?

MR. ALIBHAI: It does to the second argument that I've made today.

THE COURT: Uh-huh.

MR. ALIBHAI: There are a host of arguments, as you --

THE COURT: There are. But I want the right plaintiff there before we --

MR. ALIBHAI: I --

THE COURT: -- have any --

MR. ALIBHAI: I --

THE COURT: -- of them.

MR. ALIBHAI: I agree because I think one of the most important things you said today about this issue is the idea that Debtors or affiliates or a Trustee or a monitor or a creditor who go gets the rights can get them opens ERCOT up to so many multiple levels of liability --

THE COURT: Uh-huh.

MR. ALIBHAI: -- that we should be absolutely clear that the person who's suing us has got that cause of action.

In the very case they cited, it says that that person could apply Section 38 to acquire any right of action under Section 95 of the BIA from the monitor. So it's -- even the case they try to cite to you says the monitor has got that right, and somebody can acquire it from him or her, but they have it. And so my concern is he's watching, I've never met this person. He's got his own counsel on the call today.

THE COURT: Uh-huh.

MR. ALIBHAI: And so he can decide, when they lose on a claim today, that he's figured out how to bring the claim and bring it in Canada or in a different court or in State Court in Travis County, and then we got to deal with that.

THE COURT: Yeah, we should only do this once.

MR. ALIBHAI: No.

THE COURT: Up or down.

MR. ALIBHAI: Absolutely.

THE COURT: Right.

MR. ALIBHAI: And so, while it affects the fixing of the issue of the proper plaintiff for some of the entities, I would imagine -- I don't think this is a wholesale solution. They're going to have to figure that out because they have four plaintiffs --

THE COURT: But it may be that, once you get that, then you're able to parse apart. I don't know.

MR. ALIBHAI: Right, right.

THE COURT: I don't know.

MR. ALIBHAI: So it may raise other issues, too, but --

THE COURT: Right. But you're not waiving anything. We're just -- I want to make sure -- and again, I mean, I said this to my law clerk when we were preparing. I am mindful of the position that I sit in. I -- this is not -- this is not a case that's run by David Jones and the Southern District of Texas. This is an adversary that has been filed in conjunction with and I am ancillary to a proceeding under the Canadian Insolvency Act in Canada, and I don't want to forget that.

So let me ask you, for those of you who have been to Canada recently, you know, if something gets filed in the next

-- because this can't be hard. I mean --

MR. TECCE: Your Honor --

THE COURT: -- something --

MR. TECCE: -- I think we can do this relatively quickly.

THE COURT: Yeah. So, if you did this in a week, anybody have a sense of what response time -- and I'll put it on the record, and I hope that you will convey this to the Canadian Court. I have the utmost respect for the Canadian process, and I am looking for direction as quickly as I can get it, and I hope that I'm not inconveniencing the Court, but I want to make sure I get this right.

And so, to the extent that the Canadian Court will take this plea for accelerated consideration, I would very much appreciate it. And I'll -- I would do the same if it were the other direction.

MR. ALIBHAI: Well, and I know Your Honor would do that. And I have not had any involvement and I don't think ERCOT has had any involvement in the Canadian proceeding. So we reserve all our rights with respect to whatever Canada is going to do, and we'll reserve them there as proper. So I can't answer your question because we just haven't appeared or had any dealings there.

THE COURT: Yeah. So, Mr. Tecce, do you have any -- do you have any guess?

MR. TECCE: I don't know, Your Honor. But I can check with the -- I can check quickly.

THE COURT: Sure.

MR. TECCE: And -- because we have Canadian counsel I can ask.

But I do have one question, Your Honor, that I'd like --

THE COURT: Sure.

MR. TECCE: -- to put down. So I just would like to understand how this plays. We have summary judgment papers due on Friday on phase one issues and --

THE COURT: I hadn't gotten to that issue, I hadn't gotten --

MR. TECCE: So --

THE COURT: -- to that --

MR. TECCE: -- that's kind of -- that's why --

THE COURT: Yeah.

MR. TECCE: I didn't mean to resist, but I'm -- in my mind, that's what I'm -- I --

THE COURT: Okay. So let me tell you the commitment that I made to Judge Isgur --

MR. TECCE: Uh-huh.

THE COURT: -- is -- because his -- for those of you who have been in front of both of us, you know, as much as we are alike, we are also very different.

MR. TECCE: Sure.

THE COURT: I gave him -- I gave him my word that I would live by his order, unless you all agreed otherwise. So I am happy to move dates. It also makes an awful lot of sense because I'm guessing that, you know, Mr. Alibhai and his team don't want to put something out there if, you know, someone is going to get a free look at it; i.e., it's the wrong plaintiff and there's just another one around the corner. I would think that that would be an easy accommodation for you all to make. I know nothing has been easy.

MR. TECCE: Right.

THE COURT: I'm -- you know, I'm happy to give you all a couple of minutes to talk about it. I'm also happy -- I see a couple of nods. So I think there's really some realization --

MR. TECCE: Sure. So I don't -- I'm not trying to -- I mean, the issues that are slated for presentment are --

THE COURT: Uh-huh.

MR. TECCE: -- on the validity of the orders and the binding nature of the -- but I -- we'll -- let me find out how long it takes us to get to Canada and how quickly we can do that.

THE COURT: Okay.

MR. TECCE: And then we'll, within that context, see --

THE COURT: Is --
MR. TECCE: -- what we're going to --
THE COURT: Is that --
MR. TECCE: -- do with the --
THE COURT: -- something --
MR. TECCE: -- rest of the --
THE COURT: So I want to be helpful to this process --
MR. TECCE: Yeah.
THE COURT: -- and you know, it's -- you know, I've heard more about these ERCOT orders and the 33 hours than --
MR. TECCE: Sure.
THE COURT: -- any of you, so -- it's -- is this something that you want to step out in the hall and talk about? Is it --
MR. ALIBHAI: Can we take like a fifteen-minute break?
THE COURT: I'm also happy to give you another option, is, you know, I'm happy to give you a video hearing later this week, if you need more substance. You all tell me what's helpful. If this is a fifteen-minute conversation, let's go have it.
MR. ALIBHAI: I'd like to try that.
THE COURT: Okay.
MR. ALIBHAI: I mean --

THE COURT: So --

MR. ALIBHAI: -- I'm mindful that a few Thursdays ago, I was here to ask for a fifteen-minute break and it turned into 20 hours.

THE COURT: Yeah, no, I got it. It's okay.

MR. ALIBHAI: But I think it was worthwhile.

THE COURT: Yeah.

MR. ALIBHAI: So, if we could just have 15 minutes, I just need to check with a couple of people on a couple of things, and then we can report back.

THE COURT: Now are you able to reach out to whoever your Canadian experts are and just -- I'm just looking for information.

MR. TECCE: No, we will. Let -- I think what would be helpful is, if we can find out how quickly we can approach the Court and get whatever kind of direction we think we need to get --

THE COURT: Sure.

MR. TECCE: -- and get back to you. And within that context, we'll figure out what we do with the balance of the schedule.

THE COURT: So let me ask this. Let's see --

MR. TECCE: I would submit, though, that the only -- as long as there's -- well, whatever. We'll talk to the clients first.

THE COURT: So do you want a hearing tomorrow afternoon? Would that be more helpful, or Wednesday?

MR. TECCE: I --

THE COURT: Wednesday may be a problem. No, Wednesday is okay.

MR. ALIBHAI: I'm available tomorrow afternoon.

THE COURT: Okay.

MR. ALIBHAI: Wednesday, I have another hearing before Your Honor. I thought you had a conflict, and that's why we had to move our hearing. I thought you had a mediation, so --

MR. TECCE: I think --

THE COURT: Oh --

MR. ALIBHAI: But regardless --

MR. TECCE: -- we could do this --

THE COURT: I do.

MR. ALIBHAI: Okay.

MR. TECCE: Should we step out for 15 minutes? It's five of 4:00.

THE COURT: Sure.

MR. TECCE: And then we'll --

THE COURT: So --

MR. TECCE: -- figure out --

THE COURT: And I --

MR. TECCE: -- what we're --

THE COURT: -- want to --

MR. TECCE: -- doing.

THE COURT: -- make sure that those folks -- if we do 15 minutes, when -- you said Isgur doesn't require you until 4:30?

MR. ALIBHAI: Yeah.

THE COURT: Okay. Then --

MR. TECCE: So 4:15 --

THE COURT: -- let's do this. Take until 4:15. And if you've got a plan, I don't need everybody to come back, just somebody come back and tell me what you're doing. Okay?

MR. ALIBHAI: Very good.

MR. TECCE: Okay. Thank you.

THE COURT: All right. We'll be adjourned.

MR. ALIBHAI: Thank you, Your Honor.

THE COURT OFFICER: All rise.

(Proceedings concluded at 3:55 p.m.)

* * * * *

I certify that the foregoing is a correct transcript to the best of my ability produced from the electronic sound recording of the proceedings in the above-entitled matter.

/S./ MARY D. HENRY

*CERTIFIED BY THE AMERICAN ASSOCIATION OF ELECTRONIC REPORTERS AND TRANSCRIBERS, CET**337*
JUDICIAL TRANSCRIBERS OF TEXAS, LLC
JTT TRANSCRIPT #65597
DATE FILED: APRIL 10, 2022

TAB M

This is Exhibit “M”

referred to in the Affidavit of **JAMES C. TECCE**

Sworn before me this 14th day of April, 2022

C. Mantara

A Commissioner for taking affidavits

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re: JUST ENERGY GROUP INC., *et al*., Debtors in a Foreign Proceeding.[1]	Chapter 15 Case No. 21-30823 (MI)
JUST ENERGY TEXAS LP, FULCRUM RETAIL ENERGY LLC, HUDSON SERVICES LLC, and JUST ENERGY GROUP, INC., Plaintiffs, v. ELECTRIC RELIABILITY COUNCIL OF TEXAS, INC., Defendants.	Adv. Proc. No. 21-04399)

ORDER ABATING ADVERSARY-PROCEEDING WHILE FOREIGN REPRESENTATIVE SEEKS DIRECTION FROM CANADIAN COURT

Pursuant to the agreement of the parties and for the reasons stated on the record during the hearing held on April 4, 2022 (the "**Hearing**") in the above-captioned proceeding (the "**Adversary Proceeding**") to consider the Electric Reliability Council of Texas, Inc.'s Motion To Dismiss First Amended Complaint And For Abstention [Docket Nos. 127, 138] and Plaintiffs' Objection thereto [Docket No. 132],

IT IS HEREBY ORDERED THAT:

[1] The identifying four digits of Just Energy Group Inc.'s local Canada tax identification number are 0469. A complete list of debtor entities in these chapter 15 cases may be obtained at www.omniagentsolution.com/justenergy.

1. The Adversary Proceeding is abated and all deadlines in the Adversary Proceeding are stayed pending further Order of the Court so that the parties can seek direction from the Canadian Court with respect to the standing to prosecute the claims in the Adversary Proceeding.

2. The Hearing shall be continued until rescheduled by the Court.

Signed: April 06, 2022.

DAVID R. JONES
UNITED STATES BANKRUPTCY JUDGE

[2] Capitalized terms not defined herein have the meanings ascribed to them in the First Amended Complaint [Docket No. 95].

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

AFFIDAVIT OF JAMES TECCE

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Counsel for the Applicants

TAB 3

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE	)	THURSDAY, THE 21st
	)	
JUSTICE MCEWEN	)	DAY OF APRIL, 2022

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

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

ORDER
(Motion re Authorization to Pursue Section 36.1 Claims in Adversary Proceeding)

THIS MOTION, made by Just Energy Group, Inc. ("**Just Energy**"), in its capacity as the foreign representative (the "**Foreign Representative**") of the Applicants and the partnerships listed on Schedule "A" of the Initial Order (collectively, the "**Just Energy Entities**") pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), for various relief was heard this day by judicial video conference via Zoom in Toronto, Ontario due to the COVID-19 pandemic.

ON READING the Notice of Motion of the Foreign Representative, the Affidavit of James Tecce affirmed April 14, 2022, including the exhibits thereto (the "**Tecce Affidavit**") and the Ninth Report of FTI Consulting Canada Inc., in its capacity as monitor (the "**Monitor**") (the "**Ninth Report**"), and on hearing the submissions of respective counsel for the Foreign Representative, the Monitor, and such other counsel as were present, no one else appearing although duly served as appears from the Affidavit of Service of [*], affirmed April [*], 2022, filed:

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record herein is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

STANDING TO PURSUE ADVERSARY PROCEEDING

2. **THIS COURT ORDERS** that:

(a) the Foreign Representative and other Just Energy Entities, as the case may be, are hereby authorized and empowered to pursue the Section 36.1 Claims (as defined in the Tecce Affidavit) in the adversary proceeding commenced in the United States Bankruptcy Court for the Southern District of Texas (the "**U.S. Bankruptcy Court**") bearing adversary proceeding no. 21-4399 (MI) (the "**Adversary Proceeding**"), *nunc pro tunc*; and

(b) the Monitor is hereby authorized and directed to take whatever actions or steps it deems advisable to assist and supervise the Just Energy Entities with respect to the prosecution of the Section 36.1 Claims in the Adversary Proceeding.

GENERAL

3. **THIS COURT ORDERS** that this Order shall have full force and effect in all provinces

and territories in Canada.

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

_____

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JUST ENERGY GROUP INC., *et al*.

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

Applicants

Ontario
SUPERIOR COURT OF JUSTICE
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Proceeding commenced at Toronto

ORDER
(Motion re Authorization to Pursue Section 36.1 Claims in Adversary Proceeding)

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

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SUPERIOR COURT OF JUSTICE
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MOTION RECORD OF THE APPLICANTS
(Motion re Authorization to Pursue section 36.1 Claims in Adversary Proceeding)

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