

**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

REPLY FACTUM OF THE DIP LENDERS

**MOTION FOR SALE PROCESS APPROVAL ORDER
RETURNABLE AUGUST 17, 2022**

August 15, 2022

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PART I - OVERVIEW

1. The Stalking Horse Transaction, together with the SISP and SISP Support Agreement, provides the only certain path for Just Energy to emerge from these proceedings as a going concern. It was designed and negotiated with the advice of Just Energy's Financial Advisor, under the careful supervision of the Monitor, to ensure that the outcome of the SISP (if approved) will maximize stakeholder value.
2. No other viable solution has emerged since these proceedings began 15 months ago, including from U.S. Plaintiffs' Counsel or their clients.

3. U.S. Plaintiffs' Counsel's objections (and requested revisions) to the SISP are without merit for numerous reasons.

4. First, the SISP follows market-standard procedures which provide potential bidders with certainty of process. That certainty includes the open solicitation and defined auction procedures which are designed to provide transparency and maximize stakeholder value.

5. Second, the SISP provides for this Court's supervision at the conventional and appropriate stages – approval of the process to generate offers and approval of the transaction that emerges from that process.

6. Third, U.S. Plaintiffs' Counsel's attempt to have this Court substitute its own judgment for that of the board of directors, relying on the advice of a seasoned Financial Advisor and a highly experienced Monitor, with respect to bid qualification determinations and selection, is entirely inappropriate and introduces significant uncertainty. It is not the role of this Court to qualify or select bids.

7. Fourth, the information sharing provision of the SISP ensures that there will be information symmetry among all bidders (including the Sponsor). Since the terms of the Sponsor's Stalking Horse Transaction are committed and now public, it is appropriate that the DIP Lenders be entitled to receive information about other bids, at least on a confidential basis. The Financial Advisor's view is that such information sharing will not affect the SISP or prejudice any of its participants.

8. The objections to the Stalking Horse Transaction Agreement, and specifically the Break-Up Fee, are equally misplaced.

9. The Break-Up Fee is consideration for the stability the Applicants gain from the Stalking Horse Transaction. It is not reimbursement for expenses. The Break-Up Fee incentivizes the

Sponsor to provide the Applicants with a going concern transaction and to make its floor price and deal structure known to the market and available to be tested.

10. The Break-Up Fee is also lower than the Termination Fee previously approved by this Court in connection with the Plan. The evidence continues to be that the fee is reasonable and within the well accepted market ranges. The Break-Up Fee is a required component of the Sponsor's support.

11. The Stalking Horse Transaction, together with the SISP and SISP Support Agreement, were negotiated as interconnected agreements. Together, they will ensure that the Applicants exit these proceedings without further delay as a viable going concern. In all of the circumstances, the Applicants' motion should be granted.

PART II - THE FACTS

12. The Applicants' business is conducted in a volatile operating environment. The usual uncertainty of energy pricing is exacerbated by operating under court protection. The strains of conducting going concern operations under court protection have been intensified for the Applicants by the absence of a clear path for the operating business to exit CCAA. Employee retention and stakeholder confidence are increasingly cause for concern.¹

13. The SISP reflects the Applicants' process and the Applicants' choices – not those of the DIP Lenders. In seeking out and negotiating the SISP Support Agreement and Stalking Horse Transaction Agreement with the Sponsor, the Applicants stressed the importance to them of stability, predictability, and transparency. While criticized by U.S. Plaintiffs' Counsel without any real basis, the SISP and Stalking Horse Transaction achieve those important goals.²

¹ Affidavit of Michael Carter, sworn August 4, 2022, Motion Record of the Applicants dated August 4, 2022 ("Carter Affidavit"), paras. 21, 28-29.

² Carter Affidavit, paras. 66-67; Affidavit of Mark Caiger, sworn May 12, 2022, Motion Record of the Applicants dated May 12, 2022 ("Caiger Affidavit"), para. 30.

PART III - LAW & ARGUMENT

A. SISP Procedures and Timelines are Reasonable and Provide Certainty

14. The SISP proposed by the Applicants, on the advice of the Financial Advisor and supported by the Monitor, is reasonable and provides certainty. The changes to it proposed by U.S. Plaintiffs' Counsel are unreasonable and undermine that certainty:

Key Features of Market-Standard SISP	U.S. Plaintiffs' Counsel's Changes
Interested bidders submit NOI demonstrating reasonable likelihood that bid could be consummated	Deletion of the pre-qualification requirement of an NOI to demonstrate reasonable likelihood that bid could be consummated
Determination of qualified bids made by the Applicants and their Financial Advisor, in consultation with the Monitor	Substituting the business judgment of the Applicants' board (relying on the advice and expertise of the Financial Advisor and the Monitor) to determine Qualified Bids with that of the Court
If Qualified Bid(s) are received, an open auction process to select the Successful Bid, followed by final Court approval	Undefined process and requirement for multiple Court hearings to determine path for selection of competing bids
Defined timeline from solicitation to transaction approval	Uncertain timeline from solicitation to transaction approval

15. The revisions demanded by U.S. Plaintiffs' Counsel do not accord with market practice. Nor will they result in competition for the highest market price. Rather, they create confusion and uncertainty:

The Monitor is of the view that the uncertainty that would be introduced into the process by the proposed amendment may dissuade otherwise interested participants in the SISP from devoting the necessary resources to develop a bid for the Company.³

³ Eleventh Report of FTI Consulting Canada Inc., in its Capacity as Court-Appointed Monitor, August 13, 2022 ("Eleventh Report of the Monitor"), para. 34.

16. The CCAA does not automatically displace the Applicants' and their boards' entitlement and obligation to exercise their business judgment.⁴ Financial advisors and Monitors are routinely entrusted with the obligation to design and conduct SISPs.⁵ There is no evidence of bad faith that would justify their extraordinary displacement.

17. The SISP was designed on the advice of a seasoned Financial Advisor with the guidance and support of a highly experienced Monitor. It is crafted to create competition and attract the highest and best bid. The Monitor's support and recommendation carries significant weight:

The recommendation of the Monitor, a court-appointed officer experienced in the insolvency field, carries great weight with the Court in any approval process. Absent some compelling, exceptional factor to the contrary, a Court should accept an applicant's proposed sale process where it is recommended by the Monitor and supported by the stakeholders.⁶ [emphasis added]

18. There is no basis to second-guess the business judgment of the Applicants, the Financial Advisor, or the Monitor with respect to the structure and implementation of the SISP.⁷

19. Finally, U.S. Plaintiffs' Counsel have wrongly characterized the auction as inevitably resulting in a reverse vesting order. In fact, the auction will result in the highest and best value. Following the auction, at the implementation order hearing, the type of transaction put before the Court for approval will depend on the type of transaction proposed by the successful bidder. That could be a meetings order pursuant to a plan or a vesting order (reverse or otherwise).⁸

⁴ *Re Grant Forest Products Inc.*, [2009 CanLII 42046](#) (ON SC), paras. 17-18; section 11.5(1) of the *Companies' Creditors Arrangement Act*, [RSC 1985, c C-36](#), provides that the only basis under the CCAA for removing from office any director in respect of a debtor company is where the Court is satisfied that the director is unreasonably impairing (or is likely to unreasonably impair) the possibility of a viable compromise or arrangement.

⁵ *Re Danier Leather*, [2016 ONSC 1044](#), paras. 9, 14-16.

⁶ *AbitibiBowater inc. (Arrangement relatif à)*, [2009 QCCS 6460](#), para. 59; see also *Re Danier Leather Inc.*, [2016 ONSC 1044](#); *Re Ivaco Inc.*, [2004 CanLII 34434](#) (ON SC).

⁷ *Bloom Lake, g.p.l. (Arrangement relatif à)*, [2015 QCCS 1920](#), para. 28; *Re Brainhunter*, [2009 CanLII 72333](#) (ON SC), para. 20.

⁸ Eleventh Report of the Monitor, paras. 33, 47. As noted by the Monitor, the benefits of a reverse vesting order, among other things, include preservation of certain regulatory licenses and permits so that going concern operations can continue.

B. Transparency and Information Symmetry Must Be Favoured

20. Under the SISP, the Applicants will provide information regarding the SISP to the DIP Lenders, certain of the DIP Lenders' affiliates in their capacities as secured creditors, and the credit facility lenders. That information includes any notice of intent to bid or actual bid received from an interested party.⁹

21. The information rights contemplated by the SISP are necessary and appropriate. The DIP Lenders and their affiliates, like certain other secured creditors, have a significant interest in understanding how the SISP unfolds to its conclusion.

22. U.S. Plaintiffs' Counsel's complaint that providing this information to the DIP Lenders will give the Sponsor an advantage in the SISP is unsubstantiated. As a qualified bidder, the Sponsor has agreed to publicly disclose its "stalking horse" bid (and to maintain it). That bid is now locked in. Interested parties considering whether to deliver a notice of intent to bid or an actual bid will have the benefit of the Sponsor's committed terms and therefore the ability to craft their bid terms and consideration accordingly.

23. There is no basis to proceed in a manner that gives rise to informational asymmetry at the expense of the Sponsor.¹⁰ According to the Monitor:

Given that the Stalking Horse Transaction Agreement has already been finalized and disclosed to all potential bidders, the provision of bidder information to the Sponsor allows for symmetry of disclosure. The Monitor is of the view that the provision of such information to the DIP Lenders will not adversely affect the results of the SISP.¹¹

24. This is especially so given that, if an auction arises, the Sponsor will know the competing bidders' terms in any event. Any suggestion that the Sponsor will misuse the information to

⁹ Carter Affidavit, para. 79.

¹⁰ Carter Affidavit, para. 21.

¹¹ Eleventh Report of the Monitor, para. 41.

dissuade other potential participants is baseless. The terms of the SISP also require auction participants to confirm that they have not colluded during the SISP.

C. The Break-Up Fee Provides the Applicants with Necessary Stability

25. The use of a stalking horse bid is often the best way to maximize value by establishing a framework for competitive bidding and facilitating a realization of that value. Stalking horse bidders almost always require break-up fees in exchange for “setting the floor at auction, exposing [their] bid[s] to competing bidders, and providing other bidders with access to the due diligence necessary to enter into an asset purchase agreement.”¹²

26. U.S. Plaintiffs’ Counsel have wrongly characterized the purpose of break fees as providing reimbursement of expenses to a previously uninvolved participant. This Court has recognized that they serve a much more important purpose: “The fees, in addition to compensating Stalking Horse purchasers for the time, resources and risk taken in developing the agreement, also represent the price of stability.”¹³

27. Here, the Stalking Horse Transaction provides necessary stability by allowing the Applicants to maintain employee retention, supplier commitment, and stakeholder confidence by providing a firm and executable transaction.¹⁴ The Break-Up Fee was an inducement for the Sponsor to commit to the Stalking Horse Transaction and publicly disclose the deal structure and price to facilitate bidding, rather than keeping its cards face down. It is a required part of the Sponsor’s support for the Stalking Horse Transaction.

28. This Court previously approved a Termination Fee and associated charge in this proceeding in connection with the Plan. That fee, which is no longer payable, was higher than

¹² *Re Interforum Holding LLC*, [2011 WL 2671254](#), at *1 n.1 (E.D. Wis. July 7, 2011).

¹³ *Re Green Growth Brands Inc.*, [2020 ONSC 3565](#), para. 52.

¹⁴ Eleventh Report of the Monitor, para. 30.

the Break-Up Fee being sought on this motion. U.S. Plaintiffs' Counsel did not oppose the Termination Fee and have provided no evidence (or basis) for their change in position.

29. The evidence of the Applicants' Financial Advisor with respect to the Termination Fee, was that:

[...] the quantum of the Termination Fee accords with the average break fee percentage (2.5% to 4.5%) payable in the 638 publicly announced transactions sampled by BMO since 2007 and falls in the range of the average break fee percentage payable in transactions of comparable value.¹⁵

30. With respect to the Break-Up Fee, the Applicants' Financial Advisor has advised that:

[...] the quantum of the Break-Up Fee is in line with market terms, is consistent with market practice and is reasonable in all of the circumstances.¹⁶

31. The Break-Up Fee, which is a required component of the Sponsor's support, provides the Applicants with necessary stability in a manner that is fair and reasonable. Balanced with the benefits of the SISP and Stalking Horse Transaction, it also gives rise to the best environment for competition in the view of the Applicants and the Monitor.

32. The colourful and rhetorical allegation by U.S. Plaintiffs' Counsel that the DIP Lenders and Sponsor are somehow "petulant" or "opportunistic" is absurd. Throughout this proceeding, the DIP Lenders have unequivocally supported the Applicants in their efforts to restructure. Among other things, they have provided substantial post-filing financing, extended key milestones, sponsored a restructuring plan, and put forward a stalking horse transaction that can be tested against the market. To facilitate a successful restructuring, the DIP Lenders have also now agreed to extend the maturity of their DIP Loan without any fee (notwithstanding that such a

¹⁵ Caiger Affidavit, para. 37.

¹⁶ Carter Affidavit, para. 64.

maturity extension fee was previously approved by this Court). None of that can fairly be characterized as petulant or opportunistic.

33. The DIP Lenders previously advised the Court plainly that the economics of the Plan were, in their view, no longer viable. While the Sponsor is now attacked for having submitted a stalking horse bid that does not provide the previous \$10 million in unsecured creditor recovery, it has committed the same amount to ensure closing:

[...] the Sponsor agreed to contribute up to an additional \$10 million under the Stalking Horse Transaction as described further below to cover any shortfall in the Just Energy Entities' payment of their secured obligations and priority payables under the Stalking Horse Transaction.¹⁷

Ultimately, if the DIP Lenders' and Sponsor's view of value is incorrect, the market will establish that through the SISP.

D. Conclusion

34. The SISP, supported by the Stalking Horse Transaction, provides a path forward for the Applicants to emerge as a going concern, while simultaneously allowing for the possibility of superior transactions to emerge. The terms of the SISP, the SISP Support Agreement, and the Stalking Horse Transaction are fair, reasonable, and appropriate. They are well-supported by established precedent and practice and should be approved.

PART IV - ORDER REQUESTED

35. The DIP Lenders respectfully request that the Applicants' motion be granted in its entirety.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of August 2022.

Cassels

CASSELS BROCK & BLACKWELL LLP

¹⁷ Carter Affidavit, paras. 27, 58.

SCHEDULE “A”
LIST OF AUTHORITIES

1. *AbitibiBowater inc. (Arrangement relatif à)*, [2009 QCCS 6460](#)
2. *Bloom Lake, g.p.l. (Arrangement relatif à)*, [2015 QCCS 1920](#)
3. *Re Brainhunter*, [2009 CanLII 72333](#) (ON SC)
4. *Re Danier Leather*, [2016 ONSC 1044](#)
5. *Re Grant Forest Products Inc.*, [2009 CanLII 42046](#) (ON SC)
6. *Re Green Growth Brands Inc.*, [2020 ONSC 3565](#)
7. *Re Interforum Holding LLC*, [2011 WL 2671254](#), at *1 n.1 (E.D. Wis. July 7, 2011)
8. *Re Ivaco Inc.*, [2004 CanLII 34434](#) (ON SC)

SCHEDULE “B”
TEXT OF STATUTES, REGULATIONS & BY-LAWS

Companies’ Creditors Arrangement Act, [RSC 1985, c C-36](#)

Removal of directors

11.5(1) The court may, on the application of any person interested in the matter, make an order removing from office any director of a debtor company in respect of which an order has been made under this Act if the court is satisfied that the director is unreasonably impairing or is likely to unreasonably impair the possibility of a viable compromise or arrangement being made in respect of the company or is acting or is likely to act inappropriately as a director in the circumstances.

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

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