

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

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

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

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

**RESPONDING FACTUM OF U.S. CLASS COUNSEL  
(MOTION RETURNABLE AUGUST 17, 2022)**

August 13, 2022

**Paliare Roland Rosenberg Rothstein LLP**

155 Wellington Street West, 35th Floor

Toronto ON M5V 3H1

Tel: 416.646.4300

**Ken Rosenberg** (LSO# 21102H)

Tel: 416.646.4304

Email: ken.rosenberg@paliareolrand.com

**Massimo (Max) Starnino** (LSO# 41048G)

Tel: 416.646.7431

max.starnino@paliareroland.com

**Jeffrey Larry** (LSO# 44608D)

Tel: 416.646.4330

Email: jeff.larry@paliareroland.com

**Danielle Glatt** (LSO# 65517N)

Tel: 416.646.7440

Email: danielle.glatt@paliareroland.com

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

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

TO: **THE SERVICE LIST**

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

B E T W E E N:

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**”)

**RESPONDING FACTUM OF U.S. CLASS COUNSEL**

**(MOTION RETURNABLE AUGUST 17, 2022)**

<b>PART I. OVERVIEW .....</b>	<b>1</b>
<b>PART II. SUMMARY OF FACTS .....</b>	<b>4</b>
A. The PIMCO Sponsored Plan and Related Events.....	4
B. The SISP Motion .....	9
C. Next Steps.....	10
<b>PART III. STATEMENT OF ISSUES, LAW &amp; ARGUMENT .....</b>	<b>13</b>
A. The Applicants' Proposed SISP should not be approved in its current form. ...	14
1. The proposed auction process and RVO structure .....	15
2. The proposed Break-Up Fee .....	16
3. PIMCO's access to competing bids and related information .....	19
4. The proposed SISP timelines .....	20
B. The expedited evaluation of claims in the U.S. Class Actions should not be suspended .....	22
<b>PART IV. ORDER REQUESTED .....</b>	<b>23</b>

## **PART I. OVERVIEW**

1. The Donin and Jordet U.S. Class Actions<sup>1</sup> advance claims on behalf of (at least) hundreds of thousands of the Applicants' U.S. customers (the "**U.S. Customers**") for losses arising from the Applicants' wrongful and abusive energy pricing contracts (the "**U.S. Customer Claims**").

2. The U.S. Customers are not opposed to a sale and investment solicitation process (a "**SISP**") as a manner to advance the Applicants' restructuring, but they are opposed to the SISP proposed by the Applicants in the form attached as Exhibit "B" to the affidavit of Michael Carter sworn August 4, 2022 (the "**Applicants' Proposed SISP**"). The Applicants' Proposed SISP will hamper the U.S. Customers' ability to present a restructuring plan favourable to unsecured creditors generally, and would, like their Plan, disenfranchise large swaths of unsecured creditors and undermine the democratic process that is foundational to the *Companies Creditors Arrangement Act* (the "**CCAA**")—all further to a loan to own strategy undertaken by Pacific Investment Management Company LLC ("**PIMCO**").

3. On June 10, 2022, the Court ordered a summary evaluation of the U.S. Customer Claims on the basis that participants under the CCAA are to be treated as advantageously and fairly as circumstances permit and that creditors should not be disadvantaged. The Court intended to avoid the impermissible situation (which would have otherwise resulted) of the U.S. Customers having no meaningful role in these proceedings.

---

<sup>1</sup> The U.S. Class Actions are *Donin v. Just Energy Group Inc. et al.* (the "**Donin Action**") and *Trevor Jordet v. Just Energy Solutions, Inc.* (the "**Jordet Action**", together with the Donin Action, the "**U.S. Litigation**" or the "**U.S. Class Actions**").

4. The creditors meeting that gave rise to the Court's order never occurred because, in light of the Court's order directing the estimation of the U.S. Customer Claims, the plan sponsor, PIMCO, withdrew its support for the plan.

5. In these circumstances, however, the U.S. Customers resolved to present their own plan for consideration by creditors and the Court; one which will pay out the secured debt and pay a reasonable dividend to unsecured creditors and be acceptable to the requisite majority of them. Discussions with a serious and credible financier are underway in respect of that plan.

6. The Applicants now bring this motion for an order approving the Applicants' Proposed SISP, which includes a stalking horse bid (made by two PIMCO affiliated companies) structured by way of a reverse vesting order ("**RVO**") coupled with a request to suspend the summary evaluation of the U.S. Customer Claims and a direction that any "Qualified Bids", which are to be selected by the Applicants, proceed to auction.

7. U.S. Class Counsel opposes the request to suspend the summary estimation of the U.S. Customer Claims because to do so may serve to undermine their ability to formulate, negotiate and vote on a plan.

8. In addition, certain aspects of the Applicants' Proposed SISP are inconsistent with the scheme of the CCAA and the interests of unsecured creditors, as indicated below.

- (a) A SISP should not default to an auction process. As noted, U.S. Class Counsel is working with a serious financier to present a plan of

arrangement that pays out the secured debt in its entirety and that will be acceptable to the requisite majority of unsecured creditors. A SISP should therefore contemplate a return to court, and consideration of whether that plan (or any other plan) should be put to a vote of unsecured creditors. This is particularly true where the stalking horse agreement contemplates an RVO transaction, which is reserved for the most exceptional cases. The CCAA process should not be structured in a way that facilitates the disenfranchisement of creditors and ignores the democratic underpinnings of the CCAA.

- (b) Having regard to the contentious nature of these proceedings, U.S. Class Counsel submits that decision-making authority at various stages of a SISP should clearly reside with the Court, and that there be express opportunity for recourse to the Court in the event of disagreement.
- (c) The proposed break-up fee (the “**Break-Up Fee**”) is anti-competitive and unfairly prejudices the interests of unsecured creditors. PIMCO is no ordinary stalking horse bidder. It has already had its professional fees paid by the Applicants throughout these proceedings. Moreover, it hardly had to be enticed to buy the asset. It had already committed to doing so and had publicized its assessment of value. Having done that, but being dissatisfied with the Court’s assessment of the requirements of the CCAA, it then *chose* to withdraw its support for the Applicants’ plan, but submitted

a Stalking Horse bid which petulantly provides for less value than that which PIMCO had attributed to the assets only a few weeks earlier.

- (d) The stalking horse bidder should not have access to inside information regarding other bids and other bidders' communications with the Applicants in the absence of the other bidders' consent. Serious bidders will necessarily have to engage with the Applicants, and they should be able to have a free exchange of communication without concern that proprietary or competitive information will go to the stalking horse bidder.
- (e) The timelines for the various steps under the Applicants' Proposed SISF should be extended very slightly to facilitate participation by third parties. The SISF should not default to an auction process.

9. A mark-up addressing the U.S. Customers' concerns with the Applicants' Proposed SISF is attached at Exhibit "J" to the Affidavit of Robert Tannor, sworn August 10, 2022 ("**Tannor Affidavit**") and is included as Schedule "C" hereto for ease of reference.

## **PART II. SUMMARY OF FACTS**

### ***A. The PIMCO Sponsored Plan and Related Events***

10. On May 12, 2022, the Applicants served and filed a Motion Record in respect of, among other things, the filing of a Plan of Compromise and Arrangement, dated May 26, 2022 (the "**PIMCO Sponsored Plan**"), and to hold and conduct meetings in respect



of creditor votes on resolutions to approve the PIMCO Sponsored Plan (the “**Meetings Motion**”).<sup>2</sup>

11. U.S. Class Counsel opposed the Meetings Motion on several grounds, including that the Applicants proposed to arbitrarily limit the U.S. Customers Claims to one dollar without any meaningful attempt to independently value their claims for voting purposes.<sup>3</sup>

12. The Meetings Motion was also opposed by the representative plaintiff in the *Omarali v. Just Energy Group Inc. et al.* certified class action (“**Omarali**”), approximately 250 claimants pursuing claims for alleged losses associated with the 2021 Texas winter storm (the “**Mass Tort Claimants**”) and Pariveda Solutions Inc. (“**Pariveda**”, collectively with the U.S. Customers, Omarali and the Mass Tort Claimants, the “**Contingent Litigation Claimants**”).<sup>4</sup>

13. The Meetings Motion was heard on June 7, 2022.

14. On June 10, 2022, the Court released an endorsement in which it ordered that summary proceedings of the Contingent Litigation Claimants, including the U.S. Customer Claims, be conducted on an expedited basis as soon as reasonably possible, in an effort to estimate the value of the claims of the Contingent Litigation Claimants for the purposes of voting (the “**First Endorsement**”). The Court also ordered that the

---

<sup>2</sup> Tannor Affidavit, Responding Motion Record of U.S. Class Counsel (Motion Returnable August 17, 2022) (“**RMR**”) Tab 1, p. 6, para. 8.

<sup>3</sup> Tannor Affidavit, RMR Tab 1, p. 6, para. 9.

<sup>4</sup> Tannor Affidavit, RMR Tab 1, pp. 7-8, para. 10.

Monitor shall, forthwith, liaise with the relevant parties to determine a process to conduct the claim determination and valuations.<sup>5</sup>

15. In Justice McEwen's reasons for decision, released shortly after the First Endorsement, His Honour stated:

As per the June 10 Endorsement, I am also satisfied that a summary proceeding ought to be conducted on an expedited basis as soon as reasonably possible to determine the validity and value of the Litigation Claimants.

[...]

I appreciate, as noted, that the time is short and the proceedings must be conducted in an expedited fashion. I see no alternative, however, in an attempt to enact a process that is fair to all stakeholders including the Litigation Claimants.

To do otherwise would result in an unfair disenfranchisement of the Litigation Claimants.<sup>6</sup>

16. Later, on June 10, 2022, the Monitor's counsel reached out to U.S. Class Counsel's counsel ("**Paliare Roland**") to schedule a call with their team to discuss a process to conduct the claim determination and valuation on Monday, June 13, 2022 at 9:45 am.<sup>7</sup> However, at 9:39 am on Monday June 13, 2022, the Monitor's counsel emailed Paliare Roland to cancel the meeting.<sup>8</sup>

---

<sup>5</sup> Tannor Affidavit, RMR Tab 1, p. 7, paras. 11-14; Exhibit "B" to the Tannor Affidavit.

<sup>6</sup> Exhibit "E" to the Tannor Affidavit, RMR Tab 1(E), p. 41, paras. 48, 53-54.

<sup>7</sup> Tannor Affidavit, RMR Tab 1, p. 7, para. 15; Exhibit "C" to the Tannor Affidavit.

<sup>8</sup> Tannor Affidavit, RMR Tab 1, p. 7, para. 16; Exhibit "D" to the Tannor Affidavit.

17. At 12:43 pm the Monitor's counsel sent an email to the service list advising that a case conference had been scheduled before the Court at 4:30 pm ET to discuss the terms of the First Endorsement.<sup>9</sup>

18. Before Justice McEwen arrived, the Monitor's counsel advised that the case conference had been convened at PIMCO's counsel's request.<sup>10</sup>

19. When Justice McEwen arrived, PIMCO's counsel requested clarification in respect of the valuation of the contingent litigation claims. Justice McEwen advised that pursuant to the First Endorsement, the contingent litigation claims would be valued before the meetings scheduled on August 2, 2022 as the valuations were for the purpose of the meetings. PIMCO's counsel then advised that the plan sponsor/DIP Lenders intended to withdraw their support for and terminate the PIMCO Sponsored Plan.<sup>11</sup>

20. Notwithstanding the advice of PIMCO's counsel, support for the PIMCO Sponsored Plan was not immediately withdrawn. In that context, settlement discussions ensued between various stakeholders, and on June 17, 2022, the Monitor's counsel wrote to the Court and advised that given the status of the negotiations, the parties had all agreed that the directed process in respect of the summary evaluation of the contingent claims should be temporarily postponed.<sup>12</sup>

---

<sup>9</sup> Tannor Affidavit, RMR Tab 1, p. 8, para. 17.

<sup>10</sup> Tannor Affidavit, RMR Tab 1, p. 8, para. 18.

<sup>11</sup> Tannor Affidavit, RMR Tab 1, p. 8, para. 19.

<sup>12</sup> Tannor Affidavit, RMR Tab 1, p. 9, para. 22, Exhibit "G" to the Tannor Affidavit.

21. Settlement negotiations ultimately failed and, as a result, on July 16, 2022, Paliare Roland sent an email to the Monitor's counsel and the Applicants' counsel:

- (a) indicating that U.S. Class Counsel anticipated filing their own plan of compromise or arrangement (the "**Unsecured Creditor Plan**") and that they had a financier who might be prepared to replace the DIP facility; and,
- (b) requesting, among other things:
  - (i) that a meeting be scheduled to settle the process by which contingent claims were to be estimated for voting purposes;
  - (ii) access to the Applicants' confidential financial information; and,
  - (iii) that any further process proposed by the Applicants going forward provide for the filing and presentation of an alternative plan.<sup>13</sup>

22. In the days that followed, the Applicants' and the Monitor's counsel worked with Paliare Roland to negotiate a mutually acceptable form of NDA, but they did not take any steps in furtherance of the estimation of the U.S. Customers' Claims.<sup>14</sup>

23. On August 4, 2022, Paliare Roland sent an email to counsel for the Applicants and the Monitor requesting again that the U.S. Customer Claims be estimated, and this time enclosing a letter from U.S. Class Counsel proposing an expedited process for the

---

<sup>13</sup> Tannor Affidavit, RMR Tab 1, pp. 9-10, para. 23; Exhibit "H" to the Tannor Affidavit.

<sup>14</sup> Tannor Affidavit, RMR Tab 1, p. 10, para. 24.

estimation of the U.S. Customer Claims (the “**Estimation Process**”); one that would have the U.S. Customer Claims estimated in sufficient time to permit the U.S. Customers to participate meaningfully in the SISP and, in particular, allowing for the filing of the Unsecured Creditor Plan.<sup>15</sup>

24. U.S. Class Counsel has begun preparing their evidence in respect of the Estimation Process, and expect to be able to deliver their evidence in accordance with the timelines contemplated therein.<sup>16</sup>

**B. The SISP Motion**

25. On August 4, 2022, the Applicants served a motion record for, among other things:

- (a) an order authorizing the Applicants to enter into a definitive purchase agreement between the Applicants and LVS III SPE XV LP, TOCU XVII LLC, HVS XVI LLC, OC II LVS XIV LP, OC III LFE I LP and CBHT Energy I LLC, both PIMCO related companies (collectively, the “**Sponsor**” and the transactions the “**Stalking Horse Transaction**”);
- (b) an order approving the Applicants’ Proposed SISP and authorizing the Applicants to implement that SISP pursuant to the terms thereof; and
- (c) advice and directions of the CCAA Court regarding the suspension of all ongoing claims review, claims determination, and dispute resolution

---

<sup>15</sup> Tannor Affidavit, RMR Tab 1, pp. 10-11, para. 25; Exhibit “I” to the Tannor Affidavit.

<sup>16</sup> Tannor Affidavit, RMR Tab 1, p. 11, para. 26.

process under (i) the Claims procedure Order, granted September 15, 2021, (ii) the Order of the CCAA Court, granted March 3, 2022 appointing the Honourable Justice Dennis O'Connor as Claims Officer to adjudicate the U.S. Customers' claims; and, the First Endorsement ordering the summary evaluation of the contingent claims, including the U.S. Customer Claims.

26. U.S. Class Counsel does not oppose a SISP generally, but as described in detail in the Overview above, U.S. Class Counsel opposes certain aspects of the Applicants' Proposed SISP, because they are inconsistent with the scheme of the CCAA and the interests of unsecured creditors. Attached as Schedule "C" to this factum is U.S. Class Counsel's proposed revisions to the SISP.

27. U.S. Class Counsel also opposes the Applicants' request to prevent the summary estimation of the U.S. Customer Claims for voting purposes.

**C. Next Steps**

28. U.S. Class Counsel supports the Applicants' desire to exit the CCAA proceedings as quickly as possible, however, U.S. Class Counsel is concerned that the SISP, will not, among other things, operate to maximize returns to unsecured creditors as currently structured.<sup>17</sup>

29. Given PIMCO's advantage of 14-months time to prepare its proposal, and its informational, procedural and other advantages, potential bidders may be somewhat

---

<sup>17</sup> Tannor Affidavit, RMR Tab 1, p. 11, para. 27.

reluctant to participate in an auction. Moreover, the prospect that participants' information will be shared with PIMCO in the course of the SISF only serves to chill the process, by reinforcing the perception of PIMCO's advantage and could be chilling enough to deter participation by an otherwise interested party.<sup>18</sup>

30. The Applicants' recently released annual report for the fiscal year ended March 31, 2022 shows USD \$194 million of equity value, and suggests that there is sufficient value in the Applicants to compensate unsecured creditors. U.S. Class Counsel believes that it may be possible to find a party that is willing to sponsor the Unsecured Creditor Plan, which would pay secured creditors in full, and provide a recovery for unsecured creditors, given enough time. Indeed, U.S. Class Counsel's team has been contacted by a number of parties who have expressed an interest in filling that role, and is currently working with a serious financier to that end. U.S. Class Counsel is currently working to present the Unsecured Creditor Plan by the Qualified Bid Deadline.<sup>19</sup>

31. However, the timelines contemplated by the SISF for third parties are very tight, especially when one considers that it took the Applicants, working with PIMCO and other stakeholder, nearly 14 months to present a restructuring plan. At the various stay extensions and in numerous Monitor's reports, the Applicants and the Monitor continually highlighted the complicated nature of the companies' finances and regulatory situation.<sup>20</sup>

---

<sup>18</sup> Tannor Affidavit, RMR Tab 1, p. 11, para. 28.

<sup>19</sup> Tannor Affidavit, RMR Tab 1, pp. 11-12, para. 29.

<sup>20</sup> Tannor Affidavit, RMR Tab 1, p. 12, para. 30.

32. Some additional time is also warranted to complete due diligence and the analysis of the Applicants' financial records, given (a) the Applicants' recent shift in reporting standards, which complicates reconciliation with their previous financial statements; and (b) the complicated nature of the Applicants' business, which is subject to regulatory and operational requirements requiring time to analyze and establish debt, bonding, letters of credit, and equity commitments to purchase the business.<sup>21</sup>

33. To date, the Applicants' financial statements and the Monitor's reports do not disclose any liquidity concerns, and there is nothing that should prevent a brief extension of the various deadlines in the Applicants' Proposed SISP measured in weeks.<sup>22</sup>

34. The Applicants have adequate liquidity to continue their operations in the near term and for the next year, including the ability to pay the Monitor, vendors, taxes, interest expenses, and fees including its professional fees. The information found in the Monitor's 10<sup>th</sup> report suggests that at the time of hearing of the motion, the Applicants will have more liquidity than at any other time in these proceedings.<sup>23</sup>

35. In addition to accumulated cash, the Applicants have hedging in place to insulate them from operational risks, such as movements in energy costs related to unexpected weather events. Notwithstanding Mr. Carter's comments about risk and increased collateral, the Applicants' financial statements show unrealized gains on derivative

---

<sup>21</sup> Tannor Affidavit, RMR Tab 1, pp. 12-13, para. 31.

<sup>22</sup> Tannor Affidavit, RMR Tab 1, p. 13, para. 32.

<sup>23</sup> Tannor Affidavit, RMR Tab 1, p. 13, paras. 33-34.



instruments as of March 31 of USD \$682 million dollars, and that the company realized gains of USD\$166 million related to its energy hedges in its fiscal year ended 2022.<sup>24</sup>

36. In these circumstances, a brief extension of the timelines in the Applicants' Proposed SISP is reasonable and justified, and would make a material difference to potential bidders and, in particular, to U.S. Class Counsel's effort to present the Unsecured Creditor Plan.

### **PART III. STATEMENT OF ISSUES, LAW & ARGUMENT**

37. U.S. Class Counsel raises two issues on this motion:

- (a) Should the Applicants' Proposed SISP be approved in its current form?

*No. The Applicants' Proposed SISP is not fair and reasonable in the circumstances, in that (1) the auction process and RVO structure should not bypass the ability of creditors to consider and vote on the Unsecured Creditor Plan or the decision-making authority of this court in these proceedings; (2) the Break-Up Fee is not fair and reasonable; (3) PIMCO should not have access to competing bids and related information; and (4) the proposed SISP timelines are not realistic.*

- (b) Should the summary estimation of the U.S. Customer Claims for voting purposes be suspended?

---

<sup>24</sup> Tannor Affidavit, RMR Tab 1, p. 14, para. 35.

*No. An evaluation of the U.S. Customer Claims is necessary now, so that the U.S. Customers can participate meaningfully in the SISP through the presentation of a restructuring plan, and also so that the interest of the U.S. Customers in these proceedings can be evaluated for the purpose of an RVO. If the Applicants actually believe that the value of the U.S. Customer Claims for the purposes of voting is irrelevant, then they have the right to choose not to defend the claims and allow a default judgment to issue or an adverse inference to be drawn (for voting purposes only).*

**A. The Applicants' Proposed SISP should not be approved in its current form.**

38. The legal framework for court approval of a sales process is not in dispute.<sup>25</sup> In addition to the *Nortel* criteria, courts will indirectly consider the factors under s. 36(3) of the CCAA and the *Soundair* principles, such as the efficacy and integrity of the process by which offers have been obtained and any unfairness in the working out of the process.<sup>26</sup> Moreover, where the Court is asked to approve a process whereby a debtor is acquired by its lenders, the debtors and the Monitor must satisfy the Court that they have proceeded in a manner where the transparency, integrity, credibility and fairness of the process is beyond reproach.<sup>27</sup>

---

<sup>25</sup> See *Nortel Networks Corp. Re*, [2009 CanLII 39492](#) (Ont. Sup. Ct., Commercial List) at para. 49 [“*Nortel*”] and the framework summarized at paragraphs 34-37 of the Applicants’ factum on this motion.

<sup>26</sup> See, ex., *Harte Gold Corp. (Re)*, [2022 ONSC 653](#) (Commercial List) at paras. 20-21.

<sup>27</sup> *Mecachrome Canada Inc., Re*, [2009 QCCS 6355](#) at para. 33.

39. U.S. Class Counsel does not oppose a SISP generally and intends to submit a bid in the form of a plan of arrangement and compromise within the guidelines to be established by the form of SISP ultimately approved by this Court.

40. However, for the reasons below, the Applicants' Proposed SISP should not be approved in its current form. Instead, the SISP should proceed on the basis of U.S. Class Counsel's revisions to the Applicants' Proposed SISP. If PIMCO is not prepared to act as a stalking horse bidder in such circumstances, then the SISP can proceed as a blind bidding process.<sup>28</sup>

**1. The proposed auction process and RVO structure**

41. U.S. Class Counsel is concerned that the Applicants' proposed auction process, culminating in an RVO, should not be permitted to supplant the ability of creditors to consider and vote on the Unsecured Creditor Plan.

42. Canadian courts have affirmed that the RVO structure should remain the exception and not the rule, and should not lightly undermine creditor democracy:

[T]here must be exceptional circumstances for the court to be persuaded to bypass provisions of insolvency legislation aimed at giving both secured and unsecured creditors a meaningful voice/vote in the proceedings, as they are the residual claimants to the value of the debtor's assets during insolvency.

[...]

It makes sense, therefore, that in any application to bypass [the CCAA's] carefully crafted statutory process, the court consider whether there are compelling and exceptional circumstances to justify this extraordinary remedy, even where the RVO is not specifically contested, as the court needs to be satisfied of the integrity of the system

---

<sup>28</sup> See Exhibit "J" to the Tannor Affidavit, RMR Tab 1(J).

and the potential prejudice to creditors and other stakeholders that may not be appearing before it.<sup>29</sup>

43. U.S. Class Counsel is working with a serious financier and hope to be able to present a plan of arrangement that pays out the secured debt in its entirety and that will be acceptable to the requisite majority of unsecured creditors. In these circumstances, this Court should not commit this proceeding to an auction process culminating in an RVO. Rather, the SISP should contemplate a return to Court, and consideration by the Court of whether the Unsecured Creditor Plan should be put to creditors or, alternatively, whether any Qualifying Bids should proceed to an auction.

44. Moreover, given the contentious nature of these proceedings, the provision of a return to Court is appropriate for the adjudication of disputes which may arise regarding whether a bid is a Qualifying Bid. U.S. Class Counsel submits that decision-making authority at various stages of the SISP should clearly reside with the Court, and that there be express opportunity for recourse to the court in the event of disagreement.

## **2. The proposed Break-Up Fee**

45. The proposed Break-Up Fee unfairly prejudices the interests of unsecured creditors by creating a hurdle for competing bidders and should be eliminated or reduced significantly.

---

<sup>29</sup> *Arrangement relatif à Blackrock Metals Inc.*, [2022 QCCS 2828](#) at paras. 96-97, citing Janis Sarra, "Reverse Vesting Orders - Developing Principles and Guardrails to Inform Judicial Decisions", [2022 CanLIIDocs 431](#). Also see *Harte Gold Corp. (Re)*, [2022 ONSC 653](#) (Commercial List) at para. 38; *Quest University Canada (Re)*, [2020 BCSC 1883](#) at para. 171 [the RVO structure is not generally to be approved in a CCAA restructuring simply to rid a debtor of a recalcitrant creditor].

46. When determining whether to approve a break fee, relevant considerations include whether the amount of the fee is reasonable given the bidder's time, resources and risk in the process, and whether the fee and charge enhance the realization of the debtor's assets or the prospects of a viable compromise or arrangement being made in respect of the company.<sup>30</sup>

47. The party seeking approval of the break fee bears the burden of showing that it is fair and reasonable in the circumstances.<sup>31</sup> The court has a gatekeeping function to ensure that the fee is reasonable in each case; the court cannot merely act as a "rubber stamp" or rely upon the business judgement rule and the seller's discretion to assess the appropriateness of the break fee.<sup>32</sup> Each situation must be considered in the context of its own unique circumstances, and the mere fact that the proposed break fee is within a "range of reasonableness" as determined in other cases does not mean that it is reasonable in the given case.<sup>33</sup>

48. Courts have refused to approve break fees where, as here, the party seeking approval has presented no evidence, or insufficient evidence, of the expenses

---

<sup>30</sup> See *Quest University Canada (Re)*, [2020 BCSC 1845](#) at para. 59.

<sup>31</sup> *Mecachrome Canada Inc., Re*, [2009 QCCS 6355](#) at para. 64; *Quest University Canada (Re)*, [2020 BCSC 1845](#) at para. 59.

<sup>32</sup> *Boutique Euphoria inc., Re*, [2007 QCCS 7129](#) at para. 65 (per Gascon J. as he then was); *Leslie & Irene Dube Foundation Inc. v. P218 Enterprises Ltd.*, [2014 BCSC 1855](#) at para. 36.

<sup>33</sup> *Quest University Canada (Re)*, [2020 BCSC 1845](#) at para. 58; *Leslie & Irene Dube Foundation Inc. v. P218 Enterprises Ltd.*, [2014 BCSC 1855](#) at para. 36.

incurred in relation to their due diligence and the bidding process to substantiate the fee sought<sup>34</sup>:

The burden of showing that the break fee is reasonable rests upon the Canadian Debtors. The evidence in support thereof is sketchy at best. This is not an issue that one should consider lightly in the context of a CCAA restructuring supervised by a Court, whereby the unsecured creditors, who are already suffering the consequences of the restructuring as here, end up in reality paying the cost of such break fee.<sup>35</sup>

49. On the record before this Court, the Applicants have not established that the proposed Break-Up Fee is reasonable. In particular:

- (a) the stalking horse bidder – effectively PIMCO – has had its professional fees paid by the Applicants throughout these proceedings, and had already committed to buying the asset;<sup>36</sup>
- (b) the Applicants have not presented any evidence to substantiate that PIMCO’s expenses related to due diligence in connection with its bid, or how such expenses compare to the Break-Up Fee sought;
- (c) it is not enough to assert that the Break-Up Fee is “well within the range of payments that have been approved by this Court”;<sup>37</sup> and
- (d) that this Court previously approved the Termination Fee in connection with the PIMCO Sponsored Plan is not determinative or even relevant in

---

<sup>34</sup> *American Iron v. 1340923 Ontario*, [2018 ONSC 2810](#) (Commercial List) at para. 42; see generally paras. 38-45; *Leslie & Irene Dube Foundation Inc. v. P218 Enterprises Ltd.*, [2014 BCSC 1855](#) at para. 38; *Mecachrome Canada Inc., Re*, [2009 QCCS 6355](#) at para. 63; *Boutique Euphoria inc., Re*, [2007 QCCS 7129](#) at paras. 67-68.

<sup>35</sup> *Mecachrome Canada Inc., Re*, [2009 QCCS 6355](#) at para. 64.

<sup>36</sup> Tannor Affidavit, RMR Tab 1, p. 5, para. 6(c).

<sup>37</sup> Factum of the Applicants, pp. 20-21, para. 63.

circumstances where PIMCO chose to terminate its support for the Plan rather than accept the fairness of this Court's ruling, and has submitted an opportunistic bid which, based on their earlier submissions to this Court, is for an amount that is at least \$20 million less than what they committed to in the Plan.

### **3. PIMCO's access to competing bids and related information**

50. The Applicants' Proposed SISP contemplates that PIMCO will have access to copies of any notice of intent to bid and any bid received by the Applicants in the SISP, and information regarding the status and substance of discussions related to other bids.<sup>38</sup>

51. This provision is unfair. The stalking horse bidder should not have access to inside information regarding other bids and other bidders' communications with the Applicants. Having regard to PIMCO's financial, informational, procedural and other advantages, market participants may be reluctant to participate in an auction with PIMCO as their counterparty. Indeed, the prospect that participants' information will be shared with PIMCO in the course of the SISP only serves to reinforce the perception of PIMCO's advantage and could be enough to deter participation by an otherwise interested party.<sup>39</sup>

---

<sup>38</sup> See Exhibit "B" to the Affidavit of Michael Carter, sworn August 4, 2022, Motion Record of the Applicants, Tab 2(B), PDF p. 221, para. 15.

<sup>39</sup> Tannor Affidavit, RMR Tab 1, p. 11, para. 28; also see Martin P. Rosenthal, "Sales Process Dynamics The Monitor's Perspective", in Janis P. Sarra and Barbara Romaine, eds, *Annual Review of Insolvency Law 2012* (Toronto: Carswell, 2013) at 129: "It is important however to realize that the presence of lenders in the group of prospective purchasers may create an information imbalance within the group of prospective purchasers, that may act as a disincentive to the prospective purchasers [...] The receipt of

52. Granting this competitive advantage to PIMCO is not consistent with the required standard of transparency, integrity, credibility and fairness.<sup>40</sup>

#### **4. The proposed SISP timelines**

53. A sale process must allow a sufficient opportunity for interested parties to come forward with offers.<sup>41</sup> The court must balance the need to move quickly to address the real or perceived deterioration of value of the business during a sale process or the limited availability of restructuring financing, with a realistic timetable that encourages and does not chill the auction process.<sup>42</sup>

54. As described above, the Applicants' financial statements and the Monitor's reports do not disclose any liquidity concerns. In addition, the Applicants' recent shift in reporting standards, complicates reconciliation with their previous financial statements and warrants additional time in respect of the various milestones under the SISP.

55. At paragraph 5 of his supplemental affidavit, Mr. Carter states that "there was no material change to Just Energy's assets and liabilities in reporting under U.S. GAAP as

---

information about the sales process by a lender, in its dual capacity as lender and as prospective purchaser, may give the lender a competitive advantage over other bidders that would discourage the competition".

<sup>40</sup> *Mecachrome Canada Inc., Re*, [2009 QCCS 6355](#) at para. 33.

<sup>41</sup> *Leslie & Irene Dube Foundation Inc. v. P218 Enterprises Ltd.*, [2014 BCSC 1855](#) at para. 31.

<sup>42</sup> *Leslie & Irene Dube Foundation Inc. v. P218 Enterprises Ltd.*, [2014 BCSC 1855](#) at para. 31; *CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.*, [2012 ONSC 1750](#) (Commercial List) at para. 8, citing Huff et al. "Credit Bidding – Recent Canadian and U.S. Themes" in Janis P. Sarra (ed.), *2010 Annual Review of Insolvency Law* (Toronto: Carswell, 2010) at 16.



compared to its assets and liabilities under international financial reporting standards (“IFRS”), apart from the use of U.S. dollars rather than Canadian dollars.”<sup>43</sup>

56. Although it is correct that Base EBITDA is close to the IFRS financial statements for 2021, there are 466 pages of potential differences between IFRS and GAAP as detailed in Ernst & Young’s “US GAAP/IFRS Accounting differences identifier tool,”<sup>44</sup> which potential buyers may need to review and confirm historical financial reports to the current GAAP reporting.

57. Mr. Carter also fails to mention that the Applicants delayed their fiscal year end 2022 financial reports twice in filings to SEDAR and the SEC (likely, in part, due to the restatement of prior financials and the fiscal year end 2022 financials in accordance with GAAP). Accordingly, the additional time requested to the SISP schedule is supported by the Applicants’ recent change in financial accounting standards.<sup>45</sup>

58. In these circumstances, a brief extension of the timelines in the Applicants’ Proposed SISP is reasonable and justified, and would make a material difference to potential bidders and, in particular, to U.S. Class Counsel’s effort to present the Unsecured Creditor Plan.

---

<sup>43</sup> Affidavit of Michael Carter, sworn August 11, 2022, Responding Motion Record of the Applicants, Tab 1, p. 64, para. 5.

<sup>44</sup> [https://assets.ey.com/content/dam/ey-sites/ey-com/en\\_us/topics/assurance/accountinglink/ey-ifrs14676-211us\\_12-21-2021.pdf?download](https://assets.ey.com/content/dam/ey-sites/ey-com/en_us/topics/assurance/accountinglink/ey-ifrs14676-211us_12-21-2021.pdf?download).

<sup>45</sup> As noted above, U.S. Class Counsel’s financial advisor has concluded that the Applicants have economic value beyond the non-GAAP and non-IFRS measure that it calls Base EBITDA. Mr. Carter’s comments at paragraph 7 of his supplemental affidavit that: “Given the fact that these unrealized gains/losses are not included in the Base EBITDA calculation (and, as discussed below in FN 2, are only one side of the economic activities of the Just Energy Entities), the net financial derivative assets/liabilities must be excluded when considering the true value of the equity of Just Energy. Absent these net financial derivative assets, Just Energy’s balance sheet equity would have been approximately negative US\$280 million as of March 31, 2022.”

***B. The expedited evaluation of claims in the U.S. Class Actions should not be suspended***

59. U.S. Class Counsel opposes the Applicants' request to suspend the expedited evaluation of the U.S. Customer Claims for voting purposes.

60. An evaluation of the U.S. Customer Claims should proceed now, in order to allow the U.S. Customers to meaningfully participate in these proceedings through the presentation of the Unsecured Creditor Plan. This Court has already held that the claims of the Contingent Litigation Claimants ought to be evaluated in advance of a meeting of creditors, and that to do otherwise would result in an unfair disenfranchisement of the Contingent Litigation Claimants.<sup>46</sup>

61. The Applicants seem to be suggesting a "wait and see" approach. Respectfully, such an approach is, at best, short-sighted: it ignores the fact that in order formulate and negotiate a plan, the U.S. Customers need to know the creditor pool for the purpose of voting. More cynically, it belies the urgency of these proceedings, and sets up a situation where the estimation process is too early, until it is too late.

62. U.S. Class Counsel has proposed a fair and achievable Estimation Process,<sup>47</sup> and expect to be able to deliver their evidence in accordance with the timelines contemplated therein. The summary evaluation should proceed in accordance with the First Endorsement and U.S. Class Counsel's proposed Estimation Process.

---

<sup>46</sup> Exhibit "E" to the Tannor Affidavit, Tab 1(E), p. 41, paras. 50, 54.

<sup>47</sup> Exhibit "I" to the Tannor Affidavit, Tab 1(I), pp. 67-71.

63. U.S. Class Counsel should not be prejudiced by the Applicants' reluctance to value the claims advanced in the U.S. Class Actions or other material contingent claims. These claims need to be estimated so that the influence of the U.S. Customers and other material contingent creditors is known to other stakeholders, including bidders and financiers. If the Applicants are suggesting that the summary estimation be deferred until later, then they cannot complain about a need for urgency. If they are of the view that the estimation of claims is irrelevant to the outcome of these proceedings, then the Applicants can choose not to participate in the process, and the Court should draw an adverse inference and value the U.S. Customers' claims at their face amount for the purpose of voting (for certainty, we note that U.S. Customers are not intending to be opportunistic: U.S. Class Counsel is in the process of calculating the face amount of the U.S. Customer Claims in accordance with the rulings made by Justice O'Connor to date and documentary discovery provided by the Applicants and intend to submit a revised claim).

#### **PART IV. ORDER REQUESTED**

64. U.S. Class Counsel respectfully requests that the Court dismiss the Applicants' motion, but approve a form of SISP attached at Exhibit "J" to the Tannor Affidavit and included as Schedule "C" hereto for ease of reference.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED:**

August 13, 2022



---

**Paliare Roland Rosenberg Rothstein LLP**  
Lawyers for U.S. Class Counsel

## **SCHEDULE “A”**

### **LIST OF AUTHORITIES**

1. *Nortel Networks Corp, Re*, 2009 CanLII 39492 (Ont. Sup. Ct., Commercial List)
2. *Harte Gold Corp. (Re)*, 2022 ONSC 653 (Commercial List)
3. *Mecachrome Canada Inc., Re*, 2009 QCCS 6355
4. *Arrangement relatif à Blackrock Metals Inc.*, 2022 QCCS 2828
5. *Quest University Canada (Re)*, 2020 BCSC 1883
6. *Quest University Canada (Re)*, 2020 BCSC 1845
7. *Boutique Euphoria inc., Re*, 2007 QCCS 7129
8. *Leslie & Irene Dube Foundation Inc. v. P218 Enterprises Ltd.*, 2014 BCSC 1855
9. *American Iron v. 1340923 Ontario*, 2018 ONSC 2810 (Commercial List)
10. *CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.*, 2012 ONSC 1750 (Commercial List)

### **LIST OF SECONDARY SOURCES**

1. Martin P. Rosenthal, “Sales Process Dynamics The Monitor’s Perspective”, in Janis P Sarra and Barbara Romaine, eds, *Annual Review of Insolvency Law 2012* (Toronto: Carswell, 2013)

## SCHEDULE "B"

### TEXT OF STATUTES, REGULATIONS & BY-LAWS

#### *Companies' Creditors Arrangement Act, R.S.C., 1985, c. C-36*

##### **Restriction on disposition of business assets**

**36 (1)** A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

##### **Notice to creditors**

**(2)** A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

##### **Factors to be considered**

**(3)** In deciding whether to grant the authorization, the court is to consider, among other things,

**(a)** whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

**(b)** whether the monitor approved the process leading to the proposed sale or disposition;

**(c)** whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

**(d)** the extent to which the creditors were consulted;

**(e)** the effects of the proposed sale or disposition on the creditors and other interested parties; and

**(f)** whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

**SCHEDULE "C"**

# Sale and Investment Solicitation Process

---

1. On ●, 2022, the Ontario Superior Court of Justice (Commercial List) (the “**Court**”) granted an order (the “**SISP Order**”) that, among other things, (a) authorized Just Energy (as defined below) to implement a sale and investment solicitation process (“**SISP**”) in accordance with the terms hereof, (b) approved the Support Agreement subject to any changes necessary in accordance herewith, and (c) authorized and directed Just Energy Group Inc. to enter into the Stalking Horse Transaction Agreement subject to any changes necessary in accordance herewith, ~~(d) approved the Break-Up Fee, and (e) granted the Bid Protections Charge~~. Capitalized terms that are not defined herein have the meanings ascribed thereto in the Second Amended & Restated Initial Order granted by the Court in Just Energy’s proceedings under the *Companies’ Creditors Arrangement Act* on May 26, 2021, as amended, restated or supplemented from time to time or the SISP Order, as applicable.
2. This SISP sets out the manner in which (i) binding bids for executable transaction alternatives that are superior to the sale transaction to be provided for in the Stalking Horse Transaction Agreement involving the shares and/or the business and assets of Just Energy Group Inc. and its direct and indirect subsidiaries (collectively, “**Just Energy**”) will be solicited from interested parties, (ii) any such bids received will be addressed, (iii) any Successful Bid (as defined below) will be selected, and (iv) Court (as defined below) approval of any Successful Bid will be sought. Such transaction alternatives may include, among other things, a sale of some or all of Just Energy’s shares, assets and/or business and/or an investment in Just Energy, each of which shall be subject to all terms set forth in this SISP.
3. The SISP shall be conducted by Just Energy under the oversight of FTI Consulting Canada Inc., in its capacity as court-appointed monitor (the “**Monitor**”), with the assistance of BMO Capital Markets (the “**Financial Advisor**”).
4. Parties who wish to have their bids considered shall be expected to participate in the SISP as conducted by Just Energy and the Financial Advisor and as supervised by the Court.
5. The SISP will be conducted such that Just Energy and the Financial Advisor will (under the oversight of the Monitor):
  - a) prepare marketing materials and a process letter;
  - b) prepare and provide applicable parties with access to a data room containing diligence information;
  - c) solicit interest from parties to enter into non-disclosure agreements (parties shall only obtain access to the data room and be permitted to participate in the SISP if they execute a non-disclosure agreement in form and substance satisfactory to Just Energy, acting reasonably, or as ordered by the Court); and,
  - d) request that such parties (other than the Sponsor or its designee) submit (i) a notice of intent to bid that identifies the potential purchaser or investor and a general description of the assets and/or business(es) of the Just Energy Entities that would be the subject of the bid ~~and that reflects a reasonably likely prospect of culminating in a Qualified Bid (as defined below), as determined by the Just Energy Entities in consultation with the Monitor and the Credit Facility Agent (subject to the confidentiality requirements set forth in Section 15 below)~~ (a “**NOI**”) by the NOI Deadline (as defined below) and, if applicable, (ii) a binding

offer meeting at least the requirements set forth in Section 7 below, as determined by the Just Energy Entities in consultation with the Monitor- or the Court (a “**Qualified Bid**”) by the Qualified Bid Deadline (as defined below).

6. The SISP shall be conducted subject to the terms hereof and the following key milestones:
- a) Just Energy to commence solicitation process on the date of service of the motion for approval of the SISP – August 4, 2022;<sup>1</sup>
  - ~~b)~~ Just Energy in concert with the Financial Advisor to complete a distribution of the Teaser appended hereto as Schedule B—August 7, 2022;
  - ~~b)c)~~ Court approval of SISP and authorizing Just Energy to enter into the Stalking Horse Transaction Agreement – August 17, 2022;
  - ~~e)d)~~ Deadline to submit NOI – 11:59 p.m. Eastern Daylight Time on September 15 August 25, 2022 (the “**NOI Deadline**”);
  - ~~e)e)~~ Deadline to submit a Qualified Bid – 11:59 p.m. Eastern Daylight Time on October 20 September 29, 2022 (the “**Qualified Bid Deadline**”);
  - ~~e)f)~~ Deadline to determine whether a bid is a Qualified Bid and, if applicable, to notify those parties who submitted a Qualified Bid of the Auction (as defined below) Hearing of motion for court approval of list of Qualified Bids, exclusion of other bids, and filing of a plan or approval of auction procedures—5:00 p.m. Eastern Daylight Time on—October 6, 2022;
  - ~~f)~~ Just Energy to hold Auction (if applicable)—10:00 a.m. Eastern Daylight Time on October 8, 2022; and
  - g) Implementation Order (as defined below) hearing:
    - o (if no NOI is submitted) – by no later than September 2, 2022, subject to Court availability.
    - o (if there are no Qualified Bids is no Auction) – by no later than October 15, 2022, subject to Court availability.
    - o (if there are multiple competing bids is an Auction) – by no later than twelve (12) days after determination of the Successful Bid completion of the Auction, subject to Court availability and/or further court order.
  - ~~e)h)~~ Management meetings will be held from Court approval of the SISP on August 17<sup>th</sup> 2022 to the Qualified Bid Deadline
7. In order to constitute a Qualified Bid, which, for the avoidance of doubt, may take the form of a plan of arrangement, a bid must comply with the following:
- a. it provides for (i) the payment in full in cash on closing of the BP Commodity/ISO Services Claim (as defined in the Support Agreement), unless otherwise agreed to by the holder of such claim in its sole discretion; (ii) the payment in full in cash on closing of the Credit Facility Claims, unless otherwise agreed to by the Credit Facility Agent in its sole discretion; (iii) the payment in full in cash on closing of any claims ranking in priority to the claims set forth in subparagraphs (i) or (ii) including any claims secured by Court-ordered charges, unless otherwise agreed to by the applicable holders thereof in their sole discretion (iv) the return of all outstanding letters of credit and release of all Credit Facility LC Claims or arrangements satisfactory to the applicable Credit Facility Lenders in their discretion to secure with cash collateral or otherwise any Credit Facility LC Claims not released, and (v) the payment in full in cash on closing of any outstanding Cash Management Obligations or arrangements satisfactory to the applicable Credit Facility

<sup>1</sup> To the extent any dates would fall on a non-business day, to be the first business day thereafter.



Lenders or their affiliates to secure with cash collateral or otherwise any outstanding Cash Management Obligations.

- b. it provides a detailed sources and uses schedule that identifies, with specificity, the amount of cash consideration (the “**Cash Consideration Value**”) and any assumptions that could reduce the net consideration payable. At a minimum, the Cash Consideration Value plus Just Energy’s cash on hand must be sufficient for payment in full of the items contemplated in Sections 7(a)(i) and 7(a)(ii) herein, 3.2 of the Stalking Horse Transaction Agreement ~~and the Break-Up Fee of \$◆, plus USD\$1,000,000~~, on closing, which Cash Consideration Value is estimated to be USD\$~~444,400,000~~460,000,000 as of December 31, 2022.
- c. it is reasonably capable of being consummated by 90 days after completion of the Auction or such later date as approved by the Court if selected as the Successful Bid;
- d. it contains:
  - i. duly executed binding transaction document(s);
  - ii. the legal name and identity (including jurisdiction of existence) and contact information of the bidder, full disclosure of its direct and indirect principals, and the name(s) of its controlling equity holder(s);
  - iii. a redline to the form of transaction document(s) provided by Just Energy, if applicable;
  - iv. evidence of authorization and approval from the bidder’s board of directors (or comparable governing body) and, if necessary to complete the transaction, the bidder’s equityholder(s);
  - v. disclosure of any connections or agreements with Just Energy or any of its affiliates, any known, potential, prospective bidder, or any officer, manager, director, or known equity security holder of Just Energy or any of its affiliates; and
  - vi. such other information reasonably requested by Just Energy or the Monitor;
- e. it includes a letter stating that the bid is submitted in good faith, is binding and is irrevocable until the selection of the Successful Bid; provided, however, that if such bid is selected as the Successful Bid, it shall remain irrevocable until the closing of the Successful Bid;
- f. it provides written evidence of a bidder’s ability to fully fund and consummate the transaction and satisfy its obligations under the transaction documents, including binding equity/debt commitment letters and/or guarantees covering the full value of all cash consideration and the additional items (in scope and amount) covered by the guarantees provided by affiliates of the Purchaser in connection with the Transaction Agreement;
- g. it does not include any request for or entitlement to any break fee, expense reimbursement or similar type of payment;
- h. it is not conditional upon:
  - i. approval from the bidder’s board of directors (or comparable governing body) or equityholder(s);
  - ii. the outcome of any due diligence by the bidder; or
  - iii. the bidder obtaining financing;
- i. it includes an acknowledgment and representation that the bidder has had an opportunity to conduct any and all required due diligence prior to making its bid, subject to any outstanding motions for the production of information;
- j. it specifies any regulatory or other third-party approvals the party anticipates would be required to complete the transaction (including the anticipated timing necessary to obtain such approvals) and, in connection therewith, specifies whether the bidder or any of its affiliates is involved in any part of the energy sector, including an electric utility, retail service provider, a company with a tariff on file with the Federal Energy Regulatory Commission, or any intermediate holding company;
- k. it includes full details of the bidder’s intended treatment of Just Energy’s employees under

- the proposed bid;
- l. it is accompanied by a cash deposit (the “**Deposit**”) by wire transfer of immediately available funds equal to 10% of the Cash Consideration Value, which Deposit shall be retained by the Monitor in a non-interest bearing trust account in accordance with this SISP;
  - m. a statement that the bidder will bear its own costs and expenses (including legal and advisor fees) in connection with the proposed transaction, and by submitting its bid is agreeing to refrain from and waive any assertion or request for reimbursement on any basis; and
  - n. it is received by the Qualified Bid Deadline.
8. The Qualified Bid Deadline may be extended by (i) Just Energy for up to no longer than seven days with the consent of the Monitor, the Credit Facility Agent and the Sponsor, acting reasonably, or (ii) further order of the Court. In such circumstances, the milestones contained in Subsections 6(f) and (g) shall be extended by the same amount of time.
  9. ~~Just Energy, in consultation with the Monitor, may waive compliance with any one or more of the~~ requirements specified in Section 7 above may be waived and ~~deem~~ a non-compliant bid deemed to be a Qualified Bid, by (a) Just Energy, in consultation with the Monitor, provided that Just Energy shall not waive compliance with the requirements specified in Subsections 7(a), (b), (c), (d), (e), (g), (h), (i), (j) or (l) without the prior written consent of the Sponsor and Credit Facility Agent, each acting reasonably; or, (b) by order of the Court.
  10. Notwithstanding the requirements specified in Section 7 above, the transactions contemplated by the Stalking Horse Transaction Agreement (the “**Stalking Horse Transaction**”), is deemed to be a Qualified Bid, provided that, for greater certainty, no Deposit shall be required to be submitted in connection with the Stalking Horse Transaction.
  11. If one or more Qualified Bids (other than the Stalking Horse Transaction) has been received by Just Energy on or before the Qualified Bid Deadline, Just Energy shall proceed to determine the “Successful Bid” as further directed by the Court following its consideration of the Qualified Bids and after hearing the submissions of stakeholders with an auction process to determine the successful bid(s) (the “Auction”), which Auction shall be administered in accordance with Schedule “A” hereto. The successful bid(s) selected within the Auction shall constitute the “Successful Bid”. Forthwith upon determining to proceed with an Auction, Just Energy shall provide written notice to each party that submitted a Qualified Bid (including the Stalking Horse Transaction), along with copies of all Qualified Bids and a statement by Just Energy specifying which Qualified Bid is the leading bid.
  12. If, by the NOI Deadline no NOI has been received, then the SISP shall be deemed to be terminated and the Stalking Horse Transaction shall be the Successful Bid and shall be consummated in accordance with and subject to the terms of the Support Agreement and the Stalking Horse Transaction Agreement. If no Qualified Bid (other than the Stalking Horse Transaction) has been received by Just Energy on or before the Qualified Bid Deadline, then the Stalking Horse Transaction shall be the Successful Bid and shall be consummated in accordance with and subject to the terms of the Support Agreement and the Stalking Horse Transaction Agreement.
  13. Following selection of a Successful Bid, Just Energy, with the assistance of its advisors, shall seek to finalize any remaining necessary definitive agreement(s) with respect to the Successful Bid in accordance with the key milestones set out in Section 6. Once the necessary definitive agreement(s) with respect to a Successful Bid have been finalized, as determined by Just Energy, in consultation with the Monitor, Just Energy shall, if and as necessary, apply to the Court for an order or orders

approving such Successful Bid and/or the mechanics to authorize Just Energy to complete the transactions contemplated thereby, as applicable, and authorizing Just Energy to (i) enter into any and all necessary agreements and related documentation with respect to the Successful Bid, (ii) undertake such other actions as may be necessary to give effect to such Successful Bid, and (iii) implement the transaction(s) contemplated in such Successful Bid (each, an “**Implementation Order**”).

14. All Deposits shall be retained by the Monitor in a non-interest bearing trust account. If a Successful Bid is selected and an Implementation Order authorizing the consummation of the transaction contemplated thereunder is granted, any Deposit paid in connection with such Successful Bid will be non-refundable and shall, upon closing of the transaction contemplated by such Successful Bid, be applied to the cash consideration to be paid in connection with such Successful Bid or be dealt with as otherwise set out in the definitive agreement(s) entered into in connection with such Successful Bid. Any Deposit delivered with a Qualified Bid that is not selected as a Successful Bid, will be returned to the applicable bidder as soon as reasonably practicable (but not later than ten (10) business days) after the date upon which the Successful Bid is approved pursuant to an Implementation Order or such earlier date as may be determined by Just Energy, in consultation with the Monitor.
15. Except as may be made generally available to the public, Just Energy shall not, without the agreement of affected bidders, provide information in respect of the SISF to the DIP Lenders, the holder of the BP Commodity/ISO Services Claim, and the Supporting Secured CF Lenders or any other party directly or indirectly affiliated with or committed to the Stalking Horse Transaction ~~on a confidential basis, including (A) copies (or if not provided to the Just Energy Entities in writing, a detailed description) of any NOI and any bid received, including any Qualified Bid, no later than one (1) calendar day following receipt thereof by the Just Energy Entities or their advisors and (B) such other information as reasonably requested by the DIP Lenders’, the holder of the BP Commodity/ISO Services Claim or the Supporting Secured CF Lenders’ respective legal counsel or financial advisors or as necessary to keep the DIP Lenders, the holder of the BP Commodity/ISO Services Claim or the Supporting Secured CF Lenders informed no later than one (1) calendar day after any such request or any material change to the proposed terms of any bid received, including any Qualified Bid, as to the terms of any bid, including any Qualified Bid, (including any changes to the proposed terms thereof) and the status and substance of discussions related thereto.~~ Just Energy shall be permitted, in its discretion, to provide general updates and information in respect of the SISF to counsel to any General Unsecured Creditor (as defined in the Support Agreement) on a confidential basis, upon: (i) the irrevocable confirmation in writing from such counsel that the applicable General Unsecured Creditor will not submit any NOI or bid in the SISF, and (ii) counsel to such General Unsecured Creditor executing confidentiality agreements with Just Energy, in form and substance satisfactory to Just Energy and the Monitor or the Court.
16. Any amendments to this SISF may only be made by: (a) Just Energy with the written consent of the Monitor and after consultation with the Credit Facility Agent, or by further order of the Court, provided that Just Energy shall not amend Subsections 7(a), (b), (ced), (ffe), (gff), (hhg), (jjj) or (l) or Section 154514 without the prior written consent of the Sponsor and the Credit Facility Agent; ~~or (b) by further order of the Court.~~

**SCHEDULE “A”: AUCTION PROCEDURES**

1. — ~~**Auction.** If Just Energy receives at least one Qualified Bid (other than the Stalking Horse Transaction), Just Energy will conduct and administer the Auction in accordance with the terms of the SISP. Instructions to participate in the Auction, which will take place via video conferencing, will be provided to Qualified Parties (as defined below) not less than 24 hours prior to the Auction.~~

2. — ~~**Participation.** Only parties that provided a Qualified Bid by the Qualified Bid Deadline, including the Stalking Horse Transaction (collectively, the “Qualified Parties”), shall be eligible to participate in the Auction. No later than 5:00 p.m. Eastern Daylight Time on the day prior to the Auction, each Qualified Party (other than the Sponsor) must inform Just Energy whether it intends to participate in the Auction. Just Energy will promptly thereafter inform in writing each Qualified Party who has expressed its intent to participate in the Auction of the identity of all other Qualified Parties that have indicated their intent to participate in the Auction. If no Qualified Party provides such expression of intent, the Stalking Horse Transaction shall be the Successful Bid.~~

3. — ~~**Auction Procedures.** The Auction shall be governed by the following procedures:~~

a. — ~~**Attendance.** Only Just Energy, the other counterparties to the Support Agreement, the Qualified Parties, the Monitor and each of their respective advisors will be entitled to attend the Auction, and only the Qualified Parties will be entitled to make any subsequent Overbids (as defined below) at the Auction;~~

b. — ~~**No Collusion.** Each Qualified Party participating at the Auction shall be required to confirm on the record at the Auction that: (i) it has not engaged in any collusion with respect to the Auction and the bid process; and (ii) its bid is a good faith *bona fide* offer and it intends to consummate the proposed transaction if selected as the Successful Bid (as defined below);~~

c. — ~~**Minimum Overbid.** The Auction shall begin with the Qualified Bid that represents the highest or otherwise best Qualified Bid as determined by Just Energy, in consultation with the Monitor (the “Initial Bid”), and any bid made at the Auction by a Qualified Party subsequent to Just Energy’s announcement of the Initial Bid (each, an “Overbid”), must proceed in minimum additional cash increments of USD\$1,000,000;~~

d. — ~~**Bidding Disclosure.** The Auction shall be conducted such that all bids will be made and received in one group video conference, on an open basis, and all Qualified Parties will be entitled to be present for all bidding with the understanding that the true identity of each Qualified Party will be fully disclosed to all other Qualified Parties and that all material terms of each subsequent bid will be fully disclosed to all other Qualified Parties throughout the entire Auction; provided, however, that Just Energy, in its~~

discretion, may establish separate video conference rooms to permit interim discussions between Just Energy and individual Qualified Parties with the understanding that all formal bids will be delivered in one group video conference, on an open basis;

- e. ~~**Bidding Conclusion.** The Auction shall continue in one or more rounds and will conclude after each participating Qualified Party has had the opportunity to submit one or more additional bids with full knowledge and written confirmation of the then existing highest bid(s); and~~
- f. ~~**No Post-Auction Bids.** No bids will be considered for any purpose after the Auction has concluded.~~

### **Selection of Successful Bid**

4. ~~**Selection.** Before the conclusion of the Auction, Just Energy, in consultation with the Monitor, will: (a) review each Qualified Bid, considering the factors set out in Section 7 of the SISP and, among other things, (i) the amount of consideration being offered and, if applicable, the proposed form, composition and allocation of same, (ii) the value of any assumption of liabilities or waiver of liabilities not otherwise accounted for in prong (i) above; (iii) the likelihood of the Qualified Party's ability to close a transaction by 90 days after completion of the Auction and the timing thereof (including factors such as the transaction structure and execution risk, including conditions to, timing of, and certainty of closing; termination provisions; availability of financing and financial wherewithal to meet all commitments; and required governmental or other approvals), (iv) the likelihood of the Court's approval of the Successful Bid, (v) the net benefit to Just Energy and (vi) any other factors Just Energy may, consistent with its fiduciary duties, reasonably deem relevant; and (b) identify the highest or otherwise best bid received at the Auction (the "**Successful Bid**" and the Qualified Party making such bid, the "**Successful Party**").~~

5. ~~**Acknowledgement.** The Successful Party shall complete and execute all agreements, contracts, instruments or other documents evidencing and containing the terms and conditions upon which the Successful Bid was made within one business day of the Successful Bid being selected as such, unless extended by Just Energy in its sole discretion, subject to the milestones set forth in Section 6 of the SISP.~~

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

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

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

**FACTUM OF U.S. CLASS COUNSEL**  
**(MOTION RETURNABLE AUGUST 17, 2022)**

**Paliare Roland Rosenberg Rothstein LLP**

155 Wellington Street West, 35th Floor  
Toronto ON M5V 3H1  
Tel: 416.646.4300

**Ken Rosenberg** (LSO# 21102H)

Tel: 416.646.4304

Email: ken.rosenberg@paliareolrand.com

**Massimo (Max) Starnino** (LSO# 41048G)

Email: max.starnino@paliareroland.com

**Jeffrey Larry** (LSO# 44608D)

Email: jeff.larry@paliareroland.com

**Danielle Glatt** (LSO# 65517N)

Email: danielle.glatt@paliareroland.com

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

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