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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

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

RESPONDING MOTION RECORD OF U.S. CLASS COUNSEL

(MOTION RETURNABLE AUGUST 17, 2022)

August 10, 2022

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

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

TO: **THE SERVICE LIST**

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

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")**

I N D E X

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., 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")**

AFFIDAVIT OF ROBERT TANNOR
(SWORN AUGUST 10, 2022)

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

1. I am the general partner of Tannor Capital Advisors LLC ("**Tannor Capital**"), a boutique financial advisory firm specializing in restructuring. As a restructuring professional, I have actively participated in restructuring cases involving over 8 billion

dollars of debt and over 400 credits from 2008 to 2021. Prior to founding Tannor Capital, I was a senior industry practice leader and director at Ernst & Young Corporate Finance LLC in New York ("**E&Y**"). While at E&Y, I worked as lead restructuring advisor, or as part of the team, in over 30 bankruptcy cases, both in and out of court. Attached to my affidavit as **Exhibit "A"** is copy of my CV.

2. Together with Tannor Capital, I have been retained as a financial advisor to Wittels McInturff Palikovic, Finkelstein Blankinship, Frei-Pearson, Garber LLP, and Shub Law Firm LLP (collectively, "**U.S. Class Counsel**") in connection with their representation of millions of the Applicants' U.S. customers who are victim to wrongful and abusive energy pricing by the Applicants in breach of their contract (the "**U.S. Customers**") in two U.S. class actions[1] and in connection with the U.S. Customers' interests as contingent unsecured creditors in this proceeding under the *Companies' Creditors Arrangement Act* (the "**CCAA Proceeding**").

3. As such, I have knowledge of the matters contained in this affidavit. Where I do not have direct knowledge of a matter, I have stated the source of my information and I believe it to be true.

4. I have previously sworn affidavits in this proceeding on January 17, 2022, in support of U.S. Class Counsel's motion for advice and directions returnable February 9, 2022, and on May 26, 2022, in support of U.S. Class Counsel's opposition to the Applicants' Meetings Order motion and U.S. Class Counsel's cross-motion for, among

[1] *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. Class Actions**").

other things, advice and direction regarding a summary evaluation of the U.S. Customers' Claims, both returnable June 7, 2022. Copies of my previous affidavits sworn January 17, 2022 and May 26, 2022 are included in U.S. Class Counsel's Motion Record. This affidavit should be read together with my earlier affidavits. Capitalized terms used but not defined in this affidavit shall have the meanings given to them in my previous affidavits.

5. 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 Pacific Investment Management Company LLC ("**PIMCO**") related companies (collectively, the "**Sponsor**" and the transactions the "**Stalking Horse Transaction**"),

(b) an order approving the Sale and Investment Solicitation Process (the "**SISP**") and authorizing the Applicants to implement the 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 process under (i) the Claims procedure Order, granted September 15, 2021 (the "**Claims Procedure Order**"), (ii) the Order of the CCAA Court, granted March 3, 2022 appointing the Honourable Justice Dennis O'Connor as Claims Officer to adjudicated the U.S. Customers' claims (the "**Appointment Order**"); and the Endorsement of the CCAA Court dated

June 10, 2022 ordering the summary evaluation of the contingent claims, including the U.S. Customer Claims (the "**First Endorsement**").

6. U.S. Class Counsel do not oppose the SISP generally, but U.S. Class Counsel opposes certain aspects of the SISP attached as Exhibit "B" to the affidavit of Michael Carter sworn August 4, 2022 (the "**Applicants' Proposed SISP**"), as follows:

(a) the SISP should not default to an auction process. U.S. Class Counsel are 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 anticipation of that eventuality, the SISP should contemplate a return to court, and consideration by the court of whether the plan should be put to creditors or whether there should be an auction;

(b) having regard to the contentious nature of these proceedings, U.S. Class Counsel submit 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;

(c) the proposed break-up fee unfairly prejudices the interests of unsecured creditors in circumstances where 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;

(d) the Stalking Horse Bidder should not have access to inside information regarding other bids and other bidders' communications with the Applicants; and

(e) the timelines for the various steps under the SISP should be extended very slightly to facilitate participation by third parties.

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

The PIMCO Sponsored Plan and Related Events

8. 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**").

9. 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.

10. 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**").

11. The Meetings Motion was head on June 7, 2022.

12. On June 10, 2022, the Court released the First Endorsement, a brief endorsement in respect of most of the issues raised by the Applicants and the Contingent Litigation Claimants, with reasons to follow.

13. In the First Endorsement, the Court 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 contingent litigation claims for the purposes of voting. Attached to my affidavit as **Exhibit "B"** is a copy of the First Endorsement dated June 10, 2022.

14. The Court also ordered that the Monitor shall, forthwith, liaise with the relevant parties to determine a process to conduct the claim determination and valuations.

15. 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. Attached to my affidavit as **Exhibit "C"** is a copy of the email from the Monitor's counsel to U.S. Class Counsel's counsel dated June 10, 2022.

16. However, at 9:39 am on Monday June 13, 2022, the Monitor's counsel emailed Paliare Roland to cancel the meeting. Attached to my affidavit as **Exhibit "D"** is a copy

of the email from the Monitor's counsel to U.S. Class Counsel's counsel dated June 13, 2022.

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.

18. I attended the 4:30 pm case conference. Before Justice McEwen arrived, the Monitor's counsel advised that the case conference had been convened at PIMCO's counsel's request.

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.

20. On June 21, 2022, the Court released its supporting reasons for the First Endorsement. Attached to my affidavit as **Exhibit "E"** is a copy of the Reasons for Decision dated June 21, 2022.

21. On June 23, 2022, the Court released its second endorsement in respect of the issue of the different consideration being offered to unsecured creditors under the PIMCO Sponsored Plan. Attached to my affidavit as **Exhibit "F"** is a copy of the June 23, 2022 Endorsement.

22. Notwithstanding the advice of PIMCO's counsel, support for the PIMCO Sponsored Plan was not immediately withdrawn and in that context the following occurred:

(a) to avoid prejudice to their position in the face of uncertainty, on July 4, 2022, U.S. Class Counsel and Omarali brought motions seeking leave to appeal the First Endorsement—notably, the Court's finding that, for the purpose of the PIMCO Sponsored Plan, it had discretion to limit the hundreds of thousands of individual claimants in the U.S. Class Actions and the thousands of individual claimants in the Omarali class action to one single vote per action. I am advised by Paliare Roland, that given the termination of the PIMCO Sponsored Plan, neither U.S. Class Counsel nor Omarali are pursuing their motions for leave to appeal; and

(b) 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. Attached to my affidavit as **Exhibit "G"** is a copy of the letter from the Monitor's counsel to the Court dated June 17, 2022.

23. 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. Attached to my affidavit as **Exhibit "H"** is a copy of the email from Paliare Roland to the Monitor's counsel and the Applicants' counsel dated July 16, 2022.

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

25. 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 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. Attached to my affidavit as **Exhibit "I"** is a copy of Paliare Roland's email and U.S. Class Counsel's letter dated August 4, 2022.

26. I am advised by U.S. Class Counsel that they have begun preparing their evidence in respect of the Estimation Process, and that they expect to be able to deliver their evidence in accordance with the timelines contemplated therein.

Next Steps

27. U.S. Class Counsel supports the Applicants' desire to exit the CCAA Proceedings as quickly as possible. As indicated, above, however, U.S. Class Counsel has a number of concerns in respect of the SISP proposed by the Applicants, and I am concerned that it will not operate to maximize returns to unsecured creditors as currently structured.

28. Given PIMCO's advantage of 14-months time to prepare its proposal, its informational, procedural and other advantages, I believe that potential bidders may be somewhat reluctant to participate in an auction. Moreover, the prospect that participants' information will be shared with PIMCO in the course of the SISP 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.

29. Notwithstanding the foregoing, my analysis and review of the recently released annual report for the fiscal year ended March 31, 2022, which shows USD $194 million of equity value, suggests that there is sufficient value in the Applicants to compensate unsecured creditors, and I believe 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, I and other members of the U.S. Class Counsel team have been contacted by a number of parties who have expressed an interest in filling that role, and we are currently working with a serious financier to that end. We are currently working to present the Unsecured Creditor Plan by the Qualified Bid Deadline.

30. However, the timelines contemplated by the SISP 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.

31. I believe some additional time is also warranted to complete due diligence and the analysis of the Applicants' financial records for two other reasons.

(a) First, until last week, the Applicants had reported their financial results in accordance with IFRS standards, but the Applicants' 2022 fiscal year financials as at March 31, 2022, released on August 5, 2022, reported their financials in accordance with GAAP because they had determined that they no longer qualified as a "foreign private issuer" as per Rule 405 under the Securities Act of 1933. This complicates reconciliation with their previous financial statements.

(b) Second, the Applicants' business 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. As noted

above, the Applicants and the Monitor have themselves referred to the complicated nature of the Applicants' business.

32. Based on my review of the Applicants' financial statements and the Monitor's reports to date – neither of which disclose any liquidity concerns – there is nothing that should prevent a brief extension of the various deadlines in the SISP measured in weeks.

33. 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. I have not had the benefit of seeing an updated cashflow statement, but the information found in the Monitor's 10th report, summarized below, suggests that at the time of hearing of the motion, the Applicants will have more liquidity than at any other time in these proceedings, with up to CAD$401.28 in cash.

Liquidity	1.29	
(in millions)	**CAD**	**US**
Projected cash as at 10th Monitor's report to August 20	211.00	163.57
Receipt of HB 4492 amount	190.28	147.50
Liquidity	401.28	311.07

34. Even adjusting for the USD$47.5 million (equivalent to approximately CAD$61 million) posted with ERCOT as short term collateral referenced at paragraph 26 of Mr. Carter's affidavit, the Applicants should still have approximately CAD$340 million of cash (or equivalent) based on the last information provided to creditors. This is still more than at any other time in these proceedings.

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. Indeed, the Applicants' financial statements show both realized and unrealized gains due to the hedging of energy. The Applicants' financial statements for the period ended March 31, 2022, indicate that their hedges, marked to market via GAAP requirements, are worth hundreds of millions of dollars as of that date. Notwithstanding Mr. Carter's comments about risk and increased collateral, the Applicants' financial statements show unrealized gains on derivative 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. These hedges serve to protect the company in the event of unexpected movements in energy costs.

36. In these circumstances, I believe that 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. We expect to provide a proposed alternative schedule when U.S. Class Counsel file their factum, following consultation with our proposed plan financier.

37. Attached to my affidavit as **Exhibit "J"** is a copy of U.S. Class Counsel's proposed blackline revisions to the SISP.

SWORN remotely by Robert Tannor of the City of Santa Barbara, in the State of California, before me at the City of Toronto, in the Province of Ontario, on this 10th day of August, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

Ryan Shah

Commissioner for Taking Affidavits
(or as may be)

Ryan Firoz Shah, a Commissioner, etc., Province of Ontario, while a Student-at-Law. Expires May 18, 2024.

Robert Tannor

Robert Tannor

This is **Exhibit " A "**
Referred to in the Affidavit of Robert Tannor
Affirmed remotely before me this
10th day of August, 2022

Ryan Shah

A Commissioner for Taking Affidavits (or as may be)

Ryan Firoz Shah, a Commissioner, etc.,
Province of Ontario, while a Student-at-Law.
Expires May 18, 2024.

Robert Tannor
Tannor Capital Advisors LLC
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Santa Barbara, California 93105
rtannor@tannorcapital.com
O 805.567.8000 C 914.837.9997

Professional Summary
I have had a career in running companies and restructuring companies. I have deep experience as a CEO and Restructuring professional with deep finance, accounting, and restructuring experience. Over the course of my career, I have startup experience, growth experience while as an officer of operating companies, and deep experience as a restructuring advisor. While operating a hedge fund, I was Chief Investment Officer of a distressed hedge fund investing in over 400 distressed credits from bank loans to bankruptcy trade claims in the US and Canada. As a restructuring professional at a boutique restructuring firm and a credit hedge fund, I have actively participated in restructurings of over 8 billion dollars of debt in over 400 credits from 2008 to 2021.

Education and Professional Certifications
Rensselaer Polytechnic Institute, Bachelor of Science in Electric Power Engineering
London Business School, Finance and Entrepreneurship program 2006
Harvard Business School 2017, 2018, and 2019 YPO Program at HBS
Member of YPO and Former Board of Directors NY YPO

Experience
2008 to 2021 – General Partner of Tannor Capital Advisors LLC which managed the investing for Tannor Partners Credit Fund, LP ("TPCF"). TPCF has invested in over 400 companies since 2008 in the United States and Canada in credit and equity of companies undergoing external competitive pressures or internal operational challenges. Since 2021, the fund has returned capital as investments mature. The fund has made successful investments in retail, energy, airlines, pharmaceutical and medical devices, power companies, and manufacturing businesses over 13 years. In this time, Robert participated in adhoc committees as part of the restructuring process.

2004 to 2008 - Chairman and CEO of Westar Satellite Services, LP a satellite communications company based in Dallas, Texas. Robert Tannor led a group of investors to purchase the company out of bankruptcy in 2005, restructure its operations and sold the business in 2008 for a 2.5x invested capital.

2000 to 2004 - Senior industry practice leader and Director, Ernst & Young Corporate Finance LLC in New York focusing on Corporate Restructuring, distressed M&A, and Transaction Due Diligence. Robert worked as lead restructuring advisor or part of the team in over 30 bankruptcy cases, in court and out of court.

Notable assignments, M&A transactions, and Restructurings at E&Y
Pacific Crossing – a subsea cable owned by Asia Global Crossing spanning the Pacific Ocean from US West Coast to Japan (advised the bank group - $700 million credit)
Bear Swamp Pumped Storage Hydroelectric Facility – Part of US Generating NE (advised creditor certificate holders)
Velocita – a US and Canadian fiber optic network based in Virginia (advised creditor's committee - $500 million unsecured credit)
Adelphia Business Solutions – a CLEC based in Coudersport, Pennsylvania (advised creditor's committee- $1.2 billion unsecured credit)

Board Experience
Present – Board member of Overseas Military Sales Corporation, an authorized contractor by US Armed Forces to sell vehicles to US Military and US diplomats around the world. Company is based in New York and has offices in Europe.

Present Board of Directors of C&K Market, a regional grocer in Oregon and Northern California

Robert Tannor
Tannor Capital Advisors LLC
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O 805.567.8000 C 914.837.9997

Present Board of Directors New York City Metro Chapter of YPO from 2010 to 2014 – Young Presidents' Organization.

Former Board of Directors of EESISP - Electrical Employers Self Insured Safety Plan ("EESISP") from 1996 to 2000 EESISP is a worker's compensation insurance plan in New York State covering over 13,000 workers and the Joint Board of the Electrical Industry of New York with over $300 million dollars of assets responsible for oversight of workers compensation insurance coverage and claims for over 10,000 workers.

This is **Exhibit " B "**
Referred to in the Affidavit of Robert Tannor
Affirmed remotely before me this
10th day of August,2022

Ryan Shah

A Commissioner for Taking Affidavits (or as may be)

Ryan Firoz Shah, a Commissioner, etc.,
Province of Ontario, while a Student-at-Law.
Expires May 18, 2024.

CITATION: Just Energy Group Inc. et. al. v. Morgan Stanley Capital Group Inc. et. al., 2022 ONSC 3487
COURT FILE NO.: CV-21-00658423-00CL
DATE: 20220610

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED	)	*Jeremy Dacks, Shawn Irving, Marc Wasserman* and *Michael De Lellis*, for the Applicants, the Just Energy Group
	)	
– and –	)	Allyson Smith, U.S. Counsel to the Just Energy Group
IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGMENT OF JUST ENERGY GROUP INC., JUST ENERGY CORP., ONTARIO ENERGY COMMODITIES INC., UNIVERSALE ENERGY CORPORATION, JUST ENERGY FINANCE CANDA ULC,	)	*Ryan Jacobs, Alan Merskey, Jane Dietrich* and John M. Picone, Canadian Counsel to LVS III SPE XV LP, TOCU XVII LLC, HVS XVI LLC, and OC II LVS XIV LP in their capacity as the DIP Lenders
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.,	)	*David Botter, Sarah Schultz* and *Abid Quereshi*, US Counsel to LVS III SPE XV LP, TOCU XVII LLC, HVS XVI LLC, and OC II LVS XIV LP in their capacity as the DIP Lenders
8704104 CANADA INC., JUST ENERGY ADVANCED SOLUTIONS CORP., JUST ENERGY (U.S.) CORP., JUST ENERGY ILLINOIS CORP., JUST ENERGY	)	*Heather Meredith, James Gage and Natasha Rambaran*, Canadian Counsel to the Agent and the Credit Facility Lenders
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	)	*Jeff Larry, Max Starnino* and *Danielle Glatt*, 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.*
ENERGY CORP., INTERACTIVE ENERGY GROUP LLC , HUDSON PARENT HOLDINGS LLC, DRAG MARKETING LLS, JUST ENERGY ADVANCED SOLUTIONS LLC,	)	*Steven Wittels* and *Susan Russell*, US Counsel for the Respondent Fira Donin and Inna Golovan, in their capacity as proposed class representatives in *Donin et al. v. Just Energy Group Inc. et al.*; US Counsel for

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.	)	Trevor Jordet, in his capacity as proposed class representative in *Jordet v. Just Energy Solutions Inc.*
	)	*David Rosenfeld and James Harnum*, for Haidar Omarali in his capacity as Representative Plaintiff in *Omarali v. Just Energy*
Applicants	)	*Howard Gorman, Ryan Manns and Aaron Stephenson*, for Shell Energy North American (Canada) Inc. and Shell Energy North America (US)
– and –	)	
MORGAN STANLEY CAPITAL GROUP INC.	)	*Mike Weinczok*, for Computershare Trust Company of Canada
Respondents	)	
	)	*Jessica MacKinnon*, for Macquarie Energy LLC and Macquarie Energy Canada Ltd.
	)	*Bevan Brooksbank*, for Chubb Insurance Co of Canada
	)	*Jason Wadden*, for Dundon Advisers LLC
	)	*Pat Corney*, for the Ontario Energy Board
	)	*Virginia Gauthier*, for NextEra Energy Marketing, LLC
	)	*Harvey Chaiton*, for Pariveda Solutions, Inc.
	)	*Alexandra McCawley*, for FortisBC Energy Inc.
	)	*Chris Burr*, for Energy Earth, LLC
	)	*Robert Thornton, Rebecca Kennedy, Rachel Nicholson* and *Puya Fesharaki*, for FTI Consulting Canada Inc., as Monitor
	)	*John F. Higgins* and *Emily Nasir*, U.S. Counsel to FTI Consulting Canada Inc., as Monitor

) **HEARD:** June 7, 2022

ENDORSEMENT

MCEWEN J.

[1] I am providing this brief Endorsement, in advance of Reasons, given the time constraints concerning this matter and particularly the August 2, 2022 meeting date.

[2] With respect to the issues raised at the June 7, 2022 motion, I order as follows:

i. Subject to the Orders that follow, the uncontested portions of the Support Agreement, the Backstop Commitment Letter, the issuance of the Backstop Commitment Letter and the issuance of the Backstop Commitment Fee Shares, Termination Fee and Charge, sealing order and fees are approved as per the draft order.

ii. Subject to the Orders that follow, the uncontested portions of the draft Meetings Order shall go.

iii. There shall be two classes of creditors for the purposes of considering and voting on the Plan: the Secured Creditor Class and the Unsecured Creditor Class.

iv. For greater clarity, the Unsecured Creditors Class shall include the Term Loan Lenders, the two U.S. class actions, the Omarali class action and the Texas Power Interruption Claimants.

v. The plaintiff class in each of the U.S. class actions and the Omarali class action will be entitled to one vote at the meeting. The Texas Power Interruption Claimants will be entitled to four votes (one per action).

vi. Summary proceedings will be conducted on an expedited basis as soon as reasonably possible, in an effort to determine the validity and value of the claims of the plaintiff class in the U.S. class actions, the Omarali class action, the Texas Power Interruption Claimants and Pariveda Solutions Inc.

vii. The Monitor shall, forthwith, liaise with the relevant parties to determine a process to conduct the claim determinations and valuations. In this regard, the Monitor shall contact the Honourable Dennis O'Connor, the Claims Officer currently adjudicating claims submitted in the U.S. Class Actions to determine if he is prepared to provide assistance with respect to the valuations.

viii. I will conduct a further hearing in the very near future to determine the process to be followed in determining and valuing the relevant claims and any matters arising

out of the Claim Procedure Order made in this proceeding dated September 15, 2021.

ix. The parties are further directed to provide me with supplementary submissions in writing – not to exceed 10 pages – within three business days with respect to a secondary issue relating to creditor classification. I have already determined that there shall be one class of unsecured creditors. The supplementary submissions should address the appropriateness of the terms of the proposed differential consideration being offered to unsecured creditors in the plan, which is contested and which I have not yet approved. Specifically, the submissions should address the rationale for providing New Common Shares to the unsecured Term Loan Lenders and cash consideration to the General Unsecured Creditor Class.

McEwen J.

Released: June 10, 2022

CITATION: Just Energy v. Morgan Stanley et. al., 2022 ONSC 3487
COURT FILE NO.: CV-21-00658423-00CL
DATE: 20220610

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

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

– and –

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGMENT OF JUST ENERGY GROUP INC., JUST ENERGY CORP., ONTARIO ENERGY COMMODITIES INC., UNIVERSALE ENERGY CORPORATION, JUST ENERGY FINANCE CANDA 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 LLS, 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

ENDORSEMENT

McEwen J.

Released: June 10, 2022

This is **Exhibit " C "**
Referred to in the Affidavit of Robert Tannor
Affirmed remotely before me this
10th day of August,2022

Ryan Shah

A Commissioner for Taking Affidavits (or as may be)

Ryan Firoz Shah, a Commissioner, etc.,
Province of Ontario, while a Student-at-Law.
Expires May 18, 2024.

From: Rachel Nicholson
Sent: June 10, 2022 6:41 PM
To: Jeff Larry; Max Starnino; Danielle Glatt; Steven Wittels; sjr@wittelslaw.com; Marc Wasserman; Jeremy Dacks; Michael De Lellis
Cc: Robert Thornton; Rebecca Kennedy; Puya Fesharaki; Paul Bishop; Jim Robinson
Subject: RE: Just Energy - Endorsement

Counsel,

Pursuant to paragraph 2(vii) of Justice McEwen's endorsement dated June 10, 2022, the Monitor is looking to forthwith schedule a call with your team to discuss a process to conduct the claim determination and valuation, on **Monday, June 13, 2022, at 9:45 a.m.** A calendar invite will follow.

Regards,
Rachel

Thornton Grout Finnigan LLP
RESTRUCTURING + LITIGATION

Rachel A. Nicholson | | RNicholson@tgf.ca | Direct Line +1 416 304 1153 | Suite 3200, TD West Tower, 100 Wellington Street West, P.O. Box 329, Toronto-Dominion Centre, Toronto, Ontario M5K 1K7 | 416-304-1616 | Fax: 416-304-1313 | www.tgf.ca

This is **Exhibit " D "**
Referred to in the Affidavit of Robert Tannor
Affirmed remotely before me this
10th day of August,2022

Ryan Shah

A Commissioner for Taking Affidavits (or as may be)

Ryan Firoz Shah, a Commissioner, etc.,
Province of Ontario, while a Student-at-Law.
Expires May 18, 2024.

From: Rachel Nicholson
Sent: June 13, 2022 9:39 AM
To: Jeff Larry; Max Starnino; Danielle Glatt; Steven Wittels; sjr@wittelslaw.com; Marc Wasserman; Jeremy Dacks; Michael De Lellis ; Robert Thornton; Rebecca Kennedy; Puya Fesharaki; Paul Bishop; Jim Robinson
Cc: Jonathan Shub
Subject: RE: Just Energy - Endorsement

All,

Unfortunately we need to cancel this meeting. We will revert shortly to reschedule.

Thank you and apologies for the interruption.

Regards,
Rachel

Rachel A. Nicholson | RNicholson@tgf.ca | Direct Line +1 416 304 1153 | www.tgf.ca

-----Original Appointment-----
From: Rachel Nicholson
Sent: June 11, 2022 9:31 AM
To: Rachel Nicholson; Jeffrey Larry; Max Starnino; danielle.glatt@paliareroland.com; Steven Wittels; sjr@wittelslaw.com; Marc Wasserman; Jeremy Dacks; Michael De Lellis ; Robert Thornton; Rebecca Kennedy; Puya Fesharaki; Paul Bishop; Jim Robinson
Cc: Jonathan Shub
Subject: Just Energy - Endorsement
When: June 13, 2022 9:45 AM-10:30 AM (UTC-05:00) Eastern Time (US & Canada).
Where: Microsoft Teams Meeting

Microsoft Teams meeting

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From: Rachel Nicholson <RNicholson@tgf.ca>
Sent: June 10, 2022 6:41 PM
To: Jeffrey Larry <jeff.larry@paliareroland.com>; Max Starnino <max.starnino@paliareroland.com>; danielle.glatt@paliareroland.com; Steven Wittels <slw@wittelslaw.com>; sjr@wittelslaw.com; Marc Wasserman <mwasserman@osler.com>; Jeremy Dacks <jdacks@osler.com>; Michael De Lellis <mdelellis@osler.com>
Cc: Robert Thornton <RThornton@tgf.ca>; Rebecca Kennedy <Rkennedy@tgf.ca>; Puya Fesharaki <PFesharaki@tgf.ca>; Paul Bishop <paul.bishop@fticonsulting.com>; Jim Robinson <jim.robinson@fticonsulting.com>
Subject: RE: Just Energy - Endorsement

Counsel,

Pursuant to paragraph 2(vii) of Justice McEwen's endorsement dated June 10, 2022, the Monitor is looking to forthwith schedule a call with your team to discuss a process to conduct the claim determination and valuation, on **Monday, June 13, 2022, at 9:45 a.m.** A calendar invite will follow.

Regards,
Rachel

Thornton Grout Finnigan LLP
RESTRUCTURING + LITIGATION

Rachel A. Nicholson | | RNicholson@tgf.ca | Direct Line +1 416 304 1153 | Suite 3200, TD West Tower, 100 Wellington Street West, P.O. Box 329, Toronto-Dominion Centre, Toronto, Ontario M5K 1K7 | 416-304-1616 | Fax: 416-304-1313 | www.tgf.ca

This is **Exhibit " E "**
Referred to in the Affidavit of Robert Tannor
Affirmed remotely before me this
10th day of August,2022

Ryan Shah

A Commissioner for Taking Affidavits (or as may be)

Ryan Firoz Shah, a Commissioner, etc.,
Province of Ontario, while a Student-at-Law.
Expires May 18, 2024.

CITATION: Just Energy Group Inc. et. al. v. Morgan Stanley Capital Group Inc. et. al., 2022 ONSC 3470
COURT FILE NO.: CV-21-00658423-00CL
DATE: 20220621

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED	)	*Jeremy Dacks, Shawn Irving, Marc Wasserman* and *Michael De Lellis*, for the Applicants, the Just Energy Group
	)	
– and –	)	Allyson Smith, U.S. Counsel to the Just Energy Group
IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGMENT OF JUST ENERGY GROUP INC., JUST ENERGY CORP., ONTARIO ENERGY COMMODITIES INC., UNIVERSALE ENERGY CORPORATION, JUST ENERGY FINANCE CANDA ULC,	)	*Ryan Jacobs, Alan Merskey, Jane Dietrich* and John M. Picone, Canadian Counsel to LVS III SPE XV LP, TOCU XVII LLC, HVS XVI LLC, and OC II LVS XIV LP in their capacity as the DIP Lenders
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.,	)	*David Botter, Sarah Schultz* and *Abid Quereshi*, US Counsel to LVS III SPE XV LP, TOCU XVII LLC, HVS XVI LLC, and OC II LVS XIV LP in their capacity as the DIP Lenders
8704104 CANADA INC., JUST ENERGY ADVANCED SOLUTIONS CORP., JUST ENERGY (U.S.) CORP., JUST ENERGY ILLINOIS CORP., JUST ENERGY	)	*Heather Meredith, James Gage and Natasha Rambaran*, Canadian Counsel to the Agent and the Credit Facility Lenders
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	)	*Jeff Larry, Max Starnino* and *Danielle Glatt*, 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.*
ENERGY CORP., INTERACTIVE ENERGY GROUP LLC , HUDSON PARENT HOLDINGS LLC, DRAG MARKETING LLS, JUST ENERGY ADVANCED SOLUTIONS LLC,	)	*Steven Wittels* and *Susan Russell*, US Counsel for the Respondent Fira Donin and Inna Golovan, in their capacity as proposed class representatives in *Donin et al. v. Just Energy Group Inc. et al.*; US Counsel for

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.	)	Trevor Jordet, in his capacity as proposed class representative in *Jordet v. Just Energy Solutions Inc.*
Applicants	)	*David Rosenfeld and James Harnum*, for Haidar Omarali in his capacity as Representative Plaintiff in *Omarali v. Just Energy*
– and –	)	*Howard Gorman, Ryan Manns and Aaron Stephenson*, for Shell Energy North American (Canada) Inc. and Shell Energy North America (US)
MORGAN STANLEY CAPITAL GROUP INC.	)	*Mike Weinczok*, for Computershare Trust Company of Canada
Respondents	)	*Jessica MacKinnon*, for Macquarie Energy LLC and Macquarie Energy Canada Ltd.
	)	*Bevan Brooksbank*, for Chubb Insurance Co of Canada
	)	*Jason Wadden*, for Dundon Advisers LLC
	)	*Pat Corney*, for the Ontario Energy Board
	)	*Virginia Gauthier*, for NextEra Energy Marketing, LLC
	)	*Harvey Chaiton*, for Pariveda Solutions, Inc.
	)	*Alexandra McCawley*, for FortisBC Energy Inc.
	)	*Chris Burr*, for Energy Earth, LLC
	)	*Robert Thornton, Rebecca Kennedy, Rachel Nicholson* and *Puya Fesharaki*, for FTI Consulting Canada Inc., as Monitor
	)	
	)	
	)	
	)	
	)	

) *John F. Higgins* and *Emily Nasir*, U.S.
) Counsel to FTI Consulting Canada Inc., as
) Monitor
)
) **HEARD:** June 7, 2022

ENDORSEMENT

MCEWEN J.

[1] This Endorsement deals with the motion brought by the Applicants seeking an Authorization Order and Meetings Order.

[2] As a result of the time sensitivity of this matter, I released a brief endorsement on June 10, 2022 setting out my orders with reasons to follow (the "June 10 Endorsement"). I have attached the June 10 Endorsement as Schedule "A" and I am now providing those reasons.

[3] Also, given the ongoing time sensitivity, I am releasing these reasons by way of a somewhat abbreviated endorsement. I do not propose to deal with each and every argument raised by the parties but rather focus on the primary submissions.

[4] It is also not possible to address all of the dozens of cases that were referred to by the parties at the motion. I will focus on the most relevant case law.

[5] In conducting the analysis below I have sought to advance and achieve the remedial purpose of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA") in keeping with the caselaw, particularly the caselaw that has emerged from the Supreme Court of Canada.

[6] In this regard, I have specifically had regard to the guidance set out in the following two Supreme Court of Canada cases.

[7] In *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 (*Century Services*) at para. 70, the court described a CCAA court's mandate:

> The general language of the CCAA should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith and due diligence are baseline considerations that a court should always bear in mind when exercising CCAA authority. Appropriateness under the CCAA is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA. The question is whether the order will usefully further efforts to achieve the remedial purpose of the CCAA – avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for

> successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

[8] More recently, the court in *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6 at para. 205 set out the importance of finding constructive solutions:

> First, it is important to remember that the purpose of CCAA proceedings is not to disadvantage creditors but rather to try to provide a constructive solution for all stakeholders when a company has become insolvent.

BRIEF OVERVIEW

[9] The Applicants obtained relief under the CCAA by way of Initial Order dated March 9, 2021.

[10] A number of Orders have followed. I have been managing this matter for the last six months.

[11] Generally, the proposed Authorization Order seeks approval for the Plan Support Agreement, the Backstop Commitment Letter and the issuance of the Backstop Commitment Fee Shares; approval of the termination fee and the termination fee charge; sealing unredacted versions of the Plan Support Agreement and Backstop Commitment Letter; amending the Claims Procedure Order to allow the U.S. Bankruptcy Court to adjudicate certain claims; extending the stay period to August 19, 2022 and approving the fees of the Monitor and its counsel.

[12] Pursuant to the June 10 Endorsement, I approved the uncontested portions of the proposed Authorization Order.

[13] Generally, the proposed Meetings Order seeks acceptance of the filing of the Applicants' Plan of Compromise and Arrangement dated May 26, 2022. The terms of the proposed Meetings Order also, amongst other things, seek a meeting date of August 2, 2022 and related relief concerning the establishment of two classes of creditors as well as rules and procedures for the voting mechanisms at the meeting.

[14] Again, in the June 10 Endorsement, I approved the uncontested portions of the draft Meetings Order.

[15] In considering the disputed portions of the proposed Orders, I am mindful of the fact that, generally, the threshold for granting a Meetings Order is rather low and that a heavy burden should not be imposed upon the debtor company: *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 41 OAC 282 (CA) at para. 90. I have kept this in mind in fashioning the remedies. I am, however, of the view that the procedure followed at the meeting must be conducted in a fashion so that the result is not unjustly predetermined. Some of the positions taken by the Applicants required modification prior to the meeting being conducted; otherwise, a constructive solution cannot be achieved for all stakeholders and the Plan will ultimately fail at the sanction hearing.

Similarly, as will be seen below, I have found that some of the positions taken by certain stakeholders are also unduly partisan. I therefore made the orders contained in the June 10 Endorsement.

THE ISSUES IN DISPUTE

[16] These issues in dispute largely concern the Applicants[1] and litigants who had commenced actions against the Applicants as follows:

(i) Two uncertified U.S. class actions which advance claims on behalf of hundreds of thousands of the Applicants' U.S. customers for alleged losses arising from the Applicants' alleged wrongful energy pricing contracts: *Donin v. Just Energy Group Inc. et al.* and *Jordet v. Just Energy Solutions Inc.* (together the "U.S. Class Actions").

(ii) The certified Ontario class action with Mr. Haidar Omarali as the representative plaintiff (the "Omarali Class Action") in which 7,723 allegedly misclassified sales agents of Just Energy, who were designated as independent contractors, seek entitlements as employees pursuant to the *Employment Standards Act, 2000*.

(iii) Four actions brought in Texas by approximately 250 claimants pursuing claims for alleged loss of business, personal injury and/or property damage (the "Mass Tort Claims") in four different actions arising out of a winter storm in 2021.[2] Unlike the class action claims, all of these claims are brought by individual claimants. The claims are based on Texan law.

(collectively the "Litigation Claimants")

[17] The issues in dispute are as follows:

(i) The number of votes the Litigation Claimants should be afforded at the meeting.

(ii) The valuation of the Litigation Claimants' actions for the purposes of voting.

(iii) Whether the Term Loan Lenders should be placed into their own class of unsecured creditors.

---

[1] The Applicants' submissions are supported by the Planned Sponsor/DIP Lenders and the Credit Facility Lenders. For ease of reference, however, I will refer to the submissions as being advanced on behalf of the Applicants.

[2] There were originally 364 Mass Tort Claims, but in oral submissions, counsel conceded that the best estimate is 252 claimants.

(iv) The appropriateness of the Applicants' proposal that differential consideration be offered to unsecured creditors in the Plan which would have New Common Shares provided to the Term Loan Lenders and cash consideration being provided to the General Unsecured Creditor Class.

[18] The Monitor supports the relief sought by the Applicants with respect to the disputed issues.

[19] I will deal with each of the disputed issues in turn.

(i) The number of votes the Litigation Claimants should be afforded at the meeting

[20] The Applicants seek to provide a single vote to each of the two U.S. Class Actions, one vote to the Omarali Class Action and four votes to the Mass Tort Claims since, as noted, four separate actions have been brought.

[21] The Litigation Claimants submit that they ought to be allowed one vote for each member of the class, or in the case of the Mass Tort Claims, one vote per plaintiff. This would have the U.S. Class Actions possessing at least 400,000 votes and likely many more. The Omarali Class Action would possess 7,723 votes and, in total, the Mass Tort Claims would possess approximately 250 votes.

[22] As noted in the June 10 Endorsement, I accept the submissions of the Applicants that only one vote ought to be afforded per action which would have the U.S. Class Actions have a total of two votes, the Omarali Class Action have one vote and the Mass Tort Claims have four votes.

[23] I begin my analysis with respect to the dispute between the Applicants and the Litigation Claimants as to whether the Litigation Claimants are creditors and entitled to vote at all.

[24] The Applicants submit that the Litigation Claimants are not creditors and that by affording them one vote per action, the Applicants are effecting a very reasonable compromise. The Applicants submit that the Litigation Claimants constitute unsecured, highly speculative, unproven contentious claims. As such, the Litigation Claimants cannot be considered to be creditors.

[25] I disagree.

[26] I prefer the argument of the Litigation Claimants that when one does a purposeful analysis of the provisions of the CCAA and the *Bankruptcy and Insolvency Act*, RSC., 1985, c. B-3 (the "BIA"), the Litigation Claimants are, in law, creditors.

[27] The CCAA does not contain a definition of "creditor". Section 2(1), however, of the CCAA does provide for a definition of "claim" which means, "any indebtedness, liability or obligation of any kind that would be a claim provable within the meaning of section 2 of the *Bankruptcy and Insolvency Act*".

[28] The BIA defines a claim to include, "any claim or liability provable in proceedings under this *Act* by a creditor." A "creditor" is defined as, "a person having a claim provable as a claim under this *Act*."

[29] In my view, therefore, a harmonious reading of the provisions of the CCAA and BIA supports the notion that the Litigation Claimants are creditors since they possess a claim that is provable as a claim, as I will outline further below.

[30] This conclusion is supported by the Supreme Court of Canada decisions in *Newfoundland and Labrador v. AbitibiBowater Inc.*, 2012 SCC 67 at paras. 22, 26, 27, 34, 35 and 38; *9354-9186 Quebec inc. v. Callidus Corp.*, 2020 SCC 10 at paras. 58 and 65. The Applicants' submissions in this regard were not supported by case law.

[31] I am therefore of the view that the Litigation Claimants are entitled to vote at the meeting.

[32] The question, therefore, that remains is whether they should be entitled to one vote per lawsuit, as submitted by the Applicants, or whether each member of the Class Actions and each Litigant in the Mass Tort Claims ought to be afforded a vote.

[33] The Mass Tort Claims submit that it would be particularly unfair to them to be limited to one vote since the plaintiffs in those four actions are not "class plaintiffs" but rather they each possess their own individual claim. The Litigation Claimants further submit that I do not have jurisdiction to restrict the voting as proposed by the Applicants. They submit that each member of the class/plaintiff is a creditor in their own right with a provable claim. They cite a number of cases in which a number of individuals were provided with a vote.[3]

[34] As noted, the Litigation Claimants submit that they should be entitled to possess in excess of 400,000 votes with the Omarali Class Action submitting it should be entitled to 7,723 votes and the Mass Tort Claims being entitled to approximately 250 votes.

[35] The Applicants submit that it would be grossly disproportionate to allow the Litigation Claimants the number of votes they seek given the fact that their claims remain unsecured, speculative and unproven. They point to the fact that, based on numerosity, this would allow the Litigation Claimants to override the wishes of secured creditors and Term Loan Lenders who have over $1 billion of funded debt, not to mention the interests of the employees, suppliers and other stakeholders – all of whom have strong interests in ensuring that the Applicants' restructuring succeeds.

---

[3] *Cline Mining Corporation (Re), 2014 ONSC 6998; Arrangement relative à Bloom Lake, 2018 QCCS 1657; New Home Warranty of British Columbia Inc., (Bankruptcy of), 1999 CanLII 6751 (BC SC);* Amended and Restated Meeting Order dated October 27, 2020 at paras. 17, 18 and 24 Court File No. CV-17-11846-00XL (*Sears*).

[36] I prefer the submissions of the Applicants in this regard subject to the caveat, as set out in the June 10 Endorsement, that a process must be undertaken to determine the validity and value of the Litigation Claimants' claims.[4]

[37] First, I do not accept the Litigation Claimants' argument that I lack jurisdiction to provide for such a vote. In my view, based on the aforementioned Supreme Court of Canada guidance in *Century Services* and *Sun Indalex* I have authority to make such an order as it advances the policy objectives underlying the CCAA and, coupled with a proper valuation, strives to treat the Litigation Claimants fairly as between them and the other stakeholders, particularly unsecured creditors.

[38] Similarly, I reject the Omarali Class Action argument that I cannot make such an order as it runs contrary to the provisions of the *Class Proceedings Act*, 1992, S.O. 1992, c. 6 (the "CPA"). They submit that Mr. Omarali represents the class, and he does not and cannot subsume the class members' claims or rights. While I do not necessarily quarrel with this submission insofar as the CPA is concerned, the CPA is a provincial, procedural statute. This matter is proceeding pursuant to the provisions of the CCAA. While the provisions of the CPA may be instructive, they do not override my discretion derived from the CCAA in coming to the aforementioned decision.

[39] I am also of the view that the caselaw referred to by the Litigation Claimants in para. 33 above is distinguishable. In this regard I prefer the submissions of the Applicants, which are set out in para. 20 of their Reply Factum in which they set out that the claimants in those actions had proven claims that were less speculative than the claims being pursued by the Litigation Claimants. The circumstances in this matter are unique given the multitude and nature of the Litigation Claimants. In my view, the preferrable path is to afford the Litigation Claimants one vote per action and determine the validity and value of their claims.

[40] In the circumstances of this CCAA proceeding it would be unfair and create an unfortunate precedent if individuals in class proceedings were able to collectively use their votes to swamp the unsecured class on numerosity grounds and defeat a plan in a situation where they have yet to have a proven claim.

[41] I appreciate the Mass Tort Claims are in a different position. However, given the unproven nature of their claims and in an attempt to achieve a fair overall treatment of all of the Litigation Claimants and other stakeholders, they, too, should be subject to one vote per action.

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[4] As can be seen in the June 10 Endorsement, I also allowed for the valuation of the claim of the creditor, Pariveda Solutions, Inc. who attended at the motion and sought a similar valuation since its approximate U.S. $46 million claim had been assessed at $1.

(ii) The valuation of the Litigation Claimants' actions for the purposes of voting

[42] In addition to restricting the Litigation Claimants to one vote, the Applicants also submit that since the Litigation Claimants' causes of action are highly speculative and unproven, they should be restricted to $1 per vote. The Applicants submit that this treatment is consistent with similar treatment of unresolved contingent claims in other plans approved by this Court. They rely upon the rationale set out in the Notices of Disallowance that have been delivered. They also submit that it would be impossible to try to place any type of value on the Litigation Claimants' claims given the short period of time before the meeting, which is to take place on August 2, 2022. They further argue that any attempt to attribute a real value to the Litigation Claimant's claims would be wholly arbitrary, as there is insufficient information before this Court to attribute even an estimated value. The Applicants' position would limit the Litigation Claimants to 7 votes with a total value of $7.

[43] The Litigation Claimants, not surprisingly, disagree. They generally submit that there must be some genuine attempt to value their claims, otherwise they would have no meaningful participation at the meeting. By way of example, they point out that the de minimis claims (35 in total) that are valued at less than $10 per claim, would be afforded more weight than their own. The Litigation Claimants further submit that the CCAA confirms a broad and flexible authority upon this Court to allow for whatever reasonable valuation can be undertaken to protect the integrity of the process. The valuation of claims in a restructuring process is necessary and fundamental to the democratic underpinnings of the CCAA statute.

[44] I agree with the Litigation Claimants that their claims cannot be considered to be essentially worthless based on the record before me.

[45] By way of example, the uncertified U.S. Class Actions allege that the Applicants targeted consumers and businesses hoping to save on supply energy costs. The U.S. Class Actions submit that the Applicants lured customers with a teaser or fixed price for a limited time period. It was initially below competitors' rates and, after the initial period elapsed, the Applicants exploited the consumers by increasing energy costs. The Applicants have moved unsuccessfully to dismiss the U.S. Class Actions, which have been reduced in scope but continue on. Without commenting in any meaningful way on the legitimacy of the U.S. Class Actions, the Applicants have settled other lawsuits generally of the same nature. The U.S. Class Actions are also of a nature that has been certified in the past: see, for example, *In re U.S. Food Service Inc. Pricing Litig.*, 729 F. 3d at 127.

[46] The Omarali Class Action, in Ontario, has been certified. As noted, the action involves allegations that sales agents were misclassified as independent contractors. Shortly after the Omarali Class Action was certified, Just Energy reclassified its sales agents from independent contractors to employees. The Omarali Class Action was ready for trial and a trial date had been set at the time the Applicants obtained relief under the CCAA.

[47] While the Mass Tort Claims are at an early stage and have yet to be proven, they are the typical type of claims that one could expect in the circumstances of the weather event and largely involve claims for loss of business, personal injury and property damage.

[48] I have already accepted that the Litigation Claimants are entitled to vote at the meeting. 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.

[49] This is consistent with the guidance set out by the Supreme Court of Canada in *Century Services* and *Callidus* which provides that participants are to be treated advantageously and fairly as circumstances permit and that creditors should not be disadvantaged. To find otherwise would result in the Litigation Claimants having no meaningful role at the meeting, which would be entirely unfair.

[50] It ought to be undertaken prior to the Meetings Order; otherwise, a proper valuation would be largely meaningless as the Litigation Claimants would be restricted to one vote/$1 which would ensure that the Litigation Claimants had no meaningful voice at the meeting.

[51] While time is short, and the Applicants and Litigation Claimants blame each other for allowing this matter to have proceeded this far without any valuation or dispute resolution having taken place, the unfortunate reality is that this has not taken place and the proposal put forth by the Applicants is unacceptable. It must be remedied by way of a valuation, as best as it can be conducted in the circumstances.

[52] Such a valuation approach has been undertaken in other CCAA cases and is consistent with the principles set out in s. 11 and s. 20 of the CCAA: see *Air Canada, re* 2004 CanLII 6674 (ON SC) at para. 2; *AbitibiBowater inc. (Arrangement relative à)*, 2010 QCCS 1261 at para. 230.

[53] 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.

[54] To do otherwise would result in an unfair disenfranchisement of the Litigation Claimants.

[55] Last, I acknowledge that my decision to order a valuation could appear contrary to my decision of February 23, 2022 where I declined the request of the U.S. Class Actions to adjudicate their claims prior to the determination of the Applicants' Plan. At the time of the making of that decision, however, I was influenced by the fact that the Applicants were concerned that such a process would distract it from the important negotiations it was carrying out with its lenders. Those negotiations are now completed. Further, and more significantly, is the fact at the time of that order the Applicants' Plan had not yet been offered to this Court, nor had the issue of the Meetings Order been addressed. They are now both before the court and, for the reasons noted, I believe a valuation is necessary.

(iii) Whether the Term Loan Lenders should be placed into their own class of unsecured creditors

[56] Here, the Litigation Claimants submit that the unsecured Term Loan Lenders should be placed in their own class as they have no commonality of interest with other unsecured creditors.

[57] The Applicants' Plan proposes that the Term Loan Lenders will receive their pro-rata share of 10% of the New Common Shares in the continuing Just Energy entity. The other unsecured creditors will receive limited consideration, established at $10 million, subject to erosion for amounts to be paid to Convenience Claims valued at no more than $1,500 and the Applicants' legal and financial advisor fees, amongst other deductions. The Litigation Claimants also point to the fact that the Term Loan Lenders are owned in the majority by the Pacific Investment Management Company LLC ("PIMCO"). PIMCO is the Plan Sponsor and DIP Lender.

[58] In this regard, the Litigation Claimants submit that it would be inappropriate to have a single class of unsecured creditors where the Term Loan Lenders stand to profit from a continuing legal relationship with the Applicants whereas the other unsecured creditors do not and share a relatively small, eroding pot. They point to a series of cases that have held that the foundation for commonality of interests is that classes must be structured to prevent injustice and enable members to consult with a view to their common interest.[5]

[59] The Applicants respond by submitting the only reason the Litigation Claimants wish to put the Term Loan Lenders in a separate class is to ensure a "no vote" in the class occupied by the Litigation Claimants.

[60] The Applicants submit that the real basis for classification is a commonality of legal interests the creditors have relative to the debtor. They do not have to have an identity of interests *vis-à-vis* each other in order to be placed into the same class. Creditors with different legal rights can therefore be included within the same class so long as their interests are not so materially dissimilar so that it is impossible for them to consult together with a view to voting in their common interest: *Re SemCanada Crude Company* 2009 ABQB 490 at para. 38; *Re Canadian Airlines Corp.*, 2000 ABQB 442 (CanLII) at para. 31, leave to appeal ref'd 2000 ABCA 149.

[61] I prefer the submissions of the Applicants in this regard. The motivations of creditors to approve or disapprove of the Plan are largely irrelevant to classification and the interests that are primarily to be considered are the interests of the creditor in relation to the debtor company. Two unsecured creditors differently motivated due to their own economic interests and anticipated recoveries does not justify placing them in separate classes. To do so would run contrary to the general reluctance in the caselaw to fragment cases.

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[5] For example, *Woodwards' Ltd.*, re 1993 CanLII 870 (BC SC); *San Francisco Gifts Limited v. Oxford Properties Group Inc.*, 2004 ABCA 386

[62] Last, in coming to this conclusion I am mindful of the Litigation Claimants' submissions that the differences between their interests and the Term Loan Lenders' interests preclude reasonable consultation. I agree with Koehnen J., however, in his decision in *Re Sherritt International Corporation*, 2020 ONSC 5822 (CanLII) at para. 43 wherein he stated, generally, that differences of opinion do not lead to a conclusion that it is impossible to consult. There may be significant differences, but this does not justify fragmentation, particularly where the bulk of the caselaw warns against it.[6]

(iv) The appropriateness of the Applicants' proposal that differential consideration be offered to unsecured creditors in the Plan which would have New Common Shares provided to the Term Loan Lenders and cash consideration being provided to the General Unsecured Creditor Class

[63] In the June 10 Endorsement I requested additional submissions. I have received them and an additional endorsement will soon follow.

CONCLUSION

[64] Both the Applicants and the Litigation Claimants put forth proposals that unduly favoured their own interests. The orders that I have made in the June 10 Endorsement have sought to address these inequities. I have sought to establish a process where the Applicants and the stakeholders are treated as evenly and fairly as the current circumstances permit and in accordance with the policy objectives underlying the CCAA. I have sought, in my orders, to provide a constructive solution with respect to the differences concerning the Applicants and the Litigation Claimants.

DISPOSITION

[65] For the reasons above, I made the orders contained in my June 10, 2022 Endorsement.

[66] Insofar as the Sealing Order is concerned, I note that I was satisfied that the criteria set out by the Supreme Court of Canada in *Sierra Club of Canada v. Canada (Minister of Finance),* 2002 SCC 41 and *Sherman Estate v. Donovan,* 2021 SCC 25 were met as the information the Applicants seek to seal concerns discreet financial details of the Plan which constitutes an important commercial and public interest in the circumstances of this CCAA proceeding. The Plan allows for interested third parties to complete due diligence and submit a competing proposal. Accordingly, court openness poses a serious risk to this important commercial and public interest. I can see no other way to prevent the identified risk other than redacting the sensitive financial information. Last, as a matter of proportionality, the benefits of redacting this information

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[6] For example, *Canadian Airlines*, at para. 22; *Sears*, at para.16

outweigh the negative effects in the circumstances of this case. This Order is subject to further orders of this court.

[67] If necessary, other incidental issues raised at the motion can be dealt with at a case conference.

McEwen, J.

Released: June 21, 2022

SCHEDULE "A"

CITATION: Just Energy Group Inc. et. al. v. Morgan Stanley Capital Group Inc. et. al., 2022 ONSC 3487
COURT FILE NO.: CV-21-00658423-00CL
DATE: 20220610

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED	*Jeremy Dacks, Shawn Irving, Marc Wasserman* and *Michael De Lellis*, for the Applicants, the Just Energy Group
– and –	Allyson Smith, U.S. Counsel to the Just Energy Group
IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGMENT OF JUST ENERGY GROUP INC., JUST ENERGY CORP., ONTARIO ENERGY COMMODITIES INC., UNIVERSALE ENERGY CORPORATION, JUST ENERGY FINANCE CANDA ULC,	*Ryan Jacobs*, *Alan Merskey, Jane Dietrich* and John M. Picone, Canadian Counsel to LVS III SPE XV LP, TOCU XVII LLC, HVS XVI LLC, and OC II LVS XIV LP in their capacity as the DIP Lenders
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.,	*David Botter, Sarah Schultz* and *Abid Quereshi*, US Counsel to LVS III SPE XV LP, TOCU XVII LLC, HVS XVI LLC, and OC II LVS XIV LP in their capacity as the DIP Lenders
8704104 CANADA INC., JUST ENERGY ADVANCED SOLUTIONS CORP., JUST ENERGY (U.S.) CORP., JUST ENERGY ILLINOIS CORP.,	*Heather Meredith, James Gage and Natasha Rambaran*, Canadian Counsel to the Agent and the Credit Facility Lenders
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	*Jeff Larry, Max Starnino* and *Danielle Glatt*, 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.*

ENERGY CORP., INTERACTIVE ENERGY GROUP LLC , HUDSON PARENT HOLDINGS LLC, DRAG MARKETING LLS, 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.	)	*Steven Wittels* and *Susan Russell*, US Counsel for the Respondent Fira Donin and Inna Golovan, in their capacity as proposed class representatives in *Donin et al. v. Just Energy Group Inc. et al.*; US Counsel for Trevor Jordet, in his capacity as proposed class representative in *Jordet v. Just Energy Solutions Inc.*
	)	*David Rosenfeld and James Harnum*, for Haidar Omarali in his capacity as Representative Plaintiff in *Omarali v. Just Energy*
Applicants	)	*Howard Gorman, Ryan Manns and Aaron Stephenson*, for Shell Energy North American (Canada) Inc. and Shell Energy North America (US)
– and –	)	
MORGAN STANLEY CAPITAL GROUP INC.	)	*Mike Weinczok*, for Computershare Trust Company of Canada
Respondents	)	
	)	*Jessica MacKinnon*, for Macquarie Energy LLC and Macquarie Energy Canada Ltd.
	)	*Bevan Brooksbank*, for Chubb Insurance Co of Canada
	)	*Jason Wadden*, for Dundon Advisers LLC
	)	*Pat Corney*, for the Ontario Energy Board
	)	*Virginia Gauthier*, for NextEra Energy Marketing, LLC
	)	*Harvey Chaiton*, for Pariveda Solutions, Inc.
	)	*Alexandra McCawley*, for FortisBC Energy Inc.
	)	*Chris Burr*, for Energy Earth, LLC
	)	
	)	

) *Robert Thornton, Rebecca Kennedy, Rachel*
) *Nicholson* and *Puya Fesharaki*, for FTI
) Consulting Canada Inc., as Monitor
)
) *John F. Higgins* and *Emily Nasir*, U.S.
) Counsel to FTI Consulting Canada Inc., as
) Monitor

) **HEARD:** June 7, 2022

ENDORSEMENT

MCEWEN J.

[68] I am providing this brief Endorsement, in advance of Reasons, given the time constraints concerning this matter and particularly the August 2, 2022 meeting date.

[69] With respect to the issues raised at the June 7, 2022 motion, I order as follows:

(i) Subject to the Orders that follow, the uncontested portions of the Support Agreement, the Backstop Commitment Letter, the issuance of the Backstop Commitment Letter and the issuance of the Backstop Commitment Fee Shares, Termination Fee and Charge, sealing order and fees are approved as per the draft order.

(ii) Subject to the Orders that follow, the uncontested portions of the draft Meetings Order shall go.

(iii) There shall be two classes of creditors for the purposes of considering and voting on the Plan: the Secured Creditor Class and the Unsecured Creditor Class.

(iv) For greater clarity, the Unsecured Creditors Class shall include the Term Loan Lenders, the two U.S. class actions, the Omarali class action and the Texas Power Interruption Claimants.

(v) The plaintiff class in each of the U.S. class actions and the Omarali class action will be entitled to one vote at the meeting. The Texas Power Interruption Claimants will be entitled to four votes (one per action).

(vi) Summary proceedings will be conducted on an expedited basis as soon as reasonably possible, in an effort to determine the validity and value of the claims

of the plaintiff class in the U.S. class actions, the Omarali class action, the Texas Power Interruption Claimants and Pariveda Solutions Inc.

(vii) The Monitor shall, forthwith, liaise with the relevant parties to determine a process to conduct the claim determinations and valuations. In this regard, the Monitor shall contact the Honourable Dennis O'Connor, the Claims Officer currently adjudicating claims submitted in the U.S. Class Actions to determine if he is prepared to provide assistance with respect to the valuations.

(viii) I will conduct a further hearing in the very near future to determine the process to be followed in determining and valuing the relevant claims and any matters arising out of the Claim Procedure Order made in this proceeding dated September 15, 2021.

(ix) The parties are further directed to provide me with supplementary submissions in writing – not to exceed 10 pages – within three business days with respect to a secondary issue relating to creditor classification. I have already determined that there shall be one class of unsecured creditors. The supplementary submissions should address the appropriateness of the terms of the proposed differential consideration being offered to unsecured creditors in the plan, which is contested and which I have not yet approved. Specifically, the submissions should address the rationale for providing New Common Shares to the unsecured Term Loan Lenders and cash consideration to the General Unsecured Creditor Class.

McEwen J.

Released: June 10, 2022

CITATION: Just Energy v. Morgan Stanley et. al., 2022 ONSC 3487
COURT FILE NO.: CV-21-00658423-00CL
DATE: 20220610

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

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

– and –

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGMENT OF JUST ENERGY GROUP INC., JUST ENERGY CORP., ONTARIO ENERGY COMMODITIES INC., UNIVERSALE ENERGY CORPORATION, JUST ENERGY FINANCE CANDA 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 LLS, 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

ENDORSEMENT

McEwen J.

Released: June 10, 2022

CITATION: Just Energy v. Morgan Stanley et. al., 2022 ONSC 3470
COURT FILE NO.: CV-21-00658423-00CL
DATE: 20220621

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

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

– and –

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGMENT OF JUST ENERGY GROUP INC., JUST ENERGY CORP., ONTARIO ENERGY COMMODITIES INC., UNIVERSALE ENERGY CORPORATION, JUST ENERGY FINANCE CANDA 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 LLS, 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

ENDORSEMENT

Released: June 21, 2022 McEwen J.

This is **Exhibit " F "**
Referred to in the Affidavit of Robert Tannor
Affirmed remotely before me this
10th day of August, 2022

Ryan Shah

A Commissioner for Taking Affidavits (or as may be)

Ryan Firoz Shah, a Commissioner, etc.,
Province of Ontario, while a Student-at-Law.
Expires May 18, 2024.

CITATION: Just Energy Group Inc. et. al. v. Morgan Stanley Capital Group Inc. et. al., 2022 ONSC 3698
COURT FILE NO.: CV-21-00658423-00CL
DATE: 20220623

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED	)	*Jeremy Dacks, Shawn Irving, Marc Wasserman* and *Michael De Lellis,* for the Applicants, the Just Energy Group
	)	
– and –	)	Allyson Smith, U.S. Counsel to the Just Energy Group
IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGMENT OF JUST ENERGY GROUP INC., JUST ENERGY CORP., ONTARIO ENERGY COMMODITIES INC., UNIVERSALE ENERGY CORPORATION, JUST ENERGY FINANCE CANDA ULC,	)	*Ryan Jacobs, Alan Merskey, Jane Dietrich* and John M. Picone, Canadian Counsel to LVS III SPE XV LP, TOCU XVII LLC, HVS XVI LLC, and OC II LVS XIV LP in their capacity as the DIP Lenders
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.,	)	*David Botter, Sarah Schultz* and *Abid Quereshi*, US Counsel to LVS III SPE XV LP, TOCU XVII LLC, HVS XVI LLC, and OC II LVS XIV LP in their capacity as the DIP Lenders
8704104 CANADA INC., JUST ENERGY ADVANCED SOLUTIONS CORP., JUST ENERGY (U.S.) CORP., JUST ENERGY ILLINOIS CORP., JUST ENERGY	)	*Heather Meredith, James Gage and Natasha Rambaran*, Canadian Counsel to the Agent and the Credit Facility Lenders
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	)	*Jeff Larry, Max Starnino* and *Danielle Glatt*, 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.*
ENERGY CORP., INTERACTIVE ENERGY GROUP LLC , HUDSON PARENT HOLDINGS LLC, DRAG MARKETING LLS, JUST ENERGY ADVANCED SOLUTIONS LLC,	)	*Steven Wittels* and *Susan Russell*, US Counsel for the Respondent Fira Donin and Inna Golovan, in their capacity as proposed class representatives in *Donin et al. v. Just Energy Group Inc. et al.*; US Counsel for

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.	)	Trevor Jordet, in his capacity as proposed class representative in *Jordet v. Just Energy Solutions Inc.*
	)	*David Rosenfeld and James Harnum*, for Haidar Omarali in his capacity as Representative Plaintiff in *Omarali v. Just Energy*
Applicants	)	*Howard Gorman, Ryan Manns and Aaron Stephenson*, for Shell Energy North American (Canada) Inc. and Shell Energy North America (US)
– and –	)	
MORGAN STANLEY CAPITAL GROUP INC.	)	*Mike Weinczok*, for Computershare Trust Company of Canada
Respondents	)	
	)	*Jessica MacKinnon*, for Macquarie Energy LLC and Macquarie Energy Canada Ltd.
	)	*Bevan Brooksbank*, for Chubb Insurance Co of Canada
	)	*Jason Wadden*, for Dundon Advisers LLC
	)	*Pat Corney*, for the Ontario Energy Board
	)	*Virginia Gauthier*, for NextEra Energy Marketing, LLC
	)	*Harvey Chaiton*, for Pariveda Solutions, Inc.
	)	*Alexandra McCawley*, for FortisBC Energy Inc.
	)	*Chris Burr*, for Energy Earth, LLC
	)	*Robert Thornton, Rebecca Kennedy, Rachel Nicholson* and *Puya Fesharaki*, for FTI Consulting Canada Inc., as Monitor

) *John F. Higgins* and *Emily Nasir*, U.S.
) Counsel to FTI Consulting Canada Inc., as
) Monitor
)
) **HEARD:** June 7, 2022

ENDORSEMENT

MCEWEN J.

[1] On June 10, 2022 I released a brief endorsement setting out certain orders and requesting supplementary written submissions (the "written submissions") concerning the appropriateness of the terms of the proposed differential consideration being offered to unsecured creditors in the Plan. I specifically asked that submissions address the rationale for providing New Common Shares to the unsecured Term Loan Lenders and cash consideration to the General Unsecured Creditor Class.

[2] This endorsement deals with those written submissions.

[3] Having read the written submissions I accept the Applicants' submissions, which are supported by the DIP Lender, that the appropriateness of the terms of the proposed differential compensation ought to be dealt with at the Sanction Hearing.

[4] A material condition precedent to the proposed Plan is that Just Energy cease to be a reporting issuer under the *U.S. Exchange Act* after it emerges from CCAA. In order to do so, Just Energy must meet certain mandatory requirements to cease being a reporting issuer. The current structure of the Plan contemplates that only the Term Loan Lenders receive the New Common Shares. If there is also a distribution to the General Unsecured Creditors Class, the Applicants and DIP Lender submit that these requirements would be impossible to meet.

[5] They also submit that it is also not possible to give the Term Loan Lenders cash instead of New Common Shares because there is insufficient cash available.

[6] It also bears noting that experts retained by the Applicants and U.S. Class Counsel have delivered conflicting reports as to fairness of the proposed differential consideration. To date there have been no cross-examinations of the experts.

[7] As noted in my previous decision, the threshold for granting a Meetings Order is rather low. Given the complicated nature of the proposed differential consideration and the conflicting experts' reports, it is preferrable to wait until the Sanction Hearing to determine the fairness of this

portion of the Plan. Accordingly, I do not accept the Litigation Claimants' submission that is clear that the Plan cannot be sanctioned and is doomed to fail.

McEwen, J.

Released: June 23, 2022

CITATION: Just Energy v. Morgan Stanley et. al., 2022 ONSC 3698
COURT FILE NO.: CV-21-00658423-00CL
DATE: 20220623

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

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

– and –

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGMENT OF JUST ENERGY GROUP INC., JUST ENERGY CORP., ONTARIO ENERGY COMMODITIES INC., UNIVERSALE ENERGY CORPORATION, JUST ENERGY FINANCE CANDA 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 LLS, 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

ENDORSEMENT

Released: June 23, 2022 McEwen J.

This is **Exhibit " G "**
Referred to in the Affidavit of Robert Tannor
Affirmed remotely before me this
10th day of August, 2022

Ryan Shah

A Commissioner for Taking Affidavits (or as may be)

Ryan Firoz Shah, a Commissioner, etc.,
Province of Ontario, while a Student-at-Law.
Expires May 18, 2024.

Thornton Grout Finnigan LLP
RESTRUCTURING + LITIGATION

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Robert I. Thornton
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E: rthornton@tgf.ca
File No. 1522-013

June 17, 2022

VIA EMAIL

The Honourable Justice McEwen
Ontario Superior Court of Justice
330 University Avenue
Toronto, ON
M5G 1R7

Your Honour:

Re: In the Matter of the CCAA proceedings of Just Energy Group Inc. et. al. (the "Just Energy Entities") - Court File No.: CV-21-00658423-00CL

We act as counsel for FTI Consulting Canada Inc., in its capacity as Court-appointed Monitor in these proceedings.

In the Endorsement dated June 10, 2022 (the "**Endorsement**"), Your Honour ordered a summary litigation process at paragraph 2(vi) therein:

> Summary proceedings will be conducted on an expedited basis as soon as reasonably possible, in an effort to determine the validity and value of the claims of the plaintiff class in the U.S. class actions, the Omarali class action, the Texas Power Interruption Claimants and Pariveda Solutions Inc.

At paragraph 2(vii) of the Endorsement, you ordered the Monitor to forthwith liaise with the relevant parties to determine such process.

The Monitor has consulted with counsel to the four aforementioned plaintiff groups, the Just Energy Entities and the Plan Sponsor with respect to a potential summary process. However, given the status of the negotiations relating to the structure of the Just Energy Entities' restructuring in these proceedings, the parties have all agreed that the directed process should be temporarily postponed, pending a determination on Just Energy's proposed path forward.

The parties hereby request Your Honour's indulgence that compliance with the directed process set out in the Endorsement be put in abeyance pending further developments in these proceedings. Should circumstances change and the directed process be required, we shall forthwith advise Your Honour.

Thornton Grout Finnigan LLP

Yours truly,

Thornton Grout Finnigan LLP

Per: 

Robert I. Thornton

cc: Paul Bishop, Jim Robinson, FTI Consulting Canada Inc.
Marc Wasserman, Michael De Lellis, Jeremy Dacks, Shawn Irving, Osler, Hoskin & Harcourt LLP
Alan Merskey, Ryan Jacobs, Jane Dietrich, Cassels Brock & Blackwell LLP
Ken Rosenberg, Jeffrey Larry, Danielle Glatt, Paliare Roland Rosenberg Rothstein LLP
David Rosenfeld, James Harnum, Koskie Minsky LLP
Harvey Chaiton, Chaitons LLP
Jason Wadden, Tyr LLP

This is **Exhibit " H "**
Referred to in the Affidavit of Robert Tannor
Affirmed remotely before me this
10th day of August, 2022

Ryan Shah

A Commissioner for Taking Affidavits (or as may be)

Ryan Firoz Shah, a Commissioner, etc.,
Province of Ontario, while a Student-at-Law.
Expires May 18, 2024.

From: Max.Starnino@paliareroland.com
Sent: July 16, 2022 2:36 PM
To: mwasserman@osler.com; jdacks@osler.com; rthornton@tgf.ca; Rkennedy@tgf.ca; Paul.Bishop@fticonsulting.com
Cc: amerskey@cassels.com; jdietrich@cassels.com; rjacobs@cassels.com; jharnum@kmlaw.ca; drosenfeld@kmlaw.ca; Harvey@chaitons.com; slw@wittelslaw.com; gblankinship@fbfglaw.com; Ken.Rosenberg@paliareroland.com; sjr@wittelslaw.com; jbm@wittelslaw.com; jshub@shublawyers.com; JCottle@fbfglaw.com; rtannor@tannorcapital.com; Jeff.Larry@paliareroland.com; Danielle.Glatt@paliareroland.com; Sarita.Sanasie@paliareroland.com; taddavidson@andrewskurth.com; gwhite@arenaco.com
Subject: Just Energy [IWOV-PRiManage.FID339535]

Counsel,

As you know we represent the Donin and Jordet creditor groups.

Our consultations with market participants suggest that there is ample value in the Company to meaningfully compensate unsecured creditors. Accordingly, in the absence of a consensual agreement, our clients anticipate filing their own restructuring plan for consideration by creditors, providing for payment of secured creditors in full, and compensation that the necessary majority of unsecured creditors will find satisfactory (the "Creditor Plan"). In these circumstances:

1. in keeping with the terms of Justice McEwen's outstanding order, please advise us of your availability on Monday or Tuesday of this week for the purpose of the meeting that had previously been cancelled at the Company's request to settle the process by which contingent claims will be estimated for voting purposes;

2. please confirm that we will finally be given access to the Company's data room and such additional information as required for the purpose of financing the Creditor Plan; and,

3. please confirm that any further process proposed by the Company going forward will provide for the filing and presentation of the Creditor Plan.

We also take the opportunity to confirm that we have been in contact with Arena Capital, which has expressed an interest in providing replacement DIP financing necessary to free the Company from PIMCO's yoke and allow the restructuring process to unfold in a fair an even handed manner. Arena also requires access to the Company's financial information for the purpose of completing their due diligence, and they are prepared to execute an NDA. Kindly confirm that the Company will facilitate that process as well.

We look forward to hearing from you.

Massimo (Max) Starnino
Partner
Paliare Roland Rosenberg Rothstein LLP

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max.starnino@paliareroland.com

This is **Exhibit " I "**
Referred to in the Affidavit of Robert Tannor
Affirmed remotely before me this
10th day of August, 2022

Ryan Shah

A Commissioner for Taking Affidavits (or as may be)

Ryan Firoz Shah, a Commissioner, etc.,
Province of Ontario, while a Student-at-Law.
Expires May 18, 2024.

From: Max.Starnino@paliareroland.com
Sent: August 4, 2022 9:18 AM
To: MWasserman@osler.com; drosenblat@osler.com; JDacks@osler.com; rthornton@tgf.ca; rkennedy@tgf.ca
Cc: Paul.Bishop@fticonsulting.com; Ken.Rosenberg@paliareroland.com; rtannor@tannorcapital.com; Jeff.Larry@paliareroland.com; Danielle.Glatt@paliareroland.com
Subject: Just Energy: NDA/SISP/Claim Estimation [IWOV-PRiManage.FID339535]
Attachments: DRAFT SISP, PRRR Mark-up 2022.08.04.DOCX; Just Energy - Donin-Jordet Class Cnsl_s Letter Re Estimation Process 8-4-22.pdf

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Marc/Bob,

Further to our discussions earlier this week and by way of update, I write to advise as follows:

1. **NDA**. We are still waiting on our financier's NDA. We understand that the form discussed cleared their legal yesterday and that it is now with their senior officers for consideration of the business terms. We are hoping to have it signed back to you today.

2. **SISP**. We had been hoping to have input from our financier on the SISP, particularly as to diligence timelines, regulatory issues, etc., but we have been unable to share it with them given the status of the NDA. Accordingly, in the circumstances, we are providing our comments on a preliminary and without prejudice basis, subject to ongoing internal review and eventual discussion with them.

3. **Claim Estimation**. As you know, Justice McEwen's June order remains outstanding and unvaried and we wish to proceed with the estimation of our client's claim. While obviously relevant to our vote on a restructuring plan, we note that the status of our claims is also raised in respect of our standing and the materiality of the position that we take in these proceedings. Accordingly, please find enclosed a copy of a letter from Class Counsel reflecting their proposal to have the claim estimated in a timely manner, which we will address with the court at the earliest opportunity. As you know, we asked to proceed with the estimation process a number of weeks ago [redacted] While we believe that there is still ample time to estimate our claim, as set forth in the attached letter, if that is no longer the case then we will be taking the position that the court should draw an inference in our clients' favour and value their claims against the debtors at their full amount as filed for all future proceedings, including a vote on a plan.

I will be in transit today and will not have access to my computer but I can be reached by phone as necessary. You may also be able to reach Jeff or Ken, although I am not aware of their schedule.

Thank you,

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August 4, 2022

VIA EMAIL

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Marc Wasserman / Jeremy Dacks /
Dave Rosenblat
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Toronto, ON M5X 1B8

Re: Just Energy Group Inc.
Court File No. CV-21-00658423-00CL

We write regarding estimation of the *Donin* and *Jordet* consumer class claims (the "U.S. Class Actions"). As you know, paragraph 2(vii) of Justice McEwen's endorsement dated June 10, 2022, directed the Monitor to determine a process to conduct the estimation of the U.S. Class Actions. Further to that order, which remains outstanding and unvaried, the *Donin* and *Jordet* creditor groups propose that, subject to their availability, Justice O'Connor or Justice McEwen estimate the claims. If neither is available, then we propose that a mutually agreed arbitrator from JAMS be engaged. We further propose that the following process and schedule be imposed:

1. by August 19th, the Parties to provide evidence in writing and make written submissions to the adjudicator regarding the merits of the *Donin* and *Jordet* creditor groups' claims, conditional class certification of the creditor groups for the purposes of estimation, and estimation of the damages of their claim (the "Written Record");

2. as soon as possible and within sufficient time to permit the estimation of the Donin & Jordet creditor groups' claims by August 31, 2022, the adjudicator will convene a brief hearing at which parties will be entitled to make oral argument and address any questions the adjudicator may have based on the Written Record;

3. by August 31, 2022, the adjudicator to release their estimate of the Donin & Jordet creditor groups' claims.

Following the adjudicator's ruling, the estimation of the *Donin* and *Jordet* claims shall be used for the purposes of voting and standing in the within the CCAA proceeding.

A. Background of the Estimation Process

As evidenced by the progress made thus far, Justice O'Connor is well-equipped to quickly estimate the claims. He has held four hearings regarding the procedural posture of the U.S. Class Actions, the scope and damages involved in these claims, and the merits of the consumers' claim that Just Energy overcharged them for gas and electricity. The Parties have also made substantial written submissions to Justice O'Connor addressing these same issues, having collectively submitted seven briefs totaling 68 pages. Justice O'Connor has also issued three procedural and substantive rulings, demonstrating his familiarity with the cases and their merits. Indeed, on May 24, 2022, Justice O'Connor issued a ruling ordering Just Energy to produce additional discovery and narrowing the scope of the *Jordet* and *Donin* claims. Following Justice O'Connor's ruling, Just Energy produced a selection of documents and data, which will allow the parties to efficiently and effectively estimate the *Jordet* and *Donin* claims.

In light of Justice O'Connor's prior rulings, estimation of the *Donin* and *Jordet* claims can be conducted expeditiously. Following Justice O'Connor's ruling on May 24th, 2022, the Company has produced documents and data which may allow the Parties to effectively estimate the claims.

B. The Estimation Process.

The estimation process can be conducted efficiently and swiftly. The *Jordet* and *Donin* claims are based upon breach of contract. In their written submissions, the Parties will argue whether Just Energy charged its customers variable rates that violated the terms of its contracts, namely to set variable rates based upon market and business conditions. The Parties will compare the rates charged by Just Energy to its wholesale costs for natural gas and electricity and the local utilities to assess whether Just Energy charged competitive prices. Just Energy has produced all the data necessary to make this comparison. The Parties will also make written submissions regarding whether the *Jordet* and *Donin* claims should be certified as a class for purposes of the estimation process. This is a simple question of law applied to a limited and straightforward set of facts. Indeed, all four U.S. courts to consider a contested motion to certify a class of customers overcharged for variable gas and electric rates pursuant to their customer agreements have granted the motions and certified the respective classes. The issues are narrow, well trod by U.S. courts, and damages can be simply assessed using data produced by Just Energy. There is no reason a claims estimation cannot be rendered in short order.

Each of these steps can proceed while the Company determines its next steps within the CCAA proceeding.

1. A Breach of Contract Claim Can Be Quickly Adjudicated.

To state a breach of contract claim, the classes need only satisfy three elements: "the existence of a contract, including its essential terms; breach of a duty imposed by the contract;

and resultant damages." *Jordet v. Just Energy Solutions, Inc.*, 505 F. Supp. 3d 214, 222 (W.D.N.Y. 2020) (citations omitted). The classes allege that Just Energy breached its contract with class members, which represented that variable rates were priced based on market/business conditions, because Just Energy's variable rates bear no semblance to either wholesale prices or retail rates otherwise available in the market. The classes will use comparators to demonstrate that Just Energy's prices are not based on market conditions.

First, the classes will use comparisons to class members' local utility rates, which countless courts have held is a proper comparator. In *Mirkin v. XOOM Energy, LLC*, the U.S. Court of Appeals for the Second Circuit concluded that the plaintiffs could plausibly state a claim for breach of contract because the defendant ESCO deviated from the leading public utility by "up to" sixty percent. 931 F.3d 173, 178 (2d Cir. 2019). The Second Circuit also held that utilities reflect wholesale market costs that can be used to evaluate whether an ESCOs' rates are reflective of such costs. *Id*. at 178 n.2 ("Because utility companies like Con Edison participate on the wholesale energy market, their rates are another reflection of the Market Supply Cost."). Courts throughout the United States agree that contemporaneous utility rates serve as a proper barometer for business and market conditions and have sustained claims based on the differentials. *See, e.g.*, *Stanley v. Direct Energy Servs., LLC*, 466 F. Supp. 3d 415, 426 (S.D.N.Y. 2020) ("there is a reasonable contract interpretation that 'Market' meant that Defendant's variable rate would be tethered to some degree to supply costs or to competitors' rates . . . upward variation from local utility rates may also demonstrate how Defendant's consumer rates are materially disconnected from their supply costs."); *Oladapo v. Smart One Energy, LLC*, No. 14-7117, 2016 WL 344976, at *4 (S.D.N.Y. Jan. 27, 2016) ("the fact that [the ESCO's] rates consistently rose over time, while those set by [local utility] fluctuated, indicates that [the ESCO] was not setting its rates in response to 'changing gas market conditions'"); *Melville v. Spark Energy, Inc.*, No. 15-8706, 2016 WL 6775635, at *5 (D.N.J. Nov. 15, 2016) ("because [local utility] is a supplier in the energy market; its prices thus serve as at least partial indications of the market rate and are relevant despite the lack of a savings guarantee clause."); *Landau v. Viridian Energy PA LLC*, 223 F. Supp. 3d 401, 410 (E.D. Pa. 2016) (finding breach of contract where rates were higher than the local utility's rates); *Chen v. Hiko Energy, LLC*, No. 14-1771, 2014 WL 7389011, at *4 (S.D.N.Y. Dec. 29, 2014) ("Given the dramatic differences in pricing between defendant and [the local utility], it is plausible defendant's rates were not, in fact, reflective of the wholesale cost of electricity or gas, market-related factors, and . . . "costs, expenses and margins.").

Second, the classes will use Just Energy's own costs to demonstrate that Just Energy's variable rate was inconsistent and significantly higher than wholesale costs. *See, e.g.*, *Landau*, 223 F. Supp. 3d at 408-09 (where "[an ESCO's] rates increased or stayed the same even when the average wholesale market price for the region decreased[,]" breach of contract claim may proceed to trial); *Mirkin*, 2016 WL 3661106, at *8 (breach of contract where contract provided that variable rates will be "based on wholesale market conditions" and variable rate failed to track wholesale market rates) (citing *Sanborn v. Viridian Energy, Inc.*, No. 14-1731 (D. Conn.), and *Steketee v. Viridian Energy, Inc.*, No. 15-585 (D. Conn.)); *Edwards v. N. Am. Power & Gas,*

LLC, 120 F. Supp. 3d 132, 42-43 (D. Conn. 2015) (sustaining contract claim where contract promised "[t]he variable rate may increase or decrease to reflect the changes in the wholesale power market" and the plaintiff alleged that "the rates [the ESCO] charged were significantly higher than the wholesale market rate and did not always increase or decrease when the wholesale market rates did.").

Each of these comparators can be easily analyzed using data Just Energy produced to determine whether Just Energy breached its contracts with its consumers to proceed with the evaluation.

2. All Four Similar Actions to Reach Class Certification Have Been Certified.

Determining whether the classes should be certified is a simple matter of applying well-trod U.S. law to the limited set of facts at issue here. Notably, the four U.S. courts that have addressed a contested motion to certify a class of ESCO customers overcharged under the terms of their customer agreements easily granted the motions. *See Bell v. Gateway Energy Services Corp.*, No. 31168/2018 (Rockland Cnty. Super. Ct. Jan. 8, 2021), NYSCEF Doc. No. 152; *Claridge v. N. Am. Power & Gas, LLC*, No. 15-1261, 2016 WL 7009062 (S.D.N.Y. Nov. 30, 2016); *Roberts v. Verde Energy, USA, Inc.*, No. X07HHDCV156060160S, 2017 WL 6601993 (Conn. Super. Ct. Dec. 6, 2017), aff'd, 2019 WL 1276501 (Conn. Super. Ct. Feb. 1, 2019); and *BLT Steak LLC v. Liberty Power Corp, L.L.C.*, No. 151293/2013 (N.Y. Cnty., Super. Ct Aug. 14, 2020), NYSCEF Doc. No. 376.

Indeed, there are few cases better suited for class certification. The *Donin* and *Jordet* claims arise out of uniform misrepresentations regarding the pricing methodology for Just Energy's variable rate made in its standard customer contract. Just Energy provides its prospective natural gas and electricity customers with its standard contract prior to each contract's initiation. The resultant injury to the class members is also uniform because when Just Energy sets its variable rates, it uses the same rate for all customers within each utility region.

Under U.S. law, breach of contract claims are routinely certified for class treatment. "Contract claims satisfy Rule 23(b)(3) when the claims of the proposed class 'focus predominantly on common evidence[.]'" *Claridge*, 2016 WL 7009062, at *6 (quoting *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 125 (2d Cir. 2013)). "[C]laims arising from interpretations of a form contract appear to present the classic case for treatment as a class action, and breach of contract cases are routinely certified as such." *In re Scotts EZ Seed Litig.*, 304 F.R.D. 397, 411 (S.D.N.Y. 2015); *accord Gillis v. Respond Power, LLC*, 677 F. App'x 752, 756 (3d Cir. 2017) ("Because form contracts should be interpreted uniformly as to all signatories, Pennsylvania and federal courts have recognized that claims involving the interpretation of standard form contracts are particularly well-suited for class treatment.") (vacating district court's denial of class certification and remanding). Additionally, "[t]he Second Circuit has affirmed certification of a contract claim when minor variations existed in the language of the disputed contracts because the underlying claim was directed to a 'substantially similar' terms."

Claridge, 2016 WL 7009062, at *6 (quoting *In re U.S. Foodservice Inc.*, 729 F.3d at 124; *accord In re Scotts EZ Seed Litig.*, 304 F.R.D. at 411 (certifying contract class where, "[a]lthough plaintiffs do not allege defendants breached a 'form contract,' the representations defendants made to each plaintiff were uniform.") (quoting *Steinberg v. Nationwide Mut. Ins. Co.*, 224 F.R.D. 67, 74 (E.D.N.Y. 2004)); *Allapattah Servs., Inc. v. Exxon Corp.*, 333 F.3d 1248, 1261 (11th Cir. 2003), *aff'd sub nom. Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005) (affirming certification of breach of contract class where the defendant failed to price natural gas in accordance with its uniform contractual obligations).

Timely and efficient estimation of the *Jordet* and *Donin* claims is in the best interest of all Parties. Estimation will ensure that the *Jordet* and *Donin* claims will have fair and equitable participation in any upcoming vote within the CCAA proceeding.

Class Counsel looks forward to conferring with you regarding the estimation.

Respectfully submitted,

s/ D. Greg Blankinship
D. Greg Blankinship
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This is **Exhibit " J "**
Referred to in the Affidavit of Robert Tannor
Affirmed remotely before me this
10th day of August, 2022

Ryan Shah

A Commissioner for Taking Affidavits (or as may be)

Ryan Firoz Shah, a Commissioner, etc.,
Province of Ontario, while a Student-at-Law.
Expires May 18, 2024.

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;[1]

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;

~~c)~~d) Deadline to submit NOI – 11:59 p.m. Eastern Daylight Time on ♦ ~~August 25~~, 2022 (the "**NOI Deadline**");

~~d)~~e) Deadline to submit a Qualified Bid – 11:59 p.m. Eastern Daylight Time on ♦ ~~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:

- (if no NOI is submitted) – by no later than ♦ ~~September 2~~, 2022, subject to Court availability.
- (if there are no Qualified Bids~~is no Auction~~) – by no later than ♦ ~~October 15~~, 2022, subject to Court availability.
- (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 17th 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

[1] 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 t~~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~~), (~~cd~~), (e), (~~fg~~), (~~gh~~), (~~hi~~) 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 SISP 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 SISP 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 SISP, 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 SISP 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~~), (~~cd~~), (~~fe~~), (~~gf~~), (~~hg~~), (~~ji~~) or (l) or Section 15~~14~~ 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.

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

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

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

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

AFFIDAVIT OF ROBERT TANNOR
(SWORN AUGUST 10, 2022)

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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.*

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., 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")**

AFFIDAVIT OF ROBERT TANNOR
(SWORN MAY 26, 2022)

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

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

2. Together with Tannor Capital, I have been retained as a financial advisor to Wittels McInturff Palikovic, Finkelstein Blankinship, Frei-Pearson, Garber LLP, and Shub Law Firm LLP (collectively, "**U.S. Class Counsel**") in connection with their representation of millions of the Applicants' U.S. customers who are victim to wrongful and abusive energy pricing by the Applicants in breach of their contract (the "**U.S. Customers**") in two U.S. class actions [1] and in connection with the U.S. Customers' interests as contingent unsecured creditors in this proceeding under the *Companies' Creditors Arrangement Act* (the "**CCAA Proceeding**").

3. As such, I have knowledge of the matters contained in this affidavit. Where I do not have direct knowledge of a matter, I have stated the source of my information and I believe it to be true.

[1] *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, or the "**U.S. Class Actions**").

4. U.S. Class Counsel have also retained Paliare Roland Rosenberg Rothstein LLP as insolvency counsel to assist them with this matter. I am advised by Jeffrey Larry a partner of Paliare Roland, that Paliare Roland is an experienced and qualified firm with expertise representing large numbers of stakeholders who are often commercially unsophisticated and vulnerable in a wide variety of insolvency and/or class proceedings.

5. I previously swore an affidavit in this proceeding on January 17, 2022, in support of U.S. Class Counsel's motion for advice and directions returnable February 9, 2022. A copy of my affidavit sworn January 17, 2022, is included in U.S. Class Counsel's Motion Record. This affidavit should be read together with my earlier affidavit.

6. After months of advising the Court and interested parties that a Plan was pending, on May 12, 2022, the Applicants served a very lengthy motion record for an authorization order, meetings order, stay extension and other relief returnable May 26, 2022 (the "**Meetings Motion**").

7. U.S. Class Counsel oppose the Meetings Motion and take the position that the Plan should not go to a vote as presently contemplated by the Applicants.

8. U.S. Class Counsel have three immediate concerns in respect of the Plan pertaining to the Meetings Motion:

(a) the Plan currently contemplates a gross disparity in the kind of consideration to be provided to certain unsecured creditors (the "**Term Loan Lenders**") relative to the general body of unsecured creditors, yet the Plan puts all of the unsecured creditors in one class for voting purposes;

(b) the Applicants propose to limit the U.S. Customers to a single vote even though they number in excess of 400,000 in New York State alone; and

(c) the Applicants propose to arbitrarily limit the U.S. Customers claims to one dollar without any meaningful attempt to independently value this claim for voting purposes.

9. U.S. Class Counsel are of the view that all of the foregoing issues can be addressed prior to August 2, 2022, the date that has been set for the meeting of creditors, and U.S. Class Counsel are not seeking a delay of the meeting. However, I note that the public record and the information that I have reviewed in the Monitor's reports does not disclose any liquidity concerns that make August 2, 2022 a critical date.

10. I note as well that U.S. Class Counsel are, with my assistance, in the process of considering the adequacy of the return provided by the Plan to the general body of unsecured creditors. Consideration of this issue requires further disclosure and consultation with the Applicants and/or the Monitor, and with other similarly situated creditors.

11. I understand that the adequacy of consideration offered to the general unsecured creditors may be addressed at the sanction hearing. I have nevertheless briefly articulated some of my concerns regarding the adequacy of consideration (in contrast to the form of consideration) provided by the Plan in the final section of this affidavit.

The Plan contemplates gross disparity in the kind of consideration to the Term Lenders relative to general unsecured creditors

12. The Plan contemplates two classes of creditors for purposes of voting on and receiving distributions (or other treatment) under the Plan:

(a) the Secured Creditor Class (comprised of the Credit Facility Lenders); and

(b) the Unsecured Creditor Class (comprised of the Term Loan Lenders, General Unsecured Creditors, and Convenience Claims, as each is defined under the Plan).

13. Pacific Investment Management Company LLC ("**PIMCO**") is a Delaware limited liability company with principal business offices in Newport Beach, California. I understand from its publicly available documents that it manages approximately USD $2 trillion on behalf of various investors.

14. PIMCO's affiliates are the DIP Lenders, the assignees of a significant secured supplier claim (the BP Debt), and the proposed Plan sponsor.

15. PIMCO also owns 66% of the Term Loan, and, as a result, is the majority Term Loan Lender.

16. Within the Unsecured Creditor Class, the Plan presently contemplates the following disparate treatment:

(a) the Term Loan Lenders will receive their pro rata share of 10% of the New Common Shares and the ability to participate in the New Equity Offering –

resulting in the Term Loan Lenders receiving 100% of the common equity through a backstopped participation in an equity rights offering that is not available to the non-Term Loan Lender General Unsecured Creditors;

(b) Convenience Claims will be paid in full up to $1,500 from the General Unsecured Creditor Cash Pool (established at $10 million); and

(c) General Unsecured Creditors holding Accepted Claims will be paid their pro rata share of the General Unsecured Creditor Cash Pool (after payment of Convenience Claims and permitted fees and expenses (estimated in Mr. Caiger's affidavit to be in the range of $4 million - $7 millon) and subject to the turnover requirements in the Subordinated Note Indenture and the Plan).

17. At paragraph 77 of Mr. Carter's affidavit, the Applicants, referencing the affidavit of Mark Caiger sworn May 12, 2022 (the "**Caiger Affidavit**") state that "within [Mr. Caiger's] narrow range [of the enterprise value of the applicants between 4.8 to 5.1 times the current mid-point of the Applicants' 2023 estimated EBITDA ($115-$125 million)] the amount of the residual cash in the General Unsecured Creditor Cash Pool is expected to provide equivalent (but not necessarily equal) recoveries to the General Unsecured Creditors as those realized by the Term Loan Lenders".

18. Separate from concerns that I have in respect of Mr. Caiger's calculations regarding EBITDA, the recovery is not close to equivalent on its face. The U.S. Customers and the other non-Term Loan Lender General Unsecured Creditors are to receive a *cash*

payout, whereas the Term Loan Lenders are to receive an *equity share* in the New Just Energy Parent by way of a backstopped rights offering.

19. These two forms of consideration are entirely different in kind and provide different opportunities and risks. The equity share represents a continuing interest in the Applicants with an opportunity for significantly enhanced recovery and profits if and when the Undisclosed Assets (defined and described below) are realized. Conversely, the proposed cash recovery to the non-Term Loan Lender General Unsecured Creditor class is a one-time payment with no up-side potential— moreover the cash payment is at risk of erosion because it remains subject to an unknown number of convenience class creditors receiving a 100% recovery on claims at or below $1,500 (100% recovery) and creditors with claims above $1,500 (other than the contingent creditors) opting-in to the convenience class (i.e. a $3,000 creditor would likely opt-in to the convenience class in order to receive a 50% recovery on their claim). Furthermore, any proceeds to the non-Term Loan Lender General Unsecured Creditors are further diminished by professional fees. The Term Loan Lenders fees are being paid by the Applicants.

20. The "**Undisclosed Assets**" consist of: (i) the Applicants' approximately USD $145 million recovery in respect of Texas House Bill 4492, and (ii) material funds that may be awarded to the Just Energy Entities in the ERCOT litigation. None of the Undisclosed Assets are referenced in the Plan and they do not appear to be considered in Mr. Caiger's analysis.

21. In the ERCOT litigation, commenced in November 2021, Just Energy Group Inc., is advancing a claim, pursuant to s. 36.1 of the CCAA, against ERCOT challenging approximately USD $274 million paid under protest by or on behalf of the Applicants as a result of the Texas winter storm Uri in February 2021. The Applicants' claim in the ERCOT litigation has survived a motion to dismiss.

22. The Term Loan Lenders, as the common equity holders by virtue of their continuing relationship with the Applicants, will obtain the entire benefit of the USD $145 million which the Applicants have already booked as a receivable in its financial statements, although the amounts have not yet been received, and the balance of the ERCOT litigation amount representing up to USD $274 million if and when they are realized.

The Applicants propose to limit (at least) hundreds of thousands of U.S. Customers with claims to one single vote

23. I am advised by Steven Wittels, lead counsel in the Donin Action, that the proposed class in the Donin Action is defined in the Donin Complaint (attached to my January 19 Affidavit as Exhibit "B") as follows:

(a) the Multistate Class, preliminarily defined as all Just Energy customers in the United States (including customers of companies Just Energy acts as a successor to) who were charged a variable rate for their energy at any time from [applicable statute of limitations period] to the date of judgment; and

(b) the State Classes, preliminarily defined as all Just Energy customers in the state of [e.g., New York, California, etc.] (including customers of companies for which Just Energy acts is a successor) who were charged a variable rate

for their energy at any time from [applicable statute of limitations period] to the date of judgment.

24. I am advised by Greg Blankinship and Jonathan Shub, lead counsel in the Jordet Action, that the proposed class in the Jordet Action is defined as in the Jordet Complaint (attached to my January 19 Affidavit as Exhibit “D”) as follows:

(a) all Just Energy customers charged a variable rate for residential natural gas services by Just Energy from April 2012 to present; and

(b) a sub-class of Just Energy’s Pennsylvania customers charged a variable rate for residential natural gas services by Just Energy from April 2012 to present.

25. I am advised by Mr. Wittels that his office has conducted an analysis of the New York State data set provided by the Applicants in the Donin Action and has determined that the class in New York State is comprised of 417,162 customers during the relevant time frame.

26. Each of these 417,162 customers has a claim against the Applicants.

27. I am advised by Mr. Blankinship that the group of U.S. Customers captured by the Jordet Action is likely even larger.

Status of the O'Connor Adjudication

28. On February 9, 2022, U.S. Class Counsel brought a motion for advice and directions, requesting, among other things that the Court order an Expedited Adjudication Framework so that the U.S. Customer Claims could be adjudicated prior to a vote on the Plan.

29. Although U.S. Class Counsel had intended to propose a 3-month adjudication process resulting in a decision on the merits in May 2022, they modified their proposal according to information in the Monitor's Fifth Report that the delivery of the Plan was imminent and that the DIP Lenders had indicated a deadline of March 30, 2022 for a meeting of the creditors, and proposed, among other things, that all substantive and procedural issues in connection with the U.S. Customer Claims be determined (subject to a court-imposed outside deadline for the release of a decision on the merits) on the earlier of three days prior to the meeting of creditors or March 27, 2022. Attached to my affidavit as **Exhibit "B"** is a copy of Ken Rosenberg's letter enclosing the Expedited Adjudication Framework, dated February 4, 2022.

30. At the end of the hearing, the Court advised the parties that the motion was dismissed with reasons to follow. His Honour delivered his reasons on February 23, 2022. Attached to my affidavit as **Exhibit "C"** is a copy of the Order of Justice McEwen dated February 9, 2022. Attached to my affidavit as **Exhibit "D"** is a copy of the Handwritten version and Unofficial Transcript of Justice McEwen's Endorsement dated February 23, 2022.

31. On February 10, 2022, U.S. Class Counsel submitted Notices of Dispute of Revision or Disallowance to the Monitor and its counsel in respect of the Donin Action and the Jordet Action. Attached to my affidavit as **Exhibit "E"** is a copy of the Donin Notice of Dispute of Revision or Disallowance. Attached to my affidavit as **Exhibit "F"** is a copy of the Jordet Notice of Dispute of Revision or Disallowance.

32. Despite the Applicants' (and the DIP Lenders') insistence that a Plan was imminent and that the Court did not have time to order an expedited adjudication framework, the Applicants' sought repeated stay extension orders on March 3, March 24, and April 21, 2022 and did not deliver the Plan until May 12, 2022.

33. On February 24, 2022, U.S. Class Counsel filed a Notice of Motion for Leave to Appeal the February 9 Order to the Ontario Court of Appeal on an expedited basis. U.S. Class Counsel and the Respondents to the motion for leave have submitted their respective materials and factums. The parties are currently waiting for the Court's determination.

34. On March 3, 2022, the Court appointed the Honourable Justice Dennis O'Connor as Claims Officer, for the purposes of adjudicating the U.S. Customer claims (the "**O'Connor Adjudication**").

35. I am advised by U.S. Class Counsel that the following has occurred in the O'Connor Adjudication since Justice O'Connor's appointment:

(a) on March 16, 2022, Justice O'Connor held a case conference with the parties to discuss the claims at issue and consider the parties' preliminary

disputes regarding the appointment of two additional Claims Officers from the U.S.-based Judicial Arbitration and Mediation Services ("JAMS") and whether a decision regarding the scope of the claims should proceed prior to discovery. Justice O'Connor directed the parties to make written submissions regarding the appointment of two additional Claims Officers. Justice O'Connor also directed the parties to attempt to proceed with initial phases of discovery and confer regarding any disputes prior to make written submissions on that issue.

(b) on April 4, 2022, Justice O'Connor held a hearing regarding the parties' submissions on the issue of appointing two additional Claims Officers. Following written and oral submissions, on April 5, 2022, Justice O'Connor, denied the request as premature and that he needed to "first [ascertain] what in fact the issues in these claims are and what disputes there are about the applicable US procedural and substantive law.";

(c) on April 13, 2022, Justice O'Connor held a hearing regarding whether discovery is to take place prior to the determination of the scope of claims. Justice O'Connor determined that a scope hearing would take place prior to discovery and requested the parties to make written submissions regarding scope of the claims;

(d) the U.S. Customers requested a limited selection of discovery documents and information from the Applicants necessary to fairly and efficiently

adjudicate their claims. The parties have conferred on multiple occasions regarding Applicants' responses, productions, and deficiencies; and

(e) on May 19, 2022, Justice O'Connor held a hearing on U.S. Class Counsels' motion to compel discovery. The parties made extensive written and oral submissions regarding the scope of the class, the temporal and geographic scope of the claims, and the necessary discovery to proceed with the efficient adjudication of the claims.

(f) on May 24, 2022, Justice O'Connor released his decision which, among other things:

(i) limits the Donin Claim to the claim of U.S. Customers in the State of New York and declines to order further fact discovery in respect of that claim;

(ii) limits U.S. Customer Claims in the Jordet Claim to the claims of residential customers in those states where the Defendant, Just Energy Solutions, Inc. contracted with customers, for the period commencing April 16, 2014, and declines to order production of documents for the period prior to April 6, 2014; and

(iii) leaves open the issue of whether the Jordet Claim covers contracts only to the date the underlying action was issued, or if it covers contracts of the issue of the Claim to present time, subject to further

discussion and agreement by counsel to occur prior to May 30, 2022, failing which he will decide the issue.

The Plan and Valuation

36. U.S. Class Counsel have a number of preliminary concerns in respect of the consideration provided to the U.S. Customers by the Plan, in light of the fact that the Applicants and the plan sponsor, PIMCO, together with the other plan supporters have turned this restructuring into a 'loan to own' process, without a proper marketing process or valuation.

37. Tannor Capital Advisors and I will require access to the data room, business plan, discussions with management, and the investment banker for the Applicants to be able to assess the seriousness and impact of the following concerns on the Plan prior to the vote and sanction hearing.

38. The Applicants admit in their motion materials that there was no third-party valuation through a sales or investment process. Instead, they rely entirely on the affidavit of their own financial advisor, Mr. Caiger, to justify the consideration being offered under the Plan.

39. I have the following preliminary concerns with Mr. Caiger's affidavit:

(a) he describes an informal and passive marketing and sale process that relied entirely on *unsolicited* inquiries from interested parties. In my experience, this would be unusual for any company, let alone the Applicants who have

over CAD $2 billion in top line revenue. For a company the size of the Applicants, this informal process relying on people and companies to call the Applicants is entirely unsuitable. This is not how a legitimate sales process is run. In the absence of a formal marketing and sale process, third party buyers or investors may not know that potential offers will be entertained and are not likely to dedicate any efforts and resources to making an offer;

(b) he suggests that a 62-day period is a reasonable amount of time for any interested parties to contact the Applicants, sign a negotiated NDA, gain access to the data room, conduct due diligence including management interviews, review acquisition documents if they are prepared by the company, and if not, prepare acquisition documents, present an offer, and further refine acquisition documents while negotiating final details of an acquisition. I am encouraged by the Applicants disclosure of 24 unilateral inquiries received without any formal marketing process and believe that if a formal process is undertaken, there may be many other parties interested in evaluating an opportunity where a formal process is known and they also know about the fiduciary out of the current CCAA plan. With no formal marketing of this company, in my experience, 62 days is not a sufficient period of time to properly market and sell a company of this size and complexity, and the brevity creates a perceived ulterior motive – make the period so short as to impede any real marketing and sale of the Applicant.

(c) he suggests that the pool of interested buyers is limited, however Mr. Caiger fails to mention the fact that there are hundreds of “asset light” retail energy providers in the US and Canada with similar businesses to the Applicants, along with hundreds of energy exploration and distribution companies that need access to wholesale, retail, and commercial customers that may be interested in acquiring the Applicants; and

(d) he states that the Applicants have previously been “broadly marketed” for two and a half years, which I believe was prior to and during the 2020 restructuring over two years ago. Based on the disclosure in Mr. Caiger’s affidavit, I do not believe the company was marketed since the completion of the 2020 restructuring. Mr. Caiger does not consider recent global events, such as Russia’s invasion of the Ukraine, which have radically changed energy supply and demand in the past year, contributing to significant rapidly rising prices in energy and energy company profits.

40. In addition, the valuation described in Mr Caiger’s affidavit is flawed because he does not use standard recognized methods for establishing value, which has implications for the fairness of the different consideration being provided to the unsecured creditor group.

41. I raise the following preliminary concerns:

a) The EBITDA range in Mr. Caiger's affidavit is lower than the EBITDA in the May 2021 business plan that the Applicants provided to Tannor Capital Advisors earlier this year;

b) The EBITDA range as stated in Mr. Caiger's affidavit is also significantly lower than actual historical EBITDA results from 2019 through 2021. The $115 to $125 million EBITDA is significantly lower than the average EBITDA of $176 million for the annual periods of 2019 – 2021 and a small fraction of the remarkable trailing twelve month performance of $392 million Base EBITDA resulting in an understatement of Enterprise Value of at least $280 million dollars using Mr. Caiger's approximate EBITDA multiple of 5 and the average historical EBITDA mentioned. The CCAA Plan does not provide any evidence of changes to the Applicants' business plan or its operations that would radically alter its financial and operational performance.

	TTM - 12/31/2021 12 months	12 months ended March 31	12 months ended March 31	12 months ended March 31
	2021	2021	2020	2019
Base (Adjusted) EBITDA from continuing operation	329,272	182,831	185,836	160,758

c) The Enterprise Valuation methodology used by Mr. Caiger does not use recognized valuation analysis using a) discounted cash flow analysis, b) market approach using public company comparables, c) sales process

d) other valuation comparisons including Market Cap, Sales Multiples, EBITDA and P/E multiples, and Book Value multiples.

42. Lastly, Mr. Caiger's EBITDA multiple is just plain low. Our analysis of public company comparables to the applicant provides a much higher EBITDA multiple which, when combined with the fact that under the Plan all secured creditors are obtaining 100% recovery in cash or value equivalent to their claims, should give everyone pause before allowing this plan to proceed without substantial change.

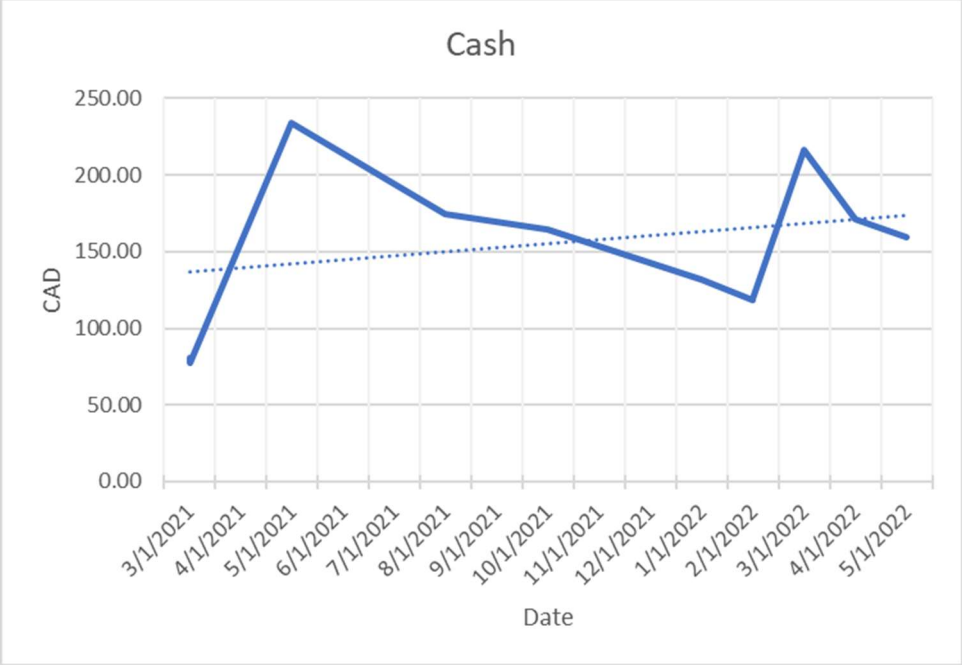
The Applicants are financially stable and there is time to decide the issues raised on behalf of the U.S. Customers

43. The Applicants have adequate liquidity to continue their operations in the near and far future, including the ability to pay the Monitor, vendors, taxes, interest expenses and fees, and its restructuring professional's fees. The court record does not disclose any financial requirement that the Meetings occur by August 2, 2022.

44. Tannor Capital has reviewed all of the Monitor's reports in the CCAA Proceeding. The Applicants' liquidity during the course of the CCAA Proceeding has been adequate to continue its business of marketing and selling electricity and gas to residential and business customers.

45. The adequate liquidity is apparent from the Monitor's reports and the 15-week cash flow projections shown in the Monitor's 10th Report as follows:

		Millions (CAD)
Monitor Report	**Date**	**Cash**
Tenth	5/7/2022	159.30
	4/10/2022	171.30
Ninth	4/9/2022	171.30
	3/20/2022	216.80
Seventh	3/19/2022	216.80
	2/27/2022	119.60
Sixth	2/26/2022	118.70
	1/30/2022	131.90
Fifth	1/29/2022	131.90
	10/31/2021	164.70
4th	10/30/2021	164.70
	8/29/2021	174.80
3rd	8/28/2021	174.80
	5/16/2021	234.10
2nd	5/15/2021	234.10
	3/15/2021	77.70
1st	3/14/2021	77.70
	3/9/2021	81.10



46. The low point of the Applicants' cash flow occurred in March 2021, the initial month of the Applicants entry into the CCAA Proceeding. Its lowest cash balance was $77.7 million. The Monitor's cash flow projections show cash flow above the minimum at the outset of the file, with a growing cash balance of $211 million for the week ending August 20, 2022.[2]

47. Based upon my review of the Applicants' disclosures through the Monitor's reports, this case is distinguishable from other insolvency cases where liquidity concerns require speedy timelines.

48. In addition, throughout the past 14-months since the Initial Order was granted, the Plan sponsors have had no problem providing various extensions to their timelines to the Applicants. Accordingly, in my view, the deadlines in the Plan appear to be dictated by the Plan sponsors' and not by any underlying liquidity concerns.

SWORN remotely by Robert Tannor of the City of Santa Barbara, in the State of California, before me at the City of Toronto, in the Province of Ontario, on this 26 day of May, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

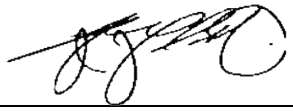
Commissioner for Taking Affidavits
(or as may be)

Robert Tannor

Robert Tannor

[2] 10th Monitors report, Page 121

This is Exhibit “A” referred to in the Affidavit of Robert Tannor sworn May 26, 2022.



Commissioner for Taking Affidavits (or as may be)

DANIELLE GLATT

Professional Summary
I have had a career in running companies and restructuring companies. I have deep experience as a CEO and Restructuring professional with deep finance, accounting, and restructuring experience. Over the course of my career, I have startup experience, growth experience while as an officer of operating companies, and deep experience as a restructuring advisor. While operating a hedge fund, I was Chief Investment Officer of a distressed hedge fund investing in over 400 distressed credits from bank loans to bankruptcy trade claims in the US and Canada. As a restructuring professional at a boutique restructuring firm and a credit hedge fund, I have actively participated in restructurings of over 8 billion dollars of debt in over 400 credits from 2008 to 2021.

Education and Professional Certifications
Rensselaer Polytechnic Institute, Bachelor of Science in Electric Power Engineering
London Business School, Finance and Entrepreneurship program 2006
Harvard Business School 2017, 2018, and 2019 YPO Program at HBS
Member of YPO and Former Board of Directors NY YPO

Experience
2008 to 2021 – General Partner of Tannor Capital Advisors LLC which managed the investing for Tannor Partners Credit Fund, LP ("TPCF"). TPCF has invested in over 400 companies since 2008 in the United States and Canada in credit and equity of companies undergoing external competitive pressures or internal operational challenges. Since 2021, the fund has returned capital as investments mature. The fund has made successful investments in retail, energy, airlines, pharmaceutical and medical devices, power companies, and manufacturing businesses over 13 years. In this time, Robert participated in adhoc committees as part of the restructuring process.

2004 to 2008 - Chairman and CEO of Westar Satellite Services, LP a satellite communications company based in Dallas, Texas. Robert Tannor led a group of investors to purchase the company out of bankruptcy in 2005, restructure its operations and sold the business in 2008 for a 2.5x invested capital.

2000 to 2004 - Senior industry practice leader and Director, Ernst & Young Corporate Finance LLC in New York focusing on Corporate Restructuring, distressed M&A, and Transaction Due Diligence. Robert worked as lead restructuring advisor or part of the team in over 30 bankruptcy cases, in court and out of court.

Notable assignments, M&A transactions, and Restructurings at E&Y
Pacific Crossing – a subsea cable owned by Asia Global Crossing spanning the Pacific Ocean from US West Coast to Japan (advised the bank group - $700 million credit)
Bear Swamp Pumped Storage Hydroelectric Facility – Part of US Generating NE (advised creditor certificate holders)
Velocita – a US and Canadian fiber optic network based in Virginia (advised creditor's committee - $500 million unsecured credit)
Adelphia Business Solutions – a CLEC based in Coudersport, Pennsylvania (advised creditor's committee- $1.2 billion unsecured credit)

Board Experience
Present – Board member of Overseas Military Sales Corporation, an authorized contractor by US Armed Forces to sell vehicles to US Military and US diplomats around the world. Company is based in New York and has offices in Europe.

Present Board of Directors of C&K Market, a regional grocer in Oregon and Northern California

Present Board of Directors New York City Metro Chapter of YPO from 2010 to 2014 – Young Presidents' Organization.

Former Board of Directors of EESISP - Electrical Employers Self Insured Safety Plan ("EESISP") from 1996 to 2000 EESISP is a worker's compensation insurance plan in New York State covering over 13,000 workers and the Joint Board of the Electrical Industry of New York with over $300 million dollars of assets responsible for oversight of workers compensation insurance coverage and claims for over 10,000 workers.

This is Exhibit “B” referred to in the Affidavit of Robert Tannor sworn May 26, 2022.

Commissioner for Taking Affidavits (or as may be)

DANIELLE GLATT

PALIARE ROLAND
BARRISTERS

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E ken.rosenberg@paliareroland.com
www.paliareroland.com

File 99380

February 4, 2022

VIA EMAIL

WITH PREJUDICE

Marc Wasserman, Michael De Lellis
Jeremy Dacks, Shawn Irving

Osler Hoskin & Harcourt LLP
Box 50, 1 First Canadian Place
100 King Street West, Suite 6200
Toronto, ON M5X 1B8

Dear Counsel:

Re: Just Energy Group Inc.
Court File No. CV-21-00658423-00CL

We write further to the Applicants' proposal for a process for the adjudication of the *Donin* and *Jordet* claims together in the *CCAA* proceeding forwarded to us by you on February 1, 2022.

The Applicants' proposal is not accepted. The timelines proposed are not sufficiently expedited to ensure that the Class Claimants can meaningfully participate in the *CCAA* process.

The enclosed table sets forth a counter proposal in respect of the adjudication of the *Donin* and *Jordet* claims (the "**Claims**"), which has the Claims heard together pursuant to the JAMS US Expedited Procedures arbitration rules (the "**Expedited Adjudication Framework**") by a tripartite panel of two US arbitrators and one Canadian arbitrator (the "**Claims Officers**"). The Class Claimants propose that the Honourable Mr. Dennis O'Connor sit as the Canadian arbitrator.

The Expedited Adjudication Framework contemplates that the Claims Officers will have complete jurisdiction and discretion to determine the appropriate process within the JAMS US expedited rules and with consideration to an endorsement from the *CCAA* court that the deadline for the release of a decision on the merits shall be three days prior to the meeting of creditors (implying an outside date of March 27, 2022, as it appears as though the DIP lender is requesting a timeline that would have a vote on March 30, 2022). This deadline may be extended by the *CCAA* court on a motion for directions on notice to the parties and the service list. Any appeal would be to the *CCAA* court.

Class Counsel was prepared to send a proposal for a process that resulted in a decision of the merits in May, 2022, but it has modified its proposed timing according to the information in the Monitor's Fifth Report (which we received at approximately 3:20 pm this afternoon, before we had an opportunity to send the earlier version of our proposed Expedited Adjudication Framework). The report states that the DIP lender has demanded a timeline that would require a vote no later than March 30, 2022.

In order for the Court to accommodate the DIP lenders' request, the Class Claimants require a determination of their Claims pursuant to the Expedited Adjudication Framework on the earlier of three days before the meeting of creditors and March 27, 2022.

Neither the Monitor's Fifth Report nor the other materials filed on this motion disclose a commercial basis for the DIP lenders' timeline, but our clients have nevertheless modified their proposed schedule to consider the DIP lenders' position. If there is information that shows a commercial basis for the DIP lenders' timeline, our clients have not been provided with access to that information.

The Expedited Adjudication Framework establishes a time-sensitive process that addresses and protects the rights and interests of the parties and ensures that all questions about scope, jurisdiction, discovery or any other matter will be dealt with efficiently by the very panel that will hear the case. This process will provide a comprehensive resolution of the Class Claimants' claims in a flexible, expeditious and efficient manner.

The Expedited Adjudication Framework is conditional on the necessary parties supporting the plan confirming that the adoption of this timetable will result in the Claims being adjudicated in the first instance in time for the Class Claimants to participate in the *CCAA* exit plan and vote in accordance with the amount of their Claims determined at the end of the proposed adjudication.

We look forward to the Applicants' response to our proposal. We would like to work together to see if we can come to an agreement before the hearing on February 9, 2022.

Yours very truly,
PALIARE ROLAND ROSENBERG ROTHSTEIN LLP

Ken Rosenberg
KR:DG

c: Jeff Larry, Danielle Glatt – Paliare Roland LLP
Robert Thornton, Rebecca Kennedy, Puya Fesharaki – TGF LLP
Clients

Step	Description	Proposed Schedule
Claims Officers selection and authority	The parties will agree on a tripartite panel of arbitrators to act as the Claims Officers. The chair of the panel shall be the Honourable Mr. Dennis O'Connor (subject to availability). If the chair of the panel is not the Honourable Mr. Dennis O'Connor, the parties will agree to another Canadian arbitrator, with prior CCAA experience Each party will then select one arbitrator from the JAMS (U.S.) pool of neutrals with both: (i) prior arbitration experience; and (ii) experience with class action cases. Pre-hearing discovery and the hearing will be conducted in accordance with the expedited procedures of the JAMS Comprehensive Arbitration Rules and Procedures governing binding Arbitrations of claims. *See* https://www.jamsadr.com/rules-comprehensive-arbitration/ and "Expedited Procedures" -- Rule 16.1 (hereafter the "**Expedited Procedures**" attached hereto).	February 14, 2022
Procedure	Any determinations in respect of the scope of the Class Claimants' claims (for example, what states and customers they cover and what entities it includes) will be determined by the Claims Officers in accordance with the Expedited Procedures -- Rule 16.1 and the endorsement of the Court that the Class Claimants' claims be determined three days prior to the meeting of creditors. All issues related to discovery, including both productions and depositions, and the determination of when and how class certification will be briefed and argued, shall also be determined	

	by the Claims Officers in accordance with the Expedited Procedures and the endorsement of the Court that the Class Claimants' claims be determined three days prior to the meeting of creditors.	
Hearing	Hearing dates shall be determined by the Claims Officers in accordance with the Expedited Rules and the endorsement of the Court that this matter be determined three days prior to the meeting of creditors.	
Decision	The Court will endorse that the Claims Officers shall provide an expedited written ruling, which decision will be binding on all parties for purposes of the *CCAA* proceeding, three days prior to the meeting of creditors (implying an outside date of March 27, 2022, as it appears as though the DIP lender is requesting a timeline that would have a vote on March 30, 2022). This deadline may be extended by the CCAA court on a motion for directions on notice to the parties and the service list	Three days prior to the meeting of creditors (implying an outside date of March 27, 2022)
Appeals	Either party may file an appeal to the *CCAA* court within five (5) days of the written ruling.	Appeal to be filed within five (5) days of judgment.

JAMS Comprehensive Arbitration Rules & Procedures

Effective June 1, 2021

Local Solutions. Global Reach.®

JAMS®

JAMS Comprehensive Arbitration Rules & Procedures

Founded in 1979, JAMS is the largest private provider of alternative dispute resolution (ADR) services worldwide. Our neutrals resolve some of the world's largest, most complex and contentious disputes, utilizing JAMS Rules & Procedures as well as the rules of other domestic and international arbitral institutions.

JAMS mediators and arbitrators are full-time neutrals who come from the ranks of retired state and federal judges and prominent attorneys. These highly trained, experienced ADR professionals are dedicated to the highest ethical standards of conduct. Whether they are conducting in-person, remote or hybrid hearings, JAMS neutrals are adept at managing the resolution process.

Effective June 1, 2021, these updated Rules reflect the latest developments in arbitration. They make explicit the arbitrator's full authority to conduct hearings in person, virtually or in a combined form, and with participants in more than one geographic location. They also update electronic filing processes to coordinate with **JAMS Access**, our secure, online case management platform.

Summary of Revisions to the Comprehensive Rules

Scan this code with your smartphone for a complete list of all changes.

Additional Arbitration Resources

Arbitration Schedule of Fees and Costs

Scan for details on our professional and administrative fees.

Latest JAMS Rules Updates

Scan for links to our updated **Streamlined, Construction, Expedited Construction** and **Employment** rules.

Sample Contract Clauses

Scan for guidance on creating custom commercial contract clauses, including our **Diversity and Inclusion** option.

Virtual & Hybrid ADR

Scan to learn about our concierge-level client services, including **Virtual ADR Moderators** and **premium technology**.

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Table of Contents

RULE 1
Scope of Rules

(a) The JAMS Comprehensive Arbitration Rules and Procedures ("Rules") govern binding Arbitrations of disputes or claims that are administered by JAMS and in which the Parties agree to use these Rules or, in the absence of such agreement, any disputed claim or counterclaim that exceeds $250,000, not including interest or attorneys' fees, unless other Rules are prescribed.

(b) The Parties shall be deemed to have made these Rules a part of their Arbitration Agreement ("Agreement") whenever they have provided for Arbitration by JAMS under its Comprehensive Rules or for Arbitration by JAMS without specifying any particular JAMS Rules and the disputes or claims meet the criteria of the first paragraph of this Rule.

(c) The authority and duties of JAMS as prescribed in the Agreement of the Parties and in these Rules shall be carried out by the JAMS National Arbitration Committee ("NAC") or the office of JAMS General Counsel or their designees.

(d) JAMS may, in its discretion, assign the administration of an Arbitration to any of its Resolution Centers.

(e) The term "Party" as used in these Rules includes Parties to the Arbitration and their counsel or representatives.

(f) "Electronic filing" (e-filing) means the electronic transmission of documents to JAMS for the purpose of filing via the Internet. "Electronic service" (e-service) means the electronic transmission of documents to a Party, attorney or representative under these Rules.

RULE 2
Party Self-Determination and Emergency Relief Procedures

(a) The Parties may agree on any procedures not specified herein or in lieu of these Rules that are consistent with the applicable law and JAMS policies (including, without limitation, Rules 15(i), 30 and 31). The Parties shall promptly notify JAMS of any such Party-agreed procedures and shall confirm such procedures in writing. The Party-agreed procedures shall be enforceable as if contained in these Rules.

(b) When an Arbitration Agreement provides that the Arbitration will be non-administered or administered by an entity other than JAMS and/or conducted in accordance with rules other than JAMS Rules, the Parties may agree to modify that Agreement to provide that the Arbitration will be administered by JAMS and/or conducted in accordance with JAMS Rules.

(c) Emergency Relief Procedures. These Emergency Relief Procedures are available in Arbitrations filed and served after July 1, 2014, and where not otherwise prohibited by law. Parties may agree to opt out of these Procedures in their Arbitration Agreement or by subsequent written agreement.

(i) A Party in need of emergency relief prior to the appointment of an Arbitrator may notify JAMS and all other Parties in writing of the relief sought and the basis for an Award of such relief. This Notice shall include an explanation of why such relief is needed on an expedited basis. Such Notice shall be given by email or personal delivery. The Notice must include a statement certifying that all other Parties have been notified. If all other Parties have not been notified, the Notice shall include an explanation of the efforts made to notify such Parties.

(ii) JAMS shall promptly appoint an Emergency Arbitrator to rule on the emergency request. In most cases the appointment of an Emergency Arbitrator will be done within 24 hours of receipt of the request. The Emergency Arbitrator shall promptly disclose any circumstance likely, based on information disclosed in the application, to affect the Arbitrator's ability to be impartial or independent. Any challenge to the appointment of the Emergency Arbitrator shall be made within 24 hours of the disclosures by the Emergency Arbitrator. JAMS will promptly review and decide any such challenge. JAMS' decision shall be final.

(iii) Within two business days, or as soon as practicable thereafter, the Emergency Arbitrator shall establish a schedule for the consideration of the request for emergency relief. The schedule shall provide a reasonable opportunity for all Parties to be heard taking into account the nature of the relief sought. The Emergency Arbitrator has the authority to rule on his or her own jurisdiction and shall resolve any disputes with respect to the request for emergency relief.

(iv) The Emergency Arbitrator shall determine whether the Party seeking emergency relief has shown that immediate loss or damage will result in the absence of emergency relief and whether the requesting Party is entitled to such relief. The Emergency Arbitrator shall enter an order or Award granting or denying the relief, as the case may be, and stating the reasons therefor.

(v) Any request to modify the Emergency Arbitrator's order or Award must be based on changed circumstances and may be made to the Emergency Arbitrator until such time as an Arbitrator or Arbitrators are appointed in accordance with the Parties' Agreement and JAMS' usual procedures. Thereafter, any request related to the relief granted or denied by the Emergency Arbitrator shall be determined by the Arbitrator(s) appointed in accordance with the Parties' Agreement and JAMS' usual procedures.

(vi) In the Emergency Arbitrator's discretion, any interim Award of emergency relief may be conditioned on the provision of adequate security by the Party seeking such relief.

RULE 3
Amendment of Rules

JAMS may amend these Rules without notice. The Rules in effect on the date of the commencement of an Arbitration (as defined in Rule 5) shall apply to that Arbitration, unless the Parties have agreed upon another version of the Rules.

RULE 4
Conflict with Law

If any of these Rules, or modification of these Rules agreed to by the Parties, is determined to be in conflict with a provision of applicable law, the provision of law will govern over the Rule in conflict, and no other Rule will be affected.

RULE 5
Commencing an Arbitration

(a) The Arbitration is deemed commenced when JAMS issues a Commencement Letter based upon the existence of one of the following:

(i) A post-dispute Arbitration Agreement fully executed by all Parties specifying JAMS administration or use of any JAMS Rules; or

(ii) A pre-dispute written contractual provision requiring the Parties to arbitrate the dispute or claim and specifying JAMS administration or use of any JAMS Rules or that the Parties agree shall be administered by JAMS; or

(iii) A written confirmation of an oral agreement of all Parties to participate in an Arbitration administered by JAMS or conducted pursuant to any JAMS Rules; or

(iv) The Respondent's failure to timely object to JAMS administration, where the Parties' Arbitration Agreement does not specify JAMS administration or JAMS Rules; or

(v) A copy of a court order compelling Arbitration at JAMS.

(b) The issuance of the Commencement Letter confirms that requirements for commencement have been met, that JAMS has received all payments required under the applicable fee schedule and that the Claimant has provided JAMS with contact information for all Parties together with evidence that the Demand for Arbitration has been served on all Parties.

(c) If a Party that is obligated to arbitrate in accordance with subparagraph (a) of this Rule fails to agree to participate in the Arbitration process, JAMS shall confirm in writing that Party's failure to respond or participate, and, pursuant to Rule 22(j), the Arbitrator, once appointed, shall schedule, and provide appropriate notice of, a Hearing or other opportunity for the Party demanding the Arbitration to demonstrate its entitlement to relief.

(d) The date of commencement of the Arbitration is the date of the Commencement Letter but is not intended to be applicable to any legal requirement, such as the statute of limitations; any contractual limitations period; or any claims notice requirement. The term "commencement," as used in this Rule, is intended only to pertain to the operation of this and other Rules (such as Rules 3, 13(a), 17(a) and 31(a)).

RULE 6
Preliminary and Administrative Matters

(a) JAMS may convene, or the Parties may request, administrative conferences to discuss any procedural matter relating to the administration of the Arbitration.

(b) If no Arbitrator has yet been appointed, at the request of a Party and in the absence of Party agreement, JAMS may determine the location of the Hearing, subject to Arbitrator review. In determining the location of the Hearing, such factors as the subject matter of the dispute, the convenience of the

Parties and witnesses, and the relative resources of the Parties shall be considered.

(c) If, at any time, any Party has failed to pay fees or expenses in full, JAMS may order the suspension or termination of the proceedings. JAMS may so inform the Parties in order that one of them may advance the required payment. If one Party advances the payment owed by a non-paying Party, the Arbitration shall proceed, and the Arbitrator may allocate the non-paying Party's share of such costs, in accordance with Rules 24(f) and 31(c). An administrative suspension shall toll any other time limits contained in these Rules or the Parties' Agreement.

(d) JAMS does not maintain an official record of documents filed in the Arbitration. If the Parties wish to have any documents returned to them, they must advise JAMS in writing within thirty (30) calendar days of the conclusion of the Arbitration. If special arrangements are required regarding file maintenance or document retention, they must be agreed to in writing, and JAMS reserves the right to impose an additional fee for such special arrangements. Documents that are submitted for e-filing are retained for thirty (30) calendar days following the conclusion of the Arbitration.

(e) Unless the Parties' Agreement or applicable law provides otherwise, JAMS, if it determines that the Arbitrations so filed have common issues of fact or law, may consolidate Arbitrations in the following instances:

(i) If a Party files more than one Arbitration with JAMS, JAMS may consolidate two or more of the Arbitrations into a single Arbitration.

(ii) Where a Demand or Demands for Arbitration is or are submitted naming Parties already involved in another Arbitration or Arbitrations pending under these Rules, JAMS may decide that the new case or cases shall be consolidated into one or more of the pending proceedings and referred to one of the Arbitrators or panels of Arbitrators already appointed.

(iii) Where a Demand or Demands for Arbitration is or are submitted naming Parties that are not identical to the Parties in the existing Arbitration or Arbitrations, JAMS may decide that the new case or cases shall be consolidated into one or more of the pending proceedings and referred to one of the Arbitrators or panels of Arbitrators already appointed.

When rendering its decision, JAMS will take into account all circumstances, including the links between the cases and the progress already made in the existing Arbitrations.

Unless applicable law provides otherwise, where JAMS decides to consolidate a proceeding into a pending Arbitration, the Parties to the consolidated case or cases will be deemed to have waived their right to designate an Arbitrator as well as any contractual provision with respect to the site of the Arbitration.

(f) Where a third party seeks to participate in an Arbitration already pending under these Rules or where a Party to an Arbitration under these Rules seeks to compel a third party to participate in a pending Arbitration, the Arbitrator shall determine such request, taking into account all circumstances he or she deems relevant and applicable.

RULE 7
Number and Neutrality of Arbitrators; Appointment and Authority of Chairperson

(a) The Arbitration shall be conducted by one neutral Arbitrator, unless all Parties agree otherwise. In these Rules, the term "Arbitrator" shall mean, as the context requires, the Arbitrator or the panel of Arbitrators in a tripartite Arbitration.

(b) In cases involving more than one Arbitrator, the Parties shall agree on, or, in the absence of agreement, JAMS shall designate, the Chairperson of the Arbitration Panel. If the Parties and the Arbitrators agree, a single member of the Arbitration Panel may, acting alone, decide discovery and procedural matters, including the conduct of hearings to receive documents and testimony from third parties who have been subpoenaed, in advance of the Arbitration Hearing, to produce documents.

(c) Where the Parties have agreed that each Party is to name one Arbitrator, the Arbitrators so named shall be neutral and independent of the appointing Party, unless the Parties have agreed that they shall be non-neutral.

RULE 8
Service

(a) JAMS or the Arbitrator may at any time require electronic filing and service of documents in an Arbitration, including through the JAMS Electronic Filing System. If JAMS or the Arbitrator requires electronic filing and service, the Parties shall maintain and regularly monitor a valid, usable and live email address for the receipt of documents and notifications. Any document filed via the JAMS Electronic Filing System shall

be considered as filed when the transmission to the JAMS Electronic Filing System is complete. Any document e-filed by 11:59 p.m. (of the sender's time zone) shall be deemed filed on that date.

(b) Every document filed with the JAMS Electronic Filing System shall be deemed to have been signed by the Arbitrator, Case Manager, attorney or declarant who submits the document to the JAMS Electronic Filing System, and shall bear the typed name, address and telephone number of a signing attorney.

(c) Delivery of e-service documents through the JAMS Electronic Filing System shall be considered as valid and effective service and shall have the same legal effect as an original paper document. Recipients of e-service documents shall access their documents through the JAMS Electronic Filing System. E-service shall be deemed complete when the Party initiating e-service or JAMS completes the transmission of the electronic document(s) to the JAMS Electronic Filing System for e-filing and/or e-service.

(d) If an electronic filing and/or service via JAMS Electronic Filing System does not occur due to technical error in the transmission of the document, the Arbitrator or JAMS may, for good cause shown, permit the document to be filed and/or served *nunc pro tunc* to the date it was first attempted to be transmitted electronically. In such cases a Party shall, absent extraordinary circumstances, be entitled to an order extending the date for any response or the period within which any right, duty or other act must be performed.

(e) For documents that are not filed electronically, service by a Party under these Rules is effected by providing one signed copy of the document to each Party and two copies in the case of a sole Arbitrator and four copies in the case of a tripartite panel to JAMS. Service may be made by hand-delivery, overnight delivery service or U.S. mail. Service by any of these means is considered effective upon the date of deposit of the document.

(f) In computing any period of time prescribed or allowed by these Rules for a Party to do some act within a prescribed period after the service of a notice or other paper on the Party and the notice or paper is served on the Party only by U.S. mail, three (3) calendar days shall be added to the prescribed period. If the last day for the performance of any act that is required by these Rules to be performed within a specific time falls on a Saturday, Sunday or other legal holiday, the period is extended to and includes the next day that is not a holiday.

RULE 9
Notice of Claims

(a) Each Party shall afford all other Parties reasonable and timely notice of its claims, affirmative defenses or counterclaims. Any such notice shall include a short statement of its factual basis. No claim, remedy, counterclaim or affirmative defense will be considered by the Arbitrator in the absence of such prior notice to the other Parties, unless the Arbitrator determines that no Party has been unfairly prejudiced by such lack of formal notice or all Parties agree that such consideration is appropriate notwithstanding the lack of prior notice.

(b) Claimant's notice of claims is the Demand for Arbitration referenced in Rule 5. It shall include a statement of the remedies sought. The Demand for Arbitration may attach and incorporate a copy of a Complaint previously filed with a court. In the latter case, Claimant may accompany the Complaint with a copy of any Answer to that Complaint filed by any Respondent.

(c) Within fourteen (14) calendar days of service of the notice of claim, a Respondent may submit to JAMS and serve on other Parties a response and a statement of any affirmative defenses, including jurisdictional challenges, or counterclaims it may have. JAMS may grant reasonable extensions of time to file a response or counterclaim prior to the appointment of the Arbitrator.

(d) Within fourteen (14) calendar days of service of a counterclaim, a Claimant may submit to JAMS and serve on other Parties a response to such counterclaim and any affirmative defenses, including jurisdictional challenges, it may have.

(e) Any claim or counterclaim to which no response has been served will be deemed denied.

(f) Jurisdictional challenges under Rule 11 shall be deemed waived, unless asserted in a response to a Demand or counterclaim or promptly thereafter, when circumstances first suggest an issue of arbitrability.

RULE 10
Changes of Claims

After the filing of a claim and before the Arbitrator is appointed, any Party may make a new or different claim against a Party or any third party that is subject to Arbitration in the proceeding. Such claim shall be made in writing, filed with JAMS and served

on the other Parties. Any response to the new claim shall be made within fourteen (14) calendar days after service of such claim. After the Arbitrator is appointed, no new or different claim may be submitted, except with the Arbitrator's approval. A Party may request a hearing on this issue. Each Party has the right to respond to any new or amended claim in accordance with Rule 9(c) or (d).

RULE 11
Interpretation of Rules and Jurisdictional Challenges

(a) Once appointed, the Arbitrator shall resolve disputes about the interpretation and applicability of these Rules and conduct of the Arbitration Hearing. The resolution of the issue by the Arbitrator shall be final.

(b) Jurisdictional and arbitrability disputes, including disputes over the formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought, and who are proper Parties to the Arbitration, shall be submitted to and ruled on by the Arbitrator. The Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter.

(c) Disputes concerning the appointment of the Arbitrator shall be resolved by JAMS.

(d) The Arbitrator may, upon a showing of good cause or *sua sponte*, when necessary to facilitate the Arbitration, extend any deadlines established in these Rules, provided that the time for rendering the Award may be altered only in accordance with Rules 22(i) or 24.

RULE 12
Representation

(a) The Parties, whether natural persons or legal entities such as corporations, LLCs or partnerships, may be represented by counsel or any other person of the Party's choice. Each Party shall give prompt written notice to the Case Manager and the other Parties of the name, address, telephone number and email address of its representative. The representative of a Party may act on the Party's behalf in complying with these Rules.

(b) Changes in Representation. A Party shall give prompt written notice to the Case Manager and the other Parties of any change in its representation, including the name, address, telephone number and email address of the new representative. Such notice shall state that the written consent of the former representative, if any, and of the new representative, has been obtained and shall state the effective date of the new representation.

(c) The Arbitrator may withhold approval of any intended change or addition to a Party's legal representative(s) where such change or addition could compromise the ability of the Arbitrator to continue to serve, the composition of the Panel in the case of a tripartite Arbitration or the finality of any Award (on the grounds of possible conflict or other like impediment). In deciding whether to grant or withhold such approval, the Arbitrator shall have regard to the circumstances, including the general principle that a Party may be represented by a legal representative chosen by that Party, the stage that the Arbitration has reached, the potential prejudice resulting from the possible disqualification of the Arbitrator, the efficiency resulting from maintaining the composition of the Panel (as constituted throughout the Arbitration), the views of the other Party or Parties to the Arbitration and any likely wasted costs or loss of time resulting from such change or addition.

RULE 13
Withdrawal from Arbitration

(a) No Party may terminate or withdraw from an Arbitration after the issuance of the Commencement Letter (see Rule 5), except by written agreement of all Parties to the Arbitration.

(b) A Party that asserts a claim or counterclaim may unilaterally withdraw that claim or counterclaim without prejudice by serving written notice on the other Parties and the Arbitrator. However, the opposing Parties may, within seven (7) calendar days of service of such notice, request that the Arbitrator condition the withdrawal upon such terms as he or she may direct.

RULE 14
Ex Parte Communications

(a) No Party may have any *ex parte* communication with a neutral Arbitrator, except as provided in section (b) of this Rule. The Arbitrator(s) may authorize any Party to communicate directly with the Arbitrator(s) by email or other written means as long as copies are simultaneously forwarded to the JAMS Case Manager and the other Parties.

(b) A Party may have *ex parte* communication with its appointed neutral or non-neutral Arbitrator as necessary to secure the Arbitrator's services and to assure the absence of conflicts, as well as in connection with the selection of the Chairperson of the arbitral panel.

(c) The Parties may agree to permit more extensive *ex parte* communication between a Party and a non-neutral Arbitrator. More extensive communication with a non-neutral Arbitrator may also be permitted by applicable law and rules of ethics.

RULE 15
Arbitrator Selection, Disclosures and Replacement

(a) Unless the Arbitrator has been previously selected by agreement of the Parties, JAMS may attempt to facilitate agreement among the Parties regarding selection of the Arbitrator.

(b) If the Parties do not agree on an Arbitrator, JAMS shall send the Parties a list of at least five (5) Arbitrator candidates in the case of a sole Arbitrator and at least ten (10) Arbitrator candidates in the case of a tripartite panel. JAMS shall also provide each Party with a brief description of the background and experience of each Arbitrator candidate. JAMS may add names to or replace any or all names on the list of Arbitrator candidates for reasonable cause at any time before the Parties have submitted their choice pursuant to subparagraph (c) below.

(c) Within seven (7) calendar days of service upon the Parties of the list of names, each Party may strike two (2) names in the case of a sole Arbitrator and three (3) names in the case of a tripartite panel, and shall rank the remaining Arbitrator candidates in order of preference. The remaining Arbitrator candidate with the highest composite ranking shall be appointed the Arbitrator. JAMS may grant a reasonable extension of the time to strike and rank the Arbitrator candidates to any Party without the consent of the other Parties.

(d) If this process does not yield an Arbitrator or a complete panel, JAMS shall designate the sole Arbitrator or as many members of the tripartite panel as are necessary to complete the panel.

(e) If a Party fails to respond to a list of Arbitrator candidates within seven (7) calendar days after its service, or fails to respond according to the instructions provided by JAMS, JAMS shall deem that Party to have accepted all of the Arbitrator candidates.

(f) Entities or individuals whose interests are not adverse with respect to the issues in dispute shall be treated as a single Party for purposes of the Arbitrator selection process. JAMS shall determine whether the interests between entities or individuals are adverse for purposes of Arbitrator selection, considering such factors as whether they are represented by the same attorney and whether they are presenting joint or separate positions at the Arbitration.

(g) If, for any reason, the Arbitrator who is selected is unable to fulfill the Arbitrator's duties, a successor Arbitrator shall be chosen in accordance with this Rule. If a member of a panel of Arbitrators becomes unable to fulfill his or her duties after the beginning of a Hearing but before the issuance of an Award, a new Arbitrator will be chosen in accordance with this Rule, unless, in the case of a tripartite panel, the Parties agree to proceed with the remaining two Arbitrators. JAMS will make the final determination as to whether an Arbitrator is unable to fulfill his or her duties, and that decision shall be final.

(h) Any disclosures regarding the selected Arbitrator shall be made as required by law or within ten (10) calendar days from the date of appointment. Such disclosures may be provided in electronic format, provided that JAMS will produce a hard copy to any Party that requests it. The Parties and their representatives shall disclose to JAMS any circumstance likely to give rise to justifiable doubt as to the Arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the Arbitration or any past or present relationship with the Parties or their representatives. The obligation of the Arbitrator, the Parties and their representatives to make all required disclosures continues throughout the Arbitration process.

(i) At any time during the Arbitration process, a Party may challenge the continued service of an Arbitrator for cause. The challenge must be based upon information that was not available to the Parties at the time the Arbitrator was selected. A challenge for cause must be in writing and exchanged with opposing Parties, who may respond within seven (7) calendar days of service of the challenge. JAMS shall make the final determination as to such challenge. Such determination shall take into account the materiality of the facts and any prejudice to the Parties. That decision will be final.

(j) Where the Parties have agreed that a Party-appointed Arbitrator is to be non-neutral, that Party-appointed Arbitrator is not obliged to withdraw if requested to do so only by the Party that did not appoint that Arbitrator.

RULE 16
Preliminary Conference

At the request of any Party or at the direction of the Arbitrator, a Preliminary Conference shall be conducted with the Parties or their counsel or representatives. The Preliminary Conference may address any or all of the following subjects:

(a) The exchange of information in accordance with Rule 17 or otherwise;

(b) The schedule for discovery as permitted by the Rules, as agreed by the Parties or as required or authorized by applicable law;

(c) The pleadings of the Parties and any agreement to clarify or narrow the issues or structure the Arbitration Hearing;

(d) The scheduling of the Hearing and any pre-Hearing exchanges of information, exhibits, motions or briefs;

(e) The attendance of witnesses as contemplated by Rule 21;

(f) The scheduling of any dispositive motion pursuant to Rule 18;

(g) The premarking of exhibits, the preparation of joint exhibit lists and the resolution of the admissibility of exhibits;

(h) The form of the Award; and

(i) Such other matters as may be suggested by the Parties or the Arbitrator.

The Preliminary Conference may be conducted telephonically and may be resumed from time to time as warranted.

RULE 16.1
Application of Expedited Procedures

(a) If these Expedited Procedures are referenced in the Parties' Agreement to arbitrate or are later agreed to by all Parties, they shall be applied by the Arbitrator.

(b) The Claimant or Respondent may opt into the Expedited Procedures. The Claimant may do so by indicating the election in the Demand for Arbitration. The Respondent may opt into the Expedited Procedures by so indicating in writing to JAMS with a copy to the Claimant served within fourteen (14) days of receipt of the Demand for Arbitration. If a Party opts into the Expedited Procedures, the other side shall indicate within seven (7) calendar days of notice thereof whether it agrees to the Expedited Procedures.

(c) If one Party elects the Expedited Procedures and any other Party declines to agree to the Expedited Procedures, each Party shall have a client or client representative present at the first Preliminary Conference (which should, if feasible, be an in-person conference), unless excused by the Arbitrator for good cause.

RULE 16.2
Where Expedited Procedures Are Applicable

(a) The Arbitrator shall require compliance with Rule 17(a) prior to conducting the first Preliminary Conference. Each Party shall confirm in writing to the Arbitrator that it has so complied or shall indicate any limitations on full compliance and the reasons therefor.

(b) Document requests shall (1) be limited to documents that are directly relevant to the matters in dispute or to its outcome; (2) be reasonably restricted in terms of time frame, subject matter and persons or entities to which the requests pertain; and (3) not include broad phraseology such as "all documents directly or indirectly related to." The Requests shall not be encumbered with extensive "definitions" or "instructions." The Arbitrator may edit or limit the number of requests.

(c) E-discovery shall be limited as follows:

(i) There shall be production of electronic documents only from sources used in the ordinary course of business. Absent a showing of compelling need, no such documents are required to be produced from backup servers, tapes or other media.

(ii) Absent a showing of compelling need, the production of electronic documents shall normally be made on the basis of generally available technology in a searchable format that is usable by the requesting Party and convenient and economical for the producing Party. Absent a showing of compelling need, the Parties need not produce metadata, with the exception of header fields for email correspondence.

(iii) The description of custodians from whom electronic documents may be collected should be narrowly tailored to include only those individuals whose electronic documents may reasonably be expected to contain evidence that is material to the dispute.

(iv) Where the costs and burdens of e-discovery are disproportionate to the nature of the dispute or to the amount in controversy, or to the relevance of the materials requested, the Arbitrator may either deny such requests or order disclosure on the condition that the requesting Party advance the reasonable cost of production to the other side, subject to the allocation of costs in the final Award.

(v) The Arbitrator may vary these Rules after discussion with the Parties at the Preliminary Conference.

(d) Depositions of percipient witnesses shall be limited as follows:

(i) The limitation of one discovery deposition per side (Rule 17(b)) shall be applied by the Arbitrator, unless it is determined, based on all relevant circumstances, that more depositions are warranted. The Arbitrator shall consider the amount in controversy, the complexity of the factual issues, the number of Parties and the diversity of their interests, and whether any or all of the claims appear, on the basis of the pleadings, to have sufficient merit to justify the time and expense associated with the requested discovery.

(ii) The Arbitrator shall also consider the additional factors listed in the JAMS Recommended Arbitration Discovery Protocols for Domestic Commercial Cases.

(e) Expert depositions, if any, shall be limited as follows: Where written expert reports are produced to the other side in advance of the Hearing, expert depositions may be conducted only by agreement of the Parties or by order of the Arbitrator for good cause shown.

(f) Discovery disputes shall be resolved on an expedited basis.

(i) Where there is a panel of three Arbitrators, the Parties are encouraged to agree, by rule or otherwise, that the Chair or another member of the panel be authorized to resolve discovery issues, acting alone.

(ii) Lengthy briefs on discovery matters should be avoided. In most cases, the submission of brief letters will sufficiently inform the Arbitrator with regard to the issues to be decided.

(iii) The Parties should meet and confer in good faith prior to presenting any issues for the Arbitrator's decision.

(iv) If disputes exist with respect to some issues, that should not delay the Parties' discovery on remaining issues.

(g) The Arbitrator shall set a discovery cutoff not to exceed seventy-five (75) calendar days after the Preliminary Conference for percipient discovery and not to exceed one hundred five (105) calendar days for expert discovery (if any). These dates may be extended by the Arbitrator for good cause shown.

(h) Dispositive motions (Rule 18) shall not be permitted, except as set forth in the JAMS Recommended Arbitration Discovery Protocols for Domestic Commercial Cases or unless the Parties agree to that procedure.

(i) The Hearing shall commence within sixty (60) calendar days after the cutoff for percipient discovery. Consecutive Hearing days shall be established unless otherwise agreed by the Parties or ordered by the Arbitrator. These dates may be extended by the Arbitrator for good cause shown.

(j) The Arbitrator may alter any of these Procedures for good cause.

RULE 17
Exchange of Information

(a) The Parties shall cooperate in good faith in the voluntary and informal exchange of all non-privileged documents and other information (including electronically stored information ("ESI")) relevant to the dispute or claim immediately after commencement of the Arbitration. They shall complete an initial exchange of all relevant, non-privileged documents, including, without limitation, copies of all documents in their possession or control on which they rely in support of their positions, and names of individuals whom they may call as witnesses at the Arbitration Hearing, within twenty-one (21) calendar days after all pleadings or notice of claims have been received. The Arbitrator may modify these obligations at the Preliminary Conference.

(b) Each Party may take one deposition of an opposing Party or of one individual under the control of the opposing Party. The Parties shall attempt to agree on the time, location and duration of the deposition. If the Parties do not agree, these issues shall be determined by the Arbitrator. The necessity of additional depositions shall be determined by the

Arbitrator based upon the reasonable need for the requested information, the availability of other discovery options and the burdensomeness of the request on the opposing Parties and the witness.

(c) As they become aware of new documents or information, including experts who may be called upon to testify, all Parties continue to be obligated to provide relevant, non-privileged documents to supplement their identification of witnesses and experts and to honor any informal agreements or understandings between the Parties regarding documents or information to be exchanged. Documents that were not previously exchanged, or witnesses and experts that were not previously identified, may not be considered by the Arbitrator at the Hearing, unless agreed by the Parties or upon a showing of good cause.

(d) The Parties shall promptly notify JAMS when a dispute exists regarding discovery issues. A conference shall be arranged with the Arbitrator, either by telephone or in person, and the Arbitrator shall decide the dispute. With the written consent of all Parties, and in accordance with an agreed written procedure, the Arbitrator may appoint a special master to assist in resolving a discovery dispute.

(e) In a consumer or employment case, the Parties may take discovery of third parties with the approval of the Arbitrator.

RULE 18
Summary Disposition of a Claim or Issue

The Arbitrator may permit any Party to file a Motion for Summary Disposition of a particular claim or issue, either by agreement of all interested Parties or at the request of one Party, provided other interested Parties have reasonable notice to respond to the request. The Request may be granted only if the Arbitrator determines that the requesting Party has shown that the proposed motion is likely to succeed and dispose of or narrow the issues in the case.

RULE 19
Scheduling and Location of Hearing

(a) The Arbitrator, after consulting with the Parties that have appeared, shall determine the date, time and location of the Hearing. The Arbitrator and the Parties shall attempt to schedule consecutive Hearing days if more than one day is necessary.

(b) If a Party has failed to participate in the Arbitration process, and the Arbitrator reasonably believes that the Party will not participate in the Hearing, the Arbitrator may set the Hearing without consulting with that Party. The non-participating Party shall be served with a Notice of Hearing at least thirty (30) calendar days prior to the scheduled date, unless the law of the relevant jurisdiction allows for, or the Parties have agreed to, shorter notice.

(c) The Arbitrator, in order to hear a third-party witness, or for the convenience of the Parties or the witnesses, may conduct the Hearing at any location. Any JAMS Resolution Center may be designated a Hearing location for purposes of the issuance of a subpoena or subpoena *duces tecum* to a third-party witness.

RULE 20
Pre-Hearing Submissions

(a) Except as set forth in any scheduling order that may be adopted, at least fourteen (14) calendar days before the Arbitration Hearing, the Parties shall file with JAMS and serve and exchange (1) a list of the witnesses they intend to call, including any experts; (2) a short description of the anticipated testimony of each such witness and an estimate of the length of the witness' direct testimony; (3) any written expert reports that may be introduced at the Arbitration Hearing; and (4) a list of all exhibits intended to be used at the Hearing. The Parties should exchange with each other copies of any such exhibits to the extent that they have not been previously exchanged. The Parties should pre-mark exhibits and shall attempt to resolve any disputes regarding the admissibility of exhibits prior to the Hearing.

(b) The Arbitrator may require that each Party submit a concise written statement of position, including summaries of the facts and evidence a Party intends to present, discussion of the applicable law and the basis for the requested Award or denial of relief sought. The statements, which may be in the form of a letter, shall be filed with JAMS and served upon the other Parties at least seven (7) calendar days before the Hearing date. Rebuttal statements or other pre-Hearing written submissions may be permitted or required at the discretion of the Arbitrator.

RULE 21
Securing Witnesses and Documents for the Arbitration Hearing

At the written request of a Party, all other Parties shall produce for the Arbitration Hearing all specified witnesses in their employ or under their control without need of subpoena. The Arbitrator may issue subpoenas for the attendance of witnesses or the production of documents either prior to or at the Hearing pursuant to this Rule or Rule 19(c). The subpoena or subpoena *duces tecum* shall be issued in accordance with the applicable law. Pre-issued subpoenas may be used in jurisdictions that permit them. In the event a Party or a subpoenaed person objects to the production of a witness or other evidence, the Party or subpoenaed person may file an objection with the Arbitrator, who shall promptly rule on the objection, weighing both the burden on the producing Party and witness and the need of the proponent for the witness or other evidence.

RULE 22
The Arbitration Hearing

(a) The Arbitrator will ordinarily conduct the Arbitration Hearing in the manner set forth in these Rules. The Arbitrator may vary these procedures if it is determined to be reasonable and appropriate to do so.

(b) The Arbitrator shall determine the order of proof, which will generally be similar to that of a court trial.

(c) The Arbitrator shall require witnesses to testify under oath if requested by any Party, or otherwise at the discretion of the Arbitrator.

(d) Strict conformity to the rules of evidence is not required, except that the Arbitrator shall apply applicable law relating to privileges and work product. The Arbitrator shall consider evidence that he or she finds relevant and material to the dispute, giving the evidence such weight as is appropriate. The Arbitrator may be guided in that determination by principles contained in the Federal Rules of Evidence or any other applicable rules of evidence. The Arbitrator may limit testimony to exclude evidence that would be immaterial or unduly repetitive, provided that all Parties are afforded the opportunity to present material and relevant evidence.

(e) The Arbitrator shall receive and consider relevant deposition testimony recorded by transcript or videotape, provided that the other Parties have had the opportunity to attend and cross-examine. The Arbitrator may in his or her discretion consider witness affidavits or other recorded testimony even if the other Parties have not had the opportunity to cross-examine, but will give that evidence only such weight as he or she deems appropriate.

(f) The Parties will not offer as evidence, and the Arbitrator shall neither admit into the record nor consider, prior settlement offers by the Parties or statements or recommendations made by a mediator or other person in connection with efforts to resolve the dispute being arbitrated, except to the extent that applicable law permits the admission of such evidence.

(g) The Arbitrator has full authority to determine that the Hearing, or any portion thereof, be conducted in person or virtually by conference call, videoconference or using other communications technology with participants in one or more geographical places, or in a combined form. If some or all of the witnesses or other participants are located remotely, the Arbitrator may make such orders and set such procedures as the Arbitrator deems necessary or advisable.

(h) When the Arbitrator determines that all relevant and material evidence and arguments have been presented, and any interim or partial Awards have been issued, the Arbitrator shall declare the Hearing closed. The Arbitrator may defer the closing of the Hearing until a date determined by the Arbitrator in order to permit the Parties to submit post-Hearing briefs, which may be in the form of a letter, and/or to make closing arguments. If post-Hearing briefs are to be submitted or closing arguments are to be made, the Hearing shall be deemed closed upon receipt by the Arbitrator of such briefs or at the conclusion of such closing arguments, whichever is later.

(i) At any time before the Award is rendered, the Arbitrator may, *sua sponte* or on application of a Party for good cause shown, reopen the Hearing. If the Hearing is reopened, the time to render the Award shall be calculated from the date the reopened Hearing is declared closed by the Arbitrator.

(j) The Arbitrator may proceed with the Hearing in the absence of a Party that, after receiving notice of the Hearing pursuant to Rule 19, fails to attend. The Arbitrator may not render an Award solely on the basis of the default or absence of the Party, but shall require any Party seeking relief to submit such evidence as the Arbitrator may require for the rendering of an Award. If the Arbitrator reasonably believes that a Party will not attend the Hearing, the Arbitrator may schedule the Hearing as a telephonic Hearing and may receive the evidence

necessary to render an Award by affidavit. The notice of Hearing shall specify if it will be in person or telephonic.

(k) Any Party may arrange for a stenographic record to be made of the Hearing and shall inform the other Parties in advance of the Hearing. No other means of recording the proceedings shall be permitted absent agreement of the Parties or by direction of the Arbitrator.

(i) The requesting Party shall bear the cost of such stenographic record. If all other Parties agree to share the cost of the stenographic record, it shall be made available to the Arbitrator and may be used in the proceeding.

(ii) If there is no agreement to share the cost of the stenographic record, it may not be provided to the Arbitrator and may not be used in the proceeding, unless the Party arranging for the stenographic record agrees to provide access to the stenographic record either at no charge or on terms that are acceptable to the Parties and the reporting service.

(iii) If the Parties agree to the Optional Arbitration Appeal Procedure (Rule 34), they shall, if possible, ensure that a stenographic or other record is made of the Hearing and shall share the cost of that record.

(iv) The Parties may agree that the cost of the stenographic record shall or shall not be allocated by the Arbitrator in the Award.

RULE 23
Waiver of Hearing

The Parties may agree to waive the oral Hearing and submit the dispute to the Arbitrator for an Award based on written submissions and other evidence as the Parties may agree.

RULE 24
Awards

(a) The Arbitrator shall render a Final Award or a Partial Final Award within thirty (30) calendar days after the date of the close of the Hearing, as defined in Rule 22(h) or (i), or, if a Hearing has been waived, within thirty (30) calendar days after the receipt by the Arbitrator of all materials specified by the Parties, except (1) by the agreement of the Parties; (2) upon good cause for an extension of time to render the Award; or (3) as provided in Rule 22(i). The Arbitrator shall provide the Final Award or the Partial Final Award to JAMS for issuance in accordance with this Rule.

(b) Where a panel of Arbitrators has heard the dispute, the decision and Award of a majority of the panel shall constitute the Arbitration Award.

(c) In determining the merits of the dispute, the Arbitrator shall be guided by the rules of law agreed upon by the Parties. In the absence of such agreement, the Arbitrator shall be guided by the rules of law and equity that he or she deems to be most appropriate. The Arbitrator may grant any remedy or relief that is just and equitable and within the scope of the Parties' Agreement, including, but not limited to, specific performance of a contract or any other equitable or legal remedy.

(d) In addition to a Final Award or Partial Final Award, the Arbitrator may make other decisions, including interim or partial rulings, orders and Awards.

(e) Interim Measures. The Arbitrator may grant whatever interim measures are deemed necessary, including injunctive relief and measures for the protection or conservation of property and disposition of disposable goods. Such interim measures may take the form of an interim or Partial Final Award, and the Arbitrator may require security for the costs of such measures. Any recourse by a Party to a court for interim or provisional relief shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.

(f) The Award of the Arbitrator may allocate Arbitration fees and Arbitrator compensation and expenses, unless such an allocation is expressly prohibited by the Parties' Agreement. (Such a prohibition may not limit the power of the Arbitrator to allocate Arbitration fees and Arbitrator compensation and expenses pursuant to Rule 31(c).)

(g) The Award of the Arbitrator may allocate attorneys' fees and expenses and interest (at such rate and from such date as the Arbitrator may deem appropriate) if provided by the Parties' Agreement or allowed by applicable law. When the Arbitrator is authorized to award attorneys' fees and must determine the reasonable amount of such fees, he or she may consider whether the failure of a Party to cooperate reasonably in the discovery process and/or comply with the Arbitrator's discovery orders caused delay to the proceeding or additional costs to the other Parties.

(h) The Award shall consist of a written statement signed by the Arbitrator regarding the disposition of each claim and the relief, if any, as to each claim. Unless all Parties agree otherwise, the Award shall also contain a concise written statement of the reasons for the Award.

(i) After the Award has been rendered, and provided the Parties have complied with Rule 31, the Award shall be issued by serving copies on the Parties. Service may be made by U.S. mail. It need not be sent certified or registered.

(j) Within seven (7) calendar days after service of a Partial Final Award or Final Award by JAMS, any Party may serve upon the other Parties and file with JAMS a request that the Arbitrator correct any computational, typographical or other similar error in an Award (including the reallocation of fees pursuant to Rule 31(c) or on account of the effect of an offer to allow judgment), or the Arbitrator may *sua sponte* propose to correct such errors in an Award. A Party opposing such correction shall have seven (7) calendar days thereafter in which to file and serve any objection. The Arbitrator may make any necessary and appropriate corrections to the Award within twenty-one (21) calendar days of receiving a request or fourteen (14) calendar days after his or her proposal to do so. The Arbitrator may extend the time within which to make corrections upon good cause. The corrected Award shall be served upon the Parties in the same manner as the Award.

(k) The Award is considered final, for purposes of either the Optional Arbitration Appeal Procedure pursuant to Rule 34 or a judicial proceeding to enforce, modify or vacate the Award pursuant to Rule 25, fourteen (14) calendar days after service if no request for a correction is made, or as of the effective date of service of a corrected Award.

RULE 25
Enforcement of the Award

Proceedings to enforce, confirm, modify or vacate an Award will be controlled by and conducted in conformity with the Federal Arbitration Act, 9 U.S.C. Sec 1, *et seq.*, or applicable state law. The Parties to an Arbitration under these Rules shall be deemed to have consented that judgment upon the Award may be entered in any court having jurisdiction thereof.

RULE 26
Confidentiality and Privacy

(a) JAMS and the Arbitrator shall maintain the confidential nature of the Arbitration proceeding and the Award, including the Hearing, except as necessary in connection with a judicial challenge to or enforcement of an Award, or unless otherwise required by law or judicial decision.

(b) The Arbitrator may issue orders to protect the confidentiality of proprietary information, trade secrets or other sensitive information.

(c) Subject to the discretion of the Arbitrator or agreement of the Parties, any person having a direct interest in the Arbitration may attend the Arbitration Hearing. The Arbitrator may exclude any non-Party from any part of a Hearing.

RULE 27
Waiver

(a) If a Party becomes aware of a violation of or failure to comply with these Rules and fails promptly to object in writing, the objection will be deemed waived, unless the Arbitrator determines that waiver will cause substantial injustice or hardship.

(b) If any Party becomes aware of information that could be the basis of a challenge for cause to the continued service of the Arbitrator, such challenge must be made promptly, in writing, to the Arbitrator or JAMS. Failure to do so shall constitute a waiver of any objection to continued service by the Arbitrator.

RULE 28
Settlement and Consent Award

(a) The Parties may agree, at any stage of the Arbitration process, to submit the case to JAMS for mediation. The JAMS mediator assigned to the case may not be the Arbitrator or a member of the Appeal Panel, unless the Parties so agree, pursuant to Rule 28(b).

(b) The Parties may agree to seek the assistance of the Arbitrator in reaching settlement. By their written agreement to submit the matter to the Arbitrator for settlement assistance, the Parties will be deemed to have agreed that the assistance of the Arbitrator in such settlement efforts will not disqualify the Arbitrator from continuing to serve as Arbitrator if settlement is not reached; nor shall such assistance be argued to a reviewing court as the basis for vacating or modifying an Award.

(c) If, at any stage of the Arbitration process, all Parties agree upon a settlement of the issues in dispute and request the Arbitrator to embody the agreement in a Consent Award, the Arbitrator shall comply with such request, unless the Arbitrator believes the terms of the agreement are illegal or undermine the integrity of the Arbitration process. If the Arbitrator is concerned about the possible consequences of the proposed

Consent Award, he or she shall inform the Parties of that concern and may request additional specific information from the Parties regarding the proposed Consent Award. The Arbitrator may refuse to enter the proposed Consent Award and may withdraw from the case.

RULE 29
Sanctions

The Arbitrator may order appropriate sanctions for failure of a Party to comply with its obligations under any of these Rules or with an order of the Arbitrator. These sanctions may include, but are not limited to, assessment of Arbitration fees and Arbitrator compensation and expenses; assessment of any other costs occasioned by the actionable conduct, including reasonable attorneys' fees; exclusion of certain evidence; drawing adverse inferences; or, in extreme cases, determining an issue or issues submitted to Arbitration adversely to the Party that has failed to comply.

RULE 30
Disqualification of the Arbitrator as a Witness or Party and Exclusion of Liability

(a) The Parties may not call the Arbitrator, the Case Manager or any other JAMS employee or agent as a witness or as an expert in any pending or subsequent litigation or other proceeding involving the Parties and relating to the dispute that is the subject of the Arbitration. The Arbitrator, Case Manager and other JAMS employees and agents are also incompetent to testify as witnesses or experts in any such proceeding.

(b) The Parties shall defend and/or pay the cost (including any attorneys' fees) of defending the Arbitrator, Case Manager and/or JAMS from any subpoenas from outside parties arising from the Arbitration.

(c) The Parties agree that neither the Arbitrator, nor the Case Manager, nor JAMS is a necessary Party in any litigation or other proceeding relating to the Arbitration or the subject matter of the Arbitration, and neither the Arbitrator, nor the Case Manager, nor JAMS, including its employees or agents, shall be liable to any Party for any act or omission in connection with any Arbitration conducted under these Rules, including, but not limited to, any disqualification of or recusal by the Arbitrator.

RULE 31
Fees

(a) Each Party shall pay its *pro rata* share of JAMS fees and expenses as set forth in the JAMS fee schedule in effect at the time of the commencement of the Arbitration, unless the Parties agree on a different allocation of fees and expenses. JAMS' agreement to render services is jointly with the Party and the attorney or other representative of the Party in the Arbitration. The non-payment of fees may result in an administrative suspension of the case in accordance with Rule 6(c).

(b) JAMS requires that the Parties deposit the fees and expenses for the Arbitration from time to time during the course of the proceedings and prior to the Hearing. The Arbitrator may preclude a Party that has failed to deposit its *pro rata* or agreed-upon share of the fees and expenses from offering evidence of any affirmative claim at the Hearing.

(c) The Parties are jointly and severally liable for the payment of JAMS Arbitration fees and Arbitrator compensation and expenses. In the event that one Party has paid more than its share of such fees, compensation and expenses, the Arbitrator may award against any other Party any such fees, compensation and expenses that such Party owes with respect to the Arbitration.

(d) Entities or individuals whose interests are not adverse with respect to the issues in dispute shall be treated as a single Party for purposes of JAMS' assessment of fees. JAMS shall determine whether the interests between entities or individuals are adverse for purpose of fees, considering such factors as whether the entities or individuals are represented by the same attorney and whether the entities or individuals are presenting joint or separate positions at the Arbitration.

RULE 32
Bracketed (or High-Low) Arbitration Option

(a) At any time before the issuance of the Arbitration Award, the Parties may agree, in writing, on minimum and maximum amounts of damages that may be awarded on each claim or on all claims in the aggregate. The Parties shall promptly notify JAMS and provide to JAMS a copy of their written agreement setting forth the agreed-upon minimum and maximum amounts.

(b) JAMS shall not inform the Arbitrator of the agreement to proceed with this option or of the agreed-upon minimum and maximum levels without the consent of the Parties.

(c) The Arbitrator shall render the Award in accordance with Rule 24.

(d) In the event that the Award of the Arbitrator is between the agreed-upon minimum and maximum amounts, the Award shall become final as is. In the event that the Award is below the agreed-upon minimum amount, the final Award issued shall be corrected to reflect the agreed-upon minimum amount. In the event that the Award is above the agreed-upon maximum amount, the final Award issued shall be corrected to reflect the agreed-upon maximum amount.

RULE 33
Final Offer (or Baseball) Arbitration Option

(a) Upon agreement of the Parties to use the option set forth in this Rule, at least seven (7) calendar days before the Arbitration Hearing, the Parties shall exchange and provide to JAMS written proposals for the amount of money damages they would offer or demand, as applicable, and that they believe to be appropriate based on the standard set forth in Rule 24(c). JAMS shall promptly provide copies of the Parties' proposals to the Arbitrator, unless the Parties agree that they should not be provided to the Arbitrator. At any time prior to the close of the Arbitration Hearing, the Parties may exchange revised written proposals or demands, which shall supersede all prior proposals. The revised written proposals shall be provided to JAMS, which shall promptly provide them to the Arbitrator, unless the Parties agree otherwise.

(b) If the Arbitrator has been informed of the written proposals, in rendering the Award, the Arbitrator shall choose between the Parties' last proposals, selecting the proposal that the Arbitrator finds most reasonable and appropriate in light of the standard set forth in Rule 24(c). This provision modifies Rule 24(h) in that no written statement of reasons shall accompany the Award.

(c) If the Arbitrator has not been informed of the written proposals, the Arbitrator shall render the Award as if pursuant to Rule 24, except that the Award shall thereafter be corrected to conform to the closest of the last proposals and the closest of the last proposals will become the Award.

(d) Other than as provided herein, the provisions of Rule 24 shall be applicable.

RULE 34
Optional Arbitration Appeal Procedure

The Parties may agree at any time to the JAMS Optional Arbitration Appeal Procedure. All Parties must agree in writing for such procedure to be effective. Once a Party has agreed to the Optional Arbitration Appeal Procedure, it cannot unilaterally withdraw from it, unless it withdraws, pursuant to Rule 13, from the Arbitration.

This is Exhibit “C” referred to in the Affidavit of Robert Tannor sworn May 26, 2022.

Commissioner for Taking Affidavits (or as may be)

DANIELLE GLATT

Court File No. CV-21-00658423 L

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, S 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 C NADA 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
(Class Counsel's Motion for Advice and Direction)

THIS MOTION, brought by Wittels McInturff Palikovic, Finkelstein Blankinship, Frei-Pearson, Garber LLP, and Shub Law Firm LLP (collectively, "**Class Counsel**"), in their capacity as counsel to the proposed plaintiff classes (the "**Class Claimants**") in *Donin v. Just Energy Group*

Inc. et al.[1] (the "**Donin Action**") and *Trevor Jordet v. Just Energy Solutions Inc.* [2] (the "**Jordet Action**", together with the Donin Action the "**U.S. Litigation**"), seeking advice and directions of the Court in respect of the Class Claimants' role in these proceedings and the availability of due process, including:

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

(b) an order declaring that the Class Claimants are to be unaffected by this CCAA Proceeding;

(c) in the alternative to the relief sought in paragraph (b), in the event the Class Claimants are to be affected by this CCAA Proceeding:

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

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

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

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

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

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

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

(ii) an order, substantially in the form attached to Class Counsel's notice of motion as Schedule "A", directing the Applicants to provide the Class Claimants with access to any data room established by them in respect of these proceedings, and appointing a mediator/arbitrator to resolve all matters pertaining to the production of documents and access to information for restructuring purposes (as distinct from production for the purpose of the Claims Adjudication Process) together with such other procedural or substantive matters as the parties may agree or the Court may direct;

(iii) in the alternative to the relief sought in paragraph (c)(ii), above, an order:

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

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

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

(3) copies of all of the Applicants' insurance policies that might respond to the Class Claims, the coverage status, the total amount drawn against the policy to date, and a list of competing claims made against the policies;

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

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

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

(7) an updated business plan showing updates of actual results to projected results, an update showing the range of recoveries as per Texas House Bill 4492, the proceeds from

the sale of ecobee Shares, and all other updates included in the business plan since it was published in May 2021; and

(8) a statement of the enterprise value of the company with supporting documents showing methodology, multiples, discount rates used, and comparables relied upon;

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

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

(d) the costs of this motion; and

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

was heard on February 9, 2022 by judicial video conference via Zoom in Toronto, Ontario due to the COVID-19 pandemic, with reasons released on February 23, 2022.

ON READING the Motion Record of Class Counsel dated January 19, 2022, the Factum and Book of Authorities of Class Counsel dated February 4, 2022, the Compendium of Class Counsel dated February 8, 2022, the Motion Record of the Applicants dated February 2, 2022, the Responding Factum of the Applicants dated February 7, 2022, the Factum and Book of Authorities of the DIP Lenders dated February 7, 2022, the Compendium of the Applicants and the DIP Lenders dated February 7, 2022, and the Fifth Report of FTI Consulting Canada Inc., in its capacity as Court Appointed Monitor, dated February 4, 2022, and on hearing the submissions of respective

counsel for the Applicants, Class Counsel, the DIP Lenders, the Monitor, and such other counsel as were present, no one else appearing although duly served, filed:

1. **THIS COURT ORDERS** that this motion is dismissed.

McEwen J.

This is Exhibit “D” referred to in the Affidavit of Robert Tannor sworn May 26, 2022.

Commissioner for Taking Affidavits (or as may be)

DANIELLE GLATT

Court File Number: CV-21-00658423-00CL

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

In the Matter of: Just Energy Group Inc.
Plaintiff(s)

AND

Defendant(s)

Case Management ☑ Yes ☐ No by Judge: McEwen J

Counsel	Telephone No:	Facsimile No:
see counsel slip		

☐ Order ☐ Direction for Registrar **(No formal order need be taken out)**
☐ Above action transferred to the Commercial List at Toronto **(No formal order need be taken out)**

☐ Adjourned to: _____
☐ Time Table approved (as follows):

US Class Counsel brought a motion on February 9/22 primarily seeking the following relief:

(1) an order declaring the class claimants in the Dorin v. Just Energy Group Inc et and the Tardot v. Just Energy Solutions Inc (the "Class Claimants") are to be unaffected by this CCAA Proceeding;

(2) in the alternative, an order directing

23 Feb 22
Date

McEwen J
Judge's Signature

☑ Additional Pages 16

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amongst other things, "a timely schedule and process" leading to the final adjudication of the Donin and Tordet Actions (the "Class Claims") prior to this Court's determination of the Applicants' Plan, or other event to exit the CCAA Proceeding; and,

(3) access to any data room, appointing a mediator/arbitrator to resolve disputes, production of specific documents listed in the Notice of Motion, & a compulsory meeting between the Applicants and U.S. Class Counsel.

Upon the conclusion of the motion I dismissed the motion with reasons to follow. I am now providing those reasons by hand given the time sensitive nature of this matter.

I do not propose to outline the background of this matter,

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in great detail, as the facts are well-known to the stakeholders.

Briefly, the Applicants obtained CCAA protection in March/21. The Applicants have been working with its significant stakeholder in their capital structure to develop a going-concern restructuring plan (the "Plan").

The Applicants provide energy to approximately 950,000 customers in Canada and the U.S. and employ over 1,000 people.

Currently, the Applicants are hopeful that agreement on the Plan can be reached in the near future. A motion date has been set for March 3/22 at which time the Applicants will seek an order to file the Plan and obtain a meeting order. There is some

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possibility that the March 3/22 hearing date will be delayed somewhat if the Plan has not been prepared.

In this regard the Applicants are working with their DIP lenders (who are also the Term Loan Lenders, and the assignee of a large secured supplier claim from BP), the Credit Facility Lenders and Shell who is also a significant, secured supplier.

The Monitor is assisting and is supportive of the attempt to file a Plan.

Against this backdrop, the U.S. Class Counsel bring their motion. Generally, they assert that either the Class Claimants should be unaffected by the CCAA proceeding or, alternatively, that the aforementioned expedited process be

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undertaken before three arbitrators from JAMS (US) to ensure that the Class Claimants can meaningfully participate in the restructuring process and vote at a meeting of creditors considering the Plan.

This would of necessity require a motion on certification, possible summary judgment, outstanding discovery (to date there has been no discovery in the Tandet Action) preparation of experts reports, procedural motions, PTC and trial.[1]

US Class Counsel link their schedule to the Creditors' Meeting where a vote would take place.

Although uncertified, the Class Claims have survived an attempt in the US Courts to have them dismissed outright, although the

 Judges Initials _____

1. A potential appeal could obviously not be dealt with in the proposed timeframe.

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Class Claims have been narrowed in scope.

Also, US Class Counsel have filed two Proofs of Claim, which the Monitor has denied. Each is in the amount of approximately $3.6 billion USD and is an unsecured claim.

Insofar as the motion is concerned, the Applicants oppose the relief sought and are supported by the Monitor.

The DIP Lenders, the Agent/Credit Facility Lenders and Shell also oppose the motion.

I will now turn to the relief sought by U.S. Class Counsel. First, as noted, US Class Counsel seek an order that the Class Claimants should be unaffected by

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this CCAA Proceeding.

General, they submit that the Applicants cannot have it both ways. Namely, they cannot describe the Class Claims as being meritless / frivilous and at the same time resist a motion to allow them to proceed outside of the CCAA Proceeding.

I disagree. If the order was granted it would allow the unsecured Class Claimants to partially dictate the form of the Plan which has not yet been placed before this Court. This runs contrary to the caselaw that allows debtors to determine how they should deal with creditors in a proposed plan — subject to a creditor vote.

In this regard, U.S. Class Counsel have not produced any

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caselaw to support its position. To allow the relief sought would, in essence, elevate the Class Claims above other unliquidated, unsecured, contingent claims who would undoubtedly like to receive similar treatment.

Further, as a practical matter, the DIP Lenders who have been longstanding stakeholders, have clearly stated that they will not support a Plan that leaves the Class Claims unaffected. This is a reasonable position given the nature of the proposed Plan.

Second is the motion directing the speedy determination of the Class Claims utilizing JAMS (U.S.) within the general time frame set out above.

Here U.S. Class Counsel submit that the Applicants ignored them

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for approximately three weeks later in 2021 and US Class Counsel were later told in early Feb/22 that there was no time to conduct the proposed process given the proposed meeting date.

US Class Counsel also submit that there is equity in the Applicants based on their own filings (which is both contested by the Applicants).

Overall, they argue that the process must be fair and reasonable/constructive for all stakeholders; that their timeline is achievable and has been accomplished in other similar cases[2]; and that given the size of the Class Claims that they should be determined before the creditors vote, particularly since they have been disallowed by the Monitor.

Judges Initials TM

2. Essar Steel Algoma (Re) 2016 ONSC 1802, leave refd 2016 ONCA 274; Covia Canada Partnership Corp v PWA Corp 1993 CanLII 9429 (ONSC) aff'd 1993 CanLII 815 (ONCA).

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I do not agree for a number of reasons:

i) I do not accept that the Applicants have "sandbagged" the US Class Counsel based on the record before me. Given the complexity of the restructuring and the timing of the U.S. Class Counsel's proposed adjudication plan it is not surprising that it took a matter of weeks to respond;

ii) within the CCAA Proceeding U.S Class Counsel have not yet contested the disallowance of the Class Claims, thus not triggering the adjudication process provided for in claims procedure order;

iii) I have significant concerns, and very much doubt, that the process proposed by US Class Counsel is viable given the significant number of hearings - including

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certification and damage - that would have to occur in a compressed timeline (it bears noting that in the 3-4 years that the Class Claims have been outstanding they have not completed these stages).

iv) even if such a process was allowed it would be a tremendous distraction from the restructuring which is at a critical juncture;

v) the Applicants' Plan has not yet been offered to the Court, nor has the issue of a meeting order been addressed - the CCAA process should be allowed to progress further before the adjudication proposed by U.S. Class Counsel is considered;

vi) last and overall, I am not of the view that the hotly contested Class Claims (both an

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liability and quantum) ought to adjudicated before other claims and prior to the next contemplated steps in the CCAA Proceeding - in this regard the cases relied upon (Essar and Covia) are distinguishable as per the submissions of the DIP Lenders at paras 34-35 of their Factum.[2a]

The third issue concerns the data room / production of documents and related relief.

US Class Counsel generally submit that given the size and nature of their US Class Claims that it is appropriate that they have access to the data room and the specific documents referenced in para 3(c) of their Notice of Motion.

In this regard US Class Counsel rely on a number of other

 Judges Initials JM

2a. See also the Applicants Factum at para 69.

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CCAA cases in which significant stakeholders were given access to data rooms / documentation.[3]

US Class Counsel have entered into an NDA with the Applicants. With the assistance of the Monitor, certain documentation, including the Applicants' May 21 Business Plan and DIP Term Sheet amongst other documents, have been provided to US Class Counsel. Many requests have not been agreed to by the Applicants.

It bears noting that the secured lenders will not provide their consent to share information/documentation sought which concerns their confidential negotiations.

Further, in this regard the Monitor submits that it, and the Applicants, have been responsive to US Class

 Judges Initials TM

3. As per para 84 of US Class Counsel's factum.

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Class Counsel's request for documentation and that the early documentation withheld relates to information concerning the negotiations. The Monitor, again, supports the Applicants' position.

At the motion, time did not allow for a granular review of the documents produced and sought.

I agree with the Applicants, however, that US Class Counsel should not be allowed to documentation concerning the ongoing negotiations. Further, based on the record I am generally satisfied that adequate production has been made.

If specific documents not related to the negotiations, are still sought I can be spoken to.

With respect to the issue of production I also note that the cases relied

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upon by US Class Counsel are not analogous to the within CCAA Proceeding. For example, this CCAA Proceeding is far different than that in Sino-Forest or Nortel.[4]

For all of the reasons above the motion is dismissed. Generally, I am of the view that the CCAA Proceeding ought to proceed as per the provisions of the Act without the relief sought by US Class Counsel (save and except some limited production if deemed sensible by this Court).

In due course the Plan will be presented to the Court and the question of a meeting order will be dealt with. US Class Counsel will have the opportunity to make submissions. This is

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4. See para 84 of the Applicants' Factum.

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preferrable and fairer to all creditors than to have the Class Claims receive enhanced treatment insofar as an expedited hearing and production are concerned.

It also negates the possibility of derailing the ongoing, sensitive negotiations that are currently ongoing and creating a truncated adjudication of the Class Claims that may well be unachievable in the available time period.

Judges Initials _____

Unofficial Transcription of the Written Reasons of Justice McEwen, February 23, 2022

In the Matter of Just Energy Group Inc.
McEwen J.

U.S. Class Counsel brought a motion on February 9/22 primarily seeking the following relief:

1. an order declaring the class claimants in the Donin v. Just Energy Group Inc et and Jordet v. Just Energy Solutions Inc. (the "Class Claimants") are to be unaffected by this CCAA Proceeding;

2. in the alternative, an order directing amongst other things, a timely schedule and process leading to the final adjudication of the Donin and Jardet Actions (the "Class Claims") prior to this Courts determination of the Applicants Plan, or other event to exit this CCAA Proceeding; and

3. access to any data room/appointing a mediator/arbitrator to resolve disputes/production of specific documents listed in the Notice of Motion / + a compulsory meeting between the Applicants and U.S. Class Counsel.

Upon the conclusion of the motion I dismissed the motion with reasons to follow. I am now providing those reasons by hand given the time sensitive nature of this matter.

I do not propose to outline the background of this matter, in great detail, as the facts are well-known to the stakeholders.

Briefly, the Applicants obtained CCAA protection in March/21. The Applicants have been working with its significant stakeholder in their capital structure to develop a going-concern restructuring plan (the "Plan").

The Applicants provide energy to approximately 950,000 customers in Canada and the U.S. and employ over 1,000 people.

Currently, the Applicants are hopeful that agreement on the Plan can be reached in the near future. A motion date has been set for March 3/22 at which time the Applicants will seek an order to file the Plan and obtain a meeting order. There is some possibility that the March 3/22 hearing date will be delayed somewhat if the Plan has not been prepared.

In this regard the Applicants are working with the DIP Lenders (who are also the Term Loan Lenders, and the assignee of a large secured supplier claim from BP), the Credit Facility lenders and Shell who is also a significant, secured supplier.

The Monitor is assisting and is supportive of the attempt to file a Plan.

Against this backdrop, the U.S. Class Counsel bring their motion. Generally, they assert that either the Class Claimants should be unaffected by the CCAA proceeding or, alternatively, that the aforementioned expedited process be undertaken before three arbitrators from JAMS (US) to ensure that the Class Claimants can meaningfully participate in the restructuring process and vote at a meeting of creditors considering the Plan.

This would, of necessity, require a motion on certification, possible summary judgment, outstanding discovery (to date there has been no discovery in the Jardet Action), preparation of expert reports, procedural motions, PTC and trial.[1]

U.S. Class Counsel link their schedule to the Creditors Meeting where a vote would take place.

Although uncertified, the Class Claims have survived an attempt in the US Courts to have them dismissed outright, although the Class Claims have been narrowed in scope.

Also, U.S. Class Counsel have filed two Proofs of Claims, which the Monitor has denied. Each is in the amount of approximately $3.6 billion USD and is an unsecured claim.

Insofar as the motion is concerned, the Applicants oppose the relief sought and are supported by the Monitor.

The DIP Lenders, the Agent/Credit Facility Lenders and Shell also oppose the motion.

I will now turn to the relief sought by U.S. Class Counsel. First, as noted, U.S. Class Counsel seek an order that the Class Claimants should be unaffected by this CCAA Proceeding.

Generally, they submit that the Applicants cannot have it both ways. Namely, they cannot describe the Class Claims as being meritless/frivolous and at the same time resist a motion to allow them to proceed outside of the CCAA Proceeding.

I disagree. If the order was granted it would allow the unsecured Class Claimants to partially dictate the form of the Plan which has not yet been placed before this Court. This runs contrary to the caselaw that allows debtors to determine how they should deal with creditors in a proposed plan – subject to a creditor vote.

In this regard, U.S. Class Counsel have not produced any caselaw to support its position. To allow the relief sought would, in essence, elevate the Class Claims above other unliquidated, unsecured, contingent claims who would undoubtedly like to receive similar treatment.

Further, as a practical matter, the DIP Lenders who have been longstanding stakeholders, have clearly stated that they will not support a Plan that leaves the Class

[1] A potential appeal could obviously not be dealt with in the proposed timeframe.

Claims unaffected. This is a reasonable position given the nature of the proposed Plan. Second, is the motion directing the speedy determination of the Class Claims utilizing JAMS (US) within the general time frame set out above.

Here U.S. Class Counsel submit that the Applicants ignored them for approximately three weeks late in 2021 and U.S. Class Counsel were later told in early Feb/22 that there was no time to conduct the proposed process given the proposed meeting date.

U.S. Class Counsel also submit that there is equity in the Applicants based on their own filing (which is hotly contested by the Applicants).

Overall, they argue that the process must be fair and reasonable/constructive for all stakeholders; that their timeline is achievable and has been accomplished in other similar cases[2]; and that given the size of the Class Claims that they should be determined before the creditors vote, particularly since they have been disallowed by the Monitor.

I do not agree for a number of reasons:

i) I do not accept that the Applicants have "sandbagged" the U.S. Class Counsel based on the record before me. Given the complexity of the restructuring and the timing of the Class Counsel's proposed adjudication plan it is not surprising that it took a matter of weeks to respond;

ii) Within the CCAA Proceeding U.S. Class Counsel have not yet contested the disallowance of the Class Claims, there not triggering the adjudication process provided for in claims procedure order;

iii) I have significant concerns, and very much doubt, that the process proposed by U.S. Class Counsel is viable given the significant number of hearings – including certification and damage – that would have to occur in a compressed timeline (it bears noting that in the 3-4 years that the Class Claims have been outstanding they have not completed these stages);

iv) even if such a process was allowed it would be a tremendous distraction from the restructuring which is at a critical juncture;

v) the Applicants' Plan has not yet been offered to the Court, nor has the issue of a meeting order been addressed – the CCAA process should be allowed to progress further before the adjudication proposed by U.S. Class Counsel is considered;

vi) last and overall, I am not of the view that the hotly contested Class Claims (both on liability and quantum) ought to adjudicated before other claims and prior to the next contemplated steps in the CCAA Proceeding – in this regard

[2] Essar Steel Algoma (re) 2016 ONSC 1802, leave ref'd 2016 ONCA 274; Covia Canada Partnership Corp. v. PWA Corp. 1993 CanLII 9429 (ONSC) aff'd 1993 CanLII 815 (ONCA)

the cases relied upon (Essar and Covia) are distinguishable as per the submissions of the DIP Lenders at paras 34-35 of their factum [3]

The third issue concerns the data room/production of documents and related relief.

U.S. Class Counsel generally submit that given the size and nature of their Class Claims that it is appropriate that they have access to the data room and the specific documents referenced in para 3(c) of their Notice of Motion.

In this regard U.S. Class Counsel rely on a number of other CCAA cases in which significant stakeholders were given access to data rooms/documentation.[4]

U.S. Class Counsel have entered into an NDA with the Applicants with the assistance of the Monitor, certain documentation, including the Applicants' May 21 Business Plan and the DIP Term Sheet amongst other documents, have been provided to U.S. Class Counsel. Many requests have not been agreed to by the Applicants.

It bears noting that the secured lenders will not provide their consent to share information/documentation sought which concerns their confidential negotiations.

Further, in this regard the Monitor submits that it, and the Applicants, have been responsive to U.S. Class Counsel's request for documentation and that the only documentation withheld relates to information concerning the negotiations. The Monitor, again, supports the Applicants' position.

At the motion, time did not allow for a granular review of the documents produced and sought.

I agree with the Applicants, however, that U.S. Class Counsel should not be allowed the documentation concerning the ongoing negotiations. Further, based on the record I am generally satisfied that adequate production had been made.

If specific documents, not related to the negotiations are still sought I can be spoken to.

With respect to the issue of production. I also note that the cases relied upon by U.S. Class Counsel are not analogous to the within CCAA Proceeding. For example, this CCAA Proceeding is far different than that in Sino-Forest or Nortel[5].

For all of the reasons above the motion is dismissed. Generally, I am of the view that the CCAA Proceeding ought to proceed as per the provision of the Act without the relief sought by U.S. Class Counsel (save and except some limited production if deemed sensible by this Court).

[3] See also the Applicants factum at para 69

[4] As per para 84 of the U.S. Class Counsel's factum

[5] See para 84 of the Applicants' factum

In due course the Plan will be presented to the Court and the question of a monitoring order will be dealt with. U.S. Class Counsel will have the opportunity to make submissions. This is preferable and fairer to all creditors than to have the Class Clams receive enhanced treatment insofar as an expedited hearing and production are concerned.

It also negates the possibility of derailing the ongoing, sensitive negotiations that are currently ongoing and creating a truncated adjudication of the Class Claims that may well be unachievable in the available time period.

McEwan J.

This is Exhibit “E” referred to in the Affidavit of Robert Tannor sworn May 26, 2022.

Commissioner for Taking Affidavits (or as may be)

DANIELLE GLATT

NOTICE OF DISPUTE OF REVISION OR DISALLOWANCE

With respect to Claims against the Just Energy Entities[1] and/or D&O Claims against the Directors and/or Officers of the Just Energy Entities

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

1. **Particulars of Claimant:**

Claims Reference Number: PC-11177-1

Full Legal Name of Claimant (include trade name, if different)

Fira Donin and Inna Golovan (as Representative Plaintiffs)

(the "**Claimant**")

Full Mailing Address of the Claimant:

J. Burkett McIntuff (attorney for Representative Plaintiffs), Wittels McInturff Palikovic

18 Half Mile Rd, Armonk, New York, 10504, United States

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

Other Contact Information of the Claimant:

Telephone Number:	+1 910-476-7253
Email Address:	jbm@wittelslaw.com
Facsimile Number:	+1 914-273-2563
Attention (Contact Person):	J. Burkett McIntuff (attorney for Representative Plaintiffs)

2. **Particulars of original Claimant from whom you acquired the Claim or D&O Claim (if applicable):**

Have you acquired this Claim by assignment?

Yes: ☐ No: ☒

If yes and if not already provided, attach documents evidencing assignment.

Full Legal Name of original Claimant(s): Fira Donin and Inna Golovan (as Representative Plaintiffs)

3. **Dispute of Revision or Disallowance of Claim:**

The Claimant hereby disagrees with the value of its Claim as set out in the Notice of Revision or Disallowance dated January 11, 2022, and asserts a Claim as follows:

Type of Claim	Applicable Debtor(s)	Amount allowed by the Just Energy Entities		Amount claimed by Claimant	
		Amount allowed as secured:	Amount allowed as unsecured:	Secured:	Unsecured:
A. Pre-Filing Claim	Just Energy Entities	$ 0	$ 0	$	$ USD 3,662,444,442.00
B. Restructuring Period Claim		$	$	$	$
C. Pre-Filing D&O Claim		$	$	$	$
D. Restructuring Period D&O Claim		$	$	$	$
E. Total Claim	Just Energy Entities	$ 0	$ 0	$	$ USD 3,662,444,442.00

(Insert particulars of your Claim per the Notice of Revision or Disallowance, and the value of your Claim as asserted by you).

4. Reasons for Dispute:

Provide full particulars of why you dispute the Just Energy Entities' revision or disallowance of your Claim as set out in the Notice of Revision or Disallowance, and provide all supporting documentation, including amount, description of transaction(s) or agreement(s) giving rise to the Claim, name of any guarantor(s) which has guaranteed the Claim, and amount of Claim allocated thereto, date and number of all invoices, particulars of all credits, discounts, etc. claimed, as well as a description of the security, if any, granted by the affected Just Energy Entity to the Claimant and estimated value of such security. The particulars provided must support the value of the Claim as stated by you in item 3, above.

See attached Schedule A.

5. Certification

I hereby certify that:

1. **I am the Claimant or an authorized representative of the Claimant.**
2. **I have knowledge of all the circumstances connected with this Claim.**
3. The Claimant submits this Notice of Dispute of Revision or Disallowance in respect of the Claim referenced above.
4. All available documentation in support of the Claimant's dispute is attached.

All information submitted in this Notice of Dispute of Revision or Disallowance must be true, accurate and complete. Filing false information relating to your **Claim may result in your Claim being disallowed in whole or in part and** may result in further penalties.

Signature:

Name: J. Burkett McInturff

Title: Partner, Wittels McInturff Palikovic

Witness:

(signature)

Susan Russell

(print)

Dated at Armonk, New York this 10 day of February, 2022

This Notice of Dispute of Revision or Disallowance MUST be submitted to the Monitor at the below address **by no later than 5:00 p.m. (Toronto time) on the day that is thirty (30) days after this Notice of Revision or Disallowance is deemed to have been received by you** (in accordance with paragraph 50 of the Claims Procedure Order, a copy of which can be found on the Monitor's website at http://cfcanada.fticonsulting.com/justenergy).

Delivery to the Monitor may be made by ordinary prepaid mail, registered mail, courier, personal delivery, facsimile transmission or email to the address below.

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

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

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

IF YOU FAIL TO FILE A NOTICE OF DISPUTE OF REVISION OR DISALLOWANCE WITHIN THE PRESCRIBED TIME PERIOD, YOUR CLAIM AS SET OUT IN THE NOTICE OF REVISION OR DISALLOWANCE WILL BE BINDING UPON YOU.

Notice of Dispute of Revision or Disallowance

RE: Claim Reference Number: PC-11177-1

Schedule A

INTRODUCTION

Claimants Fira Donin and Inna Golovan (the "Claimants") brought a U.S. class action to redress Just Energy Group Inc. et al. and the other Just Energy Entities' ("Just Energy") deceptive, bad faith, and unfair pricing practices that have caused millions of consumers and businesses across the U.S. to pay considerably more for their electricity and natural gas than they should have paid.

Ms. Donin and Ms. Golovan's claims are joined by and parallel to those of Trevor Jordet (Claim Reference Number: PC-11175-1). Mr. Jordet brought a separate and similar U.S. class action that also seeks to recover for the millions of U.S. consumers and businesses harmed by Just Energy's unlawful conduct.

Regarding the class actions' status, **two** separate U.S. federal judges have concluded that Mses. Donin and Golovan, and Mr. Jordet alleged valid class claims against the Just Energy Entities. Both of Just Energy's Notices of Revision or Disallowance (the "Notice of Disallowance") concede this fact; both acknowledge that **two** different federal judges ruled that the class actions have viable contract claims and have "alleged a right to relief that is not entirely speculative," and that each presents serious liability issues that "could not readily be resolved solely on the pleadings."

These federal judges' conclusions are no surprise to Claimants, Just Energy, or their respective counsel. The class action claims arise from bedrock principals of contract law and are supported by a legion of U.S. case law, regulations, and statutes. The claims also represent paradigmatic class action claims that are readily certifiable (and have been certified on five separate occasions), are pleaded in tandem with increasing regulatory scrutiny (including outright bans) of the exact pricing practices Just Energy employed throughout the U.S., and follow in the footsteps of at least **six** regulatory actions against Just Energy.

What is more, the class claims were supported with a preliminary yet detailed report by an expert in competitive wholesale and retail energy markets. This expert advises the U.S. Air Force, the U.S. Army, and the U.S. Department of Energy when they act as purchasers of electricity and natural gas from competitive retail suppliers in the *same* markets where Just Energy operates. This expert, who also supports U.S. state governments and agencies in energy-related formal proceedings, used the *same* breach of contract theories upheld by the two separate federal judges and calculated that Just Energy overcharged its U.S. customers by US$2,380,337,594. Just as the federal judges agreed, the expert calculated damages from the difference between the prices Just Energy was contractually bound to charge U.S. customers as compared to the prices ultimately charged. Then, because Just Energy's unlawful pricing practices spanned more than a decade, Claimants' counsel applied the pre-judgment interest rules of the class actions' forum

state (New York) and calculated US$1,282,106,848 in unpaid interest. On November 1, 2021, Claimants submitted a class action claim in this proceeding for US$3,662,444,442.

The class action claims are as straightforward as they are strong. Just Energy targets consumers and businesses hoping to save on energy supply costs. Just Energy lures customers with a teaser or fixed rate for a limited period that is initially below its competitors' rates. Once that initial rate expires, Just Energy charges what it represents to be a "variable rate," which under Just Energy's contract must be set according to "business and market conditions." As one federal judge has already observed, "'business and market conditions' has some standard that [Just Energy] had to apply in setting [their] variable pricing but apparently failed to adhere to in [their] pricing."

In reality, however, Just Energy exploits its pricing discretion and the dramatic information asymmetry with its customers to artificially inflate its variable rates without regard to its contractual obligations. As a result, Just Energy's variable rates are consistently substantially higher than those otherwise available in the natural gas and electricity supply markets, and its rates do not fluctuate based on any reasonable interpretation of "business market conditions," such as wholesale market energy prices or the rates other competitive market participants (including local utilities and Just Energy's own fixed rates) charge for energy supply.

At bottom, Just Energy faces grim prospects in the class actions: The decisions of two federal judges sustaining straightforward and meritorious claims, a preliminary yet detailed analysis by a qualified expert showing *billions* in damages, a multitude of case law and regulatory action condemning Just Energy's very practices, five highly similar class certification decisions, and a checkered past of at least at least six regulatory actions.

Considering its slim odds on the merits, Just Energy's Notice of Disallowance predictably takes a blunderbuss approach. In fact, the Notice of Disallowance is essentially an outline of defenses that either this Court or the persons assigned to adjudicate Claimants' claims can evaluate (and discard) with straightforward discovery and limited testimony—just as other factfinders have done in previous similar cases. The Notice of Disallowance also presents no case law or a shred of actual evidence to support its odd contention that the sustained claims in two U.S. class actions are "meritless." It instead offers smokescreens and paper tigers that have been rejected by courts and regulators alike. Musings of counsel as to why Just Energy may not have breached its customer contracts are offered in place of facts, yet such conjecture was already rebuffed by two U.S. federal judges.

Just Energy understands its imminent risk of staggering liability. All five courts that have addressed class certification in cases involving energy supply companies based on the same liability theory Claimants proffer here certified the classes. Nearly every defendant involved in a similar energy class action that has survived a motion to dismiss—as is doubly the case here—settles due to the ease of proving liability and class certification following discovery. No factfinder will look kindly on variable rates that are substantially higher than utility rates and Just Energy's own fixed rates, even though Just Energy's costs for fixed and variable rate customers are the same. Claimants' expert will handily dispose of Just Energy's incredible and counterintuitive claims, including that variable rates are riskier to service than fixed rates and

therefore its exorbitant variable rate margins are justified. Just Energy's internal pricing data and analysis will show the real basis for Just Energy's variable rate margins and the factfinder will easily conclude that Just Energy breached its contracts with its U.S. customers. For these and the other reasons below, Claimants dispute the Notice of Disallowance.

BACKGROUND

I. Procedural History

On October 3, 2017, Claimants Donin and Golovan filed their proposed class action lawsuit *Donin et al. v. Just Energy Group Inc. et al.*, No. 17-cv-5787-WFK-SJB (E.D.N.Y.) in the United States Federal District Court for the Eastern District of New York. (Claimants' counsel also represent ten other Just Energy customers.) Claimants' complaint alleges the Just Energy Entities breached the following: their contractual obligations to base their variable gas and electricity rates on "business and market conditions"; their contractual obligation to charge a specified energy rate; and the implied covenant of duty of good faith and fair dealing. *See, e.g.*, *Donin* Complaint ¶¶ 26-35. Claimants brought their claims on behalf of all Just Energy Entities' U.S. customers that were charged a variable rate for electricity and natural gas supply.

On September 24, 2021, Judge William F. Kuntz of the U.S. District Court for the Eastern District of New York denied the Just Energy Entities' motion to dismiss Claimants' contract claims on behalf of all U.S. customers, ruling *inter alia* that Claimants had adequately alleged that the Just Energy Entities breached their contractual obligation to charge market-based rates, breached their contractual obligation to charge a specified energy rate, and breached the implied covenant of good faith and fair dealing. Decision & Order at 3, 12–15, *Donin* Dkt. No. 111.

That Just Energy Group Inc. was ***not*** dismissed from *Donin*, of course exposes the falsity of Just Energy's claim that *Donin* is limited "should it be certified, to New York customers." Further, and as set forth below, the relevant law is clear that Mses. Donin and Golovan can represent Just Energy customers from states other than New York. Indeed, the Donin/Golovan claim was also submitted on behalf of ten other U.S. consumers represented by the undersigned. Those consumers are from California, Michigan, Texas, and New York.

Regarding the status of discovery in the *Donin* action, Just Energy's claims are demonstrably false. For example, Just Energy oddly posits that "Claimants have missed the relevant deadline set by the New York Court to submit expert reports in the underlying litigation" when the *Donin* docket plainly shows expert discovery was stayed as of May 8, 2019 pending the dismissal ruling. May 8, 2019, Minute Order; *see also* ECF No. 51 at 14:14–17 (THE COURT: "[S]hould the case survive summary -- excuse me, motion to dismiss, we will discuss a timely schedule for conducting expert discovery. Until then, expert discovery is stayed."). Likewise, Just Energy falsely claims that fact discovery closed right before the COVID-19 pandemic. Yet the record is clear that discovery in *Donin* was simply stayed pending the dismissal ruling, which because of the pandemic was not issued until September 24, 2021. *See e.g.,* ECF No. 60 at 12:8–13:2. Just Energy similarly ignores the fact that the Donin/Golovan claim here was also submitted on behalf of ten other U.S. consumers whose class action claims are not pending in *Donin*.

II. Deregulation of State Gas and Electricity Retail Supply Markets

In the 1990s and early 2000s, numerous U.S. states deregulated retail natural gas and electricity supply markets. Retail energy supply deregulation's primary goal was increased competition with an eye to achieving greater consumer choice and lower energy supply rates. The most frequently cited reason for deregulation was lower prices. As a result, in deregulated states across the U.S. consumers and businesses can choose their energy supplier. The new energy suppliers, who compete against local utilities, are known as energy service companies, or "ESCOs."[1] Regardless of the supplier consumers select, the local utility continues to deliver the commodity to consumers' homes. In almost all states, the local utility also bills customers for both the energy supply and delivery costs in a single "consolidated" bill. The only difference to the customer is whether the utility or an ESCO sets the energy supply price.

ARGUMENT

III. Just Energy Breached Its Contracts with U.S. Customers

Just Energy's Notice of Disallowance wrongly argues that liability presents a "substantial hurdle" for the classes, namely because Just Energy's customer contract "expressly provides that it does not guarantee the financial savings" and because "local utility rates are not an appropriate barometer by which to measure the rates of energy service companies[.]" As described below, these arguments miss the mark and the classes will prevail on the merits. *See, e.g.*, *Melville v. Spark Energy, Inc.*, No. 15-8706, 2016 WL 6775635, at *5 (D.N.J. Nov. 15, 2016) ("[B]ecause [the local utility] is a supplier in the energy market; its prices thus serve as at least partial indications of the market rate and are relevant despite the lack of a savings guarantee clause.").

A. Default Utility Prices Are a Valid Benchmark

In what is best characterized as a "see what sticks" argument, Just Energy briefly claims (without support) that utility rates cannot serve as proper benchmarks for variable prices based on "business and market conditions." Yet courts and public service commissions throughout the U.S. have repeatedly (and resoundingly) rejected this claim.

By way of background, consumers that do not switch to an ESCO continue to receive supply from their local utility. The utilities charge supply rates consistent with market conditions in the competitive wholesale market, plus other wholesale costs, namely transmission, capacity, ancillary, congestion, and storage costs (for electric) and transportation and distribution costs (for gas)—without any markup or profit. Because utility supply rates do not include any profits, they are pure reflections of wholesale market costs and associated costs over time. Additionally,

[1] The acronyms for competitive energy supply companies vary from state to state. For example, in Indiana and Illinois, independent natural gas service companies are known as alternative retail natural gas suppliers or "AGS." In Pennsylvania, independent natural gas supply companies are known as natural gas suppliers or "NGS."

because the utility is the primary supplier and competitor in virtually all utility regions, its rates by definition represent retail electricity and natural gas market pricing.

By contrast, ESCOs like Just Energy have a tactical advantage over the regulated utilities as they can purchase electricity and natural gas from any number of markets using any number of strategies, and therefore their costs for purchasing electricity and natural gas should at the very least track—if not undercut—utility prices. For example, ESCOs such as Just Energy can employ various energy acquisition strategies including: (i) owning energy production and generation facilities; (ii) purchasing energy from wholesale marketers and brokers at the price available at or near the time it is used by the consumer; (iii) and purchasing energy ahead of time, either by purchasing energy to be used in the future or by purchasing futures contracts for the delivery at a predetermined price. Deregulation's purpose is to allow ESCOs to use these and other arbitrage opportunities to benefit consumers.

Additionally, because of deregulation, ESCOs like Just Energy do not need regulatory approval of their rates or the method by which they set their rates. Customers are protected in the competitive market by enforcement of the terms of their contracts. While utility supply is typically procured from the competitive wholesale market, ultimately the utility may charge no more than allowed by the regulator. ESCO customers do not have this safeguard. Consumers must rely on their contracts with the ESCOs to ensure that they receive the promised price.

Considering these realities, ESCOs should be able to offer rates competitive with, or substantially lower than, utilities, and in fact many do. Indeed, Just Energy's fixed rates are competitive with, and in fact almost always lower than, contemporaneous utility rates. Therefore, while utility rates may not precisely match Just Energy's rates, they should be commensurate. But Just Energy's variable rates are not remotely commensurate with utility rates because they are always substantially higher.

In fact, contrary to its contractual obligation, Just Energy's rates are substantially higher than its own fixed rates, other ESCOs' rates, and local utilities' rates, and are wholly disconnected from wholesale electricity and natural gas prices. Instead, Just Energy's variable rates are based on factors other than market conditions.

Further, there is no good faith justification for charging customers a variable rate that is outrageously higher than the rates Just Energy charges its fixed rate customers. Just Energy routinely predicts with reasonable accuracy the energy needs of its variable rate customers, and because it has access to multiple variable rate procurement strategies, its costs for serving variable rate customers and fixed rate customers are not substantially different. The only reason Just Energy's variable rates are so much higher than its fixed rates is that it engages in profiteering and price gouging, a stark demonstration of bad faith pricing practices.

In its Notice of Disallowance, Just Energy first claims that local utilities are improper benchmarks because ESCOs occasionally offer tangential products or services. This is balderdash. New York's Public Service Commission (the "NYPSC") recently examined—and forcefully rejected—this precise contention from Just Energy and other ESCOs, who were represented by Just Energy's U.S. counsel at bar.

With respect to value-added products, NYPSC staff found that "these sorts of value-added products is at best de minimis and **does not explain away the significantly higher commodity costs charged by so many ESCOs**."[2] Similarly, the NYPSC found that the "claim that at least a portion of the significant delta between ESCO and utility charges is explained by ESCOs offering renewable energy is disingenuous at best. ESCOs may be charging a premium for green energy, but they are not actually providing a significant amount of added renewable energy to customers in New York."[3] In fact, the NYPSC found it "troubling" that even after considering reams of evidence "neither ESCOs nor any other party have shown . . . that ESCO charges above utility rates were generally – or in any specific instances – justified."[4]

Second, in its Notice of Disallowance, Just Energy claims that "[l]ocal utility commodity prices do not reflect wholesale energy prices" because utilities "are permitted to defer charges (with the approval of the regulator) to smooth price volatility." The NYPSC rejected this claim as well:

> [S]ome ESCOs complain that out-of-period adjustments made by utilities, with the Commission's approval, make it impossible for ESCOs to be competitive with the utilities, particularly in the context of variable-rate gas commodity service.[] These ESCOs do not acknowledge, however, that out-of-period adjustments by the utilities ultimately are a zero-sum game: for any downward adjustment made to a customer's bill, a corresponding out-of-period increase must be made. This process moderates fluctuations in customer bills that otherwise would result from market activity.[] Thus, out-of-period adjustments do not unfairly provide the utilities a pricing advantage when a price comparison is made on an annual basis.[5]

Third, Just Energy argues that local utilities do not compete with ESCOs because they do not face the same costs, risks, and market forces as ESCOs. To the contrary, as explained above, ESCOs have significant purchasing and pricing advantages over utilities.

Fourth, Just Energy wrongly contends that a comparison is not possible because "utility commodity prices do not include reasonable profit margins" and overhead. The NYPSC staff explained that these costs do "not justify the significant overcharges" ESCOs levied on consumers.[6] The ultimate factfinder might understand that the contract's "business and market

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[2] Case No. 12-M-0476, Department of Public Service Staff Unredacted Initial Brief (Mar. 30, 2018), at 87 (emphasis added).

[3] Case No. 12-M-0476, Department of Public Service Staff Unredacted Initial Brief (Mar. 30, 2018), at 69.

[4] Case No. 12-M-0476, Order Adopting Changes to the Retail Access Energy Market and Establishing Further Process, New York Public Service Commission (Dec. 12, 2019) at 30.

[5] Case No. 12-M-0476, Order Adopting Changes to the Retail Access Energy Market and Establishing Further Process, New York Public Service Commission (Dec. 12, 2019) at 43 (citations in footnotes omitted).

[6] Case No. 12-M-0476, Department of Public Service Staff Unredacted Initial Brief (Mar. 30, 2018), at 37.

conditions" language permits Just Energy a reasonable margin. However, such profits must be consistent with others' profit margins, and Just Energy's profiteering cannot be so extreme that its rate bears no relation to market prices.

Finally, Just Energy asserts that "[g]eneral energy market conditions affect ESCOs and local utilities differently," and that ESCOs might consider competitors' prices, customer retention, subsidizing the fixed rates, and value into consideration when setting their rates. Yet Just Energy's contract does not bear such weight, and these exact defenses have been resoundingly rejected by many courts. *See, e.g.*, *Hamlen v. Gateway Energy Servs. Corp.*, No. 16-3526, 2017 WL 6398729, at *7 (S.D.N.Y. Dec. 8, 2017) (contract breached when ESCO considered, but did not disclose, customer retention and attrition as factors when setting variable rates).

Recently, U.S. state regulators have begun to make clear that variable rate schemes like Just Energy's are antithetical to deregulation's purpose and provide no value to consumers or the market. For instance, the NYPSC recently concluded:

> Because customers receive no value when they pay a premium for variable-rate commodity-only service from ESCOs, ESCOs will be prohibited from offering variable-rate, commodity-only service except where the offering includes generated savings. As has been demonstrated in these proceedings in the context of low-income customer protection, it is possible for some ESCOs to serve customers at a guaranteed savings. Saving customers money was a crucial policy goal articulated by the Commission when the retail access market was initially opened. Thus, rather than prohibit variable-rate, commodity-only offerings, such offerings will be permitted only if the ESCO guarantees to serve the customer at a price below the price charged by the utility on an annually reconciled basis.[7]

Similarly, the Connecticut Public Service Commission requested that "all Variable Plans for residential and business customers" be eliminated, citing the recent significant increases to generation rates under these plans in support of its request.[8]

As discussed below, countless courts throughout the country likewise agree that contemporaneous utility rates serve as a proper barometer for business and market conditions and have sustained claims based on the differentials. *See, e.g.*, *Mirkin v. XOOM Energy, LLC*, 931 F.3d 173, 178 n.2 (2d Cir. 2019) (holding that "[b]ecause utility companies like Con Edison participate on the wholesale energy market, their rates are another reflection of the Market Supply Cost."); *see also id.* (sustaining breach of contract claim where the defendant ESCO deviated from the leading public utility); *Stanley v. Direct Energy Servs., LLC*, 466 F. Supp. 3d 415, 426 (S.D.N.Y. 2020) ("there is a reasonable contract interpretation that 'Market' meant that Defendant's variable rate would be tethered to some degree to supply costs or to competitors'

[7] Case No. 15-M-0127, Order Adopting Changes to the Retail Access Energy Market and Establishing Further Process, New York Public Service Commission (Dec. 12, 2019) at 39-40.

[8] PURA Establishment of Rules for Electric Suppliers and EDCs Concerning Operations and Marketing in the Electric Retail Market, Connecticut Public Regulatory Authority Docket No. 13-07-18 (Nov. 5, 2014).

rates . . . upward variation from local utility rates may also demonstrate how Defendant's consumer rates are materially disconnected from their supply costs."); *Oladapo v. Smart One Energy, LLC*, No. 14-cv-7117, 2016 WL 344976, at *4 (S.D.N.Y. Jan. 27, 2016) ("the fact that [the ESCO's] rates consistently rose over time, while those set by [local utility] fluctuated, indicates that [the ESCO] was not setting its rates in response to 'changing gas market conditions'"); *Melville v. Spark Energy, Inc.*, No. 15-cv-8706, 2016 WL 6775635, at *5 (D.N.J. Nov. 15, 2016) ("because [local utility] is a supplier in the energy market; its prices thus serve as at least partial indications of the market rate and are relevant despite the lack of a savings guarantee clause."); *Landau v. Viridian Energy PA LLC*, 223 F. Supp. 3d 401, 410 (E.D. Pa. 2016) (finding breach of contract where rates were higher than the local utility's rates); *Melville v. Spark Energy, Inc.*, No. 15-cv-8706, 2016 WL 6775635, at *3 (D.N.J. Nov. 15, 2016) ("Here, the [contract] states that the flex-rate plan uses a rate that 'may vary according to market conditions.' Plaintiffs argue that rates charged . . . were not market-based and, in support, list the rates charged by [the ESCO] in comparison to [the utility] during several months from 2013 to 2014. . . . Such evidence supports the allegation that [the ESCO's] prices were untethered to those of the market at large."); *Chen v. Hiko Energy, LLC*, No. 14-cv-1771, 2014 WL 7389011, at *4 (S.D.N.Y. Dec. 29, 2014) ("Given the dramatic differences in pricing between defendant and [the local utility], it is plausible defendant's rates were not, in fact, reflective of the wholesale cost of electricity or gas, market-related factors, and . . . "costs, expenses and margins.").

B. Breach of Contract

To state a breach of contract claim, the classes need only satisfy three elements: "the existence of a contract, including its essential terms; breach of a duty imposed by the contract; and resultant damages." *Jordet*, 505 F. Supp. 3d at 222 (citations omitted). The classes allege that Just Energy breached its contract with class members, which represented that variable rates were priced based on the "business and market conditions," because Just Energy's variable rates bear no semblance to either wholesale prices or competitors' rates.

The classes will use numerous comparators to demonstrate that Just Energy's prices materially differed from metrics that could be reasonable interpretations of the use of the phrase "business and market conditions" in Just Energy's contracts.

First, the classes will use comparisons to class members' local utility rates, which countless courts have held is a proper comparator. In *Mirkin v. XOOM*, the U.S. Court of Appeals for the Second Circuit concluded that consumers could plausibly state a claim for breach of contract because the defendant ESCO deviated from the leading public utility by "up to" sixty percent. 931 F.3d at 178. The Second Circuit also plainly held that utilities are a reflection of wholesale market costs that can be used to evaluate whether an ESCOs rates are reflective of such costs. *Id.* at 178 n.2 ("Because utility companies like Con Edison participate on the wholesale energy market, their rates are another reflection of the Market Supply Cost."). As one federal judge held in *Chen v. Hiko Energy, LLC*:

> Plaintiffs' contracts provided that defendant would charge variable monthly rate reflecting the wholesale cost of electricity or gas, as well as various "market-related

> factors, plus all sales and other applicable taxes, fees, charges or other assessments and HIKO's costs, expenses and margins." . . . But the [complaint] alleges the electricity rate defendant charged Chen in February 2014 was nearly triple [the local utility] . . . **Given the dramatic differences in pricing between defendant and [the utility], it is plausible defendant's rates were not, in fact, reflective of the wholesale cost of electricity or gas, market-related factors, and defendant's "costs, expenses and margins."**

No. 14-cv-1771, 2014 WL 7389011, at *4 (S.D.N.Y. Dec. 29, 2014) (emphasis added); *see also Melville*, 2016 WL 6775635, at *5 ("[B]ecause [the local utility] is a supplier in the energy market, its prices thus serve as at least partial indications of the market rate and are relevant despite the lack of a savings guarantee clause."); *Stanley*, 466 F. Supp. 3d at 427 ("'This incomplete and confusing explanation for calculating variable market-based rates could lead a reasonable consumer to believe that he or she would receive a variable market rate, *i.e.*, one that was competitive with those charged by other ESCOs.'") (quoting *Claridge v. N. Am. Power & Gas, LLC*, No. 15-cv-1261, 2015 WL 5155934, *4 (S.D.N.Y. Sept. 2, 2015)).

Second, the classes will use wholesale prices and Just Energy's own costs to demonstrate that Just Energy's variable rate was inconsistent and significantly higher than wholesale costs. *See, e.g.*, *Landau*, 223 F. Supp. 3d at 408-09 (E.D. Pa. 2016) (where "[an ESCO's] rates increased or stayed the same even when the average wholesale market price for the region decreased[,]" breach of contract claim may proceed to trial); *Stanley v. Direct Energy Servs., LLC*, 466 F. Supp. 3d at 426 (S.D.N.Y. 2020) ("[T]here is a reasonable contract interpretation that 'Market' meant that Defendant's variable rate would be tethered to some degree to supply costs or to competitors' rates . . . upward variation from local utility rates may also demonstrate how Defendant's consumer rates are materially disconnected from their supply costs."); *Mirkin*, 2016 WL 3661106, at *8 (breach of contract when contract provided that variable rates will be "based on wholesale market conditions" and variable rate failed to track wholesale market rates) (citing *Sanborn v. Viridian Energy, Inc.*, No. 14-cv-1731 (D. Conn.), and *Steketee v. Viridian Energy, Inc.*, No. 15-cv-585 (D. Conn.)); *Edwards v. N. Am. Power & Gas, LLC*, 120 F. Supp. 3d 132, 42-43 (D. Conn. 2015) (sustaining contract claim where contract promised "[t]he variable rate may increase or decrease to reflect the changes in the wholesale power market" and the plaintiff alleged that "the rates [the ESCO] charged were significantly higher than the wholesale market rate and did not always increase or decrease when the wholesale market rates did.").[9]

Third, the classes will use comparisons to Just Energy's contemporaneous fixed rates and other ESCOs' contemporaneous rates "to support her allegation that Defendant's variable rates are untethered to wholesale market supply costs" and to show "that Defendant charges higher variable rates than other ESCOs." *Stanley*, 466 F. Supp. 3d at 427. Just Energy likewise does not take issue with Claimants' use of Just Energy's fixed rates and other ESCOs' rates as comparators; rather, it specifically demands the latter.

[9] This of course easily defeats the Notice of Disallowance's claim that utility rates cannot serve as a yardstick for Texas wholesale rates because "customers in Texas cannot obtain power directly from a local utility (they must obtain power from a retailer)." That Just Energy's rates were consistently and substantially higher than wholesale costs and Just Energy's own costs will show breach even though Texas customers must purchase from a retailer.

Just Energy's claim that its contracts do not guarantee savings is similarly of no moment. Indeed, the same argument has been quickly dispatched by numerous courts.

> Agway's agreement represents that the variable monthly rate "shall each month reflect the cost of electricity acquired by Agway from all sources . . . related transmission and distribution charges and other market-related factors, plus all applicable taxes, fees, charges or other assessments and Agway's costs, expenses and margins." **Defendant argues that it has not been misleading because it never represented that savings were guaranteed. But this is inapposite to whether Defendant in fact charged rates to Plaintiff and putative class members that were based only upon those factors explicitly enumerated in the contract, as required by the contract.** . . . Plaintiff has plausibly alleged that Agway's rates were "not in fact competitive market rates based on the wholesale cost of electricity" or the factors set forth in the agreement.

Gonzales v. Agway Energy Servs., LLC, No. 18-cv-235, 2018 WL 5118509, at *4 (N.D.N.Y. Oct. 22, 2018) (emphasis added).

No factfinder will interpret "business and market conditions" to mean that Just Energy can price gouge—so much so that the rates bear no resemblance to wholesale costs and competitors' rates.

C. Breach of Implied Covenant of Good Faith and Fair Dealing

"An implied covenant of good faith and fair dealing is contained in all contracts . . . , and breach of that duty is subsumed in the breach of contract claim." *Jordet*, 505 F. Supp. 3d at 222; *cf. Stanley*, 466 F. Supp. 3d at 428 (all contracts contain an implied covenant of good faith and fair dealing) (citing *Arcadia Bioscis., Inc. v. Vilmorin & Cie*, 356 F. Supp. 3d 379, 399 (S.D.N.Y. 2019)). "The implied covenant is 'breached when a party acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement.'" *Stanley*, 466 F. Supp. 3d at 428 (quoting *Skillgames, LLC v. Brody*, 767 N.Y.S.2d 418, 423 (2003); citing *Moran v. Erk*, 11 N.Y.3d 452 (2008) ("The implied covenant . . . embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.")). "'In order to find a breach of the implied covenant, a party's action must directly violate an obligation that may be presumed to have been intended by the parties.'" *Id.* at 428-29 (quoting *Gaia House Mezz LLC v. State Street Bank & Tr. Co.*, 720 F.3d 84, 93 (2d Cir. 2013)).

Just Energy "'violated the covenant by exercising [any price-setting] discretion [it may have had] in bad faith and in a manner inconsistent with [Claimants'] reasonable expectations.'" *Stanley*, 466 F. Supp. 3d at 429 (quoting *Claridge*, 2015 WL 5155934, at *6; citing *Hamlen*, 2017 WL 892399, at *5 (noting that the plaintiff had sufficiently "alleged [that the] defendant acted in bad faith by exercising its discretion to charge unreasonable rates to profiteer off its customers, who reasonably expected to pay [the] defendant competitive prices for natural gas" and that "the implied covenant of good faith and fair dealing requires [the] defendant to seek a profit that is commercially reasonable")).

As explained above, the classes will be able to prove that Just Energy's variable rate profit margins are so unreasonable as to be set in bad faith. The classes will demonstrate Just Energy's bad faith by, *inter alia*, showing the stark disparity with Just Energy's fixed rate (which represents an actual market-based rate) profit margins and variable rate profit margins.

IV. Just Energy's Criticisms of Claimants' Expert Report Are Easily Dispatched

Offering no facts and little substantive argument, Just Energy contends that Claimants' damages estimates, based on the report of their expert Serhan Ogur, Ph.D (the "Ogur Report"), are speculative and inflated. Claimants, who have not yet completed discovery in the underlying actions, made clear that their damages estimations were just that, estimations based on the information to which they currently have access. Accordingly, Claimants have been aggressively pushing for disclosures by Just Energy so that the parties and the factfinder can have a clear and accurate understanding of the number of aggrieved U.S. consumers and the scope of their damages. These are simple facts based on data which Just Energy could easily disclose to resolve most, if not all, of its concerns regarding the scope and size of the classes. Claimants are confident that either this Court or the persons assigned to adjudicate Claimants' claims will require the disclosure of such information.

Critically, Just Energy's attacks on the Ogur Report at best represent a diminution of the size and scope of the classes and their damages; these criticisms of the Ogur Report do not justify complete claim denial. It is unclear why the Monitor would support total claim denial based on Just Energy's claim that the U.S. classes are owed less than the Claimants' expert estimated.

Indeed, none of the criticisms raised by Just Energy justifies denial of the Claimants' claims.

First, Just Energy argues that the Ogur Report erred by using utility rates as a baseline for the rates Just Energy should have charged under the terms of its customer contract. As discussed above, this critique has no merit—after all utility rates are called the "price to compare" by utilities and regulators precisely because those rates represent the proper benchmark for customer comparisons. This attack on the Ogur Report is also a red herring, as the report's "overcharge theory is based on the difference between the electricity and natural gas rates the affected class were charged versus what they would have been charged if Just Energy's rates were based on business and market conditions." Ogur Report at 10. During the adjudication process, Claimants will not only rely on utility rates as a price to compare, but they will also show, among other measures, that Just Energy's margins are excessive based on Just Energy's actual costs and the margins it charges customers on fixed rate contracts (which carry the same if not higher costs to Just Energy as compared to its variable rate customers).

Second, Just Energy complains that the Ogur Report includes commercial customers, and it asserts without support that commercial contracts are different than residential contracts. Notably, neither the *Donin/Golovan* nor the *Jordet* Actions is limited to residential customers, and the Donin and Golovan contracts by their own terms apply to both "Home" and "Business" customers. The same is true for the Jordet contract. Again, this is a problem of Just Energy's own making. Producing the applicable contracts will allow the parties and the factfinder to easily determine precisely which customers are subject to which pricing terms.

Third, while conceding that the breach of contract claims against Just Energy Group, Inc. were sustained, Just Energy wrongly argues that "any damages must be limited to customers who were contractual counterparties with those defendants." Just Energy Group, Inc. is the parent company of all U.S. Just Energy entities that contract with U.S. consumers and **lost** its motion to dismiss the *Donin* breach of contract claims that were brought directly against Just Energy Group, Inc. Just like for New York, Just Energy Group, Inc. is responsible for the damages to customers across the U.S. Moreover, a very large portion of the gas and electricity customer class resides in New York.

Fourth, Just Energy curiously claims that Texas customers are somehow not included in the sustained class action breach of contract claims. Yet as discussed above, the undersigned represents consumers from Texas, and the *Donin* dismissal opinion dis not limit the nationwide scope of the classes' claims in any way.

Fifth, Just Energy posits without factual support that Dr. Ogur's assumed percentage of variable versus fixed rate customers is not accurate. This is another simple fact that Just Energy will be required to disclose as a part of the adjudication process. Just Energy also claims that a smaller percentage of customers enroll directly into variable rate contracts as opposed to customers initially on fixed rate contracts who roll over to variable rates after the fixed rate expires. This is a curious contention given that both the *Donin*/*Golovan* and *Jordet* Actions explicitly plead that they had fixed rate contracts that rolled over to variable rates. To the extent there are customers that were on variable rate contracts from the outset, pre-adjudication discovery will reveal that the operative contract language is the same.

Sixth, Just Energy complains (without support or specification) that the Ogur Report covers periods outside the statute of limitations. This is a straightforward issue that will be resolved in the adjudication process.

Seventh, Just Energy contends that the rate of damages after 2018 was less than before 2018. But this argument relies on the faulty notion, discussed above, that only straight variable rate contracts, as opposed to fixed-to-variable rate rollover contracts, are part of the classes. Again, the number of class members and their respective damages and usage will be easily determined when Just Energy produces the requested data in pre-adjudication discovery.

Eighth, Just Energy complains that extrapolating damages from those suffered by the named plaintiffs in the *Donin/Golovan* and *Jordet* Actions is inappropriate because the sample size is too small. But as noted in the Ogur Report, final damages calculations will be based on forthcoming pre-adjudication discovery. Relatedly, Just Energy contends that the difference between their rates and Pennsylvania and New York utility rates may not be the same as in other states. Again, this is an issue easily resolved with pre-adjudication discovery.

Ninth, Just Energy claims that Dr. Ogur is somehow barred from the straightforward data that can be used to calculate class-wide damages without disclosing that expert discovery in *Donin* was stayed pending the dismissal ruling. *See* ECF No. 51 at 14:14–17 (THE COURT: "[S]hould

the case survive summary -- excuse me, motion to dismiss, we will discuss a timely schedule for conducting expert discovery. Until then, expert discovery is stayed.").

Finally, Just Energy quips that Claimants' prejudgment interest calculations were flawed because New York's rate is higher than those of other states. This is largely a math issue to be resolved after pre-adjudication discovery.

None of the arguments proffered in response to the estimations made in the Ogur Report justify wholesale denial of Claimants' claims, and all concerns raised by Just Energy will all be addressed after pre-adjudication discovery and in the adjudication process.

V. The Classes Will Be Certified

The Notice of Disallowance curiously posits that class certification presents a "substantial hurdle." Yet the five courts that have addressed a contested motion to certify a class of ESCO customers overcharged under the terms of their customer agreements easily granted the motions. *Bell v. Gateway Energy Services Corp.*, No. 31168/2018 (Rockland Cnty. Super. Ct. Jan. 8, 2021), NYSCEF Doc. No. 152; *Claridge v. N. Am. Power & Gas, LLC*, No. 15-cv-1261, 2016 WL 7009062 (S.D.N.Y. Nov. 30, 2016) (plaintiff was represented by co-counsel *Roberts v. Verde Energy, USA, Inc.*, No. X07HHDCV156060160S, 2017 WL 6601993 (Conn. Super. Ct. Dec. 6, 2017), *aff'd*, 2019 WL 1276501 (Conn. Super. Ct. Feb. 1, 2019); and *BLT Steak LLC v. Liberty Power Corp, L.L.C.*, No. 151293/2013 (N.Y. Cnty., Super. Ct Aug. 14, 2020), NYSCEF Doc. No. 376 (plaintiff was represented by co-counsel); *Martinez v. Agway Energy Services, LLC*, No. 18-cv-00235, 2022 WL 306437 (N.D.N.Y. Feb. 2, 2022) (plaintiff represented by co-counsel). Claimants are confident that the factfinder here will follow suit.

There are few cases better suited for class certification. The classes' claims arise out of uniform misrepresentations regarding the pricing methodology for Just Energy's variable rate made in its standard customer contract. Just Energy provides its prospective electricity and natural gas customers with its standard contract prior to each contract's initiation. If the customer accepts the agreement, the it becomes the operative contract. Additionally, not only are the contractual commitments concerning Just Energy's variable rate uniform, but the resultant injury to the classes is also uniform because when Just Energy sets its variable rates, it uses the same rate for all customers within each utility region, regardless of which version of the contract governs its relationship with each variable rate customer. For these and the other reasons described below, the prerequisites to class certification will be easily met.[10]

A. The Proposed Class Satisfies the Rule 23(a) Factors.

Rule 23(a) requires that a plaintiff seeking class certification demonstrate that the proposed class satisfies the following four factors:

> (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the

[10] Claimants' analysis herein demonstrates compliance with the most exacting class certification standards, Rule 23 of the U.S. Federal Rules of Civil Procedure (the "Rules").

representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a); *accord Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 345 (2011).

i. Numerosity

Rule 23(a)(1) requires that "the class is so numerous that joinder of all members is impracticable." "[N]umerosity is presumed where a putative class has forty or more members." *Shahriar v. Smith & Wollensky Rest. Grp.*, 659 F.3d 234, 252 (2d Cir. 2011). Just Energy had millions of customers on variable rates during the relevant period. There is numerosity here.

ii. Commonality

Rule 23(a)(2) requires a showing of "questions of law or fact common to the class." "Commonality is satisfied where a single issue of law or fact is common to the class." *In re Scotts EZ Seed Litig.*, 304 F.R.D. at 405 (quoting *In re IndyMac Mort.-Backed Sec. Litig.*, 286 F.R.D. 226, 233 (S.D.N.Y. 2012)). "[E]ven a single common question will do." *Dukes*, 564 U.S. at 346 (citation, internal quotation marks, and brackets omitted).

Here, the class' claims largely turn on whether or not Just Energy set its rate based on "business and market conditions," as required in the customer contract. Because all class members were made the same promise, answering this common question will dominate this action. As one federal judge has held in certifying virtually identical claims, "[t]he claims of the proposed class turn on the 'common contention' that [Defendant] misleadingly described its method for calculating variable monthly rates, a claim that 'is capable of classwide resolution . . .' Plaintiff[] ha[s] therefore shown common questions of law and fact under Rule 23(a)(2)." *Claridge*, 2016 WL 7009062, at *4 (citing *Dukes*, 564 U.S. at 350).[11] And in any event, "[c]ommonality is not defeated because consumers interpreted arguably vague and misleading language in different ways." *Claridge*, 2016 WL 7009062, at *3.

iii. Typicality

Rule 23(a)(3) requires "the claims of the class representatives be typical of those of the class, and is satisfied when each class member's claim arises from the same course of events, and each

[11] Just Energy half-heartedly argues that individual damages claims arising out of Just Energy's various tangential products and services will predominate over common issues. However, it is well established that differences in individual damages do not preclude class certification. *See, e.g.*, *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 671 (7th Cir. 2015) ("It has long been recognized that the need for individual damages determinations at this later stage of the litigation does not itself justify the denial of certification.") (collecting cases). Moreover, the classes are limited to variable rate customers and do not include other products or services. To the extent that Just Energy is referring to non-energy-related value-added services, as the NYPSC explained at length, such products have no value and do not justify charging rates more than the default service providers. Thus, the classes can use a common set of proof to show each class member's damages, namely, Just Energy's records showing the rates charged, costs incurred, and margin realized combined with publicly available wholesale cost data and utility rates.

class member makes similar legal arguments to prove the defendant's liability." *In re Scotts EZ Seed Litig.*, 304 F.R.D. at 405 (quoting *Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147, 155 (2d Cir. 2001)). "'Minor variations in the fact patterns underlying the individual claims do not preclude a finding of typicality' . . . [rather, the Rule] requires 'only that the disputed issues of law or fact occupy essentially the same degree of centrality to the named plaintiff's claim as to that of other members of the proposed class." *In re Scotts*, 304 F.R.D. at 405-06.

Here, the classes' claims arise from the same core events, and each class member would make the same legal arguments to prove Just Energy's liability. The classes were commonly bound by a sales agreement distributed to all Just Energy customers. Each contract contains the same or similar terms. Thus, all class members would proffer the same evidence and arguments in pursuing their claims against Just Energy.

iv. Adequacy Of Representation

Rule 23(a)(4) requires a showing that "the representative parties will fairly and adequately protect the interests of the class." "Adequacy is satisfied unless plaintiff's interests are antagonistic to the interest of other members of the class." *Claridge*, 2016 WL 7009062, at *5 (quoting *Sykes v. Mel S. Harris & Associates LLC*, 780 F.3d 70, 90 (2d Cir. 2015)).

Claimants will fairly and adequately protect the interests of the classes. Since the Actions' respective inceptions, Claimants have "actively assisted in the cases' prosecution and nothing in the record suggests [their] interests are antagonistic to those of other class members." *In re Scotts EZ Seed Litig.*, 304 F.R.D. at 406-07.

Likewise, Claimants' counsel is qualified and experienced in prosecuting complex class actions nationwide, in both state and federal courts, including customer protection class actions against ESCOs. Indeed, no law firms in the U.S. have more experience successfully prosecuting class actions against ESCOs who overcharge their customers.

B. The Proposed Class Satisfies the Rule 23(b)(2) Factors

Pursuant to Rule 23(b)(2), "[a] class action may be maintained if Rule 23(a) is satisfied and if . . . the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole[.]" Just Energy has acted on grounds that apply generally to the classes, namely by representing that its variable rates are market based, when Just Energy's rates are in fact untethered from market conditions. Thus, final injunctive and declaratory relief is appropriate with respect to the classes.

C. The Proposed Class Satisfies the Rule 23(b)(3) Factors

Rule 23(b)(3) requires that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."

i. Predominance

> A court must "bear[] firmly in mind that the focus of Rule 23(b)(3) is on the predominance of common questions . . ." *Amgen Inc. v. Connecticut Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1194 (2013). It "does not require a plaintiff seeking class certification to prove that each element of her claim is susceptible to classwide proof," but instead to prove that "common questions predominate over any questions affecting only individual class members." *Id.* at 1196 (emphasis in original; alterations and quotation marks omitted); *accord Sykes v. Mel S. Harris & Associates LLC*, 780 F.3d 70, 87 (2d Cir. 2015) ("The mere existence of individual issues will not be sufficient to defeat certification. Rather, the balance must tip such that these individual issues predominate.").

Claridge, 2016 WL 7009062, at *2 (certifying class of ESCO customers).

"Predominance is satisfied if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof." *Id.* at *5 (quoting *Roach v. T.L. Cannon Corp.*, 778 F.3d 401, 405 (2d Cir. 2015)).

a. The Nationwide Classes Will be Certified

Just Energy contends—without any support—that Claimant does not have standing to represent all of Just Energy natural gas customers on a variable rate across the U.S. However, Just Energy ignores the well-settled doctrine that class action plaintiffs have class standing to allege sufficiently similar injuries suffered by all potential class members. *See, e.g.*, *Stanley v. Direct Energy Servs., LLC*, 466 F. Supp. 3d 415, 438 (S.D.N.Y. 2020). As Judge Karas aptly explained, Just Energy's use of materially similar representations and pricing policies is sufficient to confer Claimants' standing on behalf of the class:

> However, Plaintiff has alleged that Defendant sent "uniform notices" to their legacy customers from NYSEG Solutions and/or Energetix that promised competitive, market-based variable rates. (Am. Compl. ¶ 2.) And Plaintiff has further alleged that Defendant engages in a uniform policy of price gouging all of its customers. (*Id.* ¶¶ 2, 24, 68.) The Second Circuit has explicitly instructed that "non-identical injuries of *the same general character* can support standing" for a class action. *Langan*, 897 F.3d at 94 (emphasis added) (citation omitted). And "courts in th[e Second C]ircuit have construed the payment of a premium price to be an injury in and of itself[, and] . . . where plaintiffs allege that customers paid a premium price based on a misrepresentation, those customers can have standing under Article III." *Guariglia v. Procter & Gamble Co.*, No. 15-CV-4307, 2018 WL 1335356, at *12 (E.D.N.Y. Mar. 14, 2018) (citations and quotation marks omitted). Under analogous circumstances, the Second Circuit determined that standing existed for a plaintiff who sought to represent a variety of certificate holders in connection to certain mortgage investments, despite the fact that other certificate holders were "outside the specific tranche from which the named plaintiff

> purchased certificates" and were subject to "different payment priorities." *Langan*, 897 F.3d at 94 (referring to *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*, 693 F.3d 145 (2d Cir. 2012)). Similarly, here, it may be true that Energetix customers and NYSEG Solutions customers had different contracts before Defendant bought them. It may also be true that customers outside New York received slightly different terms or offers than those that Plaintiff received. But the fact that the "ultimate damages [for each member of the class may] . . . vary . . . is not sufficient to defeat class certification under Rule 23(a), let alone class standing." *NECA*, 693 F.3d at 164-65 (citation and quotation marks omitted).

Stanley, 466 F. Supp. 3d at 438-39.

Just Energy's Notice of Disallowance admits that it uses uniform customer contracts with the same pricing provisions, arguing that "the applicable contract puts customers (including the Claimants) on clear notice of the variable rates that Just Energy NY ould set and to which customers (including the Claimant) will be subject."

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

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

'diverse, nonuniform, and confusing'") (citation omitted); *Flanagan v. Allstate Ins. Co.*, 242 F.R.D. 421, 431 (N.D. Ill. 2007) (finding that numerous states' breach of contract laws are sufficiently similar for class certification purposes).

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

The same is true for class members that purchased energy from one of Just Energy's many affiliates. That consumers purchased from an affiliate is not a barrier to Claimants bringing claims on these consumers' behalf because "courts in this Circuit have held that, subject to further inquiry at the class certification stage, a named plaintiff has standing to bring class action claims . . . for products that he did not purchase, so long as those products . . . are 'sufficiently similar' to the products that the named plaintiff *did* purchase." *Mosely v. Vitalize Labs, LLC*, No. 13-2470, 2015 WL 5022635, at *7 (E.D.N.Y. Aug. 24, 2015) (emphasis in original). This is because a class action plaintiff may sue for non-purchased products if he or she (1) suffered injury, and (2) the injurious conduct implicates the same set of concerns as the conduct alleged to have caused injury to other members of the proposed class. *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*, 693 F.3d 145, 162 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 1624 (2013); *see also In re Frito-Lay N. Am., Inc. All Natural Litig.*, No. 12-2413, 2013 WL 4647512, at *12 (E.D.N.Y. Aug. 29, 2013) (same) ("*NECA-IBEW* [] instructs that, because plaintiffs have satisfied the Article III standing inquiry, their ability to represent putative class members who purchased products plaintiffs have not themselves purchased is a question for a class certification motion."); *Wai Chu v. Samsung Elecs. Am., Inc.*, No. 18-11742, 2020 WL 1330662, at *4 (S.D.N.Y. Mar. 23, 2020) (*NECA-IBEW's* "same set of concerns" requirement satisfied for thirty-two devices, even though plaintiff only purchased three).

b. The Breach of Contract Claim Will Be Certified

The classes' breach of contract claims present straightforward common questions that will be answered through common proof, precluding the predominance of individual issues. "Contract claims satisfy Rule 23(b)(3) when the claims of the proposed class 'focus predominantly on common evidence[.]'" *Claridge*, 2016 WL 7009062, at *6 (quoting *In re U.S. Foodservice Inc.*, 729 F.3d at 125). "[C]laims arising from interpretations of a form contract appear to present the classic case for treatment as a class action, and breach of contract cases are routinely certified as such." *In re Scotts EZ Seed Litig.,* 304 F.R.D. at 411; *accord Gillis v. Respond Power, LLC*, 677 F. App'x 752, 756 (3d Cir. 2017) ("Because form contracts should be interpreted uniformly as to

all signatories, Pennsylvania and federal courts have recognized that claims involving the interpretation of standard form contracts are particularly well-suited for class treatment.") (vacating district court's denial of class certification and remanding). Additionally, "[t]he Second Circuit has affirmed certification of a contract claim when minor variations existed in the language of the disputed contracts because the underlying claim was directed to a 'substantially similar' terms." *Claridge*, 2016 WL 7009062, at *6 (quoting *In re U.S. Foodservice Inc.*, 729 F.3d at 124; *accord In re Scotts EZ Seed Litig.,* 304 F.R.D. at 411 (certifying contract class where, "[a]lthough plaintiffs do not allege defendants breached a 'form contract,' the representations defendants made to each plaintiff were uniform.") (quoting *Steinberg v. Nationwide Mut. Ins. Co.*, 224 F.R.D. 67, 74 (E.D.N.Y. 2004)); *Allapattah Servs., Inc. v. Exxon Corp.*, 333 F.3d 1248, 1261 (11th Cir. 2003), *aff'd sub nom. Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005) (affirming certification of breach of contract class where the defendant failed to price natural gas in accordance with its uniform contractual obligations).

Moreover, proof of Claimants' claims will be common to all class members, as it will rely on Just Energy's admittedly standard contracts, as well as publicly available data, witness testimony, and business records which will demonstrate that Just Energy did not set its variable rate in accordance with the market, as required in its customer contract.

c. The Good Faith and Fair Dealing Claim Will Be Certified

The good faith and fair dealing claim is likewise well suited for class treatment. "The implied covenant is "breached when a party acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement.'" *Stanley*, 466 F. Supp. 3d at 428.

Whether Just Energy acted in bad faith is common to all class members and will be evaluated with common evidence. *See In re U.S. Foodservice Inc.*, 729 F.3d at 125 (common evidence used to determine whether business practice "departs from prevailing commercial standards of fair dealing so as to constitute a breach"). As with the classes' breach of contract claim, Claimants will demonstrate that standard contracts gave rise to their and the classes' reasonable expectations concerning the variable rate, and will prove Just Energy's failure to provide a competitive, market-based rate and its bad faith profiteering through common evidence.

ii. <u>Superiority</u>

There are several reasons why a class action is superior to other available adjudicatory methods. <u>First</u>, a class action will permit an orderly and expeditious administration of class claims, foster economies of time, effort, and expense, and ensure uniformity of decisions. *See* Fed. R. Civ. P. 23(b)(3) advisory committee's note. Just Energy has acted on grounds generally applicable to the classes. By prosecuting this action as a class, once Just Energy's liability has been adjudicated, the factfinder will be able to determine the claims of all class members.

Individualized actions, on the other hand, "would simply entail repeated adjudications of identical [contract] provisions." *Claridge*, 2016 WL 7009062, at *6; *cf. Roberts*, 2017 WL 6601993, at *2 ("Piecemeal litigation would be less workable. Given that much of the case

depends on the central common legal issues surrounding the contract class members would have little interest in separately controlling the litigation . . ."). Additionally, prosecuting separate actions would create a risk of inconsistent or varying adjudications with respect to individual class members that could establish incompatible standards of conduct for Just Energy.

Second, the individual damages suffered are small relative to the expense and burden of individual litigation, such that class members are unlikely to prosecute individual actions. *See Roberts*, 2017 WL 6601993, at *2 ("Consumer contracts affecting thousands of people but not necessarily yielding thousands of dollars to each class member are well suited for class certification. Without the class action method most claims like this wouldn't be brought, including claims with great social utility.").

Finally, this lawsuit presents no difficulties that would impede its management as a class action. *See* Fed. R. Civ. P. 23(b)(3)(D).

VI. The Increasing Regulatory Denunciation of Just Energy's Pricing Practices Further Demonstrates that Claimants' Class Action Claims Are Strong

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

> Every day we delay [deregulation], we're costing consumers a lot of money . . . . It can be done quickly. The key is to get the legislation done fast.[12]

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

Responding to ESCOs' price gouging, many key deregulation supporters now regret their role. For example, reflecting on Maryland's experience, a Maryland Senator lamented that "[d]eregulation has failed. We are not going to give up on re-regulation till it is done."[13]

A Connecticut leader who joined in that state's foray into deregulation was similarly remorseful:

> Probably six out of the 187 legislators understood it at the time, because it is so incredibly complex . . . . If somebody says, no, we

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

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

> didn't screw up, then I don't know what world we are living in. We did.[14]

State regulators have, ***for years***, also denounced predatory pricing practices like those challenged in the class actions. For example, in 2014 the NYPSC declared that New York's retail energy markets were plagued with "marketing behavior that creates and too often relies on customer confusion."[15] The NYPSC further noted "it is extremely difficult for mass market retail energy customers to access pricing information relevant to their decision to commence, continue or terminate service through an ESCO."[16] The NYPSC concluded as follows:

> [A]s currently structured, the retail energy commodity markets for residential and small nonresidential customers cannot be considered to be workably competitive. Although there are a large number of suppliers and buyers, and suppliers can readily enter and exit the market, the general absence of information on market conditions, particularly the price charged by competitors, is an impediment to effective competition. . . . [17]

The conduct of ESCOs like Just Energy has been devastating to consumers across the U.S. For example, "[a]ccording to the data provided by [New York's] utilities, the approximately two million New York State residential utility customers who took commodity service from an ESCO collectively paid almost $1.2 billion more than they would have paid if they purchased commodity from their distribution utility during the 36-months ending December 31, 2016."[18] "Additionally, small commercial customers paid $136 million more than they would have paid if they instead simply remained with their default utilities for commodity supply for the same 36-month period."[19] Combining these two groups, New York consumers have been "'overcharged' by over $1.3 billion dollars over this time period."[20]

Based on the flood of consumer complaints, negative media reports, and data demonstrating massive overcharges, the NYPSC announced in December 2016 an evidentiary hearing to consider primarily whether ESCOs should be "completely prohibited from serving their current

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[14] Keating, *supra*.

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

[16] *Id*. at 11.

[17] *Id*. at 10.

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

[19] *Id.* at 3.

[20] *Id.*

products" to New York residential consumers.[21] Then, on December 16, 2016, the NYPSC permanently prohibited ESCOs from serving low-income customers, because of "the persistent ESCO failure to address (or even apparently to acknowledge) the problem of overcharges to [low income] customers . . . ."[22]

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

> [A]s the current retail access mass markets are structured, customers simply cannot make fully informed and fact-based choices on price . . . since the terms and pricing of the ESCO product offerings are not transparent to customers. For variable rate products this is due, in large part, to the fact that ESCOs often offer "teaser rates" to start, and after expiration of the teaser rate, the rate is changed to what is called a "market rate" that is not transparent to the customer, and the contract signed by the customer does not provide information on how that "market rate" is calculated.[23]
>
> * * *
>
> ESCOs take advantage of the mass market customers' lack of knowledge and understanding of, among other issues, the electric and gas commodity markets, commodity pricing, and contract terms (which often extend to three full pages), and in particular, the ESCOs' use of teaser rates and "market based rate" mechanisms that customers are charged after the teaser rate expires. In fact, ESCOs appear to be unwilling to provide the necessary product pricing details as to how those "market based rates" are derived to mass market customers in a manner that is transparent so as to enable an open and competitive marketplace where customers can participate fairly and with the necessary knowledge to make rational and fully informed decisions on whether it is in their best interest to take commodity service from their default utility, or from a particular ESCO among competing but equally opaque choices.[24]

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

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

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

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

In response to these criticisms, the ESCOs claimed as Just Energy does here that their marketing and overhead costs explain the overcharges, but NYPSC staff found that these costs do "**not justify the significant overcharges**."[25] Likewise, when the ESCOs claimed as Just Energy does here that their provision to consumers of so-called value-added products such as light bulbs and thermostats contributed to their excessive rates, NYPSC staff found that "**these sorts of value-added products is at best de minimis and does not explain away the significantly higher commodity costs charged by so many ESCOs**."[26]

Instead, NYPSC staff reached the following conclusion:

> The massive $1.3 billion in overcharges is the result of higher, and more often than not, significantly higher, commodity costs imposed by the ESCOs on unsuspecting residential and other mass market customers. These overcharges are simply due to (1) the lack of transparency and greed in the market, which prevents customers from making rational economic choices based on facts rather than the promises of the ESCO representative, and (2) obvious efforts by the ESCOs to prevent, or at least limit, the transparency of the market. These obvious efforts include the lack of a definition for "market rate" in their contracts, resulting in the fattening of ESCOs' retained earnings.[27]

Following these conclusions, in December 2019 the NYPSC **banned** the exact same variable rate pricing practices that the class actions challenge.

The NYPSC's press release announcing the ban on variable energy rates does not mince words, stressing that it was intended to "prevent[] bad actors among ESCOs from overcharging New York consumers" and that the regulations only went forward after "the state's highest court definitively halted ESCOs' attempts to use litigation to evade and/or delay consumer-protection regulation."[28] The regulations themselves likewise condemn ESCOs' conduct and declare that "avoiding accountability" has become a "business model" in the deregulated energy market:

> Based upon the number of customer complaints that continue to be made against ESCOs, and the likely need for increased enforcement activities, the large number of ESCO customers that pay significant premiums for products with little or no apparent added benefit, . . .

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[25] *Id.* at 37.

[26] *Id.* at 87.

[27] *Id*.

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

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

9 Feb 22

Order to go as per the draft filed and signed. Counsel have agreed to the form and content.

McEwen J.

Ontario
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

ORDER
(Class Counsel's Motion for Advice and Direction)

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> it appears that a material level of misleading marketing practices continues to plague the retail access market.
>
> * * *
>
> The persistence of complaints related to ESCO marketing practices is indicative of some ESCOs continuing to skirt rules and attempting to avoid accountability as part of their business model.[29]

The NYPSC's variable rate ban followed a two-year investigation of ESCO practices that culminated in a 10-day evidentiary hearing to examine evidence submitted by 19 parties and to hear the testimony and cross-examination of 22 witnesses and witness panels.[30]

The NYPSC prefaced the ban with the observation that variable energy rates—like those Just Energy charged its U.S. customers—are "[t]he most commonly offered ESCO product" and that this popular product is frequently provided at "a higher price than charged by the utilities."[31]

The absurdity of consumers paying ESCOs more for the exact same energy offered by regulated utilities was not lost on the NYPSC:

> If market participants are unwilling, or unable, to provide material benefits to consumers beyond those provided by utilities in exchange for a regulated, just and reasonable rate, the market serves no proper purpose and should be ended.[32]

In fact, the NYPSC found it "troubling" that even after considering reams of evidence "neither ESCOs nor any other party have shown . . . that ESCO charges above utility rates were generally – or in any specific instances – justified."[33] This fact only highlighted the NYPSC's "long-held concern that many customers may only be taking ESCO service due to their misunderstanding of [ESCOs'] products and/or prices."[34]

Accordingly, and on this record, the NYPSC banned variable energy rates like those Just Energy charged to the Claimants and its other U.S. customers.[35] In place of these floating variable rates,

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

[30] *Id.* at 3–4.

[31] *Id.* at 11.

[32] *Id.* at 12.

[33] *Id.* at 30.

[34] *Id.* at 31.

[35] *Id.* at 39.

the NYPSC required ESCOs to guarantee that their variable rates would save customers money compared to what the utility would have charged.[36] Under the new regulations, if the consumer is charged more than the utility, the consumer must be refunded the difference.[37]

In Claimants' class actions, the difference between what Just Energy charged consumers for the exact same energy that class members' utilities would have charged is more than US$2 billion. The NYPSC's regulations took effect in April 2021. Around the same time, Just Energy ceased offering service in New York and tried to spin the state's ban on its core practice as "regulatory constraints . . . requiring certain variable rate customers to be dropped to the utility."[38]

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

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

For example, on December 31, 2014, Just Energy agreed to settle claims brought by the Massachusetts Attorney General that are strikingly similar to those in the class actions, making various concessions related to its deceptive energy sales and billing practices in Massachusetts.[39] Just Energy agreed to refund US$4,000,000 along with several key changes to its business practices, including that Just Energy was banned for three years from enrolling Massachusetts consumers into variable rate energy products unless it complied with the following requirements:

> Within 30 days of a customer enrolling in a variable energy rate product, Just Energy must provide the customer with written notice of the date on which the introductory rate will expire.
>
> Any new contracts for variable rate products shall either (i) include the calculation that will be used to set monthly rates under the contract such that the customer can calculate the cost of Just Energy's residential energy, or (ii) make the rates available 60 days in advance via phone and the internet.[40]

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[36] *Id.*

[37] *Id.*

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

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

[40] *Id.* ¶ 28(a)–(b), (d).

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

> For current Just Energy variable rate customers, the company is required to clearly and conspicuously post its current variable rates and post subsequent variable rates with at least 45 days advance notice.[42] Just Energy is also required to mail notice to all existing Massachusetts variable rate customers alerting them to the fact that advance pricing information is now available via phone and on Just Energy's website, and that these customers can cancel their Just Energy contracts without paying termination fees.[43]
>
> Just Energy must at its own expense hire an independent monitor for three years to audit *inter alia* Just Energy's Massachusetts marketing materials, billing data, consumer communications, and direct marketing efforts.[44]
>
> Just Energy must distribute a copy of the Assurance of Discontinuance to current and future (for three years) principals, officers, directors, and supervisory personnel responsible for the Massachusetts market.[45] Just Energy must also secure and maintain these individuals' signed acknowledgement of receipt of the Assurance of Discontinuance.

The Massachusetts Attorney General's sweeping action was far from the first time Just Energy had been targeted by regulators. For example, in June 2003, the *Toronto Star* reported that Just Energy (then operating under the name Ontario Energy Savings Corp.) was fined for violating the Ontario Energy Board's code of conduct by fraudulently enrolling customers.[46]

In 2008, the Illinois Attorney General sued U.S. Energy Savings Corp. (whose name was changed to Just Energy in 2012), alleging violations of Illinois' consumer fraud laws. The May 2009 anouncement a US$1 million settlement noted that the Attorney General had "received a nearly unprecedented number of calls from consumers who were deceived by false assurances that they would receive significant savings by switching to this alternative gas supplier."[47]

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[41] *Id*. ¶ 30(a).

[42] *Id*. ¶ 30(b).

[43] *Id*. ¶ 30(c).

[44] *Id*. ¶ 44, Attachment 2.

[45] *Id*. ¶ 46.

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

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

According to the lawsuit, among other deceptive conduct "consumers were led to believe that they would automatically save money by enrolling in the U.S. Energy Savings program."[48]

During this same period, the Citizens Utility Board (the "CUB") and AARP filed a formal complaint with the Illinois Commerce Commission (the "ICC") alleging, *inter alia*, that Just Energy told customers they would "save money," and that consumers would not see any gas price increases if they signed up; and that Just Energy presented false and misleading information about its prices.[49] In April 2010, the ICC found that Just Energy's sales and marketing practices were deceptive, issued a US$90,000 fine, and ordered an independent audit of its practices.[50]

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

In November 2016, Ohio's Public Utilities Commission (the "PUCO") fined Just Energy **for a second time** for misleading marketing practices. An article in the *Columbus Dispatch* notes that Just Energy is an "energy company with a track record of misleading marketing," that it was fined by the PUCO in 2010 for deceptive marketing, and that it "sells energy contracts that often cost more than customers would pay if they received the standard service price."[52]

There are also *thousands* of complaints about Just Energy and its affiliated entities on the internet. Over the last three years alone, Just Energy has had at least 280 complaints filed against it with the Better Business Bureau (the "BBB").[53] Even though Just Energy is listed on the BBB's website as having been in business for 24 years, the BBB clearly declares that "THIS BUSINESS IS NOT BBB ACCREDITED" and displays the following "Pattern of Complaint" warning to the consuming public:

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[48] *Id*.

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

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

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

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

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

> **BBB files indicate that this business has a pattern of complaints concerning door to door sales representatives who are using misleading sales tactics, misrepresenting themselves as the consumer's current energy or gas company, and not being transparent about cancellations fees which may be charged by their current provider for switching their services. Additionally, consumers allege Just Energy's representatives display poor customer service when the business is contacted to resolve billing and contract concerns.**

Media reports about Just Energy are equally troubling. For example, when the confidential results of the Illinois Commerce Commission's audit referenced above were made public, Chicago's CBS affiliate reported that between 2010 and 2011 Just Energy received over 29,729 customer complaints.[54] "There were so many complaints over so many years with so little company oversight on how they were handled that the audit said, '[a]n adequate compliance culture at the top levels of the organization is not evident.'"[55]

A May 8, 2019, article in the *Chicago Reporter* showcased a carpenter who, over the course of 10 years, paid Just Energy over US$20,000 more than he would have paid the utility.[56] This Just Energy customer's experience was used to highlight the then-proposed Illinois Home Energy Affordability & Transparency Act ("HEAT"). On August 27, 2019, Illinois Governor J.B. Pritzker signed HEAT into law. Effective January 1, 2020, HEAT requires *inter alia* ESCOs like Just Energy operating in Illinois to include the utility's comparison price on all marketing materials, during telephone or door-to-door solicitations, and on every consumer's utility bill so consumers can make informed price comparisons.

Here, the factfinder's informed price comparison, will demonstrate over US$2 billion in damages to Just Energy's U.S. customers.

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

[55] *Id*.

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

This is Exhibit “F” referred to in the Affidavit of Robert Tannor sworn May 26, 2022.

Commissioner for Taking Affidavits (or as may be)

DANIELLE GLATT

NOTICE OF DISPUTE OF REVISION OR DISALLOWANCE

With respect to Claims against the Just Energy Entities[1] and/or D&O Claims against the Directors and/or Officers of the Just Energy Entities

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

1. **Particulars of Claimant:**

Claims Reference Number: PC-11175-1

Full Legal Name of Claimant (include trade name, if different)

Trevor Jordet (as Representative Plaintiff)

(the "**Claimant**")

Full Mailing Address of the Claimant:

Greg Blankinship (attorney for Representative Plaintiff), Finkelstein, Blankinship, Frei-Pearson & Garber, LLP

One North Broadway, Suite 900, White Plains, NY, 10601, United States

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

Other Contact Information of the Claimant:

Telephone Number:	+1 914-298-3281
Email Address:	gblankinship@fbfglaw.com
Facsimile Number:	+1 914-273-2563
Attention (Contact Person):	Greg Blankinship (attorney for Representative Plaintiff)

2. **Particulars of original Claimant from whom you acquired the Claim or D&O Claim (if applicable):**

Have you acquired this Claim by assignment?

Yes: ☐ No: ☒

If yes and if not already provided, attach documents evidencing assignment.

Full Legal Name of original Claimant(s): Trevor Jordet (as Representative Plaintiff)

3. **Dispute of Revision or Disallowance of Claim:**

The Claimant hereby disagrees with the value of its Claim as set out in the Notice of Revision or Disallowance dated January 11, 2022, and asserts a Claim as follows:

Type of Claim	Applicable Debtor(s)	Amount allowed by the Just Energy Entities		Amount claimed by Claimant	
		Amount allowed as secured:	Amount allowed as unsecured:	Secured:	Unsecured:
A. Pre-Filing Claim	Just Energy Entities	$ 0	$ 0	$	$ USD 3,662,444,442.00
B. Restructuring Period Claim		$	$	$	$
C. Pre-Filing D&O Claim		$	$	$	$
D. Restructuring Period D&O Claim		$	$	$	$
E. Total Claim	Just Energy Entities	$ 0	$ 0	$	$ USD 3,662,444,442.00

(Insert particulars of your Claim per the Notice of Revision or Disallowance, and the value of your Claim as asserted by you).

4. Reasons for Dispute:

Provide full particulars of why you dispute the Just Energy Entities' revision or disallowance of your Claim as set out in the Notice of Revision or Disallowance, and provide all supporting documentation, including amount, description of transaction(s) or agreement(s) giving rise to the Claim, name of any guarantor(s) which has guaranteed the Claim, and amount of Claim allocated thereto, date and number of all invoices, particulars of all credits, discounts, etc. claimed, as well as a description of the security, if any, granted by the affected Just Energy Entity to the Claimant and estimated value of such security. The particulars provided must support the value of the Claim as stated by you in item 3, above.

See attached Schedule A.

5. Certification

I hereby certify that:

1. I am the Claimant or an authorized representative of the Claimant.
2. I have knowledge of all the circumstances connected with this Claim.
3. The Claimant submits this Notice of Dispute of Revision or Disallowance in respect of the Claim referenced above.
4. All available documentation in support of the Claimant's dispute is attached.

All information submitted in this Notice of Dispute of Revision or Disallowance must be true, accurate and complete. Filing false information relating to your Claim may result in your Claim being disallowed in whole or in part and may result in further penalties.

Signature: _____

Name: Greg Blankinship

Title: Partner, Finkelstein, Blankinship, Frei-Pearson & Garber, LLP

Witness:

Debora Solomon
(signature)

Debora Solomon
(print)

Dated at White Plains, New York this 10 day of February, 2022

This Notice of Dispute of Revision or Disallowance MUST be submitted to the Monitor at the below address **by no later than 5:00 p.m. (Toronto time) on the day that is thirty (30) days after this Notice of Revision or Disallowance is deemed to have been received by you** (in accordance with paragraph 50 of the Claims Procedure Order, a copy of which can be found on the Monitor's website at http://cfcanada.fticonsulting.com/justenergy).

Delivery to the Monitor may be made by ordinary prepaid mail, registered mail, courier, personal delivery, facsimile transmission or email to the address below.

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

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

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

IF YOU FAIL TO FILE A NOTICE OF DISPUTE OF REVISION OR DISALLOWANCE WITHIN THE PRESCRIBED TIME PERIOD, YOUR CLAIM AS SET OUT IN THE NOTICE OF REVISION OR DISALLOWANCE WILL BE BINDING UPON YOU.

Notice of Dispute of Revision or Disallowance

RE: Claim Reference Number: PC-11175-1

Schedule A

INTRODUCTION

Claimant Trevor Jordet ("Claimant") brought a U.S. class action to redress Just Energy Solutions, Inc.'s and the other Just Energy Entities' ("Just Energy") deceptive, bad faith, and unfair pricing practices that have caused millions of consumers and businesses across the U.S. to pay considerably more for their electricity and natural gas than they should have paid.

Mr. Jordet's Claim is joined by and parallel to the Claims of Fira Donin and Inna Golovan and the ten other U.S. consumers represented by Ms. Donin's and Ms. Golovan's counsel (Claim Reference Number: PC-11177-1). Ms. Donin and Ms. Golovan brought a separate and similar U.S. class action that also seeks to recover for the millions of U.S. consumers and businesses harmed by Just Energy's unlawful conduct.

Regarding class actions' status, **two** separate U.S. federal judges concluded that Mr. Jordet and Mses. Donin and Golovan alleged valid class claims against Just Energy. Both Just Energy Notices of Revision or Disallowance (the "Notice of Disallowance") concede this fact (as they must) and both acknowledge that **two** different federal judges ruled that the class actions have viable contract claims, have "alleged a right to relief that is not entirely speculative," and that there are serious liability issues that "could not readily be resolved solely on the pleadings."

These federal judges' conclusions are no surprise to Claimant, Just Energy, or their respective counsel. The class action claims arise from bedrock principals of contract law and are supported by a legion of U.S. case law, regulation, and statute. The claims also represent paradigmatic class action claims that are readily certifiable (and have been certified on five separate occasions), are pleaded in tandem with increasing regulatory scrutiny (including outright bans) of the exact pricing practices Just Energy employed throughout the U.S., and follow in the footsteps of at least **six** regulatory actions against Just Energy.

What is more, the class claims were supported with a preliminary yet detailed report by an expert in competitive wholesale and retail energy markets. This expert advises the U.S. Air Force, the U.S. Army, and the U.S. Department of Energy when they act as purchasers of electricity and natural gas from competitive retail suppliers in the *same* markets where Just Energy operates. This expert, who also supports U.S. state governments and agencies in energy-related formal proceedings, used the *same* breach of contract theories upheld by the two separate federal judges and calculated that Just Energy overcharged its U.S. customers by US$2,380,337,594. Just as the federal judges agreed, the expert's damages were calculated from the difference between the prices Just Energy was contractually bound to charge U.S. customers as compared to the prices ultimately charged. Then, because Just Energy's unlawful pricing practices spanned more than a decade, Claimants' counsel applied the pre-judgment interest rules of the class actions' forum

state (New York) and calculated US$1,282,106,848 in unpaid interest. On November 1, 2021, Claimants submitted a class action claim in this proceeding for US$3,662,444,442.

The claims at issue in the class actions are as straightforward as they are strong. Just Energy targets consumers and businesses hoping to save on energy supply costs. Just Energy lures customers with a teaser or fixed rate for a limited number of months that is initially lower than its competitors' rates. Once that initial rate expires, Just Energy charges what it represents to be a "variable rate," which under Just Energy's contract must be set according to "business and market conditions." As one federal judge has already observed, "'business and market conditions' has some standard that [Just Energy] had to apply in setting [their] variable pricing but apparently failed to adhere to in [their] pricing."

In reality, however, Just Energy exploits its pricing discretion and the dramatic information asymmetry with its customers to artificially inflate it variable rates without regard to its contractual obligations. As a result, Just Energy's variable rates are consistently substantially higher than those otherwise available in the natural gas and electricity supply markets, and its rates do not fluctuate based on any reasonable interpretation of "business market conditions," such as wholesale market energy prices or the rates other competitive market participants (including local utilities and Just Energy's own fixed rates) charge for energy supply.

At bottom, Just Energy faces grim prospects in the class actions: The decisions of two federal judges sustaining straightforward and meritorious claims, a preliminary yet detailed analysis by a qualified expert showing *billions* in damages, a multitude of case law and regulatory action condemning Just Energy's very practices, five highly similar class certification decisions, and a checkered past of at least at least six regulatory actions.

Considering its slim odds on the merits, Just Energy's Notice of Disallowance predictably takes a blunderbuss approach. In fact, it presents an outline of defenses that that either this Court or the persons assigned to adjudicate Claimant's claims can evaluate (and discard) with straightforward discovery and limited testimony—just as other factfinders have done in similar cases. The Notice of Disallowance presents no case law or a shred of actual evidence to support its odd contention that the sustained claims in two U.S. class actions are "meritless." It instead offers smokescreens and paper tigers that have been rejected by courts and regulators alike. Musings of counsel as to why Just Energy may not have breached its customer contract are offered in place of facts, yet such conjecture was already rebuffed by two U.S. federal judges.

Just Energy understands its imminent risk of staggering liability. All five courts that have addressed class certification in cases involving energy supply companies based on the same liability theory Claimant proffers here certified the classes. Nearly every defendant involved in a similar energy class has that has survived a motion to dismiss—as is doubly the case here—settles due to the ease of proving liability and class certification following discovery.[1] No factfinder will look kindly on Just Energy's variable rates that are substantially higher than utility rates or its own fixed rates, even though Just Energy's costs for fixed and variable rate customers

[1] Indeed, nearly every defendant involved in a similar energy class has that has survived a motion to dismiss—as is the case here—ultimately settles due to the ease of proving liability and class certification following discovery.

are the same. Claimant's expert will handily dispose of Just Energy's incredible and counterintuitive claims, including that variable rates are riskier to service than fixed rates and therefore its exorbitant variable rate margins are justified. Just Energy's internal pricing data and analysis will show the real basis for Just Energy's variable rate margins and the factfinder will easily conclude that Just Energy breached its contracts with its U.S. customers. For these and the other reasons below, Claimant disputes the Notice of Disallowance.

BACKGROUND

I. Procedural History

Trevor Jordet filed a class action lawsuit *Jordet v. Just Energy Sols., Inc.* in the U.S. District Court for the Eastern District of Pennsylvania on April 6, 2018. On August 30, 2018, the action was later transferred to the U.S. District Court for the Western District of New York.

Jordet's complaint pleads breach of contract and, alternatively, unjust enrichment individually and on behalf of all Just Energy U.S. customers charged a variable rate for natural gas supply by Just Energy between April 6, 2012 and the present.

On December 7, 2020, Judge William M. Skretny of the U.S. District Court for the Western District of New York denied Just Energy's motion to dismiss the breach of contract claims, ruling that "'business and market conditions' has some standard that [Just Energy] had to apply in setting its variable pricing but apparently failed to adhere to in [their] pricing." *Jordet v. Just Energy Sols., Inc.*, 505 F. Supp. 3d 214, 226-27 (W.D.N.Y. 2020). Judge Skretny distinguished *Jordet* from unsuccessful cases against third party energy companies on the ground that Just Energy's customer contract "provided some definition of what [Just Energy] considered business and market conditions [] from the inclusion of natural gas costs as a factor in rate setting." *Id.* at 225. The Court further held that "Plaintiff also plausibly alleges this breach as natural gas wholesale prices decreased while Defendant's pricing increased." *Id.* at 227.

Regarding the statute of limitations, Judge Skretny ruled that Claimant could pursue a class action for the period April 6, 2014 through the present. *Id*. On August 31, 2021, Just Energy filed notice of these bankruptcy proceedings and the attendant stay. ECF No. 53.

II. Deregulation of State Gas and Electricity Retail Supply Markets

In the 1990s and early-2000s, numerous U.S. states deregulated retail natural gas and electricity supply markets. Retail energy supply deregulation's primary goal was increased competition with an eye to achieving greater consumer choice and lower energy supply rates. The most frequently cited reason for deregulation was lower prices. As a result, in deregulated states across the U.S. consumers and businesses can choose their energy supplier. The new energy suppliers, who compete against local utilities, are known as energy service companies, or "ESCOs."[2] Regardless of the supplier consumers select, the local utility continues to deliver the

[2] The acronyms for competitive energy supply companies vary from state to state. For example, in Indiana and Illinois, independent natural gas service companies are known as alternative retail natural gas

commodity to consumers' homes. In almost all states, the local utility also bills customers for both the energy supply and delivery costs in a single "consolidated" bill. The only difference to the customer is whether the utility or an ESCO sets the energy supply price.

ARGUMENT

III. Just Energy Breached its Contracts with U.S. Customers

Just Energy's Notice of Disallowance wrongly argues that liability presents a "substantial hurdle" for the classes, namely because Just Energy's customer contract "expressly provides that it does not guarantee the financial savings" and because "local utility rates are not an appropriate barometer by which to measure the rates of energy service companies[.]" As described below, these arguments miss the mark and the classes will prevail on the merits. *See, e.g.*, *Melville v. Spark Energy, Inc.*, No. 15-8706, 2016 WL 6775635, at *5 (D.N.J. Nov. 15, 2016) ("[B]ecause [the local utility] is a supplier in the energy market; its prices thus serve as at least partial indications of the market rate and are relevant despite the lack of a savings guarantee clause.").

A. Default Utility Prices Are a Valid Benchmark

In what is best characterized as a "see what sticks" argument, Just Energy briefly claims (without support) that utility rates cannot serve as proper benchmarks for variable prices based on "business and market conditions." Yet courts and public service commissions throughout the U.S. have repeatedly (and resoundingly) rejected this claim.

By way of background, consumers that do not switch to an ESCO continue to receive supply from their local utility. The utilities charge supply rates consistent with market conditions in the competitive wholesale marketplace, plus other wholesale costs, namely transportation, distribution, and storage costs (*i.e.*, the same costs ESCOs such as Just Energy incur)— without any markup or profit. Because utility supply rates do not include any profits, they are pure reflections of average wholesale market costs and associated costs over time. Additionally, because the utility is the primary supplier and competitor in virtually all utility regions, its rates by definition represent retail electricity and natural gas market pricing.

By contrast, ESCOs like Just Energy have a tactical advantage over the regulated utilities as they can purchase electricity and natural gas from any number of markets using any number of purchasing strategies, and therefore their costs for purchasing electricity and natural gas should at the very least track—if not undercut—utility prices. For example, ESCOs such as Just Energy can employ various energy acquisition strategies including: (i) owning energy production and generation facilities; (ii) purchasing energy from wholesale marketers and brokers at the price available at or near the time it is used by the consumer; (iii) and by purchasing energy ahead of time, either by purchasing energy to be used in the future or by purchasing futures contracts for the delivery at a predetermined price. Deregulation's purpose is to allow ESCOs to use these and other arbitrage opportunities to reduce costs for consumers' benefit.

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suppliers or "AGS." In Pennsylvania, independent natural gas supply companies are known as natural gas suppliers or "NGS."

Additionally, because of deregulation, ESCOs like Just Energy do not need regulatory approval of their rates or the method by which they set their rates. Customers are protected in the competitive market by enforcement of the terms of their contracts. While utility supply is typically procured from the competitive wholesale market, ultimately the utility may charge no more than allowed by the regulator. ESCO customers do not have this safeguard. Consumers must rely on written agreements with the ESCOs to ensure that they receive the promised price.

Considering these realities, ESCOs should be able to offer rates competitive with, or substantially lower than, utilities, and in fact many do. Indeed, Just Energy's fixed rates are competitive with, and in fact almost always lower than, contemporaneous utility rates. Therefore, while utility rates may not precisely match Just Energy's rates, they should be commensurate. But Just Energy's variable rates are not remotely commensurate with utility rates because they are always substantially higher.

In fact, contrary to its contractual obligation, Just Energy's rates are substantially higher than its own fixed rates, other ESCOs' rates, and local utilities' rates, and are wholly disconnected from wholesale electricity and natural gas prices. Instead, Just Energy's variable rates are based on factors other than market conditions.

Further, there is no good faith justification for charging customers a variable rate that is outrageously higher than the rates Just Energy charges its fixed rate customers. Just Energy routinely predicts with reasonable accuracy the energy needs of its variable rate customers, and because it has access to multiple variable rate procurement strategies, its costs for serving variable rate customers and fixed rate customers are not substantially different. The only reason Just Energy's variable rates are so much higher than its fixed rates is that it engages in profiteering and price gouging, a stark demonstration of bad faith pricing practices.

In its Notice of Disallowance, first, Just Energy claims that local utilities are improper benchmarks because ESCOs occasionally offer tangential products or services is meritless. This is balderdash. New York's Public Service Commission (the "NYPSC") recently examined—and incisively rejected—this precise contention from Just Energy and other ESCOs, who were represented by Judge Energy's U.S. counsel at bar. With respect to value-added products, NYPSC staff found that found that "these sorts of value-added products is at best de minimis and **does not explain away the significantly higher commodity costs charged by so many ESCOs**."[3] Similarly, the NYPSC found that the "claim that at least a portion of the significant delta between ESCO and utility charges is explained by ESCOs offering renewable energy is disingenuous at best. ESCOs may be charging a premium for green energy, but they are not actually providing a significant amount of added renewable energy to customers in New York."[4] In fact, the NYPSC found it "troubling" that even after considering reams of evidence "neither

[3] Case No. 12-M-0476, Department of Public Service Staff Unredacted Initial Brief (Mar. 30, 2018), at 87 (Emphasis Added).

[4] Case No. 12-M-0476, Department of Public Service Staff Unredacted Initial Brief (Mar. 30, 2018), at 69.

ESCOs nor any other party have shown . . . that ESCO charges above utility rates were generally – or in any specific instances – justified."[5]

Second, in its Notice of Disallowance, Just Energy claims that "[l]ocal utility commodity prices do not reflect wholesale energy prices" because utilities "are permitted to defer charges (with the approval of the regulator) to smooth price volatility." The NYPSC considered and rejected these precise contentions:

> [S]ome ESCOs complain that out-of-period adjustments made by utilities, with the Commission's approval, make it impossible for ESCOs to be competitive with the utilities, particularly in the context of variable-rate gas commodity service.[] These ESCOs do not acknowledge, however, that out-of-period adjustments by the utilities ultimately are a zero-sum game: for any downward adjustment made to a customer's bill, a corresponding out-of-period increase must be made. This process moderates fluctuations in customer bills that otherwise would result from market activity.[] Thus, out-of-period adjustments do not unfairly provide the utilities a pricing advantage when a price comparison is made on an annual basis.[6]

Third, Just Energy argues that local utilities do not compete with ESCOs because they do not face the same costs, risks, and market forces as ESCOs. To the contrary, as explained above, ESCOs have significant purchasing and pricing advantages over utilities.

Fourth, Just Energy wrongly contends that a comparison is not possible because "utility commodity prices do not include reasonable profit margins" and overhead. The NYPSC staff explained that these costs do "not justify the significant overcharges" ESCOs levied on consumers.[7] The ultimate factfinder might understand that the contract's "business and market conditions" language permits Just Energy a reasonable margin. However, such profits must be consistent with others' profit margins, and that Just Energy's profiteering would not be so extreme that its rate bears no relation to market prices.

Finally, Just Energy asserts that "[g]eneral energy market conditions affect ESCOs and local utilities differently," and that ESCOs might consider competitors' prices, customer retention, subsidizing the fixed rates, and value into consideration when setting their rates. Yet Just Energy's contract does not bear such weight, and these exact defenses have been resoundingly rejected by many courts. *See, e.g.*, *Hamlen v. Gateway Energy Servs. Corp.*, No. 16-3526, 2017 WL 6398729, at *7 (S.D.N.Y. Dec. 8, 2017) (contract breached when ESCO considered, but did not disclose, customer retention and attrition as factors when setting variable rates).

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[5] Case No. 12-M-0476, Order Adopting Changes to the Retail Access Energy Market and Establishing Further Process, New York Public Service Commission (Dec. 12, 2019) at 30.

[6] Case No. 12-M-0476, Order Adopting Changes to the Retail Access Energy Market and Establishing Further Process, New York Public Service Commission (Dec. 12, 2019) at 43 (citations in footnotes omitted).

[7] Case No. 12-M-0476, Department of Public Service Staff Unredacted Initial Brief (Mar. 30, 2018), at 37.

Recently, U.S. state regulators have begun to make clear that variable rate schemes like Just Energy's are antithetical deregulation's purpose and provide no value to consumers or the market. For instance, the NYPSC recently stated:

> Because customers receive no value when they pay a premium for variable-rate commodity-only service from ESCOs, ESCOs will be prohibited from offering variable-rate, commodity-only service except where the offering includes generated savings. As has been demonstrated in these proceedings in the context of low-income customer protection, it is possible for some ESCOs to serve customers at a guaranteed savings. Saving customers money was a crucial policy goal articulated by the Commission when the retail access market was initially opened. Thus, rather than prohibit variable-rate, commodity-only offerings, such offerings will be permitted only if the ESCO guarantees to serve the customer at a price below the price charged by the utility on an annually reconciled basis.[8]

Similarly, the Connecticut Public Service Commission that "all Variable Plans for residential and business customers be eliminated, citing the recent significant increases to generation rates under these plans in support of its request.[9]

As discussed below, countless courts throughout the country likewise agree that contemporaneous utility rates serve as a proper barometer for business and market conditions and have sustained claims based on the differentials. *See, e.g.*, *Mirkin v. XOOM Energy, LLC*, 931 F.3d 173, 178 n.2 (2d Cir. 2019) (holding that "[b]ecause utility companies like Con Edison participate on the wholesale energy market, their rates are another reflection of the Market Supply Cost."); *see also id.* (sustaining breach of contract claim where the defendant ESCO deviated from the leading public utility); *Stanley v. Direct Energy Servs., LLC*, 466 F. Supp. 3d 415, 426 (S.D.N.Y. 2020) ("there is a reasonable contract interpretation that 'Market' meant that Defendant's variable rate would be tethered to some degree to supply costs or to competitors' rates . . . upward variation from local utility rates may also demonstrate how Defendant's consumer rates are materially disconnected from their supply costs."); *Oladapo v. Smart One Energy, LLC*, No. 14-7117, 2016 WL 344976, at *4 (S.D.N.Y. Jan. 27, 2016) ("the fact that [the ESCO's] rates consistently rose over time, while those set by [local utility] fluctuated, indicates that [the ESCO] was not setting its rates in response to 'changing gas market conditions'"); *Melville v. Spark Energy, Inc.*, No. 15-8706, 2016 WL 6775635, at *5 (D.N.J. Nov. 15, 2016) ("because [local utility] is a supplier in the energy market; its prices thus serve as at least partial indications of the market rate and are relevant despite the lack of a savings guarantee clause."); *Landau v. Viridian Energy PA LLC*, 223 F. Supp. 3d 401, 410 (E.D. Pa. 2016) (finding breach of contract where rates were higher than the local utility's rates); *Melville v. Spark Energy, Inc.*, No. 15-8706 (RBK/JS), 2016 WL 6775635, at *3 (D.N.J. Nov. 15, 2016) ("Here, the [contract] states

[8] Case No. 15-M-0127, Order Adopting Changes To The Retail Access Energy Market And Establishing Further Process, New York Public Service Commission (Dec. 12, 2019) at 39-40.

[9] PURA Establishment of Rules for Electric Suppliers and EDCs Concerning Operations and Marketing in the Electric Retail Market, Connecticut Public Regulatory Authority Docket No. 13-07-18 (November 5, 2014).

that the flex-rate plan uses a rate that 'may vary according to market conditions.' Plaintiffs argue that rates charged . . . were not market-based and, in support, list the rates charged by [the ESCO] in comparison to [the utility] during several months from 2013 to 2014. . . . Such evidence supports the allegation that [the ESCO's] prices were untethered to those of the market at large."); *Chen v. Hiko Energy, LLC*, No. 14-1771, 2014 WL 7389011, at *4 (S.D.N.Y. Dec. 29, 2014) ("Given the dramatic differences in pricing between defendant and [the local utility], it is plausible defendant's rates were not, in fact, reflective of the wholesale cost of electricity or gas, market-related factors, and . . . "costs, expenses and margins.").

B. Breach of Contract

To state a breach of contract claim, the classes need only satisfy three elements: "the existence of a contract, including its essential terms; breach of a duty imposed by the contract; and resultant damages." *Jordet*, 505 F. Supp. 3d at 222 (citations omitted). The classes allege that Just Energy breached its contract with class members, which represented that variable rates were priced based on the "business and market conditions," because Just Energy's variable rates bear no semblance to either wholesale prices or competitors' rates.

The classes will use numerous comparators to demonstrate that Just Energy's prices materially differed from metrics that could be reasonable interpretations of the use of the phrase "business and market conditions" in Just Energy's contracts.

First, the classes will use comparisons to class members' local utility rates, which countless courts have held is a proper comparator. In *Mirkin v. XOOM*, the U.S. Court of Appeals for the Second Circuit concluded that the plaintiffs could plausibly state a claim for breach of contract because the defendant ESCO deviated from the leading public utility by "up to" sixty percent. 931 F.3d at 178. The Second Circuit also plainly held that utilities are a reflection of wholesale market costs that can be used to evaluate whether an ESCOs rates are reflective of such costs. *Id.* at 178 n.2 ("Because utility companies like Con Edison participate on the wholesale energy market, their rates are another reflection of the Market Supply Cost."). As one federal judge held in *Chen v. Hiko Energy, LLC*:

> Plaintiffs' contracts provided that defendant would charge variable monthly rate reflecting the wholesale cost of electricity or gas, as well as various "market-related factors, plus all sales and other applicable taxes, fees, charges or other assessments and HIKO's costs, expenses and margins." (SAC ¶ 15). But the [complaint] alleges the electricity rate defendant charged Chen in February 2014 was nearly triple [the local utility] . . . **Given the dramatic differences in pricing between defendant and [the utility], it is plausible defendant's rates were not, in fact, reflective of the wholesale cost of electricity or gas, market-related factors, and defendant's "costs, expenses and margins."**

No. 14-1771, 2014 WL 7389011, at *4 (S.D.N.Y. Dec. 29, 2014) (emphasis added); *see also Melville*, 2016 WL 6775635, at *5 ("[B]ecause [the local utility] is a supplier in the energy market; its prices thus serve as at least partial indications of the market rate and are relevant despite the lack of a savings guarantee clause."); *Stanley*, 466 F. Supp. 3d at 427 ("'This

incomplete and confusing explanation for calculating variable market-based rates could lead a reasonable consumer to believe that he or she would receive a variable market rate, i.e., once that was competitive with those charged by other ESCOs.'") (quoting *Claridge v. N. Am. Power & Gas, LLC*, No. 15-CV-1261 PKC, 2015 WL 5155934, *4 (S.D.N.Y. Sept. 2, 2015)).

Second, the classes will use wholesale prices and Just Energy's own costs to demonstrate that Just Energy's variable rate was inconsistent and significantly higher than wholesale costs. *See, e.g.*, *Landau*, 223 F. Supp. 3d at 408-09 (E.D. Pa. 2016) (where "[an ESCO's] rates increased or stayed the same even when the average wholesale market price for the region decreased[,]" breach of contract claim may proceed to trial); *Stanley v. Direct Energy Servs., LLC*, 466 F. Supp. 3d at 426 (S.D.N.Y. 2020) ("[T]here is a reasonable contract interpretation that 'Market' meant that Defendant's variable rate would be tethered to some degree to supply costs or to competitors' rates . . . upward variation from local utility rates may also demonstrate how Defendant's consumer rates are materially disconnected from their supply costs."); *Mirkin*, 2016 WL 3661106, at *8 (breach of contract when contract provided that variable rates will be "based on wholesale market conditions" and variable rate failed to track wholesale market rates) (citing *Sanborn v. Viridian Energy, Inc.*, No. 14-1731 (D. Conn.), and *Steketee v. Viridian Energy, Inc.*, No. 15-585 (D. Conn.)); *Edwards v. N. Am. Power & Gas, LLC*, 120 F. Supp. 3d 132, 42-43 (D. Conn. 2015) (sustaining contract claim where contract promised "[t]he variable rate may increase or decrease to reflect the changes in the wholesale power market" and the plaintiff alleged that "the rates [the ESCO] charged were significantly higher than the wholesale market rate and did not always increase or decrease when the wholesale market rates did."). Notably, Just Energy does not take issue with this comparator in its Notice of Disallowance, despite Claimant Jordet's use of wholesale natural gas prices as a comparator in his complaint.

Third, the classes will use comparisons to Just Energy's contemporaneous fixed rates and other ESCOs' contemporaneous rates "to support her allegation that Defendant's variable rates are untethered to wholesale market supply costs" and to show "that Defendant charges higher variable rates than other ESCOs." *Stanley*, 466 F. Supp. 3d at 427. Just Energy likewise does not take issue with Claimant Jordet's use of Just Energy's fixed rates and other ESCOs' rates as comparators; rather, it specifically demands the latter.

Just Energy's claim that its contracts do not guarantee savings is similarly of no moment. Indeed, the same argument has been quickly dispatched by numerous courts.

> Agway's agreement represents that the variable monthly rate "shall each month reflect the cost of electricity acquired by Agway from all sources . . . related transmission and distribution charges and other market-related factors, plus all applicable taxes, fees, charges or other assessments and Agway's costs, expenses and margins." **Defendant argues that it has not been misleading because it never represented that savings were guaranteed. But this is inapposite to whether Defendant in fact charged rates to Plaintiff and putative class members that were based only upon those factors explicitly enumerated in the contract, as required by the contract.** . . . Plaintiff has plausibly alleged that Agway's rates were "not in fact competitive market rates based on the wholesale cost of electricity" or the factors set forth in the agreement.

Gonzales v. Agway Energy Servs., LLC, No. 18-235, 2018 WL 5118509, at *4 (N.D.N.Y. Oct. 22, 2018) (emphasis added).

No factfinder will interpret "business and market conditions" to mean that Just Energy can price gouge—so much so that the rates bear no resemblance to wholesale costs and competitors' rates.

C. Implied Covenant of Good Faith and Fair Dealing

"An implied covenant of good faith and fair dealing is contained in all contracts . . ., and breach of that duty is subsumed in the breach of contract claim." *Jordet*, 505 F. Supp. 3d at 222; *cf. Stanley*, 466 F. Supp. 3d at 428 (all contracts contain an implied covenant of good faith and fair dealing) (citing *Arcadia Bioscis., Inc. v. Vilmorin & Cie*, 356 F. Supp. 3d 379, 399 (S.D.N.Y. 2019)). "The implied covenant is "breached when a party acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement.'" *Stanley*, 466 F. Supp. 3d at 428 (quoting *Skillgames, LLC v. Brody*, 767 N.Y.S.2d 418, 423 (2003); citing *Moran v. Erk*, 11 N.Y.3d 452 (2008) ("The implied covenant . . . embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.")). "'In order to find a breach of the implied covenant, a party's action must directly violate an obligation that may be presumed to have been intended by the parties.'" *Id.* at 428-29 (quoting *Gaia House Mezz LLC v. State Street Bank & Tr. Co.*, 720 F.3d 84, 93 (2d Cir. 2013)).

Just Energy "'violated the covenant by exercising [any price-setting] discretion [it may have had] in bad faith and in a manner inconsistent with [Claimant's] reasonable expectations.'" *Stanley*, 466 F. Supp. 3d at 429 (quoting *Claridge*, 2015 WL 5155934, at *6; citing *Hamlen*, 2017 WL 892399, at *5 (noting that the plaintiff had sufficiently "alleged [that the] defendant acted in bad faith by exercising its discretion to charge unreasonable rates to profiteer off its customers, who reasonably expected to pay [the] defendant competitive prices for natural gas" and that "the implied covenant of good faith and fair dealing requires [the] defendant to seek a profit that is commercially reasonable")).

As explained above, the classes will be able to prove that Just Energy's variable rate profit margins are so unreasonable as to be set in bad faith. The classes will demonstrate Just Energy's bad faith by, *inter alia*, showing the stark disparity with Just Energy's fixed rate (which represents an actual market-based rate) profit margins and variable rate profit margins.

IV. Just Energy's Criticisms of Claimant's Expert Report are Easily Dispatched

Offering no facts and little substantive argument, Just Energy contends that Claimants' damages estimates, based on the report of their expert of Serhan Ogur, Ph.D (the "Ogur Report"), are speculative and inflated. Claimants, who have not yet completed discovery in the underlying actions, made clear that their damages estimations were just that, estimations based on the information to which they currently have access. Accordingly, Claimants have been aggressively pushing for disclosures by Just Energy so that the parties and the factfinder can have a clear and accurate understanding of the number of aggrieved U.S. consumers and the

scope of their damages. These are simple facts based on data which Just Energy could easily disclose to resolve most, if not all, of its concerns regarding the scope and size of the classes. Claimants are confident that either this Court or the persons assigned to adjudicate Claimants' claims will require the disclosure of such information.

Critically, Just Energy's attacks on the Ogur Report at best represent a diminution of the size and scope of the classes and their damages; these criticisms of the Ogur Report do not justify complete claim denial. It is unclear why the Monitor would support total claim denial based on Just Energy's claim that the U.S. classes are owed less than the Claimants' expert estimated.

Indeed, none of the criticisms raised by Just Energy justifies denial of the Claimants' claims.

First, Just Energy complains that the Ogur Report addresses both electric and natural gas customers. Mr. Jordet (who represents natural gas consumers) filed a joint Claim with Ms. Donin and Ms. Golovan (who represent both electricity and natural gas customers) and the ten other consumers represented by Ms. Donin's and Ms. Golovan's counsel. All Claimants relied on the Ogur Report, which explicitly and in great detail addresses both natural gas *and* electric customer damages. Neither Just Energy nor the Monitor explain why a combined claim or combined report justifies denial of all Claimants' entire claims.

Second, Just Energy argues that the Ogur Report erred by using utility rates as a baseline for the rates Just Energy should have charged under the terms of its customer contract. As discussed above, this critique has no merit—after all utility rates are called the "price to compare" by utilities and regulators precisely because those rates represent the proper benchmark for customer comparisons. This attack on the Ogur Report is also a red herring, as the report's "overcharge theory is based on the difference between the electricity and natural gas rates the affected class were charged versus what they would have been charged if Just Energy's rates were based on business and market conditions." Ogur Report at 10. During the adjudication process, Claimants will not only rely on utility rates as a price to compare, but they will also show, among other measures, that Just Energy's margins are excessive based on Just Energy's actual costs and the margins it charges customers on fixed rate contracts (which carry the same if not higher costs to Just Energy as compared to its variable rate customers). Notably, the *Jordet* complaint compared Just Energy's rates to both the applicable utility rate **and** also to the applicable wholesale market rates.

Third, Just Energy complains that the Ogur Report includes commercial customers, and it asserts without support that commercial contracts are different than residential contracts. Notably, neither the *Jordet* nor the *Donin* Actions is limited to residential customers, and the *Jordet* contract by its own terms applies to both "Home" and "Business" customers. The same is true for the Donin and Golovan contracts. Again, this is a problem of Just Energy's own making. Producing the applicable contracts will allow the parties and the factfinder to easily determine precisely which customers are subject to which pricing terms.

Fourth, Just Energy wrongly contend that only Just Energy Solutions, Inc. customers can be included in the natural gas portion of the customer class because that is the only entity named in the *Jordet* Action. Even if true, this contention at best would marginally limit the portion of the

class who purchased natural gas because Just Energy Solutions, Inc. is the Just Energy entity that sells all or most of the natural gas the Just Energy Entities sell in the U.S. Likewise, Just Energy is wrong to claim that the electricity portion of the customer class should be limited to customers of Just Energy New York and Just Energy Group, Inc. But a very large portion of the electricity customer class resides in New York, and Just Energy Group, Inc. owns all of the other Just Energy entities that sell electricity in the U.S. Notably, Just Energy Group, Inc. tried and failed to win its dismissal from the *Donin* Action.

Fifth, Just Energy posits without factual support that Dr. Ogur's assumed percentage of variable versus fixed rate customers is not accurate. This is another simple fact that Just Energy will be required to disclose as a part of the adjudication process. Just Energy also claims that a smaller percentage of customers enroll directly into variable rate contracts as opposed customers initially on fixed rate contracts who roll over to variable rates after the fixed rate expires. This is a curious contention given that both the *Jordet* and *Donin* Actions explicitly plead that they had fixed rate contracts that rolled over to variable rates. To the extent there are customers that were on variable rate contracts from the outset, pre-adjudication discovery will reveal that the operative contract language is the same.

Sixth, Just Energy complains (without support or specification) that the Ogur Report covers periods outside the statute of limitations. This is a straightforward issue that will be resolved in the adjudication process.

Seventh, Just Energy contends that the rate of damages after 2018 was less than before 2018. But this argument relies on the faulty notion, discussed above, that only straight variable rate contracts, as opposed to fixed-to-variable rate rollover contracts, are part of the classes. Again, the number of class members and their respective damages usage will be easily determined when Just Energy produces the requested data in pre-adjudication discovery.

Eighth, Just Energy complains that extrapolating damages from those suffered by the named plaintiffs in the *Jordet* and *Donin* Actions is inappropriate because the sample size is too small. But as noted in the Ogur Report, final damages calculations will be based on forthcoming pre-adjudication discovery. Relatedly, Just Energy contends that the difference between their rates and Pennsylvania and New York utility rates may not be the same as in other states. Again, this is an issue easily resolved with pre-adjudication discovery.

Finally, Just Energy quips that Claimants' prejudgment interest calculations were flawed because New York's rate is higher than those of other states. This is largely a math issue to be resolved after pre-adjudication discovery.

None of the arguments proffered in response to the estimations made in the Ogur Report justify wholesale denial of the Claimants' claim, and all concerns raised by Just Energy will all be addressed after pre-adjudication discovery and in the adjudication process.

V. The Classes will be Certified

The Notice of Disallowance curiously posits that class certification presents a "substantial hurdle." Yet the five courts that have addressed a contested motion to certify a class of ESCO customers overcharged under the terms of their customer agreements easily granted the motions. *Bell v. Gateway Energy Services Corp.*, No. 31168/2018 (Rockland Cnty. Super. Ct. Jan. 8, 2021), NYSCEF Doc. No. 152; *Claridge v. N. Am. Power & Gas, LLC*, No. 15-1261, 2016 WL 7009062 (S.D.N.Y. Nov. 30, 2016) (plaintiff was represented by the undersigned); *Roberts v. Verde Energy, USA, Inc.*, No. X07HHDCV156060160S, 2017 WL 6601993 (Conn. Super. Ct. Dec. 6, 2017), *aff'd*, 2019 WL 1276501 (Conn. Super. Ct. Feb. 1, 2019); and *BLT Steak LLC v. Liberty Power Corp, L.L.C.*, No. 151293/2013 (N.Y. Cnty., Super. Ct Aug. 14, 2020), NYSCEF Doc. No. 376 (plaintiff was represented by the undersigned); *Martinez v. Agway Energy Services, LLC*, No. 18-00235, 2022 WL 306437 (N.D.N.Y. Feb. 2, 2022) (plaintiff represented by the undersigned). Claimant is confident that the factfinder here will follow suit.

There are few cases better suited for class certification. The classes' claims arise out of uniform misrepresentations regarding the pricing methodology for Just Energy's variable rate made in its standard customer contract. Just Energy provides its prospective natural gas customers with its standard contract prior to each contract's initiation. If the customer accepts the agreement, the it becomes the operative contract. Additionally, not only are contractual commitments concerning Just Energy's variable rate uniform, but the resultant injury to the classes is also uniform because when Just Energy sets its variable rates, it uses the same rate for all customers within each utility region, regardless of which version of the contract governs its relationship with each variable rate customer. For these and the other reasons described below, the prerequisites to class certification will be easily met.[10]

A. The Proposed Class Satisfies the Rule 23(a) Factors.

Rule 23(a) requires that a plaintiff seeking class certification demonstrate that the proposed class satisfies the following four factors:

> (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a); *accord Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 345 (2011).

i. Numerosity

Rule 23(a)(1) requires that "the class is so numerous that joinder of all members is impracticable." "[N]umerosity is presumed where a putative class has forty or more members." *Shahriar v. Smith & Wollensky Rest. Grp.*, 659 F.3d 234, 252 (2d Cir. 2011). Just Energy had millions of customers on variable rates during the relevant period. There is numerosity here.

[10] Claimant's analysis herein demonstrates compliance with the most exacting class certification standards, Rule 23 of the U.S. Federal Rules of Civil Procedure (the "Rules").

ii. Commonality

Rule 23(a)(2) requires a showing of "questions of law or fact common to the class." "Commonality is satisfied where a single issue of law or fact is common to the class." *In re Scotts EZ Seed Litig.*, 304 F.R.D. at 405 (quoting *In re IndyMac Mort.-Backed Sec. Litig.*, 286 F.R.D. 226, 233 (S.D.N.Y. 2012)). "[E]ven a single common question will do." *Dukes*, 564 U.S. at 346 (citation, internal quotation marks, and brackets omitted).

Here, the class' claims largely turn on whether or not Just Energy set its rate based on "business and market conditions," as required in the customer contract. Because all class members were made the same promise, answering this common question will dominate this action. As one federal judge has held in certifying virtually identical claims, "[t]he claims of the proposed class turn on the 'common contention' that [Defendant] misleadingly described its method for calculating variable monthly rates, a claim that 'is capable of classwide resolution . . .' Plaintiff[] ha[s] therefore shown common questions of law and fact under Rule 23(a)(2)." *Claridge*, 2016 WL 7009062, at *4 (citing *Dukes*, 564 U.S. at 350).[11] And in any event, "[c]ommonality is not defeated because consumers interpreted arguably vague and misleading language in different ways." *Claridge*, 2016 WL 7009062, at *3.

iii. Typicality

Rule 23(a)(3) requires "the claims of the class representatives be typical of those of the class, and is satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *In re Scotts EZ Seed Litig.*, 304 F.R.D. at 405 (quoting *Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147, 155 (2d Cir. 2001)). "'Minor variations in the fact patterns underlying the individual claims do not preclude a finding of typicality' . . . [rather, the Rule] requires 'only that the disputed issues of law or fact occupy essentially the same degree of centrality to the named plaintiff's claim as to that of other members of the proposed class." *In re Scotts*, 304 F.R.D. at 405-06).

Here, the classes' claims arise from the same core events, and each class member would make the same legal arguments to prove Just Energy's liability. The classes were commonly bound by a sales agreement distributed to all Just Energy customers. Each contract contains the same or

[11] Just Energy half-heartedly argues that individual damages claims arising out of Just Energy's various tangential products and services will predominate over common issues. However, it is well-established that differences in individual damages do not preclude class certification. *See, e,g.*, *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 671 (7th Cir. 2015) ("It has long been recognized that the need for individual damages determinations at this later stage of the litigation does not itself justify the denial of certification.") (collecting cases). Moreover, the classes are limited to variable rate customers and do not include other products or services. To the extent that Just Energy is referring to non-energy-related value-added services, as the NYPSC explained at length, such products have no value and do not justify charging rates more than the default service providers. Thus, the classes can use a common set of proof to show each class member's damages, namely, Just Energy's records showing the rates charged, costs incurred, and margin realized combined with publicly available wholesale cost data and utility rates.

similar terms. Thus, all class members would proffer the same evidence and arguments in pursuing their claims against Just Energy.

iv. Adequacy Of Representation

Rule 23(a)(4) requires that requires a showing that "the representative parties will fairly and adequately protect the interests of the class." "Adequacy is satisfied unless plaintiff's interests are antagonistic to the interest of other members of the class." *Claridge*, 2016 WL 7009062, at *5 (quoting *Sykes v. Mel S. Harris & Associates LLC*, 780 F.3d 70, 90 (2d Cir. 2015)).

Claimant will fairly and adequately protect the interests of the classes. Since the actions' respective inceptions, Claimants have actively assisted in the cases' prosecution and nothing in the record suggests [their] interests are antagonistic to those of other class members." *In re Scotts EZ Seed Litig.*, 304 F.R.D. at 406-07.

Likewise, Claimants' counsel is qualified and experienced in prosecuting complex class actions nationwide, in both state and federal courts, including customer protection class actions against ESCOs. Indeed, no law firms in the U.S. have more experience successfully prosecuting class actions against ESCOs who overcharge their customers.

B. The Proposed Class Satisfies the Rule 23(b)(2) Factors

Pursuant to Rule 23(b)(2), "[a] class action may be maintained if Rule 23(a) is satisfied and if . . . the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole[.]" Just Energy has acted on grounds that apply generally to the Class, namely by representing that its variable rates are market-based, when Just Energy's rates are in fact untethered from market conditions. Thus, final injunctive and declaratory relief is appropriate with respect to the classes.

C. The Proposed Class Satisfies the Rule 23(b)(3) Factors

Rule 23(b)(3) requires that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."

i. Predominance

> A court must "bear[] firmly in mind that the focus of Rule 23(b)(3) is on the predominance of common questions . . ." *Amgen Inc. v. Connecticut Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1194 (2013). It "does not require a plaintiff seeking class certification to prove that each element of her claim is susceptible to classwide proof," but instead to prove that "common questions predominate over any questions affecting only individual class members." *Id.* at 1196 (emphasis in original; alterations and quotation marks omitted); *accord Sykes v. Mel S. Harris & Associates LLC*, 780 F.3d 70, 87 (2d Cir. 2015) ("The mere existence of individual

> issues will not be sufficient to defeat certification. Rather, the balance must tip such that these individual issues predominate.").

Claridge, 2016 WL 7009062, at *2 (certifying class of ESCO customers).

"Predominance is satisfied if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof." *Id.* at *5 (quoting *Roach v. T.L. Cannon Corp.*, 778 F.3d 401, 405 (2d Cir. 2015)).

a. The Nationwide Classes Will be Certified

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

> However, Plaintiff has alleged that Defendant sent "uniform notices" to their legacy customers from NYSEG Solutions and/or Energetix that promised competitive, market-based variable rates. (Am. Compl. ¶ 2.) And Plaintiff has further alleged that Defendant engages in a uniform policy of price gouging all of its customers. (*Id.* ¶¶ 2, 24, 68.) The Second Circuit has explicitly instructed that "non-identical injuries of *the same general character* can support standing" for a class action. *Langan*, 897 F.3d at 94 (emphasis added) (citation omitted). And "courts in th[e Second C]ircuit have construed the payment of a premium price to be an injury in and of itself[, and] . . . where plaintiffs allege that customers paid a premium price based on a misrepresentation, those customers can have standing under Article III." *Guariglia v. Procter & Gamble Co.*, No. 15-CV-4307, 2018 WL 1335356, at *12 (E.D.N.Y. Mar. 14, 2018) (citations and quotation marks omitted). Under analogous circumstances, the Second Circuit determined that standing existed for a plaintiff who sought to represent a variety of certificate holders in connection to certain mortgage investments, despite the fact that other certificate holders were "outside the specific tranche from which the named plaintiff purchased certificates" and were subject to "different payment priorities." *Langan*, 897 F.3d at 94 (referring to *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*, 693 F.3d 145 (2d Cir. 2012)). Similarly, here, it may be true that Energetix customers and NYSEG Solutions customers had different contracts before Defendant bought them. It may also be true that customers outside New York received slightly different terms or offers than those that Plaintiff received. But the fact that the "ultimate damages [for each member of the class may] . . . vary . . . is

> not sufficient to defeat class certification under Rule 23(a), let alone class standing." *NECA*, 693 F.3d at 164-65 (citation and quotation marks omitted).

Stanley, 466 F. Supp. 3d at 438-39.

Just Energy's Notice of Disallowance admits that it uses uniform customer contracts with the same pricing provisions, arguing that "the applicable contract contains multiple provisions that put customers (including the Claimant) on clear notice of the variable rates that Just Energy Solutions would set and to which customers (including Claimant) will be subject[.]"

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

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

This reflects "the obvious truth that class actions necessarily involve plaintiffs litigating injuries that they themselves would not have standing to litigate," *Langan*, 897 F.3d at 95, and that "[n]amed plaintiffs in a putative consumer protection class action may assert claims under laws of states where they do not reside to preserve those claims in anticipation of eventually being

joined by class members who do not reside in the states for which claims have been asserted." *Pisarri v. Town Sports Int'l, LLC*, No. 18-1737, 2019 WL 1245485, at *3 (S.D.N.Y. Mar. 4, 2019) (quotation and citation omitted). Indeed, the Second Circuit has expressly held that "any concern about whether it is proper for a class to include out-of-state, nonparty class members with claims subject to different state laws is a question of predominance under Rule 23(b)(3) not a question of adjudicatory competence under Article III." *Langan*, 897 F.3d at 93 (quotation marks omitted). Thus, where a plaintiff's own claims survive dismissal, *Langan* teaches that counts alleging violations of other jurisdictions' laws are to be addressed at class certification.

The same is true for class members that purchased energy from one of Just Energy's many affiliates. That consumers purchased from an affiliate is not a barrier to Claimant bringing claims on these consumers' behalf because "courts in this Circuit have held that, subject to further inquiry at the class certification stage, a named plaintiff has standing to bring class action claims . . . for products that he did not purchase, so long as those products . . . are 'sufficiently similar' to the products that the named plaintiff *did* purchase." *Mosely v. Vitalize Labs, LLC*, No. 13-2470, 2015 WL 5022635, at *7 (E.D.N.Y. Aug. 24, 2015) (emphasis in original). This is because a class action plaintiff may sue for non-purchased products if he or she (1) suffered injury, and (2) the injurious conduct implicates the same set of concerns as the conduct alleged to have caused injury to other members of the proposed class. *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*, 693 F.3d 145, 162 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 1624 (2013); *see also In re Frito-Lay N. Am., Inc. All Natural Litig.*, No. 12-2413, 2013 WL 4647512, at *12 (E.D.N.Y. Aug. 29, 2013) (same) ("*NECA-IBEW* [] instructs that, because plaintiffs have satisfied the Article III standing inquiry, their ability to represent putative class members who purchased products plaintiffs have not themselves purchased is a question for a class certification motion."); *Wai Chu v. Samsung Elecs. Am., Inc.*, No. 18-11742, 2020 WL 1330662, at *4 (S.D.N.Y. Mar. 23, 2020) (*NECA-IBEW's* "same set of concerns" requirement satisfied for thirty-two devices, even though plaintiff only purchased three).

b. The Breach of Contract Claim Will be Certified

The classes' breach of contract claims present straightforward common questions that will be answered through common proof, precluding the predominance of individual issues. "Contract claims satisfy Rule 23(b)(3) when the claims of the proposed class 'focus predominantly on common evidence[.]'" *Claridge*, 2016 WL 7009062, at *6 (quoting *In re U.S. Foodservice Inc.*, 729 F.3d at 125). "[C]laims arising from interpretations of a form contract appear to present the classic case for treatment as a class action, and breach of contract cases are routinely certified as such." *In re Scotts EZ Seed Litig.,* 304 F.R.D. at 411; *accord Gillis v. Respond Power, LLC*, 677 F. App'x 752, 756 (3d Cir. 2017) ("Because form contracts should be interpreted uniformly as to all signatories, Pennsylvania and federal courts have recognized that claims involving the interpretation of standard form contracts are particularly well-suited for class treatment.") (vacating district court's denial of class certification and remanding). Additionally, "[t]he Second Circuit has affirmed certification of a contract claim when minor variations existed in the language of the disputed contracts because the underlying claim was directed to a 'substantially similar' terms." *Claridge*, 2016 WL 7009062, at *6 (quoting *In re U.S. Foodservice Inc.*, 729 F.3d at 124; *accord In re Scotts EZ Seed Litig.,* 304 F.R.D. at 411 (certifying contract class where, "[a]lthough plaintiffs do not allege defendants breached a 'form contract,' the

representations defendants made to each plaintiff were uniform.") (quoting *Steinberg v. Nationwide Mut. Ins. Co.*, 224 F.R.D. 67, 74 (E.D.N.Y. 2004)); *Allapattah Servs., Inc. v. Exxon Corp.*, 333 F.3d 1248, 1261 (11th Cir. 2003), *aff'd sub nom. Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005) (affirming certification of breach of contract class where the defendant failed to price natural gas in accordance with its uniform contractual obligations).

Moreover, proof of Claimant's claim will be common to all class members, as it will rely on Just Energy's admittedly standard contracts, as well as publicly available data, witness testimony, and business records which will demonstrate that that Just Energy did not set its variable rate in accordance with the market, as required in its customer contract.

c. The Good Faith and Fair Dealing Claim Will be Certified

The good faith and fair dealing claim is likewise well-suited for class treatment. "The implied covenant is "breached when a party acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement.'" *Stanley*, 466 F. Supp. 3d at 428.

Whether Just Energy acted in bad faith is common to all class members and will be evaluated with common evidence. *See In re U.S. Foodservice Inc.*, 729 F.3d at 125 (common evidence used to determine whether business practice "departs from prevailing commercial standards of fair dealing so as to constitute a breach"). As with the classes' breach of contract claim, Claimant will demonstrate that standard contracts gave rise to his and the classes' reasonable expectations concerning the variable rate, and will prove Just Energy's failure to provide a competitive, market-based rate and its bad faith profiteering through common evidence.

ii. <u>Superiority</u>

There are several reasons why a class action is superior to other available adjudicatory methods. <u>First</u>, a class action will permit an orderly and expeditious administration of class claims, foster economies of time, effort, and expense, and ensure uniformity of decisions. *See* Fed. R. Civ. P. 23(b)(3) advisory committee's note. Just Energy has acted on grounds generally applicable to the classes. By prosecuting this action as a class, once Just Energy's liability has been adjudicated, the factfinder will be able to determine the claims of all class members.

Individualized actions, on the other hand, "would simply entail repeated adjudications of identical [contract] provisions." *Claridge*, 2016 WL 7009062, at *6; *cf. Roberts*, 2017 WL 6601993, at *2 ("Piecemeal litigation would be less workable. Given that much of the case depends on the central common legal issues surrounding the contract class members would have little interest in separately controlling the litigation . . ."). Additionally, prosecuting separate actions would create a risk of inconsistent or varying adjudications with respect to individual class members that could establish incompatible standards of conduct for Just Energy.

<u>Second</u>, the individual damages suffered are small relative to the expense and burden of individual litigation, such that class members are unlikely to prosecute individual actions. *See Roberts*, 2017 WL 6601993, at *2 ("Consumer contracts affecting thousands of people but not

necessarily yielding thousands of dollars to each class member are well suited for class certification. Without the class action method most claims like this wouldn't be brought, including claims with great social utility."). Finally, this lawsuit presents no difficulties that would impede its management as a class action. *See* Fed. R. Civ. P. 23(b)(3)(D).

VI. The Increasing Regulatory Denunciation of Just Energy's Pricing Practices Further Demonstrates that Claimant's Class Action Claims are Strong

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

> Every day we delay [deregulation], we're costing consumers a lot of money . . . . It can be done quickly. The key is to get the legislation done fast.[12]

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

Responding to ESCOs' price gouging, many key deregulation supporters now regret their role. For example, reflecting on Maryland's experience, a Maryland Senator lamented that "[d]eregulation has failed. We are not going to give up on re-regulation till it is done."[13]

A Connecticut leader who joined in that state's foray into deregulation was similarly remorseful:

> Probably six out of the 187 legislators understood it at the time, because it is so incredibly complex . . . . If somebody says, no, we didn't screw up, then I don't know what world we are living in. We did.[14]

State regulators have, ***for years***, also denounced predatory pricing practices like those challenged in the class actions. For example, in 2014 the NYPSC declared that New York's retail energy markets were plagued with "marketing behavior that creates and too often relies on customer

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

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

[14] Keating, *supra*.

confusion."[15] The NYPSC further noted "it is extremely difficult for mass market retail energy customers to access pricing information relevant to their decision to commence, continue or terminate service through an ESCO."[16] The NYPSC concluded as follows:

> [A]s currently structured, the retail energy commodity markets for residential and small nonresidential customers cannot be considered to be workably competitive. Although there are a large number of suppliers and buyers, and suppliers can readily enter and exit the market, the general absence of information on market conditions, particularly the price charged by competitors, is an impediment to effective competition . . . .[17]

The conduct of ESCOs like Just Energy has been devastating to consumers across the U.S. For example, "[a]ccording to the data provided by [New York's] utilities, the approximately two million New York State residential utility customers who took commodity service from an ESCO collectively paid almost $1.2 billion more than they would have paid if they purchased commodity from their distribution utility during the 36-months ending December 31, 2016."[18] "Additionally, small commercial customers paid $136 million more than they would have paid if they instead simply remained with their default utilities for commodity supply for the same 36-month period."[19] Combining these two groups, New York consumers have been "'overcharged' by over $1.3 billion dollars over this time period."[20]

Based on the flood of consumer complaints, negative media reports, and data demonstrating massive overcharges, the NYPSC announced in December 2016 an evidentiary hearing to consider primarily whether ESCOs should be "completely prohibited from serving their current products" to New York residential consumers.[21] Then, on December 16, 2016, the NYPSC permanently prohibited ESCOs from serving low-income customers, because of "the persistent ESCO failure to address (or even apparently to acknowledge) the problem of overcharges to [low income] customers . . . ."[22]

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

[16] *Id*. at 11.

[17] *Id*. at 10.

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

[19] *Id.* at 3.

[20] *Id.*

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

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

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

> [A]s the current retail access mass markets are structured, customers simply cannot make fully informed and fact-based choices on price . . . since the terms and pricing of the ESCO product offerings are not transparent to customers. For variable rate products this is due, in large part, to the fact that ESCOs often offer "teaser rates" to start, and after expiration of the teaser rate, the rate is changed to what is called a "market rate" that is not transparent to the customer, and the contract signed by the customer does not provide information on how that "market rate" is calculated.[23]
>
> * * *
>
> ESCOs take advantage of the mass market customers' lack of knowledge and understanding of, among other issues, the electric and gas commodity markets, commodity pricing, and contract terms (which often extend to three full pages), and in particular, the ESCOs' use of teaser rates and "market based rate" mechanisms that customers are charged after the teaser rate expires. In fact, ESCOs appear to be unwilling to provide the necessary product pricing details as to how those "market based rates" are derived to mass market customers in a manner that is transparent so as to enable an open and competitive marketplace where customers can participate fairly and with the necessary knowledge to make rational and fully informed decisions on whether it is in their best interest to take commodity service from their default utility, or from a particular ESCO among competing but equally opaque choices.[24]

In response to these criticisms, the ESCOs claimed as Just Energy does here that their marketing and overhead costs explain the overcharges, but NYPSC staff found that these costs do "**not justify the significant overcharges**."[25] Likewise, when the ESCOs claimed as Just Energy does here that their provision to consumers of so-called value-added products such as light bulbs and thermostats contributed to their excessive rates, NYPSC staff found that "**these sorts of value-added products is at best de minimis and does not explain away the significantly higher commodity costs charged by so many ESCOs**."[26]

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

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

[25] *Id.* at 37.
[26] *Id.* at 87.

Instead, NYPSC staff reached the following conclusion:

> The massive $1.3 billion in overcharges is the result of higher, and more often than not, significantly higher, commodity costs imposed by the ESCOs on unsuspecting residential and other mass market customers. These overcharges are simply due to (1) the lack of transparency and greed in the market, which prevents customers from making rational economic choices based on facts rather than the promises of the ESCO representative, and (2) obvious efforts by the ESCOs to prevent, or at least limit, the transparency of the market. These obvious efforts include the lack of a definition for "market rate" in their contracts, resulting in the fattening of ESCOs' retained earnings.[27]

Following these conclusions, in December 2019 the NYPSC **banned** the exact same variable rate pricing practices that the class actions challenge.

The NYPSC's press release announcing the ban on variable energy rates does not mince words, stressing that it was intended to "prevent[] bad actors among ESCOs from overcharging New York consumers" and that the regulations only went forward after "the state's highest court definitively halted ESCOs' attempts to use litigation to evade and/or delay consumer-protection regulation."[28] The regulations themselves likewise condemn ESCOs' conduct and declare that "avoiding accountability" has become a "business model" in the deregulated energy market:

> Based upon the number of customer complaints that continue to be made against ESCOs, and the likely need for increased enforcement activities, the large number of ESCO customers that pay significant premiums for products with little or no apparent added benefit, . . . it appears that a material level of misleading marketing practices continues to plague the retail access market.
>
> * * *
>
> The persistence of complaints related to ESCO marketing practices is indicative of some ESCOs continuing to skirt rules and attempting to avoid accountability as part of their business model.[29]

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[27] *Id*.

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

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

The NYPSC's variable rate ban followed a two-year investigation of ESCO practices that culminated in a 10-day evidentiary hearing to examine evidence submitted by 19 parties and to hear the testimony and cross-examination of 22 witnesses and witness panels.[30]

The NYPSC prefaced the ban with the observation that variable energy rates—like those Just Energy charged its U.S. customers—are "[t]he most commonly offered ESCO product" and that this popular product is frequently provided at "a higher price than charged by the utilities."[31]

The absurdity of consumers paying ESCOs more for the exact same energy offered by regulated utilities was not lost on the NYPSC:

> If market participants are unwilling, or unable, to provide material benefits to consumers beyond those provided by utilities in exchange for a regulated, just and reasonable rate, the market serves no proper purpose and should be ended.[32]

In fact, the NYPSC found it "troubling" that even after considering reams of evidence "neither ESCOs nor any other party have shown . . . that ESCO charges above utility rates were generally – or in any specific instances – justified."[33] This fact only highlighted the NYPSC's "long-held concern that many customers may only be taking ESCO service due to their misunderstanding of [ESCOs'] products and/or prices."[34]

Accordingly, and on this record, the NYPSC banned variable energy rates like those Just Energy charged to the Claimant Jordet and its other U.S. customers.[35] In place of these floating variable rates, the NYPSC required ESCOs to guarantee that their variable rates would save customers money compared to what the utility would have charged.[36] Under the new regulations, if the the consumer is charged more than the utility, the consumer must be refunded the difference.[37]

In Claimants' class actions, the difference between what Just Energy charged consumers for the exact same energy that class members' utilities would have charged is more than US$2 billion.

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[30] *Id.* at 3–4.

[31] *Id.* at 11.

[32] *Id.* at 12.

[33] *Id.* at 30.

[34] *Id.* at 31.

[35] *Id.* at 39.

[36] *Id.*

[37] *Id.*

The NYPSC's regulations took effect in April 2021. Around the same time, Just Energy ceased offering service in New York and tried to spin the state's ban on its core practice as "regulatory constraints . . . requiring certain variable rate customers to be dropped to the utility."[38]

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

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

For example, on December 31, 2014, Just Energy agreed to settle claims brought by the Massachusetts Attorney General that are strikingly similar to those in the class actions, making various concessions related to its deceptive energy sales and billing practices in Massachusetts.[39] Just Energy agreed to refund US$4,000,000 along with several key changes to its business practices, including that Just Energy was banned for three years from enrolling Massachusetts consumers into variable rate energy products unless it complied with the following requirements:

> Within 30 days of a customer enrolling in a variable energy rate product, Just Energy must provide the customer with written notice of the date on which the introductory rate will expire.
>
> Any new contracts for variable rate products shall either (i) include the calculation that will be used to set monthly rates under the contract such that the customer can calculate the cost of Just Energy's residential energy, or (ii) make the rates available 60 days in advance via phone and the internet.[40]

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

> For current Just Energy variable rate customers, the company is required to clearly and conspicuously post its current variable rates and post subsequent variable rates with at least 45 days advance notice.[42] Just Energy is also required to mail notice to all existing Massachusetts

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

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

[40] *Id.* ¶ 28(a)–(b), (d).

[41] *Id.* ¶ 30(a).

[42] *Id.* ¶ 30(b).

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

The Massachusetts Attorney General's sweeping action was far from the first time Just Energy had been targeted by regulators. For example, in June 2003, the *Toronto Star* reported that Just Energy (then operating under the name Ontario Energy Savings Corp.) was fined for violating the Ontario Energy Board's code of conduct by fraudulently enrolling customers.[46]

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

During this same period, the Citizens Utility Board (the "CUB") and AARP filed a formal complaint with the Illinois Commerce Commission (the "ICC") alleging, *inter alia*, that Just Energy told customers they would "save money," that consumers would not see any gas price increases if they signed up, and that Just Energy presented false and misleading information

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[43] *Id*. ¶ 30(c).

[44] *Id*. ¶ 44, Attachment 2.

[45] *Id*. ¶ 46.

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

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

[48] *Id*.

about its prices.[49] In April 2010, the ICC found that Just Energy's sales and marketing practices were deceptive, issued a US$90,000 fine, and ordered an independent audit of its practices.[50]

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

In November 2016, Ohio's Public Utilities Commission (the "PUCO") fined Just Energy **for a second time** for misleading marketing practices. An article in the *Columbus Dispatch* notes that Just Energy is an "energy company with a track record of misleading marketing," that it was fined by the PUCO in 2010 for deceptive marketing, and that it "sells energy contracts that often cost more than customers would pay if they received the standard service price."[52]

There are also *thousands* of complaints about Just Energy and its affiliated entities on the internet. Over the last three years alone, Just Energy has had at least 280 complaints filed against it with the Better Business Bureau (the "BBB").[53] Even though Just Energy is listed on the BBB's website as having been in business for 24 years, the BBB clearly declares that "THIS BUSINESS IS NOT BBB ACCREDITED" and displays the following "Pattern of Complaint" warning to the consuming public:

> **BBB files indicate that this business has a pattern of complaints concerning door to door sales representatives who are using misleading sales tactics, misrepresenting themselves as the consumer's current energy or gas company, and not being transparent about cancellations fees which may be charged by their current provider for switching their services. Additionally, consumers allege Just Energy's representatives display poor customer service when the business is contacted to resolve billing and contract concerns.**

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

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

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

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

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

Media reports about Just Energy are equally troubling. For example, when the confidential results of the Illinois Commerce Commission's audit referenced above were made public, Chicago's CBS affiliate reported that between 2010 and 2011 Just Energy received over 29,729 customer complaints.[54] "There were so many complaints over so many years with so little company oversight on how they were handled that the audit said, '[a]n adequate compliance culture at the top levels of the organization is not evident.'"[55]

A May 8, 2019, article in the *Chicago Reporter* showcased a carpenter who, over the course of 10 years, paid Just Energy over US$20,000 more than he would have paid the utility.[56] This Just Energy customer's experience was used to highlight the then-proposed Illinois Home Energy Affordability & Transparency Act ("HEAT"). On August 27, 2019, Illinois Governor J.B. Pritzker signed HEAT into law. Effective January 1, 2020, HEAT requires *inter alia* ESCOs like Just Energy operating in Illinois to include the utility's comparison price on all marketing materials, during telephone or door-to-door solicitations, and on every consumer's utility bill so consumers can make informed price comparisons.

Here, the factfinder's informed price comparison, will demonstrate over US$2 billion in damages to Just Energy's U.S. customers.

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

[55] *Id*.

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

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

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

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

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

AFFIDAVIT OF ROBERT TANNOR
(SWORN MAY 26, 2022)

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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.*

Tab 3

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

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

AFFIDAVIT OF ROBERT TANNOR
(Sworn January 17, 2022)

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

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

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

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

A. BACKGROUND

(i) The U.S. Litigation

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

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

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

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

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

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

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

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

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

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

(ii) This CCAA Proceeding

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

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

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

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

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

(i) Class Counsel's Initial Requests

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

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

(a) the proposed capital structure of the Applicants;

(b) creditor priorities and amounts;

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

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

(e) the Plan Term Sheet.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. CLASS COUNSEL'S PROPOSED CLAIMS ADJUDICATION PLAN

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

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

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

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

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

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

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

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

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

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

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

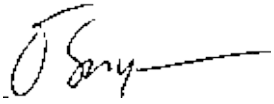
D. THERE IS EQUITY IN THE JUST ENERGY ENTITIES

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

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

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

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



Commissioner for Taking Affidavits
(or as may be)

Robert Tannor

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

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

AFFIDAVIT OF ROBERT TANNOR
(Sworn January 17, 2022)

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

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

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

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

A. BACKGROUND

(i) The U.S. Litigation

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

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

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

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

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

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

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

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

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

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

(ii) This CCAA Proceeding

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. CLASS COUNSEL'S PROPOSED CLAIMS ADJUDICATION PLAN

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

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

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

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

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

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

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

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

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

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

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

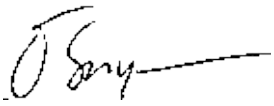
D. THERE IS EQUITY IN THE JUST ENERGY ENTITIES

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

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

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

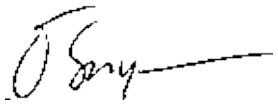
SWORN remotely by Robert Tannor of the City of Santa Barbara, in the State of California, before me at the City of Toronto, in the Province of Ontario, on this 17th day of January, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



Commissioner for Taking Affidavits
(or as may be)

Robert Tannor

This is Exhibit “A” referred to in the
Affidavit of Robert Tannor sworn January 17, 2022



A Commissioner for taking Affidavits (or as may be)

Professional Summary
I have had a career in running companies and restructuring companies. I have deep experience as a CEO and Restructuring professional with deep finance, accounting, and restructuring experience. Over the course of my career, I have startup experience, growth experience while as an officer of operating companies, and deep experience as a restructuring advisor. While operating a hedge fund, I was Chief Investment Officer of a distressed hedge fund investing in over 400 distressed credits from bank loans to bankruptcy trade claims in the US and Canada. As a restructuring professional at a boutique restructuring firm and a credit hedge fund, I have actively participated in restructurings of over 8 billion dollars of debt in over 400 credits from 2008 to 2021.

Education and Professional Certifications
Rensselaer Polytechnic Institute, Bachelor of Science in Electric Power Engineering
London Business School, Finance and Entrepreneurship program 2006
Harvard Business School 2017, 2018, and 2019 YPO Program at HBS
Member of YPO and Former Board of Directors NY YPO

Experience
2008 to 2021 – General Partner of Tannor Capital Advisors LLC which managed the investing for Tannor Partners Credit Fund, LP ("TPCF"). TPCF has invested in over 400 companies since 2008 in the United States and Canada in credit and equity of companies undergoing external competitive pressures or internal operational challenges. Since 2021, the fund has returned capital as investments mature. The fund has made successful investments in retail, energy, airlines, pharmaceutical and medical devices, power companies, and manufacturing businesses over 13 years. In this time, Robert participated in adhoc committees as part of the restructuring process.

2004 to 2008 - Chairman and CEO of Westar Satellite Services, LP a satellite communications company based in Dallas, Texas. Robert Tannor led a group of investors to purchase the company out of bankruptcy in 2005, restructure its operations and sold the business in 2008 for a 2.5x invested capital.

2000 to 2004 - Senior industry practice leader and Director, Ernst & Young Corporate Finance LLC in New York focusing on Corporate Restructuring, distressed M&A, and Transaction Due Diligence. Robert worked as lead restructuring advisor or part of the team in over 30 bankruptcy cases, in court and out of court.

Notable assignments, M&A transactions, and Restructurings at E&Y
Pacific Crossing – a subsea cable owned by Asia Global Crossing spanning the Pacific Ocean from US West Coast to Japan (advised the bank group - $700 million credit)
Bear Swamp Pumped Storage Hydroelectric Facility – Part of US Generating NE (advised creditor certificate holders)
Velocita – a US and Canadian fiber optic network based in Virginia (advised creditor's committee - $500 million unsecured credit)
Adelphia Business Solutions – a CLEC based in Coudersport, Pennsylvania (advised creditor's committee- $1.2 billion unsecured credit)

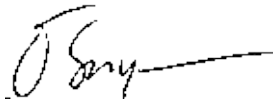
Board Experience
Present – Board member of Overseas Military Sales Corporation, an authorized contractor by US Armed Forces to sell vehicles to US Military and US diplomats around the world. Company is based in New York and has offices in Europe.

Present Board of Directors of C&K Market, a regional grocer in Oregon and Northern California

Present Board of Directors New York City Metro Chapter of YPO from 2010 to 2014 – Young Presidents' Organization.

Former Board of Directors of EESISP - Electrical Employers Self Insured Safety Plan ("EESISP") from 1996 to 2000 EESISP is a worker's compensation insurance plan in New York State covering over 13,000 workers and the Joint Board of the Electrical Industry of New York with over $300 million dollars of assets responsible for oversight of workers compensation insurance coverage and claims for over 10,000 workers.

This is Exhibit “B” referred to in the
Affidavit of Robert Tannor sworn January 17, 2022



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Attorneys for Plaintiffs and the Class

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FIRA DONIN and INNA GOLOVAN, **on behalf of themselves and all others similarly situated,** **Plaintiffs,** **v.** **JUST ENERGY GROUP INC. JUST ENERGY NEW YORK CORP., and JOHN DOES 1 TO 100,** **Defendants.**	***FIRST AMENDED CLASS ACTION COMPLAINT*** Case No: 17 Civ. 5787 (WFK) (SJB) ***JURY TRIAL DEMANDED***

TABLE OF CONTENTS

Plaintiffs Fira Donin and Inna Golovan ("Plaintiffs"), by their attorneys Wittels Law, P.C. and Hymowitz Law Group, PLLC, bring this consumer protection action in their individual capacity, and on behalf of a Class of consumers defined below, against Defendants Just Energy Group Inc., Just Energy New York Corp., and John Does 1 to 100 (hereafter collectively "Just Energy" or "Defendants" unless otherwise specified), and hereby allege the following with knowledge as to their own acts, and upon information and belief as to all other acts:

OVERVIEW OF DEFENDANTS' UNLAWFUL PRACTICES

1. This consumer class action arises from Just Energy's fraudulent, deceptive, unconscionable, bad faith, and unlawful conduct in "supplying" residential gas and electricity to consumers.

2. Traditionally, residential gas and electricity was supplied by regulated utilities like Con Edison. The rates utilities could charge were strictly controlled. In the 1990s, however, Enron's unprecedented lobbying campaign resulted in deregulation of state energy markets in New York and elsewhere such that consumers were permitted to choose from a variety of companies selling residential energy. Seizing on deregulation, independent energy service companies ("ESCOs") like Defendant Just Energy have grown rapidly.

3. Just Energy entices residential customers to sign up for its service by offering its energy at low initial "teaser rates." Yet Defendants do not alert their unsuspecting customers that when the teaser rate period expires consumers are charged exorbitant variable energy rates. Just Energy's customers are given no advance notice of these excessive variable rates. Just Energy also does not disclose to customers that its rates are consistently higher than the rates charged by consumers' existing utilities, or how variable rate customers can calculate (and avoid) Just Energy's steep variable gas and electricity charges.

4. Just Energy also breaches its customer contracts through a pricing shell game rigged in Just Energy's favor. Just Energy's customer contract explicitly incorporates the terms of Defendants' welcome emails into the contract. In April 2012 Just Energy sent Plaintiff Donin a welcome email stating that after her "intro rate" expired she would be charged an electric rate of 8¢ per kWh. Notwithstanding this contractual promise, Just Energy consistently charged Ms. Donin more than 8¢ per kWh. In fact, based on the billing data Ms. Donin has as well as the information gathered by her counsel, during a four-year period there was only one month when Just Energy charged Ms. Donin less than the 8¢ per kWh contractual rate. The same scenario occurred with Ms. Donin's Just Energy gas account. In April 2012 she received a welcome email (also explicitly incorporated into the Just Energy contract) which stated that after her "intro rate" expired she would be charged a gas rate of 63¢ per therm. The 17 months of billing data Ms. Donin has demonstrates that during all of those months Just Energy's rate was higher than 63¢ per therm.

5. Just Energy further breaches its customer contract in two additional ways. First, Just Energy's contract states that its variable rates "will not increase more than 35% over the rate from the previous billing cycle." Yet Just Energy violated this contract term when it increased Plaintiff Donin's August 2013 electricity price by more than 80% over the prior month's rate. Just Energy also increased Ms. Donin's May 2016 gas rate by more than 36% compared to the rate she paid in April 2016.

6. Second, Just Energy's customer contract states that the company's variable rates are "determined by business and market conditions," yet Defendants' variable rates are not determined by business and market conditions. Instead, when the underlying wholesale market price of gas and/or electricity that Just Energy purchases for re-sale goes ***up***, Defendants simply

pass on these costs to their customers by raising rates. However, when the market price goes ***down***, Just Energy's rate remains at an inflated level higher than the market rate. Through this scheme, Just Energy subjects consumers to consistent and unlawful "heads I win, tails you lose" pricing.

7. Just Energy's practice of charging inflated electric and gas prices is intentionally designed to maximize revenue.

8. Plaintiffs and the Class of Defendants' gas and electric customers have been injured by Defendants' unlawful practices. Accordingly, Plaintiffs and the Class defined below seek damages, restitution, declaratory, and injunctive relief for Just Energy's fraud, violation of state consumer protection statutes, unjust enrichment, and breach of contract. Residential energy costs are a significant portion of most families' budgets. To prey on consumers as Defendants have done here is unconscionable.

9. Defendants' deceptive marketing and sales practices are unlawful in multiple ways, including:

a. Using introductory teaser rates to misrepresent the cost of Defendants' energy;

b. Failing to adequately disclose that quoted rates are introductory teaser rates;

c. Failing to adequately disclose when Defendants' introductory teaser rates expire;

d. Actively misrepresenting the rates Defendants will charge when the teaser rates expire;

e. Failing to adequately disclose that Defendants' energy rates are consistently higher than the rates a customer's existing incumbent utility charges;

f. Failing to provide customers advance notice of the variable rate Defendants will charge; and

g. Failing to clearly and conspicuously identify in its contract and marketing materials the variable charges in Defendants' variable energy plans.

10. Defendants also breached their customer contract in at least the following three ways:

a. Charging rates higher than the rates promised in the welcome emails Defendants sent to consumers.

b. Violating the contract's requirement that Defendants' variable rates "will not increase more than 35% over the rate from the previous billing cycle."

c. Failing to comply with the contract's requirement that Defendants charge variable energy rates "determined by business and market conditions."

11. Only through a class action can Just Energy's customers remedy Defendants' ongoing wrongdoing. Because the monetary damages suffered by each customer are small compared to the much higher cost a single customer would incur in trying to challenge Just Energy's unlawful practices, it makes no financial sense for an individual customer to bring his or her own lawsuit. Further, many customers don't realize they are victims of Just Energy's deceptive conduct. With this class action, Plaintiffs and the Class seek to level the playing field and make sure that companies like Just Energy engage in fair and upright business practices.

I. Defendants' Fraudulent, Deceptive, and Unlawful Conduct.

12. Price is the most important consideration for energy consumers. Given that there is no difference at all in the electricity or natural gas that Just Energy supplies as opposed to the consumer's utility, the only reason a consumer switches to an ESCO like Just Energy is for the potential savings offered in a competitive market as opposed to prices offered by a regulated utility. That is, after all, the entire point of energy deregulation.

13. Understanding this basic fact about residential energy consumers' decision-making, Just Energy uses introductory teaser rates to misrepresent the cost of its energy. For example, Just Energy enticed consumers like Plaintiffs and the Class to switch their gas and electric accounts by showing them low introductory rates. Yet Defendants did not adequately

apprise consumers that the sample energy rates were teaser rates. Defendants also did not effectively disclose that Just Energy's introductory teaser rate would expire or the date on which Just Energy's actual and much higher variable rate would kick in.

14. Defendants further defrauded and deceived Plaintiffs and the Class by actively misrepresenting the rates Just Energy charges when its teaser rates expire, and by failing to adequately disclose that Just Energy's gas and electricity rates are consistently higher than the rates charged by the customers' regulated utility.

15. Defendants are aware of the variable energy rates they intend to charge. Yet to conceal Just Energy's price gouging, Defendants do not provide customers any advance notice.

16. Just Energy's material misrepresentations and omissions concerning its energy rates violate N.Y. GEN. BUS. LAW § 349-d(3), which prohibits deceptive acts and practices in the marketing of residential energy. Section 349-d(3) is part of a new law, called New York's ESCO Consumers Bill of Rights, which was specifically enacted in 2010 to combat widespread consumer fraud in New York's energy markets and to protect New York's energy consumers from underhanded business tactics like those employed by Defendants.

17. Just Energy's material misrepresentations and omissions concerning its energy rates also violate New York's and other states' consumer protection statutes and common laws of fraud and unjust enrichment.

18. Plaintiffs are not the only consumers harmed by Just Energy's conduct. On December 31, 2014, Just Energy agreed to settle strikingly similar claims brought by the Massachusetts Attorney General, making various concessions related to its deceptive residential

energy sales and billing practices in Massachusetts.[1]

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

> Just Energy represented to consumers that purchasing residential gas and/or electricity from Just Energy will save customers money;
>
> Just Energy failed to disclose complete and accurate pricing information; and
>
> Just Energy failed to disclose to consumers that its rates following any introductory period may be higher than the rates charged by consumers' traditional utilities.[2]

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

> Just Energy must cease making representations, either directly or by implication, about savings that consumers may realize by switching to Just Energy, unless Just Energy contractually obligates itself to provide such savings to consumers.[3]
>
> Where Just Energy quotes introductory teaser rates in its marketing material or in any verbal representation, the rate quote must be accompanied by a statement informing consumers that the quoted rate is an introductory rate and state when the rate will expire.[4]
>
> Just Energy is banned for three years from enrolling consumers into variable rate energy products unless it complies with the following requirements:
>
> - Within 30 days of a customer enrolling in a variable energy rate product, Just Energy must provide the customer with written notice of the date on which the introductory rate will expire.

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

[2] *Id.* ¶¶ 19(a), 20(a)–(b).

[3] *Id.* ¶ 26(a).

[4] *Id.* ¶ 26(c).

- Any new contracts for variable rate products shall either (i) include the calculation that will be used to set monthly rates under the contract such that the customer can calculate the cost of Just Energy's residential energy, or (ii) make the rates available 60 days in advance via phone and the internet.[5]

For three years Just Energy is banned from charging consumers variable electricity rates in excess of 14.25¢ per kWh.[6] [7]

For current Just Energy variable rate customers, the company is required to clearly and conspicuously post its current variable rates and post subsequent variable rates with at least 45 days advance notice.[8] Just Energy is also required to mail notice to all existing Massachusetts variable rate customers alerting them to the fact that advance pricing information is now available via phone and on Just Energy's website, and that these customers can cancel their Just Energy contracts without paying termination fees.[9]

Just Energy must at its own expense hire an independent monitor for three years to audit *inter alia* Just Energy's Massachusetts marketing materials, billing data, consumer communications, and direct marketing efforts.[10]

Just Energy must distribute a copy of the Assurance of Discontinuance to current and future (for three years) principals, officers, directors, and supervisory personnel responsible for the Massachusetts market.[11] Just Energy must also secure and maintain these individuals' signed acknowledgement of receipt of the Assurance of Discontinuance.

21. Notably, while as discussed below Just Energy has been fined by regulators for deceptive marketing at least *six* times, no other actions have to date been brought by New York's

[5] *Id*. ¶ 28(a)–(b), (d).

[6] *Id*. ¶ 30(a).

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

[8] *Id*. ¶ 30(b).

[9] *Id*. ¶ 30(c).

[10] *Id*. ¶ 44, Attachment 2.

[11] *Id*. ¶ 46.

or other states' enforcement authorities to recoup the millions Just Energy unlawfully extracted from consumers in New York and elsewhere. That is the purpose of this action.

II. Just Energy's Contract and Marketing Materials Also Violate New York's Mandatory ESCO Disclosure Statute.

22. Under N.Y. GEN. BUS. LAW § 349-d(7), Just Energy is required to clearly and conspicuously identify its variable charges in *all* consumer contracts and in *all* marketing materials. The purpose of this disclosure requirement is to ensure that consumers are adequately apprised of how their rates will be set.

23. Rather than complying with Section 349-d(7)'s disclosure requirements, Just Energy's marketing either does not mention its variable rates *at all* or fails to make the required disclosures in a clear and conspicuous manner.

24. Just Energy's contracts, which arrive when a customer can still cancel without penalty, likewise fail to meet the New York ESCO Consumers Bill of Rights' variable charge disclosure requirements.

25. Had Just Energy provided Plaintiffs with truthful, adequate, and appropriate disclosures about Just Energy's variable energy rates, they would not have switched to Just Energy.

III. Defendants' Breach of Contract.

26. Just Energy imposed on Plaintiffs and the Class a standard, non-negotiable, and uniform customer contract referred to by Defendants as the "Agreement." Defendants have advised Plaintiffs that they believe that the contract applicable to Plaintiffs is the document attached hereto as Exhibit B. Exhibit B has the following document identification code: NY_SVC_MOMENTIS_CODE_VAR_V3_Mar_27_12.

27. The Agreement Just Energy drafted is made up of various documents. Paragraph 1

of Just Energy's "General Terms and Conditions," the section entitled "Key Defined Terms," defines the Agreement to include "[c]ollectively, the Customer Agreement (the front page, the Momentis online enrollment page website, and the welcome email), these General Terms and Conditions, and any authorized attachments."

28. The welcome emails sent to Plaintiff Donin state "[w]here the words 'front page' appear in the Terms and Conditions of your Agreement, we are referring to this correspondence, the information contained herein, and the Momentis website." The welcome emails therefore constitute part of the "Customer Agreement" defined in the General Terms and Conditions, which in turn is part of the larger Agreement between Plaintiffs and Defendants.

29. "Electricity Price" is also defined in paragraph 1 of the General Terms and Conditions as "[e]ither your Intro Price or your Electricity Price, as specified on the Customer Agreement. The Intro Price will be your Electricity Price for the first 3 months of the Term of this Agreement and thereafter your Electricity Price will be the Variable Price as specified on the Customer Agreement."

30. Paragraph 1 of the General Terms and Conditions similarly define the "Natural Gas Price" as "[e]ither your Intro Price or your Natural Gas Price, as specified on the Customer Agreement. The Intro Price will be your Natural Gas Price for the first 3 months of the Term of this Agreement and thereafter your Natural Gas Price will be the Variable Price as specified in the Customer Agreement."

31. The welcome emails Defendants sent to Plaintiff Donin do not list an intro rate and instead state that the "Supply Rate after Intro period" for Plaintiff Donin's Just Energy electric account will be 8¢ per kWh. The Supply Rate after Intro period for Plaintiff Donin's gas account was set forth in Defendants' welcome email as 63¢ per therm.

32. Another part of the Agreement, the first page of Exhibit B attached hereto called the "Customer Disclosure Statement (Essential Agreement Information)," which is either "the front page" or an "authorized attachment" under the General Terms and Conditions, states that "[c]hanges to the Variable Price will be determined by business and market conditions and will not increase more than 35% over the rate from the previous billing cycle (see para. 7)."

33. Paragraph 7.1 of the General Terms and Conditions, entitled "Natural Gas Charge" states in relevant part that "[c]hanges to the Variable Price will be determined by Just Energy according to business and market conditions and will not increase more than 35% over the rate from the previous billing cycle."

34. Paragraph 7.3 of the General Terms and Conditions, entitled "Electricity Charge" states in relevant part that "[c]hanges to the Variable Price will be determined by Just Energy according to business and market conditions and will not increase more than 35% over the rate from the previous billing cycle."

35. As set forth more fully below Defendants breached the aforementioned contract provisions by (a) charging rates higher than the rates set forth in the welcome emails Defendants sent to consumers (b) violating the contract's requirement that Defendants "will not increase more than 35% over the rate from the previous billing cycle," and (c) violating the contract's requirement that Defendants charge variable energy rates "determined by business and market conditions."

PARTIES

Plaintiff Fira Donin

36. Plaintiff Donin is a citizen of New York residing in Brooklyn, New York.

37. In the Spring of 2012, Ms. Donin was contacted by a Just Energy sales representative. Upon information and belief, the sales representative was affiliated with Just

Energy Group Inc.'s Momentis network marketing program. Just Energy's representative used a written, standardized sales script and had been trained by Defendants in a way that emphasized uniformity in sales techniques. Upon information and belief, Just Energy's representatives were only permitted to use sales scripts that had been centrally approved and the content of such scripts did not meaningfully vary over time.

38. The Just Energy representative showed Ms. Donin Just Energy's rates for gas and electricity, which Plaintiff believed were representative of Just Energy's rates. The truth, however, is that the rates were teaser rates not reflective of Just Energy's actual rates. It was thus fraudulent for the Just Energy representative to show Ms. Donin a teaser rate that was supposedly representative of Just Energy's rates when in fact the teaser rate was much lower than Just Energy's ordinary rates. Based on these teaser rates, Ms. Donin agreed to switch both her electric and gas account to Just Energy. As described herein Just Energy's statements about its rates were false, fraudulent, and constitute material misrepresentations. Just Energy's statements both during the initial enrollment and at all relevant times thereafter also included several material omissions about Just Energy's variable rates, as described herein.

39. Shortly after agreeing to switch her gas and electric accounts to Just Energy, Defendants sent Plaintiff Donin emails which misrepresented the rates Just Energy would charge after the introductory period. The rates in Just Energy's emails were not substantially different from Defendants' teaser rates. Just Energy's deceptive emails repeated and reinforced Defendants' misrepresentations and omissions regarding Just Energy's rates. The emails were sent from the "justenergysales@mymomens.net" email account. The following pages contain the relevant portions of the email Defendants sent to Plaintiff Donin regarding her electric account:

From: Momentis <justenergysales@mymomentis.net>
To: [redacted]
Subject: Just Energy NY Customer Agreement and Electricity Enrollment Confirmation 36100346
Date: Mon, 16 Apr 2012 10:56:14 -0500

P.O. Box 2210
Buffalo, New York 14240-22
T 1.866.587.8674
F 1.888.548.7690
cs@justenergy.com

Welcome to Just Energy!

4/16/2012

Dear STAN DONIN,

Congratulations on enrolling as a Just Energy Customer with your Momentis Independent Marketing Representative. You have joined over 1 million North American consumers who have chosen Just Energy.

Reaffirm to Complete Your Enrollment

As a part of the enrollment process, you must reaffirm your intent to enter into this Agreement. If you have not already reaffirmed your agreement, then please call our **toll-free number, 1-866-730-9271 between 9:3 a.m. to 10 p.m. EST, 7 days a week to reaffirm your decision**. Once you have completed this step and your enrollment has been completed successfully, Just Energy New York Corp. will become your electricity suppli and you will begin to see the name of Just Energy, as well as our charges and toll free customer service number, on your utility bills.

Your Just Energy reference number is [redacted]

Following is the account information you entered.

Submission Date:

4/16/2012

Billing Address:

[redacted]
Brooklyn, NY [redacted]

Account Holder:

STAN DONIN
[redacted]
Brooklyn, NY [redacted]
[redacted]

Your Momentis Independent Representative:

[redacted]

Commodity License Information »

Account Information:

Utility Name:
CENYELE

Utility Account Number:
[redacted]

If any of this information is incorrect, please contact us at 1.866.587.8674. Please keep this email for your records.

Smart Switch 1 year ELEC 50%

Term	Intro Rate (¢/kWh)	Supply Rate after Intro period (¢/kWh)	JustGreen Option	JustGreen Rate
1 year(s)	N/A	8.00	50%	1.00

Should we need additional information to process your request, we will contact you directly.

Please find below a link to the Terms and Conditions of your Agreement with Just Energy. Where the words "front page" appear in the Terms and Conditions of your Agreement, we are referring to this correspondence, the information contained herein, and the Momentis website. In addition, there is a link below to the New York Notice of Cancellation.

Terms and Conditions of your Service Agreement
New York Notice of Cancellation

40. Once Ms. Donin's gas and electricity accounts were successfully transferred to Just Energy, Defendants began supplying Plaintiff's residential energy in June 2012. After Ms. Donin learned in August 2016 that she had been overcharged by Just Energy by more than $2,000 compared to what her local utilities would have charged, she notified Just Energy that she wanted to cancel her gas and electricity accounts.

Plaintiff Inna Golovan

41. Plaintiff Golovan is a citizen of New York residing in Brooklyn, New York.

42. In or around the Summer of 2012, Ms. Golovan was contacted by a Just Energy sales representative. Upon information and belief, the sales representative was affiliated with Just Energy Group Inc.'s Momentis network marketing program. Just Energy's representative used a written, standardized sales script and had been trained by Defendants in a way that emphasized uniformity in sales techniques. Upon information and belief, Just Energy's representatives were only permitted to use sales scripts that had been centrally approved and the content of such scripts did not meaningfully vary over time.

43. Defendants' representative showed Ms. Golovan Just Energy's electricity rate, which Plaintiff believed was representative of Just Energy's rates. The truth, however, is that the rate was a teaser rate not reflective of Just Energy's actual rates. It was thus fraudulent for the Just Energy representative to show Ms. Donin a teaser rate that was supposedly representative of Just Energy's rates when in fact the teaser rate was much lower than Just Energy's ordinary rates. Based on this rate, Plaintiff Ms. Golovan agreed to switch her electric account to Just Energy. As described herein Just Energy's statements about its rate were false, fraudulent, and constitute material misrepresentations. Just Energy's statements both during the initial enrollment and at all relevant times thereafter also included several material omissions about Just

Energy's variable rates, as described herein.

44. Once Ms. Golovan's electricity account was successfully transferred to Just Energy, Defendants began supplying Plaintiff's residential electricity in August 2012. After Ms. Golovan learned in April 2015 that Just Energy's electricity rates had been consistently high, she notified Just Energy that she wanted to cancel her electricity account.

Defendant Just Energy Group Inc.

45. Established in 1997, Defendant Just Energy Group Inc. (which refers to itself as "Just Energy"), is a publicly traded Canadian corporation incorporated under the laws of Ontario. In 2004, Just Energy made its initial expansion into the United States. Headed by Enron alums James Lewis and Deborah Merril, Just Energy is operated out of dual headquarters in Houston, Texas and Toronto, Ontario. Just Energy's operating affiliates include Defendant Just Energy New York Corp., Just Energy Illinois Corp., Just Energy Indiana Corp., Just Energy Texas L.P., Just Energy Massachusetts Corp., Just Energy Michigan Corp., Amigo Energy, Commerce Energy Inc., Green Star Energy, Hudson Energy Services, LLC, Momentis U.S. Corp., National Energy Corp., Tara Energy, Universal Energy Corporation, and Universal Gas and Electric Corporation. Just Energy and its operating affiliates market and sell natural gas and/or electricity in New York, California, Delaware, Florida, Georgia, Illinois, Indiana, Maryland, Massachusetts, Michigan, New Jersey, Ohio, Pennsylvania, and Texas.

46. Just Energy's shares are traded on the Toronto Stock Exchange and the New York Stock Exchange bearing the ticker symbol "JE." Just Energy is the 11th largest independent energy supplier in the United States, with over 1.8 million customers across North America. Variable rate plans are one of Just Energy's main products.

47. Just Energy has amassed a damning public dossier. The following chronology unearthed by Plaintiffs' counsel's pre-suit investigation documents Defendants' deceptive business practices.

48. In June 2003, the Toronto Star reported that Just Energy (then operating under the name Ontario Energy Savings Corp.) was fined for violating the Ontario Energy Board's code of conduct for fraudulently enrolling customers.[12]

49. In 2008, the Illinois Attorney General sued U.S. Energy Savings Corp. (whose name was changed to Just Energy in 2012), alleging violations of Illinois' consumer fraud laws. The May 2009 Press Release announcing a $1 million settlement noted that the Illinois Attorney General had "received a nearly unprecedented number of calls from consumers who were deceived by false assurances that they would receive significant savings by switching to this alternative gas supplier."[13] According to the Attorney General's complaint, among other deceptive conduct "consumers were led to believe that they would automatically save money by enrolling in the U.S. Energy Savings program."[14]

50. During this same period, the Citizens Utility Board (the "CUB") and AARP filed a formal complaint with the Illinois Commerce Commission (the "ICC") alleging, *inter alia*, that Just Energy told customers they would "save money" by signing up, that consumers would not see any gas price increases if they signed up, and that Just Energy presented false and misleading

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

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

[14] *Id.*

information about its prices.[15] In April 2010, the ICC found that Just Energy's sales and marketing practices were deceptive, fined the company $90,000, and ordered an independent audit of its practices.[16]

51. In July 2008, New York's Attorney General announced a $200,000 settlement with Just Energy (then named U.S. Energy Savings) and noted that the Attorney General's "office received hundreds of consumer complaints that sales contractors promised immediate savings on utility bills, but the price of gas was actually more than the price charged by the local utility because the price was locked in for a multi-year period."[17]

52. As previously noted, in December 2014 Just Energy agreed to settle deceptive marketing claims brought by the Massachusetts Attorney General.

53. In November 2016, Ohio's Public Utilities Commission (the "PUCO") fined Just Energy *for a second time* for misleading marketing practices. An article in the Columbus Dispatch notes that Just Energy is an "energy company with a track record of misleading marketing," that it was fined by the PUCO in 2010 for deceptive marketing, and that it "sells energy contracts that often cost more than customers would pay if they received the standard service price."[18] The article also mentions that some of the complaints that led to the PUCO's

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

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

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

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

action "stemmed from contracts sold on behalf of Just Energy by another company, saveonenergy.com."[19]

54. There are also numerous complaints about Just Energy on the internet.

55. Over the last three years alone Just Energy has had at least 284 complaints filed with the Better Business Bureau (the "BBB"). Of the customer reviews posted to the BBB's website, 93% are categorized by the BBB as "Negative Reviews."

56. Below are a few examples taken from the consumer complaint website Ripoff Report:[20]

> **Just Energy Switched my energy rate to variable with NO NOTICE, doubled fees for six months.**
>
> I have noticed over the past few months that the energy cost was getting higher and I thought it was due to the cold winter and higher energy usage. I called Duquesne Light last month and they said call your energy supplier which is JUST ENERGY. In December they had changed my fixed electrical usage rate to a nearly DOUBLE variable rate with NO NOTICE (total extra fees amounting to about $1,500.00). I called Just Energy and tried to get reimbursed, they reviewed my account and said they sent me a POST CARD in the mail when the rate change occurred (which I have never received). I have gotten no reimbursement and they offered to send me a $20.00 visa gift card which I declined. If anyone can offer any information about anything I can do to try and reclaim some money that would be great!!!!
>
> **Just Energy Our bill has doubled since signing up for this, "energy efficient" program. Nipsco checked what we have been paying and what we are now paying and confirmed that. Our thermostat is digitally programmed to have heat set at 65 and our bill is $354.20**
>
> We signed up for Just Energy because of them of course telling us we can save more money on our gas bill. We just received a bill of $354.20 and a disconnect notice. We called Nipsco to figure out what is going on and they were able to look at what we have been paying with them which had been .38 cents per therm and now we are being charged double that! I would like to note that our indoor

[19] *Id.*

[20] Misspellings corrected.

thermostat is electronically programmed to be at 65 degrees when heat is running . . . . I was also told by Nipsco that they cannot check or confirm because Just Energy is a different company, that we are now most likely stuck into a contract with these people and obligated to pay these outrageous bills. Having 4 children having our services disconnected is not an option, it's just sad . . . that instead of buying my kids Christmas presents I now have to pay this high gas bill or go without heat in the dead of winter.

Commerce Energy dba Just Energy Just Energy, US Energy Broken Promises

For the past 7 months, I was understanding that Just Energy was a utility company that was about helping the consumer save money on their electric bills from AEP. Come to find out that they were in fact charging my account more than what I could have been paying if I stayed with AEP. I was also told that when I signed up with them that my rate would be a fixed rate of 6.5 cents but in fact it wasn't. I am completely at a loss of words at how this company has done me wrong.

I am on a very fixed income and every dollar I can save is a blessing, so when they come to my house promising that they can save me money I was all for it. Just recently I was told that I was being charged an additional fee of supplier charges that I wasn't supposed to have on my bill. I am very upset with this and I want some explanation as to why this was happening . . . as well as I want my money back. So to anyone who is thinking about signing up with this company, please do your research and think again.

Just Energy of Massachusetts Just Energy of Ontario Just energy promised me 6.9 cents, not to ever go above Nstar rates, after a month or two the rate is almost twice Nstar rate, because I use electricity for heating my bill was very high after they doubled their rates that I noticed, most people would not, they ripped me off for $1,300, only God knows how much the rip off in their final month. Please do not sign with them.

Just Energy sales representative called me promised 6.9 cents rate, that will never go above Nstar rate, that happened for a month or two, now my rate is almost twice Nstar rate, I only noticed because I use electricity for heat, my utilization is high so is my rip off, so I have to notice most people with low utilization would not, they ripped me off $1,300 in 2 months and only God knows how much is the rip off this month, the problem is by the time you realize and change they already ripped you off 3 months. Please no matter what you do, do not sign up with Just Energy.

Just Energy 100% scam. Pushy sales people lie. Company won't cancel service. Rates went way up!!!

Pushy sales people who lie. Rates went way up, not down as promised.

Company not allowing me to cancel service . . . . Upon receiving the first bill after the switch to Just Energy our cost for gas doubled, and electric went up 50%. Calls to cancel service and switch back to our local company do not go though, month after month I continue to get ripped off.

Just Energy Scummy bunch of scheisters! Avoid them at any cost. I bought their spiel, and I suffered as a result. Prices are not competitive. After I moved, they screwed me cause I wouldn't continue with the Just Energy, Scam, Untrustworthy, Avoid

AVOID Just Energy. Quick talking salesmen, who will rip you off. Rates are not competitive, and they charged me $50 when I moved out of my apartment. Never deal with this company if you want a truth in advertising and a good deal.

USESC, Just Energy Scammed me I'm a 72 year old Hispanic. This man flashed a badge made me get my gas bill and promised I'd save money.

I am a 72 year old Hispanic lady, on social security and Section 8. A man showed up at my apartment. He flashed a badge and began to explain on what USESC was all about.

He talked about how high the gas rates are going and that by signing with this company I would be locked into a certain rate and that my gas bills would be lower. He made me get my current gas bill and he showed me the rate I was at and compared it to a rate he said I would be locked into.

I was made to believe that I would be saving money. When I began to look at my bills after signing I noticed that instead of saving money I have begun to pay more. On my bills I have seen a 200 dollar increase monthly and have not saved a dime on anything.

I was completely scammed into signing this contract and I believe it's because I'm a senior citizen. I now cannot afford to pay my gas bill and feed my children.

It would be best if no one else got scammed the way I did. I'm raising my grandchildren and we are barely surviving. I'm outraged that a company would purposely scam the weak and helpless

Heaven
Chicago, Illinois
U.S.A.

just energy I sign a contract with just energy and the bill went up instead of down

I sign a contract with just energy and the bill went up instead of down . . . .

57. Just Energy's twitter feed tells a similar story, as the word "scam" appears more than 40 times in posts from 2009 to the present.

58. Media reports about Just Energy equally condemn Defendants for deceptive conduct. When the confidential results of the audit ordered by the ICC referenced above were made public, Chicago's CBS affiliate reported that between 2010 and 2011 Just Energy received over 29,729 customer complaints.[21] "There were so many complaints over so many years with so little company oversight on how they were handled that the audit said, '[a]n adequate compliance culture at the top levels of the organization is not evident.'"[22]

59. A 2014 exposé by Canada's Global News highlights that the "CUB, the Better Business Bureau (BBB), the Ontario Energy Board, among others, have been inundated with complaints from consumers about the sales methods employed by Just Energy. The most common grievance is Just Energy promises people savings that don't materialize."[23]

60. The exposé further references Just Energy's founder Rebecca MacDonald who has "raked in an estimated $150 million from the company since she established it in the 1990s" and is facing accusations "over whether she's misled investors in her company."[24] Those accusations include that MacDonald faked her credentials and the conclusions by "two of Canada's top forensic accounting firms" that Defendants used "an unregulated form of

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

[22] *Id.*

[23] Livesey, Bruce, "Canadian energy company stalked by controversy over its sales methods," *Global News*, (Nov. 6, 2014).

[24] *Id.*

accounting to paint a much rosier picture of the company's financial situation," which in turn allowed Just Energy to show an "artificial profit."[25]

61. The Global News exposé also contains a 22-minute video entitled the "Just Energy Hustle." Below is an excerpt of a Global News Journalist's videotaped interview with Just Energy's Co-CEO Deborah Merril. Despite having joined Just Energy in 2007, in the 2014 interview the Co-CEO denies even knowing about the many criticisms leveled at Just Energy's marketing and sales practices:

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

"The Just Energy Hustle," Minutes 18:35 to 19:18.[26]

62. More than a year prior to the Global News exposé, on July 31, 2013, New York-based investment management firm Spruce Point Capital Management released an investment

[25] *Id.*

[26] *Available at:* https://globalnews.ca/news/1656865/canadian-energy-company-stalked-by-controversy-over-its-sales-methods/

analysis that labeled Just Energy as "a company that U.S. consumers and investors are quickly realizing has become toxic to their wallets through deceptive energy marketing practices, and harmful to their brokerage accounts."[27] The report signaled that Just Energy's "growth appears to be the result of deceptive sales tactics, now at risk of unravelling" which is "evidenced by a large body of consumer fraud complaints."[28]

63. The report also highlights how Just Energy (referred to below as "JE") uses a teaser rate to deceive consumers:[29]

> As noted in the table below, JE "appears" to offer the lowest price fixed contract, but as discussed below there's a 'catch.'

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

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

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

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

[28] *Id.* at 3.

[29] *Id.* at 4–5.

Defendant Just Energy New York Corp.

64. Defendant Just Energy New York Corp. is a Delaware company with its principle executive office in Toronto, Ontario. Defendant Just Energy Group Inc.'s public financial filings reveal that it completely controls its operating affiliates, including Defendant Just Energy New York Corp. These filings and other public data show that Just Energy Group Inc. and its unified executive team control all operational and financial aspects of its operating affiliates, which are run on a consolidated basis as one company. Just Energy Group Inc. uses its operating affiliates to perpetrate the unlawful conduct challenged in this lawsuit. Just Energy Group Inc. reports its operating affiliates' earnings and losses in a consolidated format. Defendant Just Energy New York Corp. is the corporate entity that supplied Plaintiffs' energy.

65. Just Energy New York Corp. is Just Energy Group Inc.'s agent in New York and has apparent authority to act on Just Energy Group Inc.'s behalf. Just Energy New York Corp. and Just Energy Group Inc. use the same corporate logo and share the same principal place of business. On information and belief, Just Energy New York Corp. has no separate offices or letterhead. On information and belief, Just Energy New York Corp. does not have its own management or employees. When Defendants issue new releases about New York, they do so under Just Energy Group Inc.'s brand. On information and belief, Just Energy New York Corp. does not have its own payroll. On information and belief, to the extent Just Energy New York Corp. maintains any corporate policies those policies were developed and implemented by Just Energy Group Inc.'s management and employees. On information and belief, Just Energy New York Corp. does not own real property. On information and belief, Just Energy New York Corp. does not advertise or have a website. Rather customers sign up with "Just Energy" through co-Defendant Just Energy Group Inc.'s advertisements, sales staff, independent sales contractors,

and website. On information and belief, all Just Energy marketing directed at New York consumers was created by or on behalf of Just Energy Group Inc. On information and belief, Just Energy Group Inc is fully aware that Just Energy New York Corp. has apparent authority to act on Just Energy Group Inc.'s behalf.

66. On information and belief, Just Energy New York Corp. possesses actual authority to act on Just Energy Group Inc.'s behalf in New York. On information and belief, Just Energy Group Inc.'s management, employees, or other individuals or entities contracted by Just Energy Group Inc. drafted the customer contract at issue in this litigation. On information and belief, Just Energy Group Inc. caused Defendants to breach their contracts with Plaintiffs and the Class.

67. On information and belief, Just Energy New York Corp. is entirely dominated by Just Energy Group Inc. On information and belief, Just Energy New York Corp. observes no corporate formalities. On information and belief, Just Energy New York Corp. keeps no corporate records or minutes and has no officers or directors elected in accordance with its by-laws. On information and belief, Just Energy Group Inc. commingles assets with Just Energy New York Corp. On information and belief, Just Energy Group Inc. pays all of Just Energy New York Corp.'s bills. On information and belief, Just Energy New York Corp. has no assets and passes all revenues to Just Energy Group Inc. On information and belief, Just Energy New York Corp. does not own real property. On information and belief, any real property owned by Defendants is owned by Just Energy Group Inc. or other entities controlled by Just Energy Group Inc. On information and belief, Just Energy New York Corp.'s marketing and sales data are not recorded independently but are treated as part of Just Energy Group Inc.'s marketing and sales data. On information and belief, Just Energy New York Corp. does not have an independent

marketing and sales department and does not utilize marketing and sales software for its sole benefit. Instead, on information and belief, Just Energy Group Inc.'s marketing and sale channels and software are used for soliciting consumers.

68. In sum, Just Energy New York Corp. is a shell company through which Just Energy Group Inc. operates in New York. Just Energy New York Corp. is Just Energy Group Inc.'s agent in New York with authority to bind New York consumers to Just Energy's customer contract.

Defendants John Doe 1 to 100

69. Defendants John Does 1 to 100 are the shell companies and affiliates similar to Just Energy New York Corp. through which Defendant Just Energy Group Inc. does business in New York and elsewhere. John Does 1 to 100 are also the Just Energy management and employees who perpetrated the unlawful acts described herein.

JURISDICTION AND VENUE

Subject Matter Jurisdiction

70. This Court has jurisdiction over Plaintiff's claims pursuant to 28 U.S.C. § 1332 (the "Class Action Fairness Act").

71. This action meets the prerequisites of the Class Action Fairness Act, because the claims of the Class defined below exceed the sum or value of $5,000,000, the Class has more than 100 members, and diversity of citizenship exists between at least one member of the Class and Defendants.

Personal Jurisdiction

72. This Court has specific personal jurisdiction over Defendants because they maintain sufficient contacts in this jurisdiction, including the advertising, marketing, distribution

and sale of natural gas and electricity to New York consumers.

73. Defendant Just Energy New York Corp. contracts with consumers in this district and is Defendant Just Energy Group Inc.'s agent and alter ego in this district.

74. Defendant Just Energy Group Inc.'s press releases describe this Defendant's conduct in New York. For example, on April 3, 2017 Defendant Just Energy Group Inc. stated that "Just Energy . . . operates in California, Georgia, Ohio, Michigan, Illinois, New York, Delaware, New Jersey, Pennsylvania and Maryland." An October 18, 2017 Just Energy Group Inc. press release states that Just Energy Group Inc.'s markets include "New York City." An August 10, 2016 Just Energy Group Inc. press release states that Just Energy Group Inc. "actively" markets "energy management solutions" in "California, New York and New Jersey . . . ."

75. On September 4, 2017 Just Energy Group Inc. issued a press release stating that "it will participate in the Rodman & Renshaw 17th Annual Global Investment Conference on Thursday, September 10, at the St. Regis Hotel in New York, NY." The same press release also states that "Co-Chief Executive Officer, Deborah Merril and Chief Financial Officer, Patrick McCullough are scheduled to present an overview of the Company and its strategies on Thursday, September 10, at 10:00 a.m. EST."

76. On August 12, 2010 Just Energy Group Inc. announced that it was expanding into two new utility territories in New York and that it launched "Momentis network marketing in Ontario and New York . . . ." As set forth above, upon information and belief Plaintiffs were solicited by a sales representative affiliated with Just Energy Group Inc.'s Momentis network marketing program and the contract Defendants contend is applicable to Plaintiffs contains the word "MOMENTIS" in its document identification code and references the Momentis website.

The welcome email sent to Plaintiff Donin was sent from the "justenergysales@mymomens.net" email account. According to the New York Department of State's Division of Corporations database Momentis U.S. Corp. was registered as a Delaware corporation on February 5, 2010. The Department of State's database lists Momentis U.S. Corp.'s CEO as Just Energy Group Inc.'s co-CEO James Lewis. According to the Department of State's database Momentis U.S. Corp. was dissolved on June 29, 2016.

77. Defendant Just Energy Group Inc.'s securities filings also describe this Defendant's contacts with New York. For example, Just Energy Group Inc.'s 2018 Third Quarter Report states that Just Energy receives payment from New York utilities related gas delivered to these New York utilities.

78. Just Energy Group Inc.'s 2016 Annual Report states that it sells gas and electricity in New York. The emails sent by Just Energy to Plaintiff Donin also refer to Just Energy's "JustGreen" energy. Just Energy Group Inc.'s 2016 Annual Report states that "[t]he Company currently sells JustGreen gas in the eligible markets of Ontario, British Columbia, Alberta, Saskatchewan, Michigan, New York, Ohio, Illinois, New Jersey, Maryland, Pennsylvania and California. JustGreen electricity is sold in Ontario, Alberta, New York, Texas, Maryland, Massachusetts, Ohio, Illinois and Pennsylvania."

79. Just Energy Group Inc.'s 2015 Annual Report states that Just Energy Group Inc. is "exposed to customer credit risk on its continuing operations in Alberta, Texas, Illinois, British Columbia, New York, California, Michigan and Georgia and commercial direct-billed accounts in British Columbia, New York and Ontario."

80. Just Energy Group Inc.'s 2011 Annual Report states that its larger customers include the New York City Housing Authority.

Venue

81. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b)(2). Substantial acts in furtherance of the alleged improper conduct occurred within this District and Plaintiffs reside within this District.

FACTUAL ALLEGATIONS

I. Energy Deregulation and Resulting Wide-Spread Consumer Fraud.

82. In 1996, New York deregulated the sale of retail gas and electricity. As a result of deregulation, New York consumers can purchase natural gas and electricity through third-party suppliers while continuing to receive delivery of the energy from their existing public utilities. These third-party energy suppliers are known as energy service companies, or "ESCOs." Since New York opened its retail gas and electric markets to competition, approximately two New York consumers have switched to an ESCO.

83. ESCOs are subject to minimal regulation by New York's utility regulator, the New York State Public Service Commission (the "PSC"). ESCOs like Just Energy do not have to file their rates with the PSC, or the method by which those rates are set. The PSC also does not limit in any way the prices ESCOs charge.

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

85. If a customer switches to an ESCO, the customer's existing utility continues to bill the customer for both the energy supply and delivery costs. The only difference to the customer is which company sets the price for the customer's energy supply.

86. After a customer switches to an ESCO, the customer's energy supply charge (based either on a customer's kilowatt hour [electricity] or therm [gas] usage) is calculated using the supply rate charged by the ESCO and not the regulated rate charged by the customer's former utility. The supply rate charged is itemized on the customer's bill as the number of kilowatt hours ("kWh") or therms multiplied by the rate. For example, if a customer uses 145 kWh at a rate of 10.0¢ per kWh, the customer will be billed $14.50 (145 x $.10) for their energy supply.

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

> Every day we delay [deregulation], we're costing consumers a lot of money . . . . It can be done quickly. The key is to get the legislation done fast.[30]

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

89. Responding to shocking energy prices, many key players that supported

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

deregulation now regret the role they played. For example, reflecting on Maryland's failed deregulation experience, a Maryland Senator commented:

> Deregulation has failed. We are not going to give up on re-regulation till it is done.[31]

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

> Probably six out of the 187 legislators understood it at the time, because it is so incredibly complex . . . . If somebody says, no, we didn't screw up, then I don't know what world we are living in. We did.[32]

91. One of deregulation's main unintended consequences has been the proliferation of ESCOs like Just Energy whose business model is primarily based on taking advantage of consumers. As a result of this widespread misconduct, states like New York began enacting post-deregulation remedial legislation meant to "establish[] important consumer safeguards in the marketing and offering of contracts for energy services to residential and small business customers." [33] As the sponsoring memorandum notes, the ESCO Consumers Bill of Rights, codified as G.B.L. Section 349-d, in 2010 sought to end the exact type of deceptive conduct Plaintiffs challenge here:

> Over the past decade, New York has promoted a competitive retail model for the provision of electricity and natural gas. Consumers have been encouraged to switch service providers from traditional utilities to energy services companies. Unfortunately, consumer protection appears to have taken a back seat in this process.

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

[32] Keating, *supra*.

[33] ESCO Consumers Bill of Rights, New York Sponsors Memorandum, 2009 A.B. 1558, at 1 (2009) attached as Exhibit C.

* * *

> High-pressure and *misleading sales tactics*, onerous contracts with unfathomable *fine print, short-term "teaser" rates followed by skyrocketing variable prices*—many of the problems recently seen with subprime mortgages are being repeated in energy competition. Although the PSC has recently adopted a set of guidelines, its "Uniform Business Practices" are limited and omit important consumer protections in several areas. The fact is, competition in supplying energy cannot succeed without a meaningful set of standards to weed out companies whose business model is based on taking unfair advantage of consumers.

Id. at 3–4 (emphasis added).

92. New York regulators have also begun to call out the high levels of misconduct that pervade deregulated energy markets. For example, in 2014 the PSC concluded that New York's residential and small-commercial retail energy markets were plagued with "marketing behavior that creates and too often relies on customer confusion."[34] The PSC further noted "it is extremely difficult for mass market retail energy customers to access pricing information relevant to their decision to commence, continue or terminate service through an ESCO."[35] The PSC concluded as follows:

> [A]s currently structured, the retail energy commodity markets for residential and small nonresidential customers cannot be considered to be workably competitive. Although there are a large number of suppliers and buyers, and suppliers can readily enter and exit the market, the general absence of information on market conditions, particularly the price charged by competitors, is an impediment to effective competition . . . .[36]

93. The PSC's complaint data confirms its conclusions. The PSC's annual complaint statistics reports indicate that in 2012 the PSC received 1,733 ESCO related complaints of which 322 alleged deceptive marketing. The number of ESCO related complaints increased to 2,384 in 2013 with 2,001 reporting deceptive marketing practices. In 2014 there were 4,640 initial ESCO

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

[35] *Id*. at 11.

[36] *Id*. at 10.

related complaints, with 2,510 claiming deceptive marketing. In 2015 the data shows there were 5,044 initial ESCO related complaints with 2,348 alleging deceptive marketing practices. In 2016 there were 2,995 initial complaints against ESCOs, with 1,375 alleging deceptive marketing practices.

94. The number of deceptive marketing allegations against ESCOs far exceed the combined number of complaints received by all other regulated utilities in New York, including the lightly regulated telecommunications industry. Further, no single ESCO or single region of New York is responsible for most of the complaints. Rather, the complaint data demonstrates that consumer fraud is part of the industry's standard operating procedures.

95. A large percentage consumer complaints to the PSC concern variable rate pricing like Defendants' where consumers' bills are more or less as advertised during the teaser or fixed rate period, but after this initial period expires, instead of switching the consumer back to the utility the ESCO uses the consumers' inaction to substantially increase the price without further notice or explanation as to how the new rate is determined.

96. Statistics from the New York Attorney General's ("NYAG") office confirm the pattern of activity this consumer class action seeks to combat. From at least the year 2000 to the present, the NYAG has investigated numerous ESCOs' deceptive and illegal business practices. These investigations have resulted in at least eight settlements providing for extensive injunctive relief and millions in restitution and penalties.

97. In the last three years, the NYAG has also directly received more than 600 complaints against ESCOs. These complaints demonstrate that the ESCO practices that were the subject of the NYAG's previous settlements continue, and that industry participants like Just Energy view regulatory enforcement actions as simply the cost of continuing their fraudulent

business practices.

98. The deceptive conduct of ESCOs like Just Energy has been devastating to consumers nationwide. For example, "[a]ccording to the data provided by [New York's] utilities, the approximately two million New York State residential utility customers who took commodity service from an ESCO collectively paid almost $1.2 billion more than they would have paid if they purchased commodity from their distribution utility during the 36-months ending December 31, 2016."[37] "Additionally, small commercial customers paid $136 million more than they would have paid if they instead simply remained with their default utilities for commodity supply for the same 36-month period."[38] Combining these two groups, New York consumers have been "'overcharged' by over $1.3 billion dollars over this time period."[39]

99. New York's low-income consumers have also been hit hard. The utilities reported that low-income ESCO customers (a subset of the residential customers mentioned above) "collectively paid in excess of $146 million more than they would have paid if they took commodity supply from their utility."[40]

100. Based on the flood of consumer complaints, negative media reports, and data demonstrating massive overcharges the PSC announced in December 2016 an evidentiary hearing to consider primarily whether ESCOs should be "completely prohibited from serving their current products" to New York residential consumers.[41] In other words, to reassess whether

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

[38] *Id.* at 3.

[39] *Id.*

[40] *Id.*

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

New York's deregulation experiment has failed everyday consumers.

101. Then, on December 16, 2016, the PSC permanently prohibited ESCOs from serving low-income customers, because of "the persistent ESCO failure to address (or even apparently to acknowledge) the problem of overcharges to [low income] customers . . . ."[42]

102. Following the first part of the evidentiary hearing announced in December 2016, on March 30, 2018, PSC staff reached the following conclusions about ESCOs in New York:

> [M]ass market ESCO customers have become the victims of a failed market structure that results in customers being fooled by advertising and marketing tricks into paying substantially more for commodity service than they had remained full utility customers, yet thinking they are getting a better deal. Rather than fierce ESCO against ESCO price competition working to protect customers from excessive charges, ESCOs have deliberately obfuscated prices and resisted market reforms such that the Commission's decision to allow ESCOs access to the utility distribution systems to sell electric and gas commodity products to mass market customers has proven to be no longer just and reasonable. [43]
>
> * * *
>
> [T]he Commission must direct that mass market ESCO customer bills disclose a relative bill comparison showing the current bill charges and what the customer would have paid had they taken delivery and commodity from their utility.[44]
>
> * * *
>
> The primary problem with the retail markets for mass market customers is the overcharging of customers for commodity due to the lack of transparency to customers on ESCO prices and products; this lack of transparency allows ESCOs to charge customers practically whatever they want without customers' understanding that they are paying substantially more than if they received full utility service. Consequently, potential commodity customers attempting to choose between the ESCO offerings

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

[43] CASE 12-M-0476, Department of Public Service Staff Unredacted Initial Brief, at 1 (Mar. 30, 2018).

[44] *Id.* at 4.

> and the default utility service cannot readily determine which ESCO offers the best price for comparable products or if the ESCOs' prices can possibly "beat" or even be competitive with the utility's default commodity service for the duration of the contract term.
>
> Thus, as the current retail access mass markets are structured, customers simply cannot make fully informed and fact-based choices on price . . . since the terms and pricing of the ESCO product offerings are not transparent to customers. For variable rate products this is due, in large part, to the fact that ESCOs often offer "teaser rates" to start, and after expiration of the teaser rate, the rate is changed to what is called a "market rate" that is not transparent to the customer, and the contract signed by the customer does not provide information on how that "market rate" is calculated.[45]
>
> * * *
>
> ESCOs take advantage of the mass market customers' lack of knowledge and understanding of, among other issues, the electric and gas commodity markets, commodity pricing, and contract terms (which often extend to three full pages), and in particular, the ESCOs' use of teaser rates and "market based rate" mechanisms that customers are charged after the teaser rate expires. In fact, ESCOs appear to be unwilling to provide the necessary product pricing details as to how those "market based rates" are derived to mass market customers in a manner that is transparent so as to enable an open and competitive marketplace where customers can participate fairly and with the necessary knowledge to make rational and fully informed decisions on whether it is in their best interest to take commodity service from their default utility, or from a particular ESCO among competing but equally opaque choices.[46]

103. As for the ESCOs' claim that their marketing and overhead costs explain the overcharges, PSC staff found that these costs do "not justify the significant overcharges" ESCOs levied on New York consumers.[47] Likewise, when the ESCOs claimed that their provision to consumers of so-called value-added products such as light bulbs and thermostats contributed to their excessive rates, PSC staff found that "these sorts of value-added products is at best de

[45] *Id.* at 41–42 (citations omitted).

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

[47] *Id.* at 37.

minimis and does not explain away the significantly higher commodity costs charged by so many ESCOs."[48] Similarly, the PSC staff found that the "claim that at least a portion of the significant delta between ESCO and utility charges is explained by ESCOs offering renewable energy is disingenuous at best. ESCOs may be charging a premium for green energy, but they are not actually providing a significant amount of added renewable energy to customers in New York."[49]

104. Instead, PSC staff reached the following conclusion:

> The massive $1.3 billion in overcharges is the result of higher, and more often than not, significantly higher, commodity costs imposed by the ESCOs on unsuspecting residential and other mass market customers. These Overcharges are simply due to (1) the lack of transparency and greed in the market, which prevents customers from making rational economic choices based on facts rather than the promises of the ESCO representative, and (2) obvious efforts by the ESCOs to prevent, or at least limit, the transparency of the market. These obvious efforts include the lack of a definition for "market rate" in their contracts, resulting in the fattening of ESCOs' retained earnings.[50]

105. This class action, which seeks more than $100,000,000 in damages, restitution, penalties, and equitable relief is further proof that residential energy deregulation has been an abject failure.

II. Just Energy Misled Its Customers and Then Gouged Them Compared to What They Would Have Paid Had They Stayed with Their Local Utility.

106. To convince consumers to switch, Defendants represented that customers would save money on their energy costs by switching over from their current utilities.

107. As evidenced by the fact that Just Energy used to be called "U.S. Energy Savings," Defendants understand that the potential for saving money on their home energy costs

[48] *Id.* at 87.

[49] *Id.* at 69.

[50] *Id.*

is the primary, if not exclusive, reason consumers switch to Just Energy.

108. Defendants' primary way of enticing consumers with promised savings is through Just Energy's teaser rates. Defendants make the consuming public aware of Just Energy's teaser rates through various means, including via company-controlled in-person solicitations, telemarketing calls from Defendants' call centers, internet ESCO price aggregators such as www.chooseenergy.com and www.saveonenergy.com that Defendants pay to showcase Just Energy's prices, or through state utility ESCO pricing websites such as New York's www.newyorkpowertochoose.com.

109. Just Energy's teaser rates consistently misrepresent the cost of Defendants' energy because they suggest Just Energy's rates are lower than what Just Energy knows it will eventually charge consumers once the teaser period expires. Just Energy's teaser rates also misleadingly suggest to the consumer that Just Energy's rates are lower than their utility's rates. The truth is that Just Energy has a long history of charging substantially more than customers' local utilities.

110. To compound the deception, Defendants do not adequately disclose that the quoted rates are introductory teaser rates and that when Just Energy's teaser rates expire the consumer will pay a rate that is much higher than the utility's rate.

111. Defendants also do not adequately disclose when Just Energy's teaser rates expire. Instead, Just Energy enrolls consumers into variable rate plans knowing (but failing to disclose) that once the teaser rate expires Just Energy's rates will surpass the utility's rates.

112. Just Energy also actively misrepresents the rates it will charge when its teaser rates expire. For example, in April 2012 Just Energy sent Plaintiff Donin an email stating that she would be charged an electric rate of 8¢ per kWh once her "intro period" lapsed. Yet Just

Energy consistently charged Ms. Donin more than 8¢ per kWh. The Just Energy billing data Ms. Donin has in her possession shows that Just Energy's charges were far in excess of 8¢ per kWh.

113. Despite having ample advance notice of the variable rates it will impose on customers, Just Energy also fails to advise consumers of the rates they will be charged.

114. Defendants' entire sales model is structured to take advantage of well-studied patterns of human decision-making. Just Energy lures consumers to switch with misleading teaser rates and then exploits consumer inertia once those rates expire to bill consumers for its high-priced residential energy.

115. It is well-established that defaults are powerful drivers of consumer behavior. There are various factors underlying this human tendency that have been discussed in the judgment and decision-making literature, such as the work about defaults and the "status quo bias,"[51] and "Nudges."[52]

116. In this case, Defendants know that once they have the consumer enrolled they can charge high energy rates and many consumers (if not most) will simply pay Defendants' exorbitant charges.

117. Defendants' cynical exploitation of consumer inertia is further exacerbated by the fact that (i) it is extremely difficult for consumers to compare Just Energy's prices with what their local utility charges, and (ii) Just Energy tacks on early termination fees as a disincentive to consumer mobility and choice.

118. Upon being shown Just Energy's teaser rate, a reasonable consumer

[51] Daniel Kahneman, Jack L. Knetsch and Richard H. Thaler (1991), "Endowment Effect, Loss Aversion, and Status Quo Bias," *The Journal of Economic Perspectives*, Vol. 5, pp. 193–206.

[52] R. Thaler and S. Sunstein (2008), *Nudge*, Yale University Press.

understands—and expects—Just Energy's rates would typically be lower than the utility's rates.

119. But Just Energy's rates do no such thing. Instead, during the class period and during the time Plaintiffs were Just Energy customers, there were extended lengths of time in which Just Energy's rates were higher than the utility's rates.

120. Further, there are extended periods of time when the wholesale market price of gas or electricity declined or remained steady, yet Just Energy's prices rose. Moreover, even when market prices rise, Just Energy's rates often increase at a faster and higher rate than the market rates. But Just Energy does not disclose these material facts to its prospective or current customers.[53]

121. Just Energy misleads consumers into thinking that its rates are lower than consumers' utilities' rates. Yet when Plaintiff Donin was able to obtain comparison data in the summer of 2016 for what her electric utility would have charged from May 2015 to July 2016, Just Energy billed Ms. Donin more than the utility ***every single month***. These overcharges total more than $375. For Plaintiff Donin's gas utility, Plaintiff Donin obtained comparison data in the summer of 2016 that showed Just Energy charged more than the utility ***every single month*** for the 31 months from December 2013 to July 2016 for which data was available to Ms. Donin. For this period Ms. Donin paid Just Energy $1,929.06 more than she would have paid her gas utility.

122. No reasonable consumer exposed to Just Energy's marketing would expect that

[53] The wholesale cost of energy is the most significant and potentially volatile component of electricity and natural gas costs that ESCOs like Just Energy incur for supplying energy. Costs associated with transmission or transportation costs or other similarly static market and business price related factors do not account for the extent to which Just Energy's prices are disassociated from changes in wholesale prices. Similarly, costs associated with Just Energy's supply of so-called "green" energy do not account for the extent to which Just Energy's prices are disassociated from changes in wholesale prices.

Just Energy would charge them more than the utility by so much money for so long.

123. The rates Just Energy actually charges in comparison to the utility rate demonstrates the deceptive nature of Just Energy's marketing. Yet it is extremely difficult for Just Energy's customers to determine what their utility would have charged as the only energy supply rate listed on their bills is Just Energy's rate and the utility's current rate is very difficult for ordinary consumers to locate or calculate.

124. Thus, Just Energy's statements with respect to the rates it will charge are materially misleading. Instead, consumers are charged rates that are substantially higher. Just Energy fails to disclose this and other material fact to its customers.

125. No reasonable consumer who knows the truth about Just Energy's exorbitant rates would choose Just Energy as an electricity or natural gas supplier.

126. Just Energy intentionally makes these misleading statements regarding its rates to induce reasonable consumers to rely upon its statements and switch their energy supply.

III. Just Energy Violates New York's Variable Rate Disclosure Law

127. Because of the New York Legislature's concerns with skyrocketing variable rates, New York adopted N.Y. GEN. BUS. LAW § 349-d(7), which requires that "[i]n every contract for energy services and in all marketing materials provided to prospective purchasers of such contracts, all variable charges shall be clearly and conspicuously identified."

128. Through their conduct, Defendants have violated both the spirit and letter of N.Y. GEN. BUS. LAW § 349-d, the law that is explicitly designed to allow energy consumers to make informed choices: "These provisions will go a long way toward restoring an orderly marketplace where consumers can make informed decisions on their choices for gas and electric service . . .

."[54]

129. At all relevant times Defendants' marketing materials and contracts never clearly and conspicuously apprised Plaintiffs of the actual factors that make up Just Energy's variable rate.

130. The marketing materials Defendants produced that were provided to Plaintiffs and the Class violate N.Y. GEN. BUS. LAW § 349-d(7) by not clearly and conspicuously setting forth all of the factors actually affecting Just Energy's variable rates. Indeed, most of the marketing materials provided to Plaintiffs and the Class do not even mention that Just Energy's rates are variable, nor do they comply with the statute's requirement that the factors that comprise Just Energy's rate be clearly and conspicuously disclosed.

131. Further, as described below, the various incarnations of Just Energy's consumer contract provided to Plaintiffs and the Class also violate N.Y. GEN. BUS. LAW § 349-d(7).

132. The Just Energy sales representative who signed up Plaintiffs used Just Energy marketing material and Just Energy's published teaser rates. Among other omissions, that sales representative failed to mention that once the teaser rate expires Just Energy's prices are invariably higher than the utility's rates almost all of the time. Based on the sales representative's statements, Plaintiffs decided to switch to Just Energy.

133. The Just Energy materials the representative provided to Plaintiffs did not contain language clearly and conspicuously describing the factors that affect Just Energy's variable rates or disclose that Just Energy's rates were variable.

134. Following their agreement to switch their accounts to Just Energy, the contracts Plaintiffs received fail to make the clear and conspicuous disclosure of Just Energy's variable

[54] Exhibit C, New York Sponsors Memo at 4.

rates as mandated by New York's ESCO Consumers Bill of Rights, as noted above.

135. Plaintiffs would have never signed up to purchase energy from Just Energy had Defendants complied with N.Y. GEN. BUS. LAW § 349-d(7).

IV. Just Energy Breaches its Consumer Contracts.

136. In or around the Spring of 2012, Plaintiff Donin (through her husband Stan Donin) enrolled their gas and electric accounts with Just Energy. Plaintiff Donin believed she was enrolling with the entity that controls the "Just Energy" brand, to wit Just Energy Group Inc.

137. In June 2012, Plaintiff Donin's electricity and gas accounts were switched to Just Energy. Thereafter, Plaintiff Donin paid the rate that she was charged by Just Energy.

138. In or around the Summer of 2012, Plaintiff Golovan enrolled her electric account with Just Energy. Plaintiff Golovan believed she was enrolling with the entity that controls the "Just Energy" brand, to wit Just Energy Group Inc.

139. In August 2012, Plaintiff Golovan's electricity account was switched to Just Energy. Thereafter, Plaintiff Golovan paid the rate that she was charged.

140. After Plaintiffs enrolled but before Just Energy began supplying their residential energy Just Energy provided Plaintiffs with Defendants' standard and uniform Agreement, including Defendants' welcome email. Just Energy also afforded Plaintiffs a rescissionary period during which they could rescind the Agreement prior to purchasing energy from Just Energy. During that rescissionary period, the Agreement served as a solicitation in which Just Energy identified the basis upon which the promised rate would be determined.

141. The Agreement represents that (a) Defendants energy rates will be the rates set forth in the welcome emails Defendants sent to consumers, (b) Defendants rates "will not increase more than 35% over the rate from the previous billing cycle," and (c) Defendants charge variable energy

rates "determined by business and market conditions."

142. The following table identifies for Ms. Donin's electric account the billing periods for the 49 months for which Plaintiff Donin and her counsel have her Just Energy billing data, the variable rate Just Energy charged Plaintiff Donin, the corresponding rate her electric utility Con Edison would have charged (which, as discussed below, is a reasonable representation of a rate based on business and market conditions), and the percent difference between Just Energy's and Con Edison's rates:

Billing Period From Date	Billing Period To Date	Just Energy Rate Per kWh	Con Ed Rate Per kWh	Difference	Percent Difference
6/26/2012	7/26/2012	$0.130761	$ 0.12106	$0.009704	8%
7/26/2012	8/24/2012	$0.135004	$ 0.09057	$0.044429	49%
8/24/2012	9/25/2012	$0.129536	$ 0.09696	$0.032575	34%
9/25/2012	10/24/2012	$0.125955	$ 0.10008	$0.025874	26%
10/24/2012	11/27/2012	$0.135003	$ 0.08577	$0.049234	57%
11/27/2012	12/26/2012	$0.109997	$ 0.07481	$0.035189	47%
12/26/2012	1/28/2013	$0.129386	$ 0.10983	$0.019552	18%
1/28/2013	2/27/2013	$0.132674	$ 0.12684	$0.005838	5%
2/27/2013	3/28/2013	$0.135002	$ 0.07601	$0.058993	78%
3/28/2013	4/26/2013	$0.136664	$ 0.07419	$0.062475	84%
4/26/2013	5/28/2013	$0.148058	$ 0.09615	$0.051907	54%
5/28/2013	6/26/2013	$0.148995	$ 0.10840	$0.040600	37%
6/26/2013	7/26/2013	$0.077106	$ 0.12956	($0.052455)	-40%
7/26/2013	8/26/2013	$0.139002	$ 0.09442	$0.044578	47%
8/26/2013	9/25/2013	$0.138995	$ 0.10736	$0.031635	29%
9/25/2013	10/24/2013	$0.139006	$ 0.11109	$0.027912	25%
10/24/2013	11/25/2013	$0.139005	$ 0.09415	$0.044857	48%
11/25/2013	12/26/2013	$0.148687	$ 0.11602	$0.032671	28%
12/26/2013	1/28/2014	$0.140205	$ 0.19650	($0.056300)	-29%
1/28/2014	2/27/2014	$0.139004	$ 0.16647	($0.027463)	-16%
2/27/2014	3/31/2014	$0.148050	$ 0.13686	$0.011193	8%
3/31/2014	4/29/2014	$0.149003	$ 0.08072	$0.068279	85%
4/29/2014	5/29/2014	$0.149007	$ 0.10170	$0.047306	47%
5/29/2014	6/27/2014	$0.149000	$ 0.11056	$0.038437	35%
6/27/2014	7/29/2014	$0.144400	$ 0.10610	$0.038300	36%
7/29/2014	8/27/2014	$0.144000	$ 0.10007	$0.043927	44%
8/27/2014	9/26/2014	$0.144000	$ 0.10245	$0.041547	41%
9/26/2014	10/27/2014	$0.144000	$ 0.10032	$0.043680	44%

10/27/2014	11/26/2014	$0.157508	$ 0.09824	$0.059271	60%
11/26/2014	12/29/2014	$0.159000	$ 0.08765	$0.071346	81%
12/29/2014	1/29/2015	$0.159000	$ 0.10842	$0.050576	47%
1/29/2015	3/2/2015	$0.159000	$ 0.16226	($0.003261)	-2%
3/2/2015	3/31/2015	$0.159000	$ 0.08974	$0.069260	77%
3/31/2015	4/29/2015	$0.163828	$ 0.07266	$0.091164	125%
4/29/2015	5/29/2015	$0.139843	$ 0.09671	$0.043130	45%
5/29/2015	6/29/2015	$0.122223	$ 0.09037	$0.031853	35%
6/29/2015	7/29/2015	$0.119000	$ 0.09677	$0.022234	23%
7/29/2015	8/27/2015	$0.119000	$ 0.10398	$0.015018	14%
8/27/2015	9/28/2015	$0.119000	$ 0.09672	$0.022277	23%
9/28/2015	10/27/2015	$0.137614	$ 0.08585	$0.051763	60%
10/27/2015	11/30/2015	$0.130182	$ 0.07453	$0.055656	75%
11/30/2015	12/29/2015	$0.129000	$ 0.06713	$0.061869	92%
12/29/2015	1/29/2016	$0.129000	$ 0.08014	$0.048856	61%
1/29/2016	3/1/2016	$0.129000	$ 0.07542	$0.053582	71%
3/1/2016	3/30/2016	$0.129000	$ 0.07338	$0.055621	76%
3/30/2016	4/28/2016	$0.102738	$ 0.08976	$0.012981	14%
4/28/2016	5/27/2016	$0.103767	$ 0.07959	$0.024180	30%
5/27/2016	6/28/2016	$0.095244	$ 0.07941	$0.015831	20%
6/28/2016	7/28/2016	$0.094000	$ 0.09397	$0.000029	0%

143. The following table identifies for Ms. Donin's gas account the billing periods for the 17 months for which Plaintiff Donin and her counsel have her Just Energy billing data, the variable rate Just Energy charged Plaintiff Donin, the corresponding rate her gas utility National Grid would have charged (which, as discussed below, is a reasonable representation of a rate based on business and market conditions), and the percent difference between Just Energy's and National Grid's rates:

Billing Period From Date	Billing Period To Date	Just Energy Rate Per Therm	National Grid Rate Per Therm	Difference	Percent Difference
1/5/2015	2/3/2015	$0.7859	$0.5901	$0.1958	33%
2/3/2015	3/4/2015	$0.8790	$0.5901	$0.2889	49%
3/4/2015	4/2/2015	$0.8800	$0.5901	$0.2899	49%
4/2/2015	5/4/2015	$0.6953	$0.5901	$0.1052	18%
5/4/2015	6/3/2015	$0.6500	$0.5901	$0.0599	10%
6/3/2015	7/2/2015	$0.6488	$0.5901	$0.0587	10%
7/2/2015	8/3/2015	$0.6492	$0.5901	$0.0591	10%
8/3/2015	9/2/2015	$0.6507	$0.5901	$0.0606	10%
9/2/2015	10/1/2015	$0.6990	$0.5901	$0.1089	18%

Missing					
10/30/2015	12/2/2015	$0.6999	$0.5901	$0.1098	19%
12/2/2015	1/4/2016	$0.7290	$0.5901	$0.1389	24%
1/4/2016	2/6/2016	$0.7290	$0.5901	$0.1389	24%
2/6/2016	3/2/2016	$0.7272	$0.5901	$0.1371	23%
3/2/2016	4/4/2016	$0.6836	$0.5901	$0.0935	16%
4/4/2016	5/3/2016	$0.6700	$0.5901	$0.0799	14%
5/3/2016	6/6/2016	$0.9144	$0.5901	$0.3243	55%
6/6/2016	7/5/2016	$0.9519	$0.5901	$0.3618	61%

144. The following table identifies for Ms. Golovan's electric account the billing periods for the 10 months for which Plaintiff Golovan and her counsel have her Just Energy billing data, the variable rate Just Energy charged Plaintiff Golovan, the corresponding rate her electric utility Con Edison would have charged (which, as discussed below, is a reasonable representation of a rate based on business and market conditions), and the percent difference between Just Energy's and Con Edison's rates:

Billing Period From Date	Billing Period To Date	Just Energy Rate Per kWh	Con Ed Rate Per kWh	Difference	Percent Difference
7/10/2014	8/8/2014	$0.1440	$0.0948	$0.0492	52%
8/8/2014	9/9/2014	$0.1440	$0.1043	$0.0397	38%
9/9/2014	10/8/2014	$0.1440	$0.0966	$0.0474	49%
10/8/2014	11/6/2014	$0.1440	$0.1025	$0.0415	40%
11/6/2014	12/10/2014	$0.1590	$0.1013	$0.0577	57%
8/8/2014	1/9/2015	$0.1502	$0.0979	$0.0523	53%
1/9/2015	2/10/2015	$0.1590	$0.1189	$0.0401	34%
2/10/2015	3/12/2015	$0.1590	$0.1639	($0.0049)	-3%
3/12/2015	4/10/2015	$0.1606	$0.0728	$0.0878	121%
4/10/2015	5/11/2015	$0.1551	$0.0828	$0.0723	87%

145. Defendants' multiple breaches of contract are demonstrated by the data in the above tables. For example, despite sending Plaintiff Donin welcome emails stating that the "Supply Rate after Intro period" for Plaintiff Donin's Just Energy account will be 8¢ per kWh (electric) and 63¢ per therm (gas), Just Energy charged Plaintiff Donin in excess of these

amounts for 48 of 49 months[55] (electric) and 17 of 17 months (gas).[56]

146. The tables also show that Defendants violated their contractual undertaking that Just Energy's variable rates "will not increase more than 35% over the rate from the previous billing cycle." Just Energy violated this requirement when it increased Plaintiff Donin's electricity price for the billing period ending on August 26, 2013 by 80.27% compared to the prior month's rate. Just Energy also increased Ms. Donin's gas rate for the billing period ending on June 6, 2016 by 36.48% compared to the rate prior month's rate.

147. Finally, that Just Energy's variable rate is not in fact based on the wholesale cost of electricity is demonstrated by the fact that Just Energy's variable rate was consistently significantly higher than Con Ed's rates and that the rate did not fluctuate with commodity prices.

148. Indeed, in 45 of the 49 months Plaintiff Donin was a Just Energy customer (or 91% of the time) Just Energy's rate was higher than Con Edison's rate. In fact, on average, Just Energy's rate was 40% higher than Con Edison's rate.

149. The pre-discovery billing data available for Plaintiff Donin's gas account shows that 100% of the time Just Energy's rate was higher than National Grid's rate and that on average Just Energy's rate was 26% higher than National Grid's rates.

150. The pre-discovery billing data available for Plaintiff Golovan's electric account shows that 90% of the time Just Energy's rate was higher than Con Edison's rate and that on average Just Energy's rate was 53% higher than Con Edison's rates.

[55] Where data is available to Plaintiff and her counsel.

[56] Where data is available to Plaintiff and her counsel.

151. The utility's rates serve as an appropriate indicator of business and market conditions because they are based on the wholesale energy costs and the associated market costs that are the same costs ESCOs such as Just Energy incur.

152. While the utilities and Just Energy may not purchase energy and incur associated costs in precisely the same manner, over time the wholesale costs they incur should be commensurate. In fact, Just Energy has a tactical advantage over the utility as it can purchase energy from highly competitive markets for future use, and therefore its cost for purchasing energy should at the very least reflect (if not undercut) market prices, albeit over a longer term. Therefore, while the utility's rates may not precisely match Just Energy's rates, they should correlate with the utility's rates. Instead, Just Energy's rates are wildly incongruent.

153. For example, using Plaintiff Donin's electric account data (the account with the most available pre-discovery data) when Con Edison's rate dropped 14% from $0.10008 to $0.08577 per kWh from October to November 2012, Just Energy increased its already much higher prices by 7% from $0.125955 to $0.135003 per kWh. Similarly, when Con Edison's rate slid 40% from $0.12684 to $0.07601 per kWh between February and March 2013, Just Energy's rate rose 2% from $0.132674 to $0.135002 per kWh.

154. The disparities are also evident over time. For instance, while Con Edison's rate generally declined between February 2014 and November 2014 from $0.13686 to $0.08765 per kWh (declining 36%), Just Energy's already much higher rates increased from $0.148050 to $0.15900 per kWh (increasing by 7%).

155. Just Energy's stark rate disparities with those of the local utility, wherein Just Energy's rates were higher more than 90% of the time where Plaintiffs have available billing data, considered together with the fact that Just Energy's rates do not reflect market fluctuations,

demonstrate that Just Energy does not charge a rate based on business and market conditions as required by its customer contract, but rather gouges its customers by charging outrageously high rates.

156. The disconnect between Just Energy's variable rate and changes in wholesale costs is also demonstrated by the fact that Just Energy's variable rate often increased while wholesale costs declined.

157. The wholesale cost of energy is the primary component of the non-overhead "market conditions" Just Energy incurs.

158. Just Energy's identification of "business" conditions as the other contractual factor used for setting rates also does not explain Just Energy's price gouging. A reasonable consumer might understand that an ESCO will attempt to make a reasonable margin on the commodity it sells to consumers. However, such a consumer would also expect that such profits would be consistent with profit margins obtained by other suppliers in the market, and also that Just Energy's profiteering at the expense of its customers would not be so extreme that its rate bears no relation to market prices but is instead outrageously higher. That other ESCOs' rates are lower, even though they purchase energy from the wholesale market, demonstrates that Just Energy sets its profit margins in bad faith. Similarly, the utility's rate reflects a rate that Just Energy could charge (because Just Energy could purchase energy in the same way and at the same cost as the utility) plus a reasonable margin. No reasonable consumer would consider a margin that is on 26% to 53% to be fair or commercially reasonable.

159. Any potentially conceivable additional business and market are insignificant in terms of the overall costs Just Energy incurs to provide its energy, and do not fluctuate over time.

Therefore, these other cost factors cannot explain the drastic increases in Just Energy's variable rate or the reason its rates are disconnected from changes in wholesale costs.

160. Thus, Just Energy's energy pricing does not comply with its customer contract's requirement that variable prices be "determined by business and market conditions." Instead, consumers are charged rates that are substantially higher those of competitors, especially Just Energy's main competitors—the utilities, and untethered from the factors specified in the contract.

TOLLING OF THE STATUTES OF LIMITATION

I. Discovery Rule Tolling

161. Plaintiffs and the Class had no way of discovering Just Energy's unlawful conduct. Even New York's public utility regulator, the PSC, has concluded that "it is extremely difficult for mass market retail energy customers to access pricing information relevant to their decision to commence, continue or terminate service through an ESCO."[57] By contrast, Just Energy was so intent on expressly hiding the fact that consumers had been duped by Defendants' deceptive teaser rates, Defendants concocted a scheme to misrepresent the rates it would charge once the teaser rates expire. Defendants further failed to give customers advance notice of the variable rates it was going to assess, even though Defendants knew well in advance what those rates would be.

162. Within the period of any applicable statutes of limitation, Plaintiffs and the other Class Members could not have discovered Just Energy's illegal conduct through the exercise of reasonable diligence.

[57] CASE 12-M-0476, Order Taking Actions to Improve the Residential and Small Nonresidential Retail Access Markets, at 11 (Feb. 20, 2014).

163. Plaintiffs and the other Class Members did not discover and did not know of facts that would have caused a reasonable person to suspect they were victims of Just Energy's illegal conduct.

164. All applicable statutes of limitation have been tolled by operation of the discovery rule.

II. Fraudulent Concealment Tolling

165. All applicable statutes of limitation have also been tolled by Just Energy's knowing and active fraudulent concealment and denial of the facts alleged herein throughout the period relevant to this action.

166. Instead of disclosing that its quoted rates are teaser rates, when those rates will expire, that its energy rates are consistently higher than the rates a customer's existing utility charges, and giving consumers advance notice of the rates Defendants will charge, Just Energy used its teaser rates to falsely represent the cost of its energy and actively misrepresented the rates Defendants would charge once the teaser rate expired.

III. Estoppel

167. Just Energy was under a continuous duty to disclose to Plaintiffs and the other Class Members the truth about its energy rates.

168. Just Energy knowingly, affirmatively, and actively concealed the true nature of its rates from consumers.

169. Just Energy was also under a continuous duty to disclose to Plaintiffs and Class Members that it was receiving thousands of complaints from customers who had been led to believe that they would save money with Just Energy compared to their incumbent utility.

170. Based on the foregoing, Just Energy is estopped from relying on any statutes of

limitations in defense of this action.

CLASS ACTION ALLEGATIONS

171. Plaintiffs sue on their own behalf and on behalf of a Class for damages, injunctive, and all other available relief under Rules 23(a), (b)(2), (b)(3), and (c)(4) of the Federal Rules of Civil Procedure.

172. The Class, preliminarily defined as two subclasses ("Subclasses"), is as follows:

a. The Multistate Class, preliminarily defined as all Just Energy customers in the United States (including customers of companies Just Energy acts as a successor to) who were charged a variable rate for their energy at any time from [applicable statute of limitations period] to the date of judgment.

b. The State Classes, preliminarily defined as all Just Energy customers in the state of [e.g., New York, California, etc.] (including customers of companies Just Energy acts as a successor to) who were charged a variable rate for their energy at any time from [applicable statute of limitations period] to the date of judgment.

173. Excluded from the Subclasses (hereafter collectively the "Class" unless otherwise specified) are the officers and directors of Defendants, members of the immediate families of the officers and directors of Defendants, and their legal representatives, heirs, successors or assigns and any entity in which Defendants have or have had a controlling interest. Also excluded are all federal, state and local government entities; and any judge, justice or judicial officer presiding over this action and the members of their immediate families and judicial staff.

174. Plaintiffs reserve the right, as might be necessary or appropriate, to modify or amend the definition of the Class and/or add additional Subclasses, when Plaintiffs file their motion for class certification.

175. Plaintiffs do not know the exact size of the Class, since such information is in the exclusive control of Defendants. Plaintiffs believe, however, that based on the publicly available

data concerning Just Energy's customers in the United States, the Class encompasses more than one million individuals whose identities can be readily ascertained from Defendants' records. Accordingly, the members of the Class are so numerous that joinder of all such persons is impracticable.

176. The Class is ascertainable because its members can be readily identified using data and information kept by Defendants in the usual course of business and within their control. Plaintiffs anticipate providing appropriate notice to each Class Member, in compliance with all applicable federal rules.

177. Plaintiffs are adequate class representatives. Their claims are typical of the claims of the Class and do not conflict with the interests of any other members of the Class. Plaintiffs and the other members of the Class were subject to the same or similar conduct engineered by Defendants. Further, Plaintiffs and members of the Class sustained substantially the same injuries and damages arising out of Defendants' conduct.

178. Plaintiffs will fairly and adequately protect the interests of all Class Members. Plaintiffs have retained competent and experienced class action attorneys to represent their interests and those of the Class.

179. Questions of law and fact are common to the Class and predominate over any questions affecting only individual Class Members, and a class action will generate common answers to the questions below, which are apt to drive the resolution of this action:

a. Whether Defendants' conduct violates New York General Business Law §349-d;

b. Whether Defendants' conduct violates New York General Business Law §349;

c. Whether Defendants' conduct violates various other state consumer protection statutes;

d. Whether Defendants' representations are fraudulent;

e. Whether Defendants engaged in fraudulent concealment;

f. Whether Defendants were unjustly enriched as a result of their conduct;

g. Whether Defendants breached their customer contracts;

h. Whether Defendants violated the duty of good faith and fair dealing;

i. Whether Class Members have been injured by Defendants' conduct;

j. Whether any or all applicable limitations periods are tolled by Defendants' acts;

k. Whether, and to what extent, equitable relief should be imposed on Defendants to prevent them from continuing their unlawful practices; and

l. The extent of class-wide injury and the measure of damages for those injuries.

180. A class action is superior to all other available methods for resolving this controversy because i) the prosecution of separate actions by Class Members will create a risk of adjudications with respect to individual Class Members that will, as a practical matter, be dispositive of the interests of the other Class Members not parties to this action, or substantially impair or impede their ability to protect their interests; ii) the prosecution of separate actions by Class Members will create a risk of inconsistent or varying adjudications with respect to individual Class Members, which will establish incompatible standards for Defendants' conduct; iii) Defendants have acted or refused to act on grounds generally applicable to all Class Members; and iv) questions of law and fact common to the Class predominate over any questions affecting only individual Class Members.

181. Further, the following issues are also appropriately resolved on a class-wide basis under FED. R. CIV. P. 23(c)(4):

a. Whether Defendants' conduct violates New York General Business Law §349-d;

b. Whether Defendants' conduct violates New York General Business Law §349;

c. Whether Defendants' conduct violates various other state consumer protection statutes;

d. Whether Defendants' representations are fraudulent;

e. Whether Defendants engaged in fraudulent concealment;

f. Whether Defendants were unjustly enriched as a result of their conduct;

g. Whether Defendants breached their customer contracts;

h. Whether Defendants violated the duty of good faith and fair dealing;

i. Whether any or all applicable limitations periods are tolled by Defendants' conduct; and

j. Whether, and to what extent, equitable relief should be imposed on Defendants to prevent them from continuing their unlawful practices.

182. Accordingly, this action satisfies the requirements set forth under FED. R. CIV. P. 23(a), 23(b), and 23(c)(4).

CAUSES OF ACTION

COUNT I

N.Y. GEN. BUS. LAW § 349-D(3)

(ON BEHALF OF THE NEW YORK CLASS)

183. Plaintiffs re-allege and incorporate by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

184. Plaintiffs bring this claim under N.Y. GEN. BUS. LAW § 349-d(3) on their own behalf and on behalf of each member of the New York Class who became a Just Energy customer on or after January 10, 2011, the operative date of Section 349-d.

185. N.Y. GEN. BUS. LAW §349-d(3) provides that "[n]o person who sells or offers for sale any energy services for, or on behalf of, an ESCO shall engage in any deceptive acts or practices in the marketing of energy services."

186. Defendants offer for sale energy services for and on behalf of an ESCO.

187. Defendants have engaged in, and continue to engage in, deceptive acts and practices in violation of N.Y. GEN. BUS. LAW § 349-d(3), including:

a. Using introductory teaser rates to misrepresent the cost of Defendants' energy;

b. Failing to adequately disclose that quoted rates are introductory teaser rates;

c. Failing to adequately disclose when Defendants' introductory teaser rates expire;

d. Actively misrepresenting the rates Defendants will charge when the teaser rates expire;

e. Failing to adequately disclose that Defendants' energy rates are consistently higher than the rates a customer's existing incumbent utility charges; and

f. Failing to provide customers advance notice of the variable rate Defendants will charge.

188. The aforementioned acts are willful, unfair, unconscionable, deceptive, and contrary to the public policy of New York, which aims to protect consumers.

189. N.Y. GEN. BUS. LAW § 349-d(10) provides that "any person who has been injured by reason of any violation of this section may bring an action in his or her own name to enjoin such unlawful act or practice, an action to recover his or her actual damages or five hundred dollars, whichever is greater, or both such actions. The court may, in its discretion, increase the award of damages to an amount not to exceed three times the actual damages up to ten thousand dollars, if the

court finds the defendant willfully or knowingly violated this section. The court may award reasonable attorney's fees to a prevailing plaintiff."

190. As a direct and proximate result of Defendants' unlawful deceptive acts and practices, Plaintiffs and the Class have suffered injury and monetary damages in an amount to be determined at the trial of this action but not less than $500 for each violation, such damages to be trebled, plus attorneys' fees.

191. Plaintiffs and the other Class Members further seek an order enjoining Defendants from undertaking any further unlawful conduct. Pursuant to N.Y. GEN. BUS. LAW § 349-d(10), this Court has the power to award such relief.

COUNT II

N.Y. GEN. BUS. LAW § 349

(ON BEHALF OF THE NEW YORK CLASS)

192. Plaintiffs re-allege and incorporate by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

193. Plaintiffs bring this claim under N.Y. GEN. BUS. LAW § 349 on their own behalf and on behalf of each member of the New York Class.

194. Defendants have engaged in, and continue to engage in, deceptive acts and practices in violation of N.Y. GEN. BUS. LAW § 349, including:

a. Using introductory teaser rates to misrepresent the cost of Defendants' energy;

b. Failing to adequately disclose that quoted rates are introductory teaser rates;

c. Failing to adequately disclose when Defendants' introductory teaser rates expire;

d. Actively misrepresenting the rates Defendants will charge when the teaser rates expire;

e. Failing to adequately disclose that Defendants' energy rates are consistently higher than the rates a customer's existing incumbent utility charges; and

f. Failing to provide customers advance notice of the variable rate Defendants will charge.

195. The aforementioned acts are willful, unfair, unconscionable, deceptive, and contrary to the public policy of New York, which aims to protect consumers.

196. As a direct and proximate result of Defendants' unlawful deceptive acts and practices, Plaintiffs and the Class have suffered injury and monetary damages in an amount to be determined at the trial of this action but not less than $50 for each violation, such damages to be trebled, plus attorneys' fees.

197. Plaintiffs and the Class Members further seek equitable relief against Defendants. Pursuant to N.Y. GEN. BUS. LAW § 349, this Court has the power to award such relief, including but not limited to, an order declaring Defendants' practices as alleged herein to be unlawful, an order enjoining Defendants from undertaking any further unlawful conduct, and an order directing Defendants to refund to Plaintiffs and the Class all amounts wrongfully assessed, collected, or withheld.

COUNT III

N.Y. GEN. BUS. LAW § 349-D(7)

(ON BEHALF OF THE NEW YORK CLASS)

198. Plaintiffs re-allege and incorporate by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

199. Plaintiffs bring this claim under N.Y. GEN. BUS. LAW § 349-d(7) on their own behalf and on behalf of each member of the New York Class who became a Just Energy customer on or after January 10, 2011.

200. Section 349-d(7) provides that "[i]n every contract for energy services and in all marketing materials provided to prospective purchasers of such contracts, all variable charges shall be clearly and conspicuously identified." N.Y. GEN. BUS. LAW § 349-d(7).

201. The marketing materials Defendants provided to Plaintiffs fail to disclose the actual factors that contribute to Just Energy's variable rates, much less do they make the required disclosure in a clear and conspicuous manner.

202. The marketing materials Defendants provided to Plaintiffs fail to clearly and conspicuously disclose that Plaintiffs will be charged variable rates.

203. The consumer contract Defendants provided to Plaintiffs—while they still had an opportunity to cancel without penalty—likewise does not clearly and conspicuously inform consumers about the actual factors affecting Just Energy's variable rates.

204. The consumer contract Defendants provided to Plaintiffs does not clearly and conspicuously disclose that Plaintiffs will be charged variable rates.

205. The welcome emails Defendants sent Plaintiff Donin do not clearly and conspicuously disclose that Plaintiffs will be charged variable rates. The emails do not even contain the word "variable."

206. Through their conduct described above, Defendants have violated N.Y. GEN. BUS. LAW § 349-d(7) and have caused financial injury to Plaintiffs and Just Energy's other variable rate customers in New York.

207. As a direct and proximate result of Defendants' conduct, Plaintiffs and the New York Class have suffered injury and monetary damages in an amount to be determined at the trial of this action but not less than $500 for each violation, such damages to be trebled, plus attorneys' fees.

208. Plaintiffs and the other Class Members further seek an order enjoining Defendants from undertaking any further unlawful conduct. Pursuant to N.Y. GEN. BUS. LAW § 349-d(10), this Court has the power to award such relief.

COUNT IV

UNFAIR AND DECEPTIVE ACTS AND PRACTICES

(ON BEHALF OF EACH STATE CLASS OTHER THAN NEW YORK, WHICH UPON INFORMATION AND BELIEF ARE CALIFORNIA, DELAWARE, FLORIDA, GEORGIA, ILLINOIS, INDIANA, MARYLAND, MASSACHUSETTS, MICHIGAN, NEW JERSEY, OHIO, PENNSYLVANIA, AND TEXAS)

209. Plaintiffs re-allege and incorporate by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

210. As described above, Plaintiffs and the Class have suffered ascertainable losses of money and have otherwise been harmed as a result of Defendants' unfair and deceptive practices, including:

a. Using introductory teaser rates to misrepresent the cost of Defendants' energy;

b. Failing to adequately disclose that quoted rates are introductory teaser rates;

c. Failing to adequately disclose when Defendants' introductory teaser rates expire;

d. Actively misrepresenting the rates Defendants will charge when the teaser rates expire;

e. Failing to adequately disclose that Defendants' energy rates are consistently higher than the rates a customer's existing incumbent utility charges; and

f. Failing to provide customers advance notice of the variable rate Defendants will charge.

211. The aforementioned acts are willful, unfair, unconscionable, deceptive, and contrary to the public policies of California, Delaware, Florida, Georgia, Illinois, Indiana, Maryland, Massachusetts, Michigan, New Jersey, Ohio, Pennsylvania, Texas, and any other state where Just Energy sells variable rate energy, all of which aim to protect consumers.

212. Plaintiffs and the members of each State Class are entitled to recover damages, and all other available relief for Defendants' unfair and deceptive practices under the laws of their states of residence:[58] California—CAL. BUS. & PROF CODE § 17200 *et seq.*, and CAL. CIV. CODE § 1750 *et seq.*, Delaware—DEL. CODE ANN. TIT. 6 SEC. 2511 *et seq.*, Florida—FLA. STAT.§ 501.201, *et seq.*, Georgia—GA. CODE. ANN. § 10-1-393(a) *et seq.*, and GA. CODE. ANN. § 10-1-371(5) *et seq.*, Illinois—815 ILL. COMP. STAT. § 505/1, *et seq.*, Indiana—IND. CODE § 24-5-0.5-3 *et seq.*, Maryland— MD. CODE COM. LAW § 13-303 *et seq.*, Massachusetts—MASS. GEN. LAWS CH. 93A, § 1 *et seq.*, Michigan— MICH. COMP. LAWS § 445.903(1) *et seq.*, New Jersey—N.J. STAT. ANN. § 56:8-2 *et seq.*, Ohio— OHIO REV. CODE § 1345.02 *et seq.*, Pennsylvania—73 P.S. § 201-2(4) *et seq.*, Texas— TEX. BUS. & COM. CODE § 17.46(a) *et seq.*.

213. On October 2, 2017 Plaintiffs sent a letter complying with CAL. CIV. CODE § 1782(a). Because Plaintiffs did not receive a full and satisfactory response to their letter within 30 days, they now claim relief under CAL. CIV. CODE § 1750 *et seq.* and seek all damages and relief to which the California Class is entitled.

214. On October 2, 2017 Plaintiffs sent a letter complying with GA. CODE ANN § 10-1-399(b). Because Plaintiffs did not receive a full and satisfactory response to their letter within 30

[58] There is no material conflict between New York's consumer fraud law and the state statutes listed here.

days, they now claim relief under GA. CODE. ANN. § 10-1-393(a) *et seq.* and seek all damages and relief to which the Georgia Class is entitled.

215. On October 2, 2017, Plaintiffs sent a letter complying with IND. CODE § 24-5-0.5-5(a). Because Plaintiffs did not receive a full and satisfactory response to their letter within 30 days, they now claim relief under IND. CODE § 24-5-0.5-3 *et seq.* for "curable" acts and seek all damages and relief to which the Indiana Class is entitled. Plaintiffs also seek full relief for Defendants' "incurable" acts on behalf of the Indiana Class.

216. On October 2, 2017, Plaintiffs sent a letter complying with MASS. GEN. LAWS CH. 93A, § 9(3). Because Plaintiffs did not receive a full and satisfactory response to their letter within 30 days, they now claim relief under MASS. GEN. LAWS CH. 93A, § 1 *et seq.* and seek all damages and relief to which the Massachusetts Class is entitled.

217. Plaintiffs complied with N.J. Stat. Ann. § 56:8-20. Within ten (10) days of filing of Plaintiffs' initial complaint on October 3, 2017 Plaintiffs mailed a copy of the initial Class Action Complaint to New Jersey's Attorney General.

218. On October 2, 2017, Plaintiffs sent Defendants a letter complying with TEX. BUS. & COM. CODE § 17.505(a). Because Plaintiffs did not receive a full and satisfactory response to their letter within 30 days, they now claim relief under TEX. BUS. & COM. CODE § 17.46(a) *et seq.* and seek all damages and relief to which the Texas Class is entitled.

219. Plaintiffs complied with TEX. BUS. & COM. CODE § 17.501. Specifically, within thirty days of filing Plaintiffs' initial Class Action Complaint, Plaintiffs provided the consumer protection division of the Texas Attorney General's office a copy of the initial Class Action Complaint.

COUNT V

COMMON LAW FRAUD

(ON BEHALF OF A MULTISTATE CLASS UNDER THE LAWS OF EACH STATE WHERE DEFENDANTS DO BUSINESS, OR, ALTERNATIVELY, ON BEHALF OF EACH OF THE INDIVIDUAL STATE CLASSES AGAINST ALL DEFENDANTS)

220. Plaintiffs re-allege and incorporate by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

221. Plaintiffs bring this claim on their own behalf and on behalf of each member of the Multistate Class under the laws of the states where Defendants sold variable rate energy, and on behalf of each member of the individual State Classes under the laws of those States.

222. As discussed above, Defendants (i) used introductory teaser rates to misrepresent the cost of Defendants' energy, and (ii) actively misrepresented the rates Defendants would charge when the teaser rates expire.

223. In deciding to become and remain Just Energy customers, Plaintiffs and the Class reasonably relied on these misrepresentations to form the mistaken belief that Just Energy's teaser rates were representative of Just Energy's ordinary rates and that thus they would save money on their energy compared to what their local utility would have charged.

224. To solidify and further their fraud, Defendants committed numerous fraudulent omissions including (i) failing to adequately disclose that quoted rates are introductory teaser rates, (ii) failing to adequately disclose when Defendants' introductory teaser rates expire, (iii) failing to adequately disclose that Defendants' energy rates are consistently higher than the rates a customer's existing incumbent utility charges, and (iv) failing to provide customers advance notice of the variable rate Defendants will charge.

225. Defendants' fraudulent conduct was knowing and intentional. The misrepresentations and omissions made by Defendants were intended to induce and actually induced Plaintiffs and Class Members to become and remain Just Energy customers.

226. Defendants' fraud caused damage to Plaintiffs and the Class, who are entitled to damages and other legal and equitable relief as a result.

227. Defendants' acts were done maliciously, oppressively, deliberately, with intent to defraud, and in reckless disregard of Plaintiffs' rights and well-being to enrich Defendants. Defendants' conduct warrants an assessment of punitive damages in an amount sufficient to deter such conduct in the future, which amount is to be determined according to proof.

COUNT VI

FRAUD BY CONCEALMENT

(ON BEHALF OF A MULTISTATE CLASS UNDER THE LAWS OF EACH STATE WHERE DEFENDANTS DO BUSINESS, OR, ALTERNATIVELY, ON BEHALF OF EACH OF THE INDIVIDUAL STATE CLASSES AGAINST ALL DEFENDANTS)

228. Plaintiffs re-allege and incorporate by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

229. Plaintiffs bring this claim on their own behalf and on behalf of each member of the Multistate Class under the laws of the states where Defendants sold variable rate energy, and on behalf of each member of the individual State Classes under the laws of those States.

230. Defendants concealed material facts concerning their variable energy rates including (i) failing to adequately disclose that quoted rates are introductory teaser rates, (ii) failing to adequately disclose when Defendants' introductory teaser rates expire, (iii) failing to adequately disclose that Defendants' energy rates are consistently higher than the rates a customer's existing incumbent utility charges, and (iv) failing to provide customers advance notice of the variable rate Defendants will charge.

231. Defendants sold Plaintiffs energy without disclosing these material facts and took active steps to conceal them including by (i) using introductory teaser rates to misrepresent the cost of Defendants' energy, and (ii) actively misrepresenting the rates Defendants would charge when the teaser rates expire.

232. Defendants' material omissions and misrepresentations were intentional and were committed to protect Defendants' profits, avoid damage to Defendants' image, and to save Defendants money, and Defendants did so at Plaintiffs' expense.

233. The information Defendants concealed was material because price is the most important consideration for consumers' energy purchasing decisions.

234. Defendants had a duty to disclose the material information they concealed because this information was known and accessible only to Defendants; Defendants had superior knowledge and access to the facts, and Defendants knew the facts were not known to, or reasonably discoverable by Plaintiffs. Defendants also had a duty to disclose because Just Energy made affirmative misrepresentations about its energy rates, which were misleading, deceptive, and incomplete without disclosure of the material information.

235. Just Energy still has not made full and adequate disclosures and continues to defraud Class Members and conceal material information regarding Just Energy's rates.

236. Plaintiffs were unaware of these omitted material facts and would not have become Just Energy customers if they had known these concealed and/or suppressed facts; and/or would not have continued to be Just Energy customers for as long as they were. Plaintiffs' actions were justified.

237. In deciding to become and remain Just Energy customers, Plaintiffs and the Class reasonably relied on Just Energy's misrepresentations and omissions to form the mistaken belief

that Just Energy's teaser rates were representative of Just Energy's ordinary rates and that thus they would save money on their energy compared to what their local utility would have charged.

238. Defendants' fraud by concealment caused damage to Plaintiffs and the Class, who are entitled to damages and other legal and equitable relief as a result.

239. Defendants' acts were done maliciously, oppressively, deliberately, with intent to defraud, and in reckless disregard of Plaintiffs' rights and well-being to enrich Defendants. Defendants' conduct warrants an assessment of punitive damages in an amount sufficient to deter such conduct in the future, which amount is to be determined according to proof.

COUNT VII

UNJUST ENRICHMENT

(ON BEHALF OF A MULTISTATE CLASS UNDER NEW YORK LAW, OR, ALTERNATIVELY THE LAWS OF EACH STATE WHERE DEFENDANTS DO BUSINESS, OR, ALTERNATIVELY, ON BEHALF OF EACH OF THE INDIVIDUAL STATE CLASSES AGAINST ALL DEFENDANTS)

240. Plaintiffs re-allege and incorporate by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

241. Plaintiffs bring this claim on their own behalf and on behalf of each member of the individual State Classes.

242. Plaintiffs bring this claim on their own behalf and on behalf of each member of the Multistate Class under New York law, or, alternatively, the laws of the states where Defendants sold variable rate energy, or, alternatively, on behalf of each member of the individual State Classes under the laws of those States.

243. This claim is brought under the laws of all states where Just Energy does business that permit an independent cause of action for unjust enrichment, as there is no material difference in the law of unjust enrichment as applied to the claims and questions in this case.

244. As a result of their unjust conduct, Defendants have been unjustly enriched.

245. By reason of Defendants' wrongful conduct, Defendants have benefited from receipt of improper funds, and under principles of equity and good conscience, Defendants should not be permitted to keep this money.

246. As a result of Defendants' conduct it would be unjust and/or inequitable for Defendants to retain the benefits of their conduct without restitution to Plaintiffs and the Class. Accordingly, Defendants must account to Plaintiffs and the Class for their unjust enrichment.

COUNT VIII

BREACH OF CONTRACT

(ON BEHALF OF A MULTISTATE CLASS UNDER NEW YORK LAW, OR, ALTERNATIVELY THE LAWS OF EACH STATE WHERE DEFENDANTS DO BUSINESS, OR, ALTERNATIVELY, ON BEHALF OF EACH OF THE INDIVIDUAL STATE CLASSES AGAINST ALL DEFENDANTS)

247. Plaintiffs re-allege and incorporate by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

248. Plaintiffs bring this claim on their own behalf and on behalf of each member of the Multistate Class under New York law, or, alternatively, the laws of the states where Defendants sold variable rate energy, or, alternatively, on behalf of each member of the individual State Classes under the laws of those States.

249. Plaintiffs and the Class entered into a valid contract with Defendants for the provision of residential energy.

250. Defendants' customer contract explicitly incorporates the terms of any of Defendants' welcome emails into the contract.

251. Defendants sent Plaintiffs and the Class welcome emails that state that after the "intro rate" expired consumers would be charged a specified energy rate.

252. Defendants' customer contract states that Just Energy's variable rates "will not increase more than 35% over the rate from the previous billing cycle."

253. Defendants' customer contract states that the company's variable rates are "determined by business and market conditions."

254. Pursuant to the contract, Plaintiffs and the Class paid the rates charged by Defendants.

255. Notwithstanding Defendants' contractual promise, Just Energy consistently charged Plaintiffs and the Class more than the amounts specified in the welcome emails.

256. Notwithstanding Defendants' contractual promise, Just Energy increased Plaintiffs and Class' prices more than 35% over the rate from the previous billing cycle.

257. Notwithstanding Defendants' contractual promise, Just Energy variable rates are not "determined by business and market conditions."

258. Plaintiffs and the Class were damaged as a result of Defendants' breaches of contract because they were billed, and they paid energy rates that were not consistent with the rates required under Defendants' customer contract.

259. By reason of the foregoing, Defendants are jointly and severally liable to Plaintiffs and the other members of the Class for the damages that they have suffered as a result of Defendants' actions, the amount of such damages to be determined at trial.

COUNT IX

BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

BOTH IN THE ALTERNATIVE TO BREACH OF CONTRACT AND AN ALTERNATIVE BREACH OF CONTRACT COUNT

(ON BEHALF OF A MULTISTATE CLASS UNDER NEW YORK LAW, OR, ALTERNATIVELY THE LAWS OF EACH STATE WHERE DEFENDANTS DO BUSINESS, OR, ALTERNATIVELY, ON BEHALF OF EACH OF THE INDIVIDUAL STATE CLASSES AGAINST ALL DEFENDANTS)

260. Plaintiffs re-allege and incorporate by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

261. Plaintiffs bring this claim on their own behalf and on behalf of each member of the Multistate Class under New York law, or, alternatively, the laws of the states where Defendants sold variable rate energy, or, alternatively, on behalf of each member of the individual State Classes under the laws of those States.

262. Every contract applicable to Plaintiffs and the Class contains an implied covenant of good faith and fair dealing in the performance and enforcement of the contract. The implied covenant is an independent duty and may be breached even if there is no breach of contract's express terms.

263. Under the Defendants' customer contract, Defendants have unilateral discretion to set the variable rates for electricity based on "business and market conditions."

264. Plaintiffs reasonably expected that Defendants' variable energy rates would reflect business and market conditions and that Defendants would refrain from price gouging. Without reasonable expectations, Plaintiffs and other Class members would not have agreed to buy energy from Defendants.

265. Defendants breached the implied covenant of good faith and fair dealing by arbitrarily and unreasonably exercising its unilateral rate-setting discretion to price gouge and

frustrate Plaintiffs and other Class members' reasonable expectations that the variable rates for electricity would be "determined by business and market conditions."

266. Defendants' acted in bad faith when they made contractual promises to base its rates on "business and market conditions" knowing full well that its rates were substantially higher than rates that are actually based on these criteria.

267. As a result of Defendants' breach, Defendants are jointly and severally liable to Plaintiffs and other Class members for actual damages in an amount to be determined at trial.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court:

(a) Issue an order certifying the Classes defined above, appointing the Plaintiffs as Class Representatives, and designating the undersigned firms as Class Counsel;

(b) Find that Defendants have committed the violations of law alleged herein;

(c) Render an award of compensatory damages of at least $100,000,000, the precise amount of which is to be determined at trial;

(d) Issue an injunction or other appropriate equitable relief requiring Defendants to refrain from engaging in the deceptive practices alleged herein;

(e) Declare that Defendants have committed the violations of law alleged herein;

(f) Render an award of punitive damages;

(g) Enter judgment including interest, costs, reasonable attorneys' fees, costs, and expenses; and

(h) Grant all such other relief as the Court deems appropriate.

Dated: April 27, 2018
Armonk, New York

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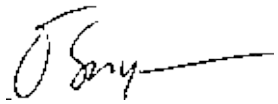
This is Exhibit “C” referred to in the
Affidavit of Robert Tannor sworn January 17, 2022



A Commissioner for taking Affidavits (or as may be)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

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

Plaintiffs,

v.

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

Defendants.

----------X

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

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

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

BACKGROUND[1]

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

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

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

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

a. Using introductory teaser rates to misrepresent the cost of Defendants' energy;

b. Failing to adequately disclose that quoted rates are introductory teaser rates;

c. Failing to adequately disclose when Defendants' introductory teaser rates expire;

d. Actively misrepresenting the rates Defendants will charge when the teaser rates expire;

e. Failing to adequately disclose that Defendants' energy rates are consistently higher than the rates a customer's existing incumbent utility charges;

f. Failing to provide customers advance notice of the variable rate Defendants will charge; and

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

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

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

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

LEGAL STANDARD

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

DISCUSSION

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

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

I. Personal Jurisdiction

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

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

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

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

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

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

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

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

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

II. Plaintiff Donin has standing.

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

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

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

III. Fraud-Based Claims

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

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

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

IV. Plaintiff's GBL claims are untimely.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A "claim for breach of an implied covenant of good faith and fair dealing does not provide a cause of action separate from a breach of contract claim" when based on the same facts. *Atlantis Info. Tech., GmbH v. CA, Inc.*, 485 F. Supp. 2d 224, 230 (E.D.N.Y. 2007) (Spatt, J.); *Esposito v. Ocean Harbor Cas. Ins. Co.*, 13-CV-7073, 2013 WL 6835194, at *2 (E.D.N.Y. Dec. 19, 2013) (Feuerstein, J.). In New York, "all contracts contain an implied covenant of good faith and fair dealing, under which neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Claridge*

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

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

VIII. Plaintiff's unjust enrichment claim is dismissed.

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

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

CONCLUSION

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

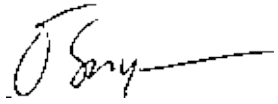
SO ORDERED.

s/ WFK

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

Dated: September 24, 2021
Brooklyn, New York

This is Exhibit “D” referred to in the
Affidavit of Robert Tannor sworn January 17, 2022



A Commissioner for taking Affidavits (or as may be)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TREVOR JORDET, Plaintiff, v. JUST ENERGY SOLUTIONS, INC., Defendant.	Civil Action No. **JURY TRIAL DEMANDED**

CLASS ACTION COMPLAINT

Plaintiff Trevor Jordet, by his attorneys, as and for his class action complaint, alleges, with personal knowledge as to his own actions, and upon information and belief as to those of others, as follows:

NATURE OF THIS CASE

1. This action seeks to redress the deceptive and bad faith pricing practices of Just Energy Solutions, Inc. ("Just Energy" or "Defendant") that has caused thousands of Pennsylvania consumers to pay considerably more for their natural gas than they should otherwise have paid.

2. Just Energy has exploited the deregulation of the retail natural gas market in Pennsylvania by luring consumers into switching natural gas suppliers using a bait-and-switch scheme designed to deceive reasonable consumers. Just Energy lures its customers into switching to its natural gas supply service by offering teaser rates that are fixed for a limited period of time and initially lower than the local utilities' rates for natural gas. Once the initial rate expires, Just Energy switches its customers over to its market variable rate, which is invariably higher than the initial teaser rate. Just Energy's market variable rate is likewise

substantially higher than the competing local utilities' and independent energy companies' ("ESCOs") rates, and is disconnected from true market-based rates.

3. As a result, Pennsylvania consumers are being fleeced millions of dollars in exorbitant charges for natural gas.

4. This suit is brought pursuant to the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("UTPCPL"), and Pennsylvania common law of on behalf of a class of Pennsylvania consumers who were charged a variable rate for natural gas by Just Energy from March 2012 to the present (the "Class" or "Class Members"). It seeks, *inter alia*, injunctive relief, actual damages and refunds, treble damages, punitive damages, attorneys' fees, and the costs of this suit.

PARTIES

5. Plaintiff Trevor Jordet is a citizen of Pennsylvania residing in Norristown, Pennsylvania. Mr. Jordet was a customer of Just Energy from approximately 2012 through approximately February 2018, and as a result of Just Energy's deceptive conduct, he incurred excessive charges for natural gas.[1]

6. Defendant Just Energy was incorporated in California, and its principal place of business or corporate headquarters is in Houston, Texas.

[1] Mr. Jordet initially contracted with Commerce Energy for his natural gas services. According to a Just Energy press release, on April 1, 2017, Commerce Energy rebranded as Just Energy Solutions Inc. Press Release, JUST ENERGY GROUP INC., *Commerce Energy Sheds Name to Begin Operating Under the Just Energy Brand* (Apr. 3, 2017), http://www.marketwired.com/press-release/commerce-energy-sheds-name-to-begin-operating-under-the-just-energy-brand-nyse-je-2207232.htm. "The change represents a transition in name only, and does not affect the status of existing customer contracts, business licenses, or any other legal documentation." *Id.*

7. Upon information and belief, Just Energy provides natural gas and natural gas services to thousands of customers in Pennsylvania, and in other states including but not limited to Illinois, Michigan, and Virginia.

JURISDICTION

8. The Court has specific personal jurisdiction over Defendant Just Energy because Plaintiff's claims arise out of and relate to Defendant's conduct in Pennsylvania.

9. Subject matter jurisdiction in this civil action is authorized pursuant to 28 U.S.C. § 1332(d)(2)(A), as the amount in controversy is in excess of $5 million and Plaintiff and many class members are citizens of Pennsylvania, whereas Defendant is a citizen of California and Texas.

10. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b)(2).

OPERATIVE FACTS

The History Of Pennsylvania's Energy Industry

11. In 1999, Pennsylvania's state legislature made the decision to deregulate the market for retail natural gas and natural gas supply by passing the Natural Gas Choice and Competition Act, a major break with past policy. Before deregulation, retail residential consumers had to purchase both the supply and the delivery of natural gas from the local utility. The public policy motivation for allowing consumers a choice of natural gas suppliers is to enable retail customers to take advantage of competition between suppliers in the open market, as compared to the monopolistic and heavily regulated utility. The premise behind this policy is that competition would result in ESCOs being more aggressive than the monopoly utility in reducing wholesale purchasing costs and thereby lower prices and costs for retail customers.

12. ESCOs such as Just Energy have various options to buy natural gas at wholesale for resale to retail customers, including: owning natural gas production facilities; purchasing natural gas from wholesale marketers and brokers at the price available at or near the time it is used by the retail consumer; and by purchasing natural gas in advance of the time it is used by consumers, either by purchasing physical gas to be used in the future or by purchasing futures contracts for the delivery of natural gas in the future at a predetermined price. The purpose of deregulation is to allow ESCOs to use these and other innovative purchasing strategies to reduce natural gas costs, and pass those savings on to consumers.

13. Consumers who do not choose to switch to an ESCO for their energy supply continue to receive their supply from their local utility. However, if a customer switches to an ESCO, the customer will have his or her energy "supplied" by the ESCO, but still "delivered" by their existing utility. The customer's existing utility continues to bill the customer for both the energy supply and delivery costs. The only difference to the customer is which company sets the price for the customer's energy supply.

14. As part of the deregulation plan, ESCOs (like Just Energy) do not have to file or seek approval for the natural gas rates they charge with the state public services commissions or the method by which they set their rates.

15. Just Energy exploits the deregulation and the lack of regulatory oversight in the energy market by luring customers with enticing teaser rates and false promises that it will offer market-based variable rates when, in fact, Just Energy's rates are substantially higher than its own fixed rates, competing ESCOs rates, and the local utilities' rates, and are untethered from changes in wholesale rates.

Mr. Jordet's Experience

16. Just Energy solicited Mr. Jordet in or around 2012, representing that it would charge a rate lower than the local utility, PECO. Expecting to save money on his natural gas bills, Mr. Jordet expressed interest in Just Energy's offer.

17. Just Energy then provided Mr. Jordet its standard and uniform residential natural gas disclosure statement and terms of service (the "Agreement") that would govern their relationship. Just Energy also provided Mr. Jordet with a rescissionary period during which he could rescind the Agreement prior to its commencement should he not agree to its terms. During that rescissionary period, the Agreement served as a solicitation in which Just Energy identified the basis upon which the promised market-based variable rate would be determined.

18. According to the Agreement, customers are initially charged a fixed introductory rate (the "Introductory Rate") for a set number of months. Once the Introductory Rate expires, Just Energy automatically converts customers to its monthly variable rate.

19. The Agreement also represents that the variable rate, which is set by Just Energy, would be set "according to business and market conditions, including but not limited to, the wholesale cost of natural gas supply, transportation, distribution and storage[.]"

20. Any reasonable consumer, including Mr. Jordet, would understand based on Just Energy's representations concerning business and market conditions that its variable rate would primarily reflect the two main components of business and market conditions facing ESCOs like Just Energy, namely the wholesale cost of purchasing the natural gas it sells to its customers, and the business and market prices charged by Just Energy's competitors (*i.e.*, the local utility and other ESCOs).

21. Mr. Jordet switched from PECO to Just Energy for his natural gas services in or around 2012, and cancelled his Agreement with Just Energy in February 2018. The following table identifies the billing periods for the past twenty-two months, the variable rate Just Energy charged Mr. Jordet, the corresponding rate PECO would have charged (which, as discussed below, is a reasonable representation of a market-based rate), and the differences between Just Energy's and PECO's contemporaneous rates:

Billing Period	Just Energy Rate Per Ccf[2]	PECO Rate Per Ccf	Difference	Percent Difference
4/15/16 – 5/16/16	$0.5895	$0.3422	$0.2453	71.3%
5/16/16 – 6/15/16	$0.6725	$0.3501	$0.3224	92.1%
6/15/16 – 7/15/16	$0.7183	$0.3501	$0.3858	105.2%
7/15/16 – 8/15/16	$0.7183	$0.3501	$0.3682	105.2%
8/15/16 – 9/14/16	$0.744	$0.2916	$0.4524	155.1%
9/14/16 – 10/13/16	$0.7056	$0.2916	$0.414	142%
10/13/16 – 11/11/16	$0.6014	$0.2916	$0.3098	106.2%
11/11/16 – 12/14/16	$0.6099	$0.3215	$0.2884	89.7%
12/14/16 – 1/18/17	$0.616	$0.3215	$0.2945	92%
1/18/17 – 2/16/17	$0.616	$0.3215	$0.2945	91.6%
2/16/17 – 3/17/17	$0.616	$0.3993	$0.2167	54.3%
3/17/17 – 4/17/17	$0.616	$0.3993	$0.2167	54.3%
4/17/17 – 5/16/17	$0.616	$0.3993	$0.2167	54.3%
5/16/17 – 6/15/17	$0.616	$0.4465	$0.1695	38%

[2] Quantities of natural gas are occasionally measured in terms of volume. A Ccf is a volumetric measure of the amount of gas contained in a space equal to one hundred cubic feet.

Billing Period	Just Energy Rate Per Ccf[2]	PECO Rate Per Ccf	Difference	Percent Difference
6/15/17 – 7/17/17	$0.616	$0.4465	$0.1695	38%
7/17/17 – 8/15/2017	$0.7233	$0.4465	$0.2768	62%
8/15/17 – 9/13/17	$0.84	$0.3858	$0.4542	117.7%
9/13/17 – 10/14/17	$0.84	$0.3858	$0.4542	117.7%
10/14/17 – 11/10/17	$0.84	$0.3858	$0.4542	117.7%
11/10/17 – 12/13/17	$0.844	$0.3991	$0.7779	111%
12/13/17 – 1/17/18	$0.84	$0.3991	$0.4409	110.5%
1/17/18 – 2/15/18	$0.84	$0.3991	$0.4409	110.5%

22. Additionally, the following table likewise identifies the billing periods for the past twenty-two months, Just Energy's variable rate, and the U.S. Energy Information Administration's ("EIA") official cost of wholesale natural gas delivered to Pennsylvania ("Citygate rate")[3]:

Billing Period	Just Energy Rate Per Ccf	Citygate Rate Per Ccf
4/15/16 – 5/16/16	$0.5895	$0.328
5/16/16 – 6/15/16	$0.6725	$0.435
6/15/16 – 7/15/16	$0.7183	$0.636
7/15/16 – 8/15/16	$0.7183	$0.655
8/15/16 – 9/14/16	$0.744	$0.557
9/14/16 – 10/13/16	$0.7056	$0.592

[3] *Natural Gas Citygate Price in Pennsylvania*, EIA, https://www.eia.gov/dnav/ng/hist/n3050pa3m.htm (last visited Apr. 4, 2018).

Billing Period	Just Energy Rate Per Ccf	Citygate Rate Per Ccf
10/13/16 – 11/11/16	$0.6014	$0.398
11/11/16 – 12/14/16	$0.6099	$0.408
12/14/16 – 1/18/17	$0.616	$0.372
1/18/17 – 2/16/17	$0.616	$0.407
2/16/17 – 3/17/17	$0.616	$0.420
3/17/17 – 4/17/17	$0.616	$0.386
4/17/17 – 5/16/17	$0.616	$0.507
5/16/17 – 6/15/17	$0.616	$0.537
6/15/17 – 7/17/17	$0.616	$0.685
7/17/17 – 8/15/2017	$0.7233	$0.730
8/15/17 – 9/13/17	$0.84	$0.623
9/13/17 – 10/14/17	$0.84	$0.542
10/14/17 – 11/10/17	$0.84	$0.467
11/10/17 – 12/13/17	$0.844	$0.408
12/13/17 – 1/17/18	$0.84	$0.349
1/17/18 – 2/15/18	$0.84	$0.3991

23. That Just Energy's variable rate is not in fact a competitive market rate based on the wholesale cost of natural gas is demonstrated by the fact that Just Energy's variable rate was consistently significantly higher than PECO's rates and that the rate did not fluctuate with commodity prices.

24. Indeed, from April 2016 through February 2018 (his most recent bill), Just Energy's rate was higher than PECO's rate *every single month*. In fact, of the twenty-two months listed above, Just Energy's variable rate was *more than double* PECO's rate for ten months. In fact, on average, Just Energy's rate was 93% higher than PECO's rate.

25. PECO's rates serve as an ideal indicator of market conditions because they are based on the wholesale natural gas and the associated market costs (*e.g.*, procurement costs, transportation, distribution, and storage -- the same costs ESCOs such as Just Energy incur). PECO and other Pennsylvania utilities can only adjust its rates quarterly based on changes in its wholesale supply costs and simply pass actual costs on to their customers -- without any markups or profit.[4] Because Pennsylvania utility rates do not include any profits, they serve as pure reflections of average market costs of wholesale natural gas, associated costs, and distribution over time.

26. While PECO and Just Energy may not purchase natural gas and associated costs in precisely the same manner, over time the wholesale costs they incur should be commensurate. In fact, Just Energy has a tactical advantage over the utility as it can purchase natural gas from a highly competitive natural gas market for future use, and therefore its cost for purchasing natural gas should at the very least reflect (if not undercut) market prices, albeit over a longer term. Therefore, while PECO's rates may not precisely match Just Energy's rates, they should be commensurate. But they are instead wildly disparate.

27. For example, when PECO's rate declined from $0.3501 to $0.2916 per Ccf (a decline of 17%) from August to September 2016, Just Energy increased its already exorbitant

[4] *Price to Compare Sample Methodology*, PECO, https://www.peco.com/SiteCollectionDocuments/Sample%20Gas%20PTC%20Methodology.pdf (last visited Apr. 4, 2018).

prices from $0.7183 to $0.744 per Ccf (an increase of 4%). Likewise, when PECO's rate declined from $0.4465 to $0.3858 per Ccf (decreasing by 14%) between August to September 2017, Just Energy's rate rose from $0.7233 to $0.84 per Ccf (increasing 16%). Even when PECO's rate remained constant at $0.3501 per Ccf between June and July 2016, Just Energy's rate increased from $0.6725 to $0.7183 per Ccf (an increase of 7%).

28. The disparities are also evident over time. For instance, while PECO's rate generally declined between June 2017 and February 2018 from $0.4465 to $0.3991 per Ccf (declining 11%), Just Energy's rates increased from $0.616 to $0.84 per Ccf (increasing by 36%).

29. Just Energy's stark rate disparities with those of the local utility, wherein Just Energy's rates were higher 100% of time from May 2016 through February 2018, considered together with the fact that Just Energy's rates do not reflect market fluctuations, demonstrate that Just Energy does not charge a rate based on business and market conditions as it states in its Agreement, but rather gouges its customers by charging outrageously high rates.

30. The disconnect between Just Energy's variable rate and changes in wholesale costs is also demonstrated by the fact that Just Energy's variable rate often increased while wholesale costs declined. The Citygate rate identified by the EIA is the actual wholesale price of natural gas in Pennsylvania. Between August 2017 and February 2018, the Citygate rate drastically declined from $0.730 to $0.3991 per Ccf (decreasing 45%), PECO's variable rate steadily increased from $0.7233 to $0.84 per Ccf (increasing 16%).

31. The cost of wholesale natural gas is the primary component of the non-overhead costs Just Energy incurs. Indeed, Just Energy concedes and represents as much, listing "the

wholesale cost of natural gas supply" as the first factor in its list of business and market pricing components.

32. Just Energy's identification of "business" conditions among the factors it considers likewise does not justify its outrageously high rates. A reasonable consumer might understand that an ESCO will attempt to make a reasonable margin on the commodity it sells to consumers. However, such a consumer would also expect that such profits would be consistent with profit margins obtained by other suppliers of natural gas in the market, and also that Just Energy's profiteering at the expense of its customers would not be so extreme that its rate bears no relation to market prices but is instead outrageously higher. That other ESCOs' rates are lower, even though they purchase natural gas from the wholesale market, demonstrates that Just Energy sets its profit margins in bad faith. Similarly, PECO's rate reflects a rate that Just Energy could charge (because Just Energy could purchase natural gas in the same way and at the same cost as PECO) plus a reasonable margin. No reasonable consumer would consider a margin that is on average 93% to be fair or commercially reasonable.

33. Any potentially conceivable additional business and market costs that are not explicitly disclosed in the Agreement (such as taxes, fees, and assessments) are relatively insignificant in terms of the overall costs Just Energy incurs to provide retail natural gas, and do not fluctuate over time. Therefore, these other cost factors cannot explain the drastic increases in Just Energy's variable rate or the reason its rates are disconnected from changes in wholesale costs.

34. Thus, Just Energy's statements with respect to the natural gas rates it will charge are materially misleading because consumers do not receive a price based on the specified factors like wholesale costs and competitor pricing. Instead, consumers are charged rates that are

substantially higher (often more than double) those of competitors and untethered from the specified market factors. Just Energy intentionally fails to disclose this material fact to its customers because no reasonable consumer -- including Mr. Jordet -- who knows the truth about Just Energy's exorbitant rates would choose Just Energy as a natural gas supplier.

35. Just Energy's statements and omissions regarding its natural gas rates are materially misleading because the only consideration for any reasonable consumer when choosing an energy supplier is price.

36. In fact, all that Just Energy offers customers is natural gas delivered by local utilities, a commodity that has the exact same qualities as natural gas supplied by other ESCOs or local utilities. Other than potential price savings, there is nothing to differentiate Just Energy from other ESCOs or local utilities. Accordingly, the potential for price savings is the only reason any reasonable consumer would enter into a contract for natural gas supply with Just Energy.

37. Just Energy knows full well that it charges a rate that is unconscionably high, and the misrepresentations it makes with regard to the rate being market-based were made for the sole purpose of inducing consumers to sign up for Just Energy's natural gas supply so that it can reap outrageous profits to the direct detriment of its consumers without regard to the consequences high utility bills cause such consumers. As such, Just Energy's actions were actuated by actual malice or accompanied by wanton and willful disregard for consumers' well-being.

CLASS ACTION ALLEGATIONS

38. Plaintiff brings this action on his own behalf and additionally, pursuant to Rules 23(b)(2) and 23(b)(3) of the Federal Rules of Civil Procedure, on behalf of a class of all Just

Energy customers charged a variable rate for residential natural gas services by Just Energy from April 2012 to the present (the "Class" or "Class Members").

39. Plaintiff also brings this action on behalf of a sub-class of Just Energy's Pennsylvania customers charged a variable rate for residential natural gas services by Just Energy from April 2012 to the present (the "Pennsylvania Sub-Class").

40. Excluded from the Class and Pennsylvania Sub-Class (collectively, the "Classes") are Defendant; any parent, subsidiary, or affiliate of Defendant; any entity in which Defendant has or had a controlling interest, or which Defendant otherwise controls or controlled; and any officer, director, legal representative, predecessor, successor, or assignee of Defendant.

41. This action is brought as a class action for the following reasons:

a. The Classes consist of thousands of persons and is therefore so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;

b. There are questions of law or fact common to the Classes that predominate over any questions affecting only individual members, including:

i. whether Defendant violated 73 PA. CONS. STAT. § 201 *et seq.*;

ii. whether Defendant breached its contract with its consumers by charging variable rates not based on the factors specified in the customer agreements;

iii. whether Defendant breached the covenant of good faith and fair dealing by exercising its unilateral price-setting discretion in bad faith, *i.e.*, to price gouge;

iv. whether Plaintiff and the Class have sustained damages and, if so, the proper measure thereof; and

v. whether Defendant should be enjoined from continuing to charge variable rates not based on market conditions;

c. The claims asserted by Plaintiff are typical of the claims of Class Members;

d. Plaintiff will fairly and adequately protect the interests of the Classes, and Plaintiff has retained attorneys experienced in class and complex litigation, including class litigation involving consumer protection and ESCOs;

e. Prosecuting separate actions by individual Class Members would create a risk of inconsistent or varying adjudications with respect to individual Class Members that would establish incompatible standards of conduct for Defendant;

f. Defendant has acted on grounds that apply generally to the Classes, namely representing that its variable rates are based on market conditions, *i.e.*, competitive and reflective of the wholesale market, when Defendant's rates are in fact substantially higher, such that final injunctive relief prohibiting Defendant from continuing its deceptive practices is appropriate with respect to the Classes as a whole;

g. A class action is superior to other available methods for the fair and efficient adjudication of the controversy, for at least the following reasons:

i. Absent a class action, as a practical matter Class Members will be unable to obtain redress, Defendant's violations of its legal obligations will continue without remedy, additional consumers and purchasers will be harmed, and Defendant will continue to retain its ill-gotten gains;

ii. It would be a substantial hardship for most individual Class Members if they were forced to prosecute individual actions;

iii. When the liability of Defendant has been adjudicated, the Court will be able to determine the claims of all Class Members;

iv. A class action will permit an orderly and expeditious administration of class claims, foster economies of time, effort, and expense and ensure uniformity of decisions;

v. The lawsuit presents no difficulties that would impede its management by the Court as a class action; and

vi. Defendant has acted on grounds generally applicable to Class Members, making class-wide monetary and injunctive relief appropriate.

42. Defendant's violations Pennsylvania's UTPCPL and common law apply to all Class Members, and Plaintiff is entitled to have Defendant enjoined from engaging in illegal and deceptive conduct in the future.

FIRST CAUSE OF ACTION

Violation of Pennsylvania's Unfair Trade Practices and Consumer Protection Law (On Behalf of the Pennsylvania Sub-Class)

43. Plaintiff repeats and re-alleges the allegations contained in the paragraphs above as if fully set forth herein.

44. Defendant has engaged in, and continues to engage in, fraudulent and deceptive conduct in violation of 73 PA. CONS. STAT. § 201-3.

45. Defendant's acts are willful, fraudulent, deceptive, unfair, unconscionable, and contrary to the public policy of Pennsylvania, which aims to protect consumers.

46. Defendant's misrepresentations and false, deceptive, and misleading statements and omissions with respect to the variable rates it charges for natural gas, as described above, constitute deceptive practices in connection with the marketing, advertising, promotion, and sale of natural gas in violation of 73 PA. CONS. STAT. § 201-3.

47. Defendant's fraudulent and deceptive conduct was designed to and did result in

misunderstandings on the part of Mr. Jordet and other reasonable consumers.

48. Defendant's false, deceptive, and misleading statements and omissions would have been material to any potential consumer's decision to purchase natural gas from Just Energy.

49. Defendant knew at the time it promised prospective customers that they will be billed a variable rate based on wholesale costs of natural gas and other business and market conditions that its promise was false because at the time of contract formation Just Energy knew that its variable rate was untethered from business and market conditions.

50. Defendant's intentional concealments were designed to deceive current and prospective variable rate customers into believing that rates will be commensurate with market conditions and the factors specified in the Agreement. By concealing its actual pricing strategy (presumably maximizing profits), Defendant benefits from reliance and deprive consumers from informed purchasing decisions and savings.

51. Defendant also baits and switches potential customers by enticing them with deceptively low Introductory Rates, only to shift them on to Just Energy's exorbitant variable rate plan shortly thereafter.

52. Defendant's practices are unconscionable and outside the norm of reasonable business practices.

53. As a direct and proximate result of Defendant's unlawful deceptive acts and practices, Plaintiff and Class Members entered into agreements to purchase natural gas from Just Energy and suffered and continue to suffer an ascertainable loss of monies based on the difference in the rate they were charged versus the rate they would have been charged had Defendant charged a rate based on business and market conditions as specified in the Agreement

or had they not switched to Defendant from their previous supplier. By reason of the foregoing and pursuant to 73 PA. CONS. STAT. § 201-9.2(a), Defendant is liable to Plaintiff and the Class for trebled actual damages, attorneys' fees, and the costs of this suit.

54. Plaintiff and Class Members further seek equitable relief against Defendant. Pursuant to 73 PA. CONS. STAT. § 201-9.2(a), this Court has the power to award such relief, including but not limited to, an order declaring Defendant's practices as alleged herein to be unlawful, an Order enjoining Defendant from undertaking any further unlawful conduct, and an order directing Defendant to refund to Plaintiff and the Class all amounts wrongfully assessed, collected, or withheld.

55. Defendant knows full well that it charges an unconscionably high rate, and the misrepresentations it makes with regard to the rate being market based were made for the purpose of inducing consumers to sign up for Defendant's natural gas supply so that it can reap outrageous profits to the direct detriment of Pennsylvania consumers without regard to the consequences high utility bills cause such consumers. As such, Defendant's actions are unconscionable and actuated by bad faith, lack of fair dealing, actual malice, or accompanied by wanton and willful disregard for consumers' well-being. Defendant is therefore additionally liable for punitive damages, in an amount to be determined at trial.

SECOND CAUSE OF ACTION
Breach of Contract and the Implied Covenant of Good Faith and Fair Dealing
(On Behalf of the Class)

56. Plaintiff repeats and re-alleges the allegations contained in the paragraphs above as if fully set forth herein.

57. Plaintiff and the Class entered into valid contracts with Defendant for the provision of natural gas.

58. Pursuant to the Agreement, Defendant agreed to charge a variable rate for natural gas based business and market conditions, such as the wholesale cost of natural gas supply, transportation, distribution, and storage.

59. Pursuant to the Agreement, Plaintiff and the Class paid the variable rates charged by Defendant for natural gas.

60. However, Defendant failed to perform its obligations under the Agreement. Indeed, Defendant charged a variable rate for natural gas that was untethered from the pricing components set forth in the parties' contract.

61. No reasonable consumer, including Mr. Jordet, would interpret the Agreement as granting Defendant with unfettered discretion to price gouge its customers.

62. Plaintiff and the Class were injured as a result because they were billed, and they paid, a charge for natural gas that was higher than it would have been had Defendant based its rate on the agreed upon factors.

63. By reason of the foregoing, Defendant is liable to Plaintiff and Class Members for the damages that they have suffered as a result of Defendant's actions, the amount of such damages to be determined at trial.

64. Additionally, every contract in Pennsylvania contains an implied covenant of good faith and fair dealing in the performance and enforcement of the contract. The implied covenant is an independent duty and may be breached even if there is no breach of a contract's express terms.

65. Under the contract, Defendant had unilateral discretion to set the variable rate for natural gas based on market conditions and other factors, such as the amount of profit Defendant hoped to earn from the sale of natural gas in a customer's utility area.

66. Plaintiff reasonably expected that the variable rates for natural gas would, notwithstanding Defendant's profit goals, reflect the market and wholesale prices for natural gas and that Defendant would refrain from price gouging. Without these reasonable expectations, Plaintiff and other Class Members would not have agreed to buy natural gas from Defendant.

67. Defendant breached the implied covenant of good faith and fair dealing by arbitrarily and unreasonably exercising its unilateral rate-setting discretion to price gouge and frustrate Plaintiff and other Class Members' reasonable expectations that the variable rate for natural gas would be commensurate with market conditions.

68. As a result of Defendant's breach, Defendant is liable to Plaintiff and Class Members for actual damages in an amount to be determined at trial.

THIRD CAUSE OF ACTION
Unjust Enrichment
(On Behalf of the Class)
(In the Alternative to Count II)

69. Plaintiff repeats and re-alleges the allegations contained in the paragraphs above as if fully set forth herein.

70. By engaging in the conduct described above, Defendant has unjustly enriched itself and received a benefit beyond what was contemplated in the contract, at the expense of Plaintiff and the Class.

71. It would be unjust and inequitable for Defendant to retain the payments Plaintiff and the Class made for excessive natural gas charges.

72. By reason of the foregoing, Defendant is liable to Plaintiff and the other members of the Class for the damages that they have suffered as a result of Defendant's actions, the amount of which shall be determined at trial.

WHEREFORE, Plaintiff respectfully requests that the Court should enter judgment against Defendant as follows:

1. Certifying this action as a class action, with a class and a sub-class as defined above;

2. On Plaintiff's First Cause of Action, awarding against Defendant damages that Plaintiff and Pennsylvania Sub-Class Members have suffered, trebled, and granting appropriate equitable relief;

3. On Plaintiff's Second Cause of Action, awarding against Defendant damages that Plaintiff and Class Members have suffered as a result of Defendant's actions;

4. On Plaintiff's Third Cause of Action, awarding against Defendant damages that Plaintiff and Class Members have suffered as a result of Defendant's actions;

5. Awarding Plaintiff and the Class punitive damages;

6. Awarding Plaintiff and the Class interest, costs, and attorneys' fees; and

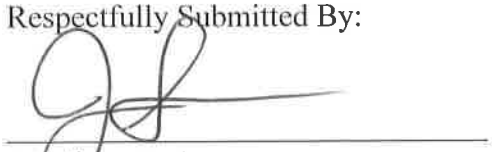
7. Awarding Plaintiff and the Class such other and further relief as this Court deems just and proper.

DEMAND FOR TRIAL BY JURY

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Plaintiff hereby demands a trial by jury.

Dated: April 6, 2018

Respectfully Submitted By:



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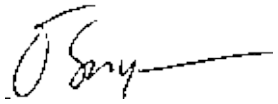
Attorneys for Plaintiff and the Class

This is Exhibit “E” referred to in the
Affidavit of Robert Tannor sworn January 17, 2022



A Commissioner for taking Affidavits (or as may be)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

TREVOR JORDET,

Plaintiff,

v.

DECISION AND ORDER

18-CV-953S

JUST ENERGY SOLUTIONS, INC.,

Defendant.

I. Introduction

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

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

II. Background

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

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

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

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

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

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

A. Pleadings

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

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

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

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

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

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

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

B. Procedural History

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

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

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

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

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

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

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

III. Discussion

A. Applicable Standards

1. Motion to Dismiss

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

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

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

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

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

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

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

2. Pennsylvania Unfair Trade Practices and Consumer Protection Law

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

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

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

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

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

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

3. Pennsylvania Contract Law and Unjust Enrichment

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

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

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

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

B. Motion to Dismiss Contentions

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

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

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

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

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

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

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

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

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

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

C. Variable Price Provision

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

E. Statutes of Limitations

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

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

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

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

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

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

F. Unjust Enrichment (Third Cause of Action)

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

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

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

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

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

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

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

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

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

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

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

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

1. False Advertising

a. Oral Representation

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

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

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

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

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

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

b. Cancellation Provision Making Contract an Advertisement

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. Conclusion

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

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

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

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

V. Orders

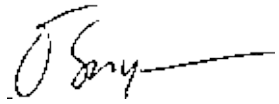
IT HEREBY IS ORDERED, that Defendant's Motion to Dismiss (Docket No. 19) is GRANTED in part, DENIED in part. Defendant shall answer the surviving Causes of Action within fourteen (14) days after entry of this Decision and Order. This Court will refer this case to a Magistrate Judge for pretrial proceedings.

SO ORDERED.

Dated: December 7, 2020
Buffalo, New York

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

This is Exhibit “F” referred to in the
Affidavit of Robert Tannor sworn January 17, 2022



A Commissioner for taking Affidavits (or as may be)

PROOF OF CLAIM FORM
FOR CLAIMS AGAINST THE JUST ENERGY ENTITIES[1]

Note: Claimants are strongly encouraged to complete and submit their Proof of Claim on the Claims Agent's online claims submission portal which can be found at https://omniagentsolutions.com/justenergyclaims.

1. Name of Just Energy Entity or Entities (the "Debtor(s)") the Claim is being made against[2]:

Debtor(s): Just Energy Entities

2A. Original Claimant (the "Claimant")

Legal Name of Claimant: Fira Donin and Inna Golovan and as Representative Plaintiffs

Name of Contact: J. Burkett McInturff

Address: Wittels McInturff Palikovic
18 Half Mile Road

Title: Attorney for the Representative Plaintiffs

Phone #: 910-476-7253

Fax #:

City: Armonk

Prov /State: NY

Email: jbm@wittelslaw.com

Postal/Zip Code: 10504

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

[2] List the name(s) of any Just Energy Entity(ies) that have guaranteed the Claim. If the Claim has been guaranteed by any Just Energy Entity, provide all documentation evidencing such guarantee.

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

2B. Assignee, if claim has been assigned

Legal Name of Assignee: n/a

Name of Contact

Address

Title

Phone #

Fax #

City

Prov /State

Email

Postal/Zip Code

3. Amount and Type of Claim

The Debtor was and still is indebted to the Claimant as follows:

Pre-Filing Claims

Debtor Name:	Currency:	Amount of Pre-Filing Claim (including interest up to and including March 9, 2021)[3]:	Whether Claim is Secured:	Value of Security Held, if any[4]:
Just Energy Entities	USD	$3,662,444,442	Yes ☐ No ☒	n/a
			Yes ☐ No ☐	
			Yes ☐ No ☐	

Restructuring Period Claims

Debtor Name:	Currency:	Amount of Restructuring Period Claim:	Whether Claim is Secured:	Value of Security Held, if any:
			Yes ☐ No ☐	
			Yes ☐ No ☐	
			Yes ☐ No ☐	

[3] Interest accruing from the Filing Date (March 9, 2021) shall not be included in any Claim.

[4] If the Claim is secured, on a separate schedule provide full particulars of the security, including the date on which the security was given, the value which you ascribe to the assets charged by your security and the basis for such valuation and attach a copy of the security documents evidencing the security.

4. Documentation[5]

Provide all particulars of the Claim and all available supporting documentation, including any calculation of the amount, and description of transaction(s) or agreement(s), or legal breach(es) giving rise to the Claim, including any claim assignment/transfer agreement or similar document, if applicable, the name of any guarantor(s) which has guaranteed the Claim and a copy of such guarantee documentation, the amount of invoices, particulars of all credits, discounts, etc. claimed, as well as a description of the security, if any, granted by the affected Just Energy Entity to the Claimant and estimated value of such security.

5. Certification

I hereby certify that:

1. I am the Claimant or an authorized representative of the Claimant.
2. I have knowledge of all the circumstances connected with this Claim.
3. The Claimant asserts this Claim against the Debtor(s) as set out above.
4. All available documentation in support of this Claim is attached.

All information submitted in this Proof of Claim form must be true, accurate and complete. Filing a false Proof of Claim may result in your Claim being disallowed in whole or in part and may result in further penalties.

Signature: _____	Witness[6]: _____ (signature)
Name: _____	_____ (print)
Title: _____	

Dated at _____ this _____ day of _____, 2021.

6. Filing of Claim and Applicable Deadlines

For Pre-Filing Claims (excluding Negative Notice Claims that are Pre-Filing Claims), this Proof of Claim must be returned to and received by the Claims Agent or the Monitor by 5:00 p.m. (Toronto Time) on November 1, 2021 (the "**Claims Bar Date**").

For Restructuring Period Claims (excluding Negative Notice Claims that are Restructuring Period Claims), this Proof of Claim must be returned to and received by the Claims Agent or the Monitor by 5:00 p.m. (Toronto Time) on the later of (i) the date that is 30 days after the date on which the

[5] If the Claimant is a Commodity Supplier submitting a Claim in respect of any crystallized marked-to-market amounts that the Claimant believes are owing by any Just Energy Entity under any Commodity Agreement, the Claimant must indicate the appropriate calculations of such crystallized marked-to-market Claim(s).

[6] Witnesses are required if an individual is submitting this Proof of Claim form by prepaid ordinary mail, registered mail, courier, personal delivery, facsimile transmission or email.

Claims Agent or the Monitor sends a General Claims Package with respect to a Restructuring Period Claim and (ii) the Claims Bar Date (the "**Restructuring Period Claims Bar Date**").

In each case, Claimants are strongly encouraged to complete and submit their Proof of Claim on the Claims Agent's online claims submission portal which can be found at https://omniagentsolutions.com/justenergyclaims. If not submitted at the online portal, Proofs of Claim must be delivered to the Claims Agent or the Monitor by prepaid ordinary mail, registered mail, courier, personal delivery, facsimile transmission or email at one of the applicable addresses below:

If located in Canada:

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

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

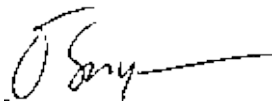
If located in the United States or elsewhere:

Just Energy Claims Processing
c/o Omni Agent Solutions
5955 De Soto Ave., Suite 100
Woodland Hills, CA 91367

In accordance with the Claims Procedure Order, notices shall be deemed to be received by the Claims Agent or the Monitor: (i) if submitted on the Claims Agent's online portal, at the time such document is submitted, or (ii) upon actual receipt thereof by the Claims Agent or the Monitor during normal business hours on a Business Day, or if delivered outside of normal business hours, on the next Business Day.

Failure to file your Proof of Claim so that it is actually received by the Claims Agent or the Monitor on or before 5:00 p.m. on the Claims Bar Date or the Restructuring Period Claims Bar Date, as applicable, WILL result in your Claims (except for any Claim outlined in any Statement of Negative Notice Claim that may have been addressed to you) being forever barred and you will be prevented from making or enforcing such Claims against the Just Energy Entities. In addition, unless you have separately received a Statement of Negative Notice Claim from the Claims Agent or the Monitor in respect of any other Claim, you shall not be entitled to further notice of and shall not be entitled to participate as a creditor in the Just Energy Entities' CCAA proceedings with respect to any such Claims.

This is Exhibit “G” referred to in the
Affidavit of Robert Tannor sworn January 17, 2022



A Commissioner for taking Affidavits (or as may be)

PROOF OF CLAIM FORM
FOR CLAIMS AGAINST THE JUST ENERGY ENTITIES[1]

Note: Claimants are strongly encouraged to complete and submit their Proof of Claim on the Claims Agent's online claims submission portal which can be found at https://omniagentsolutions.com/justenergyclaims.

1. Name of Just Energy Entity or Entities (the "Debtor(s)") the Claim is being made against[2]:

Debtor(s): Just Energy Entities

2A. Original Claimant (the "Claimant")

Legal Name of Claimant: Trevor Jordet as Representative Plaintiff

Address: FINKELSTEIN, BLANKINSHIP, FREI-PEARSON & GARBER, LLP
One North Broadway, Suite 900

City: White Plains Prov /State: NY Postal/Zip Code: 10601

Name of Contact: Greg Blankinship

Title: Attorney for the Representative Plaintiffs

Phone #: 914-298-3290

Fax #:

Email: gblankinship@fbfglaw.com

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

[2] List the name(s) of any Just Energy Entity(ies) that have guaranteed the Claim. If the Claim has been guaranteed by any Just Energy Entity, provide all documentation evidencing such guarantee.

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

2B. Assignee, if claim has been assigned

Legal Name of Assignee: n/a

Name of Contact

Address

Title

Phone #

Fax #

City

Prov /State

Email

Postal/Zip Code

3. Amount and Type of Claim

The Debtor was and still is indebted to the Claimant as follows:

Pre-Filing Claims

Debtor Name:	Currency:	Amount of Pre-Filing Claim (including interest up to and including March 9, 2021)[3]:	Whether Claim is Secured:	Value of Security Held, if any[4]:
Just Energy Entities	USD	$3,662,444,442	Yes ☐ No ☒	n/a
			Yes ☐ No ☐	
			Yes ☐ No ☐	

Restructuring Period Claims

Debtor Name:	Currency:	Amount of Restructuring Period Claim:	Whether Claim is Secured:	Value of Security Held, if any:
			Yes ☐ No ☐	
			Yes ☐ No ☐	
			Yes ☐ No ☐	

[3] Interest accruing from the Filing Date (March 9, 2021) shall not be included in any Claim.

[4] If the Claim is secured, on a separate schedule provide full particulars of the security, including the date on which the security was given, the value which you ascribe to the assets charged by your security and the basis for such valuation and attach a copy of the security documents evidencing the security.

4. Documentation[5]

Provide all particulars of the Claim and all available supporting documentation, including any calculation of the amount, and description of transaction(s) or agreement(s), or legal breach(es) giving rise to the Claim, including any claim assignment/transfer agreement or similar document, if applicable, the name of any guarantor(s) which has guaranteed the Claim and a copy of such guarantee documentation, the amount of invoices, particulars of all credits, discounts, etc. claimed, as well as a description of the security, if any, granted by the affected Just Energy Entity to the Claimant and estimated value of such security.

5. Certification

I hereby certify that:

1. I am the Claimant or an authorized representative of the Claimant.
2. I have knowledge of all the circumstances connected with this Claim.
3. The Claimant asserts this Claim against the Debtor(s) as set out above.
4. All available documentation in support of this Claim is attached.

All information submitted in this Proof of Claim form must be true, accurate and complete. Filing a false Proof of Claim may result in your Claim being disallowed in whole or in part and may result in further penalties.

Signature: _____	Witness[6]: _____ (signature)
Name: _____	_____ (print)
Title: _____	

Dated at _____ this _____ day of _____, 2021.

6. Filing of Claim and Applicable Deadlines

For Pre-Filing Claims (excluding Negative Notice Claims that are Pre-Filing Claims), this Proof of Claim must be returned to and received by the Claims Agent or the Monitor by 5:00 p.m. (Toronto Time) on November 1, 2021 (the "**Claims Bar Date**").

For Restructuring Period Claims (excluding Negative Notice Claims that are Restructuring Period Claims), this Proof of Claim must be returned to and received by the Claims Agent or the Monitor by 5:00 p.m. (Toronto Time) on the later of (i) the date that is 30 days after the date on which the

[5] If the Claimant is a Commodity Supplier submitting a Claim in respect of any crystallized marked-to-market amounts that the Claimant believes are owing by any Just Energy Entity under any Commodity Agreement, the Claimant must indicate the appropriate calculations of such crystallized marked-to-market Claim(s).

[6] Witnesses are required if an individual is submitting this Proof of Claim form by prepaid ordinary mail, registered mail, courier, personal delivery, facsimile transmission or email.

Claims Agent or the Monitor sends a General Claims Package with respect to a Restructuring Period Claim and (ii) the Claims Bar Date (the "**Restructuring Period Claims Bar Date**").

In each case, Claimants are strongly encouraged to complete and submit their Proof of Claim on the Claims Agent's online claims submission portal which can be found at https://omniagentsolutions.com/justenergyclaims. If not submitted at the online portal, Proofs of Claim must be delivered to the Claims Agent or the Monitor by prepaid ordinary mail, registered mail, courier, personal delivery, facsimile transmission or email at one of the applicable addresses below:

If located in Canada:

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

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

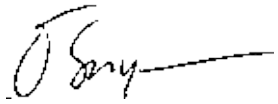
If located in the United States or elsewhere:

Just Energy Claims Processing
c/o Omni Agent Solutions
5955 De Soto Ave., Suite 100
Woodland Hills, CA 91367

In accordance with the Claims Procedure Order, notices shall be deemed to be received by the Claims Agent or the Monitor: (i) if submitted on the Claims Agent's online portal, at the time such document is submitted, or (ii) upon actual receipt thereof by the Claims Agent or the Monitor during normal business hours on a Business Day, or if delivered outside of normal business hours, on the next Business Day.

Failure to file your Proof of Claim so that it is actually received by the Claims Agent or the Monitor on or before 5:00 p.m. on the Claims Bar Date or the Restructuring Period Claims Bar Date, as applicable, WILL result in your Claims (except for any Claim outlined in any Statement of Negative Notice Claim that may have been addressed to you) being forever barred and you will be prevented from making or enforcing such Claims against the Just Energy Entities. In addition, unless you have separately received a Statement of Negative Notice Claim from the Claims Agent or the Monitor in respect of any other Claim, you shall not be entitled to further notice of and shall not be entitled to participate as a creditor in the Just Energy Entities' CCAA proceedings with respect to any such Claims.

This is Exhibit “H” referred to in the
Affidavit of Robert Tannor sworn January 17, 2022



A Commissioner for taking Affidavits (or as may be)

CLAIM DOCUMENTATION

I. Relevant Background and Summary of Claim Documentation

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

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

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

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

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

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

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

Footnote continued on next page.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Footnote continued on next page.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[7] Keating, *supra*.

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

[9] *Id*. at 3–4.

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

[11] *Id*. at 11.

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

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

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

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

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

[12] *Id*. at 10.

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

[14] *Id.* at 3.

[15] *Id.*

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

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

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

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

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

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

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

[20] *Id.* at 37.

[21] *Id.* at 87.

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

Instead, NYPSC staff reached the following conclusion:

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

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

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

[22] *Id.* at 69.

[23] *Id*.

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

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

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

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

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

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

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

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

[26] *Id.* at 3–4.

[27] *Id.* at 11.

[28] *Id.* at 12.

[29] *Id.* at 30.

[30] *Id.* at 31.

[31] *Id.* at 39.

[32] *Id.*

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

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

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

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

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

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

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

[33] *Id.*

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

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

[36] *Id.* ¶¶ 19(a), 20(a)–(b).

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

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

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

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

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

[37] *Id*. ¶ 26(a).

[38] *Id*. ¶ 26(c).

[39] *Id*. ¶ 28(a)–(b), (d).

[40] *Id*. ¶ 30(a).

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

[42] *Id*. ¶ 30(b).

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

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

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

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

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

[43] *Id*. ¶ 30(c).

[44] *Id*. ¶ 44, Attachment 2.

[45] *Id*. ¶ 46.

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

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

[48] *Id*.

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

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

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

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

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

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

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

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

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

[53] *Id.*

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

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

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

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

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

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

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

[56] *Id*.

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

[58] *Id*.

[59] *Id*.

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

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

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

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

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

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

[62] *Id*. at 3.

[63] *Id*. at 4–5.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Dated: November 1, 2021
Armonk, New York

By: /s/ Steven L. Wittels

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Exhibit 1

EXPERT REPORT OF DR. SERHAN OGUR

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I. Introduction and Qualifications

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

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

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

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

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

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

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

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

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

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

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

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

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

II. Electricity and Natural Gas Markets

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[21] Id.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. Calculation of Just Energy Overcharges

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

A. Summary of Just Energy Overcharges

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Estimated Overcharges to Residential Electricity Customers

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

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

I estimated overcharges to residential electricity customers as follows:

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

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

[28] The mismatch is due to independent rounding.

C. Estimated Overcharges to Commercial Electricity Customers

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

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

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

I estimated overcharges to commercial electricity customers as follows:

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

D. Estimated Overcharges to Residential Natural Gas Customers

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

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

[30] The mismatch is due to independent rounding.

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

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

I estimated overcharges to residential natural gas customers as follows:

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

E. Estimated Overcharges to Commercial Natural Gas Customers

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

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

[33] The mismatch is due to independent rounding.

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

I estimated overcharges to commercial natural gas customers as follows:

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

F. Caveats

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

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

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

[34] The mismatch is due to independent rounding.

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

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

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

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

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

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

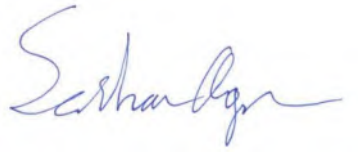
- I estimated the affected (variable-rate) volumes of loads for Just Energy's electricity and natural gas customers in the United States as a percentage of my estimates of Just Energy's total electricity and natural gas sales to residential and commercial customers. I assumed that Just Energy's sales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

V. Conclusion

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

This concludes my expert report.

Dated: November 1, 2021



Serhan Ogur, Ph.D.

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

SERHAN OGUR

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

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

Education

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

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

Previous Employment

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

Professional Experience

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

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

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

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

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

<u>Expert Testimony</u>

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

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

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

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

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

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

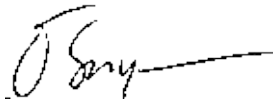
Before the Pennsylvania Public Utility Commission, Docket No. P-2016-2534980, PECO Energy Company, 2016, on behalf of the Pennsylvania Office of Consumer Advocate. Testimony addressed default service issues.

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

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

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

This is Exhibit “I” referred to in the
Affidavit of Robert Tannor sworn January 17, 2022



A Commissioner for taking Affidavits (or as may be)

From: Rebecca Kennedy <Rkennedy@tgf.ca>
Sent: Friday, November 12, 2021 12:37 PM
To: Steven Wittels <slw@wittelslaw.com>; Robert Thornton <RThornton@tgf.ca>; Samuel Robinson <SamR@stockwoods.ca>; Stephen Aylward <StephenA@stockwoods.ca>
Cc: Burkett McInturff <jbm@wittelslaw.com>; Susan J. Russell <sjr@wittelslaw.com>; Greg Blankinship <gblankinship@FBFGLaw.com>; Jonathan Shub <jshub@shublawyers.com>; Kevin Laukaitis <klaukaitis@shublawyers.com>; Robert Tannor <rtannor@tannorpartners.com>; Bishop, Paul <Paul.Bishop@fticonsulting.com>; Robinson, Jim <Jim.Robinson@fticonsulting.com>; Wasserman, Marc <MWasserman@osler.com>; De Lellis, Michael <MDeLellis@osler.com>; Dacks, Jeremy <JDacks@osler.com>
Subject: RE: In the Matter of Just Energy Group Inc. et al - Court File No. CV-21-00658423-00CL

Hi Steven,

Thank you for your email.

The Monitor does not have any financial information available to share with you with respect to the restructuring. We think that the request set out below is best directed to the Company. As such, we have copied their counsel here so that you can connect.

We hope that this helps.

Best,
Rebecca

TGF Thornton Grout Finnigan LLP
RESTRUCTURING + LITIGATION

Rebecca Kennedy | | Rkennedy@tgf.ca | Direct Line +1 416 304 0603 | Suite 3200, TD West Tower, 100 Wellington Street West, P.O. Box 329, Toronto-Dominion Centre, Toronto, Ontario M5K 1K7 | 416-304-1616 | Fax: 416-304-1313 | www.tgf.ca

From: Steven Wittels [mailto:slw@wittelslaw.com]
Sent: November 11, 2021 6:14 PM
To: Rebecca Kennedy <Rkennedy@tgf.ca>; Robert Thornton <RThornton@tgf.ca>; Samuel Robinson <SamR@stockwoods.ca>; Stephen Aylward <StephenA@stockwoods.ca>
Cc: Burkett McInturff <jbm@wittelslaw.com>; Susan J. Russell <sjr@wittelslaw.com>; Greg Blankinship <gblankinship@FBFGLaw.com>; Jonathan Shub <jshub@shublawyers.com>; Kevin Laukaitis <klaukaitis@shublawyers.com>; Robert Tannor <rtannor@tannorpartners.com>
Subject: In the Matter of Just Energy Group Inc. et al - Court File No. CV-21-00658423-00CL

Ms. Kennedy and Mr. Thornton:

As you know from our filings and yesterday's hearing before the Court, my firm together with the Blankinship and Shub firms represents the Class of millions Just Energy [JE]consumers in the United States who have suffered substantial overcharge damages after switching from their incumbent utility to Just Energy. In order to evaluate any proposed plan of re-organization by JE, our clients need access to certain financial information. Thus, as we discussed at the hearing, and as Ms. Kennedy alluded to, we and our Canadian counsel would like to have a meeting with you to discuss our being provided access to this data. We will of course be prepared to enter the necessary NDA to preserve the integrity of the data.

Please confirm your availability tomorrow Friday November 12 from 8 AM to 10:45 AM ET., or Monday morning, November 14 for a ZOOM conference.

We look forward to hearing from you. Thank you,

Steven L Wittels

WMP | Partner
18 Half Mile Road | Armonk NY 10504
slw@wittelslaw.com | https://wittelslaw.com
Phone: 914 319-9945 | Fax: 914 273 2563

Wittels McInturff Palikovic

From: "Paplawski, Emily" <EPaplawski@osler.com>
Date: Wednesday, November 10, 2021 at 4:17 PM
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Subject: In the Matter of Just Energy Group Inc. et al - Court File No. CV-21-00658423-00CL

Service List:

Please find attached the two orders granted this afternoon by Justice Koehnen in the above noted matter.

Regards,

OSLER

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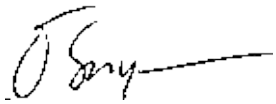
This is Exhibit “J” referred to in the
Affidavit of Robert Tannor sworn January 17, 2022



A Commissioner for taking Affidavits (or as may be)

Tannor Capital Advisors LLC

Due Diligence List - Just Energy

Green is we have, Blank we need

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

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

E Operating Cash Budget

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

F Cash Balances

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

G Asset Sales - And closures

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

III. Legal and Restructuring initiatives

A Restructuring initiatives/contracts

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

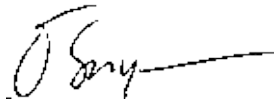
C. Insurance

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

III. Taxes

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

This is Exhibit “K” referred to in the
Affidavit of Robert Tannor sworn January 17, 2022



A Commissioner for taking Affidavits (or as may be)

From: Dacks, Jeremy <JDacks@osler.com>
Sent: Wednesday, December 8, 2021 12:05 PM
To: De Lellis, Michael; Wasserman, Marc; Steven Wittels
Cc: Jeff Larry; Ken Rosenberg; rthornton@tgf.ca; rkennedy@tgf.ca; RexHong@tannorcapital.com; Burkett McInturff; gblankinship@fbfglaw.com; jshub@shublawyers.com; klaukaitis@shublawyers.com; JCottle@fbfglaw.com; Sarita Sanasie; Megan Bradt; rtannor@tannorcapital.com; Susan J. Russell; Steven D. Cohen; Robert Tannor; Robinson, Jim; Bishop, Paul
Subject: RE: Just Energy Call. Wed Dec 8 1PM. ZOOM
Attachments: Just Energy -- TCA question list - 12-8-2021 -.xlsx; F22 Business Plan - May 2021.pdf; JE - Compiled Term Sheet.PDF; JE - Amendment No. 1 to DIP Term Sheet (Executed)_(75655836_1).pdf; 70951553_1.pdf

PRIVATE AND CONFIDENTIAL

Hi everyone.

Please find enclosed our comments on the TCA question list for our call today, and copies of the Business Plan and DIP Term Sheet and written amendments referred to therein.

Thanks,
Jeremy

OSLER

Jeremy Dacks
Partner
416.862.4923 | 647.406.1500 (cell) | JDacks@osler.com
Osler, Hoskin & Harcourt LLP | osler.com

-----Original Appointment-----
From: De Lellis, Michael <MDeLellis@osler.com>
Sent: Monday, December 06, 2021 7:32 PM
To: De Lellis, Michael; Wasserman, Marc; Steven Wittels
Cc: Jeff.Larry@paliareroland.com; ken.rosenberg@paliareroland.com; rthornton@tgf.ca; rkennedy@tgf.ca; Dacks, Jeremy; RexHong@tannorcapital.com; Burkett McInturff; gblankinship@fbfglaw.com; jshub@shublawyers.com; klaukaitis@shublawyers.com; JCottle@fbfglaw.com; Sarita.Sanasie@paliareroland.com; Megan.Bradt@paliareroland.com; rtannor@tannorcapital.com; Susan J. Russell; Steven D. Cohen; Robert Tannor; Robinson, Jim; Bishop, Paul
Subject: Just Energy Call. Wed Dec 8 1PM. ZOOM
When: Wednesday, December 08, 2021 1:00 PM-2:00 PM (UTC-05:00) Eastern Time (US & Canada).
Where: Microsoft Teams Meeting

Microsoft Teams meeting

Join on your computer or mobile app
Click here to join the meeting

Or call in (audio only)
+1 437-703-5283,,236562596# Canada, Toronto
Phone Conference ID: 236 562 596#
Find a local number | Reset PIN

OSLER

Learn More | Meeting options

From: Wasserman, Marc <MWasserman@osler.com>
Sent: Saturday, December 04, 2021 11:35 AM
To: Steven Wittels <slw@wittelslaw.com>
Cc: Jeff.Larry@paliareroland.com; ken.rosenberg@paliareroland.com; rthornton@tgf.ca; De Lellis, Michael <MDeLellis@osler.com>; rkennedy@tgf.ca; Dacks, Jeremy <JDacks@osler.com>; RexHong@tannorcapital.com; Burkett McInturff <jbm@wittelslaw.com>; gblankinship@fbfglaw.com; jshub@shublawyers.com; klaukaitis@shublawyers.com; JCottle@fbfglaw.com; Sarita.Sanasie@paliareroland.com; Megan.Bradt@paliareroland.com; rtannor@tannorcapital.com; Susan J. Russell <sjr@wittelslaw.com>; Steven D. Cohen <sdc@wittelslaw.com>; Robert Tannor <rtannor@tannorpartners.com>
Subject: Re: Just Energy Call. Wed Dec 8 1PM. ZOOM

Great. We will send a teams or zoom invite and provide answers on your list prior to the call. Have a nice weekend. Marc

Marc Wasserman
Office: 416.862.4908
Mobile: 416.904.3614
MWasserman@osler.com
Osler, Hoskin & Harcourt LLP | osler.com

> On Dec 4, 2021, at 11:29 AM, Steven Wittels <slw@wittelslaw.com> wrote:
>
> Marc:
>
> 1. If you have no other time at all Monday or Tuesday, yes we will take 1PM Wednesday.
>
> We'd like it to be a ZOOM video conference. Please advise who will be on the ZOOM and we can set up the invite, or let us know if you want to set it up.

2. Based on the list we sent you Thursday, please email us the documents/data in advance that we requested so we're better prepared to discuss on the call. Please confirm.

Thx. SLW
Steven L Wittels

On 12/4/21, 10:19 AM, "Wasserman, Marc" <MWasserman@osler.com> wrote:

Monday does not work unfortunately, neither does Tuesday. Wednesday does. Do you want the call at 1pm Wednesday?

Marc Wasserman
Office: 416.862.4908 | Mobile: 416.904.3614 | MWasserman@osler.com
Osler, Hoskin & Harcourt LLP | osler.com

-----Original Message-----
From: Steven Wittels <slw@wittelslaw.com>
Sent: Saturday, December 04, 2021 10:15 AM
To: Wasserman, Marc <MWasserman@osler.com>; Jeff.Larry@paliareroland.com; Ken.Rosenberg@paliareroland.com; rthornton@tgf.ca
Cc: De Lellis, Michael <MDeLellis@osler.com>; rkennedy@tgf.ca; Dacks, Jeremy <JDacks@osler.com>; RexHong@tannorcapital.com; Burkett McInturff <jbm@wittelslaw.com>; gblankinship@fbfglaw.com; jshub@shublawyers.com; klaukaitis@shublawyers.com; JCottle@fbfglaw.com; Sarita.Sanasie@paliareroland.com; Megan.Bradt@paliareroland.com; rtannor@tannorcapital.com; Susan J. Russell <sjr@wittelslaw.com>; Steven D. Cohen <sdc@wittelslaw.com>; Robert Tannor <rtannor@tannorpartners.com>
Subject: Re: Just Energy Call. Monday Afternoon

Marc:

We'd like to have this call on Monday afternoon given that we asked for it nearly a week ago, and provided Just Energy and the Monitor the topics we want to discuss and the documents/data we need. Given the expedited time frame for the reorganization, we don't understand why the company is taking so long to respond to our requests for basic information to which we're entitled.

Please coordinate a time for Monday, and advise today.

Thank you, SLW.

Steven L Wittels
WMP | Partner
18 Half Mile Road | Armonk NY 10504
slw@wittelslaw.com |
https://can01.safelinks.protection.outlook.com/?url=https%3A%2F%2Fwittelslaw.com%2F&data=04%7C01%7CMWasserman%40osler.com%7C9a1fd3ee03124e2bcfb708d9b7433ebe%7C38b8d7e73b2745709e91cf2ab620b2cd%7C1%7C0%7C637742321704739325%7CUnknown%7CTWFpbGZsb3d8eyJWIjoiMC4wLjAwMDAiLCJQIjoiV2luMzIiLCJBTiI6Ik1haWwiLCJXVCI6Mn0%3D%7C3000&sdata=ED0TPBq7%2BtkwVaABcjPkN81iIFX%2BFyJy5qtbFuhRimw%3D&reserved=0
Phone: 914 319-9945 Fax: 914 273 2563

On 12/4/21, 9:57 AM, "Wasserman, Marc" <MWasserman@osler.com> wrote:

Does 1pm Wednesday work for the call.

Marc Wasserman
Office: 416.862.4908 | Mobile: 416.904.3614 | MWasserman@osler.com
Osler, Hoskin & Harcourt LLP | osler.com

-----Original Message-----
From: Jeff.Larry@paliareroland.com <Jeff.Larry@paliareroland.com>
Sent: Thursday, December 02, 2021 6:17 PM
To: Wasserman, Marc <MWasserman@osler.com>
Cc: De Lellis, Michael <MDeLellis@osler.com>; RThornton@tgf.ca; rkennedy@tgf.ca; Dacks, Jeremy <JDacks@osler.com>; Ken.Rosenberg@paliareroland.com; RexHong@tannorcapital.com; jbm@wittelslaw.com; gblankinship@fbfglaw.com; jshub@shublawyers.com; klaukaitis@shublawyers.com; JCottle@fbfglaw.com; Sarita.Sanasie@paliareroland.com; Megan.Bradt@paliareroland.com; slw@wittelslaw.com; rtannor@tannorcapital.com
Subject: RE: Just Energy Call

Marc
The list of questions is attached.
Please let us know if we can arrange a call some time tomorrow after 345 or anytime Monday after 11.
Thanks,

From: Wasserman, Marc <MWasserman@osler.com>
Sent: November 30, 2021 6:32 PM
To: Jeff Larry <Jeff.Larry@paliareroland.com>
Cc: De Lellis, Michael <MDeLellis@osler.com>; rthornton@tgf.ca; rkennedy@tgf.ca; Dacks, Jeremy <JDacks@osler.com>; Ken Rosenberg <Ken.Rosenberg@paliareroland.com>; RexHong@tannorcapital.com; jbm@wittelslaw.com; gblankinship@fbfglaw.com; jshub@shublawyers.com; klaukaitis@shublawyers.com; JCottle@fbfglaw.com; Sarita Sanasie <Sarita.Sanasie@paliareroland.com>; Megan Bradt <Megan.Bradt@paliareroland.com>; slw@wittelslaw.com; rtannor@tannorcapital.com
Subject: Re: Just Energy Call

Happy to have another call but there is no real utility in have a call without a list of questions that you want answered in advance so we can have the appropriate people on. That is what we discussed on the last call. If can get us the list, we will arrange the call as soon as possible. Marc

Marc Wasserman
Office: 416.862.4908<tel:416.862.4908> | Mobile: 416.904.3614<tel:416.904.3614> | MWasserman@osler.com<mailto:MWasserman@osler.com>

Osler, Hoskin & Harcourt LLP | osler.com<file:///var/tmp/com.apple.email.maild/EMContentRepresentation/com.apple.mobilemail/CC01ADB3-FE4A-45FA-9512-115CCF15F494/https://can01.safelinks.protection.outlook.com/?url=http%3A%2F%2Fwww.osler.com%2F&data=04%7C01%7CMWasserman%40osler.com%7C9a1fd3ee03124e2bcfb708d9b7433ebe%7C38b8d7e73b2745709e91cf2ab620b2cd%7C1%7C0%7C637742321704739325%7CUnknown%7CTWFpbGZsb3d8eyJWIjoiMC4wLjAwMDAiLCJQIjoiV2luMzIiLCJBTiI6Ik1haWwiLCJXVCI6Mn0%3D%7C3000&sdata=Nvielg7vkf%2FR2c86fyvZ2CHEVS1eNTIStBBGqCWDHUs%3D&reserved=0>

On Nov 30, 2021, at 6:07 PM, Jeff.Larry@paliareroland.com<mailto:Jeff.Larry@paliareroland.com> wrote:

All:

We would like to arrange follow-up ZOOM video call.

Can you let us know if these times work:

- tomorrow between 11am-1pm or 3pm-7pm; or
- Thursday at 11:30am or after.

I can confirm that I now have most of the signatures on the NDA back from our side and I will circulate them in advance of the call.

Jeff

Jeffrey Larry, LL.B, MBA
Paliare Roland Rosenberg Rothstein LLP
155 Wellington Street West, 35th Floor
Toronto, ON M5V 3H1
t: 416.646.4330
f: 416.646.4301
c: 416.553.2789
e: jeff.larry@paliareroland.com
<mailto:jeff.larry@paliareroland.com%0b>

<mailto:jeff.larry@paliareroland.com%0b>

<mailto:jeff.larry@paliareroland.com%0b>

<mailto:jeff.larry@paliareroland.com%0b>

_____

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de le divulguer sans autorisation.

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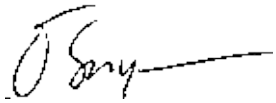
This is Exhibit “L” referred to in the
Affidavit of Robert Tannor sworn January 17, 2022



A Commissioner for taking Affidavits (or as may be)

Just Energy Announces ERCOT's Calculations of Recovery Amounts Under Texas House Bill 4492 of Certain Costs of the Texas Winter Weather Event

December 9, 2021

TORONTO, Dec. 09, 2021 (GLOBE NEWSWIRE) -- Just Energy Group Inc. ("**Just Energy**" or the " **Company**") (TSXV:JE; OTC:JENGQ), announced today an update of the expected recovery by Just Energy from the Electric Reliability Council of Texas, Inc. ("**ERCOT**") of certain costs incurred during the extreme weather event in Texas in February 2021 (the "**Weather Event**") as previously disclosed, which is expected to be approximately USD $147.5 million. On December 7, 2021, ERCOT filed its calculation with the Public Utility Commission of Texas (the "**PUCT**") in accordance with the PUCT final order implementing Texas House Bill 4492 ("**HB 4492**"). ERCOT's calculations are subject to a 15-day verification period and accordingly, remain subject to change.

As previously reported, FTI Consulting Canada Inc. (the "**Monitor**") is overseeing the proceedings of Just Energy under the *Companies' Creditors Arrangement Act* (Canada) ("**CCAA**") as the court-appointed monitor. Further information regarding the CCAA proceedings is available on the Monitor's website at http://cfcanada.fticonsulting.com/justenergy. Information regarding the CCAA proceedings can also be obtained by calling the Monitor's hotline at 416-649-8127 or 1-844-669-6340 or by email at justenergy@fticonsulting.com.

About Just Energy Group Inc.

Just Energy is a retail energy provider specializing in electricity and natural gas commodities and bringing energy efficient solutions, carbon offsets and renewable energy options to customers. Currently operating in the United States and Canada, Just Energy serves residential and commercial customers. Just Energy is the parent company of Amigo Energy, Filter Group, Hudson Energy, Interactive Energy Group, Tara Energy, and terrapass. Visit https://investors.justenergy.com to learn more.

FORWARD-LOOKING STATEMENTS

This press release may contain forward-looking statements, including with respect to the amount of cost recovery proceeds Just Energy expects to receive from ERCOT under HB 4492. These statements are based on current expectations that involve several risks and uncertainties which could cause actual results to differ from those anticipated. These risks may include, but are not limited to, risks with respect to the verification of ERCOT's calculations under HB 4492; the timing for the Company to receive any cost recovery proceeds from ERCOT; the ability of the Company to continue as a going concern; the outcome of proceedings under the CCAA proceedings and similar legislation in the United States; the outcome of any potential litigation with respect to the Weather Event, the outcome of any invoice dispute with ERCOT; the Company's discussions with key stakeholders regarding the CCAA proceedings and the outcome thereof; the impact of the evolving COVID-19 pandemic on the Company's business, operations and sales; reliance on suppliers; uncertainties relating to the ultimate spread, severity and duration of COVID-19 and related adverse effects on the economies and financial markets of countries in which the Company operates; the ability of the Company to successfully implement its business continuity plans with respect to the COVID-19 pandemic; the Company's ability to access sufficient capital to provide liquidity to manage its cash flow requirements; general economic, business and market conditions; the ability of management to execute its business plan; levels of customer natural gas and electricity consumption; extreme weather conditions; rates of customer additions and renewals; customer credit risk; rates of customer attrition; fluctuations in natural gas and electricity prices; interest and exchange rates; actions taken by governmental authorities including energy marketing regulation; increases in taxes and changes in government regulations and incentive programs; changes in regulatory regimes; results of litigation and decisions by regulatory authorities; competition; and dependence on certain suppliers. Additional information on these and other factors that could affect Just Energy's operations or financial results are included in Just Energy's annual information form and other reports on file with Canadian securities regulatory authorities which can be accessed through the SEDAR website at www.sedar.com and on the U.S. Securities and Exchange Commission's website at www.sec.gov or through Just Energy's website at www.investors.justenergy.com.

Any forward-looking statement made by Just Energy in this press release speaks only as of the date on which it is made. Just Energy undertakes no obligation to update any forward-looking statement, whether as a result of new information, future developments or otherwise, except as may be required by law.

Neither TSX Venture Exchange nor its Regulation Services Provider (as that term is defined in the policies of the TSX Venture Exchange) accepts responsibility for the adequacy or accuracy of this release.

FOR FURTHER INFORMATION PLEASE CONTACT:

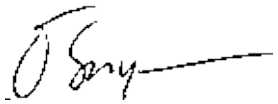
Investors
Michael Cummings
Alpha IR
Phone: (617) 982-0475
JE@alpha-ir.com

Monitor
FTI Consulting Inc.
Phone: 416-649-8127 or 1-844-669-6340
justenergy@fticonsulting.com

Media
Boyd Erman
Longview Communications
Phone: 416-523-5885
berman@longviewcomms.ca

Source: Just Energy Group Inc.

This is Exhibit “M” referred to in the
Affidavit of Robert Tannor sworn January 17, 2022



A Commissioner for taking Affidavits (or as may be)

Tannor Capital Advisors

Questions on the Just Energy May 2021 Business Plan and Forecast
12/13/21

Please allow us the adequate time to review these questions with JE's representatives.

JE Business Plan from May 2021

1. Hudson is referred to in the business plan – is this the NY subsidiary? Please provide us the list of subsidiaries and the detail of business operations and jurisdiction
2. What is the Digital Channel and how does it differ from Retail, D2D – what is this? Door to Door sales, and describe SMB Mass market channels – what is the channel how does it operate?
3. Page 4– what does the company mean when it says, "assumes access to a competitive wholesale supply"? How many wholesale suppliers does Just Energy ("JE") have? Who are they? Other than one supplier in the BP that says it will not continue – how many will continue, and what will be the effects to working capital with eight suppliers as mentioned in financial filings?
4. Page 4 of Business Plan ("BP") – it appears that churn is a major detractor to the companies' financials because of customer acquisition costs which included marketing headcount, online and advertising costs, SG&A costs associated with new customer acquisition. Can we get the financial analysis showing EBITDA benefit of decreasing churn by 5%? Same question showing EBITDA benefit by increasing marketing and advertising costs (full marketing cost – COGS and SG&A costs) with churn (average customer loss rate per month).
5. Page 4 – plan refers to Strategic Review, please describe the Strategic Review and elements in the strategic review.
6. Page 5 – BP requires multiple suppliers – will JE be successful in gaining multiple suppliers? Define success in this process
7. As of the BP Page 4, JE had 37 TWh of supply – what was the contracted Demand at the time? When will JE reach a need for 52TWh supply if not constrained by supply agreements?
8. Pg. 5 – "Negotiations will be required for almost all supply arrangements in order to emerge from the CCAA process" What is the status of the negotiations? Will renegotiated supply agreements result in a claim against JE? Will any supply agreements result in a claim against JE?
9. For JE's supply agreements in place and assumed going forward in the bankruptcy, which of the supply agreements will be shorter than 1 year in duration which ones will be longer than 1 year in duration?
10. What would the company's debt load post emergence look like compared to the current debt load?
11. Same question as 10, related to supply agreements.
12. Can we obtain the filed claims against JE? We request this to do our own analysis of the secured and unsecured claim pool
13. Pg. 5 – Explain the MtM and Delivery exposure (+50 days) what this means.
14. Same page, what is the cash need resulting in increasing the MtM energy commitments to 68TWh? And why is 68TWh mentioned? When will this energy demand be reached according to JE's forecast?

Questions on the Just Energy May 2021 Business Plan and Forecast
12/13/21

15. What is the current count of MtM customers? What is the count of customers with existing contracts over 50 days? We are just using 50 days because of an unknown division of MtM and Delivery Exposure categories.
16. ISO provided credit in the past (Page 6), what are the ISO's doing which will impact JE's working capital, provide info ISO by ISO.
17. Have the non-supplier collateral requirements grown since the BP?
18. Pg. 6 – How will JE address the need for additional working capital resulting solely from the growth of its customer base? FY22, FY23 etc.
19. We would like to see a comparison of Pg. 7 and 8 to actual for the first 2 quarters of F22 to see if the F21 Base Ebitda is tracking above or below the Normalized F22 numbers shown.
20. Pg. 12 of BP, please provide business plan vs actual count of SMB, D2D, Retail, Digital and Net adds for periods reported periods post printing of the BP vs the numbers on slide 12.
21. Pg. 13 - Why are COAs so different across Mass Market customer groups – CoA – Cost of Acquisition of Customer or CAC – Customer acquisition costs.
22. Pg. 13 – Is D2D – door to door sales? Please provide differences between Digital, Retail, D2D, and SMB channels
23. Page 14 – Why are the Gross Margins ("GM") so different across the sales channels? Provide examples by customer channel. Is higher margin inversely proportional to customer sophistication?
24. Pg. 15 and 16 – JE shows and investment of 54 mm in 2022 for Digital investment. What is the actual time frame from dollars spent to actually having new RCEs? Please provide detailed example of time frame from spend to customer add.
25. Don't marketing and agent costs get spread out over time and paid out not as a one-time cost? What are in marketing costs?
26. Pg. 16 - Why did the increased investment in Digital produce no EBITDA in F22?
27. Pg. 17 – What are the cost components of non-commission selling? Why the massive jump? Please provide a detail of non-commissioned cost increases from F21 to F22 Actual + Forecast of unreported periods.
28. Pg. 18 – When we look at the percentage of (Attrition and Failed to Renew) to Starting RCE's in F21, the percentage is approximately 23%. There is a jump in percentage in F22 in part due to the CCAA proceeding as we would expect. Can you provide us with an updated percentage reflecting on the BP vs Actual for F22?
29. Pg. 18 and 19 – the F23 and F24 attrition and fail to renew numbers go up even though the company is spending more money on the retention of customers. Please provide an explanation of this significant jump in percentages. What will higher attrition and failed to renew numbers do to the EBITDA numbers? For each 1% of Attrition and Failed to Renew, what is the resulting % decline in Ebitda?
30. Pg. 19 and Pg. 20 – Operational KPIs for Mass Markets – ATR? CCR? What does this mean?
31. Pg. 20 – What is the actual renewal rate in F22Q1, and F22Q2?
32. Pg. 20 – What is the actual ATR for F22Q1?
33. Pg. 22 – What is the actual Hudson Base Ebitda for F22 Q1 and Q2? STM definition?
34. Pg. 23 – Provide definitions – we will have more questions after receiving the definitions

Questions on the Just Energy May 2021 Business Plan and Forecast
12/13/21

35. Pg. 23 – What is a Term RCE? And What is an annual RCE – 1 year or longer?
36. Pg. 24 – Please provide Actuals for F22Q1 and F22 Q2 for Term RCEs and Annual RCEs.
37. Pg. 27 and multiple slides – what is the return on investment of marginal dollars allocated to new sales vs customer retention?
38. Pg. 33. Why is JE in these businesses that provide very little Gross Margin to the company? Can you provide Slide 33 with corresponding COGS, SG&A and profitability for F21 to F24?
39. Pg. 34 – Why does ERCOT trading benefit prior years? What are favorable resettlements?
40. Pg. 36 and 37 please explain the calcs for customer Net Present Value ("NPV") and Survival percentages. Are you using a discount rate for NPV or churn rate?
41. Pg. 38 – Explain supplier issue, competitiveness, and growth in the marketplace. Explain abbreviations on Pg. 38.

Follow up questions from last ZOOM call (Dec. 8, 2021)

42. What is the net actual received consideration for the Ecobee transaction?
43. What will the other consideration that will be received for other asset sales or closures?

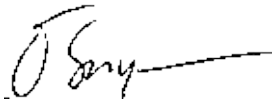
DIP Deadlines from the 15th Amendment

44. Was a reasonably acceptable Recapitalization Term Sheet delivered to the Lenders on or before November 30, 2021
45. Will counsel for the company submit an order approving a meeting for a vote on a Recapitalization Plan on or before December 21, 2021?
46. And will meeting materials in respect to the Recapitalization Plan be mailed to all relevant stakeholders on or before December 29th?
47. Will a meeting for a vote on the Recapitalization Plan be held on or before February 9, 2022?

Financial Statements

We will provide a follow up questions list on the financial statements shortly.

This is Exhibit “N” referred to in the
Affidavit of Robert Tannor sworn January 17, 2022



A Commissioner for taking Affidavits (or as may be)

From: Wasserman, Marc <MWasserman@osler.com>
Sent: Wednesday, December 15, 2021 3:01 PM
To: Steven Wittels
Cc: Jeff Larry; Ken Rosenberg; rthornton@tgf.ca; rkennedy@tgf.ca; RexHong@tannorcapital.com; Burkett McInturff; gblankinship@fbfglaw.com; jshub@shublawyers.com; klaukaitis@shublawyers.com; JCottle@fbfglaw.com; Sarita Sanasie; Megan Bradt; rtannor@tannorcapital.com; Susan J. Russell; Steven D. Cohen; Robert Tannor; Robinson, Jim; Bishop, Paul; jcyrulnik@cf-llp.com; efruchter@cf-llp.com; mark.caiger@bmo.com; Dacks, Jeremy; De Lellis, Michael
Subject: RE: Just Energy -- FOLLOW-UP Re Class Counsel's Adjudication Plan for Class Creditor-Plaintiffs' Claims + Further Questions from Tannor Capital Advisors -- Responses Due Wed Dec 15 - Proposed Zoom Mtg Dec 16 or 17

Dear Mr. Wittels.

We acknowledge receipt of your letter dated December 13 and accompanying list of questions from Tannor Capital Advisors.

As you are aware, the Just Energy Entities entered into a Non-Disclosure Agreement with the advisors to the proposed class action plaintiffs in the Jordet and Donin actions to facilitate the provision of information concerning the Just Energy Entities.

To that end, the Just Energy Entities provided their May 2021 Business Plan that has been referred to in their court materials and have organized multiple discussions with your advisor group that have included representatives from Osler, the Monitor and its counsel and the company's financial advisor.

The company and its advisors are currently working hard to develop a going concern restructuring solution for the Just Energy Entities and are not in a position to devote additional resources at this time to answer an unreasonable number of questions and inquiries from your group. The list of questions received on December 13 included 41 questions on the business plan alone. Just Energy Group Inc. is a public company and between its public company court filings, the extensive documentation that has been filed in the CCAA Proceedings to date and the information provided pursuant to the terms of the NDA, there is sufficient information available to your group at this stage of the CCAA Proceedings.

With respect to your proposal for the adjudication of your clients' claims, the Just Energy Entities, in consultation with the Monitor, will be dealing with such claims pursuant to the framework set out in the Court's Claims Procedure Order dated September 15, 2021. Should the company choose to revise or reject your clients' Proof of Claim, you will be sent a Notice of Revision or Disallowance in accordance with the Claims Procedure Order. As you may be aware, you will have 30 days from the receipt of any such disallowance to file a Notice of Dispute. That being said, the Just Energy Entities anticipate further discussions with your group concerning a fair and reasonable method of adjudicating your clients' claims at the appropriate time.

Thanks,
Marc

OSLER

Marc Wasserman
Office: 416.862.4908 | Mobile: 416.904.3614 | MWasserman@osler.com
Osler, Hoskin & Harcourt LLP | osler.com

From: Steven Wittels <slw@wittelslaw.com>
Sent: Wednesday, December 15, 2021 1:05 PM
To: Dacks, Jeremy <JDacks@osler.com>; De Lellis, Michael <MDeLellis@osler.com>; Wasserman, Marc <MWasserman@osler.com>
Cc: Jeff.Larry@paliareroland.com; ken.rosenberg@paliareroland.com; rthornton@tgf.ca; rkennedy@tgf.ca; RexHong@tannorcapital.com; Burkett McInturff <jbm@wittelslaw.com>; gblankinship@fbfglaw.com; jshub@shublawyers.com; klaukaitis@shublawyers.com; JCottle@fbfglaw.com; Sarita.Sanasie@paliareroland.com; Megan.Bradt@paliareroland.com; rtannor@tannorcapital.com; Susan J. Russell <sjr@wittelslaw.com>; Steven D. Cohen <sdc@wittelslaw.com>; Robert Tannor <rtannor@tannorpartners.com>; Robinson, Jim <Jim.Robinson@fticonsulting.com>; Bishop, Paul <Paul.Bishop@fticonsulting.com>; jcyrulnik@cf-llp.com; efruchter@cf-llp.com
Subject: Just Energy -- FOLLOW-UP Re Class Counsel's Adjudication Plan for Class Creditor-Plaintiffs' Claims + Further Questions from Tannor Capital Advisors -- Responses Due Wed Dec 15 - Proposed Zoom Mtg Dec 16 or 17

Counsel for Just Energy (Osler):

Please confirm that today you will be providing a response to Class Counsel's proposed adjudication plan of our Class Claims that we sent you on Monday, and scheduling a Zoom meeting for tomorrow or Friday, December 16 or 17.

Given that the proposed adjudication plan is straightforward, we anticipate that the company will find it acceptable.

Thank you,

SLW
Steven L Wittels

From: Steven Wittels <slw@wittelslaw.com>
Date: Monday, December 13, 2021 at 8:18 PM
To: "Dacks, Jeremy" <JDacks@osler.com>, "De Lellis, Michael" <MDeLellis@osler.com>, "Wasserman, Marc" <MWasserman@osler.com>
Cc: "Jeff.Larry@paliareroland.com" <Jeff.Larry@paliareroland.com>, "ken.rosenberg@paliareroland.com" <ken.rosenberg@paliareroland.com>, "rthornton@tgf.ca" <rthornton@tgf.ca>, "rkennedy@tgf.ca" <rkennedy@tgf.ca>, "RexHong@tannorcapital.com" <RexHong@tannorcapital.com>, Burkett McInturff <jbm@wittelslaw.com>, Greg Blankinship <gblankinship@fbfglaw.com>, Jonathan Shub <jshub@shublawyers.com>, Kevin Laukaitis <klaukaitis@shublawyers.com>, "JCottle@fbfglaw.com" <JCottle@fbfglaw.com>, "Sarita.Sanasie@paliareroland.com" <Sarita.Sanasie@paliareroland.com>, "Megan.Bradt@paliareroland.com" <Megan.Bradt@paliareroland.com>, "rtannor@tannorcapital.com" <rtannor@tannorcapital.com>, Susan Russell <sjr@wittelslaw.com>, Steven D Cohen <sdc@wittelslaw.com>, Robert Tannor <rtannor@tannorpartners.com>, "Robinson, Jim" <Jim.Robinson@fticonsulting.com>, "Bishop, Paul" <Paul.Bishop@fticonsulting.com>, "jcyrulnik@cf-llp.com" <jcyrulnik@cf-llp.com>, "efruchter@cf-llp.com" <efruchter@cf-llp.com>

Subject: Re: Just Energy -- Class Counsel's Adjudication Plan for Class Creditor-Plaintiffs' Claims + Further Questions from Tannor Capital Advisors -- Responses Due Wed Dec 15 - Proposed Zoom Mtg Dec 16 or 17

Counsel for JE (Osler) and Counsel for Monitor (TGF):

Please see attached Letter from Class Counsel describing an Adjudication Plan for Plaintiffs' claims, and further questions from Tannor Capital Advisors.

We look forward to Osler's confirmation of this letter and questions, and Osler's scheduling a Zoom meeting for this Thursday or Friday Dec 16 or 17.

Thank you,
SLW

Steven L Wittels

WMP | Partner
18 Half Mile Road | Armonk NY 10504
slw@wittelslaw.com | https://wittelslaw.com
Phone: 914 319-9945 | Fax: 914 273 2563

From: "Dacks, Jeremy" <JDacks@osler.com>
Date: Wednesday, December 8, 2021 at 12:07 PM
To: "De Lellis, Michael" <MDeLellis@osler.com>, "Wasserman, Marc" <MWasserman@osler.com>, Steven Wittels <slw@wittelslaw.com>
Cc: "Jeff.Larry@paliareroland.com" <Jeff.Larry@paliareroland.com>, "ken.rosenberg@paliareroland.com" <ken.rosenberg@paliareroland.com>, "rthornton@tgf.ca" <rthornton@tgf.ca>, "rkennedy@tgf.ca" <rkennedy@tgf.ca>, "RexHong@tannorcapital.com" <RexHong@tannorcapital.com>, Burkett McInturff <jbm@wittelslaw.com>, Greg Blankinship <gblankinship@fbfglaw.com>, Jonathan Shub <jshub@shublawyers.com>, Kevin Laukaitis <klaukaitis@shublawyers.com>, "JCottle@fbfglaw.com" <JCottle@fbfglaw.com>, "Sarita.Sanasie@paliareroland.com" <Sarita.Sanasie@paliareroland.com>, "Megan.Bradt@paliareroland.com" <Megan.Bradt@paliareroland.com>, "rtannor@tannorcapital.com" <rtannor@tannorcapital.com>, Susan Russell <sjr@wittelslaw.com>, Steven D Cohen <sdc@wittelslaw.com>, Robert Tannor <rtannor@tannorpartners.com>, "Robinson, Jim" <Jim.Robinson@fticonsulting.com>, "Bishop, Paul" <Paul.Bishop@fticonsulting.com>
Subject: RE: Just Energy Call. Wed Dec 8 1PM. ZOOM

PRIVATE AND CONFIDENTIAL

Hi everyone.

Please find enclosed our comments on the TCA question list for our call today, and copies of the Business Plan and DIP Term Sheet and written amendments referred to therein.

Thanks,
Jeremy

OSLER

Jeremy Dacks
Partner
416.862.4923 | 647.406.1500 (cell) | JDacks@osler.com
Osler, Hoskin & Harcourt LLP | osler.com

-----Original Appointment-----
From: De Lellis, Michael <MDeLellis@osler.com>
Sent: Monday, December 06, 2021 7:32 PM
To: De Lellis, Michael; Wasserman, Marc; Steven Wittels
Cc: Jeff.Larry@paliareroland.com; ken.rosenberg@paliareroland.com; rthornton@tgf.ca; rkennedy@tgf.ca; Dacks, Jeremy; RexHong@tannorcapital.com; Burkett McInturff; gblankinship@fbfglaw.com; jshub@shublawyers.com; klaukaitis@shublawyers.com; JCottle@fbfglaw.com; Sarita.Sanasie@paliareroland.com; Megan.Bradt@paliareroland.com; rtannor@tannorcapital.com; Susan J. Russell; Steven D. Cohen; Robert Tannor; Robinson, Jim; Bishop, Paul
Subject: Just Energy Call. Wed Dec 8 1PM. ZOOM
When: Wednesday, December 08, 2021 1:00 PM-2:00 PM (UTC-05:00) Eastern Time (US & Canada).
Where: Microsoft Teams Meeting

Microsoft Teams meeting

Join on your computer or mobile app
Click here to join the meeting

Or call in (audio only)
+1 437-703-5283,,236562596# Canada, Toronto
Phone Conference ID: 236 562 596#
Find a local number | Reset PIN

OSLER

Learn More | Meeting options

From: Wasserman, Marc <MWasserman@osler.com>
Sent: Saturday, December 04, 2021 11:35 AM
To: Steven Wittels <slw@wittelslaw.com>
Cc: Jeff.Larry@paliareroland.com; ken.rosenberg@paliareroland.com; rthornton@tgf.ca; De Lellis, Michael <MDeLellis@osler.com>; rkennedy@tgf.ca; Dacks, Jeremy <JDacks@osler.com>; RexHong@tannorcapital.com; Burkett

McInturff <jbm@wittelslaw.com>; gblankinship@fbfglaw.com; jshub@shublawyers.com; klaukaitis@shublawyers.com; JCottle@fbfglaw.com; Sarita.Sanasie@paliareroland.com; Megan.Bradt@paliareroland.com; rtannor@tannorcapital.com; Susan J. Russell <sjr@wittelslaw.com>; Steven D. Cohen <sdc@wittelslaw.com>; Robert Tannor <rtannor@tannorpartners.com>
Subject: Re: Just Energy Call. Wed Dec 8 1PM. ZOOM

Great. We will send a teams or zoom invite and provide answers on your list prior to the call. Have a nice weekend. Marc

Marc Wasserman
Office: 416.862.4908
Mobile: 416.904.3614
MWasserman@osler.com
Osler, Hoskin & Harcourt LLP | osler.com

On Dec 4, 2021, at 11:29 AM, Steven Wittels <slw@wittelslaw.com> wrote:

Marc:

1. If you have no other time at all Monday or Tuesday, yes we will take 1PM Wednesday.

We'd like it to be a ZOOM video conference. Please advise who will be on the ZOOM and we can set up the invite, or let us know if you want to set it up.

2. Based on the list we sent you Thursday, please email us the documents/data in advance that we requested so we're better prepared to discuss on the call. Please confirm.

Thx. SLW
Steven L Wittels

On 12/4/21, 10:19 AM, "Wasserman, Marc" <MWasserman@osler.com> wrote:

Monday does not work unfortunately, neither does Tuesday. Wednesday does. Do you want the call at 1pm Wednesday?

Marc Wasserman
Office: 416.862.4908 | Mobile: 416.904.3614 | MWasserman@osler.com
Osler, Hoskin & Harcourt LLP | osler.com

-----Original Message-----
From: Steven Wittels <slw@wittelslaw.com>
Sent: Saturday, December 04, 2021 10:15 AM
To: Wasserman, Marc <MWasserman@osler.com>; Jeff.Larry@paliareroland.com; Ken.Rosenberg@paliareroland.com; rthornton@tgf.ca
Cc: De Lellis, Michael <MDeLellis@osler.com>; rkennedy@tgf.ca; Dacks, Jeremy <JDacks@osler.com>; RexHong@tannorcapital.com; Burkett McInturff <jbm@wittelslaw.com>; gblankinship@fbfglaw.com; jshub@shublawyers.com; klaukaitis@shublawyers.com; JCottle@fbfglaw.com; Sarita.Sanasie@paliareroland.com; Megan.Bradt@paliareroland.com; rtannor@tannorcapital.com; Susan J. Russell <sjr@wittelslaw.com>; Steven D. Cohen <sdc@wittelslaw.com>; Robert Tannor <rtannor@tannorpartners.com>
Subject: Re: Just Energy Call. Monday Afternoon

Marc:

We'd like to have this call on Monday afternoon given that we asked for it nearly a week ago, and provided Just Energy and the Monitor the topics we want to discuss and the documents/data we need. Given the expedited time frame for the reorganization, we don't understand why the company is taking so long to respond to our requests for basic information to which we're entitled.

Please coordinate a time for Monday, and advise today.

Thank you, SLW.

Steven L Wittels
WMP | Partner
18 Half Mile Road | Armonk NY 10504
slw@wittelslaw.com |
https://can01.safelinks.protection.outlook.com/?url=https%3A%2F%2Fwittelslaw.com%2F&data=04%7C01%7CMWasserman%40osler.com%7C9a1fd3ee03124e2bcfb708d9b7433ebe%7C38b8d7e73b2745709e91cf2ab620b2cd%7C1%7C0%7C637742321704739325%7CUnknown%7CTWFpbGZsb3d8eyJWIjoiMC4wLjAwMDAiLCJQIjoiV2luMzIiLCJBTiI6Ik1haWwiLCJXVCI6Mn0%3D%7C3000&sdata=ED0TPBq7%2BtkwVaABcjPkN81iIFX%2BFyJy5qtbFuhRimw%3D&reserved=0
Phone: 914 319-9945 Fax: 914 273 2563

On 12/4/21, 9:57 AM, "Wasserman, Marc" <MWasserman@osler.com> wrote:

Does 1pm Wednesday work for the call.

Marc Wasserman
Office: 416.862.4908 | Mobile: 416.904.3614 | MWasserman@osler.com
Osler, Hoskin & Harcourt LLP | osler.com

-----Original Message-----
From: Jeff.Larry@paliareroland.com <Jeff.Larry@paliareroland.com>
Sent: Thursday, December 02, 2021 6:17 PM
To: Wasserman, Marc <MWasserman@osler.com>
Cc: De Lellis, Michael <MDeLellis@osler.com>; RThornton@tgf.ca; rkennedy@tgf.ca; Dacks, Jeremy <JDacks@osler.com>; Ken.Rosenberg@paliareroland.com; RexHong@tannorcapital.com; jbm@wittelslaw.com; gblankinship@fbfglaw.com; jshub@shublawyers.com; klaukaitis@shublawyers.com; JCottle@fbfglaw.com; Sarita.Sanasie@paliareroland.com; Megan.Bradt@paliareroland.com; slw@wittelslaw.com; rtannor@tannorcapital.com
Subject: RE: Just Energy Call

Marc
The list of questions is attached.
Please let us know if we can arrange a call some time tomorrow after 345 or anytime Monday after 11.
Thanks,

From: Wasserman, Marc <MWasserman@osler.com>
Sent: November 30, 2021 6:32 PM
To: Jeff Larry <Jeff.Larry@paliareroland.com>

Cc: De Lellis, Michael <MDeLellis@osler.com>; rthornton@tgf.ca; rkennedy@tgf.ca; Dacks, Jeremy <JDacks@osler.com>; Ken Rosenberg <Ken.Rosenberg@paliareroland.com>; RexHong@tannorcapital.com; jbm@wittelslaw.com; gblankinship@fbfglaw.com; jshub@shublawyers.com; klaukaitis@shublawyers.com; JCottle@fbfglaw.com; Sarita Sanasie <Sarita.Sanasie@paliareroland.com>; Megan Bradt <Megan.Bradt@paliareroland.com>; slw@wittelslaw.com; rtannor@tannorcapital.com

Subject: Re: Just Energy Call

Happy to have another call but there is no real utility in have a call without a list of questions that you want answered in advance so we can have the appropriate people on. That is what we discussed on the last call. If can get us the list, we will arrange the call as soon as possible. Marc

Marc Wasserman
Office: 416.862.4908<tel:416.862.4908> | Mobile: 416.904.3614<tel:416.904.3614> | MWasserman@osler.com<mailto:MWasserman@osler.com>

Osler, Hoskin & Harcourt LLP | osler.com<file:///var/tmp/com.apple.email.maild/EMContentRepresentation/com.apple.mobilemail/CC01ADB3-FE4A-45FA-9512-115CCF15F494/https://can01.safelinks.protection.outlook.com/?url=http%3A%2F%2Fwww.osler.com%2F&data=04%7C01%7CMWasserman%40osler.com%7C9a1fd3ee03124e2bcfb708d9b7433ebe%7C38b8d7e73b2745709e91cf2ab620b2cd%7C1%7C0%7C637742321704739325%7CUnknown%7CTWFpbGZsb3d8eyJWIjoiMC4wLjAwMDAiLCJQIjoiV2luMzIiLCJBTiI6Ik1haWwiLCJXVCI6Mn0%3D%7C3000&sdata=Nvielg7vkf%2FR2c86fyvZ2CHEVS1eNTIStBBGqCWDHUs%3D&reserved=0>

On Nov 30, 2021, at 6:07 PM, Jeff.Larry@paliareroland.com<mailto:Jeff.Larry@paliareroland.com> wrote:

All:

We would like to arrange follow-up ZOOM video call.

Can you let us know if these times work:

- tomorrow between 11am-1pm or 3pm-7pm; or
- Thursday at 11:30am or after.

I can confirm that I now have most of the signatures on the NDA back from our side and I will circulate them in advance of the call.

Jeff

Jeffrey Larry, LL.B, MBA
Paliare Roland Rosenberg Rothstein LLP
155 Wellington Street West, 35th Floor
Toronto, ON M5V 3H1
t: 416.646.4330
f: 416.646.4301
c: 416.553.2789

e: jeff.larry@paliareroland.com
<mailto:jeff.larry@paliareroland.com%0b>

<mailto:jeff.larry@paliareroland.com%0b>

<mailto:jeff.larry@paliareroland.com%0b>

<mailto:jeff.larry@paliareroland.com%0b>

_____

_____

****

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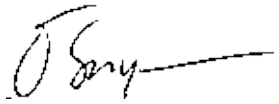
This is Exhibit “O” referred to in the
Affidavit of Robert Tannor sworn January 17, 2022



A Commissioner for taking Affidavits (or as may be)

From: Steven Wittels <slw@wittelslaw.com>
Sent: Friday, December 17, 2021 10:57 AM
To: rthornton@tgf.ca; rkennedy@tgf.ca; Bishop, Paul
Cc: Jeff Larry; Ken Rosenberg; Wasserman, Marc; RexHong@tannorcapital.com; Burkett McInturff; gblankinship@fbfglaw.com; jshub@shublawyers.com; klaukaitis@shublawyers.com; JCottle@fbfglaw.com; Sarita Sanasie; Megan Bradt; rtannor@tannorcapital.com; Susan J. Russell; Steven D. Cohen; Robert Tannor; Robinson, Jim; jcyrulnik@cf-llp.com; efruchter@cf-llp.com; mark.caiger@bmo.com; Dacks, Jeremy; De Lellis, Michael
Subject: Re: Donin-Jordet Claims in CCAA/Just Energy - Zoom Meeting with Monitor Dec 17 (aft), or Dec 20-24 Re JE Further Questions from Tannor Capital Advisors re JE Reorganization and Financial Status & Class Counsel's Adjudication Plan for Class Creditor-Pla...

Messrs. Thornton and Bishop, and Ms. Kennedy:

On behalf of Class Counsel representing the millions of Donin-Jordet claimants, this is to request a Zoom conference with the Monitor and Monitor's counsel either this afternoon Friday, December 17, or any day next week December 20-24. As you will recall, JE's counsel Mark Wasserman told us all on our December 8 group meeting that we are free to contact the Monitor to discuss the company's financial condition and restructuring plans.

At this point, despite our attempts for more than a month to gain a transparent understanding of Just Energy's financial condition and reorganization plans, the Company has not been forthcoming, and we now need the Monitor's assistance to obtain the requisite information and data so that we can further assist in JE's reorganization process.

Further, we intend to discuss with the Monitor a suitable claims resolution process for our clients' class claims along the lines of what we proposed in our email to you and the Company's counsel on December 13 (*see* below). Justice Koehnen's Claims Procedure Order dated September 15, 2021 specifically provides that for any disputed proof of claim (which JE's counsel has stated are our claims), the Monitor is empowered to "attempt to resolve such dispute and settle the purported Claim with the Claimant." *See* para 35.

Accordingly, we ask that the Monitor be prepared on our Zoom call to also discuss an appropriate and timely resolution procedure for resolution of our claims. We do not intend to wait further to some unspecified time, as suggested by Mr. Wasserman, which we view as simply a delay tactic intended to frustrate our class claimants' rights.

Kindly confirm today a Zoom meeting time for either this afternoon or a day next week, and we will then circulate a Zoom invite to all participants.

Thank you and we look forward to the Monitor and Monitor's counsel cooperating in this process.

Best, SLW

Steven L Wittels

WMP | Partner
18 Half Mile Road | Armonk NY 10504
slw@wittelslaw.com | https://wittelslaw.com
Phone: 914 319-9945 | Fax: 914 273 2563

Wittels McInturff Palikovic

From: "Wasserman, Marc" <MWasserman@osler.com>
Date: Wednesday, December 15, 2021 at 3:01 PM
To: Steven Wittels <slw@wittelslaw.com>
Cc: "Jeff.Larry@paliareroland.com" <Jeff.Larry@paliareroland.com>, "ken.rosenberg@paliareroland.com" <ken.rosenberg@paliareroland.com>, "rthornton@tgf.ca" <rthornton@tgf.ca>, "rkennedy@tgf.ca" <rkennedy@tgf.ca>, "RexHong@tannorcapital.com" <RexHong@tannorcapital.com>, Burkett McInturff <jbm@wittelslaw.com>, Greg Blankinship <gblankinship@fbfglaw.com>, Jonathan Shub <jshub@shublawyers.com>, Kevin Laukaitis <klaukaitis@shublawyers.com>, "JCottle@fbfglaw.com" <JCottle@fbfglaw.com>, "Sarita.Sanasie@paliareroland.com" <Sarita.Sanasie@paliareroland.com>, "Megan.Bradt@paliareroland.com" <Megan.Bradt@paliareroland.com>, "rtannor@tannorcapital.com" <rtannor@tannorcapital.com>, Susan Russell <sjr@wittelslaw.com>, Steven D Cohen <sdc@wittelslaw.com>, Robert Tannor <rtannor@tannorpartners.com>, "Robinson, Jim" <Jim.Robinson@fticonsulting.com>, "Bishop, Paul" <Paul.Bishop@fticonsulting.com>, "jcyrulnik@cf-llp.com" <jcyrulnik@cf-llp.com>, "efruchter@cf-llp.com" <efruchter@cf-llp.com>, "mark.caiger@bmo.com" <mark.caiger@bmo.com>, "Dacks, Jeremy" <JDacks@osler.com>, "De Lellis, Michael" <MDeLellis@osler.com>
Subject: RE: Just Energy -- FOLLOW-UP Re Class Counsel's Adjudication Plan for Class Creditor-Plaintiffs' Claims + Further Questions from Tannor Capital Advisors -- Responses Due Wed Dec 15 - Proposed Zoom Mtg Dec 16 or 17

Dear Mr. Wittels.

We acknowledge receipt of your letter dated December 13 and accompanying list of questions from Tannor Capital Advisors.

As you are aware, the Just Energy Entities entered into a Non-Disclosure Agreement with the advisors to the proposed class action plaintiffs in the Jordet and Donin actions to facilitate the provision of information concerning the Just Energy Entities.

To that end, the Just Energy Entities provided their May 2021 Business Plan that has been referred to in their court materials and have organized multiple discussions with your advisor group that have included representatives from Osler, the Monitor and its counsel and the company's financial advisor.

The company and its advisors are currently working hard to develop a going concern restructuring solution for the Just Energy Entities and are not in a position to devote additional resources at this time to answer an unreasonable number of questions and inquiries from your group. The list of questions received on December 13 included 41 questions on the business plan alone. Just Energy Group Inc. is a public company and between its public company court filings, the extensive documentation that has been filed in the CCAA Proceedings to date and the information provided pursuant to the terms of the NDA, there is sufficient information available to your group at this stage of the CCAA Proceedings.

With respect to your proposal for the adjudication of your clients' claims, the Just Energy Entities, in consultation with the Monitor, will be dealing with such claims pursuant to the framework set out in the Court's Claims Procedure Order dated September 15, 2021. Should the company choose to revise or reject your clients' Proof of Claim, you will be sent a Notice of Revision or Disallowance in accordance with the Claims Procedure Order. As you may be aware, you will have 30 days from the receipt of any such disallowance to file a Notice of Dispute. That being said, the Just Energy Entities anticipate further discussions with your group concerning a fair and reasonable method of adjudicating your clients' claims at the appropriate time.

Thanks,
Marc

OSLER

Marc Wasserman
Office: 416.862.4908 | Mobile: 416.904.3614 | MWasserman@osler.com
Osler, Hoskin & Harcourt LLP | osler.com

From: Steven Wittels <slw@wittelslaw.com>
Sent: Wednesday, December 15, 2021 1:05 PM
To: Dacks, Jeremy <JDacks@osler.com>; De Lellis, Michael <MDeLellis@osler.com>; Wasserman, Marc <MWasserman@osler.com>
Cc: Jeff.Larry@paliareroland.com; ken.rosenberg@paliareroland.com; rthornton@tgf.ca; rkennedy@tgf.ca; RexHong@tannorcapital.com; Burkett McInturff <jbm@wittelslaw.com>; gblankinship@fbfglaw.com; jshub@shublawyers.com; klaukaitis@shublawyers.com; JCottle@fbfglaw.com; Sarita.Sanasie@paliareroland.com; Megan.Bradt@paliareroland.com; rtannor@tannorcapital.com; Susan J. Russell <sjr@wittelslaw.com>; Steven D. Cohen <sdc@wittelslaw.com>; Robert Tannor <rtannor@tannorpartners.com>; Robinson, Jim <Jim.Robinson@fticonsulting.com>; Bishop, Paul <Paul.Bishop@fticonsulting.com>; jcyrulnik@cf-llp.com; efruchter@cf-llp.com
Subject: Just Energy -- FOLLOW-UP Re Class Counsel's Adjudication Plan for Class Creditor-Plaintiffs' Claims + Further Questions from Tannor Capital Advisors -- Responses Due Wed Dec 15 - Proposed Zoom Mtg Dec 16 or 17

Counsel for Just Energy (Osler):

Please confirm that today you will be providing a response to Class Counsel's proposed adjudication plan of our Class Claims that we sent you on Monday, and scheduling a Zoom meeting for tomorrow or Friday, December 16 or 17.

Given that the proposed adjudication plan is straightforward, we anticipate that the company will find it acceptable.

Thank you,

SLW
Steven L Wittels

From: Steven Wittels <slw@wittelslaw.com>
Date: Monday, December 13, 2021 at 8:18 PM
To: "Dacks, Jeremy" <JDacks@osler.com>, "De Lellis, Michael" <MDeLellis@osler.com>, "Wasserman, Marc"

<MWasserman@osler.com>
Cc: "Jeff.Larry@paliareroland.com" <Jeff.Larry@paliareroland.com>, "ken.rosenberg@paliareroland.com" <ken.rosenberg@paliareroland.com>, "rthornton@tgf.ca" <rthornton@tgf.ca>, "rkennedy@tgf.ca" <rkennedy@tgf.ca>, "RexHong@tannorcapital.com" <RexHong@tannorcapital.com>, Burkett McInturff <jbm@wittelslaw.com>, Greg Blankinship <gblankinship@fbfglaw.com>, Jonathan Shub <jshub@shublawyers.com>, Kevin Laukaitis <klaukaitis@shublawyers.com>, "JCottle@fbfglaw.com" <JCottle@fbfglaw.com>, "Sarita.Sanasie@paliareroland.com" <Sarita.Sanasie@paliareroland.com>, "Megan.Bradt@paliareroland.com" <Megan.Bradt@paliareroland.com>, "rtannor@tannorcapital.com" <rtannor@tannorcapital.com>, Susan Russell <sjr@wittelslaw.com>, Steven D Cohen <sdc@wittelslaw.com>, Robert Tannor <rtannor@tannorpartners.com>, "Robinson, Jim" <Jim.Robinson@fticonsulting.com>, "Bishop, Paul" <Paul.Bishop@fticonsulting.com>, "jcyrulnik@cf-llp.com" <jcyrulnik@cf-llp.com>, "efruchter@cf-llp.com" <efruchter@cf-llp.com>
Subject: Re: Just Energy -- Class Counsel's Adjudication Plan for Class Creditor-Plaintiffs' Claims + Further Questions from Tannor Capital Advisors -- Responses Due Wed Dec 15 - Proposed Zoom Mtg Dec 16 or 17

Counsel for JE (Osler) and Counsel for Monitor (TGF):

Please see attached Letter from Class Counsel describing an Adjudication Plan for Plaintiffs' claims, and further questions from Tannor Capital Advisors.

We look forward to Osler's confirmation of this letter and questions, and Osler's scheduling a Zoom meeting for this Thursday or Friday Dec 16 or 17.

Thank you,
SLW

Steven L Wittels

WMP | Partner
18 Half Mile Road | Armonk NY 10504
slw@wittelslaw.com | https://wittelslaw.com
Phone: 914 319-9945 | Fax: 914 273 2563

From: "Dacks, Jeremy" <JDacks@osler.com>
Date: Wednesday, December 8, 2021 at 12:07 PM
To: "De Lellis, Michael" <MDeLellis@osler.com>, "Wasserman, Marc" <MWasserman@osler.com>, Steven Wittels <slw@wittelslaw.com>
Cc: "Jeff.Larry@paliareroland.com" <Jeff.Larry@paliareroland.com>, "ken.rosenberg@paliareroland.com" <ken.rosenberg@paliareroland.com>, "rthornton@tgf.ca" <rthornton@tgf.ca>, "rkennedy@tgf.ca" <rkennedy@tgf.ca>, "RexHong@tannorcapital.com" <RexHong@tannorcapital.com>, Burkett McInturff <jbm@wittelslaw.com>, Greg Blankinship <gblankinship@fbfglaw.com>, Jonathan Shub <jshub@shublawyers.com>, Kevin Laukaitis <klaukaitis@shublawyers.com>, "JCottle@fbfglaw.com" <JCottle@fbfglaw.com>, "Sarita.Sanasie@paliareroland.com" <Sarita.Sanasie@paliareroland.com>, "Megan.Bradt@paliareroland.com" <Megan.Bradt@paliareroland.com>, "rtannor@tannorcapital.com" <rtannor@tannorcapital.com>, Susan Russell <sjr@wittelslaw.com>, Steven D Cohen <sdc@wittelslaw.com>, Robert Tannor <rtannor@tannorpartners.com>, "Robinson, Jim" <Jim.Robinson@fticonsulting.com>, "Bishop, Paul" <Paul.Bishop@fticonsulting.com>
Subject: RE: Just Energy Call. Wed Dec 8 1PM. ZOOM

PRIVATE AND CONFIDENTIAL

Hi everyone.

Please find enclosed our comments on the TCA question list for our call today, and copies of the Business Plan and DIP Term Sheet and written amendments referred to therein.

Thanks,
Jeremy

OSLER

Jeremy Dacks
Partner
416.862.4923 | 647.406.1500 (cell) | JDacks@osler.com
Osler, Hoskin & Harcourt LLP | osler.com

-----Original Appointment-----
From: De Lellis, Michael <MDeLellis@osler.com>
Sent: Monday, December 06, 2021 7:32 PM
To: De Lellis, Michael; Wasserman, Marc; Steven Wittels
Cc: Jeff.Larry@paliareroland.com; ken.rosenberg@paliareroland.com; rthornton@tgf.ca; rkennedy@tgf.ca; Dacks, Jeremy; RexHong@tannorcapital.com; Burkett McInturff; gblankinship@fbfglaw.com; jshub@shublawyers.com; klaukaitis@shublawyers.com; JCottle@fbfglaw.com; Sarita.Sanasie@paliareroland.com; Megan.Bradt@paliareroland.com; rtannor@tannorcapital.com; Susan J. Russell; Steven D. Cohen; Robert Tannor; Robinson, Jim; Bishop, Paul
Subject: Just Energy Call. Wed Dec 8 1PM. ZOOM
When: Wednesday, December 08, 2021 1:00 PM-2:00 PM (UTC-05:00) Eastern Time (US & Canada).
Where: Microsoft Teams Meeting

Microsoft Teams meeting

Join on your computer or mobile app
Click here to join the meeting

Or call in (audio only)
+1 437-703-5283,,236562596# Canada, Toronto
Phone Conference ID: 236 562 596#
Find a local number | Reset PIN

OSLER

Learn More | Meeting options

From: Wasserman, Marc <MWasserman@osler.com>
Sent: Saturday, December 04, 2021 11:35 AM
To: Steven Wittels <slw@wittelslaw.com>
Cc: Jeff.Larry@paliareroland.com; ken.rosenberg@paliareroland.com; rthornton@tgf.ca; De Lellis, Michael <MDeLellis@osler.com>; rkennedy@tgf.ca; Dacks, Jeremy <JDacks@osler.com>; RexHong@tannorcapital.com; Burkett McInturff <jbm@wittelslaw.com>; gblankinship@fbfglaw.com; jshub@shublawyers.com; klaukaitis@shublawyers.com; JCottle@fbfglaw.com; Sarita.Sanasie@paliareroland.com; Megan.Bradt@paliareroland.com; rtannor@tannorcapital.com; Susan J. Russell <sjr@wittelslaw.com>; Steven D. Cohen <sdc@wittelslaw.com>; Robert Tannor <rtannor@tannorpartners.com>
Subject: Re: Just Energy Call. Wed Dec 8 1PM. ZOOM

Great. We will send a teams or zoom invite and provide answers on your list prior to the call. Have a nice weekend. Marc

Marc Wasserman
Office: 416.862.4908
Mobile: 416.904.3614
MWasserman@osler.com
Osler, Hoskin & Harcourt LLP | osler.com

> On Dec 4, 2021, at 11:29 AM, Steven Wittels <slw@wittelslaw.com> wrote:
>
> Marc:
>
> 1. If you have no other time at all Monday or Tuesday, yes we will take 1PM Wednesday.
>
> We'd like it to be a ZOOM video conference. Please advise who will be on the ZOOM and we can set up the invite, or let us know if you want to set it up.
>
> 2. Based on the list we sent you Thursday, please email us the documents/data in advance that we requested so we're better prepared to discuss on the call. Please confirm.
>
> Thx. SLW
> Steven L Wittels
>
> On 12/4/21, 10:19 AM, "Wasserman, Marc" <MWasserman@osler.com> wrote:
>
> Monday does not work unfortunately, neither does Tuesday. Wednesday does. Do you want the call at 1pm Wednesday?
>
> Marc Wasserman
> Office: 416.862.4908 | Mobile: 416.904.3614 | MWasserman@osler.com
> Osler, Hoskin & Harcourt LLP | osler.com
>
> -----Original Message-----
> From: Steven Wittels <slw@wittelslaw.com>
> Sent: Saturday, December 04, 2021 10:15 AM

To: Wasserman, Marc <MWasserman@osler.com>; Jeff.Larry@paliareroland.com; Ken.Rosenberg@paliareroland.com; rthornton@tgf.ca
Cc: De Lellis, Michael <MDeLellis@osler.com>; rkennedy@tgf.ca; Dacks, Jeremy <JDacks@osler.com>; RexHong@tannorcapital.com; Burkett McInturff <jbm@wittelslaw.com>; gblankinship@fbfglaw.com; jshub@shublawyers.com; klaukaitis@shublawyers.com; JCottle@fbfglaw.com; Sarita.Sanasie@paliareroland.com; Megan.Bradt@paliareroland.com; rtannor@tannorcapital.com; Susan J. Russell <sjr@wittelslaw.com>; Steven D. Cohen <sdc@wittelslaw.com>; Robert Tannor <rtannor@tannorpartners.com>
Subject: Re: Just Energy Call. Monday Afternoon

Marc:

We'd like to have this call on Monday afternoon given that we asked for it nearly a week ago, and provided Just Energy and the Monitor the topics we want to discuss and the documents/data we need. Given the expedited time frame for the reorganization, we don't understand why the company is taking so long to respond to our requests for basic information to which we're entitled.

Please coordinate a time for Monday, and advise today.

Thank you, SLW.

Steven L Wittels
WMP | Partner
18 Half Mile Road | Armonk NY 10504
slw@wittelslaw.com |
https://can01.safelinks.protection.outlook.com/?url=https%3A%2F%2Fwittelslaw.com%2F&data=04%7C01%7CMWasserman%40osler.com%7C9a1fd3ee03124e2bcfb708d9b7433ebe%7C38b8d7e73b2745709e91cf2ab620b2cd%7C1%7C0%7C637742321704739325%7CUnknown%7CTWFpbGZsb3d8eyJWIjoiMC4wLjAwMDAiLCJQIjoiV2luMzIiLCJBTiI6Ik1haWwiLCJXVCI6Mn0%3D%7C3000&sdata=ED0TPBq7%2BtkwVaABcjPkN81iIFX%2BFyJy5qtbFuhRimw%3D&reserved=0
Phone: 914 319-9945 Fax: 914 273 2563

On 12/4/21, 9:57 AM, "Wasserman, Marc" <MWasserman@osler.com> wrote:

Does 1pm Wednesday work for the call.

Marc Wasserman
Office: 416.862.4908 | Mobile: 416.904.3614 | MWasserman@osler.com
Osler, Hoskin & Harcourt LLP | osler.com

-----Original Message-----
From: Jeff.Larry@paliareroland.com <Jeff.Larry@paliareroland.com>
Sent: Thursday, December 02, 2021 6:17 PM
To: Wasserman, Marc <MWasserman@osler.com>
Cc: De Lellis, Michael <MDeLellis@osler.com>; RThornton@tgf.ca; rkennedy@tgf.ca; Dacks, Jeremy <JDacks@osler.com>; Ken.Rosenberg@paliareroland.com; RexHong@tannorcapital.com; jbm@wittelslaw.com; gblankinship@fbfglaw.com; jshub@shublawyers.com; klaukaitis@shublawyers.com; JCottle@fbfglaw.com; Sarita.Sanasie@paliareroland.com; Megan.Bradt@paliareroland.com; slw@wittelslaw.com; rtannor@tannorcapital.com
Subject: RE: Just Energy Call

Marc

The list of questions is attached.

Please let us know if we can arrange a call some time tomorrow after 345 or anytime Monday after 11.

Thanks,

From: Wasserman, Marc <MWasserman@osler.com>
Sent: November 30, 2021 6:32 PM
To: Jeff Larry <Jeff.Larry@paliareroland.com>
Cc: De Lellis, Michael <MDeLellis@osler.com>; rthornton@tgf.ca; rkennedy@tgf.ca; Dacks, Jeremy <JDacks@osler.com>; Ken Rosenberg <Ken.Rosenberg@paliareroland.com>; RexHong@tannorcapital.com; jbm@wittelslaw.com; gblankinship@fbfglaw.com; jshub@shublawyers.com; klaukaitis@shublawyers.com; JCottle@fbfglaw.com; Sarita Sanasie <Sarita.Sanasie@paliareroland.com>; Megan Bradt <Megan.Bradt@paliareroland.com>; slw@wittelslaw.com; rtannor@tannorcapital.com
Subject: Re: Just Energy Call

Happy to have another call but there is no real utility in have a call without a list of questions that you want answered in advance so we can have the appropriate people on. That is what we discussed on the last call. If can get us the list, we will arrange the call as soon as possible. Marc

Marc Wasserman
Office: 416.862.4908<tel:416.862.4908> | Mobile: 416.904.3614<tel:416.904.3614> | MWasserman@osler.com<mailto:MWasserman@osler.com>

Osler, Hoskin & Harcourt LLP | osler.com<file:///var/tmp/com.apple.email.maild/EMContentRepresentation/com.apple.mobilemail/CC01ADB3-FE4A-45FA-9512-115CCF15F494/https://can01.safelinks.protection.outlook.com/?url=http%3A%2F%2Fwww.osler.com%2F&data=04%7C01%7CMWasserman%40osler.com%7C9a1fd3ee03124e2bcfb708d9b7433ebe%7C38b8d7e73b2745709e91cf2ab620b2cd%7C1%7C0%7C637742321704739325%7CUnknown%7CTWFpbGZsb3d8eyJWIjoiMC4wLjAwMDAiLCJQIjoiV2luMzIiLCJBTiI6Ik1haWwiLCJXVCI6Mn0%3D%7C3000&sdata=Nvielg7vkf%2FR2c86fyvZ2CHEVS1eNTIStBBGqCWDHUs%3D&reserved=0>

On Nov 30, 2021, at 6:07 PM, Jeff.Larry@paliareroland.com<mailto:Jeff.Larry@paliareroland.com> wrote:

All:

We would like to arrange follow-up ZOOM video call.

Can you let us know if these times work:

- tomorrow between 11am-1pm or 3pm-7pm; or
- Thursday at 11:30am or after.

I can confirm that I now have most of the signatures on the NDA back from our side and I will circulate them in advance of the call.

Jeff

Jeffrey Larry, LL.B, MBA
Paliare Roland Rosenberg Rothstein LLP
155 Wellington Street West, 35th Floor
Toronto, ON M5V 3H1
t: 416.646.4330
f: 416.646.4301
c: 416.553.2789
e: jeff.larry@paliareroland.com
<mailto:jeff.larry@paliareroland.com%0b>

<mailto:jeff.larry@paliareroland.com%0b>

<mailto:jeff.larry@paliareroland.com%0b>

<mailto:jeff.larry@paliareroland.com%0b>

_____

_____

****

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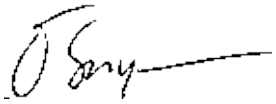
This is Exhibit “P” referred to in the
Affidavit of Robert Tannor sworn January 17, 2022



A Commissioner for taking Affidavits (or as may be)

From: Ken Rosenberg <Ken.Rosenberg@paliareroland.com>
Sent: Tuesday, January 4, 2022 11:43 AM
To: 'Wasserman, Marc'; RThornton@tgf.ca; Rkennedy@tgf.ca; RNicholson@tgf.ca; Paul.Bishop@fticonsulting.com; Jim.Robinson@fticonsulting.com; Evan.Bookstaff@fticonsulting.com; gblankinship@fbfglaw.com; jshub@shublawyers.com; sjr@wittelslaw.com; jbm@wittelslaw.com; klaukaitis@shublawyers.com; JCottle@fbfglaw.com; slw@wittelslaw.com; rtannor@tannorcapital.com; De Lellis, Michael; Dacks, Jeremy; PFesharaki@tgf.ca
Cc: Jeff Larry; Sarita Sanasie
Subject: FW: Just Energy - Scheduling a Case Conference with the Presiding Judge

Happy New Year.

We are not consenting to a further 7 - 10 day pause just to obtain a date, to schedule a date for a motion. We have not received a response from the Company regarding our substantive, timeline, process, transparency and information requests.

We ask the Monitor, when it follows up to obtain a short time/date for a Scheduling Case Conference (10 - 15 minutes is probably all that is required unless the Court has questions and/or comments), to advise the Court of our concerns noted above and below. All coupled with what we understand are the current, imminent reorganization benchmark dates as per the DIP Lenders.

We also ask that the Monitor provide the Judge with all our email correspondence in this chain.

We look forward to hearing from the Monitor, regarding the time/date of a Case Conference.

Thanks

Ken

Paliare Roland Rosenberg Rothstein LLP
Toronto

Cell: 416 735 0673

From: Wasserman, Marc <MWasserman@osler.com>
Sent: December 31, 2021 2:56 PM
To: Ken Rosenberg <Ken.Rosenberg@paliareroland.com>; RThornton@tgf.ca; Rkennedy@tgf.ca; RNicholson@tgf.ca; Paul.Bishop@fticonsulting.com; Jim.Robinson@fticonsulting.com; Evan.Bookstaff@fticonsulting.com
Cc: gblankinship@fbfglaw.com; jshub@shublawyers.com; sjr@wittelslaw.com; jbm@wittelslaw.com; klaukaitis@shublawyers.com; JCottle@fbfglaw.com; Jeff Larry <Jeff.Larry@paliareroland.com>; Sarita Sanasie <Sarita.Sanasie@paliareroland.com>; slw@wittelslaw.com; rtannor@tannorcapital.com; De Lellis, Michael <MDeLellis@osler.com>; Dacks, Jeremy <JDacks@osler.com>; PFesharaki@tgf.ca
Subject: RE: Just Energy - Scheduling a Case Conference with the Presiding Judge

Hi, hope all is well and Ken thanks for the email. We will not be in a position to have this case conference before the court next week. The Osler teams needs a well-deserved mental health break in particular given the recent surge in

Covid. We asked the monitor to inquire for a date in the latter half of the second week of January 2022. Happy New Year to All and hope everyone gets a break and stays safe and healthy. Marc

OSLER

Marc Wasserman
Office: 416.862.4908 | Mobile: 416.904.3614 | MWasserman@osler.com
Osler, Hoskin & Harcourt LLP | osler.com

From: Ken.Rosenberg@paliareroland.com <Ken.Rosenberg@paliareroland.com>
Sent: Friday, December 31, 2021 11:01 AM
To: RThornton@tgf.ca; Rkennedy@tgf.ca; RNicholson@tgf.ca; Paul.Bishop@fticonsulting.com; Jim.Robinson@fticonsulting.com; Evan.Bookstaff@fticonsulting.com
Cc: gblankinship@fbfglaw.com; jshub@shublawyers.com; sjr@wittelslaw.com; jbm@wittelslaw.com; klaukaitis@shublawyers.com; JCottle@fbfglaw.com; Jeff.Larry@paliareroland.com; Sarita.Sanasie@paliareroland.com; slw@wittelslaw.com; rtannor@tannorcapital.com; De Lellis, Michael <MDeLellis@osler.com>; Dacks, Jeremy <JDacks@osler.com>; Wasserman, Marc <MWasserman@osler.com>; PFesharaki@tgf.ca
Subject: RE: Just Energy - Scheduling a Case Conference with the Presiding Judge

---

Thanks Bob

To assist, on a with prejudice basis, so please feel free to share these comments and our first email below, with Justice McEwan:

1. To be direct, as discussed with you and the Company, the Class Claimants are of the view that the Company is in essence "killing the clock" on the Class Claimants meaningful participation in this process.

2. So, to your question about timing ……. we prefer a Case Conference next week; the week of January 3rd.

3. We are not in a position to slow down because we are not aware of the actual timing of looming key events. Such as, the release of the Company's/entrenched managements' and/or financiers proposed exit transaction/event and its associated proposed approval timeline. If we were meaningfully informed, our answer might be different. But we are not so informed.

4. We of course are available to discuss if/when the Monitor believes that can assist. We could chat sometime today (Friday) or over the next few days.

5. Further background that may assist:

- the Class's multi-billion dollar claim, which if successful, even for fraction of the claim, would be the dominant unsecured claim in this CCAA estate;

- the Company's own evidence/most current publicly filed financial statements state the unsecureds are now clearly in the money because these very Company financial statements have equity on the balance sheet. But, we are not aware of any unsecured interest representing the Class Claims in the realization discussions. All despite the fact it now appears the unsecureds are the one's who's money now appears actually at risk/on the bubble;

- whatever happened in the past, for more than a month the Class Claimants have been ready and have repeatedly asked to become deeply involved in this CCAA case. The Class Claimants do not see the same enthusiasm on the Company side to engage with the Class Claimants;

- while we are regularly advised by the Company how time-is-of-the-essence respecting the realization issues, we don't know what the real timing is, nor if/how/when the Company and/or the Monitor intend the Class Claims will be provided appropriate access and transparency to do due diligence to assess any Company sponsored exit plan, how and when the Class's claims will be adjudicated, be dealt with in a vote and/or, how the Company intends to put such Company/entrenched management's exit plan before the Court and Creditors for approval; and,

- we must assume, based on what we know from the public record, that a release of a proposed "deal/exit agenda/realization plan" may be imminent. Such Company/entrenched management exit plan may be/could be revealed within e.g., the next 7 days.

6. So, we are not in a position to slow down because of what we do and don't know. Coupled with the Company's continuing advice to us that, time-is-of-the essence.

We look forward to hearing from you.

Happy New Year.

Thanks

Ken

Paliare Roland Rosenberg Rothstein LLP
Toronto

Cell: 416 735 0673

From: Robert Thornton <RThornton@tgf.ca>
Sent: December 30, 2021 5:40 PM
To: Ken Rosenberg <Ken.Rosenberg@paliareroland.com>; Rebecca Kennedy <Rkennedy@tgf.ca>; Rachel Nicholson <RNicholson@tgf.ca>; Paul.Bishop@fticonsulting.com; Jim.Robinson@fticonsulting.com; Evan.Bookstaff@fticonsulting.com
Cc: gblankinship@fbfglaw.com; jshub@shublawyers.com; sjr@wittelslaw.com; jbm@wittelslaw.com; klaukaitis@shublawyers.com; JCottle@fbfglaw.com; Jeff Larry <Jeff.Larry@paliareroland.com>; Sarita Sanasie <Sarita.Sanasie@paliareroland.com>; slw@wittelslaw.com; rtannor@tannorcapital.com; MDeLellis@osler.com; JDacks@osler.com; mwasserman@osler.com; Ken Rosenberg <Ken.Rosenberg@paliareroland.com>; Puya Fesharaki <PFesharaki@tgf.ca>
Subject: Re: Just Energy - Scheduling a Case Conference with the Presiding Judge

Thanks Ken.

I can advise that we were just informed that Mr. Justice McEwen will be assuming carriage of this matter in January when our current judge moves off of the Commercial List.

I propose to email His Honour, copying you and companies' counsel, asking for a case conference/scheduling attendance some time in the first two weeks of January regarding your proposed motion. If you wish, I can mention your desire for such conference to be in the first week if possible, but if I do that, I will also have to mention that the company would prefer a later date, which is my understanding of their position.

Please advise how you would like me to proceed. Happy to have a brief call, should you so wish.

Thanks

Bob

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From: Ken.Rosenberg@paliareroland.com <Ken.Rosenberg@paliareroland.com>
Sent: Tuesday, December 28, 2021 2:51 PM
To: Robert Thornton; Rebecca Kennedy; Rachel Nicholson; Paul.Bishop@fticonsulting.com; Jim.Robinson@fticonsulting.com; Evan.Bookstaff@fticonsulting.com
Cc: gblankinship@fbfglaw.com; jshub@shublawyers.com; sjr@wittelslaw.com; jbm@wittelslaw.com; klaukaitis@shublawyers.com; JCottle@fbfglaw.com; Jeff.Larry@paliareroland.com; Sarita.Sanasie@paliareroland.com; slw@wittelslaw.com; rtannor@tannorcapital.com; MDeLellis@osler.com; JDacks@osler.com; mwasserman@osler.com; Ken.Rosenberg@paliareroland.com
Subject: Just Energy - Scheduling a Case Conference with the Presiding Judge

To: The Monitor

CC: The Company

Re: Just Energy CCAA -- Scheduling a Case Conference with the Presiding Judge

1 Further to our correspondence and discussions with the Monitor and the Company, will the Monitor please assist in the scheduling of a Case Conference with the presiding Judge in the first week of January, or if necessary, the second week of January. If the Presiding Judge in 2022 will continue to be Justice Koehnen, we expect 10 - 15 minutes is all that will be required. If another Commercial List Judge becomes seized of this Case, we expect it may take more time, if the Judge requires some additional briefing. Once a Case Conference date is obtained, we will of course prepare an appointment and circulate, etc.

2 If the Monitor prefers that we reach out to the Commercial List Office directly to seek a date, we will of course do so.

3 The purpose of the Conference is to set a timetable for a Motion these Class Claimants wish to bring regarding matters including possibly: the depth and breadth of disclosure to them by the Company and/or Monitor under their existing NDA (obviously we are limited at the Case Conference on how much we can say on this subject in the presence of all Creditors/Stakeholders); the participation of the Class Claimants (this includes transparency as to what is going on at the negotiation table) in the realization, sale and/or investment/restructuring process; a process to adjudicate the Class Claimants' Claim within this CCAA process, or/not, ; and, such other timely matters we believe are necessary for adjudication by the Court. If/as discussions unfold on a real time basis with the Company and/or the Monitor, this possible agenda could evolve.

- As discussed with the Monitor, we understand there are currently no Motions or Case management dates set aside by the Court for potential attendances.

- **Proposed timing – we would like a Case Conference in the week of January 3rd , if possible. We are looking for the actual motion date in the 3rd week of January, or at the latest, the 4th week of January.**

4 By way of background, and this may be expanded upon in further discussions and correspondence ……. The Company's very own public financial statements as of Sept 30th 2021, publicly filed on Sedar and apparently prepared in compliance with all necessary accounting standards, state that Just Energy has equity on its balance sheet. Thus, at first instance unsecured creditors are "in the money" based upon the Company's own financial statements. This piece of evidence, plus of course other evidence, will inform part of our narrative, both about process going forward and substance.

Given the tight time frames of this case, we look forward to hearing from you shortly.

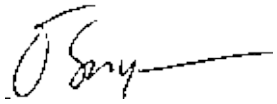
Regards

Ken

Paliare Roland Rosenberg Rothstein LLP
Toronto

Cell: 416 735 0673

This is Exhibit “Q” referred to in the
Affidavit of Robert Tannor sworn January 17, 2022



A Commissioner for taking Affidavits (or as may be)

NOTICE OF REVISION OR DISALLOWANCE

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

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

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

RE: Claim Reference Number: PC-11177-1

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

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

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

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

Reasons for Revision or Disallowance:

See attached Schedule A.

SERVICE OF DISPUTE NOTICES

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

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

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

The address of the Monitor is set out below:

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

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

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

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

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

DATED this 11th day of January, 2022.

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

Per: _____

Jim Robinson
Senior Managing Director

SCHEDULE A

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

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

Status of Litigation

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

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

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

---

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

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

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

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

Improper Expansion of Claim

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

Claim Is Meritless

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Expert Report

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

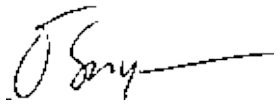
- The Claimants' expert acknowledges that he can only calculate overcharges "more precisely for each member of the affected class as well as for the entire class" once additional discovery is conducted, including Just Energy NY's provision of monthly customer level sales and price data and cost of sales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

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

Inflated Claim of Prejudgment Interest

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

This is Exhibit “R” referred to in the
Affidavit of Robert Tannor sworn January 17, 2022



A Commissioner for taking Affidavits (or as may be)

NOTICE OF REVISION OR DISALLOWANCE

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

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

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

RE: Claim Reference Number: PC-11175-1

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

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

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

Reasons for Revision or Disallowance:

See attached Schedule A.

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

The address of the Monitor is set out below:

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

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

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

DATED this 11th day of January, 2022.

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

Per: _____

Jim Robinson
Senior Managing Director

SCHEDULE A

The Claimant advances a claim against the "Just Energy Entities" in the amount of US$3,662,444,442.00 based on a proposed and uncertified class action filed in the Eastern District of Pennsylvania on April 6, 2018, titled *Trevor Jordet v. Just Energy Solutions, Inc.*, Case No. 2:18-cv-01496-MMB (the "**Jordet Action**"). The Jordet Action was subsequently transferred to the US District Court in the Western District of New York (the "**New York Court**").

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

Status of Litigation

The Jordet Action was brought solely against Just Energy Solutions, Inc. ("**Just Energy Solutions**") on behalf of a putative class of all "Just Energy customers charged a variable rate for residential natural gas services by Just Energy from April 2012 to the present". The Claimant alleged, among other things, that the defendant violated Pennsylvania Unfair Trade Practices and Consumer Protection Law ("**PUTPCP**"), breached contractual provisions and an implied covenant of good faith requiring Just Energy Solutions to consider "business and market conditions" when it charged rates that were more than the local utility rate for natural gas, and was unjustly enriched as a result of the alleged misconduct. The Jordet Action does not purport to deal with any electricity customers of Just Energy Solutions.

Following a motion to dismiss brought by the defendant, the New York Court dismissed the PUTPCP and unjust enrichment claims, such that only the alleged breach of contract claim remains.[2] Moreover, the New York Court held that claims for breach of contract prior to April 6, 2014, are time-barred. The survival of a claim on a motion to dismiss is not an assessment of its merits but only a determination that, accepting as true all of the allegations in the complaint as required on that motion, the plaintiff has alleged a right to relief that is not entirely speculative. Indeed, the Court noted in its decision that it "cannot dismiss a Complaint unless it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'"[3] The lone remaining claim turns on whether Just Energy Solutions breached contractual commitments to use its discretion to set rates consistent with "business and market conditions" (defined to include a host of factors), and the Court found that whether Just Energy Solutions'

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[2] As the New York Court noted in its decision on the motion to dismiss, a breach of the implied covenant of good faith is not a distinct cause of action from breach of contract under Pennsylvania law. *Jordet v. Just Energy Solutions Inc.,* Decision and Order 18-CV-953S regarding Motion to Dismiss dated December 7, 2020 ("**Motion to Dismiss Decision**"), Dkt. 43, at 4.

[3] Motion to Dismiss Decision, at 6.

pricing adhered to that discretionary standard could not readily be resolved solely on the pleadings.[4]

Improper Expansion of Claim

Almost four years after the commencement of the litigation, the Claimant now purports to advance a claim against all "Just Energy Entities" on behalf of both gas and electricity customers, notwithstanding the fact that the Jordet Action is limited to natural gas customers of Just Energy Solutions. Even if the underlying litigation had any merit (it does not), the Claimant cannot use these CCAA Proceedings to improperly expand the scope of his April 2018 claim to now add entirely new customer groups and new defendants who were not included in the Jordet Action.

Claim Is Meritless

The claim is contingent, uncertified, speculative, and remote, especially given that the Claimant's claim has not even proceeded to discovery. Even if discovery had taken place, the Claimant would still have to overcome substantial hurdles to be entitled to any recovery, including:

- dispositive motion practice (i.e. motion for summary judgment) following completion of discovery, which would involve the disclosure of expert reports and supporting evidence from fact witnesses, depositions, potential preliminary motions, written briefs, and oral argument;

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

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

- resolution of damages of the plaintiff or certified class(es), which may require bifurcation from the trial on liability (especially if the Claimant continues to allege damages on behalf of a national class, which the defendant argues is impermissible).

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

The claim is devoid of merit for numerous reasons, including the fact that the applicable contract contains multiple provisions that put customers (including the Claimant) on clear notice of the variable rates that Just Energy Solutions would set and to which customers (including the Claimant) will be subject:

- "**This Agreement does not guarantee financial savings.** However, at the end of your Term, if the Volume Weighted Average Utility Price is less than the Volume Weighted

[4] Motion to Dismiss Decision, at 17-18.

Average Just Energy Price, we will credit you $100 for each commodity included in this Agreement."[5] (emphasis added)

- "By signing for the ***Natural Gas and/or Electricity Rate Flex Pro Program***, I agree to an introductory fixed price, the Intro Price, for the first twelve billing cycles and thereafter be a Variable Price for the remainder of the Term. Changes to the Variable Price will be determined by business and market conditions." [6] (emphasis in original)

- "**Variable Price**: The monthly rate that you will be charged per Ccf[7] after the expiration of the 12 month Intro Price. The Variable Price will not change more than once each billing cycle. Changes to the Variable Price will be determined by Just Energy according to business and market conditions."[8] (emphasis in original)

- "After the Intro Price period expires, you will be charged a Variable Price per Ccf. The Variable Price during the first billing cycle in which the Variable Price is in the [*sic*] effect will be equal to the Intro Price. The Variable Price will not change more than once each monthly billing cycle. **Changes to the Variable Price will be determined by Just Energy according to business and market conditions, including but not limited to, the wholesale cost of natural gas supply, transportation, distribution and storage**…."[9] (emphasis added)

The parties' agreement thus expressly provides that it does not guarantee the financial savings about which the Claimant now complains. In complaining that his local utility's rates ended up being lower for a portion of the Claimant's contract term, the Claimant simply ignores away the operative agreement. There was no obligation under the agreement for Just Energy Solutions' rates to match or track those charged by the local utility.

Critically, the Claimant's allegation that the defendant breached the parties' contract by failing to set rates "according to business and market conditions" is premised on the erroneous assumption that local public utilities are the main competitors of Just Energy Solutions, and as such the defendant overcharged when its rates were higher than that of the local utility.[10] In reality, local utility rates are not an appropriate barometer by which to measure the rates of energy service companies (**"ESCOs")** like Just Energy Solutions (let alone an appropriate proxy for the long list

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

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

7 Ccf is a unit of measurement of natural gas that is the volume of 100 cubic feet.

8 Paragraph 1 of "Natural Gas Disclosure Statement and Terms of Service" incorporated into the Claimant's agreement with the defendant.

9 Paragraph 5 of "Natural Gas Disclosure Statement and Terms of Service" incorporated into the Claimant's agreement with the defendant.

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

of business and market conditions Just Energy Solutions was permitted to consider in exercising its discretion to set its rates) for several reasons, including because:

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

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

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

- **Local utility commodity prices do not include reasonable profit margins.** Unlike ESCOs, local utility commodity prices are designed to be a pass-through of wholesale costs (sometimes from different periods of time) and not a profit-generating business activity. Moreover, utilities are incentivised to allocate all possible commodity and employee/technology costs to a customer's delivery bill, since that is where the utility has a monopoly and is permitted to receive a return on investment. As a result, no accurate comparison is possible between utility commodity prices and ESCO commodity prices.

- **General energy market conditions affect ESCOs and local utilities differently.** ESCOs incur costs well beyond the costs of energy procurement, which are reflected in their prices. In addition to the costs of the product or service bundled with the commodity cost, ESCO prices may also include consideration of competitors' prices, profit margins, and customer retention policies in addition to overhead costs and marketing efforts. ESCOs account for the costs and values associated with their enhanced products and services, including renewables, and need to structure their businesses to successfully offer fixed-rate guarantees to customers who purchase such products. ESCOs face the business conditions of a competitive market—not at all like the business conditions faced by a regulated utility.

The Claimant's expert has failed to even consider the variable rates charged by other ESCOs during the relevant period in calculating the alleged damages, despite the Claimant's

acknowledgment in the Complaint that "any reasonable consumer" would believe that Just Energy Solutions' variable rates would reflect the market prices *charged by other ESCOs*.[11]

Not only is the Jordet Action devoid of merit, it is not amenable to Rule 23 certification pursuant to the relevant US law, including because:

- Claimant will need to show that the language in the various contracts falling within the class definition are sufficiently similar to present common issues of law, and that those issues predominate over individual issues that different class members face.

- Claimant will need to establish that the proposed representative plaintiff's claims are representative of the experience other customers may have had. The one-size-fits-all approach taken in the Claimant's damages model does not account for the different products and services offered by Just Energy Solutions to its customers and the different providers individual customers had prior to contracting to purchase energy services from Just Energy Solutions, and those differences may be considered at class certification.

- The differences between various contracts and products would be even more pronounced and problematic for purposes of a motion for class certification to the extent the Claimant continues to take the position that they will be seeking to include in the proposed class consumers who are not natural gas customers of Just Energy Solutions whose variable rate contracts fit within the Claimant's class definition. Although such an expansion is impermissible for the reasons described above, the proposed class's failure to satisfy the strict requirements of Rule 23 would be exponentially more pronounced where the proposed class includes customers who contracted with different entities, using different contracts, subject to different regulatory regimes, and for different product offerings.

- The Court will also need to find that the proposed representative plaintiff or other subsets of the proposed class are not subject to unique defenses that would impair the fair and efficient resolution of the action. State specific regulations could present unique claims and defenses to the extent the Claimant's alleged class extended to Just Energy customers outside of Pennsylvania.

Expert Report

The Claimant has submitted a report, that purports to be an expert report, in support of his proof of claim. The quantum of damages set out in the report is speculative and highly inflated, as it is, among other things, based on several flawed assumptions. For example:

- The report includes electricity customers in its calculation of damages, but the proposed class in the Jordet Action is limited to only natural gas customers of Just Energy Solutions.

- The report assumes the correct "comparable" to determine "business and market conditions" is that of the local utility, instead of considering the rates charged by other ESCOs. As noted above, this assumption is deeply flawed. This approach fails for a number

[11] Jordet Complaint, para 20.

of reasons, including by failing to account for any ESCO reasonable profit margin on commodity prices, as local utility commodity prices are not designed to generate any profit.

- The report incorrectly includes commercial customers, whose contracts were materially different from (and subject to different regulatory regimes than) those of residential customers. Moreover, very few of Just Energy Entities' commercial customers are contractual counterparties of the named defendant. Commercial customers currently account for approximately 50% of the Just Energy Entities' customers' electricity and gas usage.

- Calculation of damages for residential and commercial gas customers is derived from a calculation that includes the residential gas load served by all Just Energy Entities. However, only Just Energy Solutions is a named defendant in the Jordet Action, and any damages must be limited to customers who were contractual counterparties with that defendant.

- The report assumes that 50% of residential and commercial natural gas usage of the Just Energy Entities' customer base is attributable to customers that are parties to variable rate contracts that would be included in the proposed class. This assumption is incorrect.

    - Currently, only approximately 34.9% of the Just Energy Entities' non-commercial customers' natural gas usage is being charged out based on variable rates. Of that, only 2.1% of natural gas usage is attributable to customers who are parties to variable rate contracts with the Just Energy Entities – the rest being customers who are parties to fixed-rate contracts with Just Energy Entities in certain jurisdictions that rolled over to variable rates when they did not renew their fixed rate contracts.[12] This latter subset of customers would not be properly included in the proposed class.

- The damages calculation includes time-barred claims. As Judge Skretny held in his decision dated December 7, 2020, regarding the motion to dismiss, all breach of contract claims with respect to alleged overcharges prior to April 6, 2014, are time-barred.

- The expert report erroneously assumes the same rate of damages applies for the period between 2018 and 2020 as applied to the period before 2018. Given that the Just Energy Entities ceased to market variable-rate contracts to new customers by the end of 2017, the quantum of damages, if any, would have continued to decline materially following 2017 as no new variable rate customers were added to the customer pool.[13]

- The damages in the expert report are based on the calculated excess natural gas margin for residential customers, which was derived using two customers' billing data. The Claimant's expert himself acknowledges that the excess natural gas margin "is subject to

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[12] In certain jurisdictions, the Just Energy Entities are required by the relevant regulations to roll over fixed rate customers to variable rates where they do not affirmatively renew their fixed term contract.

[13] As noted above, customers who are parties to fixed rate contracts with the Just Energy Entities in certain jurisdictions that rolled over to variable rates when they did not renew their fixed rate contracts would not be properly included in the class.

potentially significant modification". This miniscule sample size means that the estimate of damages is effectively useless in accurately estimating any alleged damages.

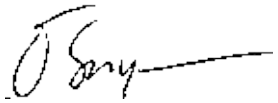
- The report assumes, without any evidence, that the differences between the variable rates the Claimant was charged and the local utility rates in Pennsylvania are the same as that in other states.

The speculative nature of the Claimant's damages calculations is further exacerbated to the extent he continues to seek to include in the proposed class consumers who are not natural gas customers of Just Energy Solutions whose variable rate contracts fit within the Claimant's class definition. Although such an expansion is impermissible for the reasons described above, the assumptions underlying the Claimant's proffered damages analysis are even more speculative where different utility rates and regulatory regimes apply in different jurisdictions, with different product offerings and rate structures. These variables are not accounted for at all in the Claimant's rudimentary damages analysis.

Inflated Claim of Prejudgment Interest

For all the reasons outlined above, the inclusion of US$1,282,196,848 in prejudgment interest is also contingent, speculative, remote, and excessive. The prejudgment interest amount calculation is also fundamentally flawed, as it applies New York's prejudgment interest rate of 9% to damages allegedly incurred in California, Delaware, Illinois, Massachusetts, Maryland, Michigan, New Jersey, Ohio, Pennsylvania, and Texas. Putting aside the fact that there is no basis for the underlying damages figure, the relevant prejudgment interest rates are significantly lower in most of these jurisdictions.

This is Exhibit “S” referred to in the
Affidavit of Robert Tannor sworn January 17, 2022



A Commissioner for taking Affidavits (or as may be)

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Re: *Donin et al. v. Just Energy Group, Inc., et al.,* No. 17 Civ. 5787 (WFK) (SJB) (E.D.N.Y.)
Jordet v. Just Energy Solutions, Inc., No. 18 Civ. 953 (WMS) (W.D.N.Y.)

Dear Counsel for Just Energy (Osler):

This is to follow up on our meeting this past Wednesday (December 8) during which Class Counsel in the above-captioned New York federal cases proposed that the parties agree on a plan for adjudication of the Donin and Jordet Creditor-Plaintiffs' claims (hereafter collectively "Donin claims" or "Claimants") in the pending CCAA proceeding. This letter sets forth a framework for the proposed adjudication which we believe should be scheduled for hearing the first week of February 2022 before a tripartite panel (the "Claims Officers").

This proposed schedule contemplates receipt of the Claims Officers' decision before any vote on the Recapitalization Plan or subsequent entry by the Canadian Court of approval of such a Plan under the current Claims Procedure Order. If the Claims Officers have not rendered their decision within this time frame, then Class Counsel will move the Court for an appropriate adjournment of the pertinent CCAA deadlines. To the extent Just Energy believes defense counsel in the pending New York federal class actions need to be involved in the claims adjudication process, to avoid delay we are copying them on this communication.

We are also enclosing with this letter our Financial Advisor Tannor Capital's list of questions on the Just Energy Business Plan of May 2021, together with follow-up questions arising from last week's meeting. We ask that JE counsel as well as the Monitor and JE's advisors be prepared to discuss these questions during a Zoom conference later this week.

In order to meet the fast-track adjudication timetable, the parties will need to cooperate on various pre-hearing matters concerning the claims, which we describe below. Thus please provide your feedback on this proposed framework in writing no later than Wednesday this week (Dec. 15). Please also schedule a Zoom meeting for this Thursday or Friday (Dec. 16 or 17) with Osler, the Monitor, FTI, and the Company's US counsel (if warranted) to discuss finalizing the adjudication process, as well as Tannor Capital's questions.

Pre-Hearing Framework & Plan Leading to Hearing by the Claims Officers

We propose that the parties negotiate and agree on the following:

1. Claims Officers' Selection and Authority

The parties should agree on a tripartite panel from JAMS (U.S.) with both (i) prior arbitration experience, and (ii) experience with class action consumer fraud cases. Additionally, pre-hearing discovery and the hearing would be conducted in accordance with the expedited procedures of the JAMS Comprehensive Arbitration Rules and Procedures ("Rules") governing binding Arbitrations of claims. *See* https://www.jamsadr.com/rules-comprehensive-arbitration/ and "Expedited Procedures" -- Rule 16.1. Under this procedure, the Claims Officers will hear and resolve any disputes and motions concerning pre-trial disclosures and process in a manner that moves the cases forward expeditiously.

We propose that each side select one member of the tripartite panel from the JAMS pool of neutrals, with the third to be selected using the strike method set forth in Rule 15 of the JAMS Rules. *Id*.

2. Pre-Trial Disclosures

Given the limited disclosure that has occurred in the New York actions to date, what is needed now for proper adjudication of these claims is sufficient disclosure by the company of its pricing methodology and costs so all parties can access the appropriate measure of damages

In particular, both sides will need sufficient disclosure such as (i) the rates charged and usage data for Just Energy's customers in the various U.S. markets where the company supplies electricity and gas, (ii) JE's costing methodology, (iii) customer agreements utilized, and (iv) marketing materials. As discussed on our call last week, we are prepared to furnish a more detailed list of what is needed pre-hearing and intend to do so once this process is agreed to.

Depending upon the data and disclosures made, it is likely that circumscribed party depositions will be needed. Absent agreement, the Claims Officers will determine the scope of discovery and depositions in accordance with the JAMS Rules.

3. The Hearing

Under the Claims Officers' guidance the parties will work towards a speedy hearing date. We envision the hearing lasting approximately 5-7 days, and the parties presenting both live witness and expert testimony. We expect an expedited written ruling from the Claims Officers, which decision will be binding on all parties for purposes of the CCAA proceeding. This claims procedure will also allow for an appeal pursuant to the Claims Procedure Order.

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We look forward to (i) your prompt response by this Wednesday (Dec. 15) as to this proposed claims adjudication procedure, and (ii) confirmation of a scheduled Zoom meeting for this Thursday or Friday (Dec. 16 or 17) with Osler, the Monitor, FTI, the company's advisors, as well as JE's U.S. counsel (if warranted), to discuss finalizing the adjudication process and responses to TCA's questions accompanying this letter.

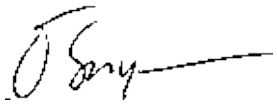
Thank you.

Very Truly Yours,

/s/ Steven L. Wittels
Steven L. Wittels

cc:
Paul Bishop and Jim Robinson (FTI)
Jason Cyrulnik & Evelyn N. Fruchter
Cyrulnik Fattaruso LLP. (U.S. Litigation counsel for JE)

This is Exhibit “T” referred to in the
Affidavit of Robert Tannor sworn January 17, 2022



A Commissioner for taking Affidavits (or as may be)

Interim condensed consolidated statements of financial position

(unaudited in thousands of Canadian dollars)

	Notes	As at September 30, 2021 (Unaudited)	As at March 31, 2021 (Audited)
ASSETS			
Current assets			
Cash and cash equivalents		**$ 199,952**	$ 215,989
Restricted cash		**3,265**	1,139
Trade and other receivables, net	4(a)	**401,633**	340,201
Gas in storage		**26,005**	2,993
Fair value of derivative financial assets	6	**461,899**	25,026
Income taxes recoverable		**10,626**	8,238
Other current assets	5(a)	**155,855**	163,405
		1,259,235	756,991
Non-current assets			
Investments	16(a)	**61,889**	32,889
Property and equipment, net		**15,732**	17,827
Intangible assets, net		**68,026**	70,723
Goodwill		**163,945**	163,770
Fair value of derivative financial assets	6	**115,606**	10,600
Deferred income tax assets		**7,599**	3,744
Other non-current assets	5(b)	**41,506**	35,262
		474,303	334,815
TOTAL ASSETS		**$ 1,733,538**	$ 1,091,806
LIABILITIES			
Current liabilities			
Trade and other payables	7	**$ 1,024,383**	$ 921,595
Deferred revenue		**9,373**	1,408
Income taxes payable		**3,637**	4,126
Fair value of derivative financial liabilities	6	**17,695**	13,977
Provisions		**835**	6,786
Current portion of long-term debt	8	**630,491**	654,180
		1,686,414	1,602,072
Non-current liabilities			
Long-term debt	8	**358**	1,560
Fair value of derivative financial liabilities	6	**13,262**	61,169
Deferred income tax liabilities		**6,773**	2,749
Other non-current liabilities		**14,155**	19,078
		34,548	84,556
TOTAL LIABILITIES		**$ 1,720,962**	$ 1,686,628
SHAREHOLDERS' EQUITY (DEFICIT)			
Shareholders' capital	11	**$ 1,537,863**	$ 1,537,863
Contributed deficit		**(10,607)**	(11,634)
Accumulated deficit		**(1,610,320)**	(2,211,728)
Accumulated other comprehensive income		**96,030**	91,069
Non-controlling interest		**(390)**	(392)
TOTAL SHAREHOLDERS' EQUITY (DEFICIT)		**12,576**	(594,822)
TOTAL LIABILITIES AND SHAREHOLDERS' EQUITY (DEFICIT)		**$ 1,733,538**	$ 1,091,806

Basis of presentation (Note 3)

Commitments and contingencies (Note 15)

See accompanying notes to the Interim Condensed Consolidated Financial Statements

Scott Gahn
Chief Executive Officer and President

Stephen Schaefer
Corporate Director

Court File No. CV-21-00658423-00CL

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **JUST ENERGY GROUP INC. ET AL.**

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
PROCEEDING COMMENCED AT TORONTO

AFFIDAVIT OF ROBERT TANNOR

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Counsel to US Counsel for Trevor Jordet, in his capacity as proposed class representative in *Jordet v. Just Energy Solutions Inc.*

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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

RESPONDING MOTION RECORD AND MOTION RECORD OF U.S. CLASS COUNSEL

(MOTION RETURNABLE JUNE 7, 2022)

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Counsel to US Counsel for Trevor Jordet, in his capacity as proposed class representative in *Jordet v. Just Energy Solutions Inc.*

Court File No. CV-21-00658423-00CL

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ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
PROCEEDING COMMENCED AT TORONTO

MOTION RECORD OF U.S. CLASS COUNSEL

(MOTION RETURNABLE AUGUST 17, 2022)

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