

CT-2012-002

**THE COMPETITION TRIBUNAL**

**IN THE MATTER OF the *Competition Act*, R.S. 1985, c. C-34,  
as amended;**

**IN THE MATTER OF an application by the Commissioner of  
Competition pursuant to section 79 of the *Competition Act*;**

**AND IN THE MATTER OF certain policies and procedures of  
Reliance Comfort Limited Partnership.**

**B E T W E E N:**

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE	
FILED / PRODUIT May 16, 2014 CT-2012-002	
Jos LaRose for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT	# 97

**THE COMMISSIONER OF COMPETITION**

Applicant

- and -

**RELIANCE COMFORT LIMITED PARTNERSHIP**

Respondent

- and -

**NATIONAL ENERGY CORPORATION**

Intervenor

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**SUPPLEMENTARY MOTION RECORD**

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**SUPPLEMENTARY MOTION RECORD INDEX**

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Intervenor

---

**AFFIDAVIT OF HEATHER O'HAGAN**

**(Affirmed May 16, 2014)**

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I, Heather O'Hagan, of the City of Toronto, in the Province of Ontario, **AFFIRM AND SAY AS FOLLOWS:**

1. I am a paralegal with the firm Borden Ladner Gervais LLP ("**BLG**"), the lawyers acting for the Respondent, Reliance Comfort Limited Partnership ("**Reliance**"). I am involved in the assembly of the productions of Reliance in this matter. As such I have knowledge of the matters to which I hereinafter depose.




2. On May 9, 2014, Patrick Johnston affirmed an affidavit in support of Reliance’s motions to compel the Commissioner of Competition and National Energy Corporation (“**National**”) to conduct reasonable reviews of the sound recordings in their possession, power, or control and produce those which are relevant. I affirm this Affidavit in order to provide the Tribunal with additional information which is relevant to Reliance’s motion.

3. On September 10, 2013, Reliance filed a Fresh as Amended Statement of Claim against National, and its parent company, Just Energy Group Inc. (“**Just Energy**”) claiming damages relating to National and Just Energy’s false and misleading representations and other improper business practices. Attached hereto as **Exhibit “A”** is Reliance’s Fresh as Amended Statement of Claim as filed with the Ontario Superior Court of Justice.

4. On December 13, 2013, National and Just Energy filed a Fresh as Amended Statement of Defence and Counterclaim, denying the Reliance’s claims and asserting counterclaims related to Reliance’s business practices. Attached hereto as **Exhibit “B”** is National and Just Energy’s Fresh as Amended Statement of Defence and Counterclaim as filed with the Ontario Superior Court of Justice.

5. On March 3, 2014, Reliance filed a Reply and Defence to Counterclaim, repeating and relying on the allegations made in the Fresh as Amended Statement of Claim against National, and its parent Company, Just Energy, and denying the claims and assertions made by National and Just Energy in the Counterclaim. Attached hereto as **Exhibit “C”** is Reliance’s Reply and Defence to Counterclaim as filed with the Ontario Superior Court of Justice.

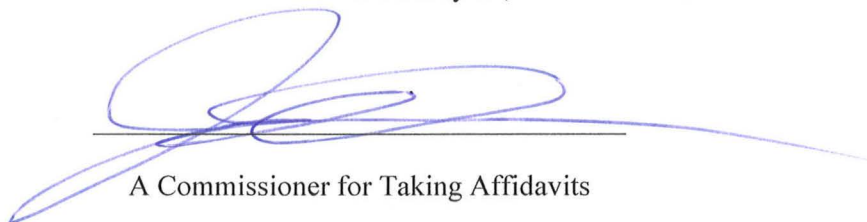
AFFIRMED BEFORE ME at the City )  
of Toronto, in the Province of Ontario )  
this 16<sup>th</sup> day of May, 2014 )  
)  
)  
)  
)  
)  
A Commissioner, etc. )

  
\_\_\_\_\_  
A Commissioner, etc.

JONATHAN ASSELSTINE

  
\_\_\_\_\_  
Heather O’Hagan

This is **Exhibit "A"** mentioned and referred  
to in the Affidavit of Heather O' Hagan  
affirmed before me on May 16, 2014



A Commissioner for Taking Affidavits

AMENDED THIS Sept 10/13 PURSUANT TO  
MODIFIÉ CE Sept 10/13 CONFORMÉMENT À

RULE/LA RÈGLE 26.02 ( )

THE ORDER OF Martin Daryl  
L'ORDONNANCE DU

DATED / FAIT LE July 24/13

Court File No. CV-12-470200

[Signature] **ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
LOCAL REGISTRAR / GREFIER LOCAL  
SUPERIOR COURT OF JUSTICE / COUR SUPÉRIEURE DE JUSTICE

BETWEEN:

RELiance COMFORT LIMITED PARTNERSHIP

Plaintiff

- and -

NATIONAL ENERGY CORPORATION and JUST ENERGY GROUP INC.

Defendants

**FRESH AS AMENDED STATEMENT OF CLAIM**

**TO THE DEFENDANTS**

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date: Dec. 17 <sup>16</sup> 2012  
2013

S. Chandradat  
Local Registrar

Address of Court Office:  
393 University Avenue  
10<sup>th</sup> floor  
Toronto, Ontario  
M5G 1E6

**TO: NATIONAL ENERGY CORPORATION**  
25 Sheppard Avenue West  
Suite 1600  
Toronto, ON  
M2N 6S6

**AND TO: JUST ENERGY GROUP INC.**  
100 King Street West, Suite 2630  
Toronto, Ontario  
M5X 1E1

**CLAIM**

1. The plaintiff, Reliance Comfort Limited Partnership (“**Reliance**”), claims against the defendants, National Energy Corporation and Just Energy Group Inc., as follows:

- (a) jointly and severally, damages in the amount of \$50 million for:
  - (i) making false or misleading representations in contravention of s. 52 of the *Competition Act* R.S.C. 1985, c. 19 (2nd Supp.) and in accordance with s. 36 of the *Competition Act*;
  - (ii) unlawful interference with economic interests, inducing breach of contract and conspiracy;
  - (iii) making false or misleading statements tending to discredit the business, wares or services of Reliance in contravention of s. 7(a) of the *Trade-marks Act* R.S.C., 1985, c. T-13;
  - (iv) directing public attention to their wares, services and business so as to cause or be likely to cause confusion with Reliance’s wares, services and business in contravention of s. 7(b) of the *Trade-marks Act*, and passing off their wares, services and business as and for those of Reliance contrary to the common law;
  - (v) infringement of Reliance’s rights to the exclusive use of its registered trade-marks, in contravention of ss. 19 and 20 of the *Trade-marks Act*;
  - (vi) using Reliance’s registered trade-marks in a manner that is likely to have the effect of depreciating the value of the goodwill attached thereto, in contravention of s. 22 of the *Trade-marks Act*;
  - (vii) infringement of Reliance’s copyright protected works in contravention of s. 27(1) of the *Copyright Act* R.S.C., 1985, c. C-42;

- (viii) secondary infringement of Reliance's copyrighted protected works in contravention of s. 27(2) of the *Copyright Act*;
- (b) in addition to damages for copyright infringement, an order that National Energy Corporation and Just Energy Group Inc. must jointly and severally pay to Reliance any such part of the profits which National Energy Corporation and Just Energy Group Inc. have made from the infringement of Reliance's copyrights that were not taken into account in calculating damages, in accordance with s. 35 of the *Copyright Act*;
- (c) at Reliance's election, in the alternative to the relief sought in paragraph 1(b), statutory damages for copyright infringement, at the highest sum that this Honourable Court considers just, in accordance with s. 38.1(1)(a) of the *Copyright Act*;
- (d) in the alternative to damages for trade mark infringement, passing off, depreciation of goodwill, and false or misleading advertising, an accounting of National Energy Corporation and Just Energy Group Inc.'s profits therefrom, as Reliance may elect after full discovery;
- (e) declarations that National Energy Corporation and Just Energy Group Inc. have:
  - (i) breached s. 17 of the *Consumer Protection Act, 2002*, S.O. 2002, c. 30;
  - (ii) directly or indirectly breached s. 43 of the *Consumer Protection Act, 2002*;
  - (iii) made false or misleading representations in breach of s. 52 of the *Competition Act*;
  - (iv) made false or misleading statements tending to discredit Reliance's business, wares or services in contravention of s. 7(a) of the *Trade-marks Act*;

- (v) directed public attention to their wares, services and businesses so as to cause or be likely to cause confusion with Reliance's wares, services and business, in contravention of s. 7(b) of the *Trade-marks Act*;
  - (vi) passed off their wares, services and businesses as and for those of Reliance, contrary to the common law;
  - (vii) infringed Reliance's rights to the exclusive use of its trade-marks, in contravention of ss. 19 and 20 of the *Trade-marks Act*;
  - (viii) used Reliance's registered trade-marks in a manner that is likely to have the effect of depreciating the value of the goodwill attached thereto, in contravention of s. 22 of the *Trade-marks Act*;
  - (ix) produced and reproduced Reliance's copyright protected works, or a substantial part thereof, without authorization, in contravention of s. 27(1) of the *Copyright Act*;
  - (x) distributed printed material containing infringing copies of Reliance's copyright protected works, in contravention of s. 27(2) of the *Copyright Act*;
- (f) a permanent injunction restraining National Energy Corporation, its representatives, contractors, employees, agents and any persons under its control or power (referred to together as "**National**"), and Just Energy Group Inc., its representatives, contractors, employees, agents and any persons under its control or power (referred to together as "**Just Energy**"), from:
- (i) making the Misrepresentations (as defined below) to Reliance's customers;

- (ii) directing public attention to their wares, services or businesses in such a manner as to cause, or be likely to cause, confusion in Canada with Reliance's wares, services or business;
- (iii) passing off their wares, services or businesses as or for those of Reliance, or suggesting that their wares, services or businesses are in any way endorsed by, licensed by, associated with or affiliated with Reliance;
- (iv) using, producing, reproducing, disseminating or distributing (or causing any of the foregoing) any physical or electronic materials in any form whatsoever, containing:
  - a. false or misleading representations regarding Reliance in contravention of s. 52 of the *Competition Act*;
  - b. false or misleading statements tending to discredit the business, wares or services of Reliance in contravention of s. 7(a) of the *Trade-marks Act*;
  - c. any of Reliance's trade-marks (including but not limited to the Trade Marks as defined below), or any trade-mark confusingly similar thereto; or
  - d. any of Reliance's copyright-protected works (including but not limited to Copyrighted Logo as defined below), or any substantial part thereof;
- (g) a wide injunction restraining National and Just Energy from reproducing any of Reliance's copyright protected works or any substantial part thereof;
- (h) an order requiring National and Just Energy to deliver up, alter or destroy, at Reliance's election, any materials in any format or medium whatsoever that would contravene the injunction sought in paragraph 1(f);



- (i) punitive damages in the amount of \$10 million;
- (j) Reliance's costs of its investigation in connection with this matter in accordance with s. 36 of the *Competition Act*;
- (k) pre-judgment and post-judgment interest in accordance with the *Courts of Justice Act*, R.S.O., 1990, c.C.43, as amended;
- (l) costs of this action on a substantial indemnity basis plus HST; and
- (m) such further and other relief as this Honourable Court deems just.

**The Parties**

2. The plaintiff, Reliance Comfort Limited Partnership, doing business as Reliance Home Comfort, is in the residential water heater rental business and leases water heaters to customers throughout Ontario. Reliance is a Manitoba limited partnership with its head office in Toronto, and it employs approximately 1,000 staff in Canada.

3. Reliance and its predecessor organizations have been in the business of delivering high quality home comfort products and services for over 40 years. Reliance is one of Canada's largest rental water heater providers. The rental water heater business is highly competitive with a number of different entities offering rental services.

4. The defendant Just Energy Group Inc. is a federally incorporated corporation that is a provider of energy solutions to residential and commercial customers, including the supply of natural gas.

5. The defendant, National Energy Corporation, an Ontario corporation doing business under the name National Home Services, is a wholly owned subsidiary of Just Energy Group Inc. National Energy Corporation is in the residential water heater rental business and leases water heaters to customers throughout Ontario.

**Misrepresentations to Reliance Customers by National and Just Energy Door-to-Door Salespersons**

6. As set out in the paragraphs below, since at least 2010, National and Just Energy have made false or misleading representations concerning Reliance to Reliance's customers or to the general public, as a result of which Reliance has lost customers to National Energy Corporation. National has further induced Reliance's customers to switch to National Energy Corporation using unlawful means.

7. National and Just Energy door-to-door salespersons, or salespersons ostensibly acting on behalf of National or Just Energy, have attended and continue to attend at the residences of Reliance customers for the purpose of causing the Reliance customer to switch to National Energy Corporation, and in the course of each visit made or make (as the case may be) one or more misrepresentations to the Reliance customer. In particular, in communicating with Reliance's customers, National and Just Energy's door-to-door salespersons made or make representations that were or are false or misleading, including by one or more of the following (the "**Consumer Misrepresentations**"):

- (a) identifying themselves as being employed by, affiliated with, or an agent for Reliance, including by oral communication and through displays of Reliance's Trade-Marks and Copyrighted Logo (as those terms are defined below);
- (b) conveying, expressly or impliedly, the impression that replacing their water heater would not entail a change of water heater suppliers or require termination of their Reliance water heater rental agreement;
- (c) identifying themselves as, or suggesting they were: (i) a representative of a utility company or government agency responsible for inspecting the water heater of the Reliance customer, or (ii) otherwise authorized or qualified by a government, industry or public authority to replace the water heater of the Reliance customer, including by stating that they were authorized by a government or other public authority to replace all water heaters throughout a neighbourhood or residential real estate development;
- (d) stating or suggesting that Reliance had assigned the Reliance customer's water heater rental agreement to National Energy Corporation or Just Energy Group Inc.;

- (e) stating or suggesting that the customer's existing water heater was substandard, was beyond its useful life, was not installed pursuant to applicable codes or other government or industry requirements, required repair, was hazardous or was unsafe;
- (f) stating or suggesting that failure by the customer to take remedial action, such as by replacing their water heater, would be unsafe and may cause harm to themselves or their families;
- (g) overstating or exaggerating the energy or costs savings that might be realised by switching from Reliance to National Energy Corporation;
- (h) overstating or exaggerating the costs of converting their existing water heater to a more efficient water heater with their existing vendor, relative to the costs of renting a more efficient water heater from National Energy Corporation;
- (i) stating or suggesting that Reliance is an American company;
- (j) stating or suggesting that National Energy Corporation is entirely Canadian owned;
- (k) stating or suggesting that Reliance customers were entitled to cancel their contracts with Reliance without incurring any further charge from Reliance; and
- (l) stating or suggesting to the Reliance customer that they could be duly appointed to act as the Reliance customer's agent for the purpose of acquiring a "Removal Reference Number" (as described further below).

8. Just Energy Group Inc. has directed and caused its representatives, agents, and contractors, including its telephone and door-to-door salespersons, to falsely advise Reliance customers that their monthly gas bill is significantly higher than it would otherwise be if the Reliance customer used a National water heater instead of a Reliance water heater. Just Energy's telephone and door-to-door salespersons have made this further misrepresentation, along with the other Consumer Misrepresentations listed above, to cause Reliance customers to switch their water heater tank rental services from Reliance to National Energy Corporation.

9. Reliance's water heater return policies require customers wishing to terminate their water heater rental agreements to first phone Reliance and obtain a "Removal Reference Number" ("RRN"). National and Just Energy's salespersons have called Reliance by telephone and imitated, pretended to be, or identified themselves to Reliance as a Reliance customer for the purpose of obtaining a RRN from Reliance (the "**Identity Misrepresentation**").

10. National has provided Reliance and Reliance customers with agency appointment forms that purportedly may be used to appoint its salespersons as agents of a Reliance customer (“**Purported Agency Forms**”). The Purported Agency Forms have a signature line for execution by a Reliance customer. In some instances, National has falsely represented to Reliance that a Purported Agency Form was executed by a Reliance customer, including by providing Reliance with a completed Purported Agency Form bearing a signature or mark on or around the area of the signature block in circumstances where the signature or mark was not actually the signature or mark of the Reliance customer (the “**Form Misrepresentation**”).

11. The Consumer Misrepresentations, the Identity Misrepresentation and the Form Misrepresentation (together, the “**Misrepresentations**”) were each false or misleading in a material respect.

12. Furthermore, National and Just Energy produced and publicly disseminated and continue to produce and publicly disseminate materials bearing one or more of Reliance’s Trade-Marks (as defined below) (the “**Misleading Documents**”) that:

- (a) overstated the annual fee increases permitted under Reliance’s water heater rental agreements;
- (b) stated that Reliance customers and/or former Reliance customers did not need to pay outstanding valid bills to Reliance;
- (c) stated that Reliance lacks a program to provide maintenance on its rental water heaters;
- (d) overstated, exaggerated, or were ambiguous as to any energy or costs savings that might be realised by switching from Reliance to National Energy Corporation;
- (e) stated that Reliance’s rental water heaters violated applicable codes, or were unsafe; and
- (f) stated that Reliance is an American company or a company owned or controlled by persons or entities residing in the United States of America.

13. The statements listed above contained in the Misleading Documents were each false or misleading in a material respect. Just Energy Group Inc. directed, caused, or knowingly permitted the Misleading Documents to misleadingly refer to itself as the purported “Canadian

ownership” of National Energy Corporation. Just Energy Group Inc. further knew of the misleading nature of the Misleading Documents and caused, directed, or allowed its door knockers to distribute the Misleading Documents in association with the sales and advertising of National Energy Corporation and/or Just Energy Group Inc.’s wares, services and business.

14. The Misleading Documents were and continue to be disseminated to the public by both National and Just Energy in order to convince existing Reliance customers to breach or otherwise terminate their contracts with Reliance and switch to National Energy Corporation, or convince potential Reliance customers to sign water heater rental agreements with National Energy Corporation instead of Reliance.

15. In making and continuing to make each Misrepresentation, and in providing the Misleading Documents to the public and to Reliance’s customers, National and Just Energy knowingly or recklessly made and continue to make a representation that was or is false or misleading in a material respect, or made and continue to make a false or misleading statement tending to discredit the business, wares or services of Reliance.

16. National Energy Corporation and Just Energy Group Inc. directed, encouraged, or otherwise caused their representatives, agents, and contractors to make the Misrepresentations and distribute the Misleading Documents through, *inter alia*, their training and ongoing supervision. Furthermore, National and Just Energy knowingly and recklessly allowed and permitted and continue to allow and permit their salespersons to make and continue to make the Misrepresentations, and distribute the Misleading Documents, notwithstanding that National and Just Energy have received numerous complaints about the false and misleading nature of the Misrepresentations and Misleading Documents.

17. The Consumer Misrepresentations were and continue to be made, and the Misleading Documents were and continue to be distributed, to Reliance’s customers in Ontario, including but not limited to customers resident in London, Windsor, Hamilton, Burlington, Oakville, Cambridge, Kitchener-Waterloo, Brantford, Guelph, Kingston, Sudbury, Sarnia, Milton, St. Thomas, Chatham, the Greater Toronto Area, North Bay, Ottawa, St. Catharines, Sault Ste. Marie, Thunder Bay and Timmins.

**Misuse of Reliance's Trade-Marks**

18. At all material times, Reliance has owned and continues to own the following valid and enforceable registered marks under the provisions of the *Trade-marks Act*, together with all associated goodwill (collectively, the "**Trade-Marks**"):

- (a) Reliance's trade-mark "Reliance" is registered under Canadian Trade Mark Registration No. TMA747845, in association with wares including "water heaters" and services including "[r]ental, sale, installation, service, lease, maintenance and consumer and commercial financing services relating to water heaters";
- (b) Reliance's trade-mark "Reliance Home Comfort" is registered under Canadian Trade Mark Registration No. TMA724655, in association with wares including "water heaters" and services including "[r]ental, sale, installation, service, lease, maintenance, consumer financing services relating to water heaters";
- (c) Reliance's "Reliance Home Comfort" logo (shown below) is registered under Canadian Trade Mark Registration Nos. TMA796930 and TMA797734 in association with wares including "water heaters" and services including "[r]ental, sale, installation, service, lease, maintenance and consumer and commercial financing services relating to water heaters", as follows:

TMA796930



TMA797734



19. National and Just Energy have used Reliance's Trade-Marks in making the Misrepresentations, and have used the Trade-Marks in association with water heater rental, installation, maintenance and related services, by displaying, without authorization, one or more of the Trade-Marks, or marks confusingly similar thereto, on letterhead, shirts, hats, badges, and other items to suggest that they are employed by, affiliated with, or agents for Reliance. These references include the statements made in the Misleading Documents.

20. National's and Just Energy's use of Reliance's Trade-Marks described above constitutes trade mark infringement. It also has had and continues to have the effect of directing public attention to National and Just Energy's wares, services or business in such a way that has caused confusion between National and Just Energy's wares, services or business, and Reliance's wares, services or business.

21. National has produced and publicly disseminated documents such as flyers, door hanging advertisements and pamphlets bearing one or more of Reliance's Trade-Marks, which refer to Reliance in a false or misleading manner and depreciate the value of the goodwill in its Trade-Marks.

22. By their actions described above, National and Just Energy have:

- (a) made false and misleading statements tending to discredit the wares, services and business of Reliance, contrary to s.7(a) of the *Trade-marks Act*;
- (b) directed public attention to their services, wares or business in such a way as to cause or be likely to cause confusion, between their services, wares or business, and the wares, services and business of Reliance, contrary to s.7(b) of the *Trade-marks Act*;
- (c) infringed and continue to infringe Reliance's right to the exclusive use throughout Canada of its Trade-marks, contrary to ss. 19 and 20 of the *Trade-marks Act*; and
- (d) depreciated the value of the goodwill attaching to Reliance's Trade-Marks, contrary to s. 22(1) of the *Trade-marks Act* and contrary to the common law.

23. As a result of the conduct described above, Reliance has suffered and is likely to suffer damage, harm and loss, including but not limited to the loss of customer accounts, damage to goodwill, and the costs of extensive and ongoing advertisements to counter the

Misrepresentations and statements made in the Misleading Documents. National Energy Corporation and Just Energy Group Inc. have profited from their wrongful acts.

**Infringement and Secondary Infringement of Reliance's Copyright**

24. Reliance owns all copyright in the artistic works constituting its logo, as depicted in paragraph 18(c) above (the "**Copyrighted Logo**").

25. National and Just Energy made unauthorized reproductions of Reliance's Copyrighted Logo, or a substantial part thereof. National and/or Just Energy made those reproductions in violation of the *Copyright Act*, and committed acts of copyright infringement and secondary infringement by reproducing the Copyrighted Logo, or a substantial part thereof, without authorization, or distributing copies of the Copyrighted Logo, or a substantial part thereof, which they should have known infringed Reliance's copyright. In doing so, National and Just Energy infringed and continue to infringe Reliance's copyrights in the Copyrighted Logo in contravention of ss. 3(1) and 27 of the *Copyright Act*. Those acts included reproducing the Copyrighted Logo on the Misleading Documents, and reproducing the Copyrighted Logo on letterhead, badges, and other items.

26. As a result of the above infringing acts, Reliance has suffered and is likely to suffer damage, harm and loss, including but not limited to the loss of customer accounts, damage to goodwill, and the costs of extensive and ongoing advertisements to counter the Misrepresentations and statements made in the Misleading Documents. National Energy Corporation and Just Energy Group Inc. have profited from their wrongful acts.

**Breach of s. 52 of the Competition Act**

27. The Misrepresentations were and continue to be made, and the Misleading Documents were published and continue to be published, by National and Just Energy, as described above, for the direct or indirect purpose of promoting National Energy Corporation's water heater rental business.



28. National Energy Corporation and Just Energy Group Inc. also knowingly or recklessly allowed and permitted, and continue to allow and permit, their salespersons, or salespersons ostensibly acting on the behalf of National Energy Corporation and Just Energy Group Inc., to make the Misrepresentations, notwithstanding that they have received numerous complaints about their false or misleading nature.

29. National Energy Corporation and Just Energy Group Inc. knowingly or recklessly caused and cause the Misleading Documents to be produced and published, and allowed and permitted and continue to allow and permit their salespersons, or salespersons ostensibly acting on their behalf, to disseminate the Misleading Documents. Furthermore, National Energy Corporation and Just Energy Group Inc. knowingly or recklessly caused and continue to cause the Misleading Documents to be produced and published, and allowed and continue to allow and permit their salespersons, or salespersons ostensibly acting on their behalf, to disseminate the Misleading Documents, notwithstanding that they have received numerous complaints about the false or misleading nature of the information therein.

30. Reliance pleads and relies on ss. 36 and 52(1) of the *Competition Act*.

31. Reliance has suffered and continues to suffer injury, harm and loss as a direct result of National and Just Energy's Misrepresentations and its production, publication and dissemination of Misleading Documents, including but not limited to the loss of customer accounts, loss of goodwill and the costs of extensive and ongoing advertising required to counter the misrepresentations contained therein. As such, Reliance is entitled to recover its damages attributable to the Misrepresentations and Misleading Documents and the costs of its investigation in accordance with s. 36 of the *Competition Act*.

#### **Unlawful Interference with Reliance's Economic Interests**

32. National and Just Energy made the Misrepresentations and produced, published and disseminated the Misleading Documents with the purpose of inducing Reliance's customers to breach their contracts with Reliance. As a result of National and Just Energy's

Misrepresentations, and the production, publication, and dissemination of the Misleading Documents, Reliance's customers breached or terminated their contracts with Reliance.

33. In making the Misrepresentations and publishing the Misleading Documents, National and Just Energy interfered with Reliance's economic interests. The Misrepresentations and the Misleading Documents were unlawful, and, *inter alia*, contrary to ss. 14 and 17 of the *Consumer Protection Act, 2002*, S.O. 2002, c. 30 and ss. 52 and 74.01 of the *Competition Act*. The Misrepresentations were made and the Misleading Documents were produced, published and disseminated with the intention of injuring Reliance.

34. In retaining Reliance water heaters as part of the Stockpile (as defined below), National unlawfully interfered with Reliance's business relationship with its customers and property, as further described below at paragraph 47.

35. As a result of the making of the Misrepresentations, the production, publication and dissemination of the Misleading Documents, and the retention of Reliance water heaters as part of the Stockpile, Reliance has suffered losses, including but not limited to the loss of customer accounts, the particulars of which will be particularized prior to trial.

#### **Inducing Breach of Contract**

36. In making the Misrepresentations to Reliance's customers, National and Just Energy knew or ought to have known that the individuals with whom they were communicating were customers of Reliance, since, *inter alia*, the vast majority of Reliance's water heaters are marked with Reliance's name or the name of its predecessor, Union Energy. National and Just Energy's conduct, as described above, induced Reliance's customers to breach their contracts with Reliance.

37. Prior thereto, Reliance had valid and enforceable contracts with these customers. National and Just Energy were aware or ought to have been aware of the existence of these contracts, and they intended to and did procure breaches thereof. Reliance has suffered the damages of the loss of revenue associated with these contracts, as well as additional costs related to the collection of outstanding accounts and recovery of water heaters not removed pursuant to

its contractual policies. As such, Reliance is thereby entitled to recover its associated loss, injury and damages.

### **Conspiracy**

38. Beginning in or about 2009 and continuing to the present, National and Just Energy conspired with each other to cause, Reliance's customers to switch to National, and thus deprive Reliance and misappropriate for themselves the revenues, proceeds and profits from Reliance's rental of water heaters to its customers. National and Just Energy acted in concert with the predominant purpose of injuring Reliance and also used unlawful means in furtherance of their conspiracy.

39. The particulars of the overt acts engaged in by National and Just Energy in furtherance of their conspiracy are set out above. Additionally, National and Just Energy together, and in furtherance of the conspiracy, prepared and distributed the Misleading Documents, and trained, encouraged, and coordinated telephone representatives and door knockers to make the Misrepresentations.

40. Moreover, Just Energy caused its telephone representatives to contact its customers (who purchased natural gas from Just Energy) to convince these customers to switch from renting a Reliance water heater to renting a National water heater, and directed, caused or knowingly permitted its telephone representatives to make Consumer Misrepresentations during these sales calls. This included by offering "bundled sales" of water heater, furnace and air conditioning unit rentals, with the former supplied by National and the latter two supplied by Just Energy, during which calls Consumer Misrepresentations were made.

41. Just Energy further caused National agents to attend at the residences of those Reliance customers who, as a result of a Consumer Misrepresentation, agreed to switch from Reliance to National. These agents attended immediately after Just Energy's call with the Reliance customer in order to remove their Reliance water heater and switch it with a National water heater.

42. Since 2011, and increasingly since that time, Just Energy has directed or permitted National door-to-door and telephone salespersons to identify themselves as being with Just Energy, instead of National, to avoid being associated with the widespread complaints regarding National's sales and marketing practices.

43. National and Just Energy agreed to act in concert to communicate the Misrepresentations by telephone, in person, and through the Misleading Documents to Reliance customers, in order to cause these customers to switch to National, with the predominant purpose of causing harm, injury and loss to Reliance.

44. Because the Misrepresentations were aimed at Reliance, and were made specifically to cause Reliance customers to switch to National, the damage caused by the acts of National and Just Energy was knowingly and intentionally directed towards Reliance, and National and Just Energy are liable therefor.

**Breach of the *Consumer Protection Act, 2002***

45. National has breached the provisions of the *Consumer Protection Act, 2002* by failing to observe and comply with the 10 day cooling off period in s. 43 of that Act. National has not only failed to inform the consumer of their rights to a cooling off period but has further rendered the protections of s. 43 a nullity by making it impossible or impracticable for the consumer to exercise their cancellation rights by immediately removing Reliance's rental water heater and installing a National Energy Corporation rental water heater (the "**Immediate Replacement Policy**").

46. National's Immediate Replacement Policy makes it impracticable for former Reliance customers to switch back to Reliance or otherwise cancel their new National water heater rental agreement upon discovering or being informed that the Consumer Misrepresentation(s) or Misleading Document(s) used by National were false or otherwise misleading. National's Immediate Replacement Policy has in fact prevented former Reliance customers who would otherwise switch back to Reliance from doing so. As a result, the implementation of the Immediate Replacement Policy has caused Reliance injury, harm and loss.

47. In addition, notwithstanding National's Immediate Replacement Policy, Reliance's standard contract with its customers provides that the contract (and charges thereunder) will only be terminated upon the return of the water heater to Reliance. However, National has stockpiled up to hundreds of Reliance water heaters for periods in excess of 60 days (the "Stockpile"). In these circumstances, Reliance continues to charge those customers until such time as National makes the return. This has resulted in increased costs to Reliance, including through increased volume to its customer call centres from affected customers challenging Reliance's legitimate billings, and delay in recovering payments for these charges.

#### **Continuing Misconduct**

48. For clarity, all of the misconduct by National and Just Energy described above, including the Misrepresentation, the production, dissemination and distribution of the Misleading Documents, the Immediate Replacement Policy, the breaches of the *Trade-marks Act*, and the coordinated misconduct between National and Just Energy to injure Reliance, continue at the present time.

49. Reliance has described the wrongful acts now known to it but the full extent of National Energy Corporation and Just Energy Group Inc.'s wrongful activities is known by them and not by Reliance.

#### **Quantum of Damages**

50. The full extent of the Reliance's damages are not currently known, however Reliance undertakes to provide particulars of all such damages prior to the trial of this action.

51. National and Just Energy have acted and continue to act in a high-handed, malicious and reprehensible fashion, and in wanton and reckless disregard for the Reliance's rights. Accordingly, Reliance is entitled to punitive, aggravated, and exemplary damages.

52. As a result of the Misrepresentations and Misleading Documents, Reliance has suffered and continues to suffer special damages, particulars of which will be provided prior to trial.

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**RELIANCE COMFORT LIMITED PARTNERSHIP**  
**Plaintiff**

- and - **NATIONAL ENERGY CORPORATION et al.**  
**Defendants**

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
PROCEEDINGS COMMENCED AT TORONTO

**FRESH AS AMENDED**  
**STATEMENT OF CLAIM**

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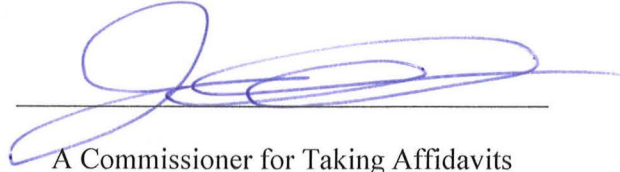
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Lawyers for the Plaintiff

This is **Exhibit "B"** mentioned and referred  
to in the Affidavit of Heather O' Hagan  
affirmed before me on May 16, 2014



A Commissioner for Taking Affidavits



AMENDED THIS Dec. 13/13 PURSUANT TO  
MODIFIÉ CE CONFORMÉMENT À

RULE/LA RÈGLE 26.02 (A)

THE ORDER OF \_\_\_\_\_  
L'ORDONNANCE DU \_\_\_\_\_  
DATED / FAIT LE \_\_\_\_\_

Court File No.: CV-12-470200

[Signature]  
REGISTRAR GREFFIER  
SUPERIOR COURT OF JUSTICE COUR SUPÉRIEURE DE JUSTICE

ONTARIO  
SUPERIOR COURT OF JUSTICE

BETWEEN:

**RELIANCE COMFORT LIMITED PARTNERSHIP**

Plaintiff

- and -

**NATIONAL ENERGY CORPORATION and  
JUST ENERGY GROUP INC.**

Defendants

**FRESH AS AMENDED  
STATEMENT OF DEFENCE AND COUNTERCLAIM**

1. The Defendants, National Energy Corporation ("National") and Just Energy Group Inc. ("JEGI"), admit the allegations in paragraph 5 of the Statement of Claim (the "Claim").

2. National and JEGI deny that the Plaintiff is entitled to any of the relief claimed in paragraph 1 of the Claim and, except as otherwise expressly admitted below, deny all other allegations in the Claim and put the Plaintiff to the strict proof thereof.

**A ~ OVERVIEW**

3. The Plaintiff, Reliance Comfort Limited Partnership ("Reliance"), is the dominant supplier of water heater rentals and related services in many regions across Ontario, serving more than 1,200,000 customers or approximately 90% of all homeowners that rent water heaters in Reliance's principal operating territory (defined below at paragraph 16 as the "Reliance Territory"). In contrast to Reliance's near-

monopoly position, National serves approximately 69,100 customers or approximately 6% of the approximately 1.2 million available water heater rental customers located within the Reliance Territory.

4. Through this action, Reliance seeks to further entrench and strengthen its long-held dominant position by making serious, unfair and unfounded allegations concerning the marketing practices of National, its only significant rival, and National's parent company, JEGI. Adopting a strategy of the best defence is a good offence, through this action Reliance also seeks to deflect attention and scrutiny from its own anti-competitive conduct towards National and other suppliers of water heater rental services. Indeed, Reliance commenced this action only after learning that the Commissioner of Competition was about to file an application before the Competition Tribunal (the "**Commissioner's Application**") alleging that Reliance had engaged in "practices that intentionally suppress competition and restrict consumer choice".

5. Reliance's claims against National's parent company, JEGI, are plainly without merit. These claims ignore the separate corporate identities of JEGI and National. Unlike National, JEGI is not, and has never been, directly engaged in the business of renting water heaters or providing related services to customers. JEGI is a holding company that was incorporated to hold the interests in various subsidiaries, such as National and Just Energy Corp. Contrary to Reliance's claims, JEGI does not employ, and has never employed, any door-to-door salespeople. Moreover, JEGI has never been involved in National's advertising campaigns. As a result, JEGI could not possibly have made any of the alleged misrepresentations or distributed any of the allegedly misleading documents. Nor has JEGI ever directed, caused or permitted any

of its employees, representatives, agents or contractors to make any of the alleged misrepresentations or distribute any of the allegedly misleading documents.

6. Reliance's claims of conspiracy, misleading advertising and breaches of the *Trade-marks Act* and *Copyright Act* are also plainly without merit. Many of the alleged representations that underlie each of these claims do not appear in the Defendants' advertisements and were simply never made by National to the public.

7. National's advertisements contain only accurate statements that are focused on the high quality and efficient water heater tanks that are supplied by National at competitive rates to Ontario homeowners. In any event, none of the alleged misrepresentations has had any bearing on Reliance's near-monopoly position, nor have they caused Reliance any depreciation of goodwill or other form of loss or harm.

8. Reliance's claims with respect to alleged improper "stockpiling" of water heater tanks are equally without merit. National does not, and has never, sought to improperly stockpile Reliance's old water heaters when customers replace them with National's new and efficient water heater tanks.

9. Rather, the reality is that Reliance has imposed arbitrary, punitive and anti-competitive restrictions on the return of water heaters at its depots. These restrictions are specifically designed to prevent National and other competitors from returning old Reliance water heaters on behalf of consumers in a timely and efficient manner. Reliance continues to profit from consumers that have switched to National by continuing to bill those consumers who have switched to National but have not been able to return the old Reliance tanks. Moreover, as noted in the Commissioner's

Application, the charges levied by Reliance are intended to dissuade, and have dissuaded, consumers from switching from Reliance to National (or another competitor).

10. Reliance's attempt to deflect scrutiny from its own anti-competitive behaviour should be rejected and the action dismissed.

## B ~ THE PARTIES

### (i) National and JEGI

11. National is a supplier of home services, including the rental of energy efficient water heaters and the supply of HVAC equipment to existing and new homeowners in Ontario. It began operations in the Reliance Territory in 2010.

12. National is a relatively small supplier of water heater rental services in Ontario, with approximately 69,100 water heater customers in the Reliance Territory, representing only approximately 6% of all water heater tank rentals in this region. While National's market share is a fraction of that of Reliance, National is Reliance's largest and only meaningful competitor in the Reliance Territory.

13. National is a wholly-owned subsidiary of JEGI, a Canadian public company formed under the *Canada Business Corporations Act*. JEGI's shares trade on the TSX and its head office is in Mississauga, Ontario. JEGI is a holding company that holds interests in various operating entities, such as Just Energy Corp. and National. Just Energy Corp., through various limited partnerships, supplies natural gas and electricity to approximately 900,000 residential and commercial customers across Canada. Just Energy Corp.'s affiliates also have operations in certain parts of the United States and the United Kingdom.

14. Although National is a wholly-owned subsidiary of JEGI, the two companies are now, and have always been, separate and distinct legal entities with separate constating documents, employees, agents and representatives. They also have separate assets, debt obligations, liabilities, bank accounts, bookkeeping and investments. National functions independently of JEGI.

**(ii) Reliance**

15. The Plaintiff, Reliance, is a privately-held limited partnership that rents natural gas and electric water heaters and provides related services to consumers in Ontario.

16. Reliance is by far the dominant supplier of water heater rental services in its principal operating territory, which consists of: the Greater Toronto Area, Ottawa, Kingston, Oakville, London, Windsor, Hamilton, Cambridge, Kitchener-Waterloo, Brantford, Guelph, Sudbury, Sarnia, Milton, Sault Ste. Marie, St. Thomas, Chatham, Thunder Bay, Timmins and North Bay (collectively, the "**Reliance Territory**"). As set out above, Reliance has more than 1,100,000 customers or approximately 90% of the customers that rent water heaters in the Reliance Territory.

17. Contrary to the allegations in paragraphs 2 and 3 of the Claim, Reliance is not a Canadian company. Reliance is wholly-owned by Alinda Capital Partners LLC, a U.S.-based private equity firm incorporated in the State of Delaware. Alinda's head office is located in Greenwich, Connecticut.

### C ~ THE WATER HEATER RENTAL BUSINESS IN ONTARIO

18. In Ontario, most residential customers rent water heaters. Most residential customers who rent a water heater also obtain related water heater services, such as installation, repair and maintenance.

19. Historically, Ontario's two largest natural gas suppliers, Enbridge Inc. ("**Enbridge**") and Union Gas Limited ("**Union Gas**"), each held a regulated monopoly as the sole supplier of natural gas in their respective operating territories. In addition to supplying natural gas, Enbridge and Union Gas also supplied related services to residential and commercial customers, including the rental of water heaters.

20. In 1999, Union Gas transferred its portfolio of water heater rentals to Union Energy Inc., which was subsequently acquired by Reliance. Through this acquisition, Reliance acquired a near-monopoly position in the supply of water heater rental services within the territory formerly served by Union Gas. This territory corresponds to the Reliance Territory, as defined in paragraph 16 above.

21. Contrary to the allegation in paragraph 3 of the Claim, the rental water heater business in Ontario is not "highly competitive". While National and other even smaller companies have attempted to enter and expand in the market over the years, Reliance has maintained a near-monopoly position in the Reliance Territory. It has done so by engaging in a series of anti-competitive and exclusionary practices.

22. Reliance's dominant market position in the supply of water heaters to residential customers has been recognized by the Commissioner of Competition. In the Commissioner's Application dated December 20, 2012 before the Competition Tribunal,

the Commissioner alleges that Reliance has engaged in a number of violations of the abuse of dominance provisions of the *Competition Act* and has sought, among other things, an administrative monetary penalty against Reliance in the maximum amount of \$10 million.

**D ~ NATIONAL'S ADVERTISING IS FAIR,  
ACCURATE AND NOT MISLEADING**

23. National markets itself as a supplier of high quality and efficient water heaters that is focused on customer satisfaction and providing products at competitive rates. Replacing an outdated and less efficient water heater tank with a new efficient water heater tank generates cost savings for the homeowner. In addition, a homeowner may receive savings where a water heater tank is replaced by one that is more appropriate for the size of the home and number of residents.

24. National employs various marketing strategies to attract new customers, including by marketing its products and services through print advertisements, flyers, pamphlets and other marketing material. JEGI is not involved, and has never been involved, in either developing or implementing any such marketing strategies related to the rental of water heaters or related services.

25. In addition, National receives marketing services from a number of third party suppliers. Among other things, these third party marketing firms identify and train individuals to provide direct marketing services for National to homeowners who are potential customers. These door-to-door salespersons are not employees of National. Rather, these individuals are self-employed and independent contractors ("**Independent Contractors**") that provide services to National pursuant to the terms of

Independent Contractor Agreements with National. No employees of National engage in door-to-door sales.

26. Door-to-door sales, including inspections of existing water heaters by Independent Contractors, are a necessary and significant part of National's marketing efforts. This is because determining the appropriate size and type of water heater for a possible upgrade to a new and efficient heater requires a physical inspection of the home, including the homeowner's existing water heater tank.

27. Significantly, and contrary to the allegations in paragraphs 6 to 17 of the Claim, JEGI does not participate, and has never participated, in National's marketing efforts. Nor has JEGI engaged in any marketing on National's behalf. JEGI has never directed, caused or permitted any of its employees, representatives, agents or contractors to make any of the alleged misrepresentations or distribute any of the allegedly misleading documents. As set out above, National and JEGI are separate legal entities that operate independently of one another.

28. Indeed, JEGI is not engaged in any door-to-door sales of any products nor does JEGI employ any salespeople. JEGI's subsidiary, Just Energy Corp., through its limited partnerships, does have independent contractors that are engaged in door-to-door sales of home energy plans and related products. However, these independent contractors are engaged in the marketing and sale of electricity and natural gas energy plans and are **not** engaged in the marketing or sale of water heater tank rental services.



29. Contrary to the allegations in paragraphs 6 to 17 of the Claim, National and JEGI expressly deny that they have made any representations to the public that were false or misleading in a material respect.

30. At all material times, the key themes in National's advertising campaigns were the following, each of which is entirely accurate:

- (a) National offers customers new Energy Star qualified water heater tanks that are more efficient and use less energy than the older tanks currently used by a significant proportion of Reliance's customers;
- (b) National offers a free preventative maintenance program for its water heater tanks, including periodic draining and flushing of the water heater tank that ensures that National's tanks continue to operate as efficiently as possible;
- (c) National offers a lifetime guarantee for water heater tanks rented by customers, including all repairs, parts and labour costs, as well as a "hassle-free" option of allowing a customer to receive a new water heater if the tank cannot be repaired to the customer's satisfaction at any point during the term of the rental agreement;
- (d) National often offers a free rental period to new customers (e.g., two months free rent);
- (e) National's technicians are professionally trained and certified to install water heater tanks;

- (f) customers may realize savings by selecting the type and size of water heater that is better suited for their individual needs; and
- (g) National is a subsidiary of a Canadian owned and operated company (JEGI) that through its subsidiaries, serves approximately 900,000 customers in Canada.

**(i) Alleged Consumer Representations**

31. Contrary to the allegations in paragraph 7 of the Claim, the Independent Contractors engaged in door-to-door sales did not make one or more material misrepresentations "in the course of each visit" to a Reliance customer. Further, as described above, no employees of National or JEGI engage in door-to-door sales.

32. The Defendants deny that the Independent Contractors retained by National made the representations alleged in paragraph 7 of the Claim and further deny that any such representations were false or misleading in a material respect.

33. For example, subparagraph 7(i) of the Claim alleges that "stating or suggesting that Reliance is an American company" is false or misleading. As noted above, Reliance is wholly-owned by Alinda Capital Partners LLC, a U.S.-based private equity firm incorporated in the State of Delaware, with a head office in Greenwich, Connecticut. This representation is not, therefore, false or misleading.

34. Similarly, subparagraph 7(j) of the Claim alleges that "stating or suggesting that National is entirely Canadian owned" is false or misleading in a material respect. A representation that National is Canadian owned and operated is not false or

misleading in a material respect as National is a wholly-owned subsidiary of JEGI, a corporation formed under the *Canada Business Corporations Act*, with a head office in Mississauga, Ontario. Further, the majority of JEGI's shares are held by Canadians.

35. Contrary to the allegations in paragraphs 7, 8 and 16 of the Claim, the Defendants deny that they made, directed, permitted or caused to be made, any of the alleged misrepresentations with the knowledge that such statements were false or misleading in a material respect or with reckless disregard for the truth of such representations.

36. Contrary to the allegation that the Defendants knowingly or recklessly permitted Independent Contractors to represent that they were employed by, affiliated with or acting as agent of Reliance or a gas utility, such as Union Energy or Enbridge, National has, in fact, implemented a number of safeguards that would prevent or contradict any such representations being made by Independent Contractors. These include the following:

- (a) a number of National's advertisements explicitly state that National is not owned by or affiliated with any utility. For example, an advertisement dated June 14, 2010 states that: "These offers and claims are made by National Home Services alone. National Home Services is not owned by or affiliated with Union Gas or any of their respective affiliates";
- (b) National requires that each Independent Contractor wear a uniform which clearly displays the National logo;

- (c) National requires that each Independent Contractor prominently display an identification badge that bears the name "National Home Services" and includes the National logo;
- (d) National requires that each Independent Contractor carry a photo identification card that bears the name "National Home Services" and includes the National logo;
- (e) as part of the orientation provided to each Independent Contractor, National instructs the Independent Contractor to display their badge and present the photo identification card to each homeowner at each visit;
- (f) the contract between National and each Independent Contractor requires each Independent Contractor to comply with all federal, provincial and municipal laws and explicitly prohibits Independent Contractors from engaging in any form of forgery or fraud;
- (g) in the event that a customer decides to switch to National, the customer is presented with a Water Heater Rental Application form. This form carries the "National Home Services" name and logo and explicitly states that "These offers and claims are made by National alone. National is not owned by or affiliated with Union Gas or any of its affiliates"
- (h) the customer must also sign a Customer Acknowledgement form on which the customer must explicitly agree to each of the following statements: "I understand that National Home Services is an independent service

provider that rents and maintains Water Heaters" and "I understand that National Home Services is not affiliated with the Local Utility Company or my current water heater supplier"; and

- (i) the customer must also sign a "Water Heater Agreement & Installation Work Order" prior to receiving a new water heater tank. This Agreement also contains the "National Home Services" name and logo. In addition, this Agreement explicitly states that "National is not owned by or affiliated with Union Gas or any of its affiliates".

37. In addition, after the Water Heater Agreement & Installation Work Order form is signed by the customer, the customer then participates in a verification procedure administered through a call centre operated by National to confirm that the above procedures have been followed. National operates a call centre with approximately 90 employees located in Toronto. National's call centre employees have received training regarding the procedures required to be followed by Independent Contractors and the process for verifying such compliance. In addition, calls between customers and call centre employees are routinely monitored by supervisors to ensure compliance with National's procedures.

38. In addition to dealing with routine service issues and customer inquiries, National's call centre employees confirm with each customer during the verification procedure that the Independent Contractor wore a National uniform and displayed a National identification badge. They also expressly confirm that the customer

understands that National is not affiliated with Reliance or Union Energy or any of their respective affiliates.

39. In contrast, National is not aware of any statements made in Reliance's own advertisements or any other similar safeguards implemented by Reliance to ensure that customers understand that Reliance is not affiliated with Union Energy, National, a public utility or a government agency.

40. Further, and in the alternative, even if the Independent Contractors made representations that were false or misleading (which is not admitted but expressly denied), the Defendants are not liable or otherwise responsible for such actions by the Independent Contractors for the following reasons:

- (a) as set out above, the Independent Contractors are not (and never were) employees or agents of either National or JEGI;
- (b) the alleged acts of the Independent Contractors were beyond the scope of any authority which may have been or could have been given to the Independent Contractors by either National or JEGI; and
- (c) the alleged acts of the Independent Contractors were carried out independently by the Independent Contractors, on their own initiative and without the knowledge of either National or JEGI.

**(ii) Alleged Identity and Form Representations**

41. Reliance's allegations in subparagraph 7(l) of the Claim concerning the Defendants' ability to be appointed as a customer's agent for the purpose of returning a water heater are without merit.

42. Historically, Reliance's competitors and customers routinely disconnected and returned Reliance rental water heaters to Reliance without any form of pre-authorization.

43. Reliance changed its historical practice shortly after National entered the Reliance Territory in 2010. In response to new competition and a potential challenge to its dominant position, in May 2010 Reliance implemented a policy that prohibits customers or competitors from returning water heater tanks without first obtaining a form of authorization from Reliance called a "Removal Reference Number" or "RRN".

44. As set out above, Reliance's RRN policy is one of the anti-competitive and exclusionary acts of Reliance that is challenged in the Commissioner's Application before the Competition Tribunal. The Commissioner's Application describes the impact of Reliance's RRN policy on consumers and competitors, in part, as follows:

Under the RRN Return Policy, Reliance creates significant barriers to the return of its water heaters by, among other things: (i) prohibiting the customer or competitor from returning a water heater unless the customer first obtains a RRN from Reliance and has signed and fully completed to Reliance's satisfaction a "Water Heater Return Form"; (ii) prohibiting competitors from obtaining a RRN on behalf of customers; (iii) refusing to provide a RRN to customers who contact Reliance with a competitor on the call; in such cases, Reliance regularly prevents these competitors from joining in on customer calls, notwithstanding that customers have

agreed to have competitors on these calls; and (iv) refusing to recognize agency agreements between customers and competitors that give competitors the authority on behalf of the customer to disconnect and return Reliance rental water heaters.

45. As further described in the Commissioner's Application, Reliance uses its RRN policy to deter, impede and prevent customers from terminating their Reliance rental agreements and switching to a competitor (such as National) by, for example, keeping customers and competitors on hold for lengthy periods of time, imposing lengthy call service periods, intentionally dropping calls, and intimidating customers with unwarranted fees and charges.

46. Contrary to subparagraph 7(l) of the Claim, it is not false or misleading for the Defendants to state or suggest to a Reliance customer that National could be appointed as an agent of the customer for the purpose of acquiring an RRN from Reliance. In fact, as described below, National frequently acts as an agent for customers who want to switch from Reliance to National, but need assistance to comply with Reliance's anti-competitive RRN policy.

47. Moreover, although Reliance's anti-competitive RRN policy includes a refusal to recognize agency agreements between customers and competitors (such as National), National's entitlement to act as an agent for customers of Reliance has already been confirmed by this Court in *MacGregor v. Reliance Comfort Limited Partnership*, 2010 ONSC 6925.

48. As a result, and contrary to Reliance's allegations in the Claim, there is nothing false or misleading about National or JEGI stating or suggesting to a Reliance



customer that National could be appointed as an agent of the customer for the purpose of acquiring a RRN.

49. Contrary to the allegation in paragraph 9 of the Claim, the Defendants expressly deny that an Independent Contractor imitated or pretended to be a Reliance customer or falsely claimed that an agency form was executed by a customer for the purpose of obtaining a RRN.

50. The Defendants further deny the allegation in paragraph 10 of the Claim that an Independent Contractor provided an agency form to a Reliance employee that bore an incorrect or false signature.

51. Further, and in the alternative, the Defendants state that any representations to Reliance employees by an Independent Contractor or by National, including those alleged in paragraphs 9 and 10 of the Claim, do not constitute a representation to the public for the purpose of section 52 of the *Competition Act*.

52. In the further alternative, the Defendants state that any such representation was made with the authority of the customer or is otherwise not false or misleading in a material respect.

**(iii) Statutory Causes of Action for Alleged Misleading Advertising**

53. Contrary to the allegations of Reliance that National and JEGI have engaged in misleading advertising in violation of section 52 of the *Competition Act*, the Defendants have not made, or permitted to be made, any representation to the public

that was false or misleading in a material respect. The Defendants also deny that sections 36 and 52(1) of the *Competition Act* apply in the circumstances of this case.

54. To the extent that any representation of National or JEGI was false or misleading in a material respect (which is not admitted but expressly denied), then:

- (a) the representation was not made by either National or JEGI with the knowledge that the representation was false or misleading, or with reckless disregard as to the truth or accuracy of such representation;
- (b) National and JEGI took all reasonable care, including the safeguards outlined in paragraph 36 above, to prevent such false or misleading representation from being made;
- (c) as set out in paragraph 40 above, National and JEGI are not liable for the actions of Independent Contractors;
- (d) the representation was not material. To the extent that water heater rental customers switched from Reliance to National, such customers switched for the predominant purpose of benefiting from National's more efficient products, free maintenance program, higher service levels and/or other reasons not attributable to the alleged misrepresentations; and
- (e) National and JEGI deny that Reliance has suffered any loss or harm as a result of the alleged misrepresentation.

### E ~ RELIANCE'S TRADE-MARK CLAIMS

55. Contrary to the allegations in paragraphs 18 to 23 of the Claim, the Defendants deny that sections 7, 19, 20 and 22 of the *Trade-marks Act* are applicable in this case.

#### (i) No Discrediting of Reliance's Business

56. In any event, the alleged representations set out in the Claim are not false or misleading, nor do they in any way discredit or tend to discredit the business or services offered by Reliance under its alleged registered trade-marks.

57. National and JEGI specifically deny that the representations alleged in paragraph 12 of the Claim were made by either of them or, alternatively, that such representations were false or misleading in a material respect. For example, contrary to subparagraph 12(c) of the Claim, National's representations regarding preventative maintenance are not false or misleading in material respect. National has accurately stated in certain advertisements that Reliance does not supply periodic preventative maintenance for rented water heaters free of charge. In contrast, National provides a free preventative maintenance program for its rented water heater tanks, including periodic draining and flushing of the water heater tank to ensure that National's tanks continue to operate as efficiently as possible.

58. Similarly, the statement in subparagraph 12(f) of the Claim that Reliance is "an American company or a company owned or controlled by persons or entities residing in the United States of America" is not false or misleading. As described above, Reliance is, in fact, wholly-owned by Alinda Capital Partners LLC, a U.S.-based private

equity firm incorporated in the State of Delaware, with a head office in Greenwich, Connecticut.

**(ii) No Infringement**

59. Contrary to the allegations at paragraph 19 and 22(c) of the Claim, the Defendants deny having used Reliance's trade-mark, or marks confusingly similar thereto, as a trade-mark on any letterhead, shirt, hat, badge or other item to suggest that they are employed by, affiliated with or agents for Reliance.

60. Further, at no time have the Defendants used Reliance's trade-mark to misrepresent the source of their wares and services. To the contrary, to the extent that National has used Reliance's trade-mark, it has done so for the sole and express purpose of correctly distinguishing National's wares and services from those of Reliance. Such use of Reliance's trade-mark is in no way an infringing use.

**(iii) No Confusion**

61. The Defendants deny that they have directed public attention to their wares, services or business in such a way as to cause or be likely to cause confusion in Canada with the wares, services or business of Reliance.

62. In particular, contrary to the allegations at paragraphs 19, 20 and 22(b) of the Claim, at no time have either JEGI or National advertised or sold their wares or services under Reliance's alleged registered trademark.

63. Further, to the extent that either JEGI or National have used Reliance's alleged registered trademark, such use did not cause, nor would it have been likely to

cause, confusion in the Canadian market. Water heaters and water heater rental services are specialized goods and services. Purchasers of such goods and services make judicious inquiries about the quality and performance of the wares and services they are purchasing. Reliance has failed to plead any fact that would establish any confusion among consumers in this market between the wares and services offered by National and those offered by Reliance.

**(iv) No Passing Off**

64. The Defendants deny that they have made any representation to the public that misled Reliance customers into thinking they were purchasing water heaters and services from Reliance. National never depicted its water heaters and services as Reliance heaters and services. To the contrary, National has made deliberate efforts to distinguish its products and services from those of Reliance, including through comparisons to National's more efficient water heater tanks and superior service offerings.

**(v) No Depreciation of Goodwill**

65. The Defendants further deny that any of the alleged representations set out in the Claim depreciated or were likely to depreciate the value of any goodwill attaching to Reliance's alleged registered trade-marks.

**F ~ CONSUMER PROTECTION ACT CLAIMS**

**(i) No Breach of Cooling-Off Provisions**

66. National denies that it has breached the provisions of the *Consumer Protection Act, 2002*. Contrary to the allegations in paragraph 45 of the Claim, National

explicitly advises consumers of their rights to the "cooling off" period in accordance with sections 42 and 43 of the *Consumer Protection Act, 2002*.

67. In particular, National's "Water Heater Agreement & Installation Work Order" that is required to be executed by each customer of National states as follows on the front page in large and bold-faced font: **"Your rights under the Consumer Protection Act, 2002 are set out on the Terms & Conditions on the reverse side of this Water Heater Agreement and Installation Work Order."**

68. National's Water Heater Agreement & Installation Work Order also contains a detailed explanation of the consumer's rights under the *Consumer Protection Act, 2002*, including the following:

- (a) the customer has the right to cancel the agreement at any time during the period that ends ten days after the customer receives a written copy of the agreement;
- (b) the customer is not required to provide any reason for cancelling the agreement during the ten-day period;
- (c) if National does not make delivery within 30 days after the delivery date specified in the agreement or does not begin performance of its obligations within 30 days after the commencement date specified in the agreement, the customer may cancel the agreement at any time before delivery or commencement of performance;

- (d) the customer may have other rights to cancel the agreement beyond those specified in the agreement; and
- (e) the customer is requested to contact the Ministry of Consumer Services for further information.

**(ii) No Improper "Stockpiling"**

69. Contrary to the allegations in paragraph 47 of the Claim, National does not, and has never, sought to improperly stockpile Reliance's old water heaters when customers replace them with National's new and efficient water heater tanks. National has repeatedly written to Reliance in an attempt to persuade Reliance to accept larger volumes of water heaters or take other steps to expedite the return of water heater tanks. National has advised Reliance that it is "very concerned that the process for both providing return numbers and accepting tank returns is extremely inefficient and resulting in unnecessary costs for former Reliance customers".

70. To the extent that there has been any "stockpiling" of water heaters as alleged in the Claim, this is solely attributable to the conduct of Reliance. As recognized in the Commissioner's Application, Reliance has imposed arbitrary, punitive and anti-competitive restrictions on the return process at its return depots which are specifically designed to prevent National and other competitors from returning old Reliance water heaters on behalf of consumers in a timely and efficient manner. These restrictions include: (i) limiting the number of water heater tanks that National can return at any given time; (ii) restricting the return of tanks to only certain days or hours within a day; (iii) restricting the locations at which National may return tanks, including refusing to

accept tanks at locations where Reliance previously accepted tanks from National; and (iv) imposing other restrictions intended to frustrate National's efforts to return Reliance water heater tanks in an efficient manner.

71. These arbitrary, punitive and anti-competitive restrictions enable Reliance to continue to profit from consumers that have switched to National by improperly continuing to charge those consumers that have switched to National but who have not been able to return their old Reliance tanks. Moreover, as noted in the Commissioner's Application, the storage charges levied by Reliance are intended to dissuade consumers from ever switching from Reliance to National (or another competitor).

72. Reliance's anti-competitive restrictions on the return of water heaters also force National to store water heaters, resulting in increased costs to National.

#### **G ~ NO COPYRIGHT INFRINGEMENT**

73. Contrary to the allegations at paragraphs 25 and 26 of the Claim, the Defendants deny that they have committed acts of copyright infringement or secondary infringement by making unauthorized reproductions of Reliance's logo.

74. In specific reply to paragraph 25 of the Claim, JEGI denies that any document, letterhead, badge or other item created or disseminated by it included reproductions of Reliance's logo either in full or in substantial part.

75. To the extent that National reproduced all or a substantial part of Reliance's logo, its use of Reliance's logo constituted fair dealing and did not infringe



any of Reliance's alleged copyrights. The Defendants specifically plead and rely on sections 29 and 29.1 of the *Copyright Act*.

**H ~ NATIONAL DID NOT INDUCE BREACH OF CONTRACT**

76. Contrary to the allegations in paragraphs 36 and 37 of the Claim, National and JEGI did not induce former customers of Reliance to breach any valid and binding contracts with Reliance, and have not otherwise encouraged customers to remove water heaters in a manner that breaches the terms of any valid contracts between Reliance and its former customers.

77. National and JEGI further deny that they can be held liable for inducing a breach of any contract as:

- (a) the contractual provisions relied upon by Reliance are not valid and enforceable against Reliance's customers;
- (b) National and JEGI were not aware of any valid and enforceable contract between Reliance and its customers preventing the removal of water heater tanks;
- (c) National and JEGI did not engage in any conduct which caused former customers of Reliance to breach any contract with Reliance; and
- (d) any conduct engaged in by National or JEGI was not wrongful or an intentional act to cause a breach of contract.

**I ~ NO UNLAWFUL INTERFERENCE WITH ECONOMIC INTERESTS**

78. Contrary to the allegations in paragraphs 32 to 35 of the Claim, National and JEGI did not unlawfully interfere with the economic interests of Reliance. In particular:

- (a) National and JEGI did not intend to injure Reliance;
- (b) National and JEGI did not interfere with Reliance's business through the use of any unlawful means; and
- (c) in the alternative, Reliance has not suffered any economic loss as a result of any interference by National or JEGI.

**J ~ NO CONSPIRACY**

79. The Defendants deny that there was any plan or conspiracy to injure Reliance through any lawful or unlawful means, as alleged at paragraph 38 of the Claim.

80. Contrary to paragraphs 38 to 43 of the Claim, JEGI has never acted in concert or in combination with National, for the predominant purpose, or with the effect, of injuring Reliance. At no time has JEGI directed, caused or knowingly permitted any employees, representatives, agents or contractors of National to identify themselves as representatives of JEGI. Nor has JEGI ever directed, caused or permitted any of its employees, representatives, agents or contractors to make any misleading representations for the purpose of promoting National's products or services.

81. Further, and in any event, to the extent National and JEGI have acted in combination, the Defendants deny that any such activity was carried out with the predominant purpose of causing injury to Reliance. To the contrary, at all material times National and JEGI have acted honestly and fairly for the legitimate purpose of promoting their own business interests.

82. To the extent Reliance has suffered any injury or loss as a result of actions undertaken by National and JEGI (which is denied), the Defendants state that any such injury or loss can only have been the result of honest and fair competition in the market. National and JEGI are not (and cannot possibly be) liable for injuries or losses suffered by Reliance as a result of fair competition.

83. In specific reply to paragraph 38 of the Claim, the Defendants deny having made any false or misleading representations or having engaged in any other form of unlawful conduct. Further, and in any event, any conduct engaged in by the Defendants was not directed toward Reliance and the Defendants could not have known in the circumstances that injury to Reliance would result.

**K ~ RELIANCE HAS NO DAMAGES**

84. The Defendants deny that Reliance has suffered any damages as a result of any acts of National or JEGI for which they can be held liable. In the alternative, the damages claimed by Reliance in this action are excessive, remote, and not recoverable at law.

85. In the further alternative, Reliance has failed to mitigate its damages properly or at all.

**L ~ RELIANCE'S ACTION IS TIME BARRED**

86. Reliance's action was commenced on December 17, 2012, and alleges conduct by National and JEGI occurring before December 17, 2010. Any such conduct occurring more than two years before the commencement of this action is barred under the *Limitations Act, 2002 (Ontario)* and section 36(4) of the *Competition Act*.

87. The Defendants request that this action be dismissed with costs on a substantial indemnity basis.

**COUNTERCLAIM**

88. National counterclaims against Reliance for the following relief:
- (a) damages in the amount of \$50 million for false or misleading representations in contravention of section 52 of the *Competition Act* and in accordance with section 36 of the *Competition Act*;
  - (b) in the alternative, damages in the amount of \$50 million for making false or misleading statements tending to discredit the business, wares or services of National in contravention of section 7(a) of the *Trade-marks Act* and in accordance with section 53.2 of the *Trade-marks Act*;
  - (c) in the alternative, damages in the amount of \$50 million for using National's Trade-mark (as defined below) in a manner that is likely to have the effect of depreciating the value of the goodwill attached thereto in

contravention of section 22 of the *Trade-marks Act* and in accordance with section 53.2 of the *Trade-marks Act*;

- (d) in the alternative, damages in the amount of \$50 million for the tort of injurious falsehood;
- (e) in the alternative, damages in the amount of \$50 million for the tort of unlawful interference with economic relations;
- (f) in the alternative, damages in the amount of \$50 million for unjust enrichment;
- (g) in the alternative, damages in the amount of \$50 million for the tort of defamation;
- (h) a declaration that Reliance has made false or misleading representations in contravention of section 52 of the *Competition Act*;
- (i) a declaration that Reliance has made false or misleading statements tending to discredit the business, wares or services of National in contravention of section 7(a) of the *Trade-marks Act*;
- (j) a declaration that Reliance has used the National Trade-mark in a manner that is likely to have the effect of depreciating the value of the goodwill attached thereto in contravention of section 22 of the *Trade-marks Act*;
- (k) an interim, interlocutory and permanent injunction restraining Reliance its employees, agents and persons under its control or power from making

false or misleading statements relating to National in any manner or any document, including but not limited to, brochures, pamphlets, other printed documents, electronic documents, websites and Internet postings, and requiring Reliance to deliver or destroy all documents containing the false or misleading statements;

- (l) National's costs of its investigation in accordance with section 36 of the *Competition Act*;
- (m) punitive damages in the amount of \$10 million;
- (n) pre-judgement and post-judgement interest in accordance with the *Courts of Justice Act*, R.S.O., 1990, c.C.43, as amended.
- (o) costs of this action on a substantial indemnity basis plus HST; and,
- (p) such further and other relief as this Honourable Court deems just.

89. National repeats and relies upon the allegations pleaded in its Statement of Defence.

#### **M ~ OVERVIEW OF COUNTERCLAIM**

90. Although much of Reliance's claim against National and JEGI is based on unfounded allegations of misleading advertising on the part of National, the reality is that it is Reliance that has consistently engaged in a campaign of misleading advertising against National since National entered the Reliance Territory in 2010. The intent of Reliance's ongoing misleading advertising campaign has been to unfairly portray National as a dishonest company that is attempting to "scam" Ontario consumers.

91. Reliance's misleading advertisements are intended to, and have impaired, National's ability to compete in the Reliance Territory. Reliance has been able to maintain its near-monopoly position in the Reliance Territory by constraining or impeding National's ability to expand.

92. National seeks to recover all the losses caused by Reliance's false and misleading statements (to the extent that such losses can be ascertained), and to permanently enjoin Reliance from making similar statements.

#### **N ~ RELIANCE'S MISLEADING ADVERTISING CAMPAIGN**

93. Reliance has disseminated false or misleading representations to Ontario consumers regarding National through various means, including, but not limited to, billboards, websites, statements made by Reliance customer service employees, and through other means that are known to Reliance and unknown to National.

94. The materially false or misleading representations made by Reliance referred to herein (collectively, the "**Reliance Misrepresentations**") include false or misleading representations that explicitly state, suggest or convey the general impression that:

- (a) National is a fraudulent, deceptive and/or dishonest supplier of water heater rental services;
- (b) National deliberately misinforms Ontario consumers regarding the cost or other aspects of the water heater rental services offered by National;

- (c) National's water heater products or services are substandard or otherwise not as represented by National;
- (d) Ontario homeowners will not receive the cost savings or other benefits from switching to National as represented by National;
- (e) Reliance's RRN policy is intended to protect consumers, as opposed to being a tactic intended to prevent consumers from switching away from Reliance to competing suppliers of water heater rental services, such as National;
- (f) speaking with Independent Contractors that are marketing National's services through door-to-door sales is unsafe and may result in harm to the homeowner;
- (g) National does not have any service technicians or qualified service technicians;
- (h) National's agreements with customers have a 15-year term, irrespective of the life of the actual water heater tank;
- (i) National's prices automatically increase by 3.5% each year;
- (j) there is no discernible difference between an Energy Star-rated water heater tank and a water heater tank that is not Energy Star-rated; and
- (k) the water heater tanks installed by National are not new tanks, but are older water heater tanks that have been refurbished.



95. More particularly, Reliance has operated, and continues to operate, a website ("[www.burnedatthedoor.com](http://www.burnedatthedoor.com)") dedicated to misrepresenting the business and affairs of National and other competitors to Reliance. The website contains certain of the Reliance Misrepresentations, including numerous representations that: (i) falsely describe the services offered by National as being without value; (ii) allege that National has engaged in activities intended to defraud consumers; and (iii) make other similar false or misleading representations regarding National, including the false statement that National is a "scam".

96. Reliance has also posted advertisements on billboards and other forms of direct consumer advertising that portray National as a deceptive, fraudulent or criminal organization. Further, these billboards do not contain any reference to Reliance and create the false impression that such billboard advertisements are public service announcements made by an independent public service or government agency as opposed to advertisements by Reliance.

97. For example, a billboard advertisement posted by Reliance includes a large image of a water heater salesperson dressed as a burglar wearing a balaclava that entirely covers the face of the salesperson, along with the statement: "Don't be deceived or misled. YOUR FRONT DOOR IS NO PLACE TO TALK WATER HEATERS. Get the facts at [www.burdnedatthedoor.com](http://www.burdnedatthedoor.com)". The advertisements do not mention the fact that Reliance posted these advertisements. Reliance has placed such billboards in areas where National is marketing its water heater rental services to Reliance customers in Ontario, including London, Windsor and Kitchener.

98. As described above, National is Reliance's only meaningful competitor in the Reliance Territory. As a result, even where the Reliance Misrepresentations do not explicitly refer to National by name, these representations are clearly directed at National, implicitly reference National by using such terms as a "competitor" to Reliance and are disseminated in those regions where National is engaged in direct marketing to consumers.

99. In addition to repeating the Reliance Misrepresentations in advertising on billboards and on its website, Reliance also employs door-to-door salespersons that attend at the residences of new customers of National or potential customers of National and who make representations concerning National that are false or misleading. The purpose of these door-to-door visits is to discourage customers from switching to National or to cause those customers that recently switched to National to cancel their contract with National and switch back to Reliance.

100. In communicating with National's customers or prospective customers, Reliance's door-to-door salespersons or other employees made or make representations that are false or misleading in a material respect, including in particular the following:

- (a) National is currently under investigation by local police forces;
- (b) local police forces have issued a warning to homeowners to avoid dealing with National;
- (c) National places liens on the homes of its customers;

- (d) customers will not realize savings from switching to National's efficient and newer water heater tanks;
- (e) National is not entitled to act as an agent for the customer in returning water heater tanks to Reliance;
- (f) National is a "crook" or is an otherwise dishonest company attempting to "scam" Ontario consumers;
- (g) advising customers that they have been "scammed" by National and encouraging customers to make a complaint to the Ontario Ministry of Consumer Services based on such incorrect information;
- (h) customers of National that sell their homes are not permitted to transfer the rental water heater tank to the purchaser of the home and will be required to purchase the water heater tank outright;
- (i) with the exception of a one-time replacement of a water heater tank, National will not replace a defective water heater tank;
- (j) customers will be subject to significant price increases by National that they would not pay if they had remained with Reliance;
- (k) Reliance is a Canadian company;
- (l) Reliance has not recently been sold to a U.S. firm; and
- (m) National is an American company with its head office in the State of Texas.

101. In addition to repeating the Reliance Misrepresentations in misleading advertisements and in door-to-door sales, Reliance has also made false and misleading representations regarding National in other forums. For example, in a job posting dated July 24, 2012 for a Customer Retention Agent, Reliance states: "We are looking for Customer Retention Representatives who will travel to various areas in the Brantford territory and spend the day informing home-owners about the truth of the deals our competitor door knockers are asking our existing customers to sign".

102. Reliance has also made automated and unsolicited telephone calls to customers or potential customers containing the Reliance Misrepresentations, including the false or misleading representations that: National is misleading customers and that National employees are posing as "home inspectors". These automated messages have been used by Reliance in regions where Reliance is aware that National is marketing water heater rental services in order to frustrate or counter National's attempt to market its services to new customers.

103. Further, Reliance has repeated the Reliance Misrepresentations in press releases and other public statements falsely claiming that National has engaged in "misleading door-to-door sales tactics" and that "National misinforms consumers about their existing contracts" and "that consumers will pay higher fees if they switch to National".

104. As a result of these false or misleading representations to National's customers or potential customers, National has suffered damages, including a loss of

business to Reliance and other suppliers of water heater rental services, as well as the cost of extensive and ongoing efforts to attempt to counter the misrepresentations.

**O ~ RELIANCE'S BREACHES OF THE *COMPETITION ACT***

105. National pleads and relies upon sections 36 and 52 of the *Competition Act*. More particularly, in contravention of section 52 of the *Competition Act*:

- (a) Reliance made the Reliance Misrepresentations, or permitted the Reliance Misrepresentations to be made;
- (b) the Reliance Misrepresentations were each false or misleading in a material respect;
- (c) the Reliance Misrepresentations were made to the public for the purpose of promoting, directly or indirectly, the supply of Reliance's water heater rental services or other business interests of Reliance;
- (d) Reliance made the Reliance Misrepresentations with the knowledge that they are each false or misleading, or with reckless disregard to the truth or accuracy of such representations; and
- (e) National has suffered, and will continue to suffer, harm as a result of Reliance's conduct.

**P ~ RELIANCE'S BREACHES OF THE *TRADE-MARKS ACT***

106. At all material times, National's trade-mark "National Home Services" was registered under Registration Number TMA824919, and was a valid and enforceable registered mark under the *Trade-marks Act* in association with, among other things, the

"installation, repair and maintenance of air conditioners, furnaces, and water heaters, and all components thereof; rental and leasing services, namely, the rental and leasing of air conditioners, furnaces, and water heaters" (the "**National Trade-mark**").

107. Reliance has publicly disseminated Reliance Misrepresentations on its websites and in other forums that use the National Trade-mark and refer to National in a false or misleading manner so as to depreciate the value of the goodwill in the National Trade-mark.

108. In doing so, Reliance violated section 7 of the *Trade-marks Act*. More particularly:

- (a) Reliance has made, and continues to make, false or misleading representations that discredit the water heater rental services and overall business of National;
- (b) Reliance has made use of, in describing National's services and its own services, descriptions that are false in a material respect and likely to mislead the public as to the character, quality and performance of these services; and
- (c) Reliance has performed, and continues to perform, acts and business practices contrary to honest industrial or commercial usage in Canada.

109. National pleads and relies on section 22 of the *Trade-marks Act*. More particularly, in violation of section 22 of the *Trade-marks Act*, the Reliance

Misrepresentations that use the **National Trade-mark** have had, and continue to have, the effect of depreciating the value of the goodwill attaching to the **National Trade-mark**.

110. **National** has suffered, and will continue to suffer, loss or damage as a result of **Reliance's** violation of sections 7 and 22 of the *Trade-marks Act*, including a loss of business and the cost of extensive and ongoing efforts to attempt to counter the misrepresentations.

**Q ~ RELIANCE'S BREACH OF THE CONSUMER PROTECTION ACT, 2002**

111. By making the **Reliance Misrepresentations**, **Reliance** has engaged in unfair practices contrary to sections 14 and 17 of the *Consumer Protection Act, 2002*. More particularly, each **Reliance Misrepresentation** constitutes a false, misleading or deceptive representation to Ontario consumers and other members of the public, contrary to section 14 of the *Consumer Protection Act, 2002*.

**R ~ RELIANCE'S INTENTIONAL AND UNLAWFUL INTERFERENCE  
WITH ECONOMIC INTERESTS**

112. In making the **Reliance Misrepresentations**, **Reliance** has, and continues to, intentionally and unlawfully interfere with **National's** economic interests. More particularly:

- (a) **Reliance** intended to injure **National**, or alternatively, targeted **National** while intending to advance its own interests;
- (b) **Reliance** engaged, and continues to engage, in conduct that is wrongful, tortious or unlawful in nature and/or that constitutes a breach of its statutory obligations, including the breaches of section 52 of the

*Competition Act*, section 14 of the *Consumer Protection Act, 2002* and sections 7 and 22 of the *Trade-marks Act* referred to herein;

- (c) Reliance has interfered, and continues to interfere, with National's economic interests; and
- (d) National has suffered, and will continue to suffer, harm as a result of Reliance's conduct.

**S ~ RELIANCE'S INJURIOUS FALSEHOOD**

113. The dissemination of the Reliance Misrepresentations to third parties, including customers of National or potential customers of National, was and continues to be an injurious falsehood. More particularly:

- (a) the Reliance Misrepresentations include false statements concerning National's business;
- (b) the Reliance Misrepresentations were made to third parties, including potential customers of National;
- (c) the Reliance Misrepresentations were made by Reliance with malice; and
- (d) National has suffered, and will continue to suffer, harm as a result of Reliance's conduct.



**T ~ RELIANCE HAS ALSO DEFAMED NATIONAL**

114. As described above, Reliance has disseminated, or caused to be disseminated, a series of false or misleading statements concerning National. The Reliance Misrepresentations are defamatory in their natural and ordinary meaning.

115. Reliance is liable both for the defamatory statements it published or disseminated and for the false and defamatory statements of others that they caused to be published or disseminated. Reliance acted intentionally in publishing or disseminating these statements, or in causing them to be published or disseminated.

**U ~ UNJUST ENRICHMENT**

116. Reliance is being unjustly enriched at the expense of National. More particularly:

- (a) as a result of the more favourable public perception of Reliance and less favourable public perception of National caused by the Reliance Misrepresentations, Reliance is gaining and/or retaining goodwill and customers that would otherwise choose to use National;
- (b) National has suffered, and will continue to suffer, a corresponding deprivation in the form of lost business and loss of goodwill; and
- (c) there is no juristic reason for Reliance's enrichment, as the conduct leading to such enrichment is wrongful, tortious or unlawful in nature, and/or constituted a breach of Reliance's statutory obligations under

section 14 of the *Consumer Protection Act, 2002*, section 7 of the *Trade-marks Act* and section 52 of the *Competition Act*.

**V ~ NATIONAL HAS SUFFERED DAMAGES**

117. As a result of Reliance's unlawful conduct described above, National has suffered and will continue to suffer damages, loss of business, harm to National's goodwill and the costs of extensive and ongoing efforts to attempt to counter Reliance's misrepresentations. Full particulars of National's damages are not currently known, but will be provided prior to trial.

118. The conduct and actions of Reliance described above are so high-handed capricious and egregious as to warrant substantial awards of aggravated, exemplary or punitive damages.

119. National requests that this Counterclaim be tried at the same time as Reliance's claim.

May 9, 2013

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RELIANCE COMFORT LIMITED  
PARTNERSHIP  
Plaintiff

and NATIONAL ENERGY CORPORATION et al.  
Defendants

Court File No: CV-12-470200

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

**STATEMENT OF DEFENCE  
AND COUNTERCLAIM**

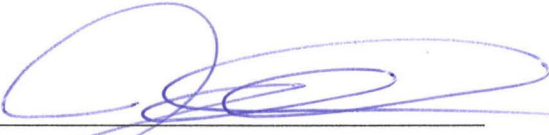
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Lawyers for the Defendants

This is **Exhibit "C"** mentioned and referred  
to in the Affidavit of Heather O' Hagan  
affirmed before me on May 16, 2014

A handwritten signature in blue ink, consisting of several loops and a long horizontal stroke, positioned above a solid horizontal line.

A Commissioner for Taking Affidavits

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

BETWEEN:

RELIANCE COMFORT LIMITED PARTNERSHIP

Plaintiff

- and -

NATIONAL ENERGY CORPORATION and JUST ENERGY GROUP INC.

Defendants

**REPLY AND DEFENCE TO COUNTERCLAIM**

**REPLY**

1. The plaintiff Reliance Comfort Limited Partnership (“Reliance”) repeats and relies on the allegations made in the Fresh as Amended Statement of Claim (“Amended Statement of Claim”). Capitalized terms defined in the Amended Statement of Claim have the same meaning in this pleading.

2. Reliance admits the allegations contained in paragraphs 13 and 18 of the Fresh as Amended Statement of Defence and Counterclaim (“Amended Defence and Counterclaim”).

3. Except as is expressly admitted herein or in the Amended Statement of Claim, Reliance denies each and every allegation contained in the Amended Defence and Counterclaim.

**A. The Competition Bureau**

4. National and Just Energy attempt to excuse their wrongful activities with baseless and irrelevant allegations that Reliance commenced this action in order to deflect scrutiny from anti-competitive conduct toward National. This is a distraction. The proceedings pending before the

Competition Tribunal were initiated in response to complaints by National, which were made following multiple unsuccessful lawsuits by National against Reliance.

5. In fact, the Competition Bureau has been investigating National for criminal offences under the *Competition Act*, R.S.C. 1985, c. C-34 in relation to the very conduct complained of by Reliance in this action. Following an investigation against National and Just Energy, which included interviews of former National employees, the Competition Bureau concluded that it had reasonable grounds to believe that National had committed offences under ss.52(1) (False or Misleading Representations) and 74.01(1)(a) (Misrepresentation to Public) of the *Competition Act*. The Competition Bureau has obtained and executed search warrants against the premises of National and Just Energy in furtherance of its investigation.

**B. Clarifications on Mischaracterized Complaints**

6. In the Amended Defence and Counterclaim, National and Just Energy defend certain of Reliance's allegations by mischaracterizing them, to which Reliance replies as follows.

*i. Reliance is "American" while National is "Canadian"*

7. National's door-to-door salespersons (referred to as "door knockers") frequently advise Reliance's customers that Reliance is an "American company". Contrary to paragraphs 17, 33, and 34 of the Amended Defence and Counterclaim, this representation is misleading in the context of a door-to-door sale because it suggests: (i) that Reliance an American entity and (ii) doing business with Reliance will support American jobs and the American economy.

8. Contrary to paragraph 33 of the Amended Defence and Counterclaim, the statement that "Reliance is American" is not true by reason of the fact that Reliance's shareholder is an American entity. National's door knockers do not state that Reliance is "American owned", but instead state that Reliance is an "American company" or simply "American".

9. Reliance is a Manitoba Limited Partnership, not an American entity. Additionally, all of Reliance's approximately 1,300 employees are located in the Provinces of Ontario (Cambridge, Windsor, Sarnia, London, Burlington, Brampton, Mississauga, Richmond Hill, Barrie,

Collingwood, Kingston, Sudbury, Thunder Bay, Toronto, Ottawa and Oshawa), Manitoba (Winnipeg), Saskatchewan (Regina), and Alberta (Edmonton and Calgary). Hence, a customer doing business with Reliance supports Canadian jobs and the Canadian economy.

10. The statement that “Reliance is American” is often paired by National’s door knockers with the statement that “National is Canadian” – in an attempt to distinguish National and Reliance on that basis. This is particularly misleading since National is no more “Canadian” or “American” than Reliance, since its parent company, Just Energy, is listed on the Toronto Stock Exchange and is owned by entities from a variety of different countries.

ii. Energy Savings

11. With respect to paragraphs 23 and 30(f) of the Amended Defence and Counterclaim, Reliance’s allegation is that National overstated or exaggerated any energy or cost savings. National door knockers often significantly overstate cost savings by exaggerating the potential energy savings to Reliance customers with water heater tanks that are marginally less efficient (less than 5%) than those offered by National. Furthermore, savings that may be realized by switching to a new Energy Star rated water heater tank (often less than 5% of a household’s gas bill per year) are often outweighed by higher pricing typically charged by National, particularly when the customer enters into a long term contract with excessive cancellation penalties.

iii. National Door Knockers do not Conduct Bona Fide Inspections

12. With respect to paragraph 26 of the Amended Defence and Counterclaim, National door knockers do not solely use inspections to determine the appropriate size and type of water heater for a possible upgrade. Instead, National door knockers frequently gain entry into the residences of Reliance customers by falsely advising Reliance customers, *inter alia*, that they are “due for an upgrade”, “entitled to an upgrade”, or are required to upgrade as part of a Provincial or government program. National door knockers also misrepresent themselves as being sent by, affiliated with, or employed by Reliance, and advise Reliance customers, or falsely convey the impression to Reliance customers, that the customer is obligated to let them inspect their water heater tank.



13. After National door knockers gain entry into the residences of Reliance customers under false pretences, they cause the customer to switch to National through the use of one or more misrepresentations. The Reliance customer often is unaware that they have switched service providers.

14. For example, National door knockers may pretend to inspect the water heater tank, and provide false results to the customer, such as by falsely stating that the water heater tank is outdated, hazardous, or must be replaced when in fact the water heater tank is still within its typical life span, functioning within normal and safe parameters, and does not otherwise reasonably require replacement.

15. National door knockers will often drain a small amount of water from the bottom of the customer's existing Reliance water heater tank which is a slightly brownish colour due to the accumulation of sediment at the bottom of the tank. The sediment does not affect the potability of the water heated by the tank, since water is drawn from the top of the tank. However, National door knockers will falsely state that the slightly brownish colour of the water indicates that the water heater tank is not functioning properly, dangerous, a health risk, or otherwise requires replacement.

16. Another common misrepresentation made by National's door knockers is that the Reliance customer's existing black ABS exhaust pipe (which extends out of the top of certain gas water heaters) is in violation of building codes, the Technical Standards & Safety Authority's *Natural Gas and Propane Installation Code* (the "TSSA Code"), or some other regulation, and that as a result the water heater tank is unsafe and/or must be replaced immediately. This representation is false. The TSSA Code was amended in 2007 to require *new* installations to be fitted with a ULC S636 certified venting pipe, which is white in colour. However, all existing black ABS pipes were "grandfathered" in and are not required to be replaced under the TSSA Code.

17. The only instance in which an exhaust pipe, whether a new white ULC S636 pipe or a black ABS pipe, must be immediately replaced is if the pipe is cracked, leaking, or otherwise damaged. National door knockers, however, falsely advise Reliance customers that their water

heater and exhaust pipe must be replaced despite the absence of any damage to their existing black ABS exhaust pipe or any danger to the customer. National door knockers have also deliberately damaged water heaters and/or venting pipes during “inspections”, following which they have advised the customer that they must now immediately replace the water heater. Reliance customers have switched to National on the basis of these and similar misrepresentations made in the course of “inspections” by National door knockers.

iv. Reliance Provides Free Maintenance

18. With respect to paragraphs 30(b), and 57 of the Amended Defence and Counterclaim, Reliance’s allegation is that National door knockers suggest that National offers a “maintenance program” while Reliance does not, which is untrue. National’s service policy is not significantly different from Reliance’s service policy.

19. Both National’s and Reliance’s terms and conditions provide for free servicing if the water heater is not functioning properly. National door knockers often falsely advise Reliance’s customers that Reliance does not service its tanks, or does not service its tanks without charge.

20. National’s “free maintenance program” is not a “program” as that term would be understood by consumers. Rather, customers have the option of having one free inspection of their water heater tank every five years. However, National will not send personnel to conduct an inspection unless the customer calls National, requests an inspection, and books an appointment.

v. National Agents Cannot be Duly Appointed as Agents of Reliance Customers for the Purposes of Obtaining an RRN

21. Contrary to paragraph 47 of the Amended Defence and Counterclaim, Reliance’s RRN policy does not “include a refusal to recognize agency agreements” and National is not entitled to act as agent for Reliance customers for the purposes of obtaining an RRN. The chronology of events related to the RRN policy as described in paragraphs 41 to 52 of the Amended Defence and Counterclaim is not accurate.

22. Reliance implemented the RRN policy in the spring of 2010, following numerous reports of misleading marketing and sales tactics by competitors. By far, the majority of complaints

related to the misconduct of National's door knockers, as set out in the Amended Statement of Claim.

23. National's misleading marketing and sales tactics have been continuous and increasing since that time. The Better Business Bureau issued an alert that National "has a pattern of complaints concerning misleading sales practices". Additionally, until 2010, water heater rental complaints were not among the Ontario Ministry of Consumer Services' "top ten" list of complaints and inquiries. After the start of National's aggressive door-to-door marketing and sales, the Ministry received 1,974 complaints in 2010 regarding water heater rentals (ranking 3<sup>rd</sup> overall on Ontario), followed by 2,518 such complaints in 2011 (ranking 2<sup>nd</sup> overall) and then 3,251 complaints in 2012 (again ranking 2<sup>nd</sup> overall).

24. Reliance implemented the RRN to ensure customers spoke directly to a Reliance representative prior to terminating their contract - so Reliance could ensure that customers were not terminating as a result of a misrepresentation. During a call by a customer to obtain an RRN, Reliance verifies that the customer is in fact aware that they are leaving Reliance, is aware that their water heater tank is not hazardous, and is not otherwise about to terminate their contract with Reliance as a result of a misrepresentation by National.

25. In response to Reliance's implementation of the RRN policy, in the summer of 2010 National brought an application by proxy in *Douglas MacGregor v. Reliance*, court file number CV-10-404539 (the "MacGregor Application"). The applicant Douglas MacGregor was a nominal plaintiff who was a former Reliance employee and subsequently a Vice-President of National by the time the MacGregor Application was commenced. The MacGregor Application sought an order that Reliance's implementation of the RRN policy terminated its contract with Mr. MacGregor (and consequently all of its customers). The MacGregor Application sought, in the alternative, an order that National could be appointed as the agent of Reliance's customers, as this would enable National door knockers to obtain RRNs themselves and prevent Reliance phone agents from ensuring customers were not being misled.

26. On November 17, 2010, Justice Echlin heard the application and found that the RRN policy did not terminate Mr. MacGregor's contract.

27. Justice Echlin held that Reliance was required to deal with National door knockers who had been duly appointed as agents of Reliance's customers, because Reliance's standard contract did not include a provision that would allow it to refuse to deal with agents. In response, between April and June, 2011, Reliance amended all of its customer contracts to include a provision that permitted Reliance to refuse to deal with any agent appointed by the customer for the purposes of Reliance's tank return processes and procedures. Since that time, Reliance has refused to deal with National door knockers purporting to act as its customers' agents for the purposes of obtaining an RRN.

28. In February, 2011, National attempted to challenge this amendment of Reliance's customer contracts through another application by proxy in *Scott Weller v. Reliance* in court file no. CV-11-420702 (the "Weller Application"). Scott Weller was the husband of Just Energy's Senior Vice-President, Finance. The Weller Application sought an order that the amendment was contrary to the Ontario *Consumer Protection Act, 2002*, S.O. 2002, c. 30 and therefore invalid.

29. On May 24, 2011, Justice Strathy (as he then was) dismissed the Weller Application. National's appeal was dismissed on May 31, 2012. Hence, contrary to paragraph 48 of the Amended Defence and Counterclaim, since June, 2011 (at the latest), any statement by National door knockers that they may be appointed as a Reliance customer's agent and obtain an RRN for the purposes of complying with Reliance's return processes and procedures is false.

### **C. Stockpiling**

30. Contrary to paragraph 70 of the Amended Defence and Counterclaim, Reliance's return process is not "specifically designed to prevent National and other competitors from returning old Reliance water heaters on behalf of consumers in a timely and efficient manner". Reliance has a network of Reliance and contractor-owned "drop off locations", which may typically accept anywhere between 10 to 400 tanks per month. The capacity of a given drop off location is determined by a variety of factors, including but not limited to the size of the drop off location, staffing levels, and health and safety considerations. Reliance's capacity to receive tanks in a given area depends on, among other things, the number of customers, the population and the ability to source contractors in the area.

31. National's complaints about problems returning tanks relate to problems that it has itself purposefully created. National has deliberately held Reliance's water heater tanks until after the expiry of the 10-day cooling off period under s.43 of the *Consumer Protection Act, 2002*. Instead of returning these tanks as a steady flow, they accumulate in National's storage facilities. National has then attempted to return water heater tanks in large quantities that well exceed the capacity of a given location. These attempted returns have often been made without notice to the drop off location. As a result, these *en mass* attempted returns have usually been rejected due to the inability of the drop off location to hold the tanks.

32. National has also attempted to return water heater tanks at drop off locations without legible or completed paperwork, outside of operating hours, and without RRNs. For these and other legitimate reasons, National returns have at times been refused by Reliance's drop off locations. In many of these instances, National has elected to stockpile the refused tanks instead of returning them in a timely and/or appropriate manner.

33. In those cases where National has provided Reliance with reasonable notice of large tank returns, Reliance has coordinated with National to effect their return in a timely and reasonable manner.

**D. National is Responsible for the Conduct of its Door Knockers**

34. Contrary to, *inter alia*, paragraph 25 of the Amended Defence and Counterclaim, National cannot escape liability by mischaracterizing its door knockers as "independent contractors". National's door knockers are its agents, and National is liable as their principal.

35. As admitted by National at paragraph 36 of the Amended Defence and Counterclaim, National's door knockers wear or display National's uniform, badge, photo identification (stating "National Home Services"), and they carry other National paraphernalia. National directly benefits from their Misrepresentations by gaining new customers from Reliance. National controls the schedule, number of hours worked, targeted areas, marketing and sales tactics and dress of its door knockers.

36. National directed, had knowledge of, or was reckless as to whether its door knockers were engaging in misleading marketing and sales tactics, and in making the Misrepresentations. National and Just Energy train National's door knockers. National and Just Energy knowingly cause or are reckless as to whether the door knockers make misrepresentations, including by encouraging door knockers to:

- (a) create confusion as to, or misrepresent, their identity, and the purpose of their door-to-door visits;
- (b) misrepresent the cost savings and energy savings associated with the National water heater being promoted;
- (c) make misrepresentations regarding the Energy Star initiative, and other government initiatives or incentives;
- (d) misrepresent the necessity of replacing the existing water heater; and
- (e) misrepresent the nationality of Reliance in relation to the nationality of National.

37. Despite having knowledge of the widespread misconduct by its door knockers since nearly the outset of its operations, National did not make reasonable efforts to stop or prevent the Misrepresentations from being made, or, alternatively, encouraged its door knockers to continue making the Misrepresentations in furtherance of increasing its sales of water heater rentals.

38. The Misrepresentations, as set out in the Amended Statement of Claim and further described in this pleading, were made directly or indirectly by National for the purpose of promoting National's business interests.

**E. Reliance's Claim is not Barred by any Limitations Period**

39. The Misrepresentations, violations of the *Trade-marks Act*, R.S.C. 1985, c. T-13, *Competition Act*, *Copyright Act*, passing off, and other misconduct pleaded in Reliance's Amended Statement of Claim each constitute continuing acts by National and Just Energy.

Additionally, National and Just Energy's misconduct continues to result in increasing damages to Reliance, for which they are liable. None of the causes of action asserted herein are barred by the *Limitations Act, 2002*, S.O. 2002, c.24.

## DEFENCE TO COUNTERCLAIM

### F. No Misleading Representations

#### i. The Alleged Misrepresentations

40. Reliance denies that it makes the representations set out in the Amended Defence and Counterclaim, and in particular in paragraph 94 thereof, except where expressly admitted herein, in which case such representations were in fact true.

41. With respect to subparagraph 94(a) of the Amended Defence and Counterclaim, Reliance does not make misrepresentations that National is "a fraudulent, deceptive and dishonest supplier of water heater rental services". Reliance phone agents frequently confirm that National is a genuine provider of water heater rental services. Rather, as described further below, Reliance phone agents do advise Reliance's customers that National *engages in misleading marketing and sales practices*.

42. Reliance has received thousands of complaints and reports from its customers that National engages in misleading marketing and sales tactics (as set out in the Amended Statement of Claim). While Reliance does not pro-actively advertise that National engages in this misconduct, Reliance phone agents will confirm to customers who report misconduct by National that they have received numerous reports about deceptive and dishonest marketing and sales activity by National. These statements are limited to marketing and sales activity, and do not relate to National's ability to provide water heater rental services.

43. With respect to subparagraphs 94(b) and (d) of the Amended Defence and Counterclaim, Reliance does not misinform Ontario consumers regarding the cost or other aspects of the water heater rental services offered by National, or misrepresent the cost savings or benefits of switching from Reliance to National. Where a customer advises Reliance of the price offered by

National, Reliance will advise the customer of the current price being paid by the customer to Reliance. Reliance's prices are often lower than National's, depending on the type and size of water heater being rented.

44. With respect to cost savings, as described above, National door knockers frequently advise Reliance customers that they will realize significant cost savings on their gas bill where in fact they will not. Where a customer reports to Reliance that a National door knocker has made such a misrepresentation, Reliance will correct the misrepresentation.

45. Contrary to subparagraph 94(e) of the Amended Defence and Counterclaim, as described above, Reliance's RRN policy is in fact intended to protect consumers, and was implemented to combat misleading marketing and sales tactics by competitors, including National. Additionally, Reliance does not discuss the reason behind the RRN policy with its customers and denies that this representation was made to the public.

46. With respect to subparagraph 94(h) of the Amended Defence and Counterclaim, where a customer calls Reliance and advises that they are considering switching, or have switched, to National, Reliance may advise the customer that signing up with National will entail a long term contract. National's terms and conditions have varied, but at all times have imposed a long term of six years or more, including a fifteen-year term. For example, National's terms and conditions have defined the contract term as being "for the useful life of the Equipment (the 'Term')" while also stating "[i]f properly maintained, the anticipated useful life of the Equipment is approximately 15 years." Conversely, the vast majority (over 90%) of Reliance's contracts have no fixed or minimum term and these customers may terminate their contract with Reliance without penalty at any time.

47. With respect to paragraph 94(i), Reliance has advised customers who have phoned into its call centre that National's rental rate increases by 3.5% per year. This statement is not a misrepresentation. National's terms and conditions have stated: "I understand that on each annual anniversary of my Installation Date, my monthly payment will increase by 3.5% of the rental amount payable in the preceding year, unless I am otherwise notified."



ii. The Burned At the Door Website and Billboards

48. The “Burned at the Door Website” (the “Website”, at [www.burnedatthedoor.com](http://www.burnedatthedoor.com)) was established in 2009 following Reliance’s receipt of hundreds (and later thousands) of complaints regarding misconduct by the door knockers of competitors, including National.

49. The Website aims to ensure fair competition and protect consumers against the misleading sales and marketing tactics of all door knockers selling water heater services, regardless of the company they represent. In this regard, the Website does not refer to any specific water heater rental provider. For example, the Website lists municipalities (referred to as “hot spots”) where door knockers acting for *any* competitor are observed. Moreover, the Website includes general consumer-oriented information, such as survey results from third parties (e.g. Angus Reid), myths and untruths about water heaters, and checklists of questions consumers should ask any door knocker. The Website clearly states that it is sponsored by Reliance Home Comfort. Reliance denies that the Website contains any misrepresentations.

50. Reliance also uses billboard advertisements as part of Burned at the Door campaign. These advertisements do not refer to National. They are informative advertisements meant to protect consumers from misleading marketing and sales activities by door knockers. Moreover, contrary to paragraph 96 of the Amended Defence and Counterclaim, they do not promote Reliance’s wares or services and are not “advertisements by Reliance”.

51. Contrary to paragraph 98 of the Amended Defence and Counterclaim, the Website and billboards are not “clearly directed at National”. Reliance has numerous competitors, and National is not Reliance’s largest competitor (which is Direct Energy), nor is it the only competitor accused of engaging in misleading sales and marketing activities by door knockers. In this regard, Reliance filed a six person complaint under s.9 of the *Competition Act*, which advanced complaints against morEnergy and National, and the Competition Bureau’s investigation into misleading marketing and sales activity targeted National, morEnergy and Ontario Consumers Home Services.

iii. Reliance's Door-to-Door Salespersons

52. Contrary to paragraph 100 of the Amended Defence and Counterclaim, Reliance's door-to-door salespersons do not make false or misleading representations to National's customers or prospective customers. Some of the allegations in paragraph 100 of the Amended Defence and Counterclaim are repetitive of other alleged misrepresentations, and Reliance repeats and relies on the paragraphs above. Additionally:

- (a) Contrary to subparagraphs 100(a) and (b) of the Amended Defence and Counterclaim, Reliance door knockers and phone agents do not advise that National is under investigation by local police forces. Rather, Reliance phone agents sometimes advise that National door knockers (and the door knockers of other competitors) have been reported to the police for engaging in misleading marketing and sales tactics, which is true. National door knockers have been regularly reported to local law enforcement agencies across Ontario for misleading, abusive, or otherwise unlawful conduct.
- (b) Contrary to subparagraph 100(e) of the Amended Defence and Counterclaim, Reliance does not advise anyone that National is not entitled to act as an agent for the customer in returning water heater tanks to Reliance. Reliance advises its customers that Reliance will not provide a National door knocker with an RRN, which is true and reflected in Reliance's terms and conditions. It is not open to National to challenge Reliance's contractual terms and conditions in this regard, as the issue is *res judicata* following National's unsuccessful appeal in *Weller v. Reliance*, described above.

iv. Voicecasts

53. With respect to paragraph 102 of the Amended Defence and Counterclaim, Reliance sends automated phone calls with pre-recorded messages to its customers in areas where it has received reports of door-to-door sales activities by competitors, and not solely by National (referred to as "voicecasts"). The lawful purpose of Reliance's voicecasts is to ensure that its customers are not misled by any door knockers.

54. The pre-recorded messages do not refer expressly or impliedly to any particular competitor, and do not contain any misrepresentations. Rather, the voicecasts have contained a variety of general warning, including one or more of the following, all of which are true:

- (a) Reliance has received hundreds of complaints about water heater salespeople who try to pressure their way into homes;
- (b) Reliance has received hundreds of complaints about water heater salespeople who falsely claim they are working with Reliance;
- (c) Reliance has received hundreds of complaints about water heater salespeople who falsely claim that Reliance is no longer in business, or is an American company;
- (d) Door-to-door water heater salespeople who gain entry into homes may falsely claim that the existing equipment is unsafe and inefficient, and encourage customers to replace their water heaters unnecessarily, following which customer may discover that they have signed long-term contracts with high exit fees;
- (e) If consumers are encouraged to replace their water heater, they should take the time to think about it before agreeing;

55. The voicecasts also refer to the Website and provide Reliance's contact information in the event the listener wishes to report a concern about door-to-door sales activity or have questions regarding their water heater.

v. Press Releases and Public Statements

56. Reliance has not issued press releases or public statements that National has engaged in misleading door-to-door sales tactics, that National misinforms consumers about their existing contracts or that consumers will pay higher fees if they switch to National. In the alternative, if such statements have been made, they are in fact true, as set out in the Amended Statement of Claim and this Reply and Defence to Counterclaim. With respect to fees, National's monthly rental prices are in fact generally higher than those of Reliance.

**G. No Violation of the *Trade-marks Act***

57. Contrary to paragraphs 106 to 110 of the Amended Defence and Counterclaim, Reliance has not contravened sections 7(a), (d), (e) or section 22 of the *Trade-marks Act*, and National has not suffered harm.

58. Sections 7(a) and (d) of the *Trade-marks Act* are constitutionally valid only insofar as those sections round out Parliament's legislative power in relation to trade marks or other intellectual property rights. To the extent that National relies on sections 7(a) and 7(d) in paragraphs 108(a) and 108(b) of the Amended Defence and Counterclaim, these allegations must relate to trade mark rights.

59. Reliance denies that it has used the National Trade-Mark in a manner that is false or misleading, or discredits or tends to discredit the business or services offered by National. Reliance denies that it has contravened section 7(a) of the *Trade-marks Act*.

60. Reliance denies that it has used the National Trade-mark in a manner that is false in a material respect, or likely to mislead the public as to the character, quality or performance of National's services. Reliance denies that it has contravened section 7(d) of the *Trade-marks Act*.

61. To the extent National relies on s.7(e) of the *Trade-marks Act* in paragraph 108(c) of the Amended Defence and Counterclaim, Reliance pleads that National cannot rely on s.7(e) as it has been declared *ultra vires* the powers of Parliament.

62. Reliance denies that it has made representations set out in the Amended Defence and Counterclaim using the National Trade-mark, so as to depreciate the value of any goodwill attaching the National Trade-mark contrary to section 22 of the *Trade-marks Act*. Reliance denies that it has contravened section 22 of the *Trade-marks Act*.

**H. No Breach of the *Consumer Protection Act, 2002***

63. Reliance has not engaged in any unfair practices contrary to sections 14 and 17 of the *Consumer Protection Act, 2002*. The statements complained of by National were not false, misleading or deceptive.

**I. No Injurious Falsehood**

64. Contrary to paragraph 113 of the Amended Defence and Counterclaim, Reliance did not disseminate injurious falsehoods regarding National. In particular:

- (a) the statements complained of by National were true;
- (b) the statements complained of by National were not made with the intent to harm National without lawful justification or for a dishonest or improper motive, rather they were made with the intent of preventing consumers from being injured by National's misleading marketing and sales tactics;
- (c) the statements complained of by National did not identify National; and
- (d) National has not suffered any harm as a result of the statements complained of.

**J. No Unlawful Interference with Economic Interests**

65. Contrary to paragraph 112 of the Amended Defence and Counterclaim, Reliance did not unlawfully interfere with the economic interests of National. In particular:

- (a) Reliance did not intend to injure National;
- (b) National did not interfere with National's business through the use of any unlawful means; and
- (c) alternatively, National has not suffered any economic loss as a result of any unlawful interference by Reliance.

**K. No Unjust Enrichment**

66. Contrary to paragraph 116 of the Amended Defence and Counterclaim, Reliance is not being unjustly enriched at the expense of National. In particular:

- (a) Reliance has not been enriched;
- (b) National has not suffered any detriment;
- (c) any enrichment by Reliance does not correspond to any detriment to National;
- (d) there is a juristic basis for any enrichment by Reliance; and
- (e) the doctrine of unjust enrichment cannot be used to obtain compensation for business losses arising from lawful competition.

**L. No Defamation**

67. Contrary to paragraphs 114 and 115 of the Amended Defence and Counterclaim, Reliance has not defamed National. In particular:

- (a) Reliance has not disseminated a series of false or misleading statements concerning National;
- (b) any statements made by Reliance about National are true, and Reliance pleads the defence of justification;
- (c) the statements complained of by National are not defamatory in their natural and ordinary meaning; and
- (d) the statements complained of by National constituted responsible communication on matters of public interest, as National's misleading marketing and sales tactics are of an urgent and serious nature, and of public importance, and Reliance used reliable sources to obtain the information contained in them.

**M. National is Estopped from Advancing its Counterclaim and the Counterclaim is an Abuse of Process**

68. Reliance pleads and relies on the doctrines of estoppel, and abuse of process. National has previously advanced the claims pleaded in its Counterclaim and could have and ought to have pleaded the remaining causes of action that were not advanced at that time. The claims pleaded were dismissed, and it is an abuse of process for National to now attempt to re-litigate them. Alternatively, National is estopped from advancing them again.

69. In particular, by Statement of Claim issued in *National Energy Corporation v. Reliance Comfort Limited Partnership* in court file no. CV-10-404128 (the “Prior National Action”), National claimed \$40 million in damages on the basis of allegations that Reliance had made false statements that, *inter alia*, National was misleading the public, not trustworthy, dishonest and unable to service its water heaters.

70. The Prior National Action advanced many of the same causes of action and allegations that are repeated in National’s Counterclaim, and other causes of action and allegations contained in National’s Counterclaim could have been pleaded in the Prior National Action. Some of the allegations made in the Prior National Action include:

**The False Statements**

4. Reliance holds a near monopoly in the water heater rental business in areas outside of the Greater Toronto Area. As a consequence of National soliciting Reliance customers, Reliance has engaged in a counter-marketing campaign directed at National the purpose of which is to limit the attrition of its customer base. As part of this marketing campaign, Reliance has made false and misleading statements concerning National and its business operations (the “statements”).

...

**Injurious Falsehood**

6. National states that Reliance knew that the statements were untrue (or was reckless as to whether they were untrue), and as such, they were made with malice. The statements were intended to hinder National from successfully marketing its services to Reliance’s customers and the public in general. National has suffered damages as a result of the statements including the loss of potential

customers. National therefore states that Reliance is liable to it for the tort of injurious falsehood. ...

**Violations of *The Competition Act* and *Trademark Act***

7. National states that because the statements were “false” and “misleading” representations made for the purpose of “promoting” Reliance’s business interests and “discrediting” National, Reliance is liable to National for breach of s.52(1)(a) of the *Competition Act* and s.7(a) of the **Trademarks Act**.

71. The Prior National Action was dismissed on September 26, 2012. National’s Counterclaim is an abuse of process, or alternatively barred by the doctrine of issue estoppel.

72. Reliance requests that National’s Counterclaim be dismissed with costs.

March 3, 2014

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**RELIANCE COMFORT LIMITED PARTNERSHIP**  
**Plaintiff**

-and-

**NATIONAL ENERGY CORPORATION *et al.***  
**Defendants**

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**DIVISIONAL COURT**

PROCEEDINGS COMMENCED AT TORONTO

**REPLY AND DEFENCE TO COUNTERCLAIM**

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**THE COMMISSIONER OF  
COMPETITION**  
Applicant

**RELIANCE COMFORT LIMITED  
PARTNERSHIP**  
Respondent

- and - **NATIONAL ENERGY CORPORATION**  
Intervenor  
**CT-2012-002**

**THE COMPETITION TRIBUNAL**

**IN THE MATTER OF the *Competition Act*, R.S.  
1985, c. C-34, as amended;**

**IN THE MATTER OF an application by the  
Commissioner of Competition pursuant to section  
79 of the *Competition Act*;**

**AND IN THE MATTER OF certain policies and  
procedures of Reliance Comfort Limited  
Partnership.**

**AFFIDAVIT OF HEATHER O' HAGAN**

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**THE COMMISSIONER OF  
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Applicant

- and -

**RELIANCE COMFORT LIMITED  
PARTNERSHIP**  
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**SUPPLEMENTARY MOTION RECORD**

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