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ENERGY EARTH, LLC,

Plaintiff,

v.

JUST ENERGY (U.S.) CORP.,

Defendant.

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IN THE DISTRICT COURT OF

HARRIS COUNTY, TEXAS

___TH JUDICIAL DISTRICT

PLAINTIFF'S ORIGINAL PETITION

Plaintiff Energy Earth, LLC (“EnergyEarth”), through its counsel, brings this action against defendant Just Energy (U.S.) Corp. for damages and declaratory relief. Based on actual knowledge with respect to itself and its own acts, and on information and belief as to all other persons and matters, EnergyEarth respectfully alleges as follows:

Nature of the Action

1. This is a breach of contract case arising from defendant’s refusal to perform under the parties’ longstanding contract. Defendant’s breach did and will cause substantial damages to EnergyEarth.

2. The parties began working together six years ago. Defendant sells electricity and gas utility services to customers in this County and around the country. EnergyEarth had developed an innovative points-based platform called “Perks” to help utility companies like defendant attract and keep loyal customers. In 2016, the parties launched Just Energy Perks, pursuant to a written contract with an agreed scope of work and duties on each side.

3. Through this program, defendant’s customers are awarded Perks points when they sign up for service and then periodically while they remain a customer. Points are redeemable for all sorts of rewards, like gift cards, prepaid Visa cards, and discounted energy-efficient products. EnergyEarth manages all aspects of the program including customer service, card and product

fulfillment, a redemption website, and point account setup and maintenance. In turn, defendant has to provide customer information and point awards, so EnergyEarth can manage the program. Defendant also has to pay for EnergyEarth's services. In that regard, defendant builds the cost of the Perks program into its utility rates to customers.

4. The Perks program has been wildly successful for defendant. Perks has given defendant a competitive advantage in the marketplace, helping it keep customers even if defendant's energy prices are higher. Defendant's customers have told it that has greatly improved their customer experience. Indeed, defendant has publicly touted Perks as making its customer relationships stronger, more profitable, and longer lasting.

5. Nonetheless, defendant repeatedly has not satisfied its duties during the contract. Its breaches include failing to enroll new and existing customers in the Perks program, failing to award the proper Perks points to new and existing customers, failing to pay redemption fees, and failing to pay the monthly program fees, all during the term of the parties' contract.

6. The final straw was last week. With no prior notice, defendant announced that it was stopping all payments to EnergyEarth under the contract. And, to add insult to injury, it blamed the Covid-19 pandemic for its choice to cease performing. This was a pretext. Defendant is open for business, soliciting customers, and enrolling them in Perks. Nothing prevents it from performing except its unwillingness to abide by the contract. Defendant apparently sees the nation's healthcare crisis as an opportunity to cut out a longtime business partner and boost its profits.

7. Accordingly, EnergyEarth has no choice but to seek full recovery from the harms caused by defendant's breaches and all other relief, damages, fees, and costs. EnergyEarth estimates this harm exceeds \$22 million dollars.

Parties

8. Plaintiff EnergyEarth is a Tennessee limited liability company with its principal place of business in Chattanooga, Tennessee. It is registered to do business in Texas.

9. Defendant is a Delaware corporation with its principal place of business in this County, at 5251 Westheimer Road, Suite 1000, Houston, Texas. It can be served at Corporation Service Company d/b/a CSC, 211 E. 7th Street, Suite 620, Austin, Texas 78701-3218.

Discovery Level and Rule 47 Statement

10. Based on the relief sought, discovery should be conducted under a Level 2 plan pursuant to Tex. R. Civ. P. 190.3. This action seeks monetary relief over \$1 million.

Jurisdiction and Venue

11. The Court has subject matter jurisdiction over this case. The amount in controversy is within its jurisdictional limits.

12. The Court has personal jurisdiction over defendant. It is a Texas resident, this action arises out of a contract it entered into in this State, and it was foreseeable that the injuries would be felt here. The parties' contract provides for jurisdiction in this State.

13. Venue is proper in this County. Pursuant to TEX. CIV. PRAC. & REM. CODE §15.002, a substantial part of the events and omissions giving rise to the claim occurred here, defendant's principal place of business is in this County, and the parties' contract provides for venue here.

Facts Giving Rise to this Action

14. EnergyEarth was founded in 2011 by a group of experienced businesspersons dedicated to changing incentive programs for the better and making a positive impact on communities and the world. Its management has decades of experience in incentive programs. It is a company of innovators, committed to protecting the Earth's natural resources and promoting a culture of conservation. It seeks to partner with domestic and international businesses and

non-profits of all sizes. It has invested heavily in its systems and technology, to better provide solutions for its partners. In 2019, EnergyEarth rebranded its programs as EE Incentives.

15. In 2014, the parties began their relationship in a joint venture with a marketing firm. In February 2016, the parties launched Perks and entered into a Master Services Agreement shortly thereafter. EnergyEarth has made significant investment in its infrastructure, its information technology, its staffing, Perks training across the country for hundreds of defendant's employees, its warehousing and fulfillment facilities, and its capabilities to service Perks and perform under the contract. Furthermore, EnergyEarth spent millions of dollars on free Perks promotional items to further drive Perks engagement. Over the years, there have been amendments to the contract, resulting in an Amended and Restated Master Services Agreement ("Agreement"). The parties have had varying rights and duties depending on the version of the Agreement in force at the time.

16. Defendant is an independent retail consumer utility company. It serves residential and commercial customers in the U.S. and Canada. Depending on location, it may provide gas or electricity utility services or both. In Texas, for example, defendant only provides its customers with electricity. This means that while defendant "supplies" the utility commodity to its customers, the "delivery" of that commodity is done by a traditional public utility. Defendant will charge its customer for the utility commodity, e.g., the electricity, per the contract between it and its customer through the public utility, which charges for delivery of the electricity.

17. One way that defendant differentiates itself in the market is by offering customer loyalty rewards called Perks, through its relationship with EnergyEarth. Defendant has praised Perks as adding great value, including improved customer retention and loyalty, building longer-lasting customer relationships, and making it more profitable. Defendant has said that Perks gives it "stickier" customers, helps it fight customer attrition, and gives it more "pricing power" in

the market. For example, in late-2019 its CEO attributed to Perks, directly and indirectly, that “gross margin increased 10% to \$188.5 million.” Perks even allows defendant to charge more than competitors for utilities because of the value added through Perks. Defendant incorporates its costs for Perks into its pricing to customers. In 2018, it touted approaching 1 million customers with Perks.

18. Defendant’s customers have flexibility to select a variety of Perks rewards. These include gift cards for various types of establishments, such as clothing, books, entertainment, dining, grocery stores, and department stores; prepaid Visa cards; home connectivity devices, like programmable, Wi-Fi-enabled thermostats and Google Home assistants; and energy-efficient and conservation products, such as LED lightbulbs, EnergyStar-qualified devices, and power strips. Perks has been wildly successful. EnergyEarth was selected in 2018 as defendant’s external partner of the year, as recognized with the plaque shown below:



19. Early on, defendant contractually committed that it would enroll all new customers in Perks and award them a certain amount of Perks points at sign-up. It also committed to enroll all of its customers in Perks and award them Perks points. And customers were entitled to be awarded Perks points for each period they were a customer. The amount and frequency of points awarded depends on the then-effective amendment to the Agreement. These obligations continued for years into the parties' relationship. Based on the limited data EnergyEarth has on active accounts from defendant, EnergyEarth estimates that defendant has under-awarded Perks points to its customers such that EnergyEarth has been harmed, after certain offsets under the parties contracts, in the amount of at least \$13,800,000 for defendant's failure to award points, based on the pricing in the Agreement. Further, defendant failed to meet its obligations in enrolling customers in Perks. This breach harmed EnergyEarth at least \$2,175,000 per 100,000 accounts defendant did not enroll in Perks.

20. Defendant failed to meet these contract obligations, committing material breaches. Its financial obligations to EnergyEarth depended upon the Perks points issued to customers. And when defendant's customers redeemed Perks points, EnergyEarth benefited from its services in procuring, providing, and delivering the redemptions to customers. Thus, by awarding fewer Perks than promised (through not enrolling customers in Perks and not awarding enrolled customers with the Perks points promised), defendant harmed EnergyEarth, as fewer points issued led to lower volume, fewer redemptions, and lower margins.

21. In 2019, Just Energy began to take steps to undercut the value of Perks to EnergyEarth and to defendant's customers. It started this by, among other steps, removing the discount offered to customers on non-energy-saving products, adding a qualification period before customers start to earn Perks points, and removing lower-cost items, making it harder for its

customers to redeem points by setting a higher floor to redeem points at all. Defendant continued to undermine Perks by removing discounts on all items, raising the floor for certain gift cards (a popular redemption item), removing bonus Perks points for account registration, and shortening the life of Perks points. It also greatly cut its communications with customers about Perks and stopped sending reminder emails and Perks point notification emails.

22. Recently, defendant added a Perks account balance minimum requirement before any points may be redeemed, prohibiting many of its customers from redeeming points at all. Not only have these actions further harmed EnergyEarth by reducing its earnings under the Agreement, they have also cheated defendant's customers out of the value of the Perks points they earned through paying defendant's higher utility service rates with the costs of Perks built in.

23. In March 2020, defendant gave notice that, effective immediately, it was ceasing all payments to EnergyEarth. In a phone call between executives at the companies that same day, defendant stated unequivocally that it was discontinuing Perks and "ceasing business" with EnergyEarth. Defendant was clear that this was not a temporary suspension of the program. This was a clear breach of the Agreement and unequivocal notice of default. Defendant invoked the force majeure clause in the Agreement, purportedly based on the Covid-19 pandemic. This was mere pretext. Defendant obviously had been looking for some time for an exit to the Agreement and its commitments to EnergyEarth. EnergyEarth responded in writing to defendant's notice, pointing out the fallacy in defendant's reliance on the force majeure clause and attempting to resume the mutually beneficial relationship between the parties. Defendant denied EnergyEarth's claims without explanation.

24. Previously, a senior executive for defendant had said that he was EnergyEarth's "biggest nightmare." And senior executives for defendant had pressured others there to discontinue Perks prematurely.

25. Aware of the popularity of Perks, however, defendant is telling its customers a very different story. Currently on its Perks redemption website, it tells customers that Perks will resume in "a few weeks"; they "continue to earn points as you did before"; they "will be able to redeem [their] perks points once the program is back up and running again"; and its "goal is to minimize the length of this interruption." Moreover, defendant activated over 1,500 new Perks accounts after announcing that it immediately was "ceasing all payments to EnergyEarth" and not "offering the Perks program to new customers." Thus, both defendant's conduct and statements to its customers demonstrate that the pandemic does not require immediate or any termination of Perks.

26. EnergyEarth's accounts receivable owed by defendant is over \$1 million. EnergyEarth is due an additional more than \$5 million for the term of the contract in program fees.

27. The current healthcare crisis has caused many businesses to make accommodations, but it certainly has not shut down defendant's business. It is signing up new customers, servicing existing customers, and billing and being paid for its services. Indeed, its website main page has a large ad offering a \$400 credit for customers who sign up for a service plan and a link for a Covid-19 update, at which it offers help for customers to pay bills through automatic, automated, or online systems, should defendant's customer service call centers shut down. In an April 1, 2020 press release, it says it is "continuing to reach customers through our digital marketing presence."

28. In short, defendant's invocation of the contract force majeure clause is pretextual. It is fully able to perform the parties' Agreement, and its refusal to do so is a deliberate breach. As

such, defendant is obligated to compensate EnergyEarth for losses and other damages it has suffered and will suffer over the remaining term of the Agreement.

**First Cause of Action
(Breach of Contract)**

29. EnergyEarth incorporates the material facts in the preceding paragraphs.

30. The Agreement, including as amended, is a valid, enforceable contract.

31. Defendant breached the Agreement in numerous respects, including by failing to award Perks points to customers; failing to enroll customers in Perks; and failing to pay amounts owed to EnergyEarth, including redemption and past and future program fees.

32. Defendant's breaches have caused EnergyEarth harm and actual damages.

33. EnergyEarth has fully performed under the Agreement.

34. EnergyEarth is entitled to recover its costs and reasonable and necessary attorney fees, pursuant to TEX. CIV. PRAC. & REM. CODE §38.001.

**Second Cause of Action
(Declaratory Judgment)**

35. EnergyEarth incorporates the material facts alleged in the preceding paragraphs.

36. Under TEX. CIV. PRAC. & REM. CODE, CHAP. 37, there is a real and substantial controversy between the parties involving a genuine conflict of tangible interests. EnergyEarth seeks a judicial declaration that the force majeure clause in the Agreement does not excuse defendant's performance and that defendant owes further payment and obligations to EnergyEarth, plus all other costs and damages properly proven.

37. EnergyEarth is entitled to recover its costs and reasonable and necessary attorney fees, pursuant to TEX. CIV. PRAC. & REM. CODE §37.009.

Attorney Fees and Expenses

38. EnergyEarth was required to hire attorneys to prosecute this suit. As the prevailing party, it is entitled to and seeks its reasonable attorney fees and expenses related to this litigation, under Chapter 37 of the TEX. CIV. PRAC. & REM. CODE, along with any other applicable grounds.

Conditions Precedent

39. All conditions precedent to relief have been performed or occurred.

Jury Demand

40. EnergyEarth demands a jury on all triable issues of fact.

Prayer for Relief

For these reasons, plaintiff EnergyEarth respectfully requests judgment against defendant Just Energy, after trial or final hearing, as follows:

- a. That the Court order that defendant has breached the Agreement and EnergyEarth has performed the Agreement;
- b. That the Court declare that defendant improperly terminated the Agreement in purporting to rely on the force majeure clause and that defendant owes further payment and obligation to EnergyEarth, plus all other costs and damages alleged;
- c. That defendant must pay damages according to the proof at trial, plus court costs, litigation expenses, and reasonable attorney fees incurred in prosecuting the case;
- d. That the Court order defendant to pay pre- and post-judgment interest as allowed by law; and
- e. That the Court grant to EnergyEarth all additional relief to which it has shown itself to be justly entitled, whether at law or in equity.

Dated: April 8, 2020

Respectfully submitted,



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